JUDICIAL BRANCH
COURT OPERATIONS DIVISION
225 Spring Street, 2nd Floor
Wethersfield, CT 06109
Fax: (860) 263-2773

Court Operations Unit (860) 263-2734 ext. 3036

Email: Margaret.George@jud.ct.gov

MEMO

TO: Donald J. Mastrony, Chief Clerk

FROM: Peggy George, Caseflow Management Specialist

DATE: October 19, 2015

RE: Remand from U.S. District Court of Donna L. Soto v. Burshmaster Firearms International, LLC
Docket No. FBT CV 15 6048103

Attached are the printable documents regarding the above matter which has been remanded by the U.S District Court to the Judicial District of Fairfield at Bridgeport.

Please acknowledge receipt of this file by returning to me a date-stamped copy of this memo. Thank you.

OFFICE OF THE CLERK
SUPERIOR COURT
2015 OCT 21 P 3: 30
JUDICIAL DISTRICT OF
FAIRFIELD AT BRIDGEPORT
STATE OF CONNECTICUT

CLOSED,EFILE

U.S. District Court
United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:15-cv-00068-RNC

Soto et al v. Bushmaster Firearms International, LLC et al
Assigned to: Judge Robert N. Chatigny
Cause: 28:1332 Diversity-Product Liability

Date Filed: 01/14/2015
Date Terminated: 09/30/2015
Jury Demand: None
Nature of Suit: 365 Personal Inj. Prod. Liability
Jurisdiction: Diversity

Plaintiff

Donna L. Soto
Administratrix of the Estate of Victoria L. Soto

represented by **Joshua D. Koskoff**
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Ave.
Bridgeport, CT 06604
203-336-4421
Email: jkoskoff@koskoff.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
350 Fairfield Avenue
Bridgeport, CT 06604
203-336-4421
Fax: 203-368-3244
Email: asterling@koskoff.com
ATTORNEY TO BE NOTICED

Plaintiff

Ian Hockley
Co-Administrator of the Estate of Dylan C. Hockley

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

William D. Sherlach
Executor of the Estate of Mary Joy Sherlach

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling

(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

William D. Sherlach
individually

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Leonard Pozner
Administrator of the Estate of Noah S. Pozner

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Gilles J. Rousseau
Administrator of the Estate of Lauren G. Rousseau

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

David C. Wheeler
Administrator of the Estate of Benjamin A. Wheeler

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Neil Heslin
Co-Administrator of the Estate of Jesse McCord Lewis

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling

(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Mark Barden
Co-Administrators of the Estate of Daniel G. Barden

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Mary D'Avino
Administratrix of the Estate of Rachel M. D'Avino

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Natalie Hammond

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Nicole Hockley
Co-Administrator of the Estate of Dylan C. Hockley

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Scarlett Lewis
Co-Administrator of the Estate of Jesse McCord Lewis

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling

(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Jacqueline Barden
Co-Administrator of the Estate of Daniel G. Barden

represented by **Joshua D. Koskoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alinor Clemans Sterling
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Bushmaster Firearms International, LLC
also known as
Freedom Group, Inc
also known as
Remington Outdoor Group, Inc

Defendant

Freedom Group, Inc
also known as
Freedom Group
also known as
Freedom Group, LLC
also known as
Remington Outdoor Company

Defendant

Bushmaster Firearms
also known as
Freedom Group
also known as
Remington Outdoor Company, Inc.

Defendant

Bushmaster Firearms, Inc
also known as
Freedom Group, Inc
also known as
Remington Outdoor Company, Inc.

Defendant

Bushmaster Holdings, LLC
also known as
Freedom Group, Inc

		Notice of Removal, filed by Remington Outdoor Company, Inc., Remington Arms Company, LLC Signed by Clerk on 1/16/15. (Attachments: # 1 Removal Standing Order)(Sundie, T) (Entered: 01/16/2015)
01/16/2015	11	NOTICE of Appearance by Matthew C. Wagner on behalf of Remington Arms Company, LLC, Remington Outdoor Company, Inc. (Wagner, Matthew) (Entered: 01/16/2015)
01/20/2015	12	Corporate Disclosure Statement by Camfour Holding, LLP, Camfour, Inc. identifying Corporate Parent Camfour Holding, Inc. for Camfour, Inc.. (Allan, Scott) (Entered: 01/20/2015)
01/20/2015	13	NOTICE of Appearance by Michael Ryan Patrick on behalf of David Laguercia, Riverview Sales, Inc. (Patrick, Michael) (Entered: 01/20/2015)
01/20/2015	14	Corporate Disclosure Statement by Riverview Sales, Inc.. (Patrick, Michael) (Entered: 01/20/2015)
01/21/2015	15	NOTICE by Remington Arms Company, LLC, Remington Outdoor Company, Inc. *Statement Pursuant to Standing Order on Removed Cases* (Whitcomb, Jonathan) (Entered: 01/21/2015)
01/21/2015	16	Consent MOTION for Extension of Time until February 20, 2015 to respond to the Complaint by Camfour Holding, LLP, Camfour, Inc.. (Allan, Scott) (Entered: 01/21/2015)
01/21/2015	17	Consent MOTION for Extension of Time until 2/20/2015*to* Respond to and/or Move Against the Complaint 1 Notice of Removal, by David Laguercia, Riverview Sales, Inc.. (Patrick, Michael) (Entered: 01/21/2015)
01/22/2015	18	ORDER granting 16 Motion for Extension of Time to 2/20/2015 to respond to the complaint. Signed by Judge Robert N. Chatigny on 1/22/2015. (Rickevicius, L.) (Entered: 01/22/2015)
01/22/2015		Answer deadline updated for Camfour Holding, LLP to 2/20/2015; Camfour, Inc. to 2/20/2015. (Rickevicius, L.) (Entered: 01/22/2015)
01/22/2015	19	ORDER granting 17 Consent Motion for Extension of Time to 2/20/2015 to respond to the complaint. Signed by Judge Robert N. Chatigny on 1/22/2015. (Rickevicius, L.) (Entered: 01/22/2015)
01/22/2015		Answer deadline updated for David Laguercia to 2/20/2015; Riverview Sales, Inc. to 2/20/2015. (Rickevicius, L.) (Entered: 01/22/2015)
01/26/2015	20	NOTICE of Appearance by Joshua D. Koskoff on behalf of Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler (Koskoff, Joshua) (Entered: 01/26/2015)
01/26/2015	21	NOTICE of Appearance by Alinor Clemans Sterling on behalf of Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach (Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler (Sterling, Alinor) (Entered: 01/26/2015)
02/03/2015	22	

		MOTION for Attorney(s) Andrew A. Lothson to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3497758) by Remington Arms Company, LLC, Remington Outdoor Company, Inc.. (Attachments: # 1 Affidavit of Andrew A. Lothson, # 2 Certificate of Good Standing)(Whitcomb, Jonathan) (Entered: 02/03/2015)
02/03/2015	23	MOTION for Attorney(s) James B. Vogts to be Admitted Pro Hac Vice (paid $75 PHV fee; receipt number 0205-3497791) by Remington Arms Company, LLC, Remington Outdoor Company, Inc.. (Attachments: # 1 Affidavit of James B. Vogts, # 2 Certificate of Good Standing)(Whitcomb, Jonathan) (Entered: 02/03/2015)
02/04/2015	24	ORDER granting 22 Motion to Appear Pro Hac Vice; granting 23 Motion to Appear Pro Hac Vice. Signed by Clerk on 2/4/15. (Sundie, T) (Entered: 02/04/2015)
02/10/2015	25	NOTICE of Appearance by James B. Vogts on behalf of Remington Arms Company, LLC, Remington Outdoor Company, Inc. (Vogts, James) (Entered: 02/10/2015)
02/10/2015	26	NOTICE of Appearance by Andrew A. Lothson on behalf of Remington Arms Company, LLC, Remington Outdoor Company, Inc. (Lothson, Andrew) (Entered: 02/10/2015)
02/13/2015	27	MOTION to Remand to State Court by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler.Responses due by 3/6/2015 (Attachments: # 1 Memorandum in Support, # 2 Exhibit A)(Koskoff, Joshua) (Entered: 02/13/2015)
02/17/2015	28	RESPONSE by Remington Arms Company, LLC, Remington Outdoor Company, Inc. *(re: Court's request for proposed briefing schedule on motions to dismiss)*. (Vogts, James) (Entered: 02/17/2015)
02/18/2015	29	MOTION for Extension of Time to respond to the complaint by Camfour Holding, LLP, Camfour, Inc.. (Allan, Scott) (Entered: 02/18/2015)
02/18/2015	30	MOTION for Entry of Scheduling Order Order by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler. (Sterling, Alinor) (Entered: 02/18/2015)
02/18/2015	31	MOTION for Extension of Time Respond to and/or Move Against the Complaint by David Laguercia, Riverview Sales, Inc.. (Patrick, Michael) (Entered: 02/18/2015)
02/19/2015	32	RESPONSE re 30 MOTION for Entry of Scheduling Order Order filed by Remington Arms Company, LLC, Remington Outdoor Company, Inc.. (Vogts, James) (Entered: 02/19/2015)
02/20/2015	33	REPLY to Response to 30 MOTION for Entry of Scheduling Order Order filed by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach (individually), Donna L. Soto, David C. Wheeler. (Sterling, Alinor) (Entered: 02/20/2015)
03/06/2015	34	Memorandum in Opposition re 27 MOTION to Remand to State Court filed by Remington Arms Company, LLC, Remington Outdoor Company, Inc.. (Vogts, James) (Entered: 03/06/2015)

05/13/2015	46	Supplemental MOTION to Remand to State Court by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler.Responses due by 6/3/2015 (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Exhibit B)(Koskoff, Joshua) (Entered: 05/13/2015)
05/18/2015	47	NOTICE by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler re 46 Supplemental MOTION to Remand to State Court *of Filing of Amended Memorandum of Law in Support of Supplemental Motion to Remand* (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Exhibit B)(Koskoff, Joshua) (Entered: 05/18/2015)
05/21/2015	48	NOTICE by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler *Withdrawal of Argument Made in Part V.C. of 47-1* (Sterling, Alinor) (Entered: 05/21/2015)
06/03/2015	49	Memorandum in Opposition re 46 Supplemental MOTION to Remand to State Court filed by Remington Arms Company, LLC, Remington Outdoor Company, Inc.. (Lothson, Andrew) (Entered: 06/03/2015)
06/15/2015	50	MOTION for Extension of Time to File Response/Reply as to 46 Supplemental MOTION to Remand to State Court until June 19, 2015 by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach(individually), Donna L. Soto, David C. Wheeler. (Koskoff, Joshua) (Entered: 06/15/2015)
06/15/2015	51	ORDER granting 50 Motion for Extension of Time to File Response/Reply re 46 Supplemental MOTION to Remand to State Court Responses due by 6/19/2015. Signed by Judge Robert N. Chatigny on 6/15/2015. (Rickevicius, L.) (Entered: 06/15/2015)
06/15/2015	52	Set/Reset Deadlines as to 46 Supplemental MOTION to Remand to State Court . Responses due by 6/19/2015. (Rickevicius, L.) (Entered: 06/15/2015)
06/19/2015	53	REPLY to Response to 46 Supplemental MOTION to Remand to State Court filed by Jacqueline Barden, Mark Barden, Mary D'Avino, Natalie Hammond, Neil Heslin, Ian Hockley, Nicole Hockley, Scarlett Lewis, Leonard Pozner, Gilles J. Rousseau, William D. Sherlach(Executor of the Estate of Mary Joy Sherlach), William D. Sherlach (individually), Donna L. Soto, David C. Wheeler. (Koskoff, Joshua) (Entered: 06/19/2015)
09/30/2015	54	ORDER granting 27 Motion to Remand to State Court. Defendants have not met their burden of establishing that there is no possibility plaintiffs can state a cause of action against the non-diverse defendant, Riverview Sales, Inc. See Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1988). Accordingly, the motion to remand is hereby granted. Plaintiffs' request for an award of fees and costs incurred as a result of the removal is denied. An opinion will follow. So ordered. Signed by Judge Robert N. Chatigny on 9/30/15. (Chatigny, Robert) (Entered: 09/30/2015)
09/30/2015	55	

		ORDER granting 46 Motion to Remand to State Court. See the text order entered today granting ECF No. 27. Signed by Judge Robert N. Chatigny on 9/30/15. (Chatigny, Robert) (Entered: 09/30/2015)
09/30/2015	56	ORDER denying 29 as moot Motion for Extension of Time. Signed by Judge Robert N. Chatigny on 9/30/15. (Chatigny, Robert) (Entered: 09/30/2015)
09/30/2015	57	ORDER denying as moot 30 Motion for Order. Signed by Judge Robert N. Chatigny on 9/30/15. (Chatigny, Robert) (Entered: 09/30/2015)
09/30/2015	58	ORDER denying as moot 31 Motion for Extension of Time. Signed by Judge Robert N. Chatigny on 9/30/15. (Chatigny, Robert) (Entered: 09/30/2015)
10/01/2015		JUDICIAL PROCEEDINGS SURVEY: The following link to the confidential survey requires you to log into CM/ECF for SECURITY purposes. Once in CM/ECF you will be prompted for the case number. Although you are receiving this survey through CM/ECF, it is hosted on an independent website called SurveyMonkey. Once in SurveyMonkey, the survey is located in a secure account. The survey is not docketed and it is not sent directly to the judge. To ensure anonymity, completed surveys are held up to 90 days before they are sent to the judge for review. We hope you will take this opportunity to participate, please click on this link: https://ecf.ctd.uscourts.gov/cgi-bin/Dispatch.pl?survey (Glynn, T.) (Entered: 10/01/2015)
10/09/2015	59	RULING re 54 Order on Motion to Remand to State Court. Please see attached for details. Signed by Judge Robert N. Chatigny on 10/9/15. (Samuels, J) (Additional attachment(s) added on 10/13/2015: # 1 REPLACEMENT PDF) (Glynn, T.). (Entered: 10/09/2015)
10/13/2015	60	Docket Entry Correction re 59 Order, REPLACEMENT PDF Added to correct Ruling. (Glynn, T.) (Entered: 10/13/2015)
10/16/2015	61	Case remanded to Connecticut Superior Court, Judicial District of Fairfield, at Bridgeport. (Glynn, T.) (Entered: 10/16/2015)

PACER Service Center			
Transaction Receipt			
10/16/2015 15:18:36			
PACER Login:	sc4063:3058647:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:15-cv-00068-RNC
Billable Pages:	10	**Cost:**	1.00

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No.
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

DEFENDANTS REMINGTON ARMS COMPANY, LLC AND REMINGTON OUTDOOR COMPANY, INC.'S NOTICE OF REMOVAL

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, notify this Court that they are removing the above captioned action currently pending in the Superior Court of the Judicial District of Fairfield County (at Bridgeport) to the United States District Court for the District of Connecticut. In support, the Remington Defendants state as follows:

INTRODUCTION

1. On December 13, 2014, Plaintiffs filed their Complaint against (1) the Remington Defendants,[1] (2) Camfour, Inc. and Camfour Holding, Inc. (collectively, the "Camfour

[1] This Notice of Removal is filed on behalf of Defendants "Remington Arms Company, LLC" and "Remington Outdoor Company, Inc." For clarification, Defendant "Remington Arms Company, LLC" was formerly known as "Remington Arms Company, Inc." Thus, "Remington Arms Company, Inc." does not exist. Defendant "Remington Outdoor Company, Inc." was formerly known as "Freedom Group, Inc." Thus, "Freedom Group, Inc." does not exist. "Bushmaster Firearms International, LLC" is also a named defendant but does not exist as it was merged into and is only an unincorporated brand of Remington Arms Company, LLC. Plaintiffs have also named or listed as "a/k/a" several other entities that do

Defendants"),[2] and (3) Riverview Sales, Inc. and David LaGuercia (collectively, the "Riverview Defendants"), in the Superior Court of the Judicial District of Fairfield County (at Bridgeport).

2. The Remington Defendants were served with the Complaint on December 15, 2014. This notice of removal is timely filed within thirty (30) days after the Remington Defendants were served.

3. The United States District Court for the District of Connecticut is the federal judicial district encompassing Fairfield County, Connecticut. Therefore, venue lies in this Court pursuant to 28 U.S.C. § 1441(a).

4. Copies of all papers, pleadings, process, and orders, if any, served on the Remington Defendants are attached as Exhibit A, including the Summonses and Plaintiffs' Complaint ("Compl.") and exhibits thereto.

DIVERSITY JURISDICTION

5. The basis for removal to federal court is diversity jurisdiction pursuant to 28 U.S.C. § 1332, because: (1) Riverview Sales, Inc. is improperly joined, (2) there is complete diversity of citizenship between Plaintiffs, on the one hand, and the diverse defendants, that is, the Remington Defendants, the Camfour Defendants and David LaGuercia, on the other hand, and (3) the amount in controversy, exclusive of interest and costs, exceeds seventy-five thousand dollars ($75,000.00).

---

not exist: (1) "Remington Arms Co., LLC"; (2) "Remington Outdoor Group, Inc."; (3) "Remington Outdoor Company"; (4) "Remington Outdoor Co."; (5) "Freedom Group, LLC"; (6) "Freedom Group"; (7) "Bushmaster Firearms"; (8) "Bushmaster Holdings, LLC"; (9) "Bushmaster Firearms, Inc."; and (10) "Bushmaster Firearms Int., Inc." These non-existent entities have not been "properly joined and served as defendants[.]" 28 U.S.C. § 1441(b)(2). For diversity purposes, "the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(b)(1).

[2] Plaintiffs have also named "Camfour Holding, LLP" as a defendant, but that entity does not exist.

6. Remington Outdoor Company, Inc. (hereinafter, "ROCI") is a corporation organized under the laws of the state of Delaware with its principal place of business in North Carolina. Thus, for the purposes of diversity jurisdiction, ROCI is a citizen of Delaware and North Carolina.

7. Remington Arms Company, LLC (hereinafter "Remington"), is a limited liability company organized under the laws of the state of Delaware with its principal place of business in North Carolina. Remington's sole member is a Delaware limited liability company with its principal place of business in North Carolina.[3] Thus, for the purposes of diversity jurisdiction, Remington is a citizen of Delaware and North Carolina.

8. Camfour, Inc. and Camfour Holding, Inc. are corporations organized under the laws of the state of Massachusetts with principal places of business in Massachusetts. Thus, for the purposes of diversity jurisdiction, the Camfour Defendants are citizens of Massachusetts. The Camfour Defendants consent to removal. (Removal Consent, attached as Exhibit B.)[4]

9. Riverview Sales, Inc. is a Connecticut corporation with its principal place of business in Connecticut, and is therefore a citizen of Connecticut.[5]

10. David LaGuercia "is or was" the federal firearms licensee of the Riverview Sales,

---

[3] Remington's sole member is FGI Operating Company, LLC ("Operating"), a Delaware limited liability company with its principal place of business in North Carolina. Operating's sole member is FGI Holding Company, LLC ("Holding"), a Delaware limited liability company with its principal place of business in North Carolina. Holding's sole member is ROCI.

[4] Camfour, Inc. is owned by Camfour Holding, Inc., which is also a corporation organized under the laws of Massachusetts with its principal place of business in Massachusetts.

[5] When removal is based on improper joinder of defendants, it is unnecessary for the removing defendants to obtain consent from the improperly joined defendants. *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 295 (S.D.N.Y. 2001) (Kaplan, J.); *see Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993) ("[A]s a general rule, removal requires the consent of all co-defendants. In cases involving alleged improper or fraudulent parties, however, application of this requirement to improperly or fraudulently joined parties would be nonsensical. . . .").

Inc. business. (*See* Compl. at ¶ 33.) LaGuercia is a Massachusetts citizen, and consents to this removal. (Removal Consent, attached as Exhibit C.)

11. All Plaintiffs are citizens of Connecticut. The Soto, Hockley, Sherlach, Pozner, Rousseau, Wheeler, Lewis, Barden and D'Avino Plaintiffs are estates created under Connecticut probate law. And Plaintiff Natalie Hammond, suing in "her individual capacity[,]" is a citizen of Connecticut. (*See* Compl. at ¶¶ 35-44, Exhs. A through I, Fiduciary's Probate Certificates of each estate; *see also* 28 U.S.C. § 1332(c)(2); Civil Summons at p. 3.)

12. As explained below, Riverview Sales, Inc. is improperly joined in this action. As a result, Riverview Sales, Inc.'s citizenship should not be considered in determining whether complete diversity exists among the remaining parties. Complete diversity exists between the Plaintiffs, on the one hand, and the Remington Defendants, the Camfour Defendants and David LaGuercia, on the other.

BACKGROUND

13. Plaintiffs' action arises from the tragic December 14, 2012 shooting at Sandy Hook Elementary School by Adam Lanza. Plaintiffs allege that a Bushmaster XM15-E2S rifle (the "firearm") manufactured by the Remington Defendants was among the firearms used by Adam Lanza to commit his heinous crimes. Plaintiffs allege that the Camfour Defendants purchased the firearm from the Remington Defendants "prior to March of 2010[.]" (*Id.* at ¶ 152.)

14. Plaintiffs allege that the Riverview Defendants purchased the firearm from the Camfour Defendants "prior to March of 2010[.]" (*Id.* at ¶ 153.)

15. Plaintiffs allege that Nancy Lanza, the mother of Adam Lanza, purchased the firearm from the Riverview Defendants in March 2010. (*Id.* at ¶ 153.)

16. Plaintiffs allege that Adam Lanza took the firearm from a gun closet in the house he shared with his mother on the morning of December 14, 2012. (Compl. at ¶ 154.)

17. Plaintiffs assert thirty-three (33) Wrongful Death claims against the Remington Defendants, the Camfour Defendants and the Riverview Defendants.[6]

IMPROPER JOINDER

18. Under the doctrine of improper or "fraudulent joinder," a defendant can remove to federal court by invoking diversity jurisdiction when there is no reasonable basis for a cause of action against the improperly joined, non-diverse defendant. *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998). The doctrine is satisfied when the defendant demonstrates "by clear and convincing evidence" that there is "no possibility" that the plaintiff "can state a cause of action against the non-diverse defendant in state court." *Id.* at 461. In other words, "[j]oinder will be considered fraudulent when it is established that there can be no recovery against the defendant under the law of the state on the cause alleged." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) (internal citation and original brackets omitted).

19. This Court has stated that "the language 'no possibility' has been interpreted as meaning no 'reasonable possibility' or 'no reasonable basis.'" *Doe v. Fed. Express Corp.*, No. 3:05-cv-1968, 2006 U.S. Dist. LEXIS 31825, *4 (D. Conn. May 22, 2006) (Eginton, J.) (citing *In re Rezulin Prods. Liability Litig.*, 133 F. Supp. 2d at n.4).

20. There is no reasonable basis for a cause of action against Riverview Sales, Inc. under the allegations of Plaintiffs' Complaint because Riverview Sales, Inc. is immune from Plaintiffs' claims under federal law.

---

[6] Plaintiff Natalie Hammond also asserts claims for Wrongful Death, *see* Counts 31-33, even though she is not alleged to have died in the incident.

21. The Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* (hereafter, "PLCAA"), immunizes firearms sellers such as Riverview Sales, Inc. from claims for damages and other forms of relief arising from the criminal misuse of firearms by third parties. 15 U.S.C. §§ 7902, 7903(5)(a).[7] Congress declared that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State and local laws" and those engaged in firearms sales "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse" firearms. 15 U.S.C. §§ 7901(a)(4) & (a)(5).

22. The operative language of the PLCAA states that "[a] qualified civil liability action may not be brought in any Federal or State court" and "shall be immediately dismissed[.]" 15 U.S.C. § 7902. Congress defined a "qualified civil liability action" 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, abatement, restitution, fines, penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or by a third party ...."

---

[7] Every federal and state appellate court to address the constitutionality of the PLCAA has found it constitutional. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392-98 (2d Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009); *Ileto v. Glock*, 565 F.3d 1126, 1138-42 (9th Cir. 2009), *cert denied*, 130 S.Ct. 3320 (2010); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172-82 (D.C. 2008), *cert denied*, 129 S. Ct. 1579 (2009); *Estate of Kim ex rel v. Coxe*, 295 P.3d 380, 388-92 (Alaska 2013); *Adames v. Sheehan*, 909 N.E.2d 742, 764-65 (Ill. 2009), *cert denied*, 130 S. Ct. 1014 (2009). In addition, at least two trial courts have issued opinions affirming the PLCAA's constitutionality. *See Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 182-86 (D.D.C. 2009); *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, *16-23 (Conn. Super. May 26, 2011). And numerous courts have applied the PLCAA to dismiss lawsuits without confronting challenges to its constitutionality. *See, e.g.*, *Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214 (N.D.N.Y. Sept. 20, 2013); *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42 (D.D.C. Jan. 8, 2013); *Bannerman v. Mountain State Pawn, Inc.*, 2010 WL 9103469 (N.D.W.Va. Nov. 5, 2011); *Ryan v. Hughes-Ortiz*, 81 Mass.App.Ct. 90 (Mass. App. 2012).

15 U.S.C. § 7903(5)(A). A "qualified product" includes a firearm as defined in 18 U.S.C. §§ 921(a)(3)(A) & (B). 15 U.S.C. § 7903(4).

23. Congress' intent was to "preempt common-law claims, such as general tort theories of liability." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009). Congress created six narrow exceptions to the definition of a "qualified civil liability action" and immunity under the PLCAA:

> (i) an action brought against a transferor convicted under section 924(h) of title 18, [United States Code,] 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 an 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 entry 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 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 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 when 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 [18 U.S.C. §§ 921 et seq.] or chapter 53 of title 26 [26 U.S.C. §§ 5801 et seq.].

15 U.S.C. §§ 7903(5)(A)(i)-(vi). Congress expressly provided that no provision of the PLCAA is to be "construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C).

24. Plaintiffs' Complaint appears to allege that Riverview Sales, Inc. created a common law public nuisance, knowingly violated the Connecticut Unfair Trade Practices Act ("CUTPA") and negligently entrusted the firearm to Nancy Lanza. (*See* Compl. at Count Three, ¶¶ 174-194.) Plaintiffs' claims do not fit within any of the six exceptions to PLCAA immunity.[8]

25. One of the exceptions to PLCAA immunity is an action for negligent entrustment. 15 U.S.C. § 7903(5)(A)(ii). Congress defined negligent entrustment as follows:

> As used in subpargraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, *the person to whom the product is supplied is likely to, and does, use the product* in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B) (emphasis added). Thus, a negligent entrustment action against a

---

[8] Plaintiffs allege an additional claim against the Remington Defendants, which appears to be a product liability action based on a failure to design the firearm "with safety mechanisms that prevent the weapon from being fired by someone other than the purchaser." (Compl. at Count One, ¶ 183.)

firearm seller must involve a sale of a firearm by a seller to the same person who thereafter "use[s]" the firearm to cause harm to himself or herself, or others. Here, Plaintiffs allege that Riverview Sales, Inc. sold the firearm to Nancy Lanza. (Compl. at ¶ 153.) They allege that nearly three years later Adam Lanza "used" the firearm to cause physical injuries to others. (*See id.* at ¶¶ 155, 166, 169, 170.) Plaintiffs cannot plead a negligent entrustment action against Riverview Sales, Inc. under the definition provided by Congress.

26. A second exception to PLCAA immunity is a claim against a seller for "knowingly violat[ing] a State or Federal statute applicable to the sale or marketing" of firearms. 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs have not alleged that Riverview Sales, Inc. violated a statute applicable to the sale or marketing of firearms in selling the firearm to Nancy Lanza. Moreover, there is no reasonable basis on which such an allegation can be made because the sale was not made in violation of an applicable firearms statute. *See Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012* at 36 ("All of the firearms . . . involved in these cases were legally purchased by the shooter's mother.") (available at http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf (last visited Jan. 13, 2014)).[9]

27. The exception for "knowingly violat[ing] a State or Federal statute applicable to the sale or marketing" of firearms does not encompass statutes of general application, but only those statutes that "expressly regulate firearms" or "that clearly can be said to implicate the purchase and sale of firearms." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d

[9] In analyzing improper joinder, "courts can look beyond the pleadings to determine if the pleadings can state a cause of action." *Pampillonia*, 138 F.3d at 461-62 (considering affidavit to decide whether defendant was improperly joined); *see Oliva v. Bristol-Myers Squibb Co.*, No. 3:05-cv-486, 2005 U.S. Dist. LEXIS 35881, *4-5 (D. Conn. Dec. 15, 2005); *In re Rezulin Prods. Liability Litig.*, 133 F. Supp. at 281-82.

Cir. 2008) (holding that New York criminal nuisance statute not "applicable to the sale or marketing of firearms"), *cert. denied*, 129 S. Ct. 3320 (2009); *Ileto*, 565 F.3d at 1135-36 (finding it "likely that Congress had in mind 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."); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp. 2d 174, 180-81 (D.D.C. 2009) (holding that alleged violation of District of Columbia Assault Weapons Manufacturing Strict Liability Act not within the § 7903(5)(A)(iii) exception). The only statute referenced in Plaintiffs' Complaint is CUTPA, a statute that does not expressly regulate or clearly implicate the regulation of firearms. CUTPA is a statute of general application that creates an action to recover an "ascertainable amount of money or property" resulting from unfair or deceptive business practices. Conn. Gen. Stat. § 42-110g. CUTPA is not the type of statute "Congress had in mind" as a predicate statute for immunity under § 7903(5)(A)(iii). *See Ileto*, 565 F.3d at 1135-36.[10]

28. Plaintiffs' allegation that Riverview Sales, Inc.'s "conduct" *in s*elling the firearm to Nancy Lanza "constituted a public nuisance" also does not fit within any of the six exceptions to firearm seller immunity. *See* 15 U.S.C. §§ 7903(5)(A)(i)-(vi*)*; *City of New York*, 524 F.3d at 403 (ordering dismissal of nuisance claim as barred by the PLCAA); *Ileto*, 565 F.3d at 1126 (general tort theories of liability preempted by the PLCAA, including public nuisance claim). Congress did not provide an exception to immunity under the PLCAA based on common law public nuisance.

29. Nor did Congress create an exception to immunity based on ordinary negligence.

---

[10] CUTPA is also not the type of statute that can serve as the basis for a negligence per se claim under Connecticut law, and thus cannot be the basis for a negligence per se claim within the § 7903(5)(A)(ii) exception to immunity. *See generally Gore v. Peoples Savings Bank*, 235 Conn. 360 (1995).

Ileto, 565 F.3d at 1135-36 ("Congress clearly intended to preempt common law claims, such as general tort theories of liability[,]" including "classic negligence" claims); *Gilliand v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, *16 (Conn. Super. May 26, 2011) ("[I]t is clear that ... a 'qualified civil liability action' ... includes cases where it is alleged that gun sellers negligently cause harm."); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.2d 3d 380, 386 (Alaska 2013) ("The statutory exceptions [under the PLCAA] do not include general negligence, and reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplussage.").

30. In sum, there is no reasonable basis for a cause of action against Riverview Sales, Inc. Under the facts pleaded by Plaintiffs, Riverview Sales, Inc. is immune from liability under the PLCAA and has been improperly joined as a defendant in this case.

AMOUNT IN CONTROVERSY

31. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 because the amount in controversy is greater than $75,000, exclusive of interest and costs.

32. Removing defendants must show that it appears "to a reasonable probability" that the claimed amount in controversy exceeds the statutory jurisdictional threshold. *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2d Cir. 2000). If it is facially apparent from the plaintiffs' complaint that the amount in controversy exceeds the removal threshold, the amount in controversy requirement is satisfied.

33. Nine Plaintiffs assert thirty (30) wrongful death claims and one plaintiff asserts a personal injury claim. Together, they seek (1) monetary damages (for *e.g.*, "Terror"; "ante-mortem pain and suffering"; "destruction of the ability to enjoy life's activities"; "destruction of earning capacity"; "pain and suffering"; "severe, permanent and painful injuries"; "medical

expenses"; and "death"), (2) punitive damages, (3) attorneys' fees, (4) costs, and (5) injunctive relief. (*See* Compl. at "WHEREFORE" clause; and *e.g.*, Count One, ¶¶ 192-193 and Count Thirty-three, ¶¶ 193-194.) Given the multiplicity of Plaintiffs and their multiple claims against multiple defendants, the Complaint, on its face, seeks compensation far in excess of the jurisdictional threshold of $75,000. (*See* Declaration of Counsel, attached as Exhibit D.)

34. Because both of the requirements for federal diversity jurisdiction under 28 U.S.C § 1332 are satisfied, *i.e.*, complete diversity of citizenship exists between the Plaintiffs, on the one hand, and the Remington Defendants, the Camfour Defendants and David LaGuercia, on the other hand, and the amount in controversy exceeds the statutory minimum, this action is properly removed.

35. Prompt written notice of this Notice of Removal is being sent to Plaintiffs through their counsel, and a copy of this Notice of Removal is being filed with the Clerk of the Superior Court of the Judicial District of Fairfield County (at Bridgeport), as required by 28 U.S.C. § 1446(d).

WHEREFORE, Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc., hereby give notice that this action is removed from the Superior Court of the Judicial District of Fairfield County (at Bridgeport) to the United States District Court for the District of Connecticut.

Dated: January 14, 2015.

Respectfully submitted,

/s/ Jonathan P. Whitcomb
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Richard Castiglioni (CT07280) (rcastiglioni@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Jonathan J. Kelson (CT26755) (jkelson@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800
(203) 348-2321 fax

James B. Vogts (*pro hac vice* application forthcoming) jvogts@smbtrials.com
Andrew A. Lothson (*pro hac vice* application forthcoming) alothson@smbtrials.com
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system and Federal Express.

Joshua D. Koskoff
Alinor C. Sterling
Katie Mesner-Hage
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244

Attorneys for Plaintiffs

/s/ Jonathan P. Whitcomb
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

EXHIBIT A

CT Corporation

Service of Process Transmittal

12/15/2014
CT Log Number 526238625

TO: Legal Department
Remington Arms Company, Inc.
PO Box 700
Madison, NC 27025-0700

RE: **Process Served in Connecticut**

FOR: Remington Outdoor Company, Inc. (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION:	Donna L. Soto, Administratrix of the Estate of Victoria L. Soto, et al., Pltfs. vs. Bushmaster Firearms International, LLC, etc., et al. including Remington Outdoor Company, Inc., Dfts.
DOCUMENT(S) SERVED:	Summons, Introduction, Instructions, Exhibit(s)
COURT/AGENCY:	Fairfield at Bridgeport Superior Court Judicial District, CT Case # None
NATURE OF ACTION:	Wrongful Death - Bushmaster AR-15 rifle, model XM15-E2S
ON WHOM PROCESS WAS SERVED:	C T Corporation System, Hartford, CT
DATE AND HOUR OF SERVICE:	By Process Server on 12/15/2014 at 15:30
JURISDICTION SERVED :	Connecticut
APPEARANCE OR ANSWER DUE:	02/03/15
ATTORNEY(S) / SENDER(S):	Joshua D. Koskoff Koskoff, Koskoff & Bieder, P.C. 350 Fairfield Avenue Bridgeport, CT 06604 203-336-4421
REMARKS:	The documents received have been modified to reflect the name of the entity being served.
ACTION ITEMS:	SOP Papers with Transmittal, via Fed Ex 2 Day , 772241424171 Email Notification, Legal Department lauren.coe@remington.com
SIGNED:	C T Corporation System
ADDRESS:	One Corporate Center Hartford, CT 06103-3220
TELEPHONE:	860-724-9044

Information displayed on this transmittal is for CT Corporation's record keeping purposes only and is provided to the recipient for quick reference. This information does not constitute a legal opinion as to the nature of action, the amount of damages, the answer date, or any information contained in the documents themselves. Recipient is responsible for interpreting said documents and for taking appropriate action. Signatures on certified mail receipts confirm receipt of package only, not contents.

SUMMONS - CIVIL
JD-CV-1 Rev. 9-14
C.G.S. §§ 51-346, 51-347, 51-349, 51-350, 52-45a, 52-48, 52-259, P.B. Secs. 3-1 through 3-21, 8-1

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

See other side for instructions

☐ "X" if amount, legal interest or property in demand, not including interest and costs is less than $2,500.
☒ "X" if amount, legal interest or property in demand, not including interest and costs is $2,500 or more.
☐ "X" if claiming other relief in addition to or in lieu of money or damages.

TO: Any proper officer; BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to make due and legal service of this Summons and attached Complaint.

Address of court clerk where writ and other papers shall be filed (Number, street, town and zip code) (C.G.S. §§ 51-346, 51-350)	Telephone number of clerk (with area code)	Return Date (Must be a Tuesday)
1061 Main Street, Bridgeport, CT 06604	(203) 579-6527	February (Month) 3 (Day), 2015 (Year)

☒ Judicial District ☐ Housing Session ☐ G.A. Number:	At (Town in which writ is returnable) (C.G.S. §§ 51-346, 51-349)	Case type code (See list on page 2)
	Bridgeport	Major: T Minor: 90

For the Plaintiff(s) please enter the appearance of:

Name and address of attorney, law firm or plaintiff if self-represented (Number, street, town and zip code)	Juris number (to be entered by attorney only)
Joshua D. Koskoff, Koskoff, Koskoff & Bieder, 350 Fairfield Avenue, Bridgeport, CT 06604	032250

Telephone number (with area code)	Signature of Plaintiff (If self-represented)
(203) 336-4421	

The attorney or law firm appearing for the plaintiff, or the plaintiff if self-represented, agrees to accept papers (service) electronically in this case under Section 10-13 of the Connecticut Practice Book.	Email address for delivery of papers under Section 10-13 (if agreed to)
☒ Yes ☐ No	jkoskoff@koskoff.com

Number of Plaintiffs: 11 | Number of Defendants: 11 | ☒ Form JD-CV-2 attached for additional parties

Parties	Name (Last, First, Middle Initial) and Address of Each party (Number; Street; P.O. Box; Town; State; Zip; Country, if not USA)	
First Plaintiff	Name: Soto, Donna L., Administratrix of the Estate of Victoria L. Soto, Deceased Address: 158 Knowlton Street, Stratford, CT 06615	P-01
Additional Plaintiff	Name: Hockley, Ian and Nicole, Co-Administrators of the Estate of Dylan C. Hockley Address: 61 Charter Ridge Drive, Sandy Hook, CT 06482	P-02
First Defendant	Name: Bushmaster Firearms International, LLC aka Freedom Group, Inc. aka Remington Outdoor Company, Inc Address: Corp Trust Ctr, 1209 Orange Street, Wilmington, DE/870 Remington Drive, Madison, NC 27025-8331	D-01
Additional Defendant	Name: Freedom Group, Inc aka Freedom Group aka Freedom Group, LLC aka Remington Outdoor Company Address: Secretary, 870 Remington Drive, Madison, NC 27025/CT Corp System, 1 Corporate Center, Hartford, CT	D-02
Additional Defendant	Name: Bushmaster Firearms aka Freedom Group, Inc. aka Remington Outdoor Company, Inc. Address: Secretary, 999 Roosevelt Trail, Windham, ME 04062; CT Corp System, 1 Corporate Center, Hartford, CT	D-03
Additional Defendant	Name: Bushmaster Firearms, Inc. aka Freedom Group, Inc. aka Remington Outdoor Company, Inc. Address: Secretary, 999 Roosevelt Trail, Windham, ME 04062; CT Corp System, 1 Corporate Center, Hartford, CT	D-04

Notice to Each Defendant

1. **YOU ARE BEING SUED.** This paper is a Summons in a lawsuit. The complaint attached to these papers states the claims that each plaintiff is making against you in this lawsuit.
2. To be notified of further proceedings, you or your attorney must file a form called an "Appearance" with the clerk of the above-named Court at the above Court address on or before the second day after the above Return Date. The Return Date is not a hearing date. You do not have to come to court on the Return Date unless you receive a separate notice telling you to come to court.
3. If you or your attorney do not file a written "Appearance" form on time, a judgment may be entered against you by default. The "Appearance" form may be obtained at the Court address above or at *www.jud.ct.gov* under "Court Forms."
4. If you believe that you have insurance that may cover the claim that is being made against you in this lawsuit, you should immediately contact your insurance representative. Other action you may have to take is described in the Connecticut Practice Book which may be found in a superior court law library or on-line at *www.jud.ct.gov* under "Court Rules."
5. If you have questions about the Summons and Complaint, you should talk to an attorney quickly. **The Clerk of Court is not allowed to give advice on legal questions.**

Signed (Sign and "X" proper box)	☒ Commissioner of the Superior Court ☐ Assistant Clerk	Name of Person Signing at Left	Date signed
		Joshua D. Koskoff	12/13/2014

If this Summons is signed by a Clerk:
a. The signing has been done so that the Plaintiff(s) will not be denied access to the courts.
b. It is the responsibility of the Plaintiff(s) to see that service is made in the manner provided by law.
c. The Clerk is not permitted to give any legal advice in connection with any lawsuit.
d. The Clerk signing this Summons at the request of the Plaintiff(s) is not responsible in any way for any errors or omissions in the Summons, any allegations contained in the Complaint, or the service of the Summons or Complaint.

For Court Use Only
File Date

A TRUE COPY
ATTEST:
CHARLES J. FISHER, JR.
STATE MARSHAL, HARTFORD COUNTY
AN INDIFFERENT PERSON

I certify I have read and understand the above:	Signed (Self-Represented Plaintiff)	Date

Name and address of person recognized to prosecute in the amount of $250
Diana Orozco, 350 Fairfield Avenue, Bridgeport,CT 06604

Signed (Official taking recognizance "X" proper box)	☒ Commissioner of the Superior Court ☐ Assistant Clerk	Date	Docket Number
		12/13/2014	

Instructions

1. *Type or print legibly; sign summons.*
2. *Prepare or photocopy a summons for each defendant.*
3. *Attach the original summons to the original complaint, and attach a copy of the summons to each copy of the complaint. Also, if there are more than 2 plaintiffs or more than 4 defendants prepare form JD-CV-2 and attach it to the original and all copies of the complaint.*
4. *After service has been made by a proper officer, file original papers and officer's return with the clerk of court.*
5. *The party recognized to pay costs must appear personally before the authority taking the recognizance.*
6. *Do not use this form for the following actions:*

(a) Family matters (for example divorce, child support, custody, paternity, and visitation matters).
(b) Summary process actions.
(c) Applications for change of name.
(d) Probate appeals.
(e) Administrative appeals.
(f) Proceedings pertaining to arbitration.
(g) Any actions or proceedings in which an attachment, garnishment or replevy is sought.

ADA NOTICE

The Judicial Branch of the State of Connecticut complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation in accordance with the ADA, contact a court clerk or an ADA contact person listed at *www.jud.ct.gov/ADA.*

Case Type Codes

Major Description	Codes Major/ Minor	Minor Description
Contracts	C 00	Construction - All other
	C 10	Construction - State and Local
	C 20	Insurance Policy
	C 30	Specific Performance
	C 40	Collections
	C 90	All other
Eminent Domain	E 00	State Highway Condemnation
	E 10	Redevelopment Condemnation
	E 20	Other State or Municipal Agencies
	E 30	Public Utilities & Gas Transmission Companies
	E 90	All other
Miscellaneous	M 00	Injunction
	M 10	Receivership
	M 20	Mandamus
	M 30	Habeas Corpus (extradition, release from Penal Institution)
	M 40	Arbitration
	M 50	Declaratory Judgment
	M 63	Bar Discipline
	M 66	Department of Labor Unemployment Compensation Enforcement
	M 68	Bar Discipline - Inactive Status
	M 70	Municipal Ordinance and Regulation Enforcement
	M 80	Foreign Civil Judgments - C.G.S. 52-604 & C.G.S. 50a-30
	M 82	Housing Civil Matters
	M 83	Small Claims Transfer to Regular Docket
	M 84	Foreign Protective Order
	M 90	All other
Property	P 00	Foreclosure
	P 10	Partition
	P 20	Quiet Title/Discharge of Mortgage or Lien
	P 30	Asset Forfeiture
	P 90	All other

Major Description	Codes Major/ Minor	Minor Description
Torts (Other than Vehicular)	T 02	Defective Premises - Private - Snow or Ice
	T 03	Defective Premises - Private - Other
	T 11	Defective Premises - Public - Snow or Ice
	T 12	Defective Premises - Public - Other
	T 20	Products Liability - Other than Vehicular
	T 28	Malpractice - Medical
	T 29	Malpractice - Legal
	T 30	Malpractice - All other
	T 40	Assault and Battery
	T 50	Defamation
	T 61	Animals - Dog
	T 69	Animals - Other
	T 70	False Arrest
	T 71	Fire Damage
	T 90	All other
Vehicular Torts	V 01	Motor Vehicles* - Driver and/or Passenger(s) vs. Driver(s)
	V 04	Motor Vehicles* - Pedestrian vs. Driver
	V 05	Motor Vehicles* - Property Damage only
	V 06	Motor Vehicle* - Products Liability Including Warranty
	V 09	Motor Vehicle* - All other
	V 10	Boats
	V 20	Airplanes
	V 30	Railroads
	V 40	Snowmobiles
	V 90	All other
		*Motor Vehicles include cars, trucks, motorcycles, and motor scooters.
Wills, Estates and Trusts	W 10	Construction of Wills and Trusts
	W 90	All other

CIVIL SUMMONS
CONTINUATION OF PARTIES
JD-CV-2 Rev. 4-97

STATE OF CONNECTICUT
SUPERIOR COURT

FIRST NAMED PLAINTIFF *(Last, First, Middle Initial)*
Soto, Donna L., Administrator of the Estate of Victoria L. Soto, Deceased

FIRST NAMED DEFENDANT *(Last, First, Middle Initial)*
Bushmaster Firearms International, LLC

ADDITIONAL PLAINTIFFS

NAME *(Last, First, Middle Initial, if individual)* ADDRESS *(No., Street, Town and ZIP Code)*	CODE
Sherlach, William, Executor of the Estate of Mary J. Sherlach 33 Vintage Road, Trumbull, CT 06611	03
Sherlach, William 33 Vintage Road, Trumbull, CT 06611	04
Pozner, Leonard, Administrator of the Estate of Noah S. Pozner 2615 Main Street, #322, Newtown, CT 06470	05
Rousseau, Gilles J., Administrator of the Estate of Lauren G. Rousseau 67 Horse Fence Hill Road, Southbury, CT 06488	06
Wheeler, David C., Administrator of the Estate of Benjamin A. Wheeler 10 Lakeview Terrace, Sandy Hook, CT 06482	07
Heslin, Neil and Lewis, Scarlett, Co-Administrators of the Estate of Jesse McCord Lewis 6 Great Ring Road, Sandy Hook, CT 06482	08
Barden, Mark and Jacqueline, Co-Administrators of the Estate of Daniel G. Barden 35 Paugussett Road, Sandy Hook, CT 06482	09
D'Avino, Mary, Administratrix of the Estate of Rachel M. D'Avino 48 Deerwood Drive, Bethlehem, CT 06751	10
Hammond, Natalie 108 Munn Road, Southbury, CT 06488	11
	12
	13

ADDITIONAL DEFENDANTS

NAME *(Last, First, Middle Initial, if individual)* ADDRESS *(No., Street, Town and ZIP Code)*	CODE
Bushmaster Holdings, LLC aka Freedom Group, Inc. aka Remington Outdoor Company Inc. Corporation Trust Center, 1209 Orange St. Wilmington, DE/CT Corp. System, One Corporate Center, 11th Fl., Hartford, CT	54
Remington Arms Co, LLC aka Bushmaster Firearms Int., Inc. aka Freedom Group, Inc aka Remington Outdoor Co. Corp. Trust Center, 1209 Orange Street. Wilmington, DE/CT Corp System, One Corporate Center, 11th Fl., Hartford, CT	55
Remington Outdoor Company, Inc. aka Freedom Group, Inc. CT Corp. System, 1 Corporate Ctr, 11th Fl, Hartford, CT 06103-3220/ Secretary, 870 Remington Drive, Madison, NC 27025-8331	56
Camfour, Inc. Secretary, 65 Westfield Industrial Park Road, Westfield, MA 01085-1693/Bryan R. Stefano, 1776 Main St., Springfield, MA 01102	57
Camfour Holding, LLP a/k/a Camfour Holding, Inc. Secretary, 65 Westfield Industrial Park Road, Westfield, MA 01085-1693/Bryan R. Stefano, 1776 Main St., Springfield, MA 01102	58
Riverview Sales, Inc. Agent for Service: Varunes & Associates, 5 Grand Street, Hartford, CT 06106	59
David LaGuercia 1100 River Road, Agawam, MA 01001/119 Walnut Street, Agawam, MA 01001	60
	61
	62
	63

FOR COURT USE ONLY - FILE DATE

DOCKET NO.

RETURN DATE: FEBRUARY 3, 2015	:	SUPERIOR COURT
	:	
DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO; IAN AND NICOLE HOCKLEY, CO-ADMINISTRATORS OF THE ESTATE OF DYLAN C. HOCKLEY; WILLIAM D. SHERLACH, EXECUTOR OF THE ESTATE OF MARY JOY SHERLACH; WILLIAM D. SHERLACH, INDIVIDUALLY; LEONARD POZNER, ADMINISTRATOR OF THE ESTATE OF NOAH S. POZNER; GILLES J. ROUSSEAU, ADMINISTRATOR OF THE ESTATE OF LAUREN G. ROUSSEAU; DAVID C. WHEELER, ADMINISTRATOR OF THE ESTATE OF BENJAMIN A. WHEELER; NEIL HESLIN AND SCARLETT LEWIS, CO-ADMINISTRATORS OF THE ESTATE OF JESSE MCCORD LEWIS; MARK AND JACQUELINE BARDEN, CO-ADMINISTRATORS OF THE ESTATE OF DANIEL G. BARDEN; MARY D'AVINO, ADMINISTRATRIX OF THE ESTATE OF RACHEL M. D'AVINO; and NATALIE HAMMOND	:	JUDICIAL DISTRICT OF FAIRFIELD AT BRIDGEPORT
VS.		
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC; FREEDOM GROUP, INC. a/k/a FREEDOM GROUP a/k/a FREEDOM GROUP, LLC a/k/a REMINGTON OUTDOOR COMPANY; BUSHMASTER FIREARMS a/k/a FREEDOM GROUP a/k/a REMINGTON OUTDOOR COMPANY, INC.; BUSHMASTER FIREARMS, INC. a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR COMPANY, INC.; BUSHMASTER HOLDINGS, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR COMPANY, INC.; REMINGTON ARMS CO., LLC, a/k/a BUSHMASTER FIREARMS INT., INC., a/k/a FREEDOM GROUP, INC. a/k/a	:	

REMINGTON OUTDOOR CO.; REMINGTON OUTDOOR COMPANY, INC. a/k/a FREEDOM GROUP, INC.; CAMFOUR, INC.; CAMFOUR HOLDING, LLP a/k/a CAMFOUR HOLDING, INC.; RIVERVIEW SALES, INC.; DAVID LAGUERCIA : **DECEMBER 13, 2014**

INTRODUCTION

1. This is a civil action for damages and injunctive relief stemming from the shooting at Sandy Hook Elementary School on December 14, 2012.

2. In less than five minutes, 20 first-grade children and 6 adults were killed. Two others were wounded.

3. The number of lives lost in those 264 seconds was made possible by the shooter's weapon of choice: a Bushmaster AR-15 rifle, model XM15-E2S.

4. The AR-15 was designed as a military weapon, and it has always excelled on the battlefield. Born out of the exigencies of modern combat, the AR-15 was engineered to deliver maximum carnage with extreme efficiency.

5. The AR-15 proved to be very good at its job. It has endured as the United States Army's standard-issue rifle and has more recently become a valuable law enforcement weapon. In both contexts, the AR-15 is subject to strict safety measures, including advanced training and regimented storage.

6. The AR-15, however, has little utility for legitimate civilian purposes. The rifle's size and overwhelming firepower, so well adapted to the battlefield, are in fact liabilities in home defense.

7. But there is one tragically predictable civilian activity in which the AR-15 reigns supreme: mass shootings. Time and again, mentally unstable individuals and criminals have acquired an AR-15 with ease, and they have unleashed the rifle's lethal power into our streets, our malls, our places of worship, and our schools.

8. Defendants – makers and sellers of the XM15-E2S rifle – have, like all Americans, watched mass shootings become a harrowing yet predictable part of modern life.

9. Defendants know that, as a result of selling AR-15s to the civilian market, individuals unfit to operate these weapons gain access to them.

10. And defendants know that the AR-15's military firepower, unsuited to home defense or recreation, enables an individual in possession of the weapon to inflict unparalleled civilian carnage.

11. Despite that knowledge, defendants continued to sell the XM15-E2S rifle to the civilian market.

12. In order to continue profiting from the sale of AR-15s, defendants chose to disregard the unreasonable risks the rifle posed outside of specialized, highly regulated institutions like the armed forces and law enforcement.

13. Plaintiffs seek nothing more and nothing less than accountability for the consequences of that choice.

PARTIES

14. Defendant Bushmaster Firearms, also known as B.F.I. and B.F.I., Inc., was a Maine corporation created in 1973 and located in Windham, Maine. Bushmaster Firearms manufactured and sold AR-15s. Bushmaster Firearms is now part of Freedom Group, Inc.

15. Defendant Bushmaster Firearms, Inc. was another Maine corporation that manufactured and sold AR-15s. Upon information and belief, Bushmaster Firearms, Inc. manufactured and sold AR-15s. Bushmaster Firearms, Inc. is now part of Freedom Group, Inc.

16. Defendant Bushmaster Firearms International, LLC was a Delaware corporation that was formed in 2006. (When originally created, it was named Rambo Acquisition, LLC.) According to corporate filings, Bushmaster Firearms International, LLC was merged into Remington Arms Company, LLC in 2011.

17. At all relevant times, Bushmaster Firearms International, LLC manufactured and sold AR-15s.

18. Upon information and belief, Bushmaster Firearms International, LLC manufactured the XM15-E2S that was used in the shooting at Sandy Hook Elementary School on December 14, 2012.

19. Defendant Remington Arms Company, LLC is a Delaware limited liability corporation. Defendant Bushmaster Firearms International, LLC was merged into Defendant Remington Arms Company, LLC in 2011. At all relevant times, Remington Arms Company, LLC manufactured and sold AR-15s.

20. Defendant Bushmaster Holdings, LLC was incorporated in 2006 and operated as a holding company for Bushmaster Firearms International, Inc. Bushmaster Holdings, LLC merged into Freedom Group, Inc. in 2009.

21. Defendant Freedom Group, Inc., which is also sometimes called Freedom Group and Freedom Group, LLC is a Delaware corporation originally formed under another name in 2007. Freedom Group, Inc. is one of the world's largest manufacturers and dealers in firearms, ammunition, and related accessories.

22. Upon information and belief, from 2006 on, Freedom Group, Inc. controlled, marketed and sold the Bushmaster brand. Upon information and belief, during this time period Freedom Group, Inc. sold Bushmaster brand products directly to retail stores.

23. Defendant Remington Outdoor Company, Inc. is a corporation formed in 2009 that is engaged in the business of manufacturing and selling AR-15s. Freedom Group, Inc., which upon information and belief at all relevant times controlled the Bushmaster brand, was renamed Remington Outdoor Company, Inc.

24. Upon information and belief, Defendants Bushmaster Firearms; Bushmaster Firearms, Inc.; Bushmaster Firearms International, LLC; Remington Arms Company, LLC; Bushmaster Holdings, LLC; Freedom Group, Inc.; and Remington Outdoor Company, Inc. are functionally one entity and are hereinafter referred to as the "Bushmaster Defendants."

25. The Bushmaster Defendants manufacture and sell firearms and ammunition under the Bushmaster brand name.

26. The Bushmaster Defendants, one or more of them, manufactured and sold the Bushmaster XM15-E2S rifle that was used in the shooting at Sandy Hook Elementary School on December 14, 2012.

27. Defendant Camfour, Inc. is a Massachusetts corporation. Camfour, Inc. was at all relevant times a distributor of firearms and was federally licensed to deal in firearms.

28. Defendant Camfour Holding, Inc. aka Camfour Holding, LLP is a Massachusetts corporation. Upon information belief, Camfour Holding, Inc. aka Camfour Holding, LLP is functionally the same entity as Camfour, Inc. These entities are hereinafter referred to as the "Camfour Defendants."

29. Upon information and belief, the Camfour Defendants purchased the Bushmaster XM15-E2S rifle that was used in the shooting at Sandy Hook Elementary School from the Bushmaster Defendants.

30. The Camfour Defendants are qualified product sellers within the meaning of 15 U.S.C. § 7903(6).

31. Upon information and belief, the Camfour Defendants sold the Bushmaster XM15-E2S rifle that was used in the shooting at Sandy Hook Elementary School to the Riverview Defendants, as described below.

32. Defendant Riverview Gun Sales, Inc. aka Riverview Gun Sales is a retail gun store located in East Windsor, Connecticut. The Bushmaster XM15-E2S rifle that was used in the shooting at Sandy Hook Elementary School on December 14, 2012 was purchased from Riverview Gun Sales.

33. Defendant David LaGuercia is or was the federally licensed firearms dealer who through Riverview Gun Sales, Inc. sold the Bushmaster XM15-E2S rifle that was used in the shooting at Sandy Hook Elementary School.

34. Riverview Gun Sales, Inc. and David LaGuercia are hereafter referred to as the "Riverview Defendants." The Riverview Defendants are qualified product sellers within the meaning of 15 U.S.C. § 7903(6).

35. On February 7, 2013, Plaintiff Donna L. Soto was appointed Administratrix of the Estate of Victoria Leigh Soto. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit A.

36. On December 3, 2014, Plaintiffs Ian and Nicole Hockley were appointed Co-Administrators of the Estate of Dylan Christopher Jack Hockley. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit B.

37. On December 4, 2014, Plaintiff David C. Wheeler was appointed Administrator of the Estate of Benjamin A. Wheeler. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit C.

38. On January 22, 2013, Plaintiff Mary A. D'Avino was appointed Administratrix of the Estate of Rachel Marie D'Avino a/k/a Rachel M. D'Avino. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit D.

39. On December 8, 2014, Plaintiffs Mark and Jacqueline Barden were appointed Co-Administrators of the Estate of Daniel G. Barden. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit E.

40. On March 7, 2013, Plaintiff William D. Sherlach was appointed Executor of the Estate of Mary Joy Sherlach. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit F. Mr. Sherlach also brings this action in his individual capacity for loss of consortium.

41. On December 9, 2014, Plaintiffs Neil Heslin and Scarlett Lewis were appointed Co-Administrators of the Estate of Jesse McCord Lewis. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit G.

42. On December 10, 2014, Plaintiff Leonard Pozner was appointed Administrator of the Estate of Noah Samuel Pozner. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit H.

43. On January 3, 2013, Plaintiff Gilles J. Rousseau was appointed Administrator of the Estate of Lauren G. Rousseau. A copy of the fiduciary certificate is attached hereto as Plaintiffs' Exhibit I.

44. Plaintiff Natalie Hammond brings this action in her individual capacity for injuries suffered on December 14, 2012.

THE GUN

A. The Bushmaster XM15-E2S is a Military Weapon

45. Bushmaster's XM15-E2S is an AR-15 rifle, a weapon adopted by the United States military and other armed forces around the world because of its efficiency as a military assault rifle.

46. After World War II, the U.S. Army's Operations Research Office analyzed over three million casualty reports from World War I and World War II. In its final report, the group observed that modern combat occurred at short range and was highly mobile. More importantly, they determined that the number one predictor of casualties was the total number of shots fired.

47. These findings led the U.S. Army to develop specifications for a new combat weapon: a lightweight firearm that would hold a large detachable magazine and rapidly expel ammunition with enough velocity to penetrate body armor and steel helmets.

48. A company called Armalite designed the AR-15 in response. Lightweight, air-cooled, gas-operated, and magazine-fed, the AR-15's capacity for rapid fire with limited recoil meant its lethality was not dependent on good aim or ideal combat conditions.

49. After extensive testing, the military concluded that a five-man squad armed with AR-15s had equal or superior "hit-and-kill" potential in combat situations when compared with an 11-man squad armed with M14 rifles, the AR-15's predecessor. Troops field-testing the AR-15 reported instantaneous deaths, as well as routine amputations, decapitations, and massive body wounds. The military ultimately adopted the AR-15 as its standard-issue service rifle, renaming it the M16.

50. After Armalite sold its licensing rights, Colt took over its military contracts and began manufacturing the M16.

51. Today, Colt remains the largest supplier of combat rifles to the military.

52. Bushmaster, meanwhile, holds the distinction of being the largest supplier of combat rifles to civilians.

53. The XM15-E2S is one such rifle.

B. A "Civilian" Weapon Designed for Combat

54. As an AR-15 rifle, the Bushmaster XM15-E2S is essentially indistinguishable from its military sibling, the M16. Both weapons are designed for mass casualty assaults. Both share design features of exceptional muzzle velocity, the ability to accommodate large-capacity magazines, and effective rapid fire.

Muzzle Velocity

55. The term "muzzle velocity" refers to the speed a bullet possesses at the moment it leaves the muzzle of a firearm.

56. The velocity of a bullet on impact is the main determinant of its destructive capacity.

57. Typical handgun muzzle velocities range from approximately 750 feet per second to approximately 1,300 feet per second.

58. Because longer barrels give the ammunition's propellant more time to work, long guns eject projectiles at significantly higher velocities than short-barreled firearms.

59. AR-15 rifles like the XM15-E2S are capable of propelling ammunition at 4,000 feet per second, which multiplies the lethality of each hit.

60. According to a study by physicians who performed autopsies on soldiers killed by gunfire in Iraq, the greater the speed of the bullet on impact, the greater the extent of tissue deterioration. The study found that rounds with a velocity exceeding 2,500 feet per second cause a shockwave to pass through the body upon impact that results in catastrophic injuries even in areas remote to the direct wound.

Large-Capacity Magazines

61. In addition to exceptional muzzle velocity, AR-15 rifles are also designed to accept large-capacity magazines.

62. Such magazines were first designed and produced for the military in order to increase the firepower of U.S. infantry by minimizing time spent reloading.

63. "Civilian" AR-15 rifles, including the XM15-E2S, are manufactured to be compatible with large capacity magazines.

Effective Rapid Fire

64. All AR-15 rifles, including the XM15-E2S, can empty their magazines with exceptional speed.

65. The rifles carried by U.S. forces are capable of both full automatic and semiautomatic fire. Full automatic fire can empty a 30-round magazine in two seconds. Semiautomatic fire can empty the same 30-round magazine in approximately ten seconds.

66. The United States Army considers semiautomatic fire more effective than automatic fire in most combat situations.

67. "Civilian" semiautomatic rifles like the XM15-E2S, therefore, are capable of the same rapid fire that the U.S. Army deems optimal for the military theater.

68. Structurally and mechanically, therefore, AR-15 rifles remain the progeny – and instruments – of war.

69. Semiautomatic fire unleashes a torrent of bullets in a matter of seconds; large-capacity magazines allow for prolonged assaults; and powerful velocity makes each hit catastrophic.

70. The net effect is more wounds, of greater severity, in more victims, in less time.

71. This superior capacity for lethality – above and beyond other semiautomatic weapons – is why the AR-15 style rifle has endured as the U.S. military's weapon of choice for 50 years.

C. A "Civilian" Weapon Marketed for Combat

72. The uniquely military characteristics of the AR-15 type rifle are not lost on the Bushmaster Defendants. In fact, they are the weapon's primary selling point.

73. The Bushmaster Defendants tout Bushmaster rifle barrels as "the finest AR15-Type / M16-Type barrels made," promising that they "provide the same matte black, non-reflective finish found on quality military-type arms."

74. When the Bushmaster Defendants rolled out a new AR-15 rifle model, defendants' advertising lauded the gun as "the uncompromising choice when you demand a rifle as mission-adaptable as you are."

75. The Bushmaster Defendant's 2012 Bushmaster Product Catalogue shows soldiers moving on patrol through jungles, armed with Bushmaster rifles. Superimposed over the silhouette of a soldier holding his helmet against the backdrop of an American flag is text that reads: "When you need to perform under pressure, Bushmaster delivers."

76. In the Bushmaster Defendant's 2011 Bushmaster Product Catalogue, firearms like the XM15-E2S are advertised with the slogan, "military-proven performance."

77. In 2010, the Bushmaster Defendants promoted one of their "civilian" rifles as "the ultimate combat weapons system."

78. Invoking the unparalleled destructive power of the weapon, the Bushmaster Defendants' advertising copy read: "Forces of opposition, bow down. You are single-handedly outnumbered."

79. The Bushmaster Defendants' militaristic marketing reinforces the image of the AR-15 as a combat weapon used for the purpose of waging war and killing human beings.

80. This marketing tactic dovetails with the widespread popularity of realistic and addictive first-person shooter games – most notably "Call of Duty" – that prominently feature AR-15s and rewards players for "head shots" and "kill streaks" among other assaultive and violent "achievements."

81. It is widely known that "Call of Duty" exposes players to intensely realistic tactical scenarios and teaches assaultive weapon techniques such as "taped reloads," which allow high capacity magazines to be taped together to reduce reloading time.

D. A "Civilian" Weapon with no Legitimate Civilian Purpose

82. As set forth above, the AR-15's combination of exceptional muzzle velocity, ability to accept large-capacity magazines, and effective rapid fire has significant utility in the military context. These same features make the weapon ill-suited for legitimate civilian purposes.

Self-Defense

83. There is no evidence that semiautomatic rifles are commonly used for, or necessary for, legitimate self-defense by law-abiding citizens.

84. Semiautomatic rifles' length makes them inferior to smaller guns in the confines of a home.

85. It is handguns, and not long guns, that are widely considered to be the optimal weapon for home defense.

86. In *D.C. v. Heller*, 554 U.S. 570, 629 (2008), the Supreme Court of the United States extolled the handgun as the "quintessential self-defense weapon." The Court cited several reasons for this: "It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." These virtues are absent from the AR-15.

87. Semiautomatic rifles are not only ill-suited to home defense, they are dangerous when used in that capacity.

88. The velocity and rate of semiautomatic fire in the home creates a significant risk of what is referred to as "over-penetration," where bullets breach walls and doors, putting family members, neighbors, and even passers-by at risk.

89. The military has concluded that use of the M16 in close quarters greatly increases the risk of noncombatant casualties, and trains soldiers accordingly.

90. When a Bushmaster AR-15 was reviewed by Guns & Ammo Magazine in 1983, the reviewer commented: "As a home defense weapon, it certainly possesses ample firepower with a 30-round magazine, but the .223 cartridge is a mite too powerful and penetrating for this use." It concluded that the rifle would instead be of value to "a police S.W.A.T. team in close-quarter encounters with evil-doers."

91. Moreover, the ability to accept large-capacity magazines, vital for modern combat, is unnecessary for home defense.

92. The National Rifle Association Institute for Legislative Action ("NRA-ILA") maintains a database of "armed citizen" stories describing private citizens who have successfully defended themselves or others using a firearm. According to a study of all incidents in that database from 1997 to 2001, an average of 2.2 shots were fired by defenders. In 28% of incidents, no shots were fired at all.

93. A similar analysis was performed for the period of 2011-2013 and revealed that defenders fired an average of 2.1 shots.

94. The likelihood of an AR-15 causing accidental harm when used for home defense substantially exceeds the likelihood that large quantities of semiautomatic fire will be necessary for protection.

Hunting and Sporting

95. The Gun Control Act of 1968 generally prohibits the importation of firearms into the United States, but makes an exception for weapons that are particularly suitable for or readily adaptable to sporting purposes.

96. Congress stated that one of the purposes for the law was to stop the influx of military-grade weapons, which was turning the United States into "the dumping ground of the castoff surplus military weapons of other nations."

97. The Bureau of Alcohol, Tobacco and Firearms (ATF) is responsible for interpreting the statute and thereby determining the suitability of various firearms for sporting or hunting purposes.

98. In 1989, ATF issued a broad suspension of the importation of "assault-type rifles" until an analysis of their sporting utility could be undertaken. ATF defined this category to include rifles with three characteristics: a military appearance, a detachable magazine, and the ability to fire semi-automatically. It referred to this group of weapons as "semiautomatic assault rifles."

99. As part of its analysis, ATF studied advertising and marketing literature, reviewed evaluations of the firearms by technical writers, solicited information from the firearm importers,

and sent questionnaires to licensed hunting guides, state game and fish commissions, local hunting associations, competitive shooting groups, and hunting/shooting magazine editors.

100. In its final report, ATF concluded that semiautomatic assault rifles were designed and intended for combat and not suited to either sporting or hunting. It prohibited the importation of rifles with military features other than detachable magazines.

101. Foreign gun manufacturers quickly adapted to the restriction. They began exporting semiautomatic rifles that had been stripped of all military features except for the ability to accept a detachable magazine. Significantly, these modified rifles had the ability to accept large-capacity magazines.

102. In 1998, ATF was called upon to evaluate the sporting utility of semiautomatic assault rifles that accepted large-capacity magazines but lacked other military features.

103. After an equally exhaustive analysis, ATF found it "clear and compelling" that semiautomatic assault rifles that accept large-capacity magazines are not suitable for sporting or hunting.

104. ATF concluded that the ability to expel large amounts of ammunition quickly "serves a function in combat and crime, but serves no sporting purpose."

ENTRUSTMENT OF MILITARY WEAPONS TO THE MILITARY

105. When assault rifles are sold to the military, the seller entrusts them to a highly regulated institution with expertise in minimizing the risk of physical harm – whether criminal or accidental – to soldiers or others.

106. Standardized medical fitness standards prohibit induction, enlistment, appointment, or retention in the Armed Forces if the individual suffers from major depression, bipolar disorder, affective psychoses, or a history of symptoms consistent with mental instability that impairs school, social, or work efficiency.

107. When the U.S. Government purchases assault rifles for use by armed forces, it retains ownership of those weapons.

108. Military assault rifles are issued to soldiers for instruction, training, exercises, and combat.

109. Soldiers are held strictly accountable for their assault rifle at all times.

110. Assault rifles must be kept in safety mode when not in use.

111. Soldiers are instructed not to leave their assault rifle unattended under any circumstances.

112. If an assault rifle cannot be accounted for, the Army will place an entire base or installation on lockdown until the weapon is located.

113. After the assault rifle is located, an investigation will be conducted and a recommendation made as to the appropriate punishment.

114. In general, the most lenient punishment for the transgression of misplacing an assault rifle is to lose rank and pay and to be assigned extra duty.

115. If an assault rifle is misplaced in a combat zone, the soldier may face severe sanctions.

116. Assault rifles are stored in secure weapons rooms on military bases. Soldiers must sign out their rifle anytime they remove it so a chain of custody is established.

117. The military requires soldiers to undergo extensive training on the proper use of an assault rifle, including techniques to minimize the weapon's potential for inflicting collateral damage.

118. The Department of the Army produces a 400-page manual for commanders, leaders, and instructors devoted exclusively to weapon pedagogy and related safety issues.

119. According to the manual, soldiers are first instructed on the weapon's capabilities, mechanical training, and the fundamentals and principles of rifle marksmanship. Live-fire applications are scheduled only after the soldier has demonstrated preliminary skills.

120. To ensure safety during live-fire applications, ammunition is issued to firing units immediately before scheduled training exercises and released to troops only when they are on the firing line.

121. Commanders are charged with identifying any "hazards" to safety by using a complex "risk assessment matrix" to estimate the probability and severity of an adverse impact. The manual notes that hazards may arise from health or behavioral concerns.

122. Military leadership is empowered to prevent access to combat weapons if circumstances warrant it.

ENTRUSTMENT OF MILITARY WEAPONS TO LAW ENFORCEMENT

123. When military-grade weapons are sold to law enforcement, the seller entrusts them to organizations and departments that regulate and oversee officers' access to firearms and possess expertise in minimizing the risk of physical harm to civilians.

124. Prior to being entrusted with assault rifles, law enforcement officers undergo extensive training.

125. Officers are trained on when it is and is not appropriate to use an assault rifle.

126. For the vast majority of engagements in which it is necessary to draw or use a firearm, law enforcement considers an officer's sidearm – and not an assault rifle – to be the most appropriate weapon

127. Police leadership is empowered to remove any weapon from an officer if circumstances warrant it.

ENTRUSTMENT OF MILITARY WEAPONS TO THE PUBLIC

128. The military and law enforcement have a legitimate need for a weapon as lethal as the AR-15, but they also recognize that strict safety measures are necessary to protect soldiers, police officers, and innocent civilians from physical harm. Consequently, entrusting assault rifles to these specialized institutions is reasonable.

129. The same is not true for the entrustment of AR-15 rifles to civilians.

130. In addition to the lack of utility set forth above, when AR-15s are entrusted to the public there is no institutional structure in place to oversee the safe and intelligent use of those weapons.

131. AR-15s are sold to wholesalers and/or dealers who sell directly to civilians.

132. Large capacity magazines that are compatible with AR-15s are sold to wholesalers and/or dealers who sell directly to civilians.

133. In the overwhelming majority of states, young people can legally purchase an AR-15 before they are legally permitted to drink alcohol.

134. In at least a dozen states, the minimum age for possession of an AR-15 is 14 or 16, or there is no minimum age at all.

135. In the overwhelming majority of states, a license or permit is not required to purchase or own an AR-15.

136. In the overwhelming majority of states, no safety training is required for the purchase of an AR-15.

137. There is not a single state that requires a mental health examination of a potential purchaser of an AR-15.

138. There is not a single state that requires a potential purchaser of an AR-15 to answer questions about other individuals with whom they intend to share access.

139. More than half of American households with firearms do not store them securely.

140. Civilians are entrusted with AR-15s even though they are not suited for legitimate civilian purposes.

141. Civilians are entrusted with AR-15s whether or not they have a mechanism to safely secure the weapons and ammunition in their home.

142. Civilians are entrusted with AR-15s even if they have children in the home who can gain access to their weapons and ammunition.

143. Civilians are entrusted with AR-15s even if they intend to make the weapon available to other persons, including those who may be mentally unstable.

144. Several highly-publicized mass shootings have demonstrated that perpetrators of mass shootings are able to purchase or otherwise acquire AR-15s.

THE ROAD TO SANDY HOOK

145. The most chilling legacy of the entrustment of AR-15s to the general population may be that Americans are no longer shocked when combat weapons are used to kill people as they work, shop, commute, attend school, and otherwise go about their lives. We may be horrified, saddened, even sickened, but we can no longer be shocked.

146. Prior to December 14, 2012, assault rifles like the XM15-E2S had been used to kill in department stores and fast food chains, at offices and homecoming parties, on courthouse steps, and in schools.

147. Prior to December 14, 2012, assault rifles like the XM15-E2S had torn apart communities in California and Massachusetts and Nevada and Washington and Nebraska and Wisconsin and Oregon and Texas and Florida and Washington D.C. and Missouri and Alabama.

148. Prior to December 14, 2012, assault rifles like the XM15-E2S had been used to kill elementary school children, high school children, and college students.

149. Yet Bushmaster Defendants continued to entrust the XM15-E2S to the civilian population through wholesalers and dealers.

150. Bushmaster Defendants continued making the XM15-E2S compatible with large capacity magazines.

151. Bushmaster Defendants continued marketing the XM15-E2S and similar rifles as combat weapons that would make others "bow down."

152. Sometime prior to March of 2010, the Bushmaster Defendants entrusted the XM15-E2S Bushmaster rifle to the Camfour Defendants.

153. Sometime prior to March of 2010, the Camfour Defendants entrusted the XM15-E2S Bushmaster rifle to the Riverview Defendants; the Riverview Defendants then entrusted the rifle to Nancy Lanza in March of 2010.

154. On the morning of December 14, 2012, Lanza retrieved the Bushmaster rifle and ten 30-round magazines – several of which he taped together to allow for faster reload – from an unlocked gun closet in the house he shared with his mother and drove to Sandy Hook Elementary School.

155. Upon information and belief, Adam Lanza chose the XM15-E2S to use in his attack on Sandy Hook Elementary School for its military and assaultive qualities, and in particular its efficiency in inflicting mass casualties.

156. Meanwhile, on the morning of December 14, 2012, Victoria Leigh Soto was a 27-year-old first-grade teacher in classroom 10 at Sandy Hook Elementary School. In fewer than five years of teaching, Vicki had earned the reputation of being a fun, and sometimes zany, teacher. Vicki loved snow and had something of an obsession with pink flamingos. Vicki began her morning, as she usually did, with a long car ride from Stratford to Sandy Hook. On this particular morning, she had with her all the ingredients and materials for her class to make gingerbread houses for the holidays.

157. On the morning of December 14, 2012, Dylan Hockley was a six-year-old boy in classroom 10. Dylan had a beaming smile that lit up a room and an infectious laugh. Dylan was a child with autism, but was learning to read and would come home every day from school proudly bearing a new book. He loved the moon, garlic bread, the color purple, cuddling, and bouncing on the trampoline. Dylan idolized his older brother, and best friend, Jake.

158. On the morning of December 14, 2012, Benjamin Wheeler, 6, wasn't sure if he wanted to be an architect, a paleontologist, a lighthouse keeper – or all three at once. Benjamin was a bright, spirited, inquisitive, caring boy who brought joyful energy to his parents and big brother. He was an avid reader and was becoming a very strong swimmer. Each morning he could hardly wait to get to classroom 8.

159. On the morning of December 14, 2012, Rachel D'Avino was a 29-year-old behavioral therapist with a passion for helping children and adults with autism. She was working toward a doctorate, and aspired to help shape the field of applied behavioral therapy. Rachel possessed seemingly limitless patience and empathy for the children with whom she worked; they, in turned, adored her. In eleven days, Rachel's boyfriend planned to propose.

160. On the morning of December 14, 2012, Daniel Barden was – at age 7 – one of the older children in classroom 8. Daniel understood things about life in a way that prompted many who knew him to call him an "old soul." Daniel was not only bright and loving; he understood what it meant to live life with compassion. Daniel always made an effort to make other children around him feel accepted. He would take notice of children who sat alone and would ask to go sit with them or invite them to join an activity. He gave hugs often, and with abandon.

161. On the morning of December 14, 2012, Mary Sherlach was a 56-year-old school psychologist at Sandy Hook Elementary School. After 18 years at the school, Mary was planning to retire the following June. On her calendar for retirement was spending more time with her husband, Bill, to whom she had been married for 31 years, and patiently waiting for one of her two daughters to provide her with a grandchild. Although retirement would allow more time for gardening and reading, Mary still planned on remaining professionally active for the pure joy that she took from helping a child through a difficult time.

162. On the morning of December 14, 2012, Jesse Lewis, 6, was a first-grader in classroom 10. The only child of Neil Heslin and Scarlett Lewis, Jesse loved to ride horses, play memory card games for which he was known to be unbeatable, and have books read to him by his mother. He also loved going out for special breakfasts before school with his dad. On the morning of December 14, father and son found time to enjoy a sausage and egg sandwich, polished off by hot chocolate.

163. On the morning of December 14, 2012, Noah Pozner was the youngest first grader in classroom 10, having just turned six only three weeks before. Noah loved costumes, video games, and superheroes – especially Spiderman. He was also a budding philosopher, known to stump his parents with spontaneous questions about Creation and the nature of free will. He was, truly, a force of nature.

164. On the morning of December 14, 2012, Lauren Rousseau, 30, headed to Sandy Hook Elementary School, where she had recently landed a permanent substitute teaching job. That day, she was scheduled to teach in classroom 8. Lauren's warmth, enthusiasm, and creativity made her a natural first-grade teacher. That evening, Lauren planned to see the movie "The Hobbit" with her boyfriend and then attend a party with friends. Lauren had already made cupcakes for the party, each one featuring a different character from The Hobbit.

165. On the morning of December 14, 2012, Natalie Hammond, 40, began her day as Lead Teacher of Sandy Hook Elementary School. It was special day for Natalie; her daughter was turning 12.

166. Just before 9:30 am, Lanza shot his way into the locked school with the Bushmaster rifle. It was the weapon he would use to take every life in the school aside from his own.

167. Mary Sherlach and the school's principal were in a meeting when they heard shots. When they went to investigate, both were killed with the Bushmaster rifle. Natalie Hammond and another staff member were shot with the Bushmaster rifle and wounded.

168. Lanza then approached two first-grade classrooms, Classroom 8 and Classroom 10.

169. In Classroom 8, Lanza used the Bushmaster rifle to kill 15 children and 2 adults, including Daniel Barden, Benjamin Wheeler, Noah Pozner, Rachel D'Avino, and Lauren Rousseau.

170. In Classroom 10, Lanza used the Bushmaster rifle to kill 5 children and 2 adults, including Dylan Hockley, Jesse Lewis, and Victoria Soto.

171. Nine children from Classroom 10 were able to escape when Lanza paused to reload the Bushmaster with another 30-round magazine.

172. The first call to 911 from Sandy Hook Elementary School was made at 9:35am. By 9:40am, Lanza's massacre was complete.

173. Police collected 154 spent .223 casings that had been expelled from the Bushmaster rifle.

COUNT ONE: § 52-555 Wrongful Death
(Estate of Victoria L. Soto v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and reallege as if fully set forth herein Paragraphs 1-173 of the foregoing opening section.

174. The Bushmaster Defendants knew, or should have known, of all of the foregoing information alleged at Paragraphs 1-10, 45-173. Based on this and similar information, the Bushmaster Defendants knew, or should have known, that the sale of assault rifles, including the XM15-E2S, in the civilian market posed an unreasonable and egregious risk of physical injury to others.

175. The Bushmaster Defendants knew, or should have known, of the civilian population's poor track record of safely securing weapons.

176. A mass casualty event, such as the shooting at Sandy Hook Elementary School, was within the scope of the risk created by the Bushmaster Defendants' manufacture and sale of the XM15-E2S for the civilian market.

177. The Bushmaster Defendants knew, or should have known, of the unreasonably high risk that the XM15-E2S would be used in a mass shooting to inflict maximum casualties before law enforcement was able to intervene.

178. The Bushmaster Defendants knew, or should have known, that schools are particularly vulnerable to – and frequently targets of – mass shootings.

179. The Bushmaster Defendants knew, or should have known, that the utility of the XM15-E2S for hunting, sporting or self-defense was negligible in comparison to the risk that the weapon would be used in its assaultive capacity.

180. The Bushmaster Defendants knew, or should have known, that the XM15-E2S, when used in its assaultive capacity, would be likely to inflict multiple casualties and serious injury.

181. The Bushmaster Defendants, as those who deal in firearms, are required to exercise the closest attention and the most careful precautions in the conduct of their business.

182. The Bushmaster Defendants have for years sold AR-15s in a manner that foreseeably leads to the use of those weapons by unauthorized and unsafe users.

183. The Bushmaster Defendants have had the ability for years to design and manufacture AR-15s for the civilian population with safety mechanisms that prevent the weapon from being fired by someone other than the purchaser.

184. The Bushmaster Defendants have had the ability for years to design and manufacture AR-15s for the civilian market that do not accept large capacity magazines.

185. The Bushmaster Defendants' conduct had a continuing inherent or natural tendency to create danger and inflict injury, was offensive to public policy, and posed a serious risk to public health.

186. The Bushmaster Defendants' conduct interfered with the right of the public to be safe in their communities, and, more particularly, of children to be safe in their schools.

187. In this case, on information and belief, the Bushmaster Defendants supplied the XM15-E2S to the Camfour Defendants for resale to the civilian population.

188. The Bushmaster Defendants knew, or should have known, that the Camfour Defendants' use of the product – the supply to the civilian market – involved an unreasonable risk of physical injury to others.

189. The Bushmaster Defendants' conduct as previously alleged constituted a public nuisance.

190. Upon information and belief, the Bushmaster Defendants' conduct as previously alleged constituted a knowing violation of the Connecticut Unfair Trade Practices Act, Connecticut General Statutes Section 42-110a et seq.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Victoria Soto, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff's decedent, Victoria Soto, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and

e. death.

193. As a result of the injuries and death of Victoria Soto, the Estate of Victoria Soto incurred funeral expenses to its financial loss.

COUNT TWO: § 52-555 Wrongful Death
(Estate of Victoria L. Soto v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and reallege as if fully set forth herein Paragraphs 1-173 of Count One.

174. The Camfour Defendants knew, or should have known, of all of the foregoing information alleged at Paragraphs 1-10, 45-173 of Count One. Based on this and similar information, the Camfour Defendants knew or should have known that the sale of assault rifles, including the XM15-E2S, in the civilian market posed an unreasonable and egregious risk of physical injury to others.

175. The Camfour Defendants knew, or should have known, of the civilian population's poor track record of safely securing weapons.

176. A mass casualty event, such as the shooting at Sandy Hook Elementary School, was within the scope of the risk created by the Camfour Defendants' sale of the XM15-E2S to the civilian market.

177. The Camfour Defendants knew, or should have known, of the unreasonably high risk that the XM15-E2S would be used in a mass shooting to inflict maximum casualties before law enforcement was able to intervene.

178. The Camfour Defendants knew or should have known that schools are particularly vulnerable to – and frequently targets of – mass shootings.

179. The Camfour Defendants knew, or should have known, that the utility of the XM15-E2S for hunting, sporting or self-defense was negligible in comparison to the risk that the weapon would be used in its assaultive capacity.

180. The Camfour Defendants knew, or should have known, that the XM15-E2S, when used in its assaultive capacity, would be likely to inflict multiple casualties and serious injury.

181. The Camfour Defendants, as those who deal in firearms, are required to exercise the closest attention and the most careful precautions in the conduct of their business.

182. The Camfour Defendants have for years sold AR-15s in a manner that foreseeably leads to the use of those weapons by unauthorized and unsafe users.

183. The Camfour Defendants' conduct had a continuing inherent or natural tendency to create danger and inflict injury, was offensive to public policy, and posed a serious risk to public health.

184. The Camfour Defendants' conduct interfered with the right of the public to be safe in their communities, and, more particularly, of children to be safe in their schools.

185. The Camfour Defendants are a qualified product seller within the meaning of 18 U.S.C. § 7903(6).

186. In this case, on information and belief, the Camfour Defendants supplied the XM15-E2S to the Riverview Defendants for resale to the civilian market.

187. The Camfour defendants knew, or should have known, that the Riverview Defendants' use of the product – supplying it to the civilian population – involved an extreme and unreasonable risk of physical injury to others.

188. The Camfour Defendants' conduct as previously alleged constituted a public nuisance.

189. Upon information and belief, the Camfour Defendants' conduct as previously alleged constituted a knowing violation of the Connecticut Unfair Trade Practices Act, Connecticut General Statutes Section 42-110a et seq.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Victoria Soto, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff's decedent, Victoria Soto, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Victoria Soto, the Estate of Victoria Soto incurred funeral expenses to its financial loss.

COUNT THREE: § 52-555 Wrongful Death
(Estate of Victoria L. Soto v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and reallege as if fully set forth herein Paragraphs 1-173 of Count One.

174. The Riverview Defendants knew, or should have known, of all of the foregoing information alleged at Paragraphs 1-10, 45-173 of Count One. Based on this and similar information, the Riverview Defendants knew or should have known that the sale of assault rifles, including the XM15-E2S, in the civilian market posed an unreasonable and egregious risk of physical injury to others.

175. The Riverview Defendants knew, or should have known, of the civilian population's poor track record of safely securing weapons.

176. A mass casualty event, such as the shooting at Sandy Hook Elementary School, was within the scope of the risk created by the Riverview Defendants' sale of the XM15-E2S to Nancy Lanza.

177. The Riverview Defendants knew, or should have known, of the unreasonably high risk that the XM15-E2S would be used in a mass shooting to inflict maximum casualties before law enforcement was able to intervene.

178. The Riverview Defendants knew, or should have known, that schools are particularly vulnerable to – and frequently targets of – mass shootings.

179. The Riverview Defendants knew, or should have known, that the utility of the XM15-E2S for hunting, sporting or self-defense was negligible in comparison to the risk that the weapon would be used in its assaultive capacity.

180. The Riverview Defendants knew, or should have known, that the XM15-E2S, when used in its assaultive capacity, would be likely to inflict multiple casualties and serious injury.

181. The Riverview Defendants, as those who deal in firearms, are required to exercise the closest attention and the most careful precautions in the conduct of their business.

182. The Riverview Defendants for years sold AR-15s in a manner that foreseeably led to the use of those weapons by unauthorized and unsafe users.

183. The Riverview Defendants' conduct had a continuing inherent or natural tendency to create danger and inflict injury, was offensive to public policy, and posed a serious risk to public health.

184. The Riverview Defendants' conduct interfered with the right of the public to be safe in their communities, and, more particularly, of children to be safe in their schools.

185. The Riverview Defendants are a qualified product seller within the meaning of 18 U.S.C. § 7903(6).

186. The Riverview Defendants began the process of selling the XM15-E2S rifle to Nancy Lanza on March 15, 2010.

187. The Riverview Defendants transferred the XM15-E2S rifle to Nancy Lanza on March 29, 2010.

188. The Riverview defendants knew, or should have known, that Nancy Lanza's receipt and possession of the XM15-E2S involved an unreasonable risk of physical injury to others.

189. The Riverview Defendants' sale of the XM15-E2S involved an unreasonable risk of physical injury to others.

190. The Riverview Defendants' conduct as previously alleged constituted a public nuisance.

191. Upon information and belief, the Riverview Defendants' conduct as previously alleged constituted a knowing violation of the Connecticut Unfair Trade Practices Act, Connecticut General Statutes Section 42-110a et seq.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Victoria Soto, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff's decedent, Victoria Soto, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Victoria Soto, the Estate of Victoria Soto incurred funeral expenses to its financial loss.

COUNT FOUR: § 52-555 Wrongful Death
(Estate of Dylan C. Hockley v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Dylan Hockley, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiffs' decedent, Dylan Hockley, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Dylan Hockley, the Estate of Dylan C. Hockley incurred funeral expenses to its financial loss.

COUNT FIVE: § 52-555 Wrongful Death
(Estate of Dylan C. Hockley v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Dylan Hockley, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiffs' decedent, Dylan Hockley, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Dylan Hockley, the Estate of Dylan C. Hockley incurred funeral expenses to its financial loss.

COUNT SIX: § 52-555 Wrongful Death
(Estate of Dylan C. Hockley v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Dylan Hockley, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiffs' decedent, Dylan Hockley, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Dylan Hockley, the Estate of Dylan C. Hockley incurred funeral expenses to its financial loss.

COUNT SEVEN: §52-555 Wrongful Death
(Estate of Mary Joy Sherlach v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Mary Joy Sherlach, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff's decedent, Mary Joy Sherlach, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Mary Joy Sherlach, the Estate of Mary Joy Sherlach incurred funeral expenses to its financial loss.

COUNT EIGHT: §52-555 Wrongful Death
(Estate of Mary Joy Sherlach v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Mary Joy Sherlach, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff's decedent, Mary Joy Sherlach, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Mary Joy Sherlach, the Estate of Mary Joy Sherlach incurred funeral expenses to its financial loss.

COUNT NINE: §52-555 Wrongful Death
(Estate of Mary Joy Sherlach v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Mary Joy Sherlach, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff's decedent, Mary Joy Sherlach, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Mary Joy Sherlach, the Estate of Mary Joy Sherlach incurred funeral expenses to its financial loss.

COUNT TEN: Loss of Consortium
(William D. Sherlach v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Mary Joy Sherlach.

192. At all times mentioned herein, the plaintiff William D. Sherlach was the husband of Mary Joy Sherlach.

193. As a result of the aforesaid occurrences to Mary Joy Sherlach, the plaintiff William Sherlach has been deprived of the companionship and society of his wife, all to his damage.

COUNT ELEVEN: Loss of Consortium
(William D. Sherlach v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Mary Joy Sherlach.

191. At all times mentioned herein, the plaintiff William D. Sherlach was the husband of Mary Joy Sherlach.

192. As a result of the aforesaid occurrences to Mary Joy Sherlach, the plaintiff William Sherlach has been deprived of the companionship and society of his wife, all to his damage.

COUNT TWELVE: Loss of Consortium
(William D. Sherlach v. Riverview Defendants)

1.-173. Plaintiff hereby incorporates and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiff hereby incorporates and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Mary Joy Sherlach.

193. At all times mentioned herein, the plaintiff William D. Sherlach was the husband of Mary Joy Sherlach.

194. As a result of the aforesaid occurrences to Mary Joy Sherlach, the plaintiff William Sherlach has been deprived of the companionship and society of his wife, all to his damage.

COUNT THIRTEEN: § 52-555 Wrongful Death
(Estate of Noah S. Pozner v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Noah Pozner, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff's decedent, Noah Pozner, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Noah Pozner, the Estate of Noah S. Pozner incurred funeral expenses to its financial loss.

COUNT FOURTEEN: § 52-555 Wrongful Death
(Estate of Noah S. Pozner v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Noah Pozner, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff's decedent, Noah Pozner, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Noah Pozner, the Estate of Noah S. Pozner incurred funeral expenses to its financial loss.

COUNT FIFTEEN: § 52-555 Wrongful Death
(Estate of Noah S. Pozner v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Noah Pozner, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff's decedent, Noah Pozner, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Noah Pozner, the Estate of Noah S. Pozner incurred funeral expenses to its financial loss.

COUNT SIXTEEN: § 52-555 Wrongful Death
(Estate of Lauren G. Rousseau v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Lauren Rousseau, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff's decedent, Lauren Rousseau, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Lauren Rousseau, the Estate of Lauren G. Rousseau incurred funeral expenses to its financial loss.

COUNT SEVENTEEN: § 52-555 Wrongful Death
(Estate of Lauren G. Rousseau v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Lauren Rousseau, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff's decedent, Lauren Rousseau, suffered the following injuries and losses:

a. Terror;

b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Lauren Rousseau, the Estate of Lauren G. Rousseau incurred funeral expenses to its financial loss.

COUNT EIGHTEEN: § 52-555 Wrongful Death
(Estate of Lauren G. Rousseau v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Lauren Rousseau, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff's decedent, Lauren Rousseau, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Lauren Rousseau, the Estate of Lauren G. Rousseau incurred funeral expenses to its financial loss.

COUNT NINETEEN: § 52-555 Wrongful Death
(Estate of Benjamin A. Wheeler v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Benjamin Wheeler, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff's decedent, Benjamin Wheeler, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Benjamin Wheeler, the Estate of Benjamin A. Wheeler incurred funeral expenses to its financial loss.

COUNT TWENTY: § 52-555 Wrongful Death
(Estate of Benjamin A. Wheeler v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Benjamin Wheeler, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff's decedent, Benjamin Wheeler, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Benjamin Wheeler, the Estate of Benjamin A. Wheeler incurred funeral expenses to its financial loss.

COUNT TWENTY-ONE: § 52-555 Wrongful Death
(Estate of Benjamin A. Wheeler v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Benjamin Wheeler, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff's decedent, Benjamin Wheeler, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Benjamin Wheeler, the Estate of Benjamin A. Wheeler incurred funeral expenses to its financial loss.

COUNT TWENTY-TWO: § 52-555 Wrongful Death
(Estate of Jesse McCord Lewis v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Jesse McCord Lewis, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiffs' decedent, Jesse McCord Lewis, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Jesse McCord Lewis, the Estate of Benjamin A. Wheeler incurred funeral expenses to its financial loss.

COUNT TWENTY-THREE: § 52-555 Wrongful Death
(Estate of Jesse McCord Lewis v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Jesse McCord Lewis, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiffs' decedent, Jesse McCord Lewis, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Jesse McCord Lewis, the Estate of Jesse McCord Lewis incurred funeral expenses to its financial loss.

COUNT TWENTY-FOUR: § 52-555 Wrongful Death
(Estate of Jesse McCord Lewis v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Jesse McCord Lewis, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiffs' decedent, Jesse McCord Lewis, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Jesse McCord Lewis, the Estate of Jesse McCord Lewis incurred funeral expenses to its financial loss.

COUNT TWENTY-FIVE: § 52-555 Wrongful Death
(Estate of Daniel G. Barden v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Daniel Barden, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiffs' decedent, Daniel Barden, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Daniel Barden, the Estate of Daniel G. Barden incurred funeral expenses to its financial loss.

COUNT TWENTY-SIX: § 52-555 Wrongful Death
(Estate of Daniel G. Barden v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Daniel Barden, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiffs' decedent, Daniel Barden, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Daniel Barden, the Estate of Daniel G. Barden incurred funeral expenses to its financial loss.

COUNT TWENTY-SEVEN: § 52-555 Wrongful Death
(Estate of Daniel G. Barden v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Daniel Barden, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiffs' decedent, Daniel Barden, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Daniel Barden, the Estate of Daniel G. Barden incurred funeral expenses to its financial loss.

COUNT TWENTY-EIGHT: § 52-555 Wrongful Death
(Estate of Rachel M. D'Avino v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Rachel D'Avino, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff's decedent, Rachel D'Avino, suffered the following injuries and losses:

a. Terror;

b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

193. As a result of the injuries and death of Rachel D'Avino, the Estate of Rachel M. D'Avino incurred funeral expenses to its financial loss.

COUNT TWENTY-NINE: § 52-555 Wrongful Death
(Estate of Rachel M. D'Avino v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Rachel D'Avino, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff's decedent, Rachel D'Avino, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

192. As a result of the injuries and death of Rachel D'Avino, the Estate of Rachel M. D'Avino incurred funeral expenses to its financial loss.

COUNT THIRTY: § 52-555 Wrongful Death
(Estate of Rachel M. D'Avino v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries, suffering, and death of Rachel D'Avino, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff's decedent, Rachel D'Avino, suffered the following injuries and losses:

a. Terror;
b. ante-mortem pain and suffering;
c. destruction of the ability to enjoy life's activities;
d. destruction of earning capacity; and
e. death.

194. As a result of the injuries and death of Rachel D'Avino, the Estate of Rachel M. D'Avino incurred funeral expenses to its financial loss.

COUNT THIRTY-ONE: § 52-555 Wrongful Death
(Natalie Hammond v. Bushmaster Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-190. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-190 of Count One.

191. The Bushmaster Defendants' conduct as previously alleged was a substantial factor resulting in the injuries and suffering of Natalie Hammond, as further described in the following two paragraphs.

192. On December 14, 2012, plaintiff, Natalie Hammond, suffered the following injuries and losses:

a. Terror;
b. pain and suffering;
c. severe, permanent and painful injuries to her left calf, left foot, left thigh and left hand;
d. destruction of the ability to enjoy life's activities; and
e. destruction of earning capacity.

193. As a result of such injuries, Ms. Hammond incurred medical expenses to her financial loss.

COUNT THIRTY-TWO: § 52-555 Wrongful Death
(Natalie Hammond v. Camfour Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-189. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-189 of Count Two.

190. The Camfour Defendants' conduct as previously alleged was a substantial factor resulting in the injuries and suffering of Natalie Hammond, as further described in the following two paragraphs.

191. On December 14, 2012, plaintiff, Natalie Hammond, suffered the following injuries and losses:

a. Terror;
b. pain and suffering;
c. severe, permanent and painful injuries to her left calf, left foot, left thigh and left hand;
d. destruction of the ability to enjoy life's activities; and
e. destruction of earning capacity.

192. As a result of such injuries, Ms. Hammond incurred medical expenses to her financial loss.

COUNT THIRTY-THREE: § 52-555 Wrongful Death
(Natalie Hammond v. Riverview Defendants)

1.-173. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 1-173 of Count One.

174.-191. Plaintiffs hereby incorporate and re-allege as if fully set forth herein Paragraphs 174-191 of Count Three.

192. The Riverview Defendants' conduct as previously alleged was a substantial factor resulting in the injuries and suffering of Natalie Hammond, as further described in the following two paragraphs.

193. On December 14, 2012, plaintiff, Natalie Hammond, suffered the following injuries and losses:

a. Terror;
b. pain and suffering;
c. severe, permanent and painful injuries to her left calf, left foot, left thigh and left hand;
d. destruction of the ability to enjoy life's activities; and
e. destruction of earning capacity.

194. As a result of such injuries, Ms. Hammond incurred medical expenses to her financial loss.

WHEREFORE, THE PLAINTIFFS CLAIM DAMAGES IN EXCESS OF FIFTEEN THOUSAND DOLLARS AND THE FOLLOWING RELIEF AS FURTHER SET FORTH BELOW:

Plaintiffs seek relief as follows:

A. Monetary damages;

B. Punitive damages;

C. Attorneys' fees;

D. Costs;

E. Injunctive relief.

This matter is within the jurisdiction of this court.

Of this writ, with your doings thereon, make due service and return.

Dated at Bridgeport, Connecticut this 13TH of December, 2014.

THE PLAINTIFFS

By _____

Joshua D. Koskoff
Alinor C. Sterling
Katie Mesner-Hage
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Juris No. 032250
Tel: 203-336-4421
Fax: 203-368-3244

PLEASE ENTER THE APPEARANCE OF:

Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604

for the Plaintiffs

A TRUE COPY
ATTEST:
CHARLES J. FISHER, JR.
STATE MARSHAL, HARTFORD COUNTY
AN INDIFFERENT PERSON

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 8/02

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Stratford Probate District	DISTRICT NO. PD47	
ESTATE OF/IN THE MATTER OF Victoria Leigh Soto (13-00070)		DATE OF CERTIFICATE *February 7, 2013* *Valid for:* 1 year from this date
FIDUCIARY'S NAME AND ADDRESS Donna Louise Soto, 158 Knowlton Street, Stratford, CT 06615	FIDUCIARY'S POSITION OF TRUST Administratrix	DATE OF APPOINTMENT February 7, 2013

The undersigned hereby certifies that the fiduciary of the above-named estate has accepted appointment, has executed bond according to law or has been excused from executing bond by will or by statute, and is legally authorized and qualified to act as such fiduciary on said estate because said appointment is unrevoked and in full force as of the above date of certificate.

Limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Lorraine Maglione
Lorraine Maglione, Assistant Clerk

Court
Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT A

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Northern Fairfield County	DISTRICT NO. PD45	
ESTATE OF/IN THE MATTER OF Dylan Christopher Jack Hockley, (14-0564)		DATE OF CERTIFICATE December 3, 2014

FIDUCIARY'S NAME AND ADDRESS	FIDUCIARY'S POSITION OF TRUST	DATE OF APPOINTMENT
Ian Hockley, 61 Charter Ridge Drive, Sandy Hook, CT 06482	Co-Administrator	December 3, 2014
Nicole Hockley, 61 Charter Ridge Drive, Sandy Hook, CT 06482	Co-Administrator	December 3, 2014

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Anna M. Lucchesi, Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT B

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Northern Fairfield County	**DISTRICT NO. PD45**	
ESTATE OF/IN THE MATTER OF Benjamin Andrew Wheeler, (14-0567)		DATE OF CERTIFICATE December 10, 2014
FIDUCIARY'S NAME AND ADDRESS David Cole Wheeler, 10 Lakeview Terrace, Sandy Hook, CT 06482	FIDUCIARY'S POSITION OF TRUST Administrator	DATE OF APPOINTMENT December 4, 2014

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Jacqueline Buckle, Chief Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT C

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Region # 22 Probate District	DISTRICT NO. PD22	
ESTATE OF/IN THE MATTER OF RACHEL MARIE D'AVINO, , AKA RACHEL M. D'AVINO (13-0036)		DATE OF CERTIFICATE December 10, 2014
FIDUCIARY'S NAME AND ADDRESS Mary A. D'Avino, 48 Deerwood Drive, Bethlehem, CT 06751	FIDUCIARY'S POSITION OF TRUST Administratrix	DATE OF APPOINTMENT January 22, 2013

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Court Seal

Pamela L. Osborne, Assistant Clerk

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT D

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Northern Fairfield County	DISTRICT NO. PD45	
ESTATE OF/IN THE MATTER OF Daniel Gerard Barden, (14-0577)		DATE OF CERTIFICATE December 10, 2014
FIDUCIARY'S NAME AND ADDRESS	FIDUCIARY'S POSITION OF TRUST	DATE OF APPOINTMENT
Mark Barden, 35 Paugussett Road, Sandy Hook, CT 06482	Co-Administrator	December 8, 2014
Jacqueline Barden, 35 Paugussett Road, Sandy Hook, CT 06482	Co-Administrator	December 8, 2014

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Jacqueline Buckle, Chief Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT E

12/09/2014 22:11 FAX 001/001

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Trumbull Probate District	DISTRICT NO. PD46	
ESTATE OF/IN THE MATTER OF Mary Joy Sherlach, late of Trumbull, AKA MARY J. SHERLACH (13-00062)		DATE OF CERTIFICATE December 10, 2014
FIDUCIARY'S NAME AND ADDRESS William D. Sherlach, 33 Vintage Road, Trumbull, CT 06611	FIDUCIARY'S POSITION OF TRUST Executor	DATE OF APPOINTMENT March 7, 2013

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Susan M Pulos

Susan M. Pulos, Assistant Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT F

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Northern Fairfield County	DISTRICT NO. PD45	
ESTATE OF/IN THE MATTER OF Jessie McCord Lewis, , AKA Jessie M. Lewis (13-0048)		DATE OF CERTIFICATE December 10, 2014

FIDUCIARY'S NAME AND ADDRESS	FIDUCIARY'S POSITION OF TRUST	DATE OF APPOINTMENT
Scarlett Lewis, 6 Great Ring Road, Sandy Hook, CT 06482	Co-Administrator, d.b.n.	December 9, 2014
Neil Heslin, 90 Polar Drive, Shelton, CT 06484	Co-Administrator, d.b.n	December 9, 2014

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Jacqueline Buckle, Chief Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT G

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Northern Fairfield County	DISTRICT NO. PD45	
ESTATE OF/IN THE MATTER OF Noah Samuel Pozner, (14-0589)		DATE OF CERTIFICATE December 10, 2014
FIDUCIARY'S NAME AND ADDRESS Leonard Pozner, 261 South Main Street, #332, Newtown, CT 06470	FIDUCIARY'S POSITION OF TRUST Administrator	DATE OF APPOINTMENT December 10, 2014

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Anna M. Lucchesi, Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT H

FIDUCIARY'S PROBATE CERTIFICATE
PC-450 REV. 7/13

STATE OF CONNECTICUT

COURT OF PROBATE

COURT OF PROBATE, Danbury Probate District	**DISTRICT NO. PD43**	
ESTATE OF/IN THE MATTER OF Lauren G. Rousseau, (13-0007)		DATE OF CERTIFICATE December 11, 2014
FIDUCIARY'S NAME AND ADDRESS Gilles J. Rousseau, 67 Horse Fence Hill Road, Southbury, CT 06488	FIDUCIARY'S POSITION OF TRUST Administrator	DATE OF APPOINTMENT January 3, 2013

The undersigned hereby certifies that the fiduciary in the above-named matter has accepted appointment, is legally authorized and qualified to act as such fiduciary because the appointment is unrevoked and in full force as of the above date of certificate.

This certificate is valid for one year from the date of the certificate.

Other limitation, if any, on the above certificate:

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Jessica E. Regan, Assistant Clerk

Court Seal

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

EXHIBIT I

(8)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No.
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

CONSENT TO REMOVAL

Defendants, Camfour, Inc. and Camfour Holding, Inc., with full reservation of any and all rights and defenses, hereby consent to removal of the above-captioned case to the United States District Court for the District of Connecticut, which was originally filed in the Superior Court of the Judicial District of Fairfield County (at Bridgeport) in the State of Connecticut.

Dated: January 13, 2015.

Christopher Renzulli
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, New York 10601

Attorneys for Defendants, Camfour, Inc. and Camfour Holding, Inc.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs.	)	
VS.	)	Civil Action No.
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

CONSENT TO REMOVAL

I, Defendant, David LaGuercia, with full reservation of any and all rights and defenses, hereby consents to removal of the above-captioned case to the United States District Court for the District of Connecticut, which was originally filed in the Superior Court of the Judicial District of Fairfield County (at Bridgeport) in the State of Connecticut.

Dated: January 14, 2015.

1/14/15

David LaGuercia

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No.
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

DECLARATION OF JONATHAN P. WHITCOMB, ESQ.

I, Jonathan P. Whitcomb, declare under penalty of perjury that the following is true and correct:

1. I am a licensed practicing attorney in the State of Connecticut. I have been retained by Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc. to defend them in the above-captioned lawsuit.

2. I have been licensed to practice law in Connecticut since 1990. During that time, I have represented parties in numerous personal injury and wrongful death actions filed in Connecticut State courts and the United States District Court, District of Connecticut. In my practice, I routinely provide to clients my evaluation of the potential monetary value of personal injury and wrongful death claims in Connecticut courts.

3. I have reviewed the allegations and claims made for personal injury and wrongful death damages by the Plaintiffs in their Complaint in this case.

4. Four of the Plaintiffs are the Estates of adults killed, with criminal intent, by Adam Lanza in the December 14, 2012 shooting at Sandy Hook Elementary School in Newtown, Connecticut: Victoria Soto, Rachel D'Avino, Mary Sherlach and Lauren Rousseau. Each of the Estates seeks recovery under the Connecticut Wrongful Death Act for their decedent's terror, ante-mortem pain and suffering, destruction of the ability to enjoy life's activities, destruction of earning capacity, death and funeral expenses. In my opinion, the monetary value of each of these wrongful death claims exceeds $75,000 in a Connecticut court. In addition, the husband of Mary Sherlach, William D. Sherlach, seeks to recover damages for the loss of his wife's society and companionship. In my opinion, the monetary value of his damages likely exceeds $75,000 in a Connecticut court.

5. Five of the Plaintiffs are the Estates of children killed, with criminal intent, by Adam Lanza in the December 14, 2012 shooting at Sandy Hook Elementary School in Newtown, Connecticut: Dylan Hockley, Benjamin Wheeler, Jesse Lewis, and Noah Pozner. Each of the Estates seeks recovery under the Connecticut Wrongful Death Act for their decedent's terror, ante-mortem pain and suffering, destruction of the ability to enjoy life's activities, destruction of earning capacity, death and funeral expenses. In my opinion, the monetary value of each of these wrongful death claims exceeds $75,000 in a Connecticut court.

6. Plaintiff Natalie Hammond survived the criminal shooting by Adam Lanza, but sustained "severe, permanent and painful [gunshot] injuries to her left calf, left foot, left thigh and left hand." She seeks recovery for terror, pain and suffering, destruction of the ability to enjoy life's activities, destruction of earning capacity and medical expenses. In my opinion, the monetary value of her claim exceeds $75,000 in a Connecticut court.

I, Jonathan P. Whitcomb, declare under penalty of perjury under the laws of the United States of America, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on: January 14, 2015

Jonathan P. Whitcomb (CT15014)
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800
jwhitcomb@dmoc.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO; IAN AND NICOLE HOCKLEY, CO-ADMINISTRATORS OF THE ESTATE OF DYLAN C. HOCKLEY; WILLIAM D. SHERLACH, EXECUTOR OF THE ESTATE OF MARY JOY SHERLACH; WILLIAM D. SHERLACH, INDIVIDUALLY; LEONARD POZNER, ADMINISTRATOR OF THE ESTATE OF NOAH S. POZNER; GILLES J. ROUSSEAU, ADMINISTRATOR OF THE ESTATE OF LAUREN G. ROUSSEAU; DAVID C. WHEELER, ADMINISTRATOR OF THE ESTATE OF BENJAMIN A. WHEELER; NEIL HESLIN AND SCARLETT LEWIS, CO-ADMINISTRATORS OF THE ESTATE OF JESSE MCCORD LEWIS; MARK AND JACQUELINE BARDEN, CO-ADMINISTRATORS OF THE ESTATE OF DANIEL G. BARDEN; MARY D'AVINO, ADMINISTRATRIX OF THE ESTATE OF RACHEL M. D'AVINO; and NATALIE HAMMOND	)	
Plaintiffs,	)	
VS.	)	Civil Action No.
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC; FREEDOM GROUP, INC. a/k/a FREEDOM GROUP a/k/a FREEDOM GROUP, LLC a/k/a REMINGTON OUTDOOR COMPANY; BUSHMASTER FIREARMS a/k/a FREEDOM GROUP a/k/a REMINGTON OUTDOOR COMPANY, INC.; BUSHMASTER FIREARMS, INC. a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR COMPANY, INC.; BUSHMASTER HOLDINGS, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR COMPANY, INC.; REMINGTON ARMS CO.,	)	

LLC, a/k/a BUSHMASTER FIREARMS INT.,)
INC., a/k/a FREEDOM GROUP, INC. a/k/a)
REMINGTON OUTDOOR CO.; REMINGTON)
OUTDOOR COMPANY, INC. a/k/a)
FREEDOM GROUP, INC.; CAMFOUR, INC.;)
CAMFOUR HOLDING, LLP a/k/a CAMFOUR)
HOLDING, INC.; RIVERVIEW SALES, INC.;)
DAVID LA GUERCIA)
)
Defendants.)

DEFENDANTS REMINGTON ARMS COMPANY, LLC AND REMINGTON OUTDOOR COMPANY, INC.'S NOTICE OF REMOVAL

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, notify this Court that they are removing the above captioned action currently pending in the Superior Court of the Judicial District of Fairfield County (at Bridgeport) to the United States District Court for the District of Connecticut. In support, the Remington Defendants state as follows:

INTRODUCTION

1. On December 13, 2014, Plaintiffs filed their Complaint against (1) the Remington Defendants,[1] (2) Camfour, Inc. and Camfour Holding, Inc. (collectively, the "Camfour

[1] This Notice of Removal is filed on behalf of Defendants "Remington Arms Company, LLC" and "Remington Outdoor Company, Inc." For clarification, Defendant "Remington Arms Company, LLC" was formerly known as "Remington Arms Company, Inc." Thus, "Remington Arms Company, Inc." does not exist. Defendant "Remington Outdoor Company, Inc." was formerly known as "Freedom Group, Inc." Thus, "Freedom Group, Inc." does not exist. "Bushmaster Firearms International, LLC" is also a named defendant but does not exist as it was merged into and is only an unincorporated brand of Remington Arms Company, LLC. Plaintiffs have also named or listed as "a/k/a" several other entities that do not exist: (1) "Remington Arms Co., LLC"; (2) "Remington Outdoor Group, Inc."; (3) "Remington Outdoor Company"; (4) "Remington Outdoor Co."; (5) "Freedom Group, LLC"; (6) "Freedom Group"; (7) "Bushmaster Firearms"; (8) "Bushmaster Holdings, LLC"; (9) "Bushmaster Firearms, Inc."; and (10) "Bushmaster Firearms Int., Inc." These non-existent entities have not been "properly joined and served as defendants[.]" 28 U.S.C. § 1441(b)(2).

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ORDER ON PRETRIAL DEADLINES

(a) In accordance with Local Civil Rule 26, within thirty days of the appearance of a defendant, the parties must confer for the purposes described in Fed. R.Civ. P. 26(f). Within fourteen days thereafter, the parties shall jointly file a report on Form 26(f), which appears in the Appendix to the Local Civil Rules. The report will be used to establish a scheduling order, which will include a date by which the case must be ready for trial.

(b) Before a party files a motion to dismiss or a motion for summary judgment, a prefiling conference will be held. A party wishing to file such a motion must submit a letter to chambers requesting a prefiling conference and briefly describing the nature and basis of the proposed motion. The letter must be submitted no later than forty-five days before the discovery deadline. Failure to request a prefiling conference will result in the waiver of the right to file a motion. Except in cases involving pro se parties, no request for a prefiling conference may be submitted unless the attorney making the request has conferred with other counsel of record and discussed the proposed motion in a good faith effort to clarify the issues, eliminate or reduce the area of controversy and arrive at a mutually satisfactory resolution. D. Conn. L. Civ. R. 37(a) (requiring counsel to confer before filing motions relating to discovery disputes). Except in cases involving pro se parties, any request for a prefiling conference must include a statement that the attorney submitting the request has conferred with other counsel and must briefly describe the results of the conference.

(c) In accordance with Fed. R. Civ. P. 16(b), motions for modification of the dates set forth in the scheduling order issued pursuant to the parties' 26(f) report will not be granted except for good cause. This standard requires a particularized showing that the scheduling order could not be complied with despite due diligence on the part of the party seeking the modification. Any such motion must be filed in writing at least five days before expiration of the date in question.

(d) Formal discovery pursuant to the Federal Rules of Civil Procedure may commence once the parties have conferred as required by Fed. R. Civ. P. 26(f) and D. Conn. L. Civ. R. 26. Informal discovery by agreement of the parties is encouraged and may commence at anytime. Unless otherwise ordered, discovery shall be completed within 6 months after the filing of the complaint, the filing of a petition for removal, or the date of transfer of an action from another District.

A copy of this Order must be served by the plaintiff on all defendants.

Robin D. Tabora
Clerk of the Court

(Effective 8/7/13)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELECTRONIC FILING ORDER

All documents in this case will be filed electronically. Documents filed electronically must be filed in OCR text searchable PDF format. Counsel are reminded that they must comply with the requirements set forth in the District Court's CM/ECF Policies and Procedures Manual.

Unless otherwise ordered, on the business day next following the day on which a document is filed electronically, counsel must provide Chambers with one paper copy of the following e-filed documents:

All pleadings (including briefs and exhibits) supporting or opposing the following:

a. Applications for temporary restraining orders, preliminary injunctions or prejudgment remedies;

b. Motions to dismiss or for summary judgment;

c. Trial briefs, including proposed findings of fact and conclusions of law; and

d. Any other filing that exceeds 15 pages.

/s/ Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NOTICE REGARDING ELECTRONIC FILING

Effective July 1, 2006, all civil cases assigned to Judge Chatigny will be designated as electronically filed cases, and thus be subject to the attached Electronic Filing Order, except cases involving pro se parties (including pro se prisoner cases). If an attorney believes that a case should be exempted from electronic filing, a motion seeking an exemption may be filed within 14 days after the attorney enters an appearance in the case.

In order to be able to file documents electronically, an attorney must first register with the Clerk's Office and obtain an electronic filing login and password. Registration forms are available on the Court's website, along with a tutorial on electronic filing (http://www.pacer.gov/ecfcbt/dc/).

FOR THE COURT

ROBIN D. TABORA, CLERK

Revised 8/7/13

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STANDING PROTECTIVE ORDER

1. It is hereby ordered by the Court that the following shall apply to information, documents, excerpts from documents, and other materials produced in this action pursuant to Federal and Local Rules of Civil Procedure governing disclosure and discovery.

2. Information, documents and other materials may be designated by the producing party in the manner permitted ("the Designating Person"). All such information, documents, excerpts from documents, and other materials will constitute "Designated Material" under this Order. The designation shall be either (a) "CONFIDENTIAL" or (b) CONFIDENTIAL-ATTORNEYS' EYES ONLY." This Order shall apply to Designated Material produced by any party or third-party in this action.

3. "CONFIDENTIAL" information means information, documents, or things that have not been made public by the disclosing party and that the disclosing party reasonably and in good faith believes contains or comprises (a) trade secrets, (b) proprietary business information, or (c) information implicating an individual's legitimate expectation of privacy.

4. "CONFIDENTIAL-ATTORNEY'S EYES ONLY" means CONFIDENTIAL information that the disclosing party reasonably and in good faith believes is so highly sensitive that its disclosure to a competitor could result in significant competitive or commercial disadvantage to the designating party.

5. Designated Material shall not be used or disclosed for any purpose other than the litigation of this action and may be disclosed only as follows:

a. *Parties:* Material designated "CONFIDENTIAL" may be disclosed to parties to this action or directors, officers and employees of parties to this action, who have a legitimate need to see the information in connection with their responsibilities for overseeing the litigation or assisting counsel in preparing the action for trial or settlement. Before Designated Material is disclosed for this purpose, each such person must agree to be bound by this Order by signing a document substantially in the form of Exhibit A.

b. *Witnesses or Prospective Witnesses:* Designated Material, including material designated "CONFIDENTIAL-ATTORNEYS' EYES ONLY," may be disclosed to a witness or prospective witness in this action, but only for purposes of testimony or preparation of testimony in this case, whether at trial, hearing, or deposition, but it may not be retained by the witness or prospective witness. Before Designated Material is disclosed for this purpose, each such person must agree to be bound by this Order, by signing a document substantially in the form of Exhibit A.

c. *Outside Experts:* Designated Material, including material designated "CONFIDENTIAL-ATTORNEYS' EYES ONLY," may be disclosed to an outside expert for the purpose of obtaining the expert's assistance in the litigation. Before Designated Material is disclosed for this purpose, each such person must agree to be bound by this Order, by signing a document substantially in the form of Exhibit A.

d. *Counsel:* Designated Material, including material designated "CONFIDENTIAL-ATTORNEYS' EYES ONLY," may be disclosed to counsel of record and in-house counsel for parties to this action and their associates, paralegals, and regularly employed office staff.

e. *Other Persons:* Designated Material may be provided as necessary to copying services, translators, and litigation support firms. Before Designated Material is disclosed to such third parties, each such person must agree to be bound by this Order by signing a document substantially in the form of Exhibit A.

6. Prior to disclosing or displaying any Designated Material to any person, counsel shall:

a. Inform the person of the confidential nature of the Designated Material; and

b. Inform the person that this Court has enjoined the use of the Designated Material by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.

7. The confidential information may be displayed to and discussed with the persons identified in Paragraphs 5(b) and (c) only on the condition that, prior to any such display or discussion, each such person shall be asked to sign an agreement to be bound by this Order in the form attached hereto as Exhibit A. In the event such person refuses to

sign an agreement in substantially the form attached as Exhibit A, the party desiring to disclose the confidential information may seek appropriate relief from the Court.

8. A person having custody of Designated Material shall maintain it in a manner that limits access to the Designated Material to persons permitted such access under this Order.

9. Counsel shall maintain a collection of all signed documents by which persons have agreed to be bound by this Order.

10. Documents shall be designated by stamping or otherwise marking the documents with the words "CONFIDENTIAL" or "CONFIDENTIAL-FOR ATTORNEYS' EYES ONLY" thus clearly identifying the category of Designated Material for which protection is sought under the terms of this Order. Designated Material not reduced to documentary form shall be designated by the producing party in a reasonably equivalent way.

11. The parties will use reasonable care to avoid designating as confidential documents or information that does not need to be designated as such.

12. A party may submit a request in writing to the party who produced Designated Material that the designation be modified or withdrawn. If the Designating Person does not agree to the redesignation within fifteen business days, the objecting party may apply to the Court for relief. Upon any such application, the burden shall be on the Designating Person to show why the designation is proper. Before serving a written challenge, the objecting party must attempt in good faith to meet and confer with the Designating Person in an effort to resolve the matter. The Court may award sanctions if it finds that a party's position was taken without substantial justification.

13. Deposition transcripts or portions thereof may be designated either (a) when the testimony is recorded, or (b) by written notice to all counsel of record, given within ten business days after the Designating Person's receipt of the transcript in which case all counsel receiving such notice shall be responsible for marking the copies of the designated transcript or portion thereof in their possession or control as directed by the Designating Person. Pending expiration of the ten business days, the deposition transcript shall be treated as designated. When testimony is designated at a deposition, the Designating Person may exclude from the deposition all persons other than those to whom the Designated Material may be disclosed under paragraph 5 of this Order. Any party may mark Designated Material as a deposition exhibit, provided the deposition witness is one to whom the exhibit may be disclosed under paragraph 5 of this Order

and the exhibit and related transcript pages receive the same confidentiality designation as the original Designated Material.

14. Any Designated Material which becomes part of an official judicial proceeding or which is filed with the Court is public. Such Designated Material will be sealed by the Court only upon motion and in accordance with applicable law, including Rule 5(e) of the Local Rules of this Court. This Protective Order does not provide for the automatic sealing of such Designated Material. If it becomes necessary to file Designated Material with the Court, a party must comply with Local Civil Rule 5 by moving to file the Designated Material under seal.

15. Filing pleadings or other papers disclosing or containing Designated Material does not waive the designated status of the material. The Court will determine how Designated Material will be treated during trial and other proceedings as it deems appropriate.

16. Upon final termination of this action, all Designated Material and copies thereof shall be returned promptly (and in no event later than forty-five (45) days after entry of final judgment), returned to the producing party, or certified as destroyed to counsel of record for the party that produced the Designated Material, or, in the case of deposition testimony regarding designated exhibits, counsel of record for the Designating Person. Alternatively, the receiving party shall provide to the Designating Person a certification that all such materials have been destroyed.

17. Inadvertent production of confidential material prior to its designation as such in accordance with this Order shall not be deemed a waiver of a claim of confidentiality. Any such error shall be corrected within a reasonable time.

18. Nothing in this Order shall require disclosure of information protected by the attorney-client privilege, or other privilege or immunity, and the inadvertent production of such information shall not operate as a waiver. If a Designating Party becomes aware that it has inadvertently produced information protected by the attorney-client privilege, or other privilege or immunity, the Designating Party will promptly notify each receiving party in writing of the inadvertent production. When a party receives notice of such inadvertent production, it shall return all copies of inadvertently produced material within three business days. Any notes or summaries referring or relating to any such inadvertently produced material subject to claim of privilege or immunity shall be destroyed forthwith. Nothing herein shall prevent the receiving party from challenging the propriety of the attorney-client privilege or work product immunity or other applicable privilege designation by submitting a challenge to the Court. The Designating Party

bears the burden of establishing the privileged nature of any inadvertently produced information or material. Each receiving party shall refrain from distributing or otherwise using the inadvertently disclosed information or material for any purpose until any issue of privilege is resolved by agreement of the parties or by the Court. Notwithstanding the foregoing, a receiving party may use the inadvertently produced information or materials to respond to a motion by the Designating Party seeking return or destruction of such information or materials. If a receiving party becomes aware that it is in receipt of information or materials which it knows or reasonably should know is privileged, Counsel for the receiving party shall immediately take steps to (i) stop reading such information or materials, (ii) notify Counsel for the Designating Party of such information or materials, (iii) collect all copies of such information or materials, (iv) return such information or materials to the Designating Party, and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

19. The foregoing is entirely without prejudice to the right of any party to apply to the Court for any further Protective Order relating to Designated Material; or to object to the production of Designated Material; or to apply to the Court for an order compelling production of Designated Material; or for modification of this Order; or to seek any other relief from the Court.

20. The restrictions imposed by this Order may be modified or terminated only by further order of the Court.

IT IS SO ORDERED,

/s/ Robert N. Chatigny
Robert N. Chatigny
United States District Judge

EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled_____ _____have been designated as confidential. I have been informed that any such documents or information labeled "CONFIDENTIAL PRODUCED PURSUANT TO PROTECTIVE ORDER" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

_____DATED:_____

Signed in the presence of:

_____(Attorney)

UNITED STATES DISTRICT COURT

for the

District of Connecticut

Donna L. Soto, et al.

Plaintiff

v.

Bushmaster Firearms International, LLC, et al.

Defendant

Case No. **3:15-CV-00068**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Defendants Camfour, Inc. and Camfour Holding., Inc.

Date: **Jan 15, 2015**

Scott C. Allan

Attorney's signature

Scott C. Allan, CT24143

Printed name and bar number

Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601

Address

sallan@renzullilaw.com

E-mail address

(914) 285-0700

Telephone number

(914) 285-1213

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on **Jan 15, 2015**, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Joshua D. Koskoff, Esq.
Alinor C. Sterling, Esq.
Katie Mesner-Hage, Esq.
Koskoff, Koskoff Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604

Counsel for Plaintiffs

David LaGuercia
Riverview Sales, Inc.
1100 River Road
Agawam, MA 01001

Scott C. Allor
Attorney's signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO; IAN AND NICOLE HOCKLEY, CO-ADMINISTRATORS OF THE ESTATE OF DYLAN C. HOCKLEY; WILLIAM D. SHERLACH, EXECUTOR OF THE ESTATE OF MARY JOY SHERLACH; WILLIAM D. SHERLACH, INDIVIDUALLY; LEONARD POZNER, ADMINISTRATOR OF THE ESTATE OF NOAH S. POZNER; GILLES J. ROUSSEAU, ADMINISTRATOR OF THE ESTATE OF LAUREN G. ROUSSEAU; DAVID C. WHEELER, ADMINISTRATOR OF THE ESTATE OF BENJAMIN A. WHEELER; NEIL HESLIN AND SCARLETT LEWIS, CO-ADMINISTRATORS OF THE ESTATE OF JESSE MCCORD LEWIS; MARK AND JACQUELINE BARDEN, CO-ADMINISTRATORS OF THE ESTATE OF DANIEL G. BARDEN; MARY D'AVINO, ADMINISTRATRIX OF THE ESTATE OF RACHEL M. D'AVINO; and NATALIE HAMMOND	)	
Plaintiffs,	)	
VS.	)	Civil Action No.
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC; FREEDOM GROUP, INC. a/k/a FREEDOM GROUP a/k/a FREEDOM GROUP, LLC a/k/a REMINGTON OUTDOOR COMPANY; BUSHMASTER FIREARMS a/k/a FREEDOM GROUP a/k/a REMINGTON OUTDOOR COMPANY, INC.; BUSHMASTER FIREARMS, INC. a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR COMPANY, INC.; BUSHMASTER HOLDINGS, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR COMPANY, INC.; REMINGTON ARMS CO.,	)	

LLC, a/k/a BUSHMASTER FIREARMS INT.,)
INC., a/k/a FREEDOM GROUP, INC. a/k/a)
REMINGTON OUTDOOR CO.; REMINGTON)
OUTDOOR COMPANY, INC. a/k/a)
FREEDOM GROUP, INC.; CAMFOUR, INC.;)
CAMFOUR HOLDING, LLP a/k/a CAMFOUR)
HOLDING, INC.; RIVERVIEW SALES, INC.;)
DAVID LA GUERCIA)
)
Defendants.)

DEFENDANTS REMINGTON ARMS COMPANY, LLC AND REMINGTON OUTDOOR COMPANY, INC.'S NOTICE OF REMOVAL

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, notify this Court that they are removing the above captioned action currently pending in the Superior Court of the Judicial District of Fairfield County (at Bridgeport) to the United States District Court for the District of Connecticut. In support, the Remington Defendants state as follows:

INTRODUCTION

1. On December 13, 2014, Plaintiffs filed their Complaint against (1) the Remington Defendants,[1] (2) Camfour, Inc. and Camfour Holding, Inc. (collectively, the "Camfour

[1] This Notice of Removal is filed on behalf of Defendants "Remington Arms Company, LLC" and "Remington Outdoor Company, Inc." For clarification, Defendant "Remington Arms Company, LLC" was formerly known as "Remington Arms Company, Inc." Thus, "Remington Arms Company, Inc." does not exist. Defendant "Remington Outdoor Company, Inc." was formerly known as "Freedom Group, Inc." Thus, "Freedom Group, Inc." does not exist. "Bushmaster Firearms International, LLC" is also a named defendant but does not exist as it was merged into and is only an unincorporated brand of Remington Arms Company, LLC. Plaintiffs have also named or listed as "a/k/a" several other entities that do not exist: (1) "Remington Arms Co., LLC"; (2) "Remington Outdoor Group, Inc."; (3) "Remington Outdoor Company"; (4) "Remington Outdoor Co."; (5) "Freedom Group, LLC"; (6) "Freedom Group"; (7) "Bushmaster Firearms"; (8) "Bushmaster Holdings, LLC"; (9) "Bushmaster Firearms, Inc."; and (10) "Bushmaster Firearms Int., Inc." These non-existent entities have not been "properly joined and served as defendants[.]" 28 U.S.C. § 1441(b)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No. 3:15-cv-00068
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

CORPORATE DISCLOSURE STATEMENT

Defendants, REMINGTON ARMS COMPANY, LLC, and REMINGTON OUTDOOR COMPANY, INC., by and through counsel, and pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, certify the following:

There is no publicly held corporation that owns more than 10% of the stock of Remington Arms Company, LLC. Remington Arms Company, LLC is a Delaware limited liability company. Remington Arms Company, LLC's sole member is FGI Operating Company, LLC ("FGI Operating"), a Delaware limited liability company. FGI Operating's sole member is FGI Holding Company, LLC ("FGI Holding"), a Delaware limited liability company. FGI Holding's sole member is Remington Outdoor Company, Inc., a Delaware corporation.

Remington Outdoor Company, Inc. is a Delaware corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

/

/

/

Dated: January 15, 2015.

Respectfully submitted,

/s/ Matthew C. Wagner
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Richard Castiglioni (CT07280) (rcastiglioni@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Jonathan J. Kelson (CT26755) (jkelson@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800
(203) 348-2321 fax

James B. Vogts (*pro hac vice* application forthcoming) jvogts@smbtrials.com
Andrew A. Lothson (*pro hac vice* application forthcoming) alothson@smbtrials.com
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system and Federal Express.

Joshua D. Koskoff
Alinor C. Sterling
Katie Mesner-Hage
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244

Attorneys for Plaintiffs

/s/ Matthew C. Wagner
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No. 3:15-cv-00068
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

NOTICE OF PENDING MOTIONS AFTER NOTICE OF REMOVAL

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), having filed their Notice of Removal pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, herby comply with this Court's Standing Order On Removed Cases (as Corrected January 12, 2012) and file this separate notice specifying any pending motions that require action by a Judge of this Court: NONE./

Dated: January 15, 2015.

Respectfully submitted,

/s/ Matthew C. Wagner
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Richard Castiglioni (CT07280) (rcastiglioni@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Jonathan J. Kelson (CT26755) (jkelson@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800
(203) 348-2321 fax

James B. Vogts (*pro hac vice* application forthcoming) jvogts@smbtrials.com
Andrew A. Lothson (*pro hac vice* application forthcoming) alothson@smbtrials.com
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system and Federal Express.

Joshua D. Koskoff
Alinor C. Sterling
Katie Mesner-Hage
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244

Attorneys for Plaintiffs

/s/ Matthew C. Wagner
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

UNITED STATES DISTRICT COURT

for the

District of Connecticut

Donna L. Soto, et al.

Plaintiff

v.

Bushmaster Firearms International, LLC, et al.

Defendant

Case No. **3:15-CV-00068**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Defendants Camfour, Inc. and Camfour Holding., Inc.

Date: **Jan 15, 2015**

Attorney's signature

Christopher Renzulli, CT24597

Printed name and bar number

Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601

Address

crenzulli@renzullilaw.com

E-mail address

(914) 285-0700

Telephone number

(914) 285-1213

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on **Jan 15, 2015**, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Joshua D. Koskoff, Esq.
Alinor C. Sterling, Esq.
Katie Mesner-Hage, Esq.
Koskoff, Koskoff Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604

Counsel for Plaintiffs

David LaGuercia
Riverview Sales, Inc.
1100 River Road
Agawam, MA 01001

Attorney's signature

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

141 Church Street
New Haven, CT 06510
(203) 773-2140

450 Main Street
Hartford, CT 06103
(860) 240-3200

915 Lafayette Blvd
Bridgeport, CT 06604
(203) 579-5861

NOTICE TO COUNSEL AND PRO SE PARTIES

The attached case has been assigned to District Judge Robert N. Chatigny who sits in Hartford. Counsel and Pro Se Parties should file all future pleadings or documents in this matter with the Clerk's Office in Hartford. Any attempt to file pleadings or other documents related to this action in any of the other seats of Court will result in those pleadings or documents being refused at the Court or being returned to you. See D. Conn. L. Civ. R. 3(a).

Counsel and Pro Se Parties are required to become familiar with and abide by the Federal Rules of Civil Procedure, the Local Rules of Civil Procedure for the District of Connecticut and Standing Orders regarding scheduling in civil cases and the filing of trial memoranda.

Counsel and Pro Se Parties are hereby notified that failure to file and serve a memorandum in opposition to a motion, within 21 days after the motion is filed, may be deemed sufficient cause to grant the motion. Failure to file and serve a memorandum in opposition to a motion to dismiss within 21 days after the motion is filed may be deemed sufficient cause to grant the motion, except where the pleadings provide sufficient grounds to deny the motion. See D. Conn. L. Civ. R. 7(a)1.

Counsel and Pro Se Parties are further notified that they are required to comply with requirements relating to Motions for Summary Judgment as set forth in Fed. R. Civ. P. 56 and D. Conn. L. Civ. R. 56. A party may move for Summary Judgment when that party believes there is no genuine issue of material fact requiring trial and the party is entitled to judgment as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record in the case or it may be supported by affidavits and other materials outside the pleadings.

When a party seeking Summary Judgment (the "moving party") files a supporting affidavit, the party opposing Summary Judgment must file an affidavit, or other documentary evidence, contradicting the moving party's submissions to demonstrate that there are factual issues requiring a trial. Facts asserted in the affidavit(s) of the moving party will be taken as true if not controverted by counter-affidavits or other documentary evidence.

Local Civil Rule 56(a) requires the party seeking Summary Judgment to file a document entitled "Local Rule 56(a)1 Statement," Which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. The material facts set forth in this statement shall be deemed admitted unless controverted by the "Local Rule 56(a)2

Statement" required to be served by the opposing party. The paragraphs in the 56(a)2 statement shall correspond to the paragraphs in the 56(a)1 statement and shall state whether the facts asserted by the moving party are admitted or denied. The Local Rule 56(a)2 statement must also include in a separate section a list of each issue of material fact as to which it is contended there is a genuine issue to be tried.

Counsel and Pro Se Parties are alerted to the requirements of Fed. R. Civ. P. 26(f) and Local Civil Rule 26, which require that the parties conduct a case management planning conference and prepare and file a report of the conference on Form 26(f) which appears in the Appendix to the Local Rules.

Counsel and Pro Se Parties are further advised that they may request a referral of their case to a United States Magistrate Judge for disposition. See 28 U.S.C. 636 and Rule 77.2 of the Local Rules for United States Magistrate Judges.

Robin D. Tabora, Clerk

(Revised 8/7/13)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ORDER RE: DISCLOSURE STATEMENT

Any nongovernmental corporate party to an action in this court shall file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock. A party shall file the statement with its initial pleading filed in the court and shall supplement the statement within a reasonable time of any change in the information. Counsel shall append a certificate of service to the statement in compliance with local rule 5(c).

Counsel for plaintiff or removing defendant shall be responsible for serving a copy of this order upon all parties to the action.

By Order of the Court
Robin D. Tabora, Clerk

Revised 8/7/13

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TIPS FOR SUCCESSFUL CM/ECF EFILING

- You cannot efile on a case using your PACER login and password. To efile on a case, you must have (1) a PACER login and password and (2) an ECF login and password (you need both). To obtain an ECF login/password a Connecticut bar number is needed and the registration form (available on our website) must be completed and emailed to the address on the form: attorney_registration_form@ctd.uscourts.gov. After the completed form is received, an email will be sent to you with your ECF login/password.

- Do not efile on a case that has not been designated as an efiled case. If there is no EFILE flag, DO NOT EFILE ON THE CASE!

- Do not attempt to re-docket something that you think may have been done incorrectly. Call the Clerk's Office for assistance before attempting to make any corrections!

- When efiling a Memorandum in Support/Opposition/Reply/Affidavit/Exhibit relating to a Motion, you must link the memo/reply/affidavit/exhibit to the underlying motion.

- Make sure the PDF document does not exceed 10,000 KB, is readable, the correct one to be filed and is right-side up if scanned.

- Do not use the apostrophe or tilde in the text of the entry.

- When efiling documents in a multi-defendant criminal case, be sure to check ONLY the box for the defendant(s) that relate to the document you are efiling, and not the entire case.

- Include your electronic signature (*/s/ followed by your name*) on the signature line for both the document and the certification of service.

- IMPORTANT INFORMATION RE PRIVACY ACT: All filings with the court - including attachments - must comply with Fed. R. Civ. P. 5.2 or Fed. R. Crim. P. 49.1: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; financial account numbers; and home addresses in criminal cases, may not appear, except as allowed by the applicable rule.

Affidavits
Affidavits may be efiled with the signature page scanned or with a /s/ on the signature line. If the affidavit is related to a motion, it must be linked to the motion.

Amended Complaints
If a new party is being added, please select the "Add/Create New Party" on the appropriate filers screen. New plaintiff(s) should be added on the filers screen with the heading "Select the Filer," new defendant(s) should be added on the filers screen with the heading, "Please select the party that this filing is **against**." Enter the name of the business or last name of the individual and click "search" to see if the name of the party is already in our system. If not, continue to create the new party following the Instructions for Searching and Adding Parties located on the District Court's website. See also www.ctd.uscourts.gov. Make sure that you select the role of the party. Do not put any information in the other fields except for "Party Text" when necessary. The "Party Text" field is used as a descriptive text as explained in the Instructions. Update the Jury Demand when prompted.

Appearances
You may not efile an appearance on behalf of another attorney. The attorney filing the appearance must be the attorney that is logged into CMECF. You must click on the following box to create an association between you and the party(ies) that you are representing:

> The following attorney/party associations do not exist for this case.
> Please check which associations should be created for this case:
>
> [√] Party Name (pty:pla) represented by Your name (aty) [√] Lead [√] Notice

Attachments
You must name your attachment by either selecting something from the "Type" drop down menu or by entering something in the "Description" field. Whatever you select or enter from both of these options will appear in the docket text.

Discovery
The Court does not accept Discovery pursuant to Local Rule 5(f).

Filers
If there is more than one party as a filer, hold the CTRL key while selecting the applicable parties.

Motions
Do not use this event if you are not asking for some relief from the court. If there is more than one relief in your motion, select the applicable reliefs by clicking on them in the box to the left. The reliefs you have selected will appear in the box to the right.

If you are efiling a motion asking permission to file something or to amend something

already filed, you must attach the proposed document as an exhibit to your motion. Do not efile the proposed document until your motion has been granted - then efile the document you asked for permission to file.

Do not combine motions with responses to other documents. Motions and responses should be filed as separate documents.

Notice (other)
If you find you are frequently using this event, call the Clerk's Office for assistance in locating the correct event for your submission.

Notice of Manual Filing
The Notice of Manual Filing should be efiled using the event for the item you are filing in paper. Do not use the "Notice (Other)" event. For example, if you are filing exhibits manually, use the "Exhibit" event and attach the pdf of the Notice of Manual Filing. Mail the exhibits along with copies of the Notice of Electronic Filing and the Notice of Manual filing to the Clerk's Office.

Returns of Service
Returns on executed summonses should be efiled using either the "Summons Executed" or "Summons Returned Executed as to USA". There is a separate event for "Waiver of Return of Service." See the Attorney Instructions for eFiling Civil Returns of Service on our website.

Sealed Documents
Attorneys may EFILE sealed documents in Criminal Cases. See the Cheat Sheet on the Court's website for helpful information.

DO NOT EFILE documents in Civil Cases that are filed under seal. You are required to submit the document in paper along with a PDF version on disk.

Revised 8/7/13

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NOTICE TO COUNSEL FOR CASES REMOVED FROM SUPERIOR COURT
STANDING ORDER

All parties removing actions to this Court pursuant to 28 U.S.C. § 1441 shall, no later than seven (7) days after filing a notice of removal, file and serve a signed statement that sets forth the following information:

1. The date on which each defendant first received a copy of the summons and complaint in the state court action.
2. The date on which each defendant was served with a copy of the summons and complaint, if any of those dates are different from the dates set forth in item 1.
3. In diversity cases, whether any defendant who has been served is a citizen of Connecticut. Also, if any party is a partnership, limited liability partnership or limited liability company or corporation, the citizenship of each partner, general partner, limited partner and member, and if any such partner, general partner, limited partner or member is itself a partnership, limited liability partnership or limited liability company or corporation, the citizenship of each member.
4. If removal takes place more than thirty (30) days after any defendant first received a copy of the summons and complaint, the reasons why removal has taken place at this time.
5. The name of any defendant served prior to the filing of the notice of removal who has not formally joined in the notice of removal and the reasons why any such defendant did not join in the notice of removal.

At the time a removal notice is filed with the Clerk of this Court, the removing party shall also file with the Clerk a separate notice, entitled "Notice of Pending Motions," specifying any pending motions that require action by a Judge of this Court and attaching a true and complete copy of each such motion and all supporting and opposition papers.

The removing party shall list in its certificate of service immediately below the name and address of counsel the name of the party or parties represented by said counsel and all parties appearing *pro se*.

NOTICE TO COUNSEL RE LOCAL RULE 5(b)

To ensure that our records are complete and to ensure that you receive notice of hearings and any court rulings, PLEASE FILE AN APPEARANCE with this office in accordance with Local Rule 5(b) of the Local Rules of Civil Procedure for the District of Connecticut.

Counsel for the removing defendant(s) is responsible for immediately serving a copy of this notice on all counsel of record and all unrepresented parties at their last known address.

ROBIN D. TABORA,
CLERK OF COURT
(Eff 7/9/13)

UNITED STATES DISTRICT COURT

for the

District of Connecticut

Donna L. Soto, et al

Plaintiff

v.

Bushmaster Firearms International, LLC, et al.

Defendant

Case No. **3:15-cv-00068-RNC**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Remington Arms Company, LLC and Remington Outdoor Company, Inc.

Date: **January 16, 2015**

Attorney's signature

Matthew C. Wagner / ct25926

Printed name and bar number

Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, CT 06901

Address

mwagner@dmoc.com

E-mail address

203-358-0800

Telephone number

203-348-2321

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on **January 16, 2015**, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Attorney's signature

Joshua D. Koskoff
Alinor C. Sterling
Katie Mesner-Hage
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
Plaintiffs,	)	No. 3:15-CV-00068-RNC
v.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.,	)	January 20, 2015
Defendants.	)	

DEFENDANTS CAMFOUR, INC.'S AND CAMFOUR HOLDING, INC.'S RULE 7.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, defendant Camfour, Inc. states that its parent corporation is Camfour Holding, Inc., and that no publicly held corporation owns 10% or more of its stock. Defendant Camfour Holding, Inc., s/h/a Camfour Holding, LLP a/k/a Camfour Holding, Inc., states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: White Plains, New York
January 20, 2015

Respectfully submitted,

By: *Scott C. Allan*

John F. Renzulli, Admission Pending, jrenzulli@renzullilaw.com
Christopher Renzulli, CT24597, renzulli@renzullilaw.com
Scott C. Allan, CT24143, sallan@renzullilaw.com
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, New York 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Attorneys for defendants Camfour, Inc. and Camfour Holding, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2015, a copy of foregoing Rule 7.1 Corporate Disclosure Statement was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

By: *Scott C. Allan*

Scott C. Allan, CT24143, sallan@renzullilaw.com
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, New York 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Attorneys for defendants Camfour, Inc. and Camfour Holding, Inc.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
	)	No. 3:15-CV-00068-RNC
Plaintiffs,	)	
v.	)	
BUSHMASTER FIREARMS INTERNATIONAL LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.	)	January 20, 2015
Defendants.	)	

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record:

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

RIVERVIEW SALES, INC. and **DAVID LAGUERCIA**

Dated: Stamford, Connecticut
January 20, 2015

Respectfully submitted,

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

Attorney for defendant Riverview Sales, Inc. and David LaGuercia

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2015, a copy of the foregoing Notice of Appearance was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

Joshua D. Koskoff, Esq.
Alinor C. Sterling, Esq.
Katie Mesner-Hage, Esq.
Koskoff, Koskoff Bieder, P.C.
350 Fairfield Avenue
Bridgeport, Connecticut 06604

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
	)	No. 3:15-CV-00068-RNC
Plaintiffs,	)	
	)	
v.	)	
	)	
BUSHMASTER FIREARMS INTERNATIONAL LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.	)	January 20, 2015
	)	
Defendants.	)	

DEFENDANT RIVERVIEW SALES, INC.'S
RULE 7.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, defendant Riverview Sales, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: Stamford, Connecticut
January 20, 2015

Respectfully submitted,

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

Attorney for defendant Riverview Sales, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2015, a copy of the foregoing Corporate Disclosure Statement was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

Joshua D. Koskoff, Esq.
Alinor C. Sterling, Esq.
Katie Mesner-Hage, Esq.
Koskoff, Koskoff Bieder, P.C.
350 Fairfield Avenue
Bridgeport, Connecticut 06604

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case 3:15-cv-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

STATEMENT PURSUANT TO STANDING ORDER ON REMOVED CASES BY REMINGTON DEFENDANTS

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), pursuant to this Court's Standing Order on Removed Cases, state the following:

1. Remington Outdoor Company, Inc. and Remington Arms Company, LLC (collectively, the "Remington Defendants") received a copy of the summons and complaint of the state court action on December 15, 2015. Camfour, Inc. and Camfour Holding, Inc. (collectively, the "Camfour Defendants") received a copy of the summons and complaint of the state court action on December 29, 2015. Riverview Sales, Inc. received a copy of the summons and complaint of the state court action on December 23, 2015. David LaGuercia received a copy of the summons and complaint of the state court action on December 26, 2015.[1]

[1] As discussed in the Notice of Removal, Plaintiffs named or listed as "a/k/a" several entities that do not exist: Remington Arms Company, Inc.; Remington Outdoor Group, Inc.; Remington Outdoor Co.; Remington Arms Co., LLC; Freedom Group, Inc.; Freedom Group, LLC; Freedom Group; Bushmaster Firearms International, LLC; Bushmaster Firearms; Bushmaster Firearms, Inc.; Bushmaster Holdings, LLC; Bushmaster Firearms Int., Inc.; and Camfour Holding, LLP. (DE 1 at 1 n. 1 and 2 n. 2.)

2. The defendants were served the summons and complaint on the same dates as they received the summons and complaint.

3. Riverview Sales, Inc. is a citizen of Connecticut. As discussed in the Notice of Removal, under the Second Circuit's test for improper joinder, there is no reasonable basis for a claim against Riverview Sales, Inc., and, therefore, its citizenship is not considered in determining whether diversity jurisdiction exists. (DE 1 at ¶¶ 12, 18-30.)

Remington Arms Company, LLC, is a limited liability company organized under the laws of the state of Delaware with its principal place of business in North Carolina. Remington Arms Company's sole member is FGI Operating Company, LLC ("Operating"), a Delaware limited liability company with its principal place of business in North Carolina. Operating's sole member is FGI Holding Company, LLC ("Holding"), a Delaware limited liability company with its principal place of business in North Carolina. Holding's sole member is Remington Outdoor Company, Inc., a corporation organized under the laws of the state of Delaware with its principal place of business in North Carolina. Thus, for the purposes of diversity jurisdiction, Remington Arms Company, LLC is a citizen of Delaware and North Carolina.

4. Removal did not take place more than thirty (30) days after any defendant first received a copy of the summons and complaint.

5. The Remington Defendants removed the case to the District of Connecticut on January 14, 2015, with the consent of the Camfour Defendants and David LaGuercia. (DE 1-2, 1-3.) As discussed in the Notice of Removal, consent of Riverview Sales, Inc. is unnecessary because it is an improperly joined party. (DE 1 at 3 n. 5.)

Dated: January 21, 2015.

Respectfully submitted,

/s/ Jonathan P. Whitcomb
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Richard Castiglioni (CT07280) (rcastiglioni@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Jonathan J. Kelson (CT26755) (jkelson@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800
(203) 348-2321 fax

James B. Vogts (*pro hac vice* application forthcoming) (jvogts@smbtrials.com)
Andrew A. Lothson (*pro hac vice* application forthcoming) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system and/or by U.S. Mail.

Joshua D. Koskoff
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
Attorney for Plaintiffs

Christopher Renzulli
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com

Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ Jonathan P. Whitcomb
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
Plaintiffs,	)	No. 3:15-CV-00068-RNC
v.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.,	)	January 21, 2015
Defendants.	)	

DEFENDANTS CAMFOUR, INC.'S AND CAMFOUR HOLDING, INC.'S MOTION FOR AN INITIAL EXTENSION OF TIME TO RESPOND TO THE COMPLAINT FROM THE CLERK OF THE COURT PURSUANT TO LOCAL CIVIL RULE 7(b)(1)(a)

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 move for an initial thirty day extension to respond to the Complaint from the Clerk of the Court pursuant to Local Civil Rule 7(b)(1)(a).

This case was removed to this Court on January 14, 2015 and Camfour's response to the Complaint is due on January 21, 2015 pursuant to Rule 81(c)(2) of the Federal Rules of Civil Procedure. Camfour intends to file a motion to dismiss the Complaint pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et. seq.* and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This case has been assigned to Judge Chatigny, who requires the parties to meet and confer and then file a request for a prefiling conference before a motion to dismiss is filed. In order to provide the necessary time to complete the required prefiling conference, Camfour

respectfully requests that its deadline to respond to the Complaint be extended by thirty days, from January 21, 2015 to February 20, 2015.

Counsel for plaintiffs, Joshua D. Koskoff, Esq., has advised that plaintiffs have no objection to the requested extension.

This is the first request for an extension to respond to the Complaint requested by Camfour and it may therefore be granted by the Clerk of the Court pursuant to Local Civil Rule 7(b)(1)(a).

For the above reasons, Camfour respectfully requests that the Clerk of the Court grant its motion for an initial extension to respond to the Complaint, and extend the deadline for its response by thirty days, from January 21, 2015 to February 20, 2015.

Dated: White Plains, New York
January 21, 2015

Respectfully submitted,

By: *Scott C. Allan*

John F. Renzulli, Admission Pending, jrenzulli@renzullilaw.com
Christopher Renzulli, CT24597, renzulli@renzullilaw.com
Scott C. Allan, CT24143, sallan@renzullilaw.com
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, New York 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Attorneys for defendants Camfour, Inc. and Camfour Holding, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2015, a copy of the foregoing Motion for an Initial Extension of Time to Respond to the Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

By: *Scott C. Allan*

Scott C. Allan, CT24143, sallan@renzullilaw.com
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, New York 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Attorneys for defendants Camfour, Inc. and Camfour Holding, Inc.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
Plaintiffs,	)	No. 3:15-CV-00068-RNC
v.	)	
BUSHMASTER FIREARMS INTERNATIONAL LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.	)	January 21, 2015
Defendants.	)	

DEFENDANTS DAVID LAGUERCIA AND RIVERVIEW SALES, INC.'S MOTION FOR AN INITIAL EXTENSION OF TIME TO RESPOND TO AND/OR MOVE AGAINST THE COMPLAINT FROM THE CLERK OF THE COURT PURSUANT TO LOCAL CIVIL RULE 7(b)(1)(a)

Defendants DAVID LAGUERCIA and RIVERVIEW SALES, INC. (collectively, "Defendants") respectfully move for an initial thirty (30) day extension of time to respond to and/or move against the Complaint pursuant to Local Civil Rule 7(b)(1)(a).

This case was removed to this Court on January 14, 2015. Accordingly, pursuant to Federal Rule of Civil Procedure 81(c)(2), Defendants' responses to the Complaint are currently due on January 21, 2015. Defendants intend to file a motion to dismiss the Complaint pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901, *et seq.* and for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

This case has been assigned to the Hon. Robert N. Chatigny who requires the parties to meet and confer and then a file a request for a prefiling conference before a motion to dismiss is filed. In order to provide the necessary time to complete the required prefiling conference, Defendants respectfully request that the deadline for Defendants to respond to and/or move against the Complaint be extended by thirty (30) days, i.e., up to and including February 20, 2015.

Counsel for plaintiffs, Joshua D. Koskoff, Esq., has advised that plaintiffs have no objection to the requested extension.

This is Defendants' first request for an extension of time to respond to and/or move against the Complaint. Therefore, this motion may be granted by the Clerk of the Court pursuant to Local Civil Rule 7(b)(1)(a).

WHEREFORE, Defendants DAVID LAGUERCIA and RIVERVIEW SALES, INC. respectfully request that this motion be granted and that their deadline to respond to and/or move against plaintiffs' Complaint be extended by thirty (30) days, i.e., up to and including February 20, 2015.

Dated: Stamford, Connecticut
January 21, 2015

Respectfully submitted,

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

Attorney for defendants David LaGuercia and Riverview Sales, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2015, a copy of the foregoing MOTION FOR AN INITIAL EXTENSION OF TIME TO RESPOND TO AND/OR MOVE AGAINST THE COMPLAINT FROM THE CLERK OF THE COURT PURSUANT TO LOCAL CIVIL RULE 7(b)(1)(a) was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

Joshua D. Koskoff, Esq.
Alinor C. Sterling, Esq.
Katie Mesner-Hage, Esq.
Koskoff, Koskoff Bieder, P.C.
350 Fairfield Avenue
Bridgeport, Connecticut 06604

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

UNITED STATES DISTRICT COURT

for the

District of Connecticut

DONNA L. SOTO, ADM. ET AL

Plaintiff

v.

BUSHMASTER FIREARMS, INC., LLC, ET Al

Defendant

Case No. **315-cv-00068-RNC**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

ALL PLAINTIFFS

Date: **Jan 26, 2015**

Attorney's signature

JOSHUA D. KOSKOFF; #ct15619

Printed name and bar number

KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604

Address

asterling@koskoff.com

E-mail address

203-336-4421

Telephone number

203-368-3244

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on **Jan 26, 2015**, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Attorney's signature

UNITED STATES DISTRICT COURT

for the

District of Connecticut

DONNA L. SOTO, ADM. ET AL

Plaintiff

v.

BUSHMASTER FIREARMS, INC., LLC, ET Al

Defendant

Case No. **315-cv-00068-RNC**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

ALL PLAINTIFFS

Date: **Jan 26, 2015**

Attorney's signature

ALINOR C. STERLING; #ct17207

Printed name and bar number

KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604

Address

asterling@koskoff.com

E-mail address

203-336-4421

Telephone number

203-368-3244

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on JAN 26, 2015, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Attorney's signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)
Plaintiffs,	)
VS.	) Civil Action No. 3:15-cv-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)
Defendants.	) February 3, 2015

MOTION FOR PERMISSION TO APPEAR AS VISITING LAWYER

Pursuant to Rule 83.1(d) of the Local Rules of The United States District Court for the District of Connecticut, the Defendants, REMINGTON ARMS COMPANY, LLC and REMINGTON OUTDOOR COMPANY, INC., respectfully move the Court to grant permission for the appearance of Andrew A. Lothson as visiting lawyer in this matter.

In support of this Motion, the Defendants represent as follows:

1. Andrew A. Lothson is an attorney practicing law in Chicago, Illinois, at the law firm of Swanson, Martin & Bell, LLP, 330 North Wabash, Suite 3300.

2. Undersigned counsel for the Defendants is a member of the Bar of this Court and has an office within the District of Connecticut for the service of all papers in this matter pursuant to Rule 83.1(c) of the Local Rules of The United States District Court for the District of Connecticut.

3. In further support of this Motion, the Defendants have submitted herewith the Affidavit of Andrew A. Lothson, which complies with the requirements of Local Rule 83.1(d).

WHEREFORE, the Defendants, REMINGTON ARMS COMPANY, LLC and REMINGTON OUTDOOR COMPANY, INC., respectfully move the Court to grant permission for the appearance of Andrew A. Lothson as a visiting lawyer in this matter.

Respectfully submitted,

/s/ Jonathan P. Whitcomb
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Richard Castiglioni (CT07280) (rcastiglioni@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Jonathan J. Kelson (CT26755) (jkelson@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
Tel: (203) 358-0800
Fax: (203) 348-2321

James B. Vogts (*pro hac vice* application forthcoming) jvogts@smbtrials.com
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
Tel: (312) 321-9100

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

By: /s/ Jonathan P. Whitcomb
Jonathan P. Whitcomb / ct15014

30680 Andrew Lothson_Pro Hac_ 20150121.DOCX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No. 3:15-cv-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

AFFIDAVIT OF ANDREW A. LOTHSON

STATE OF ILLINOIS)
) ss: Chicago
COUNTY OF COOK)

The undersigned, Andrew A. Lothson, being duly sworn, hereby deposes and says:

1. I am an attorney with the law firm of Swanson, Martin & Bell, LLP, 330 North Wabash, Suite 3300, Chicago, Illinois 60611; telephone (312) 321-9100; facsimile (312) 321-0990; e-mail alothson@smbtrials.com.
2. I am over eighteen (18) years of age and I am authorized to give this Affidavit.
3. I have been a member of the bar of the following courts: Supreme Court of Illinois (Bar No. 6297061); United States Court of Appeals for the First, Fifth, Seventh, Eighth and District of Columbia Circuits; and United States District Court, for the Northern District of Illinois, Eastern District of Michigan and District of Colorado.
4. My firm has been retained by the Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc., to represent them in connection with the above-referenced case.

5. There are no pending disciplinary complaints against me as to which a finding has been made that such complaint should proceed to a hearing.
6. I have not been denied admission to, been disciplined by, resigned from, surrendered my license to practice before, or withdrawn an application for admission to practice before this Court or any other court, while facing a disciplinary complaint.
7. I have fully reviewed and am familiar with the Federal Rules of Criminal and Civil Procedure, the Local Rules of The United States District Court for the District of Connecticut, and the Connecticut Rules of Professional Conduct.
8. I hereby designate my sponsoring attorney, Jonathan P. Whitcomb, as my agent for service of process and the District of Connecticut as the forum for the resolution of any dispute arising out of my admission.
9. The information in this Affidavit is true to my knowledge.

This the 27 day of January, 2015

Andrew A. Lothson

Sworn to and subscribed before me
this 27th day of January, 2015.

Pamela Canington
Notary Public
My Commission Expires: _____

OFFICIAL SEAL
PAMELA CANINGTON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:01/07/19

30680 Affidavit of Andrew Lothson 20150121.DOCX

Certificate of Admission To the Bar of Illinois

I, Carolyn Taft Grosboll, Clerk of the Supreme Court of Illinois, do hereby certify that

Andrew Arthur Lothson

has been duly licensed and admitted to practice as an Attorney and Counselor of Law within this State; has duly taken the required oath to support the CONSTITUTION OF THE UNITED STATES and of the STATE OF ILLINOIS, and also the oath of office prescribed by law, that said name was entered upon the Roll of Attorneys and Counselors in my office on November 6, 2008 and is in good standing, so far as the records of this office disclose.

In Witness Whereof, I have hereunto
placed my hand and affixed the seal
of said Supreme Court, at Springfield,
in said State, this Wednesday, December 31, 2014.

Carolyn Taft Grosboll

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)
Plaintiffs,	)
VS.	) Civil Action No. 3:15-cv-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)
Defendants.	) February 3, 2015

MOTION FOR PERMISSION TO APPEAR AS VISITING LAWYER

Pursuant to Rule 83.1(d) of the Local Rules of The United States District Court for the District of Connecticut, the Defendants, REMINGTON ARMS COMPANY, LLC and REMINGTON OUTDOOR COMPANY, INC., respectfully move the Court to grant permission for the appearance of James B. Vogts as visiting lawyer in this matter.

In support of this Motion, the Defendants represent as follows:

1. James B. Vogts is an attorney practicing law in Chicago, Illinois, at the law firm of Swanson, Martin & Bell, LLP, 330 North Wabash, Suite 3300.

2. Undersigned counsel for the Defendants is a member of the Bar of this Court and has an office within the District of Connecticut for the service of all papers in this matter pursuant to Rule 83.1(c) of the Local Rules of The United States District Court for the District of Connecticut.

3. In further support of this Motion, the Defendants have submitted herewith the Affidavit of James B. Vogts, which complies with the requirements of Local Rule 83.1(d).

WHEREFORE, the Defendants, REMINGTON ARMS COMPANY, LLC and REMINGTON OUTDOOR COMPANY, INC., respectfully move the Court to grant permission for the appearance of James B. Vogts as a visiting lawyer in this matter.

Respectfully submitted,

/s/ Jonathan P. Whitcomb
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Richard Castiglioni (CT07280) (rcastiglioni@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Jonathan J. Kelson (CT26755) (jkelson@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
Tel: (203) 358-0800
Fax: (203) 348-2321

Andrew A. Lothson (*pro hac vice* application forthcoming) alothson@smbtrials.com
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
Tel: (312) 321-9100

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

By: /s/ Jonathan P. Whitcomb
Jonathan P. Whitcomb / ct15014

30680 James Vogts_Pro Hac 20150121.DOCX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Civil Action No. 3:15-cv-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	
Defendants.	)	

AFFIDAVIT OF JAMES B. VOGTS

STATE OF ILLINOIS)
) ss: Chicago
COUNTY OF COOK)

The undersigned, James B. Vogts, being duly sworn, hereby deposes and says:

1. I am an attorney with the law firm of Swanson, Martin & Bell, LLP, 330 North Wabash, Suite 3300, Chicago, Illinois 60611; telephone (312) 321-9100; facsimile (312) 321-0990; e-mail jvogts@smbtrials.com
2. I am over eighteen (18) years of age and I am authorized to give this Affidavit.
3. I have been a member of the bar of the following courts: Supreme Court of Illinois (Bar No. 6188442); United States Supreme Court; United States Court of Appeals for the First, Second, Fifth, Seventh, Tenth, District of Columbia and Federal Circuits; and United States District Court, for the Northern District of Illinois, Eastern District of Wisconsin and District of Colorado.

4. My firm has been retained by the Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc., to represent them in connection with the above-referenced case.
5. There are no pending disciplinary complaints against me as to which a finding has been made that such complaint should proceed to a hearing.
6. I have not been denied admission to, been disciplined by, resigned from, surrendered my license to practice before, or withdrawn an application for admission to practice before this Court or any other court, while facing a disciplinary complaint.
7. I have fully reviewed and am familiar with the Federal Rules of Criminal and Civil Procedure, the Local Rules of The United States District Court for the District of Connecticut, and the Connecticut Rules of Professional Conduct.
8. I hereby designate my sponsoring attorney, Jonathan P. Whitcomb, as my agent for service of process and the District of Connecticut as the forum for the resolution of any dispute arising out of my admission.
9. The information in this Affidavit is true to my knowledge.

This the 23rd day of January, 2015

James B. Vogts

Sworn to and subscribed before me
this 23rd day of January, 2015.

Pamela Canington
Notary Public
My Commission Expires: _____

OFFICIAL SEAL
PAMELA CANINGTON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:01/07/19

Certificate of Admission To the Bar of Illinois

I, Carolyn Taft Grosboll, Clerk of the Supreme Court of Illinois, do hereby certify that

James Brian Vogts

has been duly licensed and admitted to practice as an Attorney and Counselor of Law within this State; has duly taken the required oath to support the CONSTITUTION OF THE UNITED STATES and of the STATE OF ILLINOIS, and also the oath of office prescribed by law, that said name was entered upon the Roll of Attorneys and Counselors in my office on November 16, 1984 and is in good standing, so far as the records of this office disclose.

In Witness Whereof, I have hereunto
placed my hand and affixed the seal
of said Supreme Court, at Springfield,
in said State, this Monday, January 26, 2015.

Carolyn Taft Grosboll

Clerk

UNITED STATES DISTRICT COURT

for the

District of Connecticut

Soto, et al

Plaintiff

v.

Bushmaster Firearms Inter., LLC, et al

Defendant

Case No. **3:15-cv-0068-RNC**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Remington Arms Company, LLC and Remington Outdoor Company, Inc.

Date: **2/10/15**

Attorney's signature

James B. Vogts (pro hac vice)

Printed name and bar number

Swanson, Martin & Bell, LLP
330 N. Wabash, Suite 3300
Chicago, IL 60611

Address

jvogts@smbtrials.com

E-mail address

312-321-9100

Telephone number

312-321-0990

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on **2/10/15**, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Attorney's signature

UNITED STATES DISTRICT COURT

for the

District of Connecticut

Soto, et al

Plaintiff

v.

Bushmaster Firearms Inter., LLC, et al

Defendant

Case No. **3:15-cv-0068-RNC**

NOTICE OF APPEARANCE

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Remington Arms Company, LLC and Remington Outdoor Company, Inc.

Date: **2/10/15**

Attorney's signature

Andrew A. Lothson (pro hac vice)

Printed name and bar number

Swanson, Martin & Bell, LLP
330 N. Wabash, Suite 3300
Chicago, IL 60611

Address

alothson@smbtrials.com

E-mail address

312-321-9100

Telephone number

312-321-0990

FAX number

CERTIFICATE OF SERVICE

I hereby certify that on **2/10/15**, a copy of foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to [Below list the names and addresses of anyone unable to accept electronic filing] as indicate on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Attorney's signature

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	February 13, 2015
Defendants.	)	

MOTION TO REMAND

Pursuant to 28 U.S.C. § 1447, plaintiffs Donna Soto, Ian and Nicole Hockley, David Wheeler, Mary D'Avino, Mark and Jacqueline Barden, William D. Sherlach, Neil Heslin and Scarlett Lewis, Leonard Pozner, Gilles Rousseau, and Natalie Hammond move the Court to remand this case to Connecticut Superior Court because the Court lacks subject matter jurisdiction over this action. In their Notice of Removal, the defendants claim that the Court may exercise diversity jurisdiction. Diversity jurisdiction, however, requires complete diversity of the parties. *See* 28 U.S.C. § 1332. Plaintiffs are citizens of Connecticut, and defendant Riverview Sales, Inc. ("Riverview") is incorporated in Connecticut and has its principal place of business here. Diversity is therefore incomplete and remand to the Connecticut Superior Court is compulsory.

The defendants nonetheless assert that under the fraudulent joinder exception to the requirement of complete diversity, the Court may disregard Riverview's Connecticut citizenship. As its name indicates, however, that exception applies only when the removing defendant proves

that there is a flaw specific to the joinder of the in-state defendant. The defendants here fail to identify, much less establish by the clear and convincing proof required, any flaw whatsoever in Riverview's joinder as a defendant in this action. Defendants do not even attempt to show in their Notice of Removal that Riverview has no true factual connection to this case – they could not since Riverview *sold* the Bushmaster XM15-E2S rifle to Nancy Lanza. Nor do they establish that the claims and defenses relating particularly to Riverview are flawed. The only argument they offer to prove the fraudulent joinder of Riverview is based on the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901 *et seq.*, which is the very same argument they intend to use to challenge the propriety of plaintiffs' claims against the diverse defendants. In other words, the defendants merely raise a defense that they believe will dispose of plaintiffs' case in its entirety; they do not prove Riverview is fraudulently joined.

Not surprisingly, this type of removal tactic has been uniformly rejected by federal courts for more than a century. Under *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914), and its progeny, a defendant may not assert fraudulent joinder by arguing, in effect, that the plaintiff's case is "ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153. When a common defense is asserted as the basis for a fraudulent joinder claim, the fraudulent joinder exception simply does not apply. Such an argument for removal does not establish any flaw in the *joinder* of the in-state defendant; it concerns only a substantive dispute on the merits for the state court to resolve. *See also Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14 (1983) ("[A] case may not be removed to federal court on the basis of a federal defense, ... even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.").

Defendants' attempt to obtain adjudication of their arguments in this Court – a forum they apparently prefer to state court – is a textbook example of this type of misuse of the removal statutes. This case belongs in Connecticut Superior Court: it must be remanded.

In addition, because Riverview is not fraudulently joined, the Notice of Removal violates the forum defendant rule, 28 U.S.C. § 1441(b)(2).

A Memorandum of Law in support of this Motion is filed herewith.

THE PLAINTIFFS,

By /s/ Joshua D. Koskoff

Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
Tel: (203) 336-4421

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a copy of the foregoing Motion and accompanying Memorandum of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Joshua D. Koskoff
Joshua D. Koskoff (ct15619)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	February 13, 2015
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND

Defendants' attempt to shift this case to federal court is a misuse of the removal procedure. Fraudulent joinder, as its name implies, is about fraud *in the joinder*. It bars plaintiffs from joining non-diverse parties who have "no real connection with the controversy" and have been named solely to defeat diversity jurisdiction. *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998). A joinder is "fraudulent" when it ties a spurious claim against an in-state defendant to valid claims against diverse defendants.

Though fraudulent joinder is designed to prevent abuse of the courts through disingenuous pleading, it is vulnerable to a different kind of abuse: the misuse of removal to engage the merits of plaintiff's case under the pretext of a jurisdictional inquiry. This is precisely what defendants have done. Defendants do not even attempt to show in their Notice of Removal either that Riverview Sales, Inc. ("Riverview") has no true factual connection to this case – they could not since Riverview *sold* the Bushmaster XM15-E2S rifle to Nancy Lanza – or

that the claims and defenses *relating particularly to Riverview* are flawed. The only argument they offer to prove the fraudulent joinder of Riverview is based on the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901 *et seq.*, which they acknowledge is the very same argument they will use to challenge plaintiffs' claims against them. In their Notice of Removal defendants assert that Riverview is "immune from liability under the PLCAA"; in their January 21, 2015 letter to the Court, they assert that "plaintiffs' Complaint should be dismissed under the Protection of Lawful Commerce in Arms Act." Defendants thus ask the Court to find that a party with an irrefutable connection to this case was "fraudulently" joined on the basis of PLCAA – even though every other defendant in the case will assert the same defense.

The defendants' tactic, if successful, would stretch the doctrine of fraudulent joinder to the point of absurdity and enlarge the scope of federal jurisdiction far beyond its constitutional and statutory constraints. For that reason, this tactic has been uniformly rejected by federal courts for more than a century. Under *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914), and its progeny, a defendant may not assert fraudulent joinder by arguing, in effect, that the plaintiff's case is "ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153. Indeed, such a claim does not establish any flaw in the joinder of any of the defendants before the Court; it merely frames a substantive dispute on the merits for the state court to resolve. Defendants' attempt to obtain adjudication of their arguments in this Court is a textbook example of this type of claim. This case must be remanded to the Connecticut Superior Court.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This action arises out of the shooting at Sandy Hook Elementary School in Newtown on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others.

A. The Allegations of the Complaint.

The plaintiffs in this case are Donna L. Soto, for the estate of her daughter, teacher Victoria Leigh Soto; Ian and Nicole Hockley, for the estate of their six-year-old son, Dylan Christopher Jack Hockley; David C. Wheeler, for the estate of his six-year-old son, Benjamin A. Wheeler; Mary A. D'Avino, for the estate of her daughter, behavioral therapist Rachel Marie D'Avino; Mark and Jacqueline Barden, for the estate of their seven-year-old son, Daniel G. Barden; William D. Sherlach, for the estate of his wife, school psychologist Mary Joy Sherlach, and for himself individually; Neil Heslin and Scarlett Lewis, for the estate of their six-year-old son, Jesse McCord Lewis; Leonard Pozner, for the estate of his six-year-old son, Noah Samuel Pozner; Gilles J. Rousseau, for the estate of his daughter, substitute teacher Lauren G. Rousseau; and teacher Natalie Hammond on her own behalf. Dkt. #1, Notice of Removal (hereafter "Notice of Removal"), Ex. 1, Complaint (hereafter "Complaint") ¶¶ 35-44. Plaintiffs are all citizens of Connecticut. Notice of Removal ¶ 11.

The defendants are the entities that manufactured, distributed, and sold the Bushmaster XM15-E2S rifle used in the Sandy Hook shooting: the Bushmaster Defendants, the Camfour Defendants, and the Riverview Defendants. Complaint ¶¶ 1-33. The appearing Bushmaster Defendants (who prefer to call themselves the Remington Defendants) are Remington Outdoor Company, Inc. and Remington Arms Company, LLC.[1] These defendants both have their principal places of business in North Carolina and are incorporated in Delaware. *See* Notice of

---

[1] The Complaint names additional entities as Bushmaster defendants. These entities have not appeared. The Remington Defendants have stated that those additional entities do not exist. *See* Notice of Removal at 1 n.1.

[2] The Bushmaster Defendants do not claim that there is federal question jurisdiction. PLCAA is not asserted as a basis for removal, and it could not in any event provide one. Removal in anticipation of a federal defense is not permitted. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 14 (1983); *First American Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 207 (D. Conn. 2000).

Removal ¶¶ 6-7. The Camfour Defendants are Camfour, Inc. and Camfour Holding; they both have their principal place of business in Massachusetts and are incorporated there. *Id.* ¶ 8. The Riverview Defendants are Riverview Sales, Inc. and David LaGuercia. Mr. LaGuercia, the federal firearm licensee of Riverview Sales, Inc. is a citizen of Massachusetts. *Id.* ¶ 10. Riverview is incorporated in Connecticut and has its principal place of business here as well. *Id.* ¶ 9.

Plaintiffs allege that the Bushmaster XM15-E2S rifle used in the shooting belongs to a specific category of weapons that were designed for the United States military to function as a lightweight but lethal service weapon. Complaint ¶¶ 45-51. The United States military and law enforcement are appropriate markets for these weapons due to their specialized needs and highly regimented safety protocols. *Id.* ¶¶ 105-127. The civilian population, by contrast, is a wholly inappropriate market for these weapons: military rifles are grossly ill-suited to home defense and sold with no regard for the purchaser's training, experience, access to safe storage, or intent to make the weapon available to others. *Id.* ¶¶ 128-143. Repeated mass shootings of innocent Americans with rifles like the Bushmaster XM15-E2S – including several attacks against school children – have been widely publicized and are well known to the entities that manufacture and sell the Bushmaster XM15-E2S rifle. *Id.* ¶¶ 144-48.

In each step in the distribution channel – the Bushmaster defendants' sale to the Camfour defendants, the Camfour defendants' sale to the Riverview defendants, and the Riverview defendants' sale to Nancy Lanza – the defendants negligently entrusted a weapon designed to inflict mass casualties to a user who would foreseeably endanger others by making the XM15-E2S available to persons unfit to possess it. Based on these and additional allegations, plaintiffs assert claims of negligent entrustment, public nuisance, and violation of the Connecticut Unfair

Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110a *et seq.* against each of the defendants.

B. The Notice of Removal.

The Bushmaster Defendants removed the case to this Court on January 14, 2015. They claim diversity jurisdiction as the sole basis for federal subject matter jurisdiction.[2] The plaintiffs, however, are citizens of Connecticut; so is Riverview. Notice of Removal ¶¶ 9, 11.

In an effort to manufacture complete diversity, defendants claim that Riverview is fraudulently joined because of PLCAA, 15 U.S.C. §§ 7901 *et seq.* According to defendants, PLCAA provides a sweeping defense that bars all of plaintiffs' claims against Riverview. Notice of Removal ¶¶ 20-30. They acknowledge that PLCAA creates an exception for claims of negligent entrustment, but argue that plaintiffs' claims nonetheless do not come within this exception. *Id.* ¶ 25. They acknowledge that PLCAA creates another exception for claims based on the violation of a state statute applicable to the sale or marketing of firearms (known as the "predicate exception"), but assert that plaintiffs' CUTPA claims do not come within that exception. *Id.* ¶ 27. Nor, they claim, do any of plaintiffs' claims come within any other exception to PLCAA. *Id.* ¶ 24. Thus, the PLCAA defense, at least as asserted by the defendants, does not depend on anything unique to Riverview; the Bushmaster and Camfour defendants will argue that the same PLCAA defense shields them from liability to plaintiffs.

And indeed they have already made that argument. On January 21, 2015, the Bushmaster Defendants sent a letter to the Court outlining the arguments they will make in connection with

[2] The Bushmaster Defendants do not claim that there is federal question jurisdiction. PLCAA is not asserted as a basis for removal, and it could not in any event provide one. Removal in anticipation of a federal defense is not permitted. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 14 (1983); *First American Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 207 (D. Conn. 2000).

their anticipated Rule 12(b)(6) Motion to Dismiss plaintiffs' complaint. In that letter, the Bushmaster Defendants argue that PLCAA bars the claims against them. Ex. A, 1/21/15 Letter, at p. 2. Repeating the assertions from their Notice of Removal, they claim that plaintiffs' claims of negligent entrustment do not satisfy the PLCAA exception for negligent entrustment, and that plaintiffs' CUTPA claims do not satisfy the predicate exception. *Id.* at p. 3. They claim further that none of plaintiffs' claims satisfy any exception to PLCAA. *Id.* at p. 2. The Bushmaster Defendants represent that the Camfour Defendants and Riverview Defendants also intend to move to dismiss. *Id.* at p. 4.

Pursuant to 28 U.S.C. § 1447, plaintiffs now seek remand to Connecticut Superior Court. Defendants are scheduled to file Motions to Dismiss by February 20, 2015. The Court has ordered the parties to file a proposed briefing schedule for those Motions by February 18, 2015. Because the Court lacks subject matter jurisdiction and thus cannot entertain any substantive motions, plaintiffs will be seeking leave to defer filing their Memorandum in Opposition to defendants' Rule 12(b)(6) Motions until after the Court addresses the threshold jurisdictional issue, at which point we believe any such filing will be unnecessary.

II. FRAUDULENT JOINDER IS A NARROW EXCEPTION TO THE RULE OF COMPLETE DIVERSITY.

Federal courts are courts of limited jurisdiction, possessing only that power authorized by the Constitution or by statute. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Evaluating the merits of a case before the threshold

jurisdictional question is resolved "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94.

A. Removal Jurisdiction Here Depends On Complete Diversity.

The statutes authorizing removal are strictly construed in deference to "congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments." *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994) (quotation marks and citation omitted).

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941) (quotation marks and citation omitted).

Removal to federal court is possible only when the action concerns a matter over which the federal district courts have original subject matter jurisdiction. *See* 28 U.S.C. § 1441. The removing defendants claim that the Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. Federal courts may exercise diversity jurisdiction pursuant to 28 U.S.C. § 1332 only when there is complete diversity among the parties, that is to say when each plaintiff's citizenship is different from the citizenship of each defendant. *Caterpillar v. Lewis*, 519 U.S. 61, 68 (1996); *Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004).

Under these elementary principles, the Court lacks subject matter jurisdiction because there is incomplete diversity. The removing defendants assert, however, that the fraudulent

joinder exception to the requirement of complete diversity enables the Court to retain power over the case. This assertion is wrong: fraudulent joinder does not apply here.

B. A Removing Defendant Bears A Heavy Burden To Satisfy The Fraudulent Joinder Exception.

The principles of jurisdictional restraint are ever present in federal court. Nonetheless, federal courts have developed the doctrine of fraudulent joinder, which recognizes that "a plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining defendants with no real connection with the controversy." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460-61 (2d Cir. 1998) (citation and internal quotation marks omitted); *see also Brown v. Eli Lilly*, 654 F.3d 347, 356 (2d Cir. 2011); *Bounds v. Pine Belt Mental Health Care Res.*, 593 F.3d 209, 215 (2d Cir. 2010).

"Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity." *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998); *In re New England Mutual Life Ins. Co. Sales Practices Litigation*, 324 F. Supp. 2d 288, 300 (D. Mass. 2004) (Keeton, J.). "It is both prudent and appropriate to keep the doctrine within narrow limits rather than to expand it. Expansion of diversity jurisdiction remains the prerogative of Congress." *Id.* at 300; *cf. Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013) ("In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.") (quotation marks and citation omitted).

Consequently, a defendant seeking to establish fraudulent joinder "bears [a] heavy burden." *Brown*, 654 F.3d at 356 (quotation marks and citation omitted). In order to show that naming a non-diverse defendant is a fraudulent joinder effected to defeat diversity, "a defendant

must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia*, 138 F.3d at 461. Finally, when determining whether a fraudulent joinder has occurred, courts must weigh all factual and legal issues in favor of the plaintiff. *See id.*

The defendants concede the first prong of the fraudulent joinder test. They do not claim any "outright fraud" in the plaintiffs' pleadings, and they admit that Riverview sold the gun that was used in the Sandy Hook shootings. They attempt nonetheless to proceed on the second prong of the test to establish that there is "no possibility" that plaintiffs can prevail against Riverview, arguing that PLCAA bars plaintiffs' claims against Riverview. PLCAA, however, is a defense common to all the defendants in this case, not one particular to Riverview. Indeed, the defendants intend to argue in forthcoming Rule 12(b)(6) motions that PLCAA bars the claims against them as well. "Fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants," if accepted, would "simultaneously show[] that no case can be made against the diverse defendant or defendants." *In re New England Mut. Life Ins. Co. Sales Prac. Litig.*, 324 F. Supp. 2d at 304. The fraudulent joinder exception does not apply *at all* in this circumstance.

III. THE FRAUDULENT JOINDER EXCEPTION DOES NOT APPLY AT ALL HERE BECAUSE THE DEFENDANTS IDENTIFY NO FLAW IN THE PLEADINGS PARTICULAR TO RIVERVIEW, RELYING RATHER ON A DEFENSE COMMON TO ALL DEFENDANTS.

When a removing defendant's "showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant. In such a situation, the entire suit must be remanded to state court." *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 571 (5th

Cir. 2004). This principle is often called the common defense rule; it is simply a recognition of the limits of fraudulent joinder analysis determined by *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914). *See, e.g.*, *Smallwood*, 385 F.3d at 571 (following *Cockrell* in articulating common defense rule); *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990) (following *Cockrell* to articulate same rule); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d at 304 (following *Cockrell* to hold that "fraudulent joinder does not exist" when the argument offered to prove the fraudulent joinder of non-diverse defendants, if assumed to be true, would "simultaneously show[] that no case can be made against the diverse defendant or defendants").

A. The Fraudulent Joinder Exception Does Not Apply When The Basis For Removal Is An Attack On The Action As A Whole.

In *Cockrell*, a railroad was sued for negligence along with two of its employees. The employees' citizenship defeated diversity. The railroad attempted to remove the case to federal court, arguing that the employees were fraudulently joined to evade federal jurisdiction. The railroad claimed that the plaintiff could not recover against its employees because the claim of negligence was "falsely or recklessly made and could not be proved." *Cockrell*, 232 U.S. at 153. Although the removing defendant framed this argument as going only to the claims against the employees, under the principle of *respondeat superior* the liability of the railroad arose from the liability of its in-state employees.

The Court first emphasized that the removing defendant's burden was to show the impropriety of the joinder:

> [T]his right of removal cannot be defeated by fraudulent joinder of a resident defendant having no real connection with the controversy. . . . So, when in such a case a resident defendant is joined with the nonresident, *the joinder*, even although fair upon its face, *may be shown by a petition for removal to be only a fraudulent device to prevent a removal*; but the showing must consist of a

> statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder will not suffice; the *showing must be such as compels the conclusion that the joinder is without right and was made in bad faith.*

Cockrell, 232 U.S. at 153 (citations omitted; emphasis supplied). The Court continued:

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the [removing defendant's] showing *manifestly went to the merits of the action as an entirety, and not to the joinder*; *that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants.* Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them.

Id. (emphasis supplied).

This analysis emphasizes both the nature and the limitations of the fraudulent joinder doctrine. First, it is a test that scrutinizes the *joining of the non-diverse defendant* and looks for indications that there is a particular reason why *that defendant* does not belong in the lawsuit. *Id.*; *see also Smallwood*, 385 F.3d at 573 ("Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was been properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case.") Second, fraudulent joinder must be narrowly construed and applied. *See Cockrell*, 232 U.S. at 153; *cf. Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013) ("[I]n light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.")

1. *Cockrell*'s Rule, Often Called the Common Defense Rule, Is Widely Followed.

In *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), the Third Circuit relied on *Cockrell* to hold that a district court's finding of fraudulent joinder in the face of a common defense was improper: "the district court, in the guise of deciding whether the joinder was fraudulent, stepped from the threshold jurisdictional issue into a decision on the merits. As the Supreme Court held in [*Cockrell*], this it may not do." *Id.* at 112; *see also Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992) (repeating common defense rule as it had been developed in *Boyer*).

In *Smallwood*, the Fifth Circuit, sitting *en banc*, held that the defendant could not argue preemption under the Federal Railroad Safety Act under the guise of fraudulent joinder because, as in *Cockrell*, the defense went to the heart of plaintiff's case against all defendants. The court reasoned:

> A claim of improper joinder by definition is directed toward joinder of the in-state party, a simple but easily obscured concept. The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper.

385 F.3d at 571. The Court then tested the nature of the removal argument, by assuming *arguendo* that the removing defendants were correct that the plaintiff would fail to recover against the in-state defendant, and asking whether, if that were so, the plaintiff's claims would also fail against the other defendants. In that circumstance, it held, fraudulent joinder simply does not apply to create federal jurisdiction. The court stated:

> In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such – an allegation that, as phrased by the Supreme Court in *Chesapeake & O.R. Co. v. Cockrell*, "the plaintiff's case [is] ill founded as to all the defendants."

Id. at 574. Thus, the court concluded that "[i]n such a situation, the entire suit must be remanded to state court." *Id.* at 571.

In *Hunter v. Philip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), the Ninth Circuit confronted facts similar to those of *Smallwood* and of this case: the use of the affirmative defense of federal preemption as a pretext to establish fraudulent joinder. The court, after discussing the reasoning of *Smallwood* at length, reached the same conclusion:

> Here, as in *Smallwood*, the district court's decision that [the plaintiff]'s claims against [the non-diverse defendant] were preempted "effectively decided the entire case." [*Smallwood*, 385 F.3d] at 571. The [moving] defendants' preemption argument accordingly should have been brought in the context of attacking the merits of [the plaintiff]'s case, rather than as a basis for removing the case to federal court.

Hunter, 582 F.3d at 1045.[3]

The common defense rule, as framed first by *Cockrell* and then by *Boyer*, *Smallwood* and *Hunter*, is now widely recognized. *See Walton v. Bayer Corp.*, 643 F.3d 994, 1001 (7th Cir. 2011) (recognizing common defense rule but finding it inapplicable because defense raised would not, if valid, apply to all defendants); *Henderson v. Washington Nat'l Ins. Co.*, 454 F.3d 1278, 1282 n.4 (11th Cir. 2006) (recognizing common defense rule but not reaching question of whether to apply it); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d at 298-304 (discussing *Cockrell*, various authorities in Fifth Circuit including *Smallwood*, and

---

[3] *Hunter* distinguished *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), which had found that a statute of limitations defense common to all defendants was a permissible means by which to establish fraudulent joinder. Though at first blush *Ritchey* appeared to support the defendants' federal preemption argument, the *Hunter* court identified an important distinction: a "statute of limitations defense is a 'rather unique' defense that 'does not truly go to the merits of the plaintiff's claim in any sense.'" *Hunter*, 582 F.3d at 1045 (citing *Ritchey*, 139 F.3d at 1319). Thus, the court's consideration of the statute of limitations defense in *Ritchie* did not compromise its limited role with respect to the fraudulent joinder analysis. The same could not be said for defendants' preemption defense in *Hunter*, which compelled "an inquiry into the merits of the plaintiff's claims against all defendants and an analysis of federal law." *Id.* at 1045.

other common defense rule cases and concluding simply that it must follow *Cockrell*); Vairo, 16 *Moore's Federal Prac.* § 107.14, at nn.57.13-57.18 (discussing *Smallwood* and *Hunter* in subsection titled "Doctrine Generally Inapplicable When Fraudulent Joinder Showing Resolves All Claims); Wright, Miller, et al., 13F *Federal Practice & Procedure: Jurisdiction* § 3641.1, at nn.40-41 (3d ed.) (discussing only *Smallwood* in text but collecting cases in notes 43-44); *Brooks v. Merck & Co., Inc.*, 443 F. Supp. 2d 994, 1002 (S.D. Ill. 2006) (collecting cases); *Feldman's Medical Center Pharmacy, Inc. v. CareFirst, Inc.*, 959 F. Supp. 2d 783, 797 (D. Md. 2013) (applying common defense rule).

The Second Circuit has not had occasion to address this aspect of *Cockrell*. In *Intershoe, Inc. v. Filanto S.P.A.*, 97 F. Supp. 2d 471, 475 (S.D.N.Y. 2000) (Wood, J.), however, the court effectively applied the rule of *Cockrell*. New York plaintiffs sued an Italian company and its chairman, who was also a citizen of New York. The Italian company removed, asserting that its chairman had been fraudulently joined because the plaintiff's business tort claims against it could not stand under New York law. The court observed that "defendants' attack on the legal sufficiency of the prima facie tort claim misconceives the appropriate inquiry into fraudulent joinder of a plaintiff. *To show fraudulent joinder, defendants must show a flaw specific to the joinder of the non-diverse party, which is the jurisdictionally relevant aspect of the claim.*" *Id.* at 475 (emphasis supplied). The court determined that the defendants' attack on the plaintiff's case went to the claims against all defendants, not just the chairman. Therefore, there was no fraudulent joinder and the defendants' proper course was to move to dismiss in state court. *Id.*

2. The Reasoning in *In re New England Mut. Life Ins. Co. Sales Practices Litig.* Is Particularly Instructive Here.

The court's reasoning in *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d at 298-304, is particularly informative here because the court (Keeton, J.) applied

Cockrell while following Second Circuit precedent, explaining its reasons for doing so very clearly. The court determined that since the First Circuit had not yet addressed fraudulent joinder, it would follow the Second Circuit's test for fraudulent joinder. *Id.* at 298 (quoting *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001)). As set forth in Section II.B above, this test allows the removing defendant to attempt to establish fraudulent joinder by showing "outright fraud committed in the plaintiff's pleadings" or "that there is no possibility, based on the pleadings," that the plaintiff can state a claim against the non-diverse defendant in state court. *Id.; see also Brown*, 654 F.3d at 356; *Pampillonia*, 138 F.3d at 461.

The court then considered *Cockrell* and the common defense rule cases. It observed that it was bound to follow *Cockrell*, and that *Cockrell* holds that "fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants" would, if accepted, "simultaneously show[] that no case exists against the diverse defendant or defendants." *Id.* at 300. It continued, "[i]n those circumstances, no legitimate reason exists to label the non-diverse defendants as fraudulently joined. *Cockrell* clarifies and, in effect, narrows the doctrine of fraudulent joinder." *Id.*

B. The PLCAA Defense Argued To Prove the Fraudulent Joinder of Riverview Will Be Argued Equally To Attack Plaintiffs' Claims Against The Other Defendants.

The litmus test for a common defense argument is whether "the [removing defendant's] showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153 (citations omitted); *see also Smallwood*, 385 F.3d at 571 ("when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant," if accepted, would "equally dispose[] of all defendants,

there is no improper joinder of the in-state defendant"); *Hunter*, 582 F.3d at 1045 (where district court's decision that the plaintiff's claims against the non-diverse defendant were preempted "'effectively decided the entire case,' the [moving] defendants' preemption argument accordingly should have been brought in the context of attacking the merits of [the plaintiff]'s case, rather than as a basis for removing the case to federal court") (citing *Smallwood*, 385 F.3d at 571); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d at 300 ("fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants" would, if accepted, "simultaneously show[] that no case exists against the diverse defendant or defendants").

Like the arguments made by the removing defendants in *Cockrell*, *Smallwood*, and *Hunter*, the Bushmaster defendants' removal argument is really an attack on the plaintiffs' case as a whole – and they apparently prefer to mount that attack in federal court rather than state court. But that choice is not theirs to make under our law. The Bushmaster defendants concede for purposes of this analysis that Riverview sold the XM15-E2S that was used in the Sandy Hook shooting to Nancy Lanza. *See* Notice of Removal ¶¶ 14-15 (repeating these allegations from plaintiffs' complaint). They do not point to any particular deficiency in plaintiffs' state law claims *against Riverview particularly* (and there is none). *See id.* ¶¶ 24-30. They invite the Court to find that Riverview is fraudulently joined because, they claim, PLCAA bars plaintiffs' claims against it. *See id.* ¶¶ 24-30 (outlining Riverview's arguments under PLCAA). They also admit that they will assert the same PLCAA defense by Motion to Dismiss. Ex. A, Jan. 21, 2015 Letter to Court (outlining defendants' arguments under PLCAA).

Plaintiffs contest the defendants' attack on the pleadings in all respects: PLCAA does not bar plaintiffs' against Riverview, nor does it bar plaintiffs' claims against the other defendants.

The teaching of *Cockrell* and its progeny, however, is that it would be jurisdictional overstepping to engage the merits at this time and in this Court. Our laws trust state courts to make reasoned decisions, allowing for federal adjudication of state law claims only in limited circumstances not present here. Before engaging the merits, the Court must determine whether the defendants have borne their heavy burden to show that the fraudulent joinder exception applies in this case. *See Brown*, 654 F.3d at 356; *Pampillonia*, 138 F.3d at 461; *Hunter*, 582 F.3d at 1046. In order to establish that the exception can apply at all, they must establish that their basis for removal goes to a particular flaw in the joinder of Riverview in this action, and not to "the merits of the action as an entirety." *See Cockrell*, 232 U.S. at 153. According to defendants' expansive description of their PLCAA defense, they cannot.

It is defendants' burden to establish by clear and convincing evidence that their fraudulent joinder argument under PLCAA, if accepted, would *not* bar all claims. But the record defendants have made shows exactly the opposite: defendants intend to file Rule 12(b)(6) motions on the basis of PLCAA, using exactly the same arguments that they used to argue Riverview is fraudulently joined. *Cf. Hunter*, 582 F.3d at 1042 (noting that District Court had first dismissed in-state defendant as fraudulently joined on basis of federal preemption defense, then dismissed remaining defendants' claims under Rule 12(b)(6) on basis of same preemption defense and other defects, and reversing because in that circumstance, there was no fraudulent joinder); *Carrillo v. JP Morgan Chase Bank, N.A.*, 2012 WL 3276971, at *4 (W.D. Tex. Aug. 9, 2012) (commenting that removing defendant made exactly the same argument in its motion to dismiss that it used to argue improper joinder and applying common defense rule); *Fee v. Chesapeake Appalachia, L.L.C.*, 2014 WL 2769119, at *4 (E.D. Ky. June 18, 2014) (noting that

removing defendants admitted that they were presenting the same arguments with respect to in-state defendant and claims against them and applying common defense rule).

Defendants will certainly have an opportunity to raise these substantive challenges in state court, where this action belongs. Plaintiffs welcome the opportunity to address them then.

C. The Defendants' Attempted Removal Violates the Well-Pleaded Complaint Rule.

It is "settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 14 (1983); *see also Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("Federal jurisdiction cannot be predicated on on an actual or anticipated defense.").

As the Fifth Circuit observed in *Smallwood*, the railroad was not permitted to remove on the basis of its federal preemption defense, and "nonetheless, Illinois Central did just that: it removed on the basis of a defense of federal conflict preemption, urged as the bar to a reasonable basis for predicting recovery against MDOT, the in-state defendant." *Smallwood*, 385 F.3d at 576. Likewise in *Hunter*, the defendant cigarette manufacturers were not permitted to rely on implied federal preemption of claims against them to remove on the basis of federal question jurisdiction. *See Hunter*, 582 F.3d at 1044-47. Their attempt to use that same preemption as a basis for fraudulent joinder could not create federal jurisdiction either. *Id.* Thus, the common defense rule "leaves intact the well-pleaded complaint doctrine with all its intended reach." *Smallwood*, 385 F.3d at 576. As in *Smallwood* and *Hunter*, the availability of a federal defense – here PLCAA – cannot serve as a pretext for removal.

IV. THE PETITION FOR REMOVAL IS DEFECTIVE AND THE ACTION MUST BE REMANDED FOR THIS REASON AS WELL.

Because the defendants fail to establish that the fraudulent joinder exception is met, the Notice of Removal also violates the forum defendant rule. 28 U.S.C. § 1441(b)(2) provides: "A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Section 1441(b)(2) is a rule of removal procedure. *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 313 (2005). Riverview, a properly joined and served defendant, is a citizen of the State of Connecticut. The removal petition therefore fails to comply with § 1441(b)(2).

V. IN THE EVENT THE COURT DOES NOT REMAND PURSUANT TO THE COMMON DEFENSE RULE AND SECTION 1441(b)(2), WHICH IT SHOULD, PLAINTIFFS SEEK REMAND ON ADDITIONAL SUBJECT MATTER JURISDICTION GROUNDS.

As observed in *Cockrell*, if the Court were to allow removal, its decision would go to the merits of plaintiffs' claims against all defendants. This, of course, is exactly why removal is attractive to the Bushmaster defendants. Despite plaintiffs' well-pleaded complaint and absolute right to name Riverview as a defendant, the Bushmaster defendants removed to this Court in an effort to obtain a preemptive ruling going to the heart of *their* liability.

If the Court were to determine that the common defense rule is not dispositive – and that determination would be error because the common defense rule *is* dispositive – we will then respond to the removing defendants' substantive attack on the pleadings, as articulated in their Notice of Removal.[4] We have chosen not to brief that position here because to do so would blur

[4] "Because jurisdiction goes to the issue of the court's power, a motion to remand based on lack of subject matter jurisdiction may be made at any time. Either a court has the power to adjudicate a case or it does not. Indeed, a federal court has an independent duty to determine that it has

the distinction between jurisdictional analysis and substantive analysis, and that is exactly what defendants' improper removal is designed to do.

VI. CONCLUSION.

For these reasons, this case must be remanded to the Superior Court of the State of Connecticut. Pursuant to 28 U.S.C. § 1447(c), plaintiffs request that they be awarded fees and costs incurred as a result of the removal.

THE PLAINTIFFS,

By /s/ Joshua D. Koskoff

Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
Tel: (203) 336-4421

---

subject matter jurisdiction and may raise the issue *sua sponte*." *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 510 F. Supp. 2d 299, 305 (S.D.N.Y. 2007); *D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broadcasting, Inc.*, 550 F. Supp. 2d 481, 486 (S.D.N.Y. 2008) (same); Fed. R. Civ. P. 12(h)(3).

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a copy of the foregoing Motion and accompanying Memorandum of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Joshua D. Koskoff
Joshua D. Koskoff (ct15619)

EXHIBIT A

DISERIO MARTIN O'CONNOR & CASTIGLIONI LLP

ATTORNEYS AT LAW

ONE ATLANTIC STREET
STAMFORD, CT 06901

35 MASON STREET
GREENWICH, CT 06830
TELEPHONE: (203) 622-4100

TELEPHONE: (203) 358-0800
FACSIMILE: (203) 348-2321
WWW.DMOC.COM

50 MAIN STREET
SUITE 1000
WHITE PLAINS, NY 10606
TELEPHONE: (914) 684-0090

Jonathan P. Whitcomb*
jwhitcomb@dmoc.com
*Also Admitted in NY

Reply To: Stamford Office

January 21, 2015

Via Hand Delivery

The Honorable Robert N. Chatigny
Abraham Ribicoff Federal Building
United States Courthouse
450 Main Street - Room 228
Hartford, Connecticut 06103

Re: *Soto, et al., v. Bushmaster Firearms International, LLC, et al.*
Case No.: 3:15-CV-00068-RNC

Dear Judge Chatigny:

This firm, together with co-counsel James Vogts and Andrew Lothson of the firm Swanson, Martin & Bell, LLP, Chicago, IL, represents Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants") in the above referenced matter. The Remington Defendants timely removed this action to this Court on January 14, 2015 [DE 1], after having been served on December 15, 2014. The present deadline for the Remington Defendants to answer or otherwise plead in response to the Complaint (the "Response Deadline") is today, January 21, 2015. Fed. R. Civ. P. 81(c)(2)(C). In accordance with this Court's Order on Pretrial Deadlines, paragraph (b) [DE 7] ("Order"), I write to respectfully request a pre-motion conference in advance of filing a Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and to request that the Response Deadline be extended until after the Court has resolved the present request for pre-motion conference, or otherwise ordered a schedule for the filing of Rule 12(b)(6) motions in response to the Complaint.

This lawsuit arises from the December 14, 2012 shooting at Sandy Hook Elementary School by Adam Lanza. The Remington Defendants allegedly manufactured one of the firearms used by Lanza. Plaintiffs' Complaint ("Compl.") asserts claims against the Remington Defendants for (1) products liability, (2) violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), (3) public nuisance, and (4) negligent entrustment. (*See* Compl. at Count One, ¶¶ 183-190.)

Plaintiffs' Complaint should be dismissed under the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* ("PLCAA"). The PLCAA broadly prohibits civil actions for damages and other forms of relief against firearm manufacturers and sellers resulting from the criminal or unlawful use of firearms by third parties. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 3320 (2009); *Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010).

Congress enacted the PLCAA specifically because lawsuits had "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 third parties, including criminals." 15 U.S.C. § 7901(a)(3). Congress found these lawsuits to be "an abuse of the legal system" and enacted the PLCAA to ensure that those who manufacture and sell firearms are not held "liable for the harm caused by those who criminally or unlawfully misuse them." 15 U.S.C. §§ 7901(a)(5), (6).

Congress, therefore, acted to preempt such "qualified civil liability action[s]" by prohibiting such lawsuits from being "brought in any Federal or State court." 15 U.S.C. § 7902(a). Plaintiffs' lawsuit falls squarely within the protections afforded to firearm manufacturers by Congress and it should "be immediately dismissed." 15 U.S.C. § 7902(b). Immunity under the PLCAA is a threshold question of law appropriately decided under Fed. R. Civ. P. 12(b)(6). *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013).

The PLCAA is plainly written. The operative provision is § 7903(5)(A), which defines a "qualified civil liability action" subject to immediate dismissal:

> The term "qualified civil liability action" means 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, injunctive or declaratory relief, abatement, restitution, fines, 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). This lawsuit is a "qualified civil liability action" involving a "qualified product[.]" 15 U.S.C. §§ 7903(5)(A), (4). The question is whether any of the claims pleaded against the Remington Defendants fit within any of the six enumerated exceptions to immunity under the PLCAA. *See* 15 U.S.C. §§ 7903(5)(A)(i)-(vi). They do not.

First, while an exception to PLCAA immunity exists for a state law claim for damages "resulting directly from an alleged defect in design or manufacture of [a firearm], when the firearm is used as intended or in a reasonably foreseeable manner," the PLCAA dictates that such an action is not available "where the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Thus, to the extent Plaintiffs have attempted to plead a products liability action for design, manufacture or marketing defects under the Connecticut Product Liability Act ("CPLA") (*see* Compl. at Count One, ¶¶ 183-84),

the PLCAA bars the claim. Under this circumstance, the criminal act is "considered the sole proximate cause of the resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v). Plaintiffs allege Adam Lanza's actions were criminal, and that their damages resulted from his criminal misuse of a firearm. (Compl. at ¶¶ 166-170.) Thus, Plaintiffs cannot state a product liability claim against the Remington Defendants.

Second, Plaintiffs have not alleged that the Remington Defendants violated a statute "applicable to the sale or marketing" of firearms. Thus, while an action against a manufacturer for "knowingly violat[ing] a State or Federal statute applicable to the sale or marketing" of firearms is an exception to PLCAA immunity, 15 U.S.C. § 7903(5)(A)(iii), Plaintiffs' Complaint on its face cannot meet this exception. As explained by the Second Circuit, this exception encompasses only statutes that "expressly regulate firearms" or "that clearly can be said to implicate the purchase and sale of firearms." *City of New York*, 524 F.3d at 403 (holding that the New York criminal nuisance statute was not "applicable to the sale or marketing of firearms"). Nor does the exception encompass statutes of general application. *Ileto*, 565 F.3d at 1135-36 (finding it "likely that Congress had in mind 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."). The only statute referenced in Plaintiffs' Complaint is CUTPA (Compl. at Count One, ¶ 190)—a statute that does not expressly regulate or clearly implicate the regulation of firearms. *See* Conn. Gen. Stat. § 42-110g. CUTPA is a statute of general application that, in certain circumstances not even applicable here, creates an action to recover an "ascertainable amount of money or property" resulting from unfair or deceptive business practices. Conn. Gen. Stat. § 42-110g(a). CUTPA is not the type of statute "Congress had in mind" as a predicate statute for immunity under § 7903(5)(A)(iii). *See Ileto*, 565 F.3d at 1135-36.

Third, Congress limited the availability of a state law action for negligent entrustment of a firearm to an action against a "seller." *See* 15 U.S.C. § 7903(5)(A)(ii). The Remington Defendants are not "sellers" under the plain language of the PLCAA. Thus, Plaintiffs cannot bring a negligent entrustment action against them, let alone one that would succeed.

Fourth, while Plaintiffs allege that the conduct of the Remington Defendants "constituted a public nuisance" (Compl. at Count One, ¶ 189), Congress did not provide for a public nuisance exception to PLCAA immunity. *See* 15 U.S.C. §§ 7903(5)(A)(i)-(vi); *see also City of New York*, 524 F.3d at 403 (ordering dismissal of nuisance claim as it was barred by the PLCAA); *Ileto*, 565 F.3d at 1126 (finding that general tort theories of liability preempted by the PLCAA, including public nuisance claim). Accordingly, Plaintiffs cannot bring a public nuisance claim against the Remington Defendants, and any such action would fail, in any event.

Pursuant to the Order, counsel for the Remington Defendants have conferred with Plaintiffs' counsel, and, while Plaintiffs do not consent to dismissal of their Complaint, they do consent to an extension of the Response Deadline and for the filing of a Rule 12 motion to dismiss up to and including February 20, 2015; the Remington Defendants are prepared to file a Rule 12(b)(6) motion to dismiss by January 30, 2015.

The Remington Defendants and Plaintiffs have also been informed that the other defendants in the case (the Camfour Defendants and the Riverview Defendants) also intend to file motions to dismiss. A joint briefing schedule for motions to dismiss would be efficient for the parties and the Court. The Remington Defendants are also agreeable to Plaintiffs having more than the customary 21-days to file response briefs, so long as the Remington Defendants are afforded additional time for a reply brief.

For all of the foregoing reasons, the Remington Defendants respectfully request a pre-motion conference for approval to file a motion to dismiss Plaintiffs' Complaint; for consideration of a joint briefing schedule for all motions to dismiss, response briefs and replies; and, in the interim, that the Court extend the Response Deadline until after the Court has resolved this pre-motion conference request.

Thank you for your consideration.

Very truly yours,

Jonathan P. Whitcomb

MCW:sm

cc:

Matthew Wagner	mwagner@dmoc.com
Andrew Lothson	alothson@smbtrials.com
James B. Vogts	jvogts@smbtrials.com
Joshua D. Koskoff	JKoskoff@KOSKOFF.com
Scott C. Allan	sallan@renzullilaw.com
Christopher Renzulli	crenzulli@renzullilaw.com
Michael R. Patrick	michael@pllclaw.com

SWANSON, MARTIN & BELL, LLP

ATTORNEYS AT LAW
330 NORTH WABASH • SUITE 3300
CHICAGO, ILLINOIS 60611
(312) 321-9100 • FAX (312) 321-0990

James B. Vogts
(312) 321-9100

E-mail at
jvogts@smbtrials.com

February 17, 2015

BY ECF/CM (e-filing)
The Honorable Robert N. Chatigny
Abraham Ribicoff Federal Building
United States Courthouse
450 Main Street - Room 228
Hartford, Connecticut 06103

Re: *Soto, et al., v. Bushmaster Firearms International, LLC, et al.*
Case No.: 3:15-CV-00068-RNC

Dear Judge Chatigny:

I am one of the attorneys representing Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants") in the above referenced matter. The Remington Defendants' pre-motion letter requesting permission to file a motion to dismiss was submitted on January 21, 2015. The parties received a request from your judicial assistant asking for an e-filed proposed briefing schedule for motions to dismiss. While Plaintiffs did not initially voice opposition to the filing of motions to dismiss and never submitted a response to the pre-motion letter, Plaintiffs have now indicated they will not agree to a briefing schedule on motions to dismiss. As such, the Remington Defendants propose the following briefing schedule for their motion to dismiss (this is the same briefing schedule proposed to Plaintiffs):

- Remington Defendants' motion to dismiss to be filed on or before February 20, 2015
- Plaintiffs' response briefs to be filed on or before March 20, 2015
- Remington Defendants' reply brief to be filed on or before April 10, 2015

Plaintiffs have also filed a motion to remand, wherein they mention that the Defendants are to file motions to dismiss by February 20, 2015. (ECF 27-1 at p. 6.) Plaintiffs state that they will seek "leave to defer filing" a response in opposition to motions to dismiss. (*Id.*) The only basis offered for that position is that Plaintiffs believe the Court will find that it is without jurisdiction. Plaintiffs are wrong on several levels.

Plaintiffs' remand motion relies on the "common defense rule" as the ground for remand. As Plaintiffs conceded in their brief, however, that exception to improper joinder-based

removal has not been adopted by the Second Circuit or in the District of Connecticut. Indeed, the rule has been heavily criticized even within those circuits that have adopted it. *See, e.g.*, *Note, Fifth Circuit Establishes "Common Defense" Exception to Fraudulent Joinder Doctrine.*, 118 HARV. L. REV. 1086 (2005) (analyzing the majority and dissenting opinions in *Smallwood v. Illinois Central Railroad Co. (Smallwood II)*, 385 F.3d 568 (5th Cir. 2004), a case heavily relied on by Plaintiffs here).

In any event, Plaintiffs misapply the common defense rule. For example, a judicial determination that there is no reasonable basis for Plaintiffs' claims against Riverview Sales (the non-diverse defendant) because of the protection afforded by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* ("PLCAA"), will not, by itself, require dismissal of all claims Plaintiffs have asserted against all parties. Plaintiffs have pleaded a separate and analytically distinct, product liability claim against the Remington Defendants that will not be addressed in the context of the motion to remand but only under the Remington Defendants' Rule 12(b)(6) motion. (*See* ECF 1, Notice of Removal at p. 8 n. 8.) As a result, the common defense rule—that Plaintiffs urge the Court to adopt—does not apply. *See, e.g.*, *Smallwood II*, 385 F.3d at 571 (majority opinion held that the "common defense" exception applies only "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant *equally disposes of all defendants*[.]" (emphasis added)). A finding that the PLCAA bars the claims against Riverview Sales will not "equally" dispose of all claims against the Remington Defendants.

Moreover, the PLCAA does not afford equal immunity to all who manufacture and sell firearms. For example, it treats claims made against "manufacturers" and "sellers" differently. *See, e.g.*, 15 U.S.C. §§ 7903(2) (defining manufacturer), (6) (defining seller), (5)(A)(ii) (negligent entrustment exception), and (5)(B) (negligent entrustment claim categorically precluded against manufacturer). It is not enough for Plaintiffs to broadly argue that all defendants will assert the PLCAA as a "common defense" and, therefore, remand is appropriate under the "common defense rule."

The Remington Defendants believe the parties should move forward concurrently on both motions to dismiss and remand because Plaintiffs' motion to remand is not well-founded. Indeed, Plaintiffs' failure to address in their motion to remand how the PLCAA specifically impacts their claims against Riverview Sales underscores the futility of Plaintiffs' lawsuit and their assertion that Riverview Sales has been properly joined. And as those federal circuits that have adopted the common defense rule have concluded, consideration of the merits of all claims against all of the parties is required to determine whether to apply the rule.

At this juncture, it is our understanding that the co-defendants will seek additional time in which to file their motions to dismiss.

The parties have also discussed a case management order. The parties agree that their obligations under Rule 26(f) should be stayed pending resolution of Plaintiffs' motion to remand. The Remington Defendants ask that those obligations be further stayed pending resolution of Rule 12(b)(6) motions.

Thank you for your attention to this matter.

Very truly yours,

/s/ James B. Vogts
James B. Vogts (Bar No. phv07263)
Swanson, Martin & Bell, LLP,
One of the Attorneys for the Defendants,
Remington Arms Company, LLC and
Remington Outdoor Company, Inc.

JBV/lh

cc: (All counsel of record via ECF/CM)

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
Plaintiffs,	)	No. 3:15-CV-00068-RNC
v.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.,	)	February 18, 2015
Defendants.	)	

DEFENDANTS CAMFOUR, INC.'S AND CAMFOUR HOLDING, INC.'S MOTION FOR AN EXTENSION OF TIME TO RESPOND TO THE COMPLAINT AND RESPONSE TO THE COURT'S REQUEST FOR A BRIEFING SCHEDULE FOR MOTIONS TO DISMISS THE COMPLAINT

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 move for an additional extension to respond to the Complaint. Camfour previously sought and was granted an initial thirty day extension pursuant to Local Civil Rule 7(b)(1)(a). (Dkt. No. 18). Camfour's response to the Complaint is presently due on February 20, 2015.

This case was removed to this Court on January 14, 2015, and plaintiffs filed a Motion to Remand on February 13, 2015 (Dkt. No. 27). Camfour intends to file a motion to dismiss the Complaint pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et. seq.* and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs have requested that this Court determine whether it has subject matter jurisdiction over this case before they are required to respond to any motions to dismiss the Complaint.

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively referred to as "Remington") wrote to the Court on February 17, 2015, (Dkt. No. 28), proposing to file their motion to dismiss the Complaint on February 20, 2015 and that briefing on it proceed simultaneously with briefing on plaintiffs' Motion to Remand.

Should this Court enter a briefing schedule for Remington's motion to dismiss, Camfour will file its motion to dismiss consistent with that schedule. In the alternative, should this Court not enter a briefing schedule for Remington's motion to dismiss because of plaintiffs' request that this Court first determine whether it has subject matter jurisdiction over this case, Camfour respectfully requests a twenty-one day extension to respond to the Complaint from the date of this Court's ruling on whether it has subject matter jurisdiction over this case.

Counsel for plaintiffs, Alinor C. Sterling, Esq., has advised that plaintiffs have no objection to the requested extension.

For the above reasons, Camfour respectfully requests that this Court grant its motion for an additional extension to respond to the Complaint, and extend the deadline for its motion to dismiss to follow any briefing schedule entered in response to Remington's February 17, 2015 request or, if no briefing schedule is entered for Remington's motion to dismiss, by twenty-one days after this Court's decision on whether it has subject matter jurisdiction over this case.

Dated: White Plains, New York
February 18, 2015

Respectfully submitted,

By: *Scott C. Allan*

John F. Renzulli, CT11119, jrenzulli@renzullilaw.com
Christopher Renzulli, CT24597, crenzulli@renzullilaw.com
Scott C. Allan, CT24143, sallan@renzullilaw.com
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508

White Plains, New York 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Attorneys for defendants Camfour, Inc. and Camfour Holding, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015, a copy of the foregoing Agreed-To Motion for an Extension of Time to Respond to the Complaint and Response to the Court's Request for a Briefing Schedule for Motions to Dismiss the Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

By: *Scott C. Allan*
Scott C. Allan, CT24143, sallan@renzullilaw.com
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, New York 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Attorneys for defendants Camfour, Inc. and Camfour Holding, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	February 18, 2015
Defendants.	)	

PLAINTIFFS' MOTION FOR ENTRY OF SCHEDULING ORDER

Pursuant to Federal Rule of Civil Procedure 6(b), plaintiffs Donna Soto, Ian and Nicole Hockley, David Wheeler, Mary D'Avino, Mark and Jacqueline Barden, William D. Sherlach, Neil Heslin and Scarlett Lewis, Leonard Pozner, Gilles Rousseau, and Natalie Hammond move the Court to enter a scheduling order concerning remand briefing, Rule 12(b)(6) briefing, and the parties' automatic disclosure and planning conference obligations under Rule 26. Plaintiffs propose that the Court enter a briefing schedule which addresses jurisdiction first. Only after the Court determines it has subject matter jurisdiction should the parties proceed with briefing under Rule 12(b)(6). Plaintiffs oppose the briefing schedule proposed by the Bushmaster Defendants in their February 17, 2015 letter to the Court because the Bushmaster Defendants' proposal would require the parties to brief substantive issues before the Court determines that it has subject matter jurisdiction.

I. Applicable Legal Standard

Pursuant to Federal Rule of Civil Procedure 6(b), courts have "wide discretion" to grant requests for extensions and set briefing schedules. *Ramashwar v. City of New York*, 231 F.

App'x 26, 28 (2d Cir. 2007); 4B Wright & Miller, Fed. Prac. & Proc. Civ. § 1165 (4th ed.) ("[F.R.C.P. 6(b)] gives the court extensive flexibility to modify the fixed time periods found throughout the rules, whether the extension is sought before or after the actual termination of the allotted time.").

II. Factual and Procedural Background.

This action arises out of the shooting at Sandy Hook Elementary School in Newtown on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others.

A. The Allegations of the Complaint.

The plaintiffs in this case are Donna L. Soto, for the estate of her daughter, teacher Victoria Leigh Soto; Ian and Nicole Hockley, for the estate of their six-year-old son, Dylan Christopher Jack Hockley; David C. Wheeler, for the estate of his six-year-old son, Benjamin A. Wheeler; Mary A. D'Avino, for the estate of her daughter, behavioral therapist Rachel Marie D'Avino; Mark and Jacqueline Barden, for the estate of their seven-year-old son, Daniel G. Barden; William D. Sherlach, for the estate of his wife, school psychologist Mary Joy Sherlach, and for himself individually; Neil Heslin and Scarlett Lewis, for the estate of their six-year-old son, Jesse McCord Lewis; Leonard Pozner, for the estate of his six-year-old son, Noah Samuel Pozner; Gilles J. Rousseau, for the estate of his daughter, substitute teacher Lauren G. Rousseau; and teacher Natalie Hammond on her own behalf. Dkt. #1, Notice of Removal, Ex. 1, Complaint (hereafter "Complaint") ¶¶ 35-44. Plaintiffs are all citizens of Connecticut. Dkt. # 1, Notice of Removal ¶ 11.

The defendants are the entities that manufactured, distributed, and sold the Bushmaster XM15-E2S rifle used in the Sandy Hook shooting: the Bushmaster Defendants, the Camfour

Defendants, and the Riverview Defendants. Complaint ¶¶ 1-33. The appearing Bushmaster Defendants (who prefer to call themselves the Remington Defendants) are Remington Outdoor Company, Inc. and Remington Arms Company, LLC.[1] These defendants both have their principal places of business in North Carolina and are incorporated in Delaware. *See* Dkt. #1, Notice of Removal, ¶¶ 6-7. The Camfour Defendants are Camfour, Inc. and Camfour Holding; they both have their principal place of business in Massachusetts and are incorporated there. *Id.* ¶ 8. The Riverview Defendants are Riverview Sales, Inc. and David LaGuercia. Mr. LaGuercia, the federal firearms licensee of Riverview Sales, Inc. is a citizen of Massachusetts. *Id.* ¶ 10. Riverview is incorporated in Connecticut and has its principal place of business here as well. *Id.* ¶ 9.

Plaintiffs allege that the Bushmaster XM15-E2S rifle used in the shooting belongs to a specific category of weapons that were designed for the United States military to function as a lightweight but lethal service weapon. Complaint ¶¶ 45-51. The United States military – and more recently law enforcement – are appropriate markets for these weapons due to their specialized needs and highly regimented safety protocols. *Id.* ¶¶ 105-127. The civilian population, by contrast, is a wholly inappropriate market for these weapons: military rifles are grossly ill-suited to home defense and sold with no regard for the purchaser's training, experience, access to safe storage, or intent to make the weapon available to others. *Id.* ¶¶ 128-143. Repeated mass shootings of innocent Americans with rifles like the Bushmaster XM15-E2S – including several attacks against school children – have been widely publicized and are well known to the entities that manufacture and sell the Bushmaster XM15-E2S rifle. *Id.* ¶¶ 144-

[1] The Complaint names additional entities as Bushmaster defendants. These entities have not appeared. The Remington Defendants have stated that those additional entities do not exist. *See* Dkt. #1, Notice of Removal, at 1 n.1.

48. In each step in the distribution channel – the Bushmaster defendants' sale to the Camfour defendants, the Camfour defendants' sale to the Riverview defendants, and the Riverview defendants' sale to Nancy Lanza – the defendants negligently entrusted a weapon designed to inflict mass casualties to a user who would foreseeably endanger others by making the XM15-E2S available to persons unfit to possess it. Based on these and additional allegations, plaintiffs assert claims of negligent entrustment, public nuisance, and violation of the Connecticut Trade Practices Act (CUTPA), Conn. Gen. Stat. §§ 42-110a *et seq.* against each of the defendants.

B. The Notice of Removal.

The Bushmaster Defendants removed the case to this Court on January 14, 2015. They claim diversity jurisdiction as the sole basis for federal subject matter jurisdiction.[2] The plaintiffs, however, are citizens of Connecticut; so is Riverview. Dkt. #1, Notice of Removal ¶¶ 9, 11. Thus on the face of the pleadings, there is no diversity jurisdiction.

In an effort to manufacture complete diversity, the Bushmaster defendants claim that Riverview is fraudulently joined because of the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901 *et seq.* According to the Bushmaster defendants, PLCAA provides a sweeping defense which bars all of plaintiffs' claims against Riverview. *See* Dkt. # 1, Notice of Removal, ¶¶ 20-30. Thus, they claim, PLCAA provides a complete defense to plaintiffs' claims of negligent entrustment, violation of the Connecticut Unfair Trade Practices Act, and nuisance against Riverview. *Id.* ¶¶ 22-23.

---

[2] The Bushmaster Defendants do not claim that there is federal question jurisdiction. PLCAA is not asserted as a basis for removal, and it could not in any event provide one. Removal in anticipation of a federal defense is not permitted. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 12 (1983); *First American Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 207 (D. Conn. 2000).

On January 21, 2015, the Bushmaster Defendants sent a letter to the Court, outlining the arguments they will make in connection with their anticipated Rule 12(b)(6) Motion to Dismiss plaintiffs' complaint. In that letter, the Bushmaster Defendants argue that PLCAA bars the claims against them. 1/21/15 Letter, at Pp. 2-4.

On February 13, 2015, plaintiffs moved the Court to remand the case to Connecticut Superior Court for lack of subject matter jurisdiction.

Defendants are presently scheduled to file Motions to Dismiss by February 20, 2015. The Court ordered the parties to file a proposed briefing schedule concerning the Rule 12(b)(6) Motions by February 18, 2015.

On February 17, 2015, the Bushmaster Defendants filed a letter brief setting forth their position concerning Rule 12(b)(6) briefing and arguing substantively against the Motion to Remand.[3] Plaintiffs object to the briefing schedule proposed by the Bushmaster Defendants.

III. PROPOSED BRIEFING SCHEDULE.

Plaintiffs move the Court to set a briefing schedule which first addresses jurisdiction in two phases, as further set forth below. Plaintiffs propose that the Court order Rule 12(b)(6) briefing to proceed only after it addresses jurisdiction.

---

[3] The Bushmaster Defendants imply in this letter that the plaintiffs surprised them by taking the position that jurisdiction should be decided before Rule 12(b)(6) briefing is done. First, a removing defendant claiming fraudulent joinder should anticipate that the Court will need to address subject matter jurisdiction in the first instance. Second, plaintiffs have been entirely forthright concerning our intention to file a Motion to Remand. The Bushmaster Defendants were advised by plaintiffs' counsel that plaintiffs would be moving to remand by email on January 20, 2015 and again by email sent on February 6, 2015. In the latter email, plaintiffs' counsel indicated that it would be important to consider the impact of the Motion to Remand on any briefing schedule. And third, plaintiffs did not respond to the Bushmaster Defendants' 1/21/15 letter to the Court because it was our understanding that that letter was being filed pursuant to the Court's Standing Order on Pretrial Deadlines; the Standing Order does not call for a response to be filed.

A. Determination of Subject Matter Jurisdiction.

Phase One:

Plaintiffs' Motion to Remand was filed 2/13/15.

Defendants' Memoranda in Opposition shall be filed on or before March 11, 2015.

Plaintiffs' Reply Briefs shall be filed by March 25, 2015.

If the Court determines that the rule of *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), governs this case, then the case will be remanded to Connecticut Superior Court.

Phase Two

If the Court determines that the rule of *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914) is not determinative, then further briefing on subject matter jurisdiction will be required.

Within twenty-one days of such a ruling, plaintiffs shall file a Supplemental Memorandum in support of their Motion to Remand addressing the Bushmaster defendants' substantive remand arguments.

Defendants shall then have twenty-one days from the filing of plaintiffs' Supplemental Memorandum in which to file any supplemental Memoranda in Opposition.

The deadline for plaintiffs' Reply Briefs shall be fourteen days following the deadline for filing defendants' Memoranda in Opposition. (If any of the defendants file their Memoranda in Opposition before the twenty-one day period has run, plaintiffs will still have fourteen days from the end of that twenty-one day period, so that the briefing schedule stays consistent.)

If the Court determines that it lacks subject matter jurisdiction, the case will be remanded to Connecticut Superior Court.

Phase Three

The need for compliance with the deadlines in Phase Three will arise only if the Court determines it has jurisdiction after considering the parties' briefing in Phase One and, if necessary, in Phase Two.

1) Motions to Dismiss

The Bushmaster Defendants will file their Rule 12(b)(6) Motion by Feb. 20, 2015, as they have indicated by letter dated 2/17/15 that they prefer to do so.

The Camfour and Riverview Defendants' deadline to file Rule 12(b)(6) Motions shall be twenty-one days following the Court's ruling on Phase Two, if the Court determines that it has subject matter jurisdiction.

The deadline for plaintiffs to file their Memoranda in Opposition to all of the defendants' Rule 12(b)(6) Motions shall be twenty-one days after the Camfour and Riverview defendants' deadline for filing their Rule 12(b)(6) Motions.

More particularly, plaintiffs' deadline to respond to the Bushmaster Defendants' Motion to Dismiss shall be suspended until the Court rules concerning subject matter jurisdiction after consideration of the Phase One briefing and, if necessary, the Phase Two briefing. In the event the Court determines that it has jurisdiction, plaintiffs' deadline to respond to the Bushmaster defendants' Motion to Dismiss shall be the same as plaintiffs' deadline to oppose the other defendants' Motions to Dismiss.

The defendants' Reply Briefs shall be filed fourteen days after the filing of plaintiffs' Memoranda in Opposition.

2) Rule 26 Automatic Disclosures and Report of the Parties' Planning Conference.

These deadlines and obligations shall be stayed pending the Court's Ruling, if any, on Phase Two.

IV. The Court Should Enter Plaintiffs' Scheduling Order.

A. The Parties' Positions.

The Bushmaster Defendants have set forth their position in their 2/17/15 Letter to the Court. They wish to proceed with the Rule 12(b)(6) briefing before the Court makes a final determination as to whether it has subject matter jurisdiction. Counsel for plaintiffs has conferred with counsel for the Bushmaster Defendants concerning the plaintiffs' proposal. The Bushmaster Defendants do not agree to plaintiffs' proposal, except in two very limited respects. The Bushmaster Defendants agree that a March 11 deadline for their Memorandum in Opposition to the Motion to Remand is acceptable, as is a March 25 deadline for the plaintiffs' Reply Brief. The Bushmaster Defendants also agree that the Rule 26 deadlines should be extended pending a determination by the Court that it has subject matter jurisdiction.

The Camfour Defendants' position concerning scheduling is set forth in their Motion for Extension to be filed today.

The Riverview Defendants do not have a position at this time.

B. The Court Should Address Subject Matter Jurisdiction First.

"Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (striking down the doctrine of "hypothetical jurisdiction" by which difficult subject matter jurisdiction questions were bypassed to allow the district courts to resolve cases on easier merits arguments). It is elementary that the Court must address its jurisdiction before turning to substantive issues.

In addition, as set forth in plaintiffs' Motion to Remand and Memorandum in Support thereof, the kind of removal argument made by the Bushmaster defendants here is an attempt to cloak a federal defense that is implicated in plaintiffs' claims against every defendant in the case as a basis for fraudulent joinder. When such a removal argument is made, the Court runs the risk of ruling on the merits of a controversy over which it lacks jurisdiction. For this reason, the Court must take care to address the jurisdictional questions first before making any ruling that implicates the merits of the case.

Finally, staying deadlines pending a determination of subject matter jurisdiction is generally appropriate. *Cf. Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.").

For these reasons, plaintiffs request their Motion be granted.

THE PLAINTIFFS,

By /s/ Alinor C. Sterling

Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
Tel: (203) 336-4421

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Alinor C. Sterling
Alinor C. Sterling (ct17207)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, et al.,	)	
Plaintiffs,	)	No. 3:15-CV-00068-RNC
v.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC., et al.,	)	February 18, 2015
Defendants.	)	

DEFENDANTS DAVID LAGUERCIA AND RIVERVIEW SALES, INC.'S MOTION FOR EXTENSION OF TIME TO RESPOND TO AND/OR MOVE AGAINST THE COMPLAINT

Defendants DAVID LAGUERCIA and RIVERVIEW SALES, INC. (collectively, "Defendants") respectfully move for an extension of time to respond to the Complaint. Defendants previously sought and were granted an initial thirty day extension pursuant to Local Civil Rule 7(b)(1)(a) such that Defendants' response to the Complaint is presently due on February 20, 2015.

This case was removed to this Court on January 14, 2015, and plaintiffs filed a Motion to Remand on February 13, 2015 (Dkt. No. 27). Defendants intend to file a motion to dismiss the Complaint pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et. seq.* and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs have requested that this Court determine whether it has subject matter jurisdiction over this case before they are required to respond to any motions to dismiss the Complaint.

Defendants Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively referred to as "Remington") wrote to the Court on February 17, 2015, (Dkt. No. 28),

proposing to file their motion to dismiss the Complaint on February 20, 2015 and that briefing on it proceed simultaneously with briefing on plaintiffs' Motion to Remand.

Should this Court enter a briefing schedule for Remington's motion to dismiss, Defendants will file their motions to dismiss consistent with that schedule or as otherwise directed by the Court. In the alternative, should this Court not enter a briefing schedule for Remington's motion to dismiss because of plaintiffs' request that this Court first determine whether it has subject matter jurisdiction over this case, Defendants respectfully requests a twenty-one day extension to respond to the Complaint from the date of this Court's ruling on whether it has subject matter jurisdiction over this case.

Counsel for plaintiffs, Alinor C. Sterling, Esq., has advised that plaintiffs have no objection to an extension to file to twenty-one days following the determination of whether the Court has jurisdiction.

For the above reasons, Defendants respectfully request that this Court grant its motion for an additional extension to respond to the Complaint, and extend the deadline for its motion to dismiss to follow any briefing schedule entered in response to Remington's February 17, 2015 request or, if no briefing schedule is entered for Remington's motion to dismiss, by twenty-one days after this Court's decision on whether it has subject matter jurisdiction over this case.

Dated: Stamford, Connecticut
February 18, 2015

Respectfully submitted,

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355

Facsimile: (203) 724-2393
Email: michael@pllclaw.com

Attorney for defendants David LaGuercia and Riverview Sales, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2015, a copy of the foregoing MOTION FOR AN EXTENSION OF TIME TO RESPOND TO AND/OR MOVE AGAINST THE COMPLAINT was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/Michael R. Patrick/

Michael R. Patrick (ct26556)
PATRICK LLC
6 Landmark Square, Fourth Floor
Stamford, Connecticut 06901
Telephone: (203) 541-0355
Facsimile: (203) 724-2393
Email: michael@pllclaw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case No. 3:15-CV-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	February 19, 2015
Defendants.	)	

DEFENDANTS REMINGTON ARMS COMPANY, LLC
AND REMINGTON OUTDOOR COMPANY, INC.'S
RESPONSE TO PLAINTIFFS' MOTION FOR ENTRY OF SCHEDULING ORDER

Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), hereby respond to Plaintiffs' Motion for Entry of Scheduling Order (ECF 30), and oppose the schedule advanced by Plaintiffs for the following reasons:

The Remington Defendants properly removed this case to this Court, because there is no reasonable basis for a claim against the sole in-state defendant, Riverview Sales, and therefore that party has been improperly joined to this action. (ECF 1.) Under the Second Circuit's test for improper joinder, removal was and remains appropriate. Plaintiffs filed a motion to remand, contending that the Court is without subject matter jurisdiction. (ECF 27.) Plaintiffs now request a two-phased briefing schedule on its motion to remand, requiring multiple sets of briefs and rulings by the Court. (ECF 30 at p. 6.) Plaintiffs' request should be rejected.

Whether the Court has subject matter jurisdiction in this case should be addressed by the parties in one round of briefing as contemplated by Local Rules 7(a) and (d). There is no reason

why multiple "phases" of briefing and sequential Court rulings are needed.

Plaintiffs' desire to initially focus only on whether the "common defense" rule "governs this case" ignores that application of the rule requires inquiry into (a) the basis for the claims against Riverview Sales (the improperly joined, non-diverse defendant) and (b) a determination of whether Riverview Sales' defenses are equally dispositive of all claims against all defendants. *Boone v. Citigroup, Inc.*, 416 F.3d 382, 388-89 (5th Cir. 2005) ("It bears emphasizing that *Smallwood II* applies '*only* in that limited range of cases where the allegation of improper joinder rests *only* on a showing that there is no reasonable basis for predicting that state law would allow for recovery against the in-state defendant and *that* showing is *equally* dispositive of *all* defendants.'" (emphasis added in original)). Plaintiffs do not explain why the parties cannot address in one round of briefing whether the "common defense" rule should be followed and whether application of the rule requires remand to the state court. Plaintiffs' proposed briefing schedule is inefficient and unnecessary.

Plaintiffs' proposed schedule is also incompatible with application of the "common defense" rule. Whether the rule "governs" the case will not be "determin[ative]" of remand to state court, as Plaintiffs argue. (*See* ECF 30 at p. 6.) Analysis of Plaintiffs' claims against all parties and their defenses will be required in order to *apply* the rule. The inquiries necessary for application of the rule in this case will require analysis of The Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq.*, and how it impacts the claims made against Riverview Sales and each of the other defendants. Such an analysis will show that the claims made against Riverview Sales, as a "seller" of the firearm, are barred by certain provisions of the PLCAA. It will also show that a finding that the defenses to the distinct claims made against Riverview Sales (which are barred) will not be dispositive of all claims against all defendants.

As the Remington Defendants pointed out in their Notice of Removal, an additional, analytically distinct claim has been made against them for allegedly failing to design the firearm with certain "safety mechanisms," a product liability claim under the Connecticut Product Liability Act. (*See* ECF 1 at p. 8 n. 8); *see also* Conn. Gen. Stat. § 52-572m; *Boone*, 416 F.3d at 391 (an "analytically distinct" claim against diverse defendant precludes application of the common defense rule). Simply put, the merits of the distinct claim against the Remington Defendants will not be decided in the context of Plaintiffs' motion to remand, but in the context of the Remington Defendants' Rule 12(b)(6) motion.

The interplay between the Remington Defendants' improper joinder argument under the Second Circuit's test and the viability of the claims against all the defendants is why the Court would benefit from concurrent briefing by the parties on defendants' Rule 12(b)(6) motions to dismiss. Full concurrent briefing on subject matter jurisdiction and the merits will help the Court understand Plaintiffs' claims in light of the distinct immunities afforded to firearm manufacturers and those afforded to firearm sellers under the PLCAA.

While the Remington Defendants are not suggesting the Court should rule on Rule 12(b)(6) motions before deciding whether it has subject matter jurisdiction, briefing on the impact of the PLCAA on all claims against all parties will assist the Court in addressing the subject matter jurisdiction question. Nor are the Remington Defendants suggesting this Court should adopt the "common defense" rule. Indeed, there are compelling reasons why it should not. As the Remington Defendants pointed out in their Letter of February 17, 2015, the common defense rule has been heavily criticized even within those circuits that have adopted it. *See, e.g.*, *Note, Fifth Circuit Establishes "Common Defense" Exception to Fraudulent Joinder Doctrine*, 118 HARV. L. REV. 1086 (2005).

WHEREFORE, the Remington Defendants respectfully request that Plaintiffs' Motion for Entry of a Briefing Schedule be denied. The Remington Defendants request a briefing schedule on Plaintiffs' Motion to Remand as agreed to by the parties: the Remington Defendants will respond to the motion by March 11, 2015, and Plaintiffs will reply by March 25, 2015. The Remington Defendants further request an order setting a date for filing of Defendants' Rule 12(b)(6) motions with briefing concurrent with Plaintiffs' Motion to Remand. (The co-defendants, the Camfour Defendants and the Riverview Defendants, have indicated in their respective Motions for Extension that they are agreeable to filing motions to dismiss in accordance with the filing of the Remington Defendants' motion to dismiss (*see* ECF 29, 31).)

Dated: February 19, 2015.

Respectfully submitted,

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800

James B. Vogts (phv07263) (jvogts@smbtrials.com)
Andrew A. Lothson (phv07262) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system.

Joshua D. Koskoff
Alinor Sterling
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
asterling@koskoff.com
Attorney for Plaintiffs

Christopher Renzulli
Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	February 20, 2015
Defendants.	)	

REPLY IN SUPPORT OF MOTION FOR SCHEDULING ORDER

Plaintiffs Donna Soto, Ian and Nicole Hockley, David Wheeler, Mary D'Avino, Mark and Jacqueline Barden, William D. Sherlach, Neil Heslin and Scarlett Lewis, Leonard Pozner, Gilles Rousseau, and Natalie Hammond file this Reply Brief in support of their Motion to Set Scheduling Order (Docket No. 30) and in response to the opposition to that motion filed by the Bushmaster Defendants.

I. The Bushmaster Defendants Concede the Court Should Not Rule on Any 12(b)(6) Motions Until It Determines It Has Jurisdiction.

The Bushmaster Defendants concede that the Court should not rule on any Rule 12(b)(6) Motions until it determines it has subject matter jurisdiction. Docket No. 32 (Bushmaster Opp.), at 3 ("[T]he Remington Defendants are not suggesting the Court should rule on 12(b)(6) motions before deciding whether it has subject matter jurisdiction."). In light of this concession, and in light of the fact that the Bushmaster Defendants' claim to jurisdiction stands on a narrow exception to the rule of complete diversity that they have not yet proven applies, it is both

astonishing and unreasonable that the Bushmaster Defendants continue to insist that plaintiffs preemptively file a Memorandum in Opposition to their Rule 12(b)(6) Motion. A fairer and more efficient approach is to first brief the jurisdictional issues and then, if the Court has jurisdiction, to turn to any Rule 12(b)(6) Motions.

The Bushmaster Defendants suggest that considering Rule 12(b)(6) briefing will "assist the Court in addressing the subject matter jurisdiction question." Docket No. 32 (Bushmaster Opp.), at 3. The opposite is true. Rule 12(b)(6) is a different standard than that for a merits-based remand analysis. Under Rule 12(b)(6), the Court must determine whether, "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff," the complaint states a claim on which relief can be granted. *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 715 (2d Cir. 2011). In the merits-based aspect of the test for "fraudulent joinder", the Court must ascertain that the removing defendant has demonstrated clearly and convincingly "that there is *no possibility*, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460-61 (2d Cir. 1991) (emphasis supplied). In this analysis, "all factual *and legal issues* are resolved in favor of the plaintiff." *Id.* (emphasis supplied).

Considering briefing argued under the Rule 12(b)(6) standard would *not* assist the Court in deciding jurisdiction. More likely, it would lead to confusion of the standards and the issues. *Cf. Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992). ("[W]hile the [district] court did not characterize its analysis as being the same as it would make on a ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), that is exactly what it was. But the inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder."). It would also violate

the spirit of the Supreme Court's ruling in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), in which the Court rejected the practice of deciding cases under Rule 12(b)(6) in order to avoid thorny jurisdictional questions.[1]

It would be unfair and inefficient to require plaintiffs to file Rule 12(b)(6) oppositions that the Court will not consider until after it rules on jurisdiction, and which in all likelihood it will never consider. The Court should suspend Rule 12(b)(6) briefing, as proposed by plaintiffs, until after subject matter jurisdiction is decided.

II. The Bushmaster Defendants' Objections to a Two-Phase Jurisdictional Briefing Schedule Are Unreasonable.

The Bushmaster Defendants assert that the two-phase jurisdictional briefing schedule proposed by plaintiffs will be inefficient. Docket No. 32 (Bushmaster Opp.), at 1-3. They argue that plaintiffs misapply the common defense rule in a number of respects, and due to this claimed misapplication, briefing in one phase would be more efficient. It is no surprise to anyone that there is a dispute between the Bushmaster Defendants and plaintiffs as to whether *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), and the common defense rule preclude removal in this case. The Court clearly cannot determine that question in the context of a scheduling motion. Plaintiffs simply propose the Court do this in Phase One of the jurisdictional briefing. If the Court determines that the Bushmaster Defendants have failed to demonstrate clearly and convincingly that the common defense rule does *not* apply, then no further briefing in this Court will be required – because the case does not belong in this Court. If the Court determines that

[1] The jurisdictional analysis is *not at all* thorny here. In the simplest analysis, the Bushmaster Defendants have removed on the basis of a federal defense, something they have no right to do. *See Franchise Tax Bd. Of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14 (1983) ("[A] case may not be removed to federal court on the basis of a federal defense[.]").

further briefing is required, it can simply order Phase Two briefing. There is really no question, though, that the Court *must* address *Cockrell* and the common defense rule first.

In an attempt to evade the common defense rule, the Bushmaster Defendants now argue – in a rapid about-face – that the PLCAA defense available to Riverview Sales, Inc. is analytically distinct in significant ways from their own PLCAA defense. *See* Docket No. 32 (Bushmaster Opp.), at 2-3. Their Notice of Removal and January 21, 2015 letter to the Court, written before plaintiffs invoked the common defense rule, indicate otherwise. In addition, *Boone v. Citigroup, Inc.*, 416 F.3d 382 (5th Cir. 2005), on which the Bushmaster Defendants rely for this argument, involved a claim of fraudulent joinder based on a statute of limitations defense, not one based on a federal defense. The limitations showing made in support of the fraudulent joinder claim did not dispose of all claims against the diverse defendants. Plaintiffs would be very much surprised if the Bushmaster Defendants will concede that PLCAA, the basis for their claim that Riverview is fraudulently joined, does not also dispose of all of plaintiffs' claims against them – but this is the concession that their argument under *Boone* would truly require.

III. The Other Defendants Do Not Oppose Plaintiffs' Scheduling Proposal.

The Camfour and Riverview Defendants have taken no position as to which scheduling proposal should be entered. They have, however, affirmatively requested that their responses to the Complaint be due after jurisdiction is determined, in the event the Court prefers to proceed as plaintiffs propose. *See* Docket Nos. 29, 31 (Motions for Extension of Time to Respond to Complaint). It also appears that they will not be filing any Rule 12(b)(6) Motions today, which is inconsistent with the adoption of Bushmaster's proposal.

The rush to brief jurisdictional issues and the merits concurrently comes exclusively from the Bushmaster Defendants.

IV. Considerations of Jurisdictional Restraint, Fairness, and Efficiency Require the Adoption of Plaintiffs' Proposed Scheduling Order.

The very purpose of *Cockrell*'s restriction of the fraudulent joinder exception is to ensure that federal courts do not engage in merits-based decisions, including those of federal defenses, that belong in state court. *See* Docket Nos. 27, 27-1 (Pl. Mot to Remand & Memo. in Support). *Cockrell* also recognizes and limits a potential abuse of the fraudulent joinder exception, a recognition echoed and elaborated on by *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 571 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005), *Hunter v. Phillip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), and the other common defense rule cases. *See id.* Plaintiffs raise *Cockrell* and the common defense rule cases not only because they demonstrate the Court lacks jurisdiction, but also because they point out the danger of viewing this type of fraudulent joinder argument like any other. This case looks like *Smallwood* and *Hunter* because it *is* like *Smallwood* and *Hunter*: the removing defendant is attempting to use a federal defense as the basis for federal jurisdiction, and the law does not allow that.

Under the circumstances, plaintiffs should not be forced to file multiple briefs on issues that the Court has yet to reach when the Court's jurisdiction is not established (and will never be). Rather, the Bushmaster Defendants should be required in the first phase of briefing to establish that *Cockrell* and the common defense rule cases do not apply and that the Court truly requires additional briefing in order to decide the jurisdictional question. If the Bushmaster Defendants satisfy the Court that such briefing is required, then it makes sense to proceed with Phase Two briefing of the jurisdictional issues. Unless and until that occurs, it is unfair to plaintiffs to require such briefing, which at this stage is unnecessary. The pleadings on their face, the law, and the record created by the Bushmaster Defendants demonstrate that the Court lacks jurisdiction over this case.

For these reasons, plaintiffs respectfully request their Motion be granted.

THE PLAINTIFFS,

By /s/ Alinor C. Sterling

Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
Tel: (203) 336-4421

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Alinor C. Sterling
Alinor C. Sterling (ct17207)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case No. 3:15-CV-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	March 6, 2015
Defendants.	)	

DEFENDANTS REMINGTON ARMS COMPANY, LLC
AND REMINGTON OUTDOOR COMPANY, INC.'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), respectfully submit this Memorandum in opposition to Plaintiffs' Motion to Remand (ECF 27; and 27-1, "Pls.' Memo.").

INTRODUCTION

The Remington Defendants demonstrated in their Notice of Removal (ECF 1, "NOR") that this action was properly removed to this Court based on diversity jurisdiction under 28 U.S.C. § 1332, because, *inter alia*, the claims Plaintiffs have asserted against the in-state defendant, Riverview Sales, Inc. ("Riverview Sales"), are barred by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq*. ("PLCAA"). As a result, there is no reasonable basis for a cause of action against Riverview Sales, and it is considered improperly joined under the Second Circuit's test. *See Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998). In their motion papers, Plaintiffs do not refute that there is no reasonable basis for a claim against

Riverview Sales. For this reason alone, the Plaintiffs' motion to remand should be denied.[1]

Instead of challenging the basis for removal head-on, Plaintiffs have (1) urged the Court to adopt the "common defense rule," and (2) argued, albeit superficially, that it should apply here. Neither the Second Circuit nor the District of Connecticut has endorsed, let alone adopted, the "common defense rule." As discussed further below, there are compelling reasons not to adopt the rule. And even if the Second Circuit were to adopt the rule, it plainly does not apply here. In short, Plaintiffs' argument for remand fails.

I. Removal Based on the Improper Joinder of Riverview Sales was Proper.

In the Second Circuit, the improper or "fraudulent" joinder doctrine is satisfied and removal is appropriate when the defendant demonstrates that there is "no possibility" that the plaintiff "can state a cause of action against the non-diverse defendant in state court." *Pampillonia*, 138 F.3d at 461. In other words, joinder is improper "when it is established that there can be no recovery against the defendant under the law of the state on the cause alleged." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) (internal citation and original brackets omitted).

Indeed, this Court's analysis in *Fernandez v. Wal-Mart Stores E.*, No. 3:05-cv-1950, 2006 U.S. Dist. LEXIS 30213, *2 (D. Conn. May 10, 2006) (Chatigny, J.), followed the Second Circuit's *Pampillonia* "no possibility" test. As used in *Pampillonia*, "the language 'no possibility' has been interpreted as meaning no 'reasonable possibility' or 'no reasonable basis.'" *Doe v. Fed. Express Corp.*, No. 3:05-cv-1968, 2006 U.S. Dist. LEXIS 31825, *4 (D. Conn. May 22, 2006)

---

[1] The basis for removal was conspicuously raised in the NOR. Plaintiffs' failure to address it constitutes waiver. Indeed, any argument Plaintiffs might raise on this issue in their reply brief would be inappropriate and should be rejected. *Cf. Shuler v. Regency House of Wallingford, Inc.*, No. 3:05-cv-480, 2006 U.S. Dist. LEXIS 1557, *5 (D. Conn. Jan. 12, 2006) (Chatigny, J.) (argument raised for the first time in a "supplemental" or "reply" brief contravenes D. Conn. Civ. R. 7(d) and cannot be a basis to grant relief requested by movant).

(Eginton, J.) (citing *In re Rezulin Prods. Liability Litig.*, 133 F. Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001). To date, the focus under the Second Circuit's test is whether there is a reasonable basis for a claim against the non-diverse defendant.

Here, there is no reasonable basis for a cause of action against Riverview Sales, because it is a "seller" of a "qualified product" and this is a "qualified civil liability action" to which no exceptions to PLCAA immunity apply under the facts pleaded in Plaintiffs' Complaint. (NOR at ¶¶ 18-30.) Indeed, Plaintiffs specifically allege that Riverview Sales is a "qualified product seller[] within the meaning of 15 U.S.C. § 7903(6)." (Compl. at ¶ 34.) It is therefore entitled to immunity for claims attempting to hold it responsible for the criminal acts of Adam Lanza. *Cf. City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009); *Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009), *cert denied*, 130 S.Ct. 3320 (2010); *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 Conn. Super. LEXIS 1320 (Conn. Super. Ct. May 26, 2011) (granting retail sellers' motion to dismiss since PLCAA barred plaintiff's claims).

Plaintiffs do not contest that Congress created only six narrow exceptions to the definition of a "qualified civil liability action" and immunity under the PLCAA. *See* 15 U.S.C. §§ 7903(5)(A)(i)-(vi). Congress expressly provided that no provision of the PLCAA is to be "construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C). While Plaintiffs' Complaint alleges that Riverview Sales negligently entrusted the firearm to Nancy Lanza, created a common law public nuisance, and knowingly violated the Connecticut Unfair Trade Practices Act ("CUTPA") (*see* Compl. at Count Three, ¶¶ 174-194), none of these

claims fit within any of the six enumerated exceptions to PLCAA immunity.[2]

A. The Negligent Entrustment Exception Does Not Apply.

One of the exceptions to PLCAA immunity is an action against a seller for negligent entrustment. 15 U.S.C. § 7903(5)(A)(ii). Congress defined negligent entrustment as follows:

> As used in subpargraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, *the person to whom the product is supplied is likely to, and does, use the product* in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B) (emphasis added). Thus, a negligent entrustment action against a firearm "seller" must involve a sale of a firearm by a seller to "the person" who thereafter "use[s]" the firearm to cause harm to himself or herself, or others. Here, Plaintiffs allege that Riverview Sales sold the firearm to Nancy Lanza. (Compl. at ¶ 153.) They allege that nearly three years later Adam Lanza "used" the firearm to cause physical injuries to others. (*See id.* at ¶¶ 155, 166, 169, 170.) Plaintiffs do not and cannot contest that, under the definition provided by Congress, the sale of the rifle to Nancy Lanza—and not to Adam Lanza—precludes a negligent entrustment action against Riverview Sales.

B. Plaintiffs' CUTPA and Public Nuisance Claims against Riverview Sales Fail.

A second exception to PLCAA immunity is a claim against a seller for "knowingly violat[ing] a State or Federal statute applicable to the sale or marketing" of firearms. 15 U.S.C. §

---

[2] Plaintiffs state that they "assert claims of negligent entrustment, public nuisance, and violation of the Connecticut Unfair Trade Practices Act ('CUTPA'), Conn. Gen. Stat. §§ 42-110a *et seq.* against each of the defendants." (Pls.' Memo. at 4-5.) Plaintiffs ignore, however, that they have alleged an additional, analytically distinct claim against the Remington Defendants, which is a product liability action based on an alleged failure to design the firearm "with safety mechanisms that prevent the weapon from being fired by someone other than the purchaser." (Compl. at Count One, ¶ 183.) To be clear, the "design" defect allegations are not asserted against Riverview Sales. (*See* Compl. at Counts 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33.)

7903(5)(A)(iii). Plaintiffs have not alleged that Riverview Sales violated a statute applicable to the sale or marketing of firearms in selling the firearm to Nancy Lanza. Moreover, there is no reasonable basis on which Plaintiffs could make such an allegation because the sale was not made in violation of any applicable firearms statute. *See Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School*, at 36, *available at* http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf (last visited Mar. 5, 2014) ("All of the firearms . . . involved in these cases were legally purchased by the shooter's mother.").[3]

The exception for "knowingly violat[ing] a State or Federal statute applicable to the sale or marketing" of firearms does not encompass statutes of general application, but only those statutes that "expressly regulate firearms" or "that clearly can be said to implicate the purchase and sale of firearms." *City of New York*, 524 F.3d at 403 (holding that the New York criminal nuisance statute is not "applicable to the sale or marketing of firearms"); *Ileto*, 565 F.3d at 1135-36 (finding it "likely that Congress had in mind 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.").

Plaintiffs do not dispute that the only predicate statute referenced in their Complaint is CUTPA, a statute that does not expressly regulate or clearly implicate the regulation of firearms. To the contrary, CUTPA is a statute of general application that creates an action to recover an "ascertainable amount of money or property" resulting from unfair or deceptive business practices. Conn. Gen. Stat. § 42-110g. CUTPA is not the type of statute "Congress had in mind" when

---

[3] In analyzing improper joinder, "courts can look beyond the pleadings to determine if the pleadings can state a cause of action." *Pampillonia*, 138 F.3d at 461-62 (considering affidavit to decide whether defendant was improperly joined); *see Oliva v. Bristol-Myers Squibb Co.*, No. 3:05-cv-486, 2005 U.S. Dist. LEXIS 35881, *4-5 (D. Conn. Dec. 15, 2005); *In re Rezulin Prods. Liability Litig.*, 133 F. Supp. at 281-82.

carving out a narrow exception to the broad immunity afforded by the PLCAA. *See Ileto*, 565 F.3d at 1135-36. Plaintiffs' CUTPA claim fails against Riverview Sales.[4]

Plaintiffs' "public nuisance" claim against Riverview Sales also fails, since that claim does not fit within any of the six exceptions to firearm seller immunity. *See* 15 U.S.C. §§ 7903(5)(A)(i)-(vi); *City of New York*, 524 F.3d at 403 (ordering dismissal of nuisance claim as barred by the PLCAA); *Ileto*, 565 F.3d at 1135-36 (same). Congress did not provide an exception to immunity under the PLCAA based on common law public nuisance.

In sum, there is no reasonable basis for a cause of action against Riverview Sales. Under the facts pleaded by Plaintiffs, Riverview Sales is immune from liability and is improperly joined as a defendant in this case under the Second Circuit's test articulated in *Pampillonia*.

II. Plaintiffs' Motion to Remand Cannot be Salvaged by the "Common Defense Rule."

As Plaintiffs conceded in their brief, the common defense rule, as an exception to removal based on improper joinder, has not been adopted by the Second Circuit or in the District of Connecticut. Indeed, the rule has been heavily criticized even within those circuits that have adopted it. *See, e.g.*, *Note, Fifth Circuit Establishes "Common Defense" Exception to Fraudulent Joinder Doctrine.*, 118 HARV. L. REV. 1086 (2005) (analyzing the majority and dissenting opinions in *Smallwood v. Illinois Central Railroad Co. (Smallwood II)*, 385 F.3d 568 (5th Cir. 2004) (*en banc*), a case heavily relied on by Plaintiffs here). But whether or not this Court adopts the common defense rule, Plaintiffs' remand argument should be rejected.

---

[4] CUTPA is also not the type of statute that can serve as the basis for a negligence *per se* claim against Riverview Sales under Connecticut law, and thus cannot be the basis for a negligence *per se* claim within the § 7903(5)(A)(ii) exception to immunity. *See generally Gore v. Peoples Savings Bank*, 235 Conn. 360 (1995).

A. The Common Defense Rule Does *Not* Apply.

The common defense rule, recognized by a few courts outside the Second Circuit, is a "narrow" exception to improper joinder-based removal. *Smallwood II*, 385 F.3d at 575-76. It applies only "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant *equally disposes of all defendants*[.]" *Id.* at 571. (*Accord* Pls.' Memo. at 9.)

Plaintiffs' argument ignores that application of the rule requires inquiry into (a) the basis for the claims against Riverview Sales, and (b) a determination that Riverview Sales' defenses are *equally* dispositive of *all* claims against *all* defendants. *See Boone v. Citigroup, Inc.*, 416 F.3d 382, 388-89 (5th Cir. 2005) ("It bears emphasizing that *Smallwood II* applies '*only* in that limited range of cases where the allegation of improper joinder rests *only* on a showing that there is no reasonable basis for predicting that state law would allow for recovery against the in-state defendant and *that* showing is *equally* dispositive of *all* defendants.'") (emphasis added in original). Thus, the crux of the common defense rule is:

> "[O]nly" where the showing that there is no reasonable basis for predicting state law would allow the plaintiff to recover against the resident defendant is such that the same showing "equally" and "necessarily" "compels" the conclusion that recovery is precluded against "all" non-resident defendants, then there is no improper joinder, but simply a *wholly meritless suit*.

Boone, 416 F.3d at 390 (emphasis added).

In arguing for remand, Plaintiffs are forced to advocate the position that they have a "wholly meritless suit." Indeed, a Seventh Circuit case cited in Plaintiffs' brief holds that if a plaintiff prevails on a motion to remand based on application of the common defense rule, dismissal in state court is required under the doctrine of judicial estoppel:

> And had the plaintiff prevailed in this court on the basis of the

> common-defense doctrine, and thus succeeded in getting the case remanded to state court, her claims against the [out-of-state] defendants in the remanded proceeding would still be barred, for she would have run head-on into the bar of judicial estoppel. She would have prevailed in this court in getting her case remanded to state court by persuading us that those defendants were identically situated to Niemann [the in-state defendant]—which if true would be a complete defense because her claim against Niemann is frivolous—only to turn around and argue in the state court that her claim against the diverse defendants was not subject to the learned-intermediary doctrine [*i.e.*, the defense] after all and so her claim against them should survive Niemann's dismissal.

Walton v. Bayer Corp., 643 F.3d 994, 1002 (7th Cir. 2011) (Posner, J.) (*see* Pls.' Memo. at 13).

Because of the compelling logic of the Seventh Circuit's decision in *Walton*, Plaintiffs here have stopped short of scrutinizing how the PLCAA impacts each claim against each defendant—a threshold analysis that this Court must undertake before applying the common defense rule in this case. Simply put, it is not enough for Plaintiffs to argue that all defendants will broadly assert the PLCAA as a "defense" and that, therefore, remand is appropriate under the common defense rule. And no case cited by Plaintiffs stands for the proposition that a broad characterization of a so-called "common defense" is sufficient to find that the defense "equally" and "necessarily" "compels" dismissal of *all* claims against *all* defendants, diverse and non-diverse alike. *Boone*, 416 F.3d at 390. To the contrary, cases cited by Plaintiffs support a probing review of each claim against each defendant and the corresponding defenses to each claim. *See, e.g.*, *Walton*, 643 F.3d at 1001 (recognizing common defense rule; analyzing the "defense" as to the in-state defendant; finding the rule inapplicable because the "defense" raised would not equally apply to all defendants as plaintiff had asserted additional allegations against the out-of-state defendants; affirming the district court's dismissal of plaintiff's claims against the in-state defendant and denial of the motion to remand) (*see* Pls.' Memo. at 13).

Because Plaintiffs' analysis stops short, the Remington Defendants will provide the

necessary analysis—which plainly shows that the common defense rule does not apply. A judicial determination that there is no reasonable basis for Plaintiffs' claims against Riverview Sales because of the protection afforded by the PLCAA, will not, by itself, require dismissal of *all* claims Plaintiffs have asserted against *all* parties. Plaintiffs cannot deny that they pleaded a separate, "analytically distinct" product liability claim against the Remington Defendants (*see* NOR at p. 8 n. 8), which will not be addressed in the context of the motion to remand but only under the Remington Defendants' Rule 12(b)(6) motion. Specifically, Plaintiffs allege the Remington Defendants failed to "design" the firearm with certain "safety mechanisms," a product liability claim. (*See* Compl. at Count One, ¶¶ 183-84); *Boone*, 416 F.3d at 391 (an "analytically distinct" claim against diverse defendant precludes application of the common defense rule).

Furthermore, a finding that the PLCAA bars claims against Riverview Sales will not "equally" dispose of all claims against the Remington Defendants. The PLCAA does not afford equal immunity to all who manufacture and sell firearms. For example, it treats claims made against "manufacturers" and "sellers" differently. *See, e.g.*, 15 U.S.C. §§ 7903(2) (defining manufacturer), (6) (defining seller), (5)(A)(ii) (providing an exception to immunity for actions brought against a seller, *but not* against a manufacturer, for negligent entrustment or negligence per se), and (5)(B) (defining "negligent entrustment" to involve the "supplying of a qualified product by a seller," *but not* by a manufacturer).

Indeed, Plaintiffs' Complaint identifies Riverview Sales as a "qualified product seller within the meaning of 15 U.S.C. § 7903(6)." (Compl. at ¶ 34.) No similar allegation is made with respect to the Remington Defendants. (*See* Compl. at ¶ 25-26.) Nor could there be, because the Remington Defendants are "manufacturer[s]," and Plaintiffs' allegations make clear that the Remington Defendants have been sued in their capacity as the manufacturers of the firearm.

Plaintiffs simply choose to ignore the distinctions among defenses available to different defendants under the PLCAA.

Several cases support the Remington Defendants' position. The Fifth Circuit's decision in *Boone v. Citigroup, Inc.* reiterated that the common defense rule is "narrow," and applies only when the same showing necessarily compels the conclusion that recovery against all defendants is precluded. 416 F.3d at 390. The *Boone* court declined to apply the rule for two reasons. First, not all claims against the diverse defendants were "premised on vicarious liability for the tortious acts of the three non-diverse [defendants]." *Id.* at 391. Thus, not all of the claims against the diverse defendants would "necessarily" be disposed of with the claims against the non-diverse defendants. Second, while the defenses set forth by both the diverse and non-diverse defendants were very similar, they were still "analytically" distinct. *Id.* The court rejected the plaintiffs' broad argument that, because all of the defendants depended on a statute of limitations defense, the case should be remanded. *Id.* The court distinguished between the non-diverse and the diverse defendants' statute of limitations arguments because some of the diverse defendants' alleged acts triggered tolling provisions that were inapplicable to the non-diverse defendants. *Id.* Moreover, "some of [the plaintiffs'] claims against the non-resident defendants [were] analytically distinct from *and in addition to* their . . . claims against . . . the resident defendants." *Id.* at 391-92 (emphasis added). Because "the failure of [the plaintiffs'] claims against the resident defendants does not in and of itself cause those of the claims against the non-resident defendants . . . to fail as well," the common defense rule did not apply. *Id.* at 392.

Here, there is no "vicarious liability" circumstance where the liability of the Remington Defendants hinges on a finding of liability against Riverview Sales *on any of the claims asserted by Plaintiffs*. Nor can Plaintiffs contest that they alleged an additional and analytically distinct

"design" defect product liability claim against the Remington Defendants that is not alleged against Riverview Sales. Under either framework articulated by the *Boone* court, the common defense rule cannot apply here.

In *Rainwater v. Lamar Life Ins. Co.*, the Fifth Circuit analyzed whether the common defense rule applies where the defenses of the in-state defendant will not bar all claims against the out-of-state defendants: "[T]his case turns, therefore, on whether the limitations defense that disposes of all claims against in-state defendants in fact disposes of all claims against all defendants, as the principle of *Smallwood* is triggered only when all defendants are reached." 391 F.3d 636, 638 (5th Cir. 2004). The defendants argued that the plaintiffs alleged state law claims that were unique to the out-of-state defendants, *e.g.*, improperly setting interest rates and improperly charging particular fees, and thus, the statute of limitations defense applicable to the in-state defendants did not reach all claims. *Id.* at 638. While the court could not determine the common defense rule's applicability because the "plaintiffs nebulously drafted their complaint," the court did state the following:

> [T]he inclusion of such claims against [the out-of-state defendants] would mean that the statute of limitations that disposes of all claims against the in-state defendants would not constitute a 'common defense.' That in turn would preclude remand under the rule of *Smallwood.*

Id. at 638.

Here, separate analyses dictate whether the PLCAA bars all claims against the Remington Defendants and Riverview Sales, which places this case outside the scope of *Smallwood II* and the common defense rule. This alone dictates that the common defense rule does not apply. *Cf. Wingate v. Air Products Inc.*, 166 F. App'x 98, 101 (5th Cir. 2006) (holding that the common defense rule did not apply where the defense did not apply equally to both the diverse and

non-diverse defendants; and rejecting plaintiff's argument that his allegations pleaded against the non-diverse defendant applied "equally" to the diverse defendant and "vice versa").

Finally, Plaintiffs' heavy reliance on the district court opinions in *Intershoe, Inc. v. Filanto S.P.A.*, 97 F. Supp. 2d 471 (S.D.N.Y. 2000) (Pls.' Memo. at 4) and *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288 (D. Mass. 2004) (Pls.' Memo. at 14-15), is misplaced. In *Intershoe*, the basis for removal was an alleged "fraudulent" misjoinder of a plaintiff (*i.e.*, plaintiffs allegedly added its own Italian "[c]hairman of the board" as a named plaintiff whose presence in the lawsuit destroyed diversity jurisdiction because there were "aliens on both sides of the case" as the defendants were also Italian). 97 F. Supp. 2d 474. Plaintiffs here mistakenly contend that it was the defendants' "chairman" that was alleged to have been fraudulently joined in *Intershoe*. (Pls.' Memo. at 14.) Plaintiffs' misreading aside, *Intershoe* did not even involve an alleged "common defense" as the basis for remand, and thus has no relevance to the present case.

In *In re New England*, the court remanded three individual plaintiffs' claims that had been part of MDL proceedings. The common defense rule applied because the liability of the removing out-of-state defendants hinged on the liability of the in-state defendants based on the doctrine of *respondeat superior*. 324 F.Supp.2d at 305-06. In contrast, the liability of the Remington Defendants in no way hinges on the liability of Riverview Sales, since there is no such *respondeat superior* circumstance, and none has been alleged. As a result, *In re New England* has no application to this case. [5]

---

[5] Plaintiffs appear to rely on *Hunter v. Philip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), for the proposition that under *Smallwood II*, remand is required when "implied" preemption of the claims against the in-state defendant "effectively decided the entire case." (*See* Pls.' Memo. at 13.) This amounts to a restatement of the general "common defense rule" analysis that a defense which equally and necessarily compels dismissal of all claims against all parties

B. There Are Compelling Reasons Not to Adopt the Rule in the First Place.

In the few circuits that have adopted the rule,[6] the century-old Supreme Court case, *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914), has been identified as the origin of a "common defense" analysis. Indeed, the Plaintiffs have declared that the "rule" of *Cockrell* should control this case. (ECF 30 at p. 6.) As critics of the common defense rule have aptly pointed out, however, circuits that have adopted the rule have stretched the *Cockrell* holding well beyond its confines. *See, e.g.*, *Note, Fifth Circuit Establishes "Common Defense" Exception to Fraudulent Joinder Doctrine*, 118 HARV. L. REV. 1086, 1092 (2005) (concluding that the majority opinion in *Smallwood II* only "nominal[ly]" adheres to the logic of *Cockrell*).

The "rule" of *Cockrell* is much narrower than Plaintiffs would lead the Court to believe. *Cockrell* stands for the proposition that when the liability of the removing out-of-state defendant is predicated on the liability of the in-state defendant, such as in a "joint liability" or *respondeat superior* circumstance (*e.g.*, employer/employee as in *Cockrell*), then the federal court should

---

requires remand. *Id.* at 1045. Indeed, the *Hunter* court went on and conducted a complete analysis of whether the plaintiffs' claims against the in-state defendant were "implied[ly] preempt[ed,]" and found that, because that doctrine did "not apply" to all such claims, the in-state defendant had not been fraudulently joined. *Id.* at 1048. In any event, if a plaintiff was successful in arguing that remand were proper because a preemption defense applied equally to all claims against all defendants, it would be "judicially estopped" from arguing the preemption defense *did not* apply in state court, where immediate dismissal of all claims against all parties would be required. *See Walton*, 643 F.3d at 1002.

[6] Several courts have expressly declined to adopt the common defense rule. For example, the Eleventh Circuit has "had the occasion to adopt the rule but declined to do so." *See Byrnes v. Small*, 2014 U.S. Dist. LEXIS 161770, *10 (M.D. Fla. Nov. 18, 2014) ("To begin with, the 'common defenses' rule is not binding law in the Eleventh Circuit, which has expressly avoided relying on it, indicating a reluctance to adopt it.") (citing *Henderson v. Washington Nat'l Ins. Co.*, 454 F.3d 1278, 1282 n.4 (11th Cir. 2006) (noting that the "common defenses" rule "draws on a century-old Supreme Court case . . . that was resurrected by the Third and Fifth Circuits in the past decades")); *In re Genetically Modified Rice Litig.*, 618 F. Supp. 2d 1047, 1051 n.4 (E.D. Mo. 2009) ("Plaintiffs also argue that I should apply the 'common defense rule' and grant remand in this case. Courts in this circuit have never applied that rule, and I decline to do so here.").

remand to state court because dismissal of *all* claims against the in-state defendant would necessarily compel dismissal of *all* claims against the out-of-state defendant. *See* 232 U.S. at 153 ("liability" of the removing employer was "predicated upon the alleged negligence of [its employees]").

The "rule" of *Cockrell* has no application to this case because there is no such *respondeat superior* allegation that the Remington Defendants' liability is premised on a finding that Riverview Sales is liable. Thus, even if the Court were to adopt the "rule" of *Cockrell*—as Plaintiffs' have urged (ECF 30 at. p. 6), remand is still inappropriate because a finding of no liability against Riverview Sales will not compel the same finding as to the Remington Defendants.[7]

Absent from Plaintiffs' motion for remand is discussion of how this Court has analyzed removal based on improper or "fraudulent" joinder under the Second Circuit's test set forth in *Pampillonia.* The reason for this omission is obvious: the analysis employed by this Court in *Fernandez v. Wal-Mart Stores East, Inc.*, 2006 U.S. Dist. LEXIS 30213 (D. Conn. May 10, 2006) (Chatigny, J.), is inconsistent with adoption of the common defense rule. In *Fernandez*, Wal-Mart removed a slip-and-fall personal injury case to this Court. *Id.* The plaintiff had also sued the Wal-Mart store manager. *Id.* Wal-Mart argued there was no reasonable basis for a claim against the store manager because he "cannot be held personally liable under a negligence theory." *Id.* at *2. Focusing on the claim against the store manager, the Court noted that "at least one other Connecticut plaintiff has succeeded in suing a Wal-Mart store manager for negligence," which

[7] It is also worth noting that the *Cockrell* holding was premised on the idea that the only way a defendant could show fraudulent joinder was by establishing that the in-state defendant had been added to the lawsuit "in bad faith." 232 U.S. at 152. *Cockrell* was decided long before the Second Circuit recognized the "no reasonable basis" test for improper or fraudulent joinder. *Pampillonia*, 138 F.3d at 461.

meant there was a reasonable possibility of liability against the store manager and remand was required. *Id.* at *2.[8]

Under the Court's approach, the focus of an improper or "fraudulent" joinder analysis is the claims against the non-diverse defendant, and nothing more. Contrary to the Court's approach in *Fernandez*, adoption of the common defense rule necessarily requires analysis of the specific claims against and defenses of the diverse defendants. Indeed, this is a primary criticism of the rule:

> [O]ur established test is an efficient test because it focuses only on the joinder of the nondiverse defendant and does not require us to examine the case against the diverse defendant. The [*Smallwood II*] majority's 'common-defense' rule, on the other hand, requires the district court to go one step further and examine the entirety of the case.

Smallwood II, 385 F.3d at 578 (Jolly, J., dissenting).

The Second Circuit's *Pampillonia* test and the common defense rule are incompatible. Indeed, the Second Circuit has employed an "objective" test, focused solely on the non-diverse defendant, to determine whether there was an improper joinder under the "no reasonable basis" analysis. That "objective" test is consistent with the dissenting opinions in *Smallwood II*: "The subjective intent of the plaintiff is irrelevant; instead, our precedent, unequivocally and without exception, has evaluated claims of fraudulent joinder with a simple, well-understood, objective two-prong test -- that is, until today." *Smallwood II*, 385 F.3d at 578 (Jolly, J., dissenting).

One thing is readily apparent from Plaintiffs' superficial analysis of (a) the common defense rule, (b) their claims alleged against each defendant, and (c) the intricacies of the defenses

---

[8] Applying the "rule" of *Cockrell* to the Court's *Fernandez* case adds further perspective. Even if this Court had reached the opposite conclusion—that is, finding there was no basis for a claim against the store manager—such a showing would not have equally compelled dismissal of Wal-Mart. Because the liability of Wal-Mart was not alleged to have been "predicated" on the liability of its store manager, *Cockrell* would not have required remand.

of each defendant: Plaintiffs have little desire to engage in a critical analysis of these central issues. But supplying the Court with only a partial analysis does everyone involved a disservice, and clearly does not supply valid grounds to grant remand. To remand based on application of the common defense rule requires a finding that there is no possibility of a claim against Riverview Sales and that this finding "necessarily" and "equally" "compels" dismissal of *all* claims against *all* parties, including the Remington Defendants. Because that finding is inapplicable here, remand should be denied.

III. Plaintiffs' Additional Arguments for Remand are Premature and Not Well-Founded.

Plaintiffs' interpretation of the "well-pleaded complaint rule" requires the Court to first adopt and then apply the common defense rule articulated by the Fifth Circuit in *Smallwood II.* (Pls.' Memo. at 18.) In this respect, the well-pleaded complaint rule is just another way of arguing the common defense rule. The Second Circuit has not adopted Plaintiffs' approach to the well-pleaded complaint rule. Nor do Plaintiffs argue that the Remington Defendants removed this case based on federal question jurisdiction pursuant to 28 U.S.C. § 1331. Indeed, the Remington Defendants removed based on 28 U.S.C. § 1332 (NOR at ¶ 5), and therefore the well-pleaded complaint rule does not apply.

Plaintiffs' argument that the Remington Defendants' removal petition runs afoul of the "forum defendant rule" is similarly unavailing. (Pls.' Memo. at 19.) The operation of the forum defendant rule is contingent upon the existence of a "properly joined" defendant who is a "citizen of the State in which [the] action is brought." 28 U.S.C. § 1441(b)(2). Plaintiffs' assertion that Riverview Sales fits this bill merely begs the central question presented in this motion, which is whether Riverview Sales has indeed been improperly joined, *i.e.*, whether there is a reasonable basis for a claim against Riverview Sales under the Second Circuit's test articulated in

Pampillonia. 138 F.3d at 461; *see also Bova v. U.S. Bank, N.A.*, 446 F. Supp. 2d 926, 931 (S.D. Ill. 2006) ("The forum defendant rule applies only to defendants who have been 'properly joined and served' within the meaning of 28 U.S.C. § 1441(b). Correspondingly, where a resident defendant has been fraudulently joined, the forum defendant rule is irrelevant.") (internal citations omitted). Plaintiffs do not contest the reasons articulated in the Notice of Removal for why there is no reasonable basis for a claim against Riverview Sales. Plaintiffs' argument for remand based on the forum defendant rule should be rejected.

IV. Plaintiffs' Request for Costs and Attorneys' Fees Should Be Denied.

It is well settled that, "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Plaintiffs have not shown that the Remington Defendants "lacked an objectively reasonable basis" for removing this case based upon diversity jurisdiction. To the contrary, as shown in the Notice of Removal and above, Riverview Sales is improperly joined under the Second Circuit's test and the "common defense rule," even if adopted, does not require remand to the state court.

CONCLUSION

For the foregoing reasons, the Motion for Remand should be denied.

Respectfully submitted,

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901

(203) 358-0800

James B. Vogts (phv07263) (jvogts@smbtrials.com)
Andrew A. Lothson (phv07262) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system.

Joshua D. Koskoff
Alinor Sterling
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
asterling@koskoff.com
Attorney for Plaintiffs

Christopher Renzulli
Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
V.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A FREEDOM GROUP, INC., A/K/A REMINGTON OUTDOOR GROUP, INC., ET AL	)	**MARCH 10, 2015**
Defendants	)	

PLAINTIFFS' MOTION FOR EXTENSION OF TIME
TO RESPOND TO MEMORANDUM IN OPPOSITION
TO MOTION TO REMAND, ON CONSENT

Pursuant to Local Civil Rule 7(b), plaintiffs respectfully move for an extension of time in which to respond to the Memorandum in Opposition to plaintiffs' Motion to Remand filed by the defendants, Remington Arms Company, LLC, and Remington Outdoor Company, Inc. Plaintiffs seek an extension of one week (from March 20, 2015, to March 27, 2015) due to long-standing vacation plans of counsel during the week of March 20. Plaintiffs' counsel has made inquiry to counsel for all defendants and there is no objection to the requested extension.

In support of this Motion, plaintiffs represent as follows:

1. This case was removed to this Court on January 14, 2015.

2. Plaintiffs filed a Motion to Remand on February 13, 2015 (Dkt. No. 27).

3. Defendants Remington Arms Company, LLC, and Remington Outdoor Company, Inc. filed a Memorandum in Opposition to the Motion to Remand on March 6, 2015 (Dkt. No. 34).

4. Plaintiffs intend to file a Reply to the Memorandum in Opposition. Pursuant to Local Rule 7(d), plaintiffs' Reply is due March 20, 2015.

5. Undersigned plaintiffs' counsel has long-standing plans to be traveling with her family the week of March 16-20, 2015, and therefore cannot reasonably meet the March 20 deadline, despite diligent efforts to do so, without altering these plans.

6. Counsel for defendants have no objection to the requested extension.

For the above reasons, plaintiffs respectfully request that the Court grant this Motion and extend the deadline for filing their Reply to March 27, 2015.

DATED: March 10, 2015

Respectfully submitted,

By **/s/ Alinor C. Sterling (CT17207**

ALINOR C. STERLING, CT17207
JOSHUA D. KOSKOFF, CT15619,
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
asterling@koskoff.com
jkoskoff@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFCIATE OF SERVICE

I hereby certify that on March 10, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Alinor C. Sterling (CT17207
ALINOR C. STERLING, CT17207
JOSHUA D. KOSKOFF, CT15619,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	March 24, 2015
Defendants.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE
REPLY BRIEF IN EXCESS OF TEN PAGES

Pursuant to Local Rule 7(d), plaintiffs' Reply to defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Remand may not exceed ten pages. Plaintiffs respectfully request leave of the Court to exceed the ten page limit by up to five additional pages.

In support of this Motion, plaintiffs represent as follows:

1. This case was removed to this Court on January 14, 2015.

2. Plaintiffs filed a Motion to Remand on February 13, 2015 (Dkt. No. 27).

3. Defendants Remington Arms Company, LLC, and Remington Outdoor Company, Inc. filed a Memorandum in Opposition to the Motion to Remand on March 6, 2015 (Dkt. No. 34).

4. On March 10, 2015, plaintiffs were granted a seven day extension in which to respond to defendants' Opposition (Dkt. No. 36).

5. Plaintiffs' Reply is due March 27, 2015.

6. The issues raised by defendants' removal and plaintiffs' subsequent Motion to Remand are complex and critical to fully address as the Court's subject matter jurisdiction is in issue.

7. Plaintiffs are making a concerted effort to confine their Reply to ten pages in accordance with Local Rule 7(d), but believe that up to five additional pages may be necessary to adequately address the relevant issues.

8. Plaintiffs' counsel has contacted counsel for each of the defendants, and they have no objection to the granting of this Motion.

For the above reasons, plaintiffs respectfully request that the Court grant this Motion and permit plaintiffs to file a Reply of up to 15 pages in length.

DATED: March 24, 2015

Respectfully submitted,

By **/s/ Alinor C. Sterling (CT17207)**

ALINOR C. STERLING, CT17207
JOSHUA D. KOSKOFF, CT15619
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
asterling@koskoff.com
jkoskoff@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFCIATE OF SERVICE

I hereby certify that on March 24, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Alinor C. Sterling (CT17207)
ALINOR C. STERLING, CT17207
JOSHUA D. KOSKOFF, CT15619

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	March 27, 2015
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO REMAND

The flaws in the Bushmaster Defendants' claim to diversity jurisdiction, which were never well hidden in the first place, are now completely apparent. The Bushmaster Defendants have conceded that their claim that Riverview is fraudulently joined rests exclusively on PLCAA, and that their own 12(b)(6) Motion, when it is eventually filed, will likewise assert PLCAA as a bar to *all* of plaintiffs' claims. These concessions are dispositive. In their opposition papers, moreover, defendants fail to refute that it is their burden to establish fraudulent joinder. Under *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), and the record created by the Bushmaster Defendants themselves, the outcome is clear: they fail to establish fraudulent joinder. Their fraudulent joinder argument is an impermissible attempt to avoid the well-pleaded complaint rule, not a showing that Riverview is an improper defendant. The Court must therefore remand this case.

Knowing they cannot prevail under *Cockrell*, the Bushmaster Defendants first simply urge the Court to ignore it and consider the merits. As plaintiffs have already argued at length, fundamental principles of jurisdictional restraint require that the Court consider *Cockrell* before

addressing the merits. Defendants then misstate the *Cockrell* test as a test of the merits of plaintiffs' claims. But *Cockrell* does not test the merits, nor does it test *plaintiffs'* claims per se. It tests the removing defendants' fraudulent joinder argument. The Court assumes the defense asserted against the in-state defendant to be true (*Cockrell* calls this "the showing"), much as it would assume the truth of the plaintiffs' allegations in a Rule 12(b)(6) analysis. It then assesses whether those *assumedly* successful arguments would also dispose of the plaintiffs' claims against the diverse defendants; *Cockrell* never reaches the merits, and deliberately so.

The Bushmaster Defendants finally attempt to avoid *Cockrell* by pointing to differences between plaintiffs' allegations against Riverview and our allegations against them. To establish fraudulent joinder, defendants would need to prove not just that allegations against them differ in some respect from those against Riverview, *but that the difference results in PLCAA being potentially unavailable to them as a defense*, a critical point that they completely ignore. They claim plaintiffs assert a product liability claim against them particularly – which is simply not so – and that they are sued as a "manufacturer," not as a "seller" – in fact, we alleged they are both. Even if defendants had correctly represented the allegations of the Complaint, they have not even attempted to argue that these supposed distinctions render PLCAA potentially unavailable to them as defense.

I. The Bushmaster Defendants Concede Dispositive Issues.

The Bushmaster Defendants do not dispute that their claim of fraudulent joinder is based solely on PLCAA. They do not dispute that their Motion to Dismiss will be as described in their January 21, 2015 Letter – based also on PLCAA. If there were any remaining doubt that PLCAA is a common defense, the Bushmaster Defendants dispelled it by withholding their

12(b)(6) Motion, which was due to February 20, 2015. Their failure to file only confirms that their allegations to establish fraudulent joinder are their 12(b)(6) arguments.

These concessions are dispositive: they establish that PLCAA is asserted as a common defense. Defendants nonetheless seek refuge in obfuscation. They argue that the Court must engage in "a probing review of each claim against each defendant and the corresponding defenses to each claim." *See* Opp. at 8. While in *some* cases courts engaged in a more thorough investigation of the pleadings because the issues framed on appeal required that degree of complexity, in other cases, such as *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568 (5th Cir. 2004), and *Hunter v. Phillip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), a straightforward record led to a simple conclusion.[1] The issues here – framed by the Bushmaster Defendants themselves in their Notice of Removal, January 21, 2015 Letter, and Opposition – are simple. Defendants have themselves demonstrated that Riverview is properly joined.

Finally, the Bushmaster Defendants do not dispute that it is their burden to establish fraudulent joinder. Plaintiffs pointed out explicitly and repeatedly in our opening motion that the removing defendant has the burden to establish that its claim of fraudulent joinder is within the limits of that doctrine as defined by *Cockrell*. DN 27-1, Pl. Mem. at 8 (citing *Brown v. Eli Lilly*,

[1] *Smallwood*, 385 F.3d at 574, which involves a common defense of federal preemption, devotes only a few sentences to the pleadings. Likewise *Hunter*, 582 F.3d at 1044-45, spends only a paragraph or two on the pleadings in its analysis of the common defense rule. *Hunter* does then go on, however, to correct the district court's determination that the plaintiff's claims against the in-state defendant were preempted, a necessary step in light of the difficulty it would pose for the plaintiff on remand if that erroneous determination had remained unaddressed. *Walton v. Bayer Corp.*, 643 F.3d 994, 1001 (7th Cir. 2011), involved a learned intermediary defense that defeated the plaintiffs' claims against the in-state defendant as a matter of law, but did not defeat the claims against the diverse defendants in the same manner. In determining that the common defense rule did not apply, the court simply tested the elements of the learned intermediary defense. *Boone v. Citigroup, Inc.*, 416 F.3d 382, 392-93 (5th Cir. 2005), contains a more in-depth analysis. This makes sense since *Boone* involved limitations defenses and tolling doctrines that were available to some defendants but not to others, and arose on a well-developed factual record following discovery and a summary judgment proceeding.

654 F.3d 347, 356 (2d Cir. 2011)), 10-11 (citing *Cockrell*, 232 U.S. at 153), 17. It is black letter law that the party invoking the Court's jurisdiction bears the burden to establish it. *E.g. McNutt v. General Motors Accept. Corp. of Indiana*, 298 U.S. 178, 189 (1936) (party invoking a federal court's jurisdiction "must carry throughout the ligation the burden of showing that he is properly in court"). This point is also made in cases on which defendants themselves rely. *E.g. Smallwood*, 385 F.3d at 573 ("To justify removal on improper joinder grounds, Illinois Central was required to prove that the joinder of MDOT was improper."). The Bushmaster Defendants make no effort to refute these authorities.[2]

They do, however, make the fatal error of arguing *as if* it were plaintiffs' burden to establish fraudulent joinder. For example, they assert that our choice to leave them to their proof reflects a weakness in our position. *E.g.* Opp. at 8 ("Plaintiffs here have stopped short of scrutinizing how the PLCAA impacts each claim against each defendant."). It is not our burden to salvage defendants' spurious claim of fraudulent joinder. That burden rests wholly and exclusively with the Bushmaster Defendants. Instead of proving fraudulent joinder, however, they have only confirmed that this case belongs in state court.

---

[2] The removing defendants' failure to appreciate governing procedural rules manifests again at page 2, footnote 1 of their brief, where they contend that plaintiffs' failure to address the merits of their removal arguments "constitutes waiver." This contention misstates the record and the law. Plaintiffs challenged the merits arguments by indicating both in our opening papers and in a scheduling motion that we contest them. DN 27-1, Pl. Mem. at 16 ("Plaintiffs contest the defendants' attack on the pleadings in all respects: PLCAA does not bar plaintiffs' claims against Riverview, nor does it bar plaintiffs' claims against the other defendants."); DN 30, Pl. Sched. Mot. at 6 (requesting that the Court schedule briefing on merits arguments for remand following determination of the *Cockrell* issue). And federal subject matter jurisdiction is put in issue merely by suggestion – thus the merits issues are *already* in issue in this case. Finally, challenges to subject matter jurisdiction are *never* waived. *Moodie v. Fed. Reserve Bank of New York*, 58 F.3d 879, 882 (2d Cir. 1995) ("'Defects in subject matter jurisdiction cannot be waived and may be raised at any time during the proceedings.'"); *Marcella v. Capital Dist. Phys. Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002) (federal jurisdiction "may not be conferred in any way by the parties, including by means of waiver or estoppel"); *see also* Fed. R. Civ. P. 12(h)(3) (subject matter jurisdiction may be raised even by suggestion).

II. The Bushmaster Defendants Misstate and Overstate the Fraudulent Joinder Test: *Cockrell*'s Rule Concerning the Limits of Fraudulent Joinder Does Not Involve a Determination of the Merits.

To begin with first principles, plaintiffs here invoke the rule of *Cockrell*, which describes the limits of the fraudulent joinder doctrine and is binding on the Court. To the extent defendants characterize plaintiffs' argument as requiring the Court to adopt the common defense rule as it is articulated in *Smallwood* and *Hunter*, they are imprecise. We refer to the common defense cases for support, but we do not argue that the Court must adopt the test articulated in those cases to decide this Motion. While *Smallwood* and *Hunter* persuasively demonstrate the importance of limiting fraudulent joinder based on a federal defense, the parameters of the fraudulent joinder exception defined by *Cockrell* already suffice to determine the issues here.

A. *Cockrell* Does Not Address the Merits of the Claim of Fraudulent Joinder.

The Bushmaster Defendants fundamentally misunderstand the *Cockrell* test. This misconception is most apparent when they make the astonishing claim that by invoking the common defense rule, "Plaintiffs are forced to advocate the position that they have a 'wholly meritless suit.'" Opp. at 7. It is the *removing defendants* who have the burden to show fraudulent joinder. *See* Part I, at p. 4 above. We merely raised the shortcoming in their fraudulent joinder argument. The impossible task of salvaging it resides with them. Our position is and always will be that we prevail on the merits. To suggest we have taken any other position is absurd and blatantly misstates the record. *See, e.g.*, DN 27-1, Pl. Mem. at 16-17; DN 30, Pl. Sched. Mot. at 6; *see also* Part III below (briefly addressing merits arguments).

Cockrell does not test the merits of a claim of fraudulent joinder. In the key analytical passage, the Court states,

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the

> alleged negligence of the latter, *the showing* manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, *it* [the showing] *indicated that the plaintiff's case was ill-founded as to all the defendants.*

Cockrell, 232 U.S. at 153 (emphasis supplied). The "showing" is the removing defendant's showing in support of fraudulent joinder, credited as true. No other reading of this passage is possible. It cannot be the plaintiff's allegations, because those were facially sufficient. Nor is the Court relying on the "showing" to make an *actual* determination that the removing defendant is correct or that the entire case is ill-founded any more than it would decide the merits in a Rule 12(b)(6) motion. We know this with absolute certainty because the *Cockrell* appeal arose following a determination of the merits in favor of the plaintiff and against the removing defendant. *Cockrell*, 232 U.S. at 149 (before appeal was taken, the action "proceeded to trial which resulted in a judgment against the company").[3]

Cases following *Cockrell* adopt its language and use it to mean the same thing. *E.g. Smallwood*, 385 F.3d at 574 ("[W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder."); *Boone*, 416 F.3d at 391; *Hunter*, 582 F.3d at 1044. *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), explains that the test avoids the merits because to pre-determine them without jurisdiction would be error. In *Boyer*, the removing defendants argued that the in-state defendant was fraudulently joined due to the existence of a release. The court held that it need not investigate the validity of the release because that issue was equally applicable to the removing defendant. *Id.* at 112. It would be absurd to read that statement (as defendants would) as a disposition of the merits of the release

[3] *Hunter* illustrates the same point. There, the court determined that there was no showing of fraudulent joinder due to the common defense rule and then went on to clarify that the plaintiff stated claims against the in-state defendant. 582 F.3d at 1045, 1047. *A fortiori*, the common defense analysis could not have involved a rejection of the merits of the plaintiff's claims.

defense, because immediately afterward the court criticizes the lower court for determining the validity of the release and thereby "in the guise of deciding whether the joinder was fraudulent, stepp[ing] from the threshold jurisdictional issue into a decision on the merits." *Id.*

Defendants here rely on a passage from *Walton v. Bayer Corp.*, 643 F.3d 994, 1002 (7th Cir. 2011), as if it establishes that a plaintiff who raises the common defense rule successfully in federal court condemns her case on remand. Opp. at 7-8. For the reasons already given, *Walton* would completely misunderstand and misapply *Cockrell* if this were indeed its holding. The statement cited is not a characterization of the common defense rule *per se*, but rather dictum particular to the facts of the case. In fact, the holding in *Walton* supports plaintiffs. In *Walton*, the plaintiff brought an action against a pharmacy and Bayer in connection with ill effects from Yazmin. Bayer removed, asserting that the learned intermediary doctrine barred claims against the in-state pharmacy. The plaintiff then argued that her claims against Bayer were the same as those against the in-state pharmacy and thus the learned intermediary doctrine was a common defense. She ignored her own allegation that Bayer concealed information concerning Yazmin, rendering the defense potentially ineffective as to Bayer. *Walton* therefore found that the common defense rule did not apply.[4]

---

[4] In dicta, *Walton* goes on to discuss a hypothetical possibility of judicial estoppel arising due to the way the plaintiff framed her arguments (and even then not clearly reconcilable with *Cockrell*). It appears that the *Walton* plaintiff did not clarify that Bayer had the burden of proof and that she was leaving Bayer to its proof to show that there was no common defense. Thus, the court felt it could have been led into error by her representations (although in fact it was not), rather than looking to Bayer to show there was no common defense. *Id.* at 1002. Obviously, it is very important to avoid this kind of confusion. This is exactly why we have taken pains to demonstrate that the test focuses on the showing by the removing defendants; that they have the burden to prove PLCAA is not a common defense; and that while we invoke the common defense rule, we maintain that we have alleged claims permitted by PLCAA against all defendants.

B. Defendants Fail to Establish Riverview is Fraudulently Joined.

The Bushmaster Defendants assert that the Fifth Circuit's interpretation of the common defense rule in *Boone*, 416 F.3d at 389-90, governs the Court's analysis and establishes that the common defense rule does not apply here.

As indicated above, the Court is not bound to follow the letter of the Fifth Circuit's interpretation of *Cockrell*, although that authority is certainly persuasive. *Boone*'s conclusion as to the scope of the common defense rule may be an overly narrow interpretation of *Cockrell*. Judge Keeton, in *In re New England Mut. Life Ins. Co. Sales Prac. Litig.*, 324 F. Supp. 2d at 306, came to a different conclusion:

> The concerns that underlie *Cockrell* also apply to arguments offered to prove fraudulent joinder that simultaneously show that *some claims* against the diverse defendant or defendants must fail. Such arguments do not engender or compel the conclusion that the non-diverse defendants were wrongfully brought into a controversy that did not concern them. They do not offer a legitimate reason to set apart the diverse defendants as "fraudulently joined."

Id. (emphasis in original). Defendants ignore this reading completely, likely because it deprives them of *any* argument that they can establish fraudulent joinder. Nonetheless, the Court need not reach the question of whether *Boone*'s test or Judge Keeton's test is the right test, because defendants have not even met their burden under *Boone*.

The Bushmaster Defendants assert that the common defense rule does not apply because plaintiffs pleaded an "analytically distinct" products liability claim against them. Opp. at 9-10, citing *Boone*, 416 F.3d at 390. While relying on *Boone*'s wording, they ignore its holding. In *Boone*, the limitations defenses that were the basis for the claim of fraudulent joinder *were potentially ineffective as to the diverse defendants*. *E.g. id.* at 392 ("[I]t is facially obvious that the pendency of the Arizona suit could not toll limitations as to any of the resident defendants. The tolling issue, however, cannot be resolved on that basis as to the diverse defendants because

at least two of them were named defendants in the Arizona suit."). Under *Boone*, to establish an analytically distinct claim defendants would need to show not just any difference in plaintiffs' allegations but that the difference in the allegations renders PLCAA *ineffective as a defense as to them.*[5]

Defendants do not even argue that differences in plaintiffs' allegations against them may cause their PLCAA defense to be potentially ineffective, and again it is their burden to do so. They argue that plaintiffs have asserted a products liability claim against them. Opp. at 9. We have not; our claims sound in negligent entrustment, violation of CUTPA, and public nuisance. And even if we had alleged such a claim, *the Bushmaster Defendants have not even attempted to show that it would not be barred by PLCAA*. In fact, they have already taken the *opposite* position. *See* DN 1 ¶ 22 (asserting that PLCAA bars *any* qualified civil liability action against a seller or manufacturer of a firearm); Jan. 21, 2015 Letter, at 2 ("Plaintiffs' lawsuit falls squarely within the protections afforded to firearm manufacturers by Congress and 'it should be immediately dismissed.'").[6]

Defendants also argue that PLCAA "treats claims against manufacturers and sellers differently." Opp. at 9. They contend that there is an exception to immunity for a negligent entrustment claim against a seller, but not a manufacturer. *Id.* Again, they mistake our pleadings. We allege the Bushmaster Defendants are sellers *and* manufacturers. *E.g.* Compl. ¶ 25. And even if we accepted *arguendo* their premise that the negligent entrustment exception applies only to sellers and they are only manufacturers, all their argument would establish is that

---

[5] As stated previously, *Walton* makes the same point. 643 F.3d at 1001. *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636, 638 (5th Cir. 2004), also relied on by defendants, is in accord.

[6] We vehemently disagree with these contentions. *See* Part III, below. But *our* position as to the merits is simply not in issue under *Cockrell*. *Cockrell* tests the *removing defendants'* "showing" and puts the burden on *them* to demonstrate their showing is not a common defense.

they have a *stronger* PLCAA defense than Riverview. (Again, this is their argument, not ours.) In short, the Bushmaster Defendants again fail to establish that PLCAA is not a common defense.

Finally, in an argument whose placement (last) and treatment (cursory) shows just how much strength defendants feel it has, defendants assert that the Court should ignore *Cockrell* because it arose in a *respondeat superior* context, and because the test applied in this Circuit is "inconsistent with the adoption of the common defense rule." Opp. at 13-14. To be sure, *Cockrell* articulates a limitation on fraudulent joinder in a *respondeat* case; it does not follow that the limitation it so clearly articulates applies *only* in *respondeat* cases. Both the Fifth and the Ninth Circuit have determined that this limitation is particularly important where, as here, a federal defense is the basis for a removing defendant's showing of fraudulent joinder. To hold otherwise potentially enables defendants to circumvent the well pleaded complaint rule. Nor is *Cockrell* inconsistent with the Second Circuit's test. *See In re New England Mut. Life Ins. Co. Sales Prac. Litig.*, 324 F. Supp. 2d at 304 (following Second Circuit test and *Cockrell*). The need to apply a merits test simply does not arise when a removing defendant has failed to identify a flaw specific to the plaintiff's case against the in-state defendant. If the removing defendant fails in this initial showing, the case belongs in state court.

III. Plaintiffs in Any Event Prevail on the Merits.

The Bushmaster Defendants have repeatedly invited the Court to ignore the limitations of fraudulent joinder established by *Cockrell* and skip to the merits. We have resisted because that is the rightful role of a Connecticut court. However, in light of the Bushmaster Defendants' repeated accusation that plaintiffs' (proper) focus on the jurisdictional issue amounts to a

concession as to the merits, plaintiffs feel obligated to address – in an introductory fashion – the speciousness of that charge.

Plaintiffs' negligent entrustment and Connecticut Unfair Trade Practices Act claims against Riverview are not barred by PLCAA.[7] The test for establishing fraudulent joinder is onerous for the removing party. The removing defendant "must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is *no possibility*, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998) (emphasis supplied). Moreover, "all factual and legal issues must be resolved in favor of the plaintiff." *Id.* Since the Bushmaster Defendants do not allege fraud, they bear the "heavy burden" of establishing that plaintiffs have no possibility of stating a valid cause of action against Riverview. *Id.* They have not, and cannot, meet this burden.

A. Plaintiffs' Claims of Negligent Entrustment Against Riverview Satisfy PLCAA's Negligent Entrustment Exception.

The Bushmaster Defendants do not dispute either that PLCAA provides an exception for claims of negligent entrustment, or that plaintiffs have stated a claim for negligent entrustment under Connecticut common law.[8] Rather, their sole argument is that plaintiffs' negligent

---

[7] Due to space considerations in this Reply brief, as well as plaintiffs' intention to address these issues shortly in a separate Supplemental Motion to Remand, plaintiffs address the negligent entrustment and CUTPA claims very briefly here and do not address the public nuisance claims at all.

[8] Section 390 of the Restatement (Second) of Torts "governs liability for negligent entrustment of dangerous instrumentalities" in Connecticut. *Bryda v. McLeod*, 2004 WL 1786822, at *2 (Conn. Super. Ct. July 12, 2004). Under that standard, a seller of a firearm may be held liable under the common law tort of negligent entrustment for supplying a firearm to a person that the seller knows, or reasonably should know, is likely to use it in a manner involving unreasonable risk of physical harm to others. Plaintiffs have alleged each of those elements against Riverview, and those allegations are binding here. *See* Compl. Count Three ¶¶ 174-189.

entrustment claim will fail because it is foreclosed by PLCAA's negligent entrustment definition. That definition reads:

> "[N]egligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B). According to the Bushmaster Defendants, this language precludes any action where the person to whom the firearm was supplied did not *directly* cause the harm. In other words, they posit that because the firearm was sold to Nancy Lanza but "used" by Adam Lanza "to cause physical injuries to others . . . [PLCAA] precludes a negligent entrustment action against Riverview Sales." Opp. at 4. The implication of this argument is that the only "use" contemplated by the statute is shooting the firearm to cause physical injury. Defendants do not identify any basis for this unduly narrow reading, nor could they: it is contrary to fundamental canons of statutory interpretation and contradicted by U.S. Supreme Court precedent.

1. The Bushmaster Defendants' Restrictive Interpretation is Untenable.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012).

a. <u>The Plain Meaning of "Use" Encompasses the Transfer of the Weapon to Another.</u>

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Since "use" is not defined in PLCAA, it must be construed in accord with its natural meaning. In *Smith v. United States*, 508 U.S. 223 (1993), the Supreme

Court was called upon to discern "the everyday meaning" of the word "use" after a criminal defendant challenged a penalty enhancement on the grounds that trading a firearm in exchange for drugs did not constitute a "use" of the firearm under the statute. After consulting multiple dictionaries and reviewing past interpretations of the term, the Court concluded that the ordinary meaning of "use" is expansive. Notably, it rejected the defendant's argument that the statute required proof that the firearm was used *as a weapon*, noting simply that "the words 'as a weapon' appear nowhere in the statute." *Id.* at 229.

Smith – which was decided over a decade before PLCAA was enacted – disposes of defendants' restrictive reading. It is absurd to assume that the ordinary meaning of "use" is actually "discharge." "It is one thing to say that the ordinary meaning of 'uses a firearm' *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of 'use' that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use." *Smith*, 444 U.S. at 230. Indeed, given that "one can use a firearm in a number of ways," *id.*, the meaning of "use" in PLCAA encompasses lending or transferring a firearm to another.

b. <u>The Language and Design of the Statute As a Whole Confirm This Ordinary Meaning.</u>

"In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (quotation marks and citation omitted). In PLCAA, Congress twice employed language that can be obviously contrasted with its choice of the word "use." In the threshold definition of

"qualified civil liability," the statute proscribes certain actions that result "from the criminal or *unlawful misuse* of a qualified product." *See* 15 U.S.C. § 7903(5) (emphasis added). The statute goes on to enumerate several types of claims that are not considered a "qualified civil liability action." The exception governing product liability claims refers to scenarios where "the *discharge* of the [firearm] was caused by a volitional act that constituted a criminal offense[.]" *Id.* at § 7903(5)(A)(v) (emphasis added).

Congress' decision to include the terms "discharge" and "unlawful misuse" in the text of PLCAA indicates that it knew how to employ narrower terms to refer to specific uses of firearms, and that it did so when such terms were appropriate. Consequently, "use" must be read not merely to mean "discharge" or "unlawful misuse." *Cf. Milner v. Dep't of Navy*, 562 U.S. 562, 131 S. Ct. 1259, 1272 (2011) (holding that "law enforcement purposes" must be read to "involve more than just investigation and prosecution" because other parts of the statute "demonstrate [that] Congress knew how to refer to these narrower activities").

B. Plaintiffs' CUTPA Claims Against Riverview Satisfy PLCAA's Predicate Statute Exception.

PLCAA, while barring "qualified civil liability actions," also provides that a qualified civil liability action shall *not* include "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[.]" 15 U.S.C. § 7903(5)(A)(iii). This is known as the predicate statute exception.

Plaintiffs claim that Riverview violated CUTPA, and that these claims come within the predicate statute exception to PLCAA. The Bushmaster Defendants acknowledge the exception but argue that it does not apply to plaintiffs' CUTPA claims. Opp. at 4. They rely on *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2004), to establish that the

predicate statute exception applies only to statutes that "expressly regulate firearms." However, *City of New York*'s holding is far broader. The court stated:

> We find nothing in the statute [PLCAA] that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute.

Id. at 400. It remains the role of a Connecticut court to say that CUTPA is such a statute. *See Pampillonia*, 138 F.3d at 460-61 (in assessing whether there is "no possibility" that a plaintiff can prevail against in-state defendant, court must resolve all legal issues in favor of the plaintiff).

THE PLAINTIFFS,

By /s/ Alinor C. Sterling (ct17207)

Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
Tel: (203) 336-4421

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case No. 3:15-CV-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	April 4, 2015
Defendants.	)	

DEFENDANTS REMINGTON ARMS COMPANY, LLC AND REMINGTON OUTDOOR COMPANY, INC.'S MOTION FOR LEAVE TO FILE SUR-REPLY TO PLAINTIFFS' REPLY ON THE MOTION FOR REMAND

Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), respectfully seek leave of Court to file the attached Sur-reply to respond to arguments and issues raised by Plaintiffs for the first time their Reply brief [ECF 39].

INTRODUCTION

The Remington Defendants request leave to file a sur-reply to address new arguments and issues Plaintiffs should have raised in their opening brief rather than waiting until their Reply. They are:

- Whether, under the Second Circuit's *Pampillonia* test, there is no reasonable basis for Plaintiffs' negligent entrustment and CUTPA claims against Riverview Sales, Inc. ("Riverview Sales").[1]

[1] Plaintiffs also contend they could not fully present their *Pampillonia* arguments on their claims against Riverview Sales in their Reply "[d]ue to space considerations". (Reply at 11 n. 7.) Their contention should be rejected: after obtaining an unopposed 1-week extension to file their Reply [ECF 36], Plaintiffs were granted an unopposed 5-page extension [ECF 38], which they did not even fully use.

- Which party bears the burden to show the Second Circuit would adopt the common defense rule and demonstrate that it applies to the circumstances of this case.

- Whether the Plaintiffs can maintain claims against the Remington Defendants as both "manufacturers" and "sellers" under the PLCAA and how this impacts application of the common defense rule.

- Whether the Plaintiffs pleaded a product liability claim against the Remington Defendants and how this impacts application of the common defense rule.

ARGUMENT

Plaintiffs have invited a sur-reply by insisting that threshold jurisdictional analyses be briefed without adherence to Local Rules 7(a) and 7(d). These analyses are whether there is "no reasonable basis" for a claim against Riverview Sales under the Second Circuit's test for improper joinder; whether the Second Circuit would adopt the common defense rule; and whether, if adopted, the common defense rule applies to the circumstances of this case, requiring remand to state court. There was no legitimate reason why Plaintiffs could not have addressed the entirety of their arguments for remand in their opening brief, especially in light of the detailed Notice of Removal filed in support of the Remington Defendants' right to remove the case to federal court based on Second Circuit precedent.

Plaintiffs have also stated they intend to file a "Supplemental Motion to Remand" providing, presumably, more argument on the same topics. (Reply at 11 n. 7.) Plaintiffs' piece-meal argument should not be countenanced. Nonetheless, the Remington Defendants will respond to that motion accordingly. And while the Court has not yet granted the Remington Defendants permission to file motions to dismiss, as is necessary to file such motions under the standing order of the Court, the Plaintiffs have turned around and argued that the Remington Defendants' "withholding" of a motion to dismiss is a concession that the common defense rule

controls this case. (*Id.* at 2-3.) This argument is spurious. Regardless, the Remington Defendants should be given a fair opportunity to address all issues raised by Plaintiffs so that the Court can make a fully informed decision regarding whether to keep the case. Accordingly, the Remington Defendants' proposed sur-reply is attached hereto.

Plaintiffs' counsel has been contacted about whether they object to the Court granting leave to file a sur-reply, and they have responded and requested that the following position be represented to the Court: "We do not object to a surreply of up to five pages. We do object to pages in excess of five."

CONCLUSION

For the foregoing reasons, the Remington Defendants request the Court grant leave to file the attached [proposed] sur-reply, and for any other relief the Court deems appropriate.

Respectfully submitted,

/s/ *James B. Vogts*
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800

James B. Vogts (phv07263) (jvogts@smbtrials.com)
Andrew A. Lothson (phv07262) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system.

Joshua D. Koskoff
Alinor Sterling
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
asterling@koskoff.com
Attorneys for Plaintiffs

Christopher Renzulli
Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case No. 3:15-CV-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	April 4, 2015
Defendants.	)	

[PROPOSED]
DEFENDANTS REMINGTON ARMS COMPANY, LLC
AND REMINGTON OUTDOOR COMPANY, INC.'S
SUR-REPLY TO PLAINTIFFS' REPLY ON THE MOTION TO REMAND

I. Plaintiffs Have Alleged "No Reasonable Basis" For A Claim Against Riverview Sales.

Plaintiffs alleged three claims against Riverview Sales: negligent entrustment; violation of CUTPA; and creation of a public nuisance. In their Reply, Plaintiffs do not contest that their public nuisance claim is barred by the PLCAA, purporting to save this issue for "a separate Supplemental Motion to Remand." (Reply at 11 n.7.) Plaintiffs' arguments for why there is a reasonable basis for liability against Riverview Sales on their other two claims fail.

A. Plaintiffs' "negligent entrustment" claim against Riverview Sales is barred.

The Court should reject Plaintiffs' attempt to expand the definition of negligent entrustment found in 15 U.S.C. § 7903(5)(B) to fit the facts of their case. Tellingly, Plaintiffs' Reply stops short of articulating exactly how the sale of the rifle to Nancy Lanza forms the factual basis of a negligent entrustment action defined in the PLCAA, which requires the firearm to be supplied to "the person" who then "use[s]" it to cause an unreasonable risk of harm to herself or others. But Plaintiffs have not alleged that Nancy Lanza "use[d]" the rifle at all. She legally purchased the rifle from Riverview Sales in 2010 and, nearly three years later, her son took the rifle from their shared home (after first killing her) and committed his heinous crimes. Adam Lanza "use[d]" the rifle, not his mother. There is no basis to allege that Riverview Sales negligently entrusted the rifle to Nancy Lanza.

Plaintiffs argue that firearm "use" in the context of the PLCAA's definition of negligent entrustment can mean more than firearm discharge based on the Supreme Court's analysis of the word "use" in an entirely different statute enacted 37-years before the PLCAA. *See Smith v. United States*, 508 U.S. 223 (1993) (interpreting § 924(c)(1) of the Gun Control Act of 1968). Indeed, the Supreme Court has recognized that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but

when used more than once in the same statute or even in the same section." *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561, 574 (2007) (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The same language in different statutes may be construed together only when the statutes are *in pari materia*. *Firstar Bank, N.A. v. Faul*, 253 F. 3d 982, 990 (7th Cir. 2001) (before construing different statutes *in pari materia*, a court must determine that the purposes and subjects of the acts are in fact similar); *Lieberman v. FTC*, 771 F.2d 32, 40 (2d Cir. 1985) (even same term within different version of same statute is not *in pari materia* where goals of the statute changed).

Section 7903(5)(B) of the PLCAA and Section 924(c)(1) of the Gun Control Act ("GCA") cannot be construed *in pari materia*. Section 924(c)(1) of the GCA provides for enhanced punishment of persons convicted of using or carrying a firearm "during or in relation to any crime of violence or drug trafficking crime." Section 7903(5) of the PLCAA, on the other hand, provides for gun seller immunity in civil actions "resulting from the criminal or unlawful use" of firearms by third parties. There is no basis to conclude that Congress intended that a "use" of a firearm under the PLCAA's definition of negligent entrustment would have the same meaning as a "use" of a firearm for purposes of enhanced punishment under the GCA. *See Firstar Bank*, 253 F.3d at 990 (citing cases refusing to apply the *in pari materia* canon "to laws superficially relating to similar subjects where a finer examination revealed the purposes of the laws varied").

In the context of civil tort law, "use" of a firearm can only mean employing the firearm's functional features to cause or threaten injury. A firearm cannot be "use[d]" to cause a risk of injury other than by shooting it, or at least threatening to shoot it. And more importantly, the "use" of a firearm under the definition of negligent entrustment must create "unreasonable risk of physical injury to *the person* or others." 15 U.S.C. § 7903(5)(B) (emphasis added). It is impossible

for a person to "use" a firearm to harm herself without discharging it (*e.g.*, suicide). Any construction of "use" to include anything other than firing or threatening to fire a firearm is contrary to the plain meaning of the text and purpose of the PLCAA.

In *Smith*, the defendant was found to have "used" a firearm under Section 924(c)(1) when he traded the firearm for drugs. *Smith*, 508 U.S. at 226. As discussed above, Section 924(c)(1) provides for enhanced punishment of persons convicted of carrying or using a firearm "during or in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1). As the Court subsequently observed in *Bailey v. United States*, "even a reference to a firearm in [a criminal's] possession could satisfy § 924(c)(1)," provided the reference was "calculated to bring about a change in the circumstance of the predicate offense . . . just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'" 516 U.S. 137, 147 (1995). But while criminal laws address many different kinds of firearm "uses," including illegal possession and armed robbery, civil tort law exists to compensate victims who have been wrongly injured. The PLCAA was enacted to protect firearm sellers against tort claims for damages arising from third-party misuse of firearms, and thus should be construed in the context of civil tort law, not federal criminal law.

Interpreting the "negligent entrustment" exception to encompass only situations in which "the person to whom" the seller "suppl[ies]" the firearm is "the person" who thereafter "use[s]" the firearm to harm "the person or others," 15 U.S.C. § 7903(5)(B), reflects the reality that a seller who entrusts an instrumentality to a customer—whether a car, a firearm or other potentially dangerous instrumentality—can only assess the competency of the customer with whom it is dealing to use the instrumentality safely. *See Phillips v. Lucky Gunner, LLC*, No.14-cv-2822, 2015 U.S. Dist. LEXIS 39284, *19 (D. Colo. Mar. 27, 2015) (dismissing all claims against sellers as barred by the PLCAA, including a negligent entrustment claim: "the standard for negligent entrustment liability

is narrower than the ordinary negligence standard because the manner in which the chattel is ultimately used is outside the supplier's control"). Extending liability under a negligent entrustment theory for the actions of persons unknown to the supplier, who later gain access to the instrumentality, eliminates the concept of "entrustment" from the cause of action altogether, and potentially leads to unlimited supplier liability. *See id.* at *19.

Even assuming *arguendo* that the expansive definition of the term "use" that Plaintiffs urge is appropriate in this context, their pleadings fail to establish such use *by Nancy Lanza.* Relying on the Supreme Court's construction of the term "use" in the GCA, Plaintiffs assert that "the meaning of 'use' in PLCAA encompasses lending or transferring a firearm to another." (Reply at 13.) Plaintiffs' Complaint does not allege, however, that Nancy Lanza lent or transferred the firearm to Adam Lanza. *See* Compl. ¶ 154 (alleging that Adam Lanza "retrieved" the firearm on the morning of December 14, 2012). To the extent Plaintiffs assert that passive conduct—such as Nancy Lanza's mere legal possession of the firearm in her home—constitutes "use" in the context of the PLCAA, they attempt to twist the tort of negligent entrustment beyond recognition. The PLCAA was enacted, in part, to prohibit this very type of claim.

A use of an entrusted firearm by a person *other* than "the person" who was supplied the firearm cannot trigger the negligent entrustment exception. This limitation is consistent with congressional intent:

> This provision would cover only cases where the dealer knows or should know that the person who is buying the gun is likely to misuse it and the buyer does, in fact, misuse it. The courthouse door is still shut to victims of the far more common practice of dealers negligently selling guns to traffickers who, in turn, supply criminals.

Committee on the Judiciary, *Report together with Dissenting and Additional Dissenting Views on the Protection of Lawful Commerce in Arms Act*, H.R. REP. No. 109-124, at 143 (June 14, 2005)

(available at http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt124/pdf/CRPT-109hrpt124.pdf (last visited Apr. 3, 2015)). Although resort to legislative history is unnecessary when there is no ambiguity, the Remington Defendants provide this legislative history as it underscores the limited scope of the negligent entrustment exception to PLCAA immunity. *Cf. Davis v. United States*, 495 U.S. 472, 479 (1990) (phrase "for the use of"—a phrase which "on its face . . . could support any number of different meanings," is narrowed by reference to legislative history).[1]

B. CUTPA is not a statute that regulates the "sale or marketing" of firearms and is thus not a predicate exception under the PLCAA.

CUTPA does not expressly regulate the sale or marketing of firearms, nor does the statute clearly implicate such activities. Rather, CUTPA is a statute of general application which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). Alleged violations of statutes of general application, such as CUTPA, cannot serve as the predicate for an action under § 7903(5)(A)(iii), which requires a "knowing" violation of a statute "applicable to the sale or marketing of firearms." 15 U.S.C. § 7903(5)(A)(iii) (predicate exception).

The Second Circuit has held that the predicate exception encompasses only (1) "statutes that expressly regulate firearms"; (2) statutes that "courts have applied to the sale and marketing of firearms"; or (3) "statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *City of New York v. Beretta U.S.A. Corp*, 524 F.3d

[1] *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 Conn. Super. LEXIS 1320 (Conn. Super. Ct. May 26, 2011), is instructive on, *inter alia*, the scope of negligent entrustment. In *Gilland*, the plaintiff was shot with a handgun the shooter had stolen from the defendant firearm dealer. The court rejected plaintiffs' argument that the dealer had entrusted the handgun to the shooter "for his use." *Id.* at 33. To the contrary, the theft of the handgun by the person who caused plaintiffs' harm was "the opposite of being provided a handgun for use since it alleges a taking without permission." *Id. Gilland* stands for the simple proposition that to invoke the negligent entrustment exception, the seller must supply the firearm to the buyer "for his use."

384, 404 (2d Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009). *City of New York* addressed whether the New York state public nuisance statute was the type of statute that Congress intended to serve as a predicate statute under Section 7903(5)(A)(iii). After examining the context in which Congress used the word "applicable," various canons of statutory construction, and the legislative history of the PLCAA, the Court of Appeals concluded that the public nuisance statute was not the type of statute that qualifies for the predicate exception under Section 7903(5)(A)(iii). *Id.* at 398-404 ("[T]he predicate exception was meant to apply only to statutes that actually regulate the firearms industry.").

While there are a number of federal and state statutes that actually regulate the firearms industry[2] or that "clearly can be said to implicate the purchase and sale of firearms," CUTPA is not among them.[3] Indeed, finding that a knowing violation of CUTPA—an unfair or deceptive act—can serve as a predicate violation under Section 7903(5)(A)(iii) would allow the exception to "swallow" the protections afforded by the PLCAA and violate the principle that statutory exceptions are to be applied narrowly to preserve the statute's primary purpose. *See City of New York*, 329 F.3d at 403; *Ileto v. Glock*, 565 F.3d 1126, 1134-36 (9th Cir. 2009) (rejecting plaintiffs' argument that general California tort statutes can serve as predicate statutes); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp.2d 174, 180-81 (D.D.C. 2009) (Strict Liability Act not a predicate statute); *Phillips*, 2015 U.S. Dist. LEXIS 39284 at *14-15 (rejecting argument that municipal code provisions, many of which referenced firearms, could serve as predicate statutes).

---

[2] *See* 15 U.S.C. § 7901(a)(4) ("The manufacture, importation, possession, sale and use of firearms and ammunition in the United States are heavily regulated by Federal, State and local laws.").

[3] Plaintiffs refer to a single passage from *City of New York* suggesting that, "under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 400. It is telling, however, that Plaintiffs make no effort to distinguish CUTPA from the public nuisance statute that the Second Circuit rejected as a predicate statute in *City of New York*.

II. Plaintiffs Have The Burden To Show That The Second Circuit Would Adopt The "Common Defense Rule" And That It Should Apply Here.

Within the Second Circuit, the "common defense rule" is not a recognized exception to the doctrine of improper or "fraudulent" joinder as a basis for removal to federal court. Although the Remington Defendants have the burden of demonstrating that there is "no reasonable basis" for the claims alleged against Riverview Sales, once improper joinder is established, Plaintiffs have the burden to show that the common defense rule would be adopted by the Second Circuit and, if so, that it applies to the circumstances of case. The Supreme Court has noted that, since 28 U.S.C. § 1441(a) was amended in 1948 to introduce exceptions to removal, "there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003).[4]

Plaintiffs have not demonstrated that the Second Circuit would adopt the common defense rule as an exception to the *Pampillonia* test for improper joinder. *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459 (2d Cir. 1998). Despite Plaintiffs' heavy reliance on the common defense rule in their opening memorandum, Plaintiffs now say they simply "invoke the rule of *Cockrell*" and "do not argue that the Court must adopt the test articulated in" the common defense cases such as *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568 (5th Cir. 2004) ("*Smallwood II*"). (*Compare* Pls.' Mem. in Supp. of Remand at 9-14 *with* Reply at 5.) Putting aside that Plaintiffs now soft-pedal the extent of their reliance on the common defense rule, Plaintiffs' suggestion that the rule of *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), standing alone, is "sufficient" to

[4] Analogous circumstances are removals based on the Class Action Fairness Act ("CAFA"), which, like the doctrine of improper joinder, is an exception to complete diversity of citizenship since it permits removal with only minimal diversity. After a CAFA-based removal, a plaintiff seeking to remand because of an exception to CAFA bears the burden of establishing that the exception applies, thereby requiring remand. *Ava Acupuncture P.C. v. State Farm Mut. Auto. Ins. Co.*, 592 F. Supp. 2d 522, 528 (S.D.N.Y. 2008) (collecting cases on point); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007); *Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675 (7th Cir. 2006); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542 (5th Cir. 2006).

mandate remand to state court in this case ignores the limited scope of the Supreme Court's decision. *Cockrell* stands for the proposition that removal is improper where the diverse defendant's liability is "predicated" on the liability of the non-diverse defendant, such as in the *respondeat superior* context. *Id.* at 153. Since Plaintiffs assert claims against the Remington Defendants that are independent from (and not predicated on) those asserted against Riverview Sales, *Cockrell* is inapposite to the case at bar. (*See* Opp'n at 13-14.)

Even if this Court were to adopt the common defense rule, Plaintiffs' explanation for why it applies here is muddled. Plaintiffs' confusion stems from their inability to settle on what rule they believe the Second Circuit would adopt. They advocate for the rule of *Cockrell* combined with some, but not all, decisions from the Fifth and Ninth Circuits. (Reply at 5.) For example, they embrace the majority opinion in *Smallwood II*, but discount the Fifth Circuit's subsequent decision in *Boone v. Citigroup, Inc.*, 416 F.3d 382 (5th Cir. 2005), because it "narrow[ed]" *Smallwood II* beyond their liking. (*Id.* at 8, and 3 n.1.) Plaintiffs' wayfaring aside, the test is whether a particular "defense" applies to the in-state defendant, and, if so, would that "showing" by itself "necessarily" and "equally" "compel" dismissal of *all* claims against *all* parties. *Boone*, 416 F.3d at 390.

Plaintiffs have also taken contradictory positions on whether the PLCAA provides a defense to any claims against any parties at all. On the one hand, Plaintiffs argue that the PLCAA provides defenses against *all* claims against *all* defendants (Reply at 2-3); and, on the other hand, they argue that their "negligent entrustment and [CUTPA] claims against Riverview are not barred by PLCAA" (*id.* at 11; *see id.* at 7 n.4). This analysis runs head-on into judicial estoppel. *Walton v. Bayer Corp.*, 643 F.3d 994, 1003 (7th Cir. 2011) ("If as we believe judicial estoppel would bar the plaintiff's claim against the Bayer defendants in state court were we to order the case remanded, a victory for her in the present phase of the litigation would be Pyrrhic.").

III. The Remington Defendants Are *Not* "Sellers" Under The PLCAA.

Plaintiffs do not dispute that the PLCAA treats "manufacturers" and "sellers" differently. Realizing that this distinction is an impediment to application of the common defense rule, Plaintiffs argue they have sued the Remington Defendants as both "manufacturers" and "sellers" and that, therefore, the Riverview Sales' PLCAA defenses apply "equally" to bar claims against the Remington Defendants. But Plaintiffs cannot rewrite the PLCAA or ignore the allegations of their own Complaint in order to recast the Remington Defendants in a role they did not have with respect to the firearm sold to Nancy Lanza.

A "seller" is defined in the PLCAA as "any person engaged in the business of *selling firearms at wholesale or retail*." 15 U.S.C. § 7903(6) (incorporating definition found at 18 U.S.C. § 921(a)(11) (emphasis added)). The Remington Defendants were not "sellers" under this definition or the allegations of Plaintiffs' Complaint. The Remington Defendants are alleged by Plaintiffs to have manufactured and sold the firearm to a wholesale "distributor" who thereafter sold the firearm to Riverview Sales, a retail dealer. (Compl. at ¶¶ 25-34.) Plaintiffs, in fact, specifically allege that the wholesale distributor and retail seller were "sellers within the meaning of § 7903(6)." (*Id.* at ¶¶ 30, 34.) Plaintiffs have not and cannot make the same allegation as to the Remington Defendants because their role was the "manufacturer" of the firearm and nothing more. *See* 15 U.S.C. § 7903(2) (a "manufacturer" is a person "engaged in the business of manufacturing the [qualified] product in interstate commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18"). The unambiguous terms of both the PLCAA and the Complaint refute Plaintiffs' belated contention.

IV. Plaintiffs Alleged A Product Liability Claim Against The Remington Defendants.

Plaintiffs insist they have not pleaded an analytically distinct product liability claim against

the Remington Defendants. But they allege the Remington Defendants (1) designed a firearm without "safety mechanisms that prevent the weapon from being fired by someone other than the purchaser" (Compl. at Count One, ¶ 183), and (2) "had the ability to design and manufacture" the firearm to "not accept large capacity magazines." (*Id.* at ¶ 184.) Further, according to Plaintiffs, the Remington Defendants' conduct in designing and manufacturing the firearm used by Adam Lanza was a "substantial factor resulting in" their damages. (*Id.* at ¶ 191.)

Under Connecticut law, all actions for damages allegedly caused by the use of products fall under the Connecticut Product Liability Act ("CPLA"), including "claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, . . . of any product." Conn. Gen. Stat. § 52-572m. A CPLA claim "shall be in lieu of all other claims . . . for harm caused by a product." Conn. Gen. Stat. § 52-572n. Here, Plaintiffs' product defect claims against the Remington Defendants are governed by the CPLA. *See Hurley v. Heart Physicians, P.C.*, 278 Conn. 305, 325 (Conn. 2006) (A product liability action "is one that seeks damages for personal injuries, including wrongful death . . . caused by the defective product.").

Plaintiffs' product liability allegations against the Remington Defendants and the defenses to those allegations are "analytically distinct" and "in addition to" the claims they assert against Riverview Sales. Thus, even if the common defense rule were adopted by the Second Circuit, it would not apply here. *See Boone*, 416 F.3d at 391-92 ("some of [the plaintiffs'] claims against the non-resident defendants [were] analytically distinct from and in addition to their … claims against … the resident defendants….[Because] the failure of [the plaintiffs'] claims against the resident defendants does not in and of itself cause those of the claims against the non-resident defendants .. to fail as well," the rule did not apply).

For all of the foregoing reasons, the Motion for Remand should be denied.

Respectfully submitted,

/s/ *James B. Vogts*
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800

James B. Vogts (phv07263) (jvogts@smbtrials.com)
Andrew A. Lothson (phv07262) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system.

Joshua D. Koskoff
Alinor Sterling
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
asterling@koskoff.com
Attorneys for Plaintiffs

Christopher Renzulli
Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case No. 3:15-CV-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	April 6, 2015
Defendants.	)	

DEFENDANTS REMINGTON ARMS COMPANY, LLC
AND REMINGTON OUTDOOR COMPANY, INC.'S
SUR-REPLY TO PLAINTIFFS' REPLY ON THE MOTION TO REMAND

I. Plaintiffs Have Alleged "No Reasonable Basis" For A Claim Against Riverview Sales.

Plaintiffs alleged three claims against Riverview Sales: negligent entrustment; violation of CUTPA; and creation of a public nuisance. In their Reply, Plaintiffs do not contest that their public nuisance claim is barred by the PLCAA, purporting to save this issue for "a separate Supplemental Motion to Remand." (Reply at 11 n.7.) Plaintiffs' arguments for why there is a reasonable basis for liability against Riverview Sales on their other two claims fail.

A. Plaintiffs' "negligent entrustment" claim against Riverview Sales is barred.

The Court should reject Plaintiffs' attempt to expand the definition of negligent entrustment found in 15 U.S.C. § 7903(5)(B) to fit the facts of their case. Tellingly, Plaintiffs' Reply stops short of articulating exactly how the sale of the rifle to Nancy Lanza forms the factual basis of a negligent entrustment action defined in the PLCAA, which requires the firearm to be supplied to "the person" who then "use[s]" it to cause an unreasonable risk of harm to herself or others. But Plaintiffs have not alleged that Nancy Lanza "use[d]" the rifle at all. She legally purchased the rifle from Riverview Sales in 2010 and, nearly three years later, her son took the rifle from their shared home (after first killing her) and committed his heinous crimes. Adam Lanza "use[d]" the rifle, not his mother. There is no basis to allege that Riverview Sales negligently entrusted the rifle to Nancy Lanza.

Plaintiffs argue that firearm "use" in the context of the PLCAA's definition of negligent entrustment can mean more than firearm discharge based on the Supreme Court's analysis of the word "use" in an entirely different statute enacted 37-years before the PLCAA. *See Smith v. United States*, 508 U.S. 223 (1993) (interpreting § 924(c)(1) of the Gun Control Act of 1968). Indeed, the Supreme Court has recognized that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but

when used more than once in the same statute or even in the same section." *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561, 574 (2007) (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The same language in different statutes may be construed together only when the statutes are *in pari materia*. *Firstar Bank, N.A. v. Faul*, 253 F. 3d 982, 990 (7th Cir. 2001) (before construing different statutes *in pari materia*, a court must determine that the purposes and subjects of the acts are in fact similar); *Lieberman v. FTC*, 771 F.2d 32, 40 (2d Cir. 1985) (even same term within different version of same statute is not *in pari materia* where goals of the statute changed).

Section 7903(5)(B) of the PLCAA and Section 924(c)(1) of the Gun Control Act ("GCA") cannot be construed *in pari materia*. Section 924(c)(1) of the GCA provides for enhanced punishment of persons convicted of using or carrying a firearm "during or in relation to any crime of violence or drug trafficking crime." Section 7903(5) of the PLCAA, on the other hand, provides for gun seller immunity in civil actions "resulting from the criminal or unlawful use" of firearms by third parties. There is no basis to conclude that Congress intended that a "use" of a firearm under the PLCAA's definition of negligent entrustment would have the same meaning as a "use" of a firearm for purposes of enhanced punishment under the GCA. *See Firstar Bank*, 253 F.3d at 990 (citing cases refusing to apply the *in pari materia* canon "to laws superficially relating to similar subjects where a finer examination revealed the purposes of the laws varied").

In the context of civil tort law, "use" of a firearm can only mean employing the firearm's functional features to cause or threaten injury. A firearm cannot be "use[d]" to cause a risk of injury other than by shooting it, or at least threatening to shoot it. And more importantly, the "use" of a firearm under the definition of negligent entrustment must create "unreasonable risk of physical injury to *the person* or others." 15 U.S.C. § 7903(5)(B) (emphasis added). It is impossible

for a person to "use" a firearm to harm herself without discharging it (*e.g.*, suicide). Any construction of "use" to include anything other than firing or threatening to fire a firearm is contrary to the plain meaning of the text and purpose of the PLCAA.

In *Smith*, the defendant was found to have "used" a firearm under Section 924(c)(1) when he traded the firearm for drugs. *Smith*, 508 U.S. at 226. As discussed above, Section 924(c)(1) provides for enhanced punishment of persons convicted of carrying or using a firearm "during or in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1). As the Court subsequently observed in *Bailey v. United States*, "even a reference to a firearm in [a criminal's] possession could satisfy § 924(c)(1)," provided the reference was "calculated to bring about a change in the circumstance of the predicate offense . . . just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'" 516 U.S. 137, 147 (1995). But while criminal laws address many different kinds of firearm "uses," including illegal possession and armed robbery, civil tort law exists to compensate victims who have been wrongly injured. The PLCAA was enacted to protect firearm sellers against tort claims for damages arising from third-party misuse of firearms, and thus should be construed in the context of civil tort law, not federal criminal law.

Interpreting the "negligent entrustment" exception to encompass only situations in which "the person to whom" the seller "suppl[ies]" the firearm is "the person" who thereafter "use[s]" the firearm to harm "the person or others," 15 U.S.C. § 7903(5)(B), reflects the reality that a seller who entrusts an instrumentality to a customer—whether a car, a firearm or other potentially dangerous instrumentality—can only assess the competency of the customer with whom it is dealing to use the instrumentality safely. *See Phillips v. Lucky Gunner, LLC*, No.14-cv-2822, 2015 U.S. Dist. LEXIS 39284, *19 (D. Colo. Mar. 27, 2015) (dismissing all claims against sellers as barred by the PLCAA, including a negligent entrustment claim: "the standard for negligent entrustment liability

is narrower than the ordinary negligence standard because the manner in which the chattel is ultimately used is outside the supplier's control"). Extending liability under a negligent entrustment theory for the actions of persons unknown to the supplier, who later gain access to the instrumentality, eliminates the concept of "entrustment" from the cause of action altogether, and potentially leads to unlimited supplier liability. *See id.* at *19.

Even assuming *arguendo* that the expansive definition of the term "use" that Plaintiffs urge is appropriate in this context, their pleadings fail to establish such use *by Nancy Lanza*. Relying on the Supreme Court's construction of the term "use" in the GCA, Plaintiffs assert that "the meaning of 'use' in PLCAA encompasses lending or transferring a firearm to another." (Reply at 13.) Plaintiffs' Complaint does not allege, however, that Nancy Lanza lent or transferred the firearm to Adam Lanza. *See* Compl. ¶ 154 (alleging that Adam Lanza "retrieved" the firearm on the morning of December 14, 2012). To the extent Plaintiffs assert that passive conduct—such as Nancy Lanza's mere legal possession of the firearm in her home—constitutes "use" in the context of the PLCAA, they attempt to twist the tort of negligent entrustment beyond recognition. The PLCAA was enacted, in part, to prohibit this very type of claim.

A use of an entrusted firearm by a person *other* than "the person" who was supplied the firearm cannot trigger the negligent entrustment exception. This limitation is consistent with congressional intent:

> This provision would cover only cases where the dealer knows or should know that the person who is buying the gun is likely to misuse it and the buyer does, in fact, misuse it. The courthouse door is still shut to victims of the far more common practice of dealers negligently selling guns to traffickers who, in turn, supply criminals.

Committee on the Judiciary, *Report together with Dissenting and Additional Dissenting Views on the Protection of Lawful Commerce in Arms Act*, H.R. REP. No. 109-124, at 143 (June 14, 2005)

(available at http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt124/pdf/CRPT-109hrpt124.pdf (last visited Apr. 3, 2015)). Although resort to legislative history is unnecessary when there is no ambiguity, the Remington Defendants provide this legislative history as it underscores the limited scope of the negligent entrustment exception to PLCAA immunity. *Cf. Davis v. United States*, 495 U.S. 472, 479 (1990) (phrase "for the use of"—a phrase which "on its face . . . could support any number of different meanings," is narrowed by reference to legislative history).[1]

B. CUTPA is not a statute that regulates the "sale or marketing" of firearms and is thus not a predicate exception under the PLCAA.

CUTPA does not expressly regulate the sale or marketing of firearms, nor does the statute clearly implicate such activities. Rather, CUTPA is a statute of general application which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). Alleged violations of statutes of general application, such as CUTPA, cannot serve as the predicate for an action under § 7903(5)(A)(iii), which requires a "knowing" violation of a statute "applicable to the sale or marketing of firearms." 15 U.S.C. § 7903(5)(A)(iii) (predicate exception).

The Second Circuit has held that the predicate exception encompasses only (1) "statutes that expressly regulate firearms"; (2) statutes that "courts have applied to the sale and marketing of firearms"; or (3) "statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *City of New York v. Beretta U.S.A. Corp*, 524 F.3d

[1] *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 Conn. Super. LEXIS 1320 (Conn. Super. Ct. May 26, 2011), is instructive on, *inter alia*, the scope of negligent entrustment. In *Gilland*, the plaintiff was shot with a handgun the shooter had stolen from the defendant firearm dealer. The court rejected plaintiffs' argument that the dealer had entrusted the handgun to the shooter "for his use." *Id.* at 33. To the contrary, the theft of the handgun by the person who caused plaintiffs' harm was "the opposite of being provided a handgun for use since it alleges a taking without permission." *Id. Gilland* stands for the simple proposition that to invoke the negligent entrustment exception, the seller must supply the firearm to the buyer "for his use."

384, 404 (2d Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009). *City of New York* addressed whether the New York state public nuisance statute was the type of statute that Congress intended to serve as a predicate statute under Section 7903(5)(A)(iii). After examining the context in which Congress used the word "applicable," various canons of statutory construction, and the legislative history of the PLCAA, the Court of Appeals concluded that the public nuisance statute was not the type of statute that qualifies for the predicate exception under Section 7903(5)(A)(iii). *Id.* at 398-404 ("[T]he predicate exception was meant to apply only to statutes that actually regulate the firearms industry.").

While there are a number of federal and state statutes that actually regulate the firearms industry[2] or that "clearly can be said to implicate the purchase and sale of firearms," CUTPA is not among them.[3] Indeed, finding that a knowing violation of CUTPA—an unfair or deceptive act—can serve as a predicate violation under Section 7903(5)(A)(iii) would allow the exception to "swallow" the protections afforded by the PLCAA and violate the principle that statutory exceptions are to be applied narrowly to preserve the statute's primary purpose. *See City of New York*, 329 F.3d at 403; *Ileto v. Glock*, 565 F.3d 1126, 1134-36 (9th Cir. 2009) (rejecting plaintiffs' argument that general California tort statutes can serve as predicate statutes); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp.2d 174, 180-81 (D.D.C. 2009) (Strict Liability Act not a predicate statute); *Phillips*, 2015 U.S. Dist. LEXIS 39284 at *14-15 (rejecting argument that municipal code provisions, many of which referenced firearms, could serve as predicate statutes).

---

[2] *See* 15 U.S.C. § 7901(a)(4) ("The manufacture, importation, possession, sale and use of firearms and ammunition in the United States are heavily regulated by Federal, State and local laws.").

[3] Plaintiffs refer to a single passage from *City of New York* suggesting that, "under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 400. It is telling, however, that Plaintiffs make no effort to distinguish CUTPA from the public nuisance statute that the Second Circuit rejected as a predicate statute in *City of New York*.

II. Plaintiffs Have The Burden To Show That The Second Circuit Would Adopt The "Common Defense Rule" And That It Should Apply Here.

Within the Second Circuit, the "common defense rule" is not a recognized exception to the doctrine of improper or "fraudulent" joinder as a basis for removal to federal court. Although the Remington Defendants have the burden of demonstrating that there is "no reasonable basis" for the claims alleged against Riverview Sales, once improper joinder is established, Plaintiffs have the burden to show that the common defense rule would be adopted by the Second Circuit and, if so, that it applies to the circumstances of case. The Supreme Court has noted that, since 28 U.S.C. § 1441(a) was amended in 1948 to introduce exceptions to removal, "there has been no question that whenever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003).[4]

Plaintiffs have not demonstrated that the Second Circuit would adopt the common defense rule as an exception to the *Pampillonia* test for improper joinder. *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459 (2d Cir. 1998). Despite Plaintiffs' heavy reliance on the common defense rule in their opening memorandum, Plaintiffs now say they simply "invoke the rule of *Cockrell*" and "do not argue that the Court must adopt the test articulated in" the common defense cases such as *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568 (5th Cir. 2004) ("*Smallwood II*"). (*Compare* Pls.' Mem. in Supp. of Remand at 9-14 *with* Reply at 5.) Putting aside that Plaintiffs now soft-pedal the extent of their reliance on the common defense rule, Plaintiffs' suggestion that the rule of *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), standing alone, is "sufficient" to

[4] Analogous circumstances are removals based on the Class Action Fairness Act ("CAFA"), which, like the doctrine of improper joinder, is an exception to complete diversity of citizenship since it permits removal with only minimal diversity. After a CAFA-based removal, a plaintiff seeking to remand because of an exception to CAFA bears the burden of establishing that the exception applies, thereby requiring remand. *Ava Acupuncture P.C. v. State Farm Mut. Auto. Ins. Co.*, 592 F. Supp. 2d 522, 528 (S.D.N.Y. 2008) (collecting cases on point); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007); *Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675 (7th Cir. 2006); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542 (5th Cir. 2006).

mandate remand to state court in this case ignores the limited scope of the Supreme Court's decision. *Cockrell* stands for the proposition that removal is improper where the diverse defendant's liability is "predicated" on the liability of the non-diverse defendant, such as in the *respondeat superior* context. *Id.* at 153. Since Plaintiffs assert claims against the Remington Defendants that are independent from (and not predicated on) those asserted against Riverview Sales, *Cockrell* is inapposite to the case at bar. (*See* Opp'n at 13-14.)

Even if this Court were to adopt the common defense rule, Plaintiffs' explanation for why it applies here is muddled. Plaintiffs' confusion stems from their inability to settle on what rule they believe the Second Circuit would adopt. They advocate for the rule of *Cockrell* combined with some, but not all, decisions from the Fifth and Ninth Circuits. (Reply at 5.) For example, they embrace the majority opinion in *Smallwood II*, but discount the Fifth Circuit's subsequent decision in *Boone v. Citigroup, Inc.*, 416 F.3d 382 (5th Cir. 2005), because it "narrow[ed]" *Smallwood II* beyond their liking. (*Id.* at 8, and 3 n.1.) Plaintiffs' wayfaring aside, the test is whether a particular "defense" applies to the in-state defendant, and, if so, would that "showing" by itself "necessarily" and "equally" "compel" dismissal of *all* claims against *all* parties. *Boone*, 416 F.3d at 390.

Plaintiffs have also taken contradictory positions on whether the PLCAA provides a defense to any claims against any parties at all. On the one hand, Plaintiffs argue that the PLCAA provides defenses against *all* claims against *all* defendants (Reply at 2-3); and, on the other hand, they argue that their "negligent entrustment and [CUTPA] claims against Riverview are not barred by PLCAA" (*id.* at 11; *see id.* at 7 n.4). This analysis runs head-on into judicial estoppel. *Walton v. Bayer Corp.*, 643 F.3d 994, 1003 (7th Cir. 2011) ("If as we believe judicial estoppel would bar the plaintiff's claim against the Bayer defendants in state court were we to order the case remanded, a victory for her in the present phase of the litigation would be Pyrrhic.").

III. The Remington Defendants Are *Not* "Sellers" Under The PLCAA.

Plaintiffs do not dispute that the PLCAA treats "manufacturers" and "sellers" differently. Realizing that this distinction is an impediment to application of the common defense rule, Plaintiffs argue they have sued the Remington Defendants as both "manufacturers" and "sellers" and that, therefore, the Riverview Sales' PLCAA defenses apply "equally" to bar claims against the Remington Defendants. But Plaintiffs cannot rewrite the PLCAA or ignore the allegations of their own Complaint in order to recast the Remington Defendants in a role they did not have with respect to the firearm sold to Nancy Lanza.

A "seller" is defined in the PLCAA as "any person engaged in the business of *selling firearms at wholesale or retail*." 15 U.S.C. § 7903(6) (incorporating definition found at 18 U.S.C. § 921(a)(11) (emphasis added)). The Remington Defendants were not "sellers" under this definition or the allegations of Plaintiffs' Complaint. The Remington Defendants are alleged by Plaintiffs to have manufactured and sold the firearm to a wholesale "distributor" who thereafter sold the firearm to Riverview Sales, a retail dealer. (Compl. at ¶¶ 25-34.) Plaintiffs, in fact, specifically allege that the wholesale distributor and retail seller were "sellers within the meaning of § 7903(6)." (*Id.* at ¶¶ 30, 34.) Plaintiffs have not and cannot make the same allegation as to the Remington Defendants because their role was the "manufacturer" of the firearm and nothing more. *See* 15 U.S.C. § 7903(2) (a "manufacturer" is a person "engaged in the business of manufacturing the [qualified] product in interstate commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18"). The unambiguous terms of both the PLCAA and the Complaint refute Plaintiffs' belated contention.

IV. Plaintiffs Alleged A Product Liability Claim Against The Remington Defendants.

Plaintiffs insist they have not pleaded an analytically distinct product liability claim against

the Remington Defendants. But they allege the Remington Defendants (1) designed a firearm without "safety mechanisms that prevent the weapon from being fired by someone other than the purchaser" (Compl. at Count One, ¶ 183), and (2) "had the ability to design and manufacture" the firearm to "not accept large capacity magazines." (*Id.* at ¶ 184.) Further, according to Plaintiffs, the Remington Defendants' conduct in designing and manufacturing the firearm used by Adam Lanza was a "substantial factor resulting in" their damages. (*Id.* at ¶ 191.)

Under Connecticut law, all actions for damages allegedly caused by the use of products fall under the Connecticut Product Liability Act ("CPLA"), including "claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, . . . of any product." Conn. Gen. Stat. § 52-572m. A CPLA claim "shall be in lieu of all other claims . . . for harm caused by a product." Conn. Gen. Stat. § 52-572n. Here, Plaintiffs' product defect claims against the Remington Defendants are governed by the CPLA. *See Hurley v. Heart Physicians, P.C.*, 278 Conn. 305, 325 (Conn. 2006) (A product liability action "is one that seeks damages for personal injuries, including wrongful death . . . caused by the defective product.").

Plaintiffs' product liability allegations against the Remington Defendants and the defenses to those allegations are "analytically distinct" and "in addition to" the claims they assert against Riverview Sales. Thus, even if the common defense rule were adopted by the Second Circuit, it would not apply here. *See Boone*, 416 F.3d at 391-92 ("some of [the plaintiffs'] claims against the non-resident defendants [were] analytically distinct from and in addition to their … claims against … the resident defendants….[Because] the failure of [the plaintiffs'] claims against the resident defendants does not in and of itself cause those of the claims against the non-resident defendants .. to fail as well," the rule did not apply).

For all of the foregoing reasons, the Motion for Remand should be denied.

Respectfully submitted,

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800

James B. Vogts (phv07263) (jvogts@smbtrials.com)
Andrew A. Lothson (phv07262) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system.

Joshua D. Koskoff
Alinor Sterling
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
asterling@koskoff.com
Attorneys for Plaintiffs

Christopher Renzulli
Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	May 1, 2015
Defendants.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE
BRIEF IN EXCESS OF FORTY PAGES

Plaintiffs hereby seek leave of the Court to file a Memorandum of Law in support of their forthcoming Supplemental Motion to Remand in excess of the forty pages allowed by Local Rule 7. In support of this Motion, plaintiffs represent as follows:

1. Plaintiffs will next week be filing a Supplemental Motion to Remand with an accompanying Memorandum of Law.

2. Plaintiffs' initial Motion to Remand asserts that under *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), the Bushmaster Defendants' claim of fraudulent joinder fails because even if their removal allegations are accepted as true they fail to establish any flaw in the joinder of Riverview Sales. That initial Motion to Remand focuses on the removing defendants' assumedly true "showing" in support of removal; the Supplemental Motion to Remand will refute the substance of the Bushmaster Defendants' removal arguments,

applying the test for fraudulent joinder set forth in *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1991).[1]

3. Pursuant to Local Rule 7(a)(2), plaintiffs' Memorandum of Law in support of the Supplemental Motion to Remand may not exceed forty (40) pages. The issues the Memorandum of Law will address are complex and must be briefed clearly, as the Court's subject matter jurisdiction is in issue. While plaintiffs are making every effort to provide the Court with focused and concise argument, plaintiffs anticipate needing an additional ten (10) pages. (Even with that expanded page limit, there are issues that, by necessity, will receive more cursory treatment.) Plaintiffs therefore seek the Court's leave to exceed the forty page limit by up to ten additional pages.

For the above reasons, plaintiffs respectfully request that the Court grant this Motion and permit plaintiffs to file a Memorandum of Law in Support of the Supplemental Motion to Remand of up to fifty (50) pages in length.

DATED: May 1, 2015

Respectfully submitted,

By /s/ Alinor C. Sterling (ct17207)

Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
asterling@koskoff.com
jkoskoff@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

[1] *Cockrell* requires remand. Plaintiffs therefore expect that the Court will never reach the issues briefed in the Supplemental Motion to Remand.

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Alinor C. Sterling (ct17207)
Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	May 8, 2015
Defendants.	)	

PLAINTIFFS' NOTICE OF DELAYED FILING

Plaintiffs hereby give Notice that they will not be filing the Supplemental Motion to Remand and supporting Memorandum of Law today but will have it filed by Wednesday, May 13, 2015.

In connection with this Notice, plaintiffs represent as follows:

1. In connection with a recent motion seeking leave to file an oversize brief, plaintiffs represented to the Court and counsel that plaintiffs would file a Supplemental Motion to Remand and supporting Memorandum of Law this week.
2. The brief is drafted and nearly final. Given the seriousness of the case and the complexity of the issues, however, counsel wish to have the weekend to review the brief and then a little time next week to cite check and proof read.
3. In addition, there have been some scheduling conflicts which have delayed our completion of the brief. More particularly, one of the attorneys working on the case, Katherine Mesner-Hage, who is an Associate with this firm and who has

been extensively involved in the drafting of the brief, had a family commitment which made it difficult to finalize briefing this week.

4. As there is no set deadline for filing the Supplemental Motion and supporting Memorandum of Law, we are not filing a Motion for Extension of Time in which to file. Nonetheless, as a representation was made that the brief would be filed by today, we wish to advise the Court and counsel of the delay and of our intentions to file by Wednesday of next week.

DATED: May 8, 2015

Respectfully submitted,

By /s/ Alinor C. Sterling (ct17207)

Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
asterling@koskoff.com
jkoskoff@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, a copy of the foregoing Notice was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Alinor C. Sterling (ct17207)
Alinor C. Sterling (ct17207)
Joshua D. Koskoff (ct15619)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	May 13, 2015
Defendants.	)	

SUPPLEMENTAL MOTION TO REMAND

Plaintiffs' initial Motion to Remand asserts that under *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914), the Bushmaster Defendants' claim of fraudulent joinder fails because they do not allege any flaw specific to the joinder of Riverview Sales, Inc. That initial Motion to Remand focuses on the removing defendants' assumedly true "showing" in support of removal; this Supplemental Motion to Remand refutes the substance of the Bushmaster Defendants' removal arguments, applying the test for fraudulent joinder set forth in *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1991). For the reasons set forth in both Motions, diversity is incomplete and the Court must remand this case to the Connecticut Superior Court.

To find fraudulent joinder under *Pampillonia*, the Court must determine "by clear and convincing evidence. . . . that there is *no possibility*, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Id.* (emphasis supplied). Put another way, *Pampillonia* endorses the formulation that as long as there is "the mere

possibility" "that plaintiff can establish any cause of action against a defendant," joinder is proper. *Id.* at 461 n.3 (quoting *Sonnenblick-Goldman Co. v. ITT Corp.*, 912 F. Supp. 85, 88 (S.D.N.Y. 1996)). The Bushmaster Defendants' Notice of Removal asserts the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 *et seq.*, as the sole basis for establishing fraudulent joinder. Neither the United States Supreme Court nor any Connecticut high court has spoken on the meaning of the statute. In other words, there is no interpretation of PLCAA that is binding in Connecticut. For the purposes of deciding whether this Court has jurisdiction, that fact alone compels remand. Speculating as to how a Connecticut court would rule ignores the dictates of prudence, jurisdictional restraint, and essential principles of federalism.

PLCAA, moreover, is *not* a valid defense to plaintiffs' claims of negligent entrustment and violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.* A Connecticut court will turn first to the plain language of PLCAA to determine whether Riverview has a valid PLCAA defense. That plain language *permits* these claims. PLCAA explicitly preserves negligent entrustment claims and claims based on statutes "applicable" to the sale and marketing of firearms. The relevant case law from other jurisdictions – including the Second Circuit's holding in *City of New York v. Beretta*, 524 F.3d 384 (2nd Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009) – only confirms that this is so. In short, a Connecticut court applying PLCAA will hold that the statute is no defense to plaintiffs' claims for negligent entrustment and violation of CUTPA.

Whether to apply PLCAA's plain language or to adopt a more restrictive reading of its provisions, however, is not the focus of this jurisdictional inquiry. This Court must determine merely whether the Bushmaster Defendants have shown clearly and convincingly that there is *no possibility* a Connecticut court will construe PLCAA less restrictively than they do. *See*

Pampillonia, 138 F.3d at 461. They cannot even come close to meeting this burden. Riverview is not fraudulently joined, and the Court must remand this case to Connecticut Superior Court.

Respectfully submitted,

By **/s/ Joshua D. Koskoff, ct15619**
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF) THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	May 13, 2015
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION TO REMAND

I. INTRODUCTION

To find fraudulent joinder under the *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1991) test, the Court must determine "by clear and convincing evidence. . . that there is *no possibility*, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Id.* (emphasis supplied). There is absolutely no basis for the Court to make such a prediction, let alone to do so with the high degree of certainty necessary to sustain jurisdiction. The Bushmaster Defendants contend that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 *et seq.*, conclusively establishes that plaintiffs cannot prevail against Riverview in Connecticut Superior Court, but no Connecticut case supports their interpretation of PLCAA. Under the demanding *Pampillonia* standard, the absence of binding authority supporting their position is dispositive.

PLCAA, moreover, is no defense to plaintiffs' claims of negligent entrustment and violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.* PLCAA *permits* these claims, explicitly preserving negligent entrustment claims and claims based on statutes "applicable" to the sale and marketing of firearms. The relevant case law from other jurisdictions – including the Second Circuit's holding in *City of New York v. Beretta*, 524 F.3d 384 (2nd Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009) – confirms this is so. A Connecticut court confronting this case will hold that PLCAA is no defense to plaintiffs' claims for negligent entrustment and violation of CUTPA.

Whether to apply PLCAA's plain language or to adopt a more restrictive reading of its provisions, however, is not the focus of this jurisdictional inquiry. The Court must determine merely whether the Bushmaster Defendants have shown clearly and convincingly that there is *no possibility* a Connecticut court will construe PLCAA less restrictively than they do. *See Pampillonia*, 138 F.3d at 461. They cannot even come close to meeting this heavy burden.

The Court must remand this case to the Connecticut Superior Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of the shooting at Sandy Hook Elementary School in Newtown on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others. Plaintiffs allege that the Bushmaster XM15-E2S used in the shooting belongs to a specific category of weapons that were designed for the United States military to function as a lightweight but massively destructive service weapon. *See* Dkt. #1, Notice of Removal, Ex. 1, Complaint ¶¶ 45-49, 54. The United States military and law enforcement are appropriate users for these weapons due to their specialized needs and highly regimented safety protocols. Compl. ¶¶ 105-127. Civilians, by contrast, are wholly inappropriate users for these weapons: military

rifles are grossly ill-suited to home defense and sold with no regard for the purchaser's training, experience, commitment to follow safe storage practices, or intent to make the weapon available to others. *Id.* ¶¶ 128-143. Repeated mass shootings of Americans with weapons like the Bushmaster XM15-E2S – including several attacks against school children – have been widely publicized and are well known to the entities that manufacture and sell the Bushmaster XM15-E2S. *Id.* ¶¶ 144-48.

With particular regard to Riverview, plaintiffs allege that it is a retail gun store located in East Windsor, Connecticut. Compl. ¶ 32. Riverview for years sold AR-15s in a manner that foreseeably led to the use of those weapons by unauthorized and unsafe users. *Id.* Count Three ¶ 182. Riverview knew or should have known that the XM15-E2S it sold to Nancy Lanza was a military weapon designed for a purely military purpose: to inflict mass casualties in as short a time as possible. *Id.* ¶¶ 45-174. Additionally, Riverview knew or should have known that the weapon was unfit and unsafe for home use, or civilian use; that some such weapons were likely to be used in their assaultive capacity, despite Connecticut's ban on similar weapons; and that, if the XM15-E2S were used in its assaultive capacity, it could easily inflict mass casualties before law enforcement was able to intervene. *Id.* It nonetheless sold the XM15-E2S to Nancy Lanza. *Id.* ¶¶ 32, 153. Nancy Lanza stored the XM15-E2S in an unlocked gun closet in the home she shared with her son, Adam. *Id.* at ¶ 154. On the morning of December 14, 2012, Adam Lanza retrieved the Bushmaster XM15-E2S from the closet, along with ten 30-round magazines. *Id.* Based on these and additional allegations, plaintiffs assert claims of negligent entrustment, knowing violation of CUTPA, and public nuisance against Riverview. All of these claims arise under state law.

Riverview shares Connecticut citizenship with the plaintiffs. Notice of Removal ¶¶ 9, 11. Plaintiffs' chosen venue, Connecticut Superior Court, is the only proper forum in which these claims can be litigated. Despite that fact, the Bushmaster Defendants removed this case on January 14, 2015. They assert that plaintiffs fraudulently joined Riverview as a defendant in order to circumvent diversity jurisdiction. Although that allegation, if true, would provide a basis for federal jurisdiction, the Bushmaster Defendants' removal papers do not identify any defect specific to Riverview. Rather, they claim that PLCAA bars all of plaintiffs' claims against Riverview and every other defendant. Notice of Removal ¶¶ 20-30; *see also* 1/21/15 Letter to Court, at p. 2. Because the removing defendants' showing as to Riverview invokes a defense common to all defendants, plaintiffs filed a Motion to Remand based on the rule stated in *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914). *See* Dkt. #27, Motion to Remand. That issue is now fully briefed. *See* Dkt. #34 (Memorandum in Opposition); Dkt. #39 (Reply); Dkt. #42 (Surreply).

III. STANDARD FOR ESTABLISHING FRAUDULENT JOINDER

The doctrine of fraudulent joinder provides that "a plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining defendants with no real connection with the controversy." *Pampillonia*, 138 F.3d at 460–61 (citation and internal quotation marks omitted); *see also Brown v. Eli Lilly*, 654 F.3d 347, 356 (2d Cir. 2011); *Bounds v. Pine Belt Mental Health Care Res.*, 593 F.3d 209, 215 (2d Cir. 2010).

Fundamental principles of jurisdictional restraint dictate that the doctrine of fraudulent joinder be applied sparingly. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013). Consequently, a defendant seeking to establish fraudulent joinder "bears [a] heavy burden." *Brown*, 654 F.3d at 356.

A. THE REMOVING DEFENDANT MUST SHOW THERE IS NO POSSIBILITY THE PLAINTIFF CAN STATE A CLAIM AGAINST THE NON-DIVERSE DEFENDANT.

In order to establish fraudulent joinder, "a defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia*, 138 F.3d at 460-61. In the absence of outright fraud, "[j]oinder will be considered fraudulent when it is established that there can be no recovery against the defendant under the law of the state on the cause alleged." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001). In making this determination, "all factual and legal issues must be resolved in favor of the plaintiff." *Pampillonia*, 138 F.3d at 461.

"This standard has been strictly applied in [the Second] Circuit." *Dieterle v. Rite Aid Pharmacy*, 2015 WL 1505666, at *3 (D. Conn. Mar. 31, 2015). "The doctrine of fraudulent joinder requires a defendant to show, by clear and convincing evidence, that a claim is so flawed that it would be impossible for the plaintiff to recover." *Ret. Program for Employees of the Town of Fairfield v. NEPC, LLC*, 642 F. Supp. 2d 92, 97 (D. Conn. 2009) (noting that "although the adequacy of the Plaintiffs' negligence claim against [the non-diverse defendant] has the potential to be a thorny issue, it is not one that should be conclusively resolved at this stage."); *see also Stan Winston v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 183 (S.D.N.Y. 2003) (concluding that defendants had not shown that it was "legally impossible" for non-diverse defendant to be liable under state law); *Nemazee v. Premier, Inc.*, 232 F. Supp. 2d 172, 178 (S.D.N.Y. 2002) (noting that fraudulent joinder "turns on whether recovery is per se precluded"; "[a]ny possibility of recovery, even if slim, militates against a finding of fraudulent joinder").

B. THE COURT MUST VIEW THE ISSUES AS A CONNECTICUT COURT WOULD, RESOLVING ALL OPEN QUESTIONS IN FAVOR OF REMAND.

In assessing whether the Bushmaster Defendants have met *Pampillonia*'s stringent standard, the Court must view the issues as a Connecticut court would. Connecticut courts of course defer to Connecticut precedent. *Stuart v. Stuart*, 297 Conn. 26, 45-46 (2010) ("it is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court and the Superior Court are bound by our precedent"). They are not bound by the same precedent that binds this Court. *See CUSA LLC v. Travelers Co., Inc.*, 2007 WL 3046270, at *3 (D. Conn. Oct. 15, 2007) (Hall, J.) (observing that while Second Circuit had spoken on an issue and District Court was bound by that ruling, Connecticut court was not bound and *Pampillonia* standard required that "the plaintiff's claims must be judged by how they would fare in state court, not by how they would fare in *federal* court") (emphasis in original).

If pertinent questions of law are unsettled, remand is compulsory. *See, e.g.*, *Ret. Program for Employees of the Town of Fairfield*, 642 F. Supp. 2d at 97-98 ("That there is at minimum a recognized dispute on this issue in the case law is a sufficient basis on which to conclude that Plaintiffs' claim against [the non-diverse defendant] survives this [fraudulent joinder] assessment."); *Kent State Univ. Bd. of Trustees v. Lexington Ins. Co.*, 512 F. App'x 485, 490 (6th Cir. 2013) (affirming district court's award of removal fees to plaintiff based on its finding that, "[g]iven the unsettled nature of Ohio law on this issue and the [fraudulent joinder] standard, remand was a foregone conclusion") (citation omitted); *In re Pradaxa (Dabigatran Etexilate) Products Liab. Litig.*, 2013 WL 5609340, at *2 (S.D. Ill. Oct. 11, 2013) ("Given that Nevada law on the issue of a sales representative's liability is unsettled, the Court must remand the case to

Nevada State Court. This is consistent with the Seventh Circuit's directive to resolve any ambiguities in the pertinent state law in favor of remand."); *IDS Prop. Cas. Ins. Co. v. Gambrell*, 913 F. Supp. 2d 748, 753, 754 (D. Ariz. 2012) ("[T]he law surrounding the viability of a bad faith claim against an insurance adjuster is unsettled in Arizona. . . . While it is a close call, as noted above, ambiguity in the law must favor the plaintiff[.]"); *Hartman v. Caraco Pharm. Labs., Ltd.*, 789 F. Supp. 2d 701, 706 (S.D.W. Va. 2011) ("This incertitude respecting both legal issues dooms defendants' fraudulent joinder challenge."); *Moorhouse v. Bayer Healthcare Pharm., Inc.*, 2008 WL 2477389, at *3 (N.D. Cal. June 18, 2008) ("Defendants contend that no California case has held a distributor liable for failure to warn in the prescription drug context. However, even if true, that fact alone does not suggest that it is *obvious* according to the *settled* rules of California that a failure to warn cause of action is not viable."); *Snyder v. Davol, Inc.*, 2008 WL 113902, at *1 (D. Or. Jan. 7, 2008) (remanding because "the issue of whether a healthcare provider can be held strictly liable under Oregon law is unsettled"); *Antonio v. Wal-Mart*, 2007 WL 2884371, at *7 (S.D. Ind. Sept. 27, 2007) ("For the purposes of deciding if removal was proper, it is enough to note that Indiana law is unsettled regarding the extent that a plaintiff may bring a claim in negligence against a store manager, based on a delegation of the premise owner's duties toward invitees.").

In the cases cited above, there was state law precedent on the relevant issue and often it strongly favored the argument of the removing defendant. Nonetheless, these courts remanded when state law was even arguably unsettled. Here, there can be no debate about whether Connecticut law is settled or not: *there is no Connecticut law on point, let alone binding precedent*. The Court must accordingly heed *Pampillonia*'s directive and remand.

IV. STANDARD FOR CONSTRUCTION OF A FEDERAL STATUTE

The *Pampillonia* analysis requires the Court to determine how a Connecticut court might construe PLCAA, a federal statute. When construing a federal statute, both federal and Connecticut courts will follow federal principles of statutory construction. *Dark-Eyes v. Commissioner of Revenue Services*, 276 Conn. 559, 571 (2006).

A. FEDERAL PRINCIPLES OF STATUTORY CONSTRUCTION.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012) (quotation marks and citation omitted). "Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there." *Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Only if the meaning of a statute is ambiguous should a court consult legislative history. *See Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2d Cir. 2007).

It is a rule of statutory construction that each word in a statute be given meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (quotation marks and citation omitted).

B. WEIGHT GIVEN TO FEDERAL PRECEDENT.

With regard to the determinative nature of existing precedent, however, federal and state court approaches will differ. The Second Circuit's construction of a federal statute is binding on future panels of the Second Circuit and district courts within the Circuit. It is not binding – but rather merely persuasive – on the Connecticut Supreme Court:

> In general, we look to the federal courts for guidance in resolving issues of federal law. *See, e.g., Joo v. Capitol Switch, Inc.*, 231 Conn. 328, 332-36, 650 A.2d 526 (1994) (considering federal court precedent to interpret federal statute); *see also Schnabel v. Tyler*, 230 Conn. 735, 743 and n. 4, 646 A.2d 152 (1994) (noting that court looks to Second Circuit precedent when interpreting federal statute). Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive.

Turner v. Frowein, 253 Conn. 312, 340-41 (2000); *see Johnson v. Williams,* 133 S. Ct. 1088, 1098 (2013) (observing that "the views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."). When the Federal Courts of Appeals divide on an issue, the Connecticut Supreme Court will generally side with the Second Circuit, although it is not bound to do so. *See Dayner v. Archdiocese of Hartford*, 301 Conn. 759, 783-84 (2011) (declining to follow Seventh Circuit precedent when Second Circuit had chosen a different approach).

V. THE CASE MUST BE REMANDED

The Bushmaster Defendants contend that all of plaintiffs' claims are, on their face, barred by PLCAA. It is *their* burden to persuade this Court of that very serious and sweeping charge, and a "heavy" one at that. *Pampillonia*, 138 F.3d at 461. "The doctrine of fraudulent joinder requires a defendant to show, by clear and convincing evidence, that a claim is so flawed that it would be impossible for the plaintiff to recover." *Ret. Program for Employees of the Town of*

Fairfield, 642 F. Supp. 2d at 97. Defendants utterly disregard this burden. They have asked this Court to declare that plaintiffs' negligent entrustment, CUTPA, and nuisance claims are *unambiguously foreclosed* on the basis of a simple recitation of PLCAA's provisions and accompanying conclusory statements that plaintiffs' claims are barred. *See* Notice of Removal ¶¶ 21-30.

Defendants' arguments are wrong. In an effort to find that plaintiffs' negligent entrustment claim is barred by PLCAA, defendants distort the plain meaning of PLCAA, justify that distortion with illogical assumptions, and ignore the entire body of substantive law that governs that claim (the common law). Defendants make an equally feeble effort to establish that plaintiffs' claim that Riverview knowingly violated CUTPA is barred by PLCAA. In doing so, they once again ignore the plain meaning of PLCAA, misread Second Circuit precedent, and ignore the text of CUTPA itself.[1] The many flaws in these arguments are discussed in detail below.

For the purposes of deciding plaintiffs' Supplemental Motion to Remand, however, it does not matter that the Bushmaster Defendants are wrong. It matters only that they lack *any* binding authority to support their arguments. The *Pampillonia* test requires the Court to determine that there is "no possibility. . . that a plaintiff can state a cause of action against the non-diverse defendant *in state court*." *Pampillonia*, 138 F.3d at 461 (emphasis supplied). Connecticut courts are bound by Connecticut precedent; yet defendants fail to identify any Connecticut case law that endorses defendants' restricted reading of PLCAA's negligent

[1] Plaintiffs answer defendants' argument as to the nuisance claims with a constitutional challenge to PLCAA.

entrustment and predicate statute provisions. Because all legal issues must be resolved in plaintiffs' favor at this juncture, the Court must remand.

A. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT PLCAA BARS PLAINTIFFS' NEGLIGENT ENTRUSTMENT CLAIM.

Plaintiffs allege a negligent entrustment claim against Riverview under Connecticut common law. That claim is expressly preserved by the text of PLCAA. In order to remain in this Court, the Bushmaster Defendants must establish clearly and convincingly that there is no possibility a Connecticut Superior Court would allow plaintiffs' claim to proceed. Defendants fail to meet that burden.

1. PLCAA Preserves Negligent Entrustment Claims.

PLCAA identifies a category of lawsuits entitled "qualified civil liability action[s]" and dictates that such actions be dismissed. 15 U.S.C. § 7903(5)(A); *id.* at § 7902. It also describes six causes of action that are *not* subject to dismissal. *See id.* at § 7903(5)(A)(i)-(vi). One of those protected causes of action is the common law tort of negligent entrustment. *See id.* at § 7903(5)(A)(ii) (qualified civil liability action "shall not include. . . an action brought against a seller for negligent entrustment"); § 7903(5)(B) ("'[N]egligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.").

The Bushmaster Defendants do not dispute this point. They fail, however, to acknowledge that PLCAA's negligent entrustment provision has been only sparsely interpreted and that there is *no case law at all* supporting their particular construction of PLCAA's negligent entrustment definition. Under the *Pampillonia* standard, these failings are fatal.

2. PLCAA Intends for Plaintiffs to Proceed Based on State Common Law Negligent Entrustment Causes of Action.

PLCAA does not create a cause of action called negligent entrustment; it preserves that pre-existing common law claim. The statute is unequivocal on this point: "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C).

The import of that directive is obvious: "While the Act may exempt 'negligent entrustment' claims from mandatory dismissal under federal law, it does not affirmatively authorize or establish such claims - it simply does not extinguish them. . . . [Thus, plaintiffs] must look to some other source of law[.]" *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476, 480-81 (Mo. Ct. App. 2013); *see also Phillips v. Lucky Gunner, LLC*, 2015 WL 1499382, at *8 (D. Colo. Mar. 27, 2015) ("[PLCAA] does not create any causes of action, but relies on state law to do so[.]"); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138 (9th Cir. 2009) ("[T]he only function of the PLCAA is to preempt certain claims."); *id.* at 1135 n.6 ("While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se).").

State common law is the only source of negligent entrustment liability. It follows that negligent entrustment claims against firearm sellers are examined under the common law of the state in which the claim is brought. *See Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *12 (Conn. Super. Ct. May 26, 2011) (recognizing PLCAA exception for negligent entrustment actions and then applying Connecticut common law to determine whether plaintiff had stated negligent entrustment claim); *Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214, at *12 (N.D.N.Y. Sept. 20, 2013) (same, but applying New York common law); *Phillips*, 2015

WL 1499382, at *6 (same, but applying Colorado common law); *Noble*, 409 S.W.3d at 480-82 (same, but applying Missouri common law); *cf. Woods v. Steadman's Hardware, Inc.*, 2013 WL 709110, at *4 (D. Mont. Feb. 26, 2013) (explaining that once a plaintiff's state law claims "pass the PLCAA filter" – that is, "fall into one of the predicate exceptions listed by the PLCAA" – plaintiff "can go forward in state court").

In *Noble*, the plaintiffs attempted to circumvent this rule because their negligent entrustment claim against a gun store was not supported by Missouri common law. (Missouri does not recognize a cause of action for negligent entrustment against the seller of a chattel.) The plaintiffs admitted that their claims were not "common law negligent entrustment" claims, but contended that the facts alleged were clearly encompassed by *PLCAA's* formulation of negligent entrustment. The court rejected this argument. The relevant question was whether "[plaintiffs'] allegations state a viable cause of action under the governing substantive law" – in this case, "Missouri's negligent-entrustment doctrine." *Id.* at 480, 482.

Congress' edict that PLCAA not be construed to create a cause of action compels this result. If courts cannot look to PLCAA as a source of negligent entrustment law, state common law *must* govern; otherwise, the negligent entrustment provision would mean nothing. The Bushmaster Defendants have not offered an alternative interpretation of how PLCAA interacts with negligent entrustment law.[2] Yet they have also failed even to *mention* Connecticut's common law of negligent entrustment, let alone to explain why it precludes plaintiffs' claims.

---

[2] Indeed, counsel for the Bushmaster Defendants has taken the exact same position in a case currently pending in Wisconsin, in which he represents a firearm seller against a negligent entrustment claim. During oral argument on the defendant seller's motion to dismiss – which was denied – Attorney Vogts echoed the arguments plaintiffs make here:

> All the PLCAA does is preempt certain state law claims. It does not create claims. So when the court is examining the plaintiffs' allegations and the plaintiffs' claims, I think it's important to keep in mind that federal law does

3. The Bushmaster Defendants' Sole Attack on Plaintiffs' Negligent Entrustment Claim – Their Restrictive Reading of the Word "Use" in PLCAA – Is Unavailing.

The Bushmaster Defendants make one – and only one – argument in support of their assertion that plaintiffs' claim against Riverview has no possibility of success. They allege in their Notice of Removal that "a negligent entrustment action against a firearm seller must involve a sale of a firearm by a seller to the same person who thereafter 'use[s]' the firearm to harm himself or herself, or others." Notice of Removal ¶ 25. In their Surreply to plaintiffs' Motion to Remand, defendants expand on this allegation:

> In the context of civil tort law, "use" of a firearm can only mean employing the firearm's functional features to cause or threaten injury. A firearm cannot be "use[d]" to cause a risk of injury other than by shooting it, or at least threatening to shoot it. And more importantly, the "use" of a firearm under the definition of negligent entrustment must create "unreasonable risk of physical injury to *the person* or others." 15 U.S.C. § 7903(5)(B) (emphasis added). It is impossible for a person to "use" a firearm to harm herself without discharging it (*e.g.*, suicide). Any construction of "use" to include anything other than firing or threatening to fire a firearm is contrary to the plain meaning of the text and purpose of the PLCAA.

Surreply at 2-3. This elaboration, however, only magnifies the deficiencies in defendants' argument.

a. Defendants' Interpretation Is Not Supported by Any Case Law.

Defendants' sole citation to a case that mentions "use" in the context of negligent entrustment is *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011). Surreply at 5 n. 1. *Gilland* holds, consistent with Connecticut common law, that the

---

> not dictate to this court that it must recognize ... a negligent entrustment claim. It's only allowing for those claims to be filed in court. *And once they're filed it's up to your Honor to apply Wisconsin law to claims that fit within those exceptions.*

Transcript of Motion Hearing, *Norberg v. Badger Guns*, Civil Case No. 10-cv-020655 (Wis. Cir. Ct.), June 9, 2011, at p. 7 (emphasis supplied), attached as Exhibit A.

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." *Id.* at *13. It is unclear how this point is helpful to the Bushmaster Defendants. Plaintiffs allege that Riverview supplied the Bushmaster XM15-E2S to Nancy Lanza for her use; they simply do not allege that Nancy Lanza "use[d]" the Bushmaster by firing it. There is absolutely nothing in *Gilland* that suggests "use" should be read as narrowly as defendants would like.

The absence of any controlling Connecticut authority dooms the Bushmaster Defendants' argument from the outset, but the dearth of supporting case law is not limited to Connecticut. There is not a *single* citation in defendants' briefing to any case endorsing their reading of PLCAA – because no such case exists. This fact alone requires remand. *E.g.*, *Ret. Program for Employees of the Town of Fairfield*, 642 F. Supp. 2d at 97-98 ("That there is at minimum a recognized dispute on this issue in the case law is a sufficient basis on which to conclude that Plaintiffs' claim against [the non-diverse defendant] survives this [fraudulent joinder] assessment."); *Kent State Univ. Bd. of Trustees*, 512 F. App'x at 490 ("[g]iven the unsettled nature of Ohio law on this issue and the [fraudulent joinder] standard, remand was a foregone conclusion"); *Hartman*, 789 F. Supp. 2d at 706 ("This incertitude respecting both legal issues dooms defendants' fraudulent joinder challenge.").

Here, not only is there no *settled* law supporting defendants' argument that "use" is synonymous with "discharge," there is *no law at all*. In order to determine that Riverview had been fraudulently joined, this Court would need to adopt a novel and restrictive interpretation of PLCAA's negligent entrustment provision *and* determine that there is no possibility that a Connecticut court might reach a different conclusion. The breadth and scope of those hypothetical findings expose the weakness of defendants' position.

b. Defendants' Argument Is Illogical.

Defendants' inability to point to any supporting case law is also emblematic of how deeply flawed their argument is. Defendants argue that "[a] firearm cannot be 'use[d]' to cause a risk of injury other than by shooting it, or at least threatening to shoot it." Surreply at 2. This is obviously untrue. (It also uses imprecise language: PLCAA's definition does not refer to the entrustee "causing" a risk of injury, but rather using the firearm "in a manner involving unreasonable risk of physical injury." 15 U.S.C. § 7903(5)(B).) Leaving a loaded handgun in a room full of children can certainly be said to "involve[e] [an] unreasonable risk of physical injury"; the same can be said of giving a firearm to a dangerous felon, or a mentally unstable person, or sharing a military assault weapon with someone unfit to use it. Indeed, if Congress had intended the meaning defendants suggest, its choice of language is baffling – "us[ing]" a firearm "in a manner involving unreasonable risk of physical injury" is a needlessly convoluted way of saying "us[ing]" a firearm to *cause* injury.

Plaintiffs also fail to grasp the significance defendants attribute to PLCAA's inclusion of injury to the entrustee – in addition to injury to "others." *See* Surreply at 2-3 ("And more importantly, the 'use' of a firearm under the definition of negligent entrustment must create "unreasonable risk of physical injury to *the person* or others. 15 U.S.C. § 7903(5)(B). It is impossible for a person to 'use' a firearm to harm herself without discharging it (*e.g.*, suicide)."). Even if it is true that it is "impossible for a person to 'use' a firearm to harm herself without discharging it," that is not at all what PLCAA requires. Once again, PLCAA refers to using a firearm "*in a manner involving unreasonable risk* of physical injury." 15 U.S.C. § 7903(5)(B) (emphasis supplied). It is not at all impossible for a person to create a risk of injury to herself by

negligently allowing others to use a firearm. Each of the examples listed above can be said to create a risk of injury to the person that is equal to the risk of injury to others. In this case, of course, there is a more obvious example: Nancy Lanza's decision to share the Bushmaster XM15-E2S with her son resulted in him killing her with that weapon.

c. "Use" Does Not Mean "Discharge."

Nor can the Bushmaster Defendants establish that the plain meaning of "use" is "discharge." *See* Surreply at 3 ("Any construction of 'use' to include anything other than firing or threatening to fire a firearm is contrary to the plain meaning of the text and purpose of the PLCAA."). To start, the United States Supreme Court has recognized that "using" a firearm encompasses more than using it for its "intended purpose" – that is, as a weapon. *Smith v. United States*, 508 U.S. 223, 230 (1993). In *Smith*, the Court was called upon to discern "the everyday meaning" of the word "use" after a criminal defendant challenged a penalty enhancement on the grounds that trading a firearm in exchange for drugs did not constitute a "use" of the firearm under the statute. *Id.* at 228. After consulting multiple dictionaries and reviewing past interpretations of the term, the Court concluded that the ordinary meaning of "use" is expansive. Notably, it rejected the defendant's argument that the statute required proof that the firearm was used *as a weapon*, noting simply that "the words 'as a weapon' appear nowhere in the statute." *Id.* at 229. Likewise, the words "as a weapon" appear nowhere in PLCAA's negligent entrustment definition. As in *Smith*, "use" must be given its ordinary meaning. [3]

[3] Defendants have argued that *Smith* is irrelevant because the Court's discussion of "use" arose in the context of criminal law, which addresses many different uses of firearms. *See* Surreply at 3. This is true, but inapposite. The *Smith* Court did not derive the meaning of "use" by placing it in the context of the criminal laws; it looked to Webster's New International Dictionary and Black's Law Dictionary to determine "the everyday meaning" of the word. 508 U.S at 228-29.

Congress' word choices in other parts of PLCAA are also significant. In PLCAA, Congress twice employed language that can be obviously contrasted with its choice of the word "use." In the threshold definition of "qualified civil liability action," the statute proscribes certain actions that result "from the criminal or *unlawful misuse* of a qualified product." *See* 15 U.S.C. § 7903(5) (emphasis supplied). And in the provision governing product liability claims, PLCAA refers to scenarios where "the *discharge* of the [firearm] was caused by a volitional act that constituted a criminal offense[.]" *Id.* at § 7903(5)(A)(v) (emphasis supplied).

Congress' decision to include the terms "discharge" and "unlawful misuse" in the text of PLCAA indicates that it knew how to employ narrower terms to refer to specific uses of firearms, and that it did so when such terms were appropriate. Consequently, "use" must be read not merely to mean "discharge" or "unlawful misuse." *See Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quotation marks and citation omitted); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 131 S. Ct. 1259, 1272 (2011) (holding that "law enforcement purposes" must be read to "involve more than just investigation and prosecution" because other parts of the statute "demonstrate [that] Congress knew how to refer to these narrower activities").

d. The Legislative History of PLCAA Is Not a Useful or Reliable Interpretive Tool.

The Bushmaster Defendants' resort to legislative history does not save their argument. As an initial matter, consulting legislative history is only appropriate when the meaning of a statute is ambiguous. *See Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2d Cir. 2007). Defendants concede this, and do not even argue that the negligent entrustment definition is ambiguous. Indeed, it is not. But even if legislative history *were*

relevant to the Court's analysis, defendants' proffered evidence is not at all probative of Congressional intent. They rely on a portion of a Report from the House of Representatives that includes a statement by House members who opposed the enactment of PLCAA. In that statement, the dissenters describe the negligent entrustment exception as precluding a straw sale or other successive entrustment.

That reliance is doubly flawed. First, the Supreme Court has instructed that legislative history "refers to the pre-enactment statements of those who drafted or voted for a law." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Thus, only the "intention of the drafters" provides guidance. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). By contrast, the Supreme Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents." *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964). The Court noted that the "fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Id.* (internal quotation marks and citation omitted).

Second, as defendants surely know, PLCAA's legislative history is replete with wildly divergent characterizations of the proposed law. The bill's proponents describe it in the most vanilla of terms, while its opponents foretell a sea change.[4] *Cf. NLRB*, 377 U.S. at 66 ("In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach."). Perhaps most

[4] *E.g.*, *compare* 151 Cong. Rec. S9094 (July 27, 2005) (statement of Sen. Sessions) ("That is what we are trying to do here, to pass some legislation that does nothing more than restore the classical understanding of American civil liability."), *with* 151 Cong. Rec. S9081 (July 27, 2005) (statement of Sen. Durbin) ("They are changing the law. They are saying, for firearms dealers, we are not going to hold them to this same standard that we hold every other business in America to when people buy products."). Quoted portions of the Congressional Record are attached as Exhibit B.

saliently, although the Washington sniper case was discussed at length in both the House and the Senate, the legislators could not agree on whether PLCAA would permit a cause of action against the firearm seller to proceed.[5]

e. Defendants Ignore the Common Law Meaning of Use.

Finally, the meaning defendants attempt to give the word "use" in PLCAA's negligent entrustment definition both ignores and is fundamentally incompatible with the common law meaning of that term.

i. Congress Borrowed Language from the Restatement (Second) of Torts, Thereby Incorporating the Common Law Meaning of "Use."

Under PLCAA's definition, negligent entrustment of a firearm turns on whether the seller should have known that the person to whom it sold the weapon was likely to "use [the firearm] in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B). That quoted language was not invented by Congress when it drafted PLCAA. The phrase mirrors the common law iteration of "use," as expressed by Section 390 of the Restatement (Second) of Torts. *See* Restatement (Second) of Torts § 390 (supplier of chattel subject to liability where entrustee is likely to "*use* [the chattel] in a manner involving unreasonable risk of physical harm to himself and others") (emphasis supplied).

---

[5] *Compare* 150 Cong. Rec. S1657 (Feb. 26, 2004) (statement of Sen. Reed) ("[T]he underlying legislation would cause currently pending suits on behalf of the families and the estates of these victims of the snipers to be thrown out of court. . . . [N]one of the appropriate exemptions from the preemption to sue would be applicable in this particular situation."), *with* 150 Cong. Rec. S1657, S1658 (Feb. 26, 2004) (statement of Sen. Craig) ("I believe we are protecting those families [of the sniper victims]. I would not write the kind of law that is being suggested would be written. . . . If Malvo walks in and pulls a Bushmaster from off the rack and walks out with it and that is not detected, they have a problem on their hands. I believe they have a problem on their hands, and they are not exempt. The argument is—and some have used it—they do not even make it to the courthouse. That is not a valid statement."). *See* Ex. B (Excepts from Congressional Record).

This congruence was clearly intentional. The Restatement (Second) of Torts is "the most widely accepted distillation of the common law of torts." *Field v. Mans*, 516 U.S. 59, 70 (1995). Moreover, Section 390 is the authoritative source of negligent entrustment law in nearly every state that recognizes the cause of action. *See Casebolt v. Cowan*, 829 P.2d 352, 358-59 (Colo. 1992) (collecting cases where states have "employed, approved, or adopted" Section 390); *W. v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment."). By borrowing Section 390's formulation of how "use" interacts with "unreasonable risk" of harm, Congress created a framework that accommodates state common law iterations of the negligent entrustment cause of action.[6] The logic of that choice, of course, flows naturally from Congress' decision not to create causes of action through PLCAA.

Recognizing that the word "use" in PLCAA's negligent entrustment definition is culled from the Restatement informs the meaning of that word. It is a well-settled principle of statutory interpretation that "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *cf. United States v. Neustadt*, 366 U.S. 696, 707 (1961) ("Certainly there is no warrant for assuming that Congress was

[6] Indeed, state courts frame their understanding of PLCAA's definition around its similarity to the Restatement and their own state law. *E.g.*, *Gilland*, 2011 WL 2479693, at *12 (noting that "[the PLCAA] definition is consistent with Connecticut law on negligent entrustment," which is considered governed by § 390 of the Restatement); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 394 & n.89 (Alaska 2013) ("The PLCAA definition is substantially the same as the Restatement version Alaska follows. [Citing § 390 in footnote]"); *Al-Salihi*, 2013 WL 5310214, at *12 ("The PLCAA standard mirrors the standard for the tort of negligent entrustment under New York law[.][Citing § 390]").

unaware of established tort definitions when it enacted the Tort Claims Act in 1946[.]"). Thus, when language "'is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also United States v. Soler*, 759 F.3d 226, 234 (2d Cir. 2014) (same).

ii. The Common Law Meaning of "Use" Embraces Successive Entrustments.

Here, the relevant body of law applying and interpreting Section 390 unequivocally rejects defendants' argument about the meaning of "use" in the context of negligent entrustment. Cases decided under Section 390 teach that the person to whom the chattel is entrusted need *not* be the person who later employs it to cause physical harm. A claim for negligent entrustment can involve successive entrustments, so long as they are reasonably foreseeable.

This common law rule is exemplified by *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), in which a verdict against a cement manufacturer for negligently entrusting cherry bombs to employees was upheld under Section 390 even though two additional entrustments preceded injury to the plaintiff. An employee of the defendant who was entrusted with cherry bombs gave several of the bombs to a group of children; one of those children then gave a bomb to the minor plaintiff, who was severely injured when she set it off. The question for the court was one of foreseeability. Ultimately, the verdict was upheld because the manufacturer's decision to entrust the bombs to employees without adequate precautions – and with reason to know that employees were not exercising the proper level of care – created an unreasonable and foreseeable risk that a cherry bomb would fall into careless or unsuspecting

hands and thereby cause injury. Consequently, the successive entrustments did not sever the causal chain between the defendant's negligence and the plaintiff's injuries.[7]

Moreover, there can be no doubt that Congress *knew* of that rule at the time PLCAA was drafted; yet Congress nonetheless preserved the common law tort of negligent entrustment. In the five years preceding PLCAA's enactment, state and federal courts had explicitly recognized that common law negligent entrustment claims could be asserted against gun sellers and manufacturers for negligence in the chain of distribution – which, by definition, involves successive entrustments. In *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (N.Y. 2001), for example, the court found that a negligent entrustment theory could be viable if the requisite knowledge was proved (although plaintiffs had not done so). The court noted: "The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others. [Citing § 390.] *The duty may extend through successive, reasonably anticipated entrustees.*" *Id.* at 236-37 (emphasis supplied); *see also Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 395 (E.D.N.Y. 2004) (finding that plaintiffs had stated prima facie negligent entrustment claim under theory articulated in *Hamilton*);

[7] Numerous courts have taken a similar approach, finding common law negligent entrustment claims sufficient where the entrustee's use of the chattel was confined to giving or lending it to another. *See, e.g.*, *Rios v. Smith*, 95 N.Y.2d 647, 653 (2001) ("Thus, the evidence was legally sufficient for the jury to determine that [the defendant] created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son, whose use of the vehicles involved lending one of the ATVs to Smith, another minor."); *Earsing v. Nelson*, 212 A.D.2d 66, 70 (1995) (upholding denial of motion to dismiss negligent entrustment claim where minor purchaser of BB gun lent it to friend who shot and injured the plaintiff); *LeClaire v. Commercial Siding & Maint. Co.*, 308 Ark. 580, 583 (1992) (reversing trial court's dismissal of negligent entrustment claim where employer entrusted car to employee, who then entrusted it to another person; the court noted: "The real rub in this case is the fact that it involves two entrustments. That is not a bar to recovery."); *Schernekau v. McNabb*, 220 Ga. App. 772 (1996) (plaintiff properly stated negligent entrustment claim against woman who permitted her son to bring air rifle to campground, even though another camper – and not defendant's son – used the rifle to injure the plaintiff).

Johnson v. Bulls Eye Shooter Supply, 2003 WL 21639244, at *5 (Wash. Super. June 27, 2003) (denying motion to dismiss negligent entrustment claim against Bushmaster for supplying the rifle that was used by the D.C. snipers because Bushmaster could be liable under § 390 "[i]f it was foreseeable that plaintiffs and others were endangered by the entrustment of the Bushmaster XM-15 assault rifle to [the dealer]").

The cases clearly put Congress on notice that the common law of negligent entrustment, *as expressed by Section 390 of the Restatement*, provided a viable cause of action against firearm sellers, including scenarios where successive entrustments were involved. In fact, *Johnson*, which arose out of the high-profile Washington D.C. sniper shootings, was referenced numerous times during Congressional debate. *See* fn. 6 above (citing Senators' comments on how PLCAA would affect the lawsuits brought by the families of sniper victims). Yet Congress did nothing to alter the common law meaning of "use," choosing instead to adopt the Restatement's language. Congress could have narrowed the common law formulation in any number of ways – for example, by requiring that the person to whom the firearm is entrusted cause the physical injury – but it did not. Under basic principles of statutory construction, we must assume that choice reflects Congress' intent. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress' choice of words is presumed to be deliberate[.]").

4. Plaintiffs' Allegations Conform to Connecticut's Common Law of Negligent Entrustment.

The Court should never reach this argument. The Bushmaster Defendants have not provided *any* valid reason why plaintiffs' claims would be foreclosed by PLCAA in Connecticut's courts; certainly, they have not demonstrated that this Court could predict that result with the certainty required by *Pampillonia*. Moreover, defendants have not even challenged the sufficiency of plaintiffs' allegations under Connecticut common law. Although it

is not plaintiffs' burden to establish the viability of their claims against Riverview, here we briefly address the common law of negligent entrustment in Connecticut and the sufficiency of plaintiffs' allegations under that law.

Under the doctrine of negligent entrustment, one who supplies a dangerous instrument to another with knowledge that doing so is likely to create an unreasonable risk of physical harm to others may be held liable when injury foreseeably results. In Connecticut, liability under this rule is derived from Section 390 of the Restatement. *See Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678, 679 (1933) (reciting elements of negligent entrustment as stated in Section 390); *Short v. Ross*, 2013 WL 1111820, at *5 (Conn. Super. Ct. Feb. 26, 2013) ("[A]s long recognized by the decisions of the Superior Court, [the Connecticut Supreme Court in] *Greeley* 'virtually adopted' the approach provided by the Restatement.") (citations omitted).[8]

Negligent entrustment liability arises from the affirmative duty to potential victims that attaches to those who handle dangerous chattels. As the commentary to Section 390 of the Restatement explains, "liability is based upon the rule. . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." Restatement (Second) of Torts § 390 cmt. b.

Naturally, a defendant's knowledge about how "human beings will conduct themselves" is a fact-intensive question. It implicates the dangerousness of the chattel; *see Greeley*, 165 A. at 679 (recognizing cause of action for negligent entrustment of automobile; although cars do not belong in the same category as firearms or explosives, cars are nevertheless "capable of doing

[8] Thus, the substantive law governing plaintiffs' claims – Section 390 of the Restatement – aligns with the definition provided in PLCAA, which relies on the same Section to describe the entrustee's "use" of the firearm.

great injury when not properly operated"); the purpose for which the chattel is entrusted; *see Turner v. Am. Dist. Tel. & Messenger Co.*, 94 Conn. 707, 110 A. 540, 543 (1920) (knowledge of entrustee's recklessness was "vitally important" element, "since plainly it cannot be regarded as negligence to supply effective weapons of protection to [a night watchman]."); the propensities of certain classes of persons; *see Burbee v. McFarland*, 114 Conn. 56, 157 A. 538, 539 (1931) ("The common law requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age," who "might innocently play with or use it to his injury."); Restatement (Second) of Torts § 390 cmt. b (liability may arise where entrustor supplies a chattel to one who "belongs to a class which is notoriously incompetent to use the chattel safely[.]"); and common knowledge about how humans are likely to behave under certain sets of circumstances; *see Short v. Ross*, 2013 WL 1111820, at *6-9 (Conn. Super. Ct. Feb. 26, 2013) (plaintiffs stated prima facie case against U-Haul for renting truck that would be used at football game tailgate); *id.* at *7 ("[A] review of our state's common law of negligent entrustment outside of the context of automobiles shows that the essence of the tort includes circumstances where an entrustor should know that there is cause why a chattel ought not to be entrusted to another.").

Plaintiffs' negligent entrustment claim against Riverview touches on each of these factors in pleading that Riverview should have known of the unreasonable risks associated with selling the Bushmaster XM15-E2S to a civilian user. With respect to the dangerousness of the weapon, plaintiffs allege:

- The Bushmaster XM15-E2S is an AR-15 rifle, a weapon designed for the United States military to inflict mass casualties. *See* Compl. ¶¶ 45, 54.
- The XM15-E2S propels ammunition at a speed that far exceeds that of a handgun, which greatly increases the ammunition's destructive impact on the human body. *See id.* at ¶¶ 55-60.

- The XM15-E2S is designed to accept large capacity magazines, a feature that allows soldiers (and civilians) to fire more rounds and minimize time spent reloading. *See id.* at ¶¶ 61-63.

- The XM15-E2S is capable of rapid, semi-automatic fire that allows soldiers (and civilians) to empty a 30-round magazine in a matter of seconds. *See id.* at ¶¶ 64-67.

- The XM15-E2S can pierce body armor, which increases its lethality when used against enemy troops (and police officers). *See id.* at ¶ 47.

- The combined effect of the XM15-E2S's mechanical features is more wounds, of greater severity, in more victims, in less time. *See id.* at ¶¶ 69-70.

This capacity for harm is contrasted with the weapon's limited purpose for civilian users:

- The XM15-E2S is ill suited to home defense: among other reasons, the velocity and rate of semi-automatic fire greatly increase the risk that bullets will breach walls and doors of the home and thus endanger innocents. *See id.* at ¶¶ 83-94.

- The Bureau of Alcohol, Tobacco and Firearms has repeatedly determined, after extensive study, that semiautomatic assault weapons like the XM15-E2S serve a purpose in combat and crime but are not suited for either hunting or sporting. *See id.* at ¶¶ 95-104.

Finally, plaintiffs make specific allegations supporting their claim that civilian users constitute a "class" of persons who are unfit to possess the XM15-E2S. These allegations speak to civilian users' demonstrated propensities for unsafe use. *Cf. Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 328 Ill. App. 3d 482, 488 (2002) (Under Section 390, "a lawsuit may succeed with proof that the defendant entrusted the dangerous article to a member of a larger class, where the defendant knew or should have known that members of the larger class generally tended to use such articles in a manner involving unreasonable risk of harm."). They also contrast the *environment* in which civilian users handle assault weapons with the environment for which those weapons were designed: the military and law enforcement. For example:

- Specialized institutions like the military and law enforcement have extensive rules and protocols in place – concerning training, storage, safety, and the mental health of soldiers and officers – to prevent combat rifles from causing criminal or accidental harm. *See* Compl. ¶¶ 105-127.

- There are no analogous rules and protocols in place when rifles like the XM15-E2S are sold to civilian users like Nancy Lanza. *See id.* at ¶¶ 128-144.

- More than half of American households with firearms do not store them securely. *See id.* at ¶ 139.

- The XM15-E2S is marketed to civilian users in explicitly militaristic terms that reinforce its image as a combat weapon used for the purpose of waging war and killing human beings. *See id.* at ¶¶ 72-81.

- Civilian users are entrusted with militarized and highly lethal weapons like the XM15-E2S without a permit, safety training, or a mental health assessment, and regardless of whether they intend to make the rifle available to other persons. *See id.* at ¶¶ 135-138.

- Prior to the sale of the XM15-E2S to Nancy Lanza in 2010, many highly publicized mass shootings had revealed the AR-15 to be the weapon of choice for mass shooters, including those that had targeted elementary school children, high school children, and college students. *See id.* at ¶¶ 145-148.

Civilian users constitute an admittedly broad class. But what matters is Riverview's actual or constructive knowledge about civilians' use of AR-15s. Plaintiffs have made specific allegations that provide a rationale for why civilian users are an appropriate class in this case. As detailed above, the AR-15 was designed with a particular market in mind – the military – and the weapon's terrifying lethality is both *justified* by the special needs of that market and *controlled* by the extensive safety measures embedded within that market. It is plaintiffs' position that unleashing the same weapon on a population that has no such need, is held to no such safety measures, and has repeatedly used the weapon as it was intended – but on innocent civilians not enemy troops – is simply not reasonable. *Cf. McCarthy v. Olin Corp.*, 119 F.3d 148, 163 (2d Cir. 1997) (Calabresi, J., dissenting) ("Selling tanks to the armed forces is fine; selling them to the

general public is, I would think, clearly negligent."). It is the role of a Connecticut jury to assess the merits of that position.[9]

B. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT PLCAA BARS PLAINTIFFS' CUTPA CLAIMS.

In addition to claims for negligent entrustment, PLCAA permits claims for knowing violations of state statutes applicable to the sale or marketing of firearms. The plain language of the statute describes this category of cases, indicating that "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" is not barred by PLCAA. 15 U.S.C. § 7903(5)(A)(iii). Defendants nonetheless claim that this provision is so narrow that there is no possibility it encompasses any claim based on CUTPA. Notice of Removal ¶¶ 26-28.

---

[9] In their Surreply, the Bushmaster Defendants argue that – even assuming plaintiffs' interpretation of "use" is correct – plaintiffs have failed to allege that Nancy Lanza "used" the Bushmaster at all. *See* Surreply at 4. A fair reading of plaintiffs' complaint indicates otherwise. *See* Compl. ¶ 154 (On December 14, 2012, Adam Lanza retrieved the Bushmaster and ten 30-round magazines from "an unlocked gun closet in the house he shared with his mother"); *id.* at ¶ 138 (purchasers of AR-15s are not required to indicate whether they intend to share weapon with others); *id* at ¶ 139 (more than half of American households do not store firearms securely); *see also id.* ¶ 188 ("The Riverview Defendants knew, or should have known, that Nancy Lanza's receipt and possession of the XM15-E2S involved an unreasonable risk of physical injury to others."). These allegations, construed in the light most favorable to plaintiffs, encompass the allegation that Nancy Lanza "used" the Bushmaster by sharing it with her son.

Moreover, even if the Court finds these allegations to be insufficient, remand is still required unless the defect cannot be cured by amendment. *See Kenneson v. Johnson & Johnson, Inc.*, 2015 WL 1867768, at *4 (D. Conn. Apr. 23, 2015) (Shea, J.) (considering Connecticut procedural standards for amendment in deciding whether plaintiffs could possibly prevail against non-diverse defendant); *Nerad v. AstraZeneca Pharm., Inc.*, 203 F. App'x 911, 914 (10th Cir. 2006) (approving of district court's discussion of plaintiff's right to amend in context of fraudulent joinder analysis: "This was a jurisdictional inquiry. As we read the order, the court determined that success was reasonably possible *at the time of removal* because, although the plaintiff might be required to amend his complaint, that amendment would be allowed as a matter of course."); *cf.* CT Prac. Bk. § 10-44 (a plaintiff whose complaint is stricken may plead over to cure any insufficiency).

A Connecticut court will find that PLCAA permits plaintiffs to proceed under CUTPA. It may reach that determination by following the Second Circuit and construing PLCAA's predicate statute provision as the Second Circuit did in *City of New York*, 524 F.3d at 399-404. Under that construction, PLCAA permits plaintiffs' CUTPA claims. Alternatively, a Connecticut court may reach its own determination as to the meaning of the predicate statute provision, construing that provision in accordance with its plain language. In either scenario, the court will conclude that CUTPA is an appropriate predicate statute.

1. Because There Is No Binding Authority on This Issue, No Further Analysis Is Necessary and Remand Is Required.

The *Pampillonia* test requires the Court to determine that there is "no possibility. . .that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia*, 138 F.3d at 461. The District Court must determine what precedent would bind the state court and proceed accordingly, recognizing that the state court will be bound to follow the law as determined by the state's highest court, not the federal court of appeals. *CUSA LLC*, 2007 WL 3046270, at *3 (observing that, while it was bound to follow Second Circuit precedent, a Connecticut court is not and remanding because there were open questions of Connecticut law). Connecticut courts are bound by Connecticut precedent. *Stuart*, 297 Conn. at 45-46 ("[I]t is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by our precedent."). Second Circuit authority, while strongly persuasive, is not binding. *Turner*, 253 Conn. at 340-41.

Defendants cite no *Connecticut* authority to establish that their reading of PLCAA's predicate statute provision is the result a Connecticut court will reach. They cannot, because there is no Connecticut law on this particular question. As all legal issues must be resolved in plaintiffs' favor in this jurisdictional analysis, the Court must remand. *See Pampillonia*, 138 F.3d

at 461 (all legal issues must be resolved in plaintiff's favor); *see also* Section II.B. above (listing cases finding that if pertinent questions of law are unsettled, remand is required).

2. The Bushmaster Defendants' Allegations on This Issue.

The Bushmaster Defendants recognize that plaintiffs' Complaint alleges that Riverview "knowingly violated the Connecticut Unfair Trade Practices Act." Notice of Removal ¶ 24. They acknowledge that PLCAA permits suits against a seller of firearms for knowingly violating a state statute applicable to the sale or marketing of firearms. *Id.* ¶ 26. They allege that because CUTPA does not "expressly regulate or clearly implicate the regulation of firearms" it is not a proper predicate statute. *Id.* ¶ 27. Therefore, they argue, PLCAA is a complete defense to plaintiffs' CUTPA claims against Riverview. *Id.* ¶¶ 26-27.[10]

3. PLCAA's Predicate Statute Provision.

PLCAA provides that a qualified action *"shall not include"*:

> 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. . .

15 U.S.C. § 7903(5)(A)(iii) (emphasis added).

The scope of the predicate statute provision has been construed by both the Second Circuit and the Ninth Circuit, as well by the District of Columbia Court of Appeals, the Indiana Appellate Court and the Alaska Supreme Court. *City of New York*, 524 F.3d at 399-404; *Ileto v. Glock*, 565 F.3d 1126, 1131-38 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169-72 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. App. 2007), *transfer denied*, 915 N.E.2d 978 (Ind.

[10] The Bushmaster defendants repeat these arguments in their Opposition to Plaintiffs' initial Motion to Remand, Dkt. #34, and their Surreply in that round of briefing, Dkt. #42.

2009); *Estate of Kim v. Coxe*, 295 P.3d 380, 393-94 (Ak. 2013). No Connecticut appellate court has ever addressed this provision.

4. The Second Circuit's Decision in *City of New York* Would Allow Plaintiffs' CUTPA Claims to Proceed under the Predicate Statute Provision.

The Second Circuit's decision in *City of New York*, 524 F.3d at 399-404, will be persuasive to a Connecticut court, but not binding on it. *E.g. Turner*, 253 Conn. at 340-41. If a Connecticut court follows *City of New York*, it will recognize that PLCAA's predicate statute provision permits plaintiffs' CUTPA claims.

In *City of New York*, the City brought suit against firearms manufacturers and wholesale sellers, asserting various claims against them based on the theory that they distributed and sold firearms in a manner that increased their use by criminal populations. The action was filed in federal court in 2000 on the basis of diversity jurisdiction. In 2005, Congress passed PLCAA and the defendants moved to dismiss. The City argued that PLCAA is unconstitutional and that it had asserted a statutory nuisance claim satisfying the predicate statute provision.[11] The District Court rejected the constitutional challenges and found that the statute was an acceptable predicate.

Judge Miner, writing for a two-judge majority, affirmed the District Court's determination that PLCAA survives constitutional challenge but reversed concerning the scope of the predicate statute provision. The court first addressed the plaintiff's challenge to PLCAA under the Tenth Amendment and fundamental principles of federalism.[12] It defused that

[11] Although this statute had not been specifically pleaded, the City asserted that its allegations of common law nuisance encompassed a statutory nuisance claim based on Penal Law Code § 240.45.

[12] The plaintiff argued that PLCAA impermissibly elevates the state legislature above the state judiciary, because the predicate statute provision (as construed by the defendants) would only

challenge in part *by construing the predicate statute provision not to require express language regarding firearms and merely to require a judicial decision that the statute is applicable to firearms*:

> The Firearms Suppliers argued [in the District Court] that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate statute even if a state's highest court were to construe that statute as applicable to firearms. *We disagree with this argument and, as set forth in more detail below, do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations of state courts.*

City of New York, 524 F.3d at 396 (citations omitted) (emphasis supplied).[13]

Turning then to the predicate statute provision, the court recognized that the key question is what "applicable" means: "Central to the issue under examination is what Congress meant by the phrase 'applicable to the sale or marketing of [firearms].' The core of the question is what Congress meant by the term 'applicable.'" 524 F.3d at 399. Rather than simply follow the plain meaning of "applicable," the Second Circuit narrowed that meaning in certain respects.[14] It emphasized again, however, that:

---

give force to legislative pronouncements and would ignore judicial interpretations of state statutes. *City of New York*, 524 F.3d at 396.

[13] The court continued, "We agree with the District Court in its rejection of the Firearms Suppliers' argument that a statute must expressly mention firearms in order to qualify as a predicate statute. The District Court held that the Firearms Suppliers' argument 'misconstrues the relationship of courts and legislatures in New York. The law is not only the language that the legislature adopts, but what the courts construe to be its meaning in individual cases.'" *City of New York*, 524 F.3d at 396 (quoting *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 266 (2005)).

[14] For example, the Court determined that in light of subsections (I) and (II) of the predicate provision, it would find a "textual definition" of "applicable," rather than follow its plain meaning. *Id.* at 401. (This was an application of the rule of *eiusdem generis*.) And it turned to the legislative history, although it is not clear exactly what conclusions, if any, the court drew from it. *Id.* at 403-04. We remark on these choices simply to highlight that a Connecticut court need *not* make the same choices.

> We find nothing in the statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. *We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute.*

524 F.3d at 399-400 (emphasis supplied).

It determined finally:

> [T]he exception created by 15 U.S.C. § 7903(5)(A)(iii): (1) does not encompass New York Penal Law § 240.45; (2) does encompass statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms; and (3) does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.

524 F.3d at 404.

a. *City of New York*'s Third Category Permits Plaintiffs to Proceed on their CUTPA Claims Because CUTPA Clearly Implicates the Purchase and Sale of Firearms.

City of New York recognizes that the predicate statute provision "does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." 524 F.3d at 404.[15] This category of statutes is broad. The court indicates that statutes in this category *need not* expressly regulate firearms. They need merely be statutes that "clearly can be said to implicate the purchase and sale of firearms." *Id.*

The removing defendants allege and argue that because CUTPA is a statute of general application, it does not "clearly implicate the *regulation* of firearms." Notice of

[15] The Bushmaster defendants equate the holding of *City of New York* with that of the Ninth Circuit in *Ileto*, 565 F.3d at 1135-36, and *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 180-81 (D.D.C. 2009). Notice of Removal ¶ 27. That is a significant misunderstanding of *City of New York*. *City of New York* reads the predicate statute provision more expansively than *Ileto* or *Estate of Charlot*.

Removal ¶ 27 (emphasis supplied); *see also* Surreply, at 5-6. This contention misstates the *City of New York* test, imposing a non-existent additional requirement. *City of New York* does not require that the predicate statute clearly implicate the *regulation* of firearms, merely that it "clearly can be said to implicate the purchase and sale of firearms." *City of New York*, 524 F.3d at 404.

And to make a point that is obvious, "clearly can be said to implicate the purchase and sale of firearms" cannot mean "expressly regulate firearms" – nor can it stand for any synonym of "expressly regulate firearms" – both because the Second Circuit treated statutes which regulate firearms expressly as a separate category and because the Second Circuit said the "clearly implicates" category of statutes *does not* "expressly regulate" firearms. *City of New York*, 524 F.3d at 404. As we discuss in Section V.B.4.c. below, CUTPA clearly implicates the purchase and sale of firearms.

b. *City of New York*'s Second Category Would Allow Plaintiffs' CUTPA Claims If a Connecticut Court Applies CUTPA to the Sale or Marketing of Firearms.

City of New York's second category of permitted cases must be understood to mean cases in which a state court applies a statute of general applicability to a claim related to the sale or marketing of firearms. *See City of New York*, 524 F.3d at 396, 399-400, 404.

In rejecting the City's Tenth Amendment challenge, the court rejected the very argument the removing defendants make here: "The Firearms Suppliers argued that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate statute even if a state's highest court were to construe that statute as applicable to firearms. *We disagree*[.]" 524 F.3d at 396 (emphasis supplied). Later, in its analysis of the predicate statute provision, the court indicated: "[w]e decline to foreclose the possibility that, under certain

circumstances, state courts may apply a state of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 400; *see also id.* at 396 ("We ... do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations of state courts."). *City of New York*'s second category of permitted statutes thus includes statutes of general application that a state court applies to the sale or marketing of firearms.

The Bushmaster Defendants claim that *City of New York*'s rejection of the statutory nuisance claim at issue in that case implicates the scope of this second category of cases. *See* Surreply at 6 n.3. And it does, but not in a way that is helpful to defendants. At the time *City of New York* was decided, New York's higher courts had twice rejected claims against gun manufacturers nearly identical to the statutory nuisance claim at issue in *City of New York.* The statutory nuisance claim did not fail because the statute in issue was generally applicable; *it failed because New York's high courts had already indicated their disapproval of such a claim.*[16]

Thus under *City of New York*'s second category, a case may proceed if a Connecticut court would apply CUTPA, "a statute of general applicability," to the sale or marketing of firearms. *See City of New York*, 524 F.3d at 396, 399-400, 404. Applying the *Pampillonia*

[16] *City of New York*'s determination that the New York statute would not serve as a predicate must be understood in the context of prior decisions by New York's high courts rejecting like claims. In 2001, the New York Court of Appeals held that gun manufacturers did not owe victims of gun violence a general duty of care in connection with the marketing and distribution of hand guns. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 230-31, 240 (N.Y. 2001). Two years later, the Appellate Division of the New York Supreme Court affirmed the dismissal of public nuisance claims brought against gun manufacturers, distributors and sellers in connection with their marketing and sales practices, finding that *Hamilton* foreclosed such claims. *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-95 (N.Y. App. 2003).

standard, if there is even a *possibility* that a Connecticut court will apply CUTPA to the sale or marketing of firearms, Riverview is not fraudulently joined, and the case must be remanded.[17]

c. CUTPA Clearly Implicates and Is Applicable to the Sale and Marketing of Firearms.

In their Notice of Removal, the Bushmaster Defendants attack the CUTPA counts based on their narrow interpretation of the predicate statute provision. *See* Notice of Removal ¶¶ 26-27. The limited question raised by their Notice of Removal is whether a Connecticut court would construe the predicate statute provision as restrictively as they do. They have not alleged that CUTPA will not suffice as a predicate statute if the provision is construed more broadly, perhaps because they recognize the futility of such an argument. Below, we address CUTPA more substantively than defendants have. By doing so we do not concede or even imply that the Court could determine remand based on an issue not alleged in the Notice of Removal. *Pampillonia* requires the removing defendants to prove fraudulent joinder by clear and convincing evidence. *Pampillonia*, 138 F.3d at 461. *A fortiori*, a claim that is not alleged cannot serve as a basis for establishing fraudulent joinder.

---

[17] Fundamental concerns for federalism require that a Connecticut court be the final arbiter of the applicability of Connecticut's statute:

> This Court recognizes that "[w]here a decision is to be made on the basis of state law. . . the Supreme Court has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts." *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150 (2d Cir.2001). "[R]ooted in basic principles of federalism," this preference requires deference to the opinions of state court on state law question when such decisions are available. *Id.*

Baker v. Health Mgmt. Sys., Inc., 298 F.3d 146, 149 (2d Cir. 2002). *City of New York* specifically allows for the creation of predicate statutes through the development of state jurisprudence: "under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." 524 F.3d at 400.

"[T]he purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce, and whether a practice is unfair depends upon the finding of a violation of an identifiable public policy. . . . *The entire act is remedial in character. . . and must be liberally construed in favor of those whom the legislature intended to benefit.*" *Willow Springs Condominium Ass'n, Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 42 (1998) (internal quotation marks and citations omitted) (emphasis supplied).

> CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of the act, [General Statutes] § 42–110b(a), states merely 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. Trade or commerce, in turn, is broadly defined as the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

Id. Clearly, CUTPA is applicable to and can be said to implicate sales and marketing conduct in Connecticut – including the sale and marketing of firearms. *See generally Salomonson v. Billistics, Inc.*, 1991 WL 204385, at *12 (Conn. Super. Sept. 27, 1991) (Freeman, JTR) (applying CUTPA to transaction involving firearms; "The instant transaction for the sale, manufacture and delivery of remanufactured weapons to Plaintiff meets the statutory definition of trade or commerce, C.G.S. § 42-110a(4)[.]").

d. Plaintiffs Allege Claims under CUTPA.

The Bushmaster defendants do not allege that plaintiffs fail to state a claim under CUTPA. *See* Notice of Removal ¶¶ 26-27. Thus the sufficiency of plaintiffs' allegations are not before the Court. We nonetheless briefly address our CUTPA allegations.

The criteria for establishing a violation of CUTPA are flexible:

> It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the

> practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons].

Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 273 Conn. 296, 305 (2005) (citations and internal quotation marks omitted). Under the cigarette rule, "[a]ll three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three[.]" *Id.* at 305. "CUTPA reflects a public policy that favors remedying wrongs that may not be actionable under other bodies of law." *Willow Springs Condo. Ass'n, Inc.*, 245 Conn. at 42.

Plaintiffs allege, inter alia, that Riverview engaged in conduct that was immoral, unethical, and unscrupulous by holding the XM15-E2S out as an appropriate weapon for civilian purchase, despite their knowledge about its excessively dangerous qualities and despite their knowledge about the likelihood that it would be misused. *See* Compl. ¶¶ 174-191. Riverview's sale of a weapon with these qualities violated the public policy of the State of Connecticut as embodied in Connecticut General Statutes Sections 53-202a *et seq.* (2011 Rev.), which banned assault weapons closely resembling the XM15-E2S.[18] Based on these allegations, a Connecticut court is likely to find that plaintiffs have alleged a CUTPA violation.

5. A Connecticut Court May Reach Its Own Broader Interpretation of the Predicate Statute Provision.

While the Second Circuit's interpretation of PLCAA's predicate statute provision will be highly persuasive to the Connecticut Supreme Court, it is by no means binding. *E.g. Turner*, 253

[18] Even if the removing defendants had challenged the substantive pleading of the elements of CUTPA, which they have not, the determination of such a challenge is best left to the Connecticut courts. *See Baker*, 298 F.3d at 149.

Conn. at 340-41. The Connecticut Supreme Court may adopt the more expansive construction of the predicate statute provision reached by Judges Katzmann and Weinstein, or one much like it.

All four judges who considered the predicate statute provision in this Circuit (Judges Miner, Cabranes, Katzmann, and Weinstein) agreed that "applicable" is a broad term, meaning "capable of being applied." Two judges (Judges Weinstein and Katzmann) determined that the meaning of the predicate provision was clear on its face and would simply have implemented its plain language. *E.g. City of New York*, 524 F.3d at 404-05 (Katzmann, J., dissenting) (finding that predicate statute provision is unambiguous and so the court must simply implement its plain language); *City of New York*, 401 F. Supp. 2d at 261 (Weinstein, J.) (holding that "[b]y its plain meaning. . . . Section 240.45 satisfies the language of the predicate exception requiring 'a statute applicable to the sale or marketing of [a firearm].'"); *see also City of Gary*, 875 N.E.2d at 434 (predicate statute provision is unambiguous and encompasses statutes "applicable to the sale or marketing" of firearms).

The two judges in the *City of New York* majority read "applicable" as ambiguous and therefore resorted to contextual and extratextual evidence to determine Congress' intent. *City of New York*, 524 F.3d at 400-04. The Connecticut Supreme Court, however, may adhere more closely to federal canons of statutory interpretation, which give weight to plain meaning in statutory analysis. *See e.g.*, *BedRoc Ltc., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"). "Applicable" is not defined, so the general rule is that "[i]n the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citing dictionary definition).

In addition, a Connecticut court may disagree with the *City of New York* majority's use of the interpretive principle of *eiusdem generis*. *City of New York* departs from the plain language of the predicate provision partially because it relies on subparts (I) and (II) of that provision and determines that the examples given there limit the scope of the predicate statute provision.[19] *Eiusdem generis* is "only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Gooch v. U.S.*, 297 U.S. 124, 128 (1936). And far from limiting the predicate statute provision, the subparts broaden it by "including" two subparts listing additional claims against gun manufacturers and sellers that are not barred by PLCAA. "'[I]ncludes' is a term of enlargement, not of limitation." *Alarm Indus. Comm. Inc., v. F.C.C.*, 131 F.3d 1066, 1070 (D.C. Cir. 1997). The Supreme Court has held that the term "including" indicates an "'illustrative and not limitative' function" that "provide[s] only general guidance" about Congressional intent. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) (citation omitted).

Thus a Connecticut court may well adopt a broader construction of the predicate statute provision than did the Second Circuit. In any event, because this Court cannot determine that a Connecticut court will certainly adopt defendants' restrictive interpretation of this provision, defendants fail to bear their burden under *Pampillonia*.

---

[19] The predicate statute provision states that cases it preserves "includ[e]" "any case in which the manufacturer. . . 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 [firearm]," or "any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a [firearm] knowing, or having reasonable cause to believe, that the actual buyer of the [firearm] was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18." 15 U.S.C. § 7903(5)(A)(iii)(I) & (II).

C. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT THE CONNECTICUT SUPREME COURT WILL CERTAINLY FIND PLCAA SURVIVES CONSTITUTIONAL CHALLENGE.

The Bushmaster Defendants assert that PLCAA bars plaintiffs' public nuisance claims. This bar to a long-standing common law cause of action – merely because it has not been legislatively codified – violates the Tenth Amendment.[20]

In our nation with dual sovereigns, "each [is] protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (citation omitted). The Tenth Amendment[21] makes explicit that the respect each must accord the other is a constitutional command under which the federal government must defer to "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Besides its anti-commandeering mandate, federalism limits congressional designs that interfere with the structure and operation of state government,[22] as well as on the scope of Congress's enumerated powers and authority to preempt state law.[23]

PLCAA oversteps these limits by impermissibly determining which branch of state government will be recognized as the authoritative expositor of the State's pertinent laws.

---

[20] Again, while the Second Circuit addressed and rejected a similar argument in *City of New York*, 524 F.3d at 396, the Connecticut Supreme Court is not bound by that decision. *See Johnson*, 133 S. Ct. at 1098 (observing that "the views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law").

[21] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

[22] *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L. Rev. 1, 50 (1988).

[23] *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 553 (1995) (recognizing that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Specifically, PLCAA prohibits "qualified civil liability actions" against gun manufacturers or sellers unless, *inter alia*, the defendant "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). Hence, PLCAA prohibits a nuisance action here because one has not been codified, but would permit an action based on a *legislative act*. The claims may have identical elements, but because one is legislative rather than statutory, PLCAA would favor the one and vitiate the other.

PLCAA unconstitutionally dictates to the States which branch of government Congress will recognize (and require the courts to recognize) as the authoritative expositor of state law in relation to firearms. Congress, however, holds no authority to make such a selection among branches of state government; that authority rests solely, and constitutionally, with the States themselves. It is axiomatic that "States are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 n.6 (1981) (citations omitted). The U.S. Supreme Court has been emphatic on this point: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (citation omitted).

The federal government can neither dictate the form of government a state adopts, nor require that a state respect federal separation of powers principles within its own government. *Dreyer v. State of Illinois*, 187 U.S. 71, 84 (1902). "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct or separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers

which, strictly speaking, pertain to another department of government, is for the determination of the state." *Id.* It follows that Congress may not require that the laws of a state be a product of legislative action, rather than authoritative construction by its courts.

It is also true that "decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). The "rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). Connecticut courts have long recognized a cause of action for nuisance. As such, a congressional enactment, like PLCAA, that denies state courts authority to declare the law, and prefers exclusive reliance on state legislatures for the definitive pronouncement of that state's law, unconstitutionally invades state sovereignty. After all, it is "[t]hrough the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a questions for the state itself.").

PLCAA patently requires States to exercise their lawmaking authority over the marketing and distribution of guns though the legislature rather than through the courts, while also constricting state judicial power. Congress made plain its concern that liability would be imposed on gun manufacturers and dealers by a "maverick judge or petit jury" in a manner that was not supported by its own view of "hundreds of years of the common law and jurisprudence of the United States [or] a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). Rather than chance such a "maverick" judgment out of the judicial branch, PLCAA withdraws authority from the courts over such actions, except when a state legislature decides to grant it.

This statutory expression of congressional preference for legislative determinations over judicial ones is not a legitimate exercise of federal power and violates the Tenth Amendment.

Once again, because the Connecticut Supreme Court has yet to address the constitutionality of PLCAA, remand is required.

VI. CONCLUSION

For these reasons, the Court must remand this case to the Connecticut Superior Court.

Respectfully submitted,

By **/s/ Joshua D. Koskoff, ct15619**

JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
V.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A FREEDOM GROUP, INC., A/K/A REMINGTON OUTDOOR GROUP, INC., ET AL	)	**MAY 13, 2015**
Defendants	)	

EXHIBIT A
TO MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION TO REMAND

Respectfully submitted,

By /s/ Joshua D. Koskoff, ct15619

JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207

Exhibit A

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 28

BRYAN NORBERG and GRAHAM KUNISCH,

Plaintiffs,

-vs- Case No. 10-CV-20655

BADGER GUNS, INC., BADGER OUTDOORS, INC.,
ADAM J. ALLAN, WALTER J. ALLAN,
MICK BEATOVIC, WEST BEND MUTUAL INSURANCE
COMPANY, JULIUS C. BURTON and
JACOB D. COLLINS,

Defendants.

MOTION HEARING

June 9, 2011 Before THOMAS R. COOPER,
Circuit Judge, Br. 28

APPEARANCES:

CANNON & DUNPHY, S.C., by PATRICK O. DUNPHY, ESQ., and BRETT A. ECKSTEIN, ESQ., 595 North Barker Road, Brookfield, Wisconsin, 53045, appeared on behalf of the Plaintiffs.

JONATHAN E. LOWY, ESQ., Brady Center to Prevent Gun Violence Legal Action Project, 1225 Eye Street, N.W., Suite 1100, Washington, D.C., 20005, appeared as co-counsel for Plaintiffs, pro hac vice.

VON BRIESEN & ROPER, S.C., by HEIDI L. VOGT, ESQ., 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin, 53202, appeared on behalf of the Defendant, West Bend Mutual Insurance Company.

SWANSON, MARTIN & BELL, LLP, by JAMES B. VOGTS, ESQ., and JAMES S. SMITH ESQ., 330 North Wabash, Suite 3300, Chicago, Illinois, 60611, appeared on behalf of the Defendants.

Marsha E. Steadman, Court Reporter

COPY

1 If the person would have been -- instead of
2 being 18 would have been 21 years old, could that person
3 have purchased -- was he -- if he had been 21 able --
4 would he have been able to purchase that weapon?
5 MR. VOGTS: Provided he did not fall into any of
6 the other prohibited categories.
7 THE COURT: Did he have any of those other? Do
8 we know that?
9 MR. VOGTS: Not based on what I think we've seen
10 and read. His only prohibitive characteristic was his
11 age.
12 THE COURT: Okay. Well, that's something maybe
13 the Wisconsin State Legislature should think about, but
14 legislation is thinking about it at the present time, but
15 that's again unrelated to this case.
16 MR. VOGTS: With that general rule that is the
17 PLCA there are exceptions.
18 THE COURT: Right.
19 MR. VOGTS: The courts identified those.
20 There's five of which identify potential state law claims
21 that could be brought against licensees, and we're
22 dealing with I believe just two of them in this case.
23 The plaintiffs have pled seven counts against
24 the group I'll call the Badger group, and Badger group is
25 only moving to dismiss two of those seven counts based on

1 preemption grounds under the PLCAA.

2 Those two claims are the common law negligence

3 claim and the public nuisance claim. None of those five

4 exceptions provide that common law negligence and public

5 nuisance claims can be brought in the face of preemptive

6 effect of a PLCAA. And it's important to note that the

7 PLCAA provides that none of those five exceptions create

8 causes of action or remedies.

9 All the PLCAA does is preempt certain state law

10 claims. It does not create claims. So when the court is

11 examining the plaintiffs' allegations and the plaintiffs'

12 claims, I think it's important to keep in mind that

13 federal law does not dictate to this court that it must

14 recognize a negligence per se claim or that it must

15 recognize a negligent entrustment claim. It's only

16 allowing for those claims to be filed in court. And once

17 they're filed it's up to your Honor to apply Wisconsin

18 law to claims that fit within those exceptions.

19 I think that's a very important qualifier that

20 we need to keep in mind. But coming back to the

21 negligence claim, plaintiffs really don't make a serious

22 effort in their briefs to defend their common law

23 negligence claim, and that's perhaps because appellate

24 courts around the country and now some trial courts have

25 held that it was clear that Congress intended to preempt

1 common law tort claims like negligence and public
2 nuisance.
3 And in fact the court in the Ileto-versus-Glock
4 case, the Ninth Circuit Federal Court of Appeals held
5 that Congress clearly intended to preempt common law
6 claims such as general tort theories of liability
7 including classic negligence claims.
8 Now, rather than arguing that, the Ileto court
9 got it wrong and that other trial courts around the
10 country have gotten it wrong, the plaintiffs have come up
11 with kind of a novel argument, but I think it's
12 ultimately unpersuasive as to why their common law claims
13 nuisance and negligence can go forward.
14 And their argument I believe, if I understand
15 it, is this, that the third exception to preemption,
16 what's been called predicate exception, all the
17 plaintiffs need to do is allege a knowing violation of a
18 statute applicable to the sale or marketing of firearms.
19 THE COURT: And I think that goes to my
20 question.
21 MR. VOGTS: Under that third exception and all
22 the protections afforded by the PLCAA disappear and none
23 of the other exceptions are needed. I think the
24 plaintiffs are improperly elevating that third exception
25 into some sort of super exception that swallows the

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
V.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A FREEDOM GROUP, INC., A/K/A REMINGTON OUTDOOR GROUP, INC., ET AL	)	**MAY 13, 2015**
Defendants	)	

EXHIBIT B
TO MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION TO REMAND

Respectfully submitted,

By /s/ Joshua D. Koskoff, ct15619

JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207

Exhibit B

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 109th CONGRESS, FIRST SESSION

Vol. 151 WASHINGTON, WEDNESDAY, JULY 27, 2005 No. 104

Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. STEVENS].

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal God, You have challenged us to become like children in order to enter Your kingdom. Today give us a child's trust, that we may find joy in Your guidance. Give us a child's wonder, that we may never take for granted the Earth's beauty and the sky's glory. Give us a child's love, that we may find our greatest joy in being close to You. Give us a child's humility, that we will trust Your wisdom to order our steps.

Guide our Senators and those who support them through the challenges of this day. As they look to You for wisdom, supply their needs according to Your infinite riches.

We pray in Your righteous Name. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT—MOTION TO PROCEED

The PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of the motion to proceed to S. 397, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 397) to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

The PRESIDENT pro tempore. Under the previous order, the time from 10 to 2 p.m. shall be equally divided, with the majority in control of the first hour and the Democrats in control of the second hour, rotating in that fashion until 2 p.m.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, this morning we are returning to the motion to proceed to the Protection of Lawful Commerce in Arms Act, otherwise known as the gun manufacturers liability legislation. Yesterday we invoked cloture on the motion to proceed. We now have an order to begin the bill at 2 p.m. today. The debate will be equally divided until 2 o'clock today. I understand a rollcall vote will not be necessary, and we will have a voice vote at 2 p.m. and then be on the bill.

Senators can expect a cloture vote on the underlying bill to occur on Friday, unless we change that time by consent. As I stated repeatedly over the last several days, we are going to have a very busy session as we address a range of issues, including energy and highways and the Interior funding bill, the gun manufacturers liability bill, veterans funding, nominations, and other issues.

Just a quick update on several of these. In terms of the Energy bill, after 5 years of hard work, the energy conferees are now done. I expect that that legislation will be filed shortly. This is a major accomplishment that will cause serious and dramatic changes in how we produce, deliver, and consume energy. We simply would not be at this point without the hard work, the perseverance, and the patience of Senator DOMENICI and his partner, Senator BINGAMAN, as well as Congressman BARTON. We will pass that conference report this week. Our country will be all the better for it.

I was talking to the Secretary of Energy earlier this morning. We were discussing the absolute importance of passing this bill to establish a framework of policy from this legislative body. He again referred to the great good this bill will do.

On highways, it has taken this Congress 3 tough years of work to come to this point, but with just a little more work, we will have a bill that the President will sign. Our conferees are working and should complete the writing of it today. I spent time with several of the conferees yesterday and with the Speaker, as we coordinate completion of this highway bill.

The good news for the American people is, as they see what is sometimes confusing on the floor of the Senate as these bills come in, this particular highway bill will make our streets and our highways safer. It will make our economy more productive. It will create many new jobs.

I mentioned veterans funding. Yesterday, the House and Senate majority agreed to ensure that $1.5 billion of needed funding will be given to the Department of Veterans Affairs this fiscal year. Veterans can be assured that their health care will remain funded. I know it is confusing what you hear on the floor, but that action is being taken.

I mentioned Interior funding. Yesterday both Houses agreed to fund many of the programs that affect many of our public lands held in trust for Americans throughout the country. We intend to complete action on this conference report this week as well.

Late last night, the conferees completed work on the Legislative Branch appropriations bill, and we will be attempting to clear that legislation as well this week.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Printed on recycled paper.

Mr. CORZINE. Mr. President, I appreciate the Senator's candor. I hope we will be able to bring up my amendment, which will protect the rights of law enforcement officers who are victimized by gun violence to get justice through the American legal system.

I would note the presence of my colleague from the State of New Jersey in the Chamber, who has been a remarkable advocate for law enforcement and for the safety and security of people in our community.

This past Monday night, I missed a vote on the floor of the Senate because I went to a wake for a police officer, Officer Reeves, who was shot on the streets of Newark by a gang member. The gun that was used has not yet been traced to find out whether it was trafficked in the illegal or black market, or whether it was bought by a straw purchaser.

But there is one thing that is certain—there were five children sitting in the pew with their mother at that wake, all under the age of 11. Gun violence is real. The amendment I would like to bring up—which I appreciate the rules of the Senate and respect the judgment of the Senator from Idaho—but the Lemongello amendment I would like to offer to the gun immunity bill is about protecting police officers on the street and giving them the right to get justice in a court of law. If, by unfortunate circumstances, they are the victims of gun violence, we have the right in the State of New Jersey, within the legal system, to call to account those who have wrongfully allowed guns to get into the hands of criminals.

In the case of Detective Lemongello, 11 guns were sold to a gun trafficker out of a gunshop—11 guns. Why does one person happen to need 11 guns? These guns were bought by a straw-purchaser for a career criminal, who then put the guns in a car and drove them to New Jersey, where one was sold to the criminal who shot Detective Lemongello in Orange, NJ.

That gun was turned on this gentleman shown in this picture, Detective Lemongello, just as a gun was recently turned on the young police officer whose wake I recently attended in Newark on Monday night, Officer Dwayne Reeves. Officer Reeves was 31 years old, and he was married with five children.

I believe in the constitutional right of individuals to bear arms under circumstances that will protect the public. I have no argument with that. But I do not think there is a constitutional right to put guns into the hands of criminals who attack police officers and other innocent victims in our country.

I represent a State where crime rates are going down, but murder rates are going up because guns are freely available among gangs on the streets in our communities. This is completely unacceptable. And to allow gun trafficking to continue on, without giving the victims of gun violence the right to seek justice in a court of law, is just plain wrong. It should be enough for any individual with common sense to say: Enough is enough.

Prohibiting civil liability actions as this bill does—and I recognize that some may argue about limited exceptions to the general immunity given to the gun industry in this bill—would make it next to impossible for Detective Lemongello, his partner Officer McGuire, or the family of Officer Dwayne Reeves to have their day in court, to seek and receive justice through the American legal system.

So again, the purpose of my amendment is to protect the rights of law enforcement officers. I understand that this bill is going to pass with, I understand, 61 cosponsors. But I hope my colleagues will understand that, at a minimum, law enforcement officers should be permitted to bring lawsuits against culpable gun dealers and manufacturers.

In the Lemongello case, actually, the people who sold the guns recognized their own mistake, and settled with Detective Lemongello and Officer McGuire. They were able to reach this settlement because Congress did not pass this bill last year, which would have given the gun dealer immunity and removed these lawsuits from the courts.

Now, what's more, the gun dealer who sold the gun to the criminal who shot Detective Lemongello and Officer McGuire, along with several other purveyors of guns in that West Virginia city, changed their policies. These gun dealers now sell one gun at a time as a result of this lawsuit and they no longer make bulk sales.

So this is a real issue. This is not just a debate. There are people dying because we are not doing the right thing. There are lots of forums where we can make this case, and we will continue to, those of us who care about public safety, who want fewer guns on the streets, and who care about accountability.

It is hard for me to understand this legislation as it relates to States rights, in the sense that State legislatures, both Republican and Democratic, have supported the right of victims of gun violence to have access to the courts.

So this is my view, and I am only one Senator, but it is heartfelt. My opposition to this bill and my support for this amendment comes in the context of the real problems and the real tragedies that will occur if we do not have the right checks and balances in the system, if we take away the right of innocent victims to go to court when they are wronged.

I understand that this bill will pass but I am asking all my colleagues to, at the least, support this amendment to protect the brave men and women in uniform who risk their lives to protect the citizens of our country every single day—people like Detective Lemongello, Officer McGuire, and Officer Reeves.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank the Senator from New Jersey and will share a little personal perspective.

I have been in law enforcement for the better part of my professional career as a prosecutor. Some of my best friends are law enforcement officers. I have stood shoulder to shoulder with them in prosecuting cases. I know the risks they undertake to carry out their duties. I believe in what they do, and I believe they should be supported.

These law enforcement officers are not telling me that if a criminal murders one of their brothers or sisters, that they want to sue Smith & Wesson. The thought does not cross their mind. They are concerned that if they catch the criminal who did it, that it is likely to be 15 or 20 years before the litigation and prosecution is over. If they are found guilty and sentenced to death—if the law provides for it, they should be—they get upset when it never seems to happen, and years and years and years go by. That disrespects police officers.

It seems to me some of the same people who are talking so much about defending police officers are not as aggressive as they should be on some of these issues that really mean much to them.

I would say that I think, on the Lemongello case that has been referred to, based on my experience and understanding of the law as a prosecutor in the Federal court, as a U.S. attorney who prosecuted individuals under Federal laws involving this, you cannot sell a firearm to a "straw" person who is holding it to move it to another person. And if you have reasonable evidence to believe the person you are selling it to is a "straw" person, and it is going to someone else, then that someone else must fill out all the forms, put their name on it, and qualify to receive the weapon. And if you do that, and sell the firearm under those circumstances to someone who is not the true purchaser, you are not only subject to a lawsuit under this bill for civil damages, but you are subject to criminal prosecution as violating a Federal law.

I have prosecuted people for that. I have even had the responsibility to prosecute a gun dealer for not accurately handling these kind of matters. If it is a crime, there is clearly a basis to sue the gun seller. But you don't want to sue the manufacturer off in Massachusetts or wherever they are making the gun. If a seller irresponsibly sells it or violates a law in selling a weapon, you don't sue the manufacturer. They don't become an insurer for criminal acts.

That is what we are trying to do here, to pass some legislation that does nothing more than restore the classical understanding of American civil liability. Who should be sued and under what

circumstances should they be sued? If they sell 11 guns and they don't make them comply with the waiting requirement, if they don't get the proper identification from the person who is actually buying the gun, then they have aided and abetted in getting the gun to someone illegally. That is something for which they can be prosecuted and sued under this legislation. What we are talking about is abusive lawsuits where people are being held liable for criminal intervening acts. That is not a principle of American law.

People say: Enough is enough. We just have to do something.

What do you mean we have to do something? We are the legislative branch. We can consider laws if there are enough votes to pass them. But that doesn't mean we allow improper lawsuits to go forward. Senator CRAIG just read the letter from Beretta. One city, Washington, DC, if its laws are allowed to stand, which make gun manufacturers liable strictly for every crime committed by a criminal in DC, it will bankrupt every gun company in America. One city can do that. And these companies sell guns to our police officers. They sell guns to our military people. They are an important part of our American economy. Are we going to now buy our guns from foreign companies? We are not going to have any left in the United States that can survive this flood of lawsuits. It is a serious matter.

The bill is carefully crafted. That is why the Democratic leader, Senator REID, and former Democratic leader, Senator BYRD, and others are cosponsoring this bill. It has been here for several years. It has been reviewed. The loopholes in it have been examined and closed. It has gained support. Now we have a bill that should have already been passed.

I find it passing strange that our colleagues who filibustered a motion to proceed to consider the bill—they filibustered that and delayed this process over a day on that issue alone, when we could have already had the bill up, debated, and voted on. The votes are here to pass it. Let's move forward and get it done. It is quite odd that our colleagues would complain about wasting time on the bill. They are just unhappy because they don't have the votes to defeat it up or down. They don't have the votes to sustain a filibuster. They are conducting delaying tactics that make this legislation that is needed, that has strong bipartisan support, cost more days and more hours of the Senate's time than it ought to.

I wish to share an overall perspective on gun law enforcement in America. Back when I was a U.S. attorney, I came to believe that we should aggressively prosecute criminals who utilize guns during the course of criminal activity, that felons ought not to possess firearms. Both of these have been in our Federal law for many years. We enhanced penalties. Not too many years ago, in the 1980s, they made it a mandatory 5 years in jail, 60 months without parole, for anybody to carry a firearm during the commission of a Federal felony or any felony. That is a strong tool. I believe we ought to prosecute those cases because I am convinced that a lot of the murders in this country are caused by drug dealers and gang members carrying guns around as they do their criminal work. And if somebody crosses them, they pull out a gun and shoot them, and people get killed.

Let me say this first: Most Americans are not murderers. Most Americans are not criminals. Most Americans who have guns—and most Americans do have guns—are law-abiding, decent, peaceful citizens. They are not ever going to murder somebody. This is some sort of myth out there that we are going to fill up the jails if we enforce these laws. There are not that many people out here trying to kill somebody or commit crimes carrying firearms. That is a hardcore group of criminals who deserve to be targeted.

I created my own program called "project trigger lock" in the 1980s. I created a newsletter on it. We sent out news to our sheriffs and our police chiefs about these kind of crimes and the policies of my office to prosecute cases that they may be working on involving these kind of criminals. We enhanced our prosecutions.

Then I was elected to the Senate. I come in here in the middle of the 1990s. All I heard is, we have to pass more laws to crack down on innocent people who own guns, people who don't commit crimes. They are the ones for whom they want to make it more difficult. They want to constrict the constitutional right to keep and bear arms through any number of devices. At that time, it was thought to be politically popular, that we would just keep voting more and more restrictions on private ownership of guns. Pretty soon, I guess they thought people would just give up and Americans would capitulate and not stand up for their right to keep and bear arms. But it didn't happen that way. The American people got their back up on it.

The politicians are beginning to hear it now, and the people expect to be able to maintain their constitutional right to have a firearm. That is just what has happened.

As all this happened—and I am in the Senate—I am thinking, This isn't going to affect crime. Ninety percent of convictions in Federal firearms cases have to do with using a firearm or carrying a firearm during the commission of a felony and the possession of a firearm after having been convicted of a felony. Those are the bread-and-butter cases. Many of them are being brought. And when you effectively enforce justice, just those two laws—and there are many others, such as machine guns and other kinds of sawed-off shotguns—that is a common case that used to be prosecuted, and I prosecuted lots of them. I personally tried sawed-off shotgun cases. I personally tried and prosecuted cases where the serial number had been erased from a firearm. It is a crime to erase it. It is a crime to sell or to carry a firearm that has a serial number erased. It is a crime to transfer a firearm to somebody else that has the serial number erased. We have all kinds of laws. It is a crime to go to a gun dealership and provide any false statement on a document that you have to sign before you get a firearm or to violate any of the myriad of laws out there.

What I am saying again is that the most common cases are the possession of a sawed-off shotgun, carrying of a firearm during a criminal offense, or possession of a firearm after having been convicted of a felony. For the rest of your life, unless your disabilities are removed, if you are convicted of a felony, you cannot be allowed to possess any firearm, even to go hunting. That really galls some people, but that is the law. We enforce that. It is enforced right now in Federal court.

So we had all these cases. And the other side, President Clinton and Vice President Gore, was declaring that if you did not support all these new restrictions on legitimate ownership of guns—these laws and regulations that they were putting up, one right after another; as soon as one passed, they would come up with another one—then you didn't believe in law enforcement, you didn't believe in fighting crime, that you were allowing murders to take place, that you didn't love children. We heard all that.

I went down to the Department of Justice to pull their statistical book. I have seen the statistical book. I used to get it when I was U.S. attorney. It would show the number of prosecutions in every category of crime. What did I find? That under President Clinton's Attorney General Reno, Department of Justice gun prosecutions had declined rather significantly. At the same time they were accusing Members on this side of being soft on gun crimes and not supporting efforts to protect the innocent from criminals and all of these things, they were reducing the number of Federal prosecutions for gun crimes. I raised that in hearing after hearing after hearing. By the time the Clinton administration was leaving office, the numbers had picked up a little bit.

President Bush came in. At the first hearing, I asked new Attorney General John Ashcroft: Are you going to make it a priority of the U.S. Department of Justice to increase the number of gun prosecutions in this country? Attorney General Ashcroft said: Yes, that is my mandate. That is what the President wants. That is what I believe in, and we are going to do it. And prosecutions have gone up. Murders continue to decline. That is one of the more remarkable things that has happened.

We can celebrate. Murder and violent crime have been on a period of decline. I am absolutely convinced that one of

the reasons that has occurred is because of the steadfast, consistent, tough prosecution of criminals who carry guns, either former criminals or criminals while they are conducting their crimes on the streets. I believe it works. In fact, it is known throughout the criminal community that if you carry a firearm during drug-trafficking offenses, if you carry a firearm during any other kind of crime you are committing, you are likely to go to Federal court to be tried by a Federal prosecutor. And in addition to the sentence you get for the underlying crime you committed, such as selling drugs or robbery or burglary, you get whacked by another 5 years in jail without parole. If you carried a machine gun, a fully automatic weapon, that is 20 years consecutive without parole. It is goodbye, so long, throw away the key. You are exiled from our community. That is what happened.

During the Clinton administration, a very fine U.S. attorney in Richmond began to drive this issue. He called it "Project Exile." He put out the word in the street. They had billboards. They put up signs. If you are convicted of carrying a gun during a crime—you are a felon and you carried a gun—we will prosecute you. You will be guaranteed a long time in jail without parole. You will be sent off to a Federal institution, maybe in a distant city. That is why he called it "Project Exile." The violent crime rate in Richmond plummeted. They did what they said they were going to do. They prosecuted those cases.

All I am saying is, with great sincerity, based on my personal experience and a fair analysis of what has happened out there, let's continue to be aggressive with these prosecutions.

Let's not let up. Let's make sure that even more people understand with crystal clarity that if they are a criminal and they are out using a gun in the course of their work, or carrying one as they go about their business, they will be prosecuted. And when they are prosecuted, they will not only be convicted, but they can be assured they are not going to get probation, some sort of halfway house, a couple of months on probation, or something like that, but they are going to the slammer for a significant period of time—perhaps a very long period of time. And if we keep that pressure on, we are going to continue to see the crime rate drop.

That is my hope and that is what is happening. I believe that is the fact. Fortune magazine, in the last few months, had an article about it. They said very few people have commented on the obvious fact that, yes, our prison population has gone up, but our crime rate has dropped. Can we add 2 and 2? Most people in America are not criminals. We are not going to continue to have the prison population go through the roof because most people don't commit robbery, burglary, or carry guns during illegal activities. Very few people do that.

What we were doing in the 1960s and 1970s was calling the criminal the victim. We forgot the true victims. We wanted to see what we could do to help the person who was committing the crimes. We finally realized that some of these people are just dangerous criminals and they have to be punished and removed from society. If you let them back out, they will commit more crimes.

So this has been occurring in our society. We are doing a better job of targeting repeat offenders. We are doing a better job of targeting violent offenders. Can we do better? Yes, we can. Can we be more sophisticated? Yes. Are our current laws a bit too heavyhanded? Probably so. We could probably reduce the penalties on some of the defendants. But the very principle that there is certainty and tough punishment for violation of Federal gun laws is one of the concepts that has led to the reduction of violent crime in America, for which we all ought to be excited.

Mr. President, I will conclude by saying we are doing some things right in law enforcement. Our law enforcement officers really are doing a fine job. We have turned the tide, in some ways. It is a mathematical thing. I have come to understand that.

Back in the 1960s, the crime rate was increasing 10, 15, 18 percent a year. People went from the 1950s when they never locked their doors to being terrified, raped, robbed, and murdered in the 1960s and 1970s. The crime rate had more than doubled in 20 years. Now there has been a decline. It has been declining for the reasons I just stated. We can be more sophisticated. I have personally offered legislation that would reduce the mandatory penalties for crack cocaine. Some on my side think that is soft on crime. I think we need to be sophisticated in enforcement. Every year in jail should be carefully considered, and people should not serve longer than they need to serve. I think we can modify that. Judges tell me they think it ought to be modified. I stepped up to the plate to do that.

But the basic principle that you crack down and you are tough on people who commit crime, and you are consistent, and they know if they are carrying a gun and committing a crime in our country they are going to be sentenced to a long time in jail, that will deter them. The word is out in Philadelphia, Richmond, and Alabama that if you carry a gun during your crimes, you are likely to go to Federal court and serve hard time, without parole. And they are not doing it so much.

I say this: It is likely that the number of gun prosecutions are going to begin to decline because criminals are not carrying guns anymore because they know it is a ticket to the big house. It is something that has worked. It has saved hundreds and thousands of innocent lives in this country. It has saved thousands of people from being permanently disabled by being victims of crime, whether it is guns, knives, or anything else. It has been a good thing that has been accomplished. I love the law enforcement community, our law officers with whom I served. They put their lives on the line for us. They work very hard for us.

As the crime rate has declined, we now have more police officers per crime. They are able to give even closer focus on each individual crime. At one point, there were so many crimes they hardly had time to investigate or prosecute them. Now, we have trends going our way. We need to keep after it. But having the right to bring out bogus lawsuits against an honest seller of a legal firearm, or against an honest manufacturer of a legal firearm, is not the right approach. It is just not consistent with our American principles of law; it is not what we believe in. It is not a legitimate tactic. It is an abuse of the legal system to carry out a political agenda, and it should not be done.

Every company, every person who has a license to sell guns, according to the law, ought to be able to do so without fear of being brought into some bogus lawsuit. That is all we are saying. I think this bill does that. I see my colleague from New Jersey, the great advocate that he is on this issue.

I yield the floor.

The PRESIDING OFFICER (Mr. COBURN). The Senator from New Jersey is recognized.

Mr. LAUTENBERG. Mr. President, I want to say a few words about this bill and how I see it.

I think this is a terrible period for America—the fact that we are taking an action and making it a preceding action to considering some other issues that are, I think, far more important than the subject at hand.

I heard an accusation by our friends on the other side that the Democrats were using delaying tactics and just not permitting us to get this bill—this important piece of legislation that says if a gun manufacturer does something, or the dealer is careless and leaves the gun on the counter and someone picks it up and goes out and kills someone, you cannot sue them; there is no civil action. That is determined to be more important than getting a defense authorization through that said give our troops everything they need to protect themselves. No, no, no, we have to put that aside because what we want to protect today in this place—and it is shameful, in my view—is gun manufacturers who might knowingly make guns available to a criminal or someone who is deranged and not yet a criminal—he is not a criminal until he pulls the trigger—or a distributor or a gun dealer.

We saw a case not too long ago regarding the Washington sniper, and the fact that the shop owner could not tell whether this fellow had stolen the gun or whether he sold him the gun. There were no records kept. It is shocking. We have heard this: When a car manufacturer produces a car and a drunk

judges and juries are not indiscriminately finding against gun manufacturers. Most are probably gun owners and hunters as well.

Despite what the NRA pedals to its members to justify its existence and their dues, the second amendment is accepted and respected by the overwhelming majority of Americans and there is no threat to responsible manufacturers, dealers, lawful buyers, or owners of the millions of guns in America. There is no justification for this special legislation and the special treatment it gives to that industry.

Of course, the gun industry is accustomed to getting special treatment from Congress. Firearms and tobacco are the only two consumer products specifically exempt from regulation by the Consumer Products Safety Commission. What an exemption. I have to hand it to the NRA, whether I agree with them or not, they sure know how to operate around here. Many industries and even individual corporations pour a lot more money into lobbying and into political contributions than the NRA and they do not get nearly the special treatment, special favors from Congress the gun lobby does—a complete exemption from consumer product safety laws and regulations, and now almost complete immunity for lawsuits from negligence or product malfunctions. All other businesses and industries in America are in discount coach while the gun lobby has special privileges flying first class on Air America under this Congress and preceding Congresses.

It is because there is that exemption from the consumer product safety laws of this country that some of these lawsuits, not frivolous, but determined by a judge or jury through the process to be legitimate and bona fide, and the resulting civil damages are necessary to move the industry to take some of the safety actions it can technologically and financially certainly afford to make that it probably would not do otherwise.

For example, take Bushmaster. Their dealer lost the sniper's assault rifle along with 238 other guns that were then used by the snipers against the innocent victims in Washington, DC. As a result of its settlement with the victims of those families, they agreed also to inform their dealers of safer sales practices that hopefully will prevent other criminals from obtaining the guns, something that had never been done before.

In June of 2004, two former New Jersey police officers were shot in the line of duty with a trafficked gun negligently sold by a West Virginia dealer. They won a $1 million settlement, and the dealer who sold the gun, along with 11 other handguns in a cash sale to a straw buyer for a gun trafficker—after that lawsuit that dealer, as well as two other area pawnshops, agreed to implement safer practices to prevent sales to traffickers, including a policy of ending large-volume sales of handguns.

In 2004 also, Tennille Jefferson, whose 7-year-old son was unintentionally killed by another child with a trafficked gun, won a settlement from a gun dealer that amounted to $850,000. The handgun was one of many the dealer sold to the trafficker despite clear signs the guns were headed for the underground market. That, too, resulted in changes in policies and sales practices that hopefully will prevent other mothers from suffering that terrible fate of losing a child.

I am not saying every one of those cases filed against the manufacturers or dealers is proper. Again, that is for the process to determine. But there is no evidence, no evidence at all, that there is anything about the nature of these suits, the outcomes of them, the jury awards relative to the damages that have occurred, that indicates this industry is being prejudiced or plagued by those who they contrive to be doing so, to justify this legislation. If we are going to reform the tort system in this country, let's do it openly and aboveboard with all industries, all of American businesses affected equally by those changes. To single out one industry, particularly one that manufacturers products, potentially, as dangerous as guns, is just a terrible day for the Senate.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, this is a sad day in the Senate. It is a sad day in two respects. Yesterday, we were debating a bill, the Department of Defense Authorization Act. It is an important bill. It is a $440 billion bill for our American military: our soldiers, sailors, marines, airmen, members of the Coast Guard, Guard and Reserve. We were trying, in that bill, to help our fighting men and women and their families.

We had a long list of amendments that we wanted to consider: extra pay for totally disabled veterans, help for the widows and orphans of combat soldiers who die in the line of duty, fair compensation for Guard and Reserve when they are activated and they are Federal employees, daycare for the families of soldiers who are activated, quality-of-life issues for the men and women in uniform who are fighting for America.

A decision was made by the Republican leadership to leave that bill, leave that issue, to come to this one. What could be more important for us to consider than the safety, the lives, and fortunes of the men and women who serve our country and risk their lives, on military duty, and their families?

Well, in the estimation of the Republican leader, Senator FRIST, there was one issue that was more important than talking about our men and women in uniform. That issue was providing immunity from liability for one industry in America, to say that of all the businesses in America that provide us with goods and services, all of the businesses that are currently held responsible for wrongdoing, we will create one exception. We will say, if the gun industry is guilty of wrongdoing, they cannot be sued. That is right. The firearms industry, which sells millions of firearms each year in the United States, should not be held responsible for their bad conduct and wrongdoing.

It is hard to say those words and not shake your head. If personal responsibility is what it means to be an American and an American business man or woman, why in the world would you exempt one industry and say they are special, they are political royalty, they cannot be held liable for their misconduct? And why did we move to this bill and away from the Department of Defense authorization bill to help our soldiers and their families? The answer is too obvious. It is because of the political clout of the National Rifle Association and the gun lobby. It is the only group I can think of which would just go straightforward with the concept they are more important to the Senate calendar than the fighting men and women who are now risking their lives for our country. They have done it many times.

The NRA runs certain people in this Chamber and on the other side when it comes to the agenda. They decide what will be taken up and what amendments will pass—an extremely powerful group. The NRA succeeded in having the Senate debate guns—and that is a rare debate—but only when it comes to this question of gun immunity.

Isn't it interesting, we want to put an amendment on this bill that says when you sell a firearm you have to check to see if the purchaser is on a watch list of terrorists. Is that unreasonable? If you have computer access through your store—and these stores do—shouldn't you check to see if that person standing across the counter from you is on the watch list for terrorism in America? That concept is rejected by the National Rifle Association. Background checks: extremely limited. Information gathered about criminal people is to be destroyed so quickly that it is of little value to law enforcement.

A March 2005 report from the Government Accountability Office found that between February and June of 2004, people on U.S. lists of suspected terrorists applied 44 times to buy guns. It is not unheard of. It happens in this country. In only nine instances were they turned down. In the months since the study ended, 12 more suspected terrorists had the green light to buy or carry guns.

FBI Director Bob Mueller—whom I respect very much—said he was forming a group to study the problem. Why aren't we talking about this instead of granting immunity for the gun dealer who sells a weapon to someone he should have known could misuse it for a crime or for terrorism? We are shielding them from civil liability for not

living up to their responsibility when it comes to the sale of lethal firearms.

Or we could talk about ways to solve the problem in America of guns being trafficked, many crossing State lines, and used in crimes. The ATF says 90 percent of the guns recovered in crimes were used by persons other than the original purchaser, other than "straw men," people who bought them to sell them to criminals. One-third of all crime guns cross State lines.

In my State of Illinois, 47 percent of guns traced to crimes committed in Illinois originated in other States. One State, Mississippi—the little State of Mississippi—is far and away the per capita leader in selling guns exported from their State and used in crime. Do you know why? Because firearms laws are not really strictly enforced in Mississippi, and some other States.

From 2000 to 2002, Department of Justice prosecutors filed three cases in Mississippi for violations of gun trafficking laws. In contrast, 32 cases were filed in Kentucky, 28 in Tennessee. So we have gun dealers in Mississippi selling trunkloads of guns to people who get on the interstate and drive up to Illinois and, perhaps, your State, too, selling them to gun gangs and drug gangs on the streets, and then spreading out these guns to kill innocent people. And the people pushing this bill are arguing that we should not hold those firearms dealers responsible because they did not "know" that a crime was going to be committed.

One hundred "Saturday night specials" to stick in the trunk of your car, junk guns, that you would never use for sports or hunting, and they didn't know? They should have known. That is a standard in law almost everywhere: that you knew or should have known. They are changing the law. They are saying, for firearms dealers, we are not going to hold them to this same standard that we hold every other business in America to when people buy products.

There are lots of other issues we could talk about, the gun show loophole, and others. But I think one of the most important things we could talk about is why this bill is on the floor today. It is not because gun manufacturers and gun dealers are facing bankruptcy and a lot of litigation. I read into the RECORD yesterday—and will not repeat—the major gun manufacturers in this country have no problems in terms of profitability. In fact, one of the leading companies, Smith & Wesson, said:

> In the nine months ended January 31, 2005, [Smith & Wesson] incurred $4,535 in [legal] defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation.

Mr. President, $4,500—does that sound like a business crisis that would move a gun immunity bill to the front of the calendar in front of the Department of Defense authorization bill? What it comes down to is this gun lobby has a lot of clout, and they are pushing for this sweeping immunity.

What kind of cases are we talking about? I said to my staff, you can talk about the law. And I could stand here as a person trained in law school and go through the obvious problems with this bill. But I think it is more important to talk about real-life situations. It is more important to give illustrations of why this is such a terrible bill.

Let me tell you about Anthony Oliver. Anthony Oliver was 14 years old. He was shot and killed on July 23 of last year while he was playing video games with his friend who was 13. Anthony's friend, his 13-year-old friend, had just bought a gun on the street for $50. He told the police he bought the gun with his allowance near his home because he was intimidated by a group of kids who jumped his friend and threatened to beat him up. He said he thought the safety was on when he accidentally killed Anthony with one shot to the stomach.

Federal investigators traced the gun. It was a "Saturday night special," one of those cheap guns just used for crime. They traced it to Lou's Jewelry and Pawn store in Upper Darby, PA. From 1996 to the year 2000, this pawnshop in Pennsylvania sold 441 guns traced to crime. It ranks as the No. 1 dealer in Pennsylvania in selling guns to criminals and 43rd in the Nation among all gun dealers.

In 2003, the last year for which we have statistics, Lou's sold 178 guns traced to crime. That year, less than 1 percent of the more than 3,000 dealers in Pennsylvania sold even one gun traced to crime. So you have a handful of dealers, just a small percentage, who are not paying attention or ignoring openly the fact that they are selling guns over and over and over again to gun traffickers and to straw purchasers.

How is that done? Well, the person who has a criminal record and cannot buy a gun brings his girlfriend in, and while he is standing there picking out the guns, the girlfriend is handing over the credit card or the cash to pay for them. They cannot sell to him. He is a criminal. He has a record of felonies, so the girlfriend buys it. So should the gun dealer be aware of that? Why, of course. It is obvious.

Should they be held accountable if they should have known that gun, through that girlfriend, is going straight into the hands of a felon, straight on to the street, killing innocent people? In America, a jury decides that. They will not be able to when this bill is passed. When this bill is passed, those who vote for it have decided they will be the jury forever when it comes to those questions of liability. We are taking that matter out of the hands of American citizens. We are putting it in the hands of a handful of Senators.

The gun that killed Anthony was sold in 2003 by Lou's to a trafficker who had purchased six guns in a very short period. They bought multiple guns, including many "Saturday night specials," which are small, easily concealed, low-quality handguns sought basically by kids, drug gangs, and those who are going to have a fast crime experience on a Saturday night.

The purchase of multiple firearms at once should have been a red flag to Lou, but Lou doesn't pay any attention to that: Give me some cash—I'll give you a gun; no questions asked.

When this bill passes, the family of Anthony Oliver will lose their lawsuit, the lawsuit they brought against Lou's pawnshop that continues to sell these guns used in crime. So what a great piece of news for that family: the tragedy of losing your 14-year-old son to a "Saturday night special" from a pawnshop which specializes in selling guns to gun traffickers and criminals. This is a great bill, isn't it?

Let me tell you about another case. Danny Guzman was a 26-year-old father of two from Worcester, MA, killed by a stray bullet fired outside of a nightclub on Christmas Eve in 1999.

After the shooting, the loaded gun used in the shooting was found behind an apartment building by a 4-year-old child. The gun had no serial number. They determined the gun was one of several stolen from Kahr Arms, a Worcester gun manufacturer, by their own employees, who hired many of these employees and, it turns out, never checked whether they had criminal records.

One of the thieves, Mark Cronin, who worked for this gun manufacturer, had been hired despite his history of crack addiction, theft, alcohol abuse, violence, and assault and battery. They did not check it. The gun manufacturer hired people to make guns and did not do a criminal background check on their employees.

Cronin told an associate that he took guns out of the Kahr company "all the time" and that he could just walk out the door with them. He took the gun that was used to kill Danny right off the assembly line. And he was pretty smart about it. He took it off the assembly line before it was stamped with a serial number. Smart guy. Can't be traced.

The investigation also led to the arrest of another employee, Scott Anderson, who had a criminal history, who pled guilty to stealing guns from the company.

Fifty Kahr firearms disappeared in a 5-year period. The local police captain classified the recordkeeping at that facility as "shoddy," that it was possible to remove weapons without detection because they did not keep their records well.

Danny Guzman's family brought a wrongful death suit in Massachusetts State court against the owner of the gun manufacturing company, saying: You should have kept your records so you could see that guns were being stolen. And you certainly should have done a background check on your employees. Hiring somebody who has such a criminal record to work in a plant

people. They believe it is OK to allow lawsuits to achieve some sort of political end.

Clearly, I do not agree and a majority of people in this body do not agree. Indeed, most Americans certainly do not agree. Most Americans think this is just blatantly unfair.

Our Constitution protects the right to keep and bear arms. Indeed, 33 States have passed laws to preempt frivolous gun lawsuits—33 States. Still today, we have the antigun crusaders who are, in effect, aided and abetted by the special interest trial lawyers charging ahead.

Since 1997, more than 30 cities and counties have sued firearm companies in an attempt to force them to change the way they make guns and the way they sell guns. In California, then-Gov. Gray Davis signed legislation explicitly authorizing lawsuits against gun manufacturers.

Because the firearms business is relatively small, one big verdict, one substantial verdict could bankrupt the entire industry. In California, that is a real possibility.

Never mind that every trial court that has heard these municipality lawsuits has thrown them out in whole or in part. Appellate courts in three States have overturned lower court verdicts and allowed the suits to go forward. Thus, it is critical we act now.

If the gun industry is forced into bankruptcy, the right to keep and bear arms will be a right in name only. Lawsuits have already pushed two companies into bankruptcy. Even if some gun manufacturers are able to hold on, the prices for firearms will be so high that owning a gun, such as a hunting rifle, will be a privilege only the wealthy can afford.

There is one other important and little known aspect of the issue. America relies on private gun manufacturers to equip our soldiers and law enforcement officers with sidearms. The guns our police officers use, the guns that our soldiers carry, are made in the United States by American workers.

We are all agreed, no one wants guns in the hands of criminals. There are thousands of laws and regulations to stop illegal gun sales, but we do not want these frivolous, unnecessary lawsuits to strip police officers and soldiers of their sidearms. Do we really want unfair litigation to cripple our national security? The answer clearly is no, and thus we will act and we will act over the course of today, tomorrow, Monday, and complete this action on Tuesday.

The bill before us is narrowly tailored. It is focused. It is fair. It is equitable. It ensures that private parties are held responsible for their actions and that is why this bill comes to this floor with broad bipartisan support. That is why passing this bill is the right thing to do.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT—MOTION TO PROCEED

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to consideration of S. 1805, which the clerk will report.

The assistant journal clerk read as follows:

A bill (S. 1805) to prohibit civil liability actions from being brought or continuing against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their product by others.

The ACTING PRESIDENT pro tempore. The Senator from Idaho.

Mr. CRAIG. Mr. President, we are now on S. 1805. Last night, Senator REED and I worked into the evening with our colleagues and leadership on both sides to craft a unanimous consent that now governs us through late next Tuesday. It establishes a variety of amendments that will be voted on over the course of today. Some will be offered and set aside to be voted on on Tuesday. On Tuesday, other key amendments will be voted on and then final passage.

I am sure there are some Members on both sides who might have amendments that were not listed to be considered for votes today and/or Tuesday. What I would ask them to do is come to the Chamber and talk to Senator REED and myself to see if we might work those out certainly. We are happy to take a look at them. There may be an opportunity late Tuesday and possibly Friday to offer additional amendments. The unanimous consent request does not preclude any Member from doing that.

I said very early on yesterday that we wanted an open, robust debate on this issue. Clearly, 75 Members of this Senate, in a very bipartisan way, said let's get on with it, with the cloture vote yesterday. We spent the day then fashioning an agreement that brings us to where we are this morning. I believe it is possible Senator DASCHLE will be in the Chamber in a few moments to offer a perfecting amendment, then Senator BOXER will have an amendment on gunlocks.

I believe the agreement that is in front of us gives us something that oftentimes is very hard to achieve in the Senate, and that is a procedure and a final passage locked into an agreement. While Senator REED and I worked late into the evening, as I mentioned, to allow that to happen, and all sides gave a little in it, what I think we have in front of us is just that, an agreement that allows a variety of Senators, who have been prominent in this debate on both sides of the issue, to offer their amendments and to have a vote.

The timelines are very limited. We are not going to filibuster in any of this. It is clear that when there are 20-, 30- and 60-minute time limits to be shared equally, it does shape and limit the debate in a way that many of us would like to see.

Certainly on Tuesday, key votes are going to be the McCain-Reed gun show loophole and Senator FEINSTEIN's gun ban, or assault weapon ban as it is argued. Those clearly will be the dominant issues on one side. Senator BEN NIGHTHORSE CAMPBELL, conceal/carry will be another one voted on on that day, and possibly debate. I will debate that along with Senator CAMPBELL today. It is on the list to accomplish today. Possibly we will also have another amendment to be voted on on Tuesday which deals with Washington, DC, and some of the gun laws that free and law-abiding citizens have to cope with in this city.

That is the character of what we have been able to put together. Senator REED, the manager on the other side, is now in the Chamber. I yield the floor for any comments he would wish to make. Timewise, we hope Senator DASCHLE can make it to the Chamber to offer his amendment, but if he cannot, at this moment I see no reason Senator BOXER could not proceed with her amendment.

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island.

Mr. REED. Mr. President, the Senator from Idaho has indicated we worked late last evening to craft a unanimous consent that will allow several important amendments to be debated today, and continuing on through Tuesday. It represents a recognition that there are serious issues to discuss. Now we are at the stage of not only discussing those issues but also taking amendments up and voting on them. I know Senator DASCHLE will be here in a moment.

Mr. REID. Will the Senator yield?

Mr. REED. I would be happy to yield to the Democratic whip.

Mr. REID. We have explained to the majority that we would, in fact, ask consent that Senator BOXER be allowed to offer her amendment. Senator DASCHLE is occupied at the present time. If necessary, I could offer it on his behalf, but I think it would be better if he offered it himself. So we ask unanimous consent that Senator BOXER be allowed to go forward with her amendment.

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

Mr. REED. Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from California.

AMENDMENT NO. 2620

Mrs. BOXER. Mr. President, I send an amendment to the desk and I ask for its immediate consideration.

The ACTING PRESIDENT pro tempore. The clerk will report.

The assistant journal clerk read as follows:

they don't have a right to recovery, so be it. But should we pass a law to say these families do not even have a chance to go after the reckless misconduct of these gun dealers that resulted in the deaths of their loved ones? That is what this bill is all about. The Senator from Maryland has dramatized it in terms that everyone who works in this Capitol will understand.

There was a time when you couldn't go home from work, from this building, for fear of being shot in the street. It happened over and over and over again. Why in the world would the Senate pass a bill to insulate this reckless gun dealer from his civil liability for selling these guns?

I thank the Senator for her leadership.

Ms. MIKULSKI. I yield such time as he may consume to the Senator from Rhode Island.

Mr. REED. Mr. President, Senator MIKULSKI is here, doing something that is, unfortunately, necessary because the underlying legislation would cause currently pending suits on behalf of the families and the estates of these victims of the snipers to be thrown out of court. That is not only unfortunate but it is unconscionable.

There are arguments that this legislation is crafted so these suits go forward. But that is not the case at all. The two salient facts in the sniper shootings with respect to this legislation are, first, the sniper, Malvo, claims he shoplifted the gun. The storeowner claims that he was unaware of these weapons being missing until he was contacted after the shooting by the ATF.

As a result, none of the appropriate exemptions from the preemption to sue would be applicable in this particular situation.

There are two particular exemptions that are often pointed to. One talks about the negligent entrustment, which is a theory of law, and negligence per se. None would apply because it requires the defendant to have knowledge of a violation of the statute or knowledge that something untoward would happen. Under the facts as we know them, the defendant alleges he was unaware of the missing weapons.

In addition, the other exemption would be if there was a violation of Federal and State statute and that violation was the proximate cause, almost direct or substantial cause of the harm caused to the plaintiff.

That, too, can be substantiated. We have a situation where this statute not only does not cover this situation and would require these cases be thrown out of court, but it raises the extraordinary question about what other cases there might be in the future that would cry out for justice, to bring a suit and demand some type of compensation because of negligence caused by a gun dealer or manufacturer or trade association. They, too, would fall. That would be as compelling as these cases of the Washington area sniper victims.

I commend Senator MIKULSKI for standing up for these families. They are good people. This is a cutout of these cases from law and allowing them to go forward. But it just begs the question of how many other worthy cases will be frustrated by this legislation, if we pass it. I, of course, urge that we do not pass the legislation. But I certainly urge the amendment proposed by Senator MIKULSKI be agreed to.

I yield my time.

Mr. CRAIG. Mr. President, may I inquire as to the time?

The PRESIDING OFFICER. The Senator from Idaho has 20 minutes, and the Senator from Maryland has 5 minutes.

Mr. CRAIG. Mr. President, I will use some of my time at this moment.

At the outset, let me say Senator MIKULSKI and I are best of friends. We appreciate our friendship, and we work closely on a variety of pieces of legislation. There is nothing I would do nor is there anything S. 1805 will do to damage the argument and passion and concern Senator MIKULSKI has put before us today with her amendment. If you believe in the underlying bill, S. 1805, there is a problem, and the problem is Senator MIKULSKI carves out a very big exception and guts the bill in the underlying principle. Let me talk about that principle.

I ask the Senator to go with me to page 7 of the bill and to look at section 4 of the bill. Let us talk about that in relation to the phenomenal tragedy that hit this city and the families she is discussing.

Not only did her friends and neighbors hunker down in fear, but so did we as John Lee Malvo and John Allen Muhammad terrorized the neighborhoods in Maryland and Virginia.

Here is the problem. What are the facts? The Senator said I am not going to try the case on the floor, but I am going to point fingers. I am not going to try the case on the floor, but I am going to point fingers.

We probably have reasonable cause to point fingers at Bull's Eye in Tacoma, WA. Something went wrong up there. There are over 300 guns missing. Lee Malvo himself said, I stole the Bushmaster I used in the sniper incidents in Virginia and in Maryland. "I stole the gun." He said so. It is on the record. Already he sets up an interesting scenario.

As a result of that, the BATF pulled the license of the gun dealer and recommended felony charges be brought by the Justice Department. This case is maturing at this moment.

What does our bill do? It tries to very narrowly create an environment and an exception.

Let us go to that bill and to page 7. Let me read starting on page 6 of the bill because I think it is important. Many Senators have ignored this in the rhetoric of the day. They shouldn't ignore it.

In general, the term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product or a trade association for damages resulting from the criminal or unlawful misuse of a qualified product by a person or a third party but shall not include—

In other words, the exceptions under which the Malvo and Muhammad case can be tried in which those parties the Senator is talking about contain compensation are the following.

No. 1, an action brought against the transactor convicted under section 924 of title 18 United States Code or a comparable or identical State felony law by a party directly harmed by the conduct for which the transferee is convicted.

Parties harmed. In other words, did the transferee, the gun dealer, malfunction? Did he break the law? There is a strong appearance that he might have.

No. 2, an action brought against a seller for negligent entrustment or negligent per se.

No. 3, an action in which a manufacturer or a seller of a qualified product knowingly and willingly violated State and Federal statute applicable to the sale or marketing of a product and the violation was a proximate cause for the harm and for which the relief is sought.

No. 4, an action for breach of contract or warranty in connection with—

And then we go on to deal with basically product liability.

My point is quite simple. I believe we are protecting those families. I would not write the kind of law that is being suggested would be written. What I am concerned about are lawsuits in which we are trying to hold accountable the innocent party—in this case potentially a manufacturer of a product—unless there is criminal intent, or unless they have broken the law.

Mr. DURBIN. Mr. President, will the Senator yield?

Mr. CRAIG. I can't yield. My time is limited. I am sorry. The Senator has had time. Let me continue.

That is the sense of the argument we are dealing with here. Negligent entrustment:

In subparagraph (a)(2), the term "negligent entrustment" means the supplying of a qualified product by a supplier for use by another person when the supplier knows or should know—

That is very important.

—the person to whom the product is supplied is likely to and does use the product in a manner involving unreasonable risk of physical injury to the person or to others.

What are we trying to do here?

Again, I have said time and time again over the last 24 hours it is a very narrow exception, but to entrust us to a century of tort law that says innocent parties are not guilty nor should they be swept into lawsuits if they have met certain standards of the law—in this case, licensed gun dealers and manufacturers.

Did the folks up at Bull's Eye in Tacoma meet those standards? We don't know. But I will tell you the BATF pulled their Federal firearms license. There is an investigation underway. If they lost that many firearms and they didn't notice it and they didn't report

it, I am not an attorney, but I have to assume they have a big violation on their hands. If Malvo walks in and pulls a Bushmaster from off the rack and walks out with it and that is not detected, they have a problem on their hands. I believe they have a problem on their hands, and they are not exempt.

The argument is—and some have used it—they do not even make it to the courthouse. That is not a valid statement.

This is a basis from which you argue before the court and a knowledgeable, and I hope trusting, judge will take these evaluations in hand and make the determination that this is not a frivolous or a junk lawsuit; that there is basis, and the reason there is basis is because there has been a clear violation of Federal law.

If there has not been a violation of Federal law, even though many of us can certainly have great concern about the families involved, do we continue to suggest that we go out and harass through the courts legal, law-abiding citizens and producers of a legal product in this country simply because it fits the passion of the day or the politics of the moment? I think not. I don't think the Senator from Maryland wants to do that. It is clear if you carve out this exception, you gut the bill because you are saying no, no. We are saying we are giving you all of these exceptions very clearly in the law. I read them to you. They are in the law. It is section 4. That is what we are dealing with. It is a very important part of it.

We think it is the right thing to do at this time. I believe a majority of my colleagues in the Senate agree with that. The reason they agree is for the very reason we have been very specific and clear to adhere to Federal law but to make sure we are not just going to the court for the purpose of expanding the sweep that one might like to take because they do not like guns or they do not like the current law or they want to control them in different ways.

The Federal law is there. It is clear. It is present. The investigation is underway. We cannot try that case here. But I do agree with the Senator from Maryland, we cannot try to, but we can point fingers.

Our bill, S. 1805, sets up a very clear case in which these lawsuits can be effectively argued and a decision made whether there was a rupturing of Federal law or whether we do have law-abiding practitioners in the business of the manufacturing and sale of firearms in this country. That has to be and it must remain the basis of the argument and the basis of this law. The amendment the Senator offers goes directly in the opposite, to carve out special exceptions within the law now and into the future.

I retain the remainder of my time.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I have two legal opinions, one from Lloyd Cutler, a very distinguished American lawyer who has served as White House counsel to a President, who says that S. 1805 contains language that would require the dismissal of the Johnson case. I have another legal opinion from Boise, Schiller & Flexner who essentially say the exceptions would only preserve civil claims brought under other kinds of law. Other than that, what they are saying is this would preempt their ability to bring this case.

The opinions clearly state that section 4 on page 7 articulated by my esteemed colleague does not hold water. It does not protect the victims of Malvo and Muhammad because it is in such plain English limited to those cases by the name of the perpetrator and predator. This does not create a loophole.

Talk about loophole, talk about the gun shield loophole, talk about all the other loopholes in the gun bills. My amendment does not create a loophole.

The legal opinions show there is ambiguity in S. 1805 and that section 4 could preempt the ability of these families to bring this case.

The distinguished Senator from Idaho has his opinion. I have my two legal opinions that show that there is confusion and honest disagreement about the bill. That is why the Mikulski amendment is necessary, to clear up the ambiguity on the matter of these cases committed by Malvo and Muhammad.

His point and my legal opinions prove the necessity of the amendment, to clear up the confusion, end the ambiguity, protect these victims and the families and their right to pursue.

I yield to the Senator from Illinois, a distinguished lawyer himself, to further amplify this argument.

Mr. DURBIN. I thank the Senator from Maryland.

I say to the Senator from Idaho who stood up here and said he did not believe the survivors of the DC sniper shooting had a right to go to court and therefore he was going to oppose the Senator's amendment, I guess that is clearly his point of view, but he said just the opposite. He said he reads this law to allow the victims and their families of the DC sniper to go court against the dealer.

If that is his opinion, then he ought to accept the amendment from the Senator from Maryland because that is all she is asking for.

If you do not believe the victims of the DC sniper should have a day in court against the dealer to determine whether or not he is guilty of wrongdoing, then just say it. But if you believe that these sniper victims and their families should have a day in court, for goodness' sake, accept the amendment of the Senator from Maryland. If you do not, it really tells the story of your bill.

If your bill is going to stop the families and victims of the DC snipers from holding a gun dealer guilty for irresponsible, reckless misconduct, frankly, that is another good reason for us to defeat the bill. Let us stand behind the innocent victims of the DC snipers.

Talk about people who hate guns. I do not hate guns but I hate snipers who shoot children and innocent people on the street and I hate the people who sell them guns irresponsibly. I think they ought to be held accountable. That is all the Senator from Maryland is asking.

Ms. MIKULSKI. Continuing my argument, there is ambiguity and there is honest disagreement. I know the Senator from Idaho might bring us a CRS opinion saying the cases might survive. My colleague from Rhode Island has an earlier CRS opinion that says the opposite. The point is, there is ambiguity both in the law and in opinions about the law.

My amendment is a simple, straightforward way to clear up the ambiguity and let these cases move forward.

The PRESIDING OFFICER. The Senators are reminded to address each other in the third person.

The Senator from Idaho has 10 minutes 27 seconds remained.

Ms. MIKULSKI. Parliamentary inquiry: Did I do something wrong?

The PRESIDING OFFICER. The Senator from Illinois referred to the Senator from Idaho in the first person.

Mr. DURBIN. I beg your pardon.

Parliamentary inquiry: I referred to the Senator from Idaho on the floor; is that improper?

The PRESIDING OFFICER. The Senator several times during his talk used the pronoun "you."

Mr. DURBIN. I apologize for using the pronoun "you." I will never do it again.

Mr. CRAIG. Mr. President, may I inquire as to the time remaining on both sides of the Mikulski amendment?

The PRESIDING OFFICER. Ten minutes 20 seconds for the Senator from Idaho and 14 seconds for the Senator from Maryland.

Mr. CRAIG. With 14 seconds remaining for the Senator from Maryland to argue, this is her amendment, and under the unanimous consent I will then offer the Frist-Craig amendment. As we know, then they will be stood up to be voted on, Frist-Craig first, Mikulski second.

If the Senator would like to make any concluding remarks about her amendment, I would certainly welcome that. She then controls 20 minutes of the 40 that would be on my amendment and the debate could go on.

Ms. MIKULSKI. Excuse me, Senator. The Frist-Craig amendment is on what topic, sir?

Mr. CRAIG. On your topic.

Ms. MIKULSKI. What is the Frist-Craig amendment?

Mr. CRAIG. I have not offered it yet.

Ms. MIKULSKI. You want to conclude debate on this amendment.

Mr. CRAIG. Then we set yours aside for the Frist-Craig debate on the same subject matter and then stand these up for votes.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF) THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	May 18, 2015
Defendants.	)	

NOTICE OF FILING OF AMENDED MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL MOTION TO REMAND

Plaintiffs hereby give notice that they have filed an Amended Memorandum of Law in Support of their Supplemental Motion to Remand. This Amended Memorandum of Law is being filed to correct an error that appears on page 17. The second complete sentence on that page reads in part: "Nancy Lanza's decision to share the Bushmaster XM15-E2S with her son resulted in him killing her with that weapon." That portion should read: "Nancy Lanza's decision to share firearms with her son resulted in him killing her with one of those firearms." This correction is reflected in the Amended Memorandum of Law filed herewith. No other changes have been made.

Respectfully submitted,

By /s/ Joshua D. Koskoff (ct15619)

Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
asterling@koskoff.com
jkoskoff@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2015, a copy of the foregoing Amended Memorandum of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff (ct15619)
Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF) THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	May 18, 2015
Defendants.	)	

AMENDED MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION TO REMAND

I. INTRODUCTION

To find fraudulent joinder under the *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1991) test, the Court must determine "by clear and convincing evidence. . . that there is *no possibility*, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Id.* (emphasis supplied). There is absolutely no basis for the Court to make such a prediction, let alone to do so with the high degree of certainty necessary to sustain jurisdiction. The Bushmaster Defendants contend that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 *et seq.*, conclusively establishes that plaintiffs cannot prevail against Riverview in Connecticut Superior Court, but no Connecticut case supports their interpretation of PLCAA. Under the demanding *Pampillonia* standard, the absence of binding authority supporting their position is dispositive.

PLCAA, moreover, is no defense to plaintiffs' claims of negligent entrustment and violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.* PLCAA *permits* these claims, explicitly preserving negligent entrustment claims and claims based on statutes "applicable" to the sale and marketing of firearms. The relevant case law from other jurisdictions – including the Second Circuit's holding in *City of New York v. Beretta*, 524 F.3d 384 (2nd Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009) – confirms this is so. A Connecticut court confronting this case will hold that PLCAA is no defense to plaintiffs' claims for negligent entrustment and violation of CUTPA.

Whether to apply PLCAA's plain language or to adopt a more restrictive reading of its provisions, however, is not the focus of this jurisdictional inquiry. The Court must determine merely whether the Bushmaster Defendants have shown clearly and convincingly that there is *no possibility* a Connecticut court will construe PLCAA less restrictively than they do. *See Pampillonia*, 138 F.3d at 461. They cannot even come close to meeting this heavy burden.

The Court must remand this case to the Connecticut Superior Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of the shooting at Sandy Hook Elementary School in Newtown on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others. Plaintiffs allege that the Bushmaster XM15-E2S used in the shooting belongs to a specific category of weapons that were designed for the United States military to function as a lightweight but massively destructive service weapon. *See* Dkt. #1, Notice of Removal, Ex. 1, Complaint ¶¶ 45-49, 54. The United States military and law enforcement are appropriate users for these weapons due to their specialized needs and highly regimented safety protocols. Compl. ¶¶ 105-127. Civilians, by contrast, are wholly inappropriate users for these weapons: military

rifles are grossly ill-suited to home defense and sold with no regard for the purchaser's training, experience, commitment to follow safe storage practices, or intent to make the weapon available to others. *Id.* ¶¶ 128-143. Repeated mass shootings of Americans with weapons like the Bushmaster XM15-E2S – including several attacks against school children – have been widely publicized and are well known to the entities that manufacture and sell the Bushmaster XM15-E2S. *Id.* ¶¶ 144-48.

With particular regard to Riverview, plaintiffs allege that it is a retail gun store located in East Windsor, Connecticut. Compl. ¶ 32. Riverview for years sold AR-15s in a manner that foreseeably led to the use of those weapons by unauthorized and unsafe users. *Id.* Count Three ¶ 182. Riverview knew or should have known that the XM15-E2S it sold to Nancy Lanza was a military weapon designed for a purely military purpose: to inflict mass casualties in as short a time as possible. *Id.* ¶¶ 45-174. Additionally, Riverview knew or should have known that the weapon was unfit and unsafe for home use, or civilian use; that some such weapons were likely to be used in their assaultive capacity, despite Connecticut's ban on similar weapons; and that, if the XM15-E2S were used in its assaultive capacity, it could easily inflict mass casualties before law enforcement was able to intervene. *Id.* It nonetheless sold the XM15-E2S to Nancy Lanza. *Id.* ¶¶ 32, 153. Nancy Lanza stored the XM15-E2S in an unlocked gun closet in the home she shared with her son, Adam. *Id.* at ¶ 154. On the morning of December 14, 2012, Adam Lanza retrieved the Bushmaster XM15-E2S from the closet, along with ten 30-round magazines. *Id.* Based on these and additional allegations, plaintiffs assert claims of negligent entrustment, knowing violation of CUTPA, and public nuisance against Riverview. All of these claims arise under state law.

Riverview shares Connecticut citizenship with the plaintiffs. Notice of Removal ¶¶ 9, 11. Plaintiffs' chosen venue, Connecticut Superior Court, is the only proper forum in which these claims can be litigated. Despite that fact, the Bushmaster Defendants removed this case on January 14, 2015. They assert that plaintiffs fraudulently joined Riverview as a defendant in order to circumvent diversity jurisdiction. Although that allegation, if true, would provide a basis for federal jurisdiction, the Bushmaster Defendants' removal papers do not identify any defect specific to Riverview. Rather, they claim that PLCAA bars all of plaintiffs' claims against Riverview and every other defendant. Notice of Removal ¶¶ 20-30; *see also* 1/21/15 Letter to Court, at p. 2. Because the removing defendants' showing as to Riverview invokes a defense common to all defendants, plaintiffs filed a Motion to Remand based on the rule stated in *Chesapeake & O. R. Co. v. Cockrell*, 232 U.S. 146 (1914). *See* Dkt. #27, Motion to Remand. That issue is now fully briefed. *See* Dkt. #34 (Memorandum in Opposition); Dkt. #39 (Reply); Dkt. #42 (Surreply).

III. STANDARD FOR ESTABLISHING FRAUDULENT JOINDER

The doctrine of fraudulent joinder provides that "a plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining defendants with no real connection with the controversy." *Pampillonia*, 138 F.3d at 460–61 (citation and internal quotation marks omitted); *see also Brown v. Eli Lilly*, 654 F.3d 347, 356 (2d Cir. 2011); *Bounds v. Pine Belt Mental Health Care Res.*, 593 F.3d 209, 215 (2d Cir. 2010).

Fundamental principles of jurisdictional restraint dictate that the doctrine of fraudulent joinder be applied sparingly. *See Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 213 (2d Cir. 2013). Consequently, a defendant seeking to establish fraudulent joinder "bears [a] heavy burden." *Brown*, 654 F.3d at 356.

A. THE REMOVING DEFENDANT MUST SHOW THERE IS NO POSSIBILITY THE PLAINTIFF CAN STATE A CLAIM AGAINST THE NON-DIVERSE DEFENDANT.

In order to establish fraudulent joinder, "a defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia*, 138 F.3d at 460-61. In the absence of outright fraud, "[j]oinder will be considered fraudulent when it is established that there can be no recovery against the defendant under the law of the state on the cause alleged." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001). In making this determination, "all factual and legal issues must be resolved in favor of the plaintiff." *Pampillonia*, 138 F.3d at 461.

"This standard has been strictly applied in [the Second] Circuit." *Dieterle v. Rite Aid Pharmacy*, 2015 WL 1505666, at *3 (D. Conn. Mar. 31, 2015). "The doctrine of fraudulent joinder requires a defendant to show, by clear and convincing evidence, that a claim is so flawed that it would be impossible for the plaintiff to recover." *Ret. Program for Employees of the Town of Fairfield v. NEPC, LLC*, 642 F. Supp. 2d 92, 97 (D. Conn. 2009) (noting that "although the adequacy of the Plaintiffs' negligence claim against [the non-diverse defendant] has the potential to be a thorny issue, it is not one that should be conclusively resolved at this stage."); *see also Stan Winston v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 183 (S.D.N.Y. 2003) (concluding that defendants had not shown that it was "legally impossible" for non-diverse defendant to be liable under state law); *Nemazee v. Premier, Inc.*, 232 F. Supp. 2d 172, 178 (S.D.N.Y. 2002) (noting that fraudulent joinder "turns on whether recovery is per se precluded"; "[a]ny possibility of recovery, even if slim, militates against a finding of fraudulent joinder").

B. THE COURT MUST VIEW THE ISSUES AS A CONNECTICUT COURT WOULD, RESOLVING ALL OPEN QUESTIONS IN FAVOR OF REMAND.

In assessing whether the Bushmaster Defendants have met *Pampillonia*'s stringent standard, the Court must view the issues as a Connecticut court would. Connecticut courts of course defer to Connecticut precedent. *Stuart v. Stuart*, 297 Conn. 26, 45-46 (2010) ("it is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court and the Superior Court are bound by our precedent"). They are not bound by the same precedent that binds this Court. *See CUSA LLC v. Travelers Co., Inc.*, 2007 WL 3046270, at *3 (D. Conn. Oct. 15, 2007) (Hall, J.) (observing that while Second Circuit had spoken on an issue and District Court was bound by that ruling, Connecticut court was not bound and *Pampillonia* standard required that "the plaintiff's claims must be judged by how they would fare in state court, not by how they would fare in *federal* court") (emphasis in original).

If pertinent questions of law are unsettled, remand is compulsory. *See, e.g., Ret. Program for Employees of the Town of Fairfield*, 642 F. Supp. 2d at 97-98 ("That there is at minimum a recognized dispute on this issue in the case law is a sufficient basis on which to conclude that Plaintiffs' claim against [the non-diverse defendant] survives this [fraudulent joinder] assessment."); *Kent State Univ. Bd. of Trustees v. Lexington Ins. Co.*, 512 F. App'x 485, 490 (6th Cir. 2013) (affirming district court's award of removal fees to plaintiff based on its finding that, "[g]iven the unsettled nature of Ohio law on this issue and the [fraudulent joinder] standard, remand was a foregone conclusion") (citation omitted); *In re Pradaxa (Dabigatran Etexilate) Products Liab. Litig.*, 2013 WL 5609340, at *2 (S.D. Ill. Oct. 11, 2013) ("Given that Nevada law on the issue of a sales representative's liability is unsettled, the Court must remand the case to

Nevada State Court. This is consistent with the Seventh Circuit's directive to resolve any ambiguities in the pertinent state law in favor of remand."); *IDS Prop. Cas. Ins. Co. v. Gambrell*, 913 F. Supp. 2d 748, 753, 754 (D. Ariz. 2012) ("[T]he law surrounding the viability of a bad faith claim against an insurance adjuster is unsettled in Arizona. . . . While it is a close call, as noted above, ambiguity in the law must favor the plaintiff[.]"); *Hartman v. Caraco Pharm. Labs., Ltd.*, 789 F. Supp. 2d 701, 706 (S.D.W. Va. 2011) ("This incertitude respecting both legal issues dooms defendants' fraudulent joinder challenge."); *Moorhouse v. Bayer Healthcare Pharm., Inc.*, 2008 WL 2477389, at *3 (N.D. Cal. June 18, 2008) ("Defendants contend that no California case has held a distributor liable for failure to warn in the prescription drug context. However, even if true, that fact alone does not suggest that it is *obvious* according to the *settled* rules of California that a failure to warn cause of action is not viable."); *Snyder v. Davol, Inc.*, 2008 WL 113902, at *1 (D. Or. Jan. 7, 2008) (remanding because "the issue of whether a healthcare provider can be held strictly liable under Oregon law is unsettled"); *Antonio v. Wal-Mart*, 2007 WL 2884371, at *7 (S.D. Ind. Sept. 27, 2007) ("For the purposes of deciding if removal was proper, it is enough to note that Indiana law is unsettled regarding the extent that a plaintiff may bring a claim in negligence against a store manager, based on a delegation of the premise owner's duties toward invitees.").

In the cases cited above, there was state law precedent on the relevant issue and often it strongly favored the argument of the removing defendant. Nonetheless, these courts remanded when state law was even arguably unsettled. Here, there can be no debate about whether Connecticut law is settled or not: *there is no Connecticut law on point, let alone binding precedent*. The Court must accordingly heed *Pampillonia*'s directive and remand.

IV. STANDARD FOR CONSTRUCTION OF A FEDERAL STATUTE

The *Pampillonia* analysis requires the Court to determine how a Connecticut court might construe PLCAA, a federal statute. When construing a federal statute, both federal and Connecticut courts will follow federal principles of statutory construction. *Dark-Eyes v. Commissioner of Revenue Services*, 276 Conn. 559, 571 (2006).

A. FEDERAL PRINCIPLES OF STATUTORY CONSTRUCTION.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012) (quotation marks and citation omitted). "Well-established principles of construction dictate that statutory analysis necessarily begins with the 'plain meaning' of a law's text and, absent ambiguity, will generally end there." *Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Only if the meaning of a statute is ambiguous should a court consult legislative history. *See Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2d Cir. 2007).

It is a rule of statutory construction that each word in a statute be given meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (quotation marks and citation omitted).

B. WEIGHT GIVEN TO FEDERAL PRECEDENT.

With regard to the determinative nature of existing precedent, however, federal and state court approaches will differ. The Second Circuit's construction of a federal statute is binding on future panels of the Second Circuit and district courts within the Circuit. It is not binding – but rather merely persuasive – on the Connecticut Supreme Court:

> In general, we look to the federal courts for guidance in resolving issues of federal law. *See, e.g.*, *Joo v. Capitol Switch, Inc.*, 231 Conn. 328, 332-36, 650 A.2d 526 (1994) (considering federal court precedent to interpret federal statute); *see also Schnabel v. Tyler*, 230 Conn. 735, 743 and n. 4, 646 A.2d 152 (1994) (noting that court looks to Second Circuit precedent when interpreting federal statute). Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive.

Turner v. Frowein, 253 Conn. 312, 340-41 (2000); *see Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013) (observing that "the views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."). When the Federal Courts of Appeals divide on an issue, the Connecticut Supreme Court will generally side with the Second Circuit, although it is not bound to do so. *See Dayner v. Archdiocese of Hartford*, 301 Conn. 759, 783-84 (2011) (declining to follow Seventh Circuit precedent when Second Circuit had chosen a different approach).

V. THE CASE MUST BE REMANDED

The Bushmaster Defendants contend that all of plaintiffs' claims are, on their face, barred by PLCAA. It is *their* burden to persuade this Court of that very serious and sweeping charge, and a "heavy" one at that. *Pampillonia*, 138 F.3d at 461. "The doctrine of fraudulent joinder requires a defendant to show, by clear and convincing evidence, that a claim is so flawed that it would be impossible for the plaintiff to recover." *Ret. Program for Employees of the Town of*

Fairfield, 642 F. Supp. 2d at 97. Defendants utterly disregard this burden. They have asked this Court to declare that plaintiffs' negligent entrustment, CUTPA, and nuisance claims are *unambiguously foreclosed* on the basis of a simple recitation of PLCAA's provisions and accompanying conclusory statements that plaintiffs' claims are barred. *See* Notice of Removal ¶¶ 21-30.

Defendants' arguments are wrong. In an effort to find that plaintiffs' negligent entrustment claim is barred by PLCAA, defendants distort the plain meaning of PLCAA, justify that distortion with illogical assumptions, and ignore the entire body of substantive law that governs that claim (the common law). Defendants make an equally feeble effort to establish that plaintiffs' claim that Riverview knowingly violated CUTPA is barred by PLCAA. In doing so, they once again ignore the plain meaning of PLCAA, misread Second Circuit precedent, and ignore the text of CUTPA itself.[1] The many flaws in these arguments are discussed in detail below.

For the purposes of deciding plaintiffs' Supplemental Motion to Remand, however, it does not matter that the Bushmaster Defendants are wrong. It matters only that they lack *any* binding authority to support their arguments. The *Pampillonia* test requires the Court to determine that there is "no possibility. . . that a plaintiff can state a cause of action against the non-diverse defendant *in state court*." *Pampillonia*, 138 F.3d at 461 (emphasis supplied). Connecticut courts are bound by Connecticut precedent; yet defendants fail to identify any Connecticut case law that endorses defendants' restricted reading of PLCAA's negligent

[1] Plaintiffs answer defendants' argument as to the nuisance claims with a constitutional challenge to PLCAA.

entrustment and predicate statute provisions. Because all legal issues must be resolved in plaintiffs' favor at this juncture, the Court must remand.

A. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT PLCAA BARS PLAINTIFFS' NEGLIGENT ENTRUSTMENT CLAIM.

Plaintiffs allege a negligent entrustment claim against Riverview under Connecticut common law. That claim is expressly preserved by the text of PLCAA. In order to remain in this Court, the Bushmaster Defendants must establish clearly and convincingly that there is no possibility a Connecticut Superior Court would allow plaintiffs' claim to proceed. Defendants fail to meet that burden.

1. PLCAA Preserves Negligent Entrustment Claims.

PLCAA identifies a category of lawsuits entitled "qualified civil liability action[s]" and dictates that such actions be dismissed. 15 U.S.C. § 7903(5)(A); *id.* at § 7902. It also describes six causes of action that are *not* subject to dismissal. *See id.* at § 7903(5)(A)(i)-(vi). One of those protected causes of action is the common law tort of negligent entrustment. *See id.* at § 7903(5)(A)(ii) (qualified civil liability action "shall not include. . . an action brought against a seller for negligent entrustment"); § 7903(5)(B) ("'[N]egligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.").

The Bushmaster Defendants do not dispute this point. They fail, however, to acknowledge that PLCAA's negligent entrustment provision has been only sparsely interpreted and that there is *no case law at all* supporting their particular construction of PLCAA's negligent entrustment definition. Under the *Pampillonia* standard, these failings are fatal.

2. PLCAA Intends for Plaintiffs to Proceed Based on State Common Law Negligent Entrustment Causes of Action.

PLCAA does not create a cause of action called negligent entrustment; it preserves that pre-existing common law claim. The statute is unequivocal on this point: "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C).

The import of that directive is obvious: "While the Act may exempt 'negligent entrustment' claims from mandatory dismissal under federal law, it does not affirmatively authorize or establish such claims - it simply does not extinguish them. . . . [Thus, plaintiffs] must look to some other source of law[.]" *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476, 480-81 (Mo. Ct. App. 2013); *see also Phillips v. Lucky Gunner, LLC*, 2015 WL 1499382, at *8 (D. Colo. Mar. 27, 2015) ("[PLCAA] does not create any causes of action, but relies on state law to do so[.]"); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138 (9th Cir. 2009) ("[T]he only function of the PLCAA is to preempt certain claims."); *id.* at 1135 n.6 ("While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se).").

State common law is the only source of negligent entrustment liability. It follows that negligent entrustment claims against firearm sellers are examined under the common law of the state in which the claim is brought. *See Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *12 (Conn. Super. Ct. May 26, 2011) (recognizing PLCAA exception for negligent entrustment actions and then applying Connecticut common law to determine whether plaintiff had stated negligent entrustment claim); *Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214, at *12 (N.D.N.Y. Sept. 20, 2013) (same, but applying New York common law); *Phillips*, 2015

WL 1499382, at *6 (same, but applying Colorado common law); *Noble*, 409 S.W.3d at 480-82 (same, but applying Missouri common law); *cf. Woods v. Steadman's Hardware, Inc.*, 2013 WL 709110, at *4 (D. Mont. Feb. 26, 2013) (explaining that once a plaintiff's state law claims "pass the PLCAA filter" – that is, "fall into one of the predicate exceptions listed by the PLCAA" – plaintiff "can go forward in state court").

In *Noble*, the plaintiffs attempted to circumvent this rule because their negligent entrustment claim against a gun store was not supported by Missouri common law. (Missouri does not recognize a cause of action for negligent entrustment against the seller of a chattel.) The plaintiffs admitted that their claims were not "common law negligent entrustment" claims, but contended that the facts alleged were clearly encompassed by *PLCAA's* formulation of negligent entrustment. The court rejected this argument. The relevant question was whether "[plaintiffs'] allegations state a viable cause of action under the governing substantive law" – in this case, "Missouri's negligent-entrustment doctrine." *Id.* at 480, 482.

Congress' edict that PLCAA not be construed to create a cause of action compels this result. If courts cannot look to PLCAA as a source of negligent entrustment law, state common law *must* govern; otherwise, the negligent entrustment provision would mean nothing. The Bushmaster Defendants have not offered an alternative interpretation of how PLCAA interacts with negligent entrustment law.[2] Yet they have also failed even to *mention* Connecticut's common law of negligent entrustment, let alone to explain why it precludes plaintiffs' claims.

---

[2] Indeed, counsel for the Bushmaster Defendants has taken the exact same position in a case currently pending in Wisconsin, in which he represents a firearm seller against a negligent entrustment claim. During oral argument on the defendant seller's motion to dismiss – which was denied – Attorney Vogts echoed the arguments plaintiffs make here:

> All the PLCAA does is preempt certain state law claims. It does not create claims. So when the court is examining the plaintiffs' allegations and the plaintiffs' claims, I think it's important to keep in mind that federal law does

3. The Bushmaster Defendants' Sole Attack on Plaintiffs' Negligent Entrustment Claim – Their Restrictive Reading of the Word "Use" in PLCAA – Is Unavailing.

The Bushmaster Defendants make one – and only one – argument in support of their assertion that plaintiffs' claim against Riverview has no possibility of success. They allege in their Notice of Removal that "a negligent entrustment action against a firearm seller must involve a sale of a firearm by a seller to the same person who thereafter 'use[s]' the firearm to harm himself or herself, or others." Notice of Removal ¶ 25. In their Surreply to plaintiffs' Motion to Remand, defendants expand on this allegation:

> In the context of civil tort law, "use" of a firearm can only mean employing the firearm's functional features to cause or threaten injury. A firearm cannot be "use[d]" to cause a risk of injury other than by shooting it, or at least threatening to shoot it. And more importantly, the "use" of a firearm under the definition of negligent entrustment must create "unreasonable risk of physical injury to *the person* or others." 15 U.S.C. § 7903(5)(B) (emphasis added). It is impossible for a person to "use" a firearm to harm herself without discharging it (*e.g.*, suicide). Any construction of "use" to include anything other than firing or threatening to fire a firearm is contrary to the plain meaning of the text and purpose of the PLCAA.

Surreply at 2-3. This elaboration, however, only magnifies the deficiencies in defendants' argument.

a. Defendants' Interpretation Is Not Supported by Any Case Law.

Defendants' sole citation to a case that mentions "use" in the context of negligent entrustment is *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011). Surreply at 5 n. 1. *Gilland* holds, consistent with Connecticut common law, that the

---

> not dictate to this court that it must recognize ... a negligent entrustment claim. It's only allowing for those claims to be filed in court. *And once they're filed it's up to your Honor to apply Wisconsin law to claims that fit within those exceptions.*

Transcript of Motion Hearing, *Norberg v. Badger Guns*, Civil Case No. 10-cv-020655 (Wis. Cir. Ct.), June 9, 2011, at p. 7 (emphasis supplied), attached as Exhibit A.

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." *Id.* at *13. It is unclear how this point is helpful to the Bushmaster Defendants. Plaintiffs allege that Riverview supplied the Bushmaster XM15-E2S to Nancy Lanza for her use; they simply do not allege that Nancy Lanza "use[d]" the Bushmaster by firing it. There is absolutely nothing in *Gilland* that suggests "use" should be read as narrowly as defendants would like.

The absence of any controlling Connecticut authority dooms the Bushmaster Defendants' argument from the outset, but the dearth of supporting case law is not limited to Connecticut. There is not a *single* citation in defendants' briefing to any case endorsing their reading of PLCAA – because no such case exists. This fact alone requires remand. *E.g.*, *Ret. Program for Employees of the Town of Fairfield*, 642 F. Supp. 2d at 97-98 ("That there is at minimum a recognized dispute on this issue in the case law is a sufficient basis on which to conclude that Plaintiffs' claim against [the non-diverse defendant] survives this [fraudulent joinder] assessment."); *Kent State Univ. Bd. of Trustees*, 512 F. App'x at 490 ("[g]iven the unsettled nature of Ohio law on this issue and the [fraudulent joinder] standard, remand was a foregone conclusion"); *Hartman*, 789 F. Supp. 2d at 706 ("This incertitude respecting both legal issues dooms defendants' fraudulent joinder challenge.").

Here, not only is there no *settled* law supporting defendants' argument that "use" is synonymous with "discharge," there is *no law at all*. In order to determine that Riverview had been fraudulently joined, this Court would need to adopt a novel and restrictive interpretation of PLCAA's negligent entrustment provision *and* determine that there is no possibility that a Connecticut court might reach a different conclusion. The breadth and scope of those hypothetical findings expose the weakness of defendants' position.

b. Defendants' Argument Is Illogical.

Defendants' inability to point to any supporting case law is also emblematic of how deeply flawed their argument is. Defendants argue that "[a] firearm cannot be 'use[d]' to cause a risk of injury other than by shooting it, or at least threatening to shoot it." Surreply at 2. This is obviously untrue. (It also uses imprecise language: PLCAA's definition does not refer to the entrustee "causing" a risk of injury, but rather using the firearm "in a manner involving unreasonable risk of physical injury." 15 U.S.C. § 7903(5)(B).) Leaving a loaded handgun in a room full of children can certainly be said to "involve[e] [an] unreasonable risk of physical injury"; the same can be said of giving a firearm to a dangerous felon, or a mentally unstable person, or sharing a military assault weapon with someone unfit to use it. Indeed, if Congress had intended the meaning defendants suggest, its choice of language is baffling – "us[ing]" a firearm "in a manner involving unreasonable risk of physical injury" is a needlessly convoluted way of saying "us[ing]" a firearm to *cause* injury.

Plaintiffs also fail to grasp the significance defendants attribute to PLCAA's inclusion of injury to the entrustee – in addition to injury to "others." *See* Surreply at 2-3 ("And more importantly, the 'use' of a firearm under the definition of negligent entrustment must create "unreasonable risk of physical injury to *the person* or others. 15 U.S.C. § 7903(5)(B). It is impossible for a person to 'use' a firearm to harm herself without discharging it (*e.g.*, suicide)."). Even if it is true that it is "impossible for a person to 'use' a firearm to harm herself without discharging it," that is not at all what PLCAA requires. Once again, PLCAA refers to using a firearm "*in a manner involving unreasonable risk* of physical injury." 15 U.S.C. § 7903(5)(B) (emphasis supplied). It is not at all impossible for a person to create a risk of injury to herself by

negligently allowing others to use a firearm. Each of the examples listed above can be said to create a risk of injury to the person that is equal to the risk of injury to others. In this case, of course, there is a more obvious example: Nancy Lanza's decision to share firearms with her son resulted in him killing her with one of those firearms.

c. "Use" Does Not Mean "Discharge."

Nor can the Bushmaster Defendants establish that the plain meaning of "use" is "discharge." *See* Surreply at 3 ("Any construction of 'use' to include anything other than firing or threatening to fire a firearm is contrary to the plain meaning of the text and purpose of the PLCAA."). To start, the United States Supreme Court has recognized that "using" a firearm encompasses more than using it for its "intended purpose" – that is, as a weapon. *Smith v. United States*, 508 U.S. 223, 230 (1993). In *Smith*, the Court was called upon to discern "the everyday meaning" of the word "use" after a criminal defendant challenged a penalty enhancement on the grounds that trading a firearm in exchange for drugs did not constitute a "use" of the firearm under the statute. *Id.* at 228. After consulting multiple dictionaries and reviewing past interpretations of the term, the Court concluded that the ordinary meaning of "use" is expansive. Notably, it rejected the defendant's argument that the statute required proof that the firearm was used *as a weapon*, noting simply that "the words 'as a weapon' appear nowhere in the statute." *Id.* at 229. Likewise, the words "as a weapon" appear nowhere in PLCAA's negligent entrustment definition. As in *Smith*, "use" must be given its ordinary meaning.[3]

[3] Defendants have argued that *Smith* is irrelevant because the Court's discussion of "use" arose in the context of criminal law, which addresses many different uses of firearms. *See* Surreply at 3. This is true, but inapposite. The *Smith* Court did not derive the meaning of "use" by placing it in the context of the criminal laws; it looked to Webster's New International Dictionary and Black's Law Dictionary to determine "the everyday meaning" of the word. 508 U.S at 228-29.

Congress' word choices in other parts of PLCAA are also significant. In PLCAA, Congress twice employed language that can be obviously contrasted with its choice of the word "use." In the threshold definition of "qualified civil liability action," the statute proscribes certain actions that result "from the criminal or *unlawful misuse* of a qualified product." *See* 15 U.S.C. § 7903(5) (emphasis supplied). And in the provision governing product liability claims, PLCAA refers to scenarios where "the *discharge* of the [firearm] was caused by a volitional act that constituted a criminal offense[.]" *Id.* at § 7903(5)(A)(v) (emphasis supplied).

Congress' decision to include the terms "discharge" and "unlawful misuse" in the text of PLCAA indicates that it knew how to employ narrower terms to refer to specific uses of firearms, and that it did so when such terms were appropriate. Consequently, "use" must be read not merely to mean "discharge" or "unlawful misuse." *See Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013) (When "Congress uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quotation marks and citation omitted); *cf. Milner v. Dep't of Navy*, 562 U.S. 562, 131 S. Ct. 1259, 1272 (2011) (holding that "law enforcement purposes" must be read to "involve more than just investigation and prosecution" because other parts of the statute "demonstrate [that] Congress knew how to refer to these narrower activities").

d. The Legislative History of PLCAA Is Not a Useful or Reliable Interpretive Tool.

The Bushmaster Defendants' resort to legislative history does not save their argument. As an initial matter, consulting legislative history is only appropriate when the meaning of a statute is ambiguous. *See Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 327 (2d Cir. 2007). Defendants concede this, and do not even argue that the negligent entrustment definition is ambiguous. Indeed, it is not. But even if legislative history *were*

relevant to the Court's analysis, defendants' proffered evidence is not at all probative of Congressional intent. They rely on a portion of a Report from the House of Representatives that includes a statement by House members who opposed the enactment of PLCAA. In that statement, the dissenters describe the negligent entrustment exception as precluding a straw sale or other successive entrustment.

That reliance is doubly flawed. First, the Supreme Court has instructed that legislative history "refers to the pre-enactment statements of those who drafted or voted for a law." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Thus, only the "intention of the drafters" provides guidance. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). By contrast, the Supreme Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents." *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964). The Court noted that the "fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Id.* (internal quotation marks and citation omitted).

Second, as defendants surely know, PLCAA's legislative history is replete with wildly divergent characterizations of the proposed law. The bill's proponents describe it in the most vanilla of terms, while its opponents foretell a sea change.[4] *Cf. NLRB*, 377 U.S. at 66 ("In their zeal to defeat a bill, [opponents] understandably tend to overstate its reach."). Perhaps most

[4] *E.g.*, *compare* 151 Cong. Rec. S9094 (July 27, 2005) (statement of Sen. Sessions) ("That is what we are trying to do here, to pass some legislation that does nothing more than restore the classical understanding of American civil liability."), *with* 151 Cong. Rec. S9081 (July 27, 2005) (statement of Sen. Durbin) ("They are changing the law. They are saying, for firearms dealers, we are not going to hold them to this same standard that we hold every other business in America to when people buy products."). Quoted portions of the Congressional Record are attached as Exhibit B.

saliently, although the Washington sniper case was discussed at length in both the House and the Senate, the legislators could not agree on whether PLCAA would permit a cause of action against the firearm seller to proceed.[5]

e. Defendants Ignore the Common Law Meaning of Use.

Finally, the meaning defendants attempt to give the word "use" in PLCAA's negligent entrustment definition both ignores and is fundamentally incompatible with the common law meaning of that term.

i. Congress Borrowed Language from the Restatement (Second) of Torts, Thereby Incorporating the Common Law Meaning of "Use."

Under PLCAA's definition, negligent entrustment of a firearm turns on whether the seller should have known that the person to whom it sold the weapon was likely to "use [the firearm] in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B). That quoted language was not invented by Congress when it drafted PLCAA. The phrase mirrors the common law iteration of "use," as expressed by Section 390 of the Restatement (Second) of Torts. *See* Restatement (Second) of Torts § 390 (supplier of chattel subject to liability where entrustee is likely to "*use* [the chattel] in a manner involving unreasonable risk of physical harm to himself and others") (emphasis supplied).

---

[5] *Compare* 150 Cong. Rec. S1657 (Feb. 26, 2004) (statement of Sen. Reed) ("[T]he underlying legislation would cause currently pending suits on behalf of the families and the estates of these victims of the snipers to be thrown out of court. . . . [N]one of the appropriate exemptions from the preemption to sue would be applicable in this particular situation."), *with* 150 Cong. Rec. S1657, S1658 (Feb. 26, 2004) (statement of Sen. Craig) ("I believe we are protecting those families [of the sniper victims]. I would not write the kind of law that is being suggested would be written. . . . If Malvo walks in and pulls a Bushmaster from off the rack and walks out with it and that is not detected, they have a problem on their hands. I believe they have a problem on their hands, and they are not exempt. The argument is—and some have used it—they do not even make it to the courthouse. That is not a valid statement."). *See* Ex. B (Excepts from Congressional Record).

This congruence was clearly intentional. The Restatement (Second) of Torts is "the most widely accepted distillation of the common law of torts." *Field v. Mans*, 516 U.S. 59, 70 (1995). Moreover, Section 390 is the authoritative source of negligent entrustment law in nearly every state that recognizes the cause of action. *See Casebolt v. Cowan*, 829 P.2d 352, 358-59 (Colo. 1992) (collecting cases where states have "employed, approved, or adopted" Section 390); *W. v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment."). By borrowing Section 390's formulation of how "use" interacts with "unreasonable risk" of harm, Congress created a framework that accommodates state common law iterations of the negligent entrustment cause of action.[6] The logic of that choice, of course, flows naturally from Congress' decision not to create causes of action through PLCAA.

Recognizing that the word "use" in PLCAA's negligent entrustment definition is culled from the Restatement informs the meaning of that word. It is a well-settled principle of statutory interpretation that "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *cf. United States v. Neustadt*, 366 U.S. 696, 707 (1961) ("Certainly there is no warrant for assuming that Congress was

[6] Indeed, state courts frame their understanding of PLCAA's definition around its similarity to the Restatement and their own state law. *E.g.*, *Gilland*, 2011 WL 2479693, at *12 (noting that "[the PLCAA] definition is consistent with Connecticut law on negligent entrustment," which is considered governed by § 390 of the Restatement); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 394 & n.89 (Alaska 2013) ("The PLCAA definition is substantially the same as the Restatement version Alaska follows. [Citing § 390 in footnote]"); *Al-Salihi*, 2013 WL 5310214, at *12 ("The PLCAA standard mirrors the standard for the tort of negligent entrustment under New York law[.][Citing § 390]").

unaware of established tort definitions when it enacted the Tort Claims Act in 1946[.]"). Thus, when language "'is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also United States v. Soler*, 759 F.3d 226, 234 (2d Cir. 2014) (same).

ii. The Common Law Meaning of "Use" Embraces Successive Entrustments.

Here, the relevant body of law applying and interpreting Section 390 unequivocally rejects defendants' argument about the meaning of "use" in the context of negligent entrustment. Cases decided under Section 390 teach that the person to whom the chattel is entrusted need *not* be the person who later employs it to cause physical harm. A claim for negligent entrustment can involve successive entrustments, so long as they are reasonably foreseeable.

This common law rule is exemplified by *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), in which a verdict against a cement manufacturer for negligently entrusting cherry bombs to employees was upheld under Section 390 even though two additional entrustments preceded injury to the plaintiff. An employee of the defendant who was entrusted with cherry bombs gave several of the bombs to a group of children; one of those children then gave a bomb to the minor plaintiff, who was severely injured when she set it off. The question for the court was one of foreseeability. Ultimately, the verdict was upheld because the manufacturer's decision to entrust the bombs to employees without adequate precautions – and with reason to know that employees were not exercising the proper level of care – created an unreasonable and foreseeable risk that a cherry bomb would fall into careless or unsuspecting

hands and thereby cause injury. Consequently, the successive entrustments did not sever the causal chain between the defendant's negligence and the plaintiff's injuries.[7]

Moreover, there can be no doubt that Congress *knew* of that rule at the time PLCAA was drafted; yet Congress nonetheless preserved the common law tort of negligent entrustment. In the five years preceding PLCAA's enactment, state and federal courts had explicitly recognized that common law negligent entrustment claims could be asserted against gun sellers and manufacturers for negligence in the chain of distribution – which, by definition, involves successive entrustments. In *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (N.Y. 2001), for example, the court found that a negligent entrustment theory could be viable if the requisite knowledge was proved (although plaintiffs had not done so). The court noted: "The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others. [Citing § 390.] *The duty may extend through successive, reasonably anticipated entrustees.*" *Id.* at 236-37 (emphasis supplied); *see also Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 395 (E.D.N.Y. 2004) (finding that plaintiffs had stated prima facie negligent entrustment claim under theory articulated in *Hamilton*);

---

[7] Numerous courts have taken a similar approach, finding common law negligent entrustment claims sufficient where the entrustee's use of the chattel was confined to giving or lending it to another. *See, e.g.*, *Rios v. Smith*, 95 N.Y.2d 647, 653 (2001) ("Thus, the evidence was legally sufficient for the jury to determine that [the defendant] created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son, whose use of the vehicles involved lending one of the ATVs to Smith, another minor."); *Earsing v. Nelson*, 212 A.D.2d 66, 70 (1995) (upholding denial of motion to dismiss negligent entrustment claim where minor purchaser of BB gun lent it to friend who shot and injured the plaintiff); *LeClaire v. Commercial Siding & Maint. Co.*, 308 Ark. 580, 583 (1992) (reversing trial court's dismissal of negligent entrustment claim where employer entrusted car to employee, who then entrusted it to another person; the court noted: "The real rub in this case is the fact that it involves two entrustments. That is not a bar to recovery."); *Schernekau v. McNabb*, 220 Ga. App. 772 (1996) (plaintiff properly stated negligent entrustment claim against woman who permitted her son to bring air rifle to campground, even though another camper – and not defendant's son – used the rifle to injure the plaintiff).

Johnson v. Bulls Eye Shooter Supply, 2003 WL 21639244, at *5 (Wash. Super. June 27, 2003) (denying motion to dismiss negligent entrustment claim against Bushmaster for supplying the rifle that was used by the D.C. snipers because Bushmaster could be liable under § 390 "[i]f it was foreseeable that plaintiffs and others were endangered by the entrustment of the Bushmaster XM-15 assault rifle to [the dealer]").

The cases clearly put Congress on notice that the common law of negligent entrustment, *as expressed by Section 390 of the Restatement*, provided a viable cause of action against firearm sellers, including scenarios where successive entrustments were involved. In fact, *Johnson*, which arose out of the high-profile Washington D.C. sniper shootings, was referenced numerous times during Congressional debate. *See* fn. 6 above (citing Senators' comments on how PLCAA would affect the lawsuits brought by the families of sniper victims). Yet Congress did nothing to alter the common law meaning of "use," choosing instead to adopt the Restatement's language. Congress could have narrowed the common law formulation in any number of ways – for example, by requiring that the person to whom the firearm is entrusted cause the physical injury – but it did not. Under basic principles of statutory construction, we must assume that choice reflects Congress' intent. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress' choice of words is presumed to be deliberate[.]").

4. Plaintiffs' Allegations Conform to Connecticut's Common Law of Negligent Entrustment.

The Court should never reach this argument. The Bushmaster Defendants have not provided *any* valid reason why plaintiffs' claims would be foreclosed by PLCAA in Connecticut's courts; certainly, they have not demonstrated that this Court could predict that result with the certainty required by *Pampillonia*. Moreover, defendants have not even challenged the sufficiency of plaintiffs' allegations under Connecticut common law. Although it

is not plaintiffs' burden to establish the viability of their claims against Riverview, here we briefly address the common law of negligent entrustment in Connecticut and the sufficiency of plaintiffs' allegations under that law.

Under the doctrine of negligent entrustment, one who supplies a dangerous instrument to another with knowledge that doing so is likely to create an unreasonable risk of physical harm to others may be held liable when injury foreseeably results. In Connecticut, liability under this rule is derived from Section 390 of the Restatement. *See Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678, 679 (1933) (reciting elements of negligent entrustment as stated in Section 390); *Short v. Ross*, 2013 WL 1111820, at *5 (Conn. Super. Ct. Feb. 26, 2013) ("[A]s long recognized by the decisions of the Superior Court, [the Connecticut Supreme Court in] *Greeley* 'virtually adopted' the approach provided by the Restatement.") (citations omitted).[8]

Negligent entrustment liability arises from the affirmative duty to potential victims that attaches to those who handle dangerous chattels. As the commentary to Section 390 of the Restatement explains, "liability is based upon the rule. . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." Restatement (Second) of Torts § 390 cmt. b.

Naturally, a defendant's knowledge about how "human beings will conduct themselves" is a fact-intensive question. It implicates the dangerousness of the chattel; *see Greeley*, 165 A. at 679 (recognizing cause of action for negligent entrustment of automobile; although cars do not belong in the same category as firearms or explosives, cars are nevertheless "capable of doing

[8] Thus, the substantive law governing plaintiffs' claims – Section 390 of the Restatement – aligns with the definition provided in PLCAA, which relies on the same Section to describe the entrustee's "use" of the firearm.

great injury when not properly operated"); the purpose for which the chattel is entrusted; *see Turner v. Am. Dist. Tel. & Messenger Co.*, 94 Conn. 707, 110 A. 540, 543 (1920) (knowledge of entrustee's recklessness was "vitally important" element, "since plainly it cannot be regarded as negligence to supply effective weapons of protection to [a night watchman]."); the propensities of certain classes of persons; *see Burbee v. McFarland*, 114 Conn. 56, 157 A. 538, 539 (1931) ("The common law requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age," who "might innocently play with or use it to his injury."); Restatement (Second) of Torts § 390 cmt. b (liability may arise where entrustor supplies a chattel to one who "belongs to a class which is notoriously incompetent to use the chattel safely[.]"); and common knowledge about how humans are likely to behave under certain sets of circumstances; *see Short v. Ross*, 2013 WL 1111820, at *6-9 (Conn. Super. Ct. Feb. 26, 2013) (plaintiffs stated prima facie case against U-Haul for renting truck that would be used at football game tailgate); *id.* at *7 ("[A] review of our state's common law of negligent entrustment outside of the context of automobiles shows that the essence of the tort includes circumstances where an entrustor should know that there is cause why a chattel ought not to be entrusted to another.").

Plaintiffs' negligent entrustment claim against Riverview touches on each of these factors in pleading that Riverview should have known of the unreasonable risks associated with selling the Bushmaster XM15-E2S to a civilian user. With respect to the dangerousness of the weapon, plaintiffs allege:

- The Bushmaster XM15-E2S is an AR-15 rifle, a weapon designed for the United States military to inflict mass casualties. *See* Compl. ¶¶ 45, 54.
- The XM15-E2S propels ammunition at a speed that far exceeds that of a handgun, which greatly increases the ammunition's destructive impact on the human body. *See id.* at ¶¶ 55-60.

- The XM15-E2S is designed to accept large capacity magazines, a feature that allows soldiers (and civilians) to fire more rounds and minimize time spent reloading. *See id.* at ¶¶ 61-63.

- The XM15-E2S is capable of rapid, semi-automatic fire that allows soldiers (and civilians) to empty a 30-round magazine in a matter of seconds. *See id.* at ¶¶ 64-67.

- The XM15-E2S can pierce body armor, which increases its lethality when used against enemy troops (and police officers). *See id.* at ¶ 47.

- The combined effect of the XM15-E2S's mechanical features is more wounds, of greater severity, in more victims, in less time. *See id.* at ¶¶ 69-70.

This capacity for harm is contrasted with the weapon's limited purpose for civilian users:

- The XM15-E2S is ill suited to home defense: among other reasons, the velocity and rate of semi-automatic fire greatly increase the risk that bullets will breach walls and doors of the home and thus endanger innocents. *See id.* at ¶¶ 83-94.

- The Bureau of Alcohol, Tobacco and Firearms has repeatedly determined, after extensive study, that semiautomatic assault weapons like the XM15-E2S serve a purpose in combat and crime but are not suited for either hunting or sporting. *See id.* at ¶¶ 95-104.

Finally, plaintiffs make specific allegations supporting their claim that civilian users constitute a "class" of persons who are unfit to possess the XM15-E2S. These allegations speak to civilian users' demonstrated propensities for unsafe use. *Cf. Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 328 Ill. App. 3d 482, 488 (2002) (Under Section 390, "a lawsuit may succeed with proof that the defendant entrusted the dangerous article to a member of a larger class, where the defendant knew or should have known that members of the larger class generally tended to use such articles in a manner involving unreasonable risk of harm."). They also contrast the *environment* in which civilian users handle assault weapons with the environment for which those weapons were designed: the military and law enforcement. For example:

- Specialized institutions like the military and law enforcement have extensive rules and protocols in place – concerning training, storage, safety, and the mental health of soldiers and officers – to prevent combat rifles from causing criminal or accidental harm. *See* Compl. ¶¶ 105-127.

- There are no analogous rules and protocols in place when rifles like the XM15-E2S are sold to civilian users like Nancy Lanza. *See id.* at ¶¶ 128-144.

- More than half of American households with firearms do not store them securely. *See id.* at ¶ 139.

- The XM15-E2S is marketed to civilian users in explicitly militaristic terms that reinforce its image as a combat weapon used for the purpose of waging war and killing human beings. *See id.* at ¶¶ 72-81.

- Civilian users are entrusted with militarized and highly lethal weapons like the XM15-E2S without a permit, safety training, or a mental health assessment, and regardless of whether they intend to make the rifle available to other persons. *See id.* at ¶¶ 135-138.

- Prior to the sale of the XM15-E2S to Nancy Lanza in 2010, many highly publicized mass shootings had revealed the AR-15 to be the weapon of choice for mass shooters, including those that had targeted elementary school children, high school children, and college students. *See id.* at ¶¶ 145-148.

Civilian users constitute an admittedly broad class. But what matters is Riverview's actual or constructive knowledge about civilians' use of AR-15s. Plaintiffs have made specific allegations that provide a rationale for why civilian users are an appropriate class in this case. As detailed above, the AR-15 was designed with a particular market in mind – the military – and the weapon's terrifying lethality is both *justified* by the special needs of that market and *controlled* by the extensive safety measures embedded within that market. It is plaintiffs' position that unleashing the same weapon on a population that has no such need, is held to no such safety measures, and has repeatedly used the weapon as it was intended – but on innocent civilians not enemy troops – is simply not reasonable. *Cf. McCarthy v. Olin Corp.*, 119 F.3d 148, 163 (2d Cir. 1997) (Calabresi, J., dissenting) ("Selling tanks to the armed forces is fine; selling them to the

general public is, I would think, clearly negligent."). It is the role of a Connecticut jury to assess the merits of that position.[9]

B. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT PLCAA BARS PLAINTIFFS' CUTPA CLAIMS.

In addition to claims for negligent entrustment, PLCAA permits claims for knowing violations of state statutes applicable to the sale or marketing of firearms. The plain language of the statute describes this category of cases, indicating that "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" is not barred by PLCAA. 15 U.S.C. § 7903(5)(A)(iii). Defendants nonetheless claim that this provision is so narrow that there is no possibility it encompasses any claim based on CUTPA. Notice of Removal ¶¶ 26-28.

---

[9] In their Surreply, the Bushmaster Defendants argue that – even assuming plaintiffs' interpretation of "use" is correct – plaintiffs have failed to allege that Nancy Lanza "used" the Bushmaster at all. *See* Surreply at 4. A fair reading of plaintiffs' complaint indicates otherwise. *See* Compl. ¶ 154 (On December 14, 2012, Adam Lanza retrieved the Bushmaster and ten 30-round magazines from "an unlocked gun closet in the house he shared with his mother"); *id.* at ¶ 138 (purchasers of AR-15s are not required to indicate whether they intend to share weapon with others); *id* at ¶ 139 (more than half of American households do not store firearms securely); *see also id.* ¶ 188 ("The Riverview Defendants knew, or should have known, that Nancy Lanza's receipt and possession of the XM15-E2S involved an unreasonable risk of physical injury to others."). These allegations, construed in the light most favorable to plaintiffs, encompass the allegation that Nancy Lanza "used" the Bushmaster by sharing it with her son.

Moreover, even if the Court finds these allegations to be insufficient, remand is still required unless the defect cannot be cured by amendment. *See Kenneson v. Johnson & Johnson, Inc.*, 2015 WL 1867768, at *4 (D. Conn. Apr. 23, 2015) (Shea, J.) (considering Connecticut procedural standards for amendment in deciding whether plaintiffs could possibly prevail against non-diverse defendant); *Nerad v. AstraZeneca Pharm., Inc.*, 203 F. App'x 911, 914 (10th Cir. 2006) (approving of district court's discussion of plaintiff's right to amend in context of fraudulent joinder analysis: "This was a jurisdictional inquiry. As we read the order, the court determined that success was reasonably possible *at the time of removal* because, although the plaintiff might be required to amend his complaint, that amendment would be allowed as a matter of course."); *cf.* CT Prac. Bk. § 10-44 (a plaintiff whose complaint is stricken may plead over to cure any insufficiency).

A Connecticut court will find that PLCAA permits plaintiffs to proceed under CUTPA. It may reach that determination by following the Second Circuit and construing PLCAA's predicate statute provision as the Second Circuit did in *City of New York*, 524 F.3d at 399-404. Under that construction, PLCAA permits plaintiffs' CUTPA claims. Alternatively, a Connecticut court may reach its own determination as to the meaning of the predicate statute provision, construing that provision in accordance with its plain language. In either scenario, the court will conclude that CUTPA is an appropriate predicate statute.

1. Because There Is No Binding Authority on This Issue, No Further Analysis Is Necessary and Remand Is Required.

The *Pampillonia* test requires the Court to determine that there is "no possibility. . .that a plaintiff can state a cause of action against the non-diverse defendant in state court." *Pampillonia*, 138 F.3d at 461. The District Court must determine what precedent would bind the state court and proceed accordingly, recognizing that the state court will be bound to follow the law as determined by the state's highest court, not the federal court of appeals. *CUSA LLC*, 2007 WL 3046270, at *3 (observing that, while it was bound to follow Second Circuit precedent, a Connecticut court is not and remanding because there were open questions of Connecticut law). Connecticut courts are bound by Connecticut precedent. *Stuart*, 297 Conn. at 45-46 ("[I]t is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by our precedent."). Second Circuit authority, while strongly persuasive, is not binding. *Turner*, 253 Conn. at 340-41.

Defendants cite no *Connecticut* authority to establish that their reading of PLCAA's predicate statute provision is the result a Connecticut court will reach. They cannot, because there is no Connecticut law on this particular question. As all legal issues must be resolved in plaintiffs' favor in this jurisdictional analysis, the Court must remand. *See Pampillonia*, 138 F.3d

at 461 (all legal issues must be resolved in plaintiff's favor); *see also* Section II.B. above (listing cases finding that if pertinent questions of law are unsettled, remand is required).

2. The Bushmaster Defendants' Allegations on This Issue.

The Bushmaster Defendants recognize that plaintiffs' Complaint alleges that Riverview "knowingly violated the Connecticut Unfair Trade Practices Act." Notice of Removal ¶ 24. They acknowledge that PLCAA permits suits against a seller of firearms for knowingly violating a state statute applicable to the sale or marketing of firearms. *Id.* ¶ 26. They allege that because CUTPA does not "expressly regulate or clearly implicate the regulation of firearms" it is not a proper predicate statute. *Id.* ¶ 27. Therefore, they argue, PLCAA is a complete defense to plaintiffs' CUTPA claims against Riverview. *Id.* ¶¶ 26-27.[10]

3. PLCAA's Predicate Statute Provision.

PLCAA provides that a qualified action *"shall not include"*:

> 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. . .

15 U.S.C. § 7903(5)(A)(iii) (emphasis added).

The scope of the predicate statute provision has been construed by both the Second Circuit and the Ninth Circuit, as well by the District of Columbia Court of Appeals, the Indiana Appellate Court and the Alaska Supreme Court. *City of New York*, 524 F.3d at 399-404; *Ileto v. Glock*, 565 F.3d 1126, 1131-38 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169-72 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. App. 2007), *transfer denied*, 915 N.E.2d 978 (Ind.

[10] The Bushmaster defendants repeat these arguments in their Opposition to Plaintiffs' initial Motion to Remand, Dkt. #34, and their Surreply in that round of briefing, Dkt. #42.

2009); *Estate of Kim v. Coxe*, 295 P.3d 380, 393-94 (Ak. 2013). No Connecticut appellate court has ever addressed this provision.

4. The Second Circuit's Decision in *City of New York* Would Allow Plaintiffs' CUTPA Claims to Proceed under the Predicate Statute Provision.

The Second Circuit's decision in *City of New York*, 524 F.3d at 399-404, will be persuasive to a Connecticut court, but not binding on it. *E.g. Turner*, 253 Conn. at 340-41. If a Connecticut court follows *City of New York*, it will recognize that PLCAA's predicate statute provision permits plaintiffs' CUTPA claims.

In *City of New York*, the City brought suit against firearms manufacturers and wholesale sellers, asserting various claims against them based on the theory that they distributed and sold firearms in a manner that increased their use by criminal populations. The action was filed in federal court in 2000 on the basis of diversity jurisdiction. In 2005, Congress passed PLCAA and the defendants moved to dismiss. The City argued that PLCAA is unconstitutional and that it had asserted a statutory nuisance claim satisfying the predicate statute provision.[11] The District Court rejected the constitutional challenges and found that the statute was an acceptable predicate.

Judge Miner, writing for a two-judge majority, affirmed the District Court's determination that PLCAA survives constitutional challenge but reversed concerning the scope of the predicate statute provision. The court first addressed the plaintiff's challenge to PLCAA under the Tenth Amendment and fundamental principles of federalism.[12] It defused that

---

[11] Although this statute had not been specifically pleaded, the City asserted that its allegations of common law nuisance encompassed a statutory nuisance claim based on Penal Law Code § 240.45.

[12] The plaintiff argued that PLCAA impermissibly elevates the state legislature above the state judiciary, because the predicate statute provision (as construed by the defendants) would only

challenge in part *by construing the predicate statute provision not to require express language regarding firearms and merely to require a judicial decision that the statute is applicable to firearms*:

> The Firearms Suppliers argued [in the District Court] that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate statute even if a state's highest court were to construe that statute as applicable to firearms. *We disagree with this argument and, as set forth in more detail below, do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations of state courts.*

City of New York, 524 F.3d at 396 (citations omitted) (emphasis supplied).[13]

Turning then to the predicate statute provision, the court recognized that the key question is what "applicable" means: "Central to the issue under examination is what Congress meant by the phrase 'applicable to the sale or marketing of [firearms].' The core of the question is what Congress meant by the term 'applicable.'" 524 F.3d at 399. Rather than simply follow the plain meaning of "applicable," the Second Circuit narrowed that meaning in certain respects.[14] It emphasized again, however, that:

---

give force to legislative pronouncements and would ignore judicial interpretations of state statutes. *City of New York*, 524 F.3d at 396.

[13] The court continued, "We agree with the District Court in its rejection of the Firearms Suppliers' argument that a statute must expressly mention firearms in order to qualify as a predicate statute. The District Court held that the Firearms Suppliers' argument 'misconstrues the relationship of courts and legislatures in New York. The law is not only the language that the legislature adopts, but what the courts construe to be its meaning in individual cases.'" *City of New York*, 524 F.3d at 396 (quoting *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 266 (2005)).

[14] For example, the Court determined that in light of subsections (I) and (II) of the predicate provision, it would find a "textual definition" of "applicable," rather than follow its plain meaning. *Id.* at 401. (This was an application of the rule of *eiusdem generis*.) And it turned to the legislative history, although it is not clear exactly what conclusions, if any, the court drew from it. *Id.* at 403-04. We remark on these choices simply to highlight that a Connecticut court need *not* make the same choices.

> We find nothing in the statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. *We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute.*

524 F.3d at 399-400 (emphasis supplied).

It determined finally:

> [T]he exception created by 15 U.S.C. § 7903(5)(A)(iii): (1) does not encompass New York Penal Law § 240.45; (2) does encompass statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms; and (3) does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.

524 F.3d at 404.

a. *City of New York*'s Third Category Permits Plaintiffs to Proceed on their CUTPA Claims Because CUTPA Clearly Implicates the Purchase and Sale of Firearms.

City of New York recognizes that the predicate statute provision "does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." 524 F.3d at 404.[15] This category of statutes is broad. The court indicates that statutes in this category *need not* expressly regulate firearms. They need merely be statutes that "clearly can be said to implicate the purchase and sale of firearms." *Id.*

The removing defendants allege and argue that because CUTPA is a statute of general application, it does not "clearly implicate the *regulation* of firearms." Notice of

[15] The Bushmaster defendants equate the holding of *City of New York* with that of the Ninth Circuit in *Ileto*, 565 F.3d at 1135-36, and *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 180-81 (D.D.C. 2009). Notice of Removal ¶ 27. That is a significant misunderstanding of *City of New York*. *City of New York* reads the predicate statute provision more expansively than *Ileto* or *Estate of Charlot*.

Removal ¶ 27 (emphasis supplied); *see also* Surreply, at 5-6. This contention misstates the *City of New York* test, imposing a non-existent additional requirement. *City of New York* does not require that the predicate statute clearly implicate the *regulation* of firearms, merely that it "clearly can be said to implicate the purchase and sale of firearms." *City of New York*, 524 F.3d at 404.

And to make a point that is obvious, "clearly can be said to implicate the purchase and sale of firearms" cannot mean "expressly regulate firearms" – nor can it stand for any synonym of "expressly regulate firearms" – both because the Second Circuit treated statutes which regulate firearms expressly as a separate category and because the Second Circuit said the "clearly implicates" category of statutes *does not* "expressly regulate" firearms. *City of New York*, 524 F.3d at 404. As we discuss in Section V.B.4.c. below, CUTPA clearly implicates the purchase and sale of firearms.

b. *City of New York*'s Second Category Would Allow Plaintiffs' CUTPA Claims If a Connecticut Court Applies CUTPA to the Sale or Marketing of Firearms.

City of New York's second category of permitted cases must be understood to mean cases in which a state court applies a statute of general applicability to a claim related to the sale or marketing of firearms. *See City of New York*, 524 F.3d at 396, 399-400, 404.

In rejecting the City's Tenth Amendment challenge, the court rejected the very argument the removing defendants make here: "The Firearms Suppliers argued that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate statute even if a state's highest court were to construe that statute as applicable to firearms. *We disagree*[.]" 524 F.3d at 396 (emphasis supplied). Later, in its analysis of the predicate statute provision, the court indicated: "[w]e decline to foreclose the possibility that, under certain

circumstances, state courts may apply a state of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 400; *see also id.* at 396 ("We … do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations of state courts."). *City of New York*'s second category of permitted statutes thus includes statutes of general application that a state court applies to the sale or marketing of firearms.

The Bushmaster Defendants claim that *City of New York*'s rejection of the statutory nuisance claim at issue in that case implicates the scope of this second category of cases. *See* Surreply at 6 n.3. And it does, but not in a way that is helpful to defendants. At the time *City of New York* was decided, New York's higher courts had twice rejected claims against gun manufacturers nearly identical to the statutory nuisance claim at issue in *City of New York*. The statutory nuisance claim did not fail because the statute in issue was generally applicable; *it failed because New York's high courts had already indicated their disapproval of such a claim.*[16]

Thus under *City of New York*'s second category, a case may proceed if a Connecticut court would apply CUTPA, "a statute of general applicability," to the sale or marketing of firearms. *See City of New York*, 524 F.3d at 396, 399-400, 404. Applying the *Pampillonia*

[16] *City of New York*'s determination that the New York statute would not serve as a predicate must be understood in the context of prior decisions by New York's high courts rejecting like claims. In 2001, the New York Court of Appeals held that gun manufacturers did not owe victims of gun violence a general duty of care in connection with the marketing and distribution of hand guns. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 230-31, 240 (N.Y. 2001). Two years later, the Appellate Division of the New York Supreme Court affirmed the dismissal of public nuisance claims brought against gun manufacturers, distributors and sellers in connection with their marketing and sales practices, finding that *Hamilton* foreclosed such claims. *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-95 (N.Y. App. 2003).

standard, if there is even a *possibility* that a Connecticut court will apply CUTPA to the sale or marketing of firearms, Riverview is not fraudulently joined, and the case must be remanded.[17]

c. CUTPA Clearly Implicates and Is Applicable to the Sale and Marketing of Firearms.

In their Notice of Removal, the Bushmaster Defendants attack the CUTPA counts based on their narrow interpretation of the predicate statute provision. *See* Notice of Removal ¶¶ 26-27. The limited question raised by their Notice of Removal is whether a Connecticut court would construe the predicate statute provision as restrictively as they do. They have not alleged that CUTPA will not suffice as a predicate statute if the provision is construed more broadly, perhaps because they recognize the futility of such an argument. Below, we address CUTPA more substantively than defendants have. By doing so we do not concede or even imply that the Court could determine remand based on an issue not alleged in the Notice of Removal. *Pampillonia* requires the removing defendants to prove fraudulent joinder by clear and convincing evidence. *Pampillonia*, 138 F.3d at 461. *A fortiori*, a claim that is not alleged cannot serve as a basis for establishing fraudulent joinder.

---

[17] Fundamental concerns for federalism require that a Connecticut court be the final arbiter of the applicability of Connecticut's statute:

> This Court recognizes that "[w]here a decision is to be made on the basis of state law. . . the Supreme Court has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts." *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150 (2d Cir.2001). "[R]ooted in basic principles of federalism," this preference requires deference to the opinions of state court on state law question when such decisions are available. *Id.*

Baker v. Health Mgmt. Sys., Inc., 298 F.3d 146, 149 (2d Cir. 2002). *City of New York* specifically allows for the creation of predicate statutes through the development of state jurisprudence: "under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." 524 F.3d at 400.

"[T]he purpose of CUTPA is to protect the public from unfair practices in the conduct of any trade or commerce, and whether a practice is unfair depends upon the finding of a violation of an identifiable public policy. . . . *The entire act is remedial in character. . . and must be liberally construed in favor of those whom the legislature intended to benefit.*" *Willow Springs Condominium Ass'n, Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 42 (1998) (internal quotation marks and citations omitted) (emphasis supplied).

> CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of the act, [General Statutes] § 42–110b(a), states merely 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. Trade or commerce, in turn, is broadly defined as the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

Id. Clearly, CUTPA is applicable to and can be said to implicate sales and marketing conduct in Connecticut – including the sale and marketing of firearms. *See generally Salomonson v. Billistics, Inc.*, 1991 WL 204385, at *12 (Conn. Super. Sept. 27, 1991) (Freeman, JTR) (applying CUTPA to transaction involving firearms; "The instant transaction for the sale, manufacture and delivery of remanufactured weapons to Plaintiff meets the statutory definition of trade or commerce, C.G.S. § 42-110a(4)[.]").

d. Plaintiffs Allege Claims under CUTPA.

The Bushmaster defendants do not allege that plaintiffs fail to state a claim under CUTPA. *See* Notice of Removal ¶¶ 26-27. Thus the sufficiency of plaintiffs' allegations are not before the Court. We nonetheless briefly address our CUTPA allegations.

The criteria for establishing a violation of CUTPA are flexible:

> It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the

> practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons].

Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 273 Conn. 296, 305 (2005) (citations and internal quotation marks omitted). Under the cigarette rule, "[a]ll three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three[.]" *Id.* at 305. "CUTPA reflects a public policy that favors remedying wrongs that may not be actionable under other bodies of law." *Willow Springs Condo. Ass'n, Inc.*, 245 Conn. at 42.

Plaintiffs allege, inter alia, that Riverview engaged in conduct that was immoral, unethical, and unscrupulous by holding the XM15-E2S out as an appropriate weapon for civilian purchase, despite their knowledge about its excessively dangerous qualities and despite their knowledge about the likelihood that it would be misused. *See* Compl. ¶¶ 174-191. Riverview's sale of a weapon with these qualities violated the public policy of the State of Connecticut as embodied in Connecticut General Statutes Sections 53-202a *et seq.* (2011 Rev.), which banned assault weapons closely resembling the XM15-E2S.[18] Based on these allegations, a Connecticut court is likely to find that plaintiffs have alleged a CUTPA violation.

5. A Connecticut Court May Reach Its Own Broader Interpretation of the Predicate Statute Provision.

While the Second Circuit's interpretation of PLCAA's predicate statute provision will be highly persuasive to the Connecticut Supreme Court, it is by no means binding. *E.g. Turner*, 253

[18] Even if the removing defendants had challenged the substantive pleading of the elements of CUTPA, which they have not, the determination of such a challenge is best left to the Connecticut courts. *See Baker*, 298 F.3d at 149.

Conn. at 340-41. The Connecticut Supreme Court may adopt the more expansive construction of the predicate statute provision reached by Judges Katzmann and Weinstein, or one much like it.

All four judges who considered the predicate statute provision in this Circuit (Judges Miner, Cabranes, Katzmann, and Weinstein) agreed that "applicable" is a broad term, meaning "capable of being applied." Two judges (Judges Weinstein and Katzmann) determined that the meaning of the predicate provision was clear on its face and would simply have implemented its plain language. *E.g. City of New York*, 524 F.3d at 404-05 (Katzmann, J., dissenting) (finding that predicate statute provision is unambiguous and so the court must simply implement its plain language); *City of New York*, 401 F. Supp. 2d at 261 (Weinstein, J.) (holding that "[b]y its plain meaning. . . . Section 240.45 satisfies the language of the predicate exception requiring 'a statute applicable to the sale or marketing of [a firearm].'"); *see also City of Gary*, 875 N.E.2d at 434 (predicate statute provision is unambiguous and encompasses statutes "applicable to the sale or marketing" of firearms).

The two judges in the *City of New York* majority read "applicable" as ambiguous and therefore resorted to contextual and extratextual evidence to determine Congress' intent. *City of New York*, 524 F.3d at 400-04. The Connecticut Supreme Court, however, may adhere more closely to federal canons of statutory interpretation, which give weight to plain meaning in statutory analysis. *See e.g.*, *BedRoc Ltc., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"). "Applicable" is not defined, so the general rule is that "[i]n the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citing dictionary definition).

In addition, a Connecticut court may disagree with the *City of New York* majority's use of the interpretive principle of *eiusdem generis*. *City of New York* departs from the plain language of the predicate provision partially because it relies on subparts (I) and (II) of that provision and determines that the examples given there limit the scope of the predicate statute provision.[19] *Eiusdem generis* is "only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Gooch v. U.S.*, 297 U.S. 124, 128 (1936). And far from limiting the predicate statute provision, the subparts broaden it by "including" two subparts listing additional claims against gun manufacturers and sellers that are not barred by PLCAA. "'[I]ncludes' is a term of enlargement, not of limitation." *Alarm Indus. Comm. Inc., v. F.C.C.*, 131 F.3d 1066, 1070 (D.C. Cir. 1997). The Supreme Court has held that the term "including" indicates an "'illustrative and not limitative' function" that "provide[s] only general guidance" about Congressional intent. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) (citation omitted).

Thus a Connecticut court may well adopt a broader construction of the predicate statute provision than did the Second Circuit. In any event, because this Court cannot determine that a Connecticut court will certainly adopt defendants' restrictive interpretation of this provision, defendants fail to bear their burden under *Pampillonia*.

---

[19] The predicate statute provision states that cases it preserves "includ[e]" "any case in which the manufacturer. . . 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 [firearm]," or "any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a [firearm] knowing, or having reasonable cause to believe, that the actual buyer of the [firearm] was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18." 15 U.S.C. § 7903(5)(A)(iii)(I) & (II).

C. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT THE CONNECTICUT SUPREME COURT WILL CERTAINLY FIND PLCAA SURVIVES CONSTITUTIONAL CHALLENGE.

The Bushmaster Defendants assert that PLCAA bars plaintiffs' public nuisance claims. This bar to a long-standing common law cause of action – merely because it has not been legislatively codified – violates the Tenth Amendment.[20]

In our nation with dual sovereigns, "each [is] protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (citation omitted). The Tenth Amendment[21] makes explicit that the respect each must accord the other is a constitutional command under which the federal government must defer to "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Besides its anti-commandeering mandate, federalism limits congressional designs that interfere with the structure and operation of state government,[22] as well as on the scope of Congress's enumerated powers and authority to preempt state law.[23]

PLCAA oversteps these limits by impermissibly determining which branch of state government will be recognized as the authoritative expositor of the State's pertinent laws.

---

[20] Again, while the Second Circuit addressed and rejected a similar argument in *City of New York*, 524 F.3d at 396, the Connecticut Supreme Court is not bound by that decision. *See Johnson*, 133 S. Ct. at 1098 (observing that "the views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law").

[21] The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

[22] *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum L. Rev. 1, 50 (1988).

[23] *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 553 (1995) (recognizing that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Specifically, PLCAA prohibits "qualified civil liability actions" against gun manufacturers or sellers unless, *inter alia*, the defendant "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). Hence, PLCAA prohibits a nuisance action here because one has not been codified, but would permit an action based on a *legislative act*. The claims may have identical elements, but because one is legislative rather than statutory, PLCAA would favor the one and vitiate the other.

PLCAA unconstitutionally dictates to the States which branch of government Congress will recognize (and require the courts to recognize) as the authoritative expositor of state law in relation to firearms. Congress, however, holds no authority to make such a selection among branches of state government; that authority rests solely, and constitutionally, with the States themselves. It is axiomatic that "States are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 n.6 (1981) (citations omitted). The U.S. Supreme Court has been emphatic on this point: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (citation omitted).

The federal government can neither dictate the form of government a state adopts, nor require that a state respect federal separation of powers principles within its own government. *Dreyer v. State of Illinois*, 187 U.S. 71, 84 (1902). "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct or separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers

which, strictly speaking, pertain to another department of government, is for the determination of the state." *Id.* It follows that Congress may not require that the laws of a state be a product of legislative action, rather than authoritative construction by its courts.

It is also true that "decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). The "rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). Connecticut courts have long recognized a cause of action for nuisance. As such, a congressional enactment, like PLCAA, that denies state courts authority to declare the law, and prefers exclusive reliance on state legislatures for the definitive pronouncement of that state's law, unconstitutionally invades state sovereignty. After all, it is "[t]hrough the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a questions for the state itself.").

PLCAA patently requires States to exercise their lawmaking authority over the marketing and distribution of guns though the legislature rather than through the courts, while also constricting state judicial power. Congress made plain its concern that liability would be imposed on gun manufacturers and dealers by a "maverick judge or petit jury" in a manner that was not supported by its own view of "hundreds of years of the common law and jurisprudence of the United States [or] a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). Rather than chance such a "maverick" judgment out of the judicial branch, PLCAA withdraws authority from the courts over such actions, except when a state legislature decides to grant it.

This statutory expression of congressional preference for legislative determinations over judicial ones is not a legitimate exercise of federal power and violates the Tenth Amendment.

Once again, because the Connecticut Supreme Court has yet to address the constitutionality of PLCAA, remand is required.

VI. CONCLUSION

For these reasons, the Court must remand this case to the Connecticut Superior Court.

Respectfully submitted,

By **/s/ Joshua D. Koskoff, ct15619**

JOSHUA D. KOSKOFF, ct15619
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2015, a copy of the foregoing Amended Memorandum of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619
ALINOR C. STERLING, ct17207

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO,	)	
ADMINISTRATRIX OF THE	)	
ESTATE OF VICTORIA L. SOTO,	)	
ET AL	)	
	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
	)	
V.	)	
	)	
BUSHMASTER FIREARMS	)	
INTERNATIONAL,	)	
LLC, A/K/A FREEDOM GROUP, INC.,	)	
A/K/A	)	**MAY 13, 2015**
REMINGTON OUTDOOR GROUP,	)	
INC., ET AL	)	
	)	
Defendants	)	

EXHIBIT A
TO MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION TO REMAND

Respectfully submitted,

By /s/ Joshua D. Koskoff, ct15619

JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207

Exhibit A

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 28

BRYAN NORBERG and GRAHAM KUNISCH,

Plaintiffs,

-vs- Case No. 10-CV-20655

BADGER GUNS, INC., BADGER OUTDOORS, INC., ADAM J. ALLAN, WALTER J. ALLAN, MICK BEATOVIC, WEST BEND MUTUAL INSURANCE COMPANY, JULIUS C. BURTON and JACOB D. COLLINS,

Defendants.

MOTION HEARING

June 9, 2011 Before THOMAS R. COOPER, Circuit Judge, Br. 28

APPEARANCES:

CANNON & DUNPHY, S.C., by PATRICK O. DUNPHY, ESQ., and BRETT A. ECKSTEIN, ESQ., 595 North Barker Road, Brookfield, Wisconsin, 53045, appeared on behalf of the Plaintiffs.

JONATHAN E. LOWY, ESQ., Brady Center to Prevent Gun Violence Legal Action Project, 1225 Eye Street, N.W., Suite 1100, Washington, D.C., 20005, appeared as co-counsel for Plaintiffs, pro hac vice.

VON BRIESEN & ROPER, S.C., by HEIDI L. VOGT, ESQ., 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin, 53202, appeared on behalf of the Defendant, West Bend Mutual Insurance Company.

SWANSON, MARTIN & BELL, LLP, by JAMES B. VOGTS, ESQ., and JAMES S. SMITH ESQ., 330 North Wabash, Suite 3300, Chicago, Illinois, 60611, appeared on behalf of the Defendants.

Marsha E. Steadman, Court Reporter

COPY

1 If the person would have been -- instead of
2 being 18 would have been 21 years old, could that person
3 have purchased -- was he -- if he had been 21 able --
4 would he have been able to purchase that weapon?
5 MR. VOGTS: Provided he did not fall into any of
6 the other prohibited categories.
7 THE COURT: Did he have any of those other? Do
8 we know that?
9 MR. VOGTS: Not based on what I think we've seen
10 and read. His only prohibitive characteristic was his
11 age.
12 THE COURT: Okay. Well, that's something maybe
13 the Wisconsin State Legislature should think about, but
14 legislation is thinking about it at the present time, but
15 that's again unrelated to this case.
16 MR. VOGTS: With that general rule that is the
17 PLCA there are exceptions.
18 THE COURT: Right.
19 MR. VOGTS: The courts identified those.
20 There's five of which identify potential state law claims
21 that could be brought against licensees, and we're
22 dealing with I believe just two of them in this case.
23 The plaintiffs have pled seven counts against
24 the group I'll call the Badger group, and Badger group is
25 only moving to dismiss two of those seven counts based on

1 preemption grounds under the PLCAA.

2 Those two claims are the common law negligence

3 claim and the public nuisance claim. None of those five

4 exceptions provide that common law negligence and public

5 nuisance claims can be brought in the face of preemptive

6 effect of a PLCAA. And it's important to note that the

7 PLCAA provides that none of those five exceptions create

8 causes of action or remedies.

9 All the PLCAA does is preempt certain state law

10 claims. It does not create claims. So when the court is

11 examining the plaintiffs' allegations and the plaintiffs'

12 claims, I think it's important to keep in mind that

13 federal law does not dictate to this court that it must

14 recognize a negligence per se claim or that it must

15 recognize a negligent entrustment claim. It's only

16 allowing for those claims to be filed in court. And once

17 they're filed it's up to your Honor to apply Wisconsin

18 law to claims that fit within those exceptions.

19 I think that's a very important qualifier that

20 we need to keep in mind. But coming back to the

21 negligence claim, plaintiffs really don't make a serious

22 effort in their briefs to defend their common law

23 negligence claim, and that's perhaps because appellate

24 courts around the country and now some trial courts have

25 held that it was clear that Congress intended to preempt

1 common law tort claims like negligence and public
2 nuisance.
3 And in fact the court in the Ileto-versus-Glock
4 case, the Ninth Circuit Federal Court of Appeals held
5 that Congress clearly intended to preempt common law
6 claims such as general tort theories of liability
7 including classic negligence claims.
8 Now, rather than arguing that, the Ileto court
9 got it wrong and that other trial courts around the
10 country have gotten it wrong, the plaintiffs have come up
11 with kind of a novel argument, but I think it's
12 ultimately unpersuasive as to why their common law claims
13 nuisance and negligence can go forward.
14 And their argument I believe, if I understand
15 it, is this, that the third exception to preemption,
16 what's been called predicate exception, all the
17 plaintiffs need to do is allege a knowing violation of a
18 statute applicable to the sale or marketing of firearms.
19 THE COURT: And I think that goes to my
20 question.
21 MR. VOGTS: Under that third exception and all
22 the protections afforded by the PLCAA disappear and none
23 of the other exceptions are needed. I think the
24 plaintiffs are improperly elevating that third exception
25 into some sort of super exception that swallows the

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO,	)	
ADMINISTRATRIX OF THE	)	
ESTATE OF VICTORIA L. SOTO,	)	
ET AL	)	
	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
	)	
V.	)	
	)	
BUSHMASTER FIREARMS	)	
INTERNATIONAL,	)	
LLC, A/K/A FREEDOM GROUP, INC.,	)	
A/K/A	)	**MAY 13, 2015**
REMINGTON OUTDOOR GROUP,	)	
INC., ET AL	)	
	)	
Defendants	)	

EXHIBIT B
TO MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION TO REMAND

Respectfully submitted,

By **/s/ Joshua D. Koskoff, ct15619**

JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Joshua D. Koskoff, ct15619
JOSHUA D. KOSKOFF, ct15619,
ALINOR C. STERLING, ct17207

Exhibit B

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 109th CONGRESS, FIRST SESSION

Vol. 151 WASHINGTON, WEDNESDAY, JULY 27, 2005 No. 104

Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore [Mr. STEVENS].

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

Eternal God, You have challenged us to become like children in order to enter Your kingdom. Today give us a child's trust, that we may find joy in Your guidance. Give us a child's wonder, that we may never take for granted the Earth's beauty and the sky's glory. Give us a child's love, that we may find our greatest joy in being close to You. Give us a child's humility, that we will trust Your wisdom to order our steps.

Guide our Senators and those who support them through the challenges of this day. As they look to You for wisdom, supply their needs according to Your infinite riches.

We pray in Your righteous Name. Amen.

PLEDGE OF ALLEGIANCE

The PRESIDENT pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME

The PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT—MOTION TO PROCEED

The PRESIDENT pro tempore. Under the previous order, the Senate will resume consideration of the motion to proceed to S. 397, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 397) to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

The PRESIDENT pro tempore. Under the previous order, the time from 10 to 2 p.m. shall be equally divided, with the majority in control of the first hour and the Democrats in control of the second hour, rotating in that fashion until 2 p.m.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The majority leader is recognized.

SCHEDULE

Mr. FRIST. Mr. President, this morning we are returning to the motion to proceed to the Protection of Lawful Commerce in Arms Act, otherwise known as the gun manufacturers liability legislation. Yesterday we invoked cloture on the motion to proceed. We now have an order to begin the bill at 2 p.m. today. The debate will be equally divided until 2 o'clock today. I understand a rollcall vote will not be necessary, and we will have a voice vote at 2 p.m. and then be on the bill.

Senators can expect a cloture vote on the underlying bill to occur on Friday, unless we change that time by consent. As I stated repeatedly over the last several days, we are going to have a very busy session as we address a range of issues, including energy and highways and the Interior funding bill, the gun manufacturers liability bill, veterans funding, nominations, and other issues.

Just a quick update on several of these. In terms of the Energy bill, after 5 years of hard work, the energy conferees are now done. I expect that that legislation will be filed shortly. This is a major accomplishment that will cause serious and dramatic changes in how we produce, deliver, and consume energy. We simply would not be at this point without the hard work, the perseverance, and the patience of Senator DOMENICI and his partner, Senator BINGAMAN, as well as Congressman BARTON. We will pass that conference report this week. Our country will be all the better for it.

I was talking to the Secretary of Energy earlier this morning. We were discussing the absolute importance of passing this bill to establish a framework of policy from this legislative body. He again referred to the great good this bill will do.

On highways, it has taken this Congress 3 tough years of work to come to this point, but with just a little more work, we will have a bill that the President will sign. Our conferees are working and should complete the writing of it today. I spent time with several of the conferees yesterday and with the Speaker, as we coordinate completion of this highway bill.

The good news for the American people is, as they see what is sometimes confusing on the floor of the Senate as these bills come in, this particular highway bill will make our streets and our highways safer. It will make our economy more productive. It will create many new jobs.

I mentioned veterans funding. Yesterday, the House and Senate majority agreed to ensure that $1.5 billion of needed funding will be given to the Department of Veterans Affairs this fiscal year. Veterans can be assured that their health care will remain funded. I know it is confusing what you hear on the floor, but that action is being taken.

I mentioned Interior funding. Yesterday both Houses agreed to fund many of the programs that affect many of our public lands held in trust for Americans throughout the country. We intend to complete action on this conference report this week as well.

Late last night, the conferees completed work on the Legislative Branch appropriations bill, and we will be attempting to clear that legislation as well this week.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Printed on recycled paper.

Mr. CORZINE. Mr. President, I appreciate the Senator's candor. I hope we will be able to bring up my amendment, which will protect the rights of law enforcement officers who are victimized by gun violence to get justice through the American legal system.

I would note the presence of my colleague from the State of New Jersey in the Chamber, who has been a remarkable advocate for law enforcement and for the safety and security of people in our community.

This past Monday night, I missed a vote on the floor of the Senate because I went to a wake for a police officer, Officer Reeves, who was shot on the streets of Newark by a gang member. The gun that was used has not yet been traced to find out whether it was trafficked in the illegal or black market, or whether it was bought by a straw purchaser.

But there is one thing that is certain—there were five children sitting in the pew with their mother at that wake, all under the age of 11. Gun violence is real. The amendment I would like to bring up—which I appreciate the rules of the Senate and respect the judgment of the Senator from Idaho—but the Lemongello amendment I would like to offer to the gun immunity bill is about protecting police officers on the street and giving them the right to get justice in a court of law. If, by unfortunate circumstances, they are the victims of gun violence, we have the right in the State of New Jersey, within the legal system, to call to account those who have wrongfully allowed guns to get into the hands of criminals.

In the case of Detective Lemongello, 11 guns were sold to a gun trafficker out of a gunshop—11 guns. Why does one person happen to need 11 guns? These guns were bought by a straw-purchaser for a career criminal, who then put the guns in a car and drove them to New Jersey, where one was sold to the criminal who shot Detective Lemongello in Orange, NJ.

That gun was turned on this gentleman shown in this picture, Detective Lemongello, just as a gun was recently turned on the young police officer whose wake I recently attended in Newark on Monday night, Officer Dwayne Reeves. Officer Reeves was 31 years old, and he was married with five children.

I believe in the constitutional right of individuals to bear arms under circumstances that will protect the public. I have no argument with that. But I do not think there is a constitutional right to put guns into the hands of criminals who attack police officers and other innocent victims in our country.

I represent a State where crime rates are going down, but murder rates are going up because guns are freely available among gangs on the streets in our communities. This is completely unacceptable. And to allow gun trafficking to continue on, without giving the victims of gun violence the right to seek justice in a court of law, is just plain wrong. It should be enough for any individual with common sense to say: Enough is enough.

Prohibiting civil liability actions as this bill does—and I recognize that some may argue about limited exceptions to the general immunity given to the gun industry in this bill—would make it next to impossible for Detective Lemongello, his partner Officer McGuire, or the family of Officer Dwayne Reeves to have their day in court, to seek and receive justice through the American legal system.

So again, the purpose of my amendment is to protect the rights of law enforcement officers. I understand that this bill is going to pass with, I understand, 61 cosponsors. But I hope my colleagues will understand that, at a minimum, law enforcement officers should be permitted to bring lawsuits against culpable gun dealers and manufacturers.

In the Lemongello case, actually, the people who sold the guns recognized their own mistake, and settled with Detective Lemongello and Officer McGuire. They were able to reach this settlement because Congress did not pass this bill last year, which would have given the gun dealer immunity and removed these lawsuits from the courts.

Now, what's more, the gun dealer who sold the gun to the criminal who shot Detective Lemongello and Officer McGuire, along with several other purveyors of guns in that West Virginia city, changed their policies. These gun dealers now sell one gun at a time as a result of this lawsuit and they no longer make bulk sales.

So this is a real issue. This is not just a debate. There are people dying because we are not doing the right thing. There are lots of forums where we can make this case, and we will continue to, those of us who care about public safety, who want fewer guns on the streets, and who care about accountability.

It is hard for me to understand this legislation as it relates to States rights, in the sense that State legislatures, both Republican and Democratic, have supported the right of victims of gun violence to have access to the courts.

So this is my view, and I am only one Senator, but it is heartfelt. My opposition to this bill and my support for this amendment comes in the context of the real problems and the real tragedies that will occur if we do not have the right checks and balances in the system, if we take away the right of innocent victims to go to court when they are wronged.

I understand that this bill will pass but I am asking all my colleagues to, at the least, support this amendment to protect the brave men and women in uniform who risk their lives to protect the citizens of our country every single day—people like Detective Lemongello, Officer McGuire, and Officer Reeves.

I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank the Senator from New Jersey and will share a little personal perspective.

I have been in law enforcement for the better part of my professional career as a prosecutor. Some of my best friends are law enforcement officers. I have stood shoulder to shoulder with them in prosecuting cases. I know the risks they undertake to carry out their duties. I believe in what they do, and I believe they should be supported.

These law enforcement officers are not telling me that if a criminal murders one of their brothers or sisters, that they want to sue Smith & Wesson. The thought does not cross their mind. They are concerned that if they catch the criminal who did it, that it is likely to be 15 or 20 years before the litigation and prosecution is over. If they are found guilty and sentenced to death—if the law provides for it, they should be—they get upset when it never seems to happen, and years and years and years go by. That disrespects police officers.

It seems to me some of the same people who are talking so much about defending police officers are not as aggressive as they should be on some of these issues that really mean much to them.

I would say that I think, on the Lemongello case that has been referred to, based on my experience and understanding of the law as a prosecutor in the Federal court, as a U.S. attorney who prosecuted individuals under Federal laws involving this, you cannot sell a firearm to a "straw" person who is holding it to move it to another person. And if you have reasonable evidence to believe the person you are selling it to is a "straw" person, and it is going to someone else, then that someone else must fill out all the forms, put their name on it, and qualify to receive the weapon. And if you do that, and sell the firearm under those circumstances to someone who is not the true purchaser, you are not only subject to a lawsuit under this bill for civil damages, but you are subject to criminal prosecution as violating a Federal law.

I have prosecuted people for that. I have even had the responsibility to prosecute a gun dealer for not accurately handling these kind of matters. If it is a crime, there is clearly a basis to sue the gun seller. But you don't want to sue the manufacturer off in Massachusetts or wherever they are making the gun. If a seller irresponsibly sells it or violates a law in selling a weapon, you don't sue the manufacturer. They don't become an insurer for criminal acts.

That is what we are trying to do here, to pass some legislation that does nothing more than restore the classical understanding of American civil liability. Who should be sued and under what

circumstances should they be sued? If they sell 11 guns and they don't make them comply with the waiting requirement, if they don't get the proper identification from the person who is actually buying the gun, then they have aided and abetted in getting the gun to someone illegally. That is something for which they can be prosecuted and sued under this legislation. What we are talking about is abusive lawsuits where people are being held liable for criminal intervening acts. That is not a principle of American law.

People say: Enough is enough. We just have to do something.

What do you mean we have to do something? We are the legislative branch. We can consider laws if there are enough votes to pass them. But that doesn't mean we allow improper lawsuits to go forward. Senator CRAIG just read the letter from Beretta. One city, Washington, DC, if its laws are allowed to stand, which make gun manufacturers liable strictly for every crime committed by a criminal in DC, it will bankrupt every gun company in America. One city can do that. And these companies sell guns to our police officers. They sell guns to our military people. They are an important part of our American economy. Are we going to now buy our guns from foreign companies? We are not going to have any left in the United States that can survive this flood of lawsuits. It is a serious matter.

The bill is carefully crafted. That is why the Democratic leader, Senator REID, and former Democratic leader, Senator BYRD, and others are cosponsoring this bill. It has been here for several years. It has been reviewed. The loopholes in it have been examined and closed. It has gained support. Now we have a bill that should have already been passed.

I find it passing strange that our colleagues who filibustered a motion to proceed to consider the bill—they filibustered that and delayed this process over a day on that issue alone, when we could have already had the bill up, debated, and voted on. The votes are here to pass it. Let's move forward and get it done. It is quite odd that our colleagues would complain about wasting time on the bill. They are just unhappy because they don't have the votes to defeat it up or down. They don't have the votes to sustain a filibuster. They are conducting delaying tactics that make this legislation that is needed, that has strong bipartisan support, cost more days and more hours of the Senate's time than it ought to.

I wish to share an overall perspective on gun law enforcement in America. Back when I was a U.S. attorney, I came to believe that we should aggressively prosecute criminals who utilize guns during the course of criminal activity, that felons ought not to possess firearms. Both of these have been in our Federal law for many years. We enhanced penalties. Not too many years ago, in the 1980s, they made it a mandatory 5 years in jail, 60 months without parole, for anybody to carry a firearm during the commission of a Federal felony or any felony. That is a strong tool. I believe we ought to prosecute those cases because I am convinced that a lot of the murders in this country are caused by drug dealers and gang members carrying guns around as they do their criminal work. And if somebody crosses them, they pull out a gun and shoot them, and people get killed.

Let me say this first: Most Americans are not murderers. Most Americans are not criminals. Most Americans who have guns—and most Americans do have guns—are law-abiding, decent, peaceful citizens. They are not ever going to murder somebody. This is some sort of myth out there that we are going to fill up the jails if we enforce these laws. There are not that many people out here trying to kill somebody or commit crimes carrying firearms. That is a hardcore group of criminals who deserve to be targeted.

I created my own program called "project trigger lock" in the 1980s. I created a newsletter on it. We sent out news to our sheriffs and our police chiefs about these kind of crimes and the policies of my office to prosecute cases that they may be working on involving these kind of criminals. We enhanced our prosecutions.

Then I was elected to the Senate. I come in here in the middle of the 1990s. All I heard is, we have to pass more laws to crack down on innocent people who own guns, people who don't commit crimes. They are the ones for whom they want to make it more difficult. They want to constrict the constitutional right to keep and bear arms through any number of devices. At that time, it was thought to be politically popular, that we would just keep voting more and more restrictions on private ownership of guns. Pretty soon, I guess they thought people would just give up and Americans would capitulate and not stand up for their right to keep and bear arms. But it didn't happen that way. The American people got their back up on it.

The politicians are beginning to hear it now, and the people expect to be able to maintain their constitutional right to have a firearm. That is just what has happened.

As all this happened—and I am in the Senate—I am thinking, This isn't going to affect crime. Ninety percent of convictions in Federal firearms cases have to do with using a firearm or carrying a firearm during the commission of a felony and the possession of a firearm after having been convicted of a felony. Those are the bread-and-butter cases. Many of them are being brought. And when you effectively enforce justice, just those two laws—and there are many others, such as machine guns and other kinds of sawed-off shotguns—that is a common case that used to be prosecuted, and I prosecuted lots of them. I personally tried sawed-off shotgun cases. I personally tried and prosecuted cases where the serial number had been erased from a firearm. It is a crime to erase it. It is a crime to sell or to carry a firearm that has a serial number erased. It is a crime to transfer a firearm to somebody else that has the serial number erased. We have all kinds of laws. It is a crime to go to a gun dealership and provide any false statement on a document that you have to sign before you get a firearm or to violate any of the myriad of laws out there.

What I am saying again is that the most common cases are the possession of a sawed-off shotgun, carrying of a firearm during a criminal offense, or possession of a firearm after having been convicted of a felony. For the rest of your life, unless your disabilities are removed, if you are convicted of a felony, you cannot be allowed to possess any firearm, even to go hunting. That really galls some people, but that is the law. We enforce that. It is enforced right now in Federal court.

So we had all these cases. And the other side, President Clinton and Vice President Gore, was declaring that if you did not support all these new restrictions on legitimate ownership of guns—these laws and regulations that they were putting up, one right after another; as soon as one passed, they would come up with another one—then you didn't believe in law enforcement, you didn't believe in fighting crime, that you were allowing murders to take place, that you didn't love children. We heard all that.

I went down to the Department of Justice to pull their statistical book. I have seen the statistical book. I used to get it when I was U.S. attorney. It would show the number of prosecutions in every category of crime. What did I find? That under President Clinton's Attorney General Reno, Department of Justice gun prosecutions had declined rather significantly. At the same time they were accusing Members on this side of being soft on gun crimes and not supporting efforts to protect the innocent from criminals and all of these things, they were reducing the number of Federal prosecutions for gun crimes. I raised that in hearing after hearing after hearing. By the time the Clinton administration was leaving office, the numbers had picked up a little bit.

President Bush came in. At the first hearing, I asked new Attorney General John Ashcroft: Are you going to make it a priority of the U.S. Department of Justice to increase the number of gun prosecutions in this country? Attorney General Ashcroft said: Yes, that is my mandate. That is what the President wants. That is what I believe in, and we are going to do it. And prosecutions have gone up. Murders continue to decline. That is one of the more remarkable things that has happened.

We can celebrate. Murder and violent crime have been on a period of decline. I am absolutely convinced that one of

the reasons that has occurred is because of the steadfast, consistent, tough prosecution of criminals who carry guns, either former criminals or criminals while they are conducting their crimes on the streets. I believe it works. In fact, it is known throughout the criminal community that if you carry a firearm during drug-trafficking offenses, if you carry a firearm during any other kind of crime you are committing, you are likely to go to Federal court to be tried by a Federal prosecutor. And in addition to the sentence you get for the underlying crime you committed, such as selling drugs or robbery or burglary, you get whacked by another 5 years in jail without parole. If you carried a machine gun, a fully automatic weapon, that is 20 years consecutive without parole. It is goodbye, so long, throw away the key. You are exiled from our community. That is what happened.

During the Clinton administration, a very fine U.S. attorney in Richmond began to drive this issue. He called it "Project Exile." He put out the word in the street. They had billboards. They put up signs. If you are convicted of carrying a gun during a crime—you are a felon and you carried a gun—we will prosecute you. You will be guaranteed a long time in jail without parole. You will be sent off to a Federal institution, maybe in a distant city. That is why he called it "Project Exile." The violent crime rate in Richmond plummeted. They did what they said they were going to do. They prosecuted those cases.

All I am saying is, with great sincerity, based on my personal experience and a fair analysis of what has happened out there, let's continue to be aggressive with these prosecutions.

Let's not let up. Let's make sure that even more people understand with crystal clarity that if they are a criminal and they are out using a gun in the course of their work, or carrying one as they go about their business, they will be prosecuted. And when they are prosecuted, they will not only be convicted, but they can be assured they are not going to get probation, some sort of halfway house, a couple of months on probation, or something like that, but they are going to the slammer for a significant period of time—perhaps a very long period of time. And if we keep that pressure on, we are going to continue to see the crime rate drop.

That is my hope and that is what is happening. I believe that is the fact. Fortune magazine, in the last few months, had an article about it. They said very few people have commented on the obvious fact that, yes, our prison population has gone up, but our crime rate has dropped. Can we add 2 and 2? Most people in America are not criminals. We are not going to continue to have the prison population go through the roof because most people don't commit robbery, burglary, or carry guns during illegal activities. Very few people do that.

What we were doing in the 1960s and 1970s was calling the criminal the victim. We forgot the true victims. We wanted to see what we could do to help the person who was committing the crimes. We finally realized that some of these people are just dangerous criminals and they have to be punished and removed from society. If you let them back out, they will commit more crimes.

So this has been occurring in our society. We are doing a better job of targeting repeat offenders. We are doing a better job of targeting violent offenders. Can we do better? Yes, we can. Can we be more sophisticated? Yes. Are our current laws a bit too heavyhanded? Probably so. We could probably reduce the penalties on some of the defendants. But the very principle that there is certainty and tough punishment for violation of Federal gun laws is one of the concepts that has led to the reduction of violent crime in America, for which we all ought to be excited.

Mr. President, I will conclude by saying we are doing some things right in law enforcement. Our law enforcement officers really are doing a fine job. We have turned the tide, in some ways. It is a mathematical thing. I have come to understand that.

Back in the 1960s, the crime rate was increasing 10, 15, 18 percent a year. People went from the 1950s when they never locked their doors to being terrified, raped, robbed, and murdered in the 1960s and 1970s. The crime rate had more than doubled in 20 years. Now there has been a decline. It has been declining for the reasons I just stated. We can be more sophisticated. I have personally offered legislation that would reduce the mandatory penalties for crack cocaine. Some on my side think that is soft on crime. I think we need to be sophisticated in enforcement. Every year in jail should be carefully considered, and people should not serve longer than they need to serve. I think we can modify that. Judges tell me they think it ought to be modified. I stepped up to the plate to do that.

But the basic principle that you crack down and you are tough on people who commit crime, and you are consistent, and they know if they are carrying a gun and committing a crime in our country they are going to be sentenced to a long time in jail, that will deter them. The word is out in Philadelphia, Richmond, and Alabama that if you carry a gun during your crimes, you are likely to go to Federal court and serve hard time, without parole. And they are not doing it so much.

I say this: It is likely that the number of gun prosecutions are going to begin to decline because criminals are not carrying guns anymore because they know it is a ticket to the big house. It is something that has worked. It has saved hundreds and thousands of innocent lives in this country. It has saved thousands of people from being permanently disabled by being victims of crime, whether it is guns, knives, or anything else. It has been a good thing that has been accomplished. I love the law enforcement community, our law officers with whom I served. They put their lives on the line for us. They work very hard for us.

As the crime rate has declined, we now have more police officers per crime. They are able to give even closer focus on each individual crime. At one point, there were so many crimes they hardly had time to investigate or prosecute them. Now, we have trends going our way. We need to keep after it. But having the right to bring out bogus lawsuits against an honest seller of a legal firearm, or against an honest manufacturer of a legal firearm, is not the right approach. It is just not consistent with our American principles of law; it is not what we believe in. It is not a legitimate tactic. It is an abuse of the legal system to carry out a political agenda, and it should not be done.

Every company, every person who has a license to sell guns, according to the law, ought to be able to do so without fear of being brought into some bogus lawsuit. That is all we are saying. I think this bill does that. I see my colleague from New Jersey, the great advocate that he is on this issue.

I yield the floor.

The PRESIDING OFFICER (Mr. COBURN). The Senator from New Jersey is recognized.

Mr. LAUTENBERG. Mr. President, I want to say a few words about this bill and how I see it.

I think this is a terrible period for America—the fact that we are taking an action and making it a preceding action to considering some other issues that are, I think, far more important than the subject at hand.

I heard an accusation by our friends on the other side that the Democrats were using delaying tactics and just not permitting us to get this bill—this important piece of legislation that says if a gun manufacturer does something, or the dealer is careless and leaves the gun on the counter and someone picks it up and goes out and kills someone, you cannot sue them; there is no civil action. That is determined to be more important than getting a defense authorization through that said give our troops everything they need to protect themselves. No, no, no, we have to put that aside because what we want to protect today in this place—and it is shameful, in my view—is gun manufacturers who might knowingly make guns available to a criminal or someone who is deranged and not yet a criminal—he is not a criminal until he pulls the trigger—or a distributor or a gun dealer.

We saw a case not too long ago regarding the Washington sniper, and the fact that the shop owner could not tell whether this fellow had stolen the gun or whether he sold him the gun. There were no records kept. It is shocking. We have heard this: When a car manufacturer produces a car and a drunk

judges and juries are not indiscriminately finding against gun manufacturers. Most are probably gun owners and hunters as well.

Despite what the NRA pedals to its members to justify its existence and their dues, the second amendment is accepted and respected by the overwhelming majority of Americans and there is no threat to responsible manufacturers, dealers, lawful buyers, or owners of the millions of guns in America. There is no justification for this special legislation and the special treatment it gives to that industry.

Of course, the gun industry is accustomed to getting special treatment from Congress. Firearms and tobacco are the only two consumer products specifically exempt from regulation by the Consumer Products Safety Commission. What an exemption. I have to hand it to the NRA, whether I agree with them or not, they sure know how to operate around here. Many industries and even individual corporations pour a lot more money into lobbying and into political contributions than the NRA and they do not get nearly the special treatment, special favors from Congress the gun lobby does—a complete exemption from consumer product safety laws and regulations, and now almost complete immunity for lawsuits from negligence or product malfunctions. All other businesses and industries in America are in discount coach while the gun lobby has special privileges flying first class on Air America under this Congress and preceding Congresses.

It is because there is that exemption from the consumer product safety laws of this country that some of these lawsuits, not frivolous, but determined by a judge or jury through the process to be legitimate and bona fide, and the resulting civil damages are necessary to move the industry to take some of the safety actions it can technologically and financially certainly afford to make that it probably would not do otherwise.

For example, take Bushmaster. Their dealer lost the sniper's assault rifle along with 238 other guns that were then used by the snipers against the innocent victims in Washington, DC. As a result of its settlement with the victims of those families, they agreed also to inform their dealers of safer sales practices that hopefully will prevent other criminals from obtaining the guns, something that had never been done before.

In June of 2004, two former New Jersey police officers were shot in the line of duty with a trafficked gun negligently sold by a West Virginia dealer. They won a $1 million settlement, and the dealer who sold the gun, along with 11 other handguns in a cash sale to a straw buyer for a gun trafficker—after that lawsuit that dealer, as well as two other area pawnshops, agreed to implement safer practices to prevent sales to traffickers, including a policy of ending large-volume sales of handguns.

In 2004 also, Tennille Jefferson, whose 7-year-old son was unintentionally killed by another child with a trafficked gun, won a settlement from a gun dealer that amounted to $850,000. The handgun was one of many the dealer sold to the trafficker despite clear signs the guns were headed for the underground market. That, too, resulted in changes in policies and sales practices that hopefully will prevent other mothers from suffering that terrible fate of losing a child.

I am not saying every one of those cases filed against the manufacturers or dealers is proper. Again, that is for the process to determine. But there is no evidence, no evidence at all, that there is anything about the nature of these suits, the outcomes of them, the jury awards relative to the damages that have occurred, that indicates this industry is being prejudiced or plagued by those who they contrive to be doing so, to justify this legislation. If we are going to reform the tort system in this country, let's do it openly and aboveboard with all industries, all of American businesses affected equally by those changes. To single out one industry, particularly one that manufacturers products, potentially, as dangerous as guns, is just a terrible day for the Senate.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, this is a sad day in the Senate. It is a sad day in two respects. Yesterday, we were debating a bill, the Department of Defense Authorization Act. It is an important bill. It is a $440 billion bill for our American military: our soldiers, sailors, marines, airmen, members of the Coast Guard, Guard and Reserve. We were trying, in that bill, to help our fighting men and women and their families.

We had a long list of amendments that we wanted to consider: extra pay for totally disabled veterans, help for the widows and orphans of combat soldiers who die in the line of duty, fair compensation for Guard and Reserve when they are activated and they are Federal employees, daycare for the families of soldiers who are activated, quality-of-life issues for the men and women in uniform who are fighting for America.

A decision was made by the Republican leadership to leave that bill, leave that issue, to come to this one. What could be more important for us to consider than the safety, the lives, and fortunes of the men and women who serve our country and risk their lives, on military duty, and their families?

Well, in the estimation of the Republican leader, Senator FRIST, there was one issue that was more important than talking about our men and women in uniform. That issue was providing immunity from liability for one industry in America, to say that of all the businesses in America that provide us with goods and services, all of the businesses that are currently held responsible for wrongdoing, we will create one exception. We will say, if the gun industry is guilty of wrongdoing, they cannot be sued. That is right. The firearms industry, which sells millions of firearms each year in the United States, should not be held responsible for their bad conduct and wrongdoing.

It is hard to say those words and not shake your head. If personal responsibility is what it means to be an American and an American business man or woman, why in the world would you exempt one industry and say they are special, they are political royalty, they cannot be held liable for their misconduct? And why did we move to this bill and away from the Department of Defense authorization bill to help our soldiers and their families? The answer is too obvious. It is because of the political clout of the National Rifle Association and the gun lobby. It is the only group I can think of which would just go straightforward with the concept they are more important to the Senate calendar than the fighting men and women who are now risking their lives for our country. They have done it many times.

The NRA runs certain people in this Chamber and on the other side when it comes to the agenda. They decide what will be taken up and what amendments will pass—an extremely powerful group. The NRA succeeded in having the Senate debate guns—and that is a rare debate—but only when it comes to this question of gun immunity.

Isn't it interesting, we want to put an amendment on this bill that says when you sell a firearm you have to check to see if the purchaser is on a watch list of terrorists. Is that unreasonable? If you have computer access through your store—and these stores do—shouldn't you check to see if that person standing across the counter from you is on the watch list for terrorism in America? That concept is rejected by the National Rifle Association. Background checks: extremely limited. Information gathered about criminal people is to be destroyed so quickly that it is of little value to law enforcement.

A March 2005 report from the Government Accountability Office found that between February and June of 2004, people on U.S. lists of suspected terrorists applied 44 times to buy guns. It is not unheard of. It happens in this country. In only nine instances were they turned down. In the months since the study ended, 12 more suspected terrorists had the green light to buy or carry guns.

FBI Director Bob Mueller—whom I respect very much—said he was forming a group to study the problem. Why aren't we talking about this instead of granting immunity for the gun dealer who sells a weapon to someone he should have known could misuse it for a crime or for terrorism? We are shielding them from civil liability for not

living up to their responsibility when it comes to the sale of lethal firearms.

Or we could talk about ways to solve the problem in America of guns being trafficked, many crossing State lines, and used in crimes. The ATF says 90 percent of the guns recovered in crimes were used by persons other than the original purchaser, other than "straw men," people who bought them to sell them to criminals. One-third of all crime guns cross State lines.

In my State of Illinois, 47 percent of guns traced to crimes committed in Illinois originated in other States. One State, Mississippi—the little State of Mississippi—is far and away the per capita leader in selling guns exported from their State and used in crime. Do you know why? Because firearms laws are not really strictly enforced in Mississippi, and some other States.

From 2000 to 2002, Department of Justice prosecutors filed three cases in Mississippi for violations of gun trafficking laws. In contrast, 32 cases were filed in Kentucky, 28 in Tennessee. So we have gun dealers in Mississippi selling trunkloads of guns to people who get on the interstate and drive up to Illinois and, perhaps, your State, too, selling them to gun gangs and drug gangs on the streets, and then spreading out these guns to kill innocent people. And the people pushing this bill are arguing that we should not hold those firearms dealers responsible because they did not "know" that a crime was going to be committed.

One hundred "Saturday night specials" to stick in the trunk of your car, junk guns, that you would never use for sports or hunting, and they didn't know? They should have known. That is a standard in law almost everywhere: that you knew or should have known. They are changing the law. They are saying, for firearms dealers, we are not going to hold them to this same standard that we hold every other business in America to when people buy products.

There are lots of other issues we could talk about, the gun show loophole, and others. But I think one of the most important things we could talk about is why this bill is on the floor today. It is not because gun manufacturers and gun dealers are facing bankruptcy and a lot of litigation. I read into the RECORD yesterday—and will not repeat—the major gun manufacturers in this country have no problems in terms of profitability. In fact, one of the leading companies, Smith & Wesson, said:

> In the nine months ended January 31, 2005, [Smith & Wesson] incurred $4,535 in [legal] defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation.

Mr. President, $4,500—does that sound like a business crisis that would move a gun immunity bill to the front of the calendar in front of the Department of Defense authorization bill? What it comes down to is this gun lobby has a lot of clout, and they are pushing for this sweeping immunity.

What kind of cases are we talking about? I said to my staff, you can talk about the law. And I could stand here as a person trained in law school and go through the obvious problems with this bill. But I think it is more important to talk about real-life situations. It is more important to give illustrations of why this is such a terrible bill.

Let me tell you about Anthony Oliver. Anthony Oliver was 14 years old. He was shot and killed on July 23 of last year while he was playing video games with his friend who was 13. Anthony's friend, his 13-year-old friend, had just bought a gun on the street for $50. He told the police he bought the gun with his allowance near his home because he was intimidated by a group of kids who jumped his friend and threatened to beat him up. He said he thought the safety was on when he accidentally killed Anthony with one shot to the stomach.

Federal investigators traced the gun. It was a "Saturday night special," one of those cheap guns just used for crime. They traced it to Lou's Jewelry and Pawn store in Upper Darby, PA. From 1996 to the year 2000, this pawnshop in Pennsylvania sold 441 guns traced to crime. It ranks as the No. 1 dealer in Pennsylvania in selling guns to criminals and 43rd in the Nation among all gun dealers.

In 2003, the last year for which we have statistics, Lou's sold 178 guns traced to crime. That year, less than 1 percent of the more than 3,000 dealers in Pennsylvania sold even one gun traced to crime. So you have a handful of dealers, just a small percentage, who are not paying attention or ignoring openly the fact that they are selling guns over and over and over again to gun traffickers and to straw purchasers.

How is that done? Well, the person who has a criminal record and cannot buy a gun brings his girlfriend in, and while he is standing there picking out the guns, the girlfriend is handing over the credit card or the cash to pay for them. They cannot sell to him. He is a criminal. He has a record of felonies, so the girlfriend buys it. So should the gun dealer be aware of that? Why, of course. It is obvious.

Should they be held accountable if they should have known that gun, through that girlfriend, is going straight into the hands of a felon, straight on to the street, killing innocent people? In America, a jury decides that. They will not be able to when this bill is passed. When this bill is passed, those who vote for it have decided they will be the jury forever when it comes to those questions of liability. We are taking that matter out of the hands of American citizens. We are putting it in the hands of a handful of Senators.

The gun that killed Anthony was sold in 2003 by Lou's to a trafficker who had purchased six guns in a very short period. They bought multiple guns, including many "Saturday night specials," which are small, easily concealed, low-quality handguns sought basically by kids, drug gangs, and those who are going to have a fast crime experience on a Saturday night.

The purchase of multiple firearms at once should have been a red flag to Lou, but Lou doesn't pay any attention to that: Give me some cash—I'll give you a gun; no questions asked.

When this bill passes, the family of Anthony Oliver will lose their lawsuit, the lawsuit they brought against Lou's pawnshop that continues to sell these guns used in crime. So what a great piece of news for that family: the tragedy of losing your 14-year-old son to a "Saturday night special" from a pawnshop which specializes in selling guns to gun traffickers and criminals. This is a great bill, isn't it?

Let me tell you about another case. Danny Guzman was a 26-year-old father of two from Worcester, MA, killed by a stray bullet fired outside of a nightclub on Christmas Eve in 1999.

After the shooting, the loaded gun used in the shooting was found behind an apartment building by a 4-year-old child. The gun had no serial number. They determined the gun was one of several stolen from Kahr Arms, a Worcester gun manufacturer, by their own employees, who hired many of these employees and, it turns out, never checked whether they had criminal records.

One of the thieves, Mark Cronin, who worked for this gun manufacturer, had been hired despite his history of crack addiction, theft, alcohol abuse, violence, and assault and battery. They did not check it. The gun manufacturer hired people to make guns and did not do a criminal background check on their employees.

Cronin told an associate that he took guns out of the Kahr company "all the time" and that he could just walk out the door with them. He took the gun that was used to kill Danny right off the assembly line. And he was pretty smart about it. He took it off the assembly line before it was stamped with a serial number. Smart guy. Can't be traced.

The investigation also led to the arrest of another employee, Scott Anderson, who had a criminal history, who pled guilty to stealing guns from the company.

Fifty Kahr firearms disappeared in a 5-year period. The local police captain classified the recordkeeping at that facility as "shoddy," that it was possible to remove weapons without detection because they did not keep their records well.

Danny Guzman's family brought a wrongful death suit in Massachusetts State court against the owner of the gun manufacturing company, saying: You should have kept your records so you could see that guns were being stolen. And you certainly should have done a background check on your employees. Hiring somebody who has such a criminal record to work in a plant

people. They believe it is OK to allow lawsuits to achieve some sort of political end.

Clearly, I do not agree and a majority of people in this body do not agree. Indeed, most Americans certainly do not agree. Most Americans think this is just blatantly unfair.

Our Constitution protects the right to keep and bear arms. Indeed, 33 States have passed laws to preempt frivolous gun lawsuits—33 States. Still today, we have the antigun crusaders who are, in effect, aided and abetted by the special interest trial lawyers charging ahead.

Since 1997, more than 30 cities and counties have sued firearm companies in an attempt to force them to change the way they make guns and the way they sell guns. In California, then-Gov. Gray Davis signed legislation explicitly authorizing lawsuits against gun manufacturers.

Because the firearms business is relatively small, one big verdict, one substantial verdict could bankrupt the entire industry. In California, that is a real possibility.

Never mind that every trial court that has heard these municipality lawsuits has thrown them out in whole or in part. Appellate courts in three States have overturned lower court verdicts and allowed the suits to go forward. Thus, it is critical we act now.

If the gun industry is forced into bankruptcy, the right to keep and bear arms will be a right in name only. Lawsuits have already pushed two companies into bankruptcy. Even if some gun manufacturers are able to hold on, the prices for firearms will be so high that owning a gun, such as a hunting rifle, will be a privilege only the wealthy can afford.

There is one other important and little known aspect of the issue. America relies on private gun manufacturers to equip our soldiers and law enforcement officers with sidearms. The guns our police officers use, the guns that our soldiers carry, are made in the United States by American workers.

We are all agreed, no one wants guns in the hands of criminals. There are thousands of laws and regulations to stop illegal gun sales, but we do not want these frivolous, unnecessary lawsuits to strip police officers and soldiers of their sidearms. Do we really want unfair litigation to cripple our national security? The answer clearly is no, and thus we will act and we will act over the course of today, tomorrow, Monday, and complete this action on Tuesday.

The bill before us is narrowly tailored. It is focused. It is fair. It is equitable. It ensures that private parties are held responsible for their actions and that is why this bill comes to this floor with broad bipartisan support. That is why passing this bill is the right thing to do.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT—MOTION TO PROCEED

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to consideration of S. 1805, which the clerk will report.

The assistant journal clerk read as follows:

A bill (S. 1805) to prohibit civil liability actions from being brought or continuing against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their product by others.

The ACTING PRESIDENT pro tempore. The Senator from Idaho.

Mr. CRAIG. Mr. President, we are now on S. 1805. Last night, Senator REED and I worked into the evening with our colleagues and leadership on both sides to craft a unanimous consent that now governs us through late next Tuesday. It establishes a variety of amendments that will be voted on over the course of today. Some will be offered and set aside to be voted on on Tuesday. On Tuesday, other key amendments will be voted on and then final passage.

I am sure there are some Members on both sides who might have amendments that were not listed to be considered for votes today and/or Tuesday. What I would ask them to do is come to the Chamber and talk to Senator REED and myself to see if we might work those out certainly. We are happy to take a look at them. There may be an opportunity late Tuesday and possibly Friday to offer additional amendments. The unanimous consent request does not preclude any Member from doing that.

I said very early on yesterday that we wanted an open, robust debate on this issue. Clearly, 75 Members of this Senate, in a very bipartisan way, said let's get on with it, with the cloture vote yesterday. We spent the day then fashioning an agreement that brings us to where we are this morning. I believe it is possible Senator DASCHLE will be in the Chamber in a few moments to offer a perfecting amendment, then Senator BOXER will have an amendment on gunlocks.

I believe the agreement that is in front of us gives us something that oftentimes is very hard to achieve in the Senate, and that is a procedure and a final passage locked into an agreement. While Senator REED and I worked late into the evening, as I mentioned, to allow that to happen, and all sides gave a little in it, what I think we have in front of us is just that, an agreement that allows a variety of Senators, who have been prominent in this debate on both sides of the issue, to offer their amendments and to have a vote.

The timelines are very limited. We are not going to filibuster in any of this. It is clear that when there are 20-, 30- and 60-minute time limits to be shared equally, it does shape and limit the debate in a way that many of us would like to see.

Certainly on Tuesday, key votes are going to be the McCain-Reed gun show loophole and Senator FEINSTEIN's gun ban, or assault weapon ban as it is argued. Those clearly will be the dominant issues on one side. Senator BEN NIGHTHORSE CAMPBELL, conceal/carry will be another one voted on on that day, and possibly debate. I will debate that along with Senator CAMPBELL today. It is on the list to accomplish today. Possibly we will also have another amendment to be voted on on Tuesday which deals with Washington, DC, and some of the gun laws that free and law-abiding citizens have to cope with in this city.

That is the character of what we have been able to put together. Senator REED, the manager on the other side, is now in the Chamber. I yield the floor for any comments he would wish to make. Timewise, we hope Senator DASCHLE can make it to the Chamber to offer his amendment, but if he cannot, at this moment I see no reason Senator BOXER could not proceed with her amendment.

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island.

Mr. REED. Mr. President, the Senator from Idaho has indicated we worked late last evening to craft a unanimous consent that will allow several important amendments to be debated today, and continuing on through Tuesday. It represents a recognition that there are serious issues to discuss. Now we are at the stage of not only discussing those issues but also taking amendments up and voting on them. I know Senator DASCHLE will be here in a moment.

Mr. REID. Will the Senator yield?

Mr. REED. I would be happy to yield to the Democratic whip.

Mr. REID. We have explained to the majority that we would, in fact, ask consent that Senator BOXER be allowed to offer her amendment. Senator DASCHLE is occupied at the present time. If necessary, I could offer it on his behalf, but I think it would be better if he offered it himself. So we ask unanimous consent that Senator BOXER be allowed to go forward with her amendment.

The ACTING PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

Mr. REED. Mr. President, I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from California.

AMENDMENT NO. 2620

Mrs. BOXER. Mr. President, I send an amendment to the desk and I ask for its immediate consideration.

The ACTING PRESIDENT pro tempore. The clerk will report.

The assistant journal clerk read as follows:

they don't have a right to recovery, so be it. But should we pass a law to say these families do not even have a chance to go after the reckless misconduct of these gun dealers that resulted in the deaths of their loved ones? That is what this bill is all about. The Senator from Maryland has dramatized it in terms that everyone who works in this Capitol will understand.

There was a time when you couldn't go home from work, from this building, for fear of being shot in the street. It happened over and over and over again. Why in the world would the Senate pass a bill to insulate this reckless gun dealer from his civil liability for selling these guns?

I thank the Senator for her leadership.

Ms. MIKULSKI. I yield such time as he may consume to the Senator from Rhode Island.

Mr. REED. Mr. President, Senator MIKULSKI is here, doing something that is, unfortunately, necessary because the underlying legislation would cause currently pending suits on behalf of the families and the estates of these victims of the snipers to be thrown out of court. That is not only unfortunate but it is unconscionable.

There are arguments that this legislation is crafted so these suits go forward. But that is not the case at all. The two salient facts in the sniper shootings with respect to this legislation are, first, the sniper, Malvo, claims he shoplifted the gun. The storeowner claims that he was unaware of these weapons being missing until he was contacted after the shooting by the ATF.

As a result, none of the appropriate exemptions from the preemption to sue would be applicable in this particular situation.

There are two particular exemptions that are often pointed to. One talks about the negligent entrustment, which is a theory of law, and negligence per se. None would apply because it requires the defendant to have knowledge of a violation of the statute or knowledge that something untoward would happen. Under the facts as we know them, the defendant alleges he was unaware of the missing weapons.

In addition, the other exemption would be if there was a violation of Federal and State statute and that violation was the proximate cause, almost direct or substantial cause of the harm caused to the plaintiff.

That, too, can be substantiated. We have a situation where this statute not only does not cover this situation and would require these cases be thrown out of court, but it raises the extraordinary question about what other cases there might be in the future that would cry out for justice, to bring a suit and demand some type of compensation because of negligence caused by a gun dealer or manufacturer or trade association. They, too, would fall. That would be as compelling as these cases of the Washington area sniper victims.

I commend Senator MIKULSKI for standing up for these families. They are good people. This is a cutout of these cases from law and allowing them to go forward. But it just begs the question of how many other worthy cases will be frustrated by this legislation, if we pass it. I, of course, urge that we do not pass the legislation. But I certainly urge the amendment proposed by Senator MIKULSKI be agreed to.

I yield my time.

Mr. CRAIG. Mr. President, may I inquire as to the time?

The PRESIDING OFFICER. The Senator from Idaho has 20 minutes, and the Senator from Maryland has 5 minutes.

Mr. CRAIG. Mr. President, I will use some of my time at this moment.

At the outset, let me say Senator MIKULSKI and I are best of friends. We appreciate our friendship, and we work closely on a variety of pieces of legislation. There is nothing I would do nor is there anything S. 1805 will do to damage the argument and passion and concern Senator MIKULSKI has put before us today with her amendment. If you believe in the underlying bill, S. 1805, there is a problem, and the problem is Senator MIKULSKI carves out a very big exception and guts the bill in the underlying principle. Let me talk about that principle.

I ask the Senator to go with me to page 7 of the bill and to look at section 4 of the bill. Let us talk about that in relation to the phenomenal tragedy that hit this city and the families she is discussing.

Not only did her friends and neighbors hunker down in fear, but so did we as John Lee Malvo and John Allen Muhammad terrorized the neighborhoods in Maryland and Virginia.

Here is the problem. What are the facts? The Senator said I am not going to try the case on the floor, but I am going to point fingers. I am not going to try the case on the floor, but I am going to point fingers.

We probably have reasonable cause to point fingers at Bull's Eye in Tacoma, WA. Something went wrong up there. There are over 300 guns missing. Lee Malvo himself said, I stole the Bushmaster I used in the sniper incidents in Virginia and in Maryland. "I stole the gun." He said so. It is on the record. Already he sets up an interesting scenario.

As a result of that, the BATF pulled the license of the gun dealer and recommended felony charges be brought by the Justice Department. This case is maturing at this moment.

What does our bill do? It tries to very narrowly create an environment and an exception.

Let us go to that bill and to page 7. Let me read starting on page 6 of the bill because I think it is important. Many Senators have ignored this in the rhetoric of the day. They shouldn't ignore it.

In general, the term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product or a trade association for damages resulting from the criminal or unlawful misuse of a qualified product by a person or a third party but shall not include—

In other words, the exceptions under which the Malvo and Muhammad case can be tried in which those parties the Senator is talking about contain compensation are the following.

No. 1, an action brought against the transactor convicted under section 924 of title 18 United States Code or a comparable or identical State felony law by a party directly harmed by the conduct for which the transferee is convicted.

Parties harmed. In other words, did the transferee, the gun dealer, malfunction? Did he break the law? There is a strong appearance that he might have.

No. 2, an action brought against a seller for negligent entrustment or negligent per se.

No. 3, an action in which a manufacturer or a seller of a qualified product knowingly and willingly violated State and Federal statute applicable to the sale or marketing of a product and the violation was a proximate cause for the harm and for which the relief is sought.

No. 4, an action for breach of contract or warranty in connection with—

And then we go on to deal with basically product liability.

My point is quite simple. I believe we are protecting those families. I would not write the kind of law that is being suggested would be written. What I am concerned about are lawsuits in which we are trying to hold accountable the innocent party—in this case potentially a manufacturer of a product—unless there is criminal intent, or unless they have broken the law.

Mr. DURBIN. Mr. President, will the Senator yield?

Mr. CRAIG. I can't yield. My time is limited. I am sorry. The Senator has had time. Let me continue.

That is the sense of the argument we are dealing with here. Negligent entrustment:

In subparagraph (a)(2), the term "negligent entrustment" means the supplying of a qualified product by a supplier for use by another person when the supplier knows or should know—

That is very important.

—the person to whom the product is supplied is likely to and does use the product in a manner involving unreasonable risk of physical injury to the person or to others.

What are we trying to do here?

Again, I have said time and time again over the last 24 hours it is a very narrow exception, but to entrust us to a century of tort law that says innocent parties are not guilty nor should they be swept into lawsuits if they have met certain standards of the law—in this case, licensed gun dealers and manufacturers.

Did the folks up at Bull's Eye in Tacoma meet those standards? We don't know. But I will tell you the BATF pulled their Federal firearms license. There is an investigation underway. If they lost that many firearms and they didn't notice it and they didn't report

it, I am not an attorney, but I have to assume they have a big violation on their hands. If Malvo walks in and pulls a Bushmaster from off the rack and walks out with it and that is not detected, they have a problem on their hands. I believe they have a problem on their hands, and they are not exempt.

The argument is—and some have used it—they do not even make it to the courthouse. That is not a valid statement.

This is a basis from which you argue before the court and a knowledgeable, and I hope trusting, judge will take these evaluations in hand and make the determination that this is not a frivolous or a junk lawsuit; that there is basis, and the reason there is basis is because there has been a clear violation of Federal law.

If there has not been a violation of Federal law, even though many of us can certainly have great concern about the families involved, do we continue to suggest that we go out and harass through the courts legal, law-abiding citizens and producers of a legal product in this country simply because it fits the passion of the day or the politics of the moment? I think not. I don't think the Senator from Maryland wants to do that. It is clear if you carve out this exception, you gut the bill because you are saying no, no. We are saying we are giving you all of these exceptions very clearly in the law. I read them to you. They are in the law. It is section 4. That is what we are dealing with. It is a very important part of it.

We think it is the right thing to do at this time. I believe a majority of my colleagues in the Senate agree with that. The reason they agree is for the very reason we have been very specific and clear to adhere to Federal law but to make sure we are not just going to the court for the purpose of expanding the sweep that one might like to take because they do not like guns or they do not like the current law or they want to control them in different ways.

The Federal law is there. It is clear. It is present. The investigation is underway. We cannot try that case here. But I do agree with the Senator from Maryland, we cannot try to, but we can point fingers.

Our bill, S. 1805, sets up a very clear case in which these lawsuits can be effectively argued and a decision made whether there was a rupturing of Federal law or whether we do have law-abiding practitioners in the business of the manufacturing and sale of firearms in this country. That has to be and it must remain the basis of the argument and the basis of this law. The amendment the Senator offers goes directly in the opposite, to carve out special exceptions within the law now and into the future.

I retain the remainder of my time.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I have two legal opinions, one from Lloyd Cutler, a very distinguished American lawyer who has served as White House counsel to a President, who says that S. 1805 contains language that would require the dismissal of the Johnson case. I have another legal opinion from Boise, Schiller & Flexner who essentially say the exceptions would only preserve civil claims brought under other kinds of law. Other than that, what they are saying is this would preempt their ability to bring this case.

The opinions clearly state that section 4 on page 7 articulated by my esteemed colleague does not hold water. It does not protect the victims of Malvo and Muhammad because it is in such plain English limited to those cases by the name of the perpetrator and predator. This does not create a loophole.

Talk about loophole, talk about the gun shield loophole, talk about all the other loopholes in the gun bills. My amendment does not create a loophole.

The legal opinions show there is ambiguity in S. 1805 and that section 4 could preempt the ability of these families to bring this case.

The distinguished Senator from Idaho has his opinion. I have my two legal opinions that show that there is confusion and honest disagreement about the bill. That is why the Mikulski amendment is necessary, to clear up the ambiguity on the matter of these cases committed by Malvo and Muhammad.

His point and my legal opinions prove the necessity of the amendment, to clear up the confusion, end the ambiguity, protect these victims and the families and their right to pursue.

I yield to the Senator from Illinois, a distinguished lawyer himself, to further amplify this argument.

Mr. DURBIN. I thank the Senator from Maryland.

I say to the Senator from Idaho who stood up here and said he did not believe the survivors of the DC sniper shooting had a right to go to court and therefore he was going to oppose the Senator's amendment, I guess that is clearly his point of view, but he said just the opposite. He said he reads this law to allow the victims and their families of the DC sniper to go court against the dealer.

If that is his opinion, then he ought to accept the amendment from the Senator from Maryland because that is all she is asking for.

If you do not believe the victims of the DC sniper should have a day in court against the dealer to determine whether or not he is guilty of wrongdoing, then just say it. But if you believe that these sniper victims and their families should have a day in court, for goodness' sake, accept the amendment of the Senator from Maryland. If you do not, it really tells the story of your bill.

If your bill is going to stop the families and victims of the DC snipers from holding a gun dealer guilty for irresponsible, reckless misconduct, frankly, that is another good reason for us to defeat the bill. Let us stand behind the innocent victims of the DC snipers.

Talk about people who hate guns. I do not hate guns but I hate snipers who shoot children and innocent people on the street and I hate the people who sell them guns irresponsibly. I think they ought to be held accountable. That is all the Senator from Maryland is asking.

Ms. MIKULSKI. Continuing my argument, there is ambiguity and there is honest disagreement. I know the Senator from Idaho might bring us a CRS opinion saying the cases might survive. My colleague from Rhode Island has an earlier CRS opinion that says the opposite. The point is, there is ambiguity both in the law and in opinions about the law.

My amendment is a simple, straightforward way to clear up the ambiguity and let these cases move forward.

The PRESIDING OFFICER. The Senators are reminded to address each other in the third person.

The Senator from Idaho has 10 minutes 27 seconds remained.

Ms. MIKULSKI. Parliamentary inquiry: Did I do something wrong?

The PRESIDING OFFICER. The Senator from Illinois referred to the Senator from Idaho in the first person.

Mr. DURBIN. I beg your pardon.

Parliamentary inquiry: I referred to the Senator from Idaho on the floor; is that improper?

The PRESIDING OFFICER. The Senator several times during his talk used the pronoun "you."

Mr. DURBIN. I apologize for using the pronoun "you." I will never do it again.

Mr. CRAIG. Mr. President, may I inquire as to the time remaining on both sides of the Mikulski amendment?

The PRESIDING OFFICER. Ten minutes 20 seconds for the Senator from Idaho and 14 seconds for the Senator from Maryland.

Mr. CRAIG. With 14 seconds remaining for the Senator from Maryland to argue, this is her amendment, and under the unanimous consent I will then offer the Frist-Craig amendment. As we know, then they will be stood up to be voted on, Frist-Craig first, Mikulski second.

If the Senator would like to make any concluding remarks about her amendment, I would certainly welcome that. She then controls 20 minutes of the 40 that would be on my amendment and the debate could go on.

Ms. MIKULSKI. Excuse me, Senator. The Frist-Craig amendment is on what topic, sir?

Mr. CRAIG. On your topic.

Ms. MIKULSKI. What is the Frist-Craig amendment?

Mr. CRAIG. I have not offered it yet.

Ms. MIKULSKI. You want to conclude debate on this amendment.

Mr. CRAIG. Then we set yours aside for the Frist-Craig debate on the same subject matter and then stand these up for votes.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
V.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A FREEDOM GROUP, INC., A/K/A REMINGTON OUTDOOR GROUP, INC., ET AL	)	**MAY 21, 2015**
Defendants	)	

NOTICE OF WITHDRAWAL OF ARGUMENT MADE IN PART V.C. OF PLAINTIFFS' AMENDED MEMORANDUM OF LAW IN SUPPORT OF SUPPLEMENTAL MOTION TO REMAND

Plaintiffs hereby give Notice that the argument made at Part V.C. (pages 42-45) of the Amended Memorandum of Law in Support of Supplemental Motion to Remand (Dkt. #47-1) is hereby withdrawn without prejudice to plaintiffs' right to renew such argument in the Connecticut Superior Court, should plaintiffs deem such renewal appropriate.

The reason for this withdrawal is as follows. Counsel for the removing defendants has suggested that a Federal Rule of Civil Procedure 5.1 Notice should be filed in connection with this argument. We do not believe a Rule 5.1 Notice is required, insofar as the argument pertains to a determination to be made by a state court, not by this Court. Filing a Rule 5.1 Notice, moreover, would give the appearance of acquiescence to the Court's jurisdiction, which is presumably why counsel for the removing defendants raised the issue. Nonetheless, in order to

ensure we do not fall afoul of any arguable obligation under Rule 5.1, and because we do not believe the issue raised is necessary to the Court's determination of the remand question, we are withdrawing the argument.

Respectfully submitted,

By **/s/ Alinor C. Sterling, ct 17207**

JOSHUA D. KOSKOFF, CT15619
ALINOR C. STERLING, CT17207
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
jkoskoff@koskoff.com
asterling@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2015, a copy of the foregoing Notice of Withdrawal was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Alinor C. Sterling, ct 17207
JOSHUA D. KOSKOFF, CT15619
ALINOR C. STERLING, CT17207

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	
VS.	)	Case No. 3:15-CV-00068-RNC
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a FREEDOM GROUP, INC. a/k/a REMINGTON OUTDOOR GROUP, INC, *et al.*	)	June 3, 2015
Defendants.	)	

DEFENDANTS REMINGTON ARMS COMPANY, LLC
AND REMINGTON OUTDOOR COMPANY, INC.'S
RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MOTION TO REMAND

Defendants, Remington Arms Company, LLC and Remington Outdoor Company, Inc. (collectively, the "Remington Defendants"), submit this Memorandum in Opposition to Plaintiffs' Supplemental Motion to Remand (DE 46; 46-1; and 47-1, "Pls.' Memo").

INTRODUCTION

The Protection of Lawful Commerce in Arms Act ("PLCAA") was enacted by Congress to protect federally-licensed firearm sellers from the very allegations made by Plaintiffs in this case. Riverview Sales, Inc. ("Riverview Sales") is alleged to be responsible for the criminal acts of Adam Lanza based on its lawful retail sale of a legal firearm to Nancy Lanza, who Riverview Sales did not know or have reason to believe was likely to use the firearm in a manner involving an unreasonable risk of harm. Congressional intent to provide firearms sellers with broad protection from liability for the criminal actions of others under these circumstances could not be clearer. Plaintiffs' claims against Riverview Sales are "qualified civil liability actions" under the PLCAA and are barred.

In the Supplemental Motion for Remand,[1] Plaintiffs attempt to fit their claims against Riverview Sales into enumerated exceptions to PLCAA immunity. Plaintiffs' arguments are unavailing because they require expansive and unrecognized interpretations of the PLCAA which, if accepted, would swallow the statute's overall purpose—to protect firearm sellers from claims arising from the criminal use of lawfully sold firearms. Because there is no reasonable basis for a cause of action against Riverview Sales, it has been improperly joined. As a result, this Court has subject matter jurisdiction based on the remaining parties' diversity of citizenship. Plaintiffs' Supplemental Motion to Remand should be denied.

ARGUMENT

I. This Court Should Interpret and Apply the PLCAA to Plaintiffs' Claims against Riverview Sales without Regard to a Connecticut State Court's Interpretation.

Plaintiffs' argument that this case must be remanded for a Connecticut state court's interpretation of the PLCAA misses the mark. The PLCAA is a preemptive federal immunity statute, enacted by Congress to limit the types of claims that may be brought against firearm sellers for damages resulting from the criminal use of firearms by third parties. This Court's interpretation of the PLCAA and its application to Plaintiffs' allegations against Riverview Sales are matters to be addressed under the federal rules of statutory construction and controlling federal precedent. *See City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008) (interpreting PLCAA under federal law and finding state-law claims preempted); *see also Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2008) (same). Plaintiffs' contention that a federal court cannot apply a federal statute and decide that

[1] Plaintiffs filed their initial Motion for Remand on February 13, 2015 (DE 27). Despite the fact that they submitted 35 pages of briefing on the initial Motion for Remand, Plaintiffs deemed it necessary to supplement their arguments in support of remand with the motion *sub judice* and another 45 pages of briefing, so far.

state-law claims against a non-diverse, improperly joined defendant are preempted is simply wrong. The federal preemption doctrine arises from the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and federal legislation may expressly or impliedly preempt state law. *See, e.g.*, *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982).

The Second Circuit's decision in *Pampillonia v. RJR Nabisco, Inc.*, 138 F. 3d 459 (2d Cir. 1998) does not compel a different conclusion. In *Pampillonia* and each of the other cases cited by Plaintiffs in support of remand, a federal immunity statute's impact on recognized state law claims was not at issue. Rather, in those cases, the question of whether a reasonable basis existed for stating a cause of action against the non-diverse defendant turned only on whether the cause of action was recognized under settled state law. (Pls.' Memo at 6-7.) If the possibility of stating a cause of action against a non-diverse defendant depended on resolution of unsettled state law, remand to the state court was held to be appropriate. However, where the question on which remand depends is whether a federal statute preempts that cause of action, a state court's answer to the question is not required or controlling. *See Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp. 2d 174, 180 (D.D.C. 2009) (state court construction of the PLCAA "is not controlling precedent for this Court."); *McDonal v. Abbott Laboratories*, 408 F.3d 177 (5th Cir. 2005) (federal court interpreted federal preemption statute on motion to remand to prohibit state tort law claims); *Silvas v. E*Trade Mortgage Corp.*, 421 F.Supp. 2d 1315, 1321 n.4 (S.D. Cal. 2006) (state court decisions interpreting federal preemption law are not binding on federal court); *Ramirez v. Am. Home Prods.*, C.A. No. B-03-155, 2005 U.S. Dist. LEXIS 40577 (S.D. Tex. Sept. 16, 2005) (interpreting federal law to preempt state common law claims and finding in-state defendants were fraudulently joined).[2]

---

[2] A federal preemption statute is a viable basis to establish diversity jurisdiction through fraudulent

A recent Fourth Circuit Court of Appeals decision underscores the weakness of Plaintiffs' argument. In *Johnson v. American Towers, LLC*, 781 F.3d 693 (4th Cir. 2015), a prison guard was shot and seriously injured in his home. The attack had been ordered by an inmate using a contraband cell phone. Plaintiffs filed suit in state court against wireless service providers and owners of cell phone towers under a common law negligence theory. *Id.* at 700. Plaintiffs alleged the defendants were aware that inmates illegally used cell phones using signals emitted from the defendants' towers, and their use of the phones created an unreasonable risk of harm to others. *Id.* The defendants removed the case to federal court, asserting, *inter alia*, complete diversity based on the fraudulent joinder of non-diverse defendants. The basis for fraudulent joinder was that the state common law claims against the non-diverse defendants were preempted by the Federal Communications Act ("FCA"), 47 U.S.C. § 332. *Johnson*, 781 F.3d at 705.

The plaintiffs in *Johnson* moved to remand the case to state court. The District Court denied the motion to remand, finding that it had subject matter jurisdiction under the fraudulent joinder doctrine. *Id.* at 704. The Fourth Circuit affirmed, finding that the FCA preempted the plaintiffs' state-law tort claim, as a matter of law, because state-law claims that "obstruct or burden a wireless service provider's ability" to provide coverage were expressly preempted under the act. *Id.* at 706. In so holding, the court applied the same standard set forth in *Pampillonia*: "The removing party must show . . . there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." *Id.* at 704 (emphasis in original). The court reasoned that "[e]ven under this rigorous standard" the plaintiffs could not succeed against

---

joinder of a non-diverse party, especially where the preemptive defense would bar the claims in a state court. *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1406 (D. Colo. 1989). The PLCAA is a preemptive statute that bars claims in federal and state court. 15 U.S.C § 7902(a); *e.g.*, *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 Conn. Super. LEXIS 1320 (Conn. Super. Ct. May 26, 2011); *see also* DE 1, NOR at 6, n. 7 (collecting cases).

the non-diverse defendants. *Id.*

The court in *Johnson* did not look to state law to determine whether the federal statute preempted the plaintiffs' state law claim against the non-diverse defendants because "[p]reemption fundamentally is a question of congressional intent." *Id.* at 705; *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (deriving meaning of federal preemptive law from principles of statutory interpretation and examination of congressional intent in legislative history); *Phillips v. Lucky Gunner, LLC*, No. 14-cv-02822-RPM, 2015 U.S. Dist. LEXIS 39284, *21-22 (D. Colo. Mar. 27, 2015) (whether state law is "pre-empted by [the PLCAA] and therefore invalid under the Supremacy Clause of the Constitution, [the Court's] sole task is to ascertain the intent of Congress.") (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987)). This Court should not defer to Connecticut law to determine whether the PLCAA preempts plaintiffs' claims against Riverview Sales. The plain language of the PLCAA and the purposes for which it was enacted control the analysis of whether Plaintiffs' claims against Riverview Sales are barred.

Plaintiffs cannot state a cause of action against Riverview Sales because their allegations fall within the PLCAA definition of a "qualified civil liability action." 15 U.S.C. § 7903(5)(A). The Court does not need to resolve a dispute over whether Connecticut law recognizes a cause of action for negligent entrustment, or whether CUTPA gives consumers and business persons standing to recover an "ascertainable loss of money or property" in trade or commerce resulting from unfair or deceptive practices. Conn. Gen. Stat. § 42-1110g. The question to be answered is whether the Plaintiffs have pleaded claims against Riverview Sales that are preempted by federal law. The answer to this question depends on this Court's interpretation and application of the PLCAA, not on an interpretation of state law by a Connecticut state court. This is a question of law for this Court's determination. *United States v. Santos*, 541 F.3d 63, 67 (2d Cir. 2008) (matters

of statutory interpretation are questions of law).

Its important to note that the court in *Johnson* went on to affirm dismissal of the entire case against all defendants based, *inter alia*, on federal preemption grounds. 781 F.3d at 707. Because the Fourth Circuit, like the Second Circuit, does not recognize the "common defense rule," the rule did not bear on whether remand was required. Indeed, at least one district court in the Second Circuit has had the opportunity but declined to adopt the rule. *Pelman ex rel. Pelman v. McDonald's Corp.*, 237 F.Supp.2d 512, 516 (S.D.N.Y. 2003), was a putative class action filed against McDonald's, claiming that an unhealthy menu led to obesity among class members. In addition to suing the diverse McDonald's, the plaintiffs named several non-diverse McDonald's franchises in New York. *Id.* at 521. McDonald's removed the case to federal court, arguing the local McDonald's franchisees were fraudulently joined. The court held that McDonald's met its heavy burden to show fraudulent joinder, finding that the state court complaint failed to state a cognizable claim against the local franchisees under New York law: "the plaintiffs' real beef is with McDonalds [sic] Corp." *Id.* at 523. The district court also dismissed the case against McDonald's on essentially the same basis it found the local defendants had been fraudulently joined. *See id.* at 542-43. On appeal from a subsequent, related dismissal, the Second Circuit reversed the dismissal of McDonald's, finding that the plaintiff had at least adequately stated a claim under a New York statute, but the district court retained subject matter jurisdiction. *See Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 512 (2d Cir. 2005).

For the reasons stated below, the only interpretation of the PLCAA consistent with the plain meaning and context of the language used by Congress, is that Plaintiffs' claims against Riverview Sales are "qualified civil liability actions" that "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). As a matter of law, there is no reasonable basis for a claim

against Riverview Sales, and therefore its citizenship should be disregarded. Plaintiffs' Motion to Remand should be denied.

II. Congress Intended to Shield Firearm Sellers from Liability under the PLCAA, Which Should Be Read as a Whole and in Context, and its Exceptions Are to Be Construed Narrowly.

Plaintiffs press two claims against Riverview Sales: alleged negligent entrustment of the firearm used in the shooting to Nancy Lanza, and an alleged violation of CUTPA based on the argument that the firearm lawfully sold to Nancy Lanza was inappropriate for civilian ownership.[3] Plaintiffs argue they have stated causes of action under these theories because both claims fall within exceptions to the PLCAA definition of a "qualified civil liability action." Plaintiffs are wrong.

Plaintiffs' factual allegations regarding Riverview Sales' sale of the firearm to Nancy Lanza do not fit within the negligent entrustment exception to firearm seller immunity. *See* 15 U.S.C. § 7903(5)(B). Broadly interpreting the PLCAA definition of negligent entrustment to encompass the lawful sale of a firearm to a person, who merely possessed the firearm in a household shared with another adult, would swallow the protections afforded by PLCAA entirely. Similarly, CUTPA cannot be found to be a predicate statute under the predicate exception to

[3] Plaintiffs have conceded that their public nuisance claim against Riverview Sales is a qualified civil liability action and subject to dismissal under the PLCAA by first limiting their defense of the claim to an argument that the PLCAA is unconstitutional under the Tenth Amendment to the United States Constitution. (Pls.' Memo at 42-45.) Plaintiffs thereafter withdrew their constitutional challenge, incorrectly contending that this Court cannot hear their constitutional challenge but must remand the case to the Connecticut state court for a ruling on the constitutionality of the PLCAA. (DE 48.) Plaintiffs are wrong, but regardless, their constitutional challenge to the PLCAA has been rejected by the Second Circuit in *City of New York*, 524 F.3d at 395-96, and by every other appellate court that has considered it. *See, e.g.*, *Estate of Kim v. Cox*, 295 P.3d 380, 388 (Alaska 2013); *Adames v. Sheehan*, 909 N.E.2d 742, 764-65 (Ill. 2009). A Connecticut Superior Court has also rejected a constitutional challenge to the PLCAA, including the Tenth Amendment argument. *Gilliand*, 2011 Conn. Super. LEXIS 1320, at *43-45.

PLCAA immunity without completely ignoring the intent of Congress to protect firearm sellers and the clear guidance of the Second Circuit. 15 U.S.C. § 7903(5)(A)(iii); *City of New York* v. Beretta, 524 F.3d 384 (2d Cir. 2008).

Interpretation of the PLCAA language should begin from the irrefutable premise that Congress intended to protect federally licensed firearms dealers, such as Riverview Sales, from tort claims arising from the criminal use of firearms they lawfully sold. *See City of New York*, 524 F.3d at 401-02 (noting that those engaged in the lawful sale of firearms "should not . . . be liable for the harm caused by those who criminally or unlawfully misuse" firearms) (quoting 15 U.S.C. § 7901(a)(5)). Because the meaning of statutory language, plain or not, depends on context, the interpretative rule that a statute must be read as a whole controls the analysis. *King v. St. Vincent Hospital*, 502 U.S. 215, 221 (1991). Where examination of a statute as a whole "demonstrates that a party's interpretation would lead to 'absurd or futile results . . . plainly at variance with the policy of the legislation as a whole' that interpretation should be rejected." *Yerdon v. Henry*, 91 F.3d 370, 376 (2d Cir. 1996) (quoting *EEOC v. Commercial Office Products, Co.*, 486 U.S. 107, 120 (1988).

Here, the declared purpose of the PLCAA is to "prohibit causes of action against manufacturers, distributors, dealers and importers of firearms" for harm "caused by the criminal or unlawful use of firearms" that "functioned as designed and intended." 15 U.S.C. § 7901(b)(1); *see City of New York*, 524 F.3d at 402 ("We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation or sale of firearms.'"). Congress created specific enumerated exceptions to the policy of broadly protecting firearm sellers. It is a fundamental rule of statutory construction that statutory exceptions should be narrowly construed to preserve the primary purpose of the statute. *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

Plaintiffs ignore these principles and instead ascribe meaning to PLCAA language that Congress could never have intended; Congress found that imposition of liability on firearm sellers for harm caused by the criminal use of firearms "is an abuse of the legal system." 15 U.S.C. § 7901(a)(6).

III. Plaintiffs' Negligent Entrustment Claim against Riverview Sales Is Barred.

Whether Plaintiffs' allegations regarding Riverview Sales' sale of the firearm to Nancy Lanza fit the PLCAA's definition of "negligent entrustment" is a question for this Court because it involves interpretation and application of the PLCAA—a federal statute. Plaintiffs' argument that this question (and every question related to their motion to remand) must first be answered by a Connecticut state court is an incorrect reading of *Pampillonia*. (*See* Argument § I, *supra*.)

A. Plaintiffs' Negligent Entrustment Allegations against Riverview Sales Do Not Satisfy the PLCAA Definition of Negligent Entrustment.

Plaintiffs' analysis is correct in two respects. First, the enumerated exceptions to PLCAA immunity do not create causes of action. 15 U.S.C. § 7903(5)(C) ("[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."). Second, whether a cause of action is available under an exception to PLCAA immunity depends on whether the cause of action is recognized under applicable state law. Plaintiffs' analysis, however, misses the mark because the allegations in support of even a recognized cause of action *must fit* an enumerated exception. If the allegations do not fit an exception to immunity, the claim is a "qualified civil liability action" and subject to dismissal.

The allegations in support of a negligent entrustment action must satisfy the following definition in order to survive PLCAA immunity:

> As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical

injury to the person or others.

15 U.S.C. § 7903(5)(B). This definition provides the minimum elements required to be pleaded in order to qualify for the negligent entrustment exception under the PLCAA, notwithstanding the fact that some states may have less stringent standards.[4] If the allegations in support of a negligent entrustment claim against a firearm seller do not reach the PLCAA's definitional "floor," the claim is a qualified civil liability action and it may not proceed. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (federal preemptive statute established a minimum standard, *i.e.*, a "floor"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (holding that the preemption clause of the Food, Drug and Cosmetic Act relating to medical devices, 21 U.S.C. § 360k(a), preempts certain state law claims: "Petitioner's common-law claims are pre-empted because they are based upon New York 'requirement[s]' with respect to Medtronic's catheter that are 'different from, or in addition to' the federal ones, and that relate to safety and effectiveness, § 360k(a).").

i. Plaintiffs Have Not Alleged Facts Demonstrating that Riverview Sales Knew or Reasonably Should Have Known How Nancy Lanza Was Likely to Use the Firearm.

Plaintiffs do not allege any facts in their Complaint establishing that Riverview Sales knew or reasonably should have known that Nancy Lanza was likely to use the firearm she purchased in a manner involving an unreasonable risk of injury to others. In the absence of these factual allegations, Plaintiffs have not pleaded a cause of action for negligent entrustment against

[4] Plaintiffs' reliance on Arkansas law is unavailing. (Pls.' Memo at 22, 23 n.7.) For example, under Arkansas law there are five elements of a negligent entrustment action, none of which includes a factual allegation that is required under the PLCAA definition of negligent entrustment—namely, that the person to whom the product is supplied be the same person who then uses the product to cause an unreasonable risk of physical injury. *See Collins v. Arkansas Cement Co.*, 453 F.2d 512, 514 (8th Cir. 1972); *LeClaire v. Commercial Siding & Maintenance Co.*, 308 Ark. 580, 582 (1992). Thus, a complaint simply setting forth the elements of an Arkansas common law negligent entrustment action against a firearm seller arising from a criminal firearm use would be a "qualified civil liability action" and subject to dismissal under the PLCAA.

Riverview Sales that reaches the PLCAA definitional floor or, for that matter, under the Connecticut cases relied on by Plaintiffs. *See Turner v. American Dist. Tel. & Messenger Co.*, 94 Conn. 707, 110 A. 540, 543 (1920) (knowledge of the entrustee's recklessness is a "vitally important" element of the claim). Indeed, Plaintiffs' Complaint describes a lawful sale of a lawfully-manufactured product to a law-abiding person, who did not disclose or even suggest to the seller an intention to use the product illegally or irresponsibly.[5] Such a sale cannot constitute negligent entrustment under any definition of the cause of action.[6]

ii. Plaintiffs' Argument that the Type of Firearm Purchased by Nancy Lanza Put Riverview Sales on Notice that She Would Use It in a Manner Involving Unreasonable Risk of Injury Should Be Rejected.

The PLCAA prohibits a wide variety of claims against firearm manufacturers and sellers, and only allows specifically enumerated others. However, Plaintiffs' primary claim in this case—that a firearm seller acted tortiously by making a lawful sale of a commonly purchased firearm to a law abiding person without any knowledge or reason to believe the person would use the firearm irresponsibly—is prohibited by the PLCAA.

---

[5] Plaintiffs suggest that they could cure "insufficient" allegations on how Nancy Lanza "used" the rifle by way of amendment and remand is therefore required. (Pls.' Memo at 29, n. 9.) Plaintiffs' contention is incorrect. *In re Rezulin*, Liab. Litig., 133 F. Supp. 2d 272, 284-285 & n.35 (S.D.N.Y. 2001) (rejecting plaintiffs' assertion that they can avoid removal by curing their complaint's deficiencies by amendment and that this possibility requires remand).

[6] For instance, a firearm seller might acquire the requisite knowledge of the risk of unlawful misuse by a purchaser based on statements made by the purchaser or the purchaser's behavior during the sales transaction. *See, e.g.*, *Shirley v. Glass,* 308 P.3d 1, 4 (Kan. 2013) (firearm sale completed despite actual buyer informing seller that he had a felony conviction); *Woods v. Steadman's Hardware, Inc.*, No. CV 12-33-H-CCL, 2013 U.S. Dist. LEXIS 26261 (D. Mont. Feb. 13, 2013) (firearm sale completed despite buyer informing seller that he had been involuntarily committed six weeks earlier). A seller might also acquire such required knowledge based on the circumstances surrounding the sale. *See, e.g.*, *United States v. Carney*, 387 F.3d 436, 442 (6th Cir. 2004) (convicted felon selected firearm and companion applied for and completed purchase).

Plaintiffs, knowing they have not alleged that Riverview Sales knew or reasonably should have known that Nancy Lanza would put the firearm to a use involving an unreasonable risk of injury, instead argue that *the type of firearm* she purchased put Riverview Sales on notice that an unreasonable risk of injury would likely result from its use. If accepted, Plaintiffs' argument would expose firearm sellers across the country to liability for lawful sales of millions of firearms, should they subsequently fall into criminal hands and be used to cause harm. This is the very type of strict liability claim that Congress clearly intended to prohibit. Even prior to the enactment of the PLCAA, courts declined to impose such sweeping liability on firearm sellers. *Cf. Delahanty v. Hinckley*, 564 A.2d 758 (D.C.App. 1989) (rejecting strict liability claim against manufacturer for the criminal use of a small, concealable handgun based on the theory that they have no social value); *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642 (1985) (same); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985) (same); *Moore v. R.G. Industries, Inc.*, 789 F.2d 1326 (9th Cir. 1985) (same).

The Bushmaster XM-15 semi-automatic rifle was lawfully manufactured, sold and possessed in Connecticut in 2010, when Nancy Lanza made her purchase from Riverview Sales.[7] Any adult resident of Connecticut who passed the required law enforcement background check and was not otherwise prohibited from owning or possessing the rifle under applicable federal, state and local laws, could own and use the firearm for lawful purposes. In fact, the XM-15 rifle and other similar AR-type semiautomatic rifles with the same design features are commonly

[7] On July 1, 2013, long after Nancy Lanza made her purchase, the Connecticut General Assembly passed "An Act Concerning Gun Violence Prevention and Children's Safety" in response to the shooting at Sandy Hook Elementary School. The legislation, prohibited, *inter alia*, ownership of numerous semiautomatic firearms in Connecticut, including the Bushmaster XM-15 semiautomatic rifle. *See Shew v. Malloy*, 994 F.Supp.2d 234, 238-41 (D.Conn. 2014). Obviously, that law is irrelevant to the lawfulness of Nancy Lanza's purchase.

purchased and owned by "[m]illions of Americans . . . for hunting and target shooting." *Shew v. Malloy*, 994 F.Supp.2d 234, 245 (D.Conn. 2014). "[T]here can be little dispute that tens of thousands of Americans own these guns and use them exclusively for lawful purposes such as hunting, target shooting and even self-defense." *N.Y. State Rifle & Pistol Association v. Cuomo*, 990 F.Supp.2d 349, 365 (W.D.N.Y. 2013); *Heller v. District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2010) ("We think it clear enough . . . that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' as the plaintiffs contend.").

Indeed, semi-automatic rifles, like the XM-15 rifle, "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994). Between 2008 and 2012, approximately 11.4% of firearms manufactured in the United States were semiautomatic rifles with design and functional characteristics similar to those of the XM-15 rifle. *Friedman v. Highland Park*, 784 F.3d 406, 2015 U.S. App. LEXIS 6902, *24 n.3 (7th Cir. Apr. 27, 2015) (Manion, J., dissenting). In 2012 alone, an estimated 11 million people participated in target shooting with such rifles. *Id.*

Thus, the argument that Nancy Lanza's purchase of the XM-15, a type of rifle that millions of other Americans have purchased and used for lawful purposes, put Riverview Sales on notice that her rifle would likely be used in a manner resulting in unreasonable risk of physical injury borders on frivolous. If Plaintiffs' allegations regarding Riverview Sales' lawful sale of the firearm to Nancy Lanza are held to state a cause of action for negligent entrustment, every lawful sale of a similar firearm to a law-abiding person could also be alleged to have been negligently entrusted. Plaintiffs acknowledge as much by asserting that Nancy Lanza was in a "class" of civilian firearm owners who are allegedly unfit to lawfully possess these types of firearms. (Pls.' Memo at 27.) Plaintiffs essentially argue that existing legislative determinations of who may own

firearms, and what types of firearms they may possess, should be disregarded, and that courts and juries should be tasked with making those decisions on a case-by-case basis.[8]

Once more, Plaintiffs ignore an expressly stated purpose of the PLCAA: "[t]o preserve and protect the Separation of Powers doctrine." 15 U.S.C. § 7901(b)(6). The PLCAA was deemed necessary because "liability actions" identical to this case were seen by Congress as "attempt[s] to use the judicial branch to circumvent the legislative branch of government." 15 U.S.C. § 7901(a)(8); *cf. Hamilton v. Beretta*, 96 N.Y.2d 222, 238 (N.Y. 2001) ("Federal law already has implemented a statutory and regulatory scheme to ensure seller 'responsibility' through licensing requirements and buyer 'responsibility' through background checks."). In 2010, both Congress and the Connecticut General Assembly considered the firearm purchased by Nancy Lanza to be lawfully and appropriately possessed by law-abiding persons for lawful purposes. Riverview Sales cannot be found to have negligently entrusted the firearm without circumventing the intent of the legislature.[9]

---

[8] Cases in which knowledge of a person's propensity to use chattel unsafely has been imputed to the seller based only on the "class" to which the person belongs have almost exclusively involved sales of potentially dangerous instrumentalities to children and known criminals. Plaintiffs' rely on *General Agents Ins. Co. v. Midwest Sporting Goods, Inc.*, 328 Ill. App. 3d 482 (Ill. App. Ct. 2002) for the proposition that all "civilians" should be treated as a class of persons not to be trusted with semiautomatic rifles, but *General Agents* involved alleged sales of firearms to a narrow class of criminals. *Id.* at 484-85. And the cases cited by the court in *General Agents* both involved sales of dangerous instrumentalities to young children. *See Semeniuk v. Chentis*, 1 Ill. App. 2d 508 (Ill. App. Ct. 1954) (sale of air rifle to 7-year old child); *Moning v. Alfono*, 400 Mich. 425 (1977) (sale of slingshot to 11-year old child).

[9] Even before enactment of the PLCCA, courts recognized that policy decisions regarding firearm sales and ownership are decisions best left to the legislature. *Cf. City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121 (Ill. 2004) ("[T]here are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms."); *Penelas v. Arms Tech., Inc.* 778 So. 2d 1042, 1045 (Fla. App. 2001) ("[T]he judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch."); *People v. Sturm, Ruger*, 761 N.Y. 2d 192, 203 (N.Y. App. 2003) ("As for those societal problems associated with, or following, legal handgun manufacturing and marketing, their resolution is best left to the

iii. The Rules of Statutory Construction Require that a Firearm "Use" Be Narrowly Defined to Preserve the Purpose of the PLCAA.

Plaintiffs argue that a "use" of a firearm under the negligent entrustment exception can include merely "sharing" a firearm with an adult member of one's household. (Pls.' Memo at 29, n. 9.) Plaintiffs also contend that a "use" under the exception can be storing a firearm in an "unlocked gun closet." (*Id.*) Plaintiffs' expansive interpretation of a firearm "use" is at odds with the overall purpose of the PLCAA and contrary to the plain meaning of the word and the context in which it is used. Congress could not have intended that the mere possibility that someone other than the purchaser *might* use the firearm unlawfully many years after it was purchased could serve as the basis for a negligent entrustment action. Again, if such general knowledge were sufficient to invoke the negligent entrustment exception, the other exceptions would be surplusage and congressional intent to immunize firearm sellers from excessive tort liability would be undermined. Under Plaintiffs' absurdly broad interpretation of "use," every firearm used in crime by someone other than its initial purchaser was negligently entrusted by the seller.[10]

---

legislative and executive branches."); *In re Firearms Cases*, 126 Cal. App. 4th 959, 985 (Cal. App. 2005) ("While plaintiffs' attempt to add another layer of oversight to a highly regulated industry may represent a desirable goal . . . [e]stablishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation."); *Hamilton*, 96 N.Y. 2d at 239-40 ("[W]e should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales remains the focus of a national policy debate.").

[10] In their Memorandum of Law in Support of the Supplemental Motion to Remand (DE 46-1), Plaintiffs incorrectly asserted that "Nancy Lanza's decision to share the Bushmaster XM15-E2S with her son resulted in him killing her with that weapon" (DE 46-1 at 17). Plaintiffs later acknowledged their error by filing an Amended Memorandum of Law stating that "Nancy Lanza's decision to share firearms with her son resulted in him killing her with one of those firearms" (DE 47). To be clear, Nancy Lanza was killed, while in bed, with a different firearm—a .22 caliber rifle. *See Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, p. 2 (available at http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf (last visited June 2, 2015)). However, under Plaintiffs' expansive interpretation of the negligent entrustment exception, Nancy Lanza "used" the .22 caliber rifle to harm herself and a cause of

Plaintiffs' suggestion that the Court adopt what they characterize as the "common law meaning of 'use'" is not helpful to their position. (Pls.' Memo at 20.) First of all, there is no accepted common law meaning of the word "use." As the Supreme Court has recognized, "[m]ost words have different shades of meaning and consequently may be variously construed, not only when used in different statutes, but when used more than once in the same statute or even the same section." *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561, 574 (2007). The meaning of the word "use" as it appears in Section 7903(5)(B) can only be understood by considering the context of the surrounding language in which it appears and the PLCAA as a whole. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Fundamental rules of statutory construction require that "use" be defined narrowly in recognition of the purpose of the PLCAA: to protect firearm sellers against claims arising from the criminal misuse of lawfully sold firearms. *See Clark*, 489 U.S. at 739.[11]

Secondly, Plaintiffs' suggestion that certain "congruence" between language found in the Restatement (Second) of Torts § 390 and § 7903(5)(B) "was clearly intentional" on the part of Congress is merely speculation. (Pls.' Memo at 21.) The "congruence" between Section 390 and Section 7903(5)(B) is not complete, which means that to the extent the drafters of the PLCAA considered Section 390, its language did not fully reflect their intent to provide firearm sellers broad protection against claims arising from the criminal use of firearms they sell.

Restatement Section 390 contemplates that a supplier will incur liability for supplying

---

action would lie against the seller of that rifle for negligent entrustment. Such a construction of the exception is nonsensical.

[11] The dictionary definition of "use" is the "act or practice of employing something" (WEBSTER'S NEW COLLEGIATE DICTIONARY, 1299 (1987)) or "to put or bring into action or service." BLACK'S LAW DICTIONARY 1382 (5th ed. 1979)). These definitions include affirmative acts of use, not passive sharing. Simply sharing a firearm with another adult member of one's household or storing it in a closet, is hardly "employing" a firearm or putting it into "action."

"directly *or through a third person* a chattel for the use of *another* whom the supplier knows or has reason to know to be likely . . . to use [the chattel] in a manner involving unreasonable risk of physical harm to himself and others." Restatement (Second) of Torts § 390 (1965) (emphasis added). In contrast, PLCAA Section 7903(5)(B) specifies that, in order to qualify for the negligent entrustment exception, the plaintiff must show that the firearm seller "knows, or reasonably should know, *the person to whom the product is supplied* is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B) (emphasis added). PLCAA Section 7903(5)(B) is specific where Restatement Section 390 is general, *i.e.* with regard to the class of persons whose "use" will potentially expose the product seller to liability. Under the PLCAA definition of negligent entrustment, this is a class of one: "the person to whom the product is supplied." 15 U.S.C. § 7903(5)(B). This distinction from Restatement Section 390—which permits liability to attach to the seller based on use of the chattel by "another"—plainly reflects Congress's intent to craft a narrow exception to the broad immunity provided under the PLCAA. Plaintiffs' reliance on case law applying Restatement Section 390 to hold sellers liable for "successive entrustments" thus flies in the face of clear congressional intent. (*See* Pls.' Memo. at 22-24.) The language used by Congress in Section 7903(5)(B) controls the analysis of whether a cause of action for negligent entrustment against Riverview Sales can be stated, not Section 390.[12]

Congress's intent to limit "negligent entrustment" actions to situations in which "the person to whom the product is supplied" is the same person who "does use" the product, was surely based

[12] Indeed, each of the Illustrations to Section 390 involve a class of one—namely, the person to whom the product was supplied was the person who thereafter carelessly drove the car, operated the boat or discharged the firearm. None of the Illustrations involved a situation where the person to whom the product was supplied later on gave it to another person without the supplier's knowledge, and the other person thereafter used the product to cause harm.

on its knowledge that firearms change hands frequently after their initial lawful sale, and that nearly all firearms that had been used in crime (89%) "changed hands at least once" before reaching the person who used it criminally. *See* Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms, Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports (1999) National Report, p. ix (available at www.atf.gov/publications/historical/ycgii/ycgii-report-1999.html (last visited June 2, 2015)). Permitting negligent entrustment actions arising from the criminal use of a firearm by persons who are once, twice or three times removed from the seller's initial sale would destroy the protections afforded by the PLCAA. Under Plaintiffs' expansive interpretation of "use," the initial lawful sale of any firearm, which later changes hands and is used in crime, could be alleged to have been negligently entrusted. There is no way to reconcile that interpretation with the purpose of the PLCAA—to protect firearm sellers from claims arising from the criminal use of firearms.[13]

Plaintiffs' continued reliance on *Smith v. United States*, 508 U.S. 223 (1993), and the Supreme Court's interpretation of a firearm "use" under § 924(c)(1) of the Gun Control Act is misplaced. (Pls.' Memo at 17.) First of all, Plaintiffs do not address the impact of the *in pari materia* doctrine on their argument that a firearm "use" under § 7903(5)(B) should be given the same meaning as a "use" under § 924(c)(1). (*See* DE 42 at pp. 1-2.) And they ignore *Bailey v. United States*, 516 U.S. 137 (1995), a subsequent decision further addressing the meaning of "use" under § 924(c)(1). (*See* DE 42 at p. 3.) *Bailey* establishes that, even under the expansive interpretation of a firearm "use" in *Smith*, Nancy Lanza did not "use" the firearm by merely

[13] This would be particularly true with respect to handguns, which are the most commonly owned type of firearm and the type of firearm most commonly used in crime. Government data shows that handguns were used in 87% of firearms crimes from 1993-2011. U.S. Department of Justice, Bureau of Justice Statistics, Firearms Violence, 1993-2011, Table 3, p. 3 (available at www.bjs.gov/content/pub/pdf/fv9311.pdf (last visited June 2, 2015)).

possessing the firearm in her home or storing it in a closet.

In *Bailey*, the defendant was convicted under § 924(c)(1) for "use" of a firearm in connection with a drug trafficking crime. *Bailey*, 516 U.S. at 138. The firearm was found together with drugs inside the defendant's closet during execution of a search warrant. *Id.* at 140. Reversal of the defendant's conviction was affirmed by the Supreme Court, which held that a "use" must involve more than mere possession, it must involve "active employment" of the firearm. *Id.* at 143. The Court held that although a "use" under Section 924(c)(1) can include "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm," a defendant cannot be charged for merely storing a firearm near drugs. *Id.* at 149. "Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession." *Id.*

Indeed, Section 924(c)(1) was amended in November 1998 to prohibit possessing a firearm "in furtherance of" a drug offense or crime of violence. *See* 18 U.S.C. § 924(c)(1)(A) (providing a sentencing enhancement for "any person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm"). Thus, even if the PLCAA and the Gun Control Act were held to be *in pari materia*, the Supreme Court's interpretation of "use" under § 924(c)(1) does not help the Plaintiffs. Nancy Lanza is alleged to have merely possessed and stored a firearm in her home. In no sense can her possession and storage of the firearm be considered "active employment." Regardless, the PLCAA and the Gun Control Act are not *in pari materia*, and, in light of the PLCAA's purpose to limit claims against firearm sellers, a firearm "use" should be interpreted to mean discharge or a threat of discharge. A broader interpretation of a firearm "use" to include Nancy Lanza's entirely lawful act of keeping a widely owned firearm in her home would render the PLCAA's protections

largely meaningless.[14]

iv. The PLCAA Was Enacted to Shield Firearm Sellers from Expansive Theories of Liability, Not to Preserve Them.

Plaintiffs have it backwards in arguing that Congress intended to preserve a cause of action against a firearm seller for a "successive entrustment" of the firearm resulting in a criminal use because "Congress knew" that some courts had recognized such a cause of action. (Pls.' Memo at at 23.) Indeed, the opposite is true. Congress was aware of lawsuits filed against firearms manufacturers, distributors and retail dealers alleging that they had entrusted firearms downstream in commerce to persons who were remote from the criminal use of the firearm and could not in any sense be found to have proximately caused the injuries claimed, and Congress enacted the PLCAA to extinguish such claims. *See* 15 U.S.C. § 7901(a)(7) ("The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law."). An interpretation of the PLCAA that will allow the type of claims made in those cases to proceed would be directly at odds with the clear intent of Congress.[15]

Indeed, seventy-five law professors joined in the opinion that the PLCAA defines

---

[14] Plaintiffs' characterization of Defendants' interpretation of "use" in § 7903(5)(B) as "novel," suggests that Plaintiffs' interpretation to include mere firearm possession and storage has been accepted by the courts. (Pls.' Memo at 15.) It has not. No court has accepted Plaintiffs' expansive interpretation of the word.

[15] *Ileto* is a good example of a "successive entrustment" case that Congress intended to preempt. There, the plaintiffs brought suit against the manufacturer and wholesale distributor of a handgun used in a mass shooting. The firearm changed hands multiple times before it reached the shooter, including a police department, a licensed retail dealer and two private gun collectors. *See Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274, 1280-81 (C.D. Cal. 2006). The Ninth Circuit looked to the PLCAA's legislative history and observed that "congressional speakers referred to *this very case* as the type of case they meant the PLCAA to preempt" and dismissed the plaintiffs' common law tort claims. *Ileto*, 565 F.3d at 1136 (emphasis in original).

"negligent entrustment extremely narrowly" and prohibits claims based on "successive entrustments":

> The exception applies only to sellers, for example, and would not apply to distributors or manufacturers, no matter how egregious their conduct. Even as to sellers, the exception would apply only where the particular person to whom a seller supplies a firearm is the one whom the seller knows or ought to know will use it to cause harm.

151 Cong. Rec. S9229 (July 28, 2005). The PLCAA should be interpreted in light of the historical context in which it was enacted: namely, as a levy to stem the flood of litigation seeking to hold firearms suppliers responsible for the criminal misuse of firearms by remote third parties.[16]

---

[16] Among the lawsuits that preceded enactment of the PLCAA were a series of cases filed in the Eastern District of New York, including *Hamilton v. Accu-Tek*, 62 F.Supp.2d 802 (E.D.N.Y. 1999), *judgment vacated and remanded for entry of dismissal order*, 264 F.3d 21 (2d Cir. 2001). In *Hamilton*, an expansive duty was imposed on the defendants "to take reasonable steps ... to reduce the possibility" that handguns "will fall into the hands who will likely misuse them." *Id.* at 231. The New York Court of Appeals, however, answering certified questions from the Second Circuit, refused to recognize the duty. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 240 (N.Y. 2001). The Court of Appeals held that "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." *Id.* The Court of Appeals also held that a duty of care should not be imposed on firearm sellers under the negligent entrustment doctrine, finding that the tort of negligent entrustment is based on the degree of knowledge the supplier has concerning the entrustee's propensity to use the chattel dangerously. *Id.* at 236. "[W]ithout the requisite knowledge, the tort of negligent entrustment does not lie." *Id.* The same district court subsequently denied the defendants' motion to dismiss a nearly identical claim in *Johnson v. Bryco Arms*, 304 F.Supp.2d 383 (E.D.N.Y. 2004), finding that the defendants owed a duty to exercise ordinary care in the marketing of their products based on the allegation that defendants were generally on notice that firearms could change hands a number of times before coming into the possession of a criminal. *Id.* at 399. These cases and others against firearm industry members served as the impetus for the PLCAA. *See* 15 U.S.C. § 7901(a)(7); 151 Cong. Rec. S9394 (July 29, 2005) (statement of Sen. Craig) ("In *City of New York v. Beretta USA Corp., et al.* currently set for trial on September 7 in Federal court in Brooklyn, NY, the plaintiff has asserted that industry members have created a 'public nuisance.' The lawful sale of a highly regulated product later misused by criminals is not a public nuisance; and has never been considered a public nuisance in American jurisprudence.").

Nevertheless, the handful of "successive entrustment" cases cited by Plaintiffs are readily distinguishable from this case. (Pls.' Memo at 23 n. 7.) For example, in *Rios v. Smith*, 95 N.Y.2d 647 (2001), a father was found to have negligently entrusted an ATV to his minor son because the father knew his son's friend, a frequent visitor to the family's farm, would also use the ATV and that the friend had done so dangerously in the past. *Id.* at 653. In contrast, Plaintiffs here do not allege that Riverview Sales had actual or constructive knowledge of how Nancy Lanza would choose to store her firearm in her home or that she would share the firearm with her adult son. And even if such knowledge had been imparted to Riverview Sales, it would not have put Riverview Sales on notice that the firearm would be used in a manner involving an unreasonable risk of injury.

Schernekau v. McNabb, 220 Ga. App. 772 (1996), was a simple negligence case in which a parent was alleged to be liable for permitting her minor son to bring an air rifle on a camping trip with 12 other children. The court reversed summary judgment for the parent, and held that the parent "in the exercise of ordinary prudence, might have foreseen that some injurious consequence could ensue from permitting her son to bring a dangerous weapon on a campout with many young children and limited adult supervision." *Id* at 773. Again, Plaintiffs here plead nothing to suggest that Riverview Sales had reason to believe the firearm it lawfully sold to Nancy Lanza would likely be used by Lanza or anyone else to cause injury.

In *Earsing v. Nelson*, 629 N.Y.S.2d 563 (1995), an air rifle was illegally sold to a 13-year old child in violation of a New York criminal statute. The court permitted a cause of action to proceed against the seller based on its violation of the criminal statute, and also permitted a negligent entrustment action to proceed because the court found that general knowledge of a child's propensity to use a firearm improperly could be imputed to the seller. *Id.* at 570. In

contrast, the sale of the firearm to Nancy Lanza was lawful, and there is no basis on which to impute knowledge to Riverview Sales that Nancy Lanza was in a category of persons who are likely to use firearms improperly. To the contrary, the opposite conclusion about Nancy Lanza must be drawn.

Nancy Lanza did not fall into any category of prohibited firearms purchasers under federal and state law. To the extent that any knowledge can be imputed to Riverview Sales regarding the risk posed by her ownership of the firearm, the knowledge imputed should be that she did not pose a likely risk of harm to others or herself. *See United States v. Orellana*, 405 F.3d 360 (5th Cir. 2005) (the purpose of Gun Control Act § 922(g) is to prohibit persons from possessing firearms within defined groups that have been selected for disqualification because they are typically considered dangerous or irresponsible); *cf. Greeley v. Cunningham*, 116 Conn. 515, 521, 165 A. 678, 680 (1933) (statute permitting unlicensed persons over 16-years old to drive in the company of a licensed driver is "legislative affirmance that an unlicensed person operating an automobile under the conditions specified . . . is not to be deemed incompetent . . .").

In sum, Plaintiffs do not have a cause of action against Riverview Sales that fits within the PLCAA's definition of negligent entrustment. As a result, Riverview Sales is improperly joined and Plaintiffs' Supplemental Motion to Remand should be denied.

IV. Plaintiffs' CUTPA Claim against Riverview Sales Is Barred.

Plaintiffs again misapply *Pampillonia* and argue that, in the absence of a Connecticut state court decision directly on point, this Court cannot rule on whether Congress intended state unfair trade practices statutes, such as CUTPA, to serve as predicate statutes under PLCAA Section 7903(5)(A)(iii). However, this Court need not wait for a Connecticut state court to address the issue of whether CUTPA is the type of statute Congress had in mind when it created the exception

to PLCAA immunity for causes of action against a seller who "knowingly violates a State or Federal statute applicable to the sale or marketing of firearms." 15 U.S.C. § 7903(5)(A)(iii). *See Charlot*, 628 F.Supp.2d at 180 (state court construction of the PLCAA "is not controlling precedent for this Court."). Whether Congress intended for statutes like CUTPA to serve as predicate statutes under Section 7903(5)(A)(iii) is squarely a question for this Court to answer. (*See* Argument § I, *supra*.)

A. The Second Circuit's Decision in *City of New York* Compels Rejection of CUTPA as a Predicate Statute under PLCAA Section 7903(5)(A)(iii).

Plaintiffs' attempt to turn the Second Circuit's decision in *City of New York v. Beretta* into precedent supporting recognition of CUTPA as a predicate statute under Section 7903(5)(A)(iii) is unavailing. The nuisance statute at issue in *City of New York*—New York Penal Law § 240.45—prohibits conduct that endangers the public and is alleged to be "unreasonable under all the circumstances." The court, relying on the overall purpose of the PLCAA, well-established canons of statutory construction and legislative history, held that the New York nuisance statute did not "fall within the predicate exception to the claim restricting provisions of the PLCAA." *City of New York*, 524 F.3d at 399. In *dicta*, the court stated that predicate statutes are those that (1) expressly regulate firearms or have been applied to the sale or marketing of firearms or (2) clearly can be said to implicate the purchase and sale of firearms. 524 F.3d at 403.

The court's reasoning was straightforward: the New York nuisance statute was not the type of statute Congress intended to serve as a predicate statute because it neither "expressly regulat[ed]" nor could "clearly . . . be said to implicate" the sale or marketing of firearms. 524 F.3d at 403. The court expressly rejected an interpretation of "applicable to" to mean "capable of being applied" because it was a "too-broad reading of the predicate exception." *Id.* at 402. Such an interpretation would be an "absurdity" because it "would allow the predicate exception to swallow

the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets." *Id.* at 401-02.

An analysis of whether CUTPA can serve as a predicate statute under Section 7903(5)(A)(iii) should be identical to the analysis performed in *City of New York* with regard to the New York nuisance statute. Both statutes are statutes of general applicability that are capable of being applied to a broad spectrum of impermissible conduct. CUTPA broadly focuses on "unfair or deceptive" conduct. Conn. Gen. Stat. § 42-110b(a). The New York nuisance statute is equally broad, prohibiting "conduct . . . unreasonable under all the circumstances." N.Y. Penal Law § 240.45(1). Neither statute expressly references the sale or marketing of firearms. And although the court in *City of New York* stated in *dicta* that a predicate statute need not necessarily "expressly refer to the firearms industry," 524 F.3d at 400, it held that "construing the term 'applicable to' to mean statutes that clearly can be said to regulate the firearms industry more accurately reflects the intent of Congress." *Id.* at 401. The court had little difficulty finding that Section 7903(5)(A)(iii) did "not encompass" the New York nuisance statute. *Id.* at 403.

The Plaintiffs agree that *City of New York* narrows "the scope" of statutes that can serve as predicates under Section 7903(5)(A)(iii): "City of New York's rejection of the statutory nuisance claim . . . does" narrow "the scope" of statutes that "clearly implicate" the sale or marketing of firearms. (Pls.' Memo at 36.) But after making this concession, Plaintiffs incorrectly assert that in *City of New York* "[t]he statutory nuisance claim did not fail because the statute in issue was generally inapplicable; it failed because New York high courts had already indicated their disapproval of such a claim." (*Id.*) Plaintiffs submit this unfounded reading of *City of New York* to convince the Court that it cannot reject CUTPA as a predicate statute because a Connecticut state court has not done so. Again, Plaintiffs are wrong.

The court in *City of New York* did not look to New York state court decisions to conclude that the New York nuisance statute was not "applicable to the sale or marketing of firearms" under Section 7903(5)(A)(iii). Rather, the court rejected the City's arguments based on consideration of the overall purpose of the PLCAA, well-established canons of statutory construction and legislative history. *City of New York*, 524 F.3d at 400-04. But even if the court had looked to New York state court decisions addressing whether the nuisance statute could be applied to the otherwise lawful business practices of firearm manufacturers and sellers, it would have come up empty. Contrary to Plaintiffs' assertion, there was no "context of prior decisions" by New York state courts addressing the viability of a cause of action against firearm manufacturers and sellers under the state nuisance statute. (*See* Pls.' Memo at 36, n. 16.)

In Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222 (N.Y. 2001), the court rejected imposition of a common law duty on the part of firearm manufacturers and distributors to exercise ordinary care in marketing and distributing handguns. Plaintiffs did not plead a statutory nuisance action and the court did not address the state nuisance statute. Similarly, in *People v. Sturm, Ruger*, 761 N.Y.S.2d 192 (N.Y.App.2003), the plaintiffs had not pleaded a statutory nuisance claim, and application of the state nuisance statute to the defendants' alleged business activities was not considered by the court. Rather, dismissal of a common law public nuisance action was affirmed. Thus, Plaintiffs' assertion that the Second Circuit in *City of New York* deferred (or even could have deferred) to New York state court decisions rejecting statutory nuisance claims against firearm industry members is meritless.

B. CUTPA Is Not a Statute that Expressly Regulates or Clearly Implicates the Sale or Marketing of Firearms.

Congress included examples of predicate statutes in Section 7903(5)(A)(iii), which, if knowingly violated by a firearms seller, could be actionable. The examples include statutes

dictating the records to be kept by sellers with respect to firearm sales and prohibiting seller complicity in illegal firearm sales. 15 U.S.C. §§ 7903(5)(B)(iii)(I) & (II). The court in *City of New York* relied upon these examples in its application of two canons of statutory construction: *noscitur a sociis* (meaning of doubtful terms may be determined by reference to related words or phrases) and *ejusdem generis* (general words should be limited to things similar to those specifically enumerated). *City of New York*, 524 F.3d at 401. The same analysis dictates that state unfair trade practice statutes, such as CUTPA, should not serve as predicate statutes under Section 7903(5)(B)(iii).[17]

Plaintiffs state that the "category" of statutes that can "clearly be said to implicate" the sale or marketing of firearms "is broad." (Pls.' Memo at 34.) It is true that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws." 15 U.S.C. § 7901(a)(4); *see, e.g.*, 18 U.S.C. § 921 *et seq.* (Gun Control Act of 1968) and regulations promulgated thereunder, 27 CFR Part 478 (Commerce in Firearms and Ammunition); 26 U.S.C. § 5801 *et seq.* (National Firearms Act) and regulations promulgated thereunder, 27 CFR Part 479 (Machine Guns, Destructive Devices and Certain Other Firearms); 28 CFR Part 25 (National Instant Criminal Background Check System); Conn. Gen. Stat. § 29-28 *et seq.* (permit for sale at retail of pistol or revolver); Conn. Gen. Stat. § 29-33 (sale, delivery or transfer of pistols and revolvers); Conn. Gen. Stat. § 29-37a (sale or delivery at retail of firearm other than pistol or revolver); Municipal Code of Hartford, Ch. 21, Art.

[17] The example provided in Section 7903(5)(B)(iii)(II) specifically refers to aiding and abetting violations of Sections 922(g) and (n) of the Gun Control Act, which identify the categories of persons who are prohibited from purchasing firearms. The example provided in Section 7903(5)(B)(iii)(I) sets forth language found in Sections 922(m) of the Gun Control Act, which makes it unlawful for sellers to knowingly fail to maintain required record of firearm sales or make false entries in those records.

II (pistol permits, sale or transfer of pistols and revolvers, and permit to carry pistols or revolver). The existence of these myriad laws regarding the manufacture, sale and ownership of firearms was not lost on Congress. Although many of these laws do not expressly reference the "sale or marketing" of firearms, many can be said to "implicate" the sales or marketing of firearms by, for example, dictating what types of firearms may be lawfully possessed and who may lawfully possess them. These were the laws Congress had in mind as predicate statutes.[18]

Plaintiffs argue that the PLCAA's legislative history is "not useful or reliable" because it does not support their position. (Pls.' Memo at 18-19.) The Ninth Circuit in *Ileto v. Glock, Inc.*, 565 F.3d 126, 1136-37 (9th Cir. 2009), like the Second Circuit in *City of New York*, was "mindful of the limited persuasive values of remarks" by individual legislators. *See City of New York*, 524 F.3d at 402. The court in *Ileto* nevertheless found "the unanimously expressed understanding" of legislators that "sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations" was in "complete harmony" with the purpose and text of the PLCAA, *id.* at 1137:

> We make two general observations from our review of the extensive legislative history of the PLCAA. First, all of the congressional speakers' statements concerning the scope of the PLCAA reflected the understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations. *See, e.g.*, 151 Cong. Rec. S9087-01 (statement of Sen. Craig) ("This bill does not shield [those who] . . . have violated existing law . . . and I am referring to the Federal firearms laws."); *id.* S9217-02 (statement of Sen. Hutchison) ("[Lawsuits] would also be allowed where there is a knowing violation of a firearms law."); *id.* (statement of Sen. Craig reading a *Wall Street Journal* article) ("The gun makers . . . would continue to face civil suits for defective products or for violating sales

[18] The dictionary definition of "implicate" is "to be involve[d] in the nature or operation of something." WEBSTER'S NEW COLLEGIATE DICTIONARY, 605 (1987). It is difficult to envision a statute being "applicable to the sale or marketing of firearms" without some aspect of firearms-related activity being inherent in the statute's purpose or basic to its operation.

> regulations."); *id.* (statement of Sen. Reed in opposition to the PLCAA) ("We will let [plaintiffs] proceed with their suit if there is a criminal violation or a statutory violation, a violation of regulations, but for the vast number of other responsibilities we owe to each other, that are defined for the civil law, one will not have the opportunity to go to court."); *id.* S8927-01 (statement of Sen. Reed) (stating that the PLCAA would not apply to violations of "statutes related to the sale or manufacturing of a gun"); *id.* S9246-02 (statement of Sen. Santorum) ("This bill provides carefully tailored protections that continue to allow legitimate suits based on knowing violations of Federal or State law related to gun sales.").

Id. at 1136; *see also City of New York*, 524 F.3d at 402-03 ("[W]e think that the [congressmen's] statements nevertheless support the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry, in light of the statements' consistency amongst each other and with the general language of the statute itself.").

Notably, Plaintiffs do not provide *any* examples of statutes that can "clearly be said to implicate" the sale or marketing of firearms that do not specifically reference firearms or have the regulation of firearms as their purpose. The suggestion that a statute is "capable of being applied" to the sale or marketing of firearms is insufficient to bring a cause of action within the predicate exception. *City of New York*, 524 F.3d at 402 (finding this "a far too broad reading of the predicate exception"); *accord Ileto*, 565 F.3d at 1126 ("Indeed, if any statute that 'could be applied' to the sales and manufacturing firearms qualified as a predicate statute, there would be no need to list examples at all."). There is simply no way to shoehorn CUTPA into the Section 7903(5)(A)(iii) exception as a statute that "clearly . . . implicates" firearms sales or marketing without ignoring binding Second Circuit precedent and congressional intent. *See, e.g.*, *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 171 (D.C.App. 2008) ("Shoehorning, as it were, into the predicate exception [the D.C. Assault Weapons Manufacturing Strict Liability Act] that, at bottom,

simply shifts the cost of injuries resulting from the discharge of lawfully manufactured and distributed firearms would, in our view, 'frustrate Congress's clear intention.'").[19]

Nevertheless, Plaintiffs argue that CUTPA "clearly . . . can be said to implicate . . . the sale and marketing of firearms," citing only *Salomonson v. Billistics, Inc.*, No. CV-88-508292, 1991 Conn. Super. LEXIS 2231 (Conn. Super. Sept. 27, 1991) as support. (Pls.' Memo at 38.) *Salomonson*, however, was a case involving disappointed commercial expectations of the plaintiff, a firearms collector, who entered into a contract with the defendant to have certain remanufacturing work performed on his firearms. *Salomonson*, 1991 Conn. Super. LEXIS 2231, at *25. The defendant was also to prepare and submit applications to the federal government for approval to do the work and transfer the firearms back to the plaintiff when the work was completed. *Id.* The defendant failed to deliver timely the completed firearms to the plaintiff and made deceptive statements regarding the status of government approval. *Id.* An Attorney Trial Judge Referee found the defendant's failure to deal in good faith with the plaintiff was oppressive and violated CUTPA. *Id.* at *37. *Salomonson* merely stands for the proposition that CUTPA is capable of

[19] Plaintiffs' reliance on *City of Gary v. Smith & Wesson*, 875 N.E.2d 422 (Ind. App. 2007) is misplaced. (Pls.' Memo at 40.) *In City of Gary*, the Indiana appellate court found that the Indiana nuisance statute was "applicable" to the sale or marketing of firearms and could serve as a predicate statute under § 7903(5)(A)(iii), but did so for reasons not present here. The court's ruling was based on a pre-PLCAA decision in the case by the Indiana Supreme Court, which held that defendants' alleged violations of Indiana statutes "specifically applicable to the sale or marketing of firearms" gave rise to a statutory public nuisance claim. *Id.* at 430-32 ("Thus, even assuming that the PLCAA requires an underlying violation of a statute directly applicable to the sale or marketing of a firearm, the City has alleged such violations in their complaint.") In contrast, Plaintiffs here have not alleged that Riverview Sales violated any laws directly applicable to the sale or marketing of firearms. Recognizing a predicate exception claim based only on an alleged violation of a statute of general application like CUTPA would be inappropriate. Secondly, the court in *City of Gary* relied on an interpretation of "applicable" by the district court in *City of New York* to mean "capable of being applied." *Id.* at 431. That interpretation, however, has since been rejected by the Second Circuit as "a far too-broad reading of the predicate exception." *City of New York*, 524 F.3d at 384.

being applied to a specific commercial transaction involving goods in which a consumer suffers an ascertainable loss of money or property. That firearms were the goods at issue was irrelevant to the court's decision. *Salomonson* does not stand for the broader proposition that CUTPA, in and of itself, "clearly can be said to implicate" the sale or marketing of firearms. *See City of New York*, 524 F.3d at 403.

In *dicta*, the court in *City of New York* "declin[ed] to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 399. The court's *dicta*, however, should be viewed in light of the court's holding, in which it "foreclose[d] the possibility" that the New York state nuisance statute could serve as a predicate statute under Section 7903(5)(A)(iii). The court did not provide any further guidance on what other type of "statute of general applicability" might qualify as a predicate statute, what "circumstances" might exist to conclude that Congress intended for such a statute to serve as a predicate, or whether the "specific conduct that the City complain[ed] of" led to the court's statement. Without further guidance, the court's *dicta* is just that—a statement that is not binding in subsequent cases. *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) (dictum not binding in future cases).

C. Plaintiffs' Characterization of Riverview Sales' Conduct Proves that Congress Did Not Intend for a Violation of CUTPA to be an Exception to PLCAA Immunity.

Plaintiffs' argument that Riverview Sales' lawful sale of the firearm to Nancy Lanza was "immoral, unethical, and unscrupulous" (Pls.' Memo at 39) only proves the point that statutes like CUTPA were not what Congress had in mind as predicate statutes under Section 7903(5)(B)(iii). Virtually any conduct can be alleged to be "immoral, unethical or unscrupulous." *Ventres v.*

Goodspeed Airport, LLC, 275 Conn. 105, 155 (2005). If such an allegation against a firearm seller is all that is required to circumvent congressional intent to protect sellers from claims arising from the criminal use of firearms, the PLCAA becomes meaningless. Firearm manufacturers and sellers will find themselves immersed in litigation based only on an allegation that what they do is morally wrong and causes harm. Moreover, a judicial finding against a firearm manufacturer or seller in such a case would have serious constitutional consequences. *See District of Columbia v. Heller*, 554 U.S. 570 (2008) (the Second Amendment confers an individual right to keep and bear arms). The PLCAA was enacted, in part, "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting and competitive or recreational target shooting." 15 U.S.C. § 7901(b)(2).

Plaintiffs' argument that the sale of the firearm to Nancy Lanza "violated the public policy of the State of Connecticut" (Pls.' Memo at 39) makes no sense at all. Connecticut policy in 2010 regarding the sale and possession of semiautomatic rifles, such as the XM-15, was embodied in Connecticut General Statutes Sections 53-202a *et seq.*, which then made it legal for Riverview Sales to sell the firearm to Nancy Lanza. The law specifically listed and described firearms considered to be "assault weapons" that could not be sold in Connecticut. Conn. Gen. Stat. § 53-202a(a). The firearm sold by Riverview Sales was not among the prohibited firearms. *See Shew v. Malloy*, 994 F.Supp.2d 234, 238-41 (D.Conn. 2014).

Public policy is also embodied in the Gun Control Act, including Section 922(t), which specifies operation of the national instant criminal background check system, and authorizes firearm sales to persons who are submitted for a background check and approved to make the purchase. Within constitutional boundaries, our legislative branches of government—not our courts—are charged with determining who may purchase firearms and what types of firearms they

may keep in their homes for lawful purposes.

D. Plaintiffs Cannot Allege a CUTPA Claim.

The "critical issue to be decided is whether the district court had subject matter jurisdiction at any time before it rendered judgment." *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 356 (2d Cir. 2011) (citation omitted) (affirming that in-state defendants were "fraudulently joined" and remand was not required, and affirming summary judgment for removing defendant). All reasons why Plaintiffs have no reasonable basis for a claim against Riverview Sales are properly presented to the Court at this time, so long as the focus remains on why diversity of citizenship exists under the fraudulent joinder analysis. *See Whitaker v. American Telecasting, Inc.*, 261 F.3d 196, 205 (2d Cir. 2001) (finding it proper to consider additional argument in support of timely removal based on diversity jurisdiction when raised in response to motion to remand). [20]

Plaintiffs' claims fail under Connecticut law, even if CUTPA were found to be a predicate statute. First, Plaintiffs are not within the categories of persons who can maintain an action under CUTPA: (1) consumers, (2) competitors, or (3) other business persons with a consumer or commercial nexus to the defendant. *Ventres*, 275 Conn. at 155. Plaintiffs do not allege (nor could they) that they are consumers, competitors or "other business persons" with a recognized consumer or commercial nexus to Riverview Sales.

Second, Plaintiffs do not seek the sort of relief CUTPA affords. CUTPA may be used to

[20] Plaintiffs address CUTPA substantively in their Motion to Remand and argue that it broadly protects them from Riverview Sales' unfair commercial activities. (Pls.' Memo at 37-38) The Remington Defendants are free to respond to Plaintiffs' arguments. In any event, Plaintiffs mistakenly contend that the Remington Defendants did not "challenge[] the substantive pleading of the elements of CUTPA" in its Notice of Removal. (Pls.' Memo at 39, n. 18.) But the Remington Defendants stated in their Notice of Removal that CUTPA only creates an action to recover an "ascertainable amount of money or property" resulting from an unfair or deceptive business practice and thus clearly questioned its use to recover wrongful death and personal injury damages. (DE 1, NOR at ¶ 27 (quoting CUTPA, Conn. Gen. Stat. § 42-110g).)

recover damages for financial injury, but not damages flowing from personal injury or wrongful death. *See Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 129-30 (2003); *cf. Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 34 (1997) (although entrepreneurial and commercial aspects of medical profession are covered by CUTPA, medical negligence claims for personal injury damages are not covered.); *see also Lafountain v. Smith & Nephew*, 2015 U.S. Dist. LEXIS 68717 (D. Conn. May 28, 2015) (Eginton, J.) (denying plaintiff's motion to remand and finding that in-state defendant was fraudulently joined under *Pampillonia* standard because plaintiff's allegations were not within the category of claims covered by CUTPA). CUTPA does not encompass Plaintiffs' wrongful death and personal injury claims.

Finally, Plaintiffs' CUTPA claims are time-barred by the applicable three-year statute of limitations. Conn. Gen. Stat. § 42-110g(f). The limitation period began to run upon the occurrence of the alleged violation, not the discovery of the alleged practice. *Independence Ins., Service Corp. v. Hartford Life & Ins., Co.*, 472 F.Supp.2d. 183, 190 (D. Conn. 2007). Plaintiffs allege Riverview Sales sold the rifle to Nancy Lanza in March 2010, more than three years before filing this lawsuit in December 2014. (Compl. at ¶ 153.) *See also Lafountain*, 2015 U.S. Dist. LEXIS 68717, at *3 (denying plaintiff's motion to remand and finding that in-state defendant was fraudulently joined under *Pampillonia* standard because negligence claim was barred by the applicable Connecticut statute of limitations).

CONCLUSION

There is no reasonable basis for a cause of action against Riverview Sales under the facts alleged in Plaintiffs' Complaint. Thus, the case pleaded against Riverview Sales is "qualified civil liability action" that is barred under the PLCAA. Riverview Sales has therefore been improperly joined, and the Court has jurisdiction over this case based on the complete diversity of the

remaining parties. Plaintiffs' Supplemental Motion to Remand should be denied.

Respectfully submitted,

/s/ *James B. Vogts*
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

Jonathan P. Whitcomb (CT15014) (jwhitcomb@dmoc.com)
Matthew C. Wagner (CT25926) (mwagner@dmoc.com)
Diserio Martin O'Connor & Castiglioni LLP
One Atlantic Street
Stamford, Connecticut 06901
(203) 358-0800

James B. Vogts (phv07263) (jvogts@smbtrials.com)
Andrew A. Lothson (phv07262) (alothson@smbtrials.com)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
(312) 321-9100

Attorneys for Defendants Remington Arms Company, LLC, and Remington Outdoor Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2015, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system.

Joshua D. Koskoff
Alinor Sterling
Koskoff, Koskoff & Bieder, P.C.
Bridgeport, CT 06604
Tel: 203-336-4421
Fax: 203-368-3244
jkoskoff@koskoff.com
asterling@koskoff.com
Attorneys for Plaintiffs

Christopher Renzulli
Scott Charles Allan
Renzulli Law Firm, LLP
81 Main Street, Suite 508
White Plains, NY 10601
Tel: 914-285-0700
Fax: 914-285-1213
crenzulli@renzullilaw.com
sallan@renzullilaw.com
Attorneys for Defendants Camfour, Inc. and Camfour Holding, Inc.

Michael Ryan Patrick
Patrick, LLC
6 Landmark Square, Fourth Floor
Stamford, CT 06901
Tel: 203-541-0355
Fax: 203-724-2393
Michael@pllclaw.com
Attorney for Defendants Riverview Sales, Inc. and David LaGuercia

/s/ James B. Vogts
One of the Attorneys for Defendants,
Remington Arms Company, LLC, and
Remington Outdoor Company, Inc.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	)	
Plaintiffs	)	**NO. 3:15 cv 00068 RNC**
V.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A FREEDOM GROUP, INC., A/K/A REMINGTON OUTDOOR GROUP, INC., ET AL	)	**JUNE 15, 2015**
Defendants	)	

PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO RESPOND TO MEMORANDUM IN OPPOSITION TO SUPPLEMENTAL MOTION TO REMAND, ON CONSENT

Pursuant to Local Civil Rule 7(b), plaintiffs respectfully move for an extension of time in which to respond to the Memorandum in Opposition to plaintiffs' Supplemental Motion to Remand filed by the defendants, Remington Arms Company, LLC, and Remington Outdoor Company, Inc. Plaintiffs seek an extension of two days (from June 17, 2015, to June 19, 2015) due to an unexpected change in briefing schedule in a matter pending before the Connecticut Supreme Court, in which counsel for plaintiffs is writing an amicus brief on behalf of the Connecticut Trial Lawyers Association. Plaintiffs' counsel has made inquiry to counsel for all defendants and there is no objection to the requested extension.

In support of this Motion, plaintiffs represent as follows:

1. This case was removed to this Court on January 14, 2015.

2. Plaintiffs filed a Supplemental Motion to Remand on May 13, 2015 (Dkt. No. 46), which was amended by Notice on May 18, 2015 (Dkt. No. 47).

3. Defendants Remington Arms Company, LLC, and Remington Outdoor Company, Inc. filed a Memorandum in Opposition to the Supplemental Motion to Remand on June 3, 2015 (Dkt. No. 49).

4. Plaintiffs intend to file a Reply to the Memorandum in Opposition. Pursuant to Local Rule 7(d), plaintiffs' Reply is due June 17, 2015.

5. Undersigned plaintiffs' counsel is drafting an amicus brief on behalf of the Connecticut Trial Lawyers Association in a case currently before the Supreme Court, *Cefaratti v. Aranow* (No. SC 19443). On June 12, 2015, the deadline for the amicus brief was moved – by order of the Court – from June 19, 2015, to June 17, 2015.

6. In light of this modified briefing schedule in *Cefaratti*, which now conflicts with the deadline for plaintiffs' Reply in this case, plaintiffs seek a two-day extension in which to file their Reply.

7. Counsel for defendants have no objection to the requested extension.

For the above reasons, plaintiffs respectfully request that the Court grant this Motion and extend the deadline for filing their Reply to June 19, 2015.

DATED: June 15, 2015

Respectfully submitted,

By **/s/ Alinor C. Sterling (CT17207)**
ALINOR C. STERLING, CT17207
JOSHUA D. KOSKOFF, CT15619
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
asterling@koskoff.com
jkoskoff@koskoff.com
Telephone: (203) 336-4421
Fax: (203) 368-3244

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2015, a copy of the foregoing Motion was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing under the court's CM/ECF System.

/s/ Alinor C. Sterling (CT17207)
ALINOR C. STERLING, CT17207
JOSHUA D. KOSKOFF, CT15619

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, *et al.*	)	
Plaintiffs,	)	Civil Action No. 3:15-cv-68 (RNC)
VS.	)	
BUSHMASTER FIREARMS INTERNATIONAL, LLC a/k/a/ FREEDOM GROUP, INC. a/k/a/ REMINGTON OUTDOOR GROUP, INC., *et al.*	)	June 19, 2015
Defendants.	)	

REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO REMAND

The issue before the Court, framed now by two rounds of briefing is this: the Bushmaster Defendants seek preemptive federal adjudication of their federal defense, using fraudulent joinder as a pretext to obtain a ruling in this Court. They assert that the Court should determine questions of first impression concerning the interpretation of PLCAA and the scope of Connecticut's negligent entrustment and CUTPA causes of action, rather than permitting a state court to do so. This argument is fundamentally offensive to our federalist system: it ignores the well-pleaded complaint rule, the sovereignty of Connecticut's courts, principles of comity, and the dictates of the Second Circuit's fraudulent joinder test. It is also not a proper basis on which to decide jurisdiction. The Court must remand to Connecticut's courts.

I. STATE COURTS ARE DEEMED COMPETENT TO INTERPRET FEDERAL STATUTES LIKE PLCAA.

The Bushmaster Defendants insist that this Court must construe PLCAA. They point to PLCAA's preemptive effect and to federal cases that have construed PLCAA *after* jurisdiction is

established. Def. Br. at 2-3, 5.[1] These decisions do not stand for the proposition that the Court can resolve contested legal issues that belong in the Connecticut courts *in order to establish its jurisdiction*. *Cf. Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 575-76 (5th Cir. 2004) (en banc) (use of fraudulent joinder to obtain preemptive federal adjudication of federal defense is a "circumvention of the well-pleaded complaint rule").

Defendants also imply that since PLCAA is a federal statute, this Court is better suited to decide its meaning. That contention cannot coexist with principles of federalism and comity. "[T]he state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so." *Defiance Water Co. v. City of Defiance*, 191 U.S. 184, 193-94 (1903); *id.* at 194 ("[T]he presumption is in all cases that the state courts will do what the ... laws of the United States require."); *see generally Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("'[C]omity' includes . . . the belief that the National Government will fare best if the States ... are left free to perform their separate functions[.]").

Johnson v. American Towers, LLC, 781 F.3d 693 (4th Cir. 2015), *see* Def. Br. at 4-6, is inapposite because it concerns primarily federal question jurisdiction. In *Johnson*, the removing defendant argued there was original jurisdiction due to complete preemption of the plaintiffs' claims by the Federal Communications Act and diversity jurisdiction arising out of fraudulent joinder. The court first construed the FCA to determine whether there was federal question jurisdiction and found there was not. It then extended that construction to find that the claims against the in-state defendant were preempted so as to give rise to diversity. *Johnson*'s extension

[1] Defendants cite cases that simply do not help them, including cases in which there was no claim of fraudulent joinder, Def. Br. at 2 (relying on *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008) and others); cases noting that a federal court is not bound by a state court's construction of a federal statute, Def. Br. at 3 (relying on *Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009) and others); and cases describing preemption, Def. Br. at 5 (relying on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and others).

of the jurisdictional inquiry, while questionable, should have no persuasive significance for this Court because the defendants in *Johnson* had a good faith basis for raising the FCA in the context of federal question jurisdiction.[2]

Both *Cockrell* and the *Pampillonia* test yield the same result: the construction of PLCAA belongs in state court. *Chesapeake & O.R. Co. v. Cockrell*, 232 U.S. 146 (1914) (fraudulent joinder should not be used to obtain preemptive federal ruling on common defense);[3] *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460-61 (2d Cir. 1998) (only if there is "no possibility" that plaintiffs "can state a cause of action against the non-diverse defendant in state court" can fraudulent joinder be established). None of the federal courts of appeals has closely examined PLCAA's negligent entrustment provision, and the Second and Ninth Circuits have reached different conclusions concerning the predicate provision. If this Court were to determine the application of PLCAA to this case, it would engage in the same statutory construction analysis a state court would follow, with exactly the same guidance from the statutory text and canons of construction. The question is *not* whether this Court might reach a "better" ruling concerning the meaning of PLCAA.[4] *See CUSA LLC v. Travelers Co., Inc.*, 2007 WL 3046270, at *3 (D. Conn. Oct. 15, 2007) (Hall, J.) ("[T]he plaintiff's claims must be judged by how they would fare in state court, not by how they would fare in *federal* court.") (emphasis in original).

---

[2] The Bushmaster Defendants do *not* claim that PLCAA confers federal question jurisdiction.
[3] The Bushmaster Defendants assert that in *Pelman ex rel. Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 516 (S.D.N.Y. 2003), the court "had the opportunity but declined to adopt the [common defense] rule." Def. Br. at 6. That case does not involve a true common defense; the ruling on the in-state defendants' claims did not resolve the remaining claims. In addition, it appears the common defense rule was not raised as the court's opinion makes no mention of it.
[4] A Connecticut court will be guided by federal precedent but is empowered and entitled to reach its own principled construction of PLCAA. *See Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013) ("[T]he views of the federal courts of appeals do not bind [a state court][.]"); *compare Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 (Ind. App. 2007) ("[T]he predicate exception is unambiguous."), *with City of New York*, 524 F.3d at 401 (finding "applicable" as used in predicate provision to be ambiguous).

If there is *any possible* reading of PLCAA under which plaintiffs prevail – and the reasonable reading of PLCAA is that we do – federalism and comity require the Court to remand.

II. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT PLCAA BARS PLAINTIFFS' NEGLIGENT ENTRUSTMENT CLAIMS.

The Bushmaster Defendants have never been able to articulate why the definition of negligent entrustment in PLCAA precludes a claim where the person to whom the firearm was entrusted did not personally cause the harm. Their latest brief is no exception.

In their first round of briefing, defendants relied on the text of PLCAA to argue that there is only one plausible interpretation of the word "use" in the negligent entrustment provision – namely, to discharge or threaten to discharge. As set forth in plaintiffs' Supplemental Motion to Remand, that interpretation is undermined by three canons of statutory interpretation: the plain meaning of "use" (which is not, according to any dictionary, synonymous with "discharge"); the statutory context (most notably Congress' use of "discharge" and "unlawful misuse" elsewhere in PLCAA); and the "old soil" attached to the word "use" from the Restatement section on negligent entrustment (which Congress borrowed in drafting PLCAA and which has long been held to encompass a foreseeable, successive entrustment).

A. Defendants' Speculation as to Congressional Intent is Unavailing.

In their Supplemental Motion to Remand, plaintiffs contended that defendants' construction of "use" to mean "discharge" required an answer to at least two questions: Why would Congress have said "use" to mean "discharge" when Congress *did* say "discharge" in describing another protected cause of action? *See* Dkt. No. 47-1 at 18. And why would Congress have said, "use in a manner involving an unreasonable risk of physical injury," if what they meant was the far narrower, "use to *cause* injury?" *See id.* at 16. Defendants' brief does not even attempt to respond to either question.

Instead, defendants pivot to argue that "discharge" must be what Congress *intended*, even if it did not say so. *See* Def. Br. at 19 ("[I]n light of the PLCAA's purpose to limit claims against firearm sellers, a firearm 'use' should be interpreted to mean discharge or a threat of discharge."); *see also id.* at 20-21.[5] The evidence of this intent, according to defendants, is the parade of horribles that would result if plaintiffs' claim is allowed to proceed. *See* Def. Br. at 18 (arguing that if plaintiffs can proceed, the "lawful sale of any firearm, which later changes hands and is used in crime, could be alleged to have been negligently entrusted"); *id.* ("Permitting negligent entrustment actions arising from the criminal use of a firearm by persons who are once, twice or three times removed from the seller's initial sale would destroy … PLCAA.").

As an initial matter, plaintiffs' claims are not nearly as broad as defendants suggest. It is confined to a particular type of weapon and a particular population of users; it alleges notice to Riverview of the specific risks associated with selling that particular type of weapon to that particular population of users; and – like any claim arising in negligence – it is dependent on a finding of proximate cause, which "implicitly includes a limitation on the defendant's liability to foreseeable bounds." *Cammarota v. Guerrera*, 148 Conn. App. 743, 755 (2014).[6]

---

[5] There is an obvious problem with this argument: defendants seek to use PLCAA's clear purpose to preempt some claims as proof that the scope of an *explicitly preserved* claim – negligent entrustment – should also be read in favor of preemption. The essence of this argument is that, because PLCAA abrogates certain claims, *every* dispute as to the meaning of PLCAA must be resolved in favor of preemption. On the contrary, "[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 127 (2d Cir. 2001).

[6] This is also why defendants are incorrect when they assert that plaintiffs' allegations amount to a "strict liability claim." Def. Br. at 12. Plaintiffs make no allegation that the XM15-E2S was defective – indeed, it functioned precisely as intended (that is, as a mass casualty weapon). Moreover, plaintiffs do not assert that Riverview should be liable simply because the XM15-E2S is an unreasonably dangerous product to sell – indeed, it is an ideally dangerous product for a large consumer base (that is, military and law enforcement personnel). "[T]he essence of the tort" of negligent entrustment, by comparison, implicates "circumstances where an entrustor

Indeed, defendants' argument amounts to little more than a lament that the implications of plaintiffs' claims are distasteful to them and that, since PLCAA was enacted to afford protections to the gun industry, the Court should assume Congress would not endorse such a claim. This is not a recognized canon of statutory interpretation. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 109 (2007) (Scalia, J., dissenting) ("[W]e never see fit to pronounce upon what we think Congress *meant* a statute to say, and what we think sound policy would *counsel* it to say, before considering what it *does* say."); *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

B. Defendants' Attack on the Relevance of Section 390 of the Restatement Fails.

It is plain that PLCAA employs the word "use" in a manner that is nearly identical to Section 390 of the Restatement. *Compare* 15 U.S.C. § 7903(5)(B) (entrustee likely to "use [the firearm] in a manner involving unreasonable risk of physical injury to the person or others"), *with* Restatement (Second) of Torts § 390 (entrustee likely to "use [the chattel] in a manner involving unreasonable risk of physical harm to himself and others"). And, just as the plain meaning of "use" in PLCAA is not "discharge," courts interpreting Section 390 have not interpreted "use" to mean "use to cause harm." Rather, they have given the term its ordinary meaning, which includes foreseeable, successive entrustments. *E.g.*, *Rios v. Smith*, 95 N.Y.2d 647, 653 (2001) (finding evidence legally sufficient for the jury to have found defendant liable

---

should know that there is cause why a chattel ought not to be entrusted to another." *Short v. Ross*, 2013 WL 1111820, at *7 (Conn. Super. Ct. Feb. 26, 2013). Plaintiffs have amply alleged that such circumstances existed when Riverview sold the XM15-E2S to Nancy Lanza. *See* Dkt. No. 47-1 at 26-28 (summarizing allegations within Connecticut's common law negligent entrustment framework).

for negligently entrusting ATVs to his son, "whose *use of the vehicles involved lending* one of the ATVs" to a friend who crashed and injured the plaintiff) (emphasis supplied).

Defendants argue that the congruence between Section 390 and PLCAA is "not complete" and that any inference of Congressional intent to borrow the common law meaning is "merely speculation." Def. Br. at 16. Yet they ignore the fact that courts interpreting PLCAA have not only recognized this similarity, but have relied upon it to guide their assessment of negligent entrustment claims. *See* Dkt. No. 47-1 at 21 fn.6 (citing cases where courts have explicitly noted the parallels between Section 390 and PLCAA).

In an effort to avoid the clear parallels between PLCAA and Section 390, defendants purport to identify a "distinction" between the two texts (unnoticed by the courts cited above) from which Congress' intent to bar plaintiffs' claim should be inferred. They argue that PLCAA narrowed the Restatement's definition of negligent entrustment by specifying that the person who uses the product in a manner involving unreasonable risk of physical injury to the person or others must be the same person to whom the defendant entrusts the product. *See* Def. Br. at 17. This is a straw man argument. There is no meaningful distinction, let alone one from which Congressional intent can be inferred. Both Section 390 and PLCAA revolve around the person to whom the chattel (or firearm) is supplied – the same person who then uses it in a manner involving an unreasonable risk of harm. Courts interpreting Section 390 have simply embraced an ordinary meaning of "use" that *includes* successive entrustments. Those decisions rightly inform the meaning of "use" in PLCAA's negligent entrustment definition.[7]

---

[7] Defendants conflate the question of *who* must use the firearm in a manner involving an unreasonable risk of physical harm with the question of what *types of uses* are encompassed by PLCAA. Only the latter question is disputed. Plaintiffs have never claimed that a defendant is liable for negligent entrustment if *anyone* uses the firearm in an unreasonably risky manner.

C. Defendants' Suggestion that PLCAA's Negligent Entrustment Provision Does Not Apply to Lawful Sales is Wrong.

Throughout their brief, defendants emphasize that Riverview's sale of the XM15-E2S to Nancy Lanza was lawful. *See* Def. Br. at 11-14; *e.g. id.* at 12 ("The Bushmaster XM-15 semi-automatic rifle was lawfully manufactured, sold and possessed in Connecticut in 2010, when Nancy Lanza made her purchase from Riverview Sales."). In doing so, they imply that a firearm seller can only be liable for negligent entrustment when the sale is unlawful.[8] Indeed, they go so far as to say that finding Riverview negligent for a sale that complied with all relevant state and federal regulations would "circumvent[] the intent of the legislature." Def. Br. at 14.

Although the legality of an entrustment may inform a fact finder's determination as to whether it was negligent, a legal sale is not necessarily a reasonable one. "There is all of the difference in the world between making something illegal and making it tortious. Making an activity tortious forces the people who derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs. It does not proscribe it altogether." *McCarthy v. Olin Corp.*, 119 F.3d 148, 163 (2d Cir. 1997) (Calabresi, J., dissenting); *see also Kalina v. Kmart Corp.*, 1993 WL 307630, at *3, 5 (Conn. Super. Ct. Aug. 5, 1993) (rejecting Kmart's argument that judgment should enter on plaintiff's negligent entrustment of a firearm claim because Kmart's "only obligation was to require the purchaser to provide appropriate identification and to complete a Firearms Transaction Record Form, ATF Form 4473, pursuant to federal regulation"); *Short v.*

Rather, plaintiffs agree with defendants that it is the person to whom the defendant entrusts a product who must use it in an unreasonably risky way.

[8] The cases they cite as proper examples of negligent entrustment claims involve patently illegal firearm sales. *See* Def. Br. at 11 fn.6 (discussing *Shirley v. Glass*, 297 Kan. 888, 890 (2013), where the actual buyer informed the seller that he had a felony conviction, and *Woods v. Steadman's Hardware, Inc.*, 2013 WL 709110, at *1 (D. Mont. Feb. 26, 2013), where the buyer informed the seller that he had been involuntarily committed six weeks earlier).

Ross, 2013 WL 1111820 (Conn. Super. Ct. Feb. 26, 2013) (denying motion to dismiss negligent entrustment claim against U-Haul even though U-Haul met all of its legal obligations).

Moreover, a reading of PLCAA as a whole demonstrates that Congress envisioned negligent entrustment as a claim arising from *legal* firearm sales. The exception immediately following the negligent entrustment exception provides for "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. Interpreting the negligent entrustment provision to apply only to illegal sales would render it superfluous. This cannot have been Congress' intent. *See United States v. Kozeny*, 541 F.3d 166, 174 (2d Cir. 2008) ("When interpreting a statute, we are required to give effect, if possible, to every clause and word of a statute, and to avoid statutory interpretations that render provisions superfluous.") (internal quotation marks and citation omitted).

III. THE REMOVING DEFENDANTS CANNOT ESTABLISH THAT PLCAA BARS PLAINTIFFS' CUTPA CLAIMS.

CUTPA will serve as a predicate statute. The Bushmaster Defendants assert that the Second Circuit's decision in *City of New York*, 524 F.3d at 399-404, directs otherwise. Def. Br. at 24-33. They disagree with its holding, asserting that the Court's conclusions are dicta. *Id.* at 24, 31. It is understandable that they resist that holding: *City of New York* indicates that CUTPA is an appropriate predicate, because CUTPA clearly applies to and implicates the sale and marketing of firearms in Connecticut. *City of New York*, 524 F.3d at 404 (predicate exception "encompass[es]" both statutes applied to sale and marketing of firearms and statutes that "clearly . . . implicate the purchase and sale of firearms"). CUTPA admittedly does not "expressly regulate" firearms, but *City of New York explicitly holds that it need not*. *Id.* at 404.

The balance of defendants' CUTPA argument devolves into a scattershot attack. Def. Br. at 33-34.[9] First, they assert plaintiffs lack standing because they lack a commercial relationship with Riverview. Def. Br. at 33. CUTPA gives a right to sue to "*[a]ny person* who suffers *any ascertainable loss* as a result of the use or employment of a method, act or practice prohibited by [§] 42-110b[.]" Conn. Gen. Stat. § 42-110g. The scope of CUTPA standing is an open question under Connecticut law. *See Ganim v. Smith & Wesson Corp.*, 358 Conn. 313, 372-73 (2001) (noting that Connecticut's attorney general had argued the statutory language of § 42-110g determines who may bring CUTPA claim, disfavoring that argument, but deciding case on basis of "remoteness" rather than resolving whether CUTPA is confined to consumer plaintiffs); 12 *Conn. Prac. Series*, Langer *et al.*, *Unfair Trade Practices* § 3.6 at n.39 (on line ed. 2014) (observing that Connecticut Supreme Court's holding in *Ganim* "suggest[s] that the breadth of the class of potential CUTPA plaintiffs is still an open question").

Second, they assert that CUTPA permits recovery for financial damages only, not for damages flowing from personal injury or death. On the contrary, while Connecticut trial courts are divided on this issue, "[a] majority of trial courts addressing the issue have . . . held that damages for personal injuries can be recovered under CUTPA." 12 *Conn. Prac. Series* § 6.7 at n.19 (collecting cases). Lastly, they claim the CUTPA claims against Riverview are time-barred. They are not. Although the claims are asserted under CUTPA, they are governed for limitations purposes by the wrongful death statute. *See Pellechia v. Connecticut Light & Power Co.*, 52 Conn. Supp. 435 (2011) (holding that CUTPA claims seeking damages for wrongful death were governed by § 52-555), *aff'd* 139 Conn. App. 88 (2012), *cert. denied*, 307 Conn. 950 (2013).

---

[9] Defendants' *ad hoc* attacks on these claims are not properly before the Court, as they were not alleged as a basis for the claim of fraudulent joinder.

THE PLAINTIFFS,

By /s/ Joshua D. Koskoff

Joshua D. Koskoff (ct15619)
Alinor C. Sterling (ct17207)
KOSKOFF, KOSKOFF & BIEDER
350 Fairfield Ave.
Bridgeport, CT 06604
Tel: (203) 336-4421

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, a copy of the foregoing Reply brief was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Joshua D. Koskoff
Joshua D. Koskoff (ct15619)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONNA L. SOTO, ET AL.,	:	
Plaintiffs,	:	
v.	:	Case No. 3:15-cv-68 (RNC)
BUSHMASTER FIREARMS INTERNATIONAL, LLC., ET AL.,	:	
Defendants.	:	

MEMORANDUM

This is an action for damages and injunctive relief arising from the mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, in which twenty children and six adults were killed by a shooter using a Bushmaster AR-15 rifle. The case is brought by or on behalf of victims of the shooting. The defendants are a number of entities and one individual involved in the manufacture, distribution and sale of the rifle. The case was filed in Connecticut Superior Court initially. In response to the state court complaint, two of the defendants removed the case to this Court invoking federal jurisdiction on the basis of diversity of citizenship.[1] The issue addressed in this memorandum is whether the case must be remanded to state court because federal jurisdiction is lacking. For reasons that follow, I conclude that remand is required.

[1] The other defendants consented to removal. See Removal Consents (ECF Nos. 1-2, 1-3).

Defendants contend that this Court has jurisdiction based on the diversity of citizenship statute, 28 U.S.C. § 1332(a)(1), which confers on district courts "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states." For diversity jurisdiction to exist, there must be complete diversity between the plaintiffs and the defendants, in other words, no plaintiff can be a citizen of the same state as any of the defendants. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005). In this case, all the plaintiffs are citizens of Connecticut;[2] and one of the defendants, Riverview Sales, Inc. ("Riverview"), is also a Connecticut citizen.[3] Defendants claim that the presence of Riverview may be disregarded for purposes of diversity jurisdiction because Riverview has been fraudulently joined as a defendant.[4]

---

[2] The Soto, Hockley, Sherlach, Pozner, Rousseau, Wheeler, Lewis, Barden and D'Avino plaintiffs are estates created under Connecticut probate law. The remaining individual plaintiff - Natalie Hammond - is a citizen of Connecticut. See Notice of Removal (ECF No. 1) ¶ 11.

[3] The manufacturer defendants (Remington Outdoor Company Inc. and Remington Arms Company, LLC) are citizens of Delaware and North Carolina. The distributor defendants (Camfour, Inc. and Camfour Holding, Inc.) are citizens of Massachusetts. Of the remaining defendants, David LaGuercia and Riverview Sales, Inc., Mr. LaGuercia is a citizen of Massachusetts, and Riverview is a citizen of Connecticut.

[4] When removal of a case from state to federal court is based on federal diversity jurisdiction, the complete diversity

Plaintiffs have moved to remand the case on the ground that defendants cannot sustain their heavy burden of establishing fraudulent joinder. The defendants do bear the burden of establishing that federal jurisdiction exists, and the burden is a heavy one. See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004). To establish fraudulent joinder, the defendants "must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that [the] plaintiff[s] can state a cause of action against the non-diverse defendant in state court." Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998). Any doubts must be resolved in favor of remand. See Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 213 (2d Cir. 2013).

Defendants do not claim that plaintiffs have engaged in outright fraud by joining a non-diverse defendant having no real connection to the case. Indeed, Riverview is alleged to have sold the rifle used in the shooting. They claim, rather, that there is no legal basis for plaintiffs' claims against Riverview because the Protection of Lawful Commerce in Arms Act ("PLCAA"),

---

requirement applies just as it would if the case were filed in federal court originally. In addition, under the federal statute governing removal, a diversity case is not removable "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b).

15 U.S.C. §§ 7901, et seq., provides Riverview with immunity from this suit. The record establishes that the immunity provided by this statute will also be asserted with regard to the claims against the non-diverse defendants.[5]

The "no possibility" standard used to assess claims of fraudulent joinder aims to identify cases in which it is objectively reasonable for the court to conclude that the plaintiff has improperly sued a non-diverse defendant in order to deprive the other defendants of their right to a federal forum under the removal statute. Said differently, fraudulent joinder exists when it is objectively reasonable to infer that the plaintiff has engaged in a form of litigation abuse. See 14B Wright, Miller & Cooper, Federal Practice & Procedure § 3723 (4th ed.) (noting that fraudulent joinder doctrine tries to avoid "reward[ing] abusive pleading by plaintiffs"). If there is no possibility a plaintiff can state a cause of action against a non-diverse defendant, then it is objectively reasonable to infer that the plaintiff is guilty of a form of cheating, and remand is

---

[5] Plaintiffs contend that the removing defendants should not be permitted to assert fraudulent joinder on the basis of a defense that applies to all the defendants. Plaintiffs invoke the common defense rule derived from Chesapeake & Ohio Ry. Co. v Cockrell, 232 U.S. 146 (1914). The rule has not been adopted by the Second Circuit but plaintiffs urge it should be followed here. Under this rule, removal is impermissible when the claim of fraudulent joinder rests on a common defense that equally disposes of the claims against all the defendants, diverse and non-diverse alike. See Smallwood v. Illinois Central RR Co., 385 F.3d 568 (5th Cir. 2004) (en banc); Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990).

an appropriate response to the plaintiff's improper conduct. But if the plaintiff's claim is not precluded as a matter of law - if there is any possibility the plaintiff can state a claim against the non-diverse defendant - an inference that the plaintiff is guilty of improper conduct is unwarranted, and adjudicating the case in federal court would violate the plaintiff's right to choose the forum for the litigation.

Viewed in light of this purpose, the "no possibility" standard for fraudulent joinder is similar to the Rule 11 standard for identifying instances of litigation abuse for which sanctions should be imposed. Rule 11 seeks to deter frivolous litigation without chilling creative advocacy. See Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment. Thus, the Rule provides that arguments for extensions, modifications, or reversals of existing law or for creation of new law are not sanctionable, provided they are not frivolous. See id. In deciding whether a claim exceeds the limits of permissible partisan advocacy, courts apply a standard of objective reasonableness. See ATSI Communications, Inc. v. Shaar Fund, Ltd., 579 F.3d 143, 150 (2d Cir. 2009). Because an "objectively unreasonable" standard may have an inhibiting effect on vigorous advocacy, to the detriment of the effective functioning of the adversarial system, a safe harbor provision gives lawyers an opportunity to withdraw a submission challenged by an adversary.

See In re Pennie & Edmonds LLP, 323 F.3d 86, 91 (2d Cir. 2003).

The analysis under both Rule 11 and fraudulent joinder therefore turns not on how likely a claim is to succeed, but rather on whether the claim is objectively frivolous. See Davis v. Prentiss Properties Ltd., Inc., 66 F. Supp. 2d 1112, 1115 (C.D. Cal. 1999) (concluding, based on Rule 11 standard, that "if a diversity-defeating claim is not frivolous, the plaintiff has the right to have it considered by the state court in which it was filed"). Applying the "no possibility" standard with the restraint characteristic of sanctions determinations ensures that litigants do not withhold claims that could be brought in good faith and in furtherance of the public interest in order to avoid the risk of removal.

Accordingly, it is necessary to determine whether there is any possibility the plaintiffs in this case can state a claim against Riverview. See Kenneson v. Johnson & Johnson, No. 3:14-cv-01184(MPS), 2015 WL 1867768, at *6 (D. Conn. Apr. 23, 2015) (holding that party was not fraudulently joined because claim "appear[ed] to be possible under Connecticut law" and "ha[d] not been foreclosed by controlling authority"); see also Retirement Prog. for Employees of the Town of Fairfield v. NEPC, LLC, 642 F. Supp. 2d 92, 97 (D. Conn. 2009)(holding that party was not fraudulently joined because "[t]he applicability of [the misrepresentation rules in § 522 of the Restatement (Second) of

Torts] in Connecticut is not clear."). More specifically, the question is whether the plaintiff's claims against Riverview are plainly foreclosed by the PLCAA, as the defendants contend, or are legally possible, as the plaintiffs argue.[6]

The PLCAA, enacted by Congress in 2005, provides immunity to firearms manufacturers and dealers from any "qualified civil liability action." 15 U.S.C. § 7902(b).[7] The PLCAA provides six exceptions when suit is permitted.[8] Plaintiffs' complaint

---

[6] At various points in their papers, defendants contend that they can establish fraudulent joinder because there is no "reasonable basis" for the claims against Riverview. See Notice of Removal (ECF No. 1), at 5. While courts in this Circuit have applied varying formulations of the standard for fraudulent joinder, see Oliva v. Bristol-Myers Squibb Co., No. 3:05CV00486(JCH), 2005 WL 3455121 (D. Conn. Dec. 16, 2005), analysis of the cases shows that, in substance, the courts are applying the "no possibility" standard set forth in Pampillonia, see 138 F.3d at 461, which is the standard applied here.

[7] The statute defines a qualified civil liability action as: "[A] civil action or proceeding . . . brought by any person against a manufacturer or seller of a [firearm distributed in interstate or foreign 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 a [firearm distributed in interstate or foreign commerce] by the person or a third party." 15 U.S.C. § 7903(5)(A).

[8] The six statutory exceptions are:

(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

against Riverview seeks to assert claims within the scope of the exceptions for claims alleging negligent entrustment, 15 U.S.C. § 7903(5)(A)(ii), and claims alleging a knowing violation of a state statute governing the sale and marketing of firearms, 15

---

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).

U.S.C. § 7903(5)(A)(iii), commonly referred to as the "predicate exception."

In contending that the plaintiffs' claims against Riverview are clearly baseless in light of the immunity provided by the PLCAA, defendants ask this Court to determine that the word "use" in the negligent entrustment exception means "discharge." In addition, they ask this Court to determine that the Connecticut Unfair Trade Practices Act does not constitute a statute governing the sale and marketing of firearms for purposes of the predicate exception. These are questions of first impression.[9]

---

[9] Cases concerning the PLCAA fall into three groups. First, there are cases that challenge its constitutionality. All courts have held that the statute is valid under the Commerce Clause and the separation-of-powers doctrine. See Ileto v. Glock Inc., 565 F.3d 1126 (9th Cir. 2009); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008); Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174 (D.D.C. 2009); Estate of Kim v. Coxe, 295 P.3d 380 (Alaska 2013); Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011); District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008). Second, there are cases concerning its preemptive effect, specifically with regard to claims under the D.C. Assault Weapons Manufacturing Strict Liability Act ("SLA"). All courts have held that the statute preempts SLA claims. See Estate of Charlot, 628 F. Supp. 2d at 174; Beretta, 940 A.2d at 163. Third, there are cases involving issues of statutory interpretation focusing mainly on the predicate exception. See Ileto, 565 F.3d at 1126; Berretta, 524 F.3d at 384; Jefferies v. District of Columbia, 916 F. Supp. 2d 42 (D.D.C. 2013); Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469 (N.D. W. Va. Nov. 5, 2010); Sambrano v. Savage Arms, Inc., 338 P.3d 103 (N.M. Ct. App. 2014); Estate of Kim, 295 P.3d at 380; Williams v. Beemiller, Inc., 100 A.D.3d 143 (N.Y. App. Div. 2012); Gilland, 2011 WL 2479693, at *1; Smith

Plaintiffs have presented reasoned arguments supporting their position that the word "use" does not necessarily mean "discharge" and that CUTPA does fit within the scope of the predicate exception even though it does not expressly refer to firearms. Defendants respond that if the plaintiffs' arguments were accepted, the immunity Congress intended to confer on firearms dealers would be illusory. Whatever persuasive force might be accorded this argument on a motion to dismiss the complaint against Riverview for failure to state a claim on which relief can be granted, the question at this juncture is whether the plaintiffs have any possibility of stating a claim. See Nemazee v. Premier, Inc., 232 F. Supp. 2d 172, 178 (S.D.N.Y. 2002) ("Any possibility of recovery, even if slim, militates against a finding of fraudulent joinder; only where there is 'no possibility' of recovery is such a finding warranted."). That plaintiffs may face an uphill battle in litigating their claims does not resolve the question presented here: whether the claims are clearly precluded as a matter of law. See Moorehouse v. Bayer Healthcare Pharm., Inc., No. 08-01831(SBA), 2008 WL 2477389, at *3 (N.D. Cal. June 18, 2011) ("Defendants contend that no California case has ever held a distributor liable for failure to warn in the prescription drug context. However, even

---

& Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007).

if true, that fact alone does not suggest that it is obvious according to the settled rules of California that a failure to warn cause of action is not viable.").

After considering the parties' lengthy submissions, I am not convinced that the plaintiffs fraudulently joined Riverview in the state court action in an improper attempt to deprive the other defendants of their right to a federal forum. While the immunity provided by the PLCAA could result in dismissal of the claims against Riverview, neither the statute itself nor any controlling case conclusively establishes that the plaintiffs cannot state a cause of action against Riverview. Under the "no possibility" standard, therefore, defendants' submissions fall short of establishing that Riverview has been fraudulently joined.[10]

Defendants urge that they are entitled to have this Court interpret and apply the PLCAA. Under the well-pleaded complaint rule, however, a federal defense does not provide a basis for removal when complete diversity is lacking. See 13D Wright, Miller & Cooper, Federal Practice & Procedure § 3566 (3d ed.). Because fraudulent joinder has not been established, this Court does not have jurisdiction to delve into the merits of this dispute. Cf. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1380-

[10] Because defendants have failed to establish that there is no possibility the plaintiffs can state a cause of action against Riverview, I do not reach plaintiffs' argument based on the common defense rule.

81 (11th Cir. 1998) ("In a fraudulent joinder inquiry, federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.").

In the motion to remand, plaintiffs request an award of costs and fees incurred as a result of the removal. When a case is remanded, fees should be awarded only if the removing party did not have an objectively reasonable basis for removal. Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005). Given the lack of controlling authority regarding removal based on PLCAA immunity, plaintiffs' request for costs and fees is denied.

Accordingly, the case will be remanded.

/s/ RNC
Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONNA L. SOTO, ET AL.,	:	
Plaintiffs,	:	
v.	:	Case No. 3:15-cv-68 (RNC)
BUSHMASTER FIREARMS INTERNATIONAL, LLC., ET AL.,	:	
Defendants.	:	

MEMORANDUM

This is an action for damages and injunctive relief arising from the mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, in which twenty children and six adults were killed by a shooter using a Bushmaster AR-15 rifle. The case is brought by or on behalf of victims of the shooting. The defendants are a number of entities and one individual involved in the manufacture, distribution and sale of the rifle. The case was filed in Connecticut Superior Court initially. In response to the state court complaint, two of the defendants removed the case to this Court invoking federal jurisdiction on the basis of diversity of citizenship.[1] The issue addressed in this memorandum is whether the case must be remanded to state court because federal jurisdiction is lacking. For reasons that follow, I conclude that remand is required.

[1] The other defendants consented to removal. See Removal Consents (ECF Nos. 1-2, 1-3).

Defendants contend that this Court has jurisdiction based on the diversity of citizenship statute, 28 U.S.C. § 1332(a)(1), which confers on district courts "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states." For diversity jurisdiction to exist, there must be complete diversity between the plaintiffs and the defendants, in other words, no plaintiff can be a citizen of the same state as any of the defendants. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005). In this case, all the plaintiffs are citizens of Connecticut;[2] and one of the defendants, Riverview Sales, Inc. ("Riverview"), is also a Connecticut citizen.[3] Defendants claim that the presence of Riverview may be disregarded for purposes of diversity jurisdiction because Riverview has been fraudulently joined as a defendant.[4]

---

[2] The Soto, Hockley, Sherlach, Pozner, Rousseau, Wheeler, Lewis, Barden and D'Avino plaintiffs are estates created under Connecticut probate law. The remaining individual plaintiff - Natalie Hammond - is a citizen of Connecticut. See Notice of Removal (ECF No. 1) ¶ 11.

[3] The manufacturer defendants (Remington Outdoor Company Inc. and Remington Arms Company, LLC) are citizens of Delaware and North Carolina. The distributor defendants (Camfour, Inc. and Camfour Holding, Inc.) are citizens of Massachusetts. Of the remaining defendants, David LaGuercia and Riverview Sales, Inc., Mr. LaGuercia is a citizen of Massachusetts, and Riverview is a citizen of Connecticut.

[4] When removal of a case from state to federal court is based on federal diversity jurisdiction, the complete diversity

Plaintiffs have moved to remand the case on the ground that defendants cannot sustain their heavy burden of establishing fraudulent joinder. The defendants do bear the burden of establishing that federal jurisdiction exists, and the burden is a heavy one. See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004). To establish fraudulent joinder, the defendants "must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that [the] plaintiff[s] can state a cause of action against the non-diverse defendant in state court." Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998). Any doubts must be resolved in favor of remand. See Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 213 (2d Cir. 2013).

Defendants do not claim that plaintiffs have engaged in outright fraud by joining a non-diverse defendant having no real connection to the case. Indeed, Riverview is alleged to have sold the rifle used in the shooting. They claim, rather, that there is no legal basis for plaintiffs' claims against Riverview because the Protection of Lawful Commerce in Arms Act ("PLCAA"),

---

requirement applies just as it would if the case were filed in federal court originally. In addition, under the federal statute governing removal, a diversity case is not removable "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b).

15 U.S.C. §§ 7901, et seq., provides Riverview with immunity from this suit. The record establishes that the immunity provided by this statute will also be asserted with regard to the claims against the other defendants.[5]

The "no possibility" standard used to assess claims of fraudulent joinder aims to identify cases in which it is objectively reasonable for the court to conclude that the plaintiff has improperly sued a non-diverse defendant in order to deprive the other defendants of their right to a federal forum under the removal statute. Said differently, fraudulent joinder exists when it is objectively reasonable to infer that the plaintiff has engaged in a form of litigation abuse. See 14B Wright, Miller & Cooper, Federal Practice & Procedure § 3723 (4th ed.) (noting that fraudulent joinder doctrine tries to avoid "reward[ing] abusive pleading by plaintiffs"). If there is no possibility a plaintiff can state a cause of action against a non-diverse defendant, then it is objectively reasonable to infer that the plaintiff is guilty of a form of cheating, and remand is

---

[5] Plaintiffs contend that the removing defendants should not be permitted to assert fraudulent joinder on the basis of a defense that applies to all the defendants. Plaintiffs invoke the common defense rule derived from Chesapeake & Ohio Ry. Co. v Cockrell, 232 U.S. 146 (1914). The rule has not been adopted by the Second Circuit but plaintiffs urge it should be followed here. Under this rule, removal is impermissible when the claim of fraudulent joinder rests on a common defense that equally disposes of the claims against all the defendants, diverse and non-diverse alike. See Smallwood v. Illinois Central RR Co., 385 F.3d 568 (5th Cir. 2004) (en banc); Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990).

an appropriate response to the plaintiff's improper conduct. But if the plaintiff's claim is not precluded as a matter of law - if there is any possibility the plaintiff can state a claim against the non-diverse defendant - an inference that the plaintiff is guilty of improper conduct is unwarranted, and adjudicating the case in federal court would violate the plaintiff's right to choose the forum for the litigation.

Viewed in light of this purpose, the "no possibility" standard for fraudulent joinder is similar to the Rule 11 standard for identifying instances of litigation abuse for which sanctions should be imposed. Rule 11 seeks to deter frivolous litigation without chilling creative advocacy. See Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment. Thus, the Rule provides that arguments for extensions, modifications, or reversals of existing law or for creation of new law are not sanctionable, provided they are not frivolous. See id. In deciding whether a claim exceeds the limits of permissible partisan advocacy, courts apply a standard of objective reasonableness. See ATSI Communications, Inc. v. Shaar Fund, Ltd., 579 F.3d 143, 150 (2d Cir. 2009). Because an "objectively unreasonable" standard may have an inhibiting effect on vigorous advocacy, to the detriment of the effective functioning of the adversarial system, a safe harbor provision gives lawyers an opportunity to withdraw a submission challenged by an adversary.

See In re Pennie & Edmonds LLP, 323 F.3d 86, 91 (2d Cir. 2003).

The analysis under both Rule 11 and fraudulent joinder therefore turns not on how likely a claim is to succeed, but rather on whether the claim is objectively frivolous. See Davis v. Prentiss Properties Ltd., Inc., 66 F. Supp. 2d 1112, 1115 (C.D. Cal. 1999) (concluding, based on Rule 11 standard, that "if a diversity-defeating claim is not frivolous, the plaintiff has the right to have it considered by the state court in which it was filed"). Applying the "no possibility" standard with the restraint characteristic of sanctions determinations ensures that litigants do not withhold claims that could be brought in good faith and in furtherance of the public interest in order to avoid the risk of removal.

Accordingly, it is necessary to determine whether there is any possibility the plaintiffs in this case can state a claim against Riverview. See Kenneson v. Johnson & Johnson, No. 3:14-cv-01184(MPS), 2015 WL 1867768, at *6 (D. Conn. Apr. 23, 2015) (holding that party was not fraudulently joined because claim "appear[ed] to be possible under Connecticut law" and "ha[d] not been foreclosed by controlling authority"); see also Retirement Prog. for Employees of the Town of Fairfield v. NEPC, LLC, 642 F. Supp. 2d 92, 97 (D. Conn. 2009)(holding that party was not fraudulently joined because "[t]he applicability of [the misrepresentation rules in § 522 of the Restatement (Second) of

Torts] in Connecticut is not clear."). More specifically, the question is whether the plaintiff's claims against Riverview are plainly foreclosed by the PLCAA, as the defendants contend, or are legally possible, as the plaintiffs argue.[6]

The PLCAA, enacted by Congress in 2005, provides immunity to firearms manufacturers and dealers from any "qualified civil liability action." 15 U.S.C. § 7902(b).[7] The PLCAA provides six exceptions when suit is permitted.[8] Plaintiffs' complaint

---

[6] At various points in their papers, defendants contend that they can establish fraudulent joinder because there is no "reasonable basis" for the claims against Riverview. See Notice of Removal (ECF No. 1), at 5. While courts in this Circuit have applied varying formulations of the standard for fraudulent joinder, see Oliva v. Bristol-Myers Squibb Co., No. 3:05CV00486(JCH), 2005 WL 3455121 (D. Conn. Dec. 16, 2005), analysis of the cases shows that, in substance, the courts are applying the "no possibility" standard set forth in Pampillonia, see 138 F.3d at 461, which is the standard applied here.

[7] The statute defines a qualified civil liability action as: "[A] civil action or proceeding . . . brought by any person against a manufacturer or seller of a [firearm distributed in interstate or foreign 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 a [firearm distributed in interstate or foreign commerce] by the person or a third party." 15 U.S.C. § 7903(5)(A).

[8] The six statutory exceptions are:

(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

against Riverview seeks to assert claims within the scope of the exceptions for claims alleging negligent entrustment, 15 U.S.C. § 7903(5)(A)(ii), and claims alleging a knowing violation of a state statute governing the sale and marketing of firearms, 15

---

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).

U.S.C. § 7903(5)(A)(iii), commonly referred to as the "predicate exception."

In contending that the plaintiffs' claims against Riverview are clearly baseless in light of the immunity provided by the PLCAA, defendants ask this Court to determine that the word "use" in the negligent entrustment exception means "discharge." In addition, they ask this Court to determine that the Connecticut Unfair Trade Practices Act does not constitute a statute governing the sale and marketing of firearms for purposes of the predicate exception. These are questions of first impression.[9]

---

[9] Cases concerning the PLCAA fall into three groups. First, there are cases that challenge its constitutionality. All courts have held that the statute is valid under the Commerce Clause and the separation-of-powers doctrine. See Ileto v. Glock Inc., 565 F.3d 1126 (9th Cir. 2009); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008); Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174 (D.D.C. 2009); Estate of Kim v. Coxe, 295 P.3d 380 (Alaska 2013); Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011); District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008). Second, there are cases concerning its preemptive effect, specifically with regard to claims under the D.C. Assault Weapons Manufacturing Strict Liability Act ("SLA"). All courts have held that the statute preempts SLA claims. See Estate of Charlot, 628 F. Supp. 2d at 174; Beretta, 940 A.2d at 163. Third, there are cases involving issues of statutory interpretation focusing mainly on the predicate exception. See Ileto, 565 F.3d at 1126; Berretta, 524 F.3d at 384; Jefferies v. District of Columbia, 916 F. Supp. 2d 42 (D.D.C. 2013); Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469 (N.D. W. Va. Nov. 5, 2010); Sambrano v. Savage Arms, Inc., 338 P.3d 103 (N.M. Ct. App. 2014); Estate of Kim, 295 P.3d at 380; Williams v. Beemiller, Inc., 100 A.D.3d 143 (N.Y. App. Div. 2012); Gilland, 2011 WL 2479693, at *1; Smith

Plaintiffs have presented reasoned arguments supporting their position that the word "use" does not necessarily mean "discharge" and that CUTPA does fit within the scope of the predicate exception even though it does not expressly refer to firearms. Defendants respond that if the plaintiffs' arguments were accepted, the immunity Congress intended to confer on firearms dealers would be illusory. Whatever persuasive force might be accorded this argument on a motion to dismiss the complaint against Riverview for failure to state a claim on which relief can be granted, the question at this juncture is whether the plaintiffs have any possibility of stating a claim. See Nemazee v. Premier, Inc., 232 F. Supp. 2d 172, 178 (S.D.N.Y. 2002) ("Any possibility of recovery, even if slim, militates against a finding of fraudulent joinder; only where there is 'no possibility' of recovery is such a finding warranted."). That plaintiffs may face an uphill battle in litigating their claims does not resolve the question presented here: whether the claims are clearly precluded as a matter of law. See Moorehouse v. Bayer Healthcare Pharm., Inc., No. 08-01831(SBA), 2008 WL 2477389, at *3 (N.D. Cal. June 18, 2011) ("Defendants contend that no California case has ever held a distributor liable for failure to warn in the prescription drug context. However, even

---

& Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007).

if true, that fact alone does not suggest that it is obvious according to the settled rules of California that a failure to warn cause of action is not viable.").

After considering the parties' lengthy submissions, I am not convinced that the plaintiffs fraudulently joined Riverview in the state court action in an improper attempt to deprive the other defendants of their right to a federal forum. While the immunity provided by the PLCAA could result in dismissal of the claims against Riverview, neither the statute itself nor any controlling case conclusively establishes that the plaintiffs cannot state a cause of action against Riverview. Under the "no possibility" standard, therefore, defendants' submissions fall short of establishing that Riverview has been fraudulently joined.[10]

Defendants urge that they are entitled to have this Court interpret and apply the PLCAA. Under the well-pleaded complaint rule, however, a federal defense does not provide a basis for removal when complete diversity is lacking. See 13D Wright, Miller & Cooper, Federal Practice & Procedure § 3566 (3d ed.). Because fraudulent joinder has not been established, this Court does not have jurisdiction to delve into the merits of this dispute. Cf. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1380-

[10] Because defendants have failed to establish that there is no possibility the plaintiffs can state a cause of action against Riverview, I do not reach plaintiffs' argument based on the common defense rule.

81 (11th Cir. 1998) ("In a fraudulent joinder inquiry, federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.").

In the motion to remand, plaintiffs request an award of costs and fees incurred as a result of the removal. When a case is remanded, fees should be awarded only if the removing party did not have an objectively reasonable basis for removal. Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005). Given the lack of controlling authority regarding removal based on PLCAA immunity, plaintiffs' request for costs and fees is denied.

Accordingly, the case will be remanded.

/s/ RNC
Robert N. Chatigny
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONNA L. SOTO, ET AL.,	:	
Plaintiffs,	:	
v.	:	Case No. 3:15-cv-68 (RNC)
BUSHMASTER FIREARMS INTERNATIONAL, LLC., ET AL.,	:	
Defendants.	:	

MEMORANDUM

This is an action for damages and injunctive relief arising from the mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, in which twenty children and six adults were killed by a shooter using a Bushmaster AR-15 rifle. The case is brought by or on behalf of victims of the shooting. The defendants are a number of entities and one individual involved in the manufacture, distribution and sale of the rifle. The case was filed in Connecticut Superior Court initially. In response to the state court complaint, two of the defendants removed the case to this Court invoking federal jurisdiction on the basis of diversity of citizenship.[1] The issue addressed in this memorandum is whether the case must be remanded to state court because federal jurisdiction is lacking. For reasons that follow, I conclude that remand is required.

[1] The other defendants consented to removal. See Removal Consents (ECF Nos. 1-2, 1-3).

Defendants contend that this Court has jurisdiction based on the diversity of citizenship statute, 28 U.S.C. § 1332(a)(1), which confers on district courts "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states." For diversity jurisdiction to exist, there must be complete diversity between the plaintiffs and the defendants, in other words, no plaintiff can be a citizen of the same state as any of the defendants. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005). In this case, all the plaintiffs are citizens of Connecticut;[2] and one of the defendants, Riverview Sales, Inc. ("Riverview"), is also a Connecticut citizen.[3] Defendants claim that the presence of Riverview may be disregarded for purposes of diversity jurisdiction because Riverview has been fraudulently joined as a defendant.[4]

---

[2] The Soto, Hockley, Sherlach, Pozner, Rousseau, Wheeler, Lewis, Barden and D'Avino plaintiffs are estates created under Connecticut probate law. The remaining individual plaintiff - Natalie Hammond - is a citizen of Connecticut. See Notice of Removal (ECF No. 1) ¶ 11.

[3] The manufacturer defendants (Remington Outdoor Company Inc. and Remington Arms Company, LLC) are citizens of Delaware and North Carolina. The distributor defendants (Camfour, Inc. and Camfour Holding, Inc.) are citizens of Massachusetts. Of the remaining defendants, David LaGuercia and Riverview Sales, Inc., Mr. LaGuercia is a citizen of Massachusetts, and Riverview is a citizen of Connecticut.

[4] When removal of a case from state to federal court is based on federal diversity jurisdiction, the complete diversity

Plaintiffs have moved to remand the case on the ground that defendants cannot sustain their heavy burden of establishing fraudulent joinder. The defendants do bear the burden of establishing that federal jurisdiction exists, and the burden is a heavy one. See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004). To establish fraudulent joinder, the defendants "must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that [the] plaintiff[s] can state a cause of action against the non-diverse defendant in state court." Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998). Any doubts must be resolved in favor of remand. See Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 213 (2d Cir. 2013).

Defendants do not claim that plaintiffs have engaged in outright fraud by joining a non-diverse defendant having no real connection to the case. Indeed, Riverview is alleged to have sold the rifle used in the shooting. They claim, rather, that there is no legal basis for plaintiffs' claims against Riverview because the Protection of Lawful Commerce in Arms Act ("PLCAA"),

---

requirement applies just as it would if the case were filed in federal court originally. In addition, under the federal statute governing removal, a diversity case is not removable "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b).

15 U.S.C. §§ 7901, et seq., provides Riverview with immunity from this suit. The record establishes that the immunity provided by this statute will also be asserted with regard to the claims against the other defendants.[5]

The "no possibility" standard used to assess claims of fraudulent joinder aims to identify cases in which it is objectively reasonable for the court to conclude that the plaintiff has improperly sued a non-diverse defendant in order to deprive the other defendants of their right to a federal forum under the removal statute. Said differently, fraudulent joinder exists when it is objectively reasonable to infer that the plaintiff has engaged in a form of litigation abuse. See 14B Wright, Miller & Cooper, Federal Practice & Procedure § 3723 (4th ed.) (noting that fraudulent joinder doctrine tries to avoid "reward[ing] abusive pleading by plaintiffs"). If there is no possibility a plaintiff can state a cause of action against a non-diverse defendant, then it is objectively reasonable to infer that the plaintiff is guilty of a form of cheating, and remand is

---

[5] Plaintiffs contend that the removing defendants should not be permitted to assert fraudulent joinder on the basis of a defense that applies to all the defendants. Plaintiffs invoke the common defense rule derived from Chesapeake & Ohio Ry. Co. v Cockrell, 232 U.S. 146 (1914). The rule has not been adopted by the Second Circuit but plaintiffs urge it should be followed here. Under this rule, removal is impermissible when the claim of fraudulent joinder rests on a common defense that equally disposes of the claims against all the defendants, diverse and non-diverse alike. See Smallwood v. Illinois Central RR Co., 385 F.3d 568 (5th Cir. 2004) (en banc); Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990).

an appropriate response to the plaintiff's improper conduct. But if the plaintiff's claim is not precluded as a matter of law - if there is any possibility the plaintiff can state a claim against the non-diverse defendant - an inference that the plaintiff is guilty of improper conduct is unwarranted, and adjudicating the case in federal court would violate the plaintiff's right to choose the forum for the litigation.

Viewed in light of this purpose, the "no possibility" standard for fraudulent joinder is similar to the Rule 11 standard for identifying instances of litigation abuse for which sanctions should be imposed. Rule 11 seeks to deter frivolous litigation without chilling creative advocacy. See Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment. Thus, the Rule provides that arguments for extensions, modifications, or reversals of existing law or for creation of new law are not sanctionable, provided they are not frivolous. See id. In deciding whether a claim exceeds the limits of permissible partisan advocacy, courts apply a standard of objective reasonableness. See ATSI Communications, Inc. v. Shaar Fund, Ltd., 579 F.3d 143, 150 (2d Cir. 2009). Because an "objectively unreasonable" standard may have an inhibiting effect on vigorous advocacy, to the detriment of the effective functioning of the adversarial system, a safe harbor provision gives lawyers an opportunity to withdraw a submission challenged by an adversary.

See In re Pennie & Edmonds LLP, 323 F.3d 86, 91 (2d Cir. 2003).

The analysis under both Rule 11 and fraudulent joinder therefore turns not on how likely a claim is to succeed, but rather on whether the claim is objectively frivolous. See Davis v. Prentiss Properties Ltd., Inc., 66 F. Supp. 2d 1112, 1115 (C.D. Cal. 1999) (concluding, based on Rule 11 standard, that "if a diversity-defeating claim is not frivolous, the plaintiff has the right to have it considered by the state court in which it was filed"). Applying the "no possibility" standard with the restraint characteristic of sanctions determinations ensures that litigants do not withhold claims that could be brought in good faith and in furtherance of the public interest in order to avoid the risk of removal.

Accordingly, it is necessary to determine whether there is any possibility the plaintiffs in this case can state a claim against Riverview. See Kenneson v. Johnson & Johnson, No. 3:14-cv-01184(MPS), 2015 WL 1867768, at *6 (D. Conn. Apr. 23, 2015) (holding that party was not fraudulently joined because claim "appear[ed] to be possible under Connecticut law" and "ha[d] not been foreclosed by controlling authority"); see also Retirement Prog. for Employees of the Town of Fairfield v. NEPC, LLC, 642 F. Supp. 2d 92, 97 (D. Conn. 2009)(holding that party was not fraudulently joined because "[t]he applicability of [the misrepresentation rules in § 522 of the Restatement (Second) of

Torts] in Connecticut is not clear."). More specifically, the question is whether the plaintiff's claims against Riverview are plainly foreclosed by the PLCAA, as the defendants contend, or are legally possible, as the plaintiffs argue.[6]

The PLCAA, enacted by Congress in 2005, provides immunity to firearms manufacturers and dealers from any "qualified civil liability action." 15 U.S.C. § 7902(b).[7] The PLCAA provides six exceptions when suit is permitted.[8] Plaintiffs' complaint

---

[6] At various points in their papers, defendants contend that they can establish fraudulent joinder because there is no "reasonable basis" for the claims against Riverview. See Notice of Removal (ECF No. 1), at 5. While courts in this Circuit have applied varying formulations of the standard for fraudulent joinder, see Oliva v. Bristol-Myers Squibb Co., No. 3:05CV00486(JCH), 2005 WL 3455121 (D. Conn. Dec. 16, 2005), analysis of the cases shows that, in substance, the courts are applying the "no possibility" standard set forth in Pampillonia, see 138 F.3d at 461, which is the standard applied here.

[7] The statute defines a qualified civil liability action as: "[A] civil action or proceeding . . . brought by any person against a manufacturer or seller of a [firearm distributed in interstate or foreign 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 a [firearm distributed in interstate or foreign commerce] by the person or a third party." 15 U.S.C. § 7903(5)(A).

[8] The six statutory exceptions are:

(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

against Riverview seeks to assert claims within the scope of the exceptions for claims alleging negligent entrustment, 15 U.S.C. § 7903(5)(A)(ii), and claims alleging a knowing violation of a state statute governing the sale and marketing of firearms, 15

---

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).

U.S.C. § 7903(5)(A)(iii), commonly referred to as the "predicate exception."

In contending that the plaintiffs' claims against Riverview are clearly baseless in light of the immunity provided by the PLCAA, defendants ask this Court to determine that the word "use" in the negligent entrustment exception means "discharge." In addition, they ask this Court to determine that the Connecticut Unfair Trade Practices Act does not constitute a statute governing the sale and marketing of firearms for purposes of the predicate exception. These are questions of first impression.[9]

---

[9] Cases concerning the PLCAA fall into three groups. First, there are cases that challenge its constitutionality. All courts have held that the statute is valid under the Commerce Clause and the separation-of-powers doctrine. See Ileto v. Glock Inc., 565 F.3d 1126 (9th Cir. 2009); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008); Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174 (D.D.C. 2009); Estate of Kim v. Coxe, 295 P.3d 380 (Alaska 2013); Gilland v. Sportsmen's Outpost, Inc., No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011); District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008). Second, there are cases concerning its preemptive effect, specifically with regard to claims under the D.C. Assault Weapons Manufacturing Strict Liability Act ("SLA"). All courts have held that the statute preempts SLA claims. See Estate of Charlot, 628 F. Supp. 2d at 174; Beretta, 940 A.2d at 163. Third, there are cases involving issues of statutory interpretation focusing mainly on the predicate exception. See Ileto, 565 F.3d at 1126; Berretta, 524 F.3d at 384; Jefferies v. District of Columbia, 916 F. Supp. 2d 42 (D.D.C. 2013); Bannerman v. Mountain State Pawn, Inc., No. 3:10-CV-46, 2010 WL 9103469 (N.D. W. Va. Nov. 5, 2010); Sambrano v. Savage Arms, Inc., 338 P.3d 103 (N.M. Ct. App. 2014); Estate of Kim, 295 P.3d at 380; Williams v. Beemiller, Inc., 100 A.D.3d 143 (N.Y. App. Div. 2012); Gilland, 2011 WL 2479693, at *1; Smith

Plaintiffs have presented reasoned arguments supporting their position that the word "use" does not necessarily mean "discharge" and that CUTPA does fit within the scope of the predicate exception even though it does not expressly refer to firearms. Defendants respond that if the plaintiffs' arguments were accepted, the immunity Congress intended to confer on firearms dealers would be illusory. Whatever persuasive force might be accorded this argument on a motion to dismiss the complaint against Riverview for failure to state a claim on which relief can be granted, the question at this juncture is whether the plaintiffs have any possibility of stating a claim. See Nemazee v. Premier, Inc., 232 F. Supp. 2d 172, 178 (S.D.N.Y. 2002) ("Any possibility of recovery, even if slim, militates against a finding of fraudulent joinder; only where there is 'no possibility' of recovery is such a finding warranted."). That plaintiffs may face an uphill battle in litigating their claims does not resolve the question presented here: whether the claims are clearly precluded as a matter of law. See Moorehouse v. Bayer Healthcare Pharm., Inc., No. 08-01831(SBA), 2008 WL 2477389, at *3 (N.D. Cal. June 18, 2011) ("Defendants contend that no California case has ever held a distributor liable for failure to warn in the prescription drug context. However, even

---

& Wesson Corp. v. City of Gary, 875 N.E.2d 422 (Ind. Ct. App. 2007).

if true, that fact alone does not suggest that it is obvious according to the settled rules of California that a failure to warn cause of action is not viable.").

After considering the parties' lengthy submissions, I am not convinced that the plaintiffs fraudulently joined Riverview in the state court action in an improper attempt to deprive the other defendants of their right to a federal forum. While the immunity provided by the PLCAA could result in dismissal of the claims against Riverview, neither the statute itself nor any controlling case conclusively establishes that the plaintiffs cannot state a cause of action against Riverview. Under the "no possibility" standard, therefore, defendants' submissions fall short of establishing that Riverview has been fraudulently joined.[10]

Defendants urge that they are entitled to have this Court interpret and apply the PLCAA. Under the well-pleaded complaint rule, however, a federal defense does not provide a basis for removal when complete diversity is lacking. See 13D Wright, Miller & Cooper, Federal Practice & Procedure § 3566 (3d ed.). Because fraudulent joinder has not been established, this Court does not have jurisdiction to delve into the merits of this dispute. Cf. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1380-

[10] Because defendants have failed to establish that there is no possibility the plaintiffs can state a cause of action against Riverview, I do not reach plaintiffs' argument based on the common defense rule.

81 (11th Cir. 1998) ("In a fraudulent joinder inquiry, federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.").

In the motion to remand, plaintiffs request an award of costs and fees incurred as a result of the removal. When a case is remanded, fees should be awarded only if the removing party did not have an objectively reasonable basis for removal. Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005). Given the lack of controlling authority regarding removal based on PLCAA immunity, plaintiffs' request for costs and fees is denied.

Accordingly, the case will be remanded.

/s/ RNC
Robert N. Chatigny
United States District Judge