

FBT-CV15-6048103-S

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO et al.	:	SUPERIOR COURT
	:	
Plaintiffs,	:	JUDICIAL DISTRICT OF FAIRFIELD
	:	
v.	:	AT BRIDGEPORT
	:	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, et al.	:	JUNE 10, 2016
	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS CAMFOUR, INC.'S AND CAMFOUR HOLDING, INC.'S MOTION TO STRIKE THE FIRST AMENDED COMPLAINT

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Defendants Camfour, Inc. and Camfour Holding, Inc. s/h/a Camfour Holding, LLP a/k/a Camfour Holding, Inc. (collectively referred to as “Camfour”) respectfully submit this reply memorandum of law in further support of their motion to strike plaintiffs’ First Amended Complaint pursuant to Practice Book § 10-39(a)(1) and the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et seq.* (“PLCAA”).

I. SUMMARY OF THE ARGUMENT

Plaintiffs do not dispute that their claims against Camfour constitute a “civil action . . . against a seller . . . of [a firearm that has been shipped or transported in interstate commerce] . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief resulting from the criminal or unlawful misuse of [the firearm] by . . . a third party,” 15 U.S.C. § 7903(5)(A). Accordingly, the only issues in dispute are whether plaintiffs’ claims against Camfour state a claim upon which relief can be granted pursuant to Connecticut law and, if so, fall within two narrow exceptions to the PLCAA: (1) negligent entrustment; or (2) the predicate exception — *i.e.*, an action arising from the knowing violation of a state or federal statute applicable to the sale or marketing of firearms that was a proximate cause of the harm for which relief is sought. 15 U.S.C. §§ 7903(5)(A)(ii) & (iii).

There is no support for plaintiffs’ position that their claims against Camfour satisfy either of these exceptions to the PLCAA. The negligent entrustment exception does not apply because Camfour did not supply the Bushmaster Rifle to the person who used it in a manner involving unreasonable risk of physical injury to the others. CUTPA does not satisfy the requirements for the predicate exception because it is not a statute applicable to the sale and marketing of firearms, and Camfour could not have knowingly violated it proximately causing the harm at issue to

plaintiffs. To accept plaintiffs' arguments would be to entirely negate the statutory immunity that Congress provided to firearms manufacturers and sellers when it enacted the PLCAA.

Even if plaintiffs' claims were not expressly barred by the PLCAA, they would still have to be dismissed because they fail to state a claim upon which relief can be granted pursuant to Connecticut law. Plaintiffs' claim for negligent entrustment against Camfour fails because Connecticut does not recognize the theory of successive entrustment and Camfour did not directly entrust the Bushmaster Rifle to Adam Lanza. The reasons why plaintiffs' CUTPA claim against Camfour fails are legion: (1) they lack standing; (2) the statute of limitations had expired months before they commenced this action; (3) CUTPA does not apply to transactions permitted by law; (4) CUTPA does not apply to claims for personal injury or wrongful death; and (5) their claims are preempted by the Product Liability Act.

II. ARGUMENT

A. Plaintiffs' Claims Against Camfour Do Not Meet the Negligent Entrustment Exception to the PLCAA

The PLCAA only allows an otherwise prohibited claim to proceed based on the negligent entrustment exception if a seller supplied a firearm "for use by another person when the seller knows, or reasonably should know, the person to whom the [firearm] is supplied is likely to, and does, use the [firearm] in a manner involving unreasonable risk of physical injury to the person or others." *Id.* § 7903(5)(B).¹

¹ The negligent entrustment exception to the PLCAA only applies when the person to whom the seller directly supplied the firearm is the one who actually uses it in a manner involving unreasonable risk of physical injury to himself or another, not subsequent parties to whom the firearm may later be entrusted. *See* 151 Cong. Rec. S9229. As discussed in Section II.B., this prohibition on liability based on successive entrustments is consistent with Connecticut law.

The negligent entrustment exception to the PLCAA only applies when the firearm is used “in a manner involving unreasonable risk of physical injury to the person or others,” a definition that necessarily excludes the lawful sale of a legal firearm from a federally licensed wholesale distributor to a federally licensed retail dealer.² Opp’n at 35 (conceding that the lawfulness of the sale is undisputed). The *Williams v. Beemiller, Inc.*, No. 7056/2005, at *15 (N.Y. Sup. Ct. Erie Cnty. Apr. 25, 2011) decision holding that the negligent entrustment exception to the PLCAA does not encompass the sale of a firearm from a wholesale distributor to a retail dealer, where the retail dealer is not the ultimate shooter, is directly on point and contrary to plaintiffs’ implication, this holding was not reversed. Although the decision was reversed on appeal, it was on different grounds, and the appellate court did not address the negligent entrustment exception to the PLCAA. 952 N.Y.S.2d 333, 339 (App. Div. 4th Dep’t 2012).

Plaintiffs also misconstrue the Connecticut Superior Court’s decision in *Gilland v. Sportsmen’s Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. May 26, 2011), claiming that “*Gilland* holds, consistent with Connecticut common law, that the theft of a firearm fails to come within PLCAA’s definition of negligent entrustment because there is no allegation that the seller ‘supplied the firearm for [the entrustee]’s use.’” Opp’n at 28 n.15. Plaintiffs in the *Gilland* case, however, had claimed that defendants had supplied the handgun to the shooter for his use because they gave it to him to inspect in the store as a prospective purchaser, but the court concluded that did not constitute supplying the firearm for use by the shooter. *Gilland*, 2011 WL 2479693, at *12-*13.

² Despite plaintiffs’ claim, Camfour did not argue that using a firearm in a “manner involving unreasonable risk of physical injury” is limited to using it “to inflict injury,” Opp’n at 26, but rather that the lawful sale of a firearm by a federally licensed firearms dealer cannot be considered using a firearm in a “manner involving unreasonable risk of physical injury” for purposes of the PLCAA.

Although plaintiffs criticize the *Williams* decision because it is an unpublished decision by a trial court, they rely on an oral decision from a trial court to support their arguments. All that the court in the *Norberg v. Badger Guns, Inc.* case (attached as Exhibit B to Pls.' Opp'n) held with regard to negligent entrustment in its January 30, 2014 oral ruling is that it "does not believe that congress [*sic*] used the word, use, to mean exclusively discharge as the defendant suggests," but that could also include "brandishing a gun in a public place. . . ." *Id.* at 21. Further, the *Norberg* case involved the alleged illegal sale of a firearm to a straw purchaser by a retail dealer. Based on the straw purchase allegations in the *Norberg* case, the retail dealer supplied the firearm to the person who actually used it to shoot plaintiffs, but another person simply filled out the paper work. Simply stated, the *Norberg* decision provides no support for plaintiffs' negligent entrustment claim against Camfour.³

Given the lack of any support for their negligent entrustment claim based on the language of the PLCAA itself, plaintiffs instead rely on a Supreme Court decision, *Smith v. United States*, that had interpreted use of a firearm in the context of an unrelated statute. 508 U.S. 223, 237 (1993). In *Smith*, the Supreme Court addressed a previous version of 18 U.S.C. § 924(c)(1), which imposed specific penalties if a criminal defendant "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm. . . ." In *Smith*, the Supreme Court held that by bartering a firearm for drugs, the defendant "used" a firearm in relation to a drug trafficking

³ Plaintiffs' citation to *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777 (Sup. Ct. Monroe Cnty. 2014) similarly provides not support for their claim that they have satisfied the negligent entrustment exception to the PLCAA. Opp'n at 30 n. 16. The *Chiapperini* decision notes that as "to the second exception for negligent entrustment or negligence *per se*, two exact claims Plaintiffs allege in Counts 2 and 5, Gander simply states that the 'second exclusion speaks for itself,' and then never again mentions the same [Gander MOL, p. 10; see also p. 18]. This Court construes this as an implied concession that Counts 2 and 5 fall outside of the 'qualified civil liability action' definition." 13 N.Y.S.3d at 786.

crime for purposes of 18 U.S.C. § 924(c)(1). Bartering (exchanging or trading) a firearm for drugs fits within the definition of using a firearm within 18 U.S.C. § 924(c)(1) because the defendant used the firearm to obtain the drugs — *i.e.*, without the firearm, he would not have been able to obtain the drugs. Bartering a firearm for drugs is logically related to a sentencing enhancement for using a firearm in connection with a drug trafficking crime. Lawfully selling a legal firearm to a federally licensed retail dealer for purposes of resale, however, bears no relation to using a firearm in a manner involving unreasonable risk of physical injury to the person or others for purposes of the PLCAA.

Despite the inapplicability of the decision in *Smith* to their novel argument regarding the use of a firearm for purposes of the PLCAA, subsequent to its decision in *Smith*, the Supreme Court unanimously held that the term “use of a firearm” applies only to the “active employment of the firearm.” *Bailey v. United States*, 516 U.S. 137, 144-51 (1995). *Bailey* also involved an interpretation of a previous version of 18 U.S.C. § 924(c)(1), which imposed specific penalties if a criminal defendant “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm. . . .” Through *Bailey*, the Supreme Court overruled its prior decision in *Smith*, in which it had interpreted the “use of a firearm” in a drug trafficking crime for purposes of 18 U.S.C. § 924(c)(1). See *United States v. Regans*, 125 F.3d 685, 686 n.2 (8th Cir. 1997) (recognizing that *Bailey* overruled *Smith*’s interpretation of “use” in 18 U.S.C. § 924(c)(1)). Based on the Supreme Court’s decision in *Bailey*, addressed in detail on pages 15-16 of the Camfour defendants Memorandum of Law in Support of their Motion to Strike, the sale of a firearm between a wholesale distributor and retail dealer, like the storage of a firearm, does not constitute the “use” of a firearm.

Camfour did not supply the Bushmaster Rifle to Riverview for its use, and Riverview did not use the Bushmaster Rifle in a manner involving unreasonable risk of physical injury others, so plaintiffs' claims against Camfour fail to satisfy the negligent entrustment exception to the PLCAA.

B. Connecticut Law Does Not Recognize Successive Negligent Entrustment and Camfour Did Not Supply the Bushmaster Rifle to the Person Who Used it to Harm Plaintiffs

In addition to failing to satisfy the requirements for the negligent entrustment exception to the PLCAA, the factual allegations in the Amended Complaint demonstrate that plaintiffs do not have a valid negligent entrustment claim against Camfour based on applicable Connecticut law because Camfour supplied the Bushmaster Rifle to Riverview, but it was Adam Lanza who used it to cause harm to plaintiffs.

There is no support for plaintiffs' claim that "civilians" can constitute a "class of persons," such as children or intoxicated persons for purposes of negligent entrustment. Opp'n at 14 n.6. Taken to its logical conclusion, plaintiffs' argument is that the Bushmaster Rifle is too dangerous to be possessed by civilians, and therefore its sale to them should be banned, and/or manufacturers and sellers be held absolutely liable for any resulting harm. Opp'n at 13. Whether sale of a product to civilians should be banned, or absolute liability imposed on manufacturers and sellers for harm caused by certain products, are issues for the legislature, not the courts.⁴ In any event, plaintiffs concede that Camfour sold the Bushmaster Rifle to a federally licensed firearms dealer, who is certainly competent to possess it. Am. Comp. ¶¶ 31-36, 178. Accordingly, even accepting their

⁴ The one case that plaintiffs cite regarding a product being too dangerous to be sold to a particular class of persons, *Burbee v. McFarland*, 114 Conn. 56 (1931), involved the sale of fireworks to a twelve year old child, not the sale of a product that could be legally sold to adults pursuant to applicable Connecticut law.

patently frivolous argument about negligently entrusting legal firearms to civilians who are legally entitled to own them under federal and state law, plaintiffs' negligent entrustment claim against Camfour fails because it did not sell the Bushmaster Rifle to a "civilian," but rather to a federally licensed firearms dealer.

Plaintiffs incorrectly claim that "the person to whom the chattel is entrusted need *not* be the person who later employs it to cause physical harm. That is, a claim for negligent entrustment can involve successive entrustments, so long as they are reasonably foreseeable." Opp'n at 32 (emphasis in original). *See also* Opp'n at 31 (claiming that the "common law meaning of [negligent entrustment] has repeatedly been held to embrace successive entrustments"). Camfour argued in both its Motion to Strike and its Motion to Dismiss that Connecticut negligent entrustment law does not apply to successive entrustments. Plaintiffs have failed to respond to this argument, and instead continue to cite only to cases interpreting Arkansas, Georgia and New York law, Opp'n at 32-33, thereby conceding that there is no support in Connecticut law for their successive negligent entrustment theory. The reason that plaintiffs are still not able to cite to a single Connecticut decision supporting their successive entrustment theory is that Connecticut law, which is applicable to their claims, forecloses their negligent entrustment claims against Camfour. Pursuant to Connecticut law, a defendant can only be held liable for negligent entrustment if the actions of the person to which the chattel was entrusted directly causes the injury to plaintiff. *Greeley v Cunningham*, 116 Conn. 515, 165 A. 678, 680 (1933);⁵ *Mesner v. Cheap Auto Rental*, No. CV075009039S, 2008 WL 590495, at *4 (Conn. Super. Feb. 13, 2008) ("Connecticut law is

⁵ "When the evidence proves that the owner of an automobile knows or ought reasonably to know that one to whom he entrusts it is so incompetent to operate it upon the highways that the former ought reasonably to anticipate the likelihood of injury to others by reason of that incompetence, and such incompetence does result in such injury, a basis of recovery by the person injured is established." *Greeley*, 165 A. at 680 (emphasis added).

clear that liability can only be imposed if the defendant entrusts the vehicle to the driver.”); *Johnson v. Amaker*, No. CV075013242S, 2008 WL 441842, at *4 (Conn. Super. Jan. 29, 2008) (holding that negligent entrustment liability only arises if the defendant directly entrusts the product to the person who uses it to harm plaintiff); *Bryda v. McLeod*, No. CV030285188S, 2004 WL 1786822, at *2 (Conn. Super. July 12, 2004).

Based on the allegations in the First Amended Complaint, Camfour sold the Bushmaster Rifle to Riverview, but it was Adam Lanza, who was two steps removed from Riverview, who used it to cause harm to them. Accordingly, plaintiffs do not have a valid negligent entrustment claim against Camfour pursuant to Connecticut law.

C. **CUTPA is Not a Statute Applicable to the Sale or Marketing of Firearms and Cannot Serve as a Predicate Statute for Purposes of the PLCAA Exception**

The only other exception to the definition of a qualified civil liability action in the PLCAA upon which plaintiffs rely is “an action in which a . . . seller of a [firearm or ammunition] knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms or ammunition], and the violation was a proximate cause of the harm for which relief is sought. . . .” 15 U.S.C. § 7903(5)(A)(iii) (“predicate exception”). The only statute that plaintiffs allege Camfour violated is CUTPA,⁶ a civil statute that simply states that “[n]o person shall engage in

⁶ In their Opposition, plaintiffs made a telling admission regarding why CUTPA cannot be considered a predicate statute for purposes of the PLCAA: “Congress envisioned negligent entrustment as a claim arising from *legal* firearm sales. The provision immediately following the negligent entrustment provision preserves ‘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[.]’” 15 U.S.C. § 7903(5)(A)(iii). In other words, there is an entirely separate provision under PLCAA for causes of action arising from the illegal sale of a firearm.” Opp’n at 36 (underlining added italics in original). Plaintiffs’ reference to the predicate exception as only applying to a cause of action arising from the illegal sale of a firearm is consistent with the PLCAA, which gives as examples of predicate statutes solely provisions in the federal criminal law related to the sale of firearms. 15 U.S.C. §§ 7903(5)(A)(iii)(1) & (II).

unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” C.G.S. § 42-110b(a).

In their Opposition, plaintiffs focus solely on attempting to stretch CUTPA into a statute applicable to the sale or marketing of firearms, *id.* at 39-45, and in doing so fail to address the other two requirements for the predicate exception to apply to their claims against Camfour: (1) that Camfour knowingly violated CUTPA; and (2) that such alleged violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs make no effort to attempt to explain how Camfour could have knowingly “engag[ed] in unfair methods of competition and unfair or deceptive acts or practices,” by lawfully selling a legal firearm to a federally licensed firearms dealer.⁷ Nor can they fashion an explanation for how an alleged violation of a statute prohibiting “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” could be a proximate cause of Adam Lanza’s criminal acts of December 14, 2012, in which he intentionally shot Natalie Hammond and murdered the other plaintiffs’ decedents.

In addition to the above two reasons, each of which independently preclude plaintiffs’ claims against Camfour from satisfying the predicate exception to the PLCAA, the simple fact is that CUTPA is not a statute applicable to the sale or marketing of firearms. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009) (holding that the predicate exception only applies to “statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry”).

⁷ Tellingly, in an attempt to avoid preemption of their CUTPA claims pursuant to the Connecticut Product Liability Act, plaintiffs state that their CUTPA claims are “founded in negligent entrustment, not product liability.” Opp’n at 45.

In *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2008), the Second Circuit Court of Appeals held that the “predicate exception was meant to apply only to statutes that actually regulate the firearms industry.” In a feeble attempt to argue that CUTPA is applicable to the sale and marketing of firearms, plaintiffs rely entirely on *dicta* from the Second Circuit’s decision in *Beretta*. Opp’n at 41-44. The actual holding from the summary paragraph of the *Beretta* decision was that “the exception created by 15 U.S.C. § 7903(5)(A)(iii) . . . does not encompass New York Penal Law § 240.45” because it does not actually regulate the firearms industry.”⁸ 524 F.3d at 404. Its continued statement regarding the general types of statutes that would be encompassed within Section 7903(5)(A)(iii) was not necessary to its resolution of the case and is therefore *dicta* that is not even binding on district courts in the Second Circuit.

Even based on the Second Circuit’s *dicta*, plaintiffs’ CUTPA claims would not satisfy the PLCAA’s predicate exception. Plaintiffs concede that CUTPA does not expressly regulate firearms, but claim that it “has been applied to the sale and marketing of firearms” and “clearly implicates and is applicable to the sale and marketing of firearms.” Opp’n at 43. They are incorrect. The one and only case that plaintiffs cite for both of these propositions, *Salomonson v. Billistics, Inc.*, No. CV-88-508292, 1991 WL 204385 (Conn. Super. Sept. 27, 1991), is not related to the sale and marketing of firearms in general, which is the applicable criteria for purposes of the predicate exception to the PLCAA. Rather *Salomonson* involved a typical commercial transaction

⁸ Plaintiffs incorrectly claim that this holding was because “New York’s high courts had already indicated their disapproval of such a claim.” Opp’n at 42 n. 22. This is incorrect. Neither of the two cases cited by plaintiffs had addressed whether a claim against the firearms industry for violating New York Penal Law § 240.45 was viable. *Hamilton v. Beretta U.S.A. Corp.*, 727 N.Y.S.2d 7, 10 (2001), involved claims of common law negligent marketing. *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194 (App. Div. 1st Dep’t 2003), involved a common law public nuisance claim.

involving unfair or deceptive acts or practices that just happened to be between a firearm owner and company with which he had contracted to have gunsmithing services performed. *Id.*

Plaintiffs are attempting to make their claims against Camfour – based on its lawful sale of a legal firearm to a federally licensed firearms dealer, and the criminal misuse of that firearm more than two and a half years later – into a CUTPA violation. This is exactly what the district court in the *Ileto* case warned against: a novel theory by a creative attorney seeking to circumvent the clear purpose of the PLCAA by relying on a statute of general applicability to hold a firearm seller liable for the criminal actions of a third party. *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1290 (C.D. Cal. 2006), *aff'd*, 565 F.3d 1126. Accordingly, plaintiffs’ CUTPA claims do not satisfy the predicate exception to the PLCAA.

D. Plaintiffs Do Not Have Standing to Assert a CUTPA Claim

Plaintiffs lack standing to bring a CUTPA claim against Camfour because they are not consumers of the Bushmaster Rifle and are not customers or competitors of Camfour. The only case they rely on to claim that they nevertheless have standing is a 2001 decision from the Connecticut Supreme Court, *Opp’n* at 50, in which it dismissed an action against the firearms industry by the City of Bridgeport and its Mayor, and concluded that it was “unnecessary to consider whether CUTPA standing is confined to consumers, competitors and those in some business or commercial relationship with the defendants.” *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 372, 780 A.2d 98, 133 (2001). *See also id.* at 359 (observing that recovery by individual victims of violence involving firearms “would more likely be appropriate”). Despite plaintiffs’ claim, the Supreme Court did not hold that “the primary victims of gun violence were appropriate plaintiffs” to raise a CUTPA claim. *Opp’n* at 50.

In a subsequent decision, however, the Connecticut Supreme Court limited CUTPA standing to plaintiffs who are consumers or competitors of defendant, or in some other type of business relationship with defendant and their claim arises from that relationship. *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157-58, 881 A.2d 937, 970 (2005) (rejecting the argument that a “CUTPA plaintiff is not required to allege any business relationship with the defendant”); *see also Pinette v. McLaughlin*, 96 Conn. App. 769, 775-78, 901 A.2d 1269, 1274-76 (2006); (relying on *Ventres* for the fact that “plaintiff must have at least some business relationship with the defendant in order to state a cause of action under CUTPA”). Plaintiffs’ only response to these binding decisions is that they “do not view them . . . as determinative in light of *Ganim*, the language of the statute itself, and our rules of statutory construction.” Opp’n at 51. It is patently frivolous to argue that a prior decision not addressing an issue is a basis to disregard a later decision deciding that very issue, or that plaintiffs’ disagreement with the results reached by both the Connecticut Supreme Court and the Connecticut Court of Appeals justifies ignoring binding precedent. Accordingly, plaintiffs do not have standing to pursue a CUTPA claim against Camfour.

E. Plaintiffs’ CUTPA Claims are Barred by the Statute of Limitations

Plaintiffs CUTPA claims are barred by the statute of limitations set forth in C.G.S. § 42-110g(f), which provides that an action based on an alleged violation of CUTPA “may not be brought more than three years after the occurrence of a violation of this chapter.” As alleged in the First Amended Complaint, the only act of Camfour that allegedly violated CUTPA was its sale of the Bushmaster Rifle to Riverview, sometime before Riverview sold the Bushmaster Rifle to Nancy Lanza on March 29, 2010. Accordingly, the statute of limitations for a potential CUTPA

claim against Camfour expired no later than March 29, 2013, and plaintiffs' CUTPA claims against Camfour are time-barred because they did not commence this action until December 13, 2014.

Plaintiffs concede that Natalie Hammond's CUTPA claim is time-barred.⁹ Plaintiffs argue that the CUTPA claims of the remaining plaintiffs are timely, however, because "[a]lthough the claims are asserted under CUTPA, they are governed for limitations purposes by the wrongful death statute." Opp'n at 52. Plaintiffs are only partially correct and their argument highlights why CUTPA claims cannot be used as a basis to recover for personal injuries resulting in death. As discussed above, CUTPA only applies to claims based on an "ascertainable loss of money or property, real or personal," C.G.S. § 42-110g(a), while the wrongful death statute, C.G.S. § 52-555(a), only applies to claims based on injuries resulting in death.¹⁰

The sole authority on which plaintiffs rely for their argument that the death of a plaintiff extends the statute of limitations to file a CUTPA claim is a non-binding decision from the Superior Court. Opp'n at 52-53. In *Pellechia v. Connecticut Light & Power Co.*, 52 Conn. Supp. 45 (2011), the court simply held that longer statutes of limitations applicable to other claims could not be used to extend the two year statute of limitations for wrongful death actions. *Id.* at 444-45. Plaintiff in the *Pellechia* case brought an action seeking damages arising from an "alleged July 29, 2006

⁹ As discussed on pages 28-29 of Camfour's opening brief, whether the statute of limitations for negligence in C.G.S. § 52-584, or the statute of limitations for an action founded upon a tort in C.G.S. § 52-577 is applied, Natalie Hammond's negligent entrustment claim is also time barred because this action was commenced more than three years after Camfour sold the Bushmaster Rifle to Riverview. Plaintiffs have failed to respond to this argument, thereby conceding that all of Natalie Hammond's claims are time-barred and must be dismissed because they were not filed until after the expiration of the statute of limitations.

¹⁰ The description of the injuries and losses of plaintiffs' decedents in the Amended Complaint confirms that plaintiffs' claims in this case are based solely on injuries resulting in death and not an "ascertainable loss of money or property, real or personal." Plaintiffs seek damages based on: terror; ante-mortem pain and suffering; destruction of ability to enjoy life's activities; destruction of earning capacity; death; and funeral expenses. Am. Compl. ¶¶ 228-29.

incident involving the death of the plaintiffs' decedent," but did not commence the action until "July 28, 2009, nearly three years" after the incident. *Id.* at 436, 445.

Plaintiff had "advanced different theories of liability," including negligence, recklessness and CUTPA and, in an effort to avoid the expiration of the two year statute of limitations imposed by the wrongful death statute, "allude[d] to the three year limitations period for CUTPA actions," but the court held that such "fragmentary references may not be considered." *Pellechia*, 52 Conn. Supp. at 445 n.5. The court held that wrongful death statute is the "sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought," and "where damages for a wrongful death are sought, the pertinent statute of limitations is to be found in § 52-55 rather than the statute of limitations for torts or negligence generally." *Id.* at 445 (citations and quotation marks omitted). Simply stated, the *Pellechia* decision stands for nothing more than the fact that an action seeking damages arising from a person's death must be brought within two years of the death.

The above holding in the *Pellechia* case was in accordance with the Connecticut Supreme Court's decision interpreting the statute of limitations for wrongful death claims in *Greco v. United Techs. Corp.*, 277 Conn. 337 (2005). In *Greco*, the Court held that because the wrongful death statute C.G.S. § 52-555:

creates a liability where none formerly existed, the statute must be strictly construed and we are not at liberty to extend, modify or enlarge its scope through the mechanics of construction. We further concluded that the time limitation contained within § 52-555 is a jurisdictional prerequisite which cannot be waived and which must be met in order to maintain an action under § 52-555. Thus, § 52-555 is not to be treated as an ordinary statute of limitations. Rather, it is a limitation on the liability itself, and not of the remedy alone. Accordingly, the right to bring a wrongful death claim pursuant to § 52-555 exists only during the statutorily prescribed time period, and expires thereafter.

Id. at 349-50 (internal citations and punctuation omitted).

Like the statute of limitations for the wrongful death statute, the statute of limitations for CUTPA is contained in the statute that creates the cause of action itself. C.G.S. § 42-110g(f) provides that an action based on an alleged violation of CUTPA “may not be brought more than three years after the occurrence of a violation of this chapter.” The Connecticut Supreme Court has also recognized the “legislative intention expressed in § 42-110g(f) to bar actions for CUTPA violations after the lapse of more than three years from their occurrence,” *Fichera v. Mine Hill Corp.*, 541 A.2d 472, 477 (Conn. 1988), and has held that when:

a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone. Under such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised at any time, even by the court sua sponte, and may not be waived.

Stec v. Raymark Indus., Inc., 299 Conn. 346, 365 (2010) (citation and internal punctuation omitted). Accordingly, like the statute of limitations for the wrongful death statute, the statute of limitations for a CUTPA violation is jurisdictional and “is as a limitation on the liability itself” and not subject to being extended. *Avon Meadow Condominium Ass’n, Inc. v. Bank of Boston Connecticut*, 50 Conn. App. 688, 699 (1988); *see also Blinkoff v. O and G Indus., Inc.*, 113 Conn. App. 1, 8-9 (2009) (holding that the statute of limitations for CUTPA actions established by C.G.S. § 42-110g(f) is jurisdictional).

There is nothing inconsistent between the jurisdictional requirement that a CUTPA claim be filed within three years of the occurrence giving rise to the alleged liability, and the Superior Court’s decision in *Pellechia* holding that an action seeking damages arising from a person’s death must be brought within two years of the death, despite the three year statute of limitations applicable to CUTPA claims. To the extent it is even viable, a plaintiff seeking to assert a CUTPA

claim through a wrongful death action is required to file suit within the earlier of three years from the date of the occurrence of the action giving rise to the alleged CUTPA liability, and two years from the death of plaintiff's decedent. In the present case, the date of the action giving rise to Camfour's alleged CUTPA liability was when it sold the Bushmaster Rifle to Riverview, sometime before Riverview sold the Bushmaster Rifle to Nancy Lanza on March 29, 2010. Accordingly, the deadline for plaintiffs to file a CUTPA claim against Camfour expired no later than March 29, 2013, after which time any potential CUTPA liability of Camfour was forever extinguished and cannot be extended or reactivated by reason of the death of plaintiffs' decedents. Plaintiffs did not commence this action against Camfour until December 13, 2014, and all of their CUTPA claims against Camfour are therefore barred by the statute of limitations, not just those of Natalie Hammond.

F. Plaintiffs' Claims are Barred by Section 42-110c(a) of CUTPA

Yet another fatal defect in plaintiffs' CUTPA claims against Camfour is the fact that CUTPA does not apply to "[t]ransactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States." C.G.S. § 42-110c(a). The reason for this provision is obvious: if something is expressly permitted by law, doing it cannot be an unfair method of competition, or an unfair or deceptive act or practice.

As specifically alleged in the First Amended Complaint, the alleged violation of CUTPA by Camfour, a federally licensed wholesale distributor of firearms, is its sale of the Bushmaster Rifle to Riverview, a federally licensed retail dealer of firearms, as specifically authorized by statutory authority of the United States as administered by the Bureau of Alcohol, Tobacco,

Firearms and Explosives.¹¹ Am. Compl. ¶¶ 27, 30-36. In addition, at the time that the Bushmaster Rifle was sold by Camfour, sale of that firearm was authorized by Connecticut law. C.G.S. § 53-202a-i.

Plaintiffs concede that “the Bushmaster XM15-E2S was legal to sell and possess in Connecticut in 2010, and was lawfully sold to Nancy Lanza.” Opp’n at 35. This concession is fatal to plaintiffs’ CUTPA claims because the operative provision of CUTPA simply states that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” C.G.S. § 42-110b(a). “CUTPA was designed to protect the public from unfair practices, and whether a practice is unfair depends upon the finding of a violation of an identifiable public policy.” *Daddona v. Liberty Mobile Home Sales, Inc.*, 209 Conn. 243, 257 (1988) (emphasis added). *See also Willow Springs Condo. Ass’n, Inc. v. Seventh BRT Devel. Corp.*, 245 Conn. 1, 42 (1998). Doing something expressly authorized by law cannot be a violation of public policy, accordingly CUTPA is facially inapplicable to plaintiffs’ factual allegations against Camfour. Although Camfour raised the argument that their CUTPA claims are barred by C.G.S. § 42-110c(a) in its Motion to Strike, Camfour’s Mem. at 21 n.14, plaintiffs made no effort to argue that this provision does not substantively bar their claims.

¹¹ Plaintiffs claim that Camfour argued in its opening brief that they “have not sufficiently or particularly alleged the factual basis for the CUTPA claims against them,” but waived that argument because it did not file a request to revise. Opp’n at 55. For this proposition, plaintiffs cited to page 21 of Camfour’s opening brief, but it noted that the “First Amended Complaint does not contain any factual allegations of conduct by Camfour that constitute either ‘unfair methods of competition’ or ‘unfair or deceptive acts or practices’ in the conduct of its wholesale firearms business.” Camfour’s claim is not that plaintiffs failed to plead the factual basis for their CUTPA claims against it, but rather that the facts alleged by plaintiffs do not constitute a CUTPA violation. Plaintiffs’ argument that their CUTPA claims should survive dismissal merely because they are contained in the same counts as their negligent entrustment claims, Opp’n at 39, is similarly misplaced. Camfour argues that the allegations in the First Amended Complaint do not support any cause of action against them pursuant to which relief can be granted.

Instead, plaintiffs simply seek to postpone dismissal of their CUTPA claims on this basis by claiming that the “First Amended Complaint does not allege the extent to which the actions in issue are regulated; defendants supply those factual claims themselves.” Opp’n at 54 (emphasis added). Based on their claim that application of C.G.S. § 42-110c(a) is a factual issue, plaintiffs argue that it can only be raised through a motion for summary judgment, not a motion to strike. Opp’n at 54. Again, plaintiffs are incorrect. Defendants are not relying on any facts outside of the complaint to show that plaintiffs’ CUTPA claims are barred by Section 42-110c(a), but are rather relying solely on the allegations in the Amended Complaint and statutory law. *See* Am. Compl. ¶¶ 30 & 36 alleging that Camfour and Riverview are “qualified product sellers within the meaning of 15 U.S.C. § 7903(6).” Pursuant to Section 7903(6) of the PLCAA, a qualified product seller is defined 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.” Accordingly, plaintiffs’ own allegations in their Amended Complaint establish that Camfour’s sale of the Bushmaster Rifle to Riverview was “permitted under law as administered by any regulatory board or officer acting under statutory authority . . . of the United States.” C.G.S. § 42-110c(a).

Therefore, the inapplicability of CUTPA to plaintiffs’ claims against Camfour is established by the allegations in the Amended Complaint itself and their CUTPA claims can properly be dismissed pursuant to a motion to strike.

G. CUTPA Does Not Apply to Claims for Personal Injury or Wrongful Death

CUTPA only applies to damages based on an “ascertainable loss of money or property, real or personal,” C.G.S. § 42-110g(a), and cannot be used as a basis to recover for personal injuries. Plaintiffs are not bringing a CUTPA claim against Camfour based on allegations that it

made deceptive claims or misrepresentations regarding the Bushmaster Rifle, but rather because it was used to cause personal injuries to Natalie Hammond and fatal injuries to the other plaintiffs' decedents.

The cases plaintiffs cite for the proposition that CUTPA can be used as the basis to recover damages for personal injuries do not even remotely support their claim. In *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 10, 955 A.2d 538, 543 (2008), the Connecticut Supreme Court noted that it is "well established that in order to prevail on a CUTPA claim, the plaintiff must demonstrate that it has suffered 'any ascertainable loss of money or property,'" and that the "sum [plaintiff] paid to the estates pursuant to the settlement of the estates' wrongful death action is an ascertainable loss." In *Builes v. Kashinevsky*, this Court held that "altering medical records to avoid negligence claims is a proper claim under CUTPA," but dismissed plaintiff's CUTPA claim because she alleged "emotional distress as her only damages relating to the alleged alteration of the medical records. Any other injuries alleged related to the actual medical treatment, and not to the alleged alteration of the medical records, which is the basis for the CUTPA claim." No. CV095022520S, 2009 WL 3366265, at *4, *6 (Conn. Super. Sept. 15, 2009).

In *Abbhi v. AMI*, the court dismissed plaintiff's CUTPA claims based on the exclusivity provision of the Connecticut Product Liability Act ("CPLA") because it was for "wrongful death against product sellers and is related to the harm caused by a product." No. 960382195S, 1997 WL 325850, at *11 (Conn. Super. June 3, 1997). In addition, the product at issue in the *Abbhi* case, a Danish pastry, was not "defective," yet it caused the death of plaintiff's decedent because it contained peanuts, to which she was allergic, but because the injury was caused by a product, the court held that the exclusivity provision of the CPLA barred a CUTPA claim. *Id.* at *1, *11. In the present case, plaintiffs' claims are in essence that the Bushmaster Rifle is "defective" in the

hands of civilians because it is unreasonably dangerous. This is a classic product liability claim and yet another reason why plaintiffs' CUTPA claims must be dismissed.

H. Plaintiffs' CUTPA Claims are Barred by the Exclusivity Provision of the Connecticut Product Liability Act

In its opening brief, Camfour noted that the only other similar case that has been filed against a federally licensed firearms manufacturer or wholesale firearms distributor seeking damages resulting from the criminal use of a firearm by a third party since the PLCAA was enacted more than a decade ago was *sua sponte* dismissed by the court pursuant to the PLCAA. *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 43 (D.D.C. 2013). Plaintiffs claim that this is because the *Jeffries* case was a "product liability" case, which is barred by the PLCAA when the harm was caused by a criminal act and that Camfour's assertion that the claims in *Jeffries* are indistinguishable from their claims is "absurd." Opp'n at 37 n.18.

As set forth by the court's decision, the *Jeffries* case arose:

out of the tragic March 30, 2010 death of sixteen-year-old Brishell Tashé Jones. The "theft" of a five-dollar piece of costume jewelry set off a chain of senseless retaliatory violence, eventually taking the lives of five teenagers. After attending the funeral of another young homicide victim, Ms. Jones congregated with a group of mourners on South Capitol Street. Orlando Carter and his crew—seeking revenge for an earlier assault—indiscriminately fired into the crowd from a rented minivan. Ms. Jones died from a gunshot wound to the head.

Plaintiff Nardyne Jefferies is the mother of Ms. Jones, and the personal representative and executor of her estate. She has sought to hold a wide array of government agencies and private actors responsible for the death of her daughter. Among those parties is Romanian National Company ROMARM S.A. ("ROMARM"), which the Complaint alleges is "the manufacturer and exporter of the AK-47 assault rifle used in the retaliatory drive-by murder of Brishell Jones." Compl. ¶ 30. The plaintiff alleges, "ROMARM had a duty to act, and either negligently or intentionally failed to act, or acted in a manner that created and/or increased the danger that put Brishell Jones directly in harm's way on March 30, 2010." *Id.*

Jeffries, 916 F. Supp. 2d at 43. Plaintiff in *Jeffries* alleged that:

Ms. Jones' killers used a ROMARM-manufactured assault rifle during the drive by. Compl. ¶¶ 16, 47. The Complaint alleges that Ms. Jones' death was the direct and/or indirect result of the "negligence and/or incompetence by private gun manufacturer(s) (including ROMARM)." *Id.* ¶ 62. It alleges that "ROMARM had a duty to act, and either negligently or intentionally failed to act, or acted in a manner that created and/or increased the danger that put Brishell Jones directly in harm's way on March 30, 2010." *Id.* ¶ 30.

Id. at 44.

The court noted that the "PLCAA makes exceptions, *inter alia*, for negligent entrustment, breach of contract or warranty, and damages resulting directly from a defect or design or manufacture of the product (except where discharge of the product was caused by a volitional act that constituted a criminal offense)." *Jeffries*, 916 F. Supp. 2d. at 45. Based on plaintiff's factual allegations, the court concluded that the

only exception that comes close is the one that allows "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." *Id.* § 7903(A)(v). However, this exception does not apply "where the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.* None of the exceptions to the PLCAA can plausibly apply in this case.

Id. at 46 (emphasis added). Although the court in *Jeffries* opined that the only exception to the PLCAA that "comes close" to applying to plaintiff's claims was the product liability exception, plaintiff did not raise a product liability claim or allege that the "AK-47 assault rifle" at issue was defective.¹² Rather her claim was that ROMARM was liable simply based on the fact that it sold the "AK-47 assault rifle" at issue to the civilian market. If the *Jeffries* case was a product liability case, than this case is as well.

Plaintiffs' primary argument is that the Bushmaster Rifle is unreasonably dangerous in the hands of anyone other than the military or law enforcement, and defendants should therefore be

¹² A copy of plaintiff's complaint in the *Jeffries* case, showing the absence of an alleged product liability claim, is attached hereto as Exhibit A.

held liable simply based on the fact that they sold it to the civilian market. The harm that plaintiffs allege was caused by the Bushmaster Rifle when Adam Lanza used it to shoot Natalie Hammond and the other plaintiffs' decedents.

Pursuant to C.G.S. § 52-572n(a), a “product liability claim as provided in sections 52-240a, 52-240b, 52-572m to 52-572q, inclusive, and 52-577a may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product.” A product liability claim pursuant to Section 52-572n(a) is broadly defined and:

includes all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. “Product liability claim” shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent.

Id. § 52-572m(b). There is nothing in the CPLA that limits its applicability to actions for personal injury or death caused by a product that is alleged to be defective, or not to have functioned as intended; rather it applies whenever the harm was caused by the product. This is why the court in the *Abbi* case dismissed plaintiff's CUTPA claims based on the exclusivity provision of the CPLA related to a death caused by an allergic reaction from eating a Danish when there were “‘peanut proteins, and/or some form of peanut product’ contained in the Danish but not identified on the product label.” 1997 WL 325850, at *1, *11. In *Gerrity v. R.J. Reynolds Tobacco Co.*, 818 A.2d 769, 774 (Conn. 2003), the Connecticut Supreme Court held that for a CUTPA claim to fall outside of the exclusivity provision in the CPLA, it would need to be “either for an injury not caused by the defective product, or if the party is not pursuing a claim for personal injury, death or property damage.” *Id.* at 774 (citation and quotation marks omitted). Plaintiffs' claims in this

case are based on personal injury and wrongful death caused by a product.

Plaintiffs claim that the decision in *Osprey Properties, LLC v. Corning*, No. FBTCV156048525, 2015 WL 9694349 (Conn. Super. Dec. 11, 2015) supports their position that their CUTPA claims are not barred by the exclusivity provision of the CPLA because they are based on defendants' conduct, not a "product defect *per se*." Opp'n at 46. In the *Osprey* case, the court allowed a CUTPA claim to proceed where plaintiff claimed defendant engaged in a "deceptive and unscrupulous act in representing that the underground storage tank was new, when, in fact, it is claimed to have been a used, damaged, repaired, or refurbished tank and the condition of the subject tank was concealed." 2015 WL 9694349, at *5, 7. That is a classic CUTPA claim. In *Dibello v. C.B. Fleet Holding Co, Inc.*, No. DBDCV055000276S 2007 WL 2756374 (Conn. Super. Aug. 31, 2007) the court dismissed plaintiff's CUTPA claim because "plaintiff did not allege sufficient facts to constitute a cause of action in CUTPA to fall outside of the exclusivity provision of the CPLA. The plaintiff failed to plead sufficient facts required by *Gerrity* to allege that the defendants' deliberate misrepresentations caused the plaintiff to suffer a financial loss." *Id.* at *3. In the present case, however, plaintiffs are not bringing a CUTPA claim against Camfour based on allegations that it made deceptive claims or misrepresentations regarding the condition of the Bushmaster Rifle, but rather because it was used to cause personal injuries to Natalie Hammond and the other plaintiffs' decedents.

Plaintiffs' claims against Camfour accordingly constitute a product liability claim for purposes of the exclusivity provision of the CPLA, in the disguise of a CUTPA claim to avoid the immunity provided to Camfour by the PLCAA. Although the PLCAA contains an exception for product liability claims, "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.” 15 U.S.C. § 7903(5)(A)(v). Plaintiffs allege that the discharge of the Bushmaster Rifle was caused by the intentional actions of Adam Lanza, and his acts are deemed as a matter of law to be the sole proximate cause of the damages for which they are seeking to hold Camfour liable.

III. CONCLUSION

For the above reasons, Camfour respectfully requests that this Court grant its motion to strike plaintiffs’ First Amended Complaint against it in its entirety (Counts 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, and 32), and grant such other relief as it deems just and proper.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum of Law in Further Support of the Motion to Strike was served on all counsel of record on June 10, 2016 by virtue of the State of Connecticut Judicial Branch's electronic filing system as well as by first class mail, U.S. postage prepaid to the following addresses:

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