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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota by its Attorney General, Keith Ellison,

Plaintiff,

v.

Glock, Inc. and Glock Ges.m.b.H.,

Defendants.

Court File No.: 27-CV-24-18827
Case Type: Other Civil

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTIONS TO DISMISS

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Defendants Glock, Inc. and Glock Ges.m.b.H. (collectively referred to as "Glock") respectfully submit this reply memorandum of law in further support of their motions to dismiss the Complaint.

ARGUMENT

I. THE COMPLAINT MUST BE DISMISSED PURSUANT TO THE PLCAA.

The State does not dispute that its claims against Glock, Inc. constitute a qualified civil liability action for purposes of the PLCAA,[1] but argues that three of the PLCAA's exceptions are applicable.[2] Opp'n at 2 (Index #72).

A. The Complaint Does Not Satisfy the Predicate Exception.

Three of the statutes upon which the State relies are statutes of general applicability, which apply to the sale and marketing of all products, necessarily including firearms. Prior to the enactment of the PLCAA, none of those statutes had been applied to the sale and marketing of firearms in the same manner as the statutes listed as examples within the predicate exception itself. The two federal appellate courts to have considered the issue both held that the predicate exception to the PLCAA can only be satisfied by the knowing violation of a state or federal

[1] The same abbreviations used in Glock, Inc.'s Memorandum of Law in Support of its Motion to Dismiss are used in this Reply Memorandum.

[2] The State claims that if any one of the exceptions to the PLCAA is satisfied, all claims can proceed. Opp'n at 9. The State relies on *Minnesota v. Fleet Farm LLC*, 679 F. Supp. 3d 825, 840-41 (D. Minn. 2023) for this proposition, but that part of the decision is *dicta*, and misconstrues the decisions on which it relied. The original decision on which this proposition is based held that if the predicate exception is satisfied, then all claims can proceed, because that exception refers to "an action in which," as opposed to "an action for" a specific type of claim. *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 337-40 (N.Y. App. Div. 2012). All cases, including *Fleet Farm*, that have allowed all claims to proceed, have done so based on their conclusion that the predicate exception had been satisfied; no case has allowed all claims to proceed solely based on only the exception for negligence per se and/or the product defect exception being satisfied. Other cases, including *Doyle v. Combined Sys., Inc.*, upon which the State relies for other propositions, properly hold that each claim must satisfy an exception to the PLCAA to survive dismissal. No. 32:22-CV-01536-K, 2023 WL 5945857, at *6 (N.D. Tex. Sept. 11, 2023) (explaining that allowing all claims to proceed if a single claim satisfied an exception "would permit claims Congress sought to foreclose").

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statute that specifically applies to the sale and marketing of firearms, not statutes of general applicability that apply to the sale and marketing of all products.[3]

The State disputes this interpretation of the predicate exception, mischaracterizing the decisions as allowing statutes of general applicability to satisfy the predicate exception. Opp'n at 10-14. The decision in the *Minnesota v. Fleet Farm LLC* case, upon which the State relies for other arguments, rejected the State's interpretation of those cases, correctly citing them for the proposition that the "predicate statute must regulate the firearms industry specifically." 679 F. Supp. 3d at 839. In response to the above decisions, the State claims that general consumer protection statutes can satisfy the predicate exception. Opp'n at 13. The State's argument is based on the deeply divided decision by the Connecticut Supreme Court in *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019). In *Soto*, four justices held that an alleged violation of the Connecticut Unfair Trade Practice Act ("CUTPA") arising from the manner in which a rifle was advertised could satisfy the predicate exception to the PLCAA. *Id.* at 301-25. The majority noted that the predicate exception could be satisfied by the violation of a statute applicable to the marketing, as opposed to the sale, of firearms, but that "no federal statutes directly or specifically regulated the marketing or advertising of firearms." *Id.* at 304. It further observed that it "would have made little sense for the [PLCAA] to carve out an exception for violations of laws applicable to the marketing of firearms if no such laws existed," and therefore leapt to the conclusion that Congress must have intended "unfair trade practice laws such as the

[3] *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132-38 (9th Cir. 2009) (holding that California's negligence and public nuisance statutes could not satisfy the predicate exception); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (holding that New York's public nuisance statute could not satisfy the predicate exception). The examples of statutes capable of satisfying the predicate exception are all provisions of the GCA "regulating record-keeping" and "prohibiting participation in direct illegal sales." *City of New York*, 524 F.3d at 402. Based on the maxim *noscitur a sociis*, statutes capable of satisfying the predicate exception are limited to similar statutes that directly "regulate the firearms industry." *Id.* at 401-02.

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FTC Act and its state analogues" to be statutes applicable to the marketing of firearms for purposes of the predicate exception. *Id.* This reasoning is flawed because, at the time the PLCAA was enacted, there were state statutes that "directly or specifically regulated the marketing or advertising of firearms" and such statutes were what Congress referenced as statutes applicable to the marketing of firearms for purposes of the predicate exception. *Id.* at 304 n.43 (referring to state statutes applicable to the marketing of firearms).

The three dissenting justices agreed that statutes that can satisfy the predicate exception are "limited to those specific to the sale and manufacture of firearms," and because CUTPA "reaches a range of commercial conduct that far exceeds the manufacture, marketing and sale of firearms, it is not by itself a predicate statute." *Soto,* 202 A.3d at 343, 348 (Robinson, J., dissenting). This Court should not follow the *Soto* decision for the reasons stated by the dissenting justices. The other two decisions cited by the State rely on the *Soto* decision. The *Doyle v. Combined Sys., Inc.*, No. 32:22-CV-01536-K, 2023 WL 5945857, at *9-*11 (N.D. Tex. Sept. 11, 2023) decision explained that plaintiffs' claims that defendants "misleadingly stated or implied that [their] rubber bullets and launchers were suitable for crowd control" in violation of the Texas Deceptive Trade Practices Act satisfied the predicate exception. *Doyle* was not a traditional PLCAA case because it arose from the Dallas Police Department's use of defendants' products for crowd control purposes, and the court explicitly warned that "treating every statutory violation that relates to the sale or marketing of a qualified product as a trigger for the predicate exception would permit actions Congress expressly sought to foreclose . . ." *Id.* at *9. The other case upon which the State relies, *Prescott v. Slide Fire Solutions,* 410 F. Supp. 3d 1123, 1137-39 (D. Nev. 2019) is similarly distinguishable because it involves allegations that defendant falsely marketed bump stocks as having been approved by the ATF, which

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subsequently classified them as machineguns. In the present case, the State is attempting to use the statutes of general applicability upon which it relies to satisfy the predicate exception in a novel manner clearly foreclosed by the PLCAA to hold Glock liable for the criminal misuse of its legal pistols simply because they can be illegally converted to machineguns through the installation of an MCD. Even if the statutes could satisfy the predicate exception in general, their alleged violation fails to satisfy proximate cause, as explained in Sections II.B & C.

B. The Complaint Does Not Satisfy the Negligence Per Se Exception.

The State's second cause of action is for "Aiding and Abetting Negligence Per Se." Compl. at 63. The State's sixth cause of action is for general "Negligence." *Id.* at 72. In its Opposition, the State now claims that its general negligence claim also satisfies the PLCAA's exception for negligence per se because it alleges that Glock knowingly violated and aided and abetted the violation of Minn. Stat. §§ 325D.44, 325F.67, 325F.69, 609.67, and 609.74. *Id.* ¶ 283. As explained in Section II.B., Glock did not violate any of these statutes based on the allegations in the Complaint and they therefore cannot satisfy the negligence per se exception to the PLCAA.

Like many states, the Minnesota Supreme Court has adopted Section 286 of the Restatement (Second) of Torts and held that a claim for negligence per se must be based on the alleged violation of a statute designed to protect a specific class of persons, as opposed to the public at large.[4] Section 609.67(2)(a) and the other statutes upon which the State now relies for its negligence per se claim, all apply to the public at large. In response to binding precedent from the Minnesota Supreme Court, the State relies entirely on a decision from a federal district court

[4] *Kronzer v. First. Nat. Bank of Minneapolis*, 305 Minn. 415, 423-25 (1975); *Lynghaug v. Payte*, 247 Minn. 186, 195 (1956); *Cooper v. Hoeglund*, 221 Minn. 446, 451 (1946).

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characterizing the Minnesota Supreme Court's decision in the *Kronzer* case as *dicta*. *See Fleet Farm*, 679 F. Supp. 3d at 847.[5] Regardless of whether the language at issue in *Kronzer* is *dicta* based on the holding in that case, the court noted that it has "long followed" Section 286 and that if a statute is "designed to protect the public at large rather than a particular class of individuals," it "should not be adopted as a duty of care." *Kronzer,* 305 Minn. at 424-25. The State does not attempt to explain why the prior decisions by the Minnesota Supreme Court on this issue are not binding.

The State alleges that Glock cited the wrong standard for evaluating its claim that Glock aided and abetted Minnesota criminals to violate Section 609.67(2)(a) by illegally manufacturing and possessing machineguns. Opp'n at 35-36. Glock cited the standards for aiding and abetting both criminal and tortious conduct and, regardless of which standard applies, the State's claim fails. The Minnesota Supreme Court has held that aiding and abetting liability is "based on proof of a scienter—the defendants must know that the conduct they are aiding and abetting is a tort." *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 186 (Minn. 1999). Among the requirements for aiding and abetting the commission of a tort are that the "defendant must know that the primary tort-feasor's conduct constitutes a breach of duty [and] the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach." *Bren Rd. LLC v. Talon OP, LP*, No. A23-0248, 2024 WL 545150, at *5 (Minn. Ct. App. Feb. 12, 2024). Based on this standard, Glock cannot be held liable unless it has actual knowledge that: (1) a specific tort-feasor is engaged in particular conduct that constitutes a tort; and (2)

[5] In addition to disregarding binding precedent from the Minnesota Supreme Court, the decision in *Fleet* Farm is an anomaly on this issue in general. *NY v. Arm or Ally, LLC*, 718 F. Supp. 3d 310, 338-39 (S.D.N.Y. 2024) (noting that to the court's knowledge, *Fleet Farm* "is the only decision to allow a state government to allege negligence *per se* on behalf of 'the public' at large").

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substantially assists or encourages that specific person to commit the tort. Based on this specific knowledge requirement, Glock explained that it is not feasible to aid and abet negligence, as opposed to an intentional tort. In its Opposition, the State claims that it is possible to aid and abet negligence, but is actually referring to intentional acts[6] by persons who illegally manufacture and possess machineguns by installing MCDs in Glock pistols, regardless of whether it characterizes such actions as negligence per se. Notably, the State was unable to muster a single Minnesota decision holding that aiding and abetting can be premised on an act that is negligent, but not intentional, instead relying on unpublished decision from a federal district court in California. Opp'n at 37. In that case, however, the defendant was alleged to have aided and abetted its clients, not unknown persons. *In re McKinsey & Co., Inc. Nat'l Prescription Opiate Litig.*, MDL No. 3084 CRB, 2024 WL 2261926, at *1, *19 (N.D. Cal. May 16, 2024).

The factual allegations in the State's Complaint do not remotely support its contention that Glock has provided substantial assistance and encouragement to persons illegally converting Glock pistols into machineguns by installing MCDs. Opp'n. at 36. The State only claims that Glock has provided substantial assistance because its pistols were originally designed in a manner that allowed MCDs to be installed in them and then did not change its design. *Id.* at 37. The State's claim that Glock "encouraged people to turn Glock semi-automatic handguns into machine guns" by installing MCDs in them by referring to shooting the fully automatic Glock 18 pistol as "fun" is equally specious. *Id.* The Complaint does not allege that Glock substantially assisted or encouraged any specific persons to illegally create a machinegun by installing an illegal MCD in a legal Glock pistol, and its second claim for aiding and abetting negligence per

[6] For this reason, the Supreme Court's decision regarding aiding and abetting liability in the *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023) is consistent with Minnesota law. In addition, aiding and abetting liability in the context of the PLCAA is addressed in 15 U.S.C. § 7903(5)(A)(iii), which is an issue of federal law.

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se therefore fails to state a claim upon which relief can be granted as matter of law.

C. The Complaint Does Not Satisfy the Product Defect Exception.

The State's seventh cause of action is for product liability based on design defect and failure to warn. The PLCAA's product defect exception applies only to manufacturing and design defect claims and the State does not argue that its failure to warn claim can satisfy that exception. Opp'n at 18 (referring only to the design defect claim). The State claims that its product liability claims are "not solely focused on the harm resulting from death, personal injuries, and property damage from the discharge of Glock handguns." Opp'n at 19. The State apparently made this argument to attempt to avoid the exception to the product defect exception stating that "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." *Id.* at 18-19. By doing so, however, the State removes its claims entirely from the product defect exception, which applies only to claims for "death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product . . . ." 15 U.S.C. § 7903(5)(A)(v). Accordingly, the product defect exception to the PLCAA is not satisfied.

II. THE STATE'S CLAIMS FAIL TO STATE A CLAIM UNDER STATE LAW.

A. The Complaint Fails to Allege a Proper Public Nuisance Claim.

Violation of Minnesota's public nuisance statute requires that the defendant "intentionally . . . maintain[] or permit[] a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public . . . ." Minn. Stat. § 609.74 (emphasis added). The State claims that Glock has "intentionally" created a public nuisance because it has not changed the design of its pistols after

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learning that criminals have illegally modified them to machineguns by installing MCDs in them." The State claims that "continuing conduct after the initial nuisance is known is 'intentional.'" Opp'n at 21. The State relies on Comment d. to the Restatement (Second) of Torts § 825, which states that "when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional." Comment c. explains that for an invasion to be intentional, the defendant must "know that it is resulting or is substantially certain to result from his conduct." Based on the allegations in the Complaint, the nuisance is created by the conduct of persons who illegally manufacture machineguns by installing MCDs in Glock pistols. To the extent it can even be characterized as "conduct," Glock not changing the design of its pistols is not the cause of the alleged nuisance.[7] By not changing the design of its pistols to make it more difficult to install an MCD, Glock has not intentionally created a public nuisance in violation of Section 609.74.

B. The Complaint Fails to Allege Violations of the CFA, DTPA, or FSAS.

The State alleges that Glock violated the CFA, DTPA, and FSAS because its advertisements are unfair, misleading and deceptive. Opp'n at 22. Other than the State's mischaracterization of them, nothing about Glock's advertisements, based on the facts alleged in the Complaint, are unfair, misleading or deceptive. The State argues that even if not deceptive on their own, Glock's references to the Glock 18 being "fun" to shoot, and the ability to customize Glock pistols, Compl. ¶¶ 71-79, 106-07, 109-11, 251, 265, 276, "become deceptive when paired with Glock's failure to disclose to consumers that [MCDs] and Glock handguns equipped with

[7] The State completely mischaracterizes the holding in *Myers v. Becker Cnty.*, 833 F. Supp. 1424, 1433 (D. Minn. 1993). Opp'n at 21. It was a decision in a wrongful arrest case, and merely observed that the arresting deputy had reasonable cause to believe that the plaintiff had violated the criminal nuisance statute because it appeared to him that she had "ignored warnings about her fences and took no action to abate the problem." *Myers*, 833 F. Supp. at 1433.

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[MCDs] are illegal and incredibly dangerous." Opp'n at 25. Stated differently, the State seeks to hold Glock liable for omissions. But liability for omissions only arises when the omission is material and there is a duty to disclose the information. *Graphic Comms. Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014).

Preliminarily, disclosing that manufacturing machineguns is illegal is not material to the sale of a semi-automatic firearm, which forecloses the State's argument that Glock can be held liable based on omission. Further, even when the information is material, omissions only become actionable under the CFA, DTPA, and FSAS when there is a statutory duty to disclose, or the defendant: (1) is in a "confidential or fiduciary relationship with the other party to the transaction"; (2) "has special knowledge of material facts to which the other party does not have access";[8] or (3) when the information must be disclosed to "prevent the words communicated from misleading the other party." *Graphic Comms.*, 850 N.W.2d at 695. Failure to disclose information based on the above circumstances is considered to be fraud. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365-66 (1976). Liability for failure to disclose only arises when the "other party acts on the presumption that no such fact exists." *Id.* at 365 (quotation marks and citation omitted). For that reason, potential liability based on a material omission must be based on representations made to a specifically identified party. *Driscoll v. Standard Hardware, Inc.*, 785 N.W.2d 805, 812-13 (Minn. Ct. App. 2010). *See also Regents of the Univ. of Minnesota*

[8] Liability based on special knowledge must be predicated upon information to which the "other party does not have access." *Graphic Comms.*, 850 N.W.2d at 695 (emphasis added). *See also Newell v. Randall*, 32 Minn. 171, 172-73 (1884) (holding that omission based liability arising from the duty not to mislead the other party was proper when defendant, when asked about the value of his business, represented that he had $3,300 in assets, without disclosing liabilities of $2,100); *Marsh v. Webber*, 13 Minn. 109, 111-14 (1868) (holding that omission based liability arising from special knowledge was proper when "defendant, knowing his sheep to be infected with a contagious distemper, sold them to plaintiff, concealing the disease"). Information that machineguns are illegal is accessible to the public.

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v. Doran Univ. III, LLC, No. A17-0277, 2017 WL 5985401, at *3-*4 (Minn. Ct. App. Dec. 4, 2017) (collecting cases). The State does not allege that Glock made representations to any specifically identified parties, but rather to the public in general, and is therefore unable to meet the requirements to establish liability based on an omission because it cannot plead the knowledge and reliance of the other party to the transaction.

The State claims that Glock had a duty to disclose "the illegality of machineguns" because it has "special knowledge of its own handguns and how easily they could be equipped" with MCDs, and because its "representations were so incomplete that Glock was required to disclose more about the illegality of machineguns" and MCDs. Opp'n at 25.[9] The information that the State alleges Glock is liable for failing to disclose is the illegality of machineguns, and it does not contend that this is a subject about which Glock has knowledge, but the other (unidentified) party does not have access. The State does not attempt to explain why Glock's representations "were so incomplete," but this appears to be based on the lack of affirmatively disclosing that machineguns are illegal. Neither is a sufficient basis to hold Glock liable for material omissions in violation of the CFA, DTPA, or FSAS.

The State also claims that Glock is liable for its specific representations that its handguns are customizable, contending that they are "representations of the 'specific or absolute characteristics of a product' that are actionable under Minnesota law." Opp'n at 26. Yet the State specifically alleges that Glock pistols are customizable. Compl. ¶¶ 71-79, 251, 265, 276. There is nothing unfair, misleading, or deceptive about accurately describing the characteristics of Glock pistols. This argument is rather dependent upon the omission of a statement that machineguns are

[9] The State claims that Glock does not challenge these allegations. Opp'n at 25. Glock explicitly challenged the State's argument that it could be held liable for omissions. Glock, Inc.'s Mem. of Law in Supp. of Mot. to Dismiss ("Mem.") at 24-25 (Index #63).

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illegal, which fails for the reasons stated above. Relative to the Glock 18 being "fun" to shoot, such representation is purely subjective and not made with the intent to sell Glock 18 pistols. Mem. at 25.[10]

The State claims that Glock did not use the term "unfair or unconscionable practice" in its motion to dismiss and therefore "does not even contest the entirety of the State's CFA and DTPA claims [as a result of which] they must survive as a matter of law." Opp'n at 28.[11] Glock specifically moved to dismiss the State's CFA and DTPA claims in their entirety, Mem. at 22-26, and the arguments raised are equally applicable to the State's contention that its failure to affirmatively advise the public that machineguns are illegal does not come close to constituting an unfair or unconscionable practice pursuant to Minn. Stat. §§ 325F.69(1) & (8) an 325D.44(1)(2)(b), which Glock referenced on page 24 of its Motion.

Based on the well-pleaded factual allegations in the Complaint, as opposed to the legal conclusions by the State, Glock, Inc. did not violate the CFA, DTPA, or FSAS as a matter of law, and the third, fourth, and fifth causes of action should therefore be dismissed.

C. The Complaint Fails to Allege a Valid Negligence Claim.

Glock does not owe a duty to the State to prevent third-party criminals from illegally modifying Glock pistols into machineguns through the installation of an MCD because its conduct in designing and manufacturing Glock pistols did not directly create the harm alleged in

[10] The State attempts to respond by claiming that this is a question of fact because it is not alleged in the Complaint. Opp'n at 26-27, n.14. But the Complaint specifically alleges that the Glock 18 is "not authorized for sale to civilians," that Glock "sells the fully automatic Glock 18 handgun to law enforcement and the military," and the "Glock 18 unavailable to the civilian public." Compl. ¶¶ 61, 65, 109. Glock's argument about references to the Glock 18 being "fun" to shoot not being actionable because they were not made in connection with the intent to sell Glock 18 pistols to consumers is therefore based directly on the State's own allegations.

[11] Despite filing a 76 page, 302 paragraph Complaint, the State argues that Glock did not sufficiently address each allegation in its kitchen-sink approach Complaint.

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the Complaint.[12] The State cites *Delgado v. Lohmar*, 289 N.W.2d 479, 484 (Minn. 1979) for the proposition that a duty is imposed because "firearms are so dangerous," Opp'n at 29, but that case involved hunters using firearms needing to take extra care to prevent accidents. It has no relation to an alleged duty on a firearm manufacturer to prevent its pistols from being illegally modified by third-party criminals.

The factual allegations in the Complaint also fail to establish that Glock's manufacture and sale of semiautomatic pistols is a proximate cause of the harm alleged simply because they can be converted to machineguns through the installation of an MCD. Glock's actions were not a "substantial factor in bringing about the harm," and it should not have anticipated that its acts were "likely to result in injury to others." *Lennon v. Piper*, 411 N.W.2d 225, 228 (Minn. App. 1987). Instead, the sole proximate cause of the harm for which the State seeks relief was the superseding criminals who intentionally convert Glock pistols into machineguns through the installation of an illegal MCD, and then use the Modified Glock Pistols to commit crimes. *Hilligoss v. Cross Companies*, 228 N.W.2d 585, 586 (Minn. 1975); *Lennon*, 411 N.W.2d at 228.[13] The State's position relative to proximate cause is so broad as to essentially eliminate that

[12] *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011) (defendant created the risk of harm by attaching a bucket to a skid loader with only one pin). *See also Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018); *Smits as Tr. For Short v. Park Nicollet Health Servs.*, 955 N.W.2d 671, 681–82 (Minn. Ct. App. 2021).

[13] Contrary to the State's argument, Opp'n at 15, proper application of proximate cause pursuant to Minnesota law would not make the predicate exception to the PLCAA a nullity. The State contends that Glock's explanation of Minnesota law on proximate cause would mean that the actions of a manufacturer or seller of firearms would never be a proximate cause of harm in a qualified civil liability action. The examples given in the predicate exception itself involve factual circumstances in which the defendant was actively involved in violating a criminal statute by knowingly making false entries in legally required records regarding "any fact material to the lawfulness of the sale or other disposition of" firearms, or aiding and abetting or conspiring with another to "sell or otherwise dispose of" a firearm to a person knowing or having reasonable cause to believe that they are prohibited from possessing firearms pursuant to federal law. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II). When applied as intended, it is therefore possible for the actions of a manufacturer or seller of firearms to constitute a proximate cause of the harm for which relief is sought in a qualified civil liability action.

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requirement. It would allow Budweiser and Ford to be considered the proximate cause of harm caused by a drunk driver simply because their products can be used to become intoxicated and operate a vehicle. The State therefore fails to state a claim upon which relief can be granted for negligence.

D. The Complaint Fails to Allege a Valid Products Liability Claim

The State's design defect claim fails to state a valid claim upon which relief can be granted for several reasons. First, the pistols are not defective at the time they leave Glock's control as legal semi-automatic pistols. *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 387 (Minn. Ct. App. 2004). Second, illegal conversion to a machinegun in violation of federal and state law is not a "reasonably foreseeable use" of a semi-automatic pistol. *Drager by Gutzman v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 882 (Minn. Ct. App. 1993). The State's argument that Glock pistols are defectively designed simply because certain persons have illegally converted them to machineguns is essentially the same as an argument that Corvettes are defectively designed because they can exceed the maximum speed limit, but even more absurd because Corvettes can exceed the speed limit in the condition in which they are sold. Third, it fails for the same reasons as the State's general negligence claim.

The State argues that it states a valid product defect claim based on a failure to warn theory based on its position that Glock "has a duty to warn of the dangers and illegality of converting its handguns to be fully automatic weapons." Opp'n at 34. Minnesota does not require a warning regarding open and obvious dangers, such as that a "knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger."[14] The illegality of

[14] *Peppin v. W.H. Brady Co.*, 372 N.W.2d 369, 375 (Minn. Ct. App. 1985) (quoting W. Prosser, Handbook of the Law of Torts, § 96 at 649 (4th ed.1971); *see also Mix v. MTD Products, Inc.*, 393 N.W.2d 18, 19 (Minn. Ct. App. 1986).

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machineguns is also well known, and Minnesota presumes that its citizens are aware of its criminal laws. The State seeks to impose an obligation on Glock to warn against violating the criminal law in general, not an inherent danger in its products. Advising that machineguns are illegal would not prevent criminals from illegally converting Glock pistols to machineguns through the installation of an MCD and using the Modified Glock Pistols to commit crimes. There can be no liability for failure to warn under Minnesota law unless the person would have acted differently if warned, and the Complaint does not even allege that the third-party criminals would not illegally convert Glock pistols to machineguns through the installation of an MCD if Glock warned them that machineguns are illegal.[15]

III. THE RELIEF SOUGHT IS UNCONSTITUTIONAL.

Binding Supreme Court precedent holds that liability for false, deceptive, or otherwise misleading communications is permissible only in the context of purely commercial speech, i.e., speech that does nothing more that propose a commercial transaction, such as descriptions of price or quantity.[16] The State disputes this contention, but relies on cases from the Eighth and Fourth Circuits and the Minnesota Supreme Court, not the U.S. Supreme Court. Restrictions on the speech at issue in the Complaint are subject to strict scrutiny.[17] *Brown v. Entm't Merchants*

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[15] *Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987). *See also Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 924-25 (8th Cir. 2004); *Dolan v. Bos. Sci. Corp.*, No. 20-CV-1827 (NEB/LIB), 2021 WL 698777, at *3 (D. Minn. Feb. 23, 2021); *Marshall v. Smith & Nephew, Inc.*, No. CV 19-2313 (DWF/DTS), 2020 WL 362803, at *7 (D. Minn. Jan. 22, 2020); *Holowaty v. McDonald's Corp.*, 10 F. Supp. 2d 1078, 1085-86 (D. Minn. 1998).

[16] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

[17] Shockingly, the State asserts that "Glock's commercial speech is not subject to First Amendment protections." Opp'n at 40 (emphasis added). The State then contends that if the First Amendment applies to Glock's speech, the restrictions it seeks to impose "would be subject to only intermediate scrutiny," *id.*, but relies solely on a decision by the Minnesota Supreme Court to counter Glock's citation to decisions from the U.S. Supreme Court regarding the U.S. Constitution. Mem. at 32-34.

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Ass'n, 564 U.S. 786, 791-2 (2011); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). The State claims that this action is based on Glock "knowingly . . . promoting the conversion of Glock handguns into illegal machineguns," Opp'n at 37-38, but none of the factual allegations in the Complaint regarding Glock's advertising, marketing, and promotion of its pistols support that conclusion.[18] To the contrary, the Complaint alleges that Glock only sells legal, semi-auto pistols to members of the public, and does not manufacture or sell MCDs. Compl. ¶¶ 3-4, 10 (Index #3). The State claims that Glock's advertising is "deceptive, misleading, and unfair—and promotes illegal activity," Opp'n at 39, but the factual allegations do not come remotely close to supporting such legal conclusions. Referring to Glock pistols as having only "34 component parts" and being capable of being "field stripped into four main components without tools in seconds," Opp'n at 40 n.21, are not deceptive, misleading, or unfair, nor do they conceivably promote illegal activity. Whether firing a fully automatic pistol is "fun" is likewise subject to full First Amendment protections because the State simply disapproves of Glock's opinion. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).

The First Amendment prohibits a state from compelling a "person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586-87 (2023). In response, the State relies on *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) for the proposition that Glock can be compelled to advise the public that machineguns, including MCDs, are illegal to prevent consumer confusion or deception. Opp'n at 41. *Zauderer* concerned the state bar's regulation of attorney advertisements,

[18] Compl. ¶¶ 2, 23, 29-30, 67, 69-70, 72, 106-07, 110-11, 115, 151-52, 154-55, 173, 220, 224, 238, 241, 250-51, 254, 256, 264-65, 268, 276.

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and the Court allowed an attorney engaged in pure commercial speech, proposing retention pursuant to a contingency fee agreement stating that "if there is no recovery, no legal fees are owed," to disclose that the client would still be liable for costs if there was no recovery. 471 U.S. at 631, 652. This compelled disclosure was permissible because of the "distinction between 'legal fees' and 'costs,'" and the likelihood that prospective clients would believe that they would not have to pay any money if they did not win. *Id.* at 652. The equivalent would be Glock selling MCDs directly to the public and advertising that they could be used to convert semi-automatic pistols to machineguns — without disclosing that it is illegal for anyone to do so except for a federally licensed firearms manufacturer registered as a special occupational taxpayer making them for a governmental agency. The Complaint, however, affirmatively pleads that Glock does not even make MCDs, Compl. ¶ 3, and the illegality of machineguns is well-known by the public based on long-standing federal and state law, unlike the differences in being responsible for paying costs, but not legal fees.

The State seeks injunctive relief requiring Glock to "modify the design of [its] semi-automatic handguns that are sold to the public and can be converted with a Glock switch, including the Glock 17 and Glock 19, so that [they] cannot be easily converted into fully automatic machine guns." Compl. at 76, ¶ 4 (emphasis added). Belatedly realizing that prohibiting the sale of the most popular handgun in the U.S. to the public would violate the Second Amendment, the State mischaracterizes the relief sought in its Complaint, incorrectly claiming that it only seeks to prohibit the sale of "select handgun models that are sold to the public in Minnesota . . . ." Opp'n at 41-42. Other than mischaracterizing the relief it actually seeks in its Complaint, the State claims that the Second Amendment does not "provide Glock's customers with a right to purchase a specific make and model of firearm." Opp'n at 42. Nothing

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in the Supreme Court's jurisprudence supports such a claim, which is the equivalent of arguing that the government could prohibit people from following the Methodist branch of Christianity as long as they could still follow the Presbyterian or Episcopal branches, or that certain disfavored books could be banned as long as they could still possess and read other books. The two decisions cited by the State provide no support for its assertion that the Second Amendment would allow the public to be precluded from purchasing firearms that are legal pursuant to federal and Minnesota law, especially the most popular handgun in America. *U.S. v. Hart*, No. 23-cr-293, 2024 WL 992632, at 4-6 (D. Minn. Jan 3. 2024), addressed machineguns, which are illegal under federal and Minnesota law. *New York v. Arm or Ally*, 718 F. Supp. 3d 310, 334-36 (S.D.N.Y. 2024), addressed the sale unserialized firearms in violation of federal and state law, and specifically noted that the laws at issue did not prohibit members of the public from "purchasing a firearm or, for that matter, from buying unfinished frames and receivers and then making them into fully functional firearms; they "must simply buy serialized parts from a licensed dealer . . . ." Both cases are inapposite.

CONCLUSION

For the above reasons, Glock respectfully requests this Court grant its Motions to Dismiss, dismiss the State's Complaint with prejudice and on the merits, and grant such other relief as it deems just and equitable.

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Respectfully Submitted,

O'MEARA WAGNER, P.A.

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