No. 14-21-00194-CV

IN THE COURT OF APPEALS FOR THE FOURTEENTH 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
Cause No. CV-0081158, Hon. Jack Ewing

Response of the Real Parties in Interest to Relators' Emergency Motion to Stay Proceedings

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TO THE HONORABLE COURT OF APPEALS:

The Real Parties in Interest[1] respectfully ask this Court to deny the Relators' Emergency Motion to Stay Proceedings.

INTRODUCTION

This lawsuit seeks justice for the victims and survivors of the shooting that occurred on May 18, 2018, at Santa Fe High School. The Relators, defendants in the trial court, face liability for negligently and illegally providing ammunition to a minor, who went on to kill ten people and injure thirteen others at the school.

In the year since the Plaintiffs brought claims against the Relators, the Relators have taken every opportunity to avoid engaging in discovery or litigating this case on the merits. Now, unable to achieve dismissal of the case in the trial court, the Relators have turned to this Court for a stay of all discovery proceedings. To that end, the Relators

[1] The real parties in interest are plaintiffs Rosie Yanas and Christopher Stone (individually and as next friends of Christopher Jake Stone); William ("Billy") Beazley and Shirley Beazley (individually and as next friends of T.B., a minor); Autumn Tisdale (individually and as a representative of the estate of Cynthia Tisdale); William Tisdale, Jr. (individually and as a representative of the estate of William R. Tisdale, Sr.); Chase Yarbrough; Donna Yarbrough; Troy Yarbrough; and Plaintiffs-Intervenors Mark McLeod and Gail McLeod (individually and as next friends of Aaron Kyle McLeod); Pamela Stanich (individually and as next friend of Jared Conard Black); Shannan Claussen (individually and as next friend of Christian Riley Garcia); Clayton Horn; Abdul Aziz and Farah Naz (individually and as next friends of Sabika Aziz Sheikh); Flo Rice; and Rhonda Hart (individually and as a representative of the estate of Kimberly Vaughan) (collectively, "Plaintiffs").

argue that they are "entitled" to immunity, and that requiring them to respond to routine discovery will result in a denial of their "rights." (Mot. at 2, 4.) And the Relators incredibly argue that a stay of the case will not be a burden on the victims of the shooting. (*Id.* at 12.)

The Relators' motion falls short for a number of reasons. First, it fails to mention that the Protection of Lawful Commerce in Arms Act ("PLCAA"), on which their motion is based, does not apply to "any action in which" a seller of firearms or ammunition knowingly violated a gun law, as the Plaintiffs have alleged in this case. *See* 15 U.S.C. § 7903(5)(A)(iii). Second, the motion leaves out that four of the five Relators are not sellers of ammunition, and therefore do not fall within PLCAA's scope. *See id.* § 7903(5)(A). And despite using the word "immunity" twenty-one times, the motion fails to demonstrate that PLCAA provides an immunity from suit, as opposed to simply an affirmative defense. Finally, the Relators conjure up an "emergency" of unrelenting discovery demands, but this notion is belied by the trial-court record. The Relators' unwarranted interpretation of PLCAA and imagined emergency do not merit extraordinary relief.

Plaintiffs respectfully ask that this Court deny the Relators' motion and permit threshold discovery to proceed.

FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 2018, 17-year-old Dimitrios Pagourtzis went to Luckygunner.com and purchased handgun and shotgun ammunition using a prepaid American Express gift card. M.R.000006 ¶¶ 21–22. The website, which is maintained by Relator Luckygunner, LLC ("Luckygunner"), did not require Pagourtzis to provide any proof of age, and his purchase was approved by Luckygunner's automated system in under two minutes. *Id.*; M.R.000017 ¶ 62.

Less than two weeks later, Pagourtzis used another prepaid American Express gift card to purchase more shotgun ammunition on Luckygunner.com. M.R.000007 ¶ 23. Again, he did not have to provide proof of age, and the purchase was approved in under two minutes. *Id.* In both instances, Relator Red Stag Fulfillment, LLC ("Red Stag") mailed the ammunition to Pagourtzis without verifying his age or requiring that an adult sign for the package. M.R.000021 ¶¶ 75, 77.

Red Stag was established in 2013 by Relators Jordan Mollenhour and Dustin Gross through their limited liability company, Relator

Mollenhour Gross, LLC, in order to provide shipping and fulfillment services for Luckygunner. M.R.000037 ¶ 169. Mollenhour Gross is the sole managing member of both Luckygunner and Red Stag. M.R.000005 ¶ 15.

On May 18, 2018, Dimitrios Pagourtzis used the ammunition that he purchased on Luckygunner to kill ten of his classmates and teachers and wound at least thirteen others. M.R.000007 ¶ 24. Christopher Stone, Kyle McLeod, Jared Conard Black, Christian Riley Garcia, and Sabika Aziz Sheikh were among the teenagers who were killed; Clayton Horn and Flo Rice were among those who were injured. M.R.000007–13 ¶¶ 26–38.

On March 4, 2020, the Plaintiffs in the *Yanas* matter brought claims against the Relators for their role in enabling one of the worst school shootings in American history. M.R.00001–51.[2] 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 their customer's age. M.R.000020–22 ¶¶ 73-79;

[2] The operative petitions in the other, now-consolidated cases were filed soon thereafter. *See* M.R.000052–142.

M.R.000030–33 ¶¶ 126–41. The Plaintiffs further alleged that the Relators 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. M.R.000037–38 ¶¶ 166–74.

Since the initial filing, the Relators have tried every possible route to avoid litigating the merits, insisting that they cannot be held liable despite illegally providing handgun ammunition to the underage shooter. First, in May 2020, the Relators removed the cases to federal court, *see* M.R.000606–07; M.R.001150–51; M.R.001460–61, where they filed motions to dismiss, *see* M.R.001797. The district court determined that the motions to dismiss had been filed prematurely, M.R.001797–98, and subsequently ruled that removal was improper, M.R.000160.

On December 23, 2020, after remand to the Galveston County Court, Relators Red Stag, Mollenhour Gross, Jordan Mollenhour, and Dustin Gross filed special appearances pursuant to Texas Rule of Civil Procedure 120a, arguing that the court lacked jurisdiction over them. *See* M.R.000671–724; M.R.001188–240; M.R.001501–55. Between

December 29, 2020, and January 7, 2021, Plaintiffs served written jurisdictional discovery on the specially appearing Relators and served written substantive discovery on the remaining Relator, Luckygunner. *See* M.R.001793–94 ¶¶ 4–7. No other discovery has been served.

On January 6, 2021, all the Relators filed motions to dismiss under Rule 91a of the Texas Rules of Civil Procedure, M.R.000162–246, and on February 8, 2021, they filed motions to stay proceedings pending resolution of their Rule 91a motions and Rule 120a special appearances, M.R.000783; M.R.001270; M.R.001600. The Relators made no attempts to negotiate with the Plaintiffs about the scope of discovery before filing their February 8 motions. M.R.001794 ¶ 8.

On March 18, 2021, after consolidating the separate cases, *see* M.R.000339–40, the trial court denied the Relators' Rule 91a motions to dismiss. M.R.000475. Since the Rule 91a motion was Luckygunner's only asserted basis for a stay of discovery, on March 23, 2021, Plaintiffs' counsel asked Relators' counsel when Luckygunner would begin to engage in discovery. M.R.001808. In response, on March 26, 2021, the Relators filed another stay motion, this time seeking to halt all proceedings until "final resolution of [their] 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." M.R.000476. As reflected by the mandamus record, the Relators never sought to negotiate a shorter stay with Plaintiffs. The Relators then requested that the trial court hear that motion on April 14, 2021. *See* Supplemental Mandamus Record (S.M.R.001). In the interest of time and judicial economy, Plaintiffs cross-requested that the court hear all the pending stay motions at the same time. *See* M.R.001768.

On April 13, 2021, the day before the scheduled hearing, the Relators filed the instant "emergency" motion for temporary relief, along with their petition for writ of mandamus. (Opposed Emergency Motion to Stay Proceedings ("Motion"); Petition for Writ of Mandamus.)[3] On April 14, 2021, at the trial-court hearing, the Plaintiffs stated that they would agree to a stay of three to four weeks to allow this Court time to decide the instant motion. (*See* Letter from Clint E. McGuire to the Hon. Christopher A. Prine, Apr. 15, 2021.) The next day, in a letter to this Court, Plaintiffs stated that they would "wait until this Court has issued a decision on the Relator's Emergency Motion before

[3] Relators did not first seek permission from the trial court to take an interlocutory appeal. *Cf.* Tex. Civ. Prac. & Rem. Code § 51.014(d); Tex. R. Civ. P. 168.

pressing discovery." (*Id.*) The Relators' claim that the trial court proceedings present an emergency is therefore moot.[4]

One additional point bears noting. The motion states that Plaintiffs made "representations at the dismissal hearing that they were not opposed to a stay pending resolution of the Rule 91a immunity defense." (Mot. at 6.) This is misleading. As reflected by the transcript for the 91a hearing, the Plaintiffs had no objection to staying discovery until the *trial court* issued its decision on the 91a motion. *See* M.R.000470:14–471:7. That is a far cry from agreeing to stay all discovery until the Relators press their dismissal arguments up to the Texas Supreme Court.

STANDARD OF REVIEW

Under Rule 52.10(b) of the Texas Rules of Appellate Procedure, this Court may "grant any just relief" pending its action on the Relators' petition for writ of mandamus. Tex. R. App. P. 52.10(b). In practice, this

[4] The Plaintiffs take issue with the representations made by the Relators in service of their claimed "emergency," (Mot. at 6). The Relators' statements that "Plaintiffs are pursuing extensive jurisdictional and merits-based discovery despite . . . the pending Motion to Stay in the trial court" and that Plaintiffs are "press[ing] discovery in the trial court *before* the trial court . . . is able to consider a stay of all proceedings," (*id.*), falsely imply that Plaintiffs were attempting to circumvent the trial court's control of the case. In truth, as reflected by the mandamus record, aside from opposing the Relators' various stay motions, the Plaintiffs have taken no other action to "press" discovery.

Court grants "immediate temporary relief" only if the "relator will be prejudiced" in the absence of such relief. *In re Jarvis*, No. 14-13-00224-CV, 2013 Tex. App. LEXIS 2804, at *1 (Tex. App.—Houston [14th Dist.] Mar. 18, 2013, orig. proceeding) (per curiam); *accord In re State ex rel. Sistrunk*, 142 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (per curiam).

ARGUMENT

The Relators' motion should be denied because the Relators face no prejudice in the trial court. Although the Relators frame their request in terms of vindicating a claimed immunity from suit, their motion is simply another attempt to delay discovery in this case. In reality, it is the Plaintiffs who will be prejudiced if the proceedings below are delayed, yet again, by the Relators' dilatory litigation tactics.

I. Proceeding with discovery in the trial court will not prejudice Relators.

The crux of the Relators' argument is that engaging in routine discovery will vitiate their legal immunity from suit under PLCAA. (Mot. at 2–3.) But this argument fails for two independent reasons. First, the Relators do not fall within PLCAA's protective scope. Second, the Relators fail to demonstrate that PLCAA confers immunity from

suit, as opposed to providing gun-industry defendants with an affirmative defense. Therefore, none of the Relators has a basis to claim that its legal rights would be prejudiced by discovery.

A. The Relators do not fall within PLCAA's scope.

As discussed more fully in the Plaintiffs' opposition to the 91a motion, M.R.000254–64, the Relators' reliance upon PLCAA is misplaced. By its terms, PLCAA provides a defense to liability, in certain cases, only to "manufacturers" and "sellers" of firearms and ammunition, as well as to "trade associations." *See* 15 U.S.C. § 7903(5)(A).[5] And a seller of ammunition is defined as "a person engaged in the business of selling ammunition . . . in interstate or foreign commerce at the wholesale or retail level." *Id.* § 7903(6)(C). The phrase "engaged in the business" is defined, in relevant part, to cover "a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition." *Id.* § 7903(1). And even for sellers of ammunition, PLCAA does not apply in "an action in which" the seller "knowingly violated a State or

[5] Although the Relators do not discuss this issue in their motion before this Court, they argued in the trial court that they were sellers of ammunition. *See, e.g.*, M.R.000169–70 ¶ 22. No other basis for PLCAA protection has ever been suggested.

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." *Id.* § 7903(5)(A)(iii).

Although Plaintiffs do not dispute that Luckygunner sells ammunition, the other Relators do not. As alleged in the operative petition, Red Stag is a shipping and fulfillment company and Mollenhour Gross, Mollenhour, and Gross are the parents of both Red Stag and Luckygunner. *See* M.R.000037 ¶ 169 ("Defendants Mollenhour and Gross established Red Stag in May 2013, through their limited liability company, MollenhourGross, to provide shipping services for Luckygunner."); *see also* M.R.000005–6 ¶¶ 15–17. After Pagourtzis bought the ammunition from Luckygunner, Red Stag shipped it to him via FedEx. M.R.000021 ¶¶ 75–77. In fact, the Relators' special appearances are based almost entirely on the premise that they do not sell any goods, particularly into Texas. *See, e.g.*, M.R.000682 & n.6; M.R.000703 ("Red Stag is a third-party warehouse order fulfillment company from Tennessee.").

As to Luckygunner, the Plaintiffs have more than sufficiently alleged at the 91a motion stage that Luckygunner violated the Youth

Handgun Safety Act, 18 U.S.C. 922(x), by selling handgun ammunition to someone that it deliberately avoided knowing was underage. *See* M.R.000032–33 ¶¶ 139–40; M.R.000036 ¶¶ 160–61. Furthermore, the Plaintiffs alleged that Luckygunner and the other Relators conspired to sell and deliver handgun ammunition to juveniles in violation of the Youth Handgun Safety Act. *Id.* Thus, under the plain text of the statute, the Relators have no basis to claim PLCAA protection.

B. PLCAA provides an affirmative defense, not an immunity from suit.

Relators offer a host of citations to caselaw describing the concept of immunity from suit and supporting the uncontroversial proposition that a defendant wrongly denied immunity from suit may seek relief via mandamus. (Mot. at 7, 9, 11); *see, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (observing that "*immunity from suit*," unlike "a mere defense to liability," is "effectively lost if a case is erroneously permitted to go to trial"). But when it comes to their key assertion—that *PLCAA* confers immunity from suit—no citations to authority are to be found. This is because, to Plaintiffs' knowledge, no such citations exist; in the fifteen years since PLCAA was signed into law, no court analyzing this precise

question has held that PLCAA provides immunity from suit rather than a defense.

Indeed, the language of PLCAA indicates that it merely provides a defense to liability. The law is explicitly aimed at "[t]he possibility of imposing liability on [the gun] industry." 15 U.S.C. § 7901(a)(6). Needless to say, preventing courts from *imposing liability* does not require a grant of immunity, only a legal defense. Moreover, Congress knows how to grant immunity from suit when it wants to do so. *See, e.g.*, 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States"). In contrast, PLCAA's operative language mentions only *types of claims* that may not be brought, not that certain defendants are entitled to immunity. *See* 15 U.S.C. § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court."). The Relators note that PLCAA called for currently pending actions to be dismissed, (Mot. at 10 (citing § 7902(b)), but their argument ignores the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (quoting *United States v. Hollywood Motor Car Co.*, 489 U.S. 263, 269

(1982)). As PLCAA's primary sponsor and author stated in congressional debate, "[t]his is not a gun industry immunity bill." 151 Cong. Rec. S9087, S9088 (daily ed., July 27, 2005) (statement of Sen. Craig).

The Relators' best citation is to a pending case in the Texas Supreme Court. (*See* Mot. at 7–8, 12 (citing *In re Acad., Ltd.*, No. 19-0497 (Tex. argued Oct. 6, 2020)).) Although the question of whether PLCAA provides immunity from suit is among the issues presented in that case, the Relators offer no basis to infer that any forthcoming decision from the Supreme Court will be favorable to their currently unsupported position.

In the absence of caselaw, the Relators suggest that the Texas Supreme Court's decision to stay trial-court proceedings in *Academy* means that this Court should stay discovery in this case. (Mot. at 7–8, 12–13.) But the Supreme Court's two-sentence order, which contains no reasoning or explanation, is surely not "precedent," (*cf.* Mot. at 13). The order, in its entirety, reads: "Relators' motion for emergency temporary relief, filed June 11, 2019, is granted. All trial court proceedings in [case caption] are stayed pending further order of this Court." *In re Acad.*, No.

19-0947, at *1 (Tex. June 21, 2019). The Relators' arguments about the order's hidden meaning are, at best, disingenuous.

What is more, the Relators' suggestion elides real differences between that case and this one. Most significantly, the litigation in *In re Academy* was much further along than this case is. Academy had, in its words, "endure[d] extensive discovery requests," including several sets of requests for production, interrogatories, and requests for admission, as well as five depositions, before it asked the Texas Supreme Court for a stay of proceedings. Motion for Emergency Temporary Relief 5, *In re Acad.*, No. 19-0947 (Tex. June 11, 2019). Here, by contrast, no documents have been produced, no depositions have been scheduled, and the Relators are resisting even jurisdictional discovery on their special appearances. Because any trial in this case is years away, there is no looming specter of "waste[d] . . . judicial and public resources," (Mot. at 8 (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 137 (Tex. 2004) (orig. proceeding))).

Without immunity from suit, the Relators' argument that they are somehow prejudiced by engaging in normal discovery falls apart. Because PLCAA simply provides a defense to liability, even if the trial

court's decision on the Rule 91a motion were incorrect, the Relators' legal rights would not be impaired by their responding to the Plaintiffs' discovery requests.[6]

II. Continued delay would burden the Plaintiffs.

The Relators assert that a stay would not be "burdensome or unduly prejudicial to the Plaintiffs" and, incredibly, assert that discovery is not "necessary to any pertinent issue at this early stage in the proceedings." (Mot. at 12.) Neither assertion is accurate.

Further delays in this case will certainly burden and prejudice the Plaintiffs. Take plaintiff Clayton Horn, for example: he has suffered irreparable physical injuries and has incurred substantial medical costs. M.R.000041–42 ¶ 197. Similarly, plaintiff Flo Rice, a former runner, now requires a cane to walk, and struggles with posttraumatic-stress disorder. M.R.000012 ¶ 36. She too has incurred substantial medical costs. M.R.000042 ¶ 200. And plaintiff Chase Yarbrough, who has undergone reconstructive surgery, still has four bullet fragments in

[6] This lack of prejudice faced by Relators also weighs strongly against the propriety of a writ of mandamus generally. *See, e.g.*, *In re Jones*, 2019 Tex. App. LEXIS 1274, at *4 (Tex. App.—Houston [14th Dist.] Feb. 21, 2019, orig. proceeding) (mem. op.) ("Mandamus will not issue where there is a clear and adequate remedy at law, such as a normal appeal." (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992))).

his body and continues to suffer pain. M.R.000110 ¶ 5.5; M.R.000137 ¶ 8.1.

Delaying these plaintiffs' ability to recover for their medical costs constitutes substantial prejudice in itself. *See, e.g.*, *Safeco Ins. Co. v. Mont. Eighth Jud. Dist. Ct.*, 2000 MT 153, ¶ 15, 300 Mont. 123, 2 P.3d 834 ("[U]nnecessary delay in the payment of [plaintiff's] medical costs . . . would certainly prejudice [plaintiff]."); *see also Roethler v. Lutheran Hosps. & Homes Soc'y*, 709 P.2d 487, 490 (Alaska 1985) ("[D]elays might constrain plaintiffs to accept a low settlement offer in order to alleviate the financial problems of ongoing medical expenses."). On top of this, further delay will prejudice the Plaintiffs' ability to obtain and present evidence and witness statements. *See, e.g.*, *BarTex Rsch. v. FedEx Corp.*, 611 F. Supp. 2d 647, 651–52 (E.D. Tex. 2009) (denying stay motion because delay "could allow for loss of critical evidence as witnesses become unavailable, their memories may fade, and evidence may be lost"); *see also Pelt v. Johnson*, 818 S.W.2d 212, 217 (Tex. App.—Waco 1991, orig. proceeding) (describing prejudice to parties from "the inevitable dimming of witnesses' memories," among other evidentiary issues caused by delay). And finally, there is the intangible—but no less

real—harm that all the Plaintiffs suffer from being denied their day in court. In short, the assertion that Plaintiffs will experience no prejudice from the Relators' attempts to further delay these proceedings is simply wrong.

Harder to understand is the Relators' suggestion that discovery isn't necessary yet. (*See* Mot. at 12–13.) Although it is true that discovery is unnecessary to decide a motion to dismiss under Rule 91a, (*see id.*), the Relators' motion to dismiss has already been denied, M.R.000475.[7] Now pending are the Relators' four special appearances, *see* M.R.000671–724; M.R.001188–240; M.R.001501–55, for which some jurisdictional discovery is necessary, *cf.* Tex. R. Civ. P. 120a(3) ("The court shall determine the special appearance on the basis of . . . the results of discovery processes . . . ."), and from which the Relators will have a statutory right of appeal, *see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(7). A stay of discovery at this time would prevent Plaintiffs

[7] Relators cite to four decisions that dismissed cases pursuant to PLCAA without discovery, (*see* Mot. at 12). However, many other cases in which PLCAA was raised as a defense have proceeded to discovery. *See, e.g.*, *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 275 (Conn. 2019) (holding that PLCAA did not bar plaintiffs' claim based on violation of law and permitting case to go to discovery); *King v. Klocek*, 187 A.D.3d 1614 (N.Y. App. Div. 2020) (same); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434–45 (Ind. Ct. App. 2007) (same); *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307, at *3–13 (D. Kan. July 18, 2016) (same).

from obtaining even this threshold jurisdictional discovery, ensuring an even-longer wait before the Plaintiffs have their day in court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Relators' Emergency Motion to Stay Proceedings.

DATED: April 22, 2021

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CERTIFICATE OF SERVICE

I certify that, on April 22, 2021, a true and correct copy of the Response of the Real Parties in Interest to Relators' Emergency Motion to Stay Proceedings was served on all counsel of record via the Court's electronic-notification system:

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Respondent, the Hon. Jack Ewing, was served via first class mail.

Hon. Jack Ewing
Judge Presiding
Galveston County Court at Law No. 3
600 59th Street, Suite 2205
Galveston, Texas 77551-4180

/s/ Clint E. McGuire
Clint E. McGuire
MARTINEZ & MCGUIRE PLLC

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