Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NATIONAL SHOOTING SPORTS FOUNDATION, INC., *Plaintiff*, v. MATTHEW J. PLATKIN, Attorney General of the State of New Jersey, *Defendant.*	No. 3:22-cv-06646-ZNQ-TJB

[PROPOSED] BRIEF OF GUN VIOLENCE PREVENTION GROUPS AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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CORPORATE DISCLOSURE STATEMENTS

Brady Center to Prevent Gun Violence is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Everytown for Gun Safety Support Fund is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Giffords Law Center to Prevent Gun Violence is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

ARGUMENT

In 2022, the New Jersey Legislature duly enacted what is now section 2C:58-35 of the New Jersey Statutes (hereinafter, "Section 35"). Section 35 authorizes the Attorney General to commence civil actions against members of the gun industry that either are responsible for creating or maintaining a public nuisance in the State or that fail to enforce reasonable controls in the conduct of their business. *See generally* N.J. Stat. Ann. § 2C:58-35. Plaintiff National Shooting Sports Foundation has moved to enjoin all enforcement of this statute on numerous grounds, including that it runs afoul of a federal law, the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901-7903. *See* Pl.'s Mem. 1-3, 7-20. But PLCAA does not preempt state statutes. And when it does address state statutes, it establishes that Congress did not intend to preclude suits brought under those statutes.

PLCAA protects gun industry members from certain types of civil actions, which it terms "qualified civil liability action[s]." *See* 15 U.S.C. §§ 7902(a), 7903(5)(A). And PLCAA makes clear that it does not preempt *every* civil action against a member of the gun industry. Instead, to count as a "qualified civil liability action," an action must be brought against a particular type of defendant (most notably, federally licensed firearm manufacturers or sellers), seek relief from a particular type of harm (harm that results from the misuse of a firearm by the plaintiff or a third party), and must not fit into one of PLCAA's six enumerated exceptions. *See* § 7903(5)(A); *see also Ileto v. Glock, Inc.*, 565

F.3d 1126, 1145 (9th Cir. 2009) ("The PLCAA preempts specified types of liability actions; it does not provide a blanket protection to specified types of defendants.").

The Attorney General has commenced several actions under Section 35, and in those cases, some defendants have raised PLCAA as a defense, while others have not (due to its clear inapplicability). Here, Plaintiff seeks to enjoin Section 35 on its face. To succeed on such a broad claim, Plaintiff must "'establish[] that no set of circumstances exists under which [Section 35] would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *accord United States v. Rahimi*, 602 U.S. 680, 693 (2024). Not only is Plaintiff unable to make this showing, it has not even tried.

Instead, Plaintiff's argument seems to be that Section 35 *itself* cannot satisfy PLCAA's so-called predicate exception, § 7903(5)(A)(iii). *See* Pl.'s Mem. 9-20. Under that exception, PLCAA permits courts to hear any "action in which a manufacturer or seller … knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." § 7903(5)(A)(iii). Plaintiff alleges that Section 35 does not meet this standard because it does not "impose clear obligations or prohibitions directly on industry members" and because it authorizes actions that require neither "knowing" violations nor "proximate causation in the ordinary sense." Pl.'s Mem. 10-20.

Plaintiff is wrong: Section 35 *can* be invoked to satisfy the predicate exception. *See infra* Part II. But this Court need not decide that question. Assuming *arguendo* that Plaintiff is correct that a knowing violation of Section 35 does not meet the predicate exception's requirements, Section 35 authorizes many *other* actions that even Plaintiff does not contend are preempted by PLCAA. *See infra* Part I. Indeed, several of the actions that the Attorney General has already brought under Section 35 are unambiguously *not* preempted, as defendants in those cases appear to recognize. *See infra* Sections I.B-C. Because Section 35 has a "plainly legitimate sweep," Plaintiff's "facial challenge must fail." *Wash. State Grange*, 552 U.S. at 449 (citation omitted).

I. Many civil actions that can be brought pursuant to Section 35 are indisputably not preempted by PLCAA.

A. PLCAA's plain language establishes that it does not preempt all litigation against gun industry members.

As its name indicates, the Protection of Lawful Commerce in Arms Act is designed to protect members of the gun industry engaged in *lawful* commerce. The text of the law explains that Congress passed it out of a belief that "[b]usinesses … engaged in … lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products … should not[] be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed or intended." 15 U.S.C. § 7901(a)(5); *accord* Pl.'s Mem. 1.

This express purpose is fulfilled by the operative language of the Act, 15 U.S.C. § 7903. That PLCAA protects only *lawful* commerce is demonstrated in two places in

the Act. First, PLCAA generally applies only to actions brought against gun companies licensed under federal law. *See* § 7903(2), (5)(A), (6).[1] Second, PLCAA does not apply to "an action in which a manufacturer or seller … knowingly violated a State or Federal statute applicable to the sale or marketing of the product," provided that "the violation was a proximate cause of the harm for which relief is sought." § 7903(5)(A)(iii). Under these provisions, PLCAA protects from suit licensed gun companies that obey the law, provided that none of PLCAA's other exceptions applies. But a gun company operating without a license or knowingly violating the law is not protected. For example, foreign gun manufacturers without federal firearms licenses are not entitled to PLCAA protection. *See, e.g.*, *Ileto*, 565 F.3d at 1145 (holding that Chinese gun manufacturer was not protected by PLCAA because it lacked federal firearms license). And PLCAA does not protect gun companies violating laws pertaining to gun trafficking or straw purchasing. *See, e.g.*, *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 338-39 (App. Div. 2012).

Similarly, PLCAA's protection from liability for "the harm caused by those who criminally or unlawfully misuse firearm products," § 7901(a)(5), is enforced by the definition of "qualified civil liability action," which is limited to actions "resulting from the criminal or unlawful misuse of a qualified product," § 7903(5)(A). Thus, if a licensed, law-abiding gun company is sued for damages inflicted unlawfully by a third party, that

[1] PLCAA does not require licensure for sellers of ammunition or for trade associations, *see* § 7903(6)(C), (8), because such entities do not require licenses under federal law, *see* 18 U.S.C. § 922(a)(1) (requiring licenses only for "importing, manufacturing, or dealing in firearms" and "importing or manufacturing ammunition").

company is protected from suit by PLCAA (again, provided that none of PLCAA's other exceptions is met). But a gun company sued for harm that *it* caused is not protected. For example, cases brought by state attorneys general to enforce their states' consumer protection laws against gun companies engaged in deceptive or unfair marketing would usually not implicate PLCAA, since such cases would not result from the criminal or unlawful misuse of a firearm by a third party. *See, e.g.*, *People v. Blackhawk Mfg. Grp. Inc.*, No. CGC-21-594577, slip op. at 5-8 (Cal. Super. Ct. May 2, 2023), attached as Exhibit A.

B. Not all actions brought pursuant to Section 35 meet the definition of "qualified civil liability actions."

The civil actions authorized by Section 35 are not limited to "qualified civil liability actions." Under Section 35, a lawsuit may be brought against any "gun industry member" that contributes to a public nuisance. N.J. Stat. Ann. § 2C:58-35(a)(1). The term "gun industry member" is defined to include any "person engaged in the sale, manufacturing, distribution, importing or marketing of a gun-related product." § 2C:58-34. This statutory term plainly encompasses entities that are not entitled to PLCAA protection, including unlicensed firearm manufacturers and sellers. Thus, for example, a lawsuit could be brought under Section 35 against a company selling firearms without a license, and that lawsuit would not be preempted by PLCAA.

This is no hypothetical; the Attorney General has already brought multiple such lawsuits. For example, in *Platkin v. Glock, Inc.*, New Jersey has sued Glock Ges.m.b.H.—

an Austrian firearm manufacturer—for designing firearms that can be easily modified into illegal machine guns. Complaint ¶¶ 8-9, 25, *Platkin v. Glock*, No. ESX-C-286-24 (N.J. Super. Ct. Ch. Div. Dec. 12, 2024) (Ex. K to Def.'s Opp'n). Because this Austrian company lacks a federal firearms license, it is not entitled to PLCAA protection. *See, e.g.*, *Ileto*, 565 F.3d at 1145.

Similarly, in *Platkin v. Patriot Enterprises Worldwide LLC*, the Attorney General brought claims under Section 35 against two companies for selling "products designed to create unserialized, untraceable firearms—commonly known as 'Ghost Guns.'" Amended Complaint ¶¶ 1, 168-206, *Patriot Enters.*, No. MER-C-93-23 (N.J. Super. Ct. Ch. Div. Dec. 14, 2023) (Ex. B to Def.'s Opp'n). Because those defendants do not hold licenses to sell firearms, their motion to dismiss (which remains pending) does not even raise a PLCAA defense. *See* Brief in Support of Defendants' Motion to Dismiss, *Patriot Enters.*, No. MER-C-93-23 (Mar. 22, 2024) (Ex. C to Def.'s Opp'n). Nor do they argue that Section 35 is inapplicable to them. *See id.*

And these are far from the only examples. Under Section 35, the Attorney General can also sue a gun industry member that fails to "establish, implement, and enforce reasonable controls regarding its manufacture, sale, distribution, importing, and marketing of gun-related products." § 2C:58-35(a)(2). While PLCAA applies only when the action "result[s] from" *someone else's* "criminal or unlawful misuse of a qualified product," § 7903(5)(A), Section 35 authorizes the Attorney General to bring actions

against defendants resulting from their *own* failures to follow the law, irrespective of whether the defendant's products are later misused by a third party.

Here, too, the Attorney General has already brought such a lawsuit. In *Platkin v. RR Outdoors, LLC d/b/a Butch's Gun World*, the Attorney General sued a firearm dealer under Section 35 for failing "to establish, implement and enforce reasonable controls regarding its sale of ammunition and ammunition magazines." Complaint ¶¶ 11, 35, *RR Outdoors*, No. CUM-C-37-24 (N.J. Super. Ct. Ch. Div. Nov. 13, 2024) (Ex. G to Def.'s Opp'n). Because there are no allegations in the complaint that any third party misused the defendant's products, *see generally id.*, the *RR Outdoors* action is clearly not a "qualified civil liability action." And sure enough, the defendant in that case has also not raised PLCAA as a defense. *See* Answer to Complaint at 5, *RR Outdoors*, No. CUM-C-37-24 (Dec. 16, 2024) (Ex. H to Def.'s Opp'n).[2]

These suits demonstrate that some civil actions brought under Section 35 do not implicate PLCAA at all. Consequently, it simply cannot be that PLCAA preempts Section 35 in its entirety. *See Platkin v. FSS Armory, Inc.*, No. MRS-C-102-23, slip op. at 24 (N.J. Super. Ct. Ch. Div. Aug. 28, 2024) (Ex. E to Def.'s Opp'n) ("It follows that as the PLCAA allows the instant lawsuit to be initiated, implied preemption is absent.").

[2] Plaintiff argues that the *RR Outdoors* action could not satisfy PLCAA's predicate exception because the defendant there lacked sufficient "guidance as to which controls and procedures are 'reasonable.'" Pl.'s Mem. 12-13. Putting the merits of that argument to one side, the applicability of PLCAA's predicate exception is irrelevant. As explained above, the *RR Outdoors* action is not a qualified civil liability action in the first place, so the predicate exception does not even come into play.

C. The Attorney General can bring an action pursuant to Section 35 that uses a different statute to satisfy PLCAA's predicate exception.

Of course, *some* actions brought under Section 35 will meet PLCAA's threshold definition of a "qualified civil liability action." But under PLCAA's terms, and as Plaintiff acknowledges, qualified civil liability actions do "not include … an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." § 7903(5)(A)(iii); *accord* Pl.'s Mem. 2. Accordingly, a claim against a licensed gun manufacturer or dealer resulting from third-party misuse of a firearm may nevertheless proceed if the manufacturer or dealer defendant knowingly violated a firearm statute—often called a "predicate statute"—and that violation proximately caused the plaintiff's harm. *See, e.g.*, *Williams*, 952 N.Y.S.2d at 337.

Plaintiff insists that Section 35 can never serve as a predicate statute. *See* Pl.'s Mem. 2-3, 9-10. *But see infra* Part II. Yet even if that were correct, it would not mean that Section 35 cannot serve as a *cause of action*. As the text of PLCAA makes clear, the predicate exception applies to "action[s] *in which* [the] manufacturer or seller … violated a … statute," § 7903(5)(A)(iii) (emphasis added); it is not limited to claims *for* violating a predicate statute. *See, e.g.*, *Roberts v. Smith & Wesson Brands, Inc.*, No. 22 LA 487, 2025 WL 1295092, at *12 (Ill. Cir. Ct. Apr. 1, 2025) (holding that predicate exception does not require cause of action and predicate statute to be one and the same). In fact,

PLCAA includes the Gun Control Act as an example of a predicate statute, *see* § 7903(5)(A)(iii)(II), even though the Gun Control Act does not itself provide a cause of action, *see, e.g.*, *City of Camden v. Beretta U.S.A. Corp.*, 81 F. Supp. 2d 541, 550 (D.N.J. 2000). And PLCAA explicitly does not create any new causes of action. § 7903(5)(C). The predicate exception thus necessarily allows suits where the cause of action and the predicate statute are different. *See, e.g.*, *King v. Klocek*, 133 N.Y.S.3d 356, 357-58 (App. Div. 2020) (allowing negligence claim to proceed based on violation of state and federal criminal statutes). Plaintiff does not argue to the contrary.

Consequently, even if Plaintiff were correct that Section 35 cannot be a predicate statute, the Attorney General could still bring an action under Section 35 predicated on the violation of *another* statute; such an action would plainly be permitted by PLCAA and is explicitly contemplated by New Jersey's law. *See* N.J. Stat. Ann. § 2C:58-35(a)(1) ("A gun industry member shall not, *by conduct either unlawful in itself* or unreasonable under all the circumstances, knowingly or recklessly create, maintain or contribute to a public nuisance . . . ." (emphasis added)).

Plaintiff concedes that the predicate exception can be satisfied by "statutes that impose clear obligations or prohibitions directly on industry members," Pl.'s Mem. 10, and there are many such statutes in state and federal law. In addition to the federal Gun Control Act, which Congress expressly stated could serve as a predicate statute, *see* § 7903(5)(A)(iii)(II), New Jersey law imposes numerous indisputably "clear" statutory prohibitions directly on industry members. *See, e.g.*, N.J. Stat. Ann. § 2C:58-2(a)(4), (5)(a)

(prohibiting firearm dealers from delivering firearms to individuals who lack permits); *id.* § 2C:58-2(a)(7) (prohibiting firearm dealers from delivering more than one handgun to any individual within 30-day period); *id.* § 2C:58-3.3(c) (prohibiting transfer of handgun ammunition to individuals under 21 years old). If a licensed dealer violates one of these prohibitions—which Plaintiff does not contest can serve as predicate statutes—and thereby contributes to a public nuisance, PLCAA does not forbid the Attorney General to bring suit using Section 35 as a cause of action.

In fact, the Attorney General has brought such actions. In *Platkin v. FSS Armory*, New Jersey filed suit under Section 35 against a dealer who "facilitated criminals' theft of twenty … guns" by storing the guns "within easy reach of a ground-floor window," in violation of a statutory prohibition against dealers' placing firearms "in any window." Complaint ¶¶ 1, 4, 11, 54, 63, 67, 72, *FSS Armory*, No. MRS-C-102-23 (Dec. 12, 2023) (citing N.J. Stat. Ann. § 2C:58-2(a)(3)) (Ex. D to Def.'s Opp'n). Because the defendant in that case violated a statutory prohibition regarding the sale or marketing of firearms, PLCAA plainly allows the action to be brought—and indeed, the court there has already denied the defendant's motion to dismiss. *See FSS Armory*, slip op. at 24 ("The explicit language of the PLCAA … allows Plaintiff to bring the instant action.").

Similarly, in *Platkin v. Glock*, the Attorney General sued Glock, Inc. and its Austrian affiliate Glock Ges.m.b.H. under Section 35 for contributing to a public nuisance. As alleged in the complaint, the Glock defendants knowingly distributed firearms the design of which allows them to be easily and cheaply converted into illegal

machine guns, in violation of a state prohibition against causing the manufacture of machine guns without authorization. *See* Complaint ¶¶ 8-9, 45, 152, 156-57, 166, 170-71, *Platkin v. Glock*, No. ESX-C-286-24 (Dec. 12, 2024) (citing N.J. Stat. Ann. § 2C:39-9(a)) (Ex. K to Def.'s Opp'n). Putting aside that as an Austrian business entity Glock Ges.m.b.H. cannot rely on PLCAA protection at all, *see supra* Section I.B, neither Glock entity contests that the machine gun statute can serve as a predicate statute under PLCAA. *See* Defendants' Memorandum of Law in Support of Their Motion to Dismiss at 16-19, *Platkin v. Glock*, No. ESX-C-286-24 (Mar. 7, 2025) (Ex. L to Def.'s Opp'n).[3]

* * * * *

In seeking to have Section 35 enjoined, Plaintiff would bar all these lawsuits—which seek to address serious public safety concerns—even though none of them is forbidden by PLCAA. Indeed, these few examples demonstrate that there are *many* possible lawsuits that could rely on Section 35 and avoid running afoul of PLCAA, *even if* Plaintiff were correct that Section 35 itself cannot serve as a predicate statute. Plaintiff's motion, fixated narrowly on the predicate exception, thus misses the forest for the trees. Just because some actions brought under Section 35—hypothetical or pending—might be barred by PLCAA does not mean that the statute is facially invalid or that it can be struck down in its entirety. *See Wash. State Grange*, 552 U.S. at 449. Plaintiff's preemption argument fails.

[3] The motion to dismiss remains pending.

II. Section 35 can serve as a predicate statute.

Although this Court need not reach this question, Plaintiff's argument that Section 35 can never satisfy PLCAA's predicate exception is also wrong. Plaintiff asserts that Section 35 cannot serve as a predicate statute because: (1) it is insufficiently "concrete," Pl.'s Mem. 10-14; (2) recognizing Section 35 would contravene Congress's intent, *id.* at 14-16; (3) the predicate exception can be satisfied only by statutes that require a "knowing" state of mind, *id.* at 16-18; and (4) section 58-35(e) impermissibly redefines proximate cause to include foreseeable criminal conduct, *id.* at 18-20. Each of these arguments fails.

A. Section 35 is "applicable to the sale or marketing of" qualified products.

The text of PLCAA evinces only one requirement for a statute to satisfy the predicate exception: the "State or Federal statute" must be "applicable to the sale or marketing of the product"—that is, the sale or marketing of the "qualified product" at issue in the case. 15 U.S.C. § 7903(5)(A)(iii). Section 35 meets this requirement.

In *City of New York v. Beretta USA Corp.*, the Second Circuit held that the predicate exception encompasses statutes that: (a) "expressly regulate firearms"; (b) "courts have applied to the sale and marketing of firearms"; or (c) "clearly can be said to implicate the purchase and sale of firearms." 524 F.3d 384, 404 (2d Cir. 2008). Section 35 meets this standard: by its express terms, it applies to "the sale, manufacturing, distribution,

importing, or marketing" of firearms and related products. N.J. Stat. Ann. §§ 2C:58-34, -35(a)(1). Plaintiff does not contest this point.

B. PLCAA does not include a "concreteness" requirement.

Instead of identifying anything in PLCAA's text that renders Section 35 an unsuitable predicate statute, Plaintiff adds a new requirement that does not appear in the words of the Act. According to Plaintiff, PLCAA's context, and Congress's presumed intent, insulates gun companies from liability unless they violate "a concrete obligation or prohibition." Pl.'s Mem. 12 (emphasis omitted). Because Congress did not include this proposed rule in the text of the Act, it cannot be inserted by a court. *See Roberts*, 2025 WL 1295092, at *14 ("[T]here is nothing in the predicate exception that describes statutes applicable to the sale and marketing of firearms for the purpose of the predicate exception in terms of 'concreteness.'"); *see also Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) ("[T]he text of a law controls over purported legislative intentions unmoored from any statutory text.").

Indeed, the text reveals that Congress was comfortable with liability for gun companies that fail to act reasonably. Three other types of actions permitted by PLCAA impose liability depending on whether the defendant acted reasonably. *See Roberts*, 2025 WL 1295092, at *14 (rejecting argument that predicate statute must have "concrete obligations" because, among other things, PLCAA's negligent entrustment, product defect, and implied warranty of merchantability exceptions involve "questions of reasonableness"). Plaintiff cannot explain why, if Congress sought to shield gun

companies unless they violated "concrete obligations or prohibitions, not just duties of care," Pl.'s Mem. 13, it nevertheless wrote three other exceptions that involve "broad duties and standards." *Roberts*, 2025 WL 1295092, at *14.[4]

Moreover, Plaintiff's theory contradicts PLCAA decisions from courts around the country. In *Soto v. Bushmaster Firearms International, LLC*, the Supreme Court of Connecticut held that the Connecticut Unfair Trade Practices Act—which provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices"—could satisfy the predicate exception. 202 A.3d 262, 274 n.9, 300-06 (Conn. 2019). In *Smith & Wesson Corp. v. City of Gary*, the Court of Appeals of Indiana held that Indiana's nuisance law—which prohibits as a nuisance anything "injurious to health," "indecent," "offensive to the senses," or "an obstruction to the free use of property"—could satisfy the predicate exception. 875 N.E.2d 422, 429-32 (Ind. Ct. App. 2007). And in *Roberts v. Smith & Wesson*, the Circuit Court of Illinois held that the Illinois Consumer Fraud and Deceptive Business Practices Act—which forbids "unfair or deceptive acts or practices"—could satisfy the predicate exception. 2025 WL 1295092, at *4, *12-13. On Plaintiff's theory, all these cases (and there are more like them) were wrongly decided.

Plaintiff nevertheless insists that a predicate statute *must* contain concrete prohibitions because otherwise a gun company could not "knowingly" violate the

[4] Plaintiff's brief fails even to acknowledge the existence of the other exceptions.

statute, as the predicate exception requires. Pl.'s Mem. 10-11. This proposed logic does not follow. There is nothing incompatible about a knowing state of mind and a reasonableness standard of conduct—it is surely possible for a defendant to *know* that its conduct is unreasonable, or that it is contributing to a public nuisance. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (discussing deliberate-indifference claim as involving defendant "knowingly and unreasonably disregarding an objectively intolerable risk of harm"); *Hernandez-Cruz v. Att'y Gen.*, 764 F.3d 281, 285 (3d Cir. 2014) (discussing statute that criminalizes "knowingly violat[ing] a duty of care"); N.J. Stat. Ann. § 2C:33-12 ("A person is guilty of maintaining a nuisance when … [b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons").

Moreover, all that is required to "knowingly" violate a statute is "knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998). "[T]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Id.* at 192. If, in a particular case, a defendant's conduct was *not* knowing, then PLCAA will provide that defendant a defense to liability. *See* 15 U.S.C. § 7903(5)(A)(iii). But again, the fact that *some* cases invoking Section 35 might be blocked by PLCAA does not mean that Section 35 is invalid across the board.

Last, Plaintiff attempts to ground its "concreteness" requirement in the sample predicate violations enumerated in PLCAA, as well as in the list of federal firearm

statutes mentioned in the Act's prefatory language. *See* Pl.'s Mem. 11-12 (citing § 7903(5)(A)(iii)(I)-(II)); *id.* at 13-14 (citing § 7901(a)(4)). Plaintiff argues that because *these* statutes set forth concrete requirements, *all* predicate statutes must set forth concrete requirements. *See id.*[5] But "[courts] do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). Plaintiff has identified no ambiguity in the predicate exception that would counsel resorting to *ejusdem generis*, *noscitur a sociis*, or similar canons of construction. *Cf. Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980) ("The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." (citation omitted)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, … 'judicial inquiry is complete.'" (citation omitted)).[6]

C. PLCAA neither seeks nor requires "national uniformity" with regard to state statutes.

Next, Plaintiff argues that recognizing Section 35 as a predicate statute would "defy 'Congress' intention to create national uniformity.'" Pl.'s Mem. 16 (citation

[5] The two sample predicate violations listed at § 7903(5)(A)(iii)(I) & (II) were included to make explicit that PLCAA would not have disallowed actions brought by victims of the Washington, D.C. sniper shootings. *See Soto*, 202 A.3d at 314-16.

[6] Plaintiff purports to rely on *City of New York v. Beretta*. *See* Pl.'s Mem. 11-12. But in that case, the court looked to PLCAA's sample predicate violations to help it understand the meaning of the statutory phrase "applicable to." 524 F.3d at 401-02. That language is not at issue here, since, unlike the general public nuisance statute at issue in *Beretta*, there can be no doubt (and Plaintiff has not contested) that Section 35 is "applicable to" the sale and marketing of firearms and ammunition. *See supra* Section II.A.

omitted). Plaintiff asserts that allowing newly enacted state laws to serve as predicate statutes would "produce absurd results" because "preemption of virtually identical suits" would turn on whether those suits were permitted by state law. *Id.* This argument is contradicted by PLCAA's plain text, which evinces a strong federalism principle.

In passing PLCAA, Congress was not intent on "national uniformity," a topic on which the Act is silent. Rather, by its express language, PLCAA's predicate exception allows for actions in which the defendant "violated a *State* or Federal statute," § 7903(5)(A)(iii) (emphasis added); and needless to say, different states have different statutes, prohibiting different conduct (which Members of Congress well know). Indeed, one of Congress's express purposes in enacting PLCAA was "[t]o preserve and protect … important principles of federalism, State sovereignty and comity between sister States." § 7901(b)(6). This purpose is furthered by recognizing that states can enact their own firearm laws and that those laws can serve as PLCAA predicate statutes. That some conduct may be legal in one state but illegal in another is commonplace in our federal system, and it does not contravene PLCAA.

By contrast, if Plaintiff were right, it is not clear why its argument would be limited to Section 35. If PLCAA truly commands national uniformity, then *none* of New Jersey's firearm laws may serve as a PLCAA predicate, no matter how "concrete" their prohibitions. But this cannot be right because it would contradict Congress's choice to make the predicate exception encompass state legislation. *See* § 7903(5)(A)(iii).

D. The predicate exception requires "knowing" violations of predicate statutes; it does not require predicate statutes that can only be violated knowingly.

After exhausting its arguments that Section 35 is entirely preempted, Plaintiff falls back on the argument that Section 35 is preempted insofar as it permits liability for less than knowing violations. *See* Pl.'s Mem. 16-18. This argument suffers from the same flaw that pervades Plaintiff's brief: despite the plain language of PLCAA, Plaintiff conflates the preemption of certain civil actions with the preemption of entire statutes.

The text of the predicate exception requires that the defendant "knowingly violated" the predicate statute. § 7903(5)(A)(iii). It does not require that the defendant violated a statute with a "knowing" mens rea requirement, which is a distinct concept. *See FSS Armory*, slip op. at 25 ("[T]he plain language of the … predicate exception only requires allegations of a knowing violation of a state or federal law, not that the statute violated contain a knowing scienter requirement."). Plaintiff's contrary reading of the Act asks this Court to disregard the statutory language, which this Court cannot do.

Moreover, Plaintiff's approach lacks support in case law. In fact, courts regularly find the predicate exception to be satisfied by knowing violations of statutes that do not themselves require a "knowing" state of mind. *See, e.g.*, *Soto*, 202 A.3d at 274 n.9, 300; *City of Gary*, 875 N.E.2d at 429-34; *Brady v. Walmart, Inc.*, No. 21-CV-1412, 2022 WL 2987078, at *6 (D. Md. July 28, 2022); *Roberts*, 2025 WL 1295092, at *4, *12-13.

Last, as explained above, the Attorney General can use Section 35 to bring actions where PLCAA is not implicated in the first place, such as because the defendant

is not entitled to PLCAA protection or because the conduct at issue does not involve third-party misuse. *See supra* Section I.B. Because PLCAA does not apply to such actions, PLCAA is no obstacle to their imposing liability for reckless or otherwise less-than-knowing conduct.

E. Section 58-35(e) is consistent with common law proximate cause.

Finally, Plaintiff argues that section 58-35(e) "does not require proximate causation in the ordinary sense." Pl.'s Mem. 18. Plaintiff contends that this conflicts with PLCAA's requirement that the violation of the predicate statute be "a proximate cause of the harm for which relief is sought," § 7903(5)(A)(iii). *See* Pl.'s Mem. 18. Plaintiff's argument fails for two reasons: First, as just explained, not every Section 35 case is a PLCAA case, so, assuming *arguendo* that section 58-35(e) *does* authorize a deviation from standard proximate causation, that would be of no concern in cases that do not implicate PLCAA. *See supra* Section II.D. Second, Plaintiff's argument is wrong on the merits. Section 58-35(e) is fully consistent with black-letter law.

Section 35 states that a gun-industry defendant's conduct is a proximate cause of harm that is "a *reasonably foreseeable* effect of such conduct, notwithstanding any intervening actions, including, but not limited to, criminal actions by third parties." N.J. Stat. Ann. § 2C:58-35(e) (emphasis added). Plaintiff claims that this "inverts the common-law rule," because "the common law in New Jersey (and elsewhere) generally

treats criminal misconduct as an intervening cause that *defeats* proximate cause." Pl.'s Mem. 19 (citing *Townsend v. Pierre*, 110 A.3d 52, 61 (N.J. 2015)).[7]

But however the law "generally" treats criminal misconduct, it is well recognized that *reasonably foreseeable* criminal misconduct—which is all that section 58-35(e) addresses—does not defeat proximate cause. *See N.J. Bank, NA v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 347 (3d Cir. 1982) ("New Jersey law [holds] that a third person's intervening criminal act does not interrupt the causal chain if the defendant reasonably could foresee the possibility of that intervening criminal conduct."); *FSS Armory*, slip op. at 26 ("Where a criminal act is reasonably foreseeable, then that act does not break the causal chain." (quoting *Minnesota v. Fleet Farm LLC*, 679 F. Supp. 3d 825, 843 (D. Minn. 2023))); *see also* Dan B. Dobbs et al., *Law of Torts* § 209 (2d ed. 2024) ("[I]f a criminal or intentional intervening act is foreseeable, … the criminal or intentional act is not a superseding cause."). Section 58-35(e) is fully consistent with traditional common-law principles and does not conflict with PLCAA.

CONCLUSION

For the foregoing reasons, and for those set forth in the brief of the Attorney General, Amici respectfully submit that this Court should deny Plaintiff's motion for a preliminary injunction.

Dated: May 23, 2025 Respectfully submitted,

[7] *Townsend* does not make any such statement. *See* 110 A.3d at 61.

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Exhibit A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 306

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

BLACKHAWK MANUFACTURING GROUP INC.; GS PERFORMANCE, LLC; MDX CORPORATION; and DOES 1-25,

Defendants.

Case No. CGC-21-594577
(Transaction # 69940726)

ORDER DENYING DEFENDANT BLACKHAWK MANUFACTURING GROUP, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant Blackhawk Manufacturing Group, Inc.'s ("Blackhawk") Motion for Judgment on the Pleadings came on regularly for hearing on February 8, 2023. Counsel for the parties were present. The appearances are as stated in the record. The matter was reported. On March 3, 2023, Plaintiff People of the State of California (the "People") and Blackhawk filed supplemental briefing and the matter was deemed submitted. Having considered the arguments and written submissions of all parties, Defendant Blackhawk's Motion for Judgment on the Pleadings is denied.[1]

[1] Blackhawk's Request for Judicial Notice is granted pursuant to Evidence Code § 452(b). The People's Request for Judicial Notice is granted as to Exhibits A, B, and C pursuant to Evidence Code § 452(d). The People's Request for Judicial Notice is denied as to Exhibit D as it is not necessary to the Court's determination of the issues raised in this motion. (*Flores v. City of San Diego* (2022) 83 Cal.App.5th 360, 371, n. 6.) Blackhawk's Supplemental Request for Judicial Notice is denied. (See *Scott v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 760 ["the mere fact that a statement appears on a web page does not mean that it is not reasonably subject to dispute. [Citations.] And if the information on the Web site is reasonably disputed by the parties, it is not subject to judicial notice."]; *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193 ["Nor may we take judicial notice of the truth of the contents of [] Web sites and blogs."]; *Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586,

BACKGROUND

On August 18, 2021, the People filed this action against Defendants Blackhawk, GS Performance, LLC ("GS Performance"), and MDX Corporation ("MDX"). On October 13, 2021, the People filed a First Amended Complaint ("FAC") alleging violations of the Unfair Competition Law ("UCL") and False Advertising Law ("FAL"). (FAC ¶ 27.) The People seek "to enjoin Defendants from engaging in prospective unlawful, unfair, and fraudulent business practices and to recover penalties and restitution for Defendants' past UCL and FAL violations." (*Id.*) Defendants are manufacturers and/or sellers. (*Id.* ¶¶ 32-34.) The People allege as follows.

Ghost guns are functional firearms that do not have serial numbers, and are thus, untraceable. (*Id.* ¶ 1.) Consumers can purchase "Build Kits" from Defendants, which include frame blanks or receiver blanks that consumers can use, along with other parts, to assemble a fully functioning firearm. (*Id.* ¶¶ 1, 8, 76 ["Defendants artificially split out those components, usually along with any specialty tools, into two or more distinct 'items' such that the consumer needs to add different 'items' into his or her online shopping cart to obtain all of the needed components."].) A frame blank or receiver blank does not have a serial number and "needs additional modification (usually drilling holes and filing away some material) before it can be used as a part of a fully functioning weapon." (*Id.* ¶¶ 8, fn. 2, 9.) A frame or receiver is a finished product, with a serial number, that can be used as part of a fully functioning firearm without any modification. (*Id.*) Companies who sell parts and kits, such as Defendants, violate and/or circumvent firearm sales laws by: (1) selling frame and receiver blanks without serial numbers; (2) allowing consumers who are otherwise prohibited from purchasing or possessing firearms to purchase a kit; (3) failing to comply with statutory laws regulating firearm ownership, registration, and safety; and (4) selling semiautomatic handguns. (*Id.* ¶¶ 1-4, 9-11, 13-14, 22, 26, 46-49, 51, 53-61, 88-89, 94, 98-99, 107, 109, 111, 116-117, 120, 124-125, 127-131, 143-145, 148-151.)[2]

Defendants deceive consumers by representing that their products are legal. (*Id.* ¶¶ 3, 12, 14, 25,

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1605, n. 10 ["Simply because information is on the Internet does not mean it is not reasonably subject to dispute."].) Although the People's allegations refer to Blackhawk's website, the People do not incorporate Blackhawk's webpages by reference.

[2] Gun Control Act (18 U.S.C. §§ 921-931), California Assembly of Firearms Law (Penal Code §§ 29180-29184), California Unsafe Handgun Act (Penal Code §§ 31900-32110), and California Manufacture of Firearms Law (Penal Code §§ 29010-29150). (FAC ¶ 4.)

96, 124, 126, 132-141, 146, 151.) "Defendants' marketing makes clear to the consumer what 'items' are needed to assemble the full working weapon. In some cases, Defendants even automatically add the necessary items to the consumer's online shopping cart." (*Id.* ¶ 76; see also *id.* ¶¶ 94, 97, 106, 116.) Defendants fail to provide disclosures regarding responsibilities and potential liabilities of assembling a ghost gun. (*Id.* ¶¶ 3, 12, 14.)

Defendants aid and abet the manufacture and sale of non-compliant firearms in violation of the Unsafe Handgun Act ("UHA") and Assembly of Firearms Law ("AFL"). (*Id.* ¶¶ 16, 51, 151.) Defendants Blackhawk and GS Performance violate the California Manufacture of Firearms Law ("MFL") by failing to obtain a California firearm manufacturing license as they manufacture at least fifty firearms per year in California and fail to include serial numbers on frame and receiver blanks. (*Id.* ¶¶ 15, 155-161.)

The above violations serve as the predicates for the first cause of action for violation of the UCL. (*Id.* ¶¶ 80, 165.) Defendants' violations of the AFL and UHA serve as the predicates for the second cause of action for violation of the FAL. (*Id.* ¶¶ 87, 121-123, 170-171.)

On June 3, 2022, the Court overruled Defendants' Demurrer to the FAC and denied Defendants' Motion to Strike the FAC in the alternative. (See June 3, 2022 Order.) On August 31, 2022, the Court denied the People's Motion for Preliminary Injunction without prejudice finding the People's motion was moot because Defendants ceased business in or directed at California. (Aug. 31, 2022 Order, 8.)

Blackhawk now moves for judgment on the pleadings on two primary grounds. (Opening Brief, 8.) First, Blackhawk asserts the People's UCL cause of action is barred by the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq*. (Opening Brief, 8.) Second, Blackhawk contends the People failed to plead "any actual violation of federal or state law" and that even if properly pled, their application to Blackhawk is unconstitutional under the First and Second Amendments of the United States Constitution. (*Id.*) The People oppose Blackhawk's motion.

LEGAL STANDARD

A defendant may move for judgment on the pleadings to the entire complaint or as to any cause of action stated in the complaint on the ground that "[t]he complaint does not state facts sufficient to

constitute a cause of action against that defendant." (Code Civ. Proc., §§ 438(c)(1)(B)(ii), 438(c)(2)(A).) The grounds for a motion for judgment on the pleadings "shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code Civ. Proc., § 438(d).) "Like a demurrer, a motion for judgment on the pleadings attacks defects disclosed on the face of the pleadings or by matters that may be judicially noticed." (*Alameda County Waste Management Authority v. Waste Connections US, Inc.* (2021) 67 Cal.App.5th 1162, 1174.) Similarly, "[i]n evaluating the sufficiency of the challenged pleading, we accept all material facts pleaded and those that arise by reasonable implication, but not conclusions of fact or law." (*Id.*)

DISCUSSION

I. The People's UCL Claim Is Not Barred By The PLCAA.

"The PLCAA was enacted in 2005 in part to prevent lawsuits against manufacturers and distributors of firearms and ammunition products 'for the 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.'" (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1316, quoting 15 U.S.C. § 7901(b)(1); see *Ileto v. Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126, 1135.)

The PLCAA mandates that "courts 'immediately dismiss[]' a 'qualified civil liability action.'" (*Ileto*, 565 F.3d at 1131, quoting 15 U.S.C. § 7902(b).) To determine whether the PLCAA applies, courts engage in a two-step analysis. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1316.) First, "whether the lawsuit in question is a 'qualified civil liability action' and second an analysis whether, if it is, 'any of the PLCAA's six exceptions to [a qualified civil liability action] apply.'" (*Id.* at 1316-1317, quoting *Ryan v. Hughes-Ortiz* (2012) 959 N.E.2d 1000, 1007.)

The PLCAA defines a "qualified civil liability action" 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. § 7903(5)(A).) A "qualified product" is "a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18 [of the United States Code]), including . . . a component part of a firearm or

ammunition, that has been shipped or transported in interstate or foreign commerce." (15 U.S.C. § 7903(4).) "[U]nlawful misuse" is defined as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." (15 U.S.C. § 7903(9).)

Blackhawk asserts the People's UCL claim is barred by the PLCAA. (Opening Brief, 8, 12-18; Reply, 6-8.) In particular, Blackhawk asserts it is federally licensed to sell parts and parts kits as well as that its "parts and parts kits are 'components of a firearm,'" therefore, they constitute a "qualified product" under the PLCAA. (Opening Brief, 14.) Blackhawk also asserts that the term "the person" includes manufacturers and sellers. (BH Suppl. Brief, 7.) Blackhawk further argues the People "seek[] to hold Blackhawk liable for harm caused by third parties." (Opening Brief, 15.)

The People oppose on the ground that this is not a qualified civil liability action because the People "seek to hold Blackhawk liable for its direct violations of California and federal law – not for harm 'solely caused' by the criminal 'misuse' of its products by the parties." (Opposition, 15; see *id.* at 10, 16; People's Suppl. Brief, 7-9, 12-14.) During oral argument, the People raised a secondary ground in opposition to Blackhawk's motion, which the People addressed in their supplemental brief. In particular, the People argue the term "the person" as used in the definition of a qualified civil liability action refers to the plaintiff (i.e., the People). (People's Suppl. Brief, 11.) The premise of the People's opposition is that PLCAA "protects manufacturers and sellers from liability involving *lawful* commerce in arms," not civil actions for violations of state and federal firearms sales laws. (People's Suppl. Brief, 9-10; see, e.g., *id.* at 9 ["in the typical PLCAA case, a plaintiff sues a firearms manufacturer or seller *who has complied with firearms laws* for injuries caused by a third-party shooter."] (emphasis in original); Opposition, 15.)

The People's opposition raises a question of statutory interpretation. "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. We begin by examining the statute's words, giving them a plain and commonsense meaning." (*People v. Lewis* (2021) 11 Cal.5th 952, 961 (cleaned up); see *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385 ["In interpreting a statutory provision, our task it to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statute's general purpose, and to avoid a construction that would lead

to unreasonable, impractical, or arbitrary results."] (cleaned up).) "The plain meaning controls if there is no ambiguity in the statutory language." (*Poole*, 61 Cal.4th at 1385 (cleaned up).) "It is not the role of the courts to add statutory provisions the Legislature could have provided, but did not." (*Artus v. Gramercy Towers Condominium Assn.* (2018) 19 Cal.App.5th 923, 945.)

A plain and commonsense reading of the definition of a "qualified civil liability action" indicates that the phrase "any person" derives from the definition of "person." Thus, "any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity" may bring "a civil action or proceeding or an administrative proceeding . . . 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." (15 U.S.C. §§ 7903(3), 7903(5)(A).) But, the action will be subject to dismissal under PLCAA "if it result[s] from the criminal or unlawful misuse of a qualified product by the person or a third party." (15 U.S.C. § 7903(5)(A).) "[T]he person" being the particular "person" who filed the action. (See, e.g., *Sambrano v. Savage Arms, Inc.* (2014) 338 P.3d 103, 104 ["As relevant to the case, such an action is generally brought against a manufacturer or seller of a 'qualified product' for damages resulting from criminal or unlawful misuse of the product by the plaintiff or a third party."]; *Gustafson v. Springfield, Inc.* (2022) 282 A.3d 739, 742 [the court modified the "person" with "plaintiff" when quoting the definition of a qualified civil liability action].)[3] The PLCAA also includes definitions for "manufacturer" and "seller." (15 U.S.C. §§ 7903(2), 7903(6).)[4] However, "person" does not expressly include a manufacturer or seller. Moreover, "unlawful misuse" is defined as "conduct that violates a statute, ordinance, or regulation as it relates to the *use* of a qualified product." (15 U.S.C. § 7903(9) (emphasis added).) The People's allegations are

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[3] Blackhawk's analysis focuses on the term "person" rather than "the person." (BH Suppl. Brief, 6-7.) The difference between the two terms is critical as "person" is broad and "the person" is specific.

[4] A "manufacturer" is defined, "with respect to a qualified product, [as] a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18." (15 U.S.C. § 7903(2).) A "seller" is defined, "with respect to a qualified product [as]--(A) an importer . . . who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18; (B) a dealer . . . who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or (C) a person engaged in the business of selling ammunition . . . in interstate or foreign commerce at the wholesale or retail level." (15 U.S.C. § 7903(6).)

focused on sales, manufacture, safety, and advertising rather than use.

This interpretation of "the person" is consistent with the PLCAA's findings and purposes.

> Congress enacted the PLCAA in response to "[l]awsuits … commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Congress found that manufacturers and sellers of firearms "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." *Id.* § 7901(a)(5). Congress found egregious "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others." *Id.* § 7901(a)(6). Congress reasoned that "[l]iability actions … are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* § 7901(a)(7).

(*Ileto v. Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126, 1135.) Two purposes of the PLCAA, as relevant here, are: (1) "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the 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"; and (2) "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." (15 U.S.C. § 7901(b)(1), (b)(4); see *Ileto v. Glock, Inc.* (C.D. Cal. Mar. 14, 2006) 421 F.Supp.2d 1274, 1289 ["Here, the clear purpose of the PLCAA was to shield firearms manufacturers and dealers from liability for injuries caused by third parties using non-defective, legally obtained firearms. [Citation.] Congress also believed that lawsuits seeking to hold firearms manufacturers liable for a third party's misuse of a firearm imposed an undue burden on interstate commerce."].)

Here, the crux of the People's action is to hold Blackhawk liable for alleged violations of firearm sales and manufacturing laws as well as deceptive advertising. Based on the PLCAA's purposes, the Court would be hard-pressed to find Congress intended to preempt public enforcement actions to enforce existing laws rather than circumventing the Legislature or interfering with separation of powers. (See e.g., 15 U.S.C. § 7901(a)(7)-(8); *Ileto v. Glock, Inc.* (C.D. Cal. Mar. 14, 2006) 421 F.Supp.2d 1274, 1290 ["Congress believed that groups were using 'liability actions' as an end-run around the legislature to establish *de facto* stricter regulations on the firearms industry."].)

Furthermore, the application of "the person" to a plaintiff, is not inconsistent with the exceptions

to a qualified civil liability action. "The PLCAA designates specific common law actions still allowed under the act." (*Travieso v. Glock Incorporated* (D. Ariz. 2021) 526 F.Supp.3d 533, 542, citing 15 U.S.C. §§ 7903(5)(A)(i)-(vi).) Therefore, a plaintiff can maintain a civil action against a manufacturer for claims such as negligent entrustment or negligence per se and design or manufacturing defects. (15 U.S.C. § 7903(A).) A plaintiff can also maintain an action under the predicate exception to the PLCAA, which includes actions "in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." (15 U.S.C. § 7903(5)(a)(iii).)

Accordingly, the Court finds this is not a qualified civil liability action under the PLCAA as the relief sought here does not result from the criminal or unlawful misuse of a qualified product by the People or a third party. (See People's Suppl. Brief, 7 [the People do not seek penalties and injunctive relief for third party conduct], 12; Opposition, 15-16.)

II. The People Sufficiently Plead Actual Violations Of State Law.

A. The UCL

Unfair competition "include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code § 17200.) Each prong, unlawful, unfair, or fraudulent, has "its own independent ground for liability" under the UCL. (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1135.) The People's first cause of action for violation of the UCL encompasses all three prongs. (See FAC ¶¶ 165-168.)

1. Unlawful

Blackhawk contends the People do not plausibly allege Blackhawk violated the Gun Control Act "GCA"), UHA, AFL, and MFL as predicates for a UCL claim. (Opening Brief, 18; Reply, 6, 11-16.)

The UCL includes "anything that can be properly be called a business practice and that at the same time is forbidden by law." (*Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642, 651, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113 .) "Virtually any statute or regulation (federal or state) can serve as a predicate for a UCL unlawful practice cause of action." (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1265.) The unlawful

prong of the UCL allows litigants to "borrow[] violations of other laws and treat them as unlawful practices that the [UCL] makes independently actionable," even when a particular statute does not provide a private right of action. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180, quoting *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103 (internal quotations omitted).)

i. GCA

Blackhawk asserts the People's allegations regarding the GCA are dependent "entirely on an improper retroactive application of the ATF's New Rule, which amended the previous rule that exclud[ed] firearms parts kits and unfinished frames or receivers from the GCA's definition of 'firearm.'" (Opening Brief, 18; see Reply, 11.) Blackhawk contends that at the time the People filed this action "none of Blackhawk's products met the GCA's definition of a 'firearm.'" (Opening Brief, 19; see Reply, 11.) The People oppose on the ground that "the ATF Rulemaking did not amend or change the definition of a 'firearm' under the GCA. Rather, the ATF clarified that Section 921(a)(3)'s *existing* 'firearm' definition included 'weapon parts kits.'" (Opposition, 19 (emphasis in original).) The Court agrees.

At the time of filing suit, a "firearm" under the GCA was defined as: "Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm." (27 CFR 478.11 (eff. March 26, 2019).) After the People filed this action, the ATF proposed rulemaking regarding the definition of "firearm" under the GCA. The ATF sought to clarify regulations to prevent courts from narrowly interpreting regulations, which would undermine the legislative intent. (86 FR 27720-01, 27722; see *id.* at 27726 ["Therefore, to reflect existing case law, this proposed rule would add a sentence at the end of the definition of 'firearm' in 27 CFR 478.11 providing that '[t]he term shall include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive.'"]; *id.* at 27727 ["ATF proposes to replace the respective regulatory definitions of 'firearm frame or receiver' and 'frame or receiver' in 27 CFR 478.11 and 479.11 because they too narrowly limit the definition of receiver with respect to most current firearms and have led to erroneous

court decisions."].)

> Overall, the NPRM (Notice of Proposed Rulemaking) proposed amending ATF's regulations *to clarify* the definition of 'firearm' and to provide a more comprehensive definition of 'frame or receiver' so that these terms more accurately reflect how most modern-day firearms are produced and function, and so that *the courts*, the firearms industry, and the public at large would no longer misinterpret the term to mean that most firearms in circulation have no parts identifiable as a frame or receiver.

(87 FR 24661 [emphases added]; see *id.* at 24653 ["Consistent with the [Gun Control Act], and to ensure proper licensing, marking, recordkeeping, and background checks with respect to certain weapon parts kits, the final rule adopts the proposed clarification of the term 'firearm' to include weapon (e.g., pistol, revolver, rifle, or shotgun) parts kits that are designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive."].) In the Court's June 3, 2022 Order overruling Defendants' Demurrer, the Court found "that the ATF's Final Rule provides the Court with further guidance when analyzing the definition of a firearm under 18 U.S.C. § 921(a)(3)." (June 3, 2022 Order, 9.)

The Federal Register later published the ATF's Final Rule, effective August 24, 2022. (87 FR 24652-01.) The current definition of a "firearm" under the GCA is:

> Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device; but the term shall not include an antique firearm. In the case of a licensed collector, the term shall mean only curios and relics. The term shall include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive. The term shall not include a weapon, including a weapon parts kit, in which the frame or receiver of such a weapon is destroyed as described in the definition of "frame or receiver".

(27 CFR 478.11 (eff. Jan. 31, 2023).)[5]

[5] Blackhawk asserts the ATF maintains that an unfinished AR-type receiver does not qualify as a "firearm" under the New Rule citing to a September 27, 2022 ATF Open Letter. (Reply, 12 & n. 4.) However, the ATF cautioned that its analysis regarding unfinished AR-type receivers "only applies to partially complete, disassembled, or nonfunctional frames or receivers without any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials. Pursuant to Final Rule 2021R-05F, partially complete, disassembled, or nonfunctional frames or receivers that are sold, distributed, possessed with such items (or made available by the seller or distributor to the same person) may change the analysis, including those distributed as frame or receiver parts kits." (Sept. 27, 2022 ATF OPEN LETTER TO ALL FEDERAL FIREARMS LICENSEES, Impact of Final Rule 2021-05F on Partially Complete AR-15/M-16 Type Receivers, https://atf.gov/firearms/docs/open-letter/all-ffls-september-2022-impact-final-rule-2021-05f-partially-complete-ar/download (last visited May 1, 2023).) Blackhawk did not request judicial notice of the September 27, 2022 ATF Open Letter. Even if the Court took judicial notice of the letter, it does not change the Court's analysis here.

Although the prior definition of "firearm" did not expressly mention "parts" or "parts kits," the phrase "may readily be converted to expel a projectile by the action of an explosive" implies that weapons parts kits may constitute a "firearm" under the GCA. (See, e.g., 86 FR 27720-01, 27726 n. 40 [the proposed rulemaking noted that courts have found parts and parts kits constitute a "firearm" under the GCA].) The People allege Blackhawk's GST-9 Build Kit, AR-10 Build Kit, and AR-15 Build Kits are firearms as defined under the GCA. (FAC ¶¶ 102, 104.) The People allege Blackhawk represents its GST-9 Build Kit can be readily converted into a fully functioning "pistol in under 15 minutes." (*Id.* ¶ 93; see *id.* ¶ 96 ["completes within minutes."].) Additionally, the People allege that a law enforcement officer employed by the San Francisco District Attorney's Office, operating in an undercover capacity, purchased an AR-15 build kit from Blackhawk and was able to assemble the AR-15 into a fully functional firearm in approximately two hours. (*Id.* ¶¶ 98, 103.) The People further allege Blackhawk violates the GCA by failing to comply with federal serialization and point-of-sale requirements such as failing to: ensure firearms bear unique serial numbers; run background checks on prospective customers; require purchasers complete Form 4473; meet purchasers to transfer the firearm in person; maintain records of sales; and include safety devices or locks. (*Id.* ¶¶ 88, 92, 98-100.)

The Court finds the People sufficiently allege Blackhawk violated the GCA to state a claim under the unlawful prong of the UCL.[6] Therefore, the Court need not address whether the People sufficiently allege violations of the AFL, UHA, and MFL.

2. Unfair

"The UCL does not define the term unfair. It is frequently stated that a business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." (*Gray v. Dignity Health* (2021) 70 Cal.App.5th 225, 238 (cleaned up).) But, the UCL "has a broad[] scope for a reason . . . It would be impossible to draft in advance detailed plans and specifications of all acts and

[6] Blackhawk is a party to pending litigation in the Northern District of Texas, where that court issued a preliminary injunction on November 3, 2022, enjoining the implementation and enforcement of the Final Rule against Blackhawk because the court preliminarily determined the Final Rule is unlawful. (*VanDerStok v. BlackHawk Manufacturing Group Inc.* (N.D. Tex. Nov. 3, 2022) ___ F.Supp.3d ___, 2022 WL 16680915, *5; see Reply, 12.) Whether the Final Rule is unlawful is not at issue here.

conduct to be prohibited, since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." (*Cel-Tech*, 20 Cal.4th at 181, quoting *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772 (cleaned up).)

> Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination.

(*Cel-Tech*, 20 Cal.4th at 182; see *id.* at 183 ["The unfair competition law is less specific, because the Legislature cannot anticipate all possible forms in which unfairness might occur."].)

Blackhawk asserts the People fail to allege any unfair business practice because the People allege Blackhawk violated public policy rather than any harm to competition. (Opening Brief, 25; see also Reply, 6, 16.) Blackhawk relies on *Cel-Tech*. However, "[t]he court in *Cel-Tech* explicitly noted that the case before it involved 'an action by a competitor alleging anticompetitive practices' and emphasized that the specific test adopted in that decision was limited to that context." (*Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County* (2020) 9 Cal.5th 279, 303.) Post-*Cel-Tech*, appellate courts have adopted "three different tests for determining unfairness in the consumer context." (*Id.*; see *id.* 303, n. 10 [First District Court of Appeal adopted the "tethering" test]; see e.g., *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854 ["where a claim of an unfair act or practice is predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions."]; *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 986.)

The Court need not address whether the People sufficiently plead unfair business practices as the People sufficiently allege unlawful business practices to state a claim under the UCL. However, even if the People's claim was solely premised on the unfair prong, Blackhawk fails to demonstrate the *Cel-Tech* test applies here.

B. Advertising

As to the fraud prong of the UCL, the definition of unfair competition "include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."

(Bus. & Prof. Code § 17200.) The fraud prong of the UCL "requires a showing that members of the public are likely to be deceived" and "may be proved even if there is no evidence that anyone was actually deceived, relied upon the fraudulent practice, or sustained any damage." (*People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1160, quoting *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839; *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1146 (internal quotations omitted).) Similarly, the FAL prohibits false or misleading advertising. (*People v. Johnson & Johnson* (2022) 77 Cal.App.5th 295, 317.) "Thus, to state a claim under either the UCL or the [FAL], based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." (*Id.* at 318, quoting *Nationwide*, 9 Cal.5th at 308 (internal quotations omitted).)

Blackhawk argues the People fail to allege any fraudulent conduct under the UCL and FAL. (Opening Brief, 25-26; Reply, 6, 16-17.) Blackhawk asserts that it "never engaged in the manufacture and sale of 'firearms' as then defined by the GCA." (*Id.* at 26.) Rather, Blackhawk contends that "until August 24, 2022, Blackhawk's statements that its unassembled parts were legal to purchase and did not need to be registered ***at the time of purchase*** was completely accurate" and not likely to deceive. (Opening Brief, 25-26 (emphasis in original); Reply, 16.) The Court disagrees.

Blackhawk focuses on an allegation that a June 2, 2020 blog post on its website stated, "these ***firearms*** do not need to be registered at time of purchase" (FAC ¶ 127) by arguing that until August 24, 2022, its unassembled parts were legal under the GCA, therefore, this was a true statement. (Opening Brief, 26; see Reply, 16.) However, Blackhawk does not reconcile the People's other allegations of misleading advertisements.

The People allege Blackhawk misleads consumers regarding "the legality of frame and receiver blanks and kit products when used for their sole, intended purpose," a fully functioning firearm, and fail to make disclosures to consumers under the AFL and UHA. (*Id.* ¶¶ 167-168.) In particular, the People allege Blackhawk touts its products as "100% Legal" and "California Compliant" despite the fact that "a finished frame or receiver triggers a consumer's obligations under the" AFL and UHA. (*Id.* ¶¶ 12, 96, 124, 126; see *id.* ¶¶ 25 ["It is deceptive to tell consumers that a product is legal when possession of the product for its sole intended use is illegal, either per se or unless the consumer takes specific regulatory

steps that ghost gun companies fail to disclose."], 87 ["advertising and other communications lull reasonable consumers into believing that Defendants' Build Kits can be used, in compliance with the law, as sold and without the consumer needing to take further steps to comply with the law."], 122 [same], 132, 153-154; see e.g., ¶¶ 93 ["Our goal is for you to be able to go from opening the mail, to a competition or defense ready pistol in under 15 minutes."], 96 ["Congratulations, you've just made a gun. And this is now legally a firearm and should be treated as such."], 127-128 [blog post].)

The People allege Blackhawk has a video on its YouTube page titled, "How To: Finish GST-9 Frame." (*Id.* ¶ 96.) The video "shows the viewer how to convert the frame blank into a firearm; indeed, the video concludes with the narrator stating 'Congratulations, you've just made a gun. And this is now legally a firearm and should be treated as such.'" (*Id.*) The People allege Blackhawk has another video on its YouTube page titled, "Build Your Own Gun in 1 Hour. 100% Legal." (*Id.* ¶ 124.) The People allege "[t]he video makes clear that Blackhawk's purpose for manufacturing and selling frame and receiver blanks is to stop the government from 'tracking your gun purchases and putting you on a list' and to avoid 'more and more paperwork' that comes with purchasing firearms." (*Id.* ¶ 124[7]; see *id.* ¶¶ 125-126.) The People further allege "Blackhawk specifically touts that building a gun is 'completely legal and does not require any sort of serial number or registration.' It also touts that there are 'no background checks' involved in the process." (*Id.*)

The People's allegations focus on Blackhawk's representations that, once assembled, a firearm is legal despite the statutory requirements under the AFL and UHA. Although there may be no affirmative disclosure requirement, the People's allegations demonstrate that such statements are misleading because they imply the consumer does not need to take any further action. This is sufficient to allege a FAL claim and UCL violation based on fraudulent conduct.

III. The People's FAL Claim And UCL Claim Based On Fraudulent Business Practices Do Not Violate The First Amendment.

Blackhawk argues the People's FAL claim and UCL claim based on fraudulent business practices seek to regulate Blackhawk's protected commercial speech and "impose a 'strict liability' standard on

[7] The People note that although Blackhawk posted the video prior to the enactment of the AFL, the video remains on Blackhawk's YouTube channel. (FAC ¶ 124, n. 57.)

First Amendment speech concerning lawful Second Amendment activity." (Opening Brief, 27-28; see Reply, 6, 18-19.)

Blackhawk does not dispute that it engaged in commercial speech. "Under the First Amendment, commercial speech is entitled to less protection from governmental regulation than other forms of expression." (*People ex rel. Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1085.) However, "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely.'" (*Kasky*, 27 Cal.4th at 953, quoting *In re R.M.J.* (1982) 455 U.S. 191, 203; see *Serova v. Sony Music Entertainment* (2022) 13 Cal.5th 859, 873 [parties agreed the UCL "can constitutionally restrict speech properly classified as commercial."].) As this Court has found, the People sufficiently allege Blackhawk engaged in misleading advertising.

> With regard to misleading commercial speech, the United States Supreme Court has drawn a distinction between, on the one hand, speech that is actually or inherently misleading, and, on the other hand, speech that is only potentially misleading. Actually or inherently misleading commercial speech is treated the same as false commercial speech, which the state may prohibit entirely.

(*Kasky*, 27 Cal.4th at 954.)

Blackhawk argues the People only allege its "speech ***might*** be misleading." (Opening Brief, 29 (emphasis in original).) However, the People sufficiently allege Blackhawk's speech was actually misleading. For instance, the People allege Blackhawk has a video on its YouTube page titled, "How To: Finish GST-9 Frame." (FAC ¶ 96.) The video "shows the viewer how to convert the frame blank into a firearm; indeed, the video concludes with the narrator stating 'Congratulations, you've just made a gun. And this is now legally a firearm and should be treated as such.'" (*Id.*) The People allege the requisite actions a person must complete prior to manufacturing or assembling a firearm under the AFL and UHA. (See *id.* ¶¶ 50-56.) Therefore, a video instructing a viewer on how to assemble a firearm and then representing that the firearm is legal upon completion without any mention of the AFL and UHA's requirements is actually misleading.

"Sometimes speech will have commercial and noncommercial components. If a legal command or law of nature makes it impossible to separate the commercial components from the noncommercial, the two are inextricably intertwined and we bestow noncommercial status on both components." (*Serova*, 13

Cal.5th at 880-881, quoting *Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 474 (internal quotations omitted).) Blackhawk contends its "advertising concerns the core Second Amendment right of law-abiding citizens to self-manufacture firearms." (Opening Brief, 28.) However, the People are not alleging that consumers cannot self-manufacture firearms or that Blackhawk's advertising is infringing on any right to self-manufacture firearms.[8] Rather, the People's allegations establish Blackhawk's advertisements concern misleading statements regarding the legality of its products when assembled. Therefore, the legality of Blackhawk's products is not inextricably intertwined with any Second Amendment activity. Moreover, the legality of its finished products specifically relates to regulations on firearms such as background checks, serialization, and safety, not a constitutional right.

Accordingly, Blackhawk's motion is denied on this ground.

IV. Blackhawk's Constitutional Challenges To The Unlawful And Unfair Prongs Of The People's UCL Claim Are Improper.

Blackhawk contends the UCL is unconstitutionally vague as applied to Blackhawk if the People's theories of unlawfulness and unfairness "are somehow correct." (Opening Brief, 26; see Reply, 17.) Blackhawk argues "[n]othing in the UCL—or any of the other statutes on which Plaintiff relies—gave Blackhawk 'fair notice' that its lawful conduct was 'unlawful' or 'unfair' under the UCL." (*Id.* at 27.) Blackhawk further contends that "[a]s applied, Plaintiff's 'unlawful' UCL theory violates the Second Amendment." (*Id.* at 29; see *id.* at 30-31; see Reply, 6, 19-20.)

Blackhawk's constitutional challenges to portions of the People's UCL claim are improper as they would not dispose of the People's entire UCL cause of action, which encompasses all three prongs of the

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[8] The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." (*District of Columbia v. Heller* (2008) 554 U.S. 570, 576; see *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111, 2125 ["the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense."].) "Like most rights, the right secured by the Second Amendment is not unlimited." (*Heller*, 554 U.S. at 626.) The People's allegations do not attempt to implicate or restrict Blackhawk's sales or self-manufacture of firearms. Instead, the People seek to hold Blackhawk liable for misleading statements regarding the statutory requisites of selling a firearm such as serialization, background checks, and safety standards. The Supreme Court expressly stated in *Heller* that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or . . . laws imposing conditions and qualifications on the commercial sale of arms." (*Id.* at 626-627.) Moreover, "you will not find a discussion of [self-manufacture of firearms] in the 'plain text' of the Second Amendment." (*Defense Distributed v. Bonta* (C.D. Cal. Oct. 21, 2022) 2022 WL 15524977, *4.)

UCL. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167 ["Ordinarily, a general demurrer may not be sustained, nor a motion for judgment on the pleadings granted, as to a portion of a cause of action."], disapproved on other grounds in *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905.) Therefore, Blackhawk's motion is denied on this ground.

CONCLUSION AND ORDER

Based on the foregoing reasons, Blackhawk's motion is denied.

IT IS SO ORDERED.

Dated: May 2, 2023

Anne-Christine Massullo
Judge of the Superior Court