CAUSE NO. CV-0081158

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

THE TENNESSEE DEFENDANTS' RULE 91A MOTION TO DISMISS SUBJECT TO ANY SPECIAL APPEARANCES UNDER TEXAS RULES OF CIVIL PROCEDURE 120A

Pursuant to TEX. R CIV. P. 91a, Defendants LuckyGunner, LLC ("LuckyGunner"), Red Stag Fulfillment, LLC ("Red Stag"), Mollenhour Gross, LLC ("MG"), Jordan Mollenhour ("Mollenhour"), and Dustin Gross ("Gross") (collectively, the "Tennessee Defendants") move to dismiss Plaintiffs' Third Amended Petition and First Amended Petition because the claims asserted against the Tennessee Defendants have no basis in law. This motion does not waive any separate Special Appearance(s) previously filed by the Tennessee Defendants, pursuant to TEX. R CIV. P. 91a.8.

INTRODUCTION

1. This consolidated lawsuit arises from a criminal shooting at Santa Fe High School in May 2018, which was perpetrated by a seventeen (17) year old student. The Plaintiffs include two groups – the "Yanas Plaintiffs" and the "Beazley Plaintiffs" – who were tragically injured or killed by the shooter.

2. At issue in this motion are the Yanas Plaintiffs' Third Amended Petition (the "Yanas TAP") and the Beazley Plaintiffs' First Amended Petition (the "Beazley FAP").[1] In both petitions, Plaintiffs contend LuckyGunner (and by extension, the rest of the Tennessee Defendants) is legally responsible for the shooter's criminal acts because LuckyGunner allegedly sold the shooter ammunition used in the shooting.

3. The alleged fault of each of the Tennessee Defendants is summarized as follows:

a. LuckyGunner, an online retailer, was negligent by allegedly selling .38 special ammunition to the shooter without verifying whether the shooter was truthful when he certified at checkout that he was not less than twenty-one (21) years old. (Yanas TAP at ¶¶67-68, 73-74, 76, 128, 140, 153, 161; Beazley FAP at ¶¶41, 45, 47, 69-70, 76.)

b. Red Stag, a third-party logistics company, was negligent by allegedly packaging and shipping the .38 special ammunition on LuckyGunner's behalf without independently verifying the shooter's age. (Yanas TAP at ¶¶41, 156-157, 161; Beazley FAP at ¶33, 76.)

c. MG, an investment company, is vicariously liable for LuckyGunner and Red Stag's negligence because it allegedly owns both companies. (Yanas TAP at ¶¶58, 169, 176; *see also* Beazley FAP at ¶¶81-82.)

d. Mollenhour and Gross, two individuals, are also vicariously liable for LuckyGunner and Red Stag's negligence because they allegedly own MG. (Yanas TAP at ¶¶58, 169, 176; *see also* Beazley FAP at ¶¶81-82.)

No matter how the Plaintiffs' claims are styled, the alleged liability of each of the Tennessee Defendants is ultimately predicated on LuckyGunner's sale of .38 special ammunition allegedly used in the shooting. (*See e.g.*, Yanas TAP at ¶¶80, 18-24, 40-41, 54-70, 73-76, 128, 140, 153, 161; Beazley FAP at ¶¶30-32, 34, 41-49, 60-72, 75-76.)

4. Plaintiffs' claims against the Tennessee Defendants have no basis in law, for two primary reasons.

[1] Plaintiffs' previous petitions named only the shooter and his parents as defendants, alleging various negligence and intentional tort theories. In March and April of 2020, Plaintiffs amended their petitions to add the five Tennessee Defendants.

5. First, the Tennessee Defendants are immune from this suit under the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq*. ("PLCAA"). The PLCAA generally prohibits lawsuits against firearms and ammunition manufacturers, distributors, sellers, dealers, and importers for damages arising from the criminal misuse of firearms and ammunition by third parties. 15 U.S.C. § 7903(5)(a); 15 U.S.C. § 7901(b)(1). Whether the Tennessee Defendants are entitled to immunity under the PLCAA is a question of law appropriately decided on the pleadings under a motion to dismiss standard. *See, e.g.*, *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1220 (D. Colo. 2015); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013).

6. Second, even if the Tennessee Defendants are somehow not immune from suit under the PLCAA, they are nevertheless not liable for the Plaintiffs' injuries because Texas law did not impose a duty on the Tennessee Defendants to protect Plaintiffs from the purchaser's subsequent criminal acts. The existence of a duty is a question of law for the Court. *Otis Engineering Corp. v. Clark*, 668 S.W. 2d 307, 308-11 (Tex. 1983). In the absence of such a duty, the Tennessee Defendants cannot be held liable under the Plaintiffs' asserted causes of action.

7. Because the claims asserted against the Tennessee Defendants have no basis in law, this lawsuit should be dismissed pursuant to Tex. R. Civ. P. 91a.

RULE 91A STANDARD

8. 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." TEX. R. CIV. P. 91a.1. When ruling on a motion, the Court may not consider evidence, and must decide the motion solely based on the pleading containing the challenged cause(s) of action. TEX. R CIV. P. 91a.6.

9. In considering a Rule 91a motion to dismiss, Texas state courts apply the analogous standards set in Federal Rule of Civil Procedure 12(b)(6) and the seminal Supreme Court cases of *Twombly* and *Iqbal*. *See, e.g.*, *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston, [14th Dist.], 2014); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont, 2014) (holding that Rule 91a is analogous to Federal Rule of Civil Procedure 12(b)(6) and that the *Twombly-Iqbal* cases are "instructive").

10. Those Supreme Court cases are pertinent here. To defeat a motion to dismiss, a plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal*, 556 U.S. at 670. "To enter the realm of plausible liability," a complaint must satisfy two hurdles. *Twombly*, 550 U.S. at 557 n. 5.

11. First, a plaintiff must frame a "complaint with enough factual matter (taken as true) to suggest" that he is entitled relief. *Twombly*, 550 U.S. at 556. As to what constitutes sufficient "factual matter," the Supreme Court has cautioned that a legal conclusion is not transformed into a factual allegation merely because a complaint represents its conclusions as facts. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Furthermore, it is "not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors of Calif. V. Calif. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

12. Second, the factual allegations must do more than claim conduct "merely consistent" with actionable wrongdoing. *Iqbal*, 556 U.S. at 678. Failure to do so "stops short of

the line between possibility and plausibility of entitlement to relief." *Id*. Where the pleaded facts "do not permit the court to infer more than the mere possibility of misconduct," the complaint is insufficient to state a claim. *Iqbal*, 556 U.S. at 679. Determining whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. In short, a complaint should be dismissed, when, on its face, it is devoid of facts necessary for the plaintiff to prevail under the cause of action asserted, or when the complaint itself discloses facts that necessarily defeat the causes of action pled.

13. A Rule 91a motion must identify the causes of action and grounds for dismissal. TEX. R CIV. P. 91a.2. Here, the Tennessee Defendants seek dismissal of all of Plaintiffs' claims against them – negligence and negligence *per se* and the derivative or collateral claims that the Tennessee Defendants were grossly negligent, and that vicarious liability exists for LuckyGunner's ammunition sale based on claims styled as "civil conspiracy" and "piercing the corporate veil" – because such claims have no basis in law.[2]

ARGUMENT

I. The Plaintiffs' claims against the Tennessee Defendants have no basis in law because the Tennessee Defendants are immune from this suit under the PLCAA.

14. The Tennessee Defendants are immune from this suit under the PLCAA. The PLCAA was adopted by Congress in 2005 with bipartisan support. It prohibits lawsuits, like this

[2] The Tennessee Defendants' motion is also timely. Counsel for the Tennessee Defendants agreed to and did accept service of the Yanas TAP and Beazley FAP on April 1, 2020. On May 1, 2020, the Tennessee Defendants timely removed this case to the Southern District of Texas pursuant to 28 U.S.C. §§ 1331 and 1441(c). As a result, this Court lost jurisdiction immediately upon removal. *See* 28 USCA § 1446; Wright & Miller, Procedure for Removal—When Removal is Effective; Further Proceedings in State Court, 14C Fed. Prac. & Proc. Juris. § 3736 (Rev. 4th ed.). Thus, the Tennessee Defendants had 30 days remaining to file Rule 91a motions to dismiss in Texas when the case was removed. On December 7, 2020, the U.S. District Court issued an order remanding this case. *See* Certified Copy of Remand Order. Within the remaining 30-day time-period that restarted when Court regained jurisdiction, the Tennessee Defendants filed their Rule 91a motion.

one, against firearms and ammunition manufacturers, distributors, sellers, dealers, and importers for damages arising from the criminal misuse of firearms and ammunition by third parties. 15 U.S.C. § 7903(5)(a); 15 U.S.C. § 7901(b)(1).

15. As demonstrated below, the Tennessee Defendants are within the class of persons Congress intended to immunize under the PLCAA, and the Plaintiffs' claims against the Tennessee Defendants are within the class of lawsuits Congress intended to prevent by adopting the PLCAA. Therefore, the Plaintiffs' claims against the Tennessee Defendants have no basis in law and must be dismissed pursuant to Tex. R. Civ. P. 91a.

A. History and purpose of the PLCAA.

16. Congress adopted the PLCAA in response to a flood of lawsuits filed in the 1990s and early 2000s by the federal government, states, municipalities, and private interest groups seeking to hold manufacturers and sellers of firearms and ammunition financially responsible for the criminal misuse of their products. 15 U.S.C. § 7901(a). Among the findings made by Congress in adopting the PLCAA was that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State and local laws" and those engaged in firearms and ammunition sales "**are not, and should not be, liable for the harm caused by those who criminally misuse**" firearms and ammunition. 15 U.S.C. §§ 7901(a)(4) & (a)(5) (emphasis added).

17. In providing the immunity afforded by the PLCAA, Congress recognized that under long-standing common law, manufacturers and sellers are not responsible for criminal acts perpetrated with firearms and ammunition. *See* 15 U.S.C. § 7901(a)(7) ("The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the

common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law."). Congress found lawsuits seeking to hold those involved in the sale and distribution of firearms and ammunition liable for damages resulting from criminal misuse to be "an abuse of the legal system." 15 U.S.C. §§ 7901(a)(6). So, Congress enacted the PLCAA to ensure that those who are involved in the sale of ammunition are not subjected to lawsuits alleging "harm caused by those who criminally or unlawfully" misuse ammunition. *See* 15 U.S.C. §§ 7901(a)(5) & (6).[3]

B. Overview of the PLCAA's provisions.

18. The operative provision of the PLCAA provides that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902. Courts interpreting this statute have described it as providing "immunity" from suits meeting the definition of a "qualified civil liability action." *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274, 1283 (C.D. Cal. 2006); *see also Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009) ("[T]he PLCAA . . . creates a substantive rule of law granting immunity to certain parties against certain types of claims."). Any "qualified civil liability action" brought in a Federal or State court "shall be immediately dismissed." *See Phillips*, 84 F. Supp. 3d at 1223 (quoting 15 U.S.C. § 7902).

19. A "qualified civil liability action" is defined as:

[3] Every federal and state appellate court to issue a final ruling on the constitutionality of the PLCAA has found it constitutional. *See Ileto v. Glock*, 565 F.3d 1126, 1138-42 (9th Cir. 2009), *cert denied*, 130 S.Ct. 3320 (2010); *City of New York v. Beretta*, 524 F.3d 384, 392-98 (2nd Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009); *District of Columbia v. Beretta*, 940 A.2d 163, 172-82 (D.C. 2008), *cert denied*, 129 S. Ct. 1579 (2009); *Estate of Kim ex rel v. Coxe*, 295 P.3d 380, 382-92 (Alaska 2013); *Adames v. Sheehan*, 909 N.E.2d 742, 764-65 (Ill. 2009), *cert denied*, 130 S.Ct. 1014 (2009). In addition, at least three trial courts have issued opinions affirming the PLCAA's constitutionality. *See Phillips*, 84 F. Supp. 3d at 1222; *Estate of Charlot v. Bushmaster Firearms, Inc*., 628 F. Supp. 2d 174, 182-86 (D.D.C. 2009); *Gilland v. Sportsmen's Outpost, Inc*., 2011 WL 2479693, *16-23 (Conn. Super. May 26, 2011). And numerous courts have applied the PLCAA to dismiss lawsuits without confronting challenges to its constitutionality. *See, e.g.*, *Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214 (N.D.N.Y. Sept. 20, 2013); *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42 (D.D.C. Jan. 8, 2013); *Bannerman v. Mountain State Pawn, Inc*., 2010 WL 9103469 (N.D.W.Va. Nov. 5, 2011); *Ryan v. Hughes-Ortiz*, 81 Mass.App.Ct. 90 (Mass. App. 2012).

> [A] civil action or proceeding or an administrative proceeding brought by any person against any manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or by a third party…."

15 U.S.C. § 7903(5)(A). A "qualified product" includes ammunition. *See* 15 U.S.C. § 7903(4). Thus, the PLCAA provides immunity to ammunition sellers from civil actions arising from the criminal misuse of their products. *See Phillips*, 84 F. Supp. 3d at 1223.

20. The PLCAA defines a "seller" as "a person engaged in the business of selling ammunition . . . at the wholesale or retail level." 15 U.S.C. § 7903(6)(c). This definition is quite broad because the PLCAA defines "engaged in the business" to include any 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) (emphasis added). Accordingly, any person who regularly devotes time, attention, and labor to the sale *or* distribution of ammunition is entitled to PLCAA immunity.

C. Applicability of the PLCAA to the Plaintiffs' claims against the Tennessee Defendants.

21. The Tennessee Defendants are entitled to immunity from this suit because the allegations in the Plaintiffs' petitions (taken as true for purposes of this motion) establish that this is a qualified civil liability action as defined by 15 U.S.C. § 7903(5)(A).

22. First, the Plaintiffs' allegations establish that the Tennessee Defendants regularly devote time, attention, and labor to the sale or distribution of ammunition. Their petitions repeatedly allege and infer that the Tennessee Defendants are engaged in the commercial sale and shipment of ammunition. *See., e.g.*, Yanas TAP at ¶127 ("The LuckyGunner Defendants and Defendant Red Stag had a duty to exercise reasonable care in selling and shipping ammunition . .

. ."); *see also* Yanas TAP at ¶171 ("Upon information and belief, the LuckyGunner Defendants and Defendant Red Stag had a joint objective: to sell and deliver ammunition . . . ."); Beazley FAP at ¶¶41, 44 ("both had a duty to exercise reasonable care in selling and shipping ammunition . . . ."). Accepting these allegations as true means that the Tennessee Defendants all fall within the broad definition of a "seller" per 15 U.S.C. § 7903(6)(c).

23. Second, the Plaintiffs' allegations establish that this suit seeks to recover damages for the criminal misuse of ammunition allegedly sold or distributed by the Tennessee Defendants. *See, e.g.*, Beazley FAP at ¶34 ("on May 18, 2018, Dimitrios Pagourtzis used his parents' weapons, firing the ammunition provided by the Luckygunner defendants, to carry out his rampage."); Yanas TAP at ¶24. Once again, accepting these allegations as true means that this suit meets the definition of a "qualified civil liability action" in 15 U.S.C. § 7903(5)(A).

24. Because both the Tennessee Defendants and the claims asserted against them fall squarely within the scope of the PLCAA, the claims against the Tennessee Defendants are barred as a matter of law and must be dismissed. *See Phillips*, 84 F. Supp. 3d at 1223 (observing that any "qualified civil liability action" brought against any seller of ammunition "shall be immediately dismissed.") (quoting 15 U.S.C. § 7902).

II. The Plaintiffs' claims do not satisfy the narrow exceptions to PLCAA immunity.

25. The immunity provided by the PLCAA is broad. When enacting the PLCAA, Congress carved out six narrow exceptions to the Act's general immunity. 15 U.S.C. §§ 7903(5)(A). None apply here.

A. The PLCAA's exceptions and the Plaintiffs' claims.

26. There are only two PLCAA exceptions that could conceivably apply to the Plaintiffs' claims: (a) "an action brought against a seller for . . . negligence *per se*;" and (b) "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. §§ 7903(5)(A)(ii) & (iii). Because Texas law requires a statutory violation to state a claim for negligence *per se*, *Bryant v. Winn–Dixie Stores, Inc.*, 786 S.W.2d 547, 549 (Tex. App.—Ft. Worth 1990, writ denied), these two exceptions operate similarly when applied to Texas cases alleging a violation of a provision of the Gun Control Act.

27. The Plaintiffs assert five "claims" against the Tennessee Defendants: negligence, negligence *per se*, gross negligence, civil conspiracy, and piercing the corporate veil.[4] Each of these claims is grounded in the premise that the Tennessee Defendants violated 18 U.S.C. § 922(x)(1)(B) when they allegedly sold and shipped .38 special ammunition to the shooter. (Yanas TAP at ¶¶43-44, 55-57, 66-69, 73-76, 80, 128, 133-136, 139-140, 153, 156-157, 159-162; Beazley FAP at ¶¶30-32, 41, 45, 48, 52-54, 69-70, 75-76.).

28. The reason for the Plaintiffs' repeated reliance on Section 922(x)(1)(B) is both obvious and critical: sufficiently alleging the Tennessee Defendants violated this statute is the **only** way the Plaintiffs can squeeze into either 15 U.S.C. §§ 7903(5)(A)(ii) or (5)(A)(iii) and avoid dismissal of their case under the PLCAA. Because Plaintiffs cannot plausibly demonstrate the Tennessee Defendants violated Section 922(x)(1)(B), their claims must be dismissed as a matter of law.

[4] In reality, only two "claims" for liability are pleaded against the Tennessee Defendants: negligence and negligence *per se*. The Plaintiffs' gross negligence, civil conspiracy, and piercing the corporate veil counts are not independent claims, but rather derivative of or collateral to their negligence and negligence *per se* claims.

B. Plaintiffs have not plausibly alleged that LuckyGunner violated Section 922(x)(1)(B).

29. 18 U.S.C. § 922(x)(1)(B) provides that:

> It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile—
>
> (A) a handgun; or
> (B) ammunition that is suitable for use only in a handgun.

By the statute's plain language, the transferor must know or be given reasonable cause to believe the purchaser of the ammunition is a juvenile before facing liability. In short, Plaintiffs are required to allege sufficient facts that the Tennessee Defendants knew or had reasonable cause to believe the purchaser was a juvenile. Plaintiffs' allegations fall far short of this burden.

30. Plaintiffs have not genuinely sought to allege LuckyGunner *actually* knew the purchaser was a juvenile. To the contrary, Plaintiffs affirmatively allege that, to complete his purchase, the purchaser "was required" to "check a box agreeing to a standard set of terms and conditions, one of which is that the purchaser is not under 21." (Yanas TAP at ¶74; *see also* Beazley FAP at ¶¶69-70.)[5] Thus, the Plaintiffs' allegations demonstrate that the information actually communicated to LuckyGunner was that the purchaser was, in fact, at least 21 years old.

31. Nevertheless, Plaintiffs suggest that LuckyGunner was somehow otherwise provided with information that gave it reasonable cause to believe the purchaser was a juvenile, to wit: that LuckyGunner *should have known* the purchaser was under 21 (despite his direct representation to the contrary) because he paid with an American Express gift card. That gift card, they suggest, gave LuckyGunner constructive notice that the purchaser was underage. (*See* Yanas

[5] Plaintiffs also allege that as part of LuckyGunner's "Terms and Conditions" the "customer agrees that he or she is 'not currently less than twenty-one (21) years old.'" (Yanas TAP at ¶68; *see id.* at ¶76; *see also* Beazley FAP at ¶69-70.)

TAP at ¶¶ 22-23, 79; Beazley FAP at ¶¶31-32). This suggestion, aside from being absurd, is not enough on its own to plausibly impart constructive knowledge on the Tennessee Defendants that the purchaser was under 21.

32. To meet the "reasonable cause to believe" standard, there must be a plausible allegation that LuckyGunner had "knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, to conclude that the other person was in fact" a prohibited purchaser. *United States v. Fifty-Two Firearms*, 362 F.Supp. 2d 1308, 1313 (M.D. Fla. 2005). The standard is a subjective inquiry and requires the defendant's "scienter to be evaluated through the lens of the particular defendant, rather than from the perspective of a hypothetical reasonable man." *United States v. Munguia*, 704 F.3d 596, 603 (9th Cir. 2012). The standard "when used for civil liability, is more favorable to [defendants] than the common law negligence standard" because it requires a reason to believe that a fact exists, not merely reason to believe that a fact might exist on further inquiry. *Knight v. Wal-Mart Stores*, 889 F.Supp. 1532, 1536-37 (S.D. Ga. 1995) ("[A] dealers' duty of care under general principles of negligence . . . varies substantively" from "the specific requirements of the [GCA].").[6]

33. The cases addressing the "reasonable cause to believe" standard in the context of firearms and ammunition sales focus on what a defendant *actually* knew at the time of the sale and what reasonable inferences could be drawn from those subjectively known facts. *See, e.g.*, *United States v. Collins*, 350 F.3d 773, 777 (8th Cir. 2003) (finding that the Gun Control Act § 922(d)(3)

[6] The "reasonable cause to believe" standard "is present in numerous federal statutes." *United States v. Saffo*, 227 F.3d 1260, 1268 (10th Cir. 2000) (prosecution for possession with intent to distribute pseudoephedrine under 21 U.S.C. § 841(d)(2)) (collecting federal statutes, including the GCA)). The type of factual allegations required to show "reasonable cause to believe" is not substantially different from actual knowledge. *United Sates v. Johal*, 428 F.3d 823, 828 (9th Cir. 2005). Both standards "turn[] on the facts actually known by the defendant in a particular case," not what could have been learned based on a reasonable inquiry. *Id*.

requires an evaluation of transferor's knowledge of the transferee's status as an unlawful drug user "at the time" of transfer). What additional knowledge could have been discovered by a seller on further inquiry is irrelevant to whether the seller had a "reasonable cause to believe."

34. As discussed above, the Plaintiffs attempt to satisfy the "reasonable cause to believe standard" by alleging that the purchaser's use of an American Express gift card should have given LuckyGunner constructive notice that the purchaser was underage. This allegation is implausible on its face. Indeed, it is common knowledge that persons of all ages frequently use gift cards to make purchases (both online and offline) of all types of products. The card's use alone does not convey any information about the card user's age. To accept the Plaintiffs' argument, one must be willing to say that LuckyGunner, armed with the knowledge that a purchase is being made with a gift card, should have concluded that the purchaser is underage despite the purchaser having affirmatively represented to the contrary. *See Fifty-Two Firearms*, 362 F.Supp. 2d at 1313. This is a bridge too far.

35. This Court is not required to accept implausible allegations that defy the Court's judicial experience and common sense. *See Iqbal*, 556 U.S. at 679 (determining whether an allegation is plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). If an allegation is so general that it encompasses a wide swath of conduct, much of it innocent, then a plaintiff has "not nudged [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The allegation that LuckyGunner knew or had reasonable cause to believe the shooter was less than 21 because he used a gift card is exactly the type of implausible allegation that *Twombly* and *Iqbal* reject.

36. Illustrating this point is *Phillips v. Lucky Gunner*, *LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015), a lawsuit that arose from a shooting at a movie theater in Aurora, Colorado. In

Phillips, the court dismissed LuckyGunner at the motion to dismiss stage under the PLCAA after similarly rejecting as implausible the plaintiffs' allegation that the mere quantity of ammunition purchased could provide LuckyGunner with knowledge of the purchaser's criminal intent:

> The only fact that plaintiffs offer to suggest that defendants should have questioned Holmes is the amount of ammunition and other potentially dangerous materials that he purchased, but there is nothing inherently suspicious about large internet orders. Consumers often buy large quantities of goods over the internet for the convenience of one transaction and to secure a better price. . . . Tellingly, there are no allegations that the quantities purchased by Holmes exceed any state or federal law placing limits on the amount of ammunition or other dangerous material a person may possess at any one time.

Id. at 1226.

37. The result in this case must be the same. There is nothing inherently suspicious about using a gift card to make an internet order. Countless consumers (perhaps the Court, even) do it every day. Tellingly, like in *Phillips*, there are no allegations in the Plaintiffs' petitions that the use of a gift card violates any state or federal law governing the sale of ammunition. For good reason: it does not. Nevertheless, the Plaintiffs want this Court to reach an absurd conclusion: that the innocuous act of paying with a gift card is now inherently suggestive of criminal conduct.

38. In sum, Plaintiffs have pled no facts to plausibly demonstrate that LuckyGunner knew or had reasonable cause to believe the purchaser was a juvenile. Instead, Plaintiffs have alleged that the purchaser affirmatively represented to LuckyGunner that he was not under 21 years old. There is no other well-pled factual allegation in the petitions that would plausibly suggest that the Tennessee Defendants should have known the purchaser was underage. In the absence of such additional facts, the Plaintiffs cannot establish that LuckyGunner violated Section 922(x)(1)(B). As a result, the Plaintiffs cannot avoid dismissal of their suit under the PLCAA.

C. The Court should not circumvent the legislative branches of government by judicially creating a duty to investigate ammunition purchasers or new exceptions to the PLCAA.

39. While the Plaintiffs' petitions do not expressly say it, what they really seek is to have this Court impose at least two new legal standards by judicial fiat. The first asks the Court to interpret the "reasonable cause to believe" standard in Section 922(x)(1)(B) as requiring a background check on all ammunition purchases. The second asks the Court to recognize an ordinary negligence exception to the PLCAA's immunity. Other courts have rejected similar requests. This Court should do the same.

40. The court in *Phillips*, along with courts in Texas and across the country, have consistently recognized that the "reasonable cause to believe" standard does not include a duty to independently investigate a purchaser's qualifications to purchase and possess firearms or ammunition. *See Bryant v. Winn–Dixie Stores, Inc.*, 786 S.W.2d 547, 549 (Tex. App.—Ft. Worth 1990, writ denied) (federal firearm statute does not impose a duty on the part of an ammunition seller to inquire into criminal history or mental stability of purchaser); *Knight v. Wal-Mart Stores*, 889 F.Supp. 1532, 1536 (S.D. Ga. 1995) (the "reasonable cause to believe" standard "does not simulate the common law duty of ordinary care" and create a duty of inquiry).[7]

41. *Heatherton v. Sears, Roebuck and Co*., 445 F.Supp. 294, 304-05 (D. Del. 1978), *rev'd on other grounds*, 593 F.2d 526 (3d. Cir. 1978), further illustrates this point. There, the plaintiff claimed the defendant violated Section 922(b)(2) of the Gun Control Act because it did not investigate the truthfulness of the purchaser's answer on the sales transaction form that he had

[7] Indeed, in their federal court briefing to obtain remand to this Court, Plaintiffs stated that they "agree" with the Tennessee Defendants that no such duty of inquiry exists: "The Luckygunner Defendants devote over three pages to the argument that a seller's duty under the "reasonable cause to believe" standard in 18 U.S.C. § 922(x) does not include a duty of inquiry. Opp. at 10-13. Plaintiffs agree." (Pls.' Reply in Support of Motion to Remand, 3:20-cv-00141 (S.D. of Tex.), Document 27 at p. 12.)

not been convicted of a felony. According to the plaintiff, the defendant would have discovered the felony conviction "merely by making one phone call" to the local police department. *Id*. at 310.[8] The court, however, refused to recognize a common law duty on the part of a firearm seller to investigate purchasers. Relying on sections 308 and 390 of the *Restatement (Second) of Torts* dealing with negligent entrustment of chattels, the court observed that "the comments to the sections do not suggest that the controller or supplier has any duty to make an investigation of the background of the person to whom he entrusts the item." *Id*. at 302. The court reasoned:

> This Court feels some reluctance to create new standards of conduct for sellers when legislators have declined to incorporate such standards into the statutory schemes. Finally, it is difficult to define the limits of a possible duty to investigate on the part of firearms sellers. Plaintiffs urge that they would expect a seller only to take steps which are "reasonable" in light of the possible risk to human life. However, they do not suggest any way to define the amount of effort which would be reasonable.

Id. at 304-05.

42. In *Heatherton*, the defendant "had no actual knowledge" of the purchaser's criminal record, and there was nothing else that gave the defendant a "reason to know" the purchaser lied on the sales transaction form about his criminal history, such as "conversation or demeanor." *Id*. at 304. With regard to the claim that the defendant violated Section 922(b)(2) of the Gun Control Act by not confirming that the sale was in compliance with state law, the court similarly held that when a dealer is "unaware of circumstances that would detract" from the conclusion that a purchase is in compliance with the law, a dealer has "reasonable cause to believe that a purchase is not in violation" of § 922(b)(2) of the Gun Control Act. *Id*. at 300-01.

43. The policy implications of imposing a duty to inquire based on reasonable care

[8] The *Heatherton* case was decided before federal law required that firearms purchasers be subjected to law enforcement background checks. *Heatherton* remains instructive federal law concerning ammunition sales, for which background checks are not required.

would be substantial, and satisfying such an open-ended duty in day-to-day transactions impossible. As the court in *Phillips* recognized:

> Imposing the broader "reasonable care" standard on suppliers, encompassing obligations to inquire, investigate, screen, monitor and evaluate buyers and their intentions, *would potentially create limitless supplier liability*. This is the very reason why suppliers of chattel are required to act only on their actual knowledge or facts from which knowledge may be reasonably inferred.

Phillips, 84 F. Supp. 3d at 1226 (emphasis added). Without a clearly defined standard to follow—best provided by statute—persons transferring ammunition will be faced with the inevitable dilemma of not knowing what type or amount of inquiry into the transferee is "reasonable" and thus legally sufficient. As a result, every transfer of ammunition subsequently used in a crime can be alleged to have been unreasonable and subject to litigation based on an alleged inadequate inquiry. This dilemma is why courts have long recognized that ammunition sellers do not owe a duty of inquiry. *See, e.g.*, *Bryant*, 786 S.W.2d at 549.[9]

44. Courts across the country have also consistently held that, with respect to firearms and ammunition, courts should not "create new standards of conduct for sellers when legislatures have declined to incorporate such standards into statutory schemes." *Heatherton*, 445 F.Supp. at 304-05 (declining to impose duty to investigate on firearm sellers); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121 (Ill. 2004) ("[T]here are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms."); *Penelas v. Arms Tech., Inc*. 778 So. 2d 1042, 1045 (Fla. App. 2001) ("[T]he judiciary is not

[9] If Plaintiffs attempt to argue that LuckyGunner, an online product retailer, is impermissibly indifferent to its buyers' ages, that argument also fails. *See Phillips*, 84 F. Supp. 3d at 1224 (rejecting plaintiffs' argument that the ammunition sellers' alleged "indifference" to illegal drug use by the online buyer of ammunition could constitute a knowing violation of federal statute prohibiting sales to illegal drug users: "Plaintiffs issue with the sales is that the sellers had no human contact with the buyer and made no attempt to learn anything about Holmes. It is the indifference to the buyer by the use of electronic communication that is the business practice that this court is asked to correct.").

empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch."); *People v. Sturm, Ruger*, 761 N.Y. 2d 192, 203 (N.Y. App. 2003) ("As for those societal problems associated with, or following, legal handgun manufacturing and marketing, their resolution is best left to the legislative and executive branches."); *In re Firearms Cases*, 126 Cal. App. 4th 959, 985 (Cal. App. 2005) ("While plaintiffs' attempt to add another layer of oversight to a highly regulated industry may represent a desirable goal … [e]stablishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation.").[10]

45. Indeed, the role legislatures have in regulating firearms and ammunition sales is reflected in one of the stated purposes of the PLCAA: "[t]o preserve and protect the Separation of Powers doctrine" found in the United States Constitution. 15 U.S.C. § 7901(b)(6). Congress deemed the PLCAA necessary because "liability actions" were seen as "attempt[s] to use the judicial branch to circumvent the legislative branch of government." 15 U.S.C. § 7901(a)(8). Here, Plaintiffs seek to do exactly that: circumvent the policy choices made by Congress and the Texas legislature that ammunition sellers do not have an affirmative duty to inquire about purchasers. If a duty is to be imposed on ammunition transferors to investigate the backgrounds of persons to whom they sell, gift or trade ammunition, defining the scope of such a duty is, respectfully, the province of our federal or state legislative bodies, not this or any other court.[11]

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[10] *See also Hamilton v. Beretta U.S.A Corp*., 96 N.Y. 2d 222, 239-40 (N.Y. App. 2001) ("[W]e should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales remains the focus of a national policy debate."); *McCarthy v. Olin Corp*., 119 F. 3d148, 157 (2d Cir. 1997) ("To impose a duty on ammunition manufacturers to protect against criminal misuse of its product would likely force ammunition products—which legislatures have not proscribed, and which concededly are not defectively designed or manufactured and have some socially valuable uses—off the market due to the threat of limitless liability.").

[11] "In the context of firearms regulation, the legislature is 'far better equipped than the judiciary' to make sensitive policy judgments (within constitutional limits) concerning the dangers" of firearms and ammunition. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (citing *Turner Broad. Sys.,*

46. The Plaintiffs' effort to have this Court judicially create an ordinary negligence exception to PLCAA immunity must fare no better. The Plaintiffs support this effort by making the nebulous claim that "companies that sell or deliver firearms and ammunition have an obligation to exercise the highest duty of care[.]" (Yanas TAP at ¶127; Beazley FAP at ¶44.). But there is simply no ordinary negligence exception to PLCAA immunity, let alone a duty to exercise the "highest duty of care." *See Delana v. CED Sales, Inc*., 486 S.W.3d 316, 321-22 (Mo. 2016) (reiterating that the PLCAA expressly preempts all general negligence actions seeking damages resulting from the criminal or unlawful use of a firearm); *In re Estate of Kim ex rel Alexander*, 295 P.3d at 386 ("The statutory exceptions do not include general negligence, and reading a general negligence exception into the statute would make the negligence *per se* and negligent entrustment exceptions a surplusage."); *Jefferies*, 916 F.Supp.2d at 46 (PLCAA "unequivocally" barred plaintiff's negligence claim against the manufacturer of an "assault weapon."); *Gilland*, 2011 WL 2479693, at **15-16 (PLCAA does not permit common law negligence claims to proceed); *Ileto v. Glock, Inc*., 565 F.3d 1126, 1135-36 (9th Cir. 2009) ("Congress clearly intended to preempt common-law claims, such as general tort theories of liability[,]" including "classic negligence" claims). Like all of these prior courts, this Court should decline to create an exception to the PLCAA that Congress has declined to adopt.

D. Conclusion.

Inc. v. FCC, 512 U.S. 622, 665 (1994)). Indeed, Plaintiffs' petitions identify other states with statutes requiring identity verification to sell ammunition. Those other states' legislatures – like Congress in enacting Section 922(x) – have set the policy governing the contours of ammunition sales. The Texas Legislature's abstention from enacting ammunition background checks speaks just as loudly. Legislative policy balances many factors, including the extent of potential regulatory burdens along with the constitutional and individual privacy rights at stake. As in other states, LuckyGunner follows the law set by the Texas Legislature. Were LuckyGunner to deviate and impose background checks, it would frustrate legislative intent, and, by extension, the will of the people. Yet that is what Plaintiffs allege LuckyGunner should have done in Texas by claiming that selling ammunition online without a background check is tortious.

47. The PLCAA affords broad immunity to sellers and distributors of ammunition, including the Tennessee Defendants in this case. While there are certain enumerated exceptions to PLCAA immunity, the Plaintiffs' allegations fall far short of sufficiently pleading such an exception. The only way for the Plaintiffs avoid the PLCAA bar to their case would be for the Court to create from whole cloth new standards of conduct (*i.e.*, background checks) that are at odds with existing federal law or to create an ordinary negligence exception to immunity that does not exist within the plain text of the PLCAA. Such actions would be nothing short of an abdication of this Court's constitutional responsibilities. Because the Plaintiffs have failed to state any cognizable claims against the Tennessee Defendants that are not barred by the PLCAA, their claims must be dismissed.

III. The Tennessee Defendants did not owe a duty to protect Plaintiffs from the shooter's intentional criminal acts.

48. Even if Plaintiffs could somehow avoid PLCAA immunity, their claims must still be dismissed because, under Texas law, LuckyGunner (and, by extension, the rest of the Tennessee Defendants) did not owe a duty to protect Plaintiffs against the shooter's criminal acts.

49. In Texas, "[t]here is no duty to control the conduct of third persons absent a special relationship between the defendant and the third party, such as employer-employee, independent contractor-contractee, parent-child." *Allen v. Wal-Mart Stores, LLC*, No. CV H-16-1428, 2017 WL 978702, at *10 (S.D. Tex. Mar. 14, 2017) (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W. 2d 523, 525 (Tex. 1990)). Within these special relationships, there is a presumed right and ability to control the conduct of third persons, and in the absence of such a relationship there is no duty to control a third person's conduct causing harm. *Loram v. Maintenance of Way, Inc. v. Ianni*, 210 S.W. 3d 593, 596 (Tex. 2006). Here, because LuckyGunner did not have a recognized special relationship with the purchaser, it had no right or ability to control the purchaser's criminal use of

the ammunition, and it did not have a duty to protect others from his criminal conduct.

50. Texas courts have recognized a duty to protect against a third party's conduct in the absence of a special relationship under very limited circumstances, but only when the third party's conduct is unquestionably the foreseeable result of the defendant's alleged negligence. *See, e.g.*, *El Chico Corp. v. Poole*, 732 S.W. 2d 306, 311-12 (Tex. 1987) (holding that a tavern owner owed a duty to not serve alcohol to a person who it knew or should have known was intoxicated because "[t]he risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee *knows* will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall."); *Otis Engineering Corp. v. Clark*, 668 S.W. 2d 307, 308-11 (Tex. 1983) (holding that employer who sent an employee home in an "extreme state of intoxication" owed a duty to person harmed by employee's negligence). The court in these cases imposed a duty on the tavern owner and employer to prevent another from driving while intoxicated because they had knowledge of both the person's intoxication and his intention to drive. The foreseeable consequences of driving while intoxicated were not questioned.

51. However, in other circumstances, courts applying Texas law have refused to impose a duty to control the conduct of another in the absence of a special relationship. For example, in *Allen*, *supra*, the court declined to recognize a duty on the part of Wal-Mart to protect the plaintiff's decedent from harming herself despite an allegation that the harm was reasonably foreseeable. The plaintiff sued Wal-Mart alleging negligence and negligence *per se* based on the sale of an "abusable volatile chemical in the form of a compressed inhalant" that was ultimately purchased and used by the plaintiff's decedent. *Allen*, at 2017 WL 978702, at *2. Wal-Mart moved to dismiss the case. In response, the plaintiff argued that Wal-Mart owed the decedent a duty to refrain from this sale because it was "reasonably foreseeable" that the product would be "misused" based on

the nature of the chemical and the decedent's purchase of a towel that "could be used as paraphernalia" to inhale the chemical. *Id*. at *3. In rejecting plaintiffs' argument, the court held that the plaintiff's allegations "did not rise to the level required by *Twombly*" to support a finding that it was reasonably foreseeable that the decedent intended to use the chemical product and the towel to harm herself. *Id*. at *16.

52. With specific regard to ammunition sales, Texas courts and courts in other jurisdictions recognize that intentional criminal conduct is not foreseeable, even when the sale is *knowingly* made to an underage person. "Unlike alcohol, the sale of ammunition does not impair the user." *Cowart v. Kmart Corp*., 20 S.W. 3d 779, 784 (Tex. App.—Dallas 2000, pet. denied) (holding ammunition seller could not foresee that a sale to a seventeen year old would result in intentional misuse of the ammunition). "While statutes regulating alcohol sales to minors intend to prevent negligence that foreseeably occurs as a result of the minor's impaired judgment resulting from drinking the intoxicating substance, statutes regulating the sale of ammunition to minors intend to prevent injuries from the misuse of a dangerous instrumentality by those too young to appreciate the danger." *Id*.; *see also Wal-Mart Stores, Inc. v. Tamez*, 960 S.W. 2d 125, 131 (Tex. App.—Corpus Christi 1997, pet. denied) (holding that ammunition seller did not breach a duty to a third party by selling ammunition to an alleged underage person in the absence of evidence that purchaser "displayed immaturity or incompetence"); *Chapman v. Oshman's Sporting Goods, Inc*., 792 S.W. 2d 785, 788 (Tex. App.—Houston [14th Dist.] 1990, writ. denied) (holding intentional criminal conduct was not the foreseeable result of the sale of a handgun to an underage buyer).[12]

[12] *See also Rains v. Bend in the River*, 124 S.W. 3d 580, 594 (Tenn. App. 2003) (finding ammunition sellers should "be held to foresee only the sorts of misuse or mishandling of ammunition that results from the purchaser' being too young to appreciate the danger of ammunition," which does not include intentional violence); *Robinson v. Howard Bros. of Jackson, Inc*., 372 So.2d 1074, 1076 (Miss. 1979) (holding ammunition seller could reasonably assume that underage buyer would obey the criminal law, and it was not reasonably foreseeable that the sale of ammunition would result premeditated murder); *Drake v. Wal-*

53. Reasonable foreseeability—whether addressed in connection with the question of duty or proximate cause—is "not measured by hindsight, but instead by what the actor knew or should have known at the time of the alleged negligence." *Boren v. Texoma Medical Center, Inc*., 258 S.W. 3d 224, 230 (Tex. 2008). "For a risk of harm to be foreseeable, the injury must be of such a general character as might reasonably be anticipated, and the injured party should be so situated with relation to the wrongful act that injury to him or one similarly situated might reasonably have been foreseen." *Id*.

54. Turning to the present case, even though LuckyGunner is not alleged to have known the purchaser was under 21 years old, merely knowing or having a reason to know that an ammunition purchaser is a minor does not make the purchaser's subsequent criminal acts foreseeable.

55. In *Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied), a pawn shop sold ammunition to a 14-year-old boy, who subsequently used the ammunition to commit murder. In affirming summary judgment for the pawn shop, the court held that the pawn shop was not liable for negligently causing the victim's death because the minor's criminal activity was not sufficiently foreseeable. The court reasoned that:

> A seller of firearms or ammunition generally has the right to assume that a minor will act in a law abiding manner. While situations may exist where a seller has specific information available to him which could make criminal activity foreseeable as the result of the sale of a firearm or ammunition to a minor, in this instance, there was no evidence presented … to show that appellee had any facts from which he should have been able to foresee [the minor's] subsequent criminal act.

Mart, Inc., 876 P.2d 738, 741 (Okla. App. 1994) (seller of handgun to an underage person "could not be reasonably expected to foresee" person's suicide); *Williams ex rel. Raymond v. Wal-Mart Stores East, L.P.*, 99 So. 3d 112 (Miss. 2012) (finding underage buyer of ammunition was old enough to appreciate the danger of misusing ammunition, and holding seller had no reason to expect buyer would commit an intentional criminal act).

Id. at *5.

56. Here, there is no well-pled allegation that LuckyGunner should have been able to foresee the shooter's criminal acts, and it is "not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors of Calif*, 459 U.S. at 526. Without such allegations, there is simply no basis on which to conclude that the reasonably foreseeable result of the ammunition sale in this case was murder, and without any foreseeability there could not have been any duty on the part of the Tennessee Defendants to protect Plaintiffs' from the purchaser's subsequent criminal acts. Therefore, the Plaintiffs' claims fail as a matter of law and must be dismissed.

IV. Plaintiffs' remaining "claims" should be dismissed.

57. Plaintiffs allege several additional claims against the Tennessee Defendants that require a viable underlying theory of liability. For example, "civil conspiracy" is not an independent cause of action. *See Four Bros. Boat Works, Inc. v. Tesoro Petrol. Cos., Inc.*, 217 S.W.3d 653, 668 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). It is a derivative tort in which a defendant's liability is predicated on liability for some underlying tort. *See id*. The same holds true for Plaintiffs' "piercing the corporate veil" allegations, which is not a cause of action but, instead, a means of imposing liability for an underlying cause of action. *Wilson v. Davis*, 305 S.W. 3d 57, 68 (Tex. App.—Houston [1st Dist.] 2009, no pet.). If Plaintiffs negligence and negligence *per se* claims fail, so must their civil conspiracy and piercing the corporate veil allegations.

58. Plaintiffs' "gross-negligence" claim fails for a similar reason. Where a negligence claim fails, a gross-negligence claim also fails because a finding of ordinary negligence is the prerequisite. *Wortham v. Dow Chem. Co.*, 179 S.W.3d 189, 201-02 (Tex. App.—Houston [14th

Dist.] 2005, no pet.); *Shell Oil Co. v. Humphrey*, 880 S.W. 2d 170, 174 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (negligence prerequisite for finding of gross negligence). Again, if Plaintiffs negligence and negligence *per se* claims fail, so must their gross negligence claim.

59. Plaintiffs also allege that the Tennessee Defendants aided and abetted a violation of Section 922(x). (Yanas TAP, ¶44; Beazley FAP, ¶¶53, 68, 76.) However, no such cause of action has been recognized in Texas. *Taylor v. Rothstein Kass & Co., PLLC*, No. 3:19-CV-1594-D, 2020 WL 554583, *5 (N.D. Tex. Feb. 4, 2020) (citing *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017) and *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 782, 781 (5th Cir. 2018)).

60. The Beazley Plaintiffs have included a vaguely worded *res ipsa loquitur* liability theory against all the defendants, including the shooter and his parents, but it is not a separate cause of action. *Jones v. Tarrant Cnty. Util. Co*., 638 S.W. 2d 862, 865 (Tex. 1982). Rather, it is a rule of evidence that has no application to the alleged circumstances of this case. The rule will apply only if a plaintiff establishes that (1) the character of the incident 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. *Id*. at 865. The purpose of the rule is to relieve a plaintiff of the burden of proving a specific act of negligence by a defendant when it is impossible for the plaintiff to determine the sequence of events, or when the defendant has superior knowledge to determine the cause of an incident. Plaintiffs do not plead any facts justifying application of the rule, nor can they under the circumstances alleged. The firearms and ammunition were under the control of the shooter at the time of the incident, not the Tennessee Defendants, and Plaintiffs have alleged and are able to prove the sequence of events that resulted in their harm. *Res ipsa* does not apply.

PRAYER

For all of the foregoing reasons, and subject to their special appearances on file and without waiver of the same, the Tennessee Defendants request that the Court grant oral argument to evaluate this motion and grant its motion to dismiss. The Tennessee Defendants also request any further relief the Court deems appropriate.

Respectfully submitted,

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