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,
Consolidated Cause No. CV-0081158,
the Honorable Jack Ewing, Presiding

REPLY IN SUPPORT OF OPPOSED EMERGENCY MOTION TO STAY PROCEEDINGS

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EMERGENCY TEMPORARY RELIEF REQUESTED

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 reply in support of their 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. *See* TEX. R. APP. P. 52.10(b).

ARGUMENT AND AUTHORITIES

This case and procedural posture are tailor-made for a stay. This is a mandamus appeal from an order denying a Rule 91a Motion to Dismiss based on the presence of statutory immunity under the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901-7903. For the reasons detailed more fully in Relator's Petition for Writ of Mandamus, the Tennessee Defendants are likely to succeed on the merits.

The Texas Supreme Court has unequivocally held that mandamus is available where a trial court denies a Motion to Dismiss under Rule 91a. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018), *citing In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014)

(reviewing denial of Rule 91a motion to dismiss on a petition for writ of mandamus). And, where a trial court refuses to enforce statutory immunity, mandamus is not just an appropriate remedy—it is the remedy. *See In re Perry*, 60 S.W.3d 857, 859–62 (Tex. 2001); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981). Contrary to the Plaintiffs' response brief, this is true even where the grant of immunity is not absolute. *See In re Perry*, 60 S.W.3d at 861 (discussing potential qualifications to legislative immunity).

A stay of proceedings is appropriate in the face of this body of law. If the underlying case proceeds as the Court conducts its review, the Relators will be denied the very rights that Congress granted; their immunity will be worthless. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (order denying immunity from suit is effectively unreviewable because immunity "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"). Equally important, all parties will have wasted resources litigating if the Court

concludes the trial court should have ordered the dismissal of the case, frustrating the purpose of Rule 91a and the Legislature's decision to provide a path for early dismissal of cases. Indeed, with the PLCAA as the backdrop, the Texas Supreme Court issued a stay of proceedings in Case Nos. 19-0497 and 19-0637, *In re Academy, Ltd. d/b/a Academy Sports + Outdoors*, ("*Academy*") even though that case arose from event older than those at issue in this case and on mandamus review of a denial of a motion for summary judgment. This Court should do the same.

I. The question of whether the PLCAA is an immunity or an affirmative defense is immaterial.

The Plaintiffs argue a stay is inappropriate because the PLCAA is not an immunity from suit. They say the PLCAA is merely an affirmative defense, and that the Tennessee Defendants are, therefore, unlikely to prevail on the merits of their petition. (Oppo. Br. at §B). The Plaintiffs did not assert this ground in trial court as a reason to deny the Tennessee Defendants' Motion to Dismiss and have therefore waived it. *See* TEX. R. APP. P. 33.1.

In any event, Plaintiffs' argument is off base. The PLCAA "does not impose a procedural limitation; rather, it creates a substantive rule of law granting ***immunity*** to certain parties against certain types of claims."

Ileto v. Glock, Inc., 565 F.3d 1126, 1142 (9th Cir. 2009) (emphasis added). The PLCAA "bars the ***commencement or the prosecution*** of qualified civil liability actions." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398 (2nd Cir. 2008) (emphasis added). Both the Ninth (*Ileto*) and the Second (*Beretta*) federal circuit courts of appeal applied the explicit language in the PLCAA: "A qualified civil liability action [like those brought by Real Parties] ***may not be brought*** in any Federal or State court." 15 U.S.C. § 7902(a) (emphasis added).[1]

But this Court need not confront *Ileto* or *Beretta* or even the plain language of the PLCAA to determine whether the PLCAA provides immunity from suit or an affirmative defense in order to grant mandamus relief in this case. That potential distinction makes no difference on review from an order denying a Rule 91a Motion to Dismiss.

[1] Plaintiffs' statement that "in the fifteen years since PLCAA was signed into law, no court analyzing this precise question has held that PLCAA provides immunity from suit" misses its mark. (Oppo. Br. at 14-15.) Nor does Plaintiffs' reliance on a single legislator's comment during a debate carry any weight. (*Id.* at 16.) Statements made by individual members of Congress have little value in interpreting the intent of Congress as a whole. *Medical Center Pharmacy v. Mukasey*, 536 F.3d 383 (5th Cir. 2008); *see also Chrysler Corporation v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). In a similar vein, one Plaintiffs' counsel (Everytown Law) has staked out a position on this issue outside of this litigation, stating the PLCAA is an "immunity" statute. *See* https://www.everytown.org/solutions/industry-reform/ (last visited Apr. 22, 2021).

The Texas Supreme Court recently explained that the text of Rule 91a limits the "scope of a court's factual, but not legal, inquiry," and allows the Court to consider the defendant's pleadings, affirmative defenses, and the substance of the Rule 91a motion itself. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651 (Tex. 2020). When the facts presented in a plaintiff's own pleadings support the application of an affirmative defense presented by the defendant, dismissal under Rule 91a is appropriate. *See id.* In *Bethel*, the Texas Supreme Court upheld a trial court's order dismissing a claim based on the affirmative defense of attorney immunity because the allegations in the plaintiff's petition defeated relief. *Id.* at 656 ("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.").

Here, the Tennessee Defendants pleaded the PLCAA as an affirmative defense and moved to dismiss all of the Plaintiffs' claims, arguing that the Plaintiffs' own pleadings supported the application of the PLCAA to this case.

In light of the Texas Supreme Court's holding in *Bethel*, the Court does not need to conclude PLCAA is an immunity rather than an

affirmative defense to find in favor of the Tennessee Defendants and issue mandamus relief in this case. *See, e.g., Bethel*, 595 S.W.3d at 658 (dismissing petition pursuant to Rule 91a based on attorney immunity); *see also City of Dallas v. Sanchez*, 494 S.W.3d 722, 727 (Tex. 2016) (dismissing petition pursuant to Rule 91a based on governmental immunity); *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 736-41 (Tex. 2019) (considering a federal preemption defense in the context of a Rule 91a motion).

The Plaintiffs' argument also overlooks cases granting mandamus in non-immunity contexts in order grant relief on issues for which there is no adequate remedy on appeal—for example, to enforce jury waivers, *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004), arbitration clauses, *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992), and forum selection clauses, *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 715 (Tex. 2016), and for a trial court's failure to dismiss a case under Rule 91a, *In re Essex Ins. Co.*, 450 S.W.3d at 526.[2]

Contrast the procedural posture of this case with *Academy* where the issue of whether the PLCAA is an affirmative defense or a

[2] Because it is a substantive federal law with constitutional underpinnings, the Supremacy Clause also encourages enforcement of the PLCAA at the earliest opportunity in the case. *See Felder v. Casey*, 487 U.S. 131, 151 (1988).

jurisdictional bar is potentially meaningful. There, Academy is seeking mandamus review of the denial of a motion for summary judgment based on PLCAA immunity. Mandamus review is "generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion." *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008). Academy has urged that review is nevertheless warranted because it has absolute immunity from suit and the case fits within circumstances where the Texas Supreme Court has allowed mandamus review, relying on *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (2004). Immunity is one argument to overcome the general prohibition against mandamus review of summary judgment orders and establish the relator has no adequate remedy on appeal even if the trial court's order incorrectly interpreted the PLCAA.

The Tennessee Defendants do not face the same impediment. Unlike *Academy* and the general bar against mandamus review of summary judgment orders, there can be no reasonable dispute in this case that the Tennessee Defendants do not have an adequate remedy by appeal. In both *In re Essex Insurance Co.*, 450 S.W.3d 524 (Tex. 2014) (orig. proceeding) (per curiam), and *In re Houston Specialty Insurance Co.*, 569 S.W.3d 138 (Tex. 2019) (orig. proceeding) (per curiam), the Texas

Supreme Court granted mandamus relief for the erroneous denial of a motion to dismiss under Rule 91a, reasoning that issuing the writ would "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Houston Specialty Ins. Co.*, 569 S.W.3d at 142 (quoting *In re Essex Ins. Co.*, 450 S.W.3d at 528). Additionally, the supreme court stated in *ConocoPhillips Co. v. Koopman*, 547 S.W.3d 858 (Tex. 2018), that a party "could have challenged the trial court's denial of its motion to dismiss *at the time it was denied*," and cited *In re Essex Insurance Co. Id.* at 881 (emphasis added). This Court, too, has held that denial of a motion to dismiss under Rule 91a is reviewable by mandamus. *In re Union Pac. R.R. Co.*, 582 S.W.3d 548, 550 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (per curiam).

The exact harms identified by these courts are at play in this case if the Court does not stay the proceedings. As a result, this Court should not deviate from settled precedent. Rule 91a emanates from the Legislature's direction to "adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence" and to adjudicate such motions to dismiss on an expedited basis. *See* TEX. GOV'T CODE ANN. § 22.004(g); Adoption of Rules for

Dismissals and Expedited Actions, Misc. Docket No. 12-9191 (Tex. Nov. 13, 2012) (per curiam), printed in 75 Tex. B.J. 870–73 (2012). The Legislature's objective was reducing the expense and delay of litigation, while maintaining fairness to the litigants. Adoption of Rules for Dismissals and Expedited Actions, 75 Tex. B.J. at 871; *see also* House Judiciary & Civil Jurisprudence Comm., Bill Analysis, Tex. H.B. 274, 82d Leg., R.S. (2011) (enacting reforms "to make the civil justice system more efficient, less costly, and more accessible").

Reviewing the denial of Rule 91a motions by mandamus furthers that goal by allowing the parties to obtain immediate review of dispositive legal questions and to evade extensive discovery and prolonged litigation over baseless claims. *See In re Farmers Tex. Cty. Mut. Ins. Co.*, No. 04-19-00180-CV, 2019 WL 2605630, at *6 (Tex. App.—San Antonio June 26, 2019, orig. proceeding) (holding that "mandamus review of orders denying Rule 91a motions comports with the Legislature's requirement for an early and speedy resolution of baseless claims").

In addition to sparing public and private resources that would be "utterly wasted enduring eventual reversal of improperly conducted proceedings," reviewing the denial of Rule 91a motions by mandamus

"preserve[s] important substantive and procedural rights from impairment or loss." *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

The risk for wasted resources and corresponding need for mandamus review is acute in cases like this one. *See 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 at 862 (granting writ to correct erroneous denial of legislative immunity even while recognizing the grant of immunity may be qualified); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (same where statute immunized defendant mother from collateral litigation while named managing conservator of child).

A stay of this case is both practical and appropriate while the Tennessee Defendants seek mandamus review. Doing so furthers the purpose of Rule 91a, 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 at 136. The Plaintiffs' letter of April 15, 2021 to the Court stating the Plaintiffs do

not object to a stay for some length of time only proves the point.

II. The Plaintiffs' arguments about the PLCAA's interpretation and application have been fully briefed in the mandamus petition and are incorrect.

The Plaintiffs' Response makes a number of arguments that go to the merits of the Petition. For example, they erroneously claim only LuckyGunner is a "seller" under the PLCAA and entitled immunity. And, they claim that deliberate indifference offers the standard for determining a violation of the Gun Control Act when no court has so held and the statutory text itself supplies the actual standard for examining a violation of 18 U.S.C. 922(x). (Oppo. Br. at 13-14).

On these arguments, the Tennessee Defendants incorporate by reference their Petition for Writ of Mandamus at §I(A)-(G). As argued in the Petition for Writ of Mandamus, the Plaintiffs' petitions – which provide the lens through which this Court must evaluate the Motions to Dismiss – plead each of the Tennessee Defendants are liable for the sale of ammunition at issue in this case. *See* Pet. for Writ of Mandamus at §§I(B), I(G). Each of the Tennessee Defendants meets the statutory definition of a "seller" and are the very types of businesses Congress intended to provide protection to in the first place. *Id.*

Similarly, as explained more fully in the Petition for Writ of Mandamus, 18 U.S.C. 922(x) supplies the standard for liability for sale of ammunition suitable only for use in a handgun to a juvenile. *See* Pet. for Writ of Mandamus at p. 28-52. The imbedded standard has been interpreted by numerous courts. *Id.* No court has applied the "deliberate indifference" standard, urged by the Plaintiffs, for an alleged Section 922 violation; indeed, it has been rejected in the ammunition sales context. *See* Pet. for Writ of Mandamus at p. 51-53. Those issues are briefed fully in the petition and their merits offer no basis for denying a stay as the Court more closely examines the applicable law in this case.

III. A stay is not burdensome or unduly prejudicial to the Plaintiffs.

The Plaintiffs suffer no cognizable prejudice as a result of a stay. They offered no evidence of prejudice in the trial court, M.R. 001770-001812, and their response in this Court offers no ***evidence*** of any harm or undue prejudice.

The Plaintiffs waited nearly two years after the event of May 18, 2018 to bring suit against the Tennessee Defendants—just before limitations was set to run on their claims. And Rule 91a counsels that motions to dismiss shall be heard on the pleadings, alone. TEX. R. CIV. P. 91a.6. 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).[3]

The Plaintiffs complain that a stay will hamper their mission to secure justice. And they point to the victim's injuries and medical bills as presenting the type of harm that counsels against issuing a stay. The Tennessee Defendants are empathetic to physical and mental trauma suffered by the victims. The criminal misuse of firearms is undeniably wrong. And, accountability for the shooter's crimes likely seems elusive since the shooter's criminal trial has not yet occurred and he has been declared mentally incompetent to stand trial.[4] The Plaintiffs' pleadings themselves point to his mental health as a reason for his crimes.[5]

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[3] Because of Rule 91a's framework and express directive, numerous courts have held that plaintiffs are not entitled to discovery in responding to motions to dismiss. *See In re Butt*, 495 S.W.3d 455, 463 (Tex. App.—Corpus Christi 2016, orig. proceeding) (plaintiffs not entitled to complete discovery before motion to dismiss ruling); *see also Gonzales v. Dallas Cnty. App. Dist.*, No. 05–13–01658–CV, 2015 WL 3866530, at *5 (Tex. App.—Dallas June 23, 2015, no pet.) (mem. op.) (rejecting the contention that the trial court should not have granted a Rule 91a motion to dismiss until the plaintiff had the opportunity to conduct discovery).

[4] *See* Houston Chronicle, *Accused Santa Fe HS Shooter may be committed long-term to mental health facility*, Apr. 10, 2021, https://www.houstonchronicle.com/news/houston-texas/crime/article/santa-fe-high-school-mental-health-facility-gun-16090215.php ("the young man charged with capital murder in the shootings is no closer to standing trial and may end up committed long-term to a mental health facility.") (last visited Apr. 22, 2021).

[5] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶42, 81-97, 118-124, 142-151; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶35-40; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶67-83, 99-113; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.12, 5.51-5.67, 6.1-6.7, 6.24-6.33.

(M.R.0000023) ("There were many warnings that [the shooter] . . . was a danger to himself and others."; (M.R.000024) ("[the parents] knew their son was experiencing extreme emotional distress. . . . [yet] allowed [guns] to be accessible to their emotionally unstable son—a son who was so trouble that his father had taken two weeks off of work to stay home with him.").

But like the Plaintiffs, the Tennessee Defendants have due process rights. This country balanced parties' interests in the swift resolution of cases with the importance of due process rights long ago. The balance was struck in favor of assuring that parties have an opportunity to fully and fairly litigate cases, including pursuing recognized appellate remedies. That due process takes time is not only unsurprising, it is necessary.

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, and the Plaintiffs have offered no proof showing that the passage of time would soften memories. Indeed, the Plaintiffs allege the sale in this case was "100% automated" and completed online. *See* Pet. for Writ of Mandamus at p. 17. So, the risk of softening memories is slim; the critical evidence related to the sale is documentary evidence, which the Plaintiffs requested through a subpoena before suing the Tennessee Defendants. The fact that the relevant evidence is both documentary and in the Plaintiffs' hands prevents the Plaintiffs from persuasively arguing that a stay will lead to clouded or less reliable memories if the time for discovery should come. (M.R.0000457 at ln. 2-10) (referencing pre-trial subpoena).[6]

And, as a more recent development, it has become clear that a stay is necessary to preserve this Court's jurisdiction and the state of the pleadings that the trial court relied on in denying the Tennessee Defendants' Motions to Dismiss. An appellate court can grant a stay if necessary to preserve the subject matter of the appeal and protect its own

[6] Plaintiffs' contentions here are further belied by the fact that while the case was pending in federal court for several months with discovery open, they pursued absolutely no discovery against any party, including the Tennessee Defendants.

jurisdiction. *See City of Dallas v. Wright*, 120 Tex. 190, 36 S.W.2d 973, 975 (1931).

In a recent filing, the Plaintiffs acknowledged their petitions are deficient to the point that, as they have expressly told the trial court, they intend to file an amended petition. (M.R.011985 at n. 8.) This alone should halt the trial court proceedings from moving forward pending resolution of the Tennessee Defendants' mandamus appeal. It is hard to envision a more impractical situation than for the parties to be litigating the viability of the now operative petitions in this Court, while amendments to those very petitions are in the works in the trial court.

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.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

In accordance with the Texas Rules of Appellate Procedure, I certify that this Motion contains 3,582 words.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed and served on all counsel of record by electronic filing on this 23rd day of April, 2021 in accordance with the Texas Rules of Appellate Procedure:

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