UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, E.T., et al.,	§	Case No. 2:22-CV-00059-AM
Plaintiffs,	§	
v.	§	
DANIEL DEFENSE, LLC, et al.,	§	
Defendants.	§	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Plaintiffs respectfully file this Reply in support of their Motion for Leave to Amend Complaint.

ARGUMENT

1. Plaintiffs' Motion to Amend Meets the Permissive Threshold That Courts Use When Considering Opposition Based Solely on Futility

Defendant Daniel Defense challenges Plaintiffs' proposed amendment solely on the ground of futility. As Daniel Defense 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* Daniel Defense Resp. to Pls.' Mot. ("Opp'n") at 2, ECF No. 153-1; *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000).

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); *Reneker v. Offill*, No. 08-CV-1394-D, 2011 WL 1427661, at *1 (N.D. Tex. Apr. 13, 2011) ("[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); *see also* Pls.' Opposed Motion to Am. Compl. at 2-5, ECF No. 146. In fact, where futility is the sole issue in dispute, a court is *required* to 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) (citations omitted). Given that this court has not yet ruled on—nor even heard argument on—the motions to

dismiss, it cannot be futile for Plaintiffs to add facts to supplement its existing allegations. Plaintiffs' motion to amend should accordingly be granted, and this Court need go no further.

2. Plaintiffs Allege a Violation of Section 46.06(a)(2) of the Texas Penal Code Sufficient to Meet the 12(b)(6) Standard and to Constitute a PLCAA Predicate Violation

As explained in prior briefing (*see* Pls.' Opp'n to Daniel Defense's Mot. to Dismiss the First Am. Compl. at 9-16, ECF No. 63-1), PLCAA's predicate exception permits actions against a gun manufacturer like Daniel Defense where a plaintiff can prove a knowing violation of "a State or 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. . ." 15 U.S.C. § 7903(5)(A)(iii). Here, Daniel Defense argues that Plaintiffs fail to allege a violation of Texas Penal Code Section 46.06(a)(2), that Plaintiffs have not shown proximate cause, and that Section 46.06(a)(2) is not a valid predicate statute. None of these arguments are correct.

a. Plaintiffs Adequately Allege That Daniel Defense's Actions Constituted Illegal Offers to Sell Within the Meaning of Section 46.06

Section 46.06(a)(2) makes it a crime to "intentionally or knowingly sell[] . . . or offer[] to sell . . . to any child younger than 18 years of age any firearm." Daniel Defense's brief does not define the term "offer"—perhaps because, under Texas law, an offer to sell is any "act that leads the offeree reasonably to believe that assent (i.e., acceptance) will conclude the deal." *Axelson, Inc. v. McEvoy–Willis*, 7 F.3d 1230, 1232-33 (5th Cir. 1993). Daniel Defense also erroneously claims that 46.06(a)(2) "applies only to an illegal sale, 'give[],' [sic] or offer to *imminently* sell a firearm to a minor." Opp'n at 3 (emphasis added). In fact, Section 46.06(a)(2) broadly reaches any "offer to sell," which remains open until it expires or is withdrawn, *see* Restatement (Second) of Contracts § 41 (1981), and Section 46.06(a)(2) contains no imminence requirement.

Daniel Defense's brief also fails to address the well-established category of "offer" that their conduct fits into: the detailed price quotation. *See ETC Intrastate Procurement Co., LLC v. JSW Steel (USA), Inc.*, 620 S.W.3d 168, 174 (Tex. App. 2021) ("A sufficiently detailed price quotation can be an offer."). In *ETC*, the court found that a "price quotation email included pricing, quantity, specifications, and payment terms" was sufficiently detailed to qualify as an offer. *Id*. *See also Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1121 (5th Cir. 1985) (concluding that a "proposal" that set forth "prices and terms" constituted an "offer in the sense that it was a promise to sell at the listed prices, justifying Shoney's in understanding that its assent, . . . would close the bargain"); *Axelson* 7 F.3d at 1233 (concluding that a "telex quotation" was sufficient to constitute an offer where it "contained all material terms"). In *Axelson*, the Fifth Circuit used a simple test to determine that a detailed price quotation constituted an offer: "If at any point in the negotiations [the offeree] had sent a telex saying, 'We accept,' the contract would have been concluded on the terms as negotiated to that point." *Id*. at 1233.

Here, Daniel Defense's detailed price quotation contained all of the hallmarks described above and more: the item (Second Am. Compl. ("SAC") ¶ 128, ECF 146-1); the quantity (*Id*.); the price (*Id*. at ¶ 129); the purchaser's account information, including name and email (*Id*. at ¶ 127); the taxes (*Id*. at ¶ 129); the shipping fee (*Id*.); and the means of acceptance (*Id*. at ¶ 131).[1] In short, it contained the material information necessary to complete the sale. Indeed, there can be no better indicator that the offer meets the *Axelson* test set forth above—that the bargain can be concluded merely by saying "we accept"—than the clickable link at the bottom of the email sent to the

[1] Daniel Defense's current website—which Daniel Defense cites to at Opp'n at 5 n.5—contains even more specific pricing terms within the shopping cart: the delivery location, the shipping method, the payment method, and the payment address. Such terms, assuming they were present at the time of the offer to Ramos, will provide even more compelling proof that this was a detailed price quotation constituting an offer.

shooter, Salvador Ramos, by Daniel Defense, which "allow[ed] him to complete the purchase with one click." SAC ¶ 131.

Texas law makes clear that such detailed price quotations—which constitute offers—are distinct from advertisements. Where advertisements address "the public at large," offers to sell "contemplate[] specific, individual transactions between private parties." *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 237 (Tex. App. 1993). An advertisement to "the public at large" typically includes only the item and perhaps the price. *See id.* In contrast, Daniel Defense's cart and email included the myriad other "specific, individual" details applicable only to that single transaction: the purchaser's name and email, quantity, taxes, shipping fee, and means of acceptance. SAC ¶¶ 127-131. Plaintiffs do not claim that the advertisements of inventory and prices to the general public on Daniel Defense's website constitute offers. However, the detailed price quotation it made to Ramos certainly did. And Daniel Defense fails to offer any substantive argument as to why the subsequent email that "circle[s] back around" to remind Ramos that the gun is "ready" in his cart does not constitute a second offer. Opp'n at 4. Indeed, the use of the word "ready" and the fact that the offer was sent directly and solely to Ramos only underline the fact that the offer was capable of immediate acceptance.

b. Plaintiffs Properly Allege That Daniel Defense's Offers to Sell Were "Knowing and Intentional"

Daniel Defense is incorrect in its assertion that "Plaintiffs allege no facts to show that Daniel Defense plausibly knew the Assailant's age when it sent the April 29, 2022, email." Opp'n at 5. In fact, Plaintiffs allege all of the following:

- Instagram, Facebook, YouTube, and other social media companies require users to input their ages in order to create accounts or use certain features. SAC ¶ 134. Ramos maintained accounts with one or more of these companies. *Id.* Upon information and belief, one or more of these companies possessed data showing that Ramos was under eighteen years of age. *Id.*

- Daniel Defense admits on its website to collecting individual data on its visitors. *Id.* ¶ 135. It collects this data through cookies, and, upon information and belief, through information provided by or available to them from one or more social media companies or other advertisers, and by other means of data collection. *Id.*
- Upon information and belief, the data collected by Daniel Defense includes the age of some specific users of its website, including the age of Ramos. *Id*. ¶ 136.
- In the alternative, Daniel Defense, knowing there was a high likelihood if not certainty that a substantial number of individuals browsing its website would be minors, consciously avoided knowing or learning which of its customers, including Ramos, were underage. *Id*. ¶ 137. Daniel Defense actively marketed its weapons to adolescents through targeting them on social media and through connections with video games, among other methods. *Id*. ¶ 120. And then instead of verifying the age of every customer before offering to sell them a firearm, Daniel Defense decided to set up its website in a manner that intentionally did not ask its customers' ages—much less ask for proof of age—before offering to sell them a firearm. *Id*. ¶ 137. In other words, it made a deliberate choice to remain ignorant of a fact—age—that is determinative of whether the offer to sell is legal. *Id*.

While some of these facts are alleged on information and belief—a perfectly sufficient standard, as discussed below—others are alleged directly. Taken individually or in combination, these allegations are more than sufficient to plausibly allege that Daniel Defense knew Ramos's age when it made the illegal offers to sell.

That some (but not all) of these allegations are made "on information and belief" does not mean the Court should discard them. In the Fifth Circuit, "upon information and belief" pleading satisfies Rule 12(b)(6) where the facts are "in the control and possession of a defendant" *or* "where the belief is based on factual information that makes the inference of culpability plausible." *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 730 (5th Cir. 2018) (citation omitted). Here, the Complaint uses "upon information and belief" exactly as the Fifth Circuit has authorized: it alleges facts in the control and possession of Daniel Defense—its knowledge of Ramos's age or its intent to make an offer to him while underage—*and* its allegations are based on known facts that make the inference plausible. Specifically, the "information and belief" allegations are a logical inference based on the fact that: 1) Ramos had

social media accounts, 2) social media companies require users to input their ages in order to create accounts, 3) social media sites that Ramos used collect and share data on age with customers including Daniel Defense, and 4) Daniel Defense admits on its website to collecting individual data on its visitors, including through cookies. *See* SAC ¶¶ 134-35. These facts lead to the logical inference that Daniel Defense—through social media partnerships and/or its own data collection—knew Ramos's age and/or intentionally made him an offer while underage. In short, while the Plaintiffs' allegations need satisfy only one of the *Innova* requirements in order to proceed "upon information and belief," they in fact satisfy both.[2]

Finally, Daniel Defense fails to dispute that Plaintiffs adequately allege that it, alternatively, consciously avoided knowing the age of its offerees. SAC ¶ 137. Under the well-established doctrine of "deliberate ignorance," this "charade of ignorance" can be "circumstantial proof of guilty knowledge." *United States v. Lee*, 966 F.3d 310, 323 (5th Cir. 2020) (cleaned up); *see also United States v. Brown*, 354 F. App'x 216, 221 (5th Cir. 2009). This provides an additional and independently sufficient basis to find Plaintiffs have adequately alleged a knowing violation.

c. Plaintiffs Pleaded Facts Sufficient to Show Proximate Cause

As Plaintiffs previously argued, "[b]reach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable." *Stanfield v. Neubaum*, 494

[2] In a footnote to its "knowledge" argument, Daniel Defense states that "The Terms and Conditions on Daniel Defense's website explain that for the sale of any firearm, the purchaser must be of legal age and must present a valid government identification document when the purchaser personally receives the firearm from a Federal Firearms Licensee." Opp'n at 5 n.5. While these are the current terms and conditions, Daniel Defense makes no representation that these were the terms and conditions at the time of the offer. *Id*. In any event, this statement serves only as further evidence that Daniel Defense understood the age restrictions on selling and offering to sell guns to minors; it does nothing to negate Daniel Defense's actual knowledge of the Ramos's age or its willful blindness to knowing that information.

S.W.3d 90, 97 (Tex. 2016). Cause in fact requires that the negligent conduct "was a substantial factor in bringing about the harm at issue" and that the conduct was a "but for" factual cause. *Id*.

Under Texas law, proximate cause is decided as a legal rather than factual matter in only the rarest of cases. *Texas Dep't of Transp. v. Olson*, 980 S.W.2d 890, 893 (Tex. App. 1998) ("The question of proximate cause is one of fact particularly within the province of a jury."). "Because proximate cause is ultimately a question for a fact-finder, we need only determine whether the petition 'creates a fact question' regarding the causal relationship between [defendant's] conduct and the alleged injuries." *Ryder Integrated Logistics, Inc. v. Fayette Cnty*., 453 S.W.3d 922, 929 (Tex. 2015) (citation omitted). *See also Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 786 (N.Y. Sup. Ct. 2014) (rejecting motion to dismiss for lack of proximate cause in a case concerning PLCAA's predicate exception because "[w]ithout the benefit of discovery, this Court is not convinced that it can be definitively stated that all of these federal laws do not apply, or were not related to [the shooter's] ambush. Proximate cause is normally a question of fact for a jury.").

In this case, Plaintiffs "create a fact question" by alleging numerous facts showing that Daniel Defense's underage offers to Ramos were integral to a chain of events leading to the purchase and the shooting. For example, Plaintiffs allege that "the risk of these catastrophic harms occurring would have been lessened if Daniel Defense had not aggressively courted Ramos when he was a minor" and that "Daniel Defense's pursuit of Ramos when he was seventeen contributed to the shooting." SAC ¶ 144. Plaintiffs point out that "[l]ess than one month after Daniel Defense offered to sell the DDM4 V7 rifle to Ramos, he used this same Daniel Defense rifle in the mass shooting in Uvalde," and allege that "Ramos's purchase and illegal use of the Daniel Defense DDM4 V7 was a direct result and foreseeable consequence of the way the company offered to sell its AR-15-style rifles to this underage user." SAC ¶ 315. Plaintiffs allege that Ramos's purchase

of the "especially lethal and destructive Daniel Defense DDM4 V7 rifle to carry out the massacre" was "influenced by Daniel Defense's offer to sell" when he was still a minor, and that this offer to sell resulted in "a more lethal attack, more carnage, and greater pain and suffering." SAC ¶ 316.

These specific allegations are more than sufficient to sustain a claim that Daniel Defense's illegal outreach to the underage Ramos was one proximate cause of Plaintiffs' suffering.[3] Daniel Defense's claim that "Plaintiffs offer a sole, conclusory allegation that the 'offers' [in violation of Texas Penal Code Section 46.06(a)(2)] caused their harm" is false. *See* Opp'n at 7-8. And unlike the cases cited by Daniel Defense (Opp'n at 6-7),[4] Plaintiffs here allege a detailed chain of facts relating to underage marketing and offers, more than sufficient to "create a fact question" as to whether those offers were one proximate cause of the devastation wreaked by Ramos, and thus more than sufficient to survive the standard of a motion to dismiss.

d. Plaintiffs' Other Allegations Do Not "Negate" Proximate Cause

[3] These allegations—that the offers had a meaningful impact on the underage Ramos and were integral to the series of actions culminating in the shooting—are reinforced by the allegations in paragraphs 78-87 of the second amended complaint. Those paragraphs discuss, in great detail, the pliability of an adolescent mind, and the degree to which it can be influenced by negligent conduct like Daniel Defense's illegal offer to sell. *See* SAC ¶¶ 78-87.

[4] In *Prescott v. Slide Fire Sols., LP*, the plaintiffs were required to show that a false statement by the defendant was a proximate cause of ATF's determination that a bump stock is not a regulated firearm. 341 F. Supp. 3d 1175, 1191 (D. Nev. 2018). But because the plaintiffs did "not come forward with any authority" supporting that causation, the court held that the false statement was "not a factor in the ATF's finding," and that therefore "Plaintiffs cannot show that Slide Fire's misrepresentation proximately caused the injuries that are the subject of this case." *Id*. In *Miller v. Salvaggio*, the plaintiff made only "conclusory allegations" that amounted to little more than repeating the elements of the violation. No. SA-20-CV-00642-JKP, 2022 WL 1050314, at *4 (W.D. Tex. Apr. 7, 2022). *Rodriguez v. Xerox Bus. Servs., LLC* falls into the category of cases in which "the defendant's negligence did no more than furnish a condition which made the injury possible," ruling out proximate cause. No. EP-16-CV-00041-FM, 2017 WL 3023213, at *4 (W.D. Tex. Mar. 27, 2017). And in *Linke United States Bratcher v. United States*, the proximate cause allegations consisted only of "bare assertions and conclusory allegations." No. W-14-CV-444, 2015 WL 12743613, at *4 (W.D. Tex. June 2, 2015).

Daniel Defense conflates evidence of *multiple* proximate causes with evidence that *negates* proximate cause. Texas law recognizes that injuries may have more than one proximate cause. *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001) ("More than one act may be the proximate cause of the same injury."); *see also* Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation, at PJC 2.4 (2020 Ed.) ("[t]here may be more than one proximate cause of" an injury). Under PLCAA's predicate exception, too, the predicate violation need only be "a"—not "the only"—proximate cause of the harm. 15 U.S.C. § 7903(5)(A)(iii). Those multiple proximate causes do not cancel out or negate each other; they can both state viable PLCAA predicate violations.

Here, the second amended complaint alleges multiple proximate causes, all of which joined together to cause the shooting to happen in the way it did, at the time it did, with the devastation it did. This theory of liability has ample precedent under Texas negligence law. *Lee Lewis*, 70 S.W.3d at 784. One illustrative example is in asbestos cases, where the court makes clear that, where a plaintiff was exposed to multiple toxins over multiple years, they need not prove exactly which exposure, at which moment, caused their disease. *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 350 (Tex. 2014) ("in multiple-exposure cases few if any plaintiffs could ever establish which particular fibers from which particular defendant caused the disease, and we do not believe the plaintiff should be required to quantify the exposure from every other conceivable source, occurring perhaps over a period of decades"). Instead, the correct question is whether any given toxic exposure constituted a "substantial factor" in the plaintiff's injuries. *Id*. at 342. *See also Ashton v. Knight Transp., Inc.*, No. 09-CV-0759-B, 2010 WL 3703985, at *4 (N.D. Tex. Sept. 20, 2010) (finding that estate of victim who was hit by two separate cars did not have to prove which car killed him—either constituted a proximate cause); *Martinez v. Porta*, 598 F.Supp.2d, 807, 816

(N.D. Tex. 2009) (holding that negligence by multiple medical professionals could be separate proximate causes of harm). Here, Daniel Defense's irresponsible marketing encouraging unlawful use of their weapons *and* their illegal offers to an underage Ramos were substantial causes of the harm. SAC ¶¶ 102-19, 140-44.

Instead of addressing the pertinent category of multiple proximate causes, Daniel Defense instead tries to contort Plaintiffs' claim into a narrower, rarer, and inapplicable category: the small category of cases where the face of a complaint actively negates proximate cause. Opp'n at 8-12. The case relied on most heavily by Daniel Defense for this theory, *Bonin v. Sabine River Auth. of Texas*,[5] doesn't even address negation of proximate cause. That case, as noted in Daniel Defense's brief, turns on the issue of whether surface waters or floodwaters caused damage to the plaintiffs, when only the former was actionable. *Id*. at *6. The magistrate judge found that the claim failed because the plaintiffs "have not made *any* allegations in the operative complaint that surface waters caused any harm to the Plaintiffs." *Id*. at *7. In other words, the failure was not that proximate cause was negated; it was that no actionable injury was alleged in the first place. *Id*. That distinguishes it sharply from the case here, where, as discussed above, Plaintiffs make a clear showing of the harms caused by Daniel Defense's illegal offer to sell a weapon to a minor.[6]

---

[5] *See* No. 17-CV-00134-TH, 2019 WL 1246259 (E.D. Tex. Mar. 1, 2019), *report and recommendation adopted*, No. 17-CV-00134-TH, 2019 WL 1244705 (E.D. Tex. Mar. 18, 2019), *aff'd sub nom. Bonin v. Sabine River Auth. of Louisiana*, 961 F.3d 381 (5th Cir. 2020).

[6] Not a single other case Daniel Defense cites for this "negation" point has anything to do with proximate cause. Daniel Defense relies on an unpublished, one-page magistrate's recommendation that *grants* leave to amend in a patent-infringement case, *Long Range Sys., Inc. v. NTN Wireless Communications, Inc.*, No. 3-03-CV-0598-L, 2003 WL 21283194, at *1 (N.D. Tex. May 28, 2003); a case that addresses statute-of-limitations issues, *Thornton v. Ditech Fin. LLC*, No. 18-CV-156, 2018 WL 4408979, at *3 (S.D. Tex. Sept. 17, 2018); and a case about First Amendment retaliation, *Britt v. Nueces Cnty.*, No. 23-CV-00319, 2024 WL 346525 (S.D. Tex. Jan. 30, 2024). The only case that has even partial relevance is *Britt*, in which the court found that the plaintiff's basis for First Amendment protection, which relied on her job description, was actively negated by a contradictory description of her job elsewhere in the complaint. *Id*. at *2-3. First Amendment

Even leaving aside the lack of precedential authority, Daniel Defense's argument does not survive as a matter of logic. The fact that Ramos may have decided to use a Daniel Defense weapon prior to the illegal offers to sell in no way negates those offers as another substantial cause of harm: the well-pleaded allegations in the proposed second amended complaint support the reasonable inferences that those illegal offers to sell when he was a minor enticed and encouraged him to follow through on his plan, made it easy for him to purchase the weapon immediately upon turning 18, and therefore increased the likelihood that the shooting would occur when and how it did. These are the logical and reasonable inferences from what Plaintiffs have alleged, and thus proximate cause is satisfied at this early pleading stage. *See Rodriguez v. Moerbe*, 963 S.W.2d 808, 819 (Tex. App. 1998) ("The general rule that the question of proximate cause is for the jury has been applied where the injury was the result of concurring [i.e. multiple] causes."). And the arguments that this particular weapon would have been purchased at the same time regardless of the illegal offers to sell, and that the shooting would have occurred anyway and would have played out in the same manner with the same death and injury toll, are both speculative and arguments that Daniel Defense can make to a jury; they provide no basis for dismissing at the pleading stage.

e. Section 46.06(a)(2) Is a Valid Predicate Statute Under PLCAA

Congress wrote the predicate exception broadly, allowing any law that is "applicable to the sale or marketing" of a firearm to qualify. And indeed, courts have permitted all manner of laws to serve as predicates, including non-firearms-specific laws such as unfair trade practices laws, *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 308, 321 (Conn. 2019); *Prescott v. Slide*

protection is an either-or proposition; plaintiff's job description either qualified her for it or didn't. *Id*. This is an entirely different analysis from causation, where, as discussed above, events can and often do have multiple proximate causes.

Fire Solutions, LP, 410 F. Supp. 3d 1123, 1138-39 (D. Nev. 2019), and state false advertising and deceptive practices acts.

But the types of statutes that most clearly and obviously qualify as predicates are statutes like the one at issue in this case, which directly and expressly regulate firearms. *See Nat'l Shooting Sports Found. Inc. v. James*, 604 F. Supp. 3d 48, 59 (N.D.N.Y. 2022) ("No reasonable interpretation of 'applicable to' can exclude a statute which imposes liability exclusively on gun manufacturers for the manner in which guns are manufactured, marketed, and sold."). *King v. Klocek* serves as a helpful example. 187 A.D.3d 1614 (N.Y. App. Div. 2020). In that case, the court permitted as a predicate a state statute that "prohibit[ed] the sale of ammunition 'designed exclusively for use in a pistol or revolver' to anyone not authorized to possess a pistol or revolver." *Id.* at 1615 (quoting N.Y. Penal Law § 270.00(5)). The court held that "Plaintiffs' allegations, if true, establish that defendant committed a predicate offense." *Id*. Uniformly, courts around the country have reached the same conclusion—violations of state laws specifically applicable to the sale and marketing of firearms, like Section 46.06(a)(2)—qualify as PLCAA predicate violations.[7]

[7] *See Englund v. World Pawn Exch.,* No. 16CV00598, 2017 WL 7518923, at *5-6 (Or. Cir. Ct. June 30, 2017) (permitting as PLCAA predicates state laws prohibiting providing false information in connection with a transfer of a firearm and improperly transferring a firearm); *Brady v. Walmart Inc.*, No. 21-CV-1412-AAQ, 2022 WL 2987078, at *6 (D. Md. July 28, 2022) (permitting as a PLCAA predicate a state statute that prohibits the possession of a rifle or shotgun by a person suffering from a mental disorder); *Jones v. MEAN LLC*, Index No. 810316/2023, Decision & Order at 3-5 (N.Y. Sup. Ct. Mar. 7, 2024) (permitting as a PLCAA predicate a statute prohibiting the sale of assault weapons), available at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=AMNZEVc3l0aG42C7OPJVtA==. *See also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) (concluding that examples indicate congressional intent to encompass "statutes that clearly can be said to regulate the firearms industry"); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 & n.12 (Ind. Ct. App. 2007) ("the predicate exception is unambiguous" in its inclusion of any state or federal statute applicable to the sale or marketing of firearms).

Daniel Defense argues that because one of PLCAA's two predicate examples references two subsections of Section 922 of the Gun Control Act, no other provisions of the Gun Control Act may serve as a predicate. Opp'n at 12-14. This is both wrong and irrelevant. It is wrong because—as noted above—there is no debate that a traditional state (or federal) statute expressly applicable to the sale or marketing of firearms can serve as a predicate statute. This includes other provisions of the Gun Control Act apart from the two predicate examples. *See, e.g.*, *Chiapperini*, 13 N.Y.S.3d at 786-87 (permitting as a predicate multiple provisions of the Gun Control Act, including ones not specifically enumerated in PLCAA's predicate exception); *Englund*, 2017 WL 7518923, at *5-6 (same). And it is irrelevant because Plaintiffs do not allege a violation of the Gun Control Act or attempt to use the Gun Control Act as a predicate. The two predicates alleged in this case are violations of the Federal Trade Commission Act ("FTC Act"), which prohibits unfair and deceptive marketing practices, and Section 46.06(a)(2). SAC ¶¶ 302-13. Thus, the question of whether a separate provision of the Gun Control Act could serve as a predicate is beside the point.

Moreover, the provision of the Gun Control Act cited by Daniel Defense is not even substantively the same as either predicate in this case. The provision Daniel Defense raises, 18 U.S.C. § 922(b), prohibits sales to minors, but it does not prohibit *offers* to sell, which is the violation of Section 46.06(a)(2) alleged by Plaintiffs. In other words, the conduct at issue here is not addressed by the Gun Control Act. So even if the only provisions of the Gun Control Act that could serve as predicates were 18 U.S.C. § 922(g) or (n)—which is not the case—and even if Plaintiffs had alleged a violation of § 922(b)—which they did not—and even if provisions that

were substantially similar to § 922(b) were also excluded as predicates—which they are not—that would still not invalidate Plaintiffs' use of the FTC Act or Section 46.06(a)(2) as valid predicates.[8]

3. Section 46.06(a)(2) of the Texas Penal Code Is Sufficient to Support a Negligence Per Se Claim

a. Daniel Defense's Violation of 46.06(a)(2) Was a Proximate Cause of Plaintiffs' Injuries

To hold a defendant liable for negligence per se under Texas law, a plaintiff must establish that "such negligence was a proximate cause" of the plaintiff's injuries. *Missouri Pac. R. Co. v. Am. Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). The standard is the same whether a plaintiff alleges "negligence per se or common negligence." *Id.* In the section of its opposition brief that addresses Plaintiffs' new negligence per se claim, Daniel Defense makes the same two arguments about proximate cause that it made in the context of the PLCAA predicate exception. Opp'n at 14-15. As explained *supra* at 7-12, both arguments miss the mark.

b. Daniel Defense's Attempt to Add an Additional Threshold Requirement to a Negligence Per Se Claim Should Be Rejected

Under Texas law, a court assessing a negligence per se claim must make two threshold determinations: (1) whether the statute that the defendant violated was enacted "to protect the class of persons to which the injured party belongs," and (2) whether the statute was enacted to protect "'against the hazard involved in the particular case.'" *Praesel v. Johnson*, 967 S.W.2d 391, 395

[8] As a final note, Daniel Defense's argument here contradicts its own prior argument in its motion to dismiss. There, Daniel Defense *conceded* that the two predicates listed in the text of PLCAA are merely "examples," and that PLCAA's predicate exception also "applies to statutes that specifically regulate the sale and marketing of firearms." ECF No. 35-1 at 11 (emphasis omitted). While Daniel Defense's use of the word "specifically" there is too narrow, as explained in Plaintiffs' earlier briefing, it at least acknowledges what is plain to see: PLCAA's predicate exception clearly reaches Section 46.06(a)(2), which does "specifically" regulate the sale and marketing of firearms.

(Tex. 1998) (quoting *Parrott v. Garcia*, 436 S.W.2d 897, 899 (Tex. 1969)). In its brief, Daniel Defense does not dispute that Plaintiffs meet these prerequisites with respect to Section 46.06(a)(2). Rather, Daniel Defense attempts to add a third requirement: that courts have *already* deemed the statute to support a negligence per se claim. Opp'n at 15-16. This argument, recycled from Daniel Defense's Motion to Dismiss, misconstrues Texas law and defies common sense.

Daniel Defense's argument relies on a brief discussion of negligence per se in *Allison v. J.P. Morgan Chase Bank, N.A.*, No. 11-CV-342, 2012 WL 4633177 (E.D. Tex. Oct. 2, 2012). Plaintiffs in that case did not "factually allege the violation of a specific statute," rendering their negligence per se claim obviously untenable: since negligence per se uses a statutory standard of conduct to define a legal duty, a plaintiff must allege that the defendant violated a specific statute. *Id.* at *14; *see Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979) ("the only inquiry for the jury is whether or not the defendant violated the statute"). The other authorities that Daniel Defense cites in support of its purported new rule are similar: in each case, the court specifically notes that plaintiffs failed to plead a statutory violation. *See* ECF No. 63-1 at 30-31.

Plaintiffs here, by contrast, have clearly alleged a violation of Section 46.06(a)(2), as Daniel Defense concedes. *See* SAC ¶¶ 319-32; Opp'n at 16 ("Plaintiffs allege Daniel Defense violated Section 46.06(a)(2)."). Rather, Daniel Defense attempts to rely on the *Allison* court's passing observation that the plaintiffs in that case also failed to "state how courts have determined that statute to establish negligence per se." Opp'n at 15-16 (quoting *Allison*, 2012 WL 4633177, at *14). But this half-sentence cannot support the weight that Daniel Defense attempts to place on it, and this Court should reject Daniel Defense's attempts to use it as the foundation for a new rule. Such a rule would have absurd consequences, ensuring that "no court could ever hold that a new statute created a standard of conduct[.]" ECF No. 63-1 at 30.

Moreover, Daniel Defense's cherry-picked dicta are at odds with the practice of courts in the Fifth Circuit applying Texas law, which routinely consider negligence per se claims without demanding a threshold showing that a Texas court has already found a violation of the relevant statute to be negligence per se. *See, e.g.*, *Gunstream Land Corp. v. Hansen*, No. 21-CV-00451, 2023 WL 9503414, at *3 (E.D. Tex. Dec. 20, 2023) (granting plaintiffs summary judgment on negligence per se claim without requiring a prior holding that a violation of the statute at issue constitutes negligence per se); *Hawkins v. Nexion Health Mgmt., Inc.*, No. 13-CV-121, 2015 WL 2395765, at *16 (E.D. Tex. May 19, 2015) (denying defendants' motion for summary judgment on negligence per se even though "[t]he parties did not cite, nor did the Court find, a meaningful Texas case" holding that a violation of the regulations at issue constitutes negligence per se).

c. Plaintiffs' Negligence Per Se Claim Is Grounded in Texas Common Law

Daniel Defense also asserts that Plaintiffs' negligence per se claim is unsupported by a common law duty, again recycling an argument from its Motion to Dismiss. Yet Daniel Defense's generic statement that "[t]here is no common law duty to protect others from criminal acts of third parties" oversimplifies and misstates Texas law. Opp'n at 19; *see also* ECF No. 63-1 at 35 (explaining why Daniel Defense's theory is mistaken). And contrary to Daniel Defense's unsupported suggestion, there *is* support in Texas law for the existence of a "common law duty in connection with . . . offers to sell a firearm." *See* Opp'n at 19.

To begin, Daniel Defense's claim that "negligence per se does not create a duty" is flatly incorrect. *See Id.* at 17. Under Texas tort law, there is no rule that a statute cannot provide a duty of care to victims harmed by third-party criminals. Indeed, in *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 547-51 (Tex. 1985), the Supreme Court of Texas held that an ordinance regulating a building owner's obligations for securing vacant property created such a duty. The

court held that the plaintiff, whose child had been raped by a criminal in a vacant apartment, could bring a negligence per se action against the property owner, concluding that "the question of what duty [the property owner] owed to [the child] is answered by the ordinance." *Id*. at 549.

Daniel Defense similarly mischaracterizes Texas law regarding the duty to prevent harms arising from third-party criminal conduct. "[D]uty is the function of several interrelated factors, the foremost and dominant consideration being foreseeability of the risk." *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987) (citations omitted), *superseded by statute*, Tex. Alco. Bev. Code § 2.03 (1987). As the *El Chico* court recognized, the fact that the relevant risk involves the actions of a third party does not preclude the existence of a duty. *See id*. at 312 ("[T]he duty to refrain" from serving alcohol to an intoxicated person "is the same whether the foreseeable injury involves the drunkard himself or a third party who may be placed in peril because of the drunkard's condition[.]"). To the contrary, when a third party's criminal conduct is a foreseeable result of a defendant's negligence, the defendant may be liable to those harmed by that conduct. *See Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) ("[T]he actor's negligence is not superseded and will not be excused when the criminal conduct is a foreseeable result of such negligence."); *see also* Restatement (Second) of Torts § 448 (1965). This common-law duty to exercise basic care to prevent foreseeable criminal conduct—in this case, the misuse of a firearm by a disaffected teenager—forms the foundation for the standard of conduct articulated in Section 46.06(a)(2).

In an attempt to escape this well-established principle of Texas tort law, Daniel Defense points to two cases that rejected a negligence per se theory when there was no analogous common-law duty. Opp'n at 17-19. Yet both cases are distinguishable from Plaintiffs'. *Perry v. S.N.* was a case about reporting child sexual abuse; the court was not asked to create a "new common law duty to report it or take other protective action," and the court did not find an existing common-

law duty corresponding to the statute. 973 S.W.2d 301, 306 (Tex. 1998). Daniel Defense's other principal case, *Holcombe v. United States*, is also about reporting duties. 388 F. Supp. 3d 777, 784-85 (W.D. Tex. 2019). There, victims of the Sutherland Springs mass shooting alleged that the Air Force failed to fulfill its reporting requirements under the Brady Act, which, had it done so, would have precluded the shooter from getting a weapon. *Id*. The Court held there was no analogous common-law duty to report, and dismissed the negligence per se claim, but permitted a negligent undertaking claim to go forward, and that claim was ultimately successful at trial. *Id*. at 802-03.

In contrast to *Perry* and *Holcombe*, which attempted to hold defendants liable for inaction, Plaintiffs here allege that Daniel Defense actively offered to sell the DDM4 V7 to the underage Ramos in violation of Section 46.06(a)(2). SAC ¶¶ 126-139. Tort law holds defendants liable when their "affirmative conduct has greatly increased the risk of harm to the plaintiff through the criminal acts of others." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 5.33 (5th ed. 1984). Selling a weapon to an underage user creates a greatly heightened risk—and Texas courts have implicitly recognized as much. For example, in *Wal-Mart Stores, Inc. v. Tamez*, the plaintiff alleged that Wal-Mart sold handgun ammunition to an underage purchaser in violation of 18 U.S.C. § 922(b)(1), a federal law that prohibits some of the same conduct outlawed by Section 46.06(a)(2). 960 S.W.2d 125, 128 (Tex. App. 1997); *see* 18 U.S.C. § 922(b)(1) (prohibiting the sale of "any firearm or ammunition to any individual who [a] licensee knows or has reasonable cause to believe is less than eighteen years of age[.]") The Texas Court of Appeals immediately recognized that "[i]n Texas, a violation of this provision may constitute negligence per se." *Tamez*, 960 S.W.2d at 128 (citing *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 844 (Tex. App. 1989) and *Ellsworth v. Bishop Jewelry & Loan Co.*, 742 S.W.2d 533, 535 (Tex. App. 1987)). The court ultimately concluded that Wal-Mart met its statutory obligations, but never questioned

that if Wal-Mart *had* violated § 922(b), it would have breached a duty to the victim of the shooter to whom it sold the ammunition. *Id.* at 128-30 (agreeing with defendant that "Wal-Mart . . . did not owe any duty to [the victim] *because its sale of the ammunition to [the shooter] was in compliance with the federal statute*") (emphasis added).

Perhaps in an effort to avoid this obvious conclusion, Daniel Defense asserts that there is no common-law duty "in connection with *mere offers* to sell a firearm." Opp'n at 19 (emphasis added). But Daniel Defense's duty to Plaintiffs stemmed from the fact that Ramos's violent acts were the "foreseeable result" of putting a deadly weapon in the hands of a teenager. *Travis*, 830 S.W.2d at 98. Offers to sell are often integral to actual sales, and by prohibiting offers to sell firearms to those under 18, Section 46.06(a)(2) sets a standard of care designed to prevent actions that may foreseeably lead to tragic consequences. When Daniel Defense offered to sell Ramos a DDM4 V7, knowing or willfully avoiding the knowledge that he was underage, it failed to meet that statutory standard—and breached the fundamental common law duty on which it rests.

4. The First Amendment Does Not Apply to Plaintiffs' Claims, Which Allege That Daniel Defense Proposed an Illegal Transaction and Encouraged Unlawful Conduct

It is black-letter law that "commercial speech that proposes an illegal transaction or that promotes or encourages an unlawful activity does not enjoy the protection of the [F]irst [A]mendment." *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 311 n.56 (Conn. 2019) (citing *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 496 (1982); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 388-89 (1973)). The United States Supreme Court has been clear in excluding "advertising of illegal activity from the protection" of the First Amendment. *Dunagin v. City of Oxford*, 718 F.2d 738, 742 (5th Cir. 1983) (citing *Pittsburgh Press Co.*, 413 U.S. at 388-89).

As a threshold matter, "[a]lthough it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Daniel Defense has not met that burden, and it is flat wrong when it says, with no citation, that the burden is on Plaintiffs to demonstrate that the First Amendment does not apply. *See* Opp'n at 20. Here, Plaintiffs have two different negligence theories, only one of which is new in the proposed second amended complaint, and therefore only one of which should be considered as part of this motion. That said, both Daniel Defense's offer to sell the underaged Ramos a rifle and its advertising of the criminal misuse of its products are speech and conduct outside the reach of First Amendment protection.[9]

[9] Alternatively, while not necessary to resolve this motion, there is a strong argument that the First Amendment categorically does not apply to this negligence dispute. The Supreme Court has found that the First Amendment applies to a few categories of intentional torts, or torts that require at least recklessness, when they involve matters of public concern. *See* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 Tex. L. Rev. 813, 830-39 (2020), https://texaslawreview.org/first-amendment-imperialism-and-the-constitutionalization-of-tort-liability/ ("Neither existing First Amendment doctrine nor sensible constitutional policy supports extending free speech protection to torts that are accomplished through speech, except in extremely narrow circumstances."); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (defamation); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967) (false light); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 493 (1975) (invasion of privacy); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 n.3, 53 (1988) (IIED); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563-64 (1977) (misappropriation). So, for example, while the Supreme Court has found the First Amendment applies in certain instances of *intentional* infliction of emotional distress, it has never found an application in cases of *negligent* infliction of emotional distress. Finding the First Amendment applicable here would be a radical expansion of the doctrine. *See Doe v. Mckesson*, 71 F.4th 278, 299 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 913 (2024) ("The First Amendment allows Mckesson to be held liable for negligence if Doe proves that Mckesson's breach of duty caused Doe's injury.").

a. The First Amendment Does Not Apply to Plaintiffs' New Criminal Predicate Statute, Which Makes Offering to Sell a Firearm to a Minor Illegal

Plaintiffs' new proposed negligence theory involves Daniel Defense twice offering to sell the DDM4 V7 Rifle to an underage Ramos, in violation of Texas Penal Code Section 46.06(a)(2). SAC ¶¶ 121-22, 127-139. Speech integral to criminal conduct is categorically excluded from First Amendment coverage. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Daniel Defense's illegal offers to sell fit squarely in this uncovered category.

Fifth Circuit precedent supports this reading of the First Amendment. In *United States v. Daly*, the defendants were convicted of various crimes that resulted from their use of personal churches as a tax-avoidance scheme. 756 F.2d 1076, 1078 (5th Cir. 1985). One of the defendants claimed that "his advocacy of a tax scheme, whether legal or illegal, [was] protected by the First Amendment, because it did not incite *imminent* lawless action," a claim the Fifth Circuit found "preposterous." *Id.* at 1081. "These statutes punish actions, not speech. The Court has emphasized that an illegal course of conduct is not protected by the First Amendment merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.* at 1082 (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

The same conclusion follows here. Section 46.06 punishes the action of offering to sell a firearm to a minor, and the fact that that conduct was "in part initiated, evidenced, or carried out by means of language" does not afford it First Amendment protection. *Doe v. Mckesson*, 71 F.4th 278, 293 (5th Cir. 2023) ("It is well-established that expressive activity is not a defense to an individual's own unlawful conduct."), *cert. denied*, 144 S. Ct. 913 (2024).[10]

[10] Daniel Defense concedes that Section 46.06(a)(2) is a facially constitutional restriction on speech. Opp'n at 26. It goes on to make an as-applied argument as to 46.06(a)(2), but that argument falls apart due to its misreading of the statute—*i.e.*, its baseless argument that Section 46.06

Throughout its opposition brief, Daniel Defense appears to confuse Plaintiffs' claims about its advertisements with its claims about the two offers to sell the rifle and uses that conflation to argue that Section 46.06(a)(2) is unconstitutional as applied in this case. *See* Opp'n at 24-27. To be clear: Plaintiffs' claims about Daniel Defense's two illegal offers to sell to a minor—the personalized price quotation to Ramos's registered account on the Daniel Defense website, SAC ¶ 129, and the email he received two days later, listing the specific model of weapon and its price, and containing a link to return to his shopping cart to finish his purchase, SAC ¶ 131—are different from any of Daniel Defense's public advertisements and must be considered separately in the context of First Amendment arguments.

b. The First Amendment Does Not Apply to Plaintiffs' Claims Based on Daniel Defense Advertisements That Encourage the Criminal Misuse of Its Products

Plaintiffs' original negligence theory alleges that "[t]he company's marketing encouraged the illegal and dangerous misuse of its AR-15-style rifles by marketing them to the civilian purchasers, including via social media, with violent and militaristic imagery, unfairly and illegally implying that civilians can use their weapons for offensive combat-like missions" in violation of the FTC Act, 15 U.S.C. § 45(n). *Compare* FAC ¶¶ 230, 235, 246, ECF No. 26, *with* SAC ¶¶ 298, 303, 322. Hence, Plaintiffs have alleged that Daniel Defense's marketing promotes illegal activity, and therefore it is not protected by the First Amendment.[11]

---

prohibits only speech that proposes an *immediate* unlawful transfer of a firearm to a minor, which Plaintiffs addressed *supra* at 2-3.

[11] Plaintiffs' proposed second amended complaint contains two new advertisements. SAC ¶¶ 56, 77. However, Daniel Defense has made broad First Amendment arguments about all of its advertisements in Plaintiffs' complaint, arguments there were available to Daniel Defense when it submitted its motion to dismiss regarding the operative complaint. *See* Opp'n at 21-25, 29-31. Those arguments are therefore outside the scope of this motion by which Plaintiffs seek only to amend their complaint. *See* Civ. L.R. CV-7(D)(1) ("The response must contain a concise statement of the reasons for *opposition to the motion* and citations of the legal authorities on which the party relies.") (emphasis added). Accordingly, those arguments are waived with respect to the

As Plaintiffs argued above, "[i]t is well-established that expressive activity is not a defense to an individual's own unlawful conduct." *Mckesson*, 71 F.4th at 293. In *Mckesson*, the Fifth Circuit found that the plaintiff police officer, who was injured by a third party at a protest, could pursue a negligence claim against the organizer of the protest. *Id.* at 291. "*Claiborne* reaffirmed that the First Amendment does not prohibit States from imposing tort liability even if the tort occurs in the context of expressive activity. The conduct the State deems unlawful here—creating unreasonably dangerous conditions—is a quintessential tort." *Id.* at 291-92 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982)). "*Claiborne* required only that the tortfeasor's conduct be unlawful—that is, that is be conduct traditionally prohibited by tort law." *Mckesson*, 71 F.4th at 295 (citing *Claiborne*, 458 U.S. at 918, 926). The Fifth Circuit found that, in order to "impose liability that accords with the First Amendment," "all that is required is that the defendant violate independent state law, whose enforcement is itself consistent with *Claiborne* insofar as it targets wrongful conduct and not legitimate expressive conduct." *Mckesson*, 71 F.4th at 297.[12]

Daniel Defense does not grapple with Plaintiffs' argument that its advertisements promote illegal activity, and this is clear from its reliance on *Junior Sports Magazines, Inc. v. Bonta*, 80

---

advertisements in the operative complaint. But should the court choose to consider them, Daniel Defense's arguments still fail to establish that its advertisements are entitled to First Amendment protection.

[12] The Supreme Court has also made clear that "speech proposing an illegal transaction" is outside of the scope of the First Amendment. *Hoffman Estates*, 455 U.S. at 496. In finding an ordinance requiring businesses to obtain a license to sell items that are "designed or marketed for use with illegal cannabis or drugs" constitutional, the Court stated, "The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely." *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 563-64 (1980); *Pittsburgh Press Co.*, 413 U.S. at 388). Similarly, Plaintiffs here have alleged that Daniel Defense's marketing promotes the illegal misuse of its products. SAC ¶¶ 45, 54-65, 298, 303, 321-22.

F.4th 1109 (9th Cir. 2023). *See* Opp'n at 25-27, 30. In *Junior Sports*, the Ninth Circuit explicitly found that the law at issue regulated truthful advertisements related to *lawful* activity. 80 F.4th at 1113. *Junior Sports* concerned whether the State of California could ban a "truthful ad about firearms used legally by adults and minors—just because the ad 'reasonably appears to be attractive to minors.'" *Id. Junior Sports* is inapposite here, where the allegations center around marketing by Daniel Defense that promotes the *illegal* misuse of its product. In contrast to *Junior Sports*, where California's regulation was "not narrowly focused on speech encouraging minors to engage in unlawful uses of firearms," *id.* at 1120, Plaintiffs' claims are focused on marketing that promotes illegal use. Daniel Defense has posted thousands of advertisements on various online platforms that Plaintiffs are not challenging. But advertisements encouraging sniper missions on civilian streets, SAC ¶ 55, or hunting people, SAC ¶ 56, to highlight two examples, more than plausibly allege that Daniel Defense is being sued for promoting unlawful uses of its products and therefore is not entitled to First Amendment protection.

To be sure, Plaintiffs understand that Daniel Defense disagrees with Plaintiffs that its advertisements are promoting the criminal misuse of its products, but that is a *factual* disagreement, one that is not properly decided under a Rule 12(b)(6) standard. *Glenntex, Inc. v. Drennan Day Custom Homes, Inc.*, No. 18-CV-973-LY, 2019 WL 6251455, at *3 n.3 (W.D. Tex. Nov. 21, 2019) ("[T]his issue involves factual questions inappropriate for resolution at the motion-to-dismiss stage.") (citation omitted), *report and recommendation adopted*, No. 18-CV-973-LY, 2019 WL 13150084, at *1. (W.D. Tex. Dec. 11, 2019). Further, it is important to remember that, at this stage on a Rule 12(b)(6) standard, both Daniel Defense and the Court must accept Plaintiffs' theory of the case. *Mckesson*, 71 F. 4th at 295 n.9. This means ignoring Daniel Defense's attempt to turn this case into a referendum on the Second Amendment, which it emphatically is not. Opp'n

at 28-29 (disagreeing with Plaintiffs' theory of the case and arguing that "the true basis for liability is Daniel Defense's promotion of the ***idea*** that firearms—regardless of their style—are desirable and useful for self-defense and other lawful purposes, including to the military and law enforcement"). Rather, the Court must focus on Plaintiffs' allegations that the specific advertisements Plaintiffs have identified are illegal unfair marketing because they promote the criminal misuse of Daniel Defense's firearms, and that type of speech and conduct is clearly excluded from First Amendment protection.

c. Speech "Integral to Criminal Conduct" Fits in an Entirely Different Categorical Exception to First Amendment Protection from Incitement, so the Incitement Standard is Irrelevant

The Supreme Court has outlined the "historic and traditional categories" of speech that are outside of the First Amendment's coverage. *Alvarez*, 567 U.S. at 717. Two of these categories are incitement and speech integral to criminal conduct. *Id.* Here, Plaintiffs have pleaded two theories of negligence that fall outside of the First Amendment's scope: the offers to sell fit into the speech integral to criminal conduct exception, and the advertising promoting the unlawful misuse of products is wrongful conduct. *See supra* at 22-25 (citing *Mckesson*, 71 F.4th at 297 (finding in order to "impose liability that accords with the First Amendment," "all that is required is that the defendant violate independent state law, whose enforcement is itself consistent with *Claiborne* insofar as it targets wrongful conduct and not legitimate expressive conduct.")). *See, e.g.*, SAC ¶¶ 55, 56, 58, 65, 121-22, 127-139, 298, 303, 321-22. Because those categories of speech are outside the ambit of the First Amendment, the question of whether or not they fit into the incitement category is irrelevant. Opp'n at 20-24; *see also Mckesson*, 71 F.4th at 295 n.9 (finding Plaintiffs' theory of the case must be accepted when adjudicating a motion to dismiss).

Daniel Defense's only authority for the proposition that the commercial/non-commercial speech distinction does not matter is a Justice Thomas concurrence from *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580 (2001). *See* Opp'n at 21, 24. However, no other justice signed on to the opinion, and single-judge concurrences in cases where there is a majority opinion do not provide the controlling rule of law. *Ainsworth v. Moffett Engineering, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013). The other cases Daniel Defense cites do not support forcing an incitement theory on Plaintiffs here.[13]

Here, Plaintiffs allege that a foreseeable chain of events, set in motion by Daniel Defense, led to the shooting at Robb Elementary. SAC ¶¶ 7-12. Plaintiffs are not proceeding under an incitement theory, and Daniel Defense should not be permitted to argue that Plaintiffs were required to do so.

5. In the Alternative, if the Court Applies the First Amendment, Daniel Defense's Speech Is Commercial Speech Properly Subject to Litigation

If the Court finds that Daniel Defense's offers to sell and challenged advertising is not speech integral to wrongful conduct, and therefore excepted from First Amendment protection, the

[13] *See Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987) (noting that Plaintiffs chose to proceed to trial on an incitement theory); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (striking down challenged Ohio criminal law because it criminalized more than just conduct that incited imminent lawless action); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (same); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 926-28 (1982) (rejecting argument that speeches advocating for boycott that were not followed by any acts of violence constituted incitement); *Samuel v. Oromia Media Network*, 569 F. Supp. 3d 904, 910 (D. Minn. 2021), *aff'd*, No. 21-3776, 2022 WL 3134467 (8th Cir. Aug. 5, 2022) (rejecting pro se plaintiff's argument that his allegations about a news network's coverage constituted unprotected incitement); *James v. Meow Media, Inc.*, 300 F.3d 683, 698-99 (6th Cir. 2002) (explicitly not resolving First Amendment questions but finding plaintiff's theory that the challenged speech fit into the obscenity exception doubtful and *sua sponte* opining that the incitement exception would not fit, either); *Bible Believers v. Wayne Ctny.*, 805 F.3d 228, 234, 240-41, 246 (6th Cir. 2015) (finding police could not cite incitement exception to the First Amendment and holding police violated speakers' First Amendment rights by threatening arrest). None of these cases are analogous to Daniel Defense's attempt to apply a First-Amendment test to conduct outside the First Amendment.

Court should alternatively find that the speech is commercial speech and imposing liability here is consistent with the limited protection accorded such speech under the First Amendment.

"Although the Constitution protects commercial speech, that protection is more limited than for most other speech." *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Pro. Eng'rs & Surveyors*, 916 F.3d 483, 487 (5th Cir. 2019) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). The Supreme Court has focused on three factors in evaluating whether speech is commercial: whether the speech is an advertisement, whether it references a particular product, and whether there is an economic motivation underlying the speech. *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *see also Gibson v. Tex. Dep't of Ins.—Div. of Workers' Comp.*, 700 F.3d 227, 235 (5th Cir. 2012) (applying *Bolger* test). The Supreme Court has "made clear that advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Eastman Chem. Co. v. Plastipure, Inc.*, 775 F.3d 230, 237 (5th Cir. 2014) (quoting *Bolger*, 463 U.S. at 68).

The offer to sell clearly fits the definition of commercial speech: It is an advertisement that references a specific product, the DDM4 V7 rifle, and it unquestionably had an economic motivation, because the goal of sending the offer, each time, was to get Ramos to purchase the gun. *See* SAC ¶¶ 127-29, 131-32. Similarly, the print and online advertisements Plaintiffs have identified in their complaint as promoting the criminal misuse of firearms—*see, e.g.*, *Id.* ¶¶ 55-59—are advertisements, referencing a particular product, with an underlying economic motivation to sell Daniel Defense guns. *Id.* ¶¶ 53, 298. These advertisements are unlawful because they violate the FTC Act. *Id.* ¶¶ 302-03, 321-22.

a. Daniel Defense's Speech Concerning Unlawful Activity Does Not Receive First Amendment Protection Under *Central Hudson*

"For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." *Express Oil Change*, 916 F.3d at 487 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 566). This is the first factor of the *Central Hudson* test. *Rowell v. Paxton*, 336 F. Supp. 3d 724, 730 (W.D. Tex. 2018) (citing *Central Hudson*, 447 U.S. at 566). If the court finds that the speech does not concern lawful activity, then the analysis under *Central Hudson* ends, and there is no First Amendment protection for the speech.

The other three factors of the *Central Hudson* test are: "(2) whether the asserted governmental interest justifying the regulation is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is more extensive than necessary to serve that interest." *Rowell*, 336 F. Supp. 3d at 730 (citing *Central Hudson*, 447 U.S. at 566).[14]

Regarding the first factor, whether the speech concerns lawful activity, *Ford Motor Company v. Texas Department of Transportation* provides an analogous example. 106 F. Supp. 2d 905, 912 (W.D. Tex. 2000), *aff'd*, 264 F.3d 493 (5th Cir. 2001). The Texas Department of Transportation filed an administrative complaint against Ford for violating Texas Motor Vehicle Commission Code sections that prohibited selling vehicles to consumers online without a dealer's license (manufacturers were ineligible for a dealer's license). 106 F. Supp. 2d at 907-08. The district court found that the speech at issue in this case—"a manufacturer's advertisement of used motor vehicles for a price that is fixed by a manufacturer"—did not concern lawful activity and

[14] These factors, which all concern challenges to government regulations, underscore how the First Amendment does not fit this tort suit. *See supra* note 9.

was not entitled to First Amendment protection. *Id.* at 912. The Fifth Circuit affirmed the decision: "That advertisement, while of truthful facts, is part of an integrated course of conduct which violates Texas law—retailing motor vehicles without a license. Ford's speech does not concern a lawful activity and any restriction on Ford's commercial speech is only incidental to the State's prohibition on Ford's ability to retail motor vehicles." 264 F.3d at 507.

For all the reasons Plaintiffs articulated above, neither Daniel Defense's offers to sell the DDM4 V7 nor its advertisements promoting the unlawful misuse of its products concern lawful activity. These offers to a 17-year-old Ramos violate Section 46.06, which criminalizes offers to sell firearms to minors. SAC ¶ 139. Daniel Defense's advertisements promoting the criminal misuse of its products are unlawful because they violate the FTC Act. *Id.* ¶¶ 302-03, 321-22.

Junior Sports, which Daniel Defense cites in support of its arguments, Opp'n at 25-27, 30, in fact supports the opposite conclusion: advertisements that promote unlawful conduct are properly regulated under the First Amendment. *See Junior Sports*, 80 F.4th at 1116, 1120 (acknowledging speech concerning unlawful activity does *not* receive First Amendment protection and "emphasiz[ing] again that § 22949.80 is not limited to speech encouraging minors to illegally buy firearms") (emphasis added). Daniel Defense is attempting to have this Court rule in the abstract as to what extent the government can regulate gun advertisements with a "pro-Second Amendment viewpoint" that promote the "idea that firearms—regardless of their style—are desirable and useful for self-defense and other lawful purposes, including to the military and law enforcement." Opp'n at 28-29. But that *is not this case*. Plaintiffs, individual victims of the Robb Elementary mass shooting, have alleged that the advertisements promoted *un*lawful uses of firearms; to the extent Daniel Defense disagrees, that is a factual dispute not fit for resolution on a Rule 12(b)(6) standard.

Regarding the second factor, whether the asserted governmental interest justifying the regulation (lawsuit) is substantial, there can be no dispute—and Daniel Defense does not contest—that the government clearly has a substantial interest in preventing illegal firearms sales, and offers of illegal firearms sales, to minors, and that the government also has a substantial interest in preventing unfair trade practices that encourage the illegal and wrongful misuse of a product such as a firearm. As to the third and fourth factors, whether the regulation directly advances the governmental interest asserted, and whether the regulation is more extensive than necessary to serve that interest, this lawsuit, which seeks to hold Daniel Defense accountable for its illegal offers of sale and unfair marketing that promotes the criminal misuse of a product, does directly advance the governmental interests asserted. And finally, Plaintiffs have not blanketly sued Daniel Defense for all of its marketing or sales practices but rather have brought a narrowly tailored suit. In sum, Plaintiffs' claims easily pass the *Central Hudson* test.

b. The Fifth Circuit Recently Affirmed That the Strict Scrutiny Standard Applied to Content- and Viewpoint-Based Speech Does Not Apply to the Commercial Speech Analysis

Daniel Defense's arguments about content- and viewpoint-based discrimination fall apart for two reasons. *See* Opp'n at 27-31. First, and most importantly, the Fifth Circuit recently rejected an attempt to insert strict scrutiny into the commercial speech analysis. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 279-84 (5th Cir. 2024), *cert. granted*, No. 23-1122, 2024 WL 3259690 (U.S. July 2, 2024). *Free Speech Coalition* concerned, in part, regulations on advertisements for websites that publish sexual material harmful to minors. 95 F.4th at 267. The Fifth Circuit rejected the plaintiffs' attempts to have strict scrutiny apply. *Id.* at 279-81. The Court instead applied *Central Hudson*'s intermediate scrutiny standard. *Id.* at 283-84. The Court should disregard Daniel

Defense's out-of-circuit citations regarding the proper level of scrutiny afforded to commercial speech, Opp'n at 28, because they conflict with the law of this Circuit.

Second, on a Rule 12(b)(6) standard, this Court need not and should not dive into any First Amendment issues that turn on disputed factual questions. *See Tex. v. Grundstrom*, 404 F.2d 644, 648 (5th Cir. 1968) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.") (citation omitted). To find that Daniel Defense's illegal offers to sell a firearm to a minor and advertisements promoting the illegal misuse of its products are not 1) speech integral to criminal conduct; 2) speech concerning unlawful and wrongful activity; or 3) advertisements referencing a particular product with an underlying economic motivation would be to disregard Plaintiffs' well-pleaded allegations in this case and Plaintiffs' theory of the case, all of which must accepted at this early stage.

For all of these reasons, the Court should find that the First Amendment is not a bar to Plaintiffs' amended complaint or to either of Plaintiffs' theories of negligence.

CONCLUSION

For the foregoing reasons and those set out in Plaintiffs' moving papers, the Court should grant Plaintiffs' Motion to Amend the Complaint.

Respectfully submitted,

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

LAW OFFICES OF BLAS DELGADO, P.C.
Blas H. Delgado
2806 Fredericksburg Rd., Ste. 116
San Antonio, TX 78201
210-227-4186
delgadoblas@yahoo.com

EVERYTOWN LAW
Eric Tirschwell (*pro hac vice*)
Laura Keeley (*pro hac vice*)
450 Lexington Avenue, P.O. Box #4184
New York, NY 10017
646-324-8226
etirschwell@everytown.org
lkeeley@everytown.org

LM LAW GROUP, PLLC
David Lopez (*pro hac vice*)
2806 Fredericksburg Rd., Ste. 118
San Antonio, TX 78201
210-396-2045
Moreno.LMLawGroup@gmail.com

Dated: July 19, 2024

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July 2024, I served the following counsel through electronic service (ECF) as authorized by Fed. R. Civ. Pro. 5:

David M. Prichard
David R. Montpas
Prichard Young, LLP
Union Square, Suite 600
10101 Reunion Place
San Antonio, Texas 78216

Stephen B. Barron
Blair J. Leake
Wright and Greenhill PC
4700 Mueller Blvd.
Suite 200
Austin, TX 78723

Thomas Phillip Brandt
Charles D. Livingston
Laura Dahl O'Leary
Fanning Harper Martinson Brandt & Kutchin, P.C.
One Glen Lakes
8140 Walnut Hill Lane
Ste 200
Dallas, TX 75231

D. Craig Wood
Katie E. Payne
Walsh Gallegos Trevino Kyle & Robinson P.C.
1020 N.E. Loop 410, Suite 450
San Antonio, Texas 78209

James E. Byrom
Stephanie Anne Hamm
Thompson & Horton, L.L.P.
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, TX 77027

Andre M. Landry, III
J.J. Hardig
Justin R. Cowan
Gray Reed
1300 Post Oak Blvd., Suite 2000
Houston, TX 77056

Clarissa M. Rodriguez
Patrick Charles Bernal
Denton, Navarro, Rocha & Bernal PC
2517 North Main Avenue
San Antonio, TX 78212

Charles Straight Frigerio
Hector Xavier Saenz
Law Offices of Charles S Frigerio
Riverview Towers
111 Soledad, Suite 465
San Antonio, TX 78205

William Scott Helfand
Norman Ray Giles
Randy Edward Lopez
Lewis Brisbois Bisgaard & Smith LLP
24 Greenway Plaza, Suite 1400
Houston, TX 77046

Briana Webb
Office of the Attorney General
Law Enforcement Defense Division
300 W 15th St.
Austin, TX 78701

/s/ Laura Keeley
Laura Keeley

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, INDIVIDUALLY AND AS MOTHER AND REPRESENTATIVE OF THE ESTATE OF DECEDENT, E.T., et al.,	§	Case No. 2:22-CV-00059-AM
Plaintiffs,	§	
v.	§	
DANIEL DEFENSE, LLC, et al.,	§	
Defendants.	§	

[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