

CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER
STONE, individually and as next friends
of CHRISTOPHER JAKE STONE

Plaintiffs,

vs.

ANTONIOS PAGOURTZIS and ROSE
MARIE KOSMETATOS

Defendants.

§ COUNTY COURT AT LAW
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§
§ GALVESTON COUNTY, TEXAS
§
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§
§ COURT NO. 3

**THE TENNESSEE DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING
RESOLUTION OF THEIR RULE 91a MOTION TO DISMISS ON PETITION FOR WRIT OF
MANDAMUS**

Defendants LuckyGunner, LLC (“LuckyGunner”), Red Stag Fulfillment, LLC (“Red Stag”), Mollenhour Gross, LLC (“MG”), Jordan Mollenhour, and Dustin Gross (collectively, the “Tennessee Defendants”) intend to seek mandamus review of the Court’s March 18, 2021 order denying their Motions to Dismiss under Rule 91a.¹

The Tennessee Defendants request the Court stay further proceedings in this consolidated case, including discovery activities and discovery motion practice, pending final resolution of the Tennessee Defendants’ Rule 91a Motion to Dismiss on Petition for Writ of Mandamus to the First or Fourteenth Court of Appeals and, if appropriate, the Texas Supreme Court.

¹ Four of the five Tennessee Defendants – Red Stag, MG, Mr. Mollenhour and Mr. Gross – have filed Special Appearances objecting to personal jurisdiction under Rule 120a. Collectively, they are the “Specially Appearing Defendants.” This motion is filed without waiver of their Special Appearances.

PRCEDURAL BACKGROUND
AND OVERVIEW OF THE BASIS FOR A STAY

On January 6, 2021, the Tennessee Defendants moved pursuant to Rule 91a to dismiss Plaintiffs' claims based on the immunity and protections afforded by the federal Protection of Lawful Commerce in Arms Act ("PLCAA"), among other grounds. *See* Mot. to Dismiss, filed Jan. 6, 2021 in *Yanas, Yarbrough* and *Tisdale* matters.

Before considering the Tennessee Defendants' Motions to Dismiss, the Court transferred and consolidated the *Tisdale* and *Yarbrough* matters into the *Yanas* case *sua sponte*. *See* Transfer and Consolidation Orders, dated February 26, 2021. After consolidation, the Court entered an order staying all proceedings while it considered the Motions to Dismiss. *See* March 5, 2021 Order Granting Protection.²

The Court addressed the Motions to Dismiss in each of the *Yanas, Tisdale* and *Yarbrough* matters, along with unopposed motions to extend the Rule 91a deadlines, during a March 10, 2021 hearing in the consolidated case. Following the hearing, the Court denied the Tennessee Defendants' Motions to Dismiss. *See* March 18, 2021 Order Denying Motion to Dismiss ("the March 18 Order").

At the March 10 hearing, the Court also withdrew its prior order staying the case based on the Plaintiffs' representation that the Plaintiffs were not opposed to a stay of proceedings pending resolution of the Motions to Dismiss, but, instead, were opposed to a stay of jurisdictional

² The Tennessee Defendants had previously moved for protection from discovery based on two threshold issues – their Motion to Dismiss under Rule 91a and the Specially Appearing Defendants' Special Appearances. *See* Mot. for Protection, filed February 8, 2021 in *Yanas, Yarbrough* and *Tisdale* matters. The Court granted the Tennessee Defendants' proposed order. By filing the present motion to stay, the Tennessee Defendants do not waive any relief requested in that original motion – and, in particular, their request to stay jurisdictional discovery – by seeking a stay of all proceedings pending resolution of their petition for writ of mandamus. Because of the mandamus review, the present motion to stay takes priority.

discovery. Plaintiffs requested an opportunity to respond to the Motion for Protection on those grounds prior to a ruling. Because the Tennessee Defendants are seeking mandamus review of the Court's March 18 Order, the same logic previously employed by the Court and agreed to by the Plaintiffs should continue to apply: The case should be stayed pending resolution of the Rule 91a motion on mandamus review.

Denial of a Rule 91a motion to dismiss based on immunity is reviewable by mandamus. *See In re Houston Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019); *see also CSR Ltd. v. Link*, 925 S.W.2d 591, 599 (Tex. 1996) (“cases involving sovereign immunity” appropriate for mandamus relief); *In re Perry*, 60 S.W.3d 857, 862 (Tex. 2001) (granting writ to correct erroneous denial of legislative immunity); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (same where statute immunized defendant from collateral litigation). A stay of this case is both practical and appropriate while the Tennessee Defendants seek mandamus review. Doing so spares the Court's resources, while also saving both sides' time and money potentially wasted and preserving the Tennessee Defendants' important substantive and procedural due process rights from the impairment or loss that would surely result if the Court were to nevertheless allow proceedings to continue during the mandamus review. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

With regard to PLCAA immunity and a stay of proceedings during a mandamus review, the Texas Supreme Court has provided guidance this Court should follow. In October 2020, the Supreme Court heard oral argument in *In re Academy, Ltd. d/b/a Academy Sports & Outdoors* (Case Nos. 19-0497 and 19-0637), two original proceedings against a firearm seller arising from a criminal shooting, in which the Court will address the scope of PLCAA immunity. Prior to oral argument, the Court granted the defendant's motion to stay the underlying proceedings, which

would include further discovery, pending the Court’s decision.³ The stay order implicitly acknowledged that the threshold nature of the defendant’s PLCAA defense justified a stay of all proceedings to avoid the “irreversible waste of judicial and public resources” that would occur if the plaintiffs were permitted to proceed with discovery. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 137 (granting mandamus relief where the very act of proceeding to trial, regardless of outcome, would defeat substantive right involved).

It is standard practice to first request the trial court stay proceedings during the pendency of a petition for writ of mandamus, so as to eliminate the parties’ and the appellate court’s burden of addressing that same issue on an “expedited” basis. *See* Tex. R. App. P. 52.10; Tex. R. App. P. 33.1. In accord with that practice, the Tennessee Defendants ask the Court to stay proceedings.

ARGUMENT AND AUTHORITIES

I. Standard for issuing a protective order and staying proceedings.

Under Texas Rule of Civil Procedure 192.6, the Court “may make any order in the interest of justice” to protect the movant from undue burden, unnecessary expense, harassment, or annoyance. TEX. R. CIV. P. 192.6(b). Such limitations may include protection with respect to the time of discovery. TEX. R. CIV. P. 192.6(b). To this end, Rule 190.4(b)(2) provides that courts may schedule discovery to occur in appropriate phases. TEX. R. CIV. P. 190.4(b)(1).

The Court has broad discretion to limit discovery pending resolution of threshold issues like immunity from suit. *See, e.g., In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999); *USX Corp. v. West*, 759 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) (stating trial court stayed merits discovery against a corporation pending resolution of two individual defendants’ special appearances).

³ *See* Mot. for Protection at Ex. D, Texas Supreme Court Order dated June 21, 2019.

II. A stay is appropriate under settled law.

A stay is appropriate in this case because forcing the Tennessee Defendants to participate in full blown pretrial litigation, or perhaps even a trial itself, while a court of appeals reviews the March 18 Order would defeat the Tennessee Defendants' substantive right to avoid the burden and expense of litigation based on PLCAA immunity from suit. *See Robinett v. Carlisle*, 928 S.W.2d 623 (Tex. App. – Fort Worth 1996) (noting that immunity from suit is a substantive right) (citing *Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995) (describing qualified immunity as a “substantive right of officials sued for money damages to be free both of individual liability and the discovery process”)).

Among the stated purposes of the PLCAA is “[t]o prevent the use of ... lawsuits to impose unreasonable burdens” on members of the firearms industry. 15 U.S.C. § 7901(b)(4); *see also City of New York v. Beretta*, 524 F.3d 384, 394-95 (2d Cir. 2008) (“Congress explicitly found that the third-party suits that the Act bars are a direct threat to the firearms industry,” and a “rationally perceived substantial effect on the industry of the litigation that the Act seeks to curtail.”). PLCAA immunity is not merely a defense to be addressed following discovery; instead, PLCAA immunity is a threshold issue. *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013). Indeed, lawsuits seeking damages resulting from the criminal use of lawfully manufactured, non-defective ammunition “may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). Further driving home this point, every single qualified lawsuit against firearm industry members that was pending when the PLCAA became law was to “be immediately dismissed.” 15 U.S.C. § 7902(b). There can be no dispute: Congress acted to prevent the use of the judicial branch to circumvent the legislative branches of government “through judgments or judicial decrees.” 15 U.S.C. § 7901(a)(8). It did so by granting the Tennessee Defendants a

substantive right to assert immunity from liability and to avoid being subjected to a trial in this case.

Absent the requested stay, the Tennessee Defendants will be unfairly prejudiced by being forced to litigate – destroying their “entitlement not to stand trial or face the other burdens of litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (benefit of immunity from suit “is effectively lost if a case is erroneously permitted to go to trial”); *McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (Scalia and Wald, JJ.) (“compelling a [defendant] to proceed to trial . . . will generally constitute irreparable injury not because of the expense of litigation, but because of the irretrievable loss of immunity from suit”).

The Tennessee Defendants’ prejudice is not just a theoretical problem. If a stay is not granted, the immense over-breadth of the discovery Plaintiffs served thus far will impose the very burdens of litigation the PLCAA is intended to protect against. *See* Mot. for Protection, filed February 8, 2021 at Exs. A-1 through C-8.

Finally, the Texas Supreme Court in *In re Academy, Ltd.* stayed all further discovery and other proceedings while it addresses the scope of the defendant’s PLCAA defense in that case. This Court should do the same.

III. Under the procedural posture of this case, a stay is not burdensome or unduly prejudicial to the Plaintiffs.

The procedural posture of this case is well suited for a stay pending resolution in the appellate court. Unlike the Tennessee Defendants – who would be harmed by responding to far ranging discovery in the face of federal statutory immunity – the Plaintiffs suffer no similar prejudice as a result of a stay. Discovery is unnecessary to any pertinent issue at this early stage in the proceedings. Multiple courts have dismissed cases under the PLCAA without discovery.

See, e.g., Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693, at *13, 24 (Conn. Super. May 26, 2011) (dismissing case without discovery); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1221-28 (D. Colo. 2015) (same); *Bannerman v. Mountain State Pawn, Inc.*, No. 3:10-CV-46, 2010 WL 9103469, at *3, 8-9 (N.D. W. Va. Nov. 2010) (same).

Rule 91a itself counsels that motions to dismiss shall be heard on the pleadings, alone. TEX. R. CIV. P. 91a.6. Thus, discovery is not appropriate. *See Bethel v. Quilling, Lownds, Winslett & Moser, P.C.*, 565 S.W.3d 651 (Tex. 2020) (affirming dismissal based on attorney immunity and explaining affirmative defenses may be presented under Rule 91a, “[o]ur interpretation of Rule 91a serves these objectives by allowing courts to dismiss meritless cases before the parties engage in costly discovery. Forcing parties to conduct discovery when the claimant’s allegations conclusively establish the existence of an affirmative defense would be a significant waste of state and private resources.”).

Indeed, Discovery will play no role in resolving the Rule 91a motions on mandamus review. Nor can there be a dispute that the vehicle to review a trial court’s order denying a motion to dismiss under Rule 91a is a petition for writ of mandamus. *See In re Houston Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019). The limitations of Rule 91a recognized in each of the cases cited above will lose their meaning if the Court allows discovery while the March 18 Order is under appellate review.

The Plaintiffs themselves have recognized a stay is appropriate pending resolution of the Rule 91a motion. During the March 10 hearing, the Plaintiffs agreed that they did not oppose a stay of proceedings while the Court considered dismissal; they merely opposed a stay of jurisdictional discovery before the Court ruled on the Tennessee Defendants’ Rule 120A Special Appearances. The Plaintiffs’ reasons for not opposing a stay while the Court addressed the Motions to Dismiss apply with equal force to staying proceedings pending mandamus review. Just

as it would have strained the Court and parties' resources to engage in extensive discovery and related motion practice while the Rule 91a Motions to Dismiss were considered, so, too, would such activities strain the Court and the parties while the case is reviewed by the First or Fourteenth Court of Appeals – especially if the court of appeals concludes the Plaintiffs' claims should have been dismissed.

Finally, this case is more recent than the events underlying those at issue in Case Nos. 19-0497 and 19-0637, *In re Academy, Ltd. d/b/a Academy Sports + Outdoors*, indicating that a stay does not otherwise prejudice the Plaintiffs. *Academy* involved a 2017 incident. The case arrived at the Texas Supreme Court in 2019. Proceedings in the underlying cases have been stayed ever since. The clear policy set forth by the Texas Supreme Court is to resolve the PLCAA defense without permitting the case to continue in the trial court during that review regardless of the age of the case. This Court should follow that precedent.

CONCLUSION

For all of the foregoing reasons, the Tennessee Defendants request the Court stay further proceedings in this consolidated case, including discovery activities and discovery motion practice, pending final resolution of the Tennessee Defendants' Rule 91a Motion to Dismiss on Petition for Writ of Mandamus to the First or Fourteenth Court of Appeals and, if appropriate, the Texas Supreme Court.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that I conferred with opposing counsel regarding the relief request herein on March 26, 2021, in accordance with the Texas Rules of Civil Procedure. Opposing counsel represented that he is opposed.

/s/ A.M. "Andy" Landry III
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was duly furnished to the below listed counsel of record via email and eFileTexas on the 26th day of March, 2021, in accordance with the Texas Rules of Civil Procedure:

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