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

CITY OF CHICAGO, an Illinois Municipal corporation, Plaintiff, -vs- GLOCK, INC., *et al,* Defendants.	Case No.:	2024CH06875
	Judge:	To Be Assigned

DEFENDANT MIDWEST SPORTING GOODS CO.'S SECTION 2-619 AND 2-615 MOTION TO DISMISS

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Dated: October 30, 2024

Midwest Sporting Goods Co. ("Midwest"), by and through its counsel, Braum | Rudd, moves to dismiss the City of Chicago, Illinois' claims against it pursuant to Illinois Code of Civil Procedure Sections 5/2-619 and 5/2-615. Specifically, Midwest seeks dismissal under Section 5/2-619 because it is immune from suit on the City's claims under 15 U.S.C. § 7901, *et. seq.,* the Protection of Lawful Commerce in Arms Act ("PLCAA"). Moreover, Midwest seeks dismissal under Section 5/2-615 because, even apart from immunity protections afforded to Midwest under the PLCAA, the City has not pled facts sufficient to state a claim against Midwest under Illinois law. Finally, to the extent that the City puts forth the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2BBBB(b)(1) & (4) ("ICFA") as its grounds for circumventing Midwest's immunity under the PLCAA, application of the ICFA in such a manner is unconstitutional.

SUMMARY OF THE ARGUMENT

Midwest is a federal firearms licensee ("FFL") licensed to sell firearms at retail at its place of business in Illinois. As such, Midwest operates within one of the most regulated industries in America and within one of the most regulated states in America as it pertains to the sale of firearms. Like many thousands of federally licensed firearms dealers around the country, Midwest sells semi-automatic Glock firearms in accordance with all applicable federal and state laws and regulations. Nonetheless, citing intentional, criminal use of firearms by third parties within the City, the City seeks relief from Midwest based on the mere fact that it sells semi-automatic Glock firearms. The City's claims against Midwest fail for the following reasons:

1) Congress precluded claims such as the City's claims here under the PLCAA, requiring that liability for criminal acts rest where it belongs: on criminals. As a federally licensed firearms dealer, Midwest's sales of semi-automatic Glock firearms are protected under the PLCAA, and the City has not alleged facts that permit its claims against Midwest to fall into any of the limited exceptions under the PLCAA enumerated in 15 U.S.C. § 7903(5)(A).

2) The City has not alleged facts sufficient to state a claim under Illinois State Law. Specifically, the alleged injuries arise out of the intentional, criminal third-party use of firearms, and Midwest neither owed the City any duty to protect it from third-party criminal conduct, nor can Midwest's sale of Glock firearms properly be deemed to be the proximate cause of the City's claimed harm.

For these reasons, the City's claims against Midwest should be dismissed under Sections 5/2-619 and 5/2-615.[1]

STATEMENT OF FACTS[2]

Midwest is a federally licensed firearms seller engaged in lawful interstate commerce in firearms. *See,* Complaint, ¶ 30. At all times material hereto, Midwest has sold semi-automatic Glock pistols. *Id.,* ¶ 8. Although Glock pistols are semi-automatic, they can be illegally modified by installing an auto sear into them to make them fire fully automatic ("Modified Glock Pistols"). *Id.* ¶¶ 1, 34-35, 44, 55. ATF is aware of the existence of auto sears, add-on devices used to convert semi-automatic firearms into fully automatic firearms, and has determined that such devices are themselves "machineguns" as they are designed and intended to convert a weapon that is not a machinegun into a machinegun. *Id.,* ¶ 36.[3] It is illegal to convert a semi-automatic Glock pistol into a machinegun by installing an auto sear. *Id.,* ¶ 52.

The City's complaint does not allege that Midwest has ever made or sold auto sears for Glock pistols or that Midwest has ever sold Modified Glock Pistols. Rather, the City contends that the mere existence of auto sears compatible with semi-automatic Glock pistols renders Midwest's sale of Glock pistols a violation of ICFA, 815 ILCS 505/2BBBB(b)(1) & (4) and MCC Section 2-

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1 Midwest incorporates herein by reference any additional legal and factual arguments raised in motions to dismiss of the other federal firearms licensee defendants to the extent that they are applicable to Midwest.

2 Such "facts" are, of course, taken from the complaint for present purposes, and they are contested by the Midwest for all other purposes.

25-090 (unreasonable sale/manufacturing, or marketing of firearms, unfair practices, and deceptive practices). That is, what the City actually complains of is not how Midwest sells firearms, but the mere fact that Midwest, like thousands of federally licensed firearms dealers around the country, sells semi-automatic Glock pistols at all.

ARGUMENT

I. STANDARDS OF REVIEW.

The purpose of a Section 2-619 motion is to dispose of easily proved issues of law and fact at the outset of litigation. *O'Casek v. Children's Home and Aid Soc. of Ill.,* 229 Ill. 2d 421, 437, (2008). A section 2-619 motion to dismiss asserts affirmative defenses or other matters that defeats the plaintiff's claims. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Absent an issue of fact, dismissal is proper as a matter of law. *Id.* The City's claims against Midwest should be dismissed under Section 2-619 because they are barred by the PLCAA.

Further, in ruling on a Section 2-615 motion to dismiss, the Court is to accept as true all well-pleaded facts and any reasonable inferences drawn from those facts. *M.U. v. Team Ill. Hockey Club, Inc*., 2022 IL App (2nd) 210568, ¶ 16. The Court may not accept as true conclusions of law or fact unsupported by specific allegations of fact. *Id*. Fact pleading is required in Illinois, and it "imposes a heavier burden on the plaintiff, so that a complaint that would survive a motion to dismiss in a notice-pleading jurisdiction might not do so in a fact-pleading jurisdiction." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004).

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[3] Notably, the City does not allege that ATF has ever determined that any firearm is itself a machinegun simply because a device that is itself a machinegun could be installed on it.

II. THE CITY'S CLAIMS AGAINST MIDWEST SHOULD BE DISMISSED UNDER ILLINOIS CODE OF CIVIL PROCEDURE SECTION 5/2-619.

A. The City's Claims Are Barred Under The PLCAA.

The City's claims against Midwest should be dismissed because the PLCAA was enacted to prohibit civil lawsuits against a retailer of a firearm for damages caused by its intentional, criminal misuse by a third party. The PLCAA prohibits the prosecution of a "qualified civil liability action" in any state or federal court, and any "action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. §§ 7902(a) & (b). One of the stated purposes of the PLCAA is to "prohibit causes of action against … dealers … for the harm solely caused by the criminal or unlawful misuse of firearm[s] . . . by others when the product functioned as designed and intended." *Id.* at § 7901(b)(1). In enacting the PLCAA, Congress specifically discussed suits such as this one:

> · Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
>
> · The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.
>
> · Businesses in the United States that are engaged...[in] the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

Id. at §§ 7901(a)(3)-(5). Thus, so as not to frustrate its purpose, the PLCAA requires the immediate dismissal of qualified civil liability actions such as these.

Determining whether a civil claim is barred by the PLCAA is a two-step analysis. The court must first determine whether the complaint is a "qualified civil action." If it is, the only way to avoid dismissal is for the claims to fall within an exception to the PLCAA.

B. <u>This Is A Qualified Civil Liability Action.</u>

The PLCAA prohibits "qualified civil liability actions," defined as "a civil action or proceeding...brought by any person against a manufacturer or seller of a qualified product...for damages, punitive damages, injunctive relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party..." *See,* 15 U.S.C. §§ 7902(a) & 7903(5)(A). The City is a "person" under the PLCAA because "[t]he term 'person' means … any government entity." *See,* 15 U.S.C. § 7903(3). The firearms at issue in this case are each a "qualified product" under the PLCAA because "[t]he term 'qualified product' means a firearm … that has been shipped or transported in interstate or foreign commerce." *See,* 15 U.S.C. § 7903(4). Midwest is a federally licensed "seller" under the PLCAA because "[t]he term 'seller' means, with respect to a qualified product … a dealer (as defined in section 921(a)(11) of title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18 …" *See,* 15 U.S.C. § 7903(6)(B).

C. <u>None Of The PLCAA Exceptions Apply To The City's Claims.</u>

While the PLCAA precludes cases such as the City's claims here, it does create an exception for, among other things, "knowingly violat[ing] a State or Federal statute applicable to the sale or marketing of [firearms] and the violation was a proximate cause of the harm for which relief is sought[.]" 15 U.S.C. § 7903(5)(A)(iii). This exception has come to be known as the "predicate exception," because a plaintiff not only must present a cognizable claim, but also must allege a <u>knowing</u> violation of a "predicate statute." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009)

(emphasis added). Pursuant to the predicate exception, "a plaintiff not only must present a cognizable claim, he or she must also allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock,* 565 F.3d 1126, 1132 (9th Cir. 2009), (quoting *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008). Further, a plaintiff "must plausibly allege that … the violation proximately caused [p]laintiff's alleged harm." *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123, 1139-1140 (D. Nev. 2019). And where a plaintiff fails to adequately and plausibly allege that a knowing violation of a predicate statute proximately caused their harm, those claims should be dismissed. *Prescott*, 341 F. Supp. 3d 1190-1193; *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1224 (D. Colo. 2015).

The City has not alleged facts to support any finding that Midwest violated any federal or state statute specifically applicable to the sale of firearms, let alone that any such violation was the proximate cause of the complained-of injuries.

1. The ICFA is not a predicate statute.

MCC Section 2-25-090 generally allows the City to bring an action for violation of the ICFA within the City of Chicago. The ICFA provisions at issue in this case, 815 ILCS 505/2BBBB(b)(1) & (4), purport to codify general common law nuisance and negligence theories rather than create express and identifiable requirements applicable to the sale of firearms:

> through the sale, manufacturing, importing, or marketing of a firearm-related product, to . . . [k]nowingly create, maintain, or contribute to a condition in Illinois that endangers the safety or health of the public by conduct either unlawful in itself or unreasonable under all circumstances, including failing to establish or utilize reasonable controls; [or to] [o]therwise engage in unfair methods of competition or unfair or deceptive acts or practices declared unlawful under Section 2 of this Act.

In bringing this action, City asks the Court to render the ICFA a predicate statute contrary to the plain language of the PLCAA itself and a substantial body of case law interpreting the PLCAA to reject application of generally applicable codifications of common law common law nuisance and negligence theories to satisfy the predicate exception. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132-38 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

Moreover, a statute merely codifying the very common law claims that the PLCAA was written to provide immunity against does not satisfy the predicate exception simply because it expressly references firearms. The ICFA provision under which the City seeks to recover against Midwest is akin to that that recently rejected by the United States District Court for the District of New Jersey in *NSSF v. Platkin*, No. 22-6646 (ZNQ)(TJB), 2023 U.S. Dist. LEXIS 16459, at *16 - *19 (D.N.J. Jan. 31, 2023), *vacated on other grounds sub nom. NSSF v. Attorney General of New Jersey*, 80 F.4th 215 (3d Cir. 2023). In *NSSF,* N.J. Stat. § 2C:58-35(a), which like the ICFA provision at issue, sought to codify public nuisance and negligence principles rather than create express, concrete identifiable regulations applicable to the sale of firearms, could not serve as grounds for a claim under the predicate exception:

> [The] predicate exception exempts only those civil actions that require proof that the actor knowingly violated the relevant statute. 15 U.S.C. § 7903(5)(A)(iii). The knowingly requirement of the predicate exception necessitates the actor to have a sufficiently concrete duty to have knowingly violated a relevant statute. It is contrary to the PLCAA to hold an industry member liable who complies with all laws but did not know that it failed to employ "reasonable procedures, safeguards, and business practices," or has conducted its lawful business in a manner so "unreasonable under all the circumstances" that it can be said to have "contribute[d] to" "a condition which ... contributes to the injury or endangerment of the health, safety, peace, comfort, or convenience of others." N.J.S.A. 2C:58-35(a)(1), (a)(2).

Id, at *18 (recognizing that permitting such a statute to circumvent the protections of the PLCAA under the predicate exception would be contrary to Congressional intent).

Here, the ICFA provision at issue does not set forth any clear, concrete requirement applicable to the sale of firearms and cannot serve as predicate exception grounds to allow the City to evade Midwest's protections under the PLCAA.

2. By selling semi-automatic Glock pistols, Midwest did not actually sell unregistered machineguns.

In what appears to be a monumental stretch to attempt to bring its claims within the predicate exception, the City seems to contend that, by selling common, semi-automatic Glock pistols, Midwest was actually selling machine guns. The City's logic appears to be that, if an auto sear (already deemed a machinegun under federal law and subject to registration and transfer restrictions under National Firearms Act) exists that can be installed on any particular model of firearm, then all units of that model of firearm are themselves machineguns. The United States Supreme Court and other courts to have considered similar arguments and rejected them. *Staples v. United States*, 511 U.S. 600, 612 n. 6 (1994) (holding that a semiautomatic AR-type rifle is not a "machinegun" given that "virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear into a machinegun."); *Cargill v. Garland*, 57 F. 4th 447, 452 (5th Cir. 2023) (explaining what a machinegun is and "what a machinegun is not" and finding that "[s]emi-automatic rifles like the AR-15 are not machineguns" under 18 U.S.C. § 922(b)(4)), *aff'd*, *Garland v. Cargill* 602 U.S. 406, (June 14, 2024).[4]

[4] Were the City's contention correct and Glock pistols are in fact "machineguns," given that the City's police department does not own and furnish its officers' service weapons and a large number of them carry Glock pistols acquired, owned, and kept by individual officers without meeting any of the registration and other requirements applicable to the ownership of actual machineguns, every one of those police officers would be a felon in violation of 18 U.S.C. 922(o), as no such individual is even permitted to possess a post-1986 machine gun. Of course, the City's legal position on this point is baseless.

Here, the mere existence of auto sears that are themselves regulated as machineguns does not render every firearm into which such a device could be installed a machinegun as well. Accordingly, as a matter of law, the City has not alleged facts upon which it could be determined that Midwest illegally sold machineguns merely by selling semi-automatic Glock pistols.

III. THE CITY HAS NOT STATED A CLAIM AGAINST MIDWEST UPON WHICH RELIEF CAN BE GRANTED UNDER ILLINOIS LAW.

Even independent of the PLCAA's protections, the City still has failed to state a claim against Midwest under Illinois law upon which relief can be granted and its claims against must be dismissed under Section 6/2-615. Specifically, Illinois law does not recognize any duty on the part of Midwest to protect the City from the intentional, criminal use of firearms by third parties, and further does not allow for a determination that merely by selling firearms, a federally licensed firearms dealer can be said to have proximately caused the harm caused by intentional, criminal use of those firearms by third parties.

A. Midwest Did Not Owe The City A Duty To Protect It From Criminal Acts.

Federal firearms licensees "owe no duty . . . to prevent their firearms from 'ending up in the hands of persons who use and possess them illegally.'" *Beretta*, 213 Ill. 2d at 393-94; *Riordan v. Int'l Armament Corp.*,132 Ill. App. 3d 642, 647 (1st Dist. 1985). Even if that were not the case, third-party criminal conduct like that alleged here cannot provide a "duty" because there was no "special relationship" between the parties. *Iseberg v. Gross*, 227 Ill. 2d 78, 87-88 (2007); *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 438 (2006); *Young v. Bryco Arms*, 213 Ill. 2d at 452. The question of "whether the parties stood in such a relationship to one another that the law will impose an obligation of reasonable conduct for the other's benefit is an issue of law for the court." *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676, 678 (1st Dist. 1984) (holding that Smith & Wesson did not

owe a duty to use "reasonable means to prevent the sale its handguns to persons who are likely to cause harm to the public."). But no such "special relationship" is alleged to exist here.

Only four recognized "special relationships" may trigger an analysis of whether there is an affirmative duty to protect another against the risk of physical harm: "common carrier-passenger, innkeeper-guest, business invitor-invitee, and voluntary custodian-protectee." *Iseberg*, 227 Ill. 2d at 87-88. Here, the City has not alleged the existence of a "special relationship" between itself and Midwest, or between Midwest and anyone else actually causing the harm complained. The City's attempt to impose a duty on Midwest to protect it from third parties' deliberate criminal acts -- under any statutory or common law theory -- fails for that reason alone.

B. Midwest Did Not Proximately Cause The City's Harm.

Proximate cause may be decided as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *Harrison v. Hardin County Comm. Unit School Dist. No. 1*, 197 Ill. 2d 466, 476 (2001). Legal cause is established only if the defendant's conduct is "so closely tied to plaintiff's injury that he should be held legally responsible for it." *Simmons v. Garces*, 198 Ill.2d 541, 558 (2012). A determination of "legal cause is a policy decision that limits how far a defendant's legal responsibility should be extended for conduct that, in fact, caused the harm." *Id*. (citing *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 455, 605 N.E.2d 493, 502 (1992)). "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." *City of Chicago v. Beretta U.S.A. Corp*, 821 N.E.2d 1099, 1127 (Ill. 2004) (citing W. Keeton, Prosser & Keeton on Torts § 41, at 264 (5th ed. 1984)).

"[In] cases in which injury is caused by the intervening acts of third parties," a "condition-versus-cause analysis applies." *Young v. Bryco Arms*, 213 Ill. 2d at 449. That is, "if the defendant's conduct merely furnishes a condition by which injury is made possible, and a third person, acting independently, subsequently causes injury, the defendant's creation of the condition is not a proximate cause of the injury. *Id*. (citing *First Springfield Bank & Trust v. Galman*, 720 N.E.2d 1068, 1071 (1999) (judgment on jury verdict reversed because illegally parked tanker truck was not as a matter of law the legal cause of pedestrian's injury)); see also, *Merlo v. Public Service Co. of Northern Illinois*, 45 N.E.2d 665 (Ill. 1942) (a business practices that merely creates a condition that makes harm possible is not the legal cause of the harm).

Based on the facts as alleged in the City's complaint, third party criminal conduct was the sole cause in fact and legal cause of the harm complained of, and the City's claims against Midwest should be dismissed.

IV. APPLICATION OF THE ICFA TO SATISFY THE PLCAA'S PREDICATE EXCEPTION IS UNCONSTITIONAL AS APPLIED TO MIDWEST.

Application of the ICFA to satisfy the predicate exception would violate the United States Constitution because: 1) is so vague as to violate the Constitution's due process protections under *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926), *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), and *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 499 (1982), and 2) application as sought by the City would violate the Constitution's Second Amendment by infringing upon citizens' rights to keep and bear arms under *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017); *Atkinson v. Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023), and *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

CONCLUSION

For the above stated reasons, as Midwest is immune from the City's claims under the PLCAA and as the City has not stated a claim under Illinois law against Midwest upon which relief can be granted, Midwest respectfully requests that the City's complaint against it be dismissed.

Dated: October 30, 2024

Respectfully submitted,

By: /s/ Scott L. Braum

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CERTIFICATE OF SERVICE

I, an attorney not licensed in Illinois, on oath, state that I served a copy of the above-mentioned document via email to counsel of record on or before 5:00 p.m. on October 30, 2024.

/s/ Timothy R. Rudd

_____

Timothy R. Rudd (PHV to be submitted)

[x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.