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CITY OF PHILADELPHIA, a municipal corporation, 1515 Arch Street 15th Floor Philadelphia, PA 19102, *Plaintiff*, v. WRT MANAGEMENT, INC. f/k/a TANNER'S SPORT CENTER INC., 2660 Dark Hollow Road, Jamison, PA 18929, FRANK'S GUN SHOP & SHOOTING RANGE LLC, 4730 Blakiston Street Philadelphia, PA 19136, MAD MINUTE ENTERPRISES, LLC d/b/a DELIA'S GUN SHOP, and DELIA'S GUN SHOP, INC. 6104 Torresdale Avenue Philadelphia, PA 19135, *Defendants*.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY Civil Action No. 230702394 CIVIL DIVISION

ORDER

AND NOW this ________ day of _________________, 202__, upon consideration of the Preliminary Objections to the Amended Complaint filed by Defendant Frank's Gun Shop & Shooting Range LLC ("Frank's") (Control No. 23114738), and Plaintiff's response thereto, it is hereby ORDERED that the Preliminary Objections are **OVERRULED**.

BY THE COURT:

____

, J.

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Control No.: 23114738

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PLAINTIFF'S RESPONSE TO DEFENDANT FRANK'S GUN SHOP & SHOOTING RANGE LLC'S PRELIMINARY OBJECTIONS TO THE AMENDED COMPLAINT

Plaintiff City of Philadelphia hereby responds to Defendant Frank's Gun Shop & Shooting Range LLC's ("Frank's") Preliminary Objections to the Amended Complaint.

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PROCEDURAL HISTORY[1]

1. Admitted.

2. Admitted in part that Frank's filed preliminary objections on or about October 11, 2023. Plaintiff is without sufficient information to admit or deny the allegations in this paragraph regarding the reason that Frank's filed its preliminary objections. To the extent a response is required, the allegations are denied.

3. Admitted in part that Plaintiff filed an Amended Complaint on or about November 1, 2023. To the extent that this paragraph characterizes a written document, the characterization is denied and the written document speaks for itself.

4. Denied as a conclusion of law to which no response is required. To the extent a response is deemed required, the allegations are denied. To the extent that this paragraph characterizes a written document, the characterization is denied and the written document speaks for itself.

INTRODUCTION

5. Admitted in part; Frank's is a federally licensed firearms dealer who engages in the sale of firearms in Philadelphia. *See* Plaintiff's First Amended Complaint ("FAC") ¶ 13. Plaintiff is without sufficient information to admit or deny the allegation that Frank's is a "Mom and Pop" business. To the extent a response is required, this allegation is denied.

6. Admitted in part; Frank's quotes a portion of the amended complaint. To the extent that this paragraph characterizes a written document, the characterization is denied and the written document speaks for itself.

[1] The City uses Frank's headings verbatim for readability; they are not intended to admit or deny any specific allegation.

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7. Admitted in part; Frank's quotes portions of the amended complaint. To the extent that this paragraph characterizes a written document, the characterization is denied and the written document speaks for itself.

8. Admitted.

9. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

10. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

11. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

12. Admitted in part that Frank's filed preliminary objections. Plaintiff is without sufficient information to admit or deny the allegations in this paragraph regarding the reason that Frank's filed its preliminary objections. To the extent a response is required, the allegations are denied.

PRELIMINARY OBJECTION I

13. Plaintiff incorporates by reference its responses to the paragraphs incorporated into Frank's objection.

14. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

15. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

16. Admitted in part; Frank's quotes a portion of 18 Pa. C.S. § 6120(a). To the extent that this paragraph characterizes a statute, the characterization is denied and the statutory text

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speaks for itself. To the extent that this paragraph states a conclusion of law, this paragraph is denied as an allegation to which no response is required.

17. Admitted in part; Frank's quotes a portion of 18 Pa. C.S. § 6120(a.1). To the extent that this paragraph characterizes a statute, the characterization is denied and the statutory text speaks for itself. To the extent that this paragraph states a conclusion of law, this paragraph is denied as an allegation to which no response is required.

18. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

19. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

[Unnumbered prayer for relief] Denied.

PRELIMINARY OBJECTION II

20. Plaintiff incorporates by reference its responses to the paragraphs incorporated into Frank's objection.

21. Admitted.

22. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

23. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

24. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

25. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

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26. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

27. Admitted in part; Frank's quotes a portion of the amended complaint and the City alleges in the Amended Complaint that Frank's engaged in illegal firearms transactions with straw purchasers which created and sustains a public nuisance. FAC ¶¶ 98, 104-112. To the extent that this paragraph characterizes the allegations in the amended complaint, the characterization is denied and the written document speaks for itself.

28. Admitted in part; the City is harmed by gun violence and has pleaded various statistics and other facts quantifying and describing this harm. FAC ¶¶ 18-22. To the extent that this paragraph characterizes the allegations in the amended complaint, the characterization is denied and the written document speaks for itself.

29. Admitted in part; the City has pleaded that Frank's engaged in illegal firearms transactions with straw purchasers that diverts firearms into an illegal secondary market, and that this causes harm to the City. FAC ¶¶ 46-48. To the extent that this paragraph characterizes the allegations in the amended complaint, the characterization is denied and the written document speaks for itself.

30. Admitted in part; Frank's quotes a portion of the amended complaint and the City alleges in the Amended Complaint that Frank's engaged in at least 48 illegal firearms transactions with straw purchasers (and possibly more transactions currently unknown to the City), which has caused harm to the City. FAC ¶¶ 65. To the extent that this paragraph characterizes the allegations in the amended complaint, the characterization is denied and the written document speaks for itself.

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31. Denied. The amended complaint pleads specific examples of firearms sold by Frank's to straw purchasers in illegal transactions that have been used in crimes and violence in the City and which have been recovered by law enforcement. FAC ¶¶ 66-80.

32. Denied. The amended complaint pleads specific examples of firearms sold by Frank's to straw purchasers in illegal transactions that have been used in crimes and violence in the City and which have been recovered by law enforcement. FAC ¶¶ 72-73, 75, 78, 80.

33. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

34. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

[Unnumbered prayer for relief] Denied.

PRELIMINARY OBJECTION III

35. Plaintiff incorporates by reference its responses to the paragraphs incorporated into Frank's objection.

36. Admitted.

37. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

38. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

39. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

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40. Admitted in part; Frank's is a retail dealer in firearms. Otherwise denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

41. Admitted in part; Frank's is a retail dealer in firearms. Otherwise denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

42. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

43. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

[Unnumbered prayer for relief] Denied.

PRELIMINARY OBJECTION IV

44. Plaintiff incorporates by reference its responses to the paragraphs incorporated into Frank's objection.

45. Admitted.

46. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

47. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

48. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

49. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

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50. Admitted in part; the City alleges that Frank's conduct violated a number of statutes which are specifically identified in the amended complaint. FAC ¶¶ 102, 115, 121, 140, 142. Otherwise denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

51. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

[Unnumbered prayer for relief] Denied.

PRELIMINARY OBJECTION V

52. Plaintiff incorporates by reference its responses to the paragraphs incorporated into Frank's objection.

53. Admitted.

54. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

55. Denied in part; the City has alleged that Frank's sold and/or transferred firearms to individuals that it knew or should have known were likely to use those firearms in an unlawful or criminal way, and/or in a manner involving the unreasonable risk of harm. FAC ¶¶ 128-129. Otherwise, denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

56. Denied in part; the City has alleged that Frank's sold and/or transferred firearms to individuals that it knew or should have known were likely to use those firearms in a manner involving the unreasonable risk of harm, and that that harm was foreseeable to Frank's at the time it sold and/or transferred the firearm. FAC ¶¶ 129, 135. Otherwise, denied as a conclusion of law

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to which no response is required. To the extent that a response is deemed required, the allegations are denied.

57. Admitted in part; the City has alleged that straw purchasers to whom Frank's sold and/or transferred firearms did use those firearms in a criminal or unlawful manner, as well as in a manner involving the unreasonable risk of harm, and that such criminal, unlawful, and harmful use was foreseeable to Frank's at the time it sold and/or transferred the firearms. FAC ¶¶ 128-29, 135. Denied as to the term "rather," to the extent it asserts that the criminal, unlawful, and harmful uses of firearms sold and/or transferred by Frank's were not foreseeable to Frank's at the time of sale and/or transfer.

58. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

[Unnumbered prayer for relief] Denied.

PRELIMINARY OBJECTION VI

59. Plaintiff incorporates by reference its responses to the paragraphs incorporated into Frank's objection.

60. Admitted.

61. Admitted in part; Frank's quotes a portion of 18 Pa. C.S. § 6111(g)(6). To the extent that this paragraph characterizes a statute, the characterization is denied and the statutory text speaks for itself. To the extent that this paragraph states a conclusion of law, this paragraph is denied as an allegation to which no response is required.

62. Admitted.

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63. Admitted in part; Frank's quotes a portion of the amended complaint. To the extent that this paragraph characterizes a written document, the characterization is denied and the written document speaks for itself.

64. Denied as a conclusion of law to which no response is required. To the extent that a response is deemed required, the allegations are denied.

65. Denied.

[Unnumbered prayer for relief] Denied.

Dated: December 22, 2023

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/s/ Lydia M. Furst

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS OPPOSITION TO DEFENDANTS FRANK'S AND DELIA'S <u>PRELIMINARY OBJECTIONS TO THE FIRST AMENDED COMLAINT</u>

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I. INTRODUCTION

Plaintiff City of Philadelphia (the "City") seeks to hold three local gun stores accountable for their repeated violations of federal and Commonwealth firearms laws that caused harm to the City and its residents. The Amended Complaint details how each store illegally sold dozens of firearms to individuals engaged in flagrant straw purchasing—meaning they were buying the guns for others in violation of both Pennsylvania and federal law. It also details how those straw-purchased guns were used in crimes throughout the City. Defendants knew these were straw purchases, and they knew that it was illegal to go through with these transactions. But they did it anyway, supplying firearms directly to an illegal secondary market that arms criminals and other prohibited persons. The gun violence that resulted from this unlawful diversion was tragic and foreseeable.

Two of the Defendants, Frank's Gun Shop & Shooting Range LLC ("Frank's") and Mad Minute Enterprises, LLC d/b/a Delia's Gun Shop and Delia's Gun Shop, Inc. (together, "Delia's"), ask the Court to dismiss the City's lawsuit.[1] Ignoring the actual allegations in the Amended Complaint, they argue that the case is controlled by *City of Philadelphia v. Beretta U.S.A., Corp*, preempted by the Uniform Firearms Act ("UFA"), and that various elements of the City's claims are inadequately pled. These arguments are mistaken.

First, Defendants repeatedly argue that this case is "identical" to *City of Philadelphia v. Beretta U.S.A., Corp.* (*Beretta I*), 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff'd*, (*Beretta II*) 277 F.3d 415 (3d Cir. 2002). *See, e.g.*, Frank's Mem. at 13, 17; Delia's Mem. at 5, 8, 9.[2] But in *Beretta*,

[1] The third Defendant WRT Management, Inc. f/k/a/ Tanner's Sport Center Inc. ("Tanner's"), filed Preliminary Objections on December 14, 2023. The City will separately respond to Tanner's POs.

[2] Delia's memorandum of law is not paginated; these page numbers are provided for reference and count the first page of that brief as page 1 (ignoring any other documents that are part of Delia's filing).

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there were no allegations that the defendants broke any laws, unlike the manifestly illegal transactions detailed in the Amended Complaint here. *See Beretta II*, 277 F.3d at 419 ("Plaintiffs do not contend that defendants violated any of the federal or state laws specifically regulating the sale and distribution of firearms in the United States and in the Commonwealth of Pennsylvania."). And *Beretta* involved gun *manufacturers* selling firearms legally to distributors far up the stream of commerce, not retailers selling directly to straw purchasers. Thus, that case involved differently situated defendants and fundamentally different conduct. It does not control the outcome here. If there was any doubt on this point, then *Beretta* itself puts that question to bed, stating that, even though the court declined to find a general legal duty for gun manufacturers to prevent gun violence, "[t]he City may still sue . . . rogue firearms dealers" who violate the law. *Beretta I*, 126 F. Supp. 2d at 902.

Second, Defendants argue that Section 6120 of the UFA preempts the City's lawsuit. This argument is groundless. The City has alleged that each Defendant violated the statutory duties of firearms dealers under Commonwealth law. *See, e.g.*, Am. Compl. ¶¶ 101, 115, 121 (citing violations of 18 Pa.C.S. § 6111(b)(1), (b)(2)-(5)). And the law is crystal clear that any gun seller who violates these statutory provisions is civilly liable to the party it harmed "[n]otwithstanding any act or statute to the contrary." 18 Pa.C.S. § 6111(g)(6). Under Pennsylvania Supreme Court precedent, this provision displaces any contrary law, such as Section 6120. And in any event, the relevant provision of Section 6120—subsection (a.1)—is consistent with Section 6111(g)(6) because it applies only to the "lawful marketing or sale" of firearms, and this action is predicated on plainly *unlawful* sales that are not covered by the statute. 18 Pa.C.S. § 6120(a.1). Finally, Defendants' attempts to invoke Section 6120(a) fail since that provision is aimed at regulation, and its application to litigation would render subsection (a.1) a nullity.

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Next, Defendants argue that the City has failed to properly plead the elements of each of its common law claims. With respect to public nuisance, Defendants first argue that there is no public right at issue, but the public right is clearly evidenced in the Commonwealth's anti-straw-purchasing laws. As to negligence, Defendants argue that they have no duty to prevent misconduct by third parties but ignore black letter law that the intervention of third parties does not cut off liability if the injury is foreseeable. *See Kuhns v. Brugger*, 135 A.2d 395, 404-05 (Pa. 1957). And, Defendants' reliance on *Beretta* for their causation arguments overlooks that their conduct is both unlawful and *directly* feeds firearms into the criminal market.

Finally, Defendants argue that the City has not adequately pled a violation of 18 Pa.C.S. § 6111(g)(6) because it fails to allege that Defendants knowingly and intentionally sold a firearm that they believed would be used in a crime. This argument misreads the statute, which only requires that Defendants had "reason to believe" the gun would be used in a crime—which the City has more than adequately alleged. It also finds no footing in a preliminary objection because a plaintiff may plead knowledge and intent generally (which the City has more than done here) and then build facts to support those allegations in discovery.

Defendants, as the Amended Complaint alleges, broke the law over and over. The UFA punishes—not protects—this sort of unlawful conduct. This case should be permitted to proceed through discovery so that the City can substantiate its detailed allegations of pervasive misconduct.

II. MATTER BEFORE THE COURT

Before the Court are preliminary objections by Defendants Frank's and Delia's to the Amended Complaint. The City alleges that Defendant retail firearms stores have repeatedly sold firearms to straw purchasers in illegal transactions, in violation of both Commonwealth and federal law, and that those illegal transactions have contributed to a public nuisance and harmed the City and its residents. Defendants have filed preliminary objections arguing: (1) that the City's lawsuit

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is preempted by the UFA, 18 Pa.C.S. § 6120(a), (a.1), Frank's Mem. at 16-22; Delia's Mem. at 3-8; (2) that the City's claims are barred by collateral estoppel based on *Beretta I* & *II*, Delia's Mem. at 8-13; (3) that the City's public nuisance claim (Count 1) is legally insufficient because it does not adequately plead a public right, a duty on the part of Defendants, or damages proximately caused by Defendants' misconduct, Frank's Mem. at 22-23, Delia's Mem. at 13-16; (4) that the City's damages are barred by the municipal cost recovery rule, Delia's Mem. at 17; (5) that the City's claims for negligence, negligence per se, and negligence (Counts 2-4) are legally insufficient, Frank's Mem. at 24-28, Delia's Mem. at 16-18; and (6) that the City has not adequately pled Defendants' state of mind regarding the criminal intent of their straw-purchaser customers and thus that its UFA claim (Count 5) is legally insufficient, Frank's Mem. at 28-29, Delia's Mem. at 18. The City hereby opposes Defendants' Preliminary Objections, arguing that each of these assertions fails.

III. QUESTIONS INVOLVED

1. Does the UFA preclude the City's lawsuit against Defendants where the Amended Complaint alleges that the Defendants' actions violated Commonwealth law?

   Suggested answer: No.

2. Does the Amended Complaint adequately plead a public nuisance claim against Defendants, where it alleges that Defendants' actions interfered with a public right and violated Commonwealth law and caused foreseeable harm to the City?

   Suggested Answer: Yes.

3. Does the Amended Complaint adequately plead a negligence claim against Defendants, where it alleges that Defendants' actions violated Commonwealth law and caused foreseeable harm to the City?

   Suggested Answer: Yes.

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4. Does the Amended Complaint adequately plead a negligence per se claim against Defendants, where it alleges that Defendants' actions violated Commonwealth laws designed to protect a class of persons that includes the City, and where those violations caused foreseeable harm to the City?

   Suggested Answer: Yes.

5. Does the Amended Complaint adequately plead a negligent entrustment claim against Defendants, where it alleges that Defendants entrusted firearms to individuals that they knew or reasonably should have known would transfer them to criminals and other prohibited persons?

   Suggested Answer: Yes.

6. Does the Amended Complaint adequately plead a claim under 18 Pa.C.S. § 6111(g)(6) against Defendants, where it pleads that Defendants knew or had reason to believe that its customers would use the firearms in subsequent crimes?

   Suggested Answer: Yes.

IV. STATEMENT OF FACTS

Frank's and Delia's are federally licensed retail firearms stores ("FFLs") located in Philadelphia. Am. Compl. ¶¶ 13-14. They are each among the principal sources of crime guns recovered in the City, with 803 crime guns attributed to Delia's and 264 crime guns attributed to Frank's between 2015 and 2019 (the last years for which data is available). *Id.* ¶ 28.[3] One of the principal ways that Defendants contribute to the illegal gun market is by repeatedly selling firearms to individuals that they know are engaged in illegal straw purchasing. *See, e.g.*, *id.* ¶¶ 4, 6.

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[3] By comparison, other dealers averaged just 5 crime guns apiece in that time frame. *Id.*

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A straw purchase is when someone buys a firearm on behalf of someone else. It is illegal under both federal and Commonwealth law for both the purchaser and the seller. The straw purchaser breaks Commonwealth and federal law by certifying that they are the "actual transferee/buyer" of the gun. *See, e.g.*, *id.* ¶¶ 23, 32, 35-36, 43-45. The gun dealer who accepts this misrepresentation with knowledge of its falsity breaks the law by falsely certifying their belief that the transaction is lawful. *Id.* ¶¶ 33-34. The dealer also breaks the law by submitting false information for a background check, failing to conduct a background check on the actual purchaser, and recording the fictitious buyer into their books and records, among other violations. *Id.* ¶¶ 31, 38, 41-42.

Because of the known and obvious dangers stemming from straw purchases, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") takes great pains to train gun stores, including the Defendants, to recognize the warning signs of straw purchasing. *See, e.g.*, *id.* ¶¶ 37, 47, 71, 77. These red flags include high-volume purchases over short periods of time, multiple-handgun transactions, buying duplicate guns, paying all cash, and buyers working in pairs to select and pay for guns, among other signs. *See id.* Despite this training, Defendants chose to consummate obvious straw-sale transactions with numerous illegal buyers. *See, e.g.*, *id.* ¶¶ 46-47.

The Amended Complaint details several of the 48 known straw purchases from Frank's. *Id*. ¶¶ 3; 65-80. For example, Frank's sold a combined 15 firearms to straw purchasers named Khalil Hayes and Sakinah Braxton in less than three months in 2020. *Id.* ¶¶ 66-71. In doing so, Frank's ignored warning signs like duplicate handguns purchases, the orchestration of purchases by a third person, and staggered buys to avoid tipping off law enforcement. *Id.* Within months, at least three guns were recovered and linked to at least three separate shootings in the City, a domestic violence incident, and two underage possessors (one of whom was on probation). *Id.*

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¶¶ 72-73. In another example, Frank's sold eight handguns to straw purchaser Morgan Johnson on *back-to-back* days, at least six of which were duplicates or near-duplicates. *See id.* ¶¶ 76-77. Two of these handguns were then recovered in Philadelphia, including one from an underage drug dealer. *Id.* ¶ 78.

Several of Delia's 31 known straw purchases are likewise described in the City's pleading. *Id.* ¶¶ 3, 81-95. For example, Delia's sold at least seven handguns to straw purchaser Anthony Cipriano in just over a month in 2021, accepting false identification that its employees admitted did not closely resemble Cipriano, and ignoring other suspicious behavior in the store. *See id.* ¶¶ 82-84. At least two of these guns were recovered in Philadelphia within a year, both in connection with drug busts. *Id.* ¶¶ 85-86. Delia's also sold at least six 9mm Taurus handguns to straw purchaser Charles Thompson in late 2019 and early 2020. *Id.* ¶ 87. Delia's ignored that Thompson was buying high volumes of the same or similar guns, and that his purchases were guided by accomplices—both obvious indicators of illegal behavior. *See id.* ¶ 90. At least three of Thompson's guns have been recovered in the City, including one from an underage possessor and one from someone without a license. *Id.* ¶ 91. Another gun straw purchased from Delia's was connected to not one, but two, shootings in the Richmond neighborhood of Philadelphia. *Id.* ¶ 93. These known straw purchases by Frank's and Delia's represent just the tip of an iceberg.[4]

Defendants knew, based on the pattern of obvious red flags that they ignored, that their customers in these transactions were really buying the guns for others. *See, e.g.*, *id.* ¶¶ 47, 97-99, 116, 124, 139-141. By proceeding with these transactions, Defendants violated numerous Commonwealth and federal laws. *See id.* ¶¶ 46, 102, 115, 142. Defendants are required to know

[4] *See* Am. Compl. ¶ 3 & n. 1 (noting that several public criminal filings identify people who straw purchased guns at Franks's and Delia's, but do not specify the number of guns they bought or provide identifying information for the guns).

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these legal obligations as part of their licensure, and they are trained on them by ATF and acknowledge them at each inspection. *See id.* ¶¶ 111, 118, 125, 135. Defendants' knowing and intentional sales to straw purchasers were therefore knowing and intentional violations of law. *See id.* ¶¶ 102, 115, 124, 139-42. And it was entirely foreseeable that Defendants' unlawful sales to straw purchasers would create and sustain a criminal market for firearms, and in turn lead to gun violence and gun-related crimes. *See id.* ¶¶ 8, 25, 104, 111, 118, 125, 135, 144.

Defendants' sales to straw purchasers harm the City in numerous ways. They sustain an illegal, unregulated secondary market that supplies firearms to individuals that the law deems too dangerous or irresponsible to possess them. *Id.* ¶¶ 23, 25. Criminals and other prohibited purchasers prefer the black market because black-market sellers do not conduct background checks—meaning that the true buyers never passed a background check, only the straws. Further, black-market sellers do not record their sales or provide information to law enforcement when the gun is recovered at a crime scene. *See id.* Many of these illegal guns are used in crimes. *See, e.g.*, *id.* ¶¶ 4-5, 72-73, 75, 78, 80, 85-86, 91-93, 95 (documenting crimes connected to Defendants' unlawful sales). The City is then forced to expend financial resources by deploying police, fire, and medical resources. *Id.* ¶ 22. It also spends its finite resources on preventative measures aimed at interdicting the flow of illegal weapons and breaking the cycle of gun violence. *Id.* The threat of violence from illegal firearms interferes with the use of public spaces and frustrates the delivery and receipt of City services. *See id.* ¶ 21. The City also suffers economic burdens, like lost wages and tax revenues and the depression of property values. *Id.* ¶ 22.

The City seeks an abatement order that enjoins Frank's and Delia's from continuing to supply guns to straw purchasers, orders them to take corrective measures to prevent recurrence,

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and compensates the City for its past and likely future costs in abating the nuisance. It also seeks damages for the harm caused by Defendants' misconduct. *Id.* ¶ 10; Prayer for Relief.

V. ARGUMENT

A. <u>This Action Is Not Precluded by Section 6120 of the UFA</u>

1. The UFA expressly permits civil actions like this one where a gun seller knowingly and intentionally violates the UFA.

Defendants' argument that Section 6120 preempts the City's lawsuit fails first and foremost because the City's lawsuit is expressly authorized by 18 Pa.C.S. § 6111(g)(6). That statute provides:

> ***Notwithstanding any act or statute to the contrary,*** any person, licensed importer, licensed manufacturer or licensed 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 for injuries suffered by any person so injured by such crime or attempted crime.

Id. (emphasis added).

Here, the City has alleged just that: the Defendant dealers violated multiple provisions of the UFA by (1) failing to accurately identify the true purchaser to the Pennsylvania State Police (in violation of Sections 6111(b)(2) and (b)(3)); (2) requesting a background check on the straw purchaser and not the true purchaser for improper purposes—namely, to simulate compliance (in violation of Section 6111(g)(3)); and (3) recording inaccurate information on required sales records (in violation of Section 6111(b)(4)). Am. Compl. ¶¶ 39-45, 102, 115, 121, 140-41. These false statements are not mere paperwork problems, they are violations of law by which dealers facilitate illegal straw purchasing. *See, e.g.*, *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 WL 3881341, at *3 (D. Kan. July 18, 2016) (holding that dealer's knowing participation in straw sale would constitute a violation of 18 U.S.C. § 924(a)(1)(A) (knowing false statements) and 18 U.S.C. § 922(m) (false entry in dealer records)); *see also Shawano Gun &*

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Loan, LLC v. Hughes, 650 F.3d 1070, 1075 (7th Cir. 2011) (dealer willfully violated Gun Control Act by, *inter alia*, "making [] false record entries . . . by allowing straw transfers"); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 787 (Sup. Ct. 2014) (dealer violates Gun Control Act and can also be liable as accomplice by transferring firearms based on information it knows or has reason to believe is false).

In addition, the Amended Complaint alleges that Defendants had reason to believe that the firearms were "intended to be used in the commission or attempted commission of crimes, including, but not limited to, the straw-purchasing and trafficking." Am. Compl. ¶¶ 139-41. As discussed above, a straw purchase is itself a crime. Further, the act of reselling the guns on the black market is also a crime. *See* 18 Pa.C.S. § 6111(c) (requiring private parties to conduct firearm sales on premises of licensed dealer, subject to background check and other requirements); *see also* 18 U.S.C. § 922(a)(1) (criminalizing unlicensed dealing in firearms); 18 Pa.C.S. § 6112 (same). Further still, it is widely known in the industry that individuals who straw buy guns for others are often doing so for individuals who cannot pass a background check themselves—yet another crime. 18 Pa.C.S. § 6111(g)(2); *see also* 18 U.S.C. § 932(b). Thus, the City has also sufficiently alleged that the Defendants had reason to believe that the firearms they sold were intended to be used in the commission of a crime. *See Smith v. United States*, 508 U.S. 223, 229 (1993) (selling gun for illicit gain amounts to "use" of gun in crime). Finally, under Commonwealth law, the City is a "person" who can maintain such a lawsuit. *See* 1 Pa.C.S. § 1991 ("***Person*** includes a . . . **government entity** other than the Commonwealth…") (cleaned up).

Section 6111(g)(6)'s "notwithstanding clause" removes it from the operation of Section 6120. As the Commonwealth Court recently explained, "a clause of this nature . . . constitutes a clear and unequivocal expression by our General Assembly that the statutory section supersedes

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and completely displaces any and/or all laws that state, or could be interpreted to state, a contrary proposition of law." *Abington Heights Sch. Dist. v. Pa. Lab. Rels. Bd.* (*Abington Heights*), 274 A.3d 775, 2022 WL 401191, at *10 (Pa. Commw. Ct. 2022); *see also Pleasant Hills Constr. Co. v. Pub. Auditorium Auth.* (*Pleasant Hills*), 784 A.2d 1277, 1282 (Pa. 2001) (notwithstanding clause has "straightforward" meaning: "regardless of what any other law provides"). Thus, when the law authorizes a course of action "notwithstanding" other laws, that authority "cannot be questioned or altered in any manner via any other conceivable law no matter how applicable that law may appear to be." *See Abington Heights*, 2022 WL 401191, at *11 (notwithstanding clause authorizing school districts to contract with postsecondary schools exempted them from collective bargaining requirements applicable to all other decisions about teaching duties); *see also Pleasant Hills*, 784 A.2d at 1281 (notwithstanding clause in statute describing bidding for redevelopment projects negated other statutory contracting requirements).

Preemption yields to a "notwithstanding" clause in the very same way, allowing municipal action in an area that would otherwise be preempted by a comprehensive statewide statutory scheme. In *City of Philadelphia v. Clement & Muller, Inc.*, 715 A.2d 397 (Pa. 1998), the Supreme Court held that a "notwithstanding" clause authorized the City of Philadelphia to tax a beer distributor even though municipal taxation of the alcoholic beverage industry was foreclosed by field preemption. *Id.* The law at issue stated that any business operating in a city of the first class "shall pay" taxes set by the city council "[n]otwithstanding a contrary provision of law of the Commonwealth." *Id.* at 399. This closely parallels Section 6111(g)(6), which states that gun dealers who knowingly violate the UFA "shall be liable" for downstream injuries "[n]otwithstanding any act or statute to the contrary." 18 Pa.C.S. § 6111(g)(6). The "notwithstanding" clauses in both provisions must be given the same effect—negating any law

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that might otherwise preempt municipal recovery. Thus, even if Section 6120 would otherwise preempt this lawsuit (it does not, as explained below *infra* at 17-21), Section 6111(g)(6) would save it.

While Section 6111(g)(6)'s "notwithstanding" clause provides its own self-contained rule for resolving conflicts with any other provision of law, general principles of statutory construction require the same result. This is because "statutes *in pari materia*"—that is, on the same subject of civil liability for firearms dealers—"shall be construed together, if possible, as one statute." 1 Pa.C.S. § 1932(b). Thus, courts are "obliged to construe [Sections 6120 and 6111(g)(6)] in harmony, if possible, so as to give effect to both." *See In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017). Harmonization is easy here, where Sections 6120(a) and (a.1) limit liability only for "lawful" conduct and Section 6111(g)(6) makes gun sellers liable for *unlawful* conduct—that is, specified violations of the UFA.[5]

Finally, Section 6111(g)(6) permits the City's *entire lawsuit* to go forward, because all of the City's claims are predicated on the same knowing and intentional violations of the UFA as the City's statutory Section 6111 claim. Am. Compl. ¶¶ 102, 115, 121, 127-28, 140-41.[6] Under Section 6111(g)(6), gun sellers who knowingly violate the UFA are "liable in the amount of the civil judgment" for resulting damages, not liable only for certain causes of action. Thus, all of the City's claims—including nuisance and negligence—survive because they are predicated on the same knowing and intentional conduct.

[5] Defendants cannot avoid this result by arguing for Section 6111(g)(6)'s implicit repeal, as this would contravene the Supreme Court's guidance that "repeal by implication is carefully avoided by the courts." *Carroll v. Ringgold Educ. Ass'n*, 680 A.2d 1137, 1142 (Pa. 1996).

[6] To avoid doubt, the City has also specifically pled a violation of 6111(g)(6) as Count 5, which is properly pled for the reasons explained in subsection C.5 below, *infra* at 36-39. Thus, even if the Court were to find that Section 6111(g)(6) does not negate Section 6120 as applied to the rest of the City's claims, Count 5 would nonetheless survive.

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2. The plain language of Section 6120(a.1) permits the City's claims based on the Defendants' unlawful conduct.

Even if Section 6111(g)(6) were inapplicable, Defendants' argument that this lawsuit is preempted by UFA Sections 6120(a) and (a.1) misses the mark. As discussed *infra* at 17-21, Section 6120(a) preempts only certain forms of municipal *lawmaking*—not *litigation* to vindicate harms caused by violations of Commonwealth and federal law. While Section 6120(a.1) concerns municipal litigation, it does not preclude this lawsuit because the City's claims are predicated on the Defendants' unlawful sale of firearms, and because the City is suing to recover its damages caused by tortious misconduct just like any other litigant.

"We necessarily begin with the language of the statute." *Woodford v. Commonwealth of Pa. Ins. Dep't*, 243 A.3d 60, 73 (Pa. 2020). Section 6120(a.1) of the UFA states:

> 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.*

18 Pa.C.S. § 6120(a.1.)(1) (emphasis added).

By including the word "lawful" in this provision, the statute does not preclude lawsuits like this one that are based on the *unlawful* sale of firearms. "Because the legislature is presumed to have intended to avoid mere surplusage, every word, sentence, and provision of a statute must be given effect." *Allegheny Cnty. Sportsmen's League v. Rendell*, 860 A.2d 10, 19 (Pa. 2004). This Court cannot, as Defendants suggest, read the word "lawful" right out of the statute. Because the text is clear, the inquiry "begins and ends with the plain language of the statute." *Pa. Rest. & Lodging Ass'n v. City of Pittsburgh*, 211 A.3d 810, 822 (Pa. 2019).

The Defendants cite the trial court decision in *Beretta I*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002), for the dubious proposition that "lawful" does not mean

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what it says. Frank's Mem. at 19; Delia's Mem. at 7. But *Beretta* did not involve a question of unlawful behavior; in that case the City sued a group of firearms manufacturers over their *lawful* sales to distributors. The federal district court's discussion of this issue in *Beretta I*, which the Third Circuit expressly declined to follow, *Beretta II*, 277 F.3d at 420 n.4, is misguided and inapplicable for several reasons. To begin, the district court there believed that "the gun manufacturers' conduct [wa]s *not unlawful*" and thus the court had "no further reason to address the City's claims on this point"—meaning its 6120(a.1) analysis is textbook dicta. *Beretta I*, 126 F. Supp. 2d at 890 n.6 (emphasis added). In fact, in a later portion of the opinion, the district court explicitly stated that the City *could* maintain a lawsuit against gun stores that break the law. *Id.* at 902 ("The City may still sue [ ] rogue firearms dealers who sell to felons and others unlawfully allowed to possess firearms.").

In any case, the district court's analysis in *Beretta I* of the term "lawful" in Section 6120(a.1) is simply wrong. The court did not (because it could not) offer any account of what the word "lawful" meant in the statute. It chose instead to erase it from the text and focus on the lack of an express exception to Section 6120(a.1) for unlawful conduct, in the way that there is for breach of contract or warranty actions. But a statute need not contain a redundant exception for something that it does not cover in the first instance, and here the plain text of the statute only reaches *lawful* conduct to begin with. *Beretta I*'s misguided analysis stands in stark contrast to state courts that have reached the opposite conclusion when interpreting similar language. *See, e.g.*, *KS&E Sports v. Runnels*, 72 N.E.3d 892, 899-901 (Ind. 2017) (inclusion of word "lawfully" in a state gun industry immunity statute indicates that "the legislature knows how to craft a statutory bar that applies only to [gun] sales made lawfully"); Order at 2, *City of Kansas City v. Jimenez Arms, Inc. et al.*, No. 2016-CV00829 (Cir. Ct. Jackson Cnty., Mo. Nov. 17, 2022) (where

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immunity statute protected "lawful" conduct, the "allegation that [a gun dealer's] actions were 'unlawful' in violation of firearms statutes and regulations brings the claims within the suits permitted by the statute"), attached hereto as **Exhibit A**.

Legislative history also supports the City's reading of Section 6120(a.1). Proponents of the bill emphasized its circumscription to *lawful* gun dealer conduct. For example, Senator Fumo (a proponent of the bill) stated: "We did not say if [municipalities] had a reason to sue you cannot sue. What we said, you cannot sue for lawful things that they do." S. Legis. Journal at 1143 (Pa. Dec. 6, 1999) (statement of Sen. Fumo); *see also id*. at 1144-45 ("Senator WOZNIAK. Mr. President, if there is a defect, if they sell to an illegal entity, they can certainly be sued, can they not? Senator FUMO. Yes, Mr. President."). Similarly, when asked about a hypothetical illegal gun sale, Rep. Gannon (another proponent of the bill) explained that "[i]t is illegal to sell that weapon in Pennsylvania, and [therefore] it would be specifically exempt from the protections afforded by this amendment." H.R. Legis. Journal at 2243 (Pa. Dec. 7, 1999). This "legislative history is persuasive and serves to confirm [the City's] reading of the statute's language"—it simply validates that "lawful" must be given effect in the statute. *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 624 n.10 (Pa. 2010).

Relying on two cases that analyze very different statutes, Frank's argues that that the term "lawful" simply means "authorized to operate as a seller of firearms." *See* Frank's Mem. at 20-21. But the statutes and cases on which Frank's relies are easily distinguishable. In Section 6120(a.1), "lawful" modifies the words "design," "manufacture," "marketing," and "sale"—meaning that *these* are the actions that must be lawful. It does not matter that the dealer who makes the sale is licensed to operate; rather, it focuses on whether the *sale itself* is lawful. If the legal status of the

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gun dealer's business was at issue, the word "lawful" would precede the word "dealer" in the statute, and not (as it actually does) the terms design, manufacture, marketing, or sale.

In *Branton v. Nicholas Meat, LLC*, by contrast, the statute at issue stated that "[n]o nuisance action shall be brought against an agricultural operation which has *lawfully been in operation* for one year or more prior to the date of bringing such action." 159 A.3d 540, 549 (Pa. Super. Ct. 2017) (emphasis added). In this context, the court held that for the operation to be lawful it needed to be in "substantial compliance" with the law. *Id*. And the fact that the defendant was cited on three occasions did not render the entire operation unlawful. *Id.* at 549-52. Here, by contrast, the statute only protects the *sale* (or the design, manufacture, or marketing) that is lawful.

In any event, both *Branton* and *Johnson* are distinguishable on the additional ground that the defendants in those cases were accused only of a handful of technical rule violations, not systematic violations of Commonwealth and federal criminal laws. *See Branton,* 159 A.3d 540 (slaughterhouse had three citations for improper handling of waste); *see also Johnson v. Toll Bros., Inc.*, 302 A.3d 1231, 1233 (Pa. Super. Ct. 2023) (alleging that door and window frames in new home construction were installed in violation of building code, allowing water intrusion). Here, by contrast, Frank's and Delia's both allegedly engaged in repetitive and systematic violations of statutory duties that go to the very purpose of the federal licensing scheme for firearm sales. Thus, these cases are distinguishable because both the underlying statutes and the scope of the defendants' misconduct is materially different from the allegations here.[7]

[7] Even if the "substantial compliance" standard articulated in *Branton* was applicable here (which it is not), that would raise a factual question that cannot be resolved on a demurrer. *See P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105, 1112 (Pa. Commw. Ct. 1996) ("[I]t would not be proper for this Court to address this factual dispute which cannot be resolved by the Court on the basis of the preliminary objections.").

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3. Section 6120(a), which preempts certain municipal regulations, does not apply.

The Defendants also invoke Section 6120(a). But this section, which preempts certain municipal *ordinances*, does not apply to the City's *lawsuit* and is also limited to only *lawful* conduct. Starting with the text, Section 6120(a) provides that "[n]o 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 this Commonwealth." *Id*. (emphasis added). This provision, like Section 6120(a.1), protects only "*lawful* ownership, possession, transfer or transportation of firearms," which again, is not the basis of the City's claims.[8] But more fundamentally, this subsection is aimed at prohibiting *legislation*—not *litigation*, which is covered by a different section. If Section 6120(a) prohibited municipalities from bringing lawsuits as aggrieved parties, Section 6120(a.1) would be entirely surplusage. It would be anomalous for the legislature to add a new provision to the law that was entirely unneeded and does no substantive work. *See Masland v. Bachman*, 374 A.2d 517, 523 (Pa. 1977) ("[T]he Legislature is not presumed to have intended the provisions of its enactments as mere surplusage."). This illogical reading should be rejected.

Again, misguided analysis in *Beretta I* infects Defendants' arguments. 126 F. Supp. 2d at 889; Frank's Mem. at 18; Delia Mem. at 5-6.[9] In that case, the district court found that the city sought "to control the gun industry by litigation, an end the City could not accomplish by passing an ordinance." *Beretta I*, 126 F. Supp. 2d at 889. But even if this reasoning had merit, it does not

[8] This section contains a second relevant textual limitation: "when carried or transported for purposes not prohibited by the laws of this Commonwealth." A firearm that is transferred to a straw purchaser is not lawfully carried or transported; it is destined for an illegal black-market transaction.

[9] This argument was not addressed by the Third Circuit. *Beretta II*, 277 F.3d at 420 n.4.

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apply here, where the City is simply vindicating harms caused by Defendants' breach of existing Commonwealth and federal law. Unlike in *Beretta*, where the duties contemplated by the tort claims were not grounded in statutory law, here Congress and the General Assembly have already declared Defendants' conduct illegal. Indeed, while the court in *Beretta I* "refus[ed] to adopt a new legal duty," it permitted exactly what the City is doing here: "[t]he City may still sue . . . rogue firearms dealers who sell to felons and others unlawfully allowed to possess firearms." 126 F. Supp. 2d at 902. If a City could not enforce laws already on the books under Section 6120(a), then the Philadelphia Police Department would be unable to enforce Commonwealth gun law without running afoul of preemption. That cannot be.

That the City seeks injunctive relief does not alter this conclusion. The injunctive relief the City seeks, like the appointment of a monitor and mandatory training, is aimed at enforcing the already-existing law and ensuring that the Defendants do not continue to systematically violate it. This is a form of relief, not an element of the underlying claim, and will only be granted if it "is necessary to prevent a legal wrong for which there is no adequate redress at law." *Buffalo Twp. v. Jones*, 813 A.2d 659, 663 (Pa. 2002).

Beyond *Beretta*, the rest of the cases that Delia's cites for the proposition that Section 6120 bars the City's lawsuit share the same flaw: all involve efforts to enact or enforce a municipal ordinance at variance from Commonwealth law. *See* Delia's Mem. at 6-7; *see also Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996) (municipal assault weapon restrictions); *Crawford v. Commonwealth*, 277 A.3d 649, 661 (Pa. Commw. Ct. 2022) (municipal permit-to-purchase, one-gun-per-month, and extreme risk protection ordinances); *Schneck v. City of Philadelphia*, 383 A.2d 227, 229 (Pa. Commw. 1978) (municipal permit-to-purchase ordinance); *NRA v. City of Philadelphia*, 977 A.2d 78, 79-80 (Pa. Commw. Ct. 2009) (municipal ordinances concerning

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temporary firearm relinquishment, lost and stolen gun reporting, assault weapon regulation, and multiple handgun purchasing), *overruled on other grounds by Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497 (Pa. Commw. Ct. 2019). But the City has passed no ordinance here, and none of these cases is controlling where the defendant's substantive legal obligations are defined exclusively by Commonwealth and federal law rather than municipal ordinance.

Defendants' attempts to overread precedent applying Section 6120(a) should be rejected. Begin with *Minich v. Cnty. of Jefferson*, 869 A.2d 1141 (Pa. Commw. Ct. 2005), which was completely omitted from Defendants' briefs. In *Minich*, a county regulation to enforce a Commonwealth-law prohibition on firearms in a "court facility" was found not to be preempted under Section 6120(a). *Id*. at 1142-43; *see also* 18 Pa.C.S. § 913. The court held that if the "County's ordinance pertains only to the unlawful possession of firearms, i.e., possession 'prohibited by the laws of this Commonwealth,' then section 6120(a) of the Crimes Code does not preempt the County's ordinance." *Minich*, 869 A.2d at 1143. Because the County's ordinance mirrored Commonwealth law, it "does not regulate the lawful possession of firearms," and fell outside of Section 6120. *Id*. at 1144.

This principle is directly applicable here. The City alleged that Defendants' conduct violates federal and Commonwealth law. Am. Compl. ¶¶ 102, 115, 121. In other words, the City's lawsuit, like the ordinance in *Minich*, seeks only to enforce existing legal obligations. This lawsuit does not "make the otherwise lawful [sale] of a firearm unlawful." *Minich*, 869 A.2d at 1143.

To be sure, case law interpreting Section 6120(a) is not a straight line. In *NRA v. City of Philadelphia*, the Commonwealth court stated "[u]nfortunately . . . 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 [] that the crystal clear holding of our Supreme Court in *Ortiz,* . . .

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precludes our acceptance of the City's argument." 977 A.2d 78, 82 (Pa. Commw. Ct. 2009). But this case did not cite or purport to overrule *Minich*. And *Minich* has been discussed on several occasions by the Commonwealth Court, with the court's recognition that it was not "explicitly overrul[ed]." *Firearm Owners Against Crime v. City of Pittsburgh*, 276 A.3d 878, 890 (Pa. Commw. Ct. 2022); *see also Firearm Owners Against Crime v. Lower Merion Twp*., 151 A.3d 1172, 1177 (Pa. Commw. Ct. 2016) ("Unlike *Minich*, the Township does not point to any corresponding provision in the Crimes Code that contains such a blanket ban of firearm possession in a park.").

Minich and *NRA v. Philadelphia* can and must be reconciled. "[A] *sub silentio* overruling will rarely be found to [be] . . . intended." *Commonwealth v. Jamison*, 652 A.2d 862, 865 (Pa. Super. Ct. 1995) (alterations in original), *aff'd sub nom*. *Commonwealth v. Tilghman*, 673 A.2d 898 (Pa. 1996). The ordinance in *Minich* "solely regulate[d] the possession of firearms that the General Assembly has already decided to be unlawful." *Lower Merion Twp*., 151 A.3d at 1177. The straw purchaser ordinance in *NRA v. City of Philadelphia*, by contrast, was related to unlawful conduct, but created new legal violations that were not coextensive with Commonwealth law. Specifically, that ordinance prohibited "the purchase of more than one handgun within any thirty-day period, except for any person who is not a straw purchaser," a regulation that finds no exact parallel in existing law. *NRA v. City of Philadelphia*, 977 A.2d at 80.[10] This ordinance also would have created a unique legal obligation, unlike *Minich*, which was just implementing and enforcing

[10] While this Court need not address this issue, given that civil liability is permitted in this case "[n]otwithstanding any act or statute to the contrary," 18 Pa.C.S. § 6111(g)(6), the City notes its view that *NRA v. City of Philadelphia* was wrongly decided and should be expressly overruled by the Commonwealth Court or Supreme Court of Pennsylvania.

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Commonwealth law. This case is more like *Minich*. The City is simply enforcing the Commonwealth and federal laws already on the books.

Finally, *Ortiz v. Commonwealth*, which Delia's relies on, *see* Delia's Mem. at 5, does not compel a finding that this suit is preempted by Section 6120. 681 A.2d 152 (Pa. 1996). *Ortiz* considered municipal laws that purported to "regulate the ownership of so-called assault weapons" and therefore "undisputed[ly]" fell within the scope of § 6120. *Id*. at 154-55. The sole question in *Ortiz* was Section 6120(a)'s compatibility with home-rule authority to enact ordinances. It had nothing to do with municipal litigation—much less litigation to enforce duties codified in Commonwealth law.[11] Indeed, none of the cases Defendants rely on, including *Beretta*, concern the preemption of a municipal lawsuit to enforce statutory obligations created by Congress and the General Assembly, demonstrating that Section 6120 is not an impediment to this suit.

B. Collateral Estoppel Does Not Apply to the City's Claims

Delia's devotes five pages of its brief to the erroneous argument that the instant case is barred by the doctrine of collateral estoppel. *See* Delia's Mem. at 8-13. This argument can be quickly dispensed with because the issues here are not identical to those adjudicated in *Beretta*.

The purpose of collateral estoppel is to "prevent[] a question of law or an issue of fact that has once been litigated and fully adjudicated . . . from being relitigated in a subsequent suit."

[11] Several judges of the Commonwealth Court have called *Ortiz* into question. *Firearm Owners Against Crime v. City of Pittsburgh*, 276 A.3d 878, 901 (Pa. Commw. Ct. 2022) (Ceisler, J., concurring and dissenting, joined by Cohn Jubelirer, P.J. and Wojcik, J.) ("I urge our Supreme Court to either overturn or rein in the reach of *Ortiz*."); *City of Philadelphia v. Armstrong*, 271 A.3d 555, 569 (Pa. Commw. Ct. 2022) (Leadbetter, J., dissenting) ("I would urge our Supreme Court to reconsider the breadth of the *Ortiz* doctrine and allow for local restrictions narrowly tailored to local necessities."). In both of these cases, Petitions for Allowance of Appeal are currently pending before the Supreme Court. *See* Petition for Allowance of Appeal, *City of Philadelphia v. Armstrong*, No. 81 EAL 2022 (filed March 16, 2022); Petition for Allowance of Appeal, *Firearm Owners Against Crime v. City of Pittsburgh*, No. 174 WAL 2022 (filed June 27, 2022).

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Mariner Chestnut Partners, L.P. v. Lenfest, 152 A.3d 265, 286 (Pa. Super. Ct. 2016). Accordingly, it precludes re-litigation of an issue only if five elements are met:

> (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.

Skotnicki v. Ins. Dep't, 175 A.3d 239, 247 (Pa. 2017). Delia's collateral estoppel argument fails on the first element: identity of issues. That element concerns issues that, if re-litigated, could unsettle the finality of the previous action. Thus, for example, a plaintiff cannot bring a products liability action against a retailer after his previous claim against the manufacturer—which involved the *same product* and alleged the *same defect*—resulted in a finding that the product was not defective. *See Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1319 (Pa. Super. Ct. 1983); *see also In re Coatesville Area Sch. Dist.*, 244 A.3d 373, 381 (Pa. 2021) (party cannot assert breach of contract in one action, and contest validity of same contract in separate action).

But here, as discussed *supra*, the City brings its case against differently situated defendants under different legal theories, and as such a finding in favor of the City would have no effect on the defendants in *Beretta*. As both the district court and Third Circuit repeatedly stated, the case before them involved gun *manufacturers* further up the distribution stream where there was no allegation of illegal conduct. *See, e.g.*, *Beretta II*, 277 F.3d at 419; *see also id.* at 426 ("Accordingly, we will dismiss plaintiffs' claims that tort liability should be assessed against *gun manufacturers* when their *legally sold*, non-defective products are criminally used to injure others.") (emphasis added). Defendants here are downstream from the manufacturers in *Beretta*, the nature of their legal duty is different, and the causal relationship between their actions and the

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City's injuries is shorter and more direct. In short, these are different defendants whom the City seeks to hold liable for their own bad conduct.

Nor is *Beretta I*'s holding as to the City's negligence claims as sweeping as Delia's asserts. *See* Delia's Mem. at 10; *see also* Frank's Mem. at 24-26 (arguing that the City's harms are too remote). Indeed, Defendants conspicuously omit the portion of the district court's opinion in *Beretta* in which the court—while evaluating plaintiffs' negligence claim—stated:

> The court's refusal to adopt a new legal duty does not foreclose the possibility that alternative suits might succeed. **The City may still sue (and the District Attorney may still prosecute) rogue firearms dealers who sell to felons and others unlawfully allowed to possess firearms**. But the recognition of the legal duty for manufacturers to victims of gun violence is a matter properly addressed to Congress or the Pennsylvania legislature.

Beretta I, 126 F. Supp. 2d at 902 (emphasis added) (internal citations omitted); *see also Beretta II*, 277 F.3d at 425 (citing approvingly to the above paragraph).

In short, the decisions in *Beretta* do not amount to a finding that no legal duty exists for *any* member of the gun industry under *any* circumstances. The Court should dismiss Delia's preliminary objection asserting collateral estoppel.

C. <u>Each of the City's Claims Is Adequately Pled</u>

1. Defendants' Objections to the Public Nuisance Claim Should Be Overruled

Turning to the elements of the City's claims, the City has adequately pleaded a claim for public nuisance. Under Pennsylvania law, a public nuisance is "an unreasonable interference with a right common to the general public." *Commonwealth ex rel. Preate v. Danny's New Adam & Eve Bookstore*, 625 A.2d 119, 122 (Pa. Commw. Ct. 1993) (quoting Restatement (Second) of Torts § 821B (1965)). Interference with a public right may be unreasonable when "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience." *Commonwealth v. Monsanto Co.*, 269 A.3d 623, 648 (Pa.

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Commw. Ct. 2021) (quoting Restatement (Second) of Torts § 821B). Interference may also be unreasonable when "the conduct is proscribed by a statute, ordinance, or administrative regulation." *Id.* For example, the Pennsylvania Supreme Court held that bullfighting was a public nuisance because there was a statute proscribing it, which was "tantamount to calling the proscribed matter prejudicial to the interests of the public." *Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo Enters., Inc.*, 237 A.2d 342, 360 (Pa. 1968).

Defendants first argue that the City has not alleged the violation of a public right, relying on the statement in *Beretta I* that there is no "right to be free from guns and violence." Frank's Mem. at 22. However, the district court's statement was premised on the absence of a statute proscribing the defendant manufacturers' conduct. *See Beretta I*, 126 F. Supp. 2d 882, 909 (distinguishing the public nuisance claim there from the claim in another case that was grounded in the Pennsylvania Constitution). In contrast, here multiple Commonwealth and federal laws proscribe the retailer Defendants' alleged conduct. Moreover, *Beretta I*'s "narrow[]" interpretation of Pennsylvania public nuisance law was animated by prudential concerns about the role of federal courts defining state law torts in the absence of clear guidance. *See id.* at 906 (noting that "federal courts should proceed cautiously . . . where state law is uncertain"); *see also Beretta II*, 277 F.3d 415, 421. Those federalism concerns are not present here.

Nor is guidance lacking about the scope of Defendants' obligations under Commonwealth law. To the contrary, the General Assembly has proscribed sales to straw purchasers by statute. *See, e.g.*, Am. Compl. ¶¶ 41-45 (listing statutory requirements under Commonwealth law to prevent straw-purchasing); *see also id.* ¶ 102 (itemizing statutory violations underlying public nuisance claim). After Officer Bradley Fox was murdered by a straw-purchased gun, these statutory provisions were amended to strengthen penalties against both straw buyers and the stores

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that supply them. *See* 18 Pa.C.S. § 6111(h)(1); David Powell, *State Legislature Passes 'Brad Fox Law*, Patch (Oct. 18, 2012).[12] And in 2008 the General Assembly created the Straw Purchase Prevention Education Fund, underscoring that illegal gun sales are "a threat to public safety and security." *See* 18 Pa.C.S. § 6182(1); § 6182(2) ("Stemming the flow of these illegal firearms through straw purchases will help to curb the crime rate throughout this Commonwealth and increase public safety."); § 6182(3) ("Educating the public" about straw purchasing "advances public safety.").

The Commonwealth's public policy with respect to preventing straw purchasing could not be any clearer. Under the reasoning of *Bravo Enterprises*, this legislative scheme demonstrates that straw sales of firearms, in and of themselves, are a public nuisance. *See Bravo Enters.*, 237 A.2d at 360 (conduct proscribed by statute was "prejudicial to the interests of the public" and thus a public nuisance); *see also, e.g.*, *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777 (Sup. Ct. 2014) (allegations that dealer sold two assault weapons in straw sale adequately pled a public nuisance claim); *Minnesota v. Fleet Farm LLC*, No. CV 22-2694 (JRT/JFD), 2023 WL 4203088, at *12 (D. Minn. June 27, 2023) (allegation that dealer sold firearms to individuals that it had reason to know were straw purchasing adequately pled public nuisance claim); *Williams v. Beemiller, Inc.*, 103 A.D.3d 1191, 1192 (N.Y. App. Div. 2013) (knowing participation in straw purchases was sufficient basis for public nuisance claim).

For similar reasons, the Defendants' reliance on *Atlantic Richfield* is misplaced. *See* Frank's Mem. at 22-23; Delia's Mem. at 14. In that case, the court held that the Lead Certification Act could not be the basis for holding manufacturers of lead paint liable for public nuisance, because that legislation did not "retroactively proscribe[] the past manufacture and sale of lead

[12] https://patch.com/pennsylvania/plymouthwhitemarsh/state-legislature-passes-brad-fox-law.

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paint." *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1282-83 (Pa. Commw. Ct. 2023). Still, the court recognized that a statute that *does* outlaw conduct, such as the bullfighting statute at issue in *Bravo Enterprises*, "is declarative of the public policy and is tantamount to calling the proscribed matter prejudicial to the interests of the public," and thus a "public nuisance." *Id.* (quoting *Bravo Enters.*, 237 A.2d at 360). That is just what the statutes do here.

Unable to meaningfully contest that straw sales and the resulting gun violence are a public nuisance, Defendants instead attempt to distance themselves from these straw transactions' foreseeable effects. Relying primarily on the nonbinding federal court decisions in *Beretta*, Defendants argue that they do not control what their customers do with the guns they illegally buy from Defendants, and that therefore Defendants are not the proximate cause of the nuisance in question. *See* Frank's Mem. at 22-23; Delia's Mem. at 14-15. But this case presents none of the attenuation issues of *Beretta*. There, the Third Circuit found that gun *manufacturers* could not be responsible for the criminal misuse of their products because any criminal diversion and use of their firearms occurred too far downstream from their lawful placement of the product into the stream of commerce. *Beretta II*, 277 F.3d at 422. Not so here. Defendants in this case are not remote from the public nuisance and are not acting legally in the first instance: they are knowingly engaging in illegal straw sales that directly feed firearms into the criminal market.

Take the case of Delia's, which sold seven handguns to straw-purchaser Anthony Cipriano, even though he presented false identification that—as an employee admitted—looked nothing like Cipriano. Am. Compl. ¶¶ 82-84. Two of these guns have also been recovered from drug dealers; and scarier still, the other guns are unaccounted for and still in circulation. *Id.* ¶¶ 85-86. Indeed, even the Third Circuit in *Beretta* recognized that retailers are more proximate to illegal straw sales than manufacturers. *See Beretta II*, 277 F.3d at 422 ("[T]he gun manufacturers supply their

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products to adult, independent federally licensed firearms dealers . . . [and] are not in control of the guns at the time they are misused, *nor do they control the independent firearms dealers*.") (emphasis added) (citation omitted).[13] Defendants cannot distance themselves from control over these guns during these unlawful straw transactions: Defendants are the sellers, and Pennsylvania's statutory scheme gives them great responsibility in preventing such sales. *See* Am. Compl. ¶¶ 49-95 (detailing Defendants' firearms sales to straw purchasers).

For purposes of proximate cause, it is irrelevant that Defendants are no longer holding the guns their straw purchasers use to flood the City with fear and violence (*cf.* Frank's Mem. at 23; Delia's Mem. at 15), because that result is readily foreseeable at the time of the straw transactions. *See Straw v. Fair*, 187 A.3d 966, 995 (Pa. Super. Ct. 2018) (quoting *Von der Heide v. Commonwealth, Dep't of Transp.*, 718 A.2d 286 (Pa. 1998)) ("[F]or an act to break the causal chain and relieve the defendant of liability, the act must be 'so extraordinary as not to have been reasonably foreseeable.'"). Pennsylvania courts follow the Restatement (Second) of Torts § 448, which provides that a third party's criminal conduct is not a superseding cause of harm where the initial tortfeasor "realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." Restatement (Second) of Torts § 448 (1965); *see also Dittman v. UPMC*, 196 A.3d 1036, 1047 (2018) (applying Restatement § 448 and concluding that criminal hacking by third parties did not relieve employer of liability for negligently storing employees' personal data). In *City of Philadelphia v. Stepan Chemical Co.*, a chemical company was liable for public nuisance relating

[13] While retail gun stores are differently situated from manufacturers, the City does not concede that manufacturers or distributors can never be liable for the misuse of their products. To the contrary, these entities may, based on a variety of circumstances, be put on notice of downstream diversion and/or misuse of their products, and may be well-positioned to prevent misconduct.

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to the improper disposal of its industrial waste, even though the waste was in the control of a third-party removal company when it was dumped on City property, and the removal company's conduct was criminal. *See* 544 F. Supp. 1135, 1153 (E.D. Pa. 1982). Under Pennsylvania law, the foreseeability of the subsequent criminal conduct governs the extent of Defendants' liability, not the identity of the criminal or the locus of the crime.

Delia's conclusory assertion that its sales complied with one aspect of the UFA (*see* Delia's Mem. at 14-15) is irrelevant. Running a background check on a straw purchaser does not relieve the store of its obligation to comply with the rest of the UFA and federal law—including provisions forbidding it from (a) falsely certifying the legality of the sale, (b) providing false information to law enforcement, or (c) recording false information in its own books and records, among other things. *See* Compl. ¶¶ 30-45 (summarizing legal framework for retail firearms transactions); *see also Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 WL 3881341, at *3 (D. Kan. July 18, 2016) (false entries in dealer paperwork are how dealers facilitate straw purchasing in violation of the Gun Control Act); *Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070, 1075 (7th Cir. 2011). Plus, when Delia's runs a background check on a straw buyer that it knows is not the actual buyer, the store is not in fact complying with the UFA background check requirement—it is *simulating* compliance. *See, e.g.*, 18 Pa.C.S. § 6111(g)(3) (prohibiting dealer from requesting background check for improper purposes); *see also* Am. Compl. ¶ 42. And by contesting issues of fact—whether its compliance was real or simulated, and whether it satisfied all legal requirements pertaining to the sale—Delia's makes an argument that is inappropriate to resolve at the preliminary objections stage, where "the allegations of the complaint are taken as true." *SCF Consulting, LLC v. Barrack, Rodos & Bacine*, 175 A.3d 273, 276 n.2 (2017).

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Accordingly, the City has sufficiently pleaded both that straw sales of firearms and the resulting gun crimes are public nuisances, and that Defendants have proximately caused those nuisances. This Court should reject Defendants' preliminary objections to this claim.

2. Defendants' Objections to the Negligence Claim Should Be Overruled

Defendants next argue that the City's negligence claims should be dismissed because (i) the Defendants owed no duty to the City and (ii) the Defendants' conduct did not proximately cause the City's injuries. Both arguments are meritless.

First, in addition to the statutory duties imposed on Pennsylvania gun stores, the City has properly pleaded that Defendants were subject to (i) the general legal duty to not expose others to foreseeable risks of injury, and (ii) a duty to exercise reasonable care in distributing and selling firearms. Am. Compl. ¶ 114. There is a "general duty imposed on all persons not to place others at risk of harm through their actions." *Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 535 A.2d 1095, 1098 (Pa. Super. Ct. 1987), *aff'd*, 572 A.2d 1209 (1990). Additionally, as a general rule, "anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." Restatement (Second) of Torts § 302, cmt. a (1965). Ultimately, the foreseeability of the risk "defines the duty to be obeyed." *Dahlstrom v. Shrum*, 84 A.2d 289, 290-91 (Pa. 1951).

Defendants argue that no duty exists because any injuries from gun violence were caused by third parties. *See* Frank's Mem. at 25; Delia's Mem. at 15. However, the Supreme Court has made clear that the intervention of a third party does not absolve a negligent actor of his duty of care if the injury was a "natural and probable result to be anticipated from the original negligence." *Kuhns v. Brugger*, 135 A.2d 395, 404 (Pa. 1957). For example, in *Kuhns*, the Court held that a grandfather owed a duty to a gunshot victim who had been wounded by the grandfather's 12-year-

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old grandson, who had access to the grandfather's loaded pistol kept in an unlocked dresser in an unlocked room. *Id.* at 398-99, 403. The Court explained that:

> [T]he duty imposed upon Bach encompassed all those persons who might suffer harm or injury from the pistol's discharge and included the pistol's use not only by Bach but its use by a third person if Bach knew or had reason to know that such person was likely to use the pistol in such a manner as to create "an unreasonable risk of harm to others."

Id. at 403; *see also* Restatement (Second) of Torts § 302 (1965) (negligence may be established by an act or omission that involves an unreasonable risk of harm to another through the foreseeable action of a third party). Likewise, in *Commonwealth v. Monsanto Co.*, the Commonwealth Court overruled a chemical manufacturer's preliminary objections to public nuisance and negligence claims, finding that pollution was the foreseeable consequence of manufacturing and marketing PCBs even though defendants "did not pour PCBs into the Commonwealth's environment first-hand" but rather "sold them to third parties." 269 A.3d at 648, 652.

Similarly, here, as pleaded in the Amended Complaint, the Defendants knew or had reason to know that the guns they sold to straw purchasers would be used by criminals in a manner that created an unreasonable risk of harm to others. *See* Am. Compl. ¶¶ 8, 25, 104, 111, 118, 125, 135, 144. The harm that flows from illegal "straw" transactions are substantial, foreseeable, and reflected in Pennsylvania's public policy. *See, e.g.*, 18 Pa.C.S. § 6182(1), (2).

Moreover, when handling an especially dangerous instrument like a firearm, the foreseeability of risk is heightened. For example, in *Kuhns*, the Court emphasized that one in charge of a dangerous weapon must use diligence commensurate with the risk; and, that under the circumstances the fact that the gun might be used by immature individuals to injure someone was reasonably foreseeable. *Kuhns*, 135 A.2d at 404. Similarly, here, the Defendants were selling dangerous weapons to straw purchasers, and they had reason to believe that those straw purchasers intended to transfer those weapons to individuals who could not otherwise purchase them lawfully.

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It was entirely foreseeable that those individuals would then use those guns in violent or other criminal acts that would harm the community.

Defendants' proximate cause argument rehashes their argument on Plaintiff's public nuisance claim and is equally unavailing. Defendants argue that *Beretta* supports their claim that the City's injuries are too remote from their conduct. *See* Frank's Mem. at 25; Delia's Mem. at 16. But as explained above, Defendants here are retailers directly engaged in illegal sales to straw purchasers, not manufacturers engaged in legal commerce. ATF trains retailers like the Defendants to recognize and stop straw purchases precisely because they are at the front line where firearms are diverted to criminals. *See* Am. Compl. ¶¶ 37, 47, 71, 77. And, as discussed above, the causal chain is not broken when these guns are illegally resold on the black market, because it is entirely foreseeable that straw purchasers will put guns in the hands of violent criminals. That is the entire point of straw purchasing: to supply felons and others who are otherwise prohibited from buying guns. *See* Am. Compl. ¶¶ 2, 23, 25.

Defendants mischaracterize the City's complaint as alleging generalized injuries that cannot be traced to them, when in fact the Amended Complaint alleges in detail (i) illegal firearm sales that are traceable to the Defendants, *see id.* ¶¶ 4-5, 72-73, 75, 78, 80, 85-86, 91-93, 95, and (ii) that a large percentage of the crime guns traced to the defendants are recovered at crime scenes shortly after they are sold. *See id.* ¶ 29. For example, Frank's sold a Glock 19, 9mm handgun to a straw purchaser on July 2, 2020, and by early September the gun was already recovered in the City from the waistband of a 16-year-old and linked to shootings at a pizza restaurant and in a residential neighborhood. *See id.* ¶ 72. A Taurus PT111 9mm handgun that Delia's sold to a straw purchaser in March 2018 was used in a pair of shootings in the City in July 2019, including one in which a 36-year-old man was shot in the abdomen. *See id.* ¶¶ 92-93. As this short "time to crime" indicates,

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the route these firearms take from the Defendants' hands to the City's streets is often straightforward and short.

Additionally, the harm suffered by the City is concrete, direct, and not speculative. The City has incurred substantial costs as the direct and proximate result of each Defendant's breach of these duties. The economic burden of gun violence, encompassing the lost wages of victims and offenders, the erosion of public and private property values, and the value of activities chilled by the proliferation of gun violence, falls squarely on the City. *See* Am. Compl. ¶ 22. And the City's residents have sustained injuries as a proximate result of criminal activities that are reasonably foreseeable from Defendants' intentional conduct. It is undeniable that gun violence is a foreseeable consequence of gun trafficking, and of selling guns to those legally prohibited from purchasing them. *Cf. Frey ex rel. Frey v. Smith ex rel. Smith*, 685 A.2d 169 (Pa. Super. Ct. 1996) (complaint properly pleaded that parents of child who owned an airgun proximately caused injuries resulting from that airgun, even though the airgun was used by another child); *Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 572 A.2d 1209, 1210 (Pa. Super. Ct. 1990) (social host of fraternity party who knowingly served alcohol to a minor may be liable for damage caused by the minor because "the risk of damage to a neighboring property as a result of [] intoxication was a foreseeable risk of [the social host's] having provided him with alcohol"). And contrary to the Defendants' arguments, *see* Delia's Mem. at 1-2; Frank's Mem. at 15, the City is not seeking to hold them liable for *all* gun violence in the City, but only for the damage that *their own actions* caused.

For all of these reasons, the Court should reject Defendants' preliminary objections to the City's negligence claim.

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3. Defendants' Objections to the Negligence Per Se Claim Should Be Overruled

Frank's argues that the City's negligence per se claim is "duplicative" of its negligence claim and should therefore be dismissed. *See* Frank's Mem. at 26-27. To the contrary, the City properly pleaded negligence per se as a separate cause of action. While a traditional negligence claim requires duty, breach, causation, and damages, negligence per se applies "when an individual violates an applicable statute, regulation or ordinance designed to prevent a public harm." *Sodders v. Fry*, 32 A.3d 882, 887 (Pa. Commw. Ct. 2011). "Proof that an applicable statute exists and that the defendant violated that statute" establishes the first two elements of negligence per se. *Grove v. Port Auth. of Allegheny Cnty.*, 218 A.3d 877, 888-889 (Pa. 2019) (citation omitted). The plaintiff must then show that the negligence proximately caused its injuries. *Id.*

Although negligence and negligence per se claims have overlapping elements, "[n]egligence *per se* is a separate legal theory having elements and underlying rationales different from [a negligence theory]." *McCloud v. McLaughlin*, 837 A.2d 541, 544 (Pa. Super. Ct. 2003); *Skowronski v. Bailey*, 478 A.2d 1362, 1365 n.3 (Pa. Super. Ct. 1984) (Plaintiff "may rely on common law principles of negligence in addition to statutory violations in order to establish liability."). To that end, negligence per se is considered a separate cause of action from negligence, such that a plaintiff that raises only negligence, but not negligence per se, within the limitations period will be precluded from proceeding on a negligence per se theory. *See Echeverria v. Holley*, 142 A.3d 29, 37-38 (Pa. Super. Ct. 2016); *see also McCloud*, 837 A.2d at 544. Accordingly, the City's negligence and negligence per se claims are not duplicative, and the court should reject Defendants' preliminary objection to this claim.

Frank's next argues that the City cannot assert a negligence per se claim because "the city must allege that the purpose of the statute . . . was designed 'at least in part, to protect the interest

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of a group of individuals, as opposed to the public generally.'" Frank's Mem. at 9 (quoting *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574 (Pa. Super. Ct. 1996)). This argument fails because the statutory provisions violated by Defendants are "at least in part" specifically intended to safeguard the City. And unlike in *Wagner*, where the air pollution code did not provide a private right of action, here the UFA explicitly provides for private enforcement. *See* 18 Pa.C.S. § 6111(g)(6); *see also Wagner*, 684 A.2d at 575 ("There is a close relationship between whether a statute provides a private cause of action and whether it protects an individual harm that would support application of the negligence *per se* doctrine.").[14] As alleged, Defendants have breached their duties mandated by various statutes, proximately causing the City's injuries. *See, e.g.*, Am. Compl. ¶ 121 (identifying statutes). These statutes regulate gun purchases, sales, and transfers with the clear purpose of curbing gun violence and making it easier for local law enforcement to investigate and prosecute gun crimes. *See Abramski v. United States*, 573 U.S. 169, 173 (2014) (one of the main purposes of federal recordkeeping requirements is to enable law enforcement "to enforce the law's verification measures and to trace firearms used in crimes"). The beneficiaries of these laws extend beyond individual victims harmed by gun violence to include the localities where such violence occurs. Indeed, the City and its public servants have direct and frequent interactions with illegal guns, making them one of the primary beneficiaries of gun safety laws violated by Defendants. *Cf. Schemberg v. Smicherko*, 85 A.3d 1071, 1072-73 (Pa. Super. Ct. 2014) (police officer could plead a negligence per se claim under Pennsylvania law that declares it a misdemeanor to create

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[14] The underlying statutory differences alone are sufficient reason to set aside Defendants' misapplication of *Wagner*. But even if they were not, Defendants' argument rests on the untenable logic that "the more people that a statute was designed to protect, the less protection the statute affords to the public," and thus that "if a statutory duty is intended to protect most people, then . . . a defendant has a diminished obligation to carry out that duty." *Shirley ex rel. Graham v. Glass*, 308 P.3d 1, 6 (Kan. 2013) (reversing grant of summary judgment for gun dealer and holding that firearm-transfer statutes can establish duty in straw purchasing case).

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substantial risk of bodily injury to public servants in order to prevent them from effectuating arrests or otherwise discharging their duties). Under these circumstances, the City has properly alleged that the statutes were designed to protect its interests.

4. The Defendants' Objections to the Negligent Entrustment Claim Should Be Overruled

The City has properly alleged that Defendants negligently entrusted firearms to individuals they knew or reasonably should have known were engaged in straw purchasing. Pennsylvania follows Section 308 of Restatement (Second) of Torts to define the tort of negligent entrustment: "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." *Spencer v. Johnson*, 249 A.3d 529, 550 (Pa. Super. Ct. 2021).[15]

Defendants argue that the City has not pled their direct entrustment of weapons to individuals likely to use them negligently or criminally, citing *Beretta*. *See* Frank's Mem. at 28. But Defendants' reliance on *Beretta* is again misplaced, because unlike the manufacturers in *Beretta* the City's complaint specifically alleges that Defendants negligently entrusted firearms to illegal gun traffickers in face-to-face transactions. *See, e.g.*, Am. Compl. ¶¶ 65-95. Defendants knew or should have known that straw purchasers supply guns to dangerous and prohibited

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[15] Defendants' conduct also falls squarely within Restatement § 390, which provides that "[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." Restatement (Second) of Torts § 390 (1965); *see also Knight v. Wal-Mart Stores, Inc.*, 889 F. Supp. 1532, 1539 (S.D. Ga. 1995) (applying § 390 to hold that gun dealer could be liable for negligent entrustment); *First Trust Co. of N.D. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 8 (N.D. 1988) (same); *Bernethy v. Walt Failor's, Inc.*, 653 P.2d 280, 283 (Wash. 1982) (same).

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individuals, and were therefore obligated to use their judgment to refuse to sell firearms to straw purchasers. Their failure to do so constitutes negligent entrustment. *See, e.g.*, *Frey*, 685 A.2d at 173 (parents whose child was injured by another minor who fired a BB-gun could recover against the other child's parents based on negligent entrustment); *Mendola v. Sambol*, 71 A.2d 827 (Pa. Super. Ct. 1950) (father subject to liability when he left an accessible gun out which was used by his child to shoot another child); *see also Shelton v. Gure*, No. 3:19-CV-00843, 2021 WL 2210989, at *10 (M.D. Pa. June 1, 2021) (finding that a negligent entrustment claim against a tractor-trailer company regarding an allegedly unqualified driver could be supported with evidence regarding the "lack of thorough vetting" of drivers, including "fail[ure] to conduct a proper background check"); *Shirley ex rel. Graham v. Glass*, 308 P.3d 1, 9 (Kan. 2013) (allowing negligent entrustment claim against firearms dealer to proceed based on alleged straw purchase in violation of Gun Control Act and corresponding provisions of state law). Accordingly, the court should reject Defendants' negligence entrustment argument.

5. Defendants' Objections to the UFA Section 6111(g)(6) Claim Should Be Overruled

Defendants argue that the City's Section 6111(g)(6) claim is deficient because it fails to plead that the stores *knew or intended* that the straw purchased firearms would be used in crime. *See* Frank's Mem. at 28-29; Delia's Mem. at 18 & n.3. But this argument misreads the statute, which specifies different levels of culpability for different elements of the claim. *See* 18 Pa.C.S. § 6111(g)(6). Under the statute's plain text, the stores' act of selling or delivering the firearm in violation of the UFA must be "knowing[] and intentional[]." *See id.* As to the customer's intentions, Defendants need only have "reason to believe" that the gun is intended for use in a crime. *See id.*

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The Amended Complaint easily clears this "reason to believe" threshold.[16] It alleges that each store repeatedly ignored obvious indicators that its customers were illegally straw purchasing guns. *See, e.g.*, Am. Compl. ¶¶ 65-95. When Delia's and Frank's each sold guns to people that they knew were straw purchasing, they knew—or at very least had reason to believe—that the straw buyers intended to resell or retransfer the guns in a second illegal transaction: that is the entire point of straw purchasing. Straw purchasers who resell or transfer firearms in Pennsylvania violate a host of federal and Commonwealth laws, including unlicensed dealing in firearms (18 U.S.C. §§ 922(a)(1), 923(a); 18 Pa.C.S. § 6112), and failure to conduct a background check (18 U.S.C. § 922(t)(1), 27 C.F.R. 478.102, 478.124(a), 18 Pa.C.S. § 6111(c)), among others. And straw purchased guns are most often intended for prohibited persons, *see* Am. Compl. ¶ 23, and such transfers are also a crime. *See* 18 U.S.C. §§ 922(d)(10)-(11), 932(b), 933(a); 18 Pa.C.S. § 6111(g)(2). It is also an additional crime for such prohibited persons to possess firearms. *See* 18 U.S.C. § 922(g); 18 Pa.C.S. § 6105(a), (c).

Importantly, the sale or transfer of a firearm in a criminal transaction constitutes "use" of the firearm in the commission of a crime. *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 225 (1993) (exchanging firearm for narcotics constitutes "use" of a firearm during and in relation to drug trafficking).[17]

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[16] The Amended Complaint also plainly meets the "knowing and intentional" pleading standard as to the stores' act of selling and delivering firearms in violation of the UFA. *See, e.g.*, Am. Compl. ¶¶ 42, 139-142. Delia's acknowledges as much in its papers. *See* Delia's Mem. at 18 n.3. The Amended Complaint is replete with examples of transactions in which the Defendants knew of—but deliberately ignored—obvious illegal straw purchasing. *See* Am. Compl. ¶¶ 65-95.

[17] Nowhere in the text of § 6111(g)(6) is there a requirement that the licensed dealer had to anticipate that the gun be used in a *violent* crime. But even if that was the test, then it would be met as well since that is the foreseeable result of unlawfully diverting firearms to an illegal and unregulated market that supplies guns to criminals, underage users, and others who are too dangerous or irresponsible to legally buy or own a gun. *See, e.g.*, *id.* ¶ 144. This is exactly why the

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To avoid this result, Defendants ask the Court to read the words "reason to believe" out of the statute and substitute the "knowing and intentional" standard that applies to the law's other elements. But Pennsylvania law "recognizes that a single offense definition may require different culpable mental states for each objective offense element." *Commonwealth v. Roebuck*, 32 A.3d 613, 617 (Pa. 2011) (upholding conviction as accomplice to third-degree murder based on proof of intentional conduct with respect to commission of the crime, but reckless state of mind as to resulting death). As Defendant's only supporting case makes clear, courts "must accept that when the General Assembly selects words to use in a statute, it has chosen them purposefully," and "cannot change those words" or render them meaningless. *See Commonwealth v. Scolieri*, 813 A.2d 672, 673 (Pa. 2002); *see also Allegheny Cnty. Sportsmen's League v. Rendell*, 860 A.2d 10, 19 (Pa. 2004).

In any event, *Scolieri* is easily distinguished, and the rule of statutory construction applied in that case dictates a different result here. The underlying statute in *Scolieri* set forth only a single level of culpability, and the question was whether to extend that state of mind to all elements of the offense. *See* 813 A.2d at 669 (construing 18 Pa.C.S. § 6310.1(a)). The Court applied a rule of statutory construction for criminal offenses which states that when a statute defines a culpable state of mind for an offense "without distinguishing among the material elements thereof," that state of mind applies to all material elements "unless a contrary purpose plainly appears." *See id.*at 678. Here, unlike in *Scolieri*, Section 6111(g)(6) specifies two different states of mind for two different elements: (1) "knowing and intentional" for the act of unlawful sale or delivery, and (2) "reason

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ATF trains guns stores to spot and prevent straw-purchasing. As the Amended Complaint alleges, Defendants had reason to believe not only that their straw-purchased guns would be illegally resold or transferred, but also that they would be used in other downstream crimes. *See, e.g.*, Am. Compl. ¶¶ 129, 135, 144.

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to believe" regarding the likelihood of subsequent criminal use. The statute therefore "distinguish[es] among the material elements" of the claim and the default rule of construction applied in *Scolieri* does not control. *See* 18 Pa.C.S. § 302(d).

Finally, even if the knowledge and intent requirement swept as broadly as Defendants say, "[m]alice, intent, knowledge, and other conditions of mind may be averred generally" in Pennsylvania civil practice. Pa.R.Civ.P. No. 1019. This is because "[w]hen initially filing a complaint, a plaintiff may not be fully aware of the defendant's state of mind [and] [o]nly through discovery can the plaintiff" learn addition facts related to a defendant's mental state. *Monroe v. CBH20, LP*, 286 A.3d 785, 799-800 (Pa. Super. Ct. 2022). Defendants are wrong to suggest that their knowledge must be pled "unequivocally" or that the allegations are "speculation" on this issue. *See* Frank's Mem. at 29; Delia's Mem. at 19. To the contrary, "there is no requirement to plead the evidence upon which the pleader will rely to establish [] facts." *Commonwealth ex rel. Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1029 (Pa. 2018). In any event, the Amended Complaint details at length numerous transactions and specific red flags that these defendants chose to ignore despite their training, which together with the general allegations of intent and knowledge, are sufficient to withstand a demurrer. This is more than enough at the pleading stage where all a plaintiff must do is "notify the adverse party of the claims it will have to defend against." *Id.*

D. <u>Municipal Cost Recovery is Permitted Here</u>

Lastly, Delia's is wrong that "payment into an abatement fund . . . is barred by the Municipal Costs Recovery Rule." Delia's Mem. at 17. Delia's argument stands on a crumbling foundation, citing the *Beretta* district court opinion—again. But Delia's ignores that the Third Circuit specifically declined to adopt this portion of the opinion and in fact questioned the lower court's conclusion by acknowledging "authority for the proposition that public entities may

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recover damages for the costs of abating public nuisances." *Beretta II*, 277 F.3d at 420 n.4 (citing *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir.1983)); *see also Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 265 (D.N.J. 2000) ("The Court also finds that precedent from within [the Third] Circuit provides further support for the notion that the municipal cost rule does not bar damages claims in public nuisance actions."), *aff'd*, 273 F.3d 536 (3d Cir. 2001). And the main case that the district court in *Beretta I* relied on, *City of Pittsburgh v. Equitable Gas Co*., 512 A.2d 83, 84 (Pa. Commw. Ct. 1986), does not address the applicability of this doctrine to a nuisance case, and its reach has been limited by more recent decisions of the Commonwealth Court. *See Monsanto Co*., 269 A.3d at 675 ("[I]t does not appear with certainty that Plaintiffs' damage claims are precluded by the municipal cost recovery rule.").

The Third Circuit in *Beretta II* was right to question the lower court's application of the municipal cost recovery doctrine to a public nuisance claim. *City of Flagstaff*, which the Third Circuit cited and is the seminal decision on this issue, holds the opposite from the lower court in *Beretta I*: "[r]ecovery has [] been allowed where the acts of a private party create a public nuisance which the government seeks to abate." 719 F.2d at 324. This holding reflects the weight of authority finding that the municipal cost recovery rule does not prevent abatement as a remedy. *See, e.g.*, *Cincinnati v. Beretta U.S.A., Corp.*, 768 N.E.2d 1136, 1150 (Ohio 2002) ("We therefore reject the court of appeals' holding that appellant cannot recover its governmental costs."); *James v. Arms Tech., Inc.*, 820 A.2d 27, 49 (N.J. Super. Ct. App. Div. 2003) ("[T]here is authority for the proposition that the Municipal Cost Recovery Rule does not apply to cases, as here, where a municipality seeks to recover damages for the cost of abating a nuisance."); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243 (Ind. 2003) ("[W]e agree with those courts

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that have rejected the municipal cost doctrine as a complete bar to recovery."); *City of Bos. v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000) (declining to apply the municipal cost recovery rule); *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 822 (N.D. Ohio 2000) ("It would be a deafening amplification of Ohio law that would allow the [municipal cost recovery] rule to bar Plaintiffs' suit."). These cases reject Delia's argument for good reason: the existence of a public nuisance claim and an award of abatement cost as its remedy is only made meaningful by redistributing some of the public's losses to the party responsible for creating the nuisance.

Finally, the City has also sought injunctive relief in this case and damages beyond just municipal costs (e.g., damages associated with diminished property value). *See* Am. Compl., Prayer for Relief (a), (c)). Thus, even if the Municipal Cost Recovery Rule applied, it would not be a basis to dismiss any claim. *See City of Gary ex rel. King*, 801 N.E.2d at 1240 ("[E]ven if money damages are ultimately found to be barred . . . injunctive relief is available."); *see also id.* at 1243, 1246 (further holding that the Rule did not support dismissal when the city might also have claims based on damages to its own property).

VI. CONCLUSION

For the foregoing reasons, Defendants' preliminary objections should be denied.

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Respectfully submitted this 22nd day of December 2023.

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EXHIBIT A

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FILED
DIVISION 9
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CIRCUIT COURT OF JACKSON COUNTY, MO
BY [signature]

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

CITY OF KANSAS CITY, MISSOURI,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2016-CV00829**
	)	**Division 9**
JIMENEZ ARMS, INC., et al.,	)	
Defendants.	)	

ORDER

Pending before the Court is CR Sales Firearms, LLC's ("CR Sales") Motion for Summary Judgment. For the following reasons, the Motion is denied in part and granted in part.

Background

On January 7, 2020, the City of Kansas City, Missouri ("the City") filed a Petition against Jimenez Arms, Inc. ("Jimenez Arms"), James Samuels ("Samuels"), Iesha Boles ("Boles"), Herb William Butzbach III ("Butzbach"), Suzette Nelson ("Nelson"), and CR Sales, bringing claims arising from an alleged "unlawful scheme to traffic pistols into the Kansas City, Missouri area." More specifically, the City alleged claims of Public Nuisance, Negligent Entrustment, Negligence, Negligence Per Se, and Civil Conspiracy against all the Defendants. CR Sales filed the pending summary judgment motion arguing all of the City's claims against it fail as a matter of law. The City opposes the motion.

Standard

Summary judgment is appropriate when the moving party demonstrates there is no genuine issue of material fact and is therefore entitled to judgment as a matter of law. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. 2009). A genuine issue of material fact must be real

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and substantial and cannot merely be made up of conjecture, theory and possibility. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. 1993). A defending party is entitled to summary judgment if "the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements." *Id.* at 381.

Analysis

CR Sales first argues the City is statutorily prohibited from bringing this lawsuit by Missouri law. Missouri Statute Section 21.750 provides:

> No county, city, town, village or any other political subdivision nor the state shall bring suit or have any right to recover against any firearms or ammunition manufacturer, trade association or dealer for damages, abatement or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, distribution, or sale of firearms or ammunition to the public.

Mo. Stat. § Section 21.750.5. CR Sales relies on *City of St. Louis v. Cernicek* in support of its position that all of the City's claims against it must be dismissed pursuant to the statute. 145 S.W.3d 37, 38 (Mo. Ct. App. 2004). However, *Cernicek* focused on whether "tortious" and "unlawful" were interchangeable in the context of the statute's language. *Id.* at 43. Relying on statutory interpretation rules, the court found they were not, and held the statute "only prohibits suits relating to the 'unlawful' design, manufacturing, marketing, distribution, and sale" of firearms or ammunition and declined to apply tort theories of liability to the "significantly regulated industry of manufacturers, distributors, and dealers of firearms." *Id.* at 42-43. The City's allegation that CR Sales' actions were "unlawful" in violation of firearms statutes and regulations brings the claims within the suits permitted by the statute. Thus, CR Sales' motion is denied on that point.

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CR Sales next argues the Protection of Lawful Commerce in Arms Act ("PLCAA") confers "qualified civil immunity" that preempts the City's lawsuit. The PLCAA "prohibit[s] causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, . . . for the harm solely caused by the criminal or unlawful misuse of firearm products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1). The parties agree the lawsuit and CR Sales fall within the purview of the PLCAA and instead focus the argument on the exceptions provided in the statute: the "predicate exception," the negligent entrustment exception, and the negligence per se exception. *Id.* at § 7903(5)(A)(iii).

The PLCAA predicate exception allows a plaintiff to bring a case against a FFL[1] that has knowingly violated gun laws:

> The term 'qualified civil liability action' . . . shall not include an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . .

15 U.S.C. at § 7903(5)(A)(iii). CR Sales advocates the dismissal of the City's civil conspiracy, negligence, and public nuisance claims because state tort law is preempted. It further argues these common law causes of action are not premised on the violation of a statute applicable to the sale or marketing of firearms or ammunition and if permitted to proceed, the predicate exception would "swallow the entirety of the statute."

A "predicate statute" is a statute that is "applicable to the sale or marketing of [firearms or ammunition]." 12 U.S.C. § 7903(5)(A)(iii). The City has alleged CR Sales violated numerous statutes and regulations, and CR Sales contends the statutory violations 18 U.S.C. § 2 (aiding and

[1] Federal Firearms Licensee.

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abetting) and 18 U.S.C. § 371 (conspiracy)[2] and regulatory violations (27 C.F.R. §§ 478.29 (Out-of-State acquisition of firearms by nonlicensees), 478.99(a) (Certain prohibited sales or deliveries), 478.123(b) (Records maintained by manufacturers), 478.123(d) (Records maintained by manufacturers), and 478.124 (Firearms transaction record)) cannot serve as predicate statutes.

As noted by CR Sales, the only two federal circuit courts addressing the application of general statutes in the context of the PLCAA—the Second and Ninth Circuits—held that statutes of general applicability, that are wholly unrelated to the sale or marketing of firearms, cannot serve as predicate statutes. *See City of New York*, 524 F.3d 384, 403 (2nd Cir. 2008); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009). However, regarding the regulatory violations, as argued by the City, Congress made it a crime to violate record-keeping regulations. 18 U.S.C. § 922(m). Courts have found a statutory violation when such regulations are not followed. *See, e.g.*, *Shawano Gun & Loan, LLC v. Hughes*, 650 F.3d 1070 (7th Cir. 2011); *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307 (D. Kan. July 18, 2016). And, Courts have found alleged regulatory violations satisfied the predicate exception. *Chiapperini v. Gander Mountain Co., Inc.*, 48 Misc. 3d 865, 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014); *see also Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 952 N.Y.S.2d 333, 339 (N.Y. App. Div. 2012). The violations alleged here can therefore satisfy the predicate exception.

Thus, because the Court finds the predicate exception applicable to this action, there is no need to engage in a claim-by-claim analysis.[3] *See Corporan*, 2016 U.S. Dist. LEXIS 93307 at *13-14 n.4 (approach consistent with statute language); *Chiapperini*,13 N.Y.S.3d at787 ("as long as one PLCAA exception applies to one claim, the entire action continues"); *Williams*, 952

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[2] The City no longer relying on 18 U.S.C. § 4.
[3] The Court also finds the negligent entrustment exception applicable here as noted below.

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N.Y.S.2d 333 (finding one applicable PLCAA exception and permitting entire case to go forward without addressing other exceptions as to remaining claims). CR Sales' summary judgment must be denied on this point as well.

CR Sales next claims the City cannot establish, as a matter of law, CR Sales acted "knowingly," relying on Missouri's definition of "knowingly." Mo. Rev. Stat. § 562.016.3 ("A person 'acts knowingly', or with knowledge, (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or (2) with respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result."). When applying a federal statute, the Court must rely on federal court decisions interpreting that law. "Decisions of the United States Supreme Court interpreting federal statutes are binding on Missouri courts." *Hatfield v. Cristopher*, 841 S.W.2d 761, 767 (Mo. Ct. App. 1992) (citation omitted); *see also Wimberly v. Labor & Indus. Relations Com.*, 688 S.W.2d 344, 347 (Mo. 1985) ("[T]he courts of this state [Missouri] are bound to follow only our Supreme Court's decisions interpreting the federal Constitution and federal statutes."). Further, disputed facts remain as to whether CR Sales acted "knowingly," and therefore, summary judgment cannot be granted.

CR Sales then turns to the City's negligence per se claims arguing they fail as a matter of law because the City failed to establish a statutory duty or standard of care CR Sales allegedly violated.[4] "[A] properly pleaded negligent entrustment claim against a seller of firearms . . . is recognized in Missouri common law and falls within the exceptions to PLCAA preemption." *Elkins v. Acad. I, LP*, 633 S.W.3d 529, 534 (Mo. Ct. App. 2021) (citation omitted). However, to

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[4] CR Sales acknowledges negligence per se and negligent entrustment claims are exceptions to the PLCAA. 15 U.S.C. § 7903(5)(A)(ii).

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maintain a negligence per se cause of action, the statute at issue must be a statute upon which negligence per se may be premised. *See Lowdermilk v. Vescovo Bldg. & Realty Co.*, 91 S.W.3d 617, 628-29 (Mo. Ct. App. 2002). The court in *Elkins* made clear a plaintiff "cannot rely on federal criminal statutes related to the sale of firearms and ammunition as establishing a duty or standard of care for a negligence per se claim in Missouri's state courts." 633 S.W.3d at 539. Because the City has not identified a statute establishing a duty, CR Sales' summary judgment must be granted as to its negligence per se claim.[5]

Finally, CR Sales argues the City's negligent entrustment claim fails because the City cannot establish elements of the claim as a matter of law. Under Missouri law, to establish a prima facie case of negligent entrustment, the City must prove: "(1) the entrustee was incompetent by reason of age, inexperience, habitual recklessness or other; (2) the entrustor knew or should have known of the entrustee's incompetence; (3) there was entrustment of the chattel; and (4) the negligence of the entrustor concurred with the conduct of the entrustee to cause the plaintiff's injuries." *See Elkins*, 633 S.W.3d at 534 (quoting *Matysyuk v. Pantyukhin*, 595 S.W.3d 543, 549 (Mo. Ct. App. 2020)). CR Sales maintains the City cannot show the existence of an "incompetent entrustee." However, after review of the City's Petition, the Court finds it has properly alleged a negligent entrustment claim and CR Sales does not dispute Samuels was a firearms trafficker. The Court cannot find Samuels was not an "incompetent entrustee" as a matter of law. CR Sales also contends the City cannot establish CR supplied chattel to an incompetent party. But, there is evidence CR Sales had control over the guns at issue and transferred them to Samuels even though it knew it could refuse to transfer a firearm. *See Lockhart v. Carlyle*, 585 S.W.3d 310, 314 (Mo. Ct. App. 2019) (entrustor has

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[5] The City also argues because it is a political entity, *Elkins* does not apply in this case, but the City has provided no legal support for this proposition.

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"dominion" over an object "either through an ownership interest . . . or by her authority to control its use."). CR Sales' motion must be denied on this basis as well.

For the foregoing reasons, it is hereby

ORDERED CR Sales Firearms, LLC's Motion for Summary Judgment is granted in part and denied in part. The City of Kansas City, Missouri's negligence per se claim is dismissed with prejudice.

IT IS SO ORDERED.

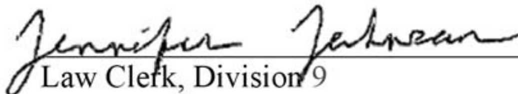
November 17, 2022
Date

HONORABLE JOEL P FAHNESTOCK

CERTIFICATE OF SERVICE

I hereby certify that notice of the above and foregoing was sent through the Court's e-filing system to all attorneys of record on this 17th day of November, 2022. Copies of the above were also mailed to:

HERB BUTZBACH III, Defendant acting pro se, 1214 Linn Street, North Kansas City, Missouri 64116



Law Clerk, Division 9

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CERTIFICATE OF SERVICE

I, Lydia Furst, hereby certify that on the date below, the foregoing response in opposition to Preliminary Objections and accompanying Memorandum of Law was served on all counsel of record by electronic filing and is available for viewing and downloading.

Dated: December 22, 2023

/s/ Lydia Furst
Lydia Furst
Divisional Deputy City Solicitor

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