UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CHRISTINA ZAMORA, INDIVIDUALLY AND AS NEXT FRIEND OF M.Z., et al.,	§	
Plaintiffs,	§	Case No. 2:23-cv-00017-AM
v.	§	
DANIEL DEFENSE, LLC, et al.,	§	
Defendants.	§	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiffs respectfully file this Reply in support of their Motion for Leave to Amend Complaint. Courts must make a holistic decision in considering a motion to amend, evaluating factors including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Defendant Oasis Outback challenges Plaintiffs' proposed amendment solely on the ground of futility. As Defendant properly notes, the court applies the same standard for futility as it would in a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *See* Def. Op. at 2; *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000). "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000) (internal quotations omitted).

Because the standard for futility is the same as the standard for a 12(b)(6) motion to dismiss, courts in the Fifth Circuit generally do not deny a motion to amend without considering the newly proffered facts as part of any pending motion to dismiss. *See, e.g.*, *Stem v. Gomez*, 813 F.3d 205, 216 (5th Cir. 2016) (reversing denial of motion to amend as to allegations that "would have cured . . . deficiencies" for purposes of a pending Rule 12(b)(6) motion and therefore "would not have been futile").[1] In fact, where futility is the sole issue in dispute, a court is *required* to

[1] *See also Moore v. Dallas Indep. Sch. Dist*., 557 F. Supp. 2d 755, 759-60 (N.D. Tex. 2008), *aff'd*, 370 F. App'x 455 (5th Cir. 2010) (unpublished) (granting plaintiff's motion to amend complaint over futility argument and considering the amended allegations in conjunction with defendant's Rule 12(c) motion); *Baudy v. Adame*, 441 F. Supp. 3d 293 (E.D. La. 2020) (concurrently considering Rule 12(b)(6) motion and subsequently-filed motion for leave to amend, denying motion to dismiss, and granting motion to amend over defendants' futility objection); *cf. Reneker*

grant the motion to amend if the newly pleaded facts would supplement existing claims or cure legal deficiencies in the complaint:

> [W]here, as here, the only proffered justification for denial is futility, the determination that the [amended] complaint is legally sufficient and not cumulative deprives the district court of all "substantial reason" to deny leave and severely restricts its discretion to do so. In such a case, leave to amend should be granted. Justice requires no less.

Jamieson by & Through Jamieson v. Shaw, 772 F.2d 1205, 1211 (5th Cir. 1985). Given that this court has not yet ruled on—nor even heard argument on—the motions to dismiss in this case, it cannot be futile for Plaintiffs to add facts to supplement its existing allegations, and it would be error to deny Plaintiffs leave to amend on that ground.

Indeed, even after motions to dismiss are *granted*, the Fifth Circuit regularly requires that leave to amend be granted as a means of curing defects. *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) ("[i]nstances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment"). And if a court has any uncertainty about whether the amendments will help the claims survive, it should grant them. Put another way, courts deny leave to amend on futility grounds only where the proposed amendment is "clearly futile." 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 1487 (3d ed. 2024 update) ("If a proposed amendment is not clearly futile, then denial of leave to amend is improper"). Notably, another court in this District erred on the side of amendment even where the court was uncertain as to the viability of the proposed amendment on the merits. *See Jaraba v. Blinken*, 568 F. Supp. 3d 720, 740 (W.D. Tex. 2021) (construing

v. Offill, No. 3:08-CV-1394-D, 2011 WL 1427661, at *1 (N.D. Tex. Apr. 13, 2011) (granting motion to amend answer over futility objection without deciding the merits of affirmative defense, stating: "[T]he court's almost unvarying practice when futility is raised is to address the merits of the claim or defense in the context of a Rule 12(b)(6) or Rule 56 motion.") (citation omitted).

plaintiffs' new factual allegations in their motion to dismiss opposition as a motion to amend, considering amendment concurrently with the motion to dismiss, and granting leave to amend as to new allegations that were not "'clearly futile,'" even though "the Court cannot be certain at this stage that" they state "a viable claim").

Defendant argues that, nonetheless, the court may deny the motion to amend because these facts are not truly "new." Def. Op. (Docket 175) at 1-2 (new facts are "limited to descriptions of the Shooter's behavior based on surveillance footage referenced in Plaintiffs' earlier briefing"). This is incorrect on multiple fronts. First, the fact that the new allegations are based on the previously referenced video does not mean that these specific facts were previously available or are not "new." *See* Plaintiffs' Motion to Amend (Docket 173) at 8-9 ("Plaintiffs' proposed amended complaint includes descriptions of Ramos's behavior in Oasis Outback based on excerpts of surveillance footage, which became available after Plaintiffs filed their amended complaint[.]"). More specifically, the new allegations provide detail about the Shooter shouldering the rifle and pulling the trigger while pointing the rifle at other customers inside Defendant's store. First Am. Compl. (Docket 173-1) ¶ 151. Those details were first made public in February 2023, when a news station obtained access to the surveillance video. *See* Yami Virgin, Exclusive Video shows Uvalde shooter had a plan, News4 San Antonio, (Feb. 28, 2023), https://news4sanantonio.com/newsletter-daily/exclusive-video-and-statements-show-indicators-missed-that-uvalde; Plaintiffs' Op. to Def. Motion to Dismiss (Docket 101) at 19. Second, the standard for futility is not whether the facts are newly known—that goes to undue delay, which Defendant has not raised here. *See Serafine v. Abbot*, No. 20-CV-1249, 2021 WL 3616103, at *1-2 (W.D. Tex. Jul. 2, 2021) (considering the timing of amendment only in connection with undue delay, considering futility separately, and finding that neither justified denying leave to amend under Rule 15(a)); *Mailing & Shipping Sys.,*

Inc. v. Neopost USA, Inc., 292 F.R.D. 369 (W.D. Tex. 2013) (same); *Allen v. Sherman Operating Co., LLC*, 520 F. Supp. 3d 854, 871-72 (E.D. Tex. 2021) (same).

Despite the clear precedent and logic demonstrating that the court should not deny this motion on grounds of futility at this stage of the legal process, Plaintiffs will nevertheless briefly address Defendant's substantive arguments. Defendant does not dispute that Plaintiffs' new allegations strengthen their factual claims that Defendant acted negligently in transferring and selling the Shooter's the murder weapon. Plaintiffs' Motion to Amend Complaint (Docket 173) at 9. Instead, Defendant's arguments here are merely a condensed repetition of the legal arguments in its Motion to Dismiss regarding PLCAA's negligent entrustment exception, and we respectfully request that the Court consider Plaintiffs' fuller refutations in their Opposition to that motion. *See* Plaintiffs' Op. to Def. Motion to Dismiss (Docket 101). In short, Defendant argues that Plaintiffs have not satisfied the exception. Def. Op. at 3. In doing so, Defendant again improperly relies on the Texas Supreme Court's interpretation of PLCAA, a federal statute. *See* Def. Op. at 3-4 (relying on *In re Acad., Ltd.*, 625 S.W.3d 19 (Tex. 2021)). But as detailed in Plaintiffs' opposition to Defendant's Motion to Dismiss, neither the Texas Supreme Court's decision in *Academy* nor any other Texas state court case controls this Court's interpretation of federal law. Docket 101 at 6-12. PLCAA's statutory definition of "negligent entrustment" (15 U.S.C. § 7903(5)(B)) controls, and this Court is not bound by *Academy*'s construction of that definition. *See Soc'y for Sav. in Cleveland v. Bowers*, 349 U.S. 143, 151 (1955) (holding that the federal courts are not bound by state court decisions on federal law); *United States v. Miami Univ.*, 294 F.3d 797, 811 (6th Cir. 2002) (citations omitted) ("[F]ederal courts owe no deference to a state court's interpretation of a federal statute[.]").

Nor is *Academy*'s interpretation of PLCAA persuasive. As discussed in Plaintiffs' Motion to Dismiss opposition, the *Academy* court disregarded PLCAA's statutory definition of negligent entrustment and reasoned instead that, because Texas tort law does not recognize a negligent entrustment theory of liability for the sale of a product, the *Academy* plaintiffs could not invoke PLCAA's negligent entrustment exception in a case arising from the sale of a firearm. *See* Docket 101 at 10-11. This interpretation was in error; the scope of PLCAA's negligent entrustment exception does not turn on state common law. Instead, the rules of statutory construction direct this Court to consider, first, whether Plaintiffs' allegations fit within PLCAA's textual definition of "negligent entrustment" (15 U.S.C. § 7903(5)(B)) and if so, second, whether Plaintiffs have asserted viable claims under state tort law. *See* Docket 101 at 5-9. Here, the parties agree that Plaintiffs' allegations fit within PLCAA's definition of "negligent entrustment." Docket 101 at 6 (citing Def. Motion to Dismiss (Docket 66) at 8, 11). And, as demonstrated in Plaintiffs' opposition to Defendant's Motion to Dismiss, Plaintiffs have stated viable state law claims for negligent sale and negligent transfer. Docket 101 at 12-18. It is immaterial that, under Texas law, these claims are denominated "negligent sale" and "negligent transfer" rather than "negligent entrustment." Docket 101 at 7-8; *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324-26 (Mo. 2016). They satisfy PLCAA's negligent entrustment exception all the same.

As noted above, however, this Court need not and should not reach this substantive issue. At this early stage of litigation, amendment must be permitted so that, when the court considers the motion to dismiss, it does so with all facts in hand. To do otherwise would embody the "excessive formalism" that the Fifth Circuit has explicitly denounced in its desire to "permit liberal pleading and amendment." *Jamieson*, 772 F.2d at 1208. For these reasons, Plaintiffs respectfully request that this Court grant Plaintiffs leave to file their proposed amended complaint.

Respectfully submitted,

By: ***/s/ Laura Keeley***

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Dated: June 28, 2024

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June 2024, I served the following counsel through electronic service (ECF) as authorized by Fed. R. Civ. Pro. 5:

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[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO AMEND

The Court is in receipt of Plaintiffs' Motion for Leave to Amend Complaint. For good cause shown, the motion is GRANTED.

SIGNED and ENTERED this ____ day of _____, 2024.

_____
Chief U.S. District Judge Alia Moses