JEFFERSON CIRCUIT COURT
CASE NO. 24-CI-000518
DIVISION SEVEN (7)
JUDGE MELISSA LOGAN BELLOWS

DANA MITCHELL, et al.

PLAINTIFFS

v.

RIVER CITY FIREARMS, INC., et al.

DEFENDANTS

DEFENDANT RSR GROUP, INC.'S AND MAGPUL INDUSTRIES CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants, RSR Group, Inc. ("RSR"), and Magpul Industries Corporation ("Magpul"), each through undersigned counsel, respectfully move to dismiss the Complaint and all claims therein against them with prejudice pursuant to CR 12.02.

I. SUMMARY OF THE ARGUMENT

Plaintiffs in this case attempt to do exactly what Congress has forbidden: they attempt to blame manufacturers and sellers of component parts for firearms for the harm caused by a third party who criminally misused them to cause Plaintiffs harm. Congress's complete prohibition of civil actions attempting to blame firearm industry members for harm caused by the criminal misuse of their products by third parties applies in full force here. Even were that not the case, well-established principles of Kentucky tort law independently require the dismissal of Plaintiffs' claims.

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Plaintiffs include those who were injured and family members of those who were killed during the tragic April 10, 2023, shooting perpetrated by Connor Sturgeon (the "Shooter") at the Old National Bank in Downtown Louisville. Plaintiffs contend that the manufacturer and

wholesale distributor who sold certain of the component parts installed on the firearm used by the Shooter are liable for the injuries the Shooter caused. Those claims must be immediately dismissed because they are prohibited by a federal immunity statute, the Protection of Lawful Commerce in Arms Act ("PLCAA"), which prohibits a civil action against a manufacturer or seller of component parts of a firearm for damages or other relief resulting from the criminal or unlawful misuse of a firearm or component parts of a firearm by a third party. It does not diminish the atrocious nature of the Shooter's crimes to acknowledge, as the PLCAA demands, that he—not a manufacturer or seller of component parts for a firearm—was solely responsible for the injuries caused his own acts. The PLCAA's protections, where they apply, are absolute—the statute prohibits covered suits from being filed in any state or federal court.

In addition to being barred by the PLCAA, plaintiffs' common-law claims should also be dismissed as a matter of law for several different independent reasons. First, Plaintiffs have failed to adequately allege causation. Second, Plaintiffs' statutory claim should be dismissed because their factual allegations do not support a violation of the statute. Third, Plaintiffs' claims for punitive damages should be dismissed because they do not constitute an independent basis on which relief can be granted, and the conclusory allegations in their Complaints do not come close to meeting the high threshold to justify the recovery of punitive damages. Finally, RSR only argues that the claims against it should also be dismissed pursuant to the immunity provided by the middleman provision of the Kentucky Product Liability Act.

II. STATEMENT OF THE CASE

On April 10, 2023, the Shooter murdered five people and shot and injured eight others at the Old National Bank in Downtown Louisville using a Radical Firearms RF-15 semi-automatic rifle ("Subject Rifle"). The Shooter had purchased the Subject Rifle from River City Firearms, Inc. ("RCF") on April 4, 2023. He also purchased from RCF in the same transaction three PMAG

magazines and an M-LOK vertical grip manufactured by Magpul, and a Crimson Trace red-dot sight (collectively the "Component Parts"). The grip and red-dot sight were all part of the Subject Rifle at the time of the shooting, and at least one of the magazines was installed in it. RSR, a wholesale distributor, had sold the magazines, grip, and red-dot sight to RCF. The Shooter did not purchase anything directly from either Magpul, the manufacturer, or RSR, the wholesale distributor.

On January 22, 2024, Plaintiffs Dana Mitchell, Julie Andersen, James E. Evans, II, Stephanie Schwartz, Karen Tutt, Individually and as Administrator of the Estate of James Tutt, Jr., deceased, Jessica Barrick, Individually and as Next Friend, Parent, and Natural Guardian of C.G.B. and J.P.B., and James M. Gilly, Jr., as Executor of the Estate of Joshua Barrick, deceased (collectively the "Mitchell Plaintiffs"), filed a Complaint in this action against RCF related to the shooting. On April 8, 2024, the Mitchell Plaintiffs filed an Amended Complaint to add RSR and Magpul as defendants ("Mitchell Complaint").

On April 3, 2024, Zurich American Insurance Company as subrogee of the Estate of Thomas Elliott, deceased, the Estate of Juliana Farmer, deceased, Dana Mitchell, Julie Anderson, the Estate of Judge Eckert, deceased, James Evans, Stephanie "Dallas" Schwartz, the Estate of James Tutt, Jr., deceased, and the Estate of Joshua Barrick, deceased (collectively the "Zurich Plaintiffs") filed a Complaint against RCF asserting its subrogation rights associated with workers' compensation benefits paid out on behalf of the victims of the shooting. The Zurich Plaintiffs' case was initially assigned case number 24-CI-2351.

On April 8, 2024, a Complaint was filed by Plaintiffs Maryanne Elliott, Individually and as the Executrix of the Estate of Thomas K. Elliott, A'Lia Tazhia Chambers and J'Yeon Christopher Chambers, as the Administrators of the Estate of Juliana Marie Farmer, and Michael Eckert, Individually and as Administrator of the Estate of Judy Dean "Deana" Eckert (collectively

the "Elliott Plaintiffs") against RCF, RSR, and Magpul, which was initially assigned Case No. 24-CI-2451 ("Elliott Complaint"). On May 6, 2024, the Zurich Plaintiffs filed an Amended Complaint adding RSR and Magpul as Defendants ("Zurich Complaint").[1]

The Mitchell Plaintiffs and the Elliott Plaintiffs consist of persons who were shot by the Shooter as well as family members of persons who were shot by the Shooter, some of whom are also included among the Zurich Plaintiffs. The Mitchell and Elliott Complaints both assert the same six causes of action: (1) negligent entrustment (against RCF only); (2) negligence; (3) wrongful death; (4) loss of spousal consortium; (5) loss of parental consortium (the Mitchell Complaint only); and (6) relief pursuant to KRS § 411.150. The Zurich Complaint raises causes of action against all defendants for negligence, and against RCF only for negligent entrustment.

III. ARGUMENT

A. STANDARD OF REVIEW

CR 12.02 provides, in relevant part, that "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (f) failure to state a claim upon which relief can be granted." *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 562 (Ky. App. 2017). "[W]hen considering a motion to dismiss under [CR 12.02], . . . the facts as pleaded in the complaint are admitted; only the right to relief remains to be challenged." *Mims v. Western–Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Huie v. Jones*, 362 S.W.2d 287, 288 (Ky. 1962)). Thus, a court should grant a motion to dismiss where "it appears the

[1] Agreed orders to consolidate have been tendered in all three cases, but have not yet been entered. Accordingly, identical motions to dismiss are being filed in each case in anticipation of their consolidation.

pleading party would not be entitled to relief under any set of facts which could be proved." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010)). "[T]he question is purely a matter of law"— the court construes the complaint in the plaintiff's favor and asks "if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" *Id.*

B. THE COMPLAINTS MUST BE DISMISSED PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT.

1. The Protection of Lawful Commerce in Arms Act was Passed to Provide Immunity to Firearm Manufacturers and Sellers from Lawsuits Seeking to Hold Them Liable for the Criminal Misuse of Their Lawful Products By Third Parties.

The PLCAA, which was enacted on October 26, 2005, prohibits the institution of a "qualified civil liability action" in any state or federal court. 15 U.S.C. § 7902(a). Because the PLCAA provides complete and substantive immunity from suit, not just a defense from liability, PLCAA immunity must be decided at the earliest available opportunity. *In re Academy, Ltd.*, 625 S.W.3d 19, 35-36 (Tex. 2021) (unanimously granting petition for mandamus and holding that requiring defendant to present a defense on the merits to a case barred by the PLCAA would defeat the substantive immunity provided by the statute).

One of the stated purposes of the PLCAA is to "prohibit causes of action against manufacturers [and] distributors . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended." *Id.* § 7901(b)(1). Congress made a number of findings regarding the necessity to enact the PLCAA, including:

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

- The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. §§ 7901(a)(3)-(5). Based upon its findings the express purposes stated therein, Congress enacted the PLCAA to prohibit qualified civil liability actions, such as this case, from being "brought in any Federal or State court." *Id.* § 7902(a).

2. <u>This Case is a Qualified Civil Liability Action</u>.

As defined by the PLCAA, and subject to six limited exceptions, a "qualified civil liability action" barred from being filed in any state or federal court is defined as a:

> civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product or a trade association, for damages, punitive damages, injunctive or declaratory relief, or penalties or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .

15 U.S.C. § 7903(5)(A). Based on the allegations in the Complaints, this case is a civil proceeding brought by persons (Plaintiffs) against a seller (RSR) and manufacturer (Magpul) of qualified products (the Component Parts) for damages and other relief based on the criminal use (the April 10, 2023 murders and intentional shooting of other persons) of the qualified products (the Component Parts) by a third party (the Shooter). *See generally* Compls.

3. <u>RSR is a Seller and Magpul is a Manufacturer</u>.

The PLCAA defines a "seller," with respect to a qualified product, in relevant part, as "a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in

interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18." 18 U.S.C. § 7903(2). Pursuant to 18 U.S.C. § 921(a)(11)(A), a "dealer" is defined as "any person engaged in the business[2] of selling firearms at wholesale or retail." As a "wholesale distributor," RSR is a seller pursuant to the terms of the PLCAA. Mitchell Compl. ¶ 27; Elliott Compl. ¶ 28.

Magpul is a manufacturer of firearms under the PLCAA, which defines a "manufacturer," with respect to a qualified product, as "a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code." 15 U.S.C. § 7903(2). Chapter 44 of title 18 of the United States Code, in turn, defines a manufacturer as "any person engaged in the business[3] of manufacturing firearms . . . for purposes of sale or distribution; and the term 'licensed manufacturer' means any such person licensed under the provisions of this chapter." 18 U.S.C. § 921(a)(10). As a federally licensed manufacturer of firearms, Magpul is a "manufacturer" pursuant to the terms of the PLCAA.

4. <u>The Subject Rifle and Component Parts are Qualified Products</u>.

The PLCAA defines a "qualified product," in part, as a "firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code) . . . that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4). Pursuant to 18

[2] The PLCAA defines the term "engaged in the business" with reference to 18 U.S.C. § 921(a)(21). 15 U.S.C. § 7903(1). The term "engaged in the business," relative to a dealer is defined as a "person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms . . . ." *Id.* § 921(a)(21)(C)

[3] The term "engaged in the business," relative to a manufacturer of firearms, is defined as "a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured." 18 U.S.C. § 921(a)(21)(A).

U.S.C. §§ 921(a)(3)(A) & (B), a firearm is defined as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" or "the frame or receiver of any such weapon. . . ." Pursuant to the allegations in the Complaint, the Subject Rifle is a firearm and therefor a qualified product pursuant to the terms of the PLCAA. *See generally* Compls. The PLCAA also defines a "component part of a firearm" as a qualified product. 15 U.S.C. § 7903(4). The term "component part" is not further defined in the PLCAA or the Gun Control Act.

Based on the allegations in the Complaints, the magazines, grip and red-dot sight are plainly each component parts of a firearm and therefore qualified products for purposes of the PLCAA. The term "component" is defined as a "part that combines with other parts to form something bigger."[4] A "part" is defined as a "separate piece of something, or a piece that combines with other pieces to form the whole of something."[5] Courts have previously confirmed the straightforward conclusion that such parts are component parts for purposes of the PLCAA. *See, e.g.*, *Prescott v. Slide Fire Sols., LP*, 341 F. Supp. 3d 1185. 1189 (D. Nev. 2018) (holding that and aftermarket stock is qualified product defined by PLCAA); *In re Academy, Ltd.*, 625 S.W.3d 19, 29 (Tex. 2021) (holding that a magazine is a qualified part for purposes of the PLCAA). As alleged in the Complaints, the Shooter had the grip, red-dot sight, and at least one of the magazines installed on the Subject Rifle, such that they constituted component parts of the Subject Rife. Mitchell Compl. ¶¶ 60-77, 87; Elliott Compl. ¶¶ 60-74, 86. The Complaints allege that the magazine is an "ammunition-feeding device that contain[s] the unfired rounds" that can be "fire[d] before having to reload [the] weapon." Mitchell Compl. ⁋ 70; Elliott Compl. ¶ 70. According to

[4] Cambridge Dictionary, Dictionary, Component, *available at* https://dictionary.cambridge.org/us/dictionary/english/component (last visited June 11, 2024).
[5] [5] Cambridge Dictionary, Dictionary, Part, *available at* https://dictionary.cambridge.org/us/dictionary/english/part (last visited June 11, 2024).

Plaintiffs' allegations, the red-dot sight "is mounted atop a rifle" and "project[s] a small red aiming dot on a clear viewing window" that provides a "fast and easy-to-use aiming system." Mitchell Compl. ⁋ 65; Elliott Compl. ¶ 65. The grip is alleged to be "affixed to the rifle's lower rail for the shooter to grasp, reducing recoil and allowing for greater control" and "stability." Mitchell Compl. ⁋ 64; Elliott Compl. ¶ 64.

Even aside from the caselaw and the plain language of the statute, it only makes sense that the products at issue here would be considered qualified products under the PLCAA. Detachable magazines are component parts of firearms designed to be operated with detachable magazines. Ammunition is, of course, necessary for a firearm to operate at all, and detachable magazines feed ammunition into many types of firearms. This logic alone suffices to subject Plaintiffs' claims to the PLCAA. But additional support can be found in the Second Amendment. Magazines have been held to be "arms" subject to the protection of the Second Amendment. *See, e.g.*, *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991 (9th Cir. 2015) (finding that magazines are covered by the Second Amendment because "they are integral components to vast categories of guns"); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018), *abrogated on other grounds by N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). If magazines are subject to the Second Amendment's protection for "arms," surely they satisfy the PLCAA's definition of "component parts."

5. <u>The Complaints are Seeking Damages and Other Relief Resulting from the Criminal Use of Qualified Products by a Third Party</u>.

According to the allegations in the Complaints, Plaintiffs are seeking damages and other relief arising from the criminal use of the Subject Rifle and Component Parts by a third party, the Shooter. In particular, Plaintiffs seek relief because the Shooter—who is not a party to this case—used the Subject Rifle with the Component Parts to murder five persons and intentionally shoot

and injure eight additional persons. Such actions by the Shooter violate criminal laws including murder, KRS § 507.020, and assault in the first degree, KRS § 508.010.

Accordingly, the alleged damages and other relief sought by the Plaintiffs resulted from the criminal use (the murder of five persons and intentional shooting and injuring of eight additional persons) of qualified products (the Subject Rifle and Component Parts) by a third party (the Shooter). The claims in the Complaints therefore constitute a qualified civil liability action, from which the PLCAA provides RSR and Magpul with complete immunity by prohibiting this action from even being "brought in any Federal or State court," unless one of the statute's narrow exceptions applies.

6. <u>The Complaints do Not Satisfy Any Exceptions to the PLCAA</u>.

There are six narrow categories of claims that the PLCAA excludes from the definition of a qualified civil liability action and therefore does not bar:

> (i) an action brought against a transferor convicted under section 924(h) of title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;
>
> (ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated 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, including—
>
> > (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18;
>
> (iv) an action for breach of contract or warranty in connection with the purchase of the product;
>
> (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or
>
> (vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26.

15 U.S.C. § 7903(5)(A).

There are no exceptions to the PLCAA that would allow the claims against RSR and Magpul to proceed. First, the PLCAA preempts any claims brought under a general negligence theory. *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009) (PLCAA preempts general negligence claims); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016) ("PLCAA expressly preempts all general negligence actions seeking damages resulting from the criminal or unlawful use of a firearm"); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) ("reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplusage").

Both wrongful-death and loss-of-consortium claims require proof of an underlying tort, such as negligence. *See, e.g.*, *Pete v. Anderson*, 413 S.W.3d 291, 303 (Ky. 2013) ("All three claims—wrongful death, loss of spousal consortium, and loss of parental consortium—depend on

proving that the death was negligently caused."); *Martin v. Ohio Cnty. Hosp. Corp.*, 295 S.W.3d 104, 107 (Ky. 2009) (noting that a loss of consortium claim must be based on negligent or wrongful conduct); *Johnson v. Basil as Next Friend of Johnson*, 584 S.W.3d 777, 781 (Ky. App. 2019) (explaining that the required elements of a wrongful death claim include "injury inflicted by the negligence or wrongful act"). Plaintiffs' claims for wrongful death and loss of consortium are premised on the alleged negligence of RSR and Magpul and similarly fail to satisfy an exception to the PLCAA. Mitchell Compl. ¶¶ 127, 144, 150, 154, 159; Elliott Compl. 144-45, 155-56.

Based on the allegations in the Complaints, the only exception that could even remotely be considered potentially applicable to Plaintiffs' claims is what is often referred to as the predicate exception set forth in 15 U.S.C. § 7903(5)(A)(iii). That provision excludes from the definition of a prohibited qualified civil liability action an "action in which a manufacturer [of firearms] knowingly violated 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).

The PLCAA gives specific examples of the types of statutes applicable to the sale or marketing of firearms that can be used to satisfy the predicate exception:

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18[.]

Id. § 7903(5)(A)(iii). Based on the examples provided in the PLCAA, as well as its expressly stated statutory purposes, federal appellate courts have held that the predicate exception can only be satisfied by the violation of statutes that specifically regulate the firearms industry, not to any general statutes that are simply applicable to the firearms industry along with everyone else.

In *Ileto v. Glock, Inc.*, the United States Court of Appeals for the Ninth Circuit held that alleged violations of California Civil Code Sections 1714(a) and 3479-80 could not be used to satisfy the predicate exception to the PLCAA. 565 F.3d 1126 (9th Cir. 2009). California had codified its common law regarding negligence and public nuisance. *Id.* at 1132-33. Section 1714(a), regarding negligence, states that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ." Section 3479, regarding nuisance, stated that "[a]nything which is injurious to health . . ., or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance." The court of appeals held that only "statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry—rather than general tort theories that happened to have been codified by a given jurisdiction" can be used to satisfy the predicate exception. *Ileto*, 565 F.3d at 1136.

Similarly, in *City of New York v. Beretta U.S.A. Corp.*, the United States Court of Appeals for the Second Circuit held that an alleged violation of a nuisance statute, N.Y. Penal Law § 240.45(1), could not satisfy the predicate exception to PLCAA. 524 F.3d 384 (2d Cir. 2008). New York's nuisance statute states that a "person is guilty of criminal nuisance in the second degree when . . . [b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons." N.Y. Penal Law § 240.45(1). The court held that Section

240.45(1) is a "statute of general applicability that does not encompass the conduct of firearms manufacturers," and therefore could not be used to satisfy the predicate exception. *City of New York*, 524 F.3d at 400. The court explained that the predicate exception can be satisfied only by the violation of a statute that: (1) "expressly regulate firearms"; (2) "courts have applied to the sale and marketing of firearms"; or (3) "clearly can be said to implicate the purchase and sale of firearms." *Id.* at 404.

The only statute referenced in the Complaints is KRS 411.150, which governs a cause of action against those "aiding or promoting" a killing, discussed further *infra*. This is not a statute applicable to the sale or marketing of firearms and component parts for firearms, and is therefore not capable of satisfying the predicate exception to the PLCAA.[6]

The reason for the focus of the PLCAA's predicate exception on laws regulating the marketing and sale of firearms make sense. Were the carve-out applicable to a broader swath of statutes, like KRS 411.150, for example, the PLCAA's core stated purpose of reducing liability for third-party harm committed after the *legal* marketing and sale of firearms would be a nullity.

C. PLAINTIFFS' CLAIMS FOR NEGLIGENCE, WRONGFUL DEATH, AND LOSS OF CONSORTIUM SHOULD ALSO BE DISMISSED PURSUANT TO KENTUCKY COMMON LAW.

In addition to being barred by the immunity provided by the PLCAA, Plaintiffs' claims for negligence, wrongful death, and loss of consortium should also be dismissed because Plaintiffs

[6] To the extent KRS 411.150, or any other Commonwealth statute, sought to create a cause of action for a suit barred by the PLCAA, such an effort would be preempted by the PLCAA under the well-settled doctrine of conflict preemption. *See Directv, Inc. v. Treesh*, 290 S.W.3d 638, 641 (Ky. 2009), as corrected (Sept. 14, 2009) ("[U]nder the Supremacy Clause of the United States Constitution (Article VI Clause 2), a state law that interferes with or is contrary to federal law is without effect.") (internal quotation marks omitted); *see also id.* ("The intent to preempt is [] understood when the state law actually conflicts with federal law.").

have failed to adequately plead the required elements. In particular, Plaintiffs cannot establish duty, any breach of duty, or causation.

1. Plaintiffs Have Failed to Adequately Plead Duty and Breach of Duty.

"The question of duty presents an issue of law." *Mullins v. Commonwealth Life Ins. Co*., 839 S.W.2d 245, 248 (Ky. 1992).

As an initial matter, the Plaintiffs assert that "[m]embers of the firearms and firearm-accessories industries have a heightened duty of care because of the risks associated with products that make weapons more deadly." Mitchell Compl. ¶ 80; Elliott Compl. ¶ 79. This novel, heightened duty for all members of an industry regardless of the specific acts at issue finds no basis in law. Indeed, the Kentucky Supreme Court imposed an ordinary standard of duty in a case in which a firearms dealer retailer sold a firearm *directly* to an underage individual in violation federal law. *See T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 530–31 (Ky. 2006). The Court took great care to "impose no new or onerous burden on the industry," and analyzed the common law duty in accordance with the existing requirements of federal firearms laws. *Id.* at 532. Thus, Plaintiffs' bold assertion of a heightened duty requirement for the legal firearms industry is entirely foreclosed by binding precedent.

Applying the correct standard, the ordinary duty of care that applies here "requires every person to exercise ordinary care in his activities to prevent foreseeable injury." *T & M Jewelry*, 189 S.W3d at 531. "Ordinary care is the same degree of care as a prudent person engaged in a similar or like business would exercise under the circumstances." *Id.* "In a case predicated on negligence it is necessary to demonstrate that the person so charged failed to discharge a legal duty or conform his conduct to the standard required. *Alderman v. Bradley*, 957 S.W.2d 264, 267 (Ky. App. 1997) (citing *Mitchell v. Hadl*, Ky., 816 S.W.2d 183 (1991)). Here, Plaintiffs have failed to allege that Magpul and RSR did not act as a "like business" would "under the circumstances." *Id.*

at 531. Magpul and RSR manufactured and sold legal products in a legal manner in the ordinary course of business. Thus, Plaintiffs have failed to allege any breach of their ordinary duty. That failure is fatal to all of Plaintiffs' negligence-based claims.

2. Plaintiffs Have Failed to Adequately Plead Causation.

Causation is also a required element of Plaintiffs' claims for negligence, wrongful death, and loss of consortium. *See Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 542 (Ky. App. 2013) ("To prevail on a negligence claim, the pleading party must prove three elements: 1) duty; 2) breach of that duty; and 3) consequent injury."); *Patton v. Bickford*, 529 S.W.3d 717, 734 (Ky. 2016); *Pete*, 413 S.W.3d at 303 ("All three claims—wrongful death, loss of spousal consortium, and loss of parental consortium—depend on proving that the death was negligently caused."). "The term 'consequent injury,' in turn, "encompasses two distinct elements—actual injury and legal causation between the breach and the injury." *Keaton*, 436 S.W.3d at 542.

Causation has two elements, but-for causation (cause in fact) and proximate causation (legal cause). *Howard v. Spradlin*, 562 S.W.3d 281, 287 (Ky. App. 2018). "But-for causation requires the existence of a direct, distinct, and identifiable nexus between the defendant's breach of duty (negligence) and the plaintiff's damages such that the event would not have occurred 'but for' the defendant's negligent or wrongful conduct in breach of a duty." *Patton*, 529 S.W.3d at 730. In the present case, the allegations in the Complaints do not even establish but-for causation—*i.e.*—there is nothing to indicate that the shooting would not have occurred if the Shooter did not have the Component Parts.

Legal cause is a question of law for the Court in this case. "'Legal causation," which addresses the degree of causation and includes an element of foreseeability, "presents a question of law when there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence.'" *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 91–92 (Ky. 2003)

(quoting *McCoy v. Carter, Ky.*, 323 S.W.2d 210, 215 (1959)); *see also Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868, 872 (Ky. App. 2001) (causation "becomes a question of law for the Court where the facts are undisputed and are susceptible of but one inference"); *Howard*, 562 S.W.3d at 288 ("As with the determination of proximate cause generally, whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury.")

Here, whether RSR's and Magpul's manufacture and sale of the Component Parts was a proximate cause of Plaintiffs' harm, and whether the shooting was an intervening, superseding cause, can be readily determined by the allegations in the Complaint. Accordingly, this Court should decide causation as a matter of law. And it should decide that matter in favor of RSR and Magpul. Even if Plaintiffs had sufficiently alleged negligent conduct by RSR and Magpul they cannot establish causation for two distinct reasons: (1) their conduct is not a legal cause of Plaintiffs' injuries; and (2) even if their conduct was a legal cause of Plaintiffs' injuries, the shooting was a superseding, intervening cause.

3. <u>RSR's and Magpul's Alleged Conduct is Not a Legal Cause of Plaintiffs' Harm</u>.

The Kentucky Supreme Court has adopted the substantial factor test for causation set forth in § 431 of the Restatement (Second) of Torts. *Pathways, Inc.*, 113 S.W.3d at 91. Section 431 states:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent.... [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events

> is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

In the present case, the manufacture and sale of the Component Parts by Magpul and RSR is not even a cause of the shooting in the "philosophic sense," because there is no allegation or reason to believe that the shooting would not have occurred without the Component Parts. Certainly, however, the legal manufacture and sale of the Component Parts is not something that any reasonable person would regard as a substantial, and therefore legal cause of an illegal shooting by a third-party criminal.

4. <u>The Shooting was a Superseding, Intervening Cause</u>.

Even if the manufacture and sale of the Component Parts by Magpul and RSR was assumed to be a legal cause of Plaintiffs' harm, Plaintiffs' claims for negligence, wrongful death, and loss of consortium against RSR and Magpul should still be dismissed because the shooting was an intervening, superseding cause. "The superseding intervening cause doctrine interplays with proximate causation in that a superseding cause breaks the chain of causation so that an otherwise negligent actor is relieved from liability." *Howard*, 562 S.W.3d at 288. In the "context of third-party intentional torts and criminal acts," the Kentucky Supreme Court "has heavily relied on" Section 448 and 449 of the Restatement (Second) of Torts. *Id.* Section 448 states that:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

The Kentucky Court of Appeals has explained that a "superseding cause possesses the following attributes":

1) an act or event that intervenes between the original act and the injury;

> 2) the intervening act or event must be of independent origin, unassociated with the original act;
>
> 3) the intervening act or event must, itself, be capable of bringing about the injury;
>
> 4) the intervening act or event must not have been reasonably foreseeable by the original actor;
>
> 5) the intervening act or event involves the unforeseen negligence of a third party [one other than the first party original actor or the second party plaintiff] or the intervention of a natural force;
>
> 6) the original act must, in itself, be a substantial factor in causing the injury, not a remote cause. The original act must not merely create negligent condition or occasion; the distinction between a legal cause and a mere condition being foreseeability of injury.

NKC Hospitals, Inc. v. Anthony, 849 S.W.2d 564, 568 (Ky. App. 1993).

In the present case, even if RSR's and Magpul's conduct as alleged in the Complaints could be considered a legal cause of Plaintiffs' harm, the Shooter's criminal actions constitute a superseding, intervening act that broke any causation that could potentially be attributed to them based on all of the criteria set forth in *Howard*. First, the shooting is an act or event that intervened between the original acts of RSR and Magpul in selling and manufacturing the Component Parts, respectively, and Plaintiffs' injuries arising from the shooting. 62 S.W.3d at 288. Second, the shooting was of independent origin, unassociated with RSR and Magpul and committed unilaterally by the Shooter. *Id.* Third, the Shooter's intentional crimes were not only capable of bringing about the injuries alleged in the Complaints—they were the sole and direct cause of those injuries. *Id.* Fourth, RSR and Magpul cannot be expected to foresee that their legal manufacture and sale of legal products to other federal firearms licensees in accordance with the vast architecture of firearms regulations would result in certain Component Parts being used by the Shooter to commit a criminal shooting. *Id.* Fifth, the shooting was caused by the unforeseen act of a third party, the Shooter, which was not merely negligent, but intentional. *Id.* Sixth, although

RSR and Magpul maintain that the manufacture and sale of the Component Parts was *not* a substantial factor in causing the shooting and, in fact, did not even amount to the creation of a negligent conduction or occasion, *see infra*, assuming for the sake of argument that the Court decided otherwise, the final factor would be satisfied as well. Accordingly, Plaintiffs' claims against RSR and Magpul for negligence, wrongful death, and loss of consortium should be dismissed based on lack of causation.

D. CERTAIN PLAINTIFFS' CLAIMS FOR VIOLATION OF KRS § 411.150 SHOULD BE DISMISSED BECAUSE THE FACTS PLED DO NOT SUPPORT THE CONCLUSION THAT RSR AND MAGPUL AIDED OR PROMOTED THE SHOOTING.

In addition to being barred by the immunity provided by the PLCAA, Plaintiffs' claims based on violation of KRS 411.150 should be dismissed for the additional, independent reason that the facts alleged in the Complaints do not support a violation of that statute by either RSR or Magpul.

Certain plaintiffs seek to hold RSR and Magpul liable for allegedly aiding and promoting the Shooter's murder of their decedents pursuant to KRS 411.150. Mitchell Compl. ¶¶ 161-64; Elliott Compl. ¶¶ 148-53. KRS § 411.150 provides that the:

> surviving spouse and child, under the age of eighteen (18) or either of them, of a person killed by the careless, wanton or malicious use of a deadly weapon, not in self-defense, may have an action against the person who committed the killing and all others aiding or promoting, or any one (1) or more of them.

The key issue is whether the defendant aided or promoted the killing. *Id.* To "aid" means "to help; to assist; to support, as by furnishing strength or means to effect a purpose; to forward; to facilitate." *Self v. Mantooth*, No. 2011-CA-001161-MR, 2012 WL 4209929, at *5 (Ky. App. Sept. 21, 2012). To "promote" means "to incite or urge on a person." *Id.* To be liable for "aiding or promoting" a killing "requires some active participation in the killing by the person so charged." *Id.* at *6. The caselaw interpreting this infrequently applied provision establishes that the statute

only applies to active involvement in the actual killing, not merely furnishing a condition that allowed the person to commit the killing. *Id.* at *5-*6 (reviewing prior decisions).

Based on the factual allegations in the Complaints, Magpul merely manufactured certain of the Component Parts and RSR merely sold the Component Parts to other federal firearms licensees. They did not even sell the Component Parts to the Shooter, who criminally misused them. There is no allegation that Magpul or RSR actively participated in the Shooter's murders. Accordingly, Plaintiffs' claims for violation of KRS § 411.150 must be dismissed.

E. PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES SHOULD BE DISMISSED.

The Mitchell Plaintiffs raise an unnumbered claim for punitive damages and the Elliott Plaintiffs raise a claim for punitive damages as Claim No. VI. Mitchell Compl. ¶¶ 165-66; Elliott Compl. ¶¶ 157-58. Preliminarily, it should be noted that "punitive damages" is not an independent basis upon which relief may be granted, but rather a form of damages that may be awarded pursuant to certain claims for relief. To the extent the Complaints treat them as independent claims, they should be dismissed because they are not a basis on which a defendant may be held liable.

Plaintiffs' request to recover punitive damages against RSR and Magpul should be dismissed for two reasons. First, as addressed in detail above, all of their underlying claims for which they seek to recover damages, including punitive damages, should be dismissed. Second, even if they had a viable claim against RSR and Magpul upon which relief could be granted, the factual allegations in their Complaints fail to satisfy the requirements to seek punitive damages.

In Kentucky, punitive damages may be awarded pursuant to either KRS 411.184 or the common law. *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 870 (Ky. 2016)). KRS 411.184(2) provides that punitive damages may only be awarded based on "clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with

oppression, fraud or malice." Alternatively, punitive damages may be "awarded under the common law standard of 'gross negligence,'" which "means a wanton or reckless disregard for the lives, safety, or property of others." *Morris v. Boerste*, 641 S.W.3d 688, 695–96 (Ky. App. 2022).

Here, Plaintiffs cannot sustain a claim for punitive damages against RSR and Magpul based on either theory. Plaintiffs' allegations supporting their claim for punitive damages amount to nothing more than conclusory labels. Mitchell Compl. ¶ 166 ("conduct, actions, and inactions of Defendants constituted gross negligence, gross carelessness, or was so grossly reckless or wanton as to warrant an award of punitive damages"); Elliott Compl. 158 ("conduct, actions, and inactions of Defendants constituted gross negligence, gross carelessness, or were so grossly reckless or wanton as to warrant an award of punitive damages"). Beyond those bare assertions, Plaintiffs have no factual support for their claims that RSR and Magpul acted "with oppression, fraud or malice" or "a wanton or reckless disregard for the lives, safety, or property of others," *Morris*, 641 S.W.3d at 695–96, by manufacturing and selling the Component Parts, which are admittedly legal, to other federal firearms licensees in a legal manner. Accordingly, Plaintiffs' "claims" against RSR and Magpul for punitive damages, as well as their request to recover punitive damages pursuant to the other claims for relief, should be dismissed.

F. ALL OF PLAINTIFF'S CLAIMS AGAINST RSR ARE BARRED BY KRS § 411.340.[7]

The Complaints and all of the claims therein against RSR should also be dismissed with prejudice for the additional reason that they are barred by KRS § 411.340, which is the middleman provision of the Kentucky Product Liability Act. Section 411.340 states that:

> In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells

[7] Magpul does not join in this argument and notes that Plaintiffs made no allegations of any defect or failure in Magpul's products.

> a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

West v. KKI, LLC, 300 S.W.3d 184, 191–92 (Ky. App. 2008) (quoting KRS § 411.340).[8] This "'middleman' provision[] . . . w[as] designed to protect . . . distributors, wholesalers, or retailers, who have no independent responsibility for the design or manufacture of a product." *Id.* at 192. A distributor loses this "immunity" only where "it: (i) breaches an express warranty or (ii) knew or should have known at the time of distribution or sale that the product was in a defective condition and unreasonably dangerous." *Elkins v. Extreme Prod. Grp.*, LLC, No. CV 5:21-050-DCR, 2021 WL 8316416, at *2 (E.D. Ky. Dec. 21, 2021) (citing *Flint v. Target Corp.*, 362 F. App'x 446, 449 (6th Cir. 2010)).

Here, Plaintiffs' claims against RSR are plainly barred by § 411.340, as even Plaintiffs concede that RSR acted as a middleman relative to the Component Parts. Mitchell Compl. ¶ 78; Elliott Compl. ¶ 77. Looking at each element of § 411.340 makes clear that Plaintiffs' claims fall

[8] Although Plaintiffs have not brought product liability claims, this case constitutes a "product liability action" for purposes of KRS 411.340. *See Warren v. Lowe's Home Centers, LLC*, No. CV 0:21-085-DCR, 2024 WL 420108, at *4 (E.D. Ky. Feb. 5, 2024) ("'As used in KRS 411.310 to 411.340, a "product liability action" shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.") (quoting KRS § 411.300(1)). Moreover, "[i]f a claim is brought against a seller or manufacturer of a product which is alleged to have caused injury, then the [Kentucky Product Liability Act," including the middleman provision, "applies, regardless of whether the action is founded on strict liability in tort, negligence or breach of warranty." *Warren*, 2024 WL 420108, at *4 (citing *Monsanto Co. v. Reed*, 814 (Ky. 1997); *see also Davis v. Sig Sauer, Inc.*, No. 3:22-CV-00010-GFVT, 2024 WL 54595, at *4 (E.D. Ky. Jan. 4, 2024) (KRS 411.340 "applies to all damages claims arising from the use of products, regardless of the legal theory advanced").

well within the immunity that it provides to RSR. First, the manufacturer of each of the Component Parts "is identified and subject to the jurisdiction of the court." *West*, 300 S.W.3d at 191–92 (quoting KRS § 411.340). Magpul is a named defendant in all three Complaints. Crimson Trace Corporation ("Crimson Trace"), which is alleged to have manufactured the red-dot sight, is not named as a defendant. Crimson Trace is an Oregan corporation located in Missouri,[9] and is subject to this Court's jurisdiction to the same extent as RSR and Magpul. Second, RSR is a distributor. Mitchell Compl. ⁋ 7; Elliott Compl. ¶ 28. Third, RSR sold the Component Parts in the same condition in which they were manufactured. Mitchell Compl. ¶¶ 7, 78, Elliott Compl. ¶¶ 77. Fourth, Plaintiffs have not alleged that RSR breached an express warranty.

Finally, beyond conclusory allegations about the awareness in society of the possibility that firearms and their component parts can be used in criminal shootings, Plaintiffs have not alleged facts that would objectively demonstrate that RSR had reason to know the Component Parts were "defective and unreasonably dangerous to the user at the time of distribution or sale." *Taylor v. Southwire Tools & Equip.*, 130 F. Supp. 3d 1017, 1023 (E.D. Ky. 2015). In fact, Plaintiffs do not even allege that the Component Parts were unreasonably dangerous to the user or consumer, i.e., the Shooter. Mere knowledge of the "dangers" associated with the use of a product is not sufficient to "overcome the protections afforded by" KRS 411.340. *Simmerman v. Ace Bayou Corp.*, No. CIV.A. 5: 14-382-DCR, 2014 WL 6633129, at *4 (E.D. Ky. Nov. 21, 2014).

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[9] Crimson Trace is a subsidiary of American Outdoor Brands, Inc. *See* U.S. Securities and Exchange Commission, Form 10-K, American Outdoor Brand, Inc. at 51, F-8, F-9, Ex. 21.1 (Apr. 30, 2023), *available at* https://ir.aob.com/static-files/22b6d756-7e2a-4501-ab38-ebe599b3198e (last visited Apr. 25, 2024) ("AOUT 10-K"). The Court may consider the AOUT 10-K in connection with the motion to dismiss without converting it into a motion for summary judgment. *See, e.g., Schell v. Young*, 640 S.W.3d 24, 33 (Ky. App. 2021) (holding that "[c]onversion from a motion to dismiss to a motion for summary judgment" does not occur where "court considers matters of public record"; "court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet") (citing *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004)).

Instead, to defeat the immunity provided by KRS § 411.340, a plaintiff must allege that the product was unreasonably dangerous because it was in a "defective condition," and that the distributor had knowledge of that conduction. *Conrad*, 2012 WL 5332494, at *2; *Mason v. Excel*, 2011 WL 847449, at *3 (W.D. Ky. 2011); *Weixler v. Paris Co.*, No. 3:02CV–390–H, 2003 WL 105503 at *2 (W.D. Ky. Jan. 2, 2003). Plaintiffs' allegations of RSR's alleged knowledge of the "danger" of the Component Parts fall far short of this high standard and amount to nothing more than the generalized public knowledge of the danger associated with firearms and their component parts applicable to all persons, including the Shooter as the user/consumer of the Component Parts.

To hold that KRS § 411.340 does not bar Plaintiffs' claims based on the factual allegations in the Complaints would be to eviscerate the purpose and meaning the statute by allowing any retailer or wholesaler who sells a product that is alleged to have caused harm to be subject to liability. *See Com. v. Love*, 334 S.W.3d 92, 97 (Ky. 2011) ("When undertaking statutory interpretation, we must 'refrain from interpreting a statute so as to produce an absurd or unreasonable result.'") (quoting *Wilburn v. Commonwealth*, 312 S.W.3d 321, 328 (Ky. 2010)). Accordingly, all of Plaintiffs' claims against RSR are also barred by KRS § 411.340 and should be dismissed on that additional basis.

IV. CONCLUSION

For the above reasons, RSR and Magpul respectfully request that this Court grant their Motion, dismiss all Complaints and causes of action against them with prejudice, and grant such other relief as it deems just and proper. A proposed Order is submitted herewith.

Dated: June 14, 2024

Respectfully submitted,

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