CAUSE NO. CV-0081158

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

THE TENNESSEE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

The Tennessee Defendants, by their undersigned attorneys and without waiver of any Special Appearances, file this reply in support of their Rule 91a Motion to Dismiss Plaintiffs' Petitions.

INTRODUCTION

Congress enacted the PLCAA because it viewed lawsuits against businesses engaged in the sale and distribution of firearms and ammunition, which were later used by criminals, to be without foundation in the law, improper attempts to circumvent the legislative branches of government, and direct threats to the Second Amendment right to keep and bear arms for lawful purposes. The legislative policy to shield firearm and ammunition sellers from litigation resulting from the criminal misuse of their products—embodied in the PLCAA—is consistent with well-established Texas law: One is generally not responsible for harm caused by others.

In their response, Plaintiffs disregard these clearly expressed legislative policies and established common law principles and ask the Court to perform a distinctly legislative task: Formulate a set of requirements by which online ammunition sellers and those distributing ammunition are to conduct their businesses, including a requirement that sellers investigate the

background and ascertain the intentions of their customers. However, neither Congress nor the Texas Legislature has seen fit to impose such obligations on ammunition sellers, whether the sales occur from storefronts or online. The legislature's paramount role in formulating policies relating to firearm and ammunition sales—which Plaintiffs completely ignore in their response—should be fully respected. New obligations, if any, should come from the legislative branches of government, not this or any other court. 15 U.S.C § 7901(a)(8). Indeed, the possibility that "liability actions" could be used to expand ammunition seller liability is precisely why Congress created broad threshold immunity for those engaged in the business of selling and distributing ammunition. *Id.* at §§ 7901(a)(7)-(8). This immunity applies here.

The crimes committed by Dimitrios Pagourtzis at Santa Fe High School were horrific, but the PLCAA and basic principles of law cannot be discarded to serve the exigencies of a particular case. Texas jurisprudence calls for the law to be predictable and consistently applied and for legislative policies to be followed. If these principles are followed, Plaintiffs' claims against the Tennessee Defendants should be dismissed.

ARGUMENT

Plaintiffs offer four arguments for why the Tennessee Defendants' motion should be denied: (1) that they sufficiently pled a violation of 18 U.S.C. § 922(x); (2) that the PLCAA should not protect entities and individuals "affiliated" with LuckyGunner who helped facilitate the alleged sale of ammunition to Pagourtzis; (3) that an ordinary negligence claim survives the PLCAA; and (4) that the Tennessee Defendants owed a common law duty to prevent Plaintiffs' harm. Each of these arguments fail.

I. Plaintiffs' claim that the Tennessee Defendants "knowingly" violated Section 922(x) is legally insufficient. Therefore, this lawsuit is barred by the PLCAA.

In an attempt to argue around application of the PLCAA, Plaintiffs (a) rely on the wrong

pleading standard, (b) ignore their own allegations that vitiate the viability of a Section 922(x) claim, and (c) ask the Court to adopt an inapplicable and rarely used criminal prosecution doctrine to save their case. These arguments should be rejected.

A. Plaintiffs rely on the wrong pleading standard.

Plaintiffs argue that the seminal United States Supreme Court decisions in *Twombly* and *Iqbal* should not control here. Yet the 14th District Appellate Court in Houston has endorsed the *Twombly-Iqbal* standard for determining the sufficiency of a plaintiff's allegations under Rule 91a. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App. - 14th Dist. [Houston] 2014). As a result, Plaintiffs invite error by asking the Court to ignore this precedent and instead adhere only to a notice pleading standard followed before Rule 91a was enacted in 2011.

Plaintiffs' reliance on *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470 (Tex. App.—Ft. Worth, Oct. 29, 2020) is misplaced. There, the court recognized that "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," but the court did not expressly endorse that view. *Id*. at *9. The *Fiamma Statler* court also *did not* endorse the view Plaintiffs espouse here —that the "fair notice" pleading standard controls whether a claim has "no basis in law or in fact" under Rule 91a. Instead, the court applied Rule 91a's standard together with the fair notice standard to affirm dismissal of the plaintiff's complaint. *Id.* Importantly, the court explained that "no basis in law" under Rule 91a means that there are "too few facts" alleged "to show a viable, legally cognizable right to relief," and "inadequate content may justify dismissal" or that "the petition alleges additional facts that, if true, bar recovery." *Id*. at *8. Thus, in deciding a Rule 91a motion under *Fiamma Statler*, a court must not only conclude that a defendant has fair notice of the nature of plaintiff's claim, the claim must also be well supported

by factual allegations. This standard is not a departure from *Twombly-Iqbal* analysis to identify baseless claims, but is, instead, consistent with that analysis.

Regardless of the pleading standard applied here, Plaintiffs have failed to allege sufficient facts that Section 922(x) was violated. Thus, they have "no basis in law or fact" under Rule 91a to avoid PLCAA immunity.

B. The PLCAA's "predicate" exception has not been satisfied.

Plaintiffs attempt to plead an exception to the PLCAA under 15 U.S.C. § 7903(5)(A)(iii), which requires proof that the Tennessee Defendants "knowingly" violated Section 922(x). A violation of Section 922(x) requires proof that LuckyGunner actually knew Pagourtzis was a juvenile at the time of the alleged sale or that Pagourtzis gave LuckyGunner "reasonable cause to believe" he was a juvenile, and LuckyGunner nevertheless sold him the ammunition. But Plaintiffs' petitions set forth the contrary allegation: Pagourtzis represented to LuckyGunner that he was "not under 21" before the alleged purchase. (Yanas TAP at ¶74; *see also id*. at ¶68.) This allegation eliminates a viable claim that LuckyGunner knowingly violated Section 922(x).

Plaintiffs' fallback position is that LuckyGunner was given a reasonable cause to believe Pagourtzis was a juvenile because he paid with a prepaid American Express gift card. They liken a customer's use of a gift card to a criminal's use of a "burner cellphone" and conclude that it is indicative of "suspicious – that is, potentially illegal – transactions" that warrant "additional scrutiny." (Yanas TAP at ¶79.) If accepted, this argument would represent an astounding expansion of the law by the judiciary – something the PLCAA expressly warns against. The fact that Plaintiffs have cited no case, whether within or outside of a PLCAA context, to support their position underscores the point.[1]

[1] On pages 17-18 of their response, Plaintiffs go as far as to argue that a gift card should be a red

In a twist of irony, Plaintiffs themselves tacitly acknowledge that the mere use of a gift card does not actually impart any knowledge about the customer's age. Indeed, they allege that a gift card "can be bought by anyone" and that the use of a gift card necessitates "additional scrutiny." (Yanas TAP at ¶ 79) If the use of a gift card were actually a legitimate indicator that a customer is underage, then no "additional scrutiny" would be required; LuckyGunner could simply approve or disapprove a transaction based on that fact alone. Plaintiffs' argument vitiates itself.

Recognizing that a gift card imparts no identifying information about its user whatsoever, Plaintiffs can only argue that the use of a gift card indicates a nebulous class of "suspicious – that is, potentially illegal – transactions." (Yanas TAP at ¶79.) From there, Plaintiffs claim that, when faced with a gift card, LuckyGunner is required to subject its customer to "additional scrutiny." *Id.* But the exact nature of the customer's "potentially illegal" conduct is not defined, so the only way LuckyGunner could satisfy Plaintiffs' open-ended standard is to embark on a seemingly limitless fishing expedition against its customers to root out their "potentially illegal" conduct.[2]

Plaintiffs cannot credibly maintain that a gift card is a "red flag" of an underage buyer, because it gives absolutely no information about the buyer's age. Nevertheless, this theory fails for an additional reason. As Plaintiffs acknowledge, LuckyGunner affirmatively seeks information

---

flag because it "can be bought by anyone and is not attached to a verifiable address." Of course, this would hold true for a litany of other payment methods, *e.g.*, cash, checks, cashier's checks, money orders, ACH/wire transfers, and cryptocurrency. By their logic, every online retailer who accepts any form of payment other than credit card should be investigating their customers. This is a clear example of where the Court should not violate the separation of powers doctrine – as the PLCAA warns against – by recognizing new requirements for online sales transactions.

[2] This case is about a customer's age, but federal law contains many categories of prohibited ammunition purchasers, including persons indicted or convicted of felonies, fugitives from justice, drug addicts, illegal aliens, and veterans who have been dishonorably discharged. *See* 18 U.S.C. § 922(d). Under Plaintiffs' theory, LuckyGunner should also require customers who use gift cards to establish they do not fall into any of these prohibited categories.

about its customers' ages by requiring them to certify that they are "not under 21" years old – something Pagourtzis did in this case. (Yanas TAP at ¶¶68, 74).[3] Plaintiffs do not allege LuckyGunner received any information suggesting this certification was false. In the absence of any such well-pled allegation to the contrary, the Plaintiffs cannot state a cognizable violation of Section 922(x).

If anything, Plaintiffs' use-of-a-gift-card-should-trigger-further-inquiry argument underscores why numerous Texas appellate courts follow the *Twombly-Iqbal* framework in deciding Rule 91a motions. Because the argument encompasses a wide swath of conduct, much of it obviously innocent, Plaintiffs have "not nudged their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. This Court is not required to accept such implausible allegations that defy the Court's judicial experience and common sense. *See Iqbal*, 556 U.S. at 679.[4]

In sum, no law limits the type of payments an online ammunition seller can accept. If

[3] Notably, Plaintiffs do not dispute that a seller of ammunition does not have a duty of inquiry under either Texas law or Section 922(x). Yet their petitions are replete with allegations that the Tennessee Defendants sold the ammunition to Pagourtzis without making an inquiry into and "verifying" his age. Plaintiffs' allegations directly contradict what is required under Section 922, as interpreted by Texas courts and others. Because Plaintiffs cannot dispute this point, they simply ignore it. *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 background of purchasers); *Knight v. Wal-Mart Stores*, 889 F.Supp. 1532, 1536 (S.D. Ga. 1995) (the "reasonable cause to believe" standard in Section 922 "does not simulate the common law duty of ordinary care" and create a duty of inquiry).

[4] Plaintiffs' theory of the case fails at another fundamental level. They pled facts directly contradicting the existence of a "knowing" violation or "reasonable cause to believe" by complaining that LuckyGunner conducts online ammunition sales with a "100% automated" system – i.e., *without acquiring knowledge* about buyers and their intentions. Plaintiffs cannot plausibly plead that LuckyGunner is liable because it knew Pagourtzis was a juvenile while simultaneously pleading that LuckyGunner is liable because *it did not know* enough about Pagourtzis's age in the first place. Circumventing PLCAA immunity and dismissal through a contradictory, implausible, and wholly unsupported allegation of a "knowing" statutory violation is not permitted under either *Iqbal*, 556 U.S. at 678, or any notice pleading standard under Rule 91a. *See Fiamma Statler*, 2020 WL 6334470 at *8.

PLCAA immunity could be avoided through the mere allegation that a perfectly legal, common form of online payment nevertheless carries with it a "red flag" that the buyer is a criminal, the purpose behind the PLCAA would be entirely frustrated. In enacting the PLCAA, Congress expressed its concern that without the immunity afforded by the Act, a "petit jury" in an action arising from the criminal misuse of a firearm or ammunition could "expand civil liability in a manner" not contemplated by the law. 15 U.S.C. § 7901(7). Congress also expressed concern that the "judicial branch" not be used "to circumvent" the legislative branches of government in regulating commerce in firearms and ammunition "through judgments and judicial decrees." 15 U.S.C. § 7901(8). Plaintiffs' bald assertion that an online buyer's use of a gift card means a sale cannot proceed without a background check into the buyer's qualifications does exactly that, and it opens the door to lawsuits that Congress plainly intended to prohibit.

C. Plaintiffs' "deliberate ignorance" argument fails.

As demonstrated above, there is no plausible allegation in Plaintiffs' petition demonstrating that any of the Tennessee Defendants knew of Pagourtzis's real age. Since Section 922(x) requires knowledge as a predicate to liability, Plaintiffs are forced to search for another way to impute knowledge upon the Tennessee Defendants. Plaintiffs wrongly seek to do so through application of a "***rare***" criminal law doctrine known as "deliberate ignorance," which was recognized by the Fifth Circuit in *U.S. v. Lara-Valasquez*, 919 F.2d 946, 951 (5th Cir. 1990) (emphasis added). Plaintiffs, however, fail to cite a single Texas state court case that analyzed, let alone actually applied, this "rare" criminal doctrine in a civil case alleging negligence *per se*. Application of this doctrine here would also run head-on into the policy choices already set by both Congress and the Texas Legislature.

Even in criminal cases, the Fifth Circuit significantly limits the doctrine's application by directing that a district court should "***not*** instruct the jury on deliberate ignorance when the

evidence raises only the inferences that the defendant had actual knowledge or no knowledge at all of the facts in question." *Id*. (emphasis added). Here, Plaintiffs affirmatively allege that LuckyGunner had no knowledge at all of Pagourtzis's actual age. Further, for the doctrine to apply, the Fifth Circuit cautions that the "circumstances" at issue need to be "so overwhelmingly suspicious" that the criminal defendant's "failure to inspect" or "question" such circumstances could "not" be "merely an oversight." *Id*. at 953. Here, the only claimed "suspicious" behavior alleged in Plaintiffs' petition is Pagourtzis's use of a gift card to make his purchase. That fact alone comes nowhere near the high bar required for application of the deliberate ignorance doctrine. Under Plaintiffs' own allegations, the rarely used criminal doctrine cannot save their case.

Notwithstanding the foregoing, the more fundamental problem with Plaintiffs' "deliberate ignorance" argument is that this type of argument has been raised against LuckyGunner before, and it was soundly rejected. Indeed, the ***only*** court to have addressed an "indifference" argument in the context of an online ammunition sale rejected the argument and dismissed the case at the pleadings stage on a motion to dismiss. *See Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1224 (D. Colo. 2015) ("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."). Plaintiffs make the exact same appeal in this case by asking the Court to change LuckyGunner's business practice and require it to have human contact with customers and attempt to learn more information about them. Plaintiffs' failure to mention that their argument has been raised and failed before is telling, and they offer no valid reason why their case is fundamentally different than *Phillips*. Ergo, this case must have the same fate as *Phillips*: dismissal on the pleadings.

In sum, Plaintiffs' indifference argument is nothing more than a back-door attempt to force ammunition sellers to investigate purchasers. Neither Congress nor the Texas Legislature have sought fit to impose such obligations on ammunition sellers. In reality, Plaintiffs are accusing LuckyGunner of nothing more than following the policy choices made by Congress and the Texas Legislature, which simply cannot be the basis of a valid negligence *per se* claim.[5]

II. Under Plaintiffs' allegations and theory of the case, all of the Tennessee Defendants qualify for the broad protection afforded by the PLCAA.

Plaintiffs' argument that the PLCAA does not protect the MG Defendants (LuckyGunner's owner) or Red Stag (the business that fulfilled LuckyGunner's sales orders for delivery by Federal Express) is demonstrably incorrect. The PLCAA was enacted to provide threshold immunity against litigation for all businesses engaged in interstate commerce involving firearms and ammunition. Congress expressly found that:

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

[5] Congress and the Texas Legislature understand these types of issues and are capable of enacting such requirements when they deem it necessary. *See, e.g.*, 15 U.S.C. § 376a(b)(4)(A) (requiring remote tobacco sellers to verify the purchaser's name, address, and date of birth through an online database and then obtain an adult signature and government-issued photo ID upon delivery); Tex. Health and Safety Code § 161.452 *et seq*. (tobacco sellers must, *inter alia*, receive age certification from purchaser, verify information provided, purchaser must use a credit or debit card or a personal check, and delivery requires adult signature); Tex. Alcoholic Beverage Code § 54.05 (requiring out-of-state wine sellers to obtain adult signature and proof of age and identity upon delivery). Plaintiffs offer no rebuttal to the fact that legislative policymaking balances many factors, including citizens' privacy and constitutional rights. Indeed, Plaintiffs now distance themselves from the allegations in their petition that LuckyGunner requires identification for purchases in the states that require it to do so. The decisions by Congress and Texas Legislature to ***not*** impose such an obligation on ammunition sellers speaks as loudly as any state's decision to do so.

15 U.S. Code § 7901(a)(5). All of the Tennessee Defendants were intended recipients of PLCAA protection.[6]

Stripping PLCAA immunity from businesses that help facilitate the interstate commerce at issue – *e.g.*, ammunition sales to customers in Texas – would be contrary to Congressional intent. Whereas maintaining protection for these businesses will further Congressional intent to protect such commerce and the modern marketplace, in which online sellers use the downstream services of other businesses to get their goods to consumers. If downstream businesses are not afforded the same PLCAA protections against litigation as the online business that begins the sales transaction, the entire system may be litigated out of existence. Were that to occur, Plaintiffs will have succeeded in defeating two of the express purposes of the PLCAA: "To prevent the use of … lawsuits to impose unreasonable burdens on interstate and foreign commerce," and "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." 15 U.S.C. § 7901(b)(2) & (4).

Plaintiffs' unreasonably narrow reading of the PLCAA's definition of "seller" to exclude some of the Tennessee Defendants is directly contradicted by Plaintiffs themselves. In their response, Plaintiffs confirm (by citing to their own petition) that all of the Tennessee Defendants are ***alleged*** to have "sold" and "aid[ed] in the sale" of the ammunition:

- Page 6: "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."

[6] "The cardinal rule in statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole, and, once the intent has been ascertained, to construe the statute so as to give effect to the purpose of the Legislature." *Citizens Bank of Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979).

- Page 6: "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."

- Page 16: "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."

- Page 22: "Here, the Tennessee Defendants were in control of the ammunition at the time ***they negligently and illegally sold the ammunition to the shooter***."

Rather than acknowledging these allegations, Plaintiffs accuse the Tennessee Defendants of offering an overly broad construction of the PLCAA's definition of "seller." Plaintiffs' accusation should fall on deaf ears because the Tennessee Defendants read the definition of "seller" as it is plainly written. There's no need to insert words in the definition or conclude that an initial phrase is or is not limited by an antecedent phrase.[7] The Tennessee Defendants are merely applying the PLCAA's definition of "seller" to the conduct that each of the Tennessee Defendants is alleged to have engaged in by the Plaintiffs' petitions. This is what the applicable standard dictates. Plaintiffs' real complaint is that they have pled themselves out of court. *See Fiamma*

[7] A statute is "to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction." *See Citizens Bank of Bryan*, 580 S.W.2d at 348. To the extent Plaintiffs are trying to create ambiguity in the PLCAA's definition of a "seller," resolution of any such ambiguity strongly favors the Tennessee Defendants' reading because the PLCAA's express object is to limit litigation against businesses that are involved in "interstate and foreign commerce" in firearms and ammunition. 15 U.S.C. § 7901(b)(4) ("To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce."). The PLCAA's "manifest object" of protecting firearms and ammunition commerce from litigation could not be stated more clearly. Thus, the PLCAA should be interpreted to achieve that object by including those engaged in ammunition commerce within its protections.

Statler, 2020 WL 6334470 at *8 (observing that a claim has "no basis in law or in fact" under Rule 91a when "the petition alleges additional facts that, if true, bar recovery.").

The plain language of the statutory provision (bolstered by Congressional findings and purposes) makes clear that Congress did not intend to limit those who qualify as an ammunition seller to merely the entity that received payment. An entity is engaged in the ammunition sales business so long as in a "regular course" of its activities, it "devotes time, attention and labor" to the business of ammunition sales with "the principle objective of livelihood or profit." 15 U.S.C. § 7903(1). Under this definition, multiple entities participated in the alleged sale of ammunition to Pagourtzis, including LuckyGunner in taking the order, Red Stag in fulfilling the order, and Federal Express in delivering the order. Each is entitled to PLCAA protection against any claim that it is legally responsible for the criminal misuse of the ammunition.[8]

Instead of acknowledging the PLCAA's plain language and purpose, Plaintiffs contend that the Tennessee Defendants' "expansive interpretation" is "particularly inappropriate in the context of a federal statute that preempts state law causes of action." (Pls.' Opp. at 13.) Plaintiffs argue that a narrow interpretation should control. Plaintiffs' argument is wrong, and every court to have considered the argument has rejected it. Expansive interpretations of statutory language conferring immunity are *only* inappropriate when the immunity of preemption must be *implied* from the

[8] There is no basis in the PLCAA's plain language to leave businesses in either upstream or downstream commerce unprotected simply because they did not take payment from the buyer. Without explanation, Plaintiffs argue it would be "nonsensical" to provide Federal Express with PLCAA protection when it participates in the sale and distribution of ammunition. But PLCAA protection for Federal Express makes perfect sense because without such protection Federal Express would be subject to litigation over its role in ammunition commerce. Any such litigation may be ultimately unsuccessful, but the PLCAA's purpose is to provide threshold immunity against the burden of being sued at all. Permitting suits against any part of the distribution and supply chain would serve as a chilling effect on commercial participation in this activity. This is the direct threat to "citizen's access" to ammunition "supply" protected by the Second Amendment that the PLCAA was enacted to prevent. 15 U.S.C. §§ 7901(a)(2), (b)(2).

statute's language. The PLCAA is an *express* preemption statute ("A qualified civil liability action may not be brought in any Federal or State Court."). As a result, the PLCAA must be read to achieve its expressly stated purpose: preempting causes of action against those participating in the business the legislature sought to protect.

Multiple cases illustrate the point. In *Delana v. CED Sales, Inc*., 486 S.W. 3d 316 (Mo. 2016), the Missouri Supreme Court rejected the plaintiffs' argument for a narrow interpretation of the PLCAA:

> *Gregory* and *Bond* involved implied preemption. In both cases, the Court held that expansive statutory definitions should be narrowly construed to avoid excessive federal intrusion into traditional issues of state concern. *Gregory* and *Bond* are not applicable to this case because the PLCAA expressly and unambiguously preempts state tort law, subject to the enumerated exceptions. This preemption is accomplished pursuant to Congress's constitutional power to regulate interstate commerce. Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues.

486 S.W. 2d at 322-23 (internal citations omitted); *see also Prescott v. Slide Fire Solutions*, 410 F. Supp. 3d 1123, 1132 n. 3 (D. Nev. 2019) (rejecting plaintiffs' argument "in favor of a narrow construction of the PLCAA"); *In re Estate of Kim ex rel Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) (PLCAA expressly preempts state common law by requiring that state courts immediately dismiss qualified civil liability actions).

In sum, if Plaintiffs' argument was correct and LuckyGunner was the only defendant engaged in the sale and distribution of ammunition to Pagourtzis, then there can be no legitimate basis for extending liability beyond LuckyGunner. But if, as Plaintiffs allege, LuckyGunner's "affiliates" (Pls.' Opp. at 1) are liable for facilitating the sale of ammunition, they too fit squarely within the PLCAA's protection. Plaintiffs cannot have it both ways. Under Plaintiffs' allegations, each of the Tennessee Defendants is entitled to PLCAA protection.

III. Plaintiffs' ordinary negligence claim is barred by the PLCAA.

Plaintiffs erroneously argue that, *if* this Court permits plaintiffs' negligence *per se* claim to proceed, then their ordinary negligence claim is exempted from PLCAA protection. Congress, however, did not create an exception for ordinary negligence actions. *See* 15 U.S.C. § 7903(5)(A). Plaintiffs ignore that, in enacting the PLCAA, "Congress consciously considered how to treat tort claims" and it "chose generally to preempt all common-law claims," ***except*** negligent entrustment and negligence *per se*. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 n.6 (9th Cir. 2009).[9]

Although some courts have declined to undertake a claim-by-claim analysis to determine if each claim meets a PLCAA exception to immunity when a viable statutory violation exists, other courts have more carefully considered the PLCAA's purpose and structure and engaged in such an analysis. *See Ramos v. Wal-Mart Stores, Inc.*, 202 F.Supp.3d 457, 464-66 (E.D. Pa. 2016) (discussing divergent view on whether PLCAA requires a claim-by-claim analysis to determine fit within enumerated exceptions); *see Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53 (Conn. 2019) (reversing dismissal of action under the PLCAA based on a violation of a predicate statute but affirming dismissal of negligent entrustment action). Courts that have engaged in claim-by-claim analyses have taken the correct course because there is no basis in the PLCAA's plain language, structure or purpose to conclude that Congress intended for an action pleaded under one exception to serve as a "super exception" that eliminates immunity for all other

[9] *See also Delana*, 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*, 295 P.3d 380, 386 (Alaska 2013) ("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 v. District of Columbia*, 916 F.Supp.2d 42, 46 (D.D.C. 2013) (PLCAA "unequivocally" barred plaintiff's negligence claim against the manufacturer of an "assault weapon."); G*illand v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *15-16 (Conn. Super. Ct. May 26, 2011) (the PLCAA does not permit common law negligence claims to proceed).

causes of action.[10]

In any event, the Court need not wade into this debate because in the absence of a well-pleaded action based on a statutory violation, even those courts that have refused to undertake a claim-by-claim analysis would reject an ordinary negligence claim. Here, because Plaintiffs have not adequately pleaded an action based on an alleged violation of Section 922(x), their ordinary negligence claim is preempted under any construction of the PLCAA.[11]

IV. Plaintiffs' analysis of when a common law "duty" exists under Texas law is flawed and should be rejected.

Because the Plaintiffs have not pled a viable cause of action under a PLCAA exception, whether the common law of Texas imposes a duty on the Tennessee Defendants need not be addressed. In any event, Plaintiffs' analysis of the duty question is wrong. Regardless of how Plaintiffs characterize their common law negligence theory, they ultimately accuse the Tennessee Defendants of failing to take affirmative steps to protect them from Pagourtzis's criminal acts. Plaintiffs reject, without explanation, the general rule that there is no duty to prevent (and one is not legally responsible for) the criminal acts of another in the absence of a "special relationship." Instead, Plaintiffs jump ahead to the concept of foreseeability, alone, as the basis on which to impose a duty on the Tennessee Defendants to protect them from third party criminal acts.

---

[10] None of the cases on which Plaintiffs rely account for the fact that Congress generally preempted all common law claims under the PLCAA and the limited exceptions act as the floor on which to proceed. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (federal preemptive statute established a minimum standard, i.e., a "floor"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (preemption clause of the Food, Drug and Cosmetic Act relating to medical devices, 21 U.S.C. § 360k(a), preempts certain state law claims: "Petitioner's common-law claims are pre-empted because they are based upon New York 'requirement[s]' with respect to Medtronic's catheter that are 'different from, or in addition to' the federal ones, and that relate to safety and effectiveness, § 360k(a)."). The basics of preemption law dictate that when Congress has expressly or impliedly preempted a cause of action, the cause of action is not available, absent repeal of the statute providing for preemption.

[11] Plaintiffs do not dispute that their other collateral and derivative claims cannot proceed if their negligence *per se* claim based on a violation of Section 922(x) is dismissed.

Although some Texas courts have, without addressing the need for a special relationship, examined whether chemical, firearm or ammunition sellers owed a duty to prevent third party criminal conduct, the facts of those cases did not support the existence of a duty or breach as a matter of law. (*See* Defs.' Rule 91a Mot. at ¶¶51-56.) Nor should the razor thin allegations made by Plaintiffs in this case. Even if LuckyGunner somehow knew Pagourtzis to be less than 21 years old, that allegation alone is not enough to impose a common law duty on LuckyGunner to protect Plaintiffs from "foreseeable" third party criminal harm. *See Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596, at *5 (Tex. App.—Amarillo, Jan. 25, 2001, pet. denied) (A seller of firearms or ammunition generally has the right to assume that a minor will act in a law abiding manner).

Plaintiffs cite generally to cases wherein common law claims against firearm and ammunition sellers were disposed of after the motion to dismiss stage, but each of those cases were decided ***before*** the PLCAA was enacted in 2005 and Rule 91a was enacted in 2011. (*See* Pls.' Opp. at 20-21.) Indeed, some of those cases were the type of cases that led Congress to provide statutory immunity for harm "caused by the misuse of firearms by third parties" and prohibit ordinary negligence claims. 15 U.S.C. § 7901(3). Plaintiffs' reliance on *Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125, 130 (Tex. App.—Corpus Christi-Edinburg 1997) is an example. In *Tamez*, the court held that a duty of inquiry ***does not exist*** under the provision of the Gun Control Act provision at issue, 18 U.S.C. § 922(b)(1), and thus the plaintiff's negligence *per se* claim failed as a matter of law. 960 S.W.2d at 128-130. Were the PLCAA available, the entire case against the retailer would have ended with a non-viable negligence *per se* claim. Were Rule 91a available, that ending could have occurred at the pleadings stage.

Even with respect to the pre-PLCAA ordinary negligence analysis, the *Tamez* court only recognized that a seller should act reasonably in the face of information given to him that should halt a specific sale from proceeding. *Id*. at 130. Here, Pagourtzis did not provide information

indicating the sale should not proceed. He certified to LuckyGunner that he was "not under 21" years old and LuckyGunner received no contrary information. In short, none of the cases cited by Plaintiffs can be read to impose the duty and the attending burden Plaintiffs seek to impose here – for online retailers to protect against the criminal use of goods they sell.[12]

Finally, throughout their response, Plaintiffs avoid confronting the constitutional doctrines of legislative deference and separation of powers. Those doctrines are deeply rooted in our legal system. To the extent that a goal of this litigation is to obtain a judicial decree that ammunition sales should be conducted in-person at storefronts or that ammunition sales should be subjected to some form of background checks (like firearms sales by federally licensed firearms dealers ("FFLs")), such decisions are clearly policy matters for the legislative branches of government. At the federal level, this would require a wholesale change in how the FBI handles background checks because ammunition sellers are not permitted to access the FBI's National Instant Background Check System ("NICS"). *See* 28 CFR 25.6(a)-(b) (FBI's NICs checks available only for firearms sales by FFLs). At the state level, Texas would need to create a department to collect data on its citizens by which their eligibility to purchase ammunition could be assessed. Whether

[12] Whether a "duty to protect" can be imposed on a website under Texas law was addressed in *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007), aff'd, 528 F.3d 413 (5th Cir. 2008). In *Doe*, a minor lied about her age to access the defendant's website. The plaintiffs alleged the website was legally responsible for the harm the minor ultimately suffered. *Id.* at 850; *see also id.* at n. 6. The court rejected plaintiffs' contention and dismissed the complaint at the pleadings stage on multiple grounds. First, the defendant was entitled to immunity under the federal Communications Decency Act, 47 U.S.C. § 230(c). Second, the court reiterated the general rule under Texas law that a duty does not exist absent a "special relationship" and that to nevertheless impose a duty on a website to protect against a third party's criminal acts would be an impossible obligation to fulfill. *Id.* at 851 ("To impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace's business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect."). This reasoning for dismissal is persuasive here. No special relationship is alleged to have existed and the circumstances alleged cannot give rise to a duty on the part of the Tennessee Defendants to have prevented the harm perpetrated by the criminal actor.

these changes should be made is clearly a legislative determination, and not for a court or a jury to impose.

CONCLUSION

For all of the foregoing reasons, the Tennessee Defendants request that the Court grant their Rule 91a motion to dismiss.

Respectfully submitted,

GRAY REED & MCGRAW LLP

By: */s/ A.M. "Andy" Landry III*

A.M. "Andy" Landry III
Texas Bar No. 11868750
alandry@grayreed.com
Kelly H. Leonard
Texas Bar No. 24078703
kleonard@grayreed.com
Tyler J. McGuire
Texas Bar No. 24098080
tmcguire@grayreed.com
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
(713) 986-7000 (Telephone)
(713) 986-7100 (Telefax)

and

Andrew A. Lothson (PHV application filed)
alothson@smbtrials.com
Swanson, Martin & Bell, LLP
330 N. Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100 (Telephone)
(312) 321-0990 (Telefax)

ATTORNEYS FOR LUCKYGUNNER, LLC, RED STAG FULLFILMENT, LLC, MOLLENHOUR GROSS, LLC, JORDAN MOLLENHOUR, AND DUSTIN GROSS

Douglas T. Gosda

Texas Bar No. 08221290
Manning, Gosda & Arredondo, L.L.P.
24 Greenway Plaza, Suite 525
Houston, Texas 77046
(713) 783-7070 (Telephone)
(713) 783-7157 (Telefax)
dgosda@mga-law.com

ATTORNEY FOR RED STAG FULFILLMENT, LLC

CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing document was served on all counsel of record on March 8, 2021 through eFileTexas and via email.

/s/ A.M. "Andy" Landry, III
A.M. "Andy" Landry, III