NO. 21-0463

In the Supreme Court of Texas

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

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

REPLY IN SUPPORT OF MOTION FOR TEMPORARY RELIEF AND STAY OF 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)

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

TO THE HONORABLE SUPREME COURT OF TEXAS:

This case and its procedural posture are tailor-made for a stay. Rule 52.10 authorizes the Relators (hereinafter, the "Defendants") to "file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition," and it empowers the Court to "grant any just relief." TEX. R. APP. P. 52.10(a)–(b). The rule's purpose is to afford this Court the "opportunity to address the dispute encompassed within a petition for mandamus … by maintaining the status quo until it can address that dispute." *In re Kelleher*, 999 S.W.2d 51, 52 (Tex. App.—Amarillo 1999, no pet.).

The Response does not address the applicable standard, and instead takes a first pass at arguing the merits underlying the Petition for Writ of Mandamus. In so doing, the Plaintiffs' Response largely confirms that a stay is appropriate at this juncture of the case, and that a ripe dispute between the parties exists concerning whether, under the facts pled by Plaintiffs, the PLCAA bars claims seeking to hold the Defendants liable for the third-party criminal acts of the shooter. The Defendants' motion should be granted.

I. Plaintiffs ask the Court to deny the stay so that they can conduct discovery and amend their pleadings. Rule 91a prohibits post-ruling amendments, and it does not allow a court to consider discovery.

The Plaintiffs argue a stay would be "judicially inefficient," and ask the Court to "deny Relators' motion so that discovery can proceed, a record can be developed, and the court below can make a ruling based on the facts of this case…." *See* Response at p. 20. The Court should reject the Plaintiffs' argument for three separate but interrelated reasons.

First, Rule 91a gives the Defendants a right to avoid litigating when the claims alleged have no legal basis. The Plaintiffs' suggestion that they should be allowed to amend their pleadings will not change the ruling below. Courts may not consider an after-the-fact nonsuit or amended pleading to moot a pending motion to dismiss. *Cf.* TEX. R. CIV. P. 91a.5 ("In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b)."). Nor can a post-ruling amendment moot a petition for writ of mandamus arising out of a trial court's failure to dismiss. *Id.* The Court's review of the threshold, case-dispositive issues remains important to the parties and Texas jurisprudence. *See* Pet. at xvii-xxiii.

Second, no matter what the Plaintiffs hope they will discover, that effort will be a waste of time. This Court has said, "[f]orcing 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." *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020). This is particularly so when the defense is based on an immunity and the defendant is "entitle[d] not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

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), this Court reasoned that issuing mandamus to correct the erroneous denial of a motion to dismiss "spare[s] 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). In short, Rule 91a implements 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).

Under this framework, Rule 91a pairs well with a preemption statute, like the PLCAA, as both serve a similar purpose: immediate dismissal of claims falling within their purview. *See* 15 U.S.C. § 7902(a)-(b); *cf. In re Facebook, Inc.*, 2020 WL 2037193 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, orig. proceeding) (subsequent orig. proceeding in Tex. Sup. Ct. filed as Case No. 20-0434) (staying case involving preemption under the Communications Decency Act, 47 U.S.C. § 230(c)(1), (e)(3)). A stay of the underlying litigation is warranted here whether the Defendants' Rule 91a motion establishes immunity from suit or provides them an affirmative defense. In either event, the immediate review of the threshold, case-dispositive issues protect the Defendants from extensive discovery and prolonged litigation over baseless claims.

Third, the extensive discovery the Plaintiffs seek is immaterial to dismissal under Rule 91a. (M.R.000783-001127, M.R.001270-001428,

M.R.001600-001757).[1] Under Rule 91a.6, a court "may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action . . . ." TEX. R. CIV. P. 91a.6; *Bethel*, 595 S.W.3d at 656 ("Rule 91a does not allow consideration of evidence.").[2]

The Plaintiffs must appreciate the restrictions of Rule 91a. At no point in the underlying proceedings did the Plaintiffs argue that discovery was necessary to respond to the Rule 91a motions—or, to avoid

[1] The discovery consists of more than 50 interrogatories and more than 200 requests for production of documents concerning both the merits of the case and what the Plaintiffs consider relevant personal jurisdictional matters. The Plaintiffs' discovery is the epitome of a "scorched earth" approach, with time-periods that date back more than a decade and with requests for myriad forms of electronically stored information ("ESI") that contradict the directives of this Court. *See, e.g.*, *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017) (discovery, including of ESI, should be reasonable and proportional to the specific issues and needs of the case). This discovery has already spurred extensive motion practice. (M.R.000783-001127, M.R.001270-001428, M.R.001600-001757) (Motions for Protective Order).

[2] 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). Plaintiffs' contention that delay in moving forward with discovery equates to unfair prejudice to them is belied by the fact that ***they waited nearly two years after the event of May 2018 to bring suit against the Defendants***, just before limitations was set to run on their claims. Plaintiffs' contention is 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 Defendants.

PLCAA immunity.[3] (M.R. 000247-000271, M.R. 000272-000306, and M.R. 000307-000334). Nor have Plaintiffs suggested that discovery would change their theory for why the Defendants are allegedly liable for Plaintiffs' damages: "a business model" claimed to be inherently illegal under federal law because it takes place online rather than at a brick and mortar store. Response at p. 2. Tellingly, Plaintiffs do not address the only court opinion to analyze the online sales practices they claim are *per se* a crime, *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1221-28 (D. Colo. 2015), in which the court rejected the claim that federal law was violated because of a lack of "interaction" between an online seller and a remote buyer of ammunition. The facts as pled are not in dispute (for the purposes of Rule 91a). Thus, this mandamus appeal boils down to a legal dispute of whether the Defendants' business practices are legal under 18 U.S.C. § 922(x), and whether the Plaintiffs' claims stating otherwise are barred by the PLCAA.[4] These threshold issues are ripe for the Court's review.

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[3] Nor do Plaintiffs dispute that multiple courts have dismissed cases under the PLCAA without discovery. Mot. at 13-14 (listing cases).

[4] Plaintiffs' argument is wrong because Section 922(x) and its imbedded "reasonable cause to believe" standard do ***not*** impose a duty on a seller to inquire into a purchaser's background (including age). *See* Pet. at Argument § II(c). If Congress

Finally, the Court's stay order in *Academy* supports the Defendants' argument that the threshold nature of the PLCAA immunity (or defense) justifies 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. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 137 (2004) (granting mandamus relief where the very act of proceeding to trial, regardless of outcome, would defeat substantive right involved). This is true even though—for reasons unknown to the parties in this case—Academy did not move to dismiss under Rule 91a. Contrary to the Plaintiffs' Response, the *Academy* posture does not somehow sanction far-reaching discovery to "develop a factual record" for the purpose of defeating the Defendants' Rule 91a motion. The Plaintiffs' arguments here all but forget that the reason the

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wants to update or change the statute and impose background checks, including for online sales, it can do so. But it is absurd for Plaintiffs to suggest that the Defendants' online "business model" results in crime stemming from every sale. Nor should courts step in to impose new requirements (or duties) that are not in the text of the statute, especially after-the-fact and for the purposes of holding an ammunition seller liable under the law as currently written. To do otherwise would eviscerate the Separation of Powers doctrine and long-standing notions of due process to the defendant. To the extent Plaintiffs believe Section 922(x) should be updated in some other way to regulate the specifics of online ammunition commerce, any such revision is squarely within Congress's domain, not the courts. *See, e.g.*, *Petitioning Creditors Moldo v. Matsco*, 252 F.3d 1039, 1056 (9th Cir. 2001) ("The Constitution entrusts to Congress, not to the courts, the role of ensuring that statutes keep up with changes in financing practices.").

Defendants moved under Rule 91a is that the Plaintiffs' own allegations affirmatively establish that their claims are barred by the PLCAA. *See Bethel*, 595 S.W.3d at 656.[5]

II. Whether the PLCAA is a jurisdictional bar or an affirmative defense does not change the basis for a stay, or the result in this case.

The Plaintiffs argue a stay is inappropriate because the PLCAA is merely an affirmative defense, not a federal immunity statute, stating: "Without immunity from suit, the Relators are no different from any other civil defendant whose Rule 91a motion was denied." Response at p. 20. If that is so, then the Plaintiffs here are no different from any other plaintiff who supplied allegations that fell far short of stating a viable cause of action. The result should have been an immediate dismissal. That the basis for dismissal was a federal preemption statute with a litany of constitutional underpinnings—ranging from the Separation of Powers doctrine and the Commerce Clause to the Second

[5] Plaintiffs' other argument—that a ruling from this Court in *Academy* will "provide sufficient guidance for lower courts to properly apply PLCAA" (Response at p. 11)—misses the point. The lower court in the present case already failed to properly apply the PLCAA and immediately dismiss the case; hence, the reason for mandamus. Moreover, an opinion in *Academy* (a case involving the over-the-counter sale of a firearm component and Colorado law) would not answer the legal question presented in this case, *i.e.*, whether online sales of ammunition in Texas require proof-of-age to be lawful under Section 922(x).

Amendment—further underscores the importance of the issues at stake in this mandamus appeal.

In any event, the PLCAA provides an immunity from Plaintiffs' claims. *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009) (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."). The statute "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 (2d 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).

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 stay further proceedings at this time or to eventually grant mandamus relief in this case. The distinction makes no difference on review from an order denying a Rule 91a motion. Mot. at p. 12, fn.7; *see also* Pet. at xix-xx.

Because it is a substantive federal law with constitutional underpinnings, the Supremacy Clause encourages enforcement of the PLCAA at the earliest opportunity in the case. *See Felder v. Casey*, 487 U.S. 131, 151 (1988). Rule 91a is the procedural mechanism in Texas to marshal that early enforcement.

Indeed, Plaintiffs do not dispute that dismissal under Rule 91a is appropriate when the facts presented in a plaintiff's own pleadings support the application of an affirmative defense. *Bethel*, 595 S.W.3d at 658 (dismissing petition based on attorney immunity).[6] Like *Bethel*, the Defendants here alleged that the PLCAA was an affirmative defense in addition to providing a jurisdictional bar. The Defendants moved to dismiss the Plaintiffs' claims because the Plaintiffs' own pleadings supported the application of PLCAA to this case.

III. Each of the Defendants is entitled to PLCAA immunity.

The Plaintiffs incorrectly claim that only one of the Defendants is a "seller" entitled to the protection of the PLCAA. They fail to recognize that every theory of liability alleged depends upon the liability of LuckyGunner. The Plaintiffs allege facts establishing *each* of the

[6] *See also City of Dallas v. Sanchez*, 494 S.W.3d 722, 727 (Tex. 2016) (affirming dismissal of petition pursuant to Rule 91a based on governmental immunity).

Defendants is a "Seller" under the PLCAA. Pet. at Stmt. of Facts § II and Argument § I(B). For example:

> - Plaintiffs allege LuckyGunner and Red Stag negligently and illegally ***sold and delivered ammunition*** to a minor . . . .[7]
>
> - Plaintiffs allege the Tennessee Defendants conspired to ***profit from and aid the sale of ammunition*** . . . .[8]
>
> - And, in briefing they said: "[E]ach of the Tennessee Defendants ***conspired to sell and deliver*** handgun ammunition to juveniles, in violation of the Youth Handgun Safety Act . . . ."[9]

Their Response only drives the point home, tying each Defendant to the online ammunition-sales business model that they argue should be made illegal. *See* Response at pp. 5-6 ("The Relators' Culpability"); *see also id.* at p. 16 ("the Plaintiffs have alleged that LuckyGunner and the other Relators conspired to sell and deliver handgun ammunition . . . ."). Without a finding that LuckyGunner is liable, no other Defendant is even alleged to hold liability.

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[7] M.R.00001-000051 at ¶¶73-79, 126-141; M.R.000247-000271 at M.R.000252.

[8] M.R.00001-000051 at ¶¶166-174. The "Tennessee Defendants" are defined as LuckyGunner, LLC, Red Stag Fulfillment, LLC, Mollenhour Gross, LLC and its two owners, Jordan Mollenhour and Dustin Gross, as all are residents of Tennessee. *See* Pet. at fn. 15 and 16; *see also* Yanas Live Pleading, Appx. C at ¶13-18 (grouping Defendants together in pleading and terming them the "Luckygunner Defendants).

[9] M.R.000247-000271 at 000255 and M.R.000262.

The PLCAA's protections are afforded to all businesses, including their owners, engaged in this type of commerce regardless of where they fall in the supply chain. 15 U.S.C. § 7901(a)(5); *see also* Pet. at Argument § I(B); NSSF Amicus Br. at § IV(B)(2). 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). The plain language of the statutory provision for "seller" (bolstered by Congressional findings and purposes) makes clear that Congress did ***not*** intend to limit those who qualify as an ammunition seller to only the entity that received payment for the goods.[10]

Stripping PLCAA immunity from businesses (and their owners) that help facilitate the commerce at issue—ammunition sales to customers in Texas—would defeat the PLCAA's purpose and run contrary to congressional intent. Online sellers routinely use the downstream services of other businesses to get their goods to consumers.

[10] "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).

Congress's protections against litigation extend to these essential downstream businesses. Any other interpretation would lead to the same disastrous outcome that the PLCAA was intended to prevent: destruction of ammunition commerce and, ultimately, citizens' Second Amendment right to access ammunition. 15 U.S.C. § 7901(b)(2), (b)(4).

In sum, Plaintiffs' objections to a stay are a perpetuation of the same flawed arguments that prompted the trial court to deny the Defendants PLCAA immunity in the first place. In this respect, Plaintiffs' Response serves to underscore that the merit of their positions (or lack thereof) is ripe for the Court's full consideration. A stay is both warranted and critical to maintaining the status quo while the Court reviews the application of the PLCAA to the Plaintiffs' claims against the Defendants.

CONCLUSION AND PRAYER

For all of the foregoing reasons, the Defendants 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,

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 forthcoming)
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 FULFILLMENT, LLC, MOLLENHOUR GROSS, LLC, JORDAN MOLLENHOUR, AND DUSTIN GROSS

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

In accordance with Texas Rules of Appellate Procedure, I certify that this Reply contains 3,085.

/s/ Kelly H. Leonard
Kelly H. Leonard

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed and served on all counsel of record by electronic filing on this 16th day of June, 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@rodgerslawgroup.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