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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

GHOST GUNNER FIREARMS CASES

Included actions:

30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost Gunner, Inc. dba GhostGunner.net, et al.*

CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner, Inc., dba GhostGunner.net, et al.*

JCCP No. 5167

Superior Court of California
County of Orange
Case No. 30-2019-01111797-CU-PO-CJC

Superior Court of California
County of San Bernardino
Case No. CIV-DS-1935422

**DECLARATION OF AMY K. VAN ZANT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' GLOBAL DEMURRER**

Date: May 6, 2022
Time: 9:00 a.m.
Dept.: CX 104
Judge: Hon. William D. Claster

I, Amy K. Van Zant, declare as follows:

1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP ("Orrick") and counsel of record for plaintiffs Francisco Gudino Cardenas and Troy McFadyen, et al. ("Plaintiffs") in this case. I respectfully submit this declaration in support of Plaintiffs' Opposition to defendants Juggernaut Tactical, Inc., MFY Technical Solutions, LLC, Blackhawk Manufacturing Group, Inc., Thunder Guns, LLC, Ghost Firearms, LLC, Tactical Gear Heads, LLC, Defense Distributors, Cody R. Wilson, Polymer80, Inc., and James Tromblee, Jr. d/b/a USPatriotArmory.com ("Defendants'") Global Demurrer. I have personal knowledge of the matters set forth herein and, if called upon, I could and would competently testify thereto.

2. A true and correct copy of *City of Cincinnati v. Beretta* U.S.A. Corp., 768 N.E.2d 1136 (Oh. 2002) is attached hereto as **Exhibit 1** and incorporated by reference herein.

3. A true and correct copy of *City of Boston v. Smith & Wesson Corp., 2000 Mass. Super. LEXIS 352* (Jul. 13, 2000*)* is attached hereto as **Exhibit 2** and incorporated by reference herein.

4. A true and correct copy of *Chiapperini v. Gander Mountain Co., Inc.*, 13 N.Y.S.3d 777 (N.Y. Sup. Ct. 2014) is attached hereto as **Exhibit 3** and incorporated by reference herein.

5. A true and correct copy of *Coxie v. Academy, Ltd*., No. 2018-CP-42-04297 (S.C. Ct. Com. Pl. July 29, 2019) is attached hereto as **Exhibit 4** and incorporated by reference herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 10, 2022 in Sunnyvale, California.

*/s/ Amy K. Van Zant*
Amy K. Van Zant

# EXHIBIT 1

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in City of Toledo v. Sherwin-Williams Co., Ohio Com.Pl., December 12, 2007

95 Ohio St.3d 416
Supreme Court of Ohio.

CITY OF CINCINNATI, Appellant,
v.
BERETTA U.S.A. CORPORATION et al., Appellees.

No. 2000–1705.
|
Submitted Oct. 2, 2001.
|
Decided June 12, 2002.

**Synopsis**
City brought action against handgun manufacturers, trade associations, and handgun distributor, seeking to hold them responsible under nuisance, negligence, and products liability theories for the harm caused by the firearms they manufactured, sold, or distributed, and seeking injunctive relief. The Court of Common Pleas, Hamilton County, dismissed the action for failure to state a claim. City appealed. The Court of Appeals affirmed. Appeal was allowed. The Supreme Court, Francis E. Sweeney, Sr., J., held that: (1) public nuisance claims are not limited to injuries to real property; (2) city stated claims for public nuisance, negligence, common-law negligent design, and common-law failure to warn; (3) city's alleged injuries were not too remote from defendants' conduct; (4) City stated a claim for recoupment of costs of government services; and (5) city's claims were not precluded by the Commerce Clause.

Reversed and remanded.

Moyer, C.J., filed a dissenting opinion in which Lundberg Stratton, J., concurred.

Cook, J., filed a dissenting opinion in which Lundberg Stratton, J., concurred.

**Procedural Posture(s):** On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

West Headnotes (27)

[1] **Pretrial Procedure** Availability of relief under any state of facts provable

In order for a complaint to be dismissed for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. Rules Civ.Proc., Rule 12(B)(6).

86 Cases that cite this headnote

[2] **Pretrial Procedure** Construction of pleadings

In construing a complaint upon a motion to dismiss for failure to state a claim, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. Rules Civ.Proc., Rule 12(B)(6).

69 Cases that cite this headnote

[3] **Pretrial Procedure** Availability of relief under any state of facts provable

As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss for failure to state a claim. Rules Civ.Proc., Rule 12(B)(6).

108 Cases that cite this headnote

[4] **Products Liability** Elements and Concepts
**Products Liability** Handguns

City's complaint stated a claim against handgun manufacturers, trade associations, and handgun distributor for public nuisance; city alleged that defendants manufactured, marketed, distributed, and sold firearms in ways that unreasonably interfered with public health, welfare, and safety in city, that city residents had common right to be free from such conduct, that defendants knew or reasonably should have known that their conduct would cause handguns to be used and possessed

  

illegally, and that such conduct produced an ongoing nuisance that had a detrimental effect upon the public health, safety, and welfare of city residents.

23 Cases that cite this headnote

[5] **Nuisance** Nature and elements of public nuisance in general

There need not be injury to real property in order for there to be a public nuisance. Restatement (Second) of Torts §§ 821B(1, 2), 821B comment.

3 Cases that cite this headnote

[6] **Products Liability** Elements and Concepts

A public-nuisance action can be maintained for injuries caused by a product, if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public. Restatement (Second) of Torts § 821B(1, 2).

13 Cases that cite this headnote

[7] **Products Liability** Elements and Concepts

**Products Liability** Handguns

Allegation that handgun manufacturers, trade associations, and handgun distributor did not control the actual use of firearms at the moment when harm occurred did not preclude city from bringing an action against the manufacturers, associations, and distributor for public nuisance, relating to their alleged conduct in marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market.

15 Cases that cite this headnote

[8] **Products Liability** Elements and Concepts

**Products Liability** Handguns

Fact that distribution of firearms was highly regulated and legislatively authorized did not preclude city from bringing an action against handgun manufacturers, trade associations, and handgun distributor for public nuisance, relating to their alleged conduct in marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market.

18 U.S.C.A. § 922; 27 C.F.R. § 178.1 et seq.

10 Cases that cite this headnote

[9] **Nuisance** Nature and elements of public nuisance in general

A nuisance can be classified as an absolute nuisance (nuisance per se) or as a qualified nuisance.

15 Cases that cite this headnote

[10] **Nuisance** Nature and elements of public nuisance in general

With an absolute nuisance, the wrongful act is either intentional or unlawful, and strict liability attaches notwithstanding the absence of fault, because of the hazards involved.

5 Cases that cite this headnote

[11] **Nuisance** Nature and elements of public nuisance in general

A qualified nuisance involves a lawful act so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.

10 Cases that cite this headnote

[12] **Products Liability** Handguns

**Products Liability** Negligence

City's allegation that handgun manufacturers, trade associations, and handgun distributor failed to exercise reasonable care in designing, manufacturing, marketing, advertising, promoting, distributing, supplying, and selling their firearms without ensuring that the firearms were safe for their intended and foreseeable use by consumers stated a claim for negligence.

7 Cases that cite this headnote

[13] **Negligence** Elements in general

  

In order to maintain a negligence action, the plaintiff must show the existence of a duty, a breach of that duty, and that the breach of that duty proximately caused the plaintiff's injury.

10 Cases that cite this headnote

[14] **Products Liability** Handguns
**Products Liability** Nature of product and existence of defect or danger
**Products Liability** Proximate Cause

City's products liability complaint, alleging that handgun manufacturers, trade associations, and handgun distributor had manufactured or supplied defective guns without appropriate safety features, satisfied the requirements of notice pleading; city was not required to allege with specificity that particular guns were defective and as a result caused particular injuries. Rules Civ.Proc., Rule 8(A)(1).

[15] **Pleading** Certainty, definiteness, and particularity

Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity. Rules Civ.Proc., Rule 8(A)(1).

46 Cases that cite this headnote

[16] **Products Liability** Economic losses; damage to product itself
**Products Liability** Handguns

City, as a governmental entity, could not bring an action under the Product Liability Act against handgun manufacturers, trade associations, and handgun distributor, where city did not allege damages other than economic damages. R.C. § 2307.71(M).

5 Cases that cite this headnote

[17] **Products Liability** Design
**Products Liability** Handguns

City's allegation that handgun manufacturers had designed their firearms without feasible safety features stated a common-law products liability claim for negligent design.

3 Cases that cite this headnote

[18] **Products Liability** Risk-utility test
**Products Liability** Consumer expectations
**Products Liability** Foreseeable or intended use

At common law, a product is defective in design if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if the benefits of the challenged design do not outweigh the risk inherent in such design.

1 Cases that cite this headnote

[19] **Products Liability** Design
**Products Liability** Foreseeability in general; foreseeable accident or injury

A product may be defective in design, under common law, if the manufacturer fails to incorporate feasible safety features to prevent foreseeable injuries.

[20] **Products Liability** Obvious danger
**Products Liability** Handguns

City's complaint alleging risks that were not open and obvious, such as that a semiautomatic gun could hold a bullet even when the ammunition magazine was empty or removed, stated a common-law claim against handgun manufacturers for failure to warn.

2 Cases that cite this headnote

[21] **Products Liability** Warnings or Instructions

The common-law failure-to-warn claim survived the enactment of the Product Liability Act. R.C. § 2307.71 et seq.

7 Cases that cite this headnote

  

[22] **Products Liability** Warnings or Instructions

To recover under a failure-to-warn theory at common law, the plaintiff must prove that the manufacturer knew or should have known, in the exercise of reasonable care, of the risk or hazard about which it failed to warn, and that the manufacturer failed to take precautions that a reasonable person would take in presenting the product to the public.

5 Cases that cite this headnote

[23] **Products Liability** Proximate Cause

**Products Liability** Handguns

City's allegations of injury were not too remote from the conduct of handgun manufacturers and trade associations for the manufacturers and associations to be liable to city for negligence, regarding the manufacture and distribution of handguns; city alleged that as direct result of manufacturers' and associations' misconduct, city suffered actual injury and damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections and other services.

2 Cases that cite this headnote

[24] **Negligence** Remoteness and attenuation; mere condition or occasion

**Negligence** Right of action; standing

Remoteness is not an independent legal doctrine but is instead related to the issues of proximate causation or standing; thus, a negligence claim will fail on remoteness grounds if the harm alleged is the remote consequence of the defendant's misconduct or is wholly derivative of the harm suffered by a third party.

3 Cases that cite this headnote

[25] **Products Liability** Negligence or fault

**Products Liability** Handguns

City's allegation that the negligent conduct of handgun manufacturers, trade associations, and handgun distributor, relating to the manufacture and distribution of firearms, involved continuing misconduct stated a claim for recoupment of costs of government services, such as police, emergency, health, corrections, and prosecution services.

1 Cases that cite this headnote

[26] **Commerce** Weapons and explosives

**Injunction** Other particular businesses or occupations

City's action to enjoin handgun manufacturers, trade associations, and handgun distributor from continuing their allegedly unlawful manufacture, marketing, and distribution of unsafe handguns did not violate the Commerce Clause; the alleged harms from defendants' conduct directly affected city residents, though the action implicated the national firearms trade. U.S.C.A. Const. Art. 1, § 8, cl. 3.

1 Cases that cite this headnote

[27] **Commerce** Powers Remaining in States, and Limitations Thereon

The Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

**Attorneys and Law Firms**

****1139** ***439** Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Paul M. DeMarco and Jean M. Geoppinger; Barrett & Weber and Michael R. Barrett, Cincinnati; Fay D. Dupuis, Cincinnati City Solicitor, W. Peter Heile, Deputy City Solicitor, Richard Ganulin, Assistant City Solicitor; Dennis A. Henigan, Washington, DC, and Jonathan E. Lowy, Legal Action Project, Center to Prevent Handgun Violence, for appellant.

Calfee, Halter & Griswold, L.L.P., Thomas I. Michals and Mark L. Belleville, Cleveland; Gordon, Feinblatt, Rothman,

  

Hoffberger & Hollander, L.L.C., and Lawrence S. Greenwald, Baltimore, MD, for appellees Beretta U.S.A. Corp.

Janik & Dorman and William J. Muniak, Medina; and Harold Mayberry, Jr., for appellee American Shooting Sports Council, Inc.

Janik & Dorman and William J. Muniak, Medina; and Douglas Kliever, for appellees National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

Brown, Cummins & Brown Co., L.P.A., and James R. Cummins, Cincinnati; Jones, Day, Reavis & Pogue and Thomas E. Fennell, Dallas, TX, for appellee Colt's Manufacturing Co., Inc.

Renzulli & Rutherford and John Renzulli, New York City, for appellee H & R 1871, Inc.

Rendigs, Fry, Kiely & Dennis, L.L.P., and W. Roger Fry; Renzulli & Rutherford and John Renzulli, New York City, for appellee Hi–Point Firearms.

***440** Buckley, King & Bluso and Raymond J. Pelstring, Cincinnati; Beckman & Associates and Bradley T. Beckman, Philadelphia, PA, for appellee North American Arms, Inc.

Thompson, Hine & Flory, L.L.P., Bruce M. Allman, Robert A. McMahon and Laurie J. Nicholson, Cincinnati; Wildman, Harrold, Allen & Dixon, James P. Dorr and Sarah L. Olson, Chicago, IL, for appellee Sturm & Ruger Co., Inc.

Taft, Stettinius & Hollister and Thomas R. Schuck, Cincinnati; Shook, Hardy & Bacon, L.L.P., Gary R. Long and Jeffrey S. Nelson, Kansas City, MO, for appellee Smith & Wesson Corp.

Porter, Wright, Morris & Arthur, L.L.P., Mark E. Elsener and Michael E. McCarty, Cincinnati; Bruinsma & Hewitt and Michael C. Hewitt, Laguna Hills, CA, for appellees Bryco Arms, Inc., and B.L. Jennings, Inc.

Porter, Wright, Morris & Arthur, L.L.P., Mark E. Elsener and Michael E. McCarty, Cincinnati; Tarics & Carrington, P.C., and Robert C. Tarics, Houston, TX, for appellee Phoenix Arms.

Porter, Wright, Morris & Arthur, L.L.P., Mark E. Elsener and Michael E. McCarty, Cincinnati; Budd, Larner, Gross, Rosenbaum, Greenberg & Sade and Timothy A. Bumann, Atlanta, GA, for appellee Taurus International Manufacturing, Inc.

Barbara E. Herring, Toledo Director of Law, and John T. Madigan, Toledo General Counsel, urging reversal for amicus curiae city of Toledo.

Robert B. Newman, Cincinnati, urging reversal for amici curiae American Association of Suicidology, American Jewish Congress, National Association of Elementary ****1140** School Principals, National Association of School Psychologists, Ohio Public Health Association, Inc., and Physicians for Social Responsibility.

Cornell P. Carter, Cleveland Director of Law, Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A., John R. Climaco, Jack D. Maistros and Keith T. Vernon, Cleveland, urging reversal for amici curiae city of Cleveland and its former Mayor, Michael R. White, Educational Fund to Stop Handgun Violence, and Ohio Coalition Against Gun Violence.

Pepper Hamilton, L.L.P., and James M. Beck, Philadelphia, PA, urging affirmance for amicus curiae Product Liability Advisory Council, Inc.

Stanton G. Darling II, Columbus, urging affirmance for amici curiae National Association of Manufacturers and Ohio Manufacturers' Association.

Vorys, Sater, Seymour & Pease, L.L.P., Daniel J. Buckley, Rebecca J. Brinsfield and Margaret A. Nero, Cincinnati, urging affirmance for amici curiae Amateur Trapshooting Association, Fairfield Sportsmen's Association, Inc., Hidden Haven, Inc., Shooting Preserve & Sporting Clays, National Wild Turkey Federation, Whitetails Unlimited, and Wildlife Conservation Fund of America.

**Opinion**

***416** FRANCIS E. SWEENEY, SR., J.

**FRANCIS E. SWEENEY, SR., J.**

{¶ 1} On April 28, 1999, plaintiff-appellant, the city of Cincinnati, filed a complaint against fifteen handgun manufacturers, three trade associations, and one handgun distributor, seeking to hold them responsible under nuisance, negligence, and product liability theories of recovery, for the harm caused by the firearms they manufacture, sell, or distribute.[1] The gist of the complaint is that ***417**

appellees[2] have manufactured, marketed, and distributed their firearms in ways that ensure the widespread accessibility of the firearms to prohibited users, including children and criminals. Thus, the complaint asserts, due to their intentional and negligent conduct and their failure to make guns safer, appellees have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance. In its complaint, appellant sought both injunctive relief and monetary damages, including reimbursement for expenses such as increased police, emergency, health, and corrections costs.

{¶ 2} Rather than file an answer, fifteen of the defendants ("appellees") moved to dismiss the complaint pursuant to Civ.R. 12(B)(6). The trial court granted the motions to dismiss, finding, inter alia, that (1) the complaint failed to state a cause of action, (2) the claims were barred by the doctrine of remoteness, and (3) appellant could not recoup expenditures for public services. The trial court further ****1141** ruled that there was no just cause for delay, and appellant appealed. The court of appeals affirmed on similar grounds. The cause is now before this court upon the allowance of a discretionary appeal.

{¶ 3} This case represents one of a growing number of lawsuits brought by municipalities against gun manufacturers and their trade associations to recover damages associated with the costs of firearm violence incurred by the municipalities. There is a difference of opinion as to whether these cases state a viable cause of action. While some courts have allowed this type of case to go forward against a Civ.R. 12(B)(6) motion to dismiss (*White v. Smith & Wesson Corp.* [N.D. Ohio 2000], 97 F.Supp.2d 816; *Boston v. Smith & Wesson Corp.* [2000], 12 Mass.L.Rptr. 225, 2000 WL 1473568), other courts have dismissed or upheld the dismissal of similar lawsuits. See, e.g., *Philadelphia v. Beretta U.S.A. Corp.* (E.D.Pa.2000), 126 F.Supp.2d 882; *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.* (C.A.3, 2001), 273 F.3d 536; *Ganim v. Smith & Wesson Corp.* (2001), 258 Conn. 313, 780 A.2d 98. After a thorough review of these cases, we agree with those decisions that permit this type of lawsuit to go beyond the pleadings stage. For the reasons that follow, we reverse the judgment of the court of appeals and remand the cause to the trial court.

***418** I. Sufficiency of Complaint

{¶ 4} The trial court granted appellees' Civ.R. 12(B)(6) motions to dismiss and the court of appeals affirmed. In determining whether the motions were properly granted, we must decide whether the complaint states a cause of action under Ohio law.

**[1]** **[2]** **[3]** {¶ 5} The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward. In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. Furthermore, "[i]n construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. We reiterated this view in *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063, and further noted that "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." Id. at 145, 573 N.E.2d 1063.

{¶ 6} In addressing the sufficiency of the complaint, we will examine each claim separately. In particular, appellant maintains that it has stated viable causes of action for public nuisance, negligence, and product liability.

A. Public Nuisance

**[4]** {¶ 7} Appellant alleged in its complaint that appellees have created and maintained a public nuisance by manufacturing, marketing, distributing, and selling firearms in ways that unreasonably interfere with the public health, welfare, and safety in Cincinnati and that the residents of Cincinnati have a common right to be free from such conduct. Appellant further alleged that appellees know, or reasonably should know, that their conduct will cause handguns to be used and possessed illegally and that such conduct produces an ongoing nuisance that has a detrimental effect upon the public health, safety, and welfare of the residents of Cincinnati.

**1142 [5] {¶ 8} Appellees advance several reasons why the complaint does not state a cause of action for public nuisance. First, appellees maintain that Ohio's nuisance law does not encompass injuries caused by product design and construction, but instead is limited to actions involving real property or to statutory or regulatory violations involving public health or safety. We disagree. The definition of "public nuisance" in 4 Restatement of the Law 2d, Torts (1965) ("Restatement") is couched in broad language. According to the Restatement, a *419 "public nuisance" is "an unreasonable interference with a right common to the general public." 4 Restatement, Section 821B(1). "Unreasonable interference" includes those acts that significantly interfere with public health, safety, peace, comfort, or convenience, conduct that is contrary to a statute, ordinance, or regulation, or conduct that is of a continuing nature or one which has produced a permanent or long-lasting effect upon the public right, an effect of which the actor is aware or should be aware. Id., Section 821B(2). Contrary to appellees' position, there need not be injury to real property in order for there to be a public nuisance. As stated in Comment *h* to Section 821B, "[u]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Id. at 93.

{¶ 9} Moreover, although we have often applied public nuisance law to actions connected to real property or to statutory or regulatory violations involving public health or safety,[3] we have never held that public nuisance law is strictly limited to these types of actions. The court of appeals relied on our decision in *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 632 N.E.2d 502, to support its view that allegedly defective product designs are not nuisances. However, the *Franks* decision was strictly limited to the question of whether the allegedly defective design and construction of a roadway intersection and the failure to erect signage or guardrails constituted a nuisance in the context of sovereign immunity. It does not involve the broader question that we are presented with here.

[6] {¶ 10} Nor should *Franks* be interpreted to mean that public-nuisance law cannot cover injuries caused by product design and construction. Instead, we find that under the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.

{¶ 11} Even the Supreme Court of Connecticut, in *Ganim v. Smith & Wesson Corp.*, 258 Conn. at 369–370, 780 A.2d 98, while dismissing the lawsuit for lack of standing, acknowledged that the definition of a common-law public nuisance was broad enough to include allegations nearly identical to those in appellant's complaint. Likewise, in his concurring opinion below, Judge Hildebrandt, in the belief that public nuisance law did not apply to product liability cases, urged this court to revisit the issue, since, in his view "the city should be permitted to bring suit against the manufacturer of a product under a public-nuisance theory, when, as here, the product has allegedly resulted in widespread harm and widespread costs to the city as a whole and to its citizens individually." See, also, *Young v. Bryco Arms* (2001), 327 Ill.App.3d 948, 262 Ill.Dec. 175, 765 N.E.2d 1, where the First District Appellate **1143 Court of Illinois held that the plaintiffs, surviving relatives of five gunshot victims, sufficiently pled a public nuisance claim against various gun manufacturers, wholesale distributors, and retail gun dealers, finding that the misconduct alleged (that the defendants' marketing and distribution practices allowed an underground firearms market to flourish) fell within the ambit of the Restatement's broad definition of public nuisance. *420

[7] {¶ 12} Appellees further argue that they cannot be held liable for the harm alleged because they did not have control over the alleged nuisance at the time of injury. Contrary to appellees' position, it is not fatal to appellant's public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred.

{¶ 13} Appellant's complaint alleged that appellees created a nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market. Thus, appellant alleged that appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury. See *Boston v. Smith & Wesson*, 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 14. Just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance.

[8] {¶ 14} Appellees also contend that appellant's nuisance claim cannot go forward because the distribution of firearms is highly regulated and covers "legislatively authorized

conduct." As a result, appellees believe that the nuisance claim was properly dismissed because "[w]hat the law sanctions cannot be held to be a public nuisance." *Mingo Junction v. Sheline* (1935), 130 Ohio St. 34, 3 O.O. 78, 196 N.E. 897, paragraph three of the syllabus. Even though there exists a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms, see, e.g., Section 922, Title 18, U.S.Code; Part 178, Title 27, C.F.R., the law does not regulate the distribution practices alleged in the complaint.

**[9] [10] [11]** {¶ 15} Finally, appellees argue that the public nuisance claim fails because appellant has failed to plead an underlying tort to support either an absolute public nuisance claim based on intentional or ultrahazardous activity or a negligence-based claim of qualified public nuisance.[4] However, the complaint clearly ***421** alleged both intentional and negligent misconduct on appellees' part. For example, Paragraph 119 of the complaint alleged that defendants "intentionally and recklessly market, distribute and sell handguns that defendants know, or reasonably should know, will be obtained by persons with criminal purposes * * *."

{¶ 16} Therefore, under these circumstances, we find that appellant has adequately pled its public-nuisance claim and ****1144** has set forth sufficient facts necessary to overcome appellees' motion to dismiss.

B. Negligence

**[12]** {¶ 17} Appellant further alleged in its complaint that appellees were negligent in failing to exercise reasonable care in designing, manufacturing, marketing, advertising, promoting, distributing, supplying, and selling their firearms without ensuring that the firearms were safe for their intended and foreseeable use by consumers. In addition, the complaint alleged that appellees failed to exercise reasonable care to provide a full warning to consumers of the risks associated with firearms.

**[13]** {¶ 18} In order to maintain a negligence action, the plaintiff must show the existence of a duty, a breach of that duty, and that the breach of that duty proximately caused the plaintiff's injury. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. The court of appeals in the instant case upheld the dismissal of the negligence claims on the ground that the city could not establish that the defendants owed it any duty. In reaching this conclusion, the court cited *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77, 9 OBR 280, 458 N.E.2d 1262, and *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 652 N.E.2d 702, for the proposition that a duty to control the conduct of a third party arises only if a "special relationship" exists between the parties. See, also, 2 Restatement, Section 315. Since there was no special relationship, the court of appeals concluded that the defendants owed no duty to appellant.

{¶ 19} The court of appeals misconstrued the nature of appellant's negligence claims and erred in relying on the above authorities to dismiss those claims for lack of duty. In both *Gelbman* and *Simpson,* the issue before this court was whether, based on their status as property owners, the defendants owed a duty to protect persons such as business invitees from the negligence or criminal acts of third parties that occur outside the owner's property and beyond the owner's control. In contrast, the negligence issue before us is not whether appellees owe ***422** appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury. Consequently, the "special relationship" rule is not determinative of the issue presented here. Instead, the allegations of the complaint are to be addressed without resort to that rule.

{¶ 20} The court in *Boston v. Smith & Wesson,* 12 Mass.L.Rptr. 225, 2000 WL 1473568, understood this distinction. When the gun defendants made a similar argument, that the city's negligent marketing and distribution claims failed because the defendants did not owe the city any duty to protect it from the criminal acts of third parties, the court stated:

{¶ 21} "Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs. * * *

{¶ 22} "Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged—-the creation of the illegal, secondary firearms market. The method by which Defendants created

this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. **1145 * * * Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm. Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs. Thus, the court need not decide whether Defendants owed a duty greater than the basic duty." (Footnotes omitted.) 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 15.

{¶ 23} The court in *White v. Smith & Wesson,* 97 F.Supp.2d 816, also applied straight negligence principles. In allowing plaintiffs' negligence claims to survive a Civ.R. 12(B)(6) motion to dismiss, the court noted, "It cannot be said, as a matter of law, that Defendants are free from negligence because they do not owe Plaintiffs a duty of care. It is now, unfortunately, the common American experience that firearms in the hands of children or other unauthorized users can create grave injury to themselves and others, thus creating harm to municipalities through physical and economic injury. It is often for a jury to decide whether a plaintiff falls within the range of a defendant's duty of care and whether that duty was fulfilled. * * * In this matter, the question is whether a reasonably prudent gun manufacturer should have anticipated an injury to the Plaintiffs as a probable result of manufacturing, marketing, and distributing a product with an alleged negligent design."

*423 {¶ 24} The court in *James v. Arcadia Machine & Tool* (Dec. 11, 2001), N.J.Super. No. ESX–L–6–59–99, also recognized the importance of allowing the plaintiffs to advance their negligence claims against the gun defendants. The court reasoned, "With no more than paper allegations and a complete absence of discovery, it would be manifestly unfair to bar the Plaintiff[s] [Newark and its mayor] from attempting to present appropriate evidence to bridge the gap between breach of duty and damages." Id. at 26–27.

{¶ 25} We agree with the rationale employed by these courts and similarly conclude that appellant has alleged a cause of action in negligence. Therefore, we find that the court of appeals erred in upholding the dismissal of the negligence counts.

C. Product Liability

[14] {¶ 26} Appellant also seeks recovery under two products liability theories, for defective design and failure to warn. In its complaint, appellant alleged that the guns manufactured or supplied by appellees were defective because they do not incorporate feasible safety devices that would prevent unauthorized use and foreseeable injuries. As to the cause of action for failure to warn, appellant alleged that appellees manufactured or supplied guns without adequate warning of their dangerousness or instruction as to their use.

{¶ 27} The court of appeals upheld the dismissal of these claims, finding that the complaint was deficient because it did not allege with specificity "a single defective condition in a particular model of gun at the time it left its particular manufacturer." Furthermore, the court held that the city could not bring its claims under the Product Liability Act, R.C. 2307.71 et seq., because it could prove no harm to itself. Nor could it recover economic loss alone under the Act, citing R.C. 2307.71(B) and (G), 2307.79, and *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64, 661 N.E.2d 714, syllabus. In his concurring opinion, Judge Painter stated his belief that had the claims not been barred by remoteness, the product liability claims remained viable causes of action under the common law. Judge Painter also said that he disagreed "with the majority's conclusion that the city's products-liability claims fail because the city's complaint did not allege particular guns or defective conditions that caused direct injuries.

**1146 {¶ 28} "Notice pleading is still the law, and the city clearly alleged that each defendant has manufactured defective products by failing to implement alternative safety designs. That was enough to give the manufacturers fair notice of the claims against them."

[15] {¶ 29} We agree with the reasoning of Judge Painter's concurring opinion. Contrary to the appellate court's majority opinion, since Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with *424 particularity.[5] Under the Ohio Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R. 8(A)(1). Consequently, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063. Appellant's complaint withstands this test of notice pleading, since it alleged that appellees had manufactured or supplied defective guns without appropriate safety features.

  

See *White,* 97 F.Supp.2d at 827. Appellant was not required to allege with specificity that particular guns were defective and as a result caused particular injuries.

**[16]** {¶ 30} Nevertheless, appellant is precluded from bringing its statutory product liability claims. Under the Product Liability Act, a claimant (including a governmental entity) cannot recover economic damages alone. Instead, in order to fall within the purview of the Act, and to be considered a "product liability claim" under R.C. 2307.71(M), the complaint must allege damages other than economic ones. *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64, 661 N.E.2d 714, syllabus. [6] In this case, since appellant alleged only economic damages, it has not set forth a statutory product liability claim and is consequently barred from bringing any such claims under the Act.

**[17]** **[18]** **[19]** {¶ 31} However, the failure to allege other than economic damages does not necessarily destroy the right to pursue common-law product liability claims. Id. at syllabus. In *Carrel v. Allied Prods. Corp.* (1997), 78 Ohio St.3d 284, 677 N.E.2d 795, paragraph one of the syllabus, we held, "The common-law action of negligent design survives the enactment of the Ohio Products Liability Act, R.C. 2307.71 *et seq.*" Therefore, although appellant is precluded from asserting its claims under Ohio's Product Liability Act, it can still assert its common-law negligent design claims. At common law, a product is defective in design "if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if the benefits of the challenged design do not outweigh the risk inherent in such design." *Knitz v. Minster* ***425** *Machine Co.* (1982), 69 Ohio St.2d 460, 23 O.O.3d 403, 432 N.E.2d 814, ****1147** syllabus. Moreover, a product may be defective in design if the manufacturer fails to incorporate feasible safety features to prevent foreseeable injuries. *Perkins v. Wilkinson Sword, Inc.* (1998), 83 Ohio St.3d 507, 511, 700 N.E.2d 1247. Appellant has set forth a common-law defective design claim by alleging that appellees have failed to design their firearms with feasible safety features. [7]

**[20]** **[21]** {¶ 32} We likewise find that appellant can bring a common-law failure-to-warn claim. Under the rationale espoused in *Carrel v. Allied Prods. Corp.,* supra, the statute does not clearly state that it intended R.C. 2307.76, the failure-to-warn statute, to supersede the common-law action. Id., 78 Ohio St.3d at 288, 677 N.E.2d 795. Thus, the common-law failure-to-warn claim survives the enactment of Ohio's Product Liability Act, R.C. 2307.71 et seq.

**[22]** {¶ 33} To recover under a failure-to-warn theory at common law, the plaintiff must prove that the manufacturer knew or should have known, in the exercise of reasonable care, of the risk or hazard about which it failed to warn and that the manufacturer failed to take precautions that a reasonable person would take in presenting the product to the public. *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, 257, 556 N.E.2d 1177.

{¶ 34} The court of appeals reasoned that the failure-to-warn claim could not go forward because the defendants owe no duty to warn of the dangers associated with firearms, which are open and obvious dangers. Although, in general, the dangers associated with firearms are open and obvious, appellant has alleged sufficient facts in its complaint to overcome a motion to dismiss. As pointed out by Judge Painter's concurrence, some of the allegations involve risks that are not open and obvious, such as the fact that a semiautomatic gun can hold a bullet even when the ammunition magazine is empty or removed. Therefore, since appellant properly alleges failure to warn, this claim withstands a motion to dismiss. See, also, *White v. Smith & Wesson,* 97 F.Supp.2d at 827–828, where the court refused to hold as a matter of law that the use of handguns involved an "open and obvious risk."

## II. Remoteness

**[23]** {¶ 35} Appellees maintain that even if appellant could establish any of the elements of the individual torts it alleged, the injuries to the city are still too ***426** remote to create liability on the part of the gun manufacturers and trade associations. In essence, appellees argue that remoteness bars recovery, since the causal connection between the alleged wrongdoing and the alleged harm is too tenuous and remote and because the claims asserted are indirect and wholly derivative of the claims of others.

**[24]** {¶ 36} Remoteness is not an independent legal doctrine but is instead related to the issues of proximate causation or standing. *White,* 97 F.Supp.2d at 823; *Boston*

*v. Smith & Wesson Corp.,* 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 4, fn. 20. Thus, a complaint will fail on remoteness grounds if the harm alleged is **1148 the remote consequence of the defendant's misconduct (causation) or is wholly derivative of the harm suffered by a third party (standing).

{¶ 37} In *Holmes v. Securities Investor Protection Corp.* (1992), 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532, the United States Supreme Court discussed remoteness and stated that, at least in some cases at common law, there must be "some direct relation between the injury asserted and the injurious conduct alleged." Id. at 268, 112 S.Ct. 1311, 117 L.Ed.2d 532. Thus, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." Id. at 268–269, 112 S.Ct. 1311, 117 L.Ed.2d 532, citing 1 Sutherland, Law of Damages (1882) 55–56. In *Holmes,* the court explained why directness of relationship is a requirement of causation: (1) indirectness adds to the difficulty in determining which of the plaintiff's damages can be attributed to the defendant's misconduct, (2) recognizing the claims of the indirectly injured would complicate the apportionment of damages among plaintiffs to avoid multiple recoveries, and (3) these complications are unwarranted given the availability of other parties who are directly injured and who can remedy the harm without these associated problems. Id. at 269–270, 112 S.Ct. 1311, 117 L.Ed.2d 532.

{¶ 38} In applying these factors to handgun litigation, the courts have taken divergent positions. While some courts have found that remoteness bars recovery (see, e.g., *Ganim v. Smith & Wesson Corp.,* 258 Conn. 313, 780 A.2d 98, using the "standing" aspect of remoteness), the courts in *White v. Smith & Wesson,* 97 F.Supp.2d 816, and in *Boston v. Smith & Wesson,* 12 Mass.L.Rptr. 225, 2000 WL 1473568, have rejected the remoteness argument. In *White,* for instance, the court concluded that remoteness did not deprive the city and the mayor of standing to sue the gun manufacturers and trade associations, since the plaintiffs were "asserting their own rights and interests and, while their claims would impact the health and safety of others, their claims are not based on the rights of others, but rather the rights of the City to sue for the harm and economic losses it has incurred, as well as their claims of unjust enrichment and nuisance abatement." Id. at 825.

*427 {¶ 39} Similarly, in *Boston v. Smith & Wesson Corp.,* although the court acknowledged that some of the injuries alleged appear to arise from harm to others, it stated that "this alleged harm is in large part not 'wholly derivative of' or 'purely contingent on' harm to third parties. [H]arm to Plaintiffs may exist even if no third party is harmed. * * * Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services). Similarly, diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on individuals. * * * Indeed, much of the harm alleged is of a type that can only be suffered by these plaintiffs." (Footnote omitted.) 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 6.

{¶ 40} We agree with the reasoning espoused in *White* and *Boston.* The complaint in this case alleged that as a direct result of the misconduct of appellees, appellant has suffered "actual injury and damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections and other services."

{¶ 41} Under the Civ.R. 12(B)(6) standard, we must presume that all factual allegations are true. See **1149 *Warth v. Seldin* (1975), 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343, where the United States Supreme Court held that when standing is challenged on a motion to dismiss, the allegations must be construed as if true. Therefore, in taking the allegations in the complaint as true, we find that the alleged harms are direct injuries to appellant, and that such harms are not so remote or indirect as to preclude recovery by appellant as a matter of law.

{¶ 42} With regard to whether causation is too remote in this case, we turn to the three factors outlined in *Holmes,* 503 U.S. at 269–270, 112 S.Ct. 1311, 117 L.Ed.2d 532. The first concern, difficulty of proof, is minimal in this case, since appellant is seeking recovery, in part, for police expenditures and property repairs, which can be easily computed. Under the second factor, there is little risk of double recovery, since appellant is seeking recovery for injuries to itself only. Finally, no other person is available to bring suit against appellees for these damages. Under the third factor, *Holmes*

  

asks whether "the general interest in deterring injurious conduct" will be better served by requiring that suit be brought by more directly injured victims. Id., 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Although appellant is indirectly attempting to protect its citizens from the alleged misconduct by the gun manufacturers and trade associations, appellant is seeking recovery for its own harm. Under these circumstances, the general interest will be best served by having this plaintiff bring this lawsuit. We believe that appellant can withstand scrutiny under the ***428** *Holmes* test. Consequently, we find that the court of appeals erred in concluding that appellant's claims were too remote for recovery.

III. Recoupment of Cost of Governmental Services

**[25]** {¶ 43} Appellant alleged in its complaint that due to the misconduct of appellees, it has sustained damages, including "significant expenses for police, emergency, health, corrections, prosecution and other services." Appellees contend that the cost of these public services is nonrecoverable, since these are services the city is under a duty to provide.

{¶ 44} For support, appellees rely in part on *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.* (C.A.9, 1983), 719 F.2d 322, a case in which the city sought to recoup police, fire, and other expenses associated with protecting the public from a petroleum gas spill arising from a train derailment. In that case, the court stated that "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement." (Citation omitted.) Id. at 323. The court of appeals accepted this position and held that a municipality may not recover for expenditures for ordinary public services that it has the duty to provide.

{¶ 45} Although a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public, it should be allowed to argue that it may recover such damages in this type of case. Unlike the train derailment that occurred in the *Flagstaff* case, which was a single, discrete incident requiring a single emergency response, the misconduct alleged in this case is ongoing and persistent. The continuing nature of the misconduct may justify the recoupment of such governmental costs. Therefore, if appellant can prove all the elements of the alleged torts, it should be able to recover the damages flowing from appellees' misconduct. Moreover, even ****1150** the *Flagstaff* court recognized that recovery by a governmental entity is allowed "where the acts of a private party create a public nuisance which the government seeks to abate." *Flagstaff,* 719 F.2d at 324. We therefore reject the court of appeals' holding that appellant cannot recover its governmental costs.

IV. Constitutional Arguments

**[26]** {¶ 46} Appellees further argue that appellant is attempting to regulate a national firearms industry and, therefore, its claims are barred under the Commerce Clause and the Due Process Clause of the United States Constitution.

**[27]** {¶ 47} The Commerce Clause " 'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.' " ***429** *Healy v. Beer Inst.* (1989), 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275, quoting *Edgar v. MITE Corp.* (1982), 457 U.S. 624, 642–643, 102 S.Ct. 2629, 73 L.Ed.2d 269. Despite the fact that no statute or regulation is involved in this case, appellees maintain that this litigation violates the Commerce Clause because appellant is seeking extraterritorial jurisdiction over conduct occurring outside Cincinnati's city limits. For support, appellees rely on *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, which found that Alabama's imposition of economic sanctions on BMW violated the Commerce Clause.

{¶ 48} Appellees' reliance on the *BMW* decision is misplaced. In finding a Commerce Clause violation in *BMW,* the court reasoned that Alabama could not impose punitive damages on BMW where the alleged misconduct (repainting a new car without notifying the dealer or purchaser) arose outside Alabama and did not affect Alabama residents. The court's rationale was that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." Id. at 572, 116 S.Ct. 1589, 134 L.Ed.2d 809. Thus, Alabama could not "punish BMW for conduct that was lawful where it occurred

and that had no impact on its residents." Id. at 573, 116 S.Ct. 1589, 134 L.Ed.2d 809.

{¶ 49} Appellant's complaint seeks injunctive relief to enjoin appellees from continuing to engage in what appellant considers to be the unlawful manufacture, marketing, and distribution of unsafe handguns. Although the injunctive relief sought may affect out-of-state conduct, we reject appellees' argument that such relief would violate the Commerce Clause. Unlike the *BMW* case, which involved an excessive punitive damages award intended to change a tortfeasor's lawful conduct in states outside Alabama, in this case, the alleged harm, which may or may not call for punitive damages, directly affects the residents of Cincinnati. Thus, the fact that appellant's claims implicate the national firearms trade does not mean that the requested relief would violate the Commerce Clause. See *White v. Smith & Wesson,* 97 F.Supp.2d at 830, which likewise found no Commerce Clause violation.

{¶ 50} We find no impediment in the Due Process or Commerce Clause that requires dismissal of this lawsuit.

## V. Conclusion

{¶ 51} In conclusion, we find that the court of appeals erred in upholding the dismissal of the complaint, since sufficient facts have been alleged to withstand scrutiny under Civ.R. 12(B)(6). Reversal of the judgment, however, does not mean that appellant will prevail upon remand. What it does mean is that appellant has alleged the facts necessary to withstand a motion to dismiss and will now have the opportunity to pursue its claims. While we do not predict the outcome of this case, ****1151** we would be remiss if we did not recognize the importance ***430** of allowing this type of litigation to go past the pleading stages. As two commentators so aptly noted: "If as a result of both private and municipal lawsuits, firearms are designed to be safer and new marketing practices make it more difficult for criminals to obtain guns, some firearm-related deaths and injuries may be prevented. While no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence, such litigation may have an important role to play, complementing other interventions available to cities and states." Vernick & Teret, New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws (1999), 36 Hous.L.Rev. 1713, 1754.

{¶ 52} Accordingly, for the above reasons, we reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

DOUGLAS, RESNICK and PFEIFER, JJ., concur.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

MOYER, C.J., dissenting.

{¶ 53} I respectfully dissent from the majority's decision. Appellant alleges an "epidemic of handguns in the hands of persons who cannot lawfully possess them, which has brought terror to the streets, schoolyards, playgrounds, and homes of Cincinnati and has resulted in thousands of preventable shootings of innocent citizens, especially children and police officers." These are serious allegations, and portray a city under siege virtually overrun with criminals bearing illegally obtained handguns.

{¶ 54} However, the issue before us is not whether the city could prove that appellees fail to take reasonable measures that would prevent handguns they sell from being possessed by criminals and minors. Nor is the issue whether this alleged failure "unreasonably interferes with the public's health, safety, welfare, and peace," as alleged by appellant. The issue is not whether we agree with appellant that there exists in Cincinnati an epidemic of violence due to handguns illegally obtained.

{¶ 55} This appeal simply involves a question of law: does the city have standing to assert its claims? The majority holds that appellant has standing. I disagree with this conclusion, and would find the city's alleged injuries to be too remote from the conduct of appellees and too derivative of the harms suffered by victims of handgun violence to establish proper standing to sue the appellees.

***431** {¶ 56} As the majority's discussion regarding remoteness and proximate causation aptly demonstrates, the harm alleged by the city must not be a remote or tenuous consequence of the appellees' alleged misconduct. Although

  

" '[in] a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events,' " courts have limited an actor's responsibility for the consequences of the actor's conduct. *Johnson v. Univ. Hosps. of Cleveland* (1989), 44 Ohio St.3d 49, 57, 540 N.E.2d 1370 (quoting Prosser & Keeton, Law of Torts [5th Ed.1984] 264, Section 41). The limitation of proximate causation rests in a very large part on the nature and degree of the connection between the defendant's acts and the events of which the plaintiff complains. Id.

The *Holmes* test

{¶ 57} I agree with the majority that the Supreme Court in *Holmes v. Securities* **1152 *Investor Protection Corp.* (1992), 503 U.S. 258, 269, 112 S.Ct. 1311, 117 L.Ed.2d 532, articulated the reason directness of relationship is a central requirement of causation. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. * * * Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. * * * And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

{¶ 58} The factors in *Holmes* are determinative of whether a plaintiff's claims are too remote or derivative. However, I strongly disagree with the majority's analysis and application of the test to the instant case.

{¶ 59} The majority's opinion provides helpful analysis of the two prevailing views reflected in the numerous civil actions by municipalities asserting negligence and public nuisance by gun manufacturers. I find the view represented in *Ganim v. Smith & Wesson* to be persuasive. *Ganim v. Smith & Wesson Corp.* (2001), 258 Conn. 313, 780 A.2d 98. *Ganim* was the first of these cases to be decided by a state supreme court. Affirming the trial court's dismissal for lack of standing, the Supreme Court of Connecticut held that the city of Bridgeport lacked standing because the harms it alleged were too remote, indirect, and derivative with respect to the defendants' alleged conduct. Id. at 365, 780 A.2d 98. The court noted that questions of remoteness and indirectness in the context of standing are analogous to questions of proximate cause in federal standing *432 jurisprudence, which "reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " Id. at 349–350, 780 A.2d 98, quoting Prosser & Keeton, Torts (5th Ed.1984) 264, Section 41.

A. Alleged injuries of the city are indirect, as they are too remote from the manufacturers' conduct and too derivative of others' harms

{¶ 60} In determining that the plaintiffs could not satisfy the first *Holmes* factor, that of directness, the *Ganim* court emphasized the numerous "links in the factual chain between the defendants' conduct and the harms suffered by the plaintiffs." Id. at 353, 780 A.2d 98. Specifically, the court noted that manufacturers sell handguns to distributors or wholesalers, and that these sales are lawful because federal law requires both buyers and sellers to be licensed. Id. at 353–354, 780 A.2d 98. Distributors then sell the handguns to retailers. Id. These sales are also lawful in that federal law requires both the distributors and the retailers to be licensed. Id. Next, retailers sell the guns legally either to authorized buyers, i.e., legitimate consumers, or to unauthorized buyers through the "straw man" method or other illegitimate means. Id. at 354, 780 A.2d 98. These latter sales would probably be criminal under federal law. Id. Next, the illegally acquired guns enter a black market, eventually finding their way to unauthorized users. Id.

{¶ 61} At this point, either authorized buyers misuse the handguns by not taking proper storage or other unwarned or uninstructed precautions, or unauthorized buyers misuse the guns to commit crimes or other harmful acts. Id. The city then incurs **1153 expenses for various municipal necessities, including crime investigation, emergency and other medical services for the injured, or similar expenses. Id. Finally, the city may suffer financial consequences, including increased costs for municipal services, increased tax burdens on taxpayers, reduced property values, loss of investments and economic development, loss of tax revenues from lost productivity, injuries and deaths of the city's residents,

destruction of families and communities in the city, and the negative impact on the lifestyle of the city's children and ability of its residents to live free from apprehension of danger. Id. at 354–355, 780 A.2d 98.

{¶ 62} The *Ganim* court found that the number of links in this factual chain was in and of itself strongly suggestive of remoteness. Id. at 355, 780 A.2d 98, citing *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.* (C.A.3, 1999), 171 F.3d 912, 930. *Steamfitters Local* focused on the "sheer number of links in the chain of causation" between the tobacco company's suppression of information and the increased costs of health care by the union fund, concluding that the "extremely indirect nature of the Fund's injuries and the highly speculative and complex damages claims" demonstrated that the ***433** union's claims "are precisely the type of indirect claims that the proximate cause requirement is intended to weed out." Id. at 930.

{¶ 63} I agree with this reasoning, and would find that the first factor articulated in *Holmes* militates against granting the city standing for these claims. In the instant case, the city characterizes appellees as corporations that design, manufacture, advertise, import and/or sell firearms that can be fired by unauthorized or unintended users in Cincinnati. Therefore, the links in the factual chain between appellees' conduct and harms suffered by the city are similar to those links enumerated in *Ganim:* manufacturer to distributor or wholesaler, distributor or wholesaler to retailer, retailer to authorized or unauthorized buyers, and ultimately accidental misuse by authorized buyers or criminal misuse by unauthorized buyers. Accidental and criminal misuse of handguns then results in increased expenses for the city for "additional police protection, overtime, emergency services, pension benefits, health care, social services and other necessary facilities and services." In addition, the city alleges that it has sustained "a loss of investment, economic development and tax revenue due to lost productivity—all associated with the defective design, and negligent manufacture, assembly, marketing, distribution, promotion and sale of guns."

{¶ 64} *Holmes* held that indirectness adds to the difficulty in determining which of a plaintiff's damages are attributable to a defendant's misconduct. *Holmes,* 503 U.S. at 269–270, 112 S.Ct. 1311, 117 L.Ed.2d 532. The very fact that there are multiple links between the conduct of the manufacturers and the harms suffered by the city demonstrates the difficulty in determining damages. For example, where a criminal wrongdoer harms another with an illegally obtained handgun, that criminal offender is responsible for injuries caused to the victim. Depending upon how the wrongdoer obtained the handgun, there may be a number of persons linking the offender to the retailer or distributor, who may also be liable. Additionally, there will be enormous difficulties in determining exactly how much of municipal expenses such as police, emergency services, pension benefits, health care, social services and other necessary facilities and services, as well as loss of revenue and investment and economic development, are a result of *only* the manufacturers' actions and *not the actions of the criminal wrongdoer,* ****1154** *the retailer, distributor, or persons who possess guns legally.*

{¶ 65} Finally, factors other than the manufacture, advertisement, distribution, and retail sales of handguns may contribute to the various harms claimed by the plaintiffs. *Ganim,* 258 Conn. at 356, 780 A.2d 98. According to *Ganim,* these may include "illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city ***434** to suburb, * * * the upward track of health costs generally, * * * and unemployment." Id.

{¶ 66} *Ganim* held that in addition to remoteness, the harms suffered by the plaintiffs were derivative of those suffered by the victims and their families. Id. at 355, 780 A.2d 98. In other words, the city would not suffer the harm of increased costs for municipal services but for the fact that certain residents of the city had been the primary victims of handgun violence. Id. For example, increased medical costs are essentially costs imposed on the victims of handgun violence, and decreased tax revenues from lost productivity are a result of lost productivity and income on the part of otherwise productive residents who have fallen victim to handgun violence. Id.

{¶ 67} I agree with this reasoning. The majority characterizes this first factor as one of "difficulty of proof," and believes the difficulty to be minimal, as the city "is seeking recovery, in part, for police expenditures and property repairs, which can be easily computed." However, in order to prove damages, the city must first identify which incidents involved the use of illegal handguns or legal handguns in the hands of unauthorized users, and then link that portion of the city's costs to that incident. In many instances the weapon used in

a crime is never recovered. How, under these circumstances, can the city prove that the weapon involved was either illegal or in the hands of an unauthorized user?

{¶ 68} In addition to disagreeing with the majority's determination that the expenses borne by the city are easily capable of proof, I strongly disagree with the majority's characterization of the first *Holmes* factor as one of difficulty of proof.

{¶ 69} The question is not whether the city can prove that it has suffered damages, but whether the city can prove that those damages are attributable to the wrongdoing of the gun manufacturers as opposed to other, independent factors. *Holmes,* 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Given the multiple links in the factual chain between the gun manufacturers' conduct and harms suffered by the city, the derivative nature of the harms when viewed in conjunction with harms suffered by the primary victims of handgun violence, as well as the multiple societal factors that contribute to the misuse of handguns, I would find a very high degree of difficulty in determining the amount of the city's damages attributable to the conduct of the gun manufacturers.

B. Recognizing the city's claim would require a court to adopt complicated rules apportioning damages

{¶ 70} The majority finds that since the city is seeking recovery for injuries to itself only, there is little risk of double recovery and, thus, the city withstands scrutiny under the second factor in the *Holmes* test. Furthermore, the majority ***435** finds that since the city is seeking recovery for its own harm, the general interest is best served by having the city bring this lawsuit. I disagree.

{¶ 71} I read *Holmes* differently. The second factor of *Holmes* is whether "recognizing claims by the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs ****1155** removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." Id., 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. In its complaint, the city paints a horrific picture of murder, assault, suicides, and accidental killings involving either illegal handguns or legal handguns in the hands of unauthorized users. As a result of these violent acts, the city, "in its role of providing protection and care for its citizens, * * * provide[s] or pay[s] for additional police protection, emergency services, pension benefits, health care and other necessary services due to the threat posed by the use of defendants' products." In addition, the city alleges harm as a result of "injuries to certain of its residents and police officers caused by the defendants' products, as well as by the loss of substantial tax revenue."

{¶ 72} Taking, as we must, these pleadings as true, *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, it follows that for practically every harm the city has suffered, there is at least one injured victim standing between the city and the gun manufacturers. In its complaint, the city states that it is seeking reimbursement for police, emergency, health, corrections, prosecution, and other services. Support for the conclusion that this is a derivative action is found in the complaint itself, which expressly connects the city's damages to death and injuries by individual citizens allegedly resulting from illegal handguns or the use of legal handguns by unauthorized users. This would suggest that many of the city's expenses would not have been incurred but for injuries to the primary victim. For example, the city may incur expenses for police, emergency services, and health care when someone has been injured because of the use of an unauthorized or illegal handgun. The injured person may also have a claim against the gun manufacturers.

{¶ 73} Moreover, the fact that the city seeks damages in part only for its own harm does not in and of itself satisfy the *Holmes* test. The Second Circuit has held that economic injuries alleged by a labor union health and welfare trust fund against tobacco companies were purely derivative of physical injuries suffered by plan participants, and thus too remote to establish standing to sue. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.* (1999), 191 F.3d 229, 239. However, the court also found that "even were we to assume that the single satisfaction rule would prohibit duplicative recoveries by multiple plaintiffs against a single defendant, it would not cure the ultimate problem set forth in *Holmes,* that is, that courts would be forced to 'adopt complicated rules apportioning ***436** damages.' " Id. at 241, quoting *Holmes,* 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Therefore, I would find that the application of the second factor of the *Holmes* test supports the decision of the court of appeals and the trial court.

  

C. Directly injured persons can remedy the harm alleged by the city

{¶ 74} What *Holmes* requires courts to analyze is not whether these damages are capable of being proven, but whether the difficulties inherent in fashioning complicated rules apportioning damages among multiple plaintiffs is justified. Thus, the third factor of *Holmes* states that because directly injured victims can generally be expected to vindicate the law "as private attorneys general" without the problems described by factors one and two, the need for courts to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct. Id., 503 U.S. at 269–270, 112 S.Ct. 1311, 117 L.Ed.2d 532. Accepting the pleadings as true, it is immediately apparent that there are unfortunately numerous directly injured victims of handgun violence in Cincinnati. One successful suit filed by a **1156 directly injured victim is every bit as much a deterrent as the instant suit and may have just as much, if not more, economic impact on the gun manufacturers. Thus, I would hold that an application of the *Holmes* test requires that we affirm the judgment of the court of appeals.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

COOK, J., dissenting.

{¶ 75} Like the Chief Justice, I would find that Cincinnati's negligence-based claims are barred by remoteness principles. I write separately, however, because our views on remoteness ultimately diverge in one subtle respect. I also write separately to illustrate why the city has failed to state cognizable claims for products liability and public nuisance.

I

{¶ 76} I agree with much of the analysis contained in the Chief Justice's dissenting opinion. But instead of viewing remoteness principles as germane to the question of whether the city has *standing* to raise the negligence claims at issue here, I would find that the remoteness of the alleged harm precludes the city from establishing *proximate cause* as a matter of law. See *Philadelphia v. Beretta U.S.A. Corp.* (C.A.3, 2002), 277 F.3d 415. Without belaboring the difference (which is essentially academic at this point), I note that the test articulated in *Holmes v. Securities Investor Protection Corp.* (1992), 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532, cited by both the majority and the Chief Justice, *437 analyzed remoteness in the proximate-cause context. Id. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Any relationship between remoteness and standing that can be gleaned from *Holmes* arises from proximate cause being an element of *statutory* standing under the federal RICO statute at issue in that case. See id. at 267–268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (analogizing to antitrust cases, which condition a plaintiff's "right to sue" on a showing of proximate cause); id. at 286–287, 112 S.Ct. 1311, 117 L.Ed.2d 532 (Scalia, J., concurring in judgment) (observing that proximate cause is one of the "usual elements" of statutory standing). Given that distinction, I hesitate to include a proximate-cause component within a conventional standing analysis, particularly when the negligence causes of action pleaded by the city already require proof of proximate cause as a substantive element.

II

{¶ 77} Inasmuch as proximate cause is an essential element of a products liability claim, see *R.H. Macy & Co. v. Otis Elevator Co.* (1990), 51 Ohio St.3d 108, 110, 554 N.E.2d 1313, remoteness principles also support dismissal of the city's causes of action sounding in products liability. Remoteness aside, however, the city's claims also fail for their failure to plead a compensable injury.

{¶ 78} The majority correctly determines that the city has failed to state a valid statutory claim for relief insofar as an action for purely economic harm is not maintainable under the Ohio Products Liability Act. See R.C. 2307.71(M). I disagree, however, with the majority's holding that the city may maintain its common-law products-liability claims alleging defective design and failure to warn. Even assuming that the Act does not preempt these claims, a proposition of which I am not convinced,[8] the city has not pleaded valid common-law causes of action. As the **1157 majority acknowledges, the city pleaded facts suggesting that it has suffered purely economic damages (i.e., increased municipal costs allegedly attributable to the actions of the various defendants). The majority cites no case, however, in which

we have allowed products liability to be a viable theory of recovery for a plaintiff situated similarly to the city in this case —namely, a plaintiff whose economic harm is *not* attributed to having been a user, consumer, or foreseeable person present at the time of product failure. See, e.g., *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, paragraph one of the syllabus (announcing rule of strict products liability "for ***438** physical harm * * * caused to the ultimate user or consumer"); *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, 35 O.O.2d 404, 218 N.E.2d 185, paragraph two of the syllabus (allowing products-liability claim by plaintiff injured "while he was working in a place where his presence was reasonably to be anticipated by the defendant"). Today's majority appears to extend products-liability law to new categories of potential plaintiffs without any reasoned explanation of how that can be so.

**III**

{¶ 79} As to the public-nuisance cause of action, it is true that principles of remoteness do not necessarily prevent the city from stating a valid claim. See *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.* (D.N.J.2000), 123 F.Supp.2d 245, 264, affirmed (C.A.3, 2001), 273 F.3d 536. Nevertheless, even this cause of action fails because the reach of public-nuisance law does not go as far as the city would have us extend it.

{¶ 80} Admittedly, the law of nuisance appears at first glance to be broad enough to encompass virtually any type of conduct. For example, 4 Restatement of the Law 2d, Torts (1977), Section 821B, cited with approval by the majority, broadly defines what may qualify as an actionable public nuisance. Similarly, this court has described the concept of nuisance in broad terms so as to include "the doing of *anything,* or the permitting of anything under one's control or direction to be done without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights." (Emphasis added.) *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 28 O.O. 369, 55 N.E.2d 724, paragraph two of the syllabus. Despite the arguably broad reach of the public-nuisance tort, however, judicial restraint counsels against this court extending it to the allegations of the city's complaint.

{¶ 81} First, the city's allegations of harm cut against holding the named defendants responsible under a public-nuisance theory. The defendants' allegedly wrongful conduct would never ripen into a public nuisance without the conduct of various unnamed third parties, such as criminals and persons who negligently allow minors to obtain guns. In other words, the defendants' marketing and distribution practices cause harm only through intervening actions of persons not within the defendants' control. Where acts of independent third parties cause the alleged harm, it cannot be said that the defendants—here, gun manufacturers, trade associations, and a gun distributor—have the requisite degree of control over the source of the nuisance to allow liability. *Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d at 422; *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d at 541.

***439** {¶ 82} Second, to allow the public-nuisance doctrine to reach the defendants in this case amounts to an unwarranted legislative judgment by this court. By its decision today, the majority subjects the defendants to potential nuisance liability for the way they design, distribute, and market lawful products. In extending the ****1158** doctrine of public nuisance in this manner, this court takes the ill-advised first step toward transforming nuisance into " 'a monster that would devour in one gulp the entire law of tort.' " *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d at 540, quoting *Tioga Pub. School Dist. v. U.S. Gypsum Co.* (C.A.8, 1993), 984 F.2d 915, 921; see, also, *Philadelphia v. Beretta U.S.A. Corp.* (E.D.Pa.2000), 126 F.Supp.2d 882, 909, affirmed (C.A.3, 2002), 277 F.3d 415. Even the Restatement, which itself broadly defines the concept of nuisance, counsels courts *against* declaring a given activity to be a public nuisance "if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct." 4 Restatement, Section 821B, Comment *f.* Where, as here, the defendants are subject to extensive federal regulation concerning their activities, the majority's decision to allow a nuisance claim is inappropriate.

{¶ 83} For the foregoing reasons, I respectfully dissent.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

  

**All Citations**

95 Ohio St.3d 416, 768 N.E.2d 1136, 2002 -Ohio- 2480

## Footnotes

1 The lawsuit originally alleged other theories of liability, including fraud, negligent misrepresentation, unfair and deceptive advertising, and unjust enrichment. However, since appellant does not contest the dismissal of these counts, we decline to address these issues.

2 The named defendants are Beretta U.S.A. Corp., Bryco Arms, Inc., Colt's Manufacturing Co., Inc., Davis Industries, Fabbrica d'Armi Pietro Beretta Sp.A., Forjas Taurus, S.A., H & R 1871, Inc., B.L. Jennings, Inc., MKS Supply, Inc., Lorcin Engineering Co., Inc., North America Arms, Inc., Phoenix Arms, Raven Arms, Inc., Smith & Wesson Corp., Sturm & Ruger Co., Inc., Taurus International Manufacturing, Inc., American Shooting Sports Coalition, Inc., National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers Institute, Inc. Of these defendants, only Davis Industries, Fabbrica d'Armi Pietro Beretta Sp.A., Forjas Taurus, S.A., and Raven Arms, Inc. did not move to dismiss.

3 See, e.g., *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 467, 63 N.E. 86 (pollution of stream on plaintiff's property due to defendant municipality's discharge of sewage downstream constitutes a nuisance).

4 A nuisance can be further classified as an absolute nuisance (nuisance per se) or as a qualified nuisance. *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 28 O.O. 369, 55 N.E.2d 724, paragraphs two and three of the syllabus. With an absolute nuisance, the wrongful act is either intentional or unlawful and strict liability attaches notwithstanding the absence of fault because of the hazards involved (*Metzger v. Pennsylvania, Ohio & Detroit RR. Co.* [1946], 146 Ohio St. 406, 32 O.O. 450, 66 N.E.2d 203, paragraph one of the syllabus), whereas a qualified nuisance involves a lawful act "so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another." Id. at paragraph two of the syllabus. A qualified nuisance hinges upon proof of negligence. Id.

5 In *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063, we stated that only in a few circumscribed types of cases, such as a workplace intentional tort or a negligent-hiring claim against a religious institution, do we require that the plaintiff plead operative facts with particularity. Id. at 145, 573 N.E.2d at 1065.

6 A claimant can recover economic losses only after first establishing that it can recover compensatory damages for harm from a manufacturer or supplier. R.C. 2307.79. "Harm" is defined as "death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not 'harm.' " R.C. 2307.71(G). Since appellant did not allege that it suffered harm within the meaning of the Act, it cannot recover for economic loss under R.C. 2307.79.

7 According to appellant, the feasible safety features include internal locking devices to "personalize" guns to prevent unauthorized users from firing them, chamber-loaded indicators to indicate that a round is in the chamber, and magazine-disconnect safeties that prevent guns from firing when the magazine is removed. On March 17, 2000, Smith & Wesson announced a settlement agreement with various cities, state attorneys general, and the Department of Housing and Urban Development, in which it agreed to change its distribution practices and implement certain safety devices. See Dao, Under Legal Siege, Gun Maker Agrees to Accept Curbs, New York Times (Mar. 18, 2000), at A1.

  

8 See, e.g., *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 292–294, 677 N.E.2d 795 (Cook, J., dissenting in part and concurring in part); *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64, 68, 661 N.E.2d 714 (Cook, J., concurring).

# EXHIBIT 2

# City of Boston v. Smith & Wesson Corp.

Superior Court of Massachusetts, At Suffolk

July 13, 2000, Decided

1999-02590

**Reporter**

2000 Mass. Super. LEXIS 352 *; 12 Mass. L. Rep. 225

City of Boston & another [1] v. Smith & Wesson Corp. & others [2]

**Disposition: [*1]** Defendants' motion to dismiss ALLOWED as to Count V to the extent that count alleges negligent distribution and marketing. Defendants' motion to dismiss DENIED as to Count V to the extent it alleges negligent design. Motion to dismiss DENIED.

[1] Boston Public Health Commission.

[2] Beretta USA Corp., BL Jennings Inc., Browning Arms Co., Inc., Bryco Arms Corp., Charter Arms Corp., Colt's Manufacturing Co., Inc., Davis Industries Inc., Firearms Import & Export Corp., Glock Inc., Harrington & Richardson Corp., Heritage Manufacturing, Inc., Hi-Point Firearms Corp., International Armaments Corp. dba Interarms, Inc., Kel-Tec CNC Industries, Inc., Import Sport, Inc. dba SGS Importers International, Inc., Lorcin Engineering Co., Inc., Marlin Firearms Co., OF Mossberg & Sons, Inc., Navegar, Inc. dba Intratec USA Corp., Phoenix Arms Inc., US Repeating Arms Co., Inc., Remington Arms Corp., Savage Arms Inc., Sigarms, Inc., Sturm, Ruger & Co., Inc., Sundance Industries Corp., Taurus International Manufacturing, Inc., American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., Sporting Arms & Ammunition Manufacturers Institute, Inc., Does 1-250. Does 1-50 are unknown business entities that manufacture firearms distributed, marketed, sold, and/or possessed within Boston. Does 51-100 are unknown business entities that are retailers of firearms found in Boston. Does 101-225 are unknown business entities that distribute and/or market firearms found within Boston. Does 226-250 are unknown business entities that are industry trade associations composed of firearms manufacturers, distributors, and retailers.

## Core Terms

firearms, guns, costs, Defendants', allegations, cases, manufacturer, Commerce, warnings, economic loss rule, remote, unauthorized, public nuisance, municipality, users, motion to dismiss, regulations, foreseeable, damages, tortfeasor, injuries, privity, third party, secondary, products, warranty, harmed, Home Rule Amendment, dealers, proximate cause

## Case Summary

### Procedural Posture

Plaintiff city and its public health commission sued various firearms manufacturers, distributors, sellers and promoters, and industry trade associations, alleging public nuisance and several negligence and breach of warranty claims, including failure to warn and design defect. Manufacturing defendants moved to dismiss for failure to state a claim.

### Overview

Plaintiffs, city and city agency, sued defendant firearms-

related businesses, alleging they knowingly exploited for profit an illegal secondary firearms market in plaintiff city, designed guns without safety devices, and failed to warn, resulting in serious harm to plaintiffs, both economic and noneconomic. Defendant manufacturers moved to dismiss for failure to state a claim, alleging the claims were substantively deficient and barred by various affirmative defenses. The court dismissed only the negligence claim to the extent it duplicated the negligent distribution and marketing claim, holding the complaint was sufficient as to the remaining claims, even where they presented a new or extreme theory of liability. Plaintiffs' allegations were not barred by remoteness or the economic loss rule or potentially relevant statutes. The court declined to address the public policy considerations.

**Outcome**

Defendants' motion to dismiss was allowed as to a duplicative count of negligent distribution and marketing, but otherwise was denied. Plaintiffs' allegations were not barred by remoteness. The economic loss rule did not compel dismissal. The complaint alleged sufficient facts to state its remaining claims.

## LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

*HN1*[] **Involuntary Dismissals, Failure to State Claims**

The standard for evaluating the sufficiency of a complaint under *Mass. R. Civ. P. 12(b)(6)* is undisputed. The court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them, in the plaintiff's favor. Plaintiffs need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

*HN2*[] **Motions to Dismiss, Failure to State Claim**

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

*HN3*[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A complaint is not subject to dismissal if it would support relief on any theory of law.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

*HN4*[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A complaint should not be dismissed simply because it

asserts a new or extreme theory of liability or improbable facts.

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN5[] **Justiciability, Standing**

The case law considers remoteness as an element of either standing or proximate cause.

Torts > ... > Causation > Proximate Cause > General Overview

HN6[] **Causation, Proximate Cause**

Proof of a causal relationship between a defendant's action and a plaintiff's injury is essential in every tort.

Torts > ... > Causation > Proximate Cause > General Overview

HN7[] **Causation, Proximate Cause**

One way in which the concept of proximate cause operates is through the remoteness doctrine, which is sometimes called the direct injury test. This doctrine states that there must be some direct relation between the injury asserted and the injurious conduct alleged. Thus, in general, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

HN8[] **Causation, Proximate Cause**

In addition to the time remoteness doctrine, other elements of proximate cause are the requirements of proof that the defendant's acts were a substantial cause of the injury and that the plaintiff's injury was reasonably foreseeable.

Family Law > Family Relationships & Torts > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN9[] **Family Law, Family Relationships & Torts**

Where the plaintiff's loss is the effect of a natural and legal relationship, such as a parent-child relationship, that loss is not too remote.

Torts > ... > Causation > Proximate Cause > General Overview

HN10[] **Causation, Proximate Cause**

The relationship between a master and an apprentice is so important and so like a parent-child relationship that the master can recover for injuries to the apprentice, whose services the master lost.

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Elements > Causation > General Overview

HN11[] **Contract Interpretation, Fiduciary Responsibilities**

It is apparent that a plaintiff cannot recover from a defendant when the plaintiff's loss arises from harm the defendant caused to the injured party, absent some special relationship between the plaintiff and the injured party, or, perhaps, an ordinary contract relationship of which the defendant knew. There is no proximate cause under those circumstances because the plaintiff's harm is too "remote."

Torts > ... > Causation > Proximate Cause > General Overview

HN12[] **Causation, Proximate Cause**

The remoteness doctrine, as it appears to exist in Massachusetts, contains an exception in cases of a special relationship between the plaintiff and the injured third party, such as a parent-child relationship or a close master-apprentice relationship. An additional exception may arise where the plaintiff and the injured third party, while not in a special relationship, have a relationship of which the defendant knew, or in cases where the defendant acted with malice or with a deliberate design to accomplish a definite end regardless of consequences to others.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN13[] **Defenses, Demurrers & Objections, Motions to Dismiss**

It is settled law that a complaint should not be dismissed simply because it asserts a new or extreme theory of liability or improbable facts. A motion to dismiss is not an appropriate vehicle for resolving undecided points of substantive law.

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

Real Property Law > Torts > Nuisance > General Overview

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

HN14[] **Types of Nuisances, Private Nuisances**

Recovery has been allowed where the acts of a private party create a public nuisance which the government seeks to abate.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Negligence > Defenses > General Overview

HN15[] **Types of Losses, Economic Losses**

The economic loss rule prohibits recovery in negligence for purely economic loss.

Torts > ... > Types of Damages > Property Damages > General Overview

Torts > Remedies > Damages > General Overview

HN16[] **Types of Damages, Property Damages**

When a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the plaintiff's person or property, the plaintiff may not recover for purely economic losses.

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Remedies > Damages > General Overview

Torts > Products Liability > Types of Defects > Manufacturing Defects

*HN17*[] **Types of Losses, Economic Losses**

In the typical products liability case where the economic loss rule is applied, a product that the defendant manufactures proves defective, and the purchaser bears costs to repair the product, and usually suffers from loss of business as well. The economic loss rule is justified because a commercial user can protect himself by seeking express contractual assurances concerning the product (and thereby perhaps paying more for the product) or by obtaining insurance against losses. In contrast, a person physically injured by the product had neither the bargaining power nor the opportunity to bargain to protect himself.

Torts > ... > Types of Damages > Property Damages > Measurements

Torts > Remedies > Damages > General Overview

*HN18*[] **Property Damages, Measurements**

"Economic loss" includes damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property.

Governments > Local Governments > Home Rule

Governments > Legislation > Statutory Remedies & Rights

Governments > State & Territorial Governments > Relations With Governments

*HN19*[] **Local Governments, Home Rule**

Under the Home Rule Amendment, the legislature provides municipalities with the express statutory right to sue and be sued. *Mass. Gen. Laws ch. 40, § 2*. It is well established that cities and towns have authority to initiate suits to recover damages under tort and contract theories.

Governments > Local Governments > Claims By & Against

*HN20*[] **Local Governments, Claims By & Against**

See *Mass. Gen. Laws ch. 40, § 2*.

Governments > State & Territorial Governments > Relations With Governments

*HN21*[] **State & Territorial Governments, Relations With Governments**

See *Mass. Gen. Laws ch. 40, § 1*.

Governments > Local Governments > Home Rule

Governments > State & Territorial Governments > Relations With Governments

*HN22*[] **Local Governments, Home Rule**

See Mass. Const. amend. art. 2, § 6.

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

HN23[] **Local Governments, Home Rule**

Mass. Gen. Laws ch. 43B, § 13, part of the Home Rule Procedures Act, largely tracks the language of the Home Rule Amendment. Section 13 has as its subject ordinances or by-laws and legislative or executive actions.

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

HN24[] **Legislation, Interpretation**

To determine whether an ordinance or by-law is inconsistent with state law, the court asks: (1) whether there was an express legislative intent to forbid local activity on the same subject, (2) whether the local regulation would frustrate the purpose of a statute so as to warrant an inference that the Legislature intended to preempt the subject, or (3) whether legislation on the subject is so comprehensive that legislative intent to preempt can be inferred, as any local enactment would frustrate the statute's purpose.

Commercial Law (UCC) > General Provisions (Article 1) > General Provisions

Governments > Courts > Common Law

HN25[] **General Provisions (Article 1), General Provisions**

An existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication.

Governments > Courts > Common Law

HN26[] **Courts, Common Law**

A statute is not to be interpreted as effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > Legislation > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN27[] **Congressional Duties & Powers, Commerce Clause**

The Commerce Clause, U.S. Const. art. I, § 8, precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state, and bars a statute that directly controls commerce occurring wholly outside the boundaries of a state regardless of whether the statute's extraterritorial reach was intended by the legislature.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Congressional Duties &

Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Balancing Tests

HN28[] **Interstate Commerce, State Powers**

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the court has generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, it has examined whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Torts > Business Torts > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN29[] **Commerce Clause, Dormant Commerce Clause**

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN30[] **Congressional Duties & Powers, Commerce Clause**

State civil suits may proceed even though the result may be to effect a change in out-of-state practices.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN31[] **Jury Trials, Province of Court & Jury**

State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN32[] **Damages, Punitive Damages**

A state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states. Economic penalties (in the form of legislatively authorized fines or judicially imposed punitive damages) must be supported by the state's interest in protecting its own consumers and its own economy.

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Real Property Law > Torts > Nuisance > General Overview

HN33[] **Types of Nuisances, Public Nuisances**

A public nuisance is an unreasonable interference with a right common to the general public.

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

Real Property Law > Torts > General Overview

Real Property Law > Torts > Nuisance > General Overview

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

*HN34*[] **Types of Nuisances, Private Nuisances**

A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury. A public nuisance does not necessarily involve interference with use and enjoyment of land. When the particular harm consists of interference with the use and enjoyment of land, the public nuisance may also be a private nuisance.

Real Property Law > Torts > Nuisance > General Overview

*HN35*[] **Torts, Nuisance**

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

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

Real Property Law > Torts > Nuisance > General Overview

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

*HN36*[] **Types of Nuisances, Private Nuisances**

A public nuisance differs from a private nuisance. It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property. Thus, in its broadest statement, the concept of a public nuisance seems unconnected to place or property.

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Real Property Law > Torts > Nuisance > General Overview

*HN37*[] **Types of Nuisances, Public Nuisances**

Liability for a public nuisance may arise even though a person complies in good faith with laws and regulations.

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Real Property Law > Torts > Nuisance > General Overview

*HN38*[] **Types of Nuisances, Public Nuisances**

Liability extends to all who join or participate in the creation or maintenance of a public nuisance.

Real Property Law > ... > Nuisance > Types of Nuisances > Private Nuisances

Real Property Law > Torts > Nuisance > General Overview

HN39[] **Types of Nuisances, Private Nuisances**

A private nuisance is actionable when a property owner creates, permits, or maintains a condition that causes a substantial and unreasonable interference with the use and enjoyment of the property of another.

Torts > Negligence > Elements

Torts > Negligence > General Overview

HN40[] **Negligence, Elements**

To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty; the defendant breached that duty, and that this breach actually and proximately caused injury. The existence of a duty is a question of law.

Torts > Negligence > Elements > Duty

Torts > ... > Proof > Custom > General Overview

HN41[] **Elements, Duty**

In determining whether the law ought to provide that a duty of care is owed by one person to another, the court looks to existing social values and customs, and to appropriate social policy. A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm.

Commercial Law (UCC) > ... > Contract Provisions > Warranties > Implied Warranty of Merchantability

Torts > Products Liability > Theories of Liability > Breach of Warranty

Commercial Law (UCC) > ... > Contract Provisions > Warranties > General Overview

HN42[] **Warranties, Implied Warranty of Merchantability**

In Massachusetts, a warranty that goods are merchantable is implied in every sale of goods. *Mass. Gen. Laws ch. 106, § 2-314*.

Contracts Law > ... > Sales of Goods > Warranties > General Overview

Torts > Products Liability > Theories of Liability > Breach of Warranty

HN43[] **Sales of Goods, Warranties**

Under the doctrine of unreasonable use, a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty.

Contracts Law > Breach > Breach of Contract Actions > General Overview

Torts > Negligence > Defenses > General Overview

HN44[] **Breach, Breach of Contract Actions**

See *Mass. Gen. Laws ch. 106, § 2-318*.

Torts > Products Liability > Types of Defects > Marketing & Warning Defects

HN45[] **Types of Defects, Marketing & Warning Defects**

A product's manufacturer has a duty to warn foreseeable users of latent dangers in the product's normal and intended use.

Torts > Products Liability > Types of Defects > Marketing & Warning Defects

HN46[] **Types of Defects, Marketing & Warning Defects**

There is no duty to warn where the danger is obvious or where the plaintiff appreciated the danger substantially to the same extent as a warning would have provided.

Torts > ... > Elements > Duty > General Overview

Torts > Products Liability > Theories of Liability > Negligence

HN47[] **Elements, Duty**

A manufacturer is under a duty to design its product with reasonable care to eliminate avoidable dangers. The manufacturer must anticipate the environment in which the product will be used and design against reasonably foreseeable risks attending the product's use in that setting. The duty is placed on the manufacturer because it stands in a superior position to recognize and cure defects in its product's design.

Contracts Law > Remedies > Restitution

HN48[] **Remedies, Restitution**

A claim that a party has been unjustly enriched seeks the equitable remedy of restitution. Restitution is appropriate when the circumstances of receipt or retention of a benefit are such that, as between the two persons, it is unjust for one to retain it. A person confers a benefit upon another if he in any way adds to the other's security or advantage.

**Judges:** Margaret R. Hinkle Justice of the Superior Court.

**Opinion by:** Margaret R. Hinkle

## Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

This is an action by the City of Boston and the Boston Public Health Commission against various firearms manufacturers, distributors, sellers and promoters, including firearms industry trade associations. [3] **[*2]** In a detailed six-count complaint, [4] Plaintiffs seek to recover damages allegedly sustained through conduct of Defendants. [5] Briefly stated, Plaintiffs allege that Defendants, through a strategy of willful blindness,

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[3] This action is one of a number of similar suits brought throughout the United States. See Note, Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry, 113 Hav.L.Rev. 1521 (2000).

[4] The six counts are: public nuisance (Count I); negligent distribution and marketing (Count II); breach of warranty through a design defect (Count III); breach of warranty through failure to warn (Count IV); negligence (Count V) and unjust enrichment (Count VI).

[5] Defendants Beretta, Colt's and Phoenix Arms have filed a third-party complaint against China North Industries Corp./Norinco and Denel (Pty) Ltd.

exploit and rely upon for profit an illegal, secondary firearms market of juveniles, criminals and other unauthorized gun users in Boston. Plaintiffs allegedly bear immense costs arising from this market. Plaintiffs also allege that Defendants design guns without readily available safety devices and fail to warn of certain dangers.

The matter is before the court on the motion of the manufacturing defendants to dismiss the First Amended Complaint under *Mass.R.Civ.P. 12(b)(6)* for failure to state a claim. After a hearing, for the reasons discussed below, the motion to dismiss is *ALLOWED* in part and *DENIED* in part. [6]

BACKGROUND

The factual allegations **[*3]** contained in the First Amended Complaint, [7] as relevant to each of the theories of liability, are summarized as follows. [8] For clarity, additional factual allegations are set forth in the discussion section where pertinent.

Plaintiffs allege that Boston faces a high level of violent crime [9] **[*4]** involving guns manufactured by Defendants. [10] Easy movement of firearms from the legal marketplace to unauthorized and illegal users, [11] **[*5]** through an illegal, secondary firearms market, fuels the gun violence. [12]

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[6] Defendants removed this action to federal court. That court remanded the case. See *City of Boston v. Smith & Wesson Corp., 66 F. Supp. 2d 246 (D. Mass. 1999)*.

[7] All references in this decision to the complaint are to the First Amended Complaint.

[8] In this decision I place no reliance on the settlement agreement between Smith & Wesson and certain public entities, which was submitted to the court after the hearing on this motion.

[9] Plaintiffs allege that these crimes from 1996 through 1998 include 30 homicides, 131 aggravated assaults, 37 armed robberies and 29 suicides.

[10] Plaintiffs allege that over 1,400 guns were involved in the crimes cited in note 9. They also allege that from July 1, 1996 through July 31, 1998, 1,470 guns were seized by the Boston Police Department and that from January 1, 1993 through November 30, 1998, the firearms recovered were made by the individual defendants in the following numbers: Beretta USA (102), Browning Arms (35), Bryco Anus (138), Charter Arms (29), Colt's Mfg. (138), Davis Industries (100), Firearms Import & Export (48), Glock (89), Harrington & Richardson (100), Hi-Point (27), Interarms (6), Lorcin (121), Marlin (51), Mossberg (73), Navegar (27), Phoenix (90), Remington (39), Savage (45), Smith & Wesson (369), Sturm & Ruger (167), Sundance (15) and Taurus (56). Plaintiffs allege additionally that thousands of guns used in crime in Boston remain unrecovered.

[11] While Plaintiffs frame many of their allegations in terms of acquisition and use of guns by juveniles and criminals, Plaintiffs refer to "all other classes prohibited from acquiring or possessing guns, such as illegal aliens, fugitives, drug addicts, persons committed to mental institutions, and persons under domestic violence restraining orders." Pls.' Mem. at 5 n.4 (citing *18 U.S.C. § 922*; *G.L.c. 140, § 129B*).

[12] Plaintiffs allege that surveys indicate that juveniles and convicted criminals can easily obtain firearms. Plaintiffs do not allege that the surveys were of Boston respondents. This survey evidence is, according to Plaintiffs, continued by a study by the Federal Bureau of Alcohol, Tobacco and Firearms ("ATF"), which found that in Boston over a one year period (Plaintiffs do not state which year) 11 percent of guns traced to crime were seized from juveniles, while the figure for the previous year was 14 percent. The ATF also found (presumably based on national data) that more guns traced to crime are seized from persons in the age group of 18, 19, and 20 years than any other three-year age group. Also presumably based on national data, the ATF found that over

[*6] Plaintiffs also allege that the flow of firearms into the illegal market and into the hands of unauthorized users in Boston has occurred in ways Defendants knew or should have known. Plaintiffs claim that Defendants could have taken action to control and prevent the illegal diversion. The methods of illegal diversion include, according to Plaintiffs: (1) straw purchases, which occurred under circumstances which indicated or should have indicated to the dealer that a straw purchase was being made; (2) multiple sales (where a purchaser buys more than one gun, at one time or over a short period, from a licensed dealer with the intent of conveying the gun to another person not qualified to purchase guns), occurring under circumstances which indicated or should have indicated to the seller that the gun was destined for the unlawful market; (3) sales to "kitchen table" dealers (federally licensed dealers who do not sell from a retail store) by Defendants, even though Defendants knew or should have known that many of those dealers fail to perform background checks or otherwise illegally divert guns to the illegal market; (4) theft of guns from firearm dealers who failed to provide adequate [*7] security for their premises, where Defendants failed to ensure that persons distributing their products have implemented adequate security measures; (5) obliteration of serial numbers from guns, where Defendants, though aware of this problem, took no initiative to make their serial numbers tamper-proof; (6) movement of firearms from states with weak gun control laws to areas (such as Boston) with stronger laws and (7) sales at gun shows, where background checks are usually not required. These guns are often used in more than one crime.

Plaintiffs allege that Defendants' distribution system is reckless and has caused firearms to come into the hands of unauthorized persons, causing Plaintiffs direct harm. [13] [*8] Plaintiffs claim that Defendants knew that their guns were distributed into the illegal, secondary market and knew that this market supplied a substantial percentage of firearms used to inflict harm upon Plaintiffs. [14] According to Plaintiffs, Defendants could have helped to prevent firearms they manufacture, market, distribute and sell from flowing into the illegal market and into the hands of unauthorized persons. [15]

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45 percent of seized weapons were possessed illegally by felons. Finally, as additional evidence of an ease of movement of firearms into an illegal market, Plaintiffs allege that there is a short time interval between retail sale and criminal use of a significant percentage of firearms. Between 40 and 44 percent of guns traced to crime seized in Boston had been sold at retail less than three years earlier, which Plaintiffs allege to be evidence of trafficking.

[13] Plaintiffs allege 15 incidents of examples of Defendants' misconduct.

[14] According to Plaintiffs, traces by the ATF of guns involved in crimes (where the ATF contacts the manufacturer, who provides the name of the distributor) provides Defendants with actual notice that the distribution system supplies guns to an unlawful market. The ATF data further indicates that a very high percentage of guns traced to crime have been "funneled through" a small set of federally licensed dealers. Plaintiffs cite statements allegedly made by Robert Hass, former Senior Vice President of Marketing and Sales for Smith & Wesson, and Robert Lockett, 1993 (firearms) Dealer of the Year, to the effect that the gun industry knows that their guns seep into an illegal market but takes no action to prevent this.

[15] To restrict or impede the unlawful flow of firearms into Boston, Defendants could have (Plaintiffs allege) taken the following "reasonably available" steps:

(1) adequately investigate or screen distributors and dealers through which Defendants distribute and sell firearms;

(2) adequately monitor, supervise, regulate, and standardize distributors' and dealers' methods of distributing and selling firearms;

(3) conduct research (or heed existing research) to better monitor and control the flow of firearms to the illegal,

secondary market, and implement preventative strategies;

(4) "establish a tighter and more direct distribution system in which Defendants remain in control of the distribution of their lethal products";

(5) adequately train and encourage distributors and dealers to act lawfully and responsibly to ensure compliance with law:

(6) direct distributors and dealers to refuse to sell firearms when the distributor or dealer knows or should know that the firearm likely will not be used for lawful purposes;

(7) require distributors and dealers not to sell more than one handgun per month to any person not holding a federal firearms license, and to track sales to enforce this restriction:

(8) require distributors and dealers to sell only to retailers who stock guns for sale from retail stores, and not to sell guns over the Internet, at gun shows, or to "kitchen table" dealers;

(9) require distributors and dealers to certify compliance with all firearms laws and to provide documentation of sales employees' and sales agents' eligibility to sell guns;

(10) require distributors and dealers to carry a specified minimum amount of liability insurance coverage at all times;

(11) refrain (and require distributors and dealers to refrain) from rewarding sales persons or purchasers based on sale or purchase volume;

(12) require distributors and dealers to meet reasonable and specified security requirements to prevent theft;

(13) require distributors and dealers to maintain computerized inventory tracking programs containing information concerning the acquisition and disposition of every gun, and enforce this requirement;

(14) require distributors and dealers to maintain records of trace requests initiated by law enforcement agencies, and to report those requests to the firearm manufacturer;

(15) track and analyze trace requests from law enforcement agencies to determine where and when in the distribution chain the gun may have been diverted to crime, and take preventative measures to reduce diversions; and

(16) institute effective training, monitoring, and sanctions to enforce these requirements (including disciplining or terminating distributors and dealers Defendants know or should know distribute firearms to the illegal market or in an illegal or unsafe manner).

**[*9]** Plaintiffs also claim that Defendants' guns are unsafely designed in that Defendants fail to incorporate features which would inhibit unlawful access, transfer or theft by criminals, juveniles and other unauthorized users. The defective design results in thousands of unintentional deaths and non-fatal injuries per year, according to Plaintiffs. [16] Plaintiffs claim that failure to incorporate "personalized" gun technology (to prevent unauthorized or prohibited persons from obtaining access to and using guns) results in homicides and other crimes, some of which occur in Boston.

**[*10]** Plaintiffs claim that Defendants are in the best position to conduct research to correct the design of their guns. Plaintiffs allege that Defendants have been aware of the need for design features which would

[16] Plaintiffs allege that 23 percent of unintentional shooting deaths nationwide per year occur because the gun user is unaware that the gun is still loaded with ammunition. Plaintiffs allege that this is one reason that the firearm death rate for children aged 14 and under is 12 times higher in the United States than the combined rate in 25 other industrialized countries. According to Plaintiffs, about 35 percent of all unintended shooting deaths occur where the user of the gun is between ages 13 and 16, during which adolescents are attracted to accessible guns and discount the risks of handling a firearm. Plaintiffs claim that the risk that a potentially suicidal adolescent will kill himself doubles if a gun is kept in the home; a person aged 10 to 19 years commits suicide with a gun every six hours; guns are used in 65 percent of male teenager suicides and 47 percent of female teenager suicides, and firearm-related suicides account for about 81 percent of the increase in the rate of suicide among 15 to 19 year-olds from 1980 to 1992. In each allegation summarized in this footnote, Plaintiffs allege that some of the events described occurred in Boston.

inhibit straw purchases, reuse of stolen weapons and accidental discharges by unauthorized users, but that Defendants have failed to research, develop and implement feasible, available technology.

According to Plaintiffs, it has been reasonably foreseeable that Defendants' guns would come into the hands of unauthorized users. [17] Plaintiffs claim that Defendants have been aware or should have been aware that, when unauthorized users gain access to Defendants' guns, shootings may result. Unintentional shootings, suicides and crimes committed by juveniles and other unauthorized users could be prevented if Defendants implemented safer gun designs, Plaintiffs allege. Such designs, according to Plaintiffs, include built-in locking systems, magazine-disconnect safeties and chamber-loaded indicators. Plaintiffs claim that Defendants knew that by failing to implement such safety designs, it was reasonably foreseeable that stolen guns could be employed by unauthorized or prohibited **[*11]** users in violent criminal acts. Plaintiffs claim that they have been repeatedly victimized by Defendants' "unreasonably dangerous products." [18]

According to Plaintiffs, when Defendants manufactured, distributed, promoted, and/or sold these guns, they knew or should have known of the unreasonable dangers of the guns; Defendants knew of and had available to them safety devices or other measures which would decrease the dangers; Defendants are in the best position to correct the unreasonably dangerous design of their products, but have failed to remedy the deficiency and Defendants purposefully and intentionally engaged **[*12]** in their activities knowing that their products could be made to prevent firing by unauthorized users and knowing that Plaintiffs would be injured and forced to bear substantial expenses. Plaintiffs further allege that Defendants have acted in concert with each other in their failure to develop and implement safety features and implement proper warnings.

Plaintiffs claim that, to increase profits, Defendants have knowingly, purposefully, intentionally or negligently misled, deceived and confused Boston and its citizens regarding the safety of firearms. Defendants did this, Plaintiffs allege, by claiming falsely and deceptively through advertising that firearm ownership enhances security and that firearms are safe. Plaintiffs say that when Defendants made these claims, Defendants knew or should have known that studies and statistics show that presence of firearms in the home increases the risk of harm and that firearms without locking devices are unsafe. [19] Plaintiffs claim that, in Boston, numerous deaths and injuries have occurred when firearms were foreseeably used in unintentional shootings, suicides by teenagers, domestic disputes and other acts of violence.

**[*13]** Plaintiffs allege that Defendants' conduct undermines the Commonwealth's public policy

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[17] Plaintiffs allege that there are guns in about half the homes in the United States.

[18] Plaintiffs allege that each year a number of children in Boston are injured or killed because Defendants' firearms are sold without the means to prevent their use by unauthorized users, without adequate warnings and without adequate instruction regarding the importance of proper firearm storage.

[19] According to Plaintiffs, the referenced studies indicate that one out of three handguns is kept loaded and unlocked in the home; guns kept in the home for self-protection are 22 times more likely to kill or injure someone known by the owners than an intruder; a gun is used for protection in fewer than two percent of home invasion crimes when someone is home and for every time a gun in the home was used in a legally justifiable shooting, there were four unintentional shootings. seven criminal assaults or homicides and 11 attempted or completed suicides. Compl. at par. 72.

regarding handguns. Plaintiffs further allege that Defendants' conduct has caused Plaintiffs harm, including substantial financial costs for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants; increased spending on law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability, and unemployment benefits, higher prison costs and youth intervention programs and lower tax revenues and lower property values.

DISCUSSION

HN1[] The standard for evaluating the sufficiency of a complaint under Mass.R.Civ.P. 12(b)(6) is undisputed. The court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them in the plaintiff's favor. Eyal v. Helen Broad Corp., 411 Mass. 426, 429, 583 N.E.2d 228 (1991). Plaintiffs "need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim." Bell v. Mazza, 394 Mass. 176, 184, 474 N.E.2d 1111 (1985). **[*14]** HN2[] A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870 (1977) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). HN3[] "[A] complaint is not subject to dismissal if it would support relief on any theory of law," Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 89, 390 N.E.2d 243 (1979) (citations omitted; emphasis in original), "even though the particular relief [which the plaintiff] has demanded and the theory on which he seems to rely may not be appropriate." Nader, 372 Mass. at 104 (citations omitted). In addition, HN4[] "[a] complaint should not be dismissed simply because it asserts a new or extreme theory of liability or improbable facts." Jenkins v. Jenkins, 15 Mass. App. Ct. 934, 934, 444 N.E.2d 1301 (1983).

In this case, Defendants argue that the complaint should be dismissed because the claims are substantively deficient and the claims are barred by reason of six **[*15]** defenses, namely (1) Boston's harm is too remote to confer standing or establish proximate cause; (2) a municipality cannot obtain relief for the expenditure of funds to provide municipal services; (3) the economic loss rule bars recovery; (4) Plaintiffs improperly aggregate claims; (5) the Home Rule Amendment and the Firearms Act bar recovery and (6) the relief requested amounts to improper regulation of interstate commerce. Each issue will be addressed in turn.

I. The "Remoteness" Issue

Defendants argue that Plaintiffs' claims are entirely derived from harm or threatened harm to others and, therefore, Plaintiffs cannot establish standing or show that Defendants' alleged actions proximately caused the harm claimed. [20]

**[*16]** HN6[] Proof of a causal relationship between a defendant's action and a plaintiff's injury is essential in every tort "because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history," the concept of proximate causation was developed to limit the liability of a wrongdoer to only those harms with a reasonable connection to the wrongdoer's actions. *Laborers Local*

[20] Defendants discuss "remoteness" as if it were a free-standing doctrine. HN5[] The case law, however, considers remoteness as an element of either standing or proximate cause. Defendants do not separate their standing and proximate cause arguments. For purposes of clarity, the court addresses Defendants' arguments in terms of proximate causation, but the analysis is equally applicable to standing principles.

*17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 235 (2d Cir. 1999)*, cert. denied, *528 U.S. 1080, 145 L. Ed. 2d 673, 120 S. Ct. 799 (2000)* (hereafter "*Laborers Local*"). "The notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' degrees " *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)* (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 264 (5th ed. 1984)). [21]

**[*17]** *HN7*[↑] One way in which the concept of proximate cause operates is through the remoteness doctrine, which is sometimes called the direct injury test. *Holmes, 503 U.S. at 268*. This doctrine states that there must be "some direct relation between the injury asserted and the injurious conduct alleged." [22] *Id.* Thus, in general, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id. at 268-69* (citing 1 J. Sutherland, Law of Damages 55-56 (1882)).

This **[*18]** doctrine has been applied in Massachusetts. [23] In the "classic" [24] **[*19]** case of *Anthony v. Slaid*, 11 Met. (52 Mass.) 290, 291 (1846), the plaintiff, for a fixed annual compensation, contracted to support the poor of a Massachusetts town. After incurring increased expense in caring for a pauper who was the victim of an assault and battery, the plaintiff sued the party responsible for the attack. [25] The Supreme Judicial Court held that the injury to the plaintiff, which derived entirely from the pauper's injuries, was too remote and indirect because the relation between the plaintiff and the pauper was based on a "special contract" rather than as a "natural and legal relation." *Id.*

The Supreme Judicial Court took occasion to explain *Anthony in Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N.E. 477 (1932)*. In that case, the injured victim's employer sought to recover from the tortfeasor for the employer's loss, which resulted from the victim-employee's decreased work ability, which in turn had resulted from the tortfeasor's negligence. Holding that the injury to the employer was too remote, the Court emphasized that the relationship between the original victim and the plaintiff was based on contract. *Id. at 287*. In contrast, *HN9*[↑] where the plaintiff's loss is the effect of a

[21] The Second Circuit Court of Appeals described the notion of proximate cause as "an elusive concept." *Laborers Local*, 191 F.3d at 235. The United States Supreme Court noted that "the principle of proximate cause is hardly a rigorous analytic tool." *Blue Shield of Va. v. McCready, 457 U.S. 465, 477 n.13, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*.

[22] The Second Circuit stated in *Laborers Local* that, in *HN8*[↑] addition to time remoteness doctrine, other elements of proximate cause are the requirements of proof that the defendant's acts were a substantial cause of the injury and that the plaintiff's injury was reasonably foreseeable. *191 F.3d at 235-36*. Defendants' argument in this case rests solely on the remoteness inquiry.

[23] The parties have referred the court to no Massachusetts case articulating this doctrine as clearly as the cases previously discussed in the text. *Anthony v. Slaid*, 11 Met. (52 Mass.) 290 (1846), appears (insofar as the cases the parties discuss) to be the source of the doctrine. This court assumes, for purposes of this motion, that the doctrine is still recognized in Massachusetts.

[24] The case was characterized as "classic" in *Seafarers Welfare Plan v. Philip Morris, 27 F. Supp. 2d 623, 628 (D. Md. 1998)*.

[25] The party responsible was the attacker's husband. Anthony, II Met. (52 Mass.) at 290.

natural and legal relationship, such as a parent-child relationship, that loss is not too remote. *Id. at 284*; *Balian v. Ogassian, 277 Mass. 525, 531, 179 N.E. 232 (1931)* (father's damages--medical expenses incurred in treatment of injured son--not too remote that father could not recover from tortfeasor); *Dennis v. Clark, 56 Mass. (2 Cush.) 347, 354-55 (1848)* **[*20]** (same).

Similarly, the Supreme Judicial Court held, *HN10*[↑] the relationship between a master and an apprentice was so important and so like a parent-child relationship that the master could recover for injuries to the apprentice, whose services the master lost. *Chelsea Moving & Trucking Co., 280 Mass. at 284-85* (citing *Ames v. Union Ry. Co., 117 Mass. 541 (1875)*). The reason for this distinction, the Court said, was that the injury to an employer "is not the natural and probable consequence of the ordinary tort." *280 Mass. at 287*. Thus, the employer's injury was too remote because it was not foreseeable to the tortfeasor, who did not know of the contract. Had the tortfeasor known of the contract, a different result may have obtained:

It is not alleged that there was any knowledge on the part of the defendant of the contract between [the employee] and the plaintiff or that the negligence of the defendant had any relation to such knowledge. There is no allegation of malice on the part of the defendant toward the plaintiff or toward anybody. There was no negligent interference with a contract. There is no allegation of deliberate design by the defendant **[*21]** to accomplish a definite end regardless of consequences to others. If elements of that nature were present a quite different question would be presented.

*280 Mass. at 286*. See also *Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309, 72 L. Ed. 290, 48 S. Ct. 134 (1927)* (tortfeasor not liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong").

*HN11*[↑] From these cases, it is apparent that a plaintiff cannot recover from a defendant when the plaintiff's loss arises from harm the defendant caused to the injured party, absent some special relationship between the plaintiff and the injured party or, perhaps, an ordinary contract relationship of which the defendant knew. [26] There is no proximate cause under those circumstances because the plaintiff's harm is too "remote."

**[*22]** The cases the parties cite show that a plaintiff's harm arises from harm to a third party when it is "purely contingent on" or "wholly derivative of" harm to the third party. [27] *Laborers Local*, 191 F.3d at 236 & 237. *Holmes* itself was a case of "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." [28] *Holmes, 503 U.S. at 268, 269-70*.

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[26] See *Associated Gen. Contractors of Cal., Inc. v. California Store Council of Carpenters, 459 U.S. 519, 532 n.25, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (quoting 1 J. Sutherland, Law of Damages 55-56 (1882)) ("where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, *if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account . . .* ") (emphasis added & deleted).

[27] The Second Circuit held:

[Plaintiffs'] damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products . . . Being purely contingent on harm to third parties, these injuries are indirect.

*Laborers Local*, 191 F.3d at 239.

[28] As Defendants note, numerous other cases bar recovery where the harm the plaintiffs allege is wholly derivative of harm to third persons. A large number of these cases involve suits by health benefit funds against tobacco manufacturers and their public relations, lobbying and research firms. In

**[*23]** In this case, the principal portion of the complaint alleging harm states:

Defendants' conduct has caused [Plaintiffs] to incur public costs to respond to both intentional and accidental gunshot injuries. The harm to [Plaintiffs] includes substantial financial costs necessary for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants. Moreover, [Plaintiffs] have suffered economic injury as a result of increased spending on, among other things, law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs. Boston has further been damaged by lower tax revenues and lower property values.

Compl. at par. 76. [29]

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these cases, the harm to the funds (increased expenses) was found to be too remote, as it derived entirely from harm to third persons (the smokers). See, e.g., *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F.3d 788, 788-99 (5th Cir. 2000)*; *International Bhd of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818, 827 (7th Cir. 1999)*; *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957, 963-64 (9th Cir. 1999)*, *cert. denied*, ***528 U.S. 1075, 145 L. Ed. 2d 666, 120 S. Ct. 789 (2000)***; *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 932-33 (3d Cir. 1999)*, cert. denied, ***528 U.S. 1105, 145 L. Ed. 2d 713, 120 S. Ct. 844 (2000)***; *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 246 (D. Mass. 1999)*; *Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc., 42 F. Supp. 2d 943, 948 (D. Ariz. 1999)*; *Seafarers Welfare Plan v. Philip Morris, 27 F. Supp. 2d 623*, 630 D.Md. 1998). *Coyne v. American Tobacco Co., 183 F.3d 488, 494-95 (6th Cir. 1999)*, is slightly different and imports the remoteness doctrine into the context of standing of taxpayers to sue. A number of these cases also suggest that the health benefit funds sustained no injury (not even a remote injury), as the costs were ultimately passed on to others with the funds being mere "financial intermediaries." *International Bhd. of Teamsters*, 196 F.3d at 823-25. See also *Seafarers Welfare Plan, 27 F. Supp. 2d at 627-28*. Not all courts follow these cases. See *Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc., 83 F. Supp. 2d 70, 86 (D.D.C. 1999)*. Even within the circuits that decided the above-cited cases, lower courts have found factual distinctions that allow similar claims to proceed beyond the motion to dismiss stage. See *National Asbestos Workers Medical Fund v. Philip Morris, Inc., 74 F. Supp. 2d 221, 225-28 (E.D.N.Y. 1999)*.

[29] Additionally, and apart from the generalized allegations found throughout the complaint that Plaintiffs have suffered harm, Plaintiffs allege the following:

As for Count I (public nuisance): Defendants "have caused damage to the public health, the public safety and general welfare of the Boston residents, and have thereby wrongfully caused the plaintiffs to incur enormous costs in support of the public health, safety and welfare. The presence of illegitimately possessed and used firearms in Boston proximately results in significant costs to plaintiffs to enforce the law, arm its police force and to treat the victims of firearms." Compl. at pars. 83 & 84.

As for Count II (negligent distribution and marketing): Defendants' conduct has caused Plaintiffs "to expend substantially more resources than [they] otherwise would in the form of police services, fire services, emergency medical services, pension benefits, disability benefits, workers' compensation benefits, health care, expenses to provide additional security measures in public schools and other public facilities." *Id.* at par. 88.

As for Count III (breach of warranty by defective design): "the plaintiffs have paid and will continue to pay increased sums of money for police services, law enforcement, fire and rescue services, indigent health care, emergency medical services and other emergency services, pension benefits, disability benefits, workers' compensation benefits, health care, prison costs, increased security and other services in the public

**[*24]** This alleged harm is in large part not "wholly derivative of" or "purely contingent on" harm to third parties. Unlike the harm alleged in the cases discussed above, which would not have existed without harm to a third party, harm to Plaintiffs may exist even if no third party is harmed. For example, Plaintiffs allege that Defendants' conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile (who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants' conduct. Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services). Similarly, diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on individuals. [30] Plaintiff's' harm is in essence the type of **[*25]** harm typically suffered by municipalities due to public nuisances. Cf. *White v. Smith & Wesson*, 97 F. Supp. 2d (ND. Ohio 2000), 2000 WL 664176 at *6. Indeed, much of the harm alleged is of a type that can only be suffered by these plaintiffs.

**[*26]** To be sure, Plaintiffs do allege injuries that arise from harm to others. Plaintiffs allege, for example, increased costs for emergency medical services, funerals, pensions, disability and unemployment benefits and lost productivity of citizens and employees harmed by guns. In addition, some of the injuries not necessarily derivative of harm to others may be exacerbated if individuals themselves are harmed. Two points need be made on this.

HN12[↑] First, the remoteness doctrine, as it appears to exist in Massachusetts, contains an exception in cases of a special relationship between the plaintiff and the injured third party, such as a parent-child

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schools and other necessary facilities and services due to the threat of or actual use of the defendants' firearms . . . Furthermore, . . . Boston has suffered from diminished tax revenues and property values." *Id.* at pars. 97 & 98.

As for Count IV (breach of warranty by failure to warn): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98, see *id.* at pars. 106 & 108, and allege that "Boston has suffered from the lost productivity of certain citizens and employees harmed as a result of the use of defendants' products and suffered a direct loss of revenue from lost tax revenues due to diminished property values in areas of Boston where defendants' products are used." *Id.* at par. 107.

As for Count V (negligence): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98. See *id.* at pars. 115 & 116.

As for Count VI (unjust enrichment): Plaintiffs repeat, in substance, the allegations of par. 97, see *id.* at par. 119, and allege that they have been harmed by "the loss of substantial tax revenues as a result of diminished property values, loss of businesses and lost productivity of those individuals harmed by guns, due to the presence and use of guns throughout Boston." *Id.* at par. 120.

[30] In their reply brief, Defendants misconstrue the remoteness doctrine as that doctrine was applied in *Anthony* and in the other cases discussed in Defendants' original memorandum. In the reply brief, Defendants state that "if firearms never were misused by such third parties to inflict direct injury on other third parties, [Plaintiffs] would have no cause to incur any of the claimed expenses." Defs.' Reply Mem. at 4. The remoteness doctrine is concerned with harm that is solely derived from injury to another rather than harm that is caused by persons other than the defendant. Plaintiffs allege that it was Defendants' misconduct that caused Plaintiffs' harm. Defendants' briefs do not raise the argument that their liability is barred by the intervening criminal (or tortious) acts of third persons.

relationship or a close master-apprentice relationship *Chelsea Moving & Trucking Co., 280 Mass. at 284-85*. An additional exception may arise where the plaintiff and the injured third party, while not in a special relationship, have a relationship of which the defendant knew, or in cases where the defendant acted with malice or with a "deliberate design . . . to accomplish a definite end regardless of consequences to others." *Id. at 286*. As governmental bodies, Plaintiffs may have the type of special relationship **[*27]** that puts this case within the first exception to *Anthony* (if such an exception exists), and the complaint's allegations are sufficient to place the case within the second *Anthony* exception (if this exception exists).

The uncertainty about the state of the law expressed in the above paragraph raises the second point. *HN13*[⬆] It is settled law that a complaint should not be dismissed "simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins, 15 Mass. App. Ct. 934, 934, 444 N.E.2d 1301 (1983)*. A motion to dismiss is not an appropriate vehicle for "resolving undecided points of substantive law[.]" *M. Aschheim Co. v. Turkanis, 17 Mass. App. Ct. 968, 968, 458 N.E.2d 743 (1983)*.

Nearly all the cases to which the parties refer which apply the remoteness doctrine are non-Massachusetts cases. [31] While the *Anthony* case appears to be the ultimate source of the remoteness doctrine, the contours of that doctrine are ill-defined in Massachusetts. Even if Plaintiffs' allegations present an extreme theory of liability, a motion to dismiss is not the proper vehicle to challenge the theory. [32] **[*29]** See *New Eng. Insulation Co. v. Gen. Dynamics Corp., 26 Mass. App. Ct. 28, 30, 522 N.E.2d 997 (1988).* **[*28]** [33]

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[31] The most recent Massachusetts case cited was decided in 1934. See *Ross v. Wright, 286 Mass. 269, 273, 190 N.E. 514 (1934)*.

[32] In their memorandum, Defendants seek to persuade the court that, should the complaint stand, a veritable Pandora's box would be opened, because cities would be allowed to sue automobile manufacturers on the theory that vehicles are made so as to be able to violate speed laws and sue liquor manufacturers on the theory that Scotch bottles are capable of being opened and the contents consumed by underage drinkers. These examples misconstrue Plaintiffs' allegations. Plaintiffs allege that Defendants' misconduct (i.e., allegedly fueling and exploiting an illegal firearms market and allegedly manufacturing defective and unreasonably dangerous products) caused Plaintiffs to suffer the harm discussed in the text. An apt analogy, to use Defendants' illustration, would be allegations that the alcohol industry exploited and relied upon an illegal, secondary market of underage drinkers and sold defective products, causing harm. In other words, it is not the mere manufacture and sale of a lawful product of which Plaintiffs complain, but rather the tortious manufacture and sale.

[33] Defendants also argue that "practical and equitable considerations" reinforce their position. Defs.' Mem. at II. It is true that, in the context of the proximate cause analysis under the federal Racketeer Inf1uenced and Corrupt Organizations (RICO) Act, the Supreme Court identified three relevant factors: (1) the difficulty of ascertaining the amount of damages attributable to the misconduct rather than to some other source; (2) the difficulty of apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to prevent multiple recoveries and (3) whether suits by directly injured victims would vindicate the general interest in deterring injurious conduct. *Holmes, 503 U.S. at 269-70*. The difficulty in ascertaining damages in this case is best assessed when the case has gone beyond the pleading stage. For purposes of the pending motion, the complaint contains sufficient allegations of harm to survive. While Defendants characterize their connection to the alleged wrongdoing as being shippers of products that made their way, "by a series of

**[*30]** In sum, Plaintiffs' allegations are not, as a matter of law, barred by "remoteness."

II. The Free Public Services Issue

Defendants argue that the complaint should be dismissed because a municipality may not recover costs of providing public services. The principal Massachusetts case on which Defendants rely is *Town of Freetown v. New Bedford Wholesale Tire, Inc., 384 Mass. 60, 423 N.E.2d 997 (1981)*. The court does not read *Freetown* as broadly as do Defendants. [34]

**[*31]** In *Freetown*, the plaintiff town alleged that the defendants negligently dumped 750,000 used tires on town land. A fire broke out, and the town's fire department "incurred greater expense than usual and necessary" in extinguishing the fire. *384 Mass. at 61*. The town sought to recover for the defendant's alleged negligence or misrepresentation. The Supreme Judicial Court held that the town could not recover because the costs of controlling that type of fire were to be borne by the town. The Court noted that the establishment and maintenance of a fire department is for the benefit of the public. Implicit in the Court's decision is the determination that the costs of this public benefit are to be carried by the public as a whole, absent a contrary statute.

In this respect, *Freetown* is consistent with the other cases to which Defendants refer In *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322, 323 (9th Cir. 1983)*, the plaintiff city incurred great public expense after the defendant's train, containing liquefied petroleum gas, derailed. The Ninth Circuit (predicting Arizona law on an issue of First impression) held that the city could **[*32]** not recover its costs.

The cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement.

*Id.* (citation omitted). The court noted that while sometimes "new tort doctrines are required to cure an unjust allocation of risks and costs," such is not the situation "where a fair and sensible system for spreading the costs of an accident is already in place." *Id.* In addition, the court said, the state legislature had chosen to allocate to the government the costs in question, and the court doubted that judicial intervention was needed to call the attention of the state legislature to "the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill." *Id. at 324*.

Similarly, in *Township of Cherry Hill v. Conti Constr. Co., 218 N.J. Super. 348, 349, 527 A.2d 921*

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legal and illegal acts beyond the manufactures' control," to persons who misused them, Defs.' Mem. at 13, Plaintiffs allege that Defendants could have exercised control over the distribution of their product. E.g., Compl. at pars. 59-60.

[34] In their original memorandum, Defendants state that the rule articulated in the *Freetown* case "is a corollary of the 'fireman's rule.' degrees " Def's.' Mem. at 15 n.2. Subsequently, the Appeals Court stated that "the firefighter's rule has no continuing vitality in Massachusetts." *Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 608-09, 724 N.E.2d 336 (2000)*. In their supplemental memorandum, Defendants argue that the fact that the Commonwealth no longer follows the firefighter's rule "has no effect on the continued vitality of the municipal cost recovery doctrine, as applied by the Supreme Judicial Council [sic] in *Freetown*." Defs.' Supp. Mem. (dated June 1, 2000), at final (unnumbered) page of argument section. The court does not rule on the relationship between the firefighter's rule and the *Freetown* doctrine.

(N.J.Super.Ct.App.Div. 1987), **[*33]** where the plaintiff town sought to recover expenses (largely police overtime) incurred when the defendant ruptured a natural gas main, recovery was barred. "Government has traditionally assumed the ultimate cost of providing basic emergency services that protect the community." *Id.* "The policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences." *Id.* (quoting Krauth v. Israel Geller & Buckingham Homes, Inc., 31 N.J. 270, 274, 157 A.2d 129 (1960) (applying firefighter's rule, which shifts to taxpayers' financial responsibility for firefighter's or police officer's injury)). See also District of Columbia v. Air Florida, Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1078, 1080 (D.C. Cir. 1984) (District must bear costs arising from crash of airplane); County of Lassen v. State, 4 Cal. App. 4th 1151, 1154, 1156, 6 Cal. Rptr. 2d 359 (Cal.Ct.App. 1992) (county must bear costs of defending inmate suit).

What each of these cases has in common **[*34]** is that the acts causing the damage were of the sort the municipality reasonably could expect might occur, and each of the results was a discrete emergency. Fires, fuel spills and ruptured gas mains are all frequent happenings which, while every effort is made to prevent them, can be expected to occur. Train derailments and airplane crashes are more unusual, but not so rare that a municipality can never expect to have to respond to such an emergency. The cases thus stand for the principle that such contingencies are part of the normal and expected costs of municipal existence, and absent legislation providing otherwise are costs to be allocated to the municipality's residents through taxes. In addition, in those cases there is no evidence that the specific defendants had engaged in a repeated course of conduct causing recurring costs to the municipality.

This case is different. Plaintiffs allege wrongful acts which are neither discrete nor of the sort a municipality can reasonably expect. Plaintiffs allege that Defendants maintained and exploited an illegal firearms market, knowing that the market would and did cause Plaintiffs harm. Defendants' argument based on *Freetown* **[*35]** thus fails because that case and other cases applying the same doctrine do not extend the rule as far as Defendants contend. Accord City of Flagstaff, 719 F.2d at 324 HN14[↑] ("Recovery has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate").

III. The Economic Loss Rule

Defendants argue that Plaintiffs' claims are barred by HN15[↑] the economic loss rule, which prohibits recovery in negligence for purely economic loss. Clark v. Rowe, 428 Mass. 339, 342, 701 N.E.2d 624 [1998]. The rule provides that

. . . HN16[↑] when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the plaintiff's person or property, the plaintiff may not recover for purely economic losses. Garweth Corp. v. Boston Edison Co., 415 Mass. 303, 305, 613 N.E.2d 92 (1993).

Priority Finishing Corp. v. LAL Constr. Co., 40 Mass. App. Ct. 719, 719 n.2, 667 N.E.2d 290 (1996).

Analytically, the economic loss rule occupies an uncertain legal position. Marking the boundary between tort and contract law, the rule may be seen as functionally **[*36]** part of the causation analysis and a limit on boundless recovery. See John M. Palmeri & Monty L. Barnett, The Continuing Vitality of the Economic Loss Rule, 31 Land & Water L. Rev. 757, 758-59 (1996). As such, it may be understood as part of the foreseeability element of proximate cause. *Id.* at 761-62. It may also be understood as going to whether

there existed a duty to another person or class of persons. *Id.* at 765. A defendant's fault appears to have some role in the economic loss rule. *Id.* at 761-62. [35] **[*37]** Additionally, as discussed below, the rule serves to separate tort and contract claims by encouraging parties to allocate risk contractually. In Massachusetts, the economic loss rule has been applied in cases where actions by a defendant interfered with a plaintiff's contract [36] and in products strict liability cases. [37]

Both types of cases, of course, lie at the boundary of tort and contract law. The reason for the rule in products liability cases is that when a product causes **[*38]** only economic loss, [38] a commercial user of the product is best left to his contractual remedies. *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 109-10, 533 N.E.2d 1350 (1989)*. ***HN17***[⬆] In the typical products liability case where the economic loss rule is applied, a product that the defendant manufactures proves defective, and the purchaser bears costs to repair the product, and usually suffers from loss of business as well. See, e.g., *id. at 104*. The economic loss rule is justified because a "commercial user can protect himself by seeking express contractual assurances concerning the product (and thereby perhaps paying more for the product) or by obtaining insurance against losses." *Id. at 109-10*. In contrast, a person physically injured by the product "had neither the bargaining power nor the opportunity to bargain" to protect himself. *Id. at 110*. See also *Restatement (Third) of Torts: Products Liability § 21*(1997).

**[*39]** In my view, the economic loss rule does not

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[35] The authors state:

Two generalizations underlie the numerous exceptions [to the economic loss rule]. First, the common rationale for allowing recovery of purely economic losses is formability. Second, the degree to which a defendant knew or should have known the extent of the consequences of negligent conduct, including economic loss, plays a dispositive role in a court's holding, more knowledge means more culpability.

One differentiating factor between those cases allowing recovery and those denying recovery is foreseeability; that is, recovery hinges on whether a defendant could foresee that time negligent conduct would cause harm to a specific person, known class of persons, or foreseeable persons under the circumstances.

Palmueri & Barret, *supra*, at 761-62, 765 (footnotes omitted).

[36] See *FMR Corp. v. Boston Edison Co., 415 Mass. 393, 395, 613 N.E.2d 902 (1993)* (plaintiffs claimed defendants' negligent conduct caused plaintiffs to sustain damages from loss of income and increased costs of doing business); *Garweth Corp., 415 Mass. at 305* (plaintiff claimed defendant's conduct caused plaintiff to sustain monetary losses in connection with contract); *Stop & Shop Cos. v. Fisher, 387 Mass. 889, 893, 444 N.E.2d 368 (1983)* (plaintiff claimed that defendant's negligence in striking bridge caused economic injury to plaintiffs). See also *Restatement (Second) of Torts § 766C* (1979).

[37] See *Marcil v. John Deere Indus. Equip. Co., 9 Mass. App. Ct. 625, 630-31, 403 N.E.2d 430 (1980)* (plaintiff claimed manufacturing defect in construction equipment caused plaintiff business losses). See also *Restatement (Third) of Torts: Products Liability § 21*(1997).

[38] "Economnic loss" in time products liability setting is "the cost of repairs and lost profits." *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 107, 533 N.E.2d 1350 (1989)*. ***HN18***[⬆] The Appeals Court defined "economic loss" as including "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property . . ." *Marcil, 9 Mass. App. Ct. at 630 n.3* (quoting *Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 199, 7 Ill. Dec. 113, 364 N.E.2d 100 (1977)*).

compel dismissal of this case for several reasons.

First, Plaintiffs' allegations here differ from those in cases where the economic loss rule was applied. Insofar as the complaint states allegations under products liability law, this case is dissimilar to the typical products suit discussed above. The reasons supporting application of the economic loss rule to strict products liability actions, essentially risk-allocation principles, do not apply to the allegations in this case with the same force as in the usual products liability action. See *Clark, 428 Mass. at 342* (Refusing to apply the economic loss rule to legal malpractice, the Court stated, "When the economic loss rule has been applied, the parties usually were in a position to bargain freely concerning the allocation of risk, and, more importantly, there was no fiduciary relationship"). To the extent the complaint states allegations analogous to the other line of cases applying the rule (interference with a contract or economic opportunity), Plaintiffs allege that it was foreseeable that they would suffer harm. Also, Plaintiffs have an interest in the safety **[*40]** and welfare of the residents of Boston. Accord *Priority Finishing Corp., 40 Mass. App. Ct. at 721* (noting that bailee of damaged property not barred by economic loss rule from recovering for financial harm because "the plaintiff's pecuniary losses are derived from physical harm to property for which the plaintiff has a right to recover").

Secondly, while the allegations of harm in this case include economic harm, they are not limited to that type of harm. See, e.g., Compl. at par. 76 (Plaintiffs incurred "public costs"); at par 83 (Plaintiffs incurred "enormous costs in support of the public welfare"); at pars. 107 & 120 (loss of productivity of individuals harmed).

Finally, as noted, the uniqueness of the allegations of this case counsels against dismissal at the pleading stage. [39]

**[*41]** IV. The Aggregation Issue

Defendants next argue that the complaint must be dismissed because it improperly aggregates claims that individually could not survive the pleading stage, that are too "amorphous" and that are "factually diverse independent claims." As to the argument that the complaint improperly combines separate claims that are individually deficient, I defer discussion to the substantive claims (see pages 30 to 41).

Defendants' second argument is that the complaint is vague because Plaintiffs have brought suit "on the basis of some amorphous injury to unspecified citizens linked in only general terms to some amorphous wrong by a group of defendants." I disagree. In my view, the complaint meets basic notice pleading requirements.

Defendants' third argument is that this action is an effort to aggregate factually and legally diverse individual claims as a strategic effort to bypass the difficulty of proving causation or the existence of a tort, and to overcome affirmative defenses. Defendants misconstrue Plaintiffs' allegations. As noted in the discussion of "remoteness," Plaintiffs do not seek to aggregate multiple claims of individuals and recover on **[*42]** their behalf. Rather, Plaintiffs, two government bodies who have advanced various theories of liability, claim that Defendants' conduct caused harm to them. The harm alleged, including costs for preventative measures, youth intervention programs, increased security at schools and other public buildings and emergency rescue services, is not the same as harm to individuals.

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[39] Defendants' argument that the economic loss rule requires dismissal of the claims for public nuisance and unjust enrichment is without merit, as the rule does not appear to apply to such claims. See *Garweth Corp., 415 Mass. at 306*.

V. Home Rule Amendment and Preemption

In their analysis of the Home Rule Amendment to the Massachusetts Constitution, Defendants advance two distinct arguments. First, they argue that Plaintiffs lack authority to bring this action under the Home Rule Amendment, Mass. Const. Art. Amend. 2, § 6 ("HRA"). Secondly, they claim that this action is preempted by the Massachusetts Firearms Act, *G.L.c. 140, §§ 121 et seq.*

*HN19*[↑] Turning first to the Home Rule Amendment, the Legislature provides municipalities with the express statutory right to sue and be sued. *G.L.c. 40, § 2*. [40] It is well established that cities and towns have authority to initiate suits to recover damages under tort and contract theories. [41] See, e.g., *Town of Middleborough v. Middleborough Gas & Elec. Dep't, 422 Mass. 583, 585, 664 N.E.2d 25 (1996).* **[*43]**

**[*44]** Defendants' Home Rule [42] **[*45]** argument is premised on a misinterpretation of Plaintiffs' claims. According to Defendants, Plaintiffs claim "statutory authority to regulate through litigation." Plaintiffs, however, do not seek to regulate but rather assert common law and statutorily based claims. The terms "ordinance" and "by-law" found in the Home Rule Amendment are not so broad as to encompass civil actions like this case. That the courts of the Commonwealth have recognized the existence of tort and contract actions by municipalities, before and after ratification of the Home Rule Amendment, belies such an expansive interpretation. [43]

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[40] *HN20*[↑] *General Laws c. 40, § 2* provides:

A town may in its corporate capacity sue and be sued by its name, and may appoint necessary agents therefor.

This reference only to "town" is complemented by *HN21*[↑] *G.L.c. 40, § 1*, which makes clear that *§ 2* applies to cities as well. *Section 1* states:

Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in time acts relating thereto. Except as expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.

[41] Of course, the Boston Public Health Commission is the second plaintiff. However, Defendants make no separate argument as to the commission's authority to be a plaintiff, and they treat both plaintiffs the same. In the complaint, Plaintiffs rely on *G.L.c. 111, § 122* (and Append. 2-4 & 2-5), for the commission's authority to sue.

[42] Article 89 of the Amendments to the Constitution of the Commonwealth was ratified in 1966, and is commonly known as the Home Rule Amendment. This replaced the existing Article 2. At present, *HN22*[↑] Article 2 of the Amendments, section 6, reads in full:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

*HN23*[↑] *General Laws c. 43B, § 13* (part of the Home Rule Procedures Act), largely tracks the language of the Home Rule Amendment. *Section 13* has as its subject ordinances or by-laws, and "legislative or executive actions."

[43] In a footnote in their reply brief, Defendants argue that while *G.L.c. 40, § 2* empowers municipalities to sue and be sued in their own names, the scope of that empowerment derives from some other authority, such as the Home Rule Amendment. This argument has no merit. As noted, cities and towns have long had the authority to initiate tort and contract actions. The

In their reply brief, Defendants seek to distinguish between a city acting in "corporate capacity" and one acting in its "government capacity." Thus, Defendants argue, the language in G.L.c. 40, § 2 (allowing a town--and, through § 1, a city--to sue "in its corporate capacity," does not allow a city to sue in its "governmental capacity." [44] This argument simply repeats the contention that Plaintiffs are seeking to **[*46]** regulate by lawsuit.

**[*47]** Defendants next argue that this action is preempted by the Massachusetts Firearms Act, G.L.c 140, § 121 et seq., and by state regulations regarding firearms, *940 Code Mass. Regs. §§ 16.00 et seq.* (regulations promulgated under G.L.c. 93A). In support of this argument, Defendants recite the standard for determining whether a local ordinance or by-law is inconsistent with and thus preempted by a state statute. See Boston Gas Co. v. City of Newton, 425 Mass. 697, 699, 682 N.E.2d 1336 (1997). [45] **[*48]** They argue that the Firearms Act is so comprehensive that the court should infer a legislative intent to preempt the field. [46]

Defendants' argument fails because this is a tort and contract case, not a suit about a local by-law or ordinance. The issue before the court is not whether the statute and regulations preempt an ordinance or by-law, but whether the statute abrogates this state's common law of tort and contract and the relevant portions of the Uniform Commercial Code relating to warranties. "HN25[] An existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication." Eyssi v. Lawrence, 416 Mass. 194, 199-200, 618 N.E.2d 1358 (1993) (quoting Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 521, 413 N.E.2d 690 (1980)). See also General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 804-05, 711 N.E.2d 589 (1999). "Moreover, HN26[] '[a] statute is not to be interpreted as effecting a material change in

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court does not believe that c. 40, § 2 requires that there exist specific statutory or constitutional authorization as to every asserted tort or contract cause of action before a city or town may initiate a suit. Defendants cite no authority to support that position.

[44] The sole Massachusetts authority on which Defendants rely to support this distinction is Higginson v. Treasurer & Sch. House Comm'rs of Boston, 212 Mass. 583 (1912). *Higginson* held that the legislature had authority to designate city parkland as the site for a school building. The Court stated that there existed two characters of city and towns, a governmental capacity and a capacity similar to a private corporation. Id. at 585. Defendants make this distinction, apparently, to suggest that G.L.c. 40, § 2 only allows municipalities to sue in their "corporate capacity" (i.e., acting in the nature of a private corporation), and not in their "governmental capacity." Regardless which capacity Plaintiffs are suing in, the cases discussed plainly allow contract and tort suits to be brought by municipalities. Defendants cite no Massachusetts case barring suit and relying on the distinction made in *Higginson*. In Slama v. Attorney Gen., 384 Mass. 620, 623-24, 428 N.E.2d 134 (1981), the Court made a different distinction and suggested that "corporate capacity" meant a municipality acting as a distinct entity, and "representative capacity" meant a municipality acting as a representative of its citizens, the actual rightholders, for whom it would be difficult or impossible to assert claims.

[45] HN24[] To determine whether an ordinance or by-law is inconsistent with state law, the Court asks (1) whether there was an express legislative intent to forbid local activity on the same subject, (2) whether the local regulation would frustrate the purpose of a statute so as to warrant an inference that the Legislature intended to preempt the subject or (3) whether legislation on the subject is so comprehensive that legislative intent to preempt can be inferred, as any local enactment would frustrate the statute's purpose. Boston Gas Co., 425 Mass. at 699.

[46] Defendants make no separate argument in relation to the regulations in ***940 Code Mass. Regs. §§ 16.00 et seq.***

or repeal of the common law unless the intent to do so is clearly expressed.' degrees " *Eyssi, 416 Mass. at 200* **[*49]** (quoting *Riley v. Davison Constr. Co., 381 Mass. 432, 438, 409 N.E.2d 1279 (1980)* (alteration by *Riley* Court)); *Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 610, 724 N.E.2d 336 (2000)*. Defendants cite no authority, and the court has found none, stating that the Firearms Act or the regulations clearly express an intent to abrogate the common law, or that they do so by necessary implication. [47]

VI. The Commerce Clause Issue

Defendants next argue that this suit is barred by the *Commerce Clause.* [48] ***[*51]*** *U.S. Const. Art I, § 8*. [49] The affirmative grant to Congress of authority to regulate interstate commerce encompasses a "dormant" limitation on the authority of states to enact legislation affecting interstate commerce. *Healy v. Beer Inst., 491 U.S. 324, 326 n 1, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989).* **[*50]** In this respect, *HN27*[↑] the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *id. at 336* (quoting *Edgar v. MITE Corp., 457 U.S. 624, 642-43, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982))*, and bars "a statute that directly controls commerce occurring wholly outside the boundaries of a State regardless of whether the statute's extraterritorial reach was intended by the legislature," *id.* (quoting *Brown-Forman, Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986))*. "The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also . . ., how the challenged statute may interact with the legitimate regulatory regimes of other States . . ." *Id.* [50] The applicability of the Commerce Clause to causes of action under state tort and contract law is unsettled.

The standard for analysis under the Commerce Clause has its focus on positive law--statutes or regulations. See *CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987)* **[*52]** ("*HN29*[↑] The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against

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[47] I do not intend anything in this decision to affirm the propriety of the injunctive relief Plaintiffs seek. Any such comment would be highly premature.

[48] Defendants frame their argument in terms of the Commerce Clause. In one paragraph of their memorandum, Defendants discuss Due Process principles, in connection with *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996). Because the thrust of this portion of their memorandum clearly focuses on a Commerce Clause argument, the court declines to read this paragraph of defendants' memorandum as raising a Due Process argument any broader than the doctrine discussed in *BMW of N. America.*

[49] Clause 3 of Art. I, § 8, grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

[50] The United States Supreme Court has summarized its two-tiered approach as follows:

*HN28*[↑] When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

*Healy, 491 U.S. at 337 n. 14* (quoting *Brown-Forman Distillers Corp., 476 U.S. at 579*) (citations omitted).

interstate commerce). [51] With one exception, none of the cases Defendants cite as conducting a Commerce Clause analysis involve application of a remedy by a court after finding defendants liable under state tort and contract law. See, e.g., *Healy, 491 U.S. at 326 (Connecticut statute)*; *Brown-Forman Distillers Corp., 476 U.S. at 584 (New York statute)*, *Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 679, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981)* (Iowa statute); *Hughes v. Oklahoma, 441 U.S. 322, 323, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)* (Oklahoma statute); *Hunt v. Washington State Apple Adver. Comm'n. 432 U.S. 333, 354, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)* (Washington statute); *Dean Foods Co. v. Brancel, 187 F.3d 609, 620 (7th Cir. 1999)* (Wisconsin regulations); *Knoll Pharm. Co. v. Sherman, 57 F. Supp. 2d 615, 623 (ND. Ill. 1999)* (Illinois statute).

**[*53]** Nonetheless, the Supreme Court did state, in *BMW of N. America, Inc. v. Gore, 517 U.S. 559, 572, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)*, that Commerce Clause principles apply in some civil suits, although the Court recognized that *HN30*[↑] state civil suits may proceed even though the result may be to effect a change in out-of-state practices. [52] **[*54]** , [53] In *BMW of N. America*, the plaintiff alleged that failure to disclose that the new automobile he purchased in Alabama had been damaged and repainted constituted fraud under Alabama law. The repainting occurred in Georgia, and the nondisclosure was due to a nationwide BMW policy not to advise car dealers of repairs to new cars if the repair cost was no more than 3 percent of the suggested retail price. After trial, the jury awarded the plaintiff compensatory damages and $ 4 million in punitive damages. The plaintiff argued that the large punitive damage award was necessary to change BMW's policy nationwide.

The Supreme Court held that "*HN32*[↑] a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States" *Id. at 572* (footnote omitted). Economic penalties (in the form of legislatively authorized fines or judicially imposed punitive damages) "must be supported by the State's interest in protecting its own consumers and its own economy." *Id.* Thus, Alabama could not "punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents, **[*55]** " and could not "impose sanctions on BMW in order to deter conduct that is lawful [54] in

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[51] See also *Dennis v. Higgins, 498 U.S. 439, 447, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991)* (Commerce Clause is limitation on "the power of the States to enact laws imposing substantial burdens on [interstate] commerce") (quoting *South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)*; alteration added).

[52] The Court stated: "*HN31*[↑] State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. America, 517 U.S. at 572 n.17*. The Court cited *New York Times Co. v. Sullivan, 376 U.S. 254, 265, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)* (relating to defamation and First Amendment), and *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)* (relating to displacement of state jurisdiction under National Labor Relations Act).

[53] The Court's statements in this regard may properly be characterized as dicta, since the Court assumed that the ultimate damage award of $ 2 million (after remittitur by the Alabama Supreme Court) was based only on conduct occurring in Alabama and held that even this award was grossly excessive. *BMW of N. America, 517 U.S. at 574*. Thus, the Commerce Clause discussion was not necessary to the Court's analysis. See *id. at 604* (Scalia, J., dissenting); *id. at 607* (Ginsburg, J., dissenting).

other jurisdictions." *Id. at 573*. Applying notions of fairness, [55] the Court concluded that the punitive damages award was grossly excessive.

Thus, the Supreme Court never held that the plaintiff's suit in the *BMW* case was barred by the Commerce Clause. In fact, the Court appeared to take for granted that the suit was proper, as would legislation have been obtaining the same result:

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors **[*56]** to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation . . . The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.

That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement.

*Id. at 568-70* (footnotes omitted). What the Supreme Court held to be improper was, in part, seeking to change BMW's conduct in other states. *Id. at 572*. See also *id. at 572 n. 18* ("The record discloses no basis for [the plaintiff's] contention that BMW could not comply with Alabama's law without changing its nationwide policy").

Here, Plaintiffs allege violations of longstanding state law and seek remedies specific to these violations. Plaintiffs seek compensatory, not punitive, damages, which the Supreme Court never questioned in *BMW of* **[*57]** *N America*. [56] **[*58]** Certainly, some of the expansive injunctive relief Plaintiffs seek (e.g., to enjoin "manufacturing, distributing, or offering for sale firearms without appropriate safety devices and warnings, including devices designed to prevent unauthorized use") can be read to seek directly to impact out-of-state conduct. However, as I have previously emphasized, all I now decide is a motion to dismiss for failure to state a claim. The scope and constitutionality of any remedy, should Plaintiffs succeed at trial, is appropriately left to the judge who will have the benefit of a full factual record. [57] The court then will also be able to determine whether the intent of any of the proposed remedies is to deter or punish for out-of-state conduct, or whether the

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[54] The Supreme Court did not consider whether a State may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America, 517 U.S. at 573 n.20*.

[55] While the Supreme Court discussed notions of fairness enshrined in "constitutional jurisprudence," the Court appeared to rely on Due Process. *BMW of N. America, 517 U.S. at 574 n.22*.

[56] See *BMW of N. America, 517 U.S. at 576* ("But this observation [that infliction of economic injury may warrant a substantial penalty] does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages").

[57] Defendants point out that the alleged diversions into an illegal firearms market can occur anywhere in the country and thus an injunction could have the effect of forcing Defendants to change its practices nationwide. Again, an argument as to the scope of injunctive relief, should such an argument be necessary and should injunctive relief be deemed appropriate, is best addressed at a later stage of litigation. Also, as noted, the Supreme Court has left open the question whether a state may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America, 517 U.S. at 573 n.20*.

intent is to protect residents of Boston. See *BMW of N. America, 517 U.S. at 572-73*. [58]

The contention that the allegations of the complaint violate the Commerce Clause is also weakened **[*59]** by the existence of the Firearms Act, *G.L.c. 140, §§ 121 et seq.*, and the Attorney General's regulations, 940 Code Mass. Regs. §§ 1600 et seq. Defendants have not attempted to argue why maintaining this action violates the Commerce Clause while the Firearms Act and the regulations do not.

VII. The Substantive Claims

Finally, Defendants argue that each of the six counts in the complaint is legally deficient.

Public Nuisance

*HN33*[] A public nuisance is an "unreasonable interference with a right common to the general public." [59] *Restatement (Second) of Torts § 821B(1)* (1979) (quoted in *Leary v. Boston, 20 Mass. App. Ct. 605, 609, 481 N.E.2d 1184 (1985)*).

**[*60]** *HN35*[] Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

*Restatement (Second) of Torts § 821B(2)*. *HN36*[] A public nuisance differs from a private nuisance: "It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property" W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90, at 643 (5th ed, 1984). Thus, in its broadest statement, the concept of a public nuisance "seems unconnected to place or property." *Leary, 20 Mass. App. Ct. at 609*.

*HN37*[] Liability for a public nuisance may arise even though a person complies in good faith with laws and regulations. **[*61]** *Hub Theatres, Inc. v. Massachusetts Port Auth., 370 Mass. 153, 156, 346 N.E.2d 371 (1976)*; *Strachan v Beacon Oil Co., 251 Mass. 479, 488, 146*

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[58] Defendants state that, according to the complaint, most of the sales of firearms to distributors took place outside Massachusetts. This appears to speak to a personal jurisdiction argument, and Plaintiffs appear to have interpreted it as such. Nevertheless, Defendants in their reply brief emphatically deny that they dispute personal jurisdiction. Defs.' Reply Mem. at 32.

[59] See also *Planned Parenthood League of Mass., Inc. v. Bell, 424 Mass. 573, 578 n.4, 677 N.E.2d 204*, cert. denied, ***522 U.S. 819, 139 L. Ed. 2d 32, 118 S. Ct. 72 (1997)*** *HN34*[] ("A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury") (quoting *Connerty v. Metropolitan Dist. Comm'n, 398 Mass. 140, 148, 495 N.E.2d 840 (1986)*) (emphasis added); *Restatement (Second) of Torts § 821B, cmt. h* ("a public nuisance does not necessarily involve interference with use and enjoyment of land . . . When the particular harm consists of interference with the use and enjoyment of land, the public nuisance may also be a private nuisance . . .").

N.E. 787 (1925).

HN38[] Liability extends to all who join or participate in the creation or maintenance of a public nuisance. Attorney Gen. V. Baldwin, 361 Mass. 199, 208 n.3, 279 N.E.2d 710 (1972).

Defendants argue that Plaintiffs' claim fails because it does not arise from activities on or related to property. However, as noted, a public nuisance is not necessarily one related to property. Defendants also argue that the claim fails because Plaintiffs cannot allege that the manufacturers owned or had control of the land or instrumentality that caused the harm, citing Belanger v. Commonwealth, 41 Mass. App. Ct. 668, 670 n.3, 673 N.E.2d 56 (1996). *Belanger*, however, addressed private nuisance, which is, as noted, distinct from public nuisance. [60] Defendants also cite Commonwealth v. Mead, 153 Mass. 284, 286, 26 N.E. 855 (1891). In *Mead*, a criminal case, the nuisance alleged was the keeping of a tenement used for the sale of intoxicating liquors. As such, **[*62]** *Mead* was a case where the nuisance was one connected with property, but the case does not hold that the connection is required. See id. at 286. [61] **[*63]** Plaintiffs allege that Defendants created and supplied an illegal, secondary market in firearms. The "instrumentality" which Plaintiffs allege Defendants controlled is the creation and supply of this secondary market. [62]

Review of the complaint shows that Plaintiffs allege Defendants intentionally and negligently created and maintained an illegal, secondary firearms market. They further allege that this market unreasonably interfered with public rights by (1) significantly interfering with the public safety, health, or peace, (2) producing permanent or long-lasting harm and (3) undermining Massachusetts firearms law, making enforcement of those laws difficult or impossible. Compl. Pars. 79 & 81. [63] Thus, the complaint alleges sufficient facts to state a claim for public nuisance. [64] To be sure, the legal theory

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[60] "HN39[] A private nuisance is actionable when a property owner creates, permits, or maintains a condition . . . that causes a substantial and unreasonable interference with the use and enjoyment of the property of another." Belanger, 41 Mass. App. Ct. at 670 n.3 (quoting Asia v. Fitchburg, 24 Mass. App. Ct. 13, 17, 505 N.E.2d 575 (1987)).

[61] Along similar lines is Massachusetts v. Pace, 616 F. Supp. 815, 821 (D. Mass. 1985), which Defendants also cite. In that case, the federal court held that the defendants did not participate to a substantial extent in the release of chemicals into the ground when the defendants only transported the chemicals to a chemical waste reclamation facility, which did release the chemicals into the ground. Thus, the nuisance in *Pace* was also of the type connected to property.

[62] In their reply brief, Defendants argue that, in order to exercise control to abate the nuisance, they would have to "identify[] all criminals and disarm[] them--something neither defendants, nor [Boston] with all its statutory and law enforcement resources can do." This argument misses the point of Plaintiffs' allegations. To exercise control to abate the alleged nuisance, Defendants would have to cease maintaining the illegal, secondary market.

[63] Plaintiffs have also alleged that they sustained special or peculiar harm.

[64] In a footnote to their original memorandum, Defendants observe that Plaintiffs have not pled that Boston's Corporation Counsel has initiated this action. Defendants conclude this makes Boston not a proper party. Defs.' Mem. at 21 n.5. Under Chapters of the City of Boston Code, the city's law department is placed under the charge of the Corporation Counsel. The ordinance states in pertinent part that the Corporation Counsel "shall, subject to the direction of the Mayor, institute any suit or proceeding in behalf of the City which line shall deem the interest of the City requires; shall by himself or by his assistants in the Law Department appear as Counsel in all suits, actions, or prosecutions which may

is unique in the Commonwealth but, as previously **[*64]** noted, that is not reason to dismiss at this stage of the proceedings.

**[*65]** Negligent Distribution and Marketing

Defendants argue that Plaintiffs' claim for negligent distribution and marketing fails because, as a matter of law, Defendants did not owe Plaintiffs a duty to protect from the criminal acts of third parties. [65] **[*66]** Here, too, Defendants misconstrue the complaint. Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs. [66]

*HN40*[↑] To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty; the defendant breached that duty and that this breach actually and proximately caused injury *Davis v Westwood Group, 420 Mass. 739 742-43, 652 N.E.2d 567 (1995)*. The existence of a duty is a question of law. *Id. at 743*; *Bergendahl v Massachusetts Elec. Co., 45 Mass. App. Ct. 715, 722-23, 701 N.E.2d 656 (1998)*, rev, denied, *428 Mass. 1111, 707 N.E.2d 1078*, cert. denied, *528 U.S. 929, 145 L. Ed. 2d 254, 120 S. Ct. 326 (1999)*. *HN41*[↑] "In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy. A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm." *Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 629, 536 N.E.2d 1067 (1989)* **[*67]** (citation omitted).

Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged--the creation of the illegal, secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that

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involve the rights or interests of the City[.]" City of Boston Code, Ordinances, c. 5, § 5-8.1 (1985 & 1999 update). Defendants cite no cases or rule of civil procedure, and present no argument as to why the quoted language from the city ordinance requires that the city plead that it has satisfied the ordinance, and why failure to do so requires dismissal. Plaintiffs do not address this issue in their opposition memorandum, and Defendants do not raise it in their reply memorandum or their sur-reply memorandum. See *Mass.R.Civ.P. 9(a)*. Defendants thus have not pressed this issue.

[65] Defendants' argument is framed in terms of the first element of a negligence action, the existence of a duty of care. However, the penultimate paragraph of this portion of their memorandum speaks of misuse of a firearm as being a bar to recovery. Defs.' Mem. at 34. This confronts the proximate causation analysis, which is an issue distinct from whether there exists a duty of care. To the extent Defendants argue that liability is barred by the intervening acts of third persons, such an argument fails in Massachusetts if the third person's acts could have been foreseen, which is what Plaintiffs allege. See *Poskus v. Lombardo's of Randolf, Inc., 423 Mass. 637, 639-40, 670 N.E.2d 383 (1996)*; *Jesionek v. Massachusetts Port Auth., 376 Mass. 101, 105, 378 N.E.2d 995 (1978)*; *Gidwani v. Wasserman, 373 Mass. 162, 166-67, 365 N.E.2d 827 (1977)*.

[66] Plaintiffs allege that Defendants are jointly and severally liable. Compl. at par. 87. Defendants make no argument against joint and several liability.

Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm. [67] **[*68]** Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs. [68] Thus, the court need not decide whether Defendants owed a duty greater than the basic duty. [69], [70]

**[*69]** Breach of Warranty-Defective Design

The complaint alleges that Defendants breached the implied warranties of merchantability and of fitness for a particular purpose, by way of defective design, by failing to incorporate certain devices.

*HN42*[↑] In Massachusetts, a warranty that goods are merchantable is implied in every sale of goods. [71] *G.L.c 106, § 2-314*. Defendants assert two reasons why this count should be dismissed. They argue (1) knowing and deliberate misuse is a complete bar to recovery and (2) Plaintiffs are not in privity with Defendants. [72]

**[*70]** *HN43*[↑] Under the doctrine of unreasonable

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[67] The complaint alleges alternatively that Defendants were negligent in failing to inhibit the formation of the secondary market. Failing to prevent an event from happening, if one knows it will occur absent intervention and one desires it to occur, may be the functional equivalent of an affirmative act. However, the court need not decide this issue, as a complaint should not be dismissed "if it would support relief on any theory of law." *Whitinsville Plaza, 378 Mass. at 89* (citations omitted; emphasis is in original).

[68] Foreseeability is sometimes considered an element of the ascertainment of the existence of a duty of care. *Whittaker v. Saraceno, 418 Mass. 196, 198-99* & n.3, *635 N.E.2d 1185 (1994)*.

[69] The legislature and the Attorney General have, as noted, established statutory and regulatory rules to prevent the harm Plaintiffs allege. This may be evidence of "existing social values and customs, as well as [] appropriate social policy," *Davis, 420 Mass. at 743*, from which a different duty can be inferred. The court does not reach this issue. Cf. *Tobin v. Norwood Country Club, Inc., 422 Mass. 126, 133, 661 N.E.2d 627 (1996)* ("Determinations of public policy, especially when a statute 'undoubtedly' identifies such a policy, are highly relevant to [the initial inquiry, whether the defendant owed a duty of care]"); *Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 11, 453 N.E.2d 430 (1983)* ("Once a vendor places liquor in the hands of a minor, it may set in motion the very harm which the Legislature has attempted to prevent").

[70] Plaintiffs also allege that Defendants were negligent in marketing their products by failing to educate consumers regarding the risks of firearms, representing that purchase of a firearm will enhance household security, representing that firearms are safe and representing that families could safely store firearms unlocked and accessible to minors or mentally impaired persons, causing additional harm to Plaintiffs. Compl. at par. 89. Defendants make no argument relative to these allegations, and the court does not address them.

[71] Defendants do not argue that the implied warranty of fitness for a particular purpose does not apply. G.L.c. 106, § 2-3 15.

[72] As these are the only grounds for dismissal of this count urged by Defendants, the court confines its discussion to these two issues. In their reply brief, Defendants for the first time appear to raise the argument that the guns were not "defective." See Defs.' Reply Mem. at 27. The argument, in its entirety, is as follows: "When a product is deliberately functioned [sic] to accomplish a known and intended result, the product is not defective and liability is not extended to the manufacturer." Defendants reference a footnote in their original memorandum. That footnote argues that misuse of a firearm constitutes a superseding cause, negating a finding of proximate causation. Defs.' Mem. at 27 n.9. Thus, Defendants present no argument as to why the firearms were, as a matter of law, not "defective" under warranty law. The court notes that the complaint contains sufficient allegations that Defendants' products were defective. See, e.g., Compl. at par. 94. *See Commonwealth v. Johnson Insulation, 425 Mass. 650, 660-61, 682 N.E.2d 1323 (1997)* (discussion of breach of implied warranty of merchantability).

use, "a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty." *Colter v. Barber-Greene Co., 403 Mass. 50, 60, 525 N.E.2d 1305 (1988)* Apart from this affirmative defense, as an element of their claim Plaintiffs must prove that at the time of their injuries Defendants' products were being used "in a manner that the defendant seller, manufacturer, or distributor reasonably could have foreseen." *Allen v Chance Mfg. Co., 398 Mass. 32, 34* & n. 1, *494 N.E.2d 1324 (1986)*. See *Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 357, 446 N.E.2d 1033 (1983)*. As to the latter, Plaintiffs have put forth sufficient allegations to survive this motion to dismiss. See Compl. at pars. 93 & 95. [73] **[*71]** As to the former, the affirmative defense, Defendants carry the burden of proof, and they have not shown that, on the facts alleged, Plaintiffs cannot prove any set of facts which would entitle them to relief. [74] See *Nader, 372 Mass. at 98*.

As to Defendants' privity argument, *HN44*[↑] *G.L.c 106, § 2-318* provides in relevant part:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor **[*72]** or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume *or be affected by the goods*.

(Emphasis added.)

On its face, then, the relevant statute does not require privity between Plaintiffs and Defendants in this case, as Plaintiffs allege that Defendants could reasonably have expected (or actually knew) that Plaintiffs would be harmed by their goods. See *Jacobs v. Yamaha Motor Corp., USA., 420 Mass. 323, 328, 649 N.E.2d 758 (1995)* (explicit language of *G.L.c 106, § 2-318*, invalidates claim that privity is required for plaintiff to sue motorcycle manufacturer). The decision in *Sebago, Inc., 18 F. Supp. 2d 70 at 99*, is not to the contrary. *Sebago, Inc.*, predicting Massachusetts law, read *Jacobs* as being limited to "consumer goods," and ruled that privity is required when a contract-based warranty claim arises from a commercial transaction. *Id.* In this case, Defendants do not argue that the **[*73]** firearms were purchased through commercial transactions. See also *Thayer v. Pittsburgh-Corning Corp., 45 Mass. App. Ct. 435, 440, 703 N.E.2d 221*, rev. denied *428 Mass.*

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[73] While these paragraphs of the complaint allege that Defendants reasonably could have expected that Plaintiffs would have been injured by Defendants' defectively designed guns (and thus speaks to the foreseeability of harm rather than foreseeability of use), the facts alleged in the complaint, if proven, would show that Defendants reasonably could have foreseen the use to which their products were put. See, e.g., Compl. at pars. 53-55 (alleging, in substance, that Defendants reasonably should have known that their guns were being used by the secondary, illegal market to inflict harm by gun violence).

[74] The court acknowledges that the breach of warranty by defective design claim seeks to apply warranty law in a way unlike past cases. The typical breach of warranty case involves allegations that the defendant's product, used in a reasonably foreseeable way, harmed the plaintiff-user. In such a situation, the defendants may assert the affirmative defense that the plaintiff acted unreasonably toward a product he knew to be defective and dangerous. Here, however, Plaintiffs were not the users, a difference which raises novel questions of law regarding the affirmative defense of unreasonable use. These questions are better addressed in the context of a factual record. Cf. *Bolduc v. Colt's Mfg. Co. 968 F. Supp. 16, 18 (D.Mass. 1997)* (deciding, at summary judgment, that plaintiff's decedent's deliberate misuse of firearm barred recovery on negligent design claim).

*1109, 707 N.E.2d 367 (1998)* (no privity required for worker injured by asbestos to sue asbestos manufacturer).

Breach of Warranty-Failure to Warn

Plaintiffs also allege that Defendants breached the implied warranties of merchantability and fitness for a particular purpose by failing to provide adequate warnings or instructions. Defendants argue that this count must be dismissed because Plaintiff's lack privity and because the dangers posed by firearms are "open and obvious." The court has already addressed the privity argument in the context of the count alleging defective design.

*HN45*[⬆] A product's manufacturer has a duty to warn foreseeable users of latent dangers in the product's normal and intended use. *Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 23, 696 N.E.2d 909(1998)*; *Carey v. Lynn Ladder & Scaffolding Co., 427 Mass. 1003, 1003, 691 N.E.2d 223 (1998)*; *Bavuso v. Caterpillar Indus., Inc., 408 Mass. 694, 699, 563 N.E.2d 198 (1990).* **[*74]** *HN46*[⬆] There is no duty to warn, however, where the danger is obvious or where the plaintiff appreciated the danger substantially to the same extent as a warning would have provided. *Carey, 427 Mass. at 1004*.

In this case, Plaintiffs allege that Defendants failed adequately to warn or instruct, e.g., as to risks that children could obtain access to the firearms, that a gun's chamber may contain a round of ammunition, as to proper storage of guns to prevent suicide, accidents, or theft, that guns can be fired with the ammunition magazine removed and without pulling the trigger, that the guns may not contain safety devices, that a gun in the home dramatically increases rather than decreases risk of injury to household members, that training is needed to handle guns safely and that improperly stored guns could be stolen. Compl. at par. 103. This failure to warn, Plaintiffs allege, was the proximate cause of Plaintiffs' injuries. *Id.* at par. 106. [75]

**[*75]** Defendants reference no case where on a motion to dismiss for failure to state a claim it was decided that, as a matter of law, the danger was obvious or that it was appreciated to the same extent as if a warning had been supplied. See *Carey, 427 Mass. at 1003* (summary judgment); *Bavuso, 408 Mass. at 694* (jury trial); *Bell v Wysong & Miles Co., 26 Mass. App. Ct. 1011, 1012, 531 N.E.2d 267 (1988)* (jury trial); *Killeen v. Harmon Grain Prods. Inc., 11 Mass. App. Ct. 20 21, 413 N.E.2d 767 (1980)* (directed verdict for defendant); *Wasylow, 975 F. Supp. 370 at 378* (summary judgment); *Bolduc v Colt's Mfg. Co., 968 F. Supp. 16, 17 (D.Mass. 1997)* (summary judgment). [76]

**[*76]** Defendants do not argue that they have no duty to warn of any of the dangers presented by firearms. The court does not have before it any evidence of the warnings that were provided, from which the court could determine whether, as a matter of law, adequate warnings were provided. Defendants are, in essence, asking this court to take judicial notice that the dangers

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[75] Paragraph 106 of the complaint mentions by name only the implied warranty of merchantability. It does, however, reference *G.L.c 106, § 2-315*, the implied warranty for fitness for a particular purpose.

[76] *Mavilia v. Stoeger Indus., 574 F. Supp. 107, 111 (D. Mass. 1983)*, was a case involving a handgun decided on a motion to dismiss under *Fed.R.Civ.P. 12(b)(6)*. That case does not appear to have involved allegations of failure adequately to warn. Applying what it perceived to be Massachusetts law as it then existed, the federal district court decided that the .38 caliber Llama automatic pistol was not inherently defective and declined to certify the issue to the Supreme Judicial Court. *Id.* & n.5. The allegations in *Mavilia* were different from Plaintiffs' allegations in this case.

posed by firearms discussed in paragraph 103 of the complaint are so obvious (or were actually appreciated) such that warnings or instructions were not required. This is contrary to Plaintiffs' allegations, and the court declines to do so.

Negligence

In this count of their complaint, Plaintiffs allege that Defendants negligently designed, marketed, distributed and sold their products. Compl. at par. 111. Inasmuch as this states a claim for negligent distribution and marketing, it is duplicative of Count II and is dismissed. However, this count states a claim not previously stated, for negligent design.

HN47[] "A manufacturer is under a duty to design its product with reasonable care to eliminate avoidable dangers. The manufacturer must anticipate the environment in which the product will be used and design **[*77]** against reasonably foreseeable risks attending the product's use in that setting. The duty is placed on the manufacturer because it stands in a superior position to recognize and cure defects in its product's design." *Simmons v. Monarch Mach. Tool Co., 413 Mass. 205, 211, 596 N.E.2d 318(1992)* (citations omitted).

In this case, Plaintiffs have alleged that Defendants were negligent in their design of firearms by failing to include adequate safety devices and failing to include adequate warnings. Such a claim is distinct from the breach of warranty counts. *Uloth v. City Tank Corp., 376 Mass. 874, 875, 384 N.E.2d 1188 (1978)*. See J.R. Nolan & L.J. Sartorio, Tort Law § 307 (2d ed. 1989 & 2000 Supp.). Because Defendants have only argued for dismissal of this count on grounds that it is duplicative, the court need not test the sufficiency of the allegations further.

In sum, the court dismisses Count V to the extent it alleges negligent distribution and marketing, but denies Defendants' motion as to the claim for negligent design.

Unjust Enrichment

In the final count of the complaint, Plaintiffs allege that Defendants have been unjustly **[*78]** enriched because they have "reaped substantial profits and gains" from their conduct, causing Plaintiffs' harm.

HN48[] A claim that a party has been unjustly enriched seeks the equitable remedy of restitution. *Keller v. O'Brien, 425 Mass. 774, 778* & n.8, *683 N.E.2d 1026. (1997)*. Restitution is appropriate when the circumstances of receipt or retention of a benefit "are such that, as between the two persons, it is unjust for [one] to retain it." *Keller, 425 Mass. at 778* (quoting *National Shawmut Bank v Fidelity Mut. Life Ins. Co., 318 Mass. 142, 146, 61 N.E.2d 18 (1945))*. "A person confers a benefit upon another if he in any way adds to the other's security or advantage." 9 Mass. Jurisprudence § 2:5 (1993) (citing *Restatement of Restitution § 1*, cmt b).

Here, Plaintiffs allege that they have conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants' conduct ("externalities"). See *White*, 97 F. Supp. 2d at 2000 WL 664176, at *10. Plaintiffs further allege that Defendants undertook the alleged wrongful conduct for the purpose of increasing their profits. Thus, Plaintiffs state **[*79]** a claim for unjust enrichment.

CONCLUSION

The parties in this case have pressed upon the court public policy considerations which they believe the court should consider. Defendants, in urging the court to look behind the allegations in the complaint, which they describe as "politicized rhetoric and conclusory allegations," emphasize that they are not the ones "truly

responsible" for the harm. Plaintiffs put forth examples of the devastating effects of gun violence. It is not this court's function, on a motion under *Rule 12(b)(6)*, to decide whether public policy requires that the complaint proceed or that it be dismissed. Rather the court's inquiry is limited to deciding whether the complaint fails to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, Defendants' motion to dismiss is *ALLOWED* as to Count V to the extent that count alleges negligent distribution and marketing. Defendants' motion to dismiss is *DENIED* as to Count V to the extent it alleges negligent design. As to all other counts, the motion to dismiss is *DENIED*.

Margaret R. Hinkle

Justice of the Superior Court

DATED: July 13, 2000

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# EXHIBIT 3

# Chiapperini v Gander Mtn. Co., Inc.

Supreme Court of New York, Monroe County

December 23, 2014, Decided

14/5717

**Reporter**
48 Misc. 3d 865 *; 13 N.Y.S.3d 777 **; 2014 N.Y. Misc. LEXIS 5910 ***; 2014 NY Slip Op 24429 ****

**[****1]** Kimberly Chiapperini, as Personal Representative of the Estate of Michael Chiapperini, Deceased, et al., Plaintiffs, v Gander Mountain Company, Inc., et al., Defendants.

**Outcome**
Motions granted in part and denied in part.

## Core Terms

grand jury, public nuisance, minutes, plaintiffs', negligent entrustment, gun, motion to dismiss, seller, permanent injunction, firearms, affirmation, allegations, cause of action, disclosure, preemption, civil liability, protocols, note of issue, state court, confirmation, manufacturer, indictment, witnesses, stricken, grand jury testimony, injunctive relief, red flag, convictions, violations, discovery

## Case Summary

**Overview**

HOLDINGS: [1]-The Protection of Lawful Commerce in Arms Act did not preempt state claims against a sporting goods store brought by the representatives of shooting victims because the representatives' negligent entrustment and negligence per se claims were exempt, and, in support of their general negligence claim, the representatives cited specific federal gun laws the store allegedly violated, *15 U.S.C.S. § 7903(5)(A)(ii)*, *(iii)*; [2]-The representatives were not entitled to the entire set of Grand Jury minutes from the criminal trial because the representatives' generic claim concerning unidentified people was insufficient to warrant wholesale disclosure of the entire Grand Jury presentation; the representatives were entitled to Grand Jury testimony from any store personnel who did not also testify at trial, *CPL 190.25(4)(a)*.

## LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

***HN1*** **Motions to Dismiss, Failure to State Claim**

In determining a *CPLR 3211(a)(7)* motion, the subject pleading is to be afforded a liberal construction. *CPLR 3026*. Under this liberal construction, the facts pleaded are to be presumed to be true and are to be accorded every favorable inference in a plaintiff's favor to see if they fit within any cognizable legal theory. Thus, the criterion is whether the plaintiff has a cause of action, not whether he or she properly stated one.

Torts > Procedural Matters > Commencement & Prosecution > Dismissal

Torts > Products Liability > General Overview

Torts > Procedural Matters > Preemption > Express Preemption

**HN2[] Commencement & Prosecution, Dismissal**

The purpose of the Protection of Lawful Commerce in Arms Act (PLCAA) is to shield gun sellers from civil liability for harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended. 15 U.S.C.S. § 7901(b)(1). To achieve its purpose, the PLCAA forbids the commencement of any "qualified civil liability action" in federal or state court. 15 U.S.C.S. § 7902(a). A "qualified civil liability action" is defined as a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. 15 U.S.C.S. § 7903(5)(A).

Torts > Negligence > Types of Negligence Actions > Negligent Entrustment

Torts > ... > Proof > Violations of Law > Statutes

**HN3[] Types of Negligence Actions, Negligent Entrustment**

See 15 U.S.C.S. § 7903(5)(A)(ii), (iii).

Governments > Legislation > Interpretation

**HN4[] Legislation, Interpretation**

Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Torts > Products Liability > General Overview

**HN5[] Complaints, Requirements for Complaint**

The third exception to the Protection of Lawful Commerce in Arms Act is referred to as the "predicate exception" because it requires that a plaintiff also allege a knowing violation of a predicate statute, i.e., a state or federal statute applicable to the sale or marketing of firearms.

Torts > ... > Causation > Proximate Cause > General Overview

Torts > ... > Proof > Evidence > Province of Court & Jury

**HN6[] Causation, Proximate Cause**

Proximate cause is normally a question of fact for a jury.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

**HN7[] Motions to Dismiss, Failure to State Claim**

Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > General Overview

Torts > Products Liability > General Overview

**HN8[] Criminal Offenses, Weapons Offenses**

In the context of exceptions to the Protection of Lawful Commerce in Arms Act, the Fourth Department found that an alleged violation of 18 U.S.C.S. § 922(m) can occur when a seller knows, or has reason to believe, that the information entered on the ATF Form 4473 is false, including information about the actual buyer. The Fourth Department further found potential accomplice liability for a gun seller aiding and abetting a buyer's false statements.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

***HN9***[] **Nuisance, Elements**

Public nuisance is defined as an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

Real Property Law > Torts > Nuisance > Elements

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

***HN10***[] **Nuisance, Elements**

To allow an individual to prosecute a public nuisance claim, he or she must show that they suffered special injury beyond that suffered by the community at large.

Torts > Negligence > Types of Negligence Actions > Negligent Entrustment

***HN11***[] **Types of Negligence Actions, Negligent Entrustment**

See the Protection of Lawful Commerce in Arms Act, *15 U.S.C.S. § 7903(5)(B)*.

Torts > Negligence > Types of Negligence Actions > Negligent Entrustment

***HN12***[] **Types of Negligence Actions, Negligent Entrustment**

The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion. If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Irrelevant Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > Scandalous Matters

***HN13***[] **Motions to Strike, Irrelevant Matters**

*CPLR 3024(b)* provides that a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading. "Unnecessarily" is the key word, and is akin to "irrelevant." Motions to strike are not favored, rest in the sound discretion of the court and will be denied unless it clearly appears that the allegations attacked have no possible bearing on the subject matter of the litigation.

Civil Procedure > Preliminary Considerations > Equity > Adequate Remedy at Law

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

***HN14***[] **Equity, Adequate Remedy at Law**

An application for a permanent injunction is an equitable request that is appropriate only upon a showing of threatened irreparable injury, the lack of an adequate remedy at law, and a balancing of equities in the movant's favor.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

***HN15***[] **Injunctions, Permanent Injunctions**

A permanent injunction is an extraordinary remedy to be granted or withheld by a court of equity in the exercise of its discretion. Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers. Indeed, equity interferes in the transactions of persons by preventive measures only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong.

Criminal Law & Procedure > ... > Secrecy > Disclosure > General Overview

**HN16** **Secrecy, Disclosure**

See CPL 190.25(4)(a).

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Civil Litigants

Criminal Law & Procedure > ... > Secrecy > Disclosure > Judicial Discretion

**HN17** **Particularized Need Standard, Civil Litigants**

A court has the limited discretion to order disclosure of grand jury minutes as part of discovery in a civil case. Disclosure may be directed when, after a balancing of a public interest in disclosure against the one favoring secrecy, the former outweighs the latter. But since disclosure is the exception rather than the rule, one seeking disclosure first must demonstrate a compelling and particularized need for access. However, just any demonstration will not suffice. For it and the countervailing policy ground it reflects must be strong enough to overcome the presumption of confidentiality. In short, without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no policies to balance.

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Civil Litigants

**HN18** **Particularized Need Standard, Civil Litigants**

At the opposite pole from cases allowing access to vindicate public rights are cases in which purely private civil litigants have sought inspection of Grand Jury minutes for the purpose of preparing suits. Although courts have recognized a limited right in civil litigants to use a trial witness's Grand Jury testimony to impeach, to refresh recollection or to lead a hostile witness, wholesale disclosure of Grand Jury testimony for purposes of trial preparation has been almost uniformly denied to private litigants. In making the discretionary balancing, a court is to consider: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.

## Headnotes/Summary

### Headnotes

**Negligence — Negligent Entrustment — Firearms — Protection of Lawful Commerce in Arms Act — Exceptions**

1. The federal Protection of Lawful Commerce in Arms Act (PLCAA) (15 USC § 7901 et seq.) did not bar plaintiffs' negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer. The PLCAA forbids the commencement of any "qualified civil liability action" against a gun seller in federal or state court (15 USC § 7902 [a]). As plaintiffs alleged claims for negligent entrustment and negligence per se, those claims fell outside of the "qualified civil liability action" definition (15 USC § 7903 [5] [A] [ii]). Additionally, under the PLCAA's predicate exception, plaintiffs were required to allege a knowing violation of a statute applicable to the sale or marketing of firearms (15 USC § 7903 [5] [A] [iii]). Without the benefit of discovery, it could not be definitively stated that the federal laws allegedly violated did not apply, or were not related, to

the shootings. Moreover, the customer's criminal acts did not relieve defendant of having to take steps to uncover them, nor did the criminal dispositions against her protect defendant and insulate it from civil litigation.

**Torts — Nuisance — Special Injury**

2. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, defendant was not entitled to dismissal of plaintiffs' public nuisance claim. For an individual to prosecute a public nuisance claim, he or she must show special injury beyond that suffered by the community at large. Plaintiffs alleged sufficient requisite special injury given the deaths of two victims and the serious physical injury to two others. Moreover, with respect to whether defendant owed a duty of reasonable care to persons injured by illegally obtained handguns, here it was uncontested that defendant sold the firearms, and that it also had direct interactions with the shooter.

**Negligence — Negligent Entrustment — Firearms Sold for Use by Convicted Felon — Knowledge of Seller**

3. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, defendant was not entitled to dismissal of plaintiffs' negligent entrustment claim. The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use it in an improper or dangerous fashion. Here, defendant should have known of the shooter's criminality if it had taken the appropriate steps in light of red flags suggesting that the shooter was not a lawful gun owner.

**Pleading — Striking out Matter Contained in Pleading — Relevance**

4. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, defendant was not entitled to have references to protocols issued by the National Shooting Sports Foundation to combat improper firearms sales stricken from the complaint. Pursuant to *CPLR 3024 (b)*, "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." However, motions to strike are not favored, and will be denied unless it clearly appears that the allegations attacked have no possible bearing on the subject matter of the litigation. Here, the protocols were relevant to defendant's standard of care, a necessary component to plaintiffs' general negligence claim.

**Injunctions — Permanent Injunction**

5. Plaintiffs' request for a permanent injunction compelling defendant gun seller to reform its firearms sales policies was stricken from their complaint alleging that defendant negligently sold firearms used by a convicted felon to commit several shootings. An application for a permanent injunction is an equitable request that is appropriate only upon a showing of threatened irreparable injury, the lack of an adequate remedy at law, and a balancing of equities in the movant's favor. Plaintiffs failed to allege future irreparable injury to them specifically, as opposed to the public in general, and that their other claims, which sought both monetary and punitive damages, would not fully compensate them for their past extraordinary harm.

**Grand Jury — Inspection of Grand Jury Minutes**

6. In a negligence action arising out of shootings by a convicted felon using a firearm purchased from defendant for the shooter by another customer, plaintiffs were entitled to limited disclosure of portions of the grand jury minutes relating to the customer's criminal prosecution. A court has limited discretion to order disclosure of grand jury minutes as part of discovery in a civil case. The court must balance the public interest in disclosure against the one favoring secrecy, considering prevention of flight by a defendant, protection of the grand jurors from interference from those under investigation, prevention of subornation of perjury and witness tampering, protection of an innocent accused, and assurance to prospective witnesses that their testimony will be kept secret. Plaintiffs articulated the requisite compelling and particularized need for some of the grand jury minutes related to defendant's representatives. As plaintiffs had the ability to access the public trial transcript from the prosecution, there was no need to disturb the grand jury process for the trial witnesses. However, the grand jury minutes for any employee of defendant who testified at grand jury but not at trial were ordered to be released to the court for an in camera review before release to the litigants.

**Counsel: [***1]** *Brian Stapleton* and *James M. Paulino,*

*II* for Gander Mountain Company, Inc., defendant.

*Michael D. Schissel* and *Diana E. Reiter* for plaintiffs.

**Judges:** HONORABLE J. SCOTT ODORISI, Justice.

**Opinion by:** J. SCOTT ODORISI

## Opinion

**[*867] [**780]** J. Scott Odorisi, J.

This lawsuit arises out of the 2012 West Webster Christmas Eve ambush and the resulting deaths and personal injuries to first responders. Pending before this court are: (1) defendant Gander Mountain Company, Inc.'s August 25, 2014, motion to dismiss; and, (2) plaintiffs' September **[**781]** 18, 2014, motion for the release of the grand jury minutes of the state criminal prosecution of defendant Dawn Nguyen.[1]

**[****2] [***2]** This court hereby: (1) *denies in large part and grants only in limited part* Gander Mountain Company, Inc.'s dismissal motion; and, (2) *grants only in limited part* plaintiffs' motion for release of the grand jury minutes—all for the reasons set forth hereinafter.

**[*868]** Lawsuit Facts

Background Information[2]

On June 6, 2010, defendant Dawn Nguyen agreed to buy guns for decedent William Spengler—a convicted manslaughter felon. Nguyen and Spengler were **[***3]** present together at defendant Gander Mountain Company, Inc.'s (Gander) Henrietta store perusing long guns. When the pair was approached by a salesperson, Spengler, not Nguyen, refused any assistance. Nguyen ultimately bought two firearms—a Bushmaster semi-automatic rifle and a Mossberg 12 gauge shotgun—by paying $1,425.58 in cash, which was provided by Spengler. To finalize the sale, and with Spengler present, Nguyen completed certain required forms attesting that she was the true gun purchaser and intended end user. Nguyen did not buy any ammunition or make any other inquires about operation of the guns. Spengler took the guns off of the counter and left the store with them, and Nguyen never again possessed them.[3]

In the early morning hours of December 24, 2012, Spengler killed his sister, set his West Webster home on fire, and then used **[**782]** the same Bushmaster rifle Nguyen bought from Gander to shoot volunteer firefighters Michael Chiapperini, Tomasz Kaczowka, Joseph Hofstetter, and Theodore Scardino, who were all responding to a 911 dispatch. Tragically, Chiapperini and Kaczowka died and Hofstetter and Scardino were seriously injured. Spengler committed suicide before being apprehended.

On April 4, 2013, Nguyen was indicted in state court for falsifying business records in the first degree (*Penal Law § 175.10*). Nguyen was also charged federally. On April 15, **[*869]** 2014, Nguyen was convicted in state court after a jury trial.[4] Thereafter, and on June 26, 2014, Nguyen pleaded guilty in federal court to the whole indictment, namely: (1) making a false statement in relation to **[***5]** the acquisition of firearms (*18 USC § 922 [a] [6]*); (2) disposition of firearms to a convicted

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[1] At Special Term, this court already denied plaintiffs' September 17, 2014 cross motion to lift the automatic discovery stay. A separate decision and order, dated December 22, 2014, reflects that denial.

[2] Partly as alleged in the complaint and as accorded every favorable inference in plaintiffs' favor. (*See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152, 773 NE2d 496, 746 NYS2d 131 [2002]*; ***Younis v Martin, 60 AD3d 1373, 876 NYS2d 587 [4th Dept 2009]***.)

[3] Gander objects to this information as hearsay provided by plaintiffs in opposition to dismissal (Gander's reply mem of law at 2, 9). However, this information was first provided to this court by Gander in one of its own motion exhibits, namely Nguyen's plea colloquy transcript (Paulino attorney affirmation, exhibit E at 18). This fact was repeated again in plaintiffs' exhibit wherein, at Nguyen's sentencing, her defense counsel once more stated that Nguyen transferred the guns to Spengler **[***4]** right at Gander's sales counter (plaintiffs' mem of law, exhibit 3 at 8, 18-19). Because Gander first introduced this information, its reply objection is erroneous, especially as it is also contrary to its original request that this court "consider extrinsic matter" (Gander's mem of law at 6).

[4] Nguyen was sentenced on May 18, 2014, to 1⅓ to 4 years, and is currently in state prison.

felon (*18 USC § 922 [d] [1]*); and, (3) possession of firearms by an unlawful user (*18 USC § 922 [g] [3]*).[5] One of the theories of criminal liability in both cases was that Nguyen falsified the forms to deceive Gander as to the identity of the true end user, which fraudulent intent also included an intent to conceal a crime.[6]

Procedural History

The present action was commenced on May 20, 2014, and in general alleges that Gander unlawfully sold the guns to both Nguyen and Spengler as it knew, or should have known, it was an illegal straw purchase for an improper buyer given Spengler's involvement (Paulino **[***6]** attorney affirmation, exhibit A, ¶¶ 1, 3, 44, 55). More specifically, the complaint contains the following causes of action, which plaintiffs designated as "Counts":

1. Negligence against Gander;

2. Negligent entrustment against Gander;

3. Negligent entrustment against Nguyen;

4. Assault and battery against Spengler's estate;

5. Negligence per se against Gander;

6. Negligent training and supervision against Gander;

7. Public nuisance against Gander;

8. Loss of consortium against all defendants (Karen Scardino);

9. Wrong death of Chiapperini against all defendants;

10. Wrong death of Kaczowka against all defendants;

11. Survival action for Chiapperini against all defendants; and,

**[*870]** 12. Survival action for Kaczowka against all defendants. (Paulino attorney affirmation, exhibit A at 13-26.)

In the complaint's wherefore clause, plaintiffs ask for "an Order compelling Gander Mountain to reform its policies, procedure and training with regard to the sale of firearms, including taking steps necessary to prevent unlawful sales to straw purchasers." (Paulino attorney affirmation, exhibit A at 26.) Plaintiffs also seek **[**783]** compensatory and punitive damages, costs and disbursements, and attorneys' fees.

Gander was served via its registered agent with the pleadings **[***7]** on May 21, 2014.

The next day, Gander filed a notice of removal taking this case to the United States District Court for the Western District of New York on the basis that it involved a federal question. On June 11, 2014, Gander filed a motion to dismiss and/or strike in District Court. On June 12, 2014, plaintiffs cross-moved to remand the matter back to state court. Gander opposed the remand motion, inter alia, on the basis that a local state court judge would be biased in this highly publicized case, would act to garner support for re-election, and would misapply federal law (plaintiffs' mem of law, exhibit 1 at 3, 19; exhibit 2 at 18, 23-25, 29, 30, 32).[7] On July 28, 2014, the remand motion was argued before Judge David G. Larimer who granted it by way of an order dated August 5, 2014.[8]

Motion Contentions Summary

Gander's Dismissal Motion

Instead of answering, and relying upon *CPLR 3024* and *3211*, Gander moved to dismiss the case on the following grounds:

1. The entire complaint is barred by the federal

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[5] At the time that Gander's motion was filed, Nguyen had not yet been sentenced in federal court, but she was later sentenced on September 17, 2014, to eight years to run concurrently with the state sentence.

[6] The Monroe County District Attorney's Office alleged, and the jury was instructed that, Nguyen intended to conceal the crime of criminal purchase of a weapon (*Penal Law § 265.17*) and/or criminal possession of a weapon in the fourth degree (*Penal Law § 265.01*) (Paulino attorney affirmation, exhibit C at 1033-1036).

[7] In opposing a remand, Gander expressed concern about Fourth Department precedent condoning claims against gun sellers and rejecting the identical federal law preemption argument (plaintiffs' mem of law, exhibit 1 at 2, 27-30; exhibit 2 at 24). Also, Gander agreed that plaintiffs' artfully drafted their complaint to avoid federal preemption (plaintiffs' mem of law, exhibit 2 at 26). Plaintiffs accused Gander of forum/judge **[***8]** shopping (plaintiffs' mem of law, exhibit 2 at 25).

[8] Because of the remand, Judge Larimer did not decide the dismissal motion; however, he quickly referenced his belief that federal law did not preempt all of plaintiffs' claims (plaintiffs' mem of law, exhibit 2 at 34-35).

Protection of Lawful Commerce in Arms Act (PLCAA).

2. The claims for negligent entrustment and public nuisance failed to state viable causes of action.

**[*871]** 3. Plaintiffs' references in the complaint to "extra legal" standards promulgated by private parties should be stricken as prejudicial and unnecessary.

4. Plaintiffs' demand for a permanent injunction compelling Gander to reform its policies should be stricken.

In support of its motion, Gander submitted an affidavit from Kevin R. McKown, its senior director of regulatory and firearm compliance, in which he provided information about Gander's unified and nationwide firearms sale training program, as well as about the subject firearms (McKown aff ¶¶ 4, 7-8, 11, 13-16).

Plaintiffs **[***9]** strenuously opposed the dismissal motion on the following grounds:

1. Per binding Fourth Department precedent, *Williams v Beemiller, Inc. (100 AD3d 143, 952 NYS2d 333 [4th Dept 2012]* [hereinafter *Williams I*], *amended by 103 AD3d 1191, 962 NYS2d 834 [4th Dept 2013]* [hereinafter *Williams II*]), exceptions apply that remove this case from PLCAA's preemption.

2. Plaintiffs sufficiently alleged valid claims for negligent entrustment and public nuisance given Gander's direct dealings with Spengler. (*See also Williams II, 103 AD3d 1191, 962 NYS2d 834*.)

3. The protocols issued by the National Shooting Sports Foundation (NSSF), in **[****3]** conjunction with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), should not be stricken from the complaint because they are highly relevant in defining Gander's standard of care.

**[**784]** 4. Gander's vagueness challenge to the request for a permanent injunction is premature, and this court has the authority to issue injunctive relief that impacts actions outside of the state.

In its reply, Gander wholly failed to address the *Williams I* case in regard to its main PLCAA preemption argument.

Plaintiffs' Grand Jury Motion

Plaintiffs moved under *Criminal Procedure Law § 190.25 (4) (a)* and *Judiciary Law § 325* for release of the grand jury minutes of Nguyen's state criminal case—*People of the State of New York v Dawn M. Nguyen* (indictment No. 13/269). As it is believed that Gander employees testified before **[***10]** the grand jury, as well as other alleged material witnesses, plaintiffs contend that the minutes are essential to their civil action. Plaintiffs argue that there is no reason to keep this grand jury proceeding secret any longer.

**[*872]** The Monroe County District Attorney's Office opposed the motion by a letter dated October 9th, but no party interposed a response.

Legal Discussion

Gander's Dismissal Motion

Gander invokes only *CPLR 3211 (a) (7)* to dismiss the whole lawsuit, but that application falters. (*See e.g. Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414, 754 NE2d 184, 729 NYS2d 425 [2001]* [reversing granted *CPLR 3211 (a) (7)* motion as the complaint adequately alleged a claim]; *Matter of City of Syracuse v Comerford, 13 AD3d 1109, 1110, 787 NYS2d 788 [4th Dept 2004]* [same].)

***HN1***[↑] In determining a *CPLR 3211 (a) (7)* motion, the subject pleading is to be afforded a liberal construction. (*See CPLR 3026*; *Leon v Martinez, 84 NY2d 83, 87, 638 NE2d 511, 614 NYS2d 972 [1994]* [motion to dismiss should have been denied]; *190 Murray St. Assoc., LLC v City of Rochester, 19 AD3d 1116, 795 NYS2d 923 [4th Dept 2005]* [reversing order granting motion to dismiss].) Under this liberal construction, "[t]he facts pleaded are to be presumed to be true and are to be *accorded every favorable inference*" in a plaintiff's favor to see if they fit within any cognizable legal theory. (*Younis, 60 AD3d at 1373* [affirming denial of motion to dismiss] [emphasis added]; *see also 511 W. 232nd Owners Corp., 98 NY2d at 152* [the complaint was sufficient to survive a motion to dismiss].) Thus, the criterion is whether the plaintiff has a cause of action, not whether he or she properly stated **[***11]** one. (*See Guggenheimer v Ginzburg, 43 NY2d 268, 275, 372 NE2d 17, 401 NYS2d 182 [1977]* [reversing grant of motion to dismiss]; *Matter of Syracuse Indus. Dev. Agency v Gamage, 77 AD3d 1353, 1354, 908 NYS2d 503 [4th Dept 2010]* [affirming denial of dismissal motion].)

With the above lenient standard in mind, each of Gander's motion contentions will be addressed.

1. PLCAA Preemption

Gander is not entitled to a dismissal based upon the PLCAA. (*See e.g.* Williams I, 100 AD3d at 147 [Supreme Court erred in dismissing the complaint per the PLCAA].) As in *Williams I*, the PLCAA does not serve as a basis to dismiss the instant complaint.[9]

The PLCAA went into law on October 26, 2005. (*See* 15 USC § 7901.) ***HN2***[↑] Its purpose **[**785]** was to shield gun sellers from civil liability **[*873]** for "harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." (*See* 15 USC § 7901 [b] [1]; *see also* Ileto v Glock, Inc., 565 F3d 1126, 1129 [9th Cir 2009].) To achieve its purpose, the PLCAA forbids the commencement of any "qualified civil liability action" in federal or state court. (15 USC § 7902 [a]; *see also* City of New York v Beretta U.S.A. Corp., 524 F3d 384, 398 [2d Cir 2008].) A "qualified civil liability action" is defined as:

> "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade **[***12]** association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party" (15 USC § 7903 [5] [A]; *see also* 15 USC § 7903 [4] ["qualified product" is a firearm "that has been shipped or transported in interstate or foreign commerce"]; 15 USC § 7903 [6] ["seller" is a federally licensed dealer]; 15 USC § 7903 [9] ["unlawful misuse" is "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product"]).[10]

The case at hand falls squarely within the "qualified civil liability action" definition. However, six categories of actions are exempt, and the two exemptions relevant to this case are as follows:

> ***HN3***[↑] "(ii) an action brought against a seller for *negligent entrustment or negligence per se*;
>
> "(iii) 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 **[*874]** of the product, and the violation was a *proximate cause* of the harm for which relief is sought, including . . .
>
> "(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or *aided, abetted, or conspired* with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> "(II) any case in which the manufacturer or seller *aided, abetted, or conspired* with any other person to sell or otherwise dispose of a qualified product, **[***14]** *knowing, or having* ***[****4]*** *reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing* or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18" (15 USC § 7903 [5] [A] [emphasis added]).

**[1]** As to the second exception for negligent entrustment or negligence per se, **[**786]** two exact claims plaintiffs allege in counts 2 and 5, Gander simply states that the "second exclusion speaks for itself," and then never again mentions the same (Gander mem of law at 10; *see also id.* at 18). This court construes this as an implied concession that counts 2 and 5 fall outside of the "qualified civil liability action" definition. Thus, and at this preliminary stage of litigation, those two claims are not preempted by the clear language of the statute. (*See* McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 94; Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 NY2d 86, 91, 761 NE2d 565, 735 NYS2d 873 [2001] [***HN4***[↑] "(w)here the language of a statute is clear and unambiguous, courts

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[9] This court thoroughly reviewed the appellate record for the *Williams* cases, which had analogous straw sale facts and similar legal allegations.

[10] It is not disputed that the Bushmaster rifle and the Mossberg shotgun are "qualified products," that Gander is a "seller," and that Spengler engaged in an "unlawful misuse" of those guns. (*See* Al-Salihi v Gander Mtn., Inc., 2013 US Dist LEXIS 134685, 2013 WL 5310214 [ND NY, Sept. 20, 2013, No. 3:11-CV-00384 (NAM/DEP)] [granting Gander's unopposed summary judgment motion per the PLCAA for an entirely legal sale when completed discovery showed no factual dispute as to whether it knew, or should have known, that the legal purchaser would eventually use the gun illegally].) The *Al-Salihi* case has material factual differences, and was in an entirely different procedural posture, namely discovery was completed and also it was not opposed by the plaintiff. Due to these key distinctions, *Al-Salihi* ***[***13]*** is distinguishable and thus does not compel a dismissal.

must give effect to its plain meaning"]; *see also* Herdzik v Chojnacki, 68 AD3d 1639, 1642, 892 NYS2d 724 [4th Dept 2009] [reinstating negligence per se claim].)

In light of the unambiguous language of the second exception, Gander is forced to focus on assailing the third exception in an attempt to knock out the remaining claims. ***HN5***[⬆] The third exception is referred to as the "predicate exception" because it requires that a plaintiff also allege **[***15]** "a knowing violation of a 'predicate statute,' i.e., a state or federal statute applicable to the sale or marketing of firearms." (*Williams I*, 100 AD3d at 148; *see also* Martin v Herzog, 228 NY 164, 168, 126 NE 814 [1920].)

**[*875]** In *Williams I*, the Fourth Department, in applying the liberal pleading standard, found that the plaintiffs sufficiently alleged knowing violations of federal and state law in order to have the first amended complaint fall under the PLCAA's predicate exception. (*See Williams I*, 100 AD3d at 148.) Based upon a review of the first amended complaint in *Williams*, those plaintiffs generically alleged violations of federal and state law without providing specific statutory provisions (*see Williams* appellate record at 112). Nevertheless, the Fourth Department disregarded the lack of citations and still found sufficient facts to make out a statutory violation of the federal Gun Control Act of 1968. (*Id.* at 149.) Unlike *Williams*, the plaintiffs here went a step further and cited specific federal gun laws Gander allegedly violated in support of its general negligence claim in count 1 and negligence per se claim in count 5 (Paulino attorney affirmation, exhibit A, ¶¶ 77, 79, 85, 94, citing 18 USC §§ 2, 371, 922 [a] [1] [A]; [6]; [d] [1]; [g] [1]; [m]; 924 [a] [1] [A]).[11]

Gander claims the cited federal statutes are either "unrelated" or "impossible" for it to have violated, or to have proximately caused Spengler's crimes. Without the benefit of discovery, this court is not convinced that it can be definitively stated that all of these federal laws do not apply, or were not related to Spengler's ambush. ***HN6***[⬆] Proximate cause is normally a question of fact for a jury (*see Williams I*, 100 AD3d at 152; *Williams II*, 103 AD3d at 1192; *Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 1277, 850 NYS2d 813 [4th Dept 2008]; *Hughes v Temple*, 187 AD2d 956, 590 NYS2d 636 [4th Dept 1992]), and the fact that plaintiff **[****5]** might ultimately fail on some alleged violations does not render the initial pleading defective. (*See* EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19, ***[**787]*** 832 NE2d 26, 799 NYS2d 170 [2005] [***HN7***[⬆] "(w)hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss"]; Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 318, 655 NE2d 661, 631 NYS2d 565 [1995]; Stukuls v State of New York, 42 NY2d 272, 275, 366 NE2d 829, 397 NYS2d 740 [1977].)

Additionally, and contrary to Gander's contention that 18 USC § 922 (m) cannot conceivably apply, ***HN8***[⬆] the Fourth Department found that the exact same alleged violation can occur **[*876]** when a seller knows, or has reason to believe, that the information entered on the ATF Form 4473 is false, including information *about the actual buyer*. (*See Williams I*, 100 AD3d at 149-150, citing 27 CFR 478.124; Shawano Gun & Loan, LLC v Hughes, 650 F3d 1070, 1073 [7th Cir 2011]; United States v Nelson, 221 F3d 1206, 1209 [11th Cir 2000]; *see* ***[***17]*** *also* Abramski v United States, 573 US ___, 134 S Ct 2259, 189 L Ed 2d 262 [2014].) The Fourth Department further found potential accomplice liability for a gun seller aiding and abetting a buyer's false statements. (*Williams I* at 150, citing 18 USC § 2 [a]; United States v Carney, 387 F3d 436, 445-446 [6th Cir 2004].) As in *Williams I*, plaintiffs here aver that Gander knew the sale was an illegal straw purchase to a person not legally authorized to possess a gun given certain red flags. (*See Williams I*, 100 AD3d at 150 [felon selected guns, which were paid for in cash, although the straw purchaser filled out the forms].) Given the Fourth Department's express allowance of an accomplice liability theory, Gander's taking offense to an alleged conspiracy is unavailing (Gander's mem of law at 3). Additionally, Gander's motion denial of any aid and assistance simply creates an issue of fact worthy of discovery (Gander's mem of law at 19; *see* Carney v Memorial Hosp. & Nursing Home of Greene County, 64 NY2d 770, 772, 475 NE2d 451, 485 NYS2d 984 [1985]; *Cinelli v Sager*, 13 AD2d 716, 213 NYS2d 487 [4th Dept 1961] [reversing grant of a dismissal as issues of fact existed]).

Furthermore, *Williams I* is also instructive in rejecting yet another of Gander's submissions, namely its piecemeal attack on each claim, particularly the negligent training and supervision claim (count 6) and the public nuisance claim (count 7). Consistent with plaintiffs' position that

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[11] Plaintiffs also allege violations of state laws, **[***16]** but without citation, a situation condoned by the Fourth Department. (*See Williams I*, 100 AD3d at 149.) Plaintiffs may rely upon a verified bill of particulars to further articulate the state law basis of their claims. (*See* CPLR 3041; *Williams I*, 100 AD3d at 149.)

as long as one PLCAA exception applies to one claim the entire action continues, the Fourth Department in **[***18]** *Williams I* declined to address another PLCAA exception to sustain the remaining claims. (*See Williams I, 100 AD3d at 151*.) Having found one applicable PLCAA exception, the Fourth Department allowed the entire case to go forward, including a public nuisance claim. (*See Williams II, 103 AD3d at 1191*.) Similar to *Williams*, this court finds two applicable PLCAA exceptions thereby permitting the entire complaint to proceed through litigation, without the need for a claim-by-claim PLCAA analysis.

Despite the obvious implication of *Williams I*, Gander continually ignored the case in the context of its PLCAA preemption argument written filings, although it appears per the federal court proceedings that *Williams I* was a motivating factor for **[*877]** keeping this case out of state court (plaintiffs' mem of law, exhibit 1 at 2, 27-30). Gander argued before Judge Larimer that *Williams I* was a "wholesale subversion" of federal law, and that a federal judge was needed in order to deviate from its holding (plaintiffs' mem of law, exhibit 2 at 24). Even if Gander disagrees with *Williams I*, it is up to the Fourth Department to reconsider the same on an appeal **[**788]** from this dismissal motion denial. In the meantime, *Williams I* is stare decisis on Gander's primary PLCAA preemption argument, **[***19]** and this court is obligated to follow the **[****6]** same. (*See Matter of Philadelphia Ins. Co. [Utica Natl. Ins. Group], 97 AD3d 1153, 1155, 948 NYS2d 501 [4th Dept 2012]*.)

Moreover, Gander's last-minute suggestion at Special Term that *Williams I* is inapplicable because it involved a different legal theory is incorrect. Just as here, the gun seller (defendant Brown) in *Williams I* also moved under *CPLR 3211 (a) (7)* to dismiss based upon a PLCAA preemption contention (*see Williams'* appellate record at 199; defendant Brown's appellate brief at 1; *Williams I, 100 AD3d at 146*). Although lack of personal jurisdiction was also an issue for defendant Brown in the *Williams I* case, it was not the sole basis for his motion as claimed by Gander at oral argument. Therefore, having failed to distinguish *Williams I* on legal grounds, Gander remains bound by its mandatory precedential authority.

Lastly, Gander's emphasis on Nguyen's convictions to relieve it of liability is misplaced (Gander mem of law at 3, 4, 19-20). First, Nguyen's state and federal convictions in no way negate Gander's independent civil liability given the completely different elements. Second, Gander's statement about never having been criminally charged in relation to the Nguyen sale does not foreclose civil liability, which involves a much lower standard of proof (Gander mem of law at 4). Third, **[***20]** Gander consistently misclassifies Nguyen's crimes as fraud, with it being the victim, which the state court jury found was defrauded (Gander mem of law at 4). Nguyen was not charged with fraud, and her convictions in no way exonerate Gander, or involved an express finding that it was fooled. In other words, Nguyen's criminal acts in no way relieve Gander of having taken steps to uncover the same as plaintiffs allege. In the *Williams* case, the straw purchaser (defendant Upshaw) was convicted of a misdemeanor, but the civil case against the seller still proceeded (*see Williams'* appellate record at 19, 73). Therefore, the criminal dispositions against Nguyen do not protect Gander and insulate it from civil litigation.

**[*878]** In sum, this court refuses to dismiss the complaint under the PLCAA. (*See Williams I, 100 AD3d at 147*.)

2. Negligent Entrustment and Public Nuisance

As an alternative to the PLCAA preemption argument, Gander seeks to dismiss the public nuisance (count 7) and negligent entrustment (count 2) claims as failing to state valid causes of action. This alternative assertion also falters.

As noted above, the public nuisance claim in *Williams II* was sustained in a case involving a sale of numerous handguns. (*See Williams II, 103 AD3d at 1191*.) Nevertheless, **[***21]** the sale in this case involved two assault-style weapons in an illegal sale that had disastrous direct consequences for plaintiffs above and beyond those suffered by the community at large. This is sufficient to sustain the public nuisance claim in count 7.

The Court of Appeals defined a public nuisance as:

> "*HN9*[] an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency . . . It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all . . . in a manner such as to offend public morals, **[**789]** interfere with use by the public of a public place or *endanger or injure the property, health, safety or comfort of a considerable number of persons*" (*Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568, 362 NE2d 968, 394 NYS2d 169 [1977]* **[****7]** [emphasis added]; *see also Williams II, 103*

AD3d at 1192).

HN10[] **[2]** To allow an individual to prosecute a public nuisance claim, he or she must show that they "suffered special injury beyond that suffered by the community at large." (532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 292, 750 NE2d 1097, 727 NYS2d 49 [2001]; *see also* Baity v General Elec. Co., 86 AD3d 948, 951, 927 NYS2d 492 [4th Dept 2011] [declining to dismiss public nuisance claim].) This court finds that plaintiffs alleged sufficient requisite special injury given the deaths of Mr. Chiapperini and Mr. Kaczowka, and the serious physical injury to Mr. Hofstetter **[***22]** and Mr. Scardino. (*See e.g.* Booth v Hanson Aggregates N.Y., Inc., 16 AD3d 1137, 1138, 791 NYS2d 766 [4th Dept 2005] [reinstating public nuisance claim due to proof of special injury to the plaintiffs]; *see also* Williams II, 103 AD3d at 1192.)

Despite these glaring special injury allegations, Gander seeks to escape liability for a public nuisance by claiming that it **[*879]** owed no specific duty to plaintiffs, citing Hamilton v Beretta U.S.A. Corp. (96 NY2d 222, 750 NE2d 1055, 727 NYS2d 7 [2001]), in which the Court of Appeals concluded that gun manufacturers did not owe a duty of reasonable care to persons injured by illegally obtained handguns. Based upon *Hamilton*, Gander asserts that it has no liability for Spengler's actions. In response, plaintiffs contend that *Hamilton's* holding does not compel a dismissal because there the plaintiff could not identify the actual gun manufacturer thus there was no direct link to Beretta. Juxtaposed to *Hamilton*, here it is uncontested that Gander sold the Bushmaster, and that it also had direct interactions with Spengler.[12] This exact same distinction was drawn in *Williams I* as the basis to distinguish and disregard *Hamilton*. (*See* Williams I, 100 AD3d at 151-152; *see also* City of New York v A-1 Jewelry & Pawn, Inc., 247 FRD 296, 348 [ED NY 2007] [permitting public nuisance claim to proceed against pawnbroker for illegal gun sales].) Accordingly, Gander's heavy reliance on Hamilton as legal authority supporting a dismissal is erroneous. **[***23]**

As to the negligent entrustment claim in count 2, the PLCAA defines that as:

> "HN11[] the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." (15 USC § 7903 [5] [B].)

New York's negligent entrustment cause of action provides:

> HN12[] "The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had *or should have* had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion . . . If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee" ( **[**790]** Earsing v Nelson, 212 AD2d 66, 69-70, 629 NYS2d 563 [4th Dept 1995] [affirming denial of motion to dismiss negligent entrustment claim] [emphasis added]; *see also* Weeks v City of New York, 181 Misc 2d 39, 46, 693 NYS2d 797 [Sup Ct, Richmond County 1999] [declining to dismiss **[*880]** negligent entrustment claim]; Restatement [Second] of Torts § 390).

Gander challenges the negligent entrustment claim on the same basis as the public nuisance claim, namely that it cannot have limitless liability, again citing *Hamilton*. As *Hamilton* has been dispelled **[***24]** by *Williams I*, it does not serve as a basis to warrant dismissal of the negligent entrustment cause of action.

**[3]** Also, Gander submits that it cannot be strictly liable for Spengler's actions of which it had no special knowledge. This court disagrees. According to plaintiffs' allegations (*see* 511 W. 232nd Owners Corp., 98 NY2d at 152; *Younis, 60 AD3d at 1373*), Gander should have known of Spengler's criminality if it had taken the appropriate steps in light of the red flags. Those red flags include: Spengler's presence and his taking the initiative to refuse assistance; the cash payment for the weapons; Nguyen's failure to inquire about ammunition and proper operation; and, Spengler taking possession of the guns right at the sales counter and leaving with them.[13] These red flags could suggest that Spengler

[12] These direct contacts with Spengler also make Gander's case of People v Sturm, Ruger & Co. (309 AD2d 91, 761 NYS2d 192 [1st Dept 2003]) distinguishable.

[13] Gander assails the information that Spengler left the store with the guns, not Nguyen, to discount that it had special knowledge of Spengler's status. As stated before, Gander originally provided this information in conjunction with its request that this court consider extrinsic proof; therefore, it cannot now ask the court to ignore the exact same information

was not a lawful gun owner, and plaintiffs should be allowed to test this claim through discovery. (*See Earsing, 212 AD2d at 69-70*; *Splawnik v Di Caprio, 146 AD2d 333, 335-336, 540 NYS2d 615 [3d Dept 1989]* [refusing to dismiss negligent entrustment claim].) Gander's reply contention that these red flags are just as capable of an "innocuous interpretation as they are a criminal one" is unpersuasive to require dismissal at this very early stage of the litigation (Gander's reply mem of law at 10). As already acknowledged, a complaint's allegations must be " **[***25]** *accorded every favorable inference*" in a plaintiff's favor. (*Younis, 60 AD3d at 1373* [emphasis added]; *see also 511 W. 232nd Owners Corp., 98 NY2d at 152*.) Consequently, and at this preliminary pleading stage, plaintiffs are entitled to the criminal inference to permit its pleading to withstand a dismissal. (*See e.g. J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 21 NY3d 324, 338, 992 NE2d 1076, 970 NYS2d 733 [2013]* [setting aside granted *CPLR 3211* dismissal motion]; *Bergler v Bergler, 288 AD2d 880, 732 NYS2d 616 [4th Dept 2001]* [affirming denial of *CPLR 3211 (a) (7)* motion].)

**[*881]** In all, Gander cannot secure dismissal of the public nuisance and negligent entrustment claims. (*See Williams II, 103 AD3d at 1191*; *Earsing, 212 AD2d at 70*.)

3. Protocols

Gander is not entitled to have the NSSF protocols removed from the complaint. (*See e.g. Bristol Harbour Assoc. v Home Ins. Co., 244 AD2d 885, 886, 665 NYS2d 142 [4th Dept 1997]* [the lower court did not abuse its discretion in denying motion to strike allegation that the defendant violated the law in insurance policy dispute].) As in *Bristol,* striking of the NSSF protocols is not warranted.

**[**791]** The subject NSSF protocols are noted at paragraphs 64 and **[***26]** 65 of the complaint and discuss a program called "Don't Lie for the Other Guy," and which discuss additional steps a gun seller should take to combat improper sales.

***HN13***[↑] The CPLR provides that "[a] party may move to strike any scandalous or prejudicial matter *unnecessarily* inserted in a pleading." (*See CPLR 3024 [b]* [emphasis added].) " 'Unnecessarily' is the key word," and is akin to "irrelevant." (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3024:4; *see also New* ***[****8]*** *York City Health & Hosps. Corp. v St. Barnabas Community Health Plan, 22 AD3d 391, 802 NYS2d 363 [1st Dept 2005]* [modifying by denying motion to strike].) Motions to strike "are *not favored*, rest in the *sound discretion* of the court and will be denied unless it clearly appears that the allegations attacked have no possible bearing on the subject matter of the litigation." (*Vice v Kinnear, 15 AD2d 619, 619-620, 222 NYS2d 590 [3d Dept 1961]* [emphasis added]; *see also Hewitt v Maass, 41 Misc 2d 894, 897, 246 NYS2d 670 [Sup Ct, Suffolk County 1964]*.)

**[4]** Under the above standard, Gander's strike request cannot withstand judicial scrutiny. (*See e.g. Knibbs v Wagner, 14 AD2d 987, 222 NYS2d 469 [4th Dept 1961]* [sustaining denial of motion to strike evidentiary matters which were relevant and thus not prejudicial].) Gander objects to the NSSF reference because they are not yet proven industry standards, and thus are not yet relevant to its standard of care, citing *Wegman v Dairylea Coop. (50 AD2d 108, 111, 376 NYS2d 728 [4th Dept 1975])*.[14] This court agrees with plaintiffs that *Wegman*, which predates *Bristol Harbour Assoc.,* ***[***27]*** ***[*882]*** *L.P.*, is distinguishable and does not mandate the granting of Gander's application. More specifically, the Fourth Department struck allegations about violations of statutes and regulations governing milk production as they had no bearing upon the breach of contract action. Unlike *Wegman*, the NSSF protocols are relevant to Gander's standard of care which is a necessary component to the general negligence claim, among other things.[15] (*See generally Miner v Long Is. Light.*

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when it hurts it (Paulino attorney affirmation, exhibit E at 18).

[14] Gander also cites *Guiliana v Chiropractic Inst. of N.Y. (45 Misc 2d 429, 430, 256 NYS2d 967 [Sup Ct, Kings County 1965])*, in which the motion to strike was granted. However, and as plaintiffs point out, *Guiliana* has been criticized. (*See* Siegel, NY Prac § 230 [5th ed 2011] [not everything beyond the essential elements of a claim need to be stricken].) Also, the *Bristol Harbour Assoc., L.P.* case, which refused to strike information, was decided after *Guiliana* and is binding precedent.

[15] In addition, Gander's president and CEO, Mike Owens, is a member of NSSF, and the NSSF protocols **[***28]** were part of a press release issued by the Brady Center in regard to this case and thus are already part of the public knowledge (Gander's mem of law at 30; *see e.g.* ***Gibson v Campbell, 16 Misc 3d 1123[A], 847 NYS2d 901, 2007 NY Slip Op 51549[U] [Sup Ct, NY County 2007]*** [refusing to strike information reported widely in the media]). Further proof of the propriety of the protocols allegations remaining in the present

Co., 40 NY2d 372, 381, 353 NE2d 805, 386 NYS2d 842 [1976] [compliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof].) Accordingly, *Wegman* is not controlling, and the more recent case of Bristol Harbour Assoc., L.P. should be followed instead to permit the allegations to stand.

In sum, Gander's request to strike is denied. (*See e.g.* Rice v St. Luke's-Roosevelt Hosp. Ctr., 293 AD2d 258, 259, **[**792]** 739 NYS2d 384 [1st Dept 2002] [ruling that allegations were not so scandalous or prejudicial to warrant being stricken per CPLR 3024 (b)].)

4. Permanent Injunction

Gander's final application is to remove the stand-alone permanent injunction request because it is vague, beyond this court's jurisdiction, and lacking the requisite elements for such a claim. Only the last contention justifies striking, *without prejudice*, the prayer for permanent injunctive relief. (*See e.g.* DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp., 120 AD3d 909, 991 NYS2d 199 [4th Dept 2014] [vacating order granting injunctive relief].)

There is no separate cause of action for a permanent injunction thereby making the request at complaint paragraph 5 and in the wherefore clause an apparent orphan **[****9]** (Paulino attorney affirmation, exhibit A at 13-26). At Special Term, plaintiffs clarified that the injunctive **[***29]** relief was tied just to their public nuisance claim in count 7. (*See generally* Town of Amherst v Niagara Frontier Port Auth., 19 AD2d 107, 114, 241 NYS2d 247 [4th Dept 1963] **[*883]** [the plaintiff sought a permanent injunction in connection with public nuisance claim].) In general, permanent injunctive relief is appropriate in certain public nuisance scenarios, but not the one presently pleaded before this court.

**HN14**[↑] An application for a permanent injunction is an equitable request that is appropriate only upon a showing of threatened irreparable injury, the lack of an adequate remedy at law, and a balancing of equities in the movant's favor. (*See* Kane v Walsh, 295 NY 198, 205-206, 66 NE2d 53 [1946]; Matter of Shanor Elec. Supply, Inc. v FAC Cont., LLC, 73 AD3d 1445, 1447, 905 NYS2d 383 [4th Dept 2010]; Grogan v Saint Bonaventure Univ., 91 AD2d 855, 856, 458 NYS2d 410 [4th Dept 1982].) The Fourth Department has decreed that

> **HN15**[↑] "[a] permanent injunction 'is an *extraordinary remedy* to be granted or withheld by a court of equity in the exercise of its discretion. . . . Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers. Indeed, "[e]quity . . . interferes in the transactions of [persons] by preventive measures *only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong*" ' " (DiMarzo v Fast Trak Structures, 298 AD2d 909, 910-911, 747 NYS2d 637 [4th Dept 2002] [emphasis added and citation omitted] [vacating permanent injunction]).

**[5]** In this case, plaintiffs allege that Gander's conduct, which forms the basis of the **[***30]** public nuisance claim, is continuing (Paulino attorney affirmation, exhibit A, ¶ 131). However, wholly absent from the public nuisance claim is any allegation that this continuing conduct poses a future irreparable injury to plaintiffs specifically, as opposed to the public in general (Paulino attorney affirmation, exhibit A, ¶¶ 128-138). Additionally missing is any allegation that plaintiffs' other claims, which seek both monetary and punitive damages, will not fully compensate them for their past extraordinary harm. In fact, plaintiffs even concede that the other actions will provide relief, but claim that this eventuality is irrelevant (plaintiffs' mem of law at 29). This is not a correct statement of the law, and it actually undercuts plaintiffs' application for a permanent injunction. Finally, plaintiffs do not at all address a balancing of equities in their favor.

In all, and based upon the current complaint, this court strikes only the request for a permanent injunction.

**[*884]** **[**793]** In conclusion of the dismissal motion, Gander must answer all of plaintiffs' substantive claims, and the only portion of the complaint which is stricken is the permanent injunction application.

Plaintiffs' Grand Jury Motion

Plaintiffs are likely **[***31]** entitled to only a very small portion of the grand jury minutes for the state prosecution of defendant Nguyen. (*See e.g.* Matter of Dunlap v District Attorney of Ontario County, 296 AD2d 856, 745 NYS2d 364 [4th Dept 2002] [County Court did not abuse its discretion in denying the petitioner's motion for disclosure of grand jury testimony]; *SSAC, Inc. v Infitec, Inc., 198 AD2d 903, 604 NYS2d 452 [4th*

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complaint is that they were also included in the *Williams*' first amended complaint (*see Williams*' appellate record at 93).

*Dept 1993]* [sustaining release of grand jury minutes].)

The CPL governs grand jury minutes, and it provides in relevant part that

> ***HN16***[↑] "[g]rand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section or *section 215.70 of the penal law*, may, except in the lawful discharge of his duties *or upon written order of the court*, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding. . . . Such evidence may not be disclosed to other persons *without a court order*" (*CPL 190.25 [4] [a]* [emphasis added]; *see also Judiciary Law § 325*; *Matter of District Attorney of Suffolk County, 58 NY2d 436, 444, 448 NE2d 440, 461 NYS2d 773 [1983]*).

***HN17***[↑] A court has the limited discretion to order disclosure of grand jury minutes as part of discovery in a civil case. (*See Matter of Lungen v Kane, 88 NY2d 861, 862, 666 NE2d 1360, 644 NYS2d 487 [1996]*.) However, and as the Court of Appeals articulated:

> "disclosure may be directed when, after a balancing of a public interest in disclosure against the one favoring secrecy, the former outweighs the latter . . . But since disclosure is 'the exception rather **[***32]** than the rule', one seeking disclosure first must demonstrate *a compelling and particularized need for access* . . . However, just any demonstration will not suffice. For it and the countervailing policy ground it reflects must be strong enough to overcome the presumption of confidentiality. In short, without the initial showing of a compelling and particularized need, the question of discretion need not be reached, for then there simply would be no **[*885]** policies to balance." (*Matter of District Attorney of Suffolk County, 58 NY2d at 444* [emphasis added and citations omitted]; *see also People v Fetcho, 91 NY2d 765, 769, 698 NE2d 935, 676 NYS2d 106 [1998]*; *People v Douglas, 288 AD2d 859, 732 NYS2d 781 [4th Dept 2001]*.)

As the Fourth Department has decreed:

> ***HN18***[↑] "At the opposite pole [from cases allowing access to vindicate public rights] are cases in which purely private civil litigants have sought inspection of Grand Jury minutes for the purpose of preparing suits. Although courts have recognized a *limited right* in civil litigants to use a trial witness' Grand Jury testimony to impeach, to refresh recollection or to lead a hostile witness . . . *wholesale* disclosure of Grand Jury testimony for purposes of trial preparation has been almost uniformly denied to private litigants" (*Matter of City of Buffalo [Cosgrove], 57 AD2d 47, 50, 394 NYS2d 919 [4th Dept 1977]* [emphasis added]; *see also Matter of Loria, 98 AD2d 989, 470 NYS2d 233 [4th Dept 1983]*).

**[**794]** In making the discretionary balancing, a court is to consider:

> "(1) prevention of flight by a **[***33]** defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely." (*People v Di Napoli, 27 NY2d 229, 235, 265 NE2d 449, 316 NYS2d 622 [1970]*; *see also Matter of Corporation Counsel of City of Buffalo [Cosgrove], 61 AD2d 32, 35-36, 401 NYS2d 339 [4th Dept 1978]*.)

**[6]** In the case at bar, plaintiffs have not demonstrated the requisite compelling and particularized need for the **[****10]** entire set of grand jury minutes. (*See e.g. Matter of Carey [Fischer], 68 AD2d 220, 230, 416 NYS2d 904 [4th Dept 1979]* [lower court did not abuse its discretion in denying application to release grand jury evidence].) Plaintiffs seek all of the minutes on the basis that material witnesses appeared before the grand jury, and the minutes can be used on cross-examination and for impeachment of those witnesses. This generic claim concerning unidentified people is insufficient to warrant wholesale **[*886]** disclosure of the entire grand jury presentation. (*See Matter of U.S. Air, 97 AD2d 961, 962, 469 NYS2d 39 [4th Dept 1983]*.) Even plaintiffs' own case law **[***34]** recognizes this. (O'Brien attorney affirmation ¶ 7, citing *Matter of Nelson v Mollen, 175 AD2d 518, 520, 573 NYS2d 99 [3d Dept 1991]*.)

However, plaintiffs articulated a compelling and particularized need for some of the grand jury minutes related to the Gander representatives. (*See e.g. Jones v State of New York, 79 AD2d 273, 277, 436 NYS2d 489*

[4th Dept 1981] [allowing release of grand jury minutes in a wrongful death case].) As shown by all of the motions papers, and as acknowledged at Special Term, plaintiffs have the ability to access the public trial transcript for Nguyen's state prosecution. Thus, there is no need to disturb the grand jury process for those Gander witnesses, or any other witness. Despite this, and as represented at Special Term, plaintiffs understand that one Gander employee testified at grand jury but was not called at the time of trial. Therefore, it appears that only the grand jury minutes exist for this Gander employee, but this information has yet to be confirmed with the Monroe County District Attorney's Office, which did not appear at oral argument. Consequently, this court's limited release ruling is contingent upon confirmation of plaintiffs' position. *This court asks that the Monroe County District Attorney's Office confirm in a letter to this court, and all of the parties, whether any grand jury minutes exist* ***[***35]*** *for a Gander employee who did not ultimately testify at trial*. If this is confirmed to be accurate, and in light of plaintiffs' serious accusations against Gander, and after the careful consideration of the factors enunciated in Di Napoli, this court directs the Monroe County District Attorney's Office to provide just those select minutes within 30 days to the court for an in camera review before further release to the litigants. (*See* People v Gissendanner, 48 NY2d 543, 551, 399 NE2d 924, 423 NYS2d 893 [1979].)

In sum, and subject to the above confirmation, plaintiffs' motion is approved as to only grand jury testimony from any Gander representative who did not also testify at trial. (*See* Matter of Quinn [Guion], 293 NY 787, 788, ***[**795]*** 58 NE2d 730 [1944] [town residents were entitled to grand jury minutes]; Matter of Scotti, 53 AD2d 282, 288, 385 NYS2d 659 [4th Dept 1976] [approving release of grand jury minutes].)

Conclusion

Based upon all of the foregoing, it is the decision and order of this court that:

**[*887]** 1. Gander's dismissal motion is *denied* as to the PLCAA preemption contention and the failure to state valid claims as to the public nuisance and negligent entrustment causes of action. The application to strike the NSSF protocols from the complaint is also *denied*. However, Gander's request to strike the permanent injunction relief is *granted*, *but without prejudice*. Accordingly, Gander is directed **[***36]** to answer the complaint within *10 days* after service of notice of entry of this decision and order. (*See* CPLR 3211 [f].)

2. Plaintiffs' motion for release of the grand jury minutes is *denied*, with the exception of the minutes of any testimony from a Gander witness who did not later testify at Nguyen's trial. After confirmation, the court will conduct an in camera review.

In furtherance of this court's discretion to oversee its cases, it is *ordered* the **[****11]** following scheduling order dates apply: discovery is to be completed by *December 31, 2015*; the note of issue is due by *January 15, 2016*; and, any summary judgment motions are due within 60 days after the note of issue filing. (*See* CPLR 3212 [a].)

*Failure of the plaintiffs to file a note of issue and certificate of readiness by the date provided herein will result in this matter being deemed stricken "off" the court's calendar without further notice pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27*. If so dismissed, the case may be restored without motion within one year of such dismissal by: (1) the filing of a note of issue and certificate of readiness; and, (2) the forwarding of a copy thereof with a letter requesting restoration to the court's assignment clerk. Also, restoration after one year shall, **[***37]** before the filing of a note of issue and certificate of readiness, require the additional documentation of a sworn affidavit by a person with knowledge showing a reasonable excuse for the delay, a meritorious cause of action, a lack of prejudice to the defendant, and the absence of intent to abandon the case. *This court shall at anytime after the date listed above, entertain a defense motion to dismiss for want of prosecution which relief could include a dismissal of the complaint. This order shall serve as valid 90-day demand under* CPLR 3216; and it is further ordered, that any extensions of the above deadlines will be granted only upon the showing of extreme good cause requested and approved prior to the above note of issue filing date.

# EXHIBIT 4

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>COUNTY OF SPARTANBURG )<br>) | IN THE COURT OF COMMON PLEAS |
| Cindy Coxie, )<br>) | Civil Action No. 2018-CP-42-04297 |
| PLAINTIFF, )<br>v. )<br>) | **Form 4**<br>**SCRCP Rule 21(b)(6) Motion To Dismiss Denied** |
| Academy, Ltd., d/b/a Academy Sports and Outdoors; and, Dustan Lawson, )<br>) | |
| DEFENDANT) | |

*CHECK ONE*:

[ ] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED. (*CHECK REASON*): [ ] Rule 12(b), SCRCP; [ ] Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k),SCRCP(Settled); [ ] Other _____.

[ ] ACTION STRICKEN (*CHECK REASON*): [ ] Rule 40(j), SCRCP; [ ] Bankruptcy; [ ] Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [ ] Other _____.

**IT IS ORDERED AND ADJUDGED:** [ ] See attached order; [X] Statement of judgment by the Court:

This matter came before the Court on the defendant Academy's Motion to Dismiss pursuant to SCRCP Rule 12(b)(6), asserting that the plaintiff has failed to state facts sufficient to constitute a cause of action.

The standard of review which this Court is required to apply in ruling on a SCRCP Rule 12(b)(6) motion is well-established in South Carolina and is not contested by the parties. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. If the facts alleged in the complaint and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case, then a court must deny the motion. The relevant question is whether, in viewing the complaint in a light most favorable to the plaintiff, and with every reasonable doubt resolved in the plaintiff's favor, the complaint states a valid claim for relief. See *Dye v. Gainey*, where "every" doubt is resolved in the plaintiff's favor when ruling on a 12(b)(6) motion. *Dye v. Gainey*, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. A judgment on the pleadings against the plaintiff is not proper where there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. All well-pleaded factual allegations are deemed admitted for the purpose of considering the motion for judgment on the pleading. Where

allegations in the complaint give rise to competing inferences on a question of material facts, dismissal under 12(b)(6) is not appropriate. In sum, under a 12(b)(6) analysis, the allegations of the complaint must be considered to be true.

Accordingly, a court considering a 12(b)(6) motion must base its ruling solely upon the allegations set forth on the face of the complaint. However, if matters outside the pleadings are presented during the course of a 12(b)(6) motion, and are not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56. Furthermore, if converted to a Rule 56 motion, all parties shall be given reasonable notice to present all material made pertinent to such a motion by that same rule.

As a general rule, important questions of novel impression should not be decided on a motion to dismiss. Where, however, the dispute is not as to the underlying facts but to the interpretation of law, and where the development of the record will not aid in the resolution of the issues, it is proper to decide novel issues on a motion to dismiss.

After reviewing the twenty-eight-page complaint, wherein monetary and injunctive relief are sought, and after considering the written and oral arguments presented by counsel, the present motion cannot be granted. The plaintiff's Complaint presents facts which, at this juncture, are deemed true, and when those facts are viewed in the light most favorable to the plaintiff and all reasonable inferences drawn therefrom are done so in a manner most favorable to the plaintiff, this Court cannot rule that, as a matter of law, the provisions of PLCAA prevent the case from moving forward.

Additionally, this court cannot rule that either the plaintiff's claims for negligence per se or negligent entrustment, as a matter of law, should be dismissed. In *State Farm Fire & Cas. Ins. Co. v. Sproull*, Judge Quattlebaum noted that,

> The South Carolina Supreme Court has never determined whether the negligent entrustment factors set forth in *Gadson* limit the claim in South Carolina to situations only involving an intoxicated driver. Instead, in *Gadson*, the South Carolina Supreme Court only stated that it declined to adopt a broader definition of negligent entrustment as set forth in the Restatement based on the set of facts before the Court. *State Farm Fire & Cas. Ins. Co. v. Sproull*, 329 F. Supp. 3d 238, 247 (D.S.C. 2018).

In another case, *Whitlaw v. Kroger Co.*, the Court found that a statute designed to protect the general public could be the basis for a negligence per se claim if the causal link is established. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991). Therefore, under South Carolina law the claims of negligent entrustment and negligence per se, are novel as applied to the facts alleged in the present complaint and require a developed factual record in the present case.

This case presents many novel issues of law and analysis. Defendant Academy acknowledges the novelty of this case and the arguments presented to this Court where, in its Reply in Support of the Motion to Dismiss, the defendant states that there is no binding precedent from the United States or South Carolina Supreme Courts. The defendant further

advises this Court that it is free to make its own determination of how the PLCAA exceptions to immunity should be applied. Again, this is a novel case where a more-developed record will assist in evaluating the application of the PLCAA, its immunity provisions, and its predicate exception to Academy's actions. As evinced by the factual arguments made in the memoranda, it is this court's impression that many of the parties' disputes are founded largely upon factual matters that will require development and argument that goes beyond the four corners of the complaint.

The better approach for all of the claims alleged in the complaint is to remain consistent with the standard of review required by a SCRCP Rule 12(b)(6) analysis and to allow a more thorough record to be developed.

As part of the arguments presented, this Court was asked to take judicial notice of certain sections of the indictment issued against Mr. Lawson. While in certain situations, judicial notice of indictments is appropriate, for the purposes of a 12(b)(6) motion this Court declines to do so as to avoid the issues related to notice, addressed supra, occasioned by a 12(b)(6) motion's conversion to a Rule 56 motion. Additionally, given sixteen-plus years of experience with criminal trial and pleas, it is this Court's impression that indictments are, generally speaking, documents drafted to provide notice of the crime being prosecuted against an accused and to establish a court's jurisdiction. As a matter of course, as with the present indictment, facts are stated broadly. Nevertheless, even if this Court took judicial notice of the contents of the indictment, the present motion would still be denied due to the allegation asserted in the Complaint that Academy violated federal and state law. Also this Court notes that the allegations in the complaint can reasonably be read to include allegations against Academy that involve conduct going beyond the sale of guns to the co-defendant Lawson.

Since this Court's present decision makes no final ruling on the merits, no other formal order will be issued by this Court.

**THIS ORDER:** Ends the case [ ]; Does not end the case [X]

Dated at Spartanburg, South Carolina, this the 29th day of July 2019.

J MARK HAYES
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2018, and a copy mailed first class this _____ day of _____, 2018 to attorneys of record or to parties (where appearing *pro se*) as follows:

CLERK OF COURT

Plaintiff's Attorney:

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**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 2050 Main Street, Suite 1100, Irvine, California 92614.

On March 10, 2022, I served the foregoing document described as:

- DECLARATION OF AMY K. VAN ZANT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' GLOBAL DEMURRER

upon the interested parties in this action listed below in the manner described as follows:

| | |
|---|---|
| | **(VIA EMAIL)** I caused to be transmitted via electronic mail the document(s) listed above to the electronic address(es) set forth below. |
| **X** | **(VIA Electronic Means)** I caused to be transmitted via electronic means the document(s) listed above to the electronic address(es) set forth below. |

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 10, 2022 at Irvine, California.

Donna M. Bourgeois