



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LISA SUMMERS, Personal Representative of)
the Estate of KESHALL ANDERSON, KISHA)
BAILEY, Individually and as the Legal Guardian)
of JORDAN DOMINIQUE ROBINSON, JR., a)
minor, MICHAEL)
BAILEY, Individually,)

Plaintiffs,
Appellants,

v.

CABELA’S WHOLESALE, LLC., a Nebraska)
Corporation registered in Delaware,)
CABELA’S WHOLESALE, INC.,)
a Nebraska Limited Liability Company)
registered in Delaware,)

Defendants,
Appellees,

No. 170,2019

ON APPEAL FROM
THE FINAL ORDER AND
JUDGEMENT DATED
DECEMBER 10, 2018 OF
THE SUPERIOR COURT OF
DELAWARE
C.A. No. N18C-07-234 VLM

APPELLANTS’ OPENING BRIEF

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NATURE OF PROCEEDINGS

On July 25, 2018, Plaintiffs LISA SUMMERS, Personal Representative of the Estate of KESHALL ANDERSON, and KISHA BAILEY, Individually and as the Legal Guardian of JORDAN DOMINIQUE ROBINSON, JR., a minor, MICHAEL BAILEY, Individually, (hereafter “Plaintiffs”) filed a timely Complaint against Defendants. The parties entered into a Stipulation dismissing certain Defendants. Plaintiffs then filed a First Amended Complaint (“FAC”) alleging Negligence Per Se, Negligence, Negligent Entrustment, Negligent Training and Supervision, Public Nuisance, Wrongful Death and a Survivor’s Action, against Cabela’s Wholesale, Inc., (“Defendant” or “Cabela’s”). Cabela’s filed a Motion to Dismiss Plaintiffs’ FAC under Superior Court Rule 12(b)(6) alleging that Plaintiffs failed to state a claim upon which relief could be granted. Plaintiffs filed an Opposition to Defendant’s Motion to Dismiss. After oral argument, the trial court granted Defendant’s Motion to Dismiss as to all claims. Appellants timely filed a Notice of Appeal. This appeal seeks a reversal of the trial court’s decision to grant Defendant’s Motion to Dismiss.

SUMMARY OF ARGUMENT

The trial court erred in granting Defendant's motion to dismiss because:

1. Plaintiffs sufficiently pled that Cabela's failed to conduct a compliant transfer of the firearm, so 11 Del. C. § 1448A did not provide immunity.
2. 11 Del. C. § 1448A does not immunize licensed firearms dealers from liability for their negligent or illegal gun sales to unlicensed parties.
3. Plaintiffs sufficiently pled a cognizable public nuisance claim.
4. If 11 Del. C. § 1448A bars all of Plaintiffs' claims it violates Delaware's open courts provision and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

Plaintiffs' allegations, that must be taken as true, include the following:

Defendant Cabela's illegally and negligently sold a handgun in a straw purchase (a sale intended for someone other than the buyer), and as a foreseeable result KeKe Anderson was killed. (A-056-060 ¶¶ 37-62, A-062 at ¶¶ 74, 75). Specifically, on July 28, 2016, Cabela's unlawfully sold a .40 caliber Smith & Wesson pistol ("the handgun") to Brilena Hardwick ("Hardwick"). (A-056-058 ¶¶ 37-52, 062 at ¶¶ 74-76). Hardwick was a straw purchaser, illegally buying the handgun for John Kuligowski ("Kuligowski"), a convicted felon who was barred from purchasing or possessing a firearm. (A-056-057, 059 at ¶¶ 37, 41, 57). Cabela's knew or should have known this was an illegal sale, and willfully ignored indicators that a straw purchase was underway that would foreseeably supply a criminal and be used in crime – as it was. (A-059 at ¶ 58-59).

Cabela's knowingly violated federal and state law in making the straw sale of the gun used to kill KeKe. *See, e.g.*, A-062 at ¶74; A-063 at ¶ 79. Cabela's violated its duties under federal law to certify the accuracy of the information provided on the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473 ("Form 4473") that is required for every firearms sale by a Federal Firearms Licensee ("FFL"), and to assess the lawfulness of a firearm transfer before submitting a name for a background check. (A-051-053 at ¶ 14-19).

When Cabela's chose to become a FFL, it assumed the duty to act as a "principal agent of federal enforcement' in 'restricting [criminals'] access to firearms'" and accepted "the responsibility to '[e]nsure that, in the course of sales or other dispositions ... weapons [are not] obtained by individuals whose possession of them would be contrary to the public interest.'" *Abramski v. United States*, 573 U.S. 169, 190 (2014) (quoting *Huddleston v. United States*, 415 U.S. 814, 824-25 (1974)). (A-049-050 at ¶ 10). One of the most important duties Cabela's assumed was to prevent, and never engage in, straw sales. (A-049-050 at ¶ 10). Straw purchases undercut gun laws by enabling people to obtain guns without any background check or record of sale - because only the straw buyer has her criminal background checked and only her name is on the transaction records. As Cabela's knew, straw purchases are a primary way that guns are diverted to felons and other dangerous individuals for criminal uses. (A-050 at ¶ 11).

Cabela's also knew or should have known of protocols from the gun industry trade association National Shooting Sports Foundation ("NSSF") and ATF that make clear that, while the prospective purchaser must answer questions on Form 4473 stating that she is buying the gun for herself and is an otherwise legal purchaser, dealers should not simply rely on a purchaser's statements or the Brady background check results; they may not transfer a gun to a prospective purchaser when there is any suspicion or indicator that the purchaser is a straw purchaser (A-

050 at ¶ 11). The NSSF and ATF recognize that dealers should screen prospective purchasers by asking questions beyond those on Form 4473, including inquiring about buyers' experience with and intended use of the guns, and whether they are buying the gun(s) for themselves. (A-54-55 at ¶¶ 25-29). Gun dealers violate their duties when they ignore, or are willfully blind to, indicators of a straw purchase. (A-055 at ¶ 29). A responsible gun dealer, when presented with "red flags," will call law enforcement to enable further investigation. (A-055 at ¶ 31).

While Plaintiffs were not required to detail specific facts supporting their claims, the FAC included some pre-discovery facts, including that Hardwick, before purchasing the handgun, but while inside the Cabela's store, remained in regular cell phone communication with Kuligowski, through text messages and phone calls in order to coordinate the straw purchase; ran up and down the aisles; acted erratically; and on Form 4473 listed a false address and falsely certifying that she was the actual purchaser of the handgun. (A-057 at ¶¶ 41-44). Before transferring the gun Cabela's knew or willfully blinded itself to "red flags" which indicated that Hardwick was a "straw purchaser." (*Id.*)

Nonetheless, Cabela's submitted Hardwick's information to law enforcement to have them run a NICS background check on her, and failed to call law enforcement, ask questions, or halt the sale of the handgun. (A-057-058). Cabela's falsely certified on Form 4473 that Hardwick was the actual buyer of the

firearm, despite having actual or constructive knowledge to the contrary. (A-058 at ¶ 52). Cabela's knew or willfully blinded itself to the fact that supplying the firearm to Hardwick was inherently dangerous because "straw purchases" are a primary mechanism by which criminals obtain guns. (A-058 at ¶ 46). Cabela's transfer was not compliant with federal and state law. (A-062 at ¶ 74).

Cabela's violations of law proximately caused precisely what the gun laws intend to prevent - a dangerous criminal obtained a gun and used it to kill an innocent person, causing Plaintiffs' harm. (A-057-060 at ¶¶ 45-62, A-062-063 at ¶¶ 74, 75, 79). As a result of Cabela's unlawful actions, Hardwick obtained the handgun, gave it to the felon Kuligowski, which he then supplied to the criminal market. (A-059 at ¶¶ 58-59). Two minors acquired the gun and used it in a drive-by shooting in Wilmington, Delaware on September 18, 2016. (A-059 at ¶¶ 58-59). The shooting claimed the life of Plaintiffs' decedent Keshall Anderson ("KeKe"), a 19-year-old, innocent bystander walking on a public street. (A-060 at ¶¶ 60-62). KeKe left behind a 6-month old son. (A-60 at ¶ 63).

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY HELD THAT CABELA’S WAS ENTITLED TO IMMUNITY FOR ITS NEGLIGENT AND ILLEGAL SALE.

A. QUESTION PRESENTED

Did the trial court err by misapplying the motion to dismiss standard in finding that there was a compliant sale that entitled Cabela’s to immunity from civil liability? (Ex. A at 25-43, 47-54; A-148-158).

B. SCOPE OF REVIEW

The standard of review on a lower court’s grant of a motion to dismiss under Rule 12(b)(6) is “de novo to ‘determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.’” *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)).

In reviewing the trial court’s dismissal, this Court must apply the standards governing a Motion to Dismiss for failure to state a claim, under which: “(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are ‘well-pleaded’ if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iii) [sic] dismissal is inappropriate unless the ‘Plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.’”

Savor, Inc. v. FMR Corp., 812 A.2d 894, 896-97 (Del. 2002) (internal citations omitted). Where discovery may enable a plaintiff to establish facts which would allow for her claims to proceed, a court should not grant a motion to dismiss without giving the plaintiff "an adequate opportunity for discovery." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1208 (Del. 1993).

C. MERITS OF THE ARGUMENT

Plaintiffs alleged that Cabela's illegally and negligently sold a handgun, and as a foreseeable consequence a criminal used it to kill KeKe Anderson. The trial court did not dispute that Plaintiffs alleged all elements, and provided adequate notice, of their claims. Moreover, the trial court recognized that § 1448A does not provide immunity to FFLs unless their firearms transfer is fully "complan[t]" with the law (*see* Mem. Opinion, attached as Exhibit ("Ex.") B at 12-14). However, the court contravened Delaware's motion to dismiss standard by rejecting Plaintiffs' allegations that Cabela's did not comply with law, including by knowingly entering the name of an obvious straw purchaser into the background check system. The trial court compounded its error by acting as a fact-finder, weighing Plaintiffs' supporting allegations – which were not even required under notice pleading – and finding that Cabela's *did not know* Hardwick was a straw purchaser, even though Plaintiffs alleged that Cabela's *did know*. Even if

Plaintiffs needed more evidence to ultimately prevail (they did not), they were entitled to discovery to prove their claims.

1. Plaintiffs Sufficiently Pled All Necessary Elements

Plaintiffs alleged far more than the required “short and plain statement of the claim showing that the pleader is entitled to relief and [] a demand for judgment for the relief to which the party deems itself entitled....” Del. R. Civ. P. 8(a). *See also John Doe No. 1 v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (“for a complaint to survive a motion to dismiss, it need only give ‘general notice of the claim asserted’”); *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995) (“[a]n allegation, though vague or lacking in detail, is nevertheless “well-pleaded” if it puts the opposing party on notice of the claim being brought against it”) (citation omitted). With great specificity Plaintiffs alleged that Cabela’s illegally and negligently sold the gun, and thereby caused Plaintiffs’ harm in a specifically-identified shooting. Neither the trial court nor Cabela’s disputed that Plaintiffs provided Defendant more than ample notice of all claims.

2. Plaintiffs Sufficiently Alleged That Cabela’s Was Not Entitled to Immunity

Plaintiffs also sufficiently alleged that Cabela’s is not entitled to immunity. Even though the trial court read § 1448A’s immunity too broadly, (*see infra* at 20-26), the court agreed that “Cabela’s is only entitled to a complete defense if it performed a compliant transfer in accordance with the statute,” which requires

compliance with the incorporated “federal regulations.” *See* Ex. B at 12-14. The relevant portion of the law states:

(a) No licensed importer, licensed manufacturer or licensed dealer shall sell, transfer or deliver from inventory any firearm, as defined in § 222 of this title, to any other person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, without conducting a criminal history background check *in accordance with regulations promulgated by the United States Department of Justice pursuant to the National Instant Criminal Background Check System (“NICS”), 28 C.F.R. §§ 25.1-25.11*, as the same may be amended from time to time, to determine whether the transfer of a firearm to any person who is not licensed under 18 U.S.C. § 923 would be in violation of federal or state law.

(b) No licensed importer, licensed manufacturer or licensed dealer shall sell, transfer or deliver from inventory any firearm, as defined in § 222 of this title, to any other person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, unless and until being informed that it may “proceed” with the sale, transfer or delivery from inventory of a firearm by the Federal Bureau of Investigation (FBI), NICS Section pursuant to the request for a criminal history record check required by subsection (a) of this section or 25 days have elapsed from the date of the request for a background check and a denial has not occurred.

....

(d) *Compliance* with the provisions of this section shall be a complete defense to any claim or cause of action under the laws of this State for liability for damages arising from the importation or manufacture of any firearm which has been shipped or transported in interstate or foreign commerce. In addition, compliance with the provisions of this section or § 1448B of this title, as the case may be, shall be a complete defense to any claim or cause of action under the

laws of this State for liability for damages allegedly arising from the actions of the transferee subsequent to the date of said compliance wherein the claim for damages is factually connected to said compliant transfer.

11 Del. C. § 1448A (emphasis added).

Hence, “compliance” requires not simply “conducting a criminal history background check,” but doing so “in accordance with regulations promulgated by the U.S. Department of Justice pursuant to the National Instant Criminal Background Check System (‘NICS’), 28 C.F.R. §§ 25.1 - 25.11”. 11 Del. C. § 1448A. Those regulations prohibit "misuse" of NICS, including by "FFLs", or individuals' purposefully furnishing incorrect information to the system to obtain a 'Proceed' response, thereby allowing a firearm transfer." 28 C.F.R. § 25.11(b)(1). Purposefully entering into the background check system the name of someone other than the intended purchaser – such as a straw purchaser -- is not "compliant" with law and disentitles FFLs to immunity under §1448A.

To overcome a claim of immunity, Plaintiffs were required, at most, to allege facts establishing the "possibility and conceivability" that Cabela's had not met the "compliance" prerequisite. *See Esposito v. Townsend*, No. 12C-08-006 (RBY), 2013 Del. Super. LEXIS 26, at *15-16 (Feb. 8, 2013). Even a "scant" record without significant facts supporting the allegation of non-compliance was

sufficient. *See Hale v. Elizabeth W. Murphey Sch., Inc.*, 2014 Del. Super. LEXIS 246, at *15 (May 20, 2014). Plaintiffs far exceeded this standard.

Plaintiffs clearly alleged that Cabela's transfer was not compliant under § 1448A(a), including that Cabela's:

- knew a straw purchase was underway (A-057 at ¶ 45);
- knew that it could not legally certify that Hardwick was the actual purchaser of the firearm (A-058 at ¶ 47);
- falsely certified that Hardwick was the actual purchaser (A-058 at ¶ 52);
- submitted Hardwick's name to law enforcement to have a NICS background check done (A-059 at ¶ 54);
- would not have completed the sale, or certified that Hardwick was the actual purchaser, if it complied with its obligations (A-058 at ¶ 51);
- would have notified law enforcement if it complied with its obligations (*Id.*);
- knew that supplying a firearm to Hardwick created an unreasonable risk of danger to others (A-058 at ¶ 46);
- did not comply with its legal obligations, including:
 - to determine whether Hardwick was a straw purchaser, or was otherwise unqualified to possess or buy a firearm;
 - to not sell a firearm if it had doubts about the legality of the sale;

- to only certify the firearms transaction form if it had no doubts that it was legal; and
- to notify law enforcement of a straw purchase (A-058 at ¶ 50);
- knowingly violated state and federal laws, and/or aided and abetted violations, including, but not limited to, 11 Del.C. §§ 1448A(a), 1448A(b), 1448A(g), 1448A(h), 18 U.S.C. §§ 922(a)(6), 922(b)(2), 922(b)(5), 922(m), 924(a)(1), 924(a)(2), 923(g)(1)(A), 924(a)(3), and 27 C.F.R. §§ 478.125, 478.128 (A-062, A-063 at ¶ 74, 79);
- proximately caused the death of KeKe Anderson (A-062 at ¶ 75).

As Plaintiffs alleged all necessary elements, established there was no basis to support immunity, and provided Cabela's more than sufficient notice to prepare defenses, it was improper to dismiss the complaint. The allegations demonstrated that the transfer was not compliant with the law, as Cabela's "purposefully furnish[ed] incorrect information to the system to obtain a 'Proceed' response, thereby allowing a firearm transfer," in violation of 28 C.F.R. § 25.11(b)(I)—which § 1448A incorporates. In fact, the court, at oral argument, stated its "understanding is that is what has been pled . . . an allegation of criminal conduct." Ex. A. at 49. The court simply refused to accept Plaintiffs' allegations as true, which is impermissible. *See Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 227 (Del. 1982) (accepting as true all well-pleaded allegations in a complaint, the trial

court's denial of the motion is erroneous if a “plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.”).

3. The Trial Court Improperly Weighed Allegations To Find That Cabela’s Was Entitled To Immunity

The trial court not only erred in rejecting Plaintiffs’ allegations that Cabela’s knew Hardwick was a straw buyer, but the court compounded its errors by weighing and then finding inadequate Plaintiffs’ specific supporting allegations -- that were not even required under notice pleading.

Exceeding their obligation to provide notice of claims, Plaintiffs alleged specific pre-discovery facts -- including “red flags” such as Hardwick’s erratic behavior and cell phone use (A-057 at ¶¶ 41-44) – that supported finding that Cabela’s purposefully entered Hardwick’s name into NICS despite knowing she was a straw purchaser (A-059 at ¶54). The trial court viewed Plaintiffs’ provision of additional details as an invitation to act as a fact-finder, weighed the facts, and found them insufficient to show that Cabela’s knew Hardwick was a straw purchaser. *See* Ex. B at 21.

That ruling was impermissible. The court was required to give Plaintiffs the “benefit of all favorable inferences” from the complaint (*see Savor*, 812 A.2d at 897), and accept that Cabela’s ***did know*** that Hardwick was a straw buyer. (A-057

at ¶ 45). ““The pleading need not set out in detail the facts upon which it is based as long as it gives the other party fair notice of what the claim is and the grounds upon which it rests. The details of the claim can be obtained through... discovery....” *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1252 (Del. 2004) (*citation omitted*). *See also Precision Air*, 654 A.2d at 406; *Desert Equities*, 624 A.2d at 1208; *Haskins v. Kay*, No.82, 2008 Del. LEXIS 571, at *5-7. If the trial court believed that additional facts were needed to ultimately prevail, it was obligated to allow Plaintiffs discovery.

The trial court violated these basic rules, as well as the rule that a complaint may not be dismissed for failure to state a claim unless it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof. *See Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952); *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970). As Plaintiffs alleged that Cabela’s violated the law and knew that Hardwick was a straw buyer, it is more than “reasonably conceivable” that Cabela’s did not comply with the law and knew Hardwick was a straw buyer.

This rule applies with full force in deciding if a complaint alleges sufficient facts to illustrate that it is conceivable that immunity does not apply. *See Esposito*, 2013 Del. Super. LEXIS 26 at *15-16; *Hale*, 2014 Del. Super. LEXIS 246 at 15-18. Indeed, because of the "fact intensive" nature of the inquiry

as to whether immunity applies, "absent clear evidence that the challenged act was [within the scope of immunity], courts have shown reluctance to grant dismissal without the opportunity for discovery." *Esposito, supra*, at *15 n. 30 (collecting cases). Plaintiffs were entitled to the "opportunity for discovery" to supplement their more-than sufficient allegations. *Id.* at *15-18. It was inappropriate, "at the pleading stage" for the trial court to "state definitively that there is no conceivable set of circumstances" under which immunity would not apply. *Id.*

4. The Trial Court Erred in Finding That Plaintiffs Did Not Allege A Noncompliant Transfer

The trial court was triply incorrect because the alleged "red flags" it weighed were sufficient to support an ultimate finding that Cabela's transfer was not compliant. The court was wrong on the "facts" and the law governing straw purchase liability.

A gun dealer knowingly facilitates a straw purchase when it willfully blinds itself to facts that make it obvious that an illegal activity is occurring. *United States v. Carney*, 387 F.3d 436, 448-50 (6th Cir. 2004), upheld a gun dealer's criminal conviction for aiding and abetting false statements by a straw purchaser because of circumstantial facts that supported inferring that the seller "either knew that [the person using straw purchaser(s)] was the actual buyer of the guns or had been deliberately ignorant of that fact."

Numerous courts have denied motions to dismiss lawsuits against gun dealers for allegedly violating the law by being willfully blind to indicators of straw sales. *See, e.g., Englund v. World Pawn*, No. 16-CV-00598, Letter Order at 5 (Ore. Cir. Ct. 2018) (finding that allegations could support a finding that online gun seller “knowingly” violated statutes when enabling firearms transfer despite indications of a straw sale) (Ex. C); *see also City of Gary v. Smith & Wesson*, 2019 Ind. App. Lex. 228, *23 n. 18 (Ind. Ct. App., May 23, 2019) (“The law is also well settled that evidence of willful blindness to critical acts may suffice to establish a knowing violation of a criminal statute.”) (gun manufacturers could be held liable for knowingly facilitating illegal firearms sales by dealers when they kept supplying dealers while willfully blinding themselves to “red flags” indicating unlawful sales). *See also non-gun dealer cases: United States v. Nosal*, 844 F.3d 1024, 1039 (9th Cir. 2016) (upholding deliberate ignorance instruction stating that the defendant acted “knowingly” if he “was aware of a high probability” and “deliberately avoided learning the truth”); *United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (accomplice’s knowledge of a fact can be proven by “willful blindness,” such as “evidence that the defendant was confronted with ‘red flags’ but nevertheless said, ‘I don’t want to know what they mean’”).

The trial court nonetheless concluded that the alleged red flags— including Hardwick’s erratic behavior and telephone communications and/or texting while in

the store (A-057 at ¶42) – were insufficient to support a “reasonable inference” that Cabela’s knowingly entered the name of a straw purchaser into NICS. Not only did this contravene Plaintiffs’ allegations, willful blindness precedent, and Delaware’s motion to dismiss standard, *see Savor*, 812 A.2d at 896-97, but the alleged red flags are recognized indicators of straw sales. *See United States v. Carranza*, No. 2:10-cr-0532-RLH-GWF, 2011 U.S. Dist. LEXIS 100951 (D. Nev., Aug. 5, 2011) *rec'd adopted by* 2011 U.S. Dist. LEXIS 101113, *32-35 (2011) (agent testified that speaking on a cell phone before abruptly leaving store was consistent with a straw purchase in which the straw buyer is receiving direction from the actual buyer).

The trial court also failed to appreciate that red flags showing a straw purchase must be considered within the “totality of [the] circumstances,” because an act that may be innocuous in one context can, in a different context, put the dealer on notice of a criminal enterprise. *See Carranza, supra*, *32-35; *see also Direct Sales Co. v. United States*, 319 U.S. 703, 710-11 (1943); *United States v. Bewig*, 354 F.3d 731, 735-37 (8th Cir. 2003); *United States v. Wyche*, 2003 U.S. App. LEXIS 28632, at *6-8 (5th Cir. Mar. 28, 2013).

The trial court also misunderstood Plaintiffs’ claims. The court found that Kuligowski’s presence in the parking lot and his driving Hardwick to the mall were not sufficient “red flags.” *See Ex. B at 20-22*. But Plaintiffs never alleged that

these were “red flags.” The trial court also appeared to believe Cabela’s could not know this was a straw sale since there was no allegation that Kuligowski entered the store. *See id.* at 3, 15. But a dealer violates the law – and may be civilly liable -- when it has reason to know that the person filling out the Form 4473 is a straw purchaser, regardless of whether the actual purchaser is known or present. *See, e.g., Fox v. L&J Supply Inc.*, 2014-24619, Order on Mtn. for Summary Judgment at 1 n. 1 (Nov. 26, 2018. J. Rodgers), attached as Ex. C; *see also Englund*, Ex. D.¹

The trial court also mistakenly found that Plaintiffs claimed “that Cabela's *could have, but did not* check 'the actual purchaser.’” Ex. B at 20 (emphasis added). But Plaintiffs do not claim that Cabela’s was obligated to locate the actual purchaser and run a background check on him. Rather, Cabela’s transfer was noncompliant because it *did not know the identity of the actual purchaser*, but ran a background check anyway. *See* § 1448A(a); 28 C.F.R. § 25.11(b)(1).

¹ Further, while Kuligowski was not physically in the store, he was present by and through his continuous cell-phone communications with Hardwick while she was in the store.

II. THE TRIAL COURT’S INTERPRETATION OF SECTION 1448A IMPERMISSIBLY BROADENS THE SCOPE OF IMMUNITY

A. QUESTION PRESENTED

Did the court err in failing to appropriately interpret 11 Del. C. § 1448A(d) in accordance with applicable principles of statutory interpretation? (Ex. A at 25-43, 47-54; A-148-158).

B. SCOPE OF REVIEW

The standard of review on a lower court’s grant of a motion to dismiss under Rule 12(b)(6) is “de novo to ‘determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.’” *Clinton*, 977 A.2d at 895 (quoting *Feldman v. Cutaia*, 951 A.2d 727, 703-31 (Del. 2008))

C. MERITS OF THE ARGUMENT

The court contravened the rules that a statute must be read to avoid surplusage; not to abrogate common law unless the General Assembly clearly stated its intent to do so; and should be read to further legislative intent.

1. The Trial Court Erroneously Concluded That A Dealer Complies With The Law Whenever It Conducts a Background Check

The trial court appeared to fundamentally misunderstand the duties of a gun dealer. Under the trial court’s analysis, an FFL who conducts a sham background check, certifies information it has reason to know is false, and

supplies straw buyers, is fully compliant with the law -- and is entitled to dismissal of a gun violence victim's suit for injuries caused by the dealer's negligent or illegal acts. All the FFL needs to do to obtain immunity is enter a name – even of an obvious straw purchaser – into NICS, and then deny knowing that it was selling the firearm to a straw purchaser. Since an FFL like Cabela's will likely *always* deny breaking the law in an illegal straw purchase, the trial court's reasoning effectively provides complete protection to FFLs who illegally and/or negligently sell guns to straw buyers. This is wholly contrary to gun laws and regulations. *See, e.g., Carney*, 387 F.3d 436.

2. The Principle of Surplusage Demands Giving Import to § 1448A's Regulation Requirement

To the extent that the trial court concluded that § 1448A does not require FFLs to conduct background check “in accordance with . . . 28 C.F.R. § [] 25.11,” §§ 1448A(a), (d), that was error. This Court has made clear that “we construe statutory language against surplusage, and assume the General Assembly used particular text purposefully.” *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 540 (Del. 2011) The legislature could have merely required “conducting a [NICS] criminal history background check” to be compliant with the law, but it instead stated that the background check must be “in accordance with regulations promulgated by the United States Department of Justice pursuant to the National

Instant Criminal Background Check System, 28 C.F.R. §§ 25.1-25.11.” §

1448A(a). Hence, the mere act of entering a name into the NICS system is *not* sufficient to invoke immunity under § 1448A where a plaintiff has credibly alleged that the FFL knowingly entered the name of a straw purchaser.

The requirement that FFLs comply with regulations acknowledges that federal and state law impose on FFLs a duty to screen for indicators of illegal sales. *See A-127-131, Mot. Ex. 3* (FFL is required to certify the lawfulness of the sale). An FFL violates federal and state law when it certifies and completes a 4473 and/or submits a NICS background check having reason to know that the purported buyer is a straw purchaser. (A-053 at ¶ 19). If the mere entry of a name – even of a straw purchaser – was all that was required of an FFL, a prospective gun buyer could simply type her name into an automated kiosk after presenting an ID and payment. Neither the Delaware legislature nor Congress intended such an absurd and dangerous result. To give meaning to the language chosen by the legislature, § 1448A mandates more than simply entering the name of an obvious straw purchaser into NICS.

3. Section 1448A Must Be Interpreted Narrowly to Permit Common Law Claims

Pursuant to the rule that “statutory provisions are [to be] strictly construed to avoid further unintended abrogation of the common law,” *Nationwide Mut. Ins. Co. v. Wooters*, No. 93C-02-029, 996 Del. Super. LEXIS 113, *14-15, Section

1448A must be construed narrowly. "[T]he common law is not repealed by statute unless the legislative intent to do so is plainly or clearly manifested" and "any such repeal is not effected to a greater extent than the unmistakable import of the [statutory] language used." *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122 (Del. 2009). Overly "[l]iteral . . . interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations consistent with the intent of the legislature." *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990).

Section 1448A comes nowhere close to the required "clear[]" statement of intent to "unmistakab[ly]" include claims like Plaintiffs' within the scope of the immunity provided by the statute. *See id.* The trial court violated these principles by providing a sweeping abrogation of common law claims that is broader than the Delaware legislature clearly indicated.

4. The Immunity Provision of § 1448A Does Not Apply to Sales by FFLS to Unlicensed Parties

While Cabela's is not entitled to immunity even if § 1448A applied to FFLs, immunity was never intended to and does not apply to FFLs in situations like this.

The key principle of statutory interpretation is to further legislative intent. *See State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990) ("Literal or perceived interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations consistent with the intent of the legislature."); *United States v.*

Bryan, 339 U.S. 323, 338-39 (1950) ("[T]he Court will not reach [a] result if it is contrary to the congressional intent and leads to absurd conclusions."); *Shapiro v. United States*, 335 U.S. 1, 31 (1948); Antonin Scalia & Bryan Gardner, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) 63-66 ("*Reading the Law*") (interpretation that advances overall goal of the statute is favored).

Delaware House Bill 35 ("HB 35"), which became §§ 1448A and 1448B in 2013, extended the background check requirement to gun sales by "unlicensed persons." HB 35 only sought to change the legal requirements for firearms transfers *between two unlicensed parties*; it was not intended to alter the rules for sales from FFLs to unlicensed parties—transactions for which background checks were required prior to HB 35. *See* § 1448B(a) (referring to "unlicensed person"). Sections 1448A and B only concern licensed dealers when they facilitate transfers between unlicensed persons by providing background checks for those sales.

When Amendment 7 sponsor Peter Schwartzkopf discussed the intent of the immunity provision that eventually became § 1448A(d), he made clear that it was consistent with the overall focus of HB 35, and only meant to protect unlicensed private parties selling firearms to other unlicensed private parties via "compliant transfer[s]"—not FFLs like Cabela's selling firearms to their customers.

(Plaintiffs' Ex. 1, House Floor Debate Transcript, March 28, 2013 at 6:20-7:3)

(emphasis added) ("if we as the state are going to tell people to comply with

certain things to sell a gun for *private gun sales* and we *should protect them*") (emphasis added). There is no evidence in the legislative record that the General Assembly intended for § 1448A(d) to apply to – much less remove accountability for -- FFLs like Cabela's when they run a background check on an allegedly obvious straw purchaser. It makes sense, as a matter of policy, that the General Assembly chose to treat sales between unlicensed parties and sales made by a FFL to a private party differently. When an FFL is directly selling to a customer, it has a greater financial stake in the transaction, more opportunity to observe and interact with the buyer, and more opportunity to prevent an illegal sale.

Section 1448A also should not be read to abrogate Cabela's liability because "the legislative intent to do so [was not] plainly or clearly manifested." *A.W. Fin. Servs.*, 981 A.2d at 1122. This Court should, consistent with the General Assembly's overall intent, narrowly construe § 1448A such that the immunity does not attach to FFLs like Cabela's when selling to their customers and only applies when two unlicensed parties engage in a "compliant transfer." *See id.*; *See also Bryan*, 339 U.S. 323; *Shapiro*, 335 U.S. 1; *Reading the Law* at 63-66.

III. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' PUBLIC NUISANCE CLAIM

A. QUESTION PRESENTED

Did the trial court err in holding that Cabela's could not be held liable for creating a public nuisance?² (Ex. A at 54).

B. SCOPE OF REVIEW

The standard of review on a lower court's grant of a motion to dismiss under Rule 12(b)(6) is "de novo to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Clinton*, 977 A.2d at 895 (quoting *Feldman v. Cutaita*, 951 A.2d 727, 703-31 (Del. 2008))

C. MERITS OF THE ARGUMENT

Plaintiffs adequately alleged a public nuisance claim, which imposes liability for an "unlawful act . . . that endangers the lives, safety, health or comfort of the public." *Quail Vill. Homeowners Ass'n v. Rossell*, No. 9131-MG, 2018 Del. Ch. LEXIS 560, at *20 (June 25, 2018). *See* A-068 at ¶¶110-111 ("acts and omissions of Cabela's... caused, created and maintained a substantial and unreasonable interference with the public's health, safety, convenience, comfort, peace and use of public property and/or private property.") The trial court

² Defendant's argument that non-property-based public nuisance claims are not permitted under Delaware law was first raised in a footnote in Defendant's Reply brief, after Plaintiffs had submitted their Opposition to the Motion to Dismiss. *See* A-204.

dismissed Plaintiffs' public nuisance claim, holding that Cabela's was "entitled to the complete defense afforded in § 1448(d)***." Ex. B at 24. This is incorrect since Cabela's transfer was not compliant. *See supra* at 3-6, 7-19.

The trial court also held that "Delaware courts have not yet recognized a public nuisance cause of action for products..." (Ex. B at 20), relying on *Sills v. Smith & Wesson Corp.*, 2000 Del. Super. LEXIS 444. However, *Sills* involved claims against a firearm manufacturer, not a dealer who illegally sold a gun, and *Sills* specifically noted that no express authority existed "requiring public nuisance claims be restricted to those based on land use..." *Id.* at *26.

Delaware can, and should, recognize public nuisance claims for harmful sales of dangerous products. Section 821B of the Restatement (Second) of Torts, upon which Delaware relies, states that a "public nuisance is an unreasonable interference with a right common to the general public." *Patton v. Simone*, 626 A.2d 844, 855 (Del. Super. 1992) (*citing* Restatement (2d) of Torts, § 821B (1979)). Nothing in this section exempts from liability nuisance-creating conduct that involves products, and there is no reason to exclude illegal gun sales from the general nuisance prohibition.

Public nuisance claims against firearm manufacturers and dealers have been accepted by the Supreme Courts of Indiana and Ohio and several other jurisdictions. *See e.g. City of Gary v. Smith & Wesson*, 801 N.E.2d 1222 (Ind.

2003) (allowing public nuisance claim against gun manufacturers, distributors, and dealers to proceed); *City of Cincinnati v. Beretta*, 768 N.E.2d 1136 (Oh. 2002)(same); *James v. Arms Tech., Inc.*, 820 A.2d 27, 51 (N.J. Super. Ct. App. Div. 2003) (same); *KS&E Sports v. Runnels*, 72 N.E.3d 892, 903 (Ind. 2017) (permitting public nuisance claim against dealer related to alleged straw sale); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296 (E.D.N.Y. 2007) (same).

This Court should reverse the dismissal of Plaintiffs' public nuisance claim.

IV. IF READ TO BAR ALL OF PLAINTIFFS' CLAIMS, SECTION 1448A IS UNCONSTITUTIONAL³

A. QUESTION PRESENTED

Did the trial court err in holding that depriving Plaintiffs of all claims to civil justice is consistent with the Delaware and United States Constitutions? (Ex. A at 33, 40, 43-45; A-158-162).

B. SCOPE OF REVIEW

The standard of review on a lower court's grant of a motion to dismiss under Rule 12(b)(6) is "de novo to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" Clinton, 977 A.2d at 895 (quoting Feldman v. Cutaia, 951 A.2d 727, 703-31 (Del. 2008))

C. MERITS OF THE ARGUMENT

The court erred in holding that it was constitutional to deprive Plaintiffs of their rights to redress. Barring Plaintiffs' claims violates Delaware's open courts provision, Due Process, and Equal Protection of the U.S. Constitution.

1. Section 1448A Violates Del. Const. Art I, § 9's Protection of The Right to An Adequate Remedy for Injury

The Delaware Constitution, art. I, § 9 provides that "every person for an injury done him or her in his or her reputation, person, movable or immovable

³ This section assumes, *arguendo*, that all of Plaintiffs' claims are barred by § 1448A.

possessions, shall have remedy by the due course of law." Section 1448A violates this right by depriving Plaintiffs, and other victims of gun violence, of any effective remedy against gun dealers who cause harm from negligent or unlawful sales and engage in sham background checks on obvious straw purchasers.

This constitutional provision enshrines the principle that "the legislature may not abolish the common law right of action to recover damages for negligent injury without substituting another substantially adequate remedy." *See Gallegher v. Davis*, 183 A. 620, 625 (Del. Super. Ct. 1936); *over'd on other grounds by Wagner v. Shanks*, 194 A.2d 701 (Del. 1963); *Young v. O.A. Newton & Son Co.*, 477 A.2d 1071, 1076 (Del. Super. Ct. 1984) (citing *Gallegher*). Although *Young* ultimately upheld the challenged statute, it engaged in a substantive analysis of whether the statute provided a sufficient alternative remedy and observed that the "test is whether the[re is an] alternate method of compensation [which] assures that the injured [party] will receive reasonable compensation for his injury." *Id.* at 1078. No Delaware court of which Plaintiffs are aware has held that the General Assembly may deprive victims of negligence from all effective remedies of law.

The trial court claimed that § 1448A does not deprive Plaintiffs of an effective remedy because the statute "does not prevent Plaintiffs from seeking compensation for their damages and suing Hardwick, Kuligowski, or the persons who were charged with [the] shooting." *See* Ex. B at 28. However, denying

redress against a wrongdoer cannot be justified by preserving a meaningless right to obtain worthless judgments against judgment-proof defendants that are unlikely worth the time and cost of litigation. The Delaware Constitution requires that a statute must provide a *meaningful* remedy that “assures that the injured [party] will receive *reasonable compensation* for his injury.” *Young*, 477 A.2d at 1078.

Section 1448A’s denial of remedies violates art. I, § 9.

2. Section 1448A Violates the Due Process Clause of The Fourteenth Amendment

Section § 1448A also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. While courts have held that common law rights may be modified or extinguished, the Supreme Court has never approved a wholesale denial of all reasonable remedies for injured plaintiffs.

The Supreme Court has recognized that “[w]here there is a legal right, there is also a legal remedy by suit or action at law.” *Marbury v. Madison*, 5 U.S. 137, 163 (1896) (quoting William Blackstone, Commentaries 23); *see also Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (“a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive the person suffering the loss of due process of law.”); *Poindexter v. Greenhaw*, 114 U.S. 270 (1885) (“No one would contend that a law of a state, forbidding all redress by actions at law for injuries

to property, would be upheld in the courts ... for that would be to deprive one of his property without due process of law.").

In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), the Supreme Court upheld a federal compensation system for victims of nuclear accidents only after extensively analyzing the alternate compensation scheme and finding that the law did "provide a reasonably just substitute for the common-law or state tort law remedies it replace[d]." *Id.* at 88. If due process principles allowed legislatures to deprive parties of all civil redress without an adequate substitute, the court would not have gone through this analysis.

Rather than challenge this precedent, the trial court relied on authority suggesting that Plaintiffs' rights did not "vest[]" prior to the passage of § 1448A. *See* Ex. B at 29. But whether Plaintiffs had a vested right in a tort claim prior to a final, non-reviewable judgment prior to § 1448A, Due Process entitles them to *some adequate remedy*. Section 1448A violates this guarantee.

3. Section 1448A Violates the Equal Protection Clause of The Fourteenth Amendment

By depriving redress to victims of negligent and criminal conduct when the tortfeasor is a gun seller, § 1448A violates the Equal Protection Clause of the Fourteenth Amendment. The law cannot even survive rational basis scrutiny, which is deferential, but is not the rubber stamp suggested by the trial court.

In *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1572 (M.D. Ga. 1990), the court held a state tort reform statute was unconstitutional on equal protection grounds under the state and federal constitutions because it afforded claimants in products liability and non-products liability cases starkly different legal remedies without a rational basis. Similarly, there is no rational basis to deny meaningful remedies for victims of wrongful gun industry conduct by immunizing gun dealers who choose to profit off the criminal gun market while allowing sellers of products from b.b. guns to cigarettes to remain fully subject to tort law when they act negligently or unlawfully. *See also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (striking down zoning ordinance that discriminated against the mentally handicapped on rational basis review).

The only “rational basis” advanced by the trial court for the General Assembly purportedly singling out gun violence victims is “incentiviz[ing]” “compliant transfers” that adhere to state and federal law. *See Ex. B. (Mem. Op.)* at 30-31. This justification cannot withstand scrutiny. First, under the trial court’s own, overly broad interpretation, § 1448A fundamentally fails to accomplish this purpose, as it immunizes dealers who supply the criminal market by running a NICS background check even on an obvious straw purchaser.

Second, Delaware's interest in having businesses comply with the law is not unique to the gun industry. It is irrational to immunize FFLs who engage in negligent and unlawful transfers but to allow unlimited liability for other industries who engage in simply negligent transfers of less dangerous products.

**4. Defendant's Broad Reading of Statutory Immunity
Should Be Rejected Under the Principle of
Constitutional Avoidance**

"Where a possible infringement of a constitutional guarantee exists, the interpreting court should strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities." *Delaware v. Raker*, 720 A.2d 1139, 1144 (Del. 1998). The court should adopt a "plausible" interpretation that avoids constitutional concerns. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). As Plaintiffs' interpretation is more than plausible, and the trial court's interpretation of § 1448A would raise substantial constitutional concerns, the doctrine of constitutional avoidance supports adopting Plaintiffs' interpretation.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the trial court, overrule Cabela's Motion to Dismiss, reinstate all of Plaintiffs' claims and remand this case to the trial court for further proceedings.

Dated: July 18, 2019.

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