

NO. _____

In the Court of Appeals for the
_____ District at Houston, Texas

IN RE LUCKYGUNNER, LLC, RED STAG FULFILLMENT, LLC,
MOLLENHOUR GROSS, LLC, JORDAN MOLLENHOUR, AND
DUSTIN GROSS,
Relators

Original Mandamus Proceeding
from County Court at Law No. 3 at Galveston County, Texas,
Consolidated Cause No. CV-0081158,
the Honorable Jack Ewing, Presiding

OPPOSED EMERGENCY MOTION TO STAY PROCEEDINGS

A.M. "Andy" Landry III
State Bar No. 11868750
Greg White
State Bar No. 21329050
Kelly H. Leonard
State Bar No. 24078703

Gray Reed & McGraw LLP
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
(713) 986-7000 (Telephone)
(713) 986-7100 (Fax)
Email: alandry@grayreed.com
Email: gwhite@grayreed.com
Email: kleonard@grayreed.com

Andrew A. Lothson (PHV pending)

Swanson, Martin & Bell LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
(312) 321-9100 (Telephone)
(312) 321-0990 (Fax)
Email: alothson@smbtrials.com

ATTORNEYS FOR RELATORS

**EMERGENCY TEMPORARY RELIEF
REQUESTED BEFORE APRIL 14, 2021**

TO THE HONORABLE COURT OF APPEALS:

Relators LuckyGunner, LLC (“LuckyGunner”), Red Stag Fulfillment, LLC (“Red Stag”), Mollenhour Gross, LLC (“MG”), Jordan Mollenhour, and Dustin Gross (collectively, the “Tennessee Defendants”) file this emergency motion to stay the trial court proceedings in Consolidated Cause No. CV-0081158, *Rosie Yanas et al. v. Antonios Pagourtzis, et al.*, in County Court at Law No. 3 pending review of the petition for writ of mandamus.¹ *See* TEX. R. APP. P. 52.10(b).

INTRODUCTION

This Motion seeks a stay of all proceedings in the trial court until a final decision is rendered in this mandamus proceeding. A stay of proceedings is appropriate because all of the Relators have immunity from suit granted by an Act of Congress. If the case proceeds with discovery below, the Relators will be denied the very rights that Congress granted; immunity will be worthless.

¹ The consolidated case includes: (1) Cause No. PR-0078972-A; *William Recie Tisdale, Sr., Individually and as Statutory Beneficiary of Cynthia Tisdale, Deceased, et al. v. Dimitrios Pagourtzis, et al.*; Pending in the Probate Court of Galveston County, Texas (“the *Tisdale* Matter”); and (2) Cause No. CV-0086848, *Chase Yarbrough, Donna Yarbrough and Troy Yarbrough v. Antonios Pagourtzis, et al.*, Pending in Court No. 3, County Court at Law, of Galveston County, Texas (“the *Yarbrough* Matter”).

The Galveston County Court at Law No. 3 and Galveston Probate Court consolidated the *Tisdale* and *Yarbrough* matters into this case *sua sponte* on February 26, 2021. (M.R. 000339-000340).

The source of the immunity granted to Relators is the Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. §§ 7901-7903. The PLCAA was enacted by Congress in 2005 with bipartisan support. It prohibits lawsuits, like this 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). The PLCAA provides that covered actions “*may not be brought in any Federal or State court.*” 15 U.S.C. § 7902(a) (emphasis added).²

The Relators filed a Motion to Dismiss this case under Tex. R. Civ. P. 91a, invoking immunity under the PLCAA. The trial court’s refusal to dismiss the case is the reason for the mandamus petition.

PROCEDURAL BACKGROUND

These consolidated lawsuits arise from Dimitrios Pagourtzis’s criminal shooting at Santa Fe High School in May 2018. (M.R.00001-51, M.R.000052-77, M.R.000078-103, M.R.000104-142, M.R.000339-340). Plaintiffs are victims of the Pagourtzis’s crimes.

² The Texas Supreme Court is currently considering the scope and application of the PLCAA in a different case stemming from the November 2017 criminal shooting in Sutherland Springs, Texas. In October of last year, the Supreme Court heard oral argument in *In re Academy, Ltd. d/b/a Academy Sports & Outdoors* (Case Nos. 19-0497 and 19-0637). An opinion has not been issued as of the date of this Motion.

On January 6, 2021, the Tennessee Defendants moved pursuant to Rule 91a to dismiss Plaintiffs' claims based on the PLCAA, among other grounds. The Tennessee Defendants are entitled to PLCAA immunity because they are alleged to have sold Pagourtzis ammunition he later used to commit his crimes. As a result, the lawsuit against the Tennessee Defendants meets the definition of a "qualified civil liability action" which is to be immediately dismissed. 15 U.S.C. §§ 7903(5)(A), 7903(4), 7902.³

Before hearing the Motions to Dismiss, the presiding judge overseeing the *Tisdale* Matter and the presiding judge overseeing the *Yanas* and *Yarbrough* Matters transferred and consolidated the *Tisdale* and *Yarbrough* matters into the *Yanas* matter in Galveston County Court at Law No. 3 *sua sponte*. (M.R. 000339-000340).

Following consolidation in late February 2021 and the statewide shutdown caused by the February ice storms, the trial court entered

³ [*Yanas* Motion to Dismiss] M.R.000193-000219; [*Tisdale* Motion to Dismiss] M.R.000193-000219; [*Yarbrough* Motion to Dismiss] M.R.000220-000246. Before answering, four of the Relators – Red Stag, MG, Mr. Mollenhour and Mr. Gross – filed sworn special appearances asking the Court to dismiss for lack of personal jurisdiction. (e.g., M.R.000671-702, M.R.000703-724, M.R.001187-1218, M.R.001219-1240, M.R.001501-1534, M.R.001535-1555). The court has not yet ruled on the special appearances. *See* TEX. R. CIV. P. 91.a (no waiver of special appearance by moving for dismissal).

orders rescheduling the dismissal hearing (previously set for February 17), extending the deadlines under TEX. R. CIV. P. 91a⁴ and staying all proceedings while it considered the Motions to Dismiss. (M.R.000341-000343, M.R.000344-000346).⁵

All pending motions to dismiss were heard on March 10. (M.R. 000335-000338). Shortly thereafter, the court withdrew its prior order staying the case. The trial court then denied the Tennessee Defendants' Rule 91a Motion to Dismiss on March 18. (M.R.000475, M.R.000410-000473, Tr. at 60:8-62:6, M.R.000474).

On March 26, 2021, in an effort to stay the case in the trial court without the necessity of presenting this Motion, the Tennessee Defendants moved to stay all proceedings, advising the trial court they intended to pursue a petition for writ of mandamus. (M.R.000476-

⁴ The trial court extended the Rule 91a deadlines on March 5, 2021 in response to an unopposed motion. (M.R. 001128-001135, M.R. 001138-001140, M.R. 000341-000343, M.R. 001432-001449, M.R. 001758-001765). The order extended the 45-day deadline provided under Rule 91a through the date of the hearing and provided the court an additional five days after the hearing to enter its ruling. (M.R. 000341-000343).

⁵ The Tennessee Defendants moved for protection from discovery based on two threshold issues – their Motions to Dismiss under Rule 91a and the specially appearing defendants' Special Appearances. (M.R.000783-001127, M.R.001270-001428, M.R.001600-001757). The trial court granted the Tennessee Defendants' proposed order before receiving briefing from the Plaintiffs. The Court later withdrew its order during the dismissal hearing and said that, if necessary, it would address the Tennessee Defendants' grounds for protection after receiving briefing from the Plaintiffs. (M.R.000410-000473, Tr. at 60:8-62:6, M.R.000474).

000486). That Motion is set to be heard on April 14 at 9:30 am. In the event the Court is unable to consider this motion before the April 14, 2021 hearing, Relators will advise the Court if the trial court enters an order mooting this request for temporary relief.

This motion presents an “emergency.” The Plaintiffs are pursuing extensive jurisdictional and merits-based discovery despite (a) the pending Motion to Stay in the trial court, M.R.000476-000486, (b) their representations at the dismissal hearing that they were not opposed to a stay pending resolution of the Rule 91a immunity defense, M.R.000410-000473, Tr. at 60:8-62:6, and (c) the pending Petition for Writ of Mandamus. (M.R.001768, M.R.001774 - M.R.0001812).

The Plaintiffs’ decision to press discovery in the trial court *before* the trial court—or, perhaps this Court—is able to consider a stay of all proceedings risks erasing the very immunity and protection from suit that is at issue in the mandamus petition. And, because the denial of a motion for protection, itself, potentially gives rise to a mandamus-able issue, the Plaintiffs’ tactic also risks presenting this Court with not one but two mandamus proceedings at once. As a result, this Court need not wait for the trial court’s ruling to grant temporary relief.

SUMMARY OF ARGUMENT

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 saves the Court’s valuable resources, and saves both sides time and expense. Just as important, it preserves the Tennessee Defendants’ vital substantive and procedural rights. The PLCAA grants immunity from suit, and extensive discovery will cause that grant to be worthless. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).

The Texas Supreme Court demonstrated the appropriate outcome for handling this type of issue in the *Academy* cases—all trial court proceedings should be stayed during the pendency of the mandamus appeal. 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). Those two cases involve cases against a firearm seller arising from a criminal shooting. The Supreme Court has been asked to address the scope and application of PLCAA immunity. Prior to oral argument in the *Academy* cases, the Supreme Court granted a motion to stay all of the underlying proceedings (including further discovery) pending the Court’s decision.⁶ The stay order implicitly acknowledged that the PLCAA justified a stay of all proceedings to avoid the “irreversible waste of judicial and public resources”. *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).

ARGUMENT AND AUTHORITIES

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

Texas Rule of Appellate Procedure 52.10(b) empowers this Court to stay the underlying proceedings pending mandamus review. A stay is necessary to “spare private parties and the public the time and money

⁶ *See* M.R.000783 – M.R.001127 at M.R.001122; M.R.0001270 – M.R.001428 at M.R. 1428; M.R.001600 – M.R.001757 at M.R.001757. Relators ask the Court to take judicial notice of the Motion to Stay in *In re Academy, Ltd. d/b/a Academy Sports & Outdoors* (Case Nos. 19-0497 and 19-0637) and the Texas Supreme Court’s Order dated June 21, 2019 granting a stay of all proceedings.

utterly wasted enduring eventual reversal of improperly conducted proceedings” and “preserve important substantive and procedural rights from impairment or loss.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136.

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 considers the mandamus petition 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 [because] of the litigation that the Act seeks to curtail.”). 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). Congress even provided that 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.

Nor is there a dispute that claims seeking damages against firearms industry members for the harm caused by criminals are subject to PLCAA-based dismissal at the pleadings stage and without discovery. *See, e.g., Phillips v. LuckyGunner, LLC*, 84 F. Supp. 3d 1216, 1220 (D. Colo. 2015) (dismissing case against LuckyGunner stemming from a shooting at a movie theater).

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. (M.R.000783-001127, M.R.001270-001428, M.R.001600-001757). The Plaintiffs are actively pursuing that discovery in the trial court, asking the trial court to rule as early as April 14 that the Tennessee Defendants are not entitled to protection from discovery. (M.R.001768, M.R.001774 - M.R.0001812). A stay pending resolution of the mandamus appeal is urgently needed to preserve the status quo.

The Texas Supreme Court recognized the validity these arguments in *In re Academy, Ltd.* by staying all further discovery and other proceedings while it addresses the scope and application of the PLCAA 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. Plaintiffs cannot claim otherwise, as they all waited nearly two years after the event of May 18, 2018 to bring suit against the Tennessee Defendants. Nor is discovery necessary to any pertinent issue at this early stage in the proceedings against the Tennessee Defendants. 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*, 84 F. Supp. 3d at 1221-28 (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); *Travieso*

v. Glock Inc., No. CV-20-00523-PHX-SMB, 2021 WL 913746 (D. Ariz. Mar. 10, 2021) (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). Indeed, discovery plays no role in resolving the Rule 91a motions on mandamus review. *See In re Houston Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019).

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 immunity defense without permitting the case to continue in the trial court during that review regardless of the age and development of the case. This Court should follow that precedent.

CONCLUSION

For all of the foregoing reasons, the Relators request the Court stay further proceedings in Consolidated Cause No. CV-0081158, *Rosie Yanas et al. v. Antonios Pagourtzis, et al.*, in County Court at Law No. 3 pending review of the petition for writ of mandamus.

At this juncture, there is no reason to wait on the trial court for a ruling. In the event the Court is unable to consider this motion before the April 14, 2021 hearing, however, the Relators will advise the Court of the trial court's ruling on their request for a stay pending resolution of the mandamus appeal.

Respectfully submitted,

Gray Reed & McGraw LLP

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

A.M. "Andy" Landry III
State Bar No. 11868750
Greg White
State Bar No. 21329050
Kelly H. Leonard
State Bar No. 24078703
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
(713) 986-7000 (Telephone)
(713) 986-7100 (Fax)
Email: alandry@grayreed.com
Email: gwhite@grayreed.com
Email: kleonard@grayreed.com

Swanson, Martin & Bell LLP
Andrew A. Lothson (PHV filed)
330 North Wabash, Suite 3300
Chicago, Illinois 60611
(312) 321-9100 (Telephone)
(312) 321-0990 (Fax)
Email: alothson@smbtrials.com

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

CERTIFICATE OF COMPLIANCE WITH RULE 52.10(A)

In accordance with Texas Rule of Appellate Procedure 52.10(a), I certify that I have made a diligent effort to notify all parties by expedited means (such as by electronic mail, telephone or fax) that a motion for temporary relief has been or will be filed.

/s/ Kelly H. Leonard

Kelly H. Leonard

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

In accordance with the Texas Rules of Appellate Procedure, I certify that this Motion contains 2,717 words.

/s/ Kelly H. Leonard

Kelly H. Leonard

CERTIFICATE OF COMPLIANCE WITH RULE 10.1(5)

I certify that I conferred with opposing counsel regarding the relief requested in this motion by telephone on April 9, 2021, and that the Real Parties are opposed to this motion.

s/A.M. "Andy" Landry III

A.M. "Andy" Landry III

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed and served on all counsel of record by electronic filing on this 13th day of April, 2021 in accordance with the Texas Rules of Appellate Procedure:

Clint E. McGuire
Martinez & McGuire PLLC
17227 Mercury Drive, Suite B
Houston, Texas 77546
Tel: 281-286-9100
Fax: 281-286-9105
clint@mmtriallawyers.com

EVERYTOWN LAW
Alla Lefkowitz
Molly Thomas-Jensen
Krystan Hitchcock
450 Lexington Ave, P.O. Box #4184
New York, NY 10017
646-324-8226
Alefkowitz@everytown.org
Mthomasjensen@everytown.org
Khitchcock@everytown.org

Darrell A. Apffel
Apffel Legal, PLLC
104 Moody Ave #101
Galveston, Texas 77550
Tel: 409-744-3597
Fax: 281-612-9992
darrell@apffellegal.com

Alton C. Todd
The Law Firm of Alton C. Todd
312 S. Friendswood Drive
Friendswood, Texas 77546
Tel: (281) 992-8633
Fax: 281-648-8633
alton@actlaw.com

Rodgers Law Group, PLLC
One Harbour Square
3027 Marina Bay Drive, Suite 310
League City, Texas 77573
Tel: 281-884-3891
Fax: 281-884-3992
ron@rodderslawgroup.com

Sherry Scott Chandler
Lewis M. Chandler
The Chandler Law Firm, L.L.P.
4141 Southwest Freeway, Ste. 300
Houston, Texas 77027
Tel: 713-228-8508
Fax: 713-228-8507
sherry@chandlerlawllp.com
lewis@chandlerlawllp.com

Lawrence M. Tylka
Tylka Law Center, P.C.
1104 East Main
League City, Texas 77573
Tel: 281-557-1500
Fax: 281-557-1510
legal@tylkalawcenter.com

J. Alfred Southerland
4141 Southwest Freeway, Suite 300
Houston, Texas 77027
Tel: (281) 928-4932
Fax: (713) 228-8507
alf@southerlandlawfirm.com

s/ Kelly H. Leonard

Kelly H. Leonard

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Anne Armstrong on behalf of Andre Landry
Bar No. 11868750
aarmstrong@grayreed.com
Envelope ID: 52395642
Status as of 4/13/2021 11:45 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
S. Gregory White		gwhite@grayreed.com	4/13/2021 11:34:21 AM	SENT
Andrew A.Lothson		alothson@smbtrials.com	4/13/2021 11:34:21 AM	SENT
Douglas T.Gosda		dgosda@mga-law.com	4/13/2021 11:34:21 AM	SENT
Clint E.McGuire		clint@mmtriallawyers.com	4/13/2021 11:34:21 AM	SENT
Darrell A.Apffel		darrell@apffellegal.com	4/13/2021 11:34:21 AM	SENT
Ron Rodgers		ron@rodgerslawgroup.com	4/13/2021 11:34:21 AM	SENT
Lawrence M.Tylka		legal@tylkalawcenter.com	4/13/2021 11:34:21 AM	SENT
Alla Lefkowitz		alefkowitz@everytown.org	4/13/2021 11:34:21 AM	SENT
Molly Thomas-Jensen		mthomasjensen@everytown.org	4/13/2021 11:34:21 AM	SENT
Krystan Hitchcock		khitchcock@everytown.org	4/13/2021 11:34:21 AM	SENT
Alton C.Todd		alton@actlaw.com	4/13/2021 11:34:21 AM	SENT
Sherry ScottChandler		sherry@chandlerlawllp.com	4/13/2021 11:34:21 AM	SENT
Lewis M.Chandler		lewis@chandlerlawllp.com	4/13/2021 11:34:21 AM	SENT
J. AlfredSoutherland		alf@southerlandlawfirm.com	4/13/2021 11:34:21 AM	SENT
Ron Rodgers		ron@smbattorney.com	4/13/2021 11:34:21 AM	SENT
Kelly Leonard		kleonard@grayreed.com	4/13/2021 11:34:21 AM	SENT
Andre M.Landry		alandry@grayreed.com	4/13/2021 11:34:21 AM	SENT