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

**REPLY TO PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS
OPPOSITION TO DEFENDANTS FRANK’S AND DELIA’S PRELIMINARY
OBJECTIONS TO THE AMENDED COMPLAINT**

Defendants, Frank’s Gun Shop & Shooting Range LLC (“Frank’s”) and Mad Minute Enterprises, LLC d/b/a Delia’s Gun Shop (“Delia’s”), file this joint reply to Plaintiff’s memorandum of law in opposition to Defendants’ preliminary objections to the amended complaint.

INTRODUCTION

Section 6120 of the Uniform Firearms Act (“UFA”), 18 Pa.C.S.A. § 6120 broadly prohibits political subdivisions, like Plaintiff, from imposing local regulations on firearms dealers or from bringing or maintaining any action “at law or in equity” against a firearms dealer related to lawful firearms sales. *See* 18 Pa.C.S.A. § 6120(a); 6120(a.1). Every court which has considered Section 6120 of the UFA has applied its immunities liberally and broadly and has excluded the type of action that Plaintiff now brings. *See Ortiz v. Com.*, 681 A.2d 152 (Pa. 1996); (holding invalid under Section 6120 several Philadelphia ordinances because “the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession [sic] of firearms.”) *Nat’l Rifle Ass’n v. City of Philadelphia*, 977 A.2d 78, 82 (Pa. Cmwlth. 2009) (“[T]he crystal clear holding of our Supreme Court in *Ortiz* [is] that, ‘the General Assembly has [through enactment of § 6120(a)] denied all municipalities the power to regulate the ownership, possession, transfer or [transportation] of firearms.’”); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff’d*, 277 F.3d 415 (3d Cir. 2002) (holding that Section 6120(a) prohibits the city of Philadelphia from regulating firearms dealers and Section 6120(a.1) prohibits the city from litigating what it cannot regulate.); *Firearm Owners Against Crime v. Lower Merion Twp.* (“FOAC”), 151 A.3d 1172 (Pa. Cmwlth. 2016) (affirming the “crystal clear” holding of *Ortiz* and, under Section 6120(a), invalidating several local firearms regulations.) But that has not stopped Plaintiff from bringing its current claim and from revisiting its thrice debunked arguments.

Plaintiff attempts to sidestep the expansive immunity conferred under Section 6120 by claiming that Section 6111(g)(6) of the UFA, 18 Pa.C.S.A. § 6111(g)(6), removes the protections of Section 6120(a.1). No court has ever held that Section 6111(g)(6) provides an exception to the immunity conferred by Section 6120. Legislatures do not hide elephants in mouseholes. But even if Section 6111(g)(6) did offer an exception, by the plain meaning of the statute the exception is a narrow one which Plaintiff lacks standing to bring.

Plaintiff is wrong to claim that Section 6120(a.1) applies only to “lawful” firearms sales and since it has alleged Defendants have engaged in “unlawful” straw sales, Section 6120(a.1) does not apply. But the law the Commonwealth Court addressed this argument in 2016 when it held against Lower Merion Township making the same argument: “contrary to the Township's averment, it is irrelevant whether the city in *City of Philadelphia* believed the conduct it was regulating was unlawful. Rather, the critical upshot is our recognition that *Ortiz's* ‘crystal clear holding’ prohibits this Court from endorsing the argument that a cognizable distinction exists between regulating lawful activity and unlawful activity. *Firearm Owners Against Crime*, 151 A.3d at 1178. In sum, Section 6120 provides Defendants with broad protection from suits like the instant one that federal and state courts in Pennsylvania have long held it does.

Accordingly, the Court should sustain Defendants’ preliminary objections to the amended complaint and dismiss it with prejudice.

I. **PLAINTIFF HAS NOT PLEAD A CLAIM UNDER SECTION 6111(g)(6).**

Plaintiff first argues that Section 6111(g)(6) of the UFA provides an exception to the immunity conferred by Section 6120(a.1). Section 6111(g)(6) states:

“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.”

There is no indication that the General Assembly intended Section 6111(g)(6) to be an exception to the immunities conferred under Section 6120 of the UFA. But, even if it did, it would offer only a *narrow* exception applying only when a plaintiff pleads sufficient facts showing support for each of three separate elements: (a) a knowing and intentional sale of a firearm in violation of the UFA; (b) with a reasonable belief that the firearm sold will be used to commit a crime or in an attempt to commit a crime; and, (c) a “person” suffers injury because of the crime committed with the firearm. Plaintiff has not alleged sufficient facts to satisfy these three elements.

Plaintiff claims to meet the knowing and intentional prong because, they naively assert, “defendant[s] violated multiple provisions of the UFA.” Plft’s Br., p. 9. But to meet this prong it is not enough for Plaintiff to simply allege that a sale was conducted in violation of the UFA. Liability under Section 6111(g)(6) requires a firearms dealer to *knowingly and intentionally* violate the UFA, one of the highest standards under our Commonwealth’s laws. Here, Plaintiff does nothing more than plead a bald conclusory allegation that Defendants “knowingly and intentionally sold and

delivered [firearms to] straw purchasers in violation of the [UFA].” Am. Compl., ¶ 142. “Pennsylvania is a fact-pleading state.” *Scrip v. Seneca*, 191 A.3d 917, 929 (Pa. Commw. Ct. 2018). To meet their heavy burden, Plaintiff must do more than simply quote in an accusatory sentence the magic words “knowingly and intentionally” from the statute. Plaintiff must plead facts that, if true, would *prove* that conclusion. *Id.* The facts alleged in Plaintiff’s Amended Complaint fall well beneath this pleading standard. Plaintiff fails to plead any facts in its Amended Complaint that illustrate how Defendants purportedly violated the UFA *knowingly and intentionally*.

Instead, the facts plead are directly at odds with Plaintiff’s bald conclusion of Defendants’ knowledge and intent. Plaintiff avers Defendants ignored “red flags” and “should have known” that certain buyers were “actually straw purchasers.” Am. Compl., ¶¶ 47, 56, 64, 65, 97-99, 114, 116, 124, 128-132. These averments do not establish that Defendants “*knowingly and intentionally*” sold firearms to purchasers in violation of the law. They say nothing at all about what each Defendant knew about the transactions that allegedly form the clear path to Defendants’ liability. The facts Plaintiff pled show that at worst – and Defendants do not concede even this level of liability – Defendants might have been negligent in complying with the law. Plaintiff cannot have it both ways. Either Defendants were sloppy in ignoring “red flags” that “should have” alerted them of a potential straw purchase or they acted with the requisite *mens rea* by making sales knowingly and intentionally in violation of the law. Plaintiff might have plead facts to support negligence, but it has plead no facts to support scienter and intent. The plain language of Section 6111(g)(6) requires

Plaintiff to plead facts establishing Defendants “knowingly and intentionally s[old] or deliver[ed] a firearm in violation of [the UFA]” and “ha[d] reason to believe that the firearm [wa]s intended to be used in the commission of a crime or attempt to commit a crime[.]” 18 Pa.C.S.A. § 6111(g)(6). Plaintiff’s Amended Complaint fails to plead sufficient facts with sufficient specificity to reach the high bar of knowledge and intent required to maintain their action.¹ Accordingly, Plaintiff’s Amended Complaint must be dismissed.

Plaintiff’s factual allegations regarding the second prong of Section 6111(g)(6) are equally lacking. Plaintiff makes a conclusionary allegation that Defendants “*had reason to believe*” the firearms would be used to commit a crime. Here too, Plaintiff fails to offer any facts that would support this attribution of knowledge to Defendants. Plaintiff claims Defendant Frank’s engaged in 48 straw sales between April 2018 and December 2021. Am. Compl. ¶ 65. Plaintiff further alleges Delia’s engaged in 31 straw sales between March 2018 and March 2022. Am. Compl., ¶ 81. Plaintiff attempts to satisfy its burden by making the vague allegations that of the 79 firearms sold 3 were “linked” to crimes scenes, stopping short of stating that the firearms were, in fact, used to commit a crime. Nowhere in those facts does knowledge and intent of criminality attach to Defendants’ lawful sale of firearms. Simply put, Plaintiff has not offered *any* specific facts that connect guns purchased from Defendants with crimes committed in the City of Philadelphia *with Defendants’ knowledge that such crimes*

¹ Defendants have never been charged criminally for any of the alleged illegal sales and, indeed, regularly cooperate with and assist law enforcement in investigating alleged straw purchases and other firearms related crimes.

would be committed. There are likewise no facts averred by Plaintiff to support a conclusion that Defendants sold firearms to anyone who Defendants knew would commit a crime with such firearm. Accordingly, Plaintiff's Amended Complaint must be dismissed.

As to the third prong, any exception conferred by Section 6111(g)(6) is further narrowed by a statutory limitation on those entitled to sue. If Section 6111(g)(6) offers an exception to Section 6120, the exception applies only to claims brought by natural persons. Plaintiff claims it is a "person" who can bring suit under Section 6111(g)(6) because "the City is a person who can maintain such a lawsuit" and points to the Statutory Construction Act that defines "person" to include any "government entity (other than the Commonwealth)." 1 Pa.C.S.A. § 1991. This conclusion ignores the full text of the Statutory Construction Act. While it is true that the Act's definition of "person" might appear to include Plaintiff, as it is a governmental entity, the Act's definitions do not apply when "context clearly indicates otherwise." *Id. Habecker v. Nationwide Ins. Co.*, 445 A.2d 1222, 1227 (Pa. Super. Ct. 1982) ("definitions under this section are applicable only when the context does not 'clearly indicate otherwise.'") As Plaintiff admits, Section 6111(g)(6) and Section 6120(a.1) must be read harmoniously. Pltf.'s Br., p. 12. The only harmonious reading of Sections 6111(g)(6) and 6120(a.1) is that the term "person," as used in Section 6111(g)(6), means natural person and not a governmental entity, like Plaintiff.

Section 6120(a.1) immunity is limited to those causes of action brought by governmental entities. 18 Pa.C.S.A. § 6120(a.1) ("*No political subdivision* may bring or

maintain an action at law or in equity against any firearms or ammunition manufacturer, trade association or dealer.”) If the term “person,” as used in Section 6111(g)(6), includes political subdivision, like Plaintiff, there is a direct conflict with the plain language of 6120(a.1). Conversely, if the term “person” is limited to natural persons, then 6111(g)(6) stands in complete harmony with Section 6120(a.1), which applies only to political subdivisions and not to a natural person. Put another way, under Section 6120 *a political subdivision is always barred* from bringing suit against a licensed firearms dealer.² But under Section 6111(g)(6), a natural person is sometimes permitted to maintain suit if and only if a firearms dealer sells a firearm to a person knowingly and intentionally in violation of the law and where the dealer has reason to believe the purchaser intends to use the firearm to commit a crime. That is the harmonious construction the Court should adopt. Accordingly, the Court should sustain Defendants’ preliminary objections and dismiss Plaintiff’s Amended Complaint.

Finally, even if Plaintiff did adequately plead liability under Section 6111(g)(6), its damages would be limited to those incurred because of harm related to a specific criminal act committed with a specific firearm. Yet, Plaintiff never connects the sale of a specific firearm to a specific crime and does not articulate the damages it sustained because of that specific crime. For example, Plaintiff claims that “a [sic] plainclothes PPD officers responding to a shooting incident” recovered a handgun allegedly sold to a straw buyer several months earlier. Am Compl., ¶ 75. Section

² And each of Defendants are duly licensed by both the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, as well as by the Pennsylvania State Police, as required by law.

6111(g)(6). As an example – though Defendants do not concede this point – this might allow Plaintiff to recover damages sustained for that specific “shooting incident.” To the extent Section 6111(g)(6) provides an exception to the immunity granted by Section 6120(a.1) which would permit a municipality to recover damages – and, as we have argued, Section 6111(g)(6) does not provide such an exception – Section 6111(g)(6)’s exception would only apply to the very specific and narrow circumstance hypothesized in this example. Plaintiff, however, maintains that the scope of Section 6111(g)(6) is broad and the damages it demands under this exception are equally broad. Plaintiff seeks to hold Defendants’ liable for damages caused by the broad societal ill of gun related crime in the City. It is inconceivable that the General Assembly intended for Section 6111(g)(6) to be interpreted so broadly and that in decades of litigation over the contours of Section 6120 neither the City nor any court has previously discovered this breathtakingly capacious exception which subverts the entire regulatory scheme so well understood under Section 6120.

II. PLAINTIFF CANNOT CIRCUMVENT SECTION 6120 BY CLAIMING IT SEEKS LIABILITY FOR “UNLAWFUL” SALES.

Plaintiff also claims that the protections of Section 6120(a.1) apply only to *lawful* sales and since it alleges Defendants engaged in unlawful straw sales Section 6120(a.1) does not apply. Plaintiff has repeatedly made this argument and courts have continually and uniformly rejected it. The Commonwealth Court has explained that the City of Philadelphia cannot distinguish between “lawful” and “unlawful” conduct for the purpose of regulating firearms explaining:

“it is irrelevant whether the city in *City of Philadelphia* believed the conduct it was regulating was unlawful. Rather, the critical upshot is our recognition that *Ortiz's* “crystal clear holding” prohibits this Court from endorsing the argument that a cognizable distinction exists between regulating lawful activity and unlawful activity.”

Firearm Owners Against Crime, 151 A.3d at 1178 (emphasis added) The “crystal clear” holding of *Ortiz* is that “the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession [sic] of firearms” and any attempt to impose such regulation is, therefore, invalid. *Id.* at 155.

The City attempts to revisit this question by repackaging it in the litigation context. But the answer is the same whether cast as a municipal regulatory scheme or public nuisance lawsuit targeting only “unlawful” conduct. Both Section 6120(a) and 6120(a.1) use the term to “lawful.” If the City cannot regulate “unlawful” conduct under Section 6120(a), then it cannot litigate “unlawful” conduct under Section 6120(a.1). *Berretta*, 126 F.Supp.2d at 889 (“What the City cannot do by act of the City Council it now seeks to accomplish with a lawsuit.”)

Plaintiff’s lawful/unlawful argument was rejected by the district court in *Berretta* where the district court held that “[t]he drafters of the UFA Amendment chose to withdraw contract and warranty actions from the UFA Amendment’s ambit, UFA § 6120(a.1)(2), but left no separate exclusion for suits alleging “unlawful” conduct.” *Berretta*, 126 F. Supp. 2d at 889. It was again rejected by the Commonwealth Court in *Firearms Owners Against Crime*, 151 A.3d at 1178 (“it is irrelevant whether the city in *City of Philadelphia* believed the conduct it was regulating was unlawful.”) This Court should reject it as well.

Moreover, in several other statutory contexts, Pennsylvania courts have interpreted the term “lawful” to mean only that a party is licensed to engage in an activity. *See Johnson v. Toll Brothers*, ____ A.3d ____, 2023 WL 6067414 (Pa. Super. Ct. 2023) (holding construction was performed “lawfully” despite multiple violations of local, state, and federal codes because defendants were authorized by law to engage in construction.); *Branton v. Nicholas Meat, LLC*, 159 A.3d 540 (Pa. Super. Ct. 2017) (meat processing operation was in “lawful” operation because it was licensed to engage in meat processing despite violations issued by the DEP.) The term lawful as used in Section 6120 of the UFA carries a similar meaning. Section 6120 is intended to protect licensed firearms arms dealers and manufacturers. It is not designed to protect unlicensed (and therefore illegal) dealers. The inclusion of the term “lawful” in Section 6120 is designed to distinguish the two. Without including the term lawful, Section 6120 would confer immunity on any seller of firearms, the lawful and unlawful unlike.

Accordingly, the Court should sustain Defendants’ preliminary objections and dismiss Plaintiff’s Amended Complaint.

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court sustain its preliminary objections and dismiss all claims against each of them with prejudice.

Dated: January 9, 2024

Respectfully submitted,

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Dated: January 9, 2024

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CERTIFICATE OF SERVICE

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

Dated: January 9, 2024

/s/ Walter S. Zimolong