UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Rosie Yanas, *et al*., Plaintiffs, v. Antonios Pagourtzis, *et al*., Defendants.	)	Case No. 3:20-cv-00141

PLAINTIFFS' AND PLAINTIFFS-INTERVENORS' MOTION TO REMAND

Plaintiffs Rosie Yanas and Christopher Stone (individually and as next friends of Christopher Jake Stone); William ("Billy") Beazley and Shirley Beazley (individually and as next friends of T.B., a minor); and plaintiffs-intervenors Mark McLeod and Gail McLeod (individually and as next friends of Aaron Kyle McLeod); Pamela Stanich (individually and as next friend of Jared Conard Black); Shannan Claussen (individually and as next friend of Christian Riley Garcia); Clayton Horn; Abdul Aziz and Farah Naz (individually and as next friends of Sabika Aziz Sheikh); Flo Rice; and Rhonda Hart (individually and as a representative of the estate of Kimberly Vaughan) respectfully move this Court to remand this case to County Court at Law No. 3 in Galveston County, Texas and to award costs and attorney's fees to plaintiffs and plaintiffs-intervenors. Plaintiffs and plaintiffs-intervenors submit this memorandum in support of their motion.[1]

[1] Prior to filing the instant motion, counsel for the movants conferred with counsel for all defendants who have entered an appearance in the action. Counsel for defendants Antonios Pagourtzis and Rose Marie Pagourtzis consented to remand this action to state

PRELIMINARY STATEMENT

On the morning of May 18, 2018, seventeen-year-old Dimitrios Pagourtzis ("the Shooter") walked into Santa Fe High School and opened fire, killing ten of his classmates and teachers, and injuring thirteen others. In his attack, the Shooter used guns that he had obtained from his parents, loaded with ammunition that he had purchased on a website called LuckyGunner.com. This personal injury and wrongful death lawsuit stems from these horrific events.

The plaintiffs and plaintiff-intervenors (together, "Plaintiffs") are the parents of six children murdered on May 18, 2018, as well as a student and a teacher who were wounded in the shooting. Plaintiffs brought suit in County Court at Law No. 3 in Galveston County against the Shooter, his parents (Antonios Pagourtzis and Rose Marie Kosmetatos, together "Parents"), and the entities and individuals that operated LuckyGunner.com and its related shipping and fulfillment company (Luckygunner LLC, Red Stag Fulfillment LLC, MollenhourGross LLC, Jordan Mollenhour, and Dustin Gross, together the "Luckygunner Defendants"). They asserted only state claims under Texas tort law. By suing the Shooter, as well as those responsible for wrongfully allowing him to access and obtain firearms (the Parents) and ammunition (the Luckygunner Defendants), Plaintiffs seek to hold responsible those who, through their intentional or negligent actions, caused the harm that each suffered.

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court. Counsel for defendants Luckygunner, LLC, Red Stag Fulfillment, LLC, MollenhourGross, LLC, Jordan Mollenhour and Dustin Gross have not consented to remand. *See* Certificate of Conference, *infra* at 30.

Plaintiffs assert no federal claims against any of the defendants and complete diversity does not exist. Yet, on May 1, 2020, the Luckygunner Defendants filed a notice of removal, in which they argue that federal question jurisdiction exists. This Court should remand this lawsuit—both because the notice of removal is procedurally deficient and also because there is no basis for federal jurisdiction over this purely state tort lawsuit.

Taking the procedural matter first, the Luckygunner Defendants' failure to obtain the consent of other defendants in the state court action requires remand. The Luckygunner Defendants suggest that this case falls within a narrow statutory exception to the general rule requiring unanimous consent of all defendants to removal, but it does not. That exception (codified at 28 U.S.C. § 1441(c)) would apply only if the claims against the Shooter and the Parents were not part of the same case or controversy as the claims against the Luckygunner Defendants. But here, the claims in this case all arise out the May 18 mass shooting. In cases such as this, both Supreme Court and Fifth Circuit precedent make clear that removal under 28 U.S.C. § 1441(c) is not available.

Turning to the matter of federal question jurisdiction, only a "slim category" of state law claims give rise to federal question jurisdiction. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). To fall within this category, a substantial and disputed federal issue must be necessarily raised on the face of the petition, and the federal issue must be capable of resolution in federal court without disrupting the balance of state and federal judicial responsibilities.

The Luckygunner Defendants' sole basis for purported federal jurisdiction is the petition's references to certain sections of the federal Youth Handgun Safety Act, 18 U.S.C.

§ 922(x), as one of the sources of duty in the case—including a section that the Luckygunner Defendants argue has never before been interpreted by federal courts. But the Supreme Court has made clear that if an issue "does not arise frequently [in the federal system], it is unlikely to implicate substantial federal interests," making removal to federal court inappropriate. *Gunn*, 568 U.S. at 262. Moreover, referring to federal law as a source of duty for garden variety negligence-based claims does not transform Texas tort claims into a federal question. This is especially true because the Plaintiffs can recover under an ordinary negligence theory (instead of a negligence *per se* theory) without requiring the jury to rely on the cited federal statute. Finally, even if a federal issue were necessarily raised (it is not), extending federal jurisdiction to this case would improperly shift a massive number of traditional state law personal injury cases into federal court.

For these reasons, as further explained below, Plaintiffs respectfully submit that the Luckygunner Defendants did not have an objectively reasonable basis to seek removal of this case. As such, under the removal statute, Plaintiffs are entitled to attorneys' fees and costs incurred in seeking this remand.

PROCEDURAL HISTORY

On May 24, 2018, the parents of Christopher Jake Stone, one of the young victims of the Santa Fe High School mass shooting, filed a petition against the Parents, alleging negligence and gross negligence. Ex. B-2 to Notice of Removal ("NOR") (Original Petition and Request for Disclosure, *Yanas et al. v. Pagourtzis et al.*). In the months that followed, this initial case was joined by several of the victims and survivors of the Santa Fe mass shooting. *See* Ex. C to NOR (Docket Report in State Court Matter). In November 2019, a

separate state court lawsuit brought by William ("Billy") Beazley and Shirley Beazley (individually and as next friends of T.B., a minor) was consolidated with the *Yanas* lawsuit. *Id*. In March 2020, the Plaintiffs amended their pleadings to assert claims against the Luckygunner Defendants. Ex. B-71 to NOR (Third Amended Petition ("TAP"), *Yanas et al. v. Pagourtzis et al*.); Ex. B-80 to NOR (First Amended Petition ("FAP"), *Beazley et al. v. Pagourtzis et al*.).

The operative petitions—the Third Amended Petition in the *Yanas* lawsuit and the First Amended Petition in the *Beazley* lawsuit—allege that the Luckygunner Defendants, along with the Parents, acted negligently and that their negligence—along with the Shooter's actions—contributed to and proximately caused the wrongful deaths and personal injuries that are the basis of these lawsuits. Ex. TAP ¶¶ 39-42; FAP ¶¶ 28-34.

These petitions assert only state law causes of action, with the primary claims sounding in negligence (ordinary negligence, negligent entrustment, negligence *per se*, gross negligence), as well as state civil conspiracy law and state corporate veil piercing law. TAP ¶¶ 118-211; FAP ¶¶ 35-89. The claims against the Luckygunner, LLC and Red Stag Fulfillment, LLC allege, in part, that on two separate occasions, they negligently sold and delivered ammunition to a seventeen-year old juvenile without verifying his age or even requiring an adult (such as one of the Shooter's parents) to sign for the delivery. TAP ¶¶ 125-141; FAP ¶¶ 52-74. The petitions further allege that Luckygunner's webstore is designed to actively avoid knowledge of customer age, despite claiming not to sell ammunition to anyone under 21. *See* TAP ¶¶ 64-67; FAP ¶¶ 41(B), 47. The Luckygunner Defendants removed this case to federal court on May 1, 2020.

ARGUMENT

This case should never have been removed from state court. This is a state personal injury and wrongful death action, sounding in Texas tort law. There is no reasonable basis for claiming, as the Luckygunner Defendants do, that the case arises under the laws of the United States. But this Court need not even reach the question of whether these state law claims arise under federal law, because the Luckygunner Defendants improperly removed this case under an exception to the general rule requiring the unanimous consent of all defendants that simply does not apply here. Thus, the notice of removal is incurably defective, and remand is required.

I. Legal Standards

The removal statute authorizes removal to federal court only where original jurisdiction—based on diversity or a federal question—exists. 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."). A separate subsection of the removal statute applies to removal in cases in which a civil action includes both claims "arising under" federal law as well as claims that do not fall within a federal court's original or supplemental jurisdiction or have been made nonremovable by statute. 28 U.S.C. § 1441(c). In that instance, the non-federal claims are to be severed and remanded to state court. *Id*.

The procedures for removing a case from state court to federal court are specified in 28 U.S.C. § 1446. The general rule in cases removed to federal court from state court is

that "all defendants who are properly joined and served must join in the removal petition, and that failure to do so renders the petition defective." *Getty Oil Corp., a Div. of Texaco, Inc. v. Ins. Co. of N. Am.,* 841 F.2d 1254, 1262 (5th Cir. 1988) (citation omitted); *see also* 28 U.S.C. § 1446(b)(2). This is known as the "rule of unanimity" and requires that each served defendant consents to the removal. *Id*. at 1262 n. 11.[2]

One of the few exceptions to the "rule of unanimity" is removal under § 1441(c). *Moreno Energy, Inc. v. Marathon Oil Co.*, 884 F. Supp. 2d 577, 582–83 (S.D. Tex. 2012). However, both the text of the statute and precedent make plain that removal under § 1441(c) is only available in a case involving sets of claims that do not arise out of a common nucleus of operative fact—a rare occurrence. *See* 14C Charles Alan Wright, *et al*., *Federal. Practice & Procedure* § 3722.3 (Rev. 4th ed. 2020). For this reason, removal under §1441(c) has come to be known as "[p]erhaps the most unusual basis for removal." *Id*.

Because federal courts are courts of limited jurisdiction, they "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). The removing party's burden is to show that they have complied with

[2] The Luckygunner Defendants cannot now attempt to cure this deficiency by obtaining belated consent of the remaining defendants. Under 28 U.S.C. § 1446, a defendant has only 30 days after receipt of an initial pleading to remove a case from state court to federal court. Once this time has lapsed—as it has here—the failure to obtain unanimous consent of all defendants cannot be cured. *Getty Oil Corp., a Div. of Texaco, Inc.*, 841 F.2d at 1262-63; *see also Dees v. Singh*, No. 3:17-CV-2885-L, 2018 WL 4184783, at *4 (N.D. Tex. Aug. 31, 2018) ("Proper consent for removal must be given within thirty days of service of the state court pleading." (quoting *Powers v. United States*, 783 F.3d 570, 576 (5th Cir. 2005))).

the procedural requirements of 28 U.S.C. § 1446 *and* that federal jurisdiction exists over the subject matter of the removed lawsuit. *Albonetti v. GAF Corporation–Chemical Group*, 520 F. Supp. 825, 827 (S.D.Tex.1981). Courts strictly construe the removal statute, so that "any doubt as to the propriety of removal should be resolved in favor of remand," because of the "significant federalism concerns" raised by removal. *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007); *see also Gutierrez v. Florez*, 543 F.3d 248, 251 (5th Cir. 2008).

II. The Notice of Removal is Defective on Its Face.

The Luckygunner Defendants removed this case without the unanimous consent of all the defendants. NOR ¶ 5. For this reason, they are forced to rely on 28 U.S.C. § 1441(c) for removal. However, the Luckygunner Defendants' notice of removal is devoid of any explanation of how Plaintiffs' claims, arising out of a single incident and a single harm, come within the § 1441(c) exception. Instead, it offers a conclusory statement that the Luckygunner Defendants' claims are removable pursuant to § 1441(c)—without addressing that statute's requirements—and contends that, therefore, "only the parties named as defendants in connection with the federal law claims need join in or consent to removal." NOR ¶ 5. Because this assertion is contrary to the text of the removal statute, as well as a persuasive body of case law, the removal was defective, and this case should be remanded to state court.

Taking the text of the statute first: § 1441(c) only applies to a civil action that includes both "(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made

nonremovable by statute."[3] In other words: "Section 1441(c) applies when a federal-question claim, within the meaning of Section 1331 of Title 28, is joined with a claim that is not itself such a federal question *and that is not within the supplemental jurisdiction of the federal courts*—which is to say that the claim does not form part of the same case or controversy (under Article III of the United States Constitution) as the federal-question claim." Wright & Miller, *supra,* § 3722.3 (emphasis added); *see also Experience Infusion Ctrs., LLC v. Lusby*, CV H-17-1168, 2017 WL 3235667, at *3 (S.D. Tex. July 31, 2017) ("When read together, the exception to consent only applies to claims that are not within the court's original or supplemental jurisdiction."); *Vinson v. Schneider Nat. Carriers, Inc*., 942 F. Supp. 2d 630, 636 (N.D. Tex. 2013) (28 U.S.C. § 1441(c) "only applies to a civil action that includes a federal question claim that is joined with a claim made nonremovable or one not falling within the court's original or supplemental jurisdiction."); *Shipley Garcia Enters., LLC v. Cureton*, CV M-12-89, 2012 WL 3249544, at *12 (S.D. Tex. Aug. 7, 2012 (holding that § 1441(c) "facially does not apply to an action over which the Court has original and supplemental jurisdiction").

Federal courts may exercise supplemental jurisdiction over claims arising from a "common nucleus of operative fact" with the purported federal claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966); *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008). This is not a difficult standard to meet, and each plaintiff's claims here,

[3] To be clear, there is no claim arising under the laws of the United States, as we explain in Section III, *infra*. For the purposes of this section, we refer to "the purported federal claims" contained within the claims brought against the Luckygunner Defendants.

which all arise out of the mass shooting on May 18, 2018, easily meet it. 13D Charles Alan Wright, *et al*., *Federal. Practice & Procedure* § 3567.1 (3d ed. 2020) ("The *Gibbs* 'common nucleus' test is broader than the 'transaction or occurrence' test used in the Civil Rules. In practice, § 1367(a) requires only that the jurisdiction-invoking claim and the supplemental claim have some loose factual connection."); *see also Experience Infusion Ctrs.,* 2017 WL 3235667, at *2. It is a bedrock principle of tort law that claims arising out of the same injury—such as the claims brought by each plaintiff here—are to be tried as one case. *See Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991) (finding that claims involving boat crew negligence and product liability of scuba equipment manufacturer, both of which were alleged to have caused diver's injuries, arose out of a common nucleus of operative fact); *Feigler v. Tidex, Inc.*, 826 F.2d 1435, 1439 (5th Cir. 1987) (finding a "common nucleus of operative fact" where seaman sued about back injury partly caused by accident aboard ship in Nigeria and partly caused by car accident in the United States).

The Supreme Court has instructed "that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions," 28 U.S.C. § 1441(c) is not applicable. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951). In *Finn*, a plaintiff sued two insurance companies and an agent of the companies, seeking recovery for a loss by fire. Though the Court was interpreting an earlier version of § 1441(c), which authorized removal in a broader category of cases, its analysis is controlling here.[4] The

[4] The text of § 1441(c) has changed since *Finn* was decided, but its reasoning remains good law and has been cited by courts within the Fifth Circuit in interpreting the

Finn Court emphasized that § 1441(c) did not apply where there was a single wrong, regardless of whether the "'injury was due to one or the other several distinct acts of alleged negligence or to a combination of some or all of them.'" *Id*. at 13 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). This is precisely the case here—where a common set of injuries to Plaintiffs are alleged to have been caused by a combination of interrelated wrongful actions by the Luckygunner Defendants as well as the Parents and the Shooter.

In sum, if the Court had jurisdiction over the claims against the Luckygunner Defendants, it would surely have supplemental jurisdiction over the claims against the remaining defendants. For this reason, removal under § 1441(c) is unavailable to the Luckygunner Defendants. This result makes sense. Otherwise, the Plaintiffs would have to conduct two trials—one in state court and one in federal court—to apportion liability for the single wrong that each of them suffered. Each plaintiff and plaintiff-intervenor has alleged that the Luckygunner Defendants and the Parents both played a substantial role in causing their injury or the death of their loved one. More specifically, the operative petitions allege that the Parents provided their son with the firearms he used to kill and injure students and teachers at Santa Fe High School, and the Luckygunner Defendants

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current version of that statute. *See, e.g. Fed. Deposit Ins. Corp. v. Ally Securities LLC*, A-12-CA-872-SS, 2012 WL 12883136, at *8 (W.D. Tex. Dec. 6, 2012) ("Although the plain language of the amended statute no longer speaks of 'separate and independent' claims, the amendments were not intended to substantively alter this aspect of § 1441(c)… Since the 2011 amendment, courts have confirmed the changes did not alter the essential substance of the rule." (internal quotation marks and citations omitted)); *Experience Infusion Ctrs. LLC*, 2017 WL 3235667, at *4-5 (applying *Finn*, but noting that the post-2011 language may provide even narrower grounds for removal).

provided him with the ammunition he loaded into those firearms, without even requiring an adult to sign for the delivery of the ammunition. *See* TAP ¶¶ 21-25, 73-77; FAP ¶¶ 28-34, 47. The Shooter could no more have fired the gun without ammunition then he could have fired the ammunition without a gun—both were essential to his plan, and both were essential to the shooting incident that gives rise to every claim in the operative pleading.

III. Federal Question Jurisdiction over Plaintiffs' State Law Claims Does Not Exist.

Beyond the fatal procedural defect outlined in Point II—which is itself sufficient to require remand—removal was improper here for an additional reason: the exclusively state law personal injury and wrongful death claims asserted by Plaintiffs against the Luckygunner Defendants do not provide federal question jurisdiction.

"Most directly, a case arises under federal law when federal law creates the cause of action asserted." *Gunn*, 568 U.S. at 257. There is, however, a "special and small category" of cases in which state law claims turn on substantial questions of federal law. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006); *see also Gunn*, 568 U.S. at 257 (explaining that there are "extremely rare exceptions" to the rule that cases arise under federal law only when federal law creates the cause of action). To prevail under this standard, the Luckygunner Defendants have the burden of showing that, somewhere on the face of the operative petitions, "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14

(2005)). "Although this inquiry rarely results in a finding of federal jurisdiction, jurisdiction is proper when all four of these requirements are met." *Corporan v. Wal-Mart Stores E., LP*, 194 F. Supp. 3d 1128, 1131 (D. Kan. 2016) (internal quotation marks and citation omitted). Here, none of those criteria are met—much less all of them—and accordingly there is no federal question jurisdiction.

The Luckygunner Defendants assert that this Court has federal question jurisdiction under 28 U.S.C. § 1331 solely based on the Plaintiffs' citation to a federal statutory provision, 18 U.S.C. § 922(x), as a source of duty in their state tort claims. *See* NOR ¶¶ 10-12. But "a plaintiff's use of federal law as the source of a duty under state law is simply insufficient to create federal question jurisdiction." *Corporan*, 194 F. Supp. 3d at 1133; *see also Grable*, 545 U.S. at 318-19 (discussing *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) and stating that "if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.")

It is for this reason that wrongful death or personal injury cases that—like this one—reference provisions of the federal Gun Control Act as a source of a defendant's duty that are removed to federal court under purported federal question jurisdiction are regularly remanded back to state court. *See, e.g.*, *Ramos v. Wal-Mart Stores, Inc.*, 202 F. Supp. 3d 457 (E.D. Pa. 2016); *Corporan*, 194 F. Supp. 3d 1128; *Daniel v. Armslist, LLC*, 15-C-1387, 2016 WL 660894 (E.D. Wis. Feb. 17, 2016); *Woods v. Steadman's Hardware, Inc.*, CV 12-33-H-CCL, 2013 WL 709110 (D. Mont. Feb. 26, 2013).

A. No Issue of Federal Law Is Necessarily Raised by Plaintiffs' Claims.

Turning to the first *Grable* factor—whether a federal issue is "necessarily raised"—the answer is no. That is because where a plaintiff's claim is supported by alternative and independent theories of liability, one of which does not implicate federal law, the claim does not arise under federal law. *See Alexander v. Woodlands Land Dev. Co. L.P.,* 325 F. Supp. 3d 786, 794-95 (S.D. Tex. 2018) (collecting Fifth Circuit cases).

Here, the Plaintiffs have alleged that the Luckygunner Defendants are liable under both negligence and negligence *per se* theories of liability. TAP ¶¶ 125-165; FAP ¶¶ 41-78. While both theories raise the Luckygunner Defendants' alleged violation of the federal Youth Handgun Safety Act (specifically, 18 U.S.C. §§ 922(x)(1)(B) and (x)(2)(B)), the simple negligence theory can be resolved without reaching the federal issue. *See* TAP ¶¶ 126, 135 (alleging that the Luckygunner Defendants breached the "general duty imposed on all persons not to expose others to reasonably foreseeable risks."); FAP ¶ 44 (same); *see also Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125, 130 (Tex. App. 1997) (holding that, under that under Texas negligence law, ammunition sellers have "a common-law duty to act reasonably in selling ammunition[.]").[5]

[5] To the extent that the Luckygunner Defendants argue that a claim for ordinary negligence necessarily raises a federal issue, because they intend to argue that the Protection of Lawful Commerce in Arms Act requires a showing that a federal statute was violated, that argument would be misplaced, as an anticipated federal defense is not a valid basis for removal. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10 (1983) ("a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim" (internal quotation marks and citations omitted); *Soto v. Bushmaster Firearms Intl.*, LLC., 139 F. Supp. 3d 560, 565 (D. Conn. 2015). Indeed, in

In Texas, as in many other states, negligence and negligence *per se* are alternative theories of recovery for the same claim—regardless of whether Plaintiffs allege them as one cause of action or (as here) two. *See Zavala v. Trujillo*, 883 S.W.2d 242, 246 (Tex. App. 1994) (explaining that under Texas law, negligence *per se* is "merely one method of proving . . . the breach of duty required in any negligence cause of action, establishing negligence as a matter of law."); *see also Johnson v. Enriquez*, 460 S.W.3d 669, 673 (Tex. App. 2015) ("[n]egligence *per se* is not a separate cause of action independent of a common-law negligence cause of action."); *Weirich v. IESI Corp.*, No. 03-14-00819-CV, 2016 WL 4628066, at *2 (Tex. App. 2016) ("Neither negligence *per se* nor *res ipsa loquitur* is an independent cause of action. Rather, negligence *per se* is merely one *method* of proving a breach of duty, a requisite element of any negligence cause of action.") (internal quotation marks and citations omitted).[6] Thus, a Texas jury could find that the Luckygunner Defendants acted negligently without ever having to reach the question of whether they violated the cited provisions of federal law. *See also Corporan*, 194 F. Supp. 3d at 1132 ("[E]ven if plaintiffs' theory of negligence per se relies exclusively on a violation of the Gun Control Act, no federal subject matter jurisdiction exists because plaintiffs' reliance on the federal statute for negligence per se is not essential to the other theories of negligence set forth in the petition.").

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their Notice of Removal, the Luckygunner Defendants concede that "[t]his federal defense . . . is not the basis for removal." (NOR ¶ 19 n.2.).

[6] While Plaintiffs followed common form in pleading negligence and negligence *per se* as two counts, Texas case law is clear that they are to be treated as one claim.

The case at hand closely resembles *Ramos v. Wal-Mart Stores, Inc*. In *Ramos,* the plaintiffs were the parents of three victims who were shot and killed by a 20-year-old who used .38 special handgun ammunition that he purchased from Wal-Mart shortly before the murders. There, the plaintiffs' complaint contained "claims of negligence, negligence per se, and negligent entrustment." 202 F. Supp. 3d 457, 468 (E.D. Pa. 2016). Wal-Mart removed the case, arguing that the meaning of the phrase "ammunition. . . other than. . . ammunition for a shotgun or rifle" as used in 18 U.S.C. § 922(b)(1)[7] raised a federal issue. *Id*. at 467. The District Court found that, even if there was an actual dispute about the federal law question, it was not "necessarily raised" because resolving that dispute was not essential to any of the plaintiffs' claims. The court explained: "negligence per se is not a separate claim of its own," and where "[r]esolving the meaning of § 922(b)(1) in Plaintiffs' favor may be essential to their theory of negligence per se, but it is not essential to either their negligence or negligent entrustment claims," the first *Grable* requirement was not satisfied, there was no federal jurisdiction, and the case was not properly removed. *Id*. at 468-69. The same result should follow here, for the same reason: the alleged violations of federal law are "not essential" to resolution of Plaintiffs' negligence claim.

[7] Both 18 U.S.C. § 922(b)(1) and 18 U.S.C. § 922(x) limit transfers of ammunition to juveniles. The former applies only to entities or persons who possess a federal firearms license; the latter applies to unlicensed entities or persons. These two provisions of the statute are related and share a common purpose. In House Report 103-389, 18 U.S.C. § 922(x) is described as an "extension" of restrictions on the transfer of handguns to juveniles under the Gun Control Act of 1968.

In their Notice of Removal, the Luckygunner Defendants cite to *Bd. of Commissioners of Se. Louisiana Flood Prot. Auth.-E. v. Tennessee Gas Pipeline Co., L.L.C.*, a Fifth Circuit case affirming the denial of a motion to remand a case back to Louisiana state court. 850 F.3d 714 (5th Cir. 2017); *see* NOR ¶ 15. In that case, the Fifth Circuit held that a plaintiff's negligence and nuisance claims necessarily raised a federal issue because federal law created both the duty and remedy underlying those claims. *Id.* at 722-23. That case does not support removal here, where Plaintiffs' negligence cause of action *can be* resolved based on state common law principles and without reliance on federal statutes to establish a duty of care. As a recent Southern District of Texas decision explained, a critical issue for the Court in *Board of Commissioners* was that the Louisiana Supreme Court had specifically rejected the reasonable standard of care in the circumstances raised by that case and therefore, the negligence and nuisance claims at issue "could not 'be resolved without a determination whether multiple federal statutes create a duty that does not otherwise exist under state law.'" *Alexander* 325 F. Supp. 3d at 795 (citing *Bd. of Comm'rs*, 850 F.3d at 722-23). Here, on the other hand, Texas courts have recognized a common law duty of reasonable case for sellers of ammunition and firearms. *See e.g., Tamez*, 960 S.W.2d at 130 (holding that ammunition sellers have "a common-law duty to act reasonably in selling ammunition.").[8]

[8] The Luckygunner Defendants also cite to *Knight v. Wal-Mart Stores, Inc.*, for the proposition that "interpretation of the Gun Control Act is a federal question." 889 F. Supp. 1532, 1538 (S.D.Ga.1995). It is a truism that interpreting a federal statute is a question of federal law, but that is not the issue before this court. The question is whether this federal issue is necessarily raised; it is not, for the reasons above. And, notably, the parties never disputed federal question jurisdiction in *Knight*. In *Corporan*, the U.S. District Court for

B. There Is No Actually Disputed Federal Issue.

In order for the federal issue in a state-law claim to "actually be in dispute to justify federal jurisdiction," there must be "controversy respecting [the] validity, construction, or effect" of the federal statute in question on the face of the well-pleaded complaint. *Grable*, 545 U.S. at 315 n.3 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 570 (1912)).

The parties certainly disagree as to whether the .38 special ammunition that the Luckygunner Defendants provided to the Shooter is "suitable for use only in a handgun," and what exactly the Luckygunner Defendants knew or did not know or deliberately avoided knowing at the time of the sale. *See* NOR ¶¶ 12, 18; TAP ¶¶ 125-141, 152-172; FAP ¶¶ 45-51, 57-58. However, these are factual disagreements, not questions of law; they are not, therefore, grounds to remove the case to federal court. *See Allen v. Bank of Am. N.A*, 5 F. Supp. 3d 819, 832 (N.D. Tex. 2014) (finding that the parties' factual dispute as whether federal regulations were violated "does not tip the scales in favor of finding federal question jurisdiction"); *Texas ex rel. Zayas v. Astrazeneca, L.P.*, No. 1-14-CV-1111, 2015 WL 13810532, at *3–4 (W.D. Tex. Mar. 30, 2015) (because the parties disagreed as to whether a drug was "medically indicated" as opposed to the effect of the Federal Food, Drug and Cosmetic Act on "medically indicated" drugs, the dispute was "not one of law," and thus was not actually disputed).

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the District of Kansas noted that the defendants' citation to *Knight* did not dissuade the court from holding that "a plaintiff's use of federal law as the source of a duty under state law is simply insufficient to create federal question jurisdiction." 194 F. Supp. 3d at 1133.

The "well-pleaded-complaint rule" requires the Court to consider only "what necessarily appears in the plaintiff's statement of his own claim" to "assess whether the case arises under federal law. . . ." *Venable v. La. Workers' Comp. Corp*., 740 F.3d 937, 942 (5th Cir. 2013) (quoting *Taylor v. Anderson,* 234 U.S. 74, 75–76 (1914)). There is no dispute that 18 U.S.C. § 922(x) applies to individuals or companies that sell or deliver ammunition that is "suitable only for a handgun," if they know or have reason to know that the purchaser is a juvenile. Instead, the Luckygunner Defendants point to factual evidence outside the operative petitions to challenge Plaintiffs' assertion that .38 special caliber ammunition is "suitable for use only in a handgun," despite the fact that Luckygunner's own website markets .38 special ammunition as handgun ammunition. *See* TAP ¶ 128.[9]

The defendants in *Ramos* almost identically argued that the Winchester .38 caliber handgun bullets at issue could be used in certain rifles. The *Ramos* court rejected this argument, refusing to be drawn into a fact dispute about whether .38 special ammunition is handgun or long gun ammunition in the context of a removal dispute; the court

[9] To support this argument, the Luckygunner Defendants point to a "long list of commercially available long-guns… designed to fire such ammunition." NOR ¶ 18 n. 4. That "long list" is a misfire. An examination of the websites cited in the NOR makes clear that these firearms are reproductions of "Old West classics," "chambered in America's most popular pistol calibers." *See e.g.,* https://www.cimarron-firearms.com/1866-short-rifle-38-special-20-oct-barrel.html; https://www.marlinfirearms.com/lever-action/model-1894/model-1894c; *see also* https://www.uberti-usa.com/history ("Uberti firearms are exacting replicas, down to the finest detail"). However, courts have recognized that the fact that ammunition that is "universally regarded and marketed as strictly handgun ammunition" can be used in a limited number of antiquated rifles does not mean that the ammunition is "for use in a rifle or shotgun." *See e.g. Appalachian Res. Dev. Corp. v. McCabe,* 387 F.3d 461, 466 (6th Cir. 2004).

emphasized that this question was not present on the face of the complaint, but instead was raised by the defendant and was "based on facts outside of the Complaint." 202 F. Supp. 3d at 467-68. So too here.

C. There Is No Substantial Federal Issue.

The Luckygunner Defendants have also failed to show that the single federal issue they raise—the use of 18 U.S.C. § 922(x) as a source of duty—is sufficiently substantial to merit removal. "[I]t is not enough that the federal issue be significant to the particular parties in the immediate suit. . . . The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 260 (2013). In determining whether a state-law claim presented a substantial federal issue, courts may consider whether: (1) "a determination of the federal question will be dispositive of the case, (2) "the case presents a nearly pure issue of law that would control in many other cases," and (3) "the federal government has an important interest in the issue, particularly if the case implicates a federal agency's ability to vindicate its rights in a federal forum." *Marren v. Stout*, 930 F. Supp. 2d 675, 683 (W.D. Tex. 2013) (citing *Empire Healthchoice*, 547 U.S. at 700-01 (2006)). The federal issue raised by the Luckygunner Defendants meets none of these criteria.

The Plaintiffs have already shown that the purported federal question will not be dispositive of this case. Simply put, even if a jury finds that the Luckygunner Defendants violated 18 U.S.C. § 922(x), the Plaintiffs may still lose the case for any number of other reasons; and more importantly, even if a jury finds that the Luckygunner Defendants did not violate § 922(x), the Plaintiffs could win on their simple negligence theory of liability.

Where a federal legal issue can dispose of an entire case—in a declaratory judgment action, for instance, or a quiet title action—this factor can weigh in favor of substantiality. But where, as here, any federal issues that arise relate only to one element and could not be resolved without fact-finding, this factor "weighs against a finding that federal-question jurisdiction is appropriate…". *Marren*, 930 F. Supp. at 689-90 (quoting *Empire Healthchoice*, 547 U.S. at 700); *see also Mikulski v. Centerior Energy Corp*., 501 F.3d 555, 571 (6th Cir. 2007) (removal improper where, even if the plaintiffs' interpretation of a federal statute prevailed, they would still need to "prove the remaining elements" of their state law claims).

Relatedly, this case does not present a pure issue of law that would control in many other cases. For this reason, the Luckygunner Defendants also fail to meet the second substantiality factor. In *Empire Healthchoice*, the Supreme Court drew a distinction between cases where the federal issue poses a "pure issue of law. . . that could be settled once and for all and would thereafter govern numerous. . . cases," and cases where the federal issue is "fact-bound and situation-specific." 547 U.S. at 700 (internal quotation marks and citation omitted). This case falls in the latter category.

Here, the Luckygunner Defendants argue that the federal issue is whether .38 special caliber ammunition is "suitable only for use in a handgun." If the Court needs an indication of whether resolution of this question will require fact-finding, the notice of removal's lengthy footnote 4 is a barely covered attempt to improperly introduce a factual dispute about whether .38 special ammunition can ever be used in a long gun. As noted above, that

violates the rule that removal is to be decided on the face of the complaint. It also weighs strongly against finding of "substantiality."

When faced with this very issue in *Ramos*, the District Court anticipated receiving evidence "concerning the styles and vintages of firearms capable of firing this ammunition and the way this ammunition is perceived in the marketplace" and concluded that "[t]he end product is likely to be a fact-bound and situation-specific determination of whether the sale of this particular ammunition, at this particular time, violated federal law. That may be of substantial significance to the parties, but not to the federal system." 202 F. Supp. 3d at 470. "Substantiality [] is not established where the federal issue is not predominant, but is merely a backdrop for a largely factual dispute, as is the case here." *McAdams v. Medtronic, Inc.*, No. CIV A. H-10-831, 2010 WL 3909958, at *4 (S.D. Tex. Sept. 29, 2010)*; see also Singh v. Duane Morris LLP,* 538 F.3d 334, 339 (5th Cir. 2008) (declining to find a federal issue to be substantial when it was "predominantly one of fact").

Nor would any finding in this case apply to numerous additional federal cases. In *Gunn v. Minton*, the Supreme Court admonished that: "If the question arises frequently, it will soon be resolved within the federal system, laying to rest any contrary state court precedent; if it does not arise frequently, it is unlikely to implicate substantial federal interests." 568 U.S. at 262. Here, the Luckygunner Defendants concede that the meaning of the relevant portions 18 U.S.C. § 922(x) is "of first impression." NOR ¶ 19. While they argue that this supports federal court jurisdiction, the case law says the opposite, as the infrequency with which 18 U.S.C. § 922(x) is invoked further undermines any finding of substantiality.

Lastly, the federal government does not have an important issue at interest in this case. Courts have found an important government interest in claims that implicate a federal regulatory scheme or a federal agency's ability to operate properly. *See Grable*, 545 U.S. at 315 (finding that "[t]he Government has a strong interest in the 'prompt and certain collection of delinquent taxes,'" and therefore "a direct interest in the availability of a federal forum to vindicate its own administrative action…") (citation omitted); *Bd. of Comm'rs*, 850 F.3d at 724 (finding that there was a substantial government interest because the dispute concerned whether federal law created the duties that the defendants allegedly breached, and "the validity of the Board's claims would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law.").

Neither the federal gun licensing scheme, nor the Bureau of Alcohol, Tobacco, Firearm, and Explosives' ability to carry out its duties is implicated by Plaintiffs' reference to § 922(x). This is because licensed federal firearms sellers are governed by a different provision of the Gun Control Act—§ 922(b).[10] In addition, none of the Luckygunner Defendants are in possession of federal firearms licenses (NOR ¶ 13 n. 3), and they are therefore not subject to regulation by a federal agency. This is a state court personal-injury

[10] *See* House Report 103-389, (describing 18 U.S.C. § 922(x) as an "extension" of restrictions on the transfer of handguns to juveniles under the Gun Control Act of 1968, which only applied to federal firearms licensees); 139 Cong. Rec. H6783 (daily ed. Sept. 21, 1993) (statement of Rep. Glickman) ("This bill [introducing the Youth Handgun Safety Act] closes - a loophole In existing Federal handgun law. Currently, Federal law makes it illegal for a licensed gun dealer to sell and give handguns to minors. However, it does not address the very real situations where other people sell and give handguns to minors.")

action in which the federal government has no important interest, and "state courts are competent" to "apply federal law to aspects of this case." *Goffney v. Bank of Am., N.A.,* 897 F. Supp. 2d 520, 527 (S.D. Tex. 2012).

The Luckygunner Defendants' attempt to create a parade of horribles by arguing that "nationwide federal firearms statutes would forever be altered. . . [by] effectively criminalizing transfers of commonly used hunting and sporting ammunition to [juveniles]"[11] is simply fanciful. *See* NOR ¶ 21. Section 922(x) applies to a tiny sliver of potential defendants—unlicensed individuals or companies who transfer ammunition to minors without their parents' consent. *See* 18 U.S.C. § 922(x)(3) (listing exceptions to prohibition, including, juveniles who possesses a handgun or handgun ammunition during the course of employment, ranching, farming, target practice, hunting, or "a course of instruction in the safe and lawful use of a handgun," as long as they have the written consent of their parent or guardians). Simply put, there is no substantial federal issue at play here.

D. Extending Federal Jurisdiction to This Case Would Disrupt the Federal-State Balance Approved by Congress.

Both Supreme Court and Fifth Circuit precedent make clear that extending federal jurisdiction to state law personal injury claims in which a federal statute serves only to *potentially* define a standard of conduct (like the claim at issue here) would upset the federal-state court balance. In *Merrell Dow Pharmaceutical, Inc. v. Thompson*, the Supreme Court held that "a complaint alleging a violation of a federal statute as an element

[11] Although the Luckygunner Defendants repeatedly state that 18 U.S.C. § 922(x) applies to sales or transfer to individuals under 21, "juveniles" as the phrase is used in § 922(x) "means a person who is less than 18 years of age." 18 U.S.C. § 922(x)(5).

of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim arising under the Constitution, laws, or treaties of the United States." 478 U.S. at 817 (internal quotation marks and citation). *Grable* subsequently indicated that "*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." 545 U.S. at 318. Like *Merrell Dow*, the Court in *Grable* was specifically concerned about opening the floodgates to "garden variety" negligence per se claims that were predicated on violations of federal law. *See id.* at 318-19.

Courts in the Fifth Circuit generally find that exerting federal jurisdiction over state tort law claims that incorporate federal standards of care would upend the proverbial oxcart, creating a federal forum for personal injury actions, where Congress plainly did not so intend. For example, in *Cantu v. Bay Area Healthcare Grp., Ltd.*, the Southern District of Texas found the consideration of this balance to be "most fatal" to the defendant's argument for removal:

> Finally, and perhaps most fatal to Defendant's argument, is the sea-change in the delicate state-federal balance that would result if federal courts, starting with this one, concluded that all state court wrongful death actions against health care facilities were eligible for the exercise of "arising under" jurisdiction so long as plaintiffs asserted that federal healthcare laws were violated in chronological proximity to and with some causal effect on the underlying injuries.

No. CIV.A. V-05-95, 2007 WL 951624, at *4 (S.D. Tex. Mar. 28, 2007).

Here, too, failing to remand this case back to state court would result in "a great disturbance in the 'congressionally approved balance of federal and state judicial

responsibilities.'" *Id*. (quoting *Grable*, 545 U.S. at 314). Under *Merrell Dow*, as interpreted by the *Grable* Court, the absence of a federal private right of action to enforce 18 U.S.C. §§ 922(x)(1)(B) and (x)(2)(B) is highly indicative that "Congress did not intend to alter the balance of federal and state judicial responsibilities" by allowing a federal forum for claims such as the ones raised in this forum. *Goffney,* 897 F. Supp. 2d at 527 (S.D. Tex. 2012). To allow federal question jurisdiction here would invite a "tremendous number of cases" from state court into federal court and would upend "Congress's intended division of labor between state and federal courts." *Grable*, 545 U.S. at 318.

IV. Plaintiffs Should Be Awarded Attorneys' Fees and Expenses Under 28 U.S.C. § 1447(c).

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Because "[t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources," § 1447(c) is an expression of Congressional "desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005).

Thus, fees under the removal statute are appropriate "where the removing party lacked an objectively reasonable basis for seeking removal." *Id*. at 141. For instance, the Fifth Circuit upheld a district court award of attorneys' fees where the court concluded that

"[n]o reasonable argument can be made that the mere fact that a federal standard is to be referenced by a state court in determining whether there has been a state-law violation causes a state-law claim to 'necessarily raise a stated federal issue.'" *Am. Airlines, Inc. v. Sabre, Inc.,* 694 F.3d 539, 543 (5th Cir. 2012) (internal quotation marks and citation omitted).

Plaintiffs respectfully submit that, as demonstrated herein, there was no objective basis for the Luckygunner Defendants to remove this case. Removal without unanimous consent where the purely state law claims and alleged federal claims clearly arose from a common nucleus of operative fact was directly contrary to the clear requirements of the removal statute and case law from the Supreme Court and the Fifth Circuit. In addition, removing a case solely because Plaintiffs cite to federal statutes in their state law negligence and negligence *per se* theories of liability is contrary to Supreme Court caselaw. *Merrell Dow*, 478 U.S. 816-17; *Grable*, 545 U.S. at 314.

Moreover, in an effort to avoid having to devote substantial time and effort to briefing these well-worn issues, the Plaintiffs raised the issue of defective removal with the Luckygunner Defendants on May 11, 2020. *See* Declaration of Clint E. McGuire, attached as Exhibit A. However, the Luckygunner Defendants rejected the Plaintiffs' request to voluntarily remand this case back to state court. *Id*. Under these circumstances, an award of costs and attorneys' fees is appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion and issue an order, substantially in the form of the proposed order filed herein,

remanding this case to the County Court at Law No. 3 of Galveston County, Texas, and awarding costs and attorneys' fees incurred as a result of the Luckygunner Defendants' removal.

DATED: June 1, 2020

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF CONFERENCE

Pursuant to Southern District Local Rule 7.1 and Galveston District Court Rule 5(d), the undersigned counsel hereby certifies that, prior to the filing of this motion, the movant conferred with counsel for all defendants who have entered an appearance in the action. Counsel for defendants Antonios Pagourtzis and Rose Marie Pagourtzis does not oppose the current motion. Counsel for Luckygunner, LLC, Red Stag Fulfillment, LLC, MollenhourGross, LLC, Jordan Mollenhour and Dustin Gross oppose the motion.

/s/ Clint E. McGuire
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CERTIFICATE OF SERVICE

I certify that, on June 1, 2020, a true and correct copy of the Plaintiffs' and Plaintiffs-Intervenors' Motion to Remand was served on all counsel of record via the Court's electronic-notification system.

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