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CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER STONE, individually and as next friends of CHRISTOPHER JAKE STONE Plaintiffs, VS. ANTONIOS PAGOURTZIS and ROSE MARIE KOSMETATOS Defendants.	COUNTY COURT AT LAW GALVESTON COUNTY, TEXAS COURT NO. 3

PLAINTIFFS' OPPOSITION TO THE TENNESSEE DEFENDANTS' 91A MOTION

TO THE HONORABLE JUDGE EWING:

COME NOW, Plaintiffs[1] and respectfully move this Court to deny Defendants' Rule 91a Motion to Dismiss and would respectfully show the Court the following:

The moving defendants, an ammunition seller and its affiliates, seek an order from this Court declaring – as a matter of law – that they cannot be held liable for selling ammunition to a minor. Under the defendants' view of the law, they can open a store where anyone old enough to know how to use a computer can buy ammunition, institute no safety measures and face absolutely no liability. The defendants make this argument despite the fact that it is illegal under federal law to sell handgun ammunition to a minor, and even though courts in Texas have consistently held that ammunition sellers have a duty "toward third parties who might be injured by an unreasonable

[1] 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) (collectively, "Plaintiffs").

sale of ammunition." *Tisdale v. Pagourtzis*, No. 3:20-cv-140, 2020 U.S. Dist. LEXIS 228866, at *14 (S.D. Tex. Dec. 7, 2020). Yet, the defendants designed a webstore through which they would remain wholly ignorant of a customer's age, and by which their customers knew their age would not be checked.

The result of this business model was all too predictable. On March 2, 2018, two weeks after a 19-year-old murdered 17 people at Marjory Stoneman Douglas High School in Florida, 17-year-old Dimitrios Pagourtzis logged on to Luckygunner.com. He did not have to show ID, or enter his age, or even use a credit card. Instead, he used a gift card to purchase both handgun and long gun ammunition through Luckygunner's "100% automated" system and chose to have his ammunition shipped with no "Adult Signature Required." His order was approved in less than two minutes. Pagourtzis was so confident that his age would not be checked that he even used his own name to make the purchase. Two months later, this 17-year-old loaded his ammunition into firearms that he accessed at his parents' home, went to school, and murdered 10 of his classmates and teachers, wounding 13 others.

Plaintiffs are the surviving relatives and victims of the Santa Fe High School shooting, and they have brought this lawsuit to hold liable those whose negligent and illegal actions enabled Dimitrios Pagourtzis to carry out one of the worst school shootings in American history. The five moving defendants, collectively referred to herein as the "Tennessee Defendants," seek to dismiss Plaintiffs' claims on the basis that they are purportedly immune from suit under the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* ("PLCAA"). But PLCAA permits cases to go forward against defendants who violate any law applicable to the sale of firearms or ammunition, as the Tennessee Defendants did here. And in any case, three of the four

Tennessee Defendants are not "sellers of ammunition," so PLCAA's protective scope simply does not apply to them.

Recognizing the weakness of their PLCAA arguments, the Tennessee Defendants attempt a Hail Mary pass, arguing that ammunition sellers do not owe a duty of ordinary care toward third parties who may be injured by an unreasonable sale of ammunition. But every Texas court to have considered this question has held otherwise. Moreover, Plaintiff's negligence per se claim – which is plainly exempted from PLCAA's scope – is not dependent on the duty of ordinary care.

On a Rule 91a motion, a court may only dismiss "baseless causes of action." *See In re TPCO Am. Corp*., No. 13-17-00294-CV, 2018 Tex. App. LEXIS 2566, at *6 (Tex. App.—Corpus Christi-Edinberg Apr. 11, 2018, pet. denied). The Tennessee Defendants' motion falls far short of meeting this standard. For this reason, Plaintiffs request that this Court deny the Tennessee Defendants' Rule 91a motion, and award Plaintiffs costs and attorneys' fees pursuant to Texas Rule of Civil Procedure 91a.7.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

Defendant Luckygunner, LLC ("Luckygunner") maintains a website that sells ammunition. Pet. ¶¶ 58-63. Defendants Jordan Mollenhour and Dustin Gross launched Luckygunner in 2009 through their limited liability company, Defendant MollenhourGross (collectively referred to as the "MG Defendants"). Pet. ¶ 58. In 2013, the MG Defendants established Red Stag Fulfillment, LLC ("Red Stag") to provide shipping and fulfillment services for Luckygunner. Pet. ¶ 169. MollenhourGross is the sole managing member of both Luckygunner and Red Stag. Pet. ¶ 15.

[2] For simplicity, all citations are to the Third Amended Petition and Request for Disclosure, filed Mar. 4, 2020 in *Yanas v. Pagourtzis* (hereinafter referred to as "Pet."). These facts are likewise alleged in the Beazley Plaintiffs' First Amended Petition and Request for Disclosure, *see generally* ¶¶ 23-34, 41-82, filed Apr. 13, 2020.

Luckygunner has always prioritized speed and profit over safety. Pet. ¶¶ 40, 60-61. Ammunition orders are approved in a manner of minutes through its "100% automated" system. Pet. ¶ 62. And for states like Texas, Luckygunner employs no mechanism to verify that its customers are old enough to purchase ammunition lawfully. Pet. ¶ 64. Even though Luckygunner, as a webstore, cannot see its customers to be able to gauge whether they are 12 or 50 years old (as a clerk at a brick-and-mortar shop would be able to), Luckygunner does not request any form of identification from its customers; it does not require customers to enter their birth date; and it does not even require its customers to be old enough to have a credit card – permitting purchases with gift cards. Pet. ¶¶ 64, 73-74. As a final flourish, Luckygunner and Red Stag permit customers to order their ammunition without requiring adult signature for delivery. Pet. ¶¶ 41, 73. The only step that Luckygunner takes with respect to age is requiring its customers to check a "Terms and Conditions" box before completing their purchase, and one of the statements in these "Terms and Conditions" is that the customer is "not currently less than twenty-one (21) years old." Pet. ¶ 67-68. Far from serving as a safeguard to prevent minors from purchasing ammunition, this statement is an attempt to create a thin veneer of plausible deniability. Pet. ¶ 173.

The Tennessee Defendants engage in this dangerous conduct despite knowing, since 2012, that would-be mass shooters buy ammunition on its website. That year, Luckygunner sold over 4,000 rounds of ammunition to a 24-year-old severely-mentally ill man who used the ammunition to kill 12 people and injure 58 others at the Aurora Century 16 movie theater in Aurora, Colorado. Pet. ¶ 71. Moreover, it is well-documented that providing underage individuals with access to deadly weapons and ammunition poses a grave and unacceptable risk to public safety. Pet. ¶¶ 43-48. Since December 2012, there have been at least 74 shootings perpetrated by individuals under the age of 21 at K-12 schools, and these mass shootings are just a fraction of all shootings

committed by juveniles and minors. Pet. ¶¶ 50-51. Instead of responsibly implementing safeguards to address this known and foreseeable risk, the Tennessee Defendants established a business that intentionally avoids knowledge of the customer's age. Pet. ¶¶ 135, 158-161. The Tennessee Defendants made a deliberate choice to remain ignorant of a fact – age – that is determinative of whether the transaction is legal under federal law. Pet. ¶¶ 54-69. This way, the Tennessee Defendants can profit off of sales to the underage market. Pet. ¶¶ 40-41.

This decision had the intended result. On March 2, 2018, 17-year-old Dimitrios Pagourtzis went to Luckygunner.com and purchased handgun and shotgun ammunition using his own name and address and a prepaid American Express gift card. Pet. ¶¶ 21-22. Luckygunner did not require Pagourtzis to provide any proof of age, and his purchase was approved by Luckygunner's automated system in under two minutes. *Id.* Less than two weeks later, Dimitrios used another prepaid American Express gift card to purchase more shotgun ammunition on Luckygunner.com. Pet. ¶ 23. Again, he did not have to show proof of age, and the purchase was approved in under two minutes. *Id.* In both instances, Red Stag mailed the ammunition to Pagourtzis via FedEx without verifying his age or requiring that an adult sign for the package. Pet. ¶¶ 75, 77.

On May 18, 2018, Dimitrios Pagourtzis used the ammunition that he purchased on Luckygunner.com to fatally shoot ten of his classmates and teachers and wound at least thirteen others. Pet. ¶ 24. Christopher Stone, Kyle McLeod, Jared Conard Black, Christian Riley Garcia, and Sabika Aziz Sheikh, were among the teenagers who were killed; Clayton Horn and Flo Rice were among those who were injured. Pet. ¶¶ 26-38.

On May 24, 2018, the parents of Christopher Jake Stone filed a petition against Antonios Pagourtzis and Rose Marie Kosmetatos, the parents of Dimitrios Pagourtzis, alleging negligence and gross negligence. Original Petition and Request for Disclosure. In the months that followed,

this initial case was joined by several other victims and survivors of the Santa Fe mass shooting, and Dimitrios Pagourtzis was added as a defendant.[3] On March 4, 2020, the Plaintiffs added the Tennessee Defendants to the lawsuit, alleging negligence, negligence per se, civil conspiracy, gross negligence and piercing the corporate veil claims. The Plaintiffs alleged that Luckygunner and Red Stag negligently and illegally sold and delivered ammunition to a minor, without taking any precautions to prevent such a sale, and in fact, taking steps to be deliberately ignorant of a customer's age. Pet. ¶¶ 73-79, 126-141. The Plaintiffs further alleged that the Tennessee Defendants conspired to profit from and aid the sale of ammunition to juveniles by establishing and maintaining a webstore platform and shipping protocol designed to avoid actually verifying the single most important characteristic of an ammunition customer under federal law – the customer's age. Pet. ¶¶ 166-174.

On May 1, 2020, the Tennessee Defendants removed this case, along with related cases brought by additional victims of the Santa Fe High School shooting, to federal court. *Tisdale*, 2020 U.S. Dist. LEXIS 228866, at *7. On December 7, 2020, the U.S. District Court remanded this case back to this Court, upon finding that it had no federal question jurisdiction. *Id.* at *19. On December 23, 2020, Red Stag and the MG Defendants filed special appearances pursuant to Rule 120A. And on January 6, 2021, all of the Tennessee Defendants filed the present Rule 91a motion to dismiss.

[3] In November 2019, a separate state court lawsuit brought by William "Billy" Beazley and Shirley Beazley (individually and as next friends of T.B) was consolidated with the *Yanas* lawsuit. Order on Unopposed Motion to Transfer and Consolidate, *Yanas et al. v. Pagourtzis et al.*, No. CV-0081158 (Nov. 12, 2019).

RULE 91A STANDARD

Pursuant to Texas Rule of Civil Procedure 91a, "a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1.

> A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

Id. In reviewing Rule 91a motions, Texas courts "must construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact." *In re Butt*, 495 S.W.3d 455, 462 (Tex. App.—Corpus Christi-Edinburg 2016, orig. proceeding). Under Texas' fair notice standard, a pleading "is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." *Id.* at 461-62 (internal citation and quotation marks omitted); *see also Galperin v. Smith Protective Servs*., No. 01-18-00427-CV, 2019 Tex. App. LEXIS 4692, at *3-4 (Tex. App.—Houston [1st Dist.] June 6, 2019, no pet. history) (applying "the fair notice standard of pleading" to a review of a Rule 91a motion).

In an effort to impose a higher pleading burden on the Plaintiffs, the Tennessee Defendants focus on federal case law regarding Rule 12(b)(6) motions. Defendants' Rule 91a Motion to Dismiss (hereinafter "Mot.") ¶¶ 9-12. But "the federal rules are based on a more stringent pleading standard than the Texas rules, and Rule 91a did not revoke Texas's established 'fair notice' pleading standard." *Butt*, 496 S.W.3d at 461. While some Texas courts have found federal 12(b)(6) case law to be instructive, *see, e.g. Wooley v. Schaffer,* 447 S.W.3d 71, 75-76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *GoDaddy.com, LLC v. Hollie Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied), more recent decisions have acknowledged that while the

rules may serve similar functions, the pleading burdens at issue are starkly different. For example, as one case recently explained:

> Although several courts have found federal cases applying Rule 12(b)(6) to be persuasive in reviewing a Rule 91a dismissal and have implicitly held the reviews to be the same, we do not go that far in this case. We merely read the fair-notice precepts along with Rule 91a's requirements of a pleaded legal and factual basis for each claim, as those terms are defined in Rule 91a.1.

Statler v. Challis, No. 02-18-00374-CV, 2020 Tex. App. LEXIS 8519, at *24 (Tex. App.—Fort Worth Oct. 29, 2020, no pet.); *see also Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 612 (Tex. App.—Corpus Christi-Edinburg 2017, no pet.) ("We cannot agree that *Iqbal* is now the rule in Texas, in light of *Iqbal*'s incompatibility with well-established Texas pleading principles, as well as our supreme court's continued holding that Texas remains a fair-notice state."); *TPCO Am. Corp*., 2018 Tex. App. LEXIS 2566, at *7 ("Texas is a fair notice pleading jurisdiction and we apply this doctrine to Rule 91a motions to dismiss.").

The Tennessee Defendants' attempts to ignore the crucial differences between federal pleading standards and Texas standards are of no import: Plaintiffs' detailed, 50-page petition more than meets the required Texas standards and would also satisfy federal pleading standards. The Rule 91a motion to dismiss must be denied.

ARGUMENT

I. PLCAA Provides No Basis for Dismissal of this Case

The Tennessee Defendants' reliance upon PLCAA is misplaced. This statute applies only to one of the defendants in this case, and, as to that defendant, PLCAA expressly permits lawsuits, such as this, which are premised upon the defendant's violation of federal gun laws. The Tennessee Defendants' motion sets forth a theory, without basis in the text of the statute or case law, that all of the defendants fall within PLCAA's ambit. But neither Red Stag nor the MG

Defendants are sellers of ammunition, so they cannot avail themselves of PLCAA's protection. As to Luckygunner – which is a seller of ammunition and thus covered by PLCAA – PLCAA's protections extend only to *lawful* sales, not those that violate the law. Here, Plaintiffs have alleged that the Tennessee Defendants conspired to sell handgun ammunition to minors, and, in fact, *did* sell and deliver handgun ammunition to a minor, in violation of 18 U.S.C. §§ 2, 371 and 922(x). This lawsuit is precisely the sort of lawsuit that Congress intended to exclude from PLCAA's protections. There is simply no basis for the Tennessee Defendants' argument that PLCAA "immunize[s]" them entirely from liability for their illegal actions. Mot. ¶ 15.

a. Statutory Background

PLCAA was enacted in 2005 to protect the firearms industry from being held liable in cases where the injury was solely caused by a third party's criminal conduct and where the gun industry defendant did nothing wrong. *See* 15 U.S.C. § 7901(a)(6). PLCAA's operative clause provides that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). A "qualified civil liability action" is defined as:

> [A] civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .

15 U.S.C. § 7903(5)(A). A "qualified product" is a firearm or ammunition "that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4).

There are six exceptions that bring a case outside of PLCAA's protection. *See Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 301 (Conn. 2019) ("Congress carved out six exceptions to [PLCAA's] immunity"). Two of those exceptions are relevant here: (i) the "predicate exception" and (ii) the negligence per se exception.

First, PLCAA allows a plaintiff to bring a case against a member of the gun industry that has knowingly violated gun laws:

> The term 'qualified civil liability action' . . . shall not include an action **in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product**, and the violation was a proximate cause of the harm for which relief is sought[.]

15 U.S.C. at § 7903(5)(A)(iii) (emphasis added). "This exception has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock, Inc*., 565 F.3d 1126, 1132 (9th Cir. 2009); *see also Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007). Conspiring to sell a firearm or ammunition to someone who is prohibited from possessing it (or aiding and abetting such a purchase) is an explicit example of a predicate violation. *See* 15 U.S.C. § 7901(5)(A)(iii)(II).

Relying on the predicate exception, courts have universally held that negligence claims are not barred by PLCAA when they are predicated on knowing violations of law applicable to the sale of firearms and ammunition. *See e.g.*, *King v. Klocek*, 187 A.D.3d 1614 (N.Y. App. Div. 2020) (permitting negligence case to proceed against gun store that sold handgun ammunition to an underage individual because the case fit within PLCAA's predicate exception); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434-45 (Ind. Ct. App. 2007) (allowing negligence and public nuisance claims to proceed after concluding that violation of a statutory public nuisance law triggered application of the predicate exception); *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307, at *3-13 (D. Kan. 2016) (permitting plaintiff's negligence claim to proceed where the defendant's alleged conduct, with anticipated amendments to the complaint, fell within the predicate exception); *Chiapperini v. Gander Mountain Co., Inc*.,

13 N.Y.S.3d 777, 787-88 (N.Y. Sup. Ct. Monroe Cnty. 2014) (permitting plaintiffs' negligence claim to proceed because the complaint had sufficiently alleged knowing violations of gun laws).

Because the predicate exception refers to "*an action in which*" a seller violates federal law, courts have held that once a predicate violation against a defendant is alleged, a claim-by-claim analysis of the lawsuit is not required, and the entire lawsuit can bypass PLCAA. *See e.g., Corporan*, 2016 U.S. Dist. LEXIS 93307, at *13, n.4 ("[B]ecause the court finds the predicate exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants."); *Williams v. Beemiller, Inc*., 952 N.Y.S.2d 333, 339 (N.Y App. Div. 2012), *amended by* 951 N.Y.S.2d 444 (N.Y. App. Div. 2013) (concluding that a separate analysis of the plaintiff's negligent entrustment and negligence per se exceptions is unnecessary after determining that the predicate exception applies); *Englund v. World Pawn Exch*., 2017 Ore. Cir. LEXIS 3, *11 (Multnomah Cnty., Ore. Cir. Ct. 2017) ("[T]he Court notes that the predicate exception's broad language provides that an entire 'action' survives – including all alleged claims. . . ."). For this reason, if the Plaintiffs have adequately alleged that the Tennessee Defendants violated a predicate statute, their entire action can proceed.

In addition, PLCAA permits a plaintiff to bring "an action against a seller for . . . negligence per se." 15 U.S.C. § 7903(5)(A)(ii). Courts have interpreted this exception to follow the forum state's laws on negligence per se liability. *See e.g., Corporan*, 2016 U.S. Dist. LEXIS 93307, at *14-19 (holding that PLCAA permits negligence per se claims to proceed and evaluating the claim under the relevant state law).

b. Red Stag and the MG Defendants Are Not Sellers of Ammunition so PLCAA Does Not Apply to Them

The Tennessee Defendants have argued that they are each entitled to PLCAA protection, but that argument misreads the text of the statute and has no support in any case interpreting

PLCAA. PLCAA only provides protection to certain defendants – specifically "a manufacturer or seller of a [firearm or ammunition] or a trade association." 15 US.C. § 7903(5)(A). While Luckygunner is indisputably a seller of ammunition, Red Stag and the MG Defendants are not. For this reason, PLCAA does not apply to them.

Under PLCAA, a "seller" is defined as "a person **engaged in the business of selling ammunition** . . . in interstate or foreign commerce at the wholesale or retail level." 15 U.S.C. § 7903(6)(C) (emphasis added). The phrase "engaged in the business" is defined, in relevant part, as "a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition." 15 U.S.C. § 7903(1).

Neither Red Stag nor the MG Defendants sell ammunition. As alleged in the complaint, Red Stag is a shipping and fulfillment company and the MG Defendants are the parents of both Red Stag and Luckygunner. *See* Pet. ¶169 ("Defendants Mollenhour and Gross established Red Stag in May 2013, through their limited liability company, MollenhourGross to provide shipping services for Luckygunner."); *see also* Pet. ¶¶15-17, 170. After Pagourtzis bought the ammunition from Luckygunner, Red Stag shipped it to him via FedEx. Pet. ¶¶ 75-77.

Based on the plain text of PLCAA, the inquiry should end there. However, the defendants confuse matters by extracting a single phrase from PLCAA out of context and making the specious argument that *any* company involved in shipping ammunition is a "seller" under PLCAA because such a company purportedly has "the principal objective of livelihood and profit through the sale or distribution of ammunition." Mot. ¶ 20. The Tennessee Defendants misread the statute. To be "engaged in the business of selling ammunition" a person must "devote[ ] time, attention, and labor **to the sale of ammunition** as a regular course of trade or business with the principal objective of

livelihood and profit through the sale or distribution of ammunition." 15 U.S.C. § 7903(1) (emphasis added). The phrase "with the principal objective of livelihood and profit through the sale or distribution of ammunition" *limits* the antecedent clause ("a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business"). The Tennessee Defendants have argued the opposite – that "with the principal objective . . ." is an expansive phrase; but for it to be so, this Court would need to insert the word "or" between these two clauses. It is, however, a basic tenet of statutory construction that courts may not insert words into a statute that the legislature excluded. *See Laidlaw Waste Sys. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).

Thus, it is not enough to show that one intends to profit off of the sale or distribution of ammunition (this absurd reading would, nonsensically, apply PLCAA protections to shipping companies like FedEx), but instead one must show both (a) that one is engaged in selling ammunition, *and* (b) that one's principal objective in selling ammunition is livelihood and profit.[4]

The Tennessee Defendants are not able to cite a single case for their "broad" (Mot. ¶ 20) interpretation of "seller" under PLCAA. That is unsurprising, as such an expansive interpretation would be particularly inappropriate in the context of a federal statute that preempts state law causes of action. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (applying a limiting interpretation to a statute, because "we have long presumed that Congress does not cavalierly pre-empt state-law

[4] The phrase "principal objective of livelihood and profit through the sale or distribution of the ammunition" is used repeatedly in the Gun Control Act. *Compare* 18 U.S.C 921(a)(21) (defining "engaged in the business" in the context of the Gun Control Act) *with* 15 U.S.C. 7903(1) (defining "engaged in the business" in the context of PLCAA). Cases interpreting the Gun Control Act have held that this phrase operates to exclude those who sell firearms (or ammunition) as a personal hobby (rather than for economic reasons). *See, e.g., U.S. v. Brenner*, 481 Fed. App'x 124, 127 (5th Cir. 2012) (not designated for publication) (noting that this phrase is meant to limit the applicability of the Gun Control Act to those whose "principal motivation is economic") (internal quotation marks and citations omitted).

causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal citations and quotation marks omitted). Simply put, there is no support for the Tennessee Defendants' broad interpretation of "seller" and this Court should reject it.

c. The Tennessee Defendants Violated Federal Law by Conspiring to Sell, and Aiding and Abetting the Sale of, Handgun Ammunition to Underage Customers

Pursuant to the Youth Handgun Safety Act – an amendment to the 1968 Gun Control Act – individuals under the age of 18 are prohibited from knowingly possessing ammunition suitable only for use in a handgun. 18 U.S.C. § 922(x)(2)(B). It is also illegal to aid or abet, willfully cause, or conspire to cause, the illegal possession of such ammunition by a juvenile under the age of 18. 18 U.S.C. §§ 2, 371. Finally, it is illegal for anyone to sell, deliver or otherwise transfer handgun ammunition to individuals they know or have reasonable cause to believe are under the age of 18. 18 U.S.C. § 922(x)(1)(B).[5]

Violation of the Youth Handgun Safety Act indisputably qualifies as a predicate violation under PLCAA's predicate exception. *See* 15 U.S.C. § 7903(5)(A)(iii). And under Texas law, violations of the Gun Control Act constitute negligence per se. *See, e.g., Tisdale*, 2020 U.S.

[5] A separate provision of the Gun Control Act prohibits *licensed* firearms sellers from selling any ammunition to individuals under the age of 18 and handgun ammunition to individuals under the age of 21. 18 U.S.C. § 922(b)(1). Section 922(x) was enacted in 1993, when Congress amended the Gun Control to cover people and entities, like Luckygunner, who are not licensed but nevertheless sell ammunition to minors. *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).

Dist. LEXIS 228866, at *13-14 ("Texas courts do indeed recognize that a violation of section 922(x) may constitute negligence per se."). Therefore, if Plaintiffs have sufficiently alleged that the Tennessee Defendants violated the Youth Handgun Safety Act and that this violation was a proximate cause of the harm to the Plaintiffs, PLCAA is no bar to any of the claims in this lawsuit. Here, the allegations do just that.

Luckygunner and the MG Defendants set up an ammunition webstore that processes transactions through a "100% automated" system and provides customers with an option to receive their ammunition with "no adult signature." Pet. ¶¶ 62-64. Luckygunner and the MG Defendants set up this system despite knowing that juveniles are particularly at risk for misusing ammunition and that juveniles regularly attempt to illegally buy ammunition online. Pet. ¶ 48, 54-55. The only action that Luckygunner takes with respect to age is mandating that customers check a "terms and conditions" box, which contains the statement that the customer is "not currently less than twenty-one (21) years old." Pet. ¶ 67-68. To be clear: this "check box" is not a meaningful attempt to ascertain the age of customers – there is no option in which a customer could check "I am less than twenty-one (21) years old" nor is there an option for customers to enter their actual age. This is the equivalent of a clerk in brick-and-mortar store putting on a blindfold and then telling any customer that walks in the door that they have to say that they are 21 or 18 years of age in order to get alcohol, cigarettes, or ammunition.

This website design is no accident; Luckygunner and the MG Defendants intentionally designed the website this way to avoid knowing the age of Luckygunner's customers, so that they could profit from the underage market for ammunition. Pet. ¶¶ 64, 158, 168. The MG Defendants also established Red Stag to provide shipping services for Luckygunner so that it could serve as a conduit to Luckygunner's customers. Pet. ¶¶ 169, 180. Despite knowing that Luckygunner takes

steps to remain deliberately ignorant of their customers' age, Red Stag ships Luckygunner's ammunition without requiring adult signature or any proof of age. Pet. ¶¶ 41, 170. In short, each of the Tennessee Defendants conspired to sell and deliver handgun ammunition to juveniles, in violation of the Youth Handgun Safety Act, by establishing a webstore and shipping protocol which made clear to customers that it would not check their age, and by which they could remain deliberately ignorant of their customers' ages. Pet. ¶¶ 40, 171; *see also* 18 U.S.C. §§ 371, 922(x)(2)(b).

As described *supra*, this conspiracy worked. Pagourtzis was able purchase handgun ammunition – 38 Special Magtech 158 grain, semi-jacketed hollow-point ammunition – without having to show his ID, enter his birthdate, have an adult sign for delivery, or even show that he was old enough to possess a validly issued credit card. Pet. ¶¶ 73, 128. This 38 special ammunition is advertised as handgun ammunition on Luckygunner's website and is only suitable for use in a handgun. Pet. ¶ 128.[6] For this reason, the Petition more than adequately alleges that the Tennessee Defendants knowingly violated 18 U.S.C.§ 922(x)(1)(b) by selling and delivering handgun ammunition to someone they deliberately avoided knowing was underage.

It is well-established that a defendant's deliberate ignorance of key facts pertaining to the legality of a transaction equates to a knowing violation of the law. *See, e.g., U.S. v. Lara-Valasquez*, 919 F.2d 946, 951 (5th Cir. 1990) ("The term deliberate ignorance 'denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the

[6] In their Notice of Removal and subsequent briefs submitted to the U.S. District Court, the Tennessee Defendants argued that this ammunition does not qualify as ammunition that is solely suitable for a handgun. However, perhaps correctly recognizing that this fact issue is not appropriate for determination at the Rule 91a motion stage, the Tennessee Defendants have not raised this argument as grounds for their motion. *See King*, 187 A.D.3d at 1616 (declining, at the motion to dismiss stage, to wade into the issue of whether certain handgun ammunition can be used in a rifle).

defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught.'"). Here, the Tennessee Defendants were "subjectively aware of a high probability of the existence of illegal conduct" and "purposefully contrived to avoid learning the illegal conduct." *Id.*

The Tennessee Defendants devote a substantial portion of their brief to the argument that they did not have "reasonable cause to believe" that Pagourtzis was a juvenile. Mot. ¶¶ 31-43. However, this misguided argument ignores the very crux of the Plaintiffs' allegations. The Tennessee Defendants designed a website and shipping protocols by which they could sell and deliver ammunition to underage customers and deliberately remain ignorant of their customers' ages. *See Tisdale*, 2020 U.S. Dist. LEXIS 228866, at *6-7 ("[T]he plaintiffs allege that the Tennessee defendants . . . conspired to intentionally not know their customers' ages, in violation of a federal criminal statute."). Through these actions, the Tennessee Defendants ensured that they would not be able to know that a particular customer was underage; and under the law of deliberate ignorance and conspiracy, these actions constitute violations of the Youth Handgun Safety Act.

While this is enough on its own to deny the Tennessee Defendants' Rule 91a motion, Pagourtzis' use of a gift card, a common tool for illegal transactions online, should have been a red flag to Luckygunner to inquire into his age. Pet. ¶ 79. The Tennessee Defendants argue that use of a gift card is not a red flag that the customer is underage. Mot. ¶ 34. But under the system that they intentionally designed, this was the *only* possible red flag of an underage purchaser. Perhaps, on a website that had other methods of confirming the legality of a sale, this in and of itself would not have been a red flag. But on *this* website – designed so that the proprietors could evade knowledge of purchasers' age – the use of a prepaid gift card should have given rise to additional scrutiny because a gift card can be bought by anyone and is not attached to a verifiable

address. Pet. ¶¶ 79, 129. Just like a "burner" cell phone, a prepaid gift card is difficult to trace to its user and for this reason, it is a well-known mechanism for engaging in illegal online transactions. Pet. ¶ 79. In any case, on a Rule 91a motion, all reasonable inferences are drawn in favor of the plaintiffs. And here, applying those inferences, the deliberate steps that Luckygunner took to remain ignorant of customer age, coupled with the use of a prepaid gift card, support a finding that the Tennessee Defendants elected to remain "deliberate ignorant" – and thus, can be found to have been knowledgeable of – the illegality of Pagourtzis' purchase of handgun ammunition.

The Tennessee Defendants' reliance on *Phillips v. Luckygunner*, 84 F. Supp. 3d 1216 (D. Colo. 2015) is misplaced. *See* Mot. ¶¶ 36-37. In that case, the surviving parents of a woman killed in the Aurora, Colorado mass shooting alleged that the 24-year-old shooter's purchase of a large quantity of ammunition should have led Luckygunner to investigate the purchaser's mental state and intent for the ammunition. *Phillips*, 84 F. Supp. 3d at 1220-21. Here, the Plaintiffs are not seeking accountability for failure to conduct an investigation into the subjective mental state of an online purchaser, but for deliberately closing their eyes to an easily-verifiable fact – the customer's age. The only thing that *Phillips v. Luckygunner* establishes is that the Tennessee Defendants have known since at least 2012 that would-be mass shooters use Luckygunner to buy ammunition.

Because Plaintiffs have put the Tennessee Defendants on "fair and adequate notice" of the facts upon which their claims are based, and because these facts support a violation of the Youth Handgun Safety Act, PLCAA is no bar to this action and the Rule 91a motion must be denied.

II. Defendants Owed Plaintiffs' a Duty to Act Reasonably in the Sale and Delivery of Ammunition

Texas courts have consistently held that "under common-law negligence principles . . . ammunition sellers owe a duty of ordinary care toward third parties who might be injured by an unreasonable sale of ammunition." *Tisdale*, 2020 U.S. Dist. LEXIS 228866, at *14 (collecting Texas cases). As one Texas appellate court explained:

> Negligence rests primarily upon the existence of reason to anticipate injury and the failure to perform the duty arising on account of that anticipation . . . . Other Texas appellate courts have found that a standard of ordinary care on the part of a firearms seller does exist toward a third party who might be injured by an unreasonable sale of a firearm. **We see no reason why this standard of ordinary care should not extend to the seller of ammunition**.

Wal-Mart Stores v. Tamez, 960 S.W.2d 125, 130 (Tex. App.—Corpus Christi-Edinburg 1997, pet. denied) (emphasis added) (internal citations and quotation marks omitted); *see also Bryant v. Winn-Dixie Stores, Inc*., 786 S.W.2d 547, 550 (Tex. App.—Corpus Christi-Edinburg 1990, writ denied) ("[I]t is unreasonable for appellants to suggest that the trial court held, as a matter of law, that no duty exists on the part of the seller of ammunition to use ordinary care.").[7]

The Tennessee Defendants confuse matters by arguing that "there is no duty to control the conduct of third persons absent a special relationship[.]" *See* Mot. ¶ 49 (internal quotation marks omitted). But that misstates Texas law: it is well-established that a "tortfeasor's negligence will not be excused where the criminal conduct is a foreseeable result of [the defendant's] negligence." *Peek v. Oshman's Sporting Goods, Inc*., 768 S.W.2d 841, 846-47 (Tex. App.—San Antonio 1989,

[7] Of course, the question of whether a duty exists under Texas law to exercise reasonable care is not relevant to the Plaintiffs' negligence per se claim, which is exempted from PLCAA. This is because in negligence per se, the duty and standard of care are derived from a statute. *Reeder v. Daniel*, 61 S.W.3d 359, 361-362 (Tex. 2001) ("Negligence per se is a common-law doctrine that allows courts to rely on a penal statute to define a reasonably prudent person's standard of care.").

writ denied) (holding that "a standard of ordinary care on the part of a firearms seller does exist toward a third party who might be injured by an unreasonable sale of a firearm to a minor.").

In the face of these well-established principles of Texas law, the Tennessee Defendants attempt to prematurely litigate whether they breached their duty of ordinary care and whether that breach proximately caused the harm to the Plaintiffs. Mot. ¶¶ 52-56. But the cases they rely upon actually make plain that these issues are to be determined at summary judgment or trial, after evidence has been gathered. *See Cowart v. Kmart Corp.,* 20 S.W. 3d 779, 783 & 786 (Tex. App.—Dallas 2000, pet. denied) (affirming trial court's grant of summary judgment because the appellees negated the foreseeability element of proximate cause); *Tamez*, 960 S.W.2d at 130-31 (reversing trial court's jury verdict because there was not "any evidence in the record that the sale in question constituted a breach of [the duty to act reasonably in selling ammunition]."); *Chapman v. Oshman's Sporting Goods, Inc*., 792 S.W. 2d 785, 787-88 (Tex. App.—Houston [14th Div.] 1990, writ denied) (affirming trial court's grant of summary judgment to the defendants because there was no evidence that the foreseeability element of proximate cause was established); *Holder v. Bowman*, No. 07-00-0126-CV, 2001 Tex. App. LEXIS 540 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied), at *1 & *10 (not designated for publication) (affirming trial court's grant of summary judgment because appellant failed to show that the sale was a proximate cause of victim's death).

Texas courts have explicitly rejected the idea that "a Rule 91a proceeding should function, in effect, as a summary judgment proceeding." *TPCO Am. Corp*., 2018 Tex. App. LEXIS 2566, at *15-17; *see also Galperin,* 2019 Tex. App. LEXIS 4692, at *5-6 (reversing a trial court's grant of a Rule 91a motion were the determination of whether or not the defendant owed a duty to the plaintiff required the collection of evidence which had not yet occurred). A Rule 91a proceeding is "akin to a threshold test" where the court examines the petition to ensure it states "a plausible

and viable cause of action pursuant to the fair notice doctrine." *TPCO Am. Corp.*, 2018 Tex. App. LEXIS 2566 at *16. The Petition more than meets that standard.

Finally, it bears noting that, to the extent that some past cases have ultimately concluded (after collecting evidence and full merits briefing) that a particular firearm or ammunition sale to a minor did not breach the standard of care or was not foreseeable, the sales in *each* of these cases occurred before the Columbine High School shooting in 1999, the Sandy Hook Elementary School shooting in 2012 or any of the 74 shootings perpetrated by individuals under the age of 21 at K-12 schools since 2012. Pet. ¶ 51. *See Tamez*, 960 S.W.2d at 127 (ammunition purchased in 1993); *Cowart,* 20 S.W. 3d at 782 (ammunition purchased in 1992); *Chapman*, 792 S.W. 2d at 787 (handgun purchased in 1986); *Holder*, 2001 Tex. App. LEXIS 540, at *1 (murder occurred in 1993). In 2018 alone a 15-year-old high school sophomore, obsessed with Nazis, killed two of his classmates and injured 18 others at Marshall County High School near Benton, Kentucky. Pet. ¶ 72. A few weeks later, a 19-year-old killed 17 students and educators at Marjory Stoneman Douglas High School in Parkland, Florida. *Id*. As the Tennessee Defendants acknowledge, foreseeability is analyzed with respect to whether the harm was foreseeable *at the time* of the actor's tortious conduct. *See* Mot. ¶ 53; *see also Roberts v. W-W Trailer Mfrs*., No. 14-01-00065-CV, 2002 Tex. App. LEXIS 1154, at *10 (Tex. App.—Houston [14th Dist.] Feb. 14, 2002, no pet.). Something that may not have been foreseeable to an ammunition seller in the 1980s and 1990s is, unfortunately, all too foreseeable now.

Because Texas courts have consistently held that ammunition sellers have a common law duty not to sell ammunition in an unreasonably dangerous manner, and because the Plaintiffs' petition gives the Tennessee Defendants adequate notice of the facts underlying Plaintiffs' negligence claim, the Rule 91a motion must be denied.

III. The Plaintiffs' Remaining Claims Can Go Forward

The Tennessee Defendants' argument to dismiss Plaintiffs' civil conspiracy, piercing the corporate veil and gross negligence claims (*see* Mot. ¶¶ 57-59) rests solely on their incorrect arguments that negligence and negligence per se must be dismissed. Since both the negligence and negligence per se claim can proceed, so can these claims.

The *res ipsa loquitur* liability theory alleged by the Beazley plaintiffs (s*ee* Mot. ¶ 60) can also proceed. The *res ipsa* doctrine is a rule of evidence by which negligence can be inferred by the jury, and is applicable when two factors are present: (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant. *Mobile Chemical Co. v. Bell*, 517 S.W.2d, 245, 251 (Tex. 1974). The Tennessee Defendants argue that *res ipsa* does not apply based upon their premise that the firearms and ammunition were under the control of the shooter at the time of the accident, rather than the Tennessee Defendants. However, control, as it is analyzed under *res ipsa*, does not mean that the instrumentality causing the injury was under the defendant's exclusive control or even the defendant's control at the time of injury. Rather, the control requirement is sufficiently met if the defendant was in control at the time the negligence inferable from the character of the accident probably occurred. *Id.* Here, the Tennessee Defendants were in control of the ammunition at the time they negligently and illegally sold the ammunition to the shooter. Further, without negligence, a minor would not ordinarily be able to purchase ammunition. As such, *res ipsa* applies.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Tennessee Defendants' Rule 91a motion to dismiss, and award costs and attorneys' fees pursuant to Texas Rule of Civil Procedure 91a.7 incurred as a result of the Tennessee Defendants' motion.

DATED: February 10, 2021

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I certify that, on February 10, 2021, a true and correct copy of the Plaintiffs' Opposition to the Tennessee Defendants' Rule 91a Motion was served on all counsel of record via the Court's electronic-notification system.

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