NO. FBT CV 15 6048103 S	**:**	**SUPERIOR COURT**
DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL	**:**	**J.D. OF FAIRFIELD**
V.	**:**	**AT BRIDGEPORT**
BUSHMASTER FIREARMS INTERNATIONAL, LLC, a/k/a, ET AL	**:**	**JANUARY 25, 2016**

PLAINTIFFS' OMNIBUS OBJECTION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs brought this action because defendants bear legal responsibility for the carnage at Sandy Hook Elementary School on December 14, 2012. Defendants chose to sell a military weapon to the civilian market, ignoring the unreasonable and demonstrated risk that its assaultive capabilities would be used against innocent civilians. In making that sale, defendants violated the common law of negligent entrustment and the Connecticut Unfair Trade Practices Act ("CUTPA"), two causes of action that Congress expressly preserved in the Protection of Lawful Commerce in Arms Act ("PLCAA").

Defendants attempt to shirk their legal responsibility by distorting the text of PLCAA to suit their purposes. Confronted with provisions of PLCAA that clearly authorize plaintiffs' causes of action, defendants resort to rewriting the statute to confer complete immunity from plaintiffs' claims. But their interpretations are contrary to PLCAA's plain meaning and find no support in case law.

For tactical reasons, defendants characterize their filings as motions to dismiss; in fact, their arguments in no way implicate the Court's power to adjudicate this case. Plaintiffs' claims sound in negligent entrustment and CUTPA, causes of action that are unquestionably within the

Court's general jurisdiction. Moreover, as Connecticut and Second Circuit case law make clear, PLCAA is non-jurisdictional. Defendants' filings must therefore be construed as motions to strike and defendants should be prohibited from filing requests to revise or any further motions to strike the First Amended Complaint.

Because of defendants' evasive tactics here and in the District Court, thirteen months have passed since this case was filed and plaintiffs are no closer to trial. Rather than face plaintiffs' claims and commence discovery, defendants continue to sound the same meritless refrain: the rules are made to protect us, not the families of Sandy Hook. On the contrary, our rules of practice hold defendants accountable for their procedural gamesmanship, and our law subjects them to liability for their conduct in this case. The Court should deny defendants' motions and permit plaintiffs' claims to proceed without further delay.[1]

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs' First Amended Complaint

This action arises out of the shooting at Sandy Hook Elementary School on December 14, 2012 that killed twenty first-grade children and six educators and wounded two others. Plaintiffs are ten families whose lives were shattered that day: nine plaintiffs lost a child or spouse, and the tenth was shot multiple times but survived. *See* First Amended Complaint ("FAC") ¶¶ 37-46; *see also* ¶¶ 191-200.

Plaintiffs allege that the AR-15 rifle used in the shooting – a Bushmaster XM15-E2S – is not an ordinary weapon. The AR-15 was conceived out of the exigencies of modern conflict, as

[1] Plaintiffs file this Omnibus Objection in response to the motions and memoranda filed by all defendants, Docket Nos. 119, 120, 122, 123, 125, and 126. Because the Riverview Defendants adopted the other defendants' arguments but did not make arguments of their own, we cite only to the memoranda filed by the Remington and Camfour Defendants.

trench warfare gave way to close-range, highly mobile combat. *Id.* ¶ 48. After World War II, the U.S. Army's Operations Research Office analyzed more than three million casualty reports in their pursuit of the ideal combat weapon. *Id.* Their findings led the Army to develop specifications for a new service weapon: a lightweight rifle that would hold a large detachable magazine and rapidly expel ammunition with enough velocity to penetrate body armor and steel helmets. *Id.* ¶¶ 48-49. The AR-15 delivered; 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. *Id.* ¶ 50. Troops field-testing the weapon reported instantaneous deaths, as well as amputations, decapitations, and massive body wounds. *Id.* ¶ 51. The military ultimately adopted the AR-15 as its standard-issue service rifle, renaming it the M16. *Id.*

As an AR-15, the Bushmaster XM15-E2S is built for mass casualty assaults. Semiautomatic fire unleashes a torrent of bullets in a matter of seconds; large-capacity magazines allow for prolonged assaults; and powerful muzzle velocity makes each hit catastrophic. *Id.* ¶¶ 56-70. The combined effect of these mechanical features is more wounds, of greater severity, in more victims, in less time. *Id.* ¶¶ 72-73. This superior capacity for lethality – above and beyond other semiautomatic weapons – is why the AR-15 has endured as the U.S. military's weapon of choice for more than 50 years. *Id.* ¶ 74.

Indeed, the XM15-E2S's lethal efficiency is ideal for highly regulated institutions that require assaultive weaponry. When the AR-15 is sold to the military – and more recently, to law enforcement – it enters an environment where its devastating lethality is both justified and strictly controlled through protocols governing training, storage, safety, and the mental health of soldiers and officers. *Id.* ¶¶ 116-43. When defendants made the Bushmaster XM15-E2S

available to the general public, however, they knowingly placed the same weapon into a very different environment: one where the weapon's utility for legitimate civilian purposes is scant, firearms are shared freely among family members, and oversight is virtually nonexistent, *id.* ¶¶ 144-66; where marketing extols the weapon for its "military-proven performance" that will make "forces of opposition bow down," *id.* ¶¶ 75-92; and where a litany of mass shootings have made two things harrowingly clear – the AR-15 is the weapon of choice for shooters looking to inflict maximum casualties, and American schools are on the frontlines of such violence, *id.* ¶¶ 167-170.

Defendants nevertheless sold the Bushmaster XM15-E2S as a civilian weapon, with negligent disregard for the obvious and unreasonable risks associated with that sale. The Remington Defendants sold the XM15-E2S to the Camfour Defendants, who in turn sold it to the Riverview Defendants; the purpose of both transactions was the re-sale of the weapon to the civilian market. *See id.* ¶¶ 176-78; *id.* Count I ¶ 223; *id.* Count II ¶ 223. In March of 2010, the Riverview Defendants sold the Bushmaster XM15-E2S to Nancy Lanza. *Id.* ¶ 182.

Plaintiffs allege that Nancy Lanza purchased the Bushmaster XM15-E2S to give to or share with her son, Adam Lanza – a devoted player of first-person shooter games who was captivated by the military. *Id.* ¶¶183-85. When Adam turned eighteen on April 22, 2010, he did not enlist; instead, he gained unfettered access to the military-style assault rifle his mother had purchased twelve days before. *Id.* ¶ 186.

On the morning of December 14, 2012, Adam Lanza selected the weaponry he would use in his assault on Sandy Hook Elementary School. Available options included, in addition to the Bushmaster XM15-E2S, at least one shotgun, two bolt-action rifles (one of which he used to kill his mother), three handguns (one of which he used to kill himself), and three samurai swords. *Id.*

¶ 188. From this extensive arsenal, Adam Lanza selected the Bushmaster XM15-E2S. His choice was anything but random; plaintiffs allege that Adam Lanza chose the Bushmaster XM15-E2S for its assaultive qualities, in particular its efficiency in inflicting mass casualties, as well as for its marketed association with military combat. *Id.* ¶¶ 189-90.

Just after 9:30 a.m., Adam Lanza shot his way into Sandy Hook Elementary School, armed with the Bushmaster XM15-E2S and ten 30-round magazines – several of which he had taped together to allow for faster reload. *Id.* ¶ 187. It was the weapon he would use to take 26 lives in under five minutes. Mary Sherlach, a child psychologist, was in a meeting with the school's principal when the first shots were fired; when they went to investigate, both were killed with the Bushmaster XM15-E2S. *Id.* ¶ 202. Lead teacher Natalie Hammond and another staff member were shot with the Bushmaster XM15-E2S and wounded. *Id.*

Adam Lanza then approached two first-grade classrooms, Classroom 8 and Classroom 10. In Classroom 8, Adam Lanza used the Bushmaster XM15-E2S to kill 15 children and 2 adults, including seven-year-old Daniel Barden, six-year-olds Benjamin Wheeler and Noah Pozner, 29-year-old behavioral therapist Rachel D'Avino, and 30-year-old substitute teacher Lauren Rousseau. *Id.* ¶ 204. In Classroom 10, Adam Lanza used the Bushmaster XM15-E2S to kill 5 children and 2 adults, including Dylan Hockley and Jesse Lewis, both six years old, and their 27-year-old teacher Victoria Soto. *Id.* ¶ 205. Nine children from Classroom 10 were able to escape when Adam Lanza paused to reload the Bushmaster XM15-E2S with another 30-round magazine. *Id.* ¶ 206.

The first 9-1-1 call from Sandy Hook Elementary School was made at 9:35 a.m.; by 9:40 a.m., the assault was complete. *Id.* ¶ 207. In the span of those five minutes, 154 bullets were expelled from the Bushmaster XM15-E2S. *Id.* ¶ 212.

Based on these and additional allegations, plaintiffs assert claims of negligent entrustment and violation of CUTPA against the entities that sold the Bushmaster XM15-E2S rifle used in the shooting: the Remington Defendants, the Camfour Defendants, and the Riverview Defendants. On October 29, 2015, plaintiffs filed their First Amended Complaint, which is the operative complaint for purposes of the defendants' motions.

II. Defendants' Removal to Federal Court and the Parties' Briefing on PLCAA

Shortly after plaintiffs filed their complaint in this Court, the Remington Defendants – with the consent of the Camfour and Riverview Defendants – removed the case to their preferred venue, the United States District Court for the District of Connecticut.

The Remington Defendants claimed they were entitled to ignore plaintiffs' chosen forum and proceed in the District Court under diversity jurisdiction because Riverview Sales, the entity that sold the XM15-E2S to Nancy Lanza and the only defendant with Connecticut citizenship, was "fraudulently joined" as a party to the case. The purpose of the fraudulent joinder doctrine is to prevent plaintiffs from defeating federal diversity jurisdiction by strategically joining non-diverse defendants who have no legitimate connection to their case. Here, there is no dispute that Riverview has a legitimate factual connection to the case. The Remington Defendants therefore focused their removal argument on the merits of plaintiffs' legal claims, arguing that plaintiffs failed to state claims against the Riverview Defendants *or any other defendant* because PLCAA prohibited the lawsuit in its entirety.

Plaintiffs opposed removal and sought remand to state court on two grounds. First, plaintiffs objected to the removal as a merits dispute improperly disguised as a jurisdictional one. Second, plaintiffs argued that the Remington Defendants were wrong on the merits in any event, because PLCAA expressly permits plaintiffs' claims. Section 7903(5)(A)(ii) of Title 15 allows

for a negligent entrustment claim – that is, the sale of a firearm to a person or entity for their "use" when the seller knows, or should know, that the entrustment involves an unreasonable risk of physical harm. Section 7903(5)(A)(iii), in turn, permits a CUTPA violation claim – that is, a claim arising from a knowing violation of a state statute that is "applicable to the sale or marketing" of firearms.

In an effort to work around PLCAA's plain language, the Remington Defendants tried to distort the meaning of two pivotal words. Regarding plaintiffs' negligent entrustment claims, the Remington Defendants asserted that an entrustee may "use" a firearm only by discharging it, and not by reselling it (as the Camfour and Riverview defendants did) or providing it to a third party (as Nancy Lanza did). This cannot be correct. We know this because the plain meaning of "use" is quite broad (according to common sense and the U.S. Supreme Court), and because Congress *did* use the word "discharge" elsewhere in PLCAA when that is what it meant. Regarding plaintiffs' CUTPA claim, the Remington Defendants contended that CUTPA is not "applicable" to the sale or marketing of firearms because, in regulating *all* trade, the statute does not single out guns by name. But the word "applicable" is not so limited, as the Second Circuit determined when construing this precise provision of PLCAA. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008) (hereinafter *Beretta*).

The District Court declined to adopt the Remington Defendants' tortured interpretation of PLCAA. Instead, it remanded the case to state court on the ground that plaintiffs had "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." *Soto v. Bushmaster Firearms Int'l, LLC.*, 2015 WL 5898277, at *4 (D. Conn. Oct. 9, 2015).

ARGUMENT

Although the venue has changed, defendants' tactics have not. Once again, they have improperly framed a dispute over PLCAA's scope as a jurisdictional issue. Though styled as motions to dismiss, defendants' pleadings challenge the *sufficiency* of the complaint, not the power of the Court to hear plaintiffs' claims. Moreover, defendants have again misconstrued PLCAA by ignoring the statute's plain meaning and advancing untenably narrow interpretations. Thus, defendants argue that even if plaintiffs have stated claims under CUTPA and the common law of negligent entrustment, those claims are nevertheless foreclosed by PLCAA.

In support of that sweeping assertion, defendants rehash their arguments from the District Court about the meaning of "use" and "applicable." The Remington Defendants also raise a new but equally untenable reading of the statute: that PLCAA does not preserve the plaintiffs' negligent entrustment claims against them because the term "seller" in PLCAA's negligent entrustment definition does not apply to companies that manufacture firearms as well. And finally, defendants contend that plaintiffs' allegations are not well pleaded under CUTPA. All of these arguments fail; the motions must be denied.

I. Defendants' Attempt to Pass Their Motions Off as Jurisdictional Is Improper

Defendants' briefs err before they even begin. By characterizing their filings as motions to dismiss rather than motions to strike, defendants attempt to blur "the distinction between claims implicating the trial court's subject matter jurisdiction and claims implicating the proper exercise of its authority." *In re Jose B.*, 303 Conn. 569, 576 (2012). For the reasons set forth below, the pending motions must be construed as motions to strike. Accordingly, if the Court denies the motions – as it should – defendants should not be permitted to file requests to revise or

subsequent motions to strike. By the same token, our procedural rules entitle plaintiffs to seek leave to amend their complaint, if necessary, to cure any pleading deficiencies.

A. Defendants' Motions Should be Construed as Motions to Strike

A motion to strike tests "whether the complaint states a cause of action." *Villager Pond, Inc. v. Town of Darien*, 54 Conn. App. 178, 182 (1999). A motion to dismiss is a distinct, purely jurisdictional filing that tests whether "a tribunal has authority . . . to decide the class of cases to which the action belongs." *In re Jose B.*, 303 Conn. at 574.

This distinction "is not merely semantic." *Egri v. Foisie*, 83 Conn. App. 243, 249 (2004). As defendants hastened to point out, a motion to dismiss puts a halt to discovery. *See, e.g.*, *Gurliacci v. Mayer*, 218 Conn. 531, 545 (1991) ("[A]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made[.]"). Moreover, "[i]f a motion to dismiss is granted, the case is terminated, save for an appeal from that ruling. The granting of a motion to strike, however, ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings." *Egrie*, 83 Conn. App. at 249; *see also* P.B. § 10-44 ("Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading[.]").

In distinguishing between a motion to dismiss and a motion to strike, "[i]t is the substance of [the] motion [] that governs its outcome, rather than how it is characterized in the title given to it by the movant." *State v. Taylor*, 91 Conn. App. 788, 792 (2005); *see also McCutcheon & Burr, Inc. v. Berman*, 218 Conn. 512, 527 (1991) (where challenge to complaint went to sufficiency of pleadings rather than subject matter jurisdiction, "the trial court should have treated the motion to dismiss as a motion to strike"). Moreover, "every presumption is to

be indulged in favor of jurisdiction," a rule that embodies "the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court by allowing the litigant, if possible, to amend the complaint to correct [any] defect." *In re Jose B.*, 303 Conn. at 579 (quotation marks and citations omitted).

Here, defendants' so-called "motions to dismiss" are in fact textbook motions to strike. They do not assert that this Court lacks subject matter jurisdiction over "the class of cases to which the action belongs." *In re Jose B.*, 303 Conn. at 574. Indeed, it is undisputed that this Court is competent to adjudicate causes of action sounding in negligent entrustment and CUTPA. Defendants merely argue that plaintiffs' allegations are not consistent with any of the causes of action preserved under PLCAA. That is, by definition, a sufficiency argument. *Cf. Amodio v. Amodio*, 247 Conn. 724, 728 (1999) ("The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of [a] statute.").

Defendants' contention that PLCAA implicates the Court's subject matter jurisdiction is notable for omitting the only relevant case to address this issue. In *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011), the Second Circuit held that PLCAA "speak[s] only to the rights and obligations of the litigants, not to the power of the court." *Id.* at 127. In reaching this conclusion, the court followed the U.S. Supreme Court's directive that courts should assume federal statutes are non-jurisdictional unless "Congress has clearly indicated otherwise." *Id.* at 126-27. Because PLCAA "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [courts],'" it must be construed as non-jurisdictional. *Id.* at 127 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438 (2011)).

Indeed, every court to consider PLCAA as a defense has done so on a motion challenging the merits – not the court's jurisdiction. Since PLCAA's enactment, firearm companies have repeatedly raised PLCAA as a defense in precisely the same way defendants do here – by arguing that the plaintiff's allegations do not conform to any of the preserved causes of action under the statute – and they have brought that challenge by way of Rule 12(b)(6) of the Federal Rules of Civil Procedure, or its state equivalent.[2] Rule 12(b)(6) is a test of legal sufficiency, not a challenge to jurisdiction. *Compare* Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted), *with* Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction). Thus, in Connecticut, its equivalent is our motion to strike. *See* P.B. § 10-39(a) ("A motion to strike shall be used whenever any party wishes to contest the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted[.]"); *Cumberland Farms, Inc. v. Town of Groton*, 1999 WL 185118, at *2 (Conn. Super. Mar. 16, 1999) ("Federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is legally and functionally equivalent to Connecticut's motion to strike.").[3]

[2] *See, e.g.*, *Beretta*, 524 F.3d at 392 (noting that defendants brought motion to dismiss before district court under Rule 12(b)(6)); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1220 (D. Colo. 2015) (decided in context of Rule 12(b)(6) motion); *Jefferies v. D.C.*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013) (same); *Bannerman v. Mountain State Pawn, Inc.*, 2010 WL 9103469, at *2 (N.D.W. Va. Nov. 5, 2010) *aff'd*, 436 F. App'x 151 (4th Cir. 2011) (same); *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1045 (C.D. Cal. 2002) *aff'd in part, rev'd in part and remanded*, 349 F.3d 1191 (9th Cir. 2003) (same); *Sambrano v. Savage Arms, Inc.*, 338 P.3d 103, 104 (N.M. App. 2014) (motion to dismiss under state provision equivalent to Rule 12(b)(6)).

[3] The defendants cite two cases to support their claim that this issue is proper on a motion to dismiss, rather than a motion to strike. *See* Camfour Mem. at 6 (citing *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693 (Conn. Super. May 26, 2011) (*Gilland I*)); Remington Mem. at 3 (citing *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 4509540 (Conn. Super. Sept. 15, 2011) (*Gilland II*)); *see also* Camfour Mem. at 16 n.7 (citing *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476, 480-82 (Mo. App. W. Dist. 2013). Both cases are inapt. In *Gilland*, the court permitted defendants to file a procedurally improper "motion to dismiss and/or strike." And

Ignoring that case law, defendants simply cite to a plethora of Connecticut cases recognizing that certain common law and statutory immunities, such as sovereign immunity, are jurisdictional. *See* Remington Mem. at 3; Camfour Mem. at 5-6. This is argument by non sequitur. Defendants make no effort to establish – nor could they – that PLCAA is analogous to governmental immunities. Moreover, our courts have repeatedly held that challenging a plaintiff's complaint for failing to properly allege a cause of action untouched by a statutory immunity is a sufficiency argument that must be raised via motion to strike. *See Gurliacci*, 218 Conn. at 542-43 (defendant's assertion of "fellow employee immunity rule" did not implicate subject matter jurisdiction; plaintiff's "failure to allege sufficient facts to fall within either of the[] two exceptions [to the immunity] . . . merely deprived the complaint of a legally sufficient cause of action, so that a motion to strike was the proper procedural vehicle"); *Egri*, 83 Conn. App. at 246–51 (motion to strike was proper procedural vehicle where plaintiff failed to allege fact that would have placed it outside scope of immunity); *Jane Doe One v. Oliver*, 46 Conn. Supp. 406, 410 (Super. 2000) *aff'd,* 68 Conn. App. 902 (2002) (motion to strike was proper vehicle to assert defense under federal Communications Decency Act, which "creates a federal immunity" by "preclude[ing] courts from entertaining [a category of] claims") (quotation marks and citation omitted).

---

while it used language in both opinions suggesting it was granting defendant's motion as a motion to dismiss, it also permitted plaintiffs to amend their complaint multiple times. *See Gilland II*, 2011 WL 4509540, at *1 (noting that "the plaintiffs amended their complaint twice in response to motions to dismiss based on the PLCAA"). Because the granting of a true motion to dismiss does not permit amendment, *See Egrie*, 83 Conn. App. at 249, *Gilland* should not be read as endorsing defendants' position that PLCAA is jurisdictional. Moreover, in *Noble*, the court reviewed the defendant's motion under a state equivalent of Rule 12(b)(6); it did not address subject matter jurisdiction at all.

B. Defendants May Not File a Request to Revise or an Additional Motion to Strike

Because defendants have already filed motions to strike, they are barred from filing requests to revise or subsequent motions to strike. Under Connecticut rules of practice, pleadings must be filed in the appropriate order. *See* P.B. § 10-6 (indicating that the proper order of pleadings following the complaint "shall be as follows: . . . (2) The defendant's motion to dismiss the complaint[;] (3) The defendant's request to revise the complaint[;] (4) The defendant's motion to strike the complaint."). This order is strictly enforced. "[P]leadings are not to be filed out of the order specified in § [10-6], and the filing of a pleading listed later in the order set out by § [10-6] waives the right to be heard on a pleading that appears earlier on the list." *Sabino v. Ruffolo*, 19 Conn. App. 402, 404 (1989); P.B. § 10-7 ("In all cases, when the judicial authority does not otherwise order, the filing of any pleading provided for by [§ 10-6] will waive the right to file any pleading . . . which precedes it in the order of pleading provided in that section.").

Thus, "[o]nce the defendant files a pleading and employs an argument, *however it is titled*, challenging the legal sufficiency of the complaint, that defendant has waived the right" to submit pleadings that must be filed prior to the motion to strike. *Batts v. Garner Facility (CCI)*, 2006 WL 2414075, at *2 (Conn. Super. Aug. 3, 2006) (Pittman, J.) (emphasis supplied) (noting that the defendant's combined motion to strike / motion to dismiss was "a violation of our rules governing orderly process of civil cases," such that the defendant was "bound by the pleading he has filed and can only be heard on his motion to strike"). This rule applies, of course, to requests to revise, which Section 10-6 of the Practice Book dictates must be filed prior to a motion to strike. *See Paulson v. Blake*, 2002 WL 31235005, at *2 (Conn. Super. Aug. 29, 2002)

(Gallagher, J.) ("The defendant's motion to strike acts as a waiver to the filing of his request to revise.").

Similarly, defendants may not reap a benefit from their improper pleading by filing a motion to strike after the denial of their so-called motions to dismiss. The rule against the filing of successive motions to strike compels this result, as does concern for judicial economy. *See Hartt v. Schwartz*, 1994 WL 110005, at *1 (Conn. Super. Mar. 15, 1994) (Hodgson, J.) ("Since the Practice Book specifically provides for the assertion of multiple grounds in a single motion to strike, and since it further provides that pleadings are to advance after the adjudication of each enumerated pleading, the defendant may not delay the progress of the suit [through] successive, multiple motions to strike."); *Marciano v. Univ. of Connecticut Health Ctr.- John Dempsey Hosp.*, 2013 WL 6671223, at *2 n.2 (Conn. Super. Nov. 19, 2013) (Pellegrino, J.T.R.) ("In treating the defendant's motion to dismiss as a motion to strike from the outset, the parties are saved the time and expense of filing and arguing an additional motion, and the court's resources are conserved.").

Accordingly, the Court should construe the defendants' motions as motions to strike and find that defendants have (1) waived the right to file any pleadings that precede the motion to strike in the pleading order and (2) are precluded from filing any successive motions to strike the First Amended Complaint. The Court should then deny the motions to strike.

II. PLAINTIFFS' NEGLIGENT ENTRUSTMENT CLAIMS ARE PRESERVED UNDER PLCAA

In Connecticut, entrusting a dangerous instrument to another gives rise to a duty to guard against the use of that instrument to cause harm – even if the harm results from a criminal act. Liability is governed by Section 390 of the Restatement (Second) of Torts, which the

Connecticut Supreme Court adopted in 1933. *See Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678 (1933) (reciting elements of § 390); *Short v. Ross*, 2013 WL 1111820, at *5 (Conn. Super. Feb. 26, 2013) (Wilson, J.) ("[A]s long recognized by the decisions of the Superior Court, *Greeley* virtually adopted the approach provided by the Restatement.").

The doctrine of negligent entrustment takes the world as it is, not as it should be. It assigns liability "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 (1965). Naturally, a defendant's knowledge about how "human beings will conduct themselves" is a fact-intensive question. It implicates, among other things, the dangerousness of the item being entrusted;[4] the propensities of certain classes of persons;[5] and inferences about how

[4] *See Greeley*, 165 A. at 679 (recognizing cause of action for negligent entrustment of an automobile; although cars do not belong in the same category as firearms or explosives, cars are nevertheless "capable of doing great injury when not properly operated").

[5] *See* Restatement (Second) of Torts § 390 cmt. b (liability may arise where defendant supplies a chattel to one who "belongs to a class which is notoriously incompetent to use the chattel safely"); *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."); *see also 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."); *Moning v. Alfono*, 400 Mich. 425, 466 n.18 (1977) ("The doctrine [of negligent entrustment] is not limited to [entrustees] whose 'individual' propensities are known to the supplier. The comments following Restatement [§] 390, show that the doctrine of negligent entrustment also applies to classes of persons.").

humans are likely to behave under certain sets of circumstances.[6] Simply put, what matters is the foreseeability of unreasonable harm.

As set forth in more detail above, plaintiffs make specific allegations in their complaint that civilians, as a class, were unfit to be entrusted with the Bushmaster XM15-E2S at the time it was sold – a fact defendants should have appreciated in light of that population's repeated failure to conduct itself properly when provided access to military firepower in an unregulated environment. Defendants clearly disagree; but they also know that Connecticut law provides no basis for converting those factual questions into legal ones. Their solution to this problem is to insist, contrary to every relevant source of law, that PLCAA compels this Court to dismiss plaintiffs' negligent entrustment claim as a matter of law. In fact, PLCAA does the exact opposite: it preserves plaintiffs' right to bring a negligent entrustment claim under Connecticut common law and seek redress from a Connecticut jury.

---

[6] In *Short v. Ross*, 2013 WL 1111820, the Superior Court held that plaintiffs had stated a prima facie case against U-Haul for negligently entrusting a truck that it knew, or should have known, was going to be used at a football tailgate. The court noted that "pursuant to the Restatement approach, the concept of incompetence is broadly drawn . . . [to] include knowledge that the individual will *somehow misuse the chattel*." *Id.* at *6 (emphasis supplied). Under the plaintiffs' complaint, that encompassed knowledge about how people act at tailgates:

> [T]he proposed environment was pedestrian-dense, unregulated by the rules of the road and would contain a large number of individuals who had recently consumed alcohol and who would therefore be less capable of exercising their faculties to avoid moving vehicles[.]

Id. at 8; *see also Fredericks v. Gen. Motors Corp.*, 48 Mich. App. 580 (1973) (plaintiff stated prima facie negligent entrustment claim against General Motors for supplying a dangerous piece of machinery to a company with poor safety standards); *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972) (affirming negligent entrustment verdict against a cement manufacturer who entrusted cherry bombs to its employees without taking proper precautions).

A. PLCAA Preserves Common Law Negligent Entrustment

PLCAA does not sweep nearly as broadly as defendants suggest. The statute defines its primary purpose as follows: "To prohibit causes of action against" firearm manufacturers and sellers "for the harm solely caused by the criminal or unlawful misuse of [a] firearm . . . when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (purposes section). As the word "solely" in that statement reflects, PLCAA is a balancing statute; it both limits the exposure of gun companies and preserves the rights of injured parties to seek redress under specified causes of action when those companies share responsibility for a particular harm.

The operative provisions of PLCAA effectuate that balance by preempting a broad category of lawsuits arising from the criminal misuse of firearms, while preserving claims that target wrongdoing in the manufacturing and sale of firearms. Specifically, PLCAA carves out six causes of action that remain viable, including "an action brought against a seller for negligent entrustment." 15 U.S.C. § 7903(5)(A)(ii).[7] It is important to note that PLCAA does not create a cause of action for negligent entrustment; it simply preserves it. *See* 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."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 n.6 (9th Cir. 2009) ("While Congress chose

[7] These enumerated causes of action may proceed regardless of the prohibition against actions "resulting from the criminal or unlawful misuse of a [firearm]." This is made clear by the structure of the statute (stating that a "qualified civil liability action" "*shall not include*" the preserved causes of action), as well as the language of the product liability provision (which, unlike the other five preserved causes of action, prohibits a claim where "the discharge of the product was caused by a volitional act that constituted a criminal offense," *id.* at § 7903(5)(A)(v)). In other words, PLCAA preserves negligent entrustment claims, including those that arise in circumstances where a third party criminally misused a firearm that functioned as designed and intended.

generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se).").

PLCAA preserves common law negligent entrustment, in particular, by codifying the essential elements of Section 390 of the Restatement. Under that section, liability arises when one "supplies" a chattel "for the use of another whom the supplier knows or has reason to know to be likely . . . . to use it in a manner involving unreasonable risk of physical harm to himself and others." Restatement (Second) of Torts § 390. PLCAA mirrors that framework within its text: negligent entrustment means "supplying" a firearm "for use by another when the seller knows, or reasonably should know, the person to whom the [firearm] is supplied is likely to, and does, use the [firearm] in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B).

By borrowing the Restatement's formulation of negligent entrustment, Congress created a framework that both reflects and accommodates state common law. The Restatement 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 – including Connecticut. *See 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."); *Casebolt v. Cowan*, 829 P.2d 352, 358-59 (Colo. 1992) (collecting cases where states have "employed, approved, or adopted" Section 390); *Short*, 2013 WL 1111820, at *5 (recognizing that the Connecticut Supreme Court adopted the Restatement approach in *Greeley*). The logic of

that choice, of course, flows naturally from Congress' decision not to create causes of action through PLCAA, but merely to preserve certain existing claims. [8]

Thus, PLCAA permits actions that satisfy the common law elements of negligent entrustment to proceed against any defendant that acts as a "seller," as that term is defined in PLCAA. *See* 15 U.S.C. § 7903(5)(A)(ii) (qualified civil liability actions shall not include "an action brought against a seller for negligent entrustment"); *id.* § 7903(6)(B) (defining "seller"). The Remington and Camfour Defendants each argue that plaintiffs have failed to state a negligent entrustment claim that PLCAA permits, for two distinct reasons. The Remington Defendants contend that they are not "sellers" as PLCAA uses the term. The Camfour Defendants, in turn, argue that they did not supply the Bushmaster XM15-E2S to the Riverview Defendants for their "use" and that, in any event, a firearm can only be "use[d] in a manner involving an unreasonable risk of physical injury" when used to directly cause injury.

In evaluating these arguments, the Court's analysis must be guided by the plain meaning of PLCAA. "With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit." *Dark-Eyes v. Comm'r of Revenue Servs.*, 276 Conn. 559, 571 (2006). That rule dictates: "[I]n interpreting a statute a court should always turn first to one,

[8] Indeed, state courts frame their understanding of PLCAA's negligent entrustment definition around its similarity to the Restatement and their own state law. *See, e.g., Gilland I,* 2011 WL 2479693, at *12 (noting that "[the PLCAA] definition is consistent with Connecticut law on negligent entrustment," which is 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]"); *see also Al-Salihi v. Gander Mountain, Inc.,* 2013 WL 5310214, at *12 (N.D.N.Y. Sept. 20, 2013) ("The PLCAA standard mirrors the standard for the tort of negligent entrustment under New York law[.][Citing § 390]").

cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001) (quotation marks and citation omitted); *see also Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004) ("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."); *cf. 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."). [9]

A plain reading of the statute compels the conclusion that plaintiffs' negligent entrustment allegations are not barred and must be permitted to proceed under Connecticut law.

B. Defendants are "Sellers" under PLCAA

The Camfour and Riverview Defendants acknowledge that they are "sellers" under PLCAA and thus subject to negligent entrustment liability. The Remington Defendants, however, dispute this point. They posit that PLCAA does not preserve a negligent entrustment claim against them because they also meet the definition of "manufacturer" under PLCAA. In

[9] Defendants seem to prefer a canon of their own fashioning – that Congress meant what it said when it wrote the purpose section of PLCAA and did not mean what it said when it delineated the scope of permitted causes of action. Throughout their briefs, defendants imply that the underlying policy goals of PLCAA are evidence that plaintiffs' negligent entrustment claims must be dismissed. *See, e.g.*, Remington Mem. at 8 (arguing that "[t]he declared purpose of Congress" set out in the purposes section demonstrates that "PLCAA was enacted to protect firearm manufacturers against the very claims Plaintiffs make in this case"). This is thoroughly circular logic. It is nonsensical to suggest that Congress' purpose in creating a category of barred lawsuits operates to preclude a lawsuit that is *explicitly exempted* from that category.

doing so, they ask this Court to read a limitation into PLCAA's text that does not exist and for which there is no support in any case law.

A "seller" is defined in PLCAA as, among other things, "a dealer . . . who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer[.]" 15 U.S.C. § 7903(6)(B). A dealer is defined, by reference to the federal Gun Control Act, as "any person engaged in the business of selling firearms at wholesale or retail." 18 U.S.C. § 921(a)(11). In other words, a "seller" under PLCAA includes an entity that acts like a dealer – by selling firearms at wholesale or retail – and is licensed as a dealer under federal law.

The Remington Defendants plainly meet that standard. They are engaged in the business of selling firearms at wholesale, and they hold a dealer's license under federal law. *See* FAC ¶¶ 171, 172 (alleging that Remington sells to wholesalers, dealers, and directly to prominent chain retail stores like Wal-Mart and Dick's Sporting Goods). Remington does not contest either of those facts in its motion.[10] The company therefore qualifies as a "seller," and PLCAA expressly preserves its liability for negligent entrustment.

The Remington Defendants' only argument to the contrary is as follows: "Congress limited the availability of a state law action for negligent entrustment of a firearm to actions against a 'seller.' Thus, state law negligent entrustment actions against firearm manufacturers

[10] The Remington Defendants point out that plaintiffs did not allege that they are a "qualified product seller within the meaning of [PLCAA]" despite doing so with respect to the Camfour and Riverview defendants. Remington Mem. at 11. Whether any of the defendants fall within the statutory definition of "seller" is a legal conclusion, not a fact, and in any event it is not plaintiffs' burden to preemptively refute every aspect of an anticipated defense in their complaint. Plaintiffs' allegations pertaining to the Remington Defendants' sales activities are sufficient; and in the event the Court disagrees, plaintiffs may move to amend to cure any deficiency.

are prohibited under the PLCAA." Remington Mem. at 11. This brief passage appears to suggest that Remington cannot be a "seller" under PLCAA because it also qualifies as a "manufacturer." As the absence of any statutory citation in Remington's brief suggests, however, that contention is completely divorced from PLCAA's text, which offers no basis for concluding that the terms "seller" and "manufacturer" are mutually exclusive.

PLCAA defines "seller" and "manufacturer" by reference to types of conduct and federal licenses that are distinct, but not contradictory.[11] By distinguishing between the two terms, PLCAA suggests that an entity might be one but not the other; and by permitting negligent entrustment actions only against sellers, the statute bars actions against entities whose only involvement with guns is their manufacture. PLCAA never suggests, however, that a single entity cannot be both a seller and a manufacturer, or that an entity that sells guns becomes immune from negligent entrustment liability as soon as it makes an additional foray into manufacturing.[12] The Remington Defendants' argument to the contrary simply has no textual basis whatsoever. *Cf. State v. DeJesus*, 288 Conn. 418, 501 (2008) ("[C]ourts must interpret

[11] A seller is someone engaged in the business of selling firearms at wholesale or retail who is licensed as a dealer. *See* 15 U.S.C. § 7903(6)(B); 18 U.S.C. § 921(a)(11). A manufacturer is someone engaged in the business of manufacturing firearms who is licensed as a manufacturer. *See* 15 U.S.C. § 7903(2).

[12] Suppose that tomorrow the Camfour Defendants begin buying firearm parts and assembling them into custom rifles for local sale. Suppose they then obtain a federal manufacturing license to ensure this side business is legally compliant. If the Remington Defendants' reading of PLCAA were correct, such conduct would act as a total shield from liability for negligent sales. This outcome cannot be squared with the directive that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *Dark-Eyes*, 276 Conn. at 571.

statutes as they are written . . . and cannot, by judicial construction, read into them provisions which are not clearly stated.") (quotation marks and citation omitted).[13]

Notably, Congress has demonstrated that it knows how to distinguish firearms "dealers" from firearms "manufacturers" when it wishes to prevent any overlap between the two categories. The National Firearms Act defines a "dealer" as "any person, *not a manufacturer* or importer, engaged in the business of selling, renting, leasing, or loaning firearms[.]" 26 U.S.C. § 5845(k) (emphasis supplied). That statutory precedent further bolsters the conclusion that PLCAA, which lacks comparable language, does not render sellers and manufacturers mutually exclusive. *See also Broughman v. Carver*, 624 F.3d 670 (4th Cir. 2010) (holding that the terms "dealer" and "manufacturer" in the Gun Control Act of 1968, whose definitions closely mirror those of "seller" and "manufacturer" in PLCAA, are not mutually exclusive).

C. The Camfour Defendants' Restrictive Interpretation of Negligent Entrustment is Unavailing

The Camfour Defendants' challenge to plaintiffs' negligent entrustment claim simply rehashes the Remington Defendants' briefing in federal court: Camfour contends that "using" a firearm in a "manner involving unreasonable risk of physical injury" can only mean using to inflict injury. (Having learned at least a partial lesson from federal court, they do not make the facially absurd argument that "use" can have no meaning other than "discharge;" the import of their argument, however, is the same.). Thus, they conclude that only Adam Lanza "used" the

[13] The Remington Defendants' disregard for PLCAA's plain meaning is hard to reconcile with their insistence that the Separation of Powers be respected. *See* Remington Mem. at 6-7. Indeed, "'preference for plain meaning is *based on* the constitutional separation of powers – Congress makes the law and the judiciary interprets it.'" *Mutts v. S. CT State Univ.*, 2006 WL 1806179, at *10 (D. Conn. June 28, 2006) *aff'd* 242 F. App'x 725 (2d Cir. 2007) (quoting *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (emphasis supplied).

Bushmaster rifle in a way that is cognizable under PLCAA. Camfour Mem. at 11; *id.* at 12 ("[T]he sale of a firearm cannot be considered 'using' a firearm in a manner involving unreasonable risk of physical injury to others.").[14]

Predictably, the Camfour Defendants' resurrection of this narrow reading of PLCAA has not cured its significant flaws: it contravenes the plain meaning of the word "use" as well as the broader statutory context, and ignores the common law roots attached to the word.[15]

1. The Plain Meaning of "Use" is Broad

In arguing that "use" of a firearm can only mean "using to cause harm," the Camfour Defendants disregard both the plain meaning rule and United States Supreme Court precedent. In *Smith v. United States,* 508 U.S. 223 (1993) – decided more than a decade before PLCAA was enacted – the Supreme Court held that "using" a firearm encompasses more than using it for its

[14] Camfour also asserts that plaintiffs' "Complaint does not allege that Camfour knew or should have reasonably known that Riverview was likely to use the Bushmaster Rifle in a manner involving unreasonable risk of physical injury to others." Camfour Mem. at 13. This is plainly incorrect. *See* FAC Count II ¶ 224 ("The Camfour defendants knew, or should have known, that the Riverview Defendants' use of the product – supplying it to the civilian population – involved an unreasonable risk of physical injury to others.").

[15] It is telling that the Camfour Defendants rely on a single case in support of their interpretation of "use." *See* Camfour Mem. at 11 (quoting from *Williams v. Beemiller, Inc.*, No. 7056/2005 (N.Y. Sup. Ct. Erie Cnty. Apr. 25, 2011), *rev'd* 952 N.Y.S.2d 333 (N.Y. App. Div. 2012)). *Williams* – an unpublished opinion by a New York trial court that was reversed on appeal – lacks both precedential and persuasive authority. The Camfour Defendants rely on the trial court's ruling that PLCAA barred a negligent entrustment claim against a firearm distributor because it had not sold the firearm to "the ultimate shooter," and thus, did not sell "directly to the person misusing the product." Op. at 15. The only insight into that conclusion is the court's statement that "[a] review of the legislative history supports a narrow and limited exception to the general protections afforded manufacturers and sellers of firearms under the PLCAA." *Id.* The court does not explain what statutory ambiguity caused it to consult legislative history in the first place; nor does it mention that the legislative history it refers to is a letter to Congress from law professors that characterizes the bill in overreaching terms. *See* Op. at 15 (citing 157 Cong. Record H9004); *cf. District of Columbia v. Heller,* 554 U.S. 570, 605 (2008) (legislative history "refers to the pre-enactment statements of those who drafted or voted for a law").

"intended purpose" (that is, as a weapon) and further, that one may "use" a firearm by bartering it. *Id.* at 230. 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:

> Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.

Smith, 508 U.S. at 228-29 (citations omitted); *see also United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) ("The overwhelming majority of authority on the plain meaning of 'use' contemplates the application of something to achieve a purpose."). Notably, the *Smith* Court 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." 508 U.S. at 229.

Likewise, there is no indication in PLCAA's negligent entrustment definition that the firearm must be used as a weapon or used to directly cause harm. As in *Smith*, "use" must be given its ordinary meaning. There is no question that Camfour and Riverview "used" or "employed" the Bushmaster rifle as an item for sale, or that it "derived service" from the rifle in the form of monetary compensation. As for Nancy Lanza, plaintiffs allege that she "bought the

Bushmaster XM15-E2S to give to and/or share with her son in order to further connect with him." FAC ¶ 185. In doing so, she clearly "derived service" from the weapon.

2. Other Language in PLCAA Confirms the Plain Meaning of "Use"

Congress' word choices in other parts of PLCAA ought to conclusively put the Camfour Defendants' (previously the Remington Defendants') argument on the meaning of "use" to rest. 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.* § 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. N.Y. 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").

Recently, in *Norberg v. Badger Guns*, No. 10-CV-20655 (Wis. Cir. Ct.), a Wisconsin court relied upon this precise argument in denying the defendant gun store's motion for summary judgment on plaintiffs' negligent entrustment claim:

> The defendants argue that the statutory definition of negligent entrustment [under PLCAA], that under the statutory definition, the person to whom Badger Guns supplied the firearm, which is Mr. Collins, was not the person, Mr. Burton, who thereafter used the firearm to harm the plaintiffs.
>
> . . . .
>
> The Court does not believe that congress used the word, use, to mean exclusively discharge as the defendant suggests. In [§ 7903(5)(A)(v)], the statute uses the word, discharge. In section 15 U.S.C.A 7903(5)(b), congress chose to employ the term, use, not, discharge. . . . *Congress knew the difference between, discharge, and, use, and did not intend to use them interchangeably.*

Norberg v. Badger Guns, No. 10-CV-20655, Oral Ruling on Defendants' Motion for Summary Judgment, at *19, 21 (Wis. Cir. Ct. Jan. 30, 2014) (Conen, J.) (emphasis supplied), attached as Exhibit A.[16]

[16] Common sense also confirms the plain meaning of "use." There are many ways to "use" a firearm in a manner that involves an unreasonable risk of physical injury to self or others. Giving a loaded handgun to a room full of children can certainly be said to "involve[e] [an] unreasonable risk of physical injury." Likewise, someone who makes a "straw purchase" – that is, purchases a firearm for another person who is prohibited from buying it themselves – is clearly using the weapon in a manner involving an unreasonable risk of harm. Indeed, courts have held that negligent entrustment claims based on straw sale allegations are not barred by PLCAA. *See Norberg*, No. 10-CV-20655, at *21 (Ex. A) (denying summary judgment on negligent entrustment claim where plaintiffs alleged that the defendant gun store should have known it was participating in a straw sale); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 788 (N.Y. Sup. Ct. 2014) (denying defendant gun store's motion to dismiss negligent entrustment claim because allegations that gun store should have known a straw sale was taking place was "not preempted by the clear language of the statute").

3. The Common Law Meaning of "Use" Confirms Its Plain Meaning

The meaning defendants attempt to give the word "use" in PLCAA's negligent entrustment definition also ignores, and is fundamentally incompatible with, the common law meaning of that term – which has repeatedly been held to embrace successive entrustments. As discussed above, PLCAA's formulation of negligent entrustment mirrors the common law iteration of "use," as expressed by Section 390 of the Restatement. *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").

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)). 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).

Here, the relevant body of law applying and interpreting Section 390 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. That is, 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. In *Collins*, an employee of the defendant – who had been entrusted with cherry bombs for dislodging cement – gave several of the bombs to a group of children; one of those children then gave a bomb to the minor plaintiff, who was injured when she set it off. Thus, the employee's only "use" of the cherry bomb was removing it from work and giving it to a group of children. Moreover, neither the second nor third entrustment was within the control of the defendant manufacturer. The Eighth Circuit nevertheless upheld the verdict.

Framing the issue as one of foreseeability, the court determined that 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. *See* 453 F.2d at 513 (although the cherry bombs were kept in a locked container and only issued when requested by a foreman, "[n]o records were kept [] of the bombs issued and no precautions were taken to insure that all of the bombs were used for business purposes or returned to the foreman for safekeeping"); *id.* at 514 (noting that the foreman had notice that "employees were not faithful in returning the unused cherry bombs or were using them in horseplay around the plant"). Consequently, the successive entrustments did not sever the causal chain between the defendant's negligence and the plaintiff's injuries.

Numerous other courts have likewise found 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 (N.Y. 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 (N.Y. App. Div. 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).

D. Defendants' Focus on Legality is a Red Herring

The Remington Defendants (and to a lesser extent, the Camfour Defendants) spend considerable time establishing an undisputed point: the Bushmaster XM15-E2S was legal to sell and possess in Connecticut in 2010, and was lawfully sold to Nancy Lanza. *See, e.g.*, Remington Mem. at 3 ("The rifle had been lawfully purchased in 2010[.]"); *id.* at 4 ("Plaintiffs nevertheless seek to turn the entirely lawful actions of the rifle's manufacturer into actionable wrongs[.]"). This emphasis on legal compliance misses the point. "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).

Indeed, legality is by no means synonymous with reasonableness. Thus, in *Kalina v. Kmart Corp.*, 1993 WL 307630 (Conn. Super. Aug. 5, 1993) (Lager, J.), the Superior Court refused to enter summary judgment on plaintiff's negligent entrustment of a firearm claim despite Kmart's argument that the standard of care was set by federal law regulating the sale of firearm: "KMart's position is that its 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." *Id.* at *3. The court declined to adopt such a rule, noting that "the trier of fact is, in this state, given a wide latitude in drawing the inference of negligence." *Id.* at 5. Thus "what KMart knew or should have known, in light of any other evidence that is introduced concerning the surrounding circumstances, should be left to the trier of fact." *Id.* at 5; *see also Short v. Ross*, 2013 WL 1111820 (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 provision immediately following the negligent entrustment provision preserves "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product[.]" 15 U.S.C. § 7903(5)(A)(iii). In other words, there is an entirely separate provision under PLCAA for causes of action arising from the illegal sale of a firearm. 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.") (quotation marks and citation omitted).

E. Negligent Entrustment and Product Liability Are Distinct Causes of Action

The Remington Defendants also incorrectly conflate negligent entrustment with product liability. *See* Remington Mem. at 12 (asserting that plaintiffs' allegations pertaining to marketing and sale of the Bushmaster XM15-E2S, as well as to "unreasonable risk" equate to a product liability claim). Their motivation for doing so is obvious: PLCAA bars any product liability claim where the harm was caused by a criminal act. Thus, by calling plaintiffs' claims something other than what they are, defendants hope to divert attention from PLCAA's negligent entrustment provision – which they know plainly allows plaintiffs' claims to proceed. This maneuver must be rejected.

Product liability and negligent entrustment are distinct causes of action in Connecticut. Though the Connecticut Product Liability Act ("CPLA") encompasses allegations of negligence in addition to governing strict liability, those allegations must still concern a defective product. *See Hurley v. Heart Physicians*, P.C., 278 Conn. 305, 325 (2006) ("[A] product liability claim under the [CPLA] is one that seeks to recover damages for personal injuries . . . *caused by the defective product*.") (emphasis supplied). "[T]he essence of the tort" of negligent entrustment, by comparison, is the act of supplying something to another under "circumstances where an entrustor should know that there is cause why a chattel ought not to be entrusted to another." *Short*, 2013 WL 1111820, at *7.

Indeed, in *Short*, the court addressed and rejected the defendant's argument that plaintiff's negligent entrustment claim was barred by the CPLA's exclusivity provision. Although the plaintiff had separately alleged that U-Haul's truck had braking and acceleration defects, the negligent entrustment count arose from the entirely distinct allegation that U-Haul should have known the truck would be used at a football tailgate in a pedestrian-dense area around people who had been consuming alcohol. Thus, that negligence was unrelated to the alleged product defect and did not come within the CPLA's purview:

> The defendant is correct that the CPLA provides the exclusive remedy to a plaintiff who claims liability as a result of a defective product. The defendant is incorrect, however, in its assertion that count two [for negligent entrustment] alleges that a defective product caused the injury. As discussed, *supra*, the plaintiff has alleged sufficiently a claim for negligent entrustment. Accordingly, . . . the plaintiff necessarily alleges independent negligence, not negligence based upon allegations that the truck was defective. Thus, [the negligent entrustment] count is not precluded by the CPLA's exclusivity provisions.

Id. at *12.

Here, plaintiffs make no allegation that the Bushmaster XM15-E2S was defective – indeed, it functioned precisely as intended (that is, as a mass casualty weapon). Moreover, plaintiffs do not assert that defendants 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). Plaintiffs' allegations focus on defendants' knowledge of the unreasonable risks associated with selling the Bushmaster XM15-E2S to the civilian market in 2010. Those allegations speak to the act of entrusting, not to a defect in the weapon. As such, defendants' reliance on the CPLA is inapt.

III. PLCAA IS NO DEFENSE TO PLAINTIFFS' CUTPA CLAIMS

In what is usually called the "predicate statute" provision of PLCAA, PLCAA leaves intact claims against gun sellers for knowing violations of state statutes applicable to the sale or marketing of firearms. PLCAA does *not* bar "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). Since CUTPA "is applicable to the sale and marketing" of guns in Connecticut, it is an appropriate predicate statute.[17]

A. The Second Circuit's Decision in *Beretta* Supports Plaintiffs' Position

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).

This provision has been construed by the Second and Ninth Circuits, the District of Columbia Court of Appeals, the Indiana Appellate Court and the Alaska Supreme Court. *Beretta*, 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. 2009); *Estate of Kim v. Coxe*, 295 P.3d 380, 393-94 (Ak. 2013).

[17] We do not claim that CUTPA satisfies PLCAA's negligence per se provision; the Court need not address the Camfour Defendants' briefing of that issue. *See* Camfour Mem. at 13-16.

Of these decisions, the Second Circuit's decision in *Beretta*, while not binding on the Court, ought to be significant in the Court's analysis. *See Turner v. Frowein*, 253 Conn. 312, 340-41 (2d Cir. 2000) (decisions of the Second Circuit concerning issues of federal law, "though not binding [on a Connecticut court], are particularly persuasive").[18] Defendants argue that *Beretta* supports their position. Remington Mem. at 13-24; Camfour Mem. at 17-20. Their reliance on *Beretta* is completely misplaced.

Beretta holds that the predicate provision encompasses both statutes "applied to the sale and marketing of firearms" and statutes that "clearly can be said to implicate the purchase and sale of firearms." *Beretta*, 524 F.3d at 404. CUTPA, of course, fits both of these categories. In *Beretta*, the City brought nuisance and other claims against gun makers and sellers, asserting they distributed and sold firearms in a manner that increased their use by criminals. The City argued that its statutory nuisance claim satisfied PLCAA's predicate provision. On appeal Judge Miner, writing for a two-judge majority, rejected the statutory public nuisance predicate but indicated that the predicate provision allows actions based on some statutes of general application.

The *Beretta* 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

[18] Because the Second Circuit and the Ninth Circuit disagree about how to read the predicate provision, the Ninth Circuit's ruling in *Ileto* has little persuasive weight.

'applicable.'" 524 F.3d at 399. Rather than use the plain meaning of "applicable," the court narrowed that meaning in certain respects.[19] It emphasized that:

> 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:

> In sum, *we hold* that the 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 (emphasis supplied). Thus while it is true that the Second Circuit dismissed the City's statutory nuisance claim, the Second Circuit's holding concerning the meaning of PLCAA's predicate provision is the passage above.[20]

---

[19] 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*.) It then turned to the legislative history. While the Court should look to the *City of New York* decision as persuasive, it need not make the same interpretive choices.

[20] *City of New York*'s determination that the nuisance 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). In other words, 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.

B. CUTPA Is an Appropriate Predicate under Two of the *Beretta* Categories

CUTPA is an appropriate predicate under *Beretta* category 2(b) ("statutes . . . that courts have applied to the sale and marketing of firearms") and category 3 ("statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms"). *See Beretta*, 524 F.3d at 404. The purpose of CUTPA is well established under Connecticut law:

> [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. . . . 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.

Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Devel. Corp., 245 Conn. 1, 42 (1998) (citation omitted). CUTPA works under 2(b) because CUTPA has been applied to the sale and marketing of firearms; it works under 3 because CUTPA clearly implicates and is applicable to the sale and marketing of firearms. *See 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 . . . meets the statutory definition of trade or commerce, C.G.S. § 42-110a(4)[.]").[21]

[21] Knowing *Beretta*'s persuasive weight, defendants pay lip service to that decision while asking the Court to construe the predicate provision far more narrowly than *Beretta* did. The long list of federal, state and municipal statutes at pages 14-16 of the Remington Defendants' brief is a smoke screen: defendants do not want the Court to focus on what *Beretta* says. They also complain that if CUTPA is a predicate statute, the reach of the predicate provision will be too broad, *id.* at 21-22 – ignoring that the plain language of the predicate provision *is* broad. Finally,

C. The Plain Language of the Predicate Provision Is Ultimately Dispositive

While *Beretta*'s interpretation of the predicate provision is certainly persuasive, it is not binding. *See Turner*, 253 Conn. at 340-41 (Second Circuit decisions "not binding" but "particularly persuasive"). Federal canons of construction require that the plain meaning of statutory language be given effect. Thus, the plain meaning approach used by the dissenting Second Circuit Judge in *Beretta* and by the District Court Judge in that case should also be highly persuasive. *See Dark-Eyes*, 276 Conn. at 571 (Connecticut courts follow plain meaning rule in construing federal statutes).

All four of the judges in the Second Circuit who considered the predicate provision (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. *Beretta*, 524 F.3d at 404-05 (Katzmann, J., dissenting); *Beretta*, 401 F. Supp. 2d at 261 (Weinstein, J.); *see also City of Gary*, 875 N.E.2d at 434 (predicate provision is unambiguous and encompasses statutes "applicable to the sale or marketing" of firearms).

In addition, the *Beretta* majority's use of the interpretive principle of *eiusdem generis* to narrow the predicate provision somewhat is problematic. *Beretta* looks to subparts (I) and (II) of the predicate provision and determines that the examples listed there limit the scope of the provision. *Eiusdem generis* is "only an instrumentality for ascertaining the correct meaning of

---

they assert that if knowledge of wrongfulness is not an element of CUTPA itself, CUTPA cannot be a predicate, *id.* at 22, again ignoring the wording of the predicate provision. PLCAA requires proof that the predicate statute was knowingly violated, not that knowledge be an element of the predicate statute itself. *See* 15 U.S.C. § 7903(5)(A)(iii).

words when there is uncertainty." *Gooch v. U.S.*, 297 U.S. 124, 128 (1936). Far from limiting the predicate provision, the subparts broaden it by "including" lists of 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); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) (the term "including" indicates an "'illustrative and not limitative' function" that "provide[s] only general guidance" about Congressional intent).

Under either the *Beretta* construction or the plain meaning construction, plaintiffs' CUTPA claims come within PLCAA's predicate provision.

IV. DEFENDANTS' ATTACKS ON THE SUFFICIENCY OF PLAINTIFFS' CUTPA CLAIMS ALSO FAIL

Defendants assert that plaintiffs' CUTPA claims cannot survive because they are really product liability claims, plaintiffs are not consumers or competitors, and CUTPA does not allow personal injury damages. Remington Mem. at 22-24; Camfour Mem. at 15-16. This scattershot attack is easily answered: plaintiffs are not making product liability claims; CUTPA allows "any person" to seek relief under its terms; and CUTPA does allow personal injury damages.

A. Plaintiffs' CUTPA Claims are Not Product Liability Claims

Contrary to defendants' assertions, plaintiffs' CUTPA claims are not foreclosed by Connecticut's Products Liability Act (CPLA). Plaintiffs' claims are anchored in negligent entrustment, not product liability. See Argument Part II.E above. This is a critical distinction in understanding plaintiffs' CUTPA claims. Plaintiffs do not claim the XM15-E2S is a defective product in any respect.

A CUTPA claim may proceed if it alleges harm caused by anything other than a defective product. The CPLA's "exclusivity provision" merely "makes the product liability act the exclusive means by which a party may secure a remedy for an injury *caused by a defective product*." *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 125-26 (2003) (emphasis supplied) (discussing Conn. Gen. Stat. § 52-572n(a)). In *Gerrity v. R.J. Reynolds Tobacco Co.*, a plaintiff brought both CUTPA and CPLA claims against cigarette companies. The Court allowed the CUTPA claim to proceed, noting that "[t]he product liability act . . . was not designed to eliminate claims that previously were understood to be outside the traditional scope of a claim for liability based on a defective product." *Id.* at 128. Therefore, under *Gerrity*, a CUTPA claim is not subsumed by the CPLA if it alleges that the defendants' malfeasance, caused the harm at issue. *See, e.g.*, *Osprey Properties, LLC v. Corning*, 2015 WL 9694349, at *5, 7 (Conn. Super. Dec. 11, 2015) (Arnold, J.) (determining CUTPA claim was not subsumed by the CPLA where the plaintiff's CUTPA allegations concerned the defendants' conduct, not product defect per se); *cf. Dibello v. C.B. Fleet Holding Co, Inc.*, 2007 WL 2756374, at *3 (Conn. Super. Aug. 31, 2007) (Mintz, J.) (striking CUTPA claim incorporating failure to warn allegations as subsumed by CPLA because it did not allege malfeasance by the defendants).

Plaintiffs' CUTPA claims are undoubtedly "outside the traditional scope of a claim for liability based on a defective product." *Gerrity*, 263 Conn. at 128. Product liability cases seek redress for harm caused by a defective product. Plaintiffs here allege no such injuries. The XM15-E2S functioned with the exact degree of lethality that defendants intended. Moreover, defendants' marketing of that weapon deliberately and accurately portrayed its assaultive capacity and military use. Plaintiffs' CUTPA claims are thus clearly distinguishable from claims subsumed by the CPLA.

B. A Person Who Suffers An Ascertainable Loss May Sue Under CUTPA

CUTPA's plain language allows "any person" to proceed: 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. Our Supreme Court has allowed consumers, competitors, and those in business relationships to proceed under CUTPA; this is not the limit, however, of its reach. CUTPA's plain language indicates its protections are available to "any person" hurt by an unfair trade practice.

Thus in *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480 (1995), the Court noted that the language of § 41-110g does not single out any particular relationship as conferring CUTPA standing.[22] *Larsen* readS CUTPA as applying to competitors and consumers, but did not limit the statute's reach to such relationships:

> [T]here is no indication in the language of CUTPA to support the view that violations under the act can arise only from consumer relationships. *Indeed, various provisions of CUTPA reveal that the opposite is true.* CUTPA provides a private cause of action to "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . ." General Statutes § 42–110g(a). "Person," in turn, is defined as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, and

[22] Again, this is not a jurisdictional issue. Although whether a plaintiff's claim is cognizable under CUTPA is "frequently discussed in terms of 'standing,' the issue of whether the plaintiff has a legally protected interest that the defendant's action has invaded, if the contention is at least arguable, goes to the merits rather than to whether the persons whose standing is challenged is a proper party to request an adjudication of the issue." 12 *Conn. Prac. Series*, Langer *et al., Unfair Trade Practices* § 3.6 at 1 & nn.10 & 11 (online ed. 2014) (footnotes omitted) (citing cases). The Camfour Defendants' reliance on *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 434-35 (2003), Camfour Mem. at 15, is misplaced. Here, the District Court ruled that plaintiffs make colorable CUTPA claims – defendants' arguments are sufficiency arguments. In addition, cases such as *Larsen*, 232 Conn. at 491-99, do not address this issue in jurisdictional terms. Even *Pinette v. Larsen*, 96 Conn. App. 769 (2006), on which the Remington Defendants rely, was resolved on summary judgment and makes no mention of jurisdiction.

> any other legal entity . . . ." General Statutes § 42–110a(3). If the legislature had intended to restrict private actions under CUTPA only to consumers or to those parties engaged in a consumer relationship, it could have done so by limiting the scope of CUTPA causes of action or the definition of "person," such as by limiting the latter term to "any party to a consumer relationship." "The General Assembly has not seen fit to limit expressly the statute's coverage to instances involving consumer injury, and we decline to insert that limitation."

232 Conn. at 492-97 (trial court erred in failing to consider the defendant's activities rather than his relationship to the plaintiff as a basis for a CUTPA claim) (emphasis supplied and citations omitted); *see also Fink v. Golenbock*, 238 Conn. 183, 213 (1996) ("it was not the employment relationship that was dispositive [in *Larsen*], but the defendant's conduct"); *McLaughlin Ford, Inc., v. Ford Motor Co.*, 192 Conn. 558 (1984) (plaintiff's CUTPA standing determined solely by reference to § 42-110g(a)).

CUTPA's broad definition of who may seek relief – "any person who suffers any ascertainable loss of money or property" – serves its remedial purpose. *See* Conn. Gen. Stat. § 42–110b(d) ("It is the intention of the legislature that this chapter [CUTPA] be remedial and be so construed.") "The public policy underlying CUTPA is to encourage litigants to act as private attorneys general and to engage in bringing actions that have as their basis unfair or deceptive trade practices." *Thames River Recycling Inc. v. Gallo*, 50 Conn. App. 767, 794-95 (1998).

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 359-61 (2001), is an important indication that plaintiffs here should be permitted to pursue their CUTPA claims. In *Ganim*, the City of Bridgeport brought suit against gun manufacturers and dealers asserting nuisance, product liability and CUTPA claims. The City claimed its own damages – it did *not* claim damages on behalf of individual victims of gun violence. The Court dismissed the case because

the City's claims were too derivative. *Id.* at 355. It observed, however, that the primary victims of gun violence were appropriate plaintiffs in such a suit.[23]

Defendants rely on a number of cases that they argue limit CUTPA. In *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 157-58 (2005), the Court did reject a CUTPA claim (in the context of a motion to strike) because the plaintiff was neither a consumer, nor a competitor, nor in a business relationship with the defendant. The *Ventres* court did not, however, reconcile its ruling with its statements in *Ganim. See* 12 Conn. Prac. Series, Langer *et al.*, *Unfair Trade Practices* § 3.6 at n.39 (online ed. 2014) (observing that *Ganim* "suggest[s] that the breadth of the class of potential CUTPA plaintiffs is still an open question"). *Pinette v. McLaughlin*, 96 Conn. App. 769 (2006), a case in which the court entered summary judgment on a CUTPA claim because the plaintiff was not a consumer, a competitor or in a business relationship with the defendant, relies on *Vacco v. Microsoft Corp.*, 260 Conn. 59, 88-89 (2002), which in turn relies on *Ganim* to describe the boundaries of who may bring a CUTPA claim. We acknowledge that these cases and the others cited support defendants' construction of CUTPA; we do not view them, however, as determinative in light of *Ganim*.

[23] The *Ganim* Court stated: "the harm suffered by the potential other plaintiffs, which include all of the primary victims mentioned previously [victims of gun violence], exists at a level less removed from the alleged actions of the defendants. They include, for example, all the homeowners in Bridgeport who have been deceived by the defendants' misleading advertising, all of the persons who have been assaulted or killed by the misuse of handguns, and all of the families of the persons who committed suicide using those handguns." *Id.* at 360. Recovery *by those plaintiffs* would more likely be appropriate: "We have already identified some of the directly injured parties who could presumably, without the attendant [remoteness] problems [the City has as a plaintiff] . . . , remedy the harms directly caused by the defendants' conduct and thereby obtain compensation[.]" *Id.* at 359. The Court did not reach the substantive sufficiency of plaintiffs' CUTPA allegations. *Id.* at 372.

C. CUTPA Provides a Remedy for Personal Injuries

Defendants assert that CUTPA does not allow recovery for "damages flowing from personal injury or wrongful death." Camfour Mem. at 15-16; Remington Mem. at 23-24. But the reverse is true: "[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 (citing cases). Indeed, this very Court has previously noted that "the Connecticut Supreme Court, in *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1, 10, 955 A.2d 538 (2008), stated that the CUTPA claim would include a claim for personal injuries . . . ." *Builes v. Kashinevsky*, 2009 WL 3366265, at *4 (Conn. Super. Sept. 15, 2009) (Bellis, J.); *see also, e.g.*, *Abbhi v. AMI*, 1997 WL 325850, at *3-4 (Conn. Super. June 3, 1997) (Silbert, J.) (explaining why plaintiffs may recover under CUTPA for both personal injury and wrongful death). Therefore this challenge also fails and plaintiffs' complaint adequately presents viable claims under CUTPA.

V. CONCLUSION

For the reasons set forth above, defendants' motions should be construed as motions to strike and denied.

THE PLAINTIFFS,

By **/s/ Joshua D. Koskoff**

JOSHUA D. KOSKOFF
ALINOR C. STERLING
KATHERINE MESNER-HAGE
KOSKOFF KOSKOFF & BIEDER
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
PHONE: (203) 336-4421
FAX: (203) 368-3244
JURIS #32250

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed, postage prepaid, and emailed this day to all counsel of record, to wit:

For Bushmaster Firearms International LLC, a/k/a;
Freedom Group, Inc., a/k/a;
Bushmaster Firearms, a/k/a;
Bushmaster Firearms, Inc., a/k/a;
Bushmaster Holdings, Inc., a/k/a
Remington Arms Company, LLC, a/k/a;
Remington Outdoor Company, Inc., a/k/a

Jonathan P. Whitcomb, Esq.
Diserio Martin O'Connor & Castiglioni, LLP
One Atlantic Street
Stamford, CT 06901
jwhitcomb@dmoc.com
TEL: (203) 358-0800
FAX: (203) 348-2321

Andrew A. Lothson, Esq.
James B. Vogts, Esq.
Swanson Martin & Bell, LLP
330 North Wabash, #3300
Chicago, IL 60611
alothson@smbtrials.com
jvogts@smbtrials.com
TEL: (312) 321-9100
FAX: (312) 321-0990

For Camfour, Inc.;
Camfour Holding, LLP, a/k/a

Scott Charles Allan, Esq.
Renzulli Law Firm, LLP
81 Main Street, #508
White Plains, NY 10601
sallan@renzullilaw.com
TEL: (914) 285-0700
FAX: (914) 285-1213

For Riverview Sales, Inc.;
David LaGuercia
Peter Matthew Berry, Esq.
Berry Law LLC
107 Old Windsor Road, 2nd Floor
Bloomfield, CT 06002
firm@berrylawllc.com
TEL: (860) 242-0800
FAX: (860) 242-0804

/s/ Joshua D. Koskoff
JOSHUA D. KOSKOFF
ALINOR C. STERLING
KATHERINE MESNER-HAGE