SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19832
S.C. 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL

V.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A, ET AL

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

TO BE ARGUED BY:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

Connecticut Statutes:

Public Acts:

Restatements of the Law:

Legislative History:

Treatises:

Miscellaneous:

I. THE TRIAL COURT ERRED IN STRIKING PLAINTIFFS' NEGLIGENT ENTRUSTMENT CLAIMS

"[L]awful acts may be performed in such a manner, so carelessly, negligently, and with so little regard to the rights of others, that he, who, in performing them, injures another, must be responsible for that damage." *Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 130 (1842). This is a fundamental tenet of negligence law. It is also, critically, the raison d'être of PLCAA's negligent entrustment exception. Unlawful acts by firearm sellers are actionable under the predicate statute exception. *See* A241, 15 U.S.C. § 7903(5)(A)(iii). Assuming, as we must, that Congress did not intend for the negligent entrustment exception to be superfluous, it follows that negligent entrustment is about the reasonableness of lawful conduct.

These points should not be controversial. Yet hardly a page of defendants' brief goes by without a gratuitous reference to the legality of their conduct, or an effort to substitute bright line rules for the fact-bound questions that animate negligent entrustment. We ask the Court to reject these tactics. The elements of negligent entrustment have been sufficiently pled and are inherently factual; they cannot be resolved on a motion to strike. Moreover, it is the proper role of this Court to say so. Allowing plaintiffs to proceed does not usurp the legislature's prerogative to regulate firearm sales – as defendants insist. *See* Def. Br. at 24-27. PLCAA makes this clear: by preserving negligent entrustment actions for unreasonable but lawful firearm sales, Congress empowered state courts to apply common law principles alongside the judgments of federal and state legislative bodies.

A. PLCAA Does Not Confer Immunity for Negligent Entrustment

Defendants cast themselves as the guardians of PLCAA against plaintiffs' assault on "the threshold statutory immunity to which defendants are entitled." Def. Br. at 1. The

source of this entitlement is "PLCAA's purpose to protect licensed firearm manufacturers and sellers from lawsuits arising from the criminal use of firearms." *Id.* at 22. But defendants show fealty to PLCAA only when it suits them; they ignore the statute's equally clear intent to permit negligent entrustment claims arising from the criminal use of firearms.

PLCAA finds that "imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system." A237, 15 U.S.C. § 7901(a)(6) (emphasis supplied). Its corresponding purpose is to prohibit "causes of action . . . for the harm solely caused by the criminal or unlawful misuse of firearm products." A238, *id.* at § 7901(b)(1) (emphasis supplied). Defendants ignore the word "solely" and its import, implying that the very premise of plaintiffs' lawsuit flouts Congress' intent. This reasoning is backwards. PLCAA provides that firearm sellers can be liable for negligent entrustment even though the firearm was later criminally misused to cause harm. *See* A241, 15 U.S.C. § 7903(5)(a) & (a)(ii) ("qualified civil liability action" "result[s] from the criminal or unlawful misuse" of a firearm "but shall not include" negligent entrustment) (emphasis supplied). In other words, criminal use underlies every permissible negligent entrustment action: otherwise, the action is not a "qualified civil liability action" and PLCAA does not apply at all.

The Court should reject defendants' efforts to use PLCAA's "purpose" to swallow its exceptions. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice[.]" *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Negligent entrustment exemplifies Congress' choices in drafting PLCAA: when a firearm is negligently entrusted, the harm caused by its subsequent criminal misuse is not solely attributable to the criminal; firearm sellers share responsibility when they disregard (or create) an unreasonable and foreseeable risk of criminal misuse.

PLCAA's definition of negligent entrustment, moreover, dispels the notion that Congress intended to restrict the cause of action. PLCAA adopts the traditional tort standard embedded in the Restatement,[1] requiring a firearm seller to act on what they "know[] or reasonably should know," and framing the entrustee's use in terms of whether it "involve[ed] unreasonable risk of physical injury." A241, 15 U.S.C. 7903(5)(B). These fact-bound questions cannot be resolved on a motion to strike.

B. Defendants Distort Common Law Negligent Entrustment

The First Amended Complaint pleads negligent entrustment under Section 390. Defendants argue otherwise by distorting two elements of the doctrine. First, they contend that knowledge of the risk posed by an entrustee's use must be judged from the entrustor's "subjective" perspective, such that "objective notions of 'foreseeable' harm" are irrelevant to the analysis. Def. Br. at 12. Second, defendants argue that a commercial intermediary's lawful resale of a firearm is necessarily a reasonable use of the chattel, no matter how many well-pled facts demonstrate that the resale needlessly heightened the risk of harm. Case law squarely rejects these arguments, which improperly circumscribe the doctrine of negligent entrustment in an effort to recast factual issues as purely legal disputes.

1. Negligent Entrustment Asks Whether an Entrustee's Use Posed a Foreseeable and Objectively Unreasonable Risk of Harm

Restatement Section 390 turns on what an entrustor "kn[ew] or had reason to know." Contrary to defendants' suggestion, that is not a "subjective standard." Def. Br. at 12. It refers to what a reasonable actor in the entrustor's position would have understood – an

[1] *Cf. Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("[W]hen 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." (quotation marks and citation omitted)).

objective inquiry. The Restatement makes this point explicitly, noting that "[t]he words 'reason to know' . . . denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." RA34, Rest. (2d) Torts § 12(1) (emphasis supplied). This Court has endorsed that section of the Restatement. *See, e.g.*, *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 119 fn.4 (2012). And defendants cite no authority whatsoever indicating that "reason to know" carries a different, narrower meaning under Section 390.

Instead, defendants rely on wholly inapposite case law regarding criminal mens rea under federal statutes. For example, they cite *United States v. Munguia*, 704 F.3d 596, 603 (9th Cir. 2012), for the proposition that an entrustor's knowledge must "be evaluated through the lens of the particular defendant, rather than from the perspective of a hypothetical reasonable man." Def. Br. at 13 n.9. But *Munguia* had nothing to do with negligent entrustment. The quoted language applies instead to analysis of criminal intent under 21 U.S.C § 841(c)(2), which criminalizes possession of a listed chemical with intent to manufacture a controlled substance. *See* 704 F.3d at 602-03. In relying on that case law, defendants collapse the essential distinction between negligently entrusting a firearm (a civil wrong defined by objectively unreasonable conduct) and crimes requiring proof of a particular defendant's state of mind.[2]

[2] Defendants also refer to *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015) in accusing plaintiffs of "inject[ing] the duty of 'reasonable care' into the law of negligent entrustment." Def. Br. at 13. To the extent *Phillips* holds that reasonable care has no place in negligent entrustment law, the district court's position is at odds with the Colorado Supreme Court's view of state law. *See Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992) ("The doctrine of negligent entrustment provides a framework for resolution of the issue of duty, and also identifies criteria for assessing exercise of reasonable care in light of the apparent risk under particular circumstances." (emphasis supplied)).

Defendants also suggest that conventional "notions of 'foreseeable' harm" play no role in negligent entrustment liability. Def. Br. at 12. That is obviously wrong. Section 390 asks whether an entrustee is "likely . . . to use [the chattel] in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to . . . be endangered by its use." A264, Rest. (2d) Torts § 390. Foreseeability inheres in that standard. One of the cases on which defendants rely – *Knight v. Wal-Mart Stores*, 889 F. Supp. 1532 (S.D. Ga. 1995) – makes precisely this point. There, the plaintiff sought damages from a firearm seller on two grounds: the seller's disregard of evidence that the purchaser had been institutionalized, which violated the statutory standard of care set by 18 U.S.C. § 922(d)(4); and negligent entrustment. *See Knight*, 889 F. Supp. at 1535. The court permitted the plaintiffs to proceed only on negligent entrustment, emphasizing that the theory was more expansive because it rendered "foreseeing future harm" actionable. *Id.* at 1536.[3] There is no indication in *Knight*, or any other case defendants cite, that foreseeability is constrained in the negligent entrustment context.

Nonetheless, defendants appear to suggest that the entrustor of a firearm can be liable for negligent entrustment only if it has specific knowledge about the particular person who uses the weapon to cause harm. Def. Br. at 14. Defendants thus emphasize that they lacked specific knowledge about the "dangerous propensities" of Adam Lanza. *Id.* This amounts to another unfounded restriction on foreseeability in the negligent entrustment

[3] Curiously, defendants suggest that *Knight* drew a distinction between "the common law negligence standard" and negligent entrustment. Def. Br. at 12 n.9. In fact, the court used the phrase "the common law negligence standard" to characterize the doctrine of negligent entrustment. *See id.* at 1535 ("Within common law, the theory of liability is negligent entrustment: the Court must again decide if Wal-Mart breached its duty, *i.e.*, if a reasonable person would have foreseen [the resulting harm.]" (emphasis supplied)).

context, which courts have repeatedly rejected. For example, in *Collins v. Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), a cement manufacturer entrusted cherry bombs to its employees without taking "precautions" regarding misuse, despite knowing that the employees handled the bombs carelessly. *Id.* at 513-514. One of the employees gave a bomb to a group of children, who passed it on to another child who injuriously detonated it. There was no allegation that the cement manufacturer had specific knowledge about the child who ultimately set off the bomb. But that was beside the point: the court affirmed a negligent entrustment verdict against the manufacturer because the type of harm at issue had been foreseeable. *Id.* at 514-15.[4]

The law is clear that an entrustee's use of a chattel can be unduly risky, within the meaning of Restatement 390, where the risk arises from a subsequent entrustee's conduct. The critical question is whether that subsequent conduct was foreseeable. Here, plaintiffs have alleged that Adam Lanza's harmful conduct was a foreseeable consequence of each defendant's entrustment. Those allegations state claims for negligent entrustment.

2. No Defendant's Use of the Bushmaster XM15-E2S Was Reasonable as a Matter of Law

Plaintiffs have adequately alleged that each entrustee of the Bushmaster XM15-E2S used the weapon in a manner involving unreasonable risk of physical injury to others. The First Amended Complaint pleads, among other things, that Camfour and Riverview had actual or constructive knowledge of Remington's marketing campaign targeted at a

[4] *See also Rios v. Smith*, 95 N.Y.2d 647, 653 (N.Y. 2001) ("[E]vidence 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 [a friend]."); *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 who caused harm, because the presence of "two entrustments" was not "a bar to recovery").

"younger demographic,"[5] the consequences of a porous regulatory system, the reality of firearm sharing and unsafe storage practices, and the history of the AR-15's use in mass shootings. *See* A72-A78, A82, FAC ¶¶ 47-74, 85, 93-115, 167-70. Selling the Bushmaster with that knowledge, under those circumstances, cannot be deemed reasonable as a matter of law – particularly considering the deference accorded the trier of fact in deciding that issue. *See Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301, 336 (2014).

Defendants dispute that conclusion by rewriting the governing legal standard. First, they argue that negligent entrustment liability attaches only if the entrustee "was likely to, and did, use the product to cause harm." Def. Br. at 1 (emphasis supplied). But the controlling language of Section 390 is far broader than defendants' formulation. It requires "use in a manner involving unreasonable risk of physical harm" – not use that causes harm. Rest. (2d) Torts § 390; 15 U.S.C. § 7903(5)(B) (reciting same language). Case law recognizing that a chattel can be successively entrusted before causing harm flows naturally from that language. *See Collins*, 453 F.2d at 514-15; *Rios*, 95 N.Y.2d at 653; *LeClaire*, 308 Ark. at 583. Plaintiffs allege a similar sequence of negligent entrustments.

Defendants further misconstrue Section 390 by contending that the unreasonable risk of harm must arise because the entrustee is "incompetent or has a dangerous

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[5] Defendants argue that plaintiffs have not sufficiently pled Remington's targeting of a "younger demographic." *See* Def. Br. at 16. This is an ungenerous reading of the Complaint. *See* A82, FAC ¶ 175 (linking militaristic marketing to younger demographic); A75, *id.* ¶¶ 85-86 (product placement in video games); A80, *id* ¶¶ 146-47 (state laws permit those under 21 to purchase and/or possess AR-15s). Plaintiffs are permitted "every reasonable inference" that can be drawn from these allegations. *Connecticut Indep. Util. Workers v. Dep't of Pub. Util. Control*, 312 Conn. 265, 274 (2014); *see also Gazo v. City of Stamford*, 255 Conn. 245, 260 (2001) (complaint should be read "broadly and realistically, rather than narrowly and technically"). If the Court disagrees, plaintiffs are entitled to plead over to add that allegation. *See Mueller v. Tepler*, 312 Conn. 631,645-46 (2015).

propensity." Def. Br. at 10-11. Defendants suggest that those terms do not describe Camfour and Riverview, however risky their sales of the rifle may have been. Again, however, the controlling language of the Restatement is far broader. It states that an entrustee's use may be unreasonable because of "youth, inexperience, or otherwise" – a sweeping standard that places no limitation on the source of risk. A264, Rest. (2d) Torts § 390 (emphasis supplied). Thus, in *Short v. Ross*, our superior court rejected a defendant's argument that a negligent entrustment claim must narrowly allege that the entrustee "possessed dangerous propensities or was otherwise incompetent." A393, 2013 WL 1111820, at *4. Rather, "the Restatement approach . . . contemplates the possibility of 'other cause'" implicating risk. A394, *id.* at *5.

Finally, building on their mischaracterizations of Section 390, defendants effectively argue that a commercial intermediary who lawfully sells a firearm cannot have used the weapon unreasonably. Conveniently, this bright-line rule would immunize upstream sellers like Remington and Camfour from negligent entrustment liability under any set of facts short of criminality, however egregious the risks created by their conduct. Under this approach, it wouldn't matter if Remington possessed a trove of internal memos about how to target angry young men; or if Remington significantly expanded their presence at gun shows despite reports that ISIS encourages recruits to arm themselves with AR-15s at such shows because background checks are not required;[6] or even if twenty-six elementary school students and educators were killed every month – or every day.

Consistent with the text of Section 390, courts have repeatedly refused to endorse such artificial limitations on negligent entrustment liability. In particular, both *Moning v.*

[6] *See* RA68, "Islamic State magazine steers followers to U.S. gun shows for 'easy' access to weapons," *The Washington Post*, May 5, 2017.

Alfono, 254 N.W.2d 759 (Mich. 1977), and *Killeen v. Harmon Grain Products, Inc.*, 413 N.E.2d (Mass. App. Ct. 1980), confirm that the presence of commercial intermediaries does not preclude negligent entrustment claims against an upstream seller. Defendants offer no meaningful rebuttal to those decisions, or the Restatement principles on which they rely. They make no effort to address *Killeen*, which states explicitly that efforts by a manufacturer to induce purchases by those "whose use of the product would involve unreasonable risk of injury" provides a basis for liability under Section 390. 413 N.E.2d at 772-73. As for *Moning*, defendants resort to rewriting the case in an effort to distinguish it. They assert that "[p]laintiffs incorrectly characterize *Moning* as a negligent entrustment case." Def. Br. at 19. That reading is hard to fathom: *Moning* specifically recites that the plaintiff "relies on the doctrine of negligent entrustment," quotes Section 390, and notes that negligent entrustment "is not limited to plaintiffs whose 'individual' propensities are known to the supplier . . . [but] also applies to classes of persons." 254 N.W.2d at 767 & n.18.[7]

The Court should reject defendants' arguments not because they subvert public policy and the aims of tort law (although they do), but because they distort negligent entrustment and require the Court to resolve fact-bound questions without a factual record.

C. Connecticut's Legislature Did Not Sanction Defendants' AR-15 Sales

Defendants lean heavily on a factually and morally bankrupt claim: that "the Connecticut General Assembly determined" the XM15-E2S "could be legally possessed."

[7] Defendants briefly suggest that *Moning* is distinguishable because it addressed sales to children. *See* Def. Br. at 19. But that aspect of the case resonates with plaintiffs' allegations that defendants targeted a "younger demographic," through video game placement among other marketing tactics, despite knowledge that teenagers can legally purchase AR-15s and often have unscreened access through family members and unsafe storage. *See* A75, A80-A81, A87, FAC ¶¶ 85, 146-47, 152-53, 157-58, 220. It is this younger demographic – not children – in whose hands the AR-15 poses the greatest risk. That fact is as salient here as children's incompetence to handle slingshots was in *Moning*.

Def. Br. at 2. In truth, the legislature determined in 1993 that the sale of military grade weapons – AR-15s just like the XM15-E2S – threatened public safety. It tried to ban "the weapons of war that are being used to inflict mayhem on our streets[.]" RA45, 681 H.R. Proc., Pt. 32, 1993 Sess. at 11570. Legislators presciently expressed concern that children were being killed.[8] Banned weapons included the Colt AR-15. RA29, P.A. 93-306 § 1. True, the XM15-E2S was not banned, but it does not follow that the legislature "determined" it was appropriate. Indeed, the XM15-E2S is the functional equivalent of the Colt AR-15. *See* A72-A74, FAC ¶¶ 47-55. When it should have heeded the legislature's justified concerns, Bushmaster flouted them.[9] It is wrong for defendants to now use legislation designed to protect citizens from the catastrophic harm posed by weapons of war as justification to deny plaintiffs a legal remedy for that precise harm.

II. THE TRIAL COURT ERRED IN STRIKING PLAINTIFFS' CUTPA CLAIMS

Connecticut's legislature passed CUTPA to "protect the public," *Willow Springs Condo. Ass'n v. Seventh BRT Devel.*, 245 Conn. 1, 42 (1998); repeatedly expanded its private right of action[10]; and enacted *eighty* consumer protection statutes reliant on CUTPA

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[8] "If you're not concerned about the adults that are getting shot by the weapons, [have] concern about the children." RA 49, 682 H.R. Proc., 1993 Sess. at 11863.

[9] Because firearms makers flouted the ban and because of their fear for public safety, the legislature to try to improve the ban in 2001: "[T]he manufacturers have taken those banned weapons and d[one] cosmetic changes and we still have the same guns with the same effect, to kill the most people in the shortest period of time." RA52-RA53, 459 S. Proc. Pt. 9, 2001 Sess. at 2510-11; RA56, 853 H.R. Proc. Pt. 15, 2001 Sess. at 4846 (citing the shooting at Columbine).

[10] RA16, P.A. 75-618 § 5 (expanding private action standing); RA20, P.A. 76-303 § 3 (making counsel fees available only to prevailing plaintiff, rather than to either party); RA21, P.A. 78-346 (expanding "trade or commerce" to include renting/leasing); A249, P.A. 79-210 § 2 (expanding standing again by deleting privity requirement); RA24, P.A. 84-468 § 2 (eliminating public interest/injury requirement), RA31, P.A. 95-123 (adding right to jury trial).

for enforcement, 12 Conn. Prac. Series, *Unfair Trade Practices*, Appendix E. Defendants nonetheless take the position that CUTPA provides no remedy to plaintiffs who prove that unfair, unscrupulous and immoral sales and marketing of firearms resulted in the death of a loved one. Their construction vitiates the statutory scheme enacted by our legislature. Defendants also brief four alternate grounds of affirmance which must be rejected.[11]

A. Plaintiffs Have CUTPA Standing

In their standing section, defendants dodge the statutory text and misportray key cases. They argue that *Ventres v. Goodspeed Airport*, 275 Conn. 105 (2005) imposed a "prudential standing limitation" on the statutory standing language, Def. Br. at 29-30, even though *Ventres* does not parse the relevant statutory text; mention any canon of statutory construction; review prior leading CUTPA standing cases[12]; or discuss the policy reasons to impose a "consumer, competitor, business relationship" requirement. The claim that the Court limited the plain statutory text without discussion is improbable at best.[13]

The Court does not rule in a vacuum – it construes § 42-110g(a) with the assistance of earlier standing rulings. *Larsen* recognizes that "[a]ny person" must be given its full expansive meaning. 232 Conn. at 497. *Ganim* holds that the remoteness doctrine nonetheless limits § 42-110g(a) standing. 258 Conn. at 372. *Vacco*, relying on *Ganim* and

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[11] Defendants' alternate grounds of affirmance, even if accepted, will not resolve the case. If they prevail on an alternate ground, and they should not, the Court must remand the case so that plaintiffs can plead over. *Mueller*, 312 Conn. at 645-46.

[12] *See e.g. McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558 (1984); *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480 (1995); *Abrahams v. Young & Rubicam, Inc.*, 240 Conn. 300 (1997); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 373 (2001).

[13] They also argue *stare decisis* and legislative acquiescence, Def. Br. at 31, doctrines that do not apply because *Ventres* did not definitively construe § 42-110g(a).

Abrahams, confirms that "traditional common-law principles of remoteness and proximate causation" determine CUTPA standing. 260 Conn. at 88. Plaintiffs have CUTPA standing.

B. CUTPA Protects Those Harmed By Unfair Or Unscrupulous Commercial Conduct, Including Those Whose Injury Is Death

CUTPA holds the wrongdoer accountable for "actual damages" resulting from unscrupulous business conduct. A247, § 42-110g(a). The Act confirms that "actual damages" encompass death damages in many ways – by its plain text, which provides for "actual damages," as opposed to "commercial damages only;" by identifying its remedial purpose, a purpose that would be frustrated if CUTPA were not to provide full remedy for serious injury; and by sourcing its gloss in FTC rulings that protect the whole person.

"[D]amage is the loss, hurt, or harm which results from the injury; and damages are the recompense or compensation awarded for the damage suffered." *Beverly Hills Concepts, Inc. v. Schatz & Schatz*, 247 Conn. 48, 78 (1998). "[A]ctual damages" are "synonymous with compensatory damages," *DiNapoli v. Cooke,* 43 Conn. App. 419, 427 (1996), as distinct from nominal or punitive damages. The rule of construction that the legislature "is presumed to be aware of this court's decisions," *Alvarez v. New Haven Register, Inc.,* 249 Conn. 709, 722 (1999), indicates that "actual damages" in § 42-110g(a) means what our courts say it means – compensatory damages. The rule of construction that "'[w]here the legislature uses the same phrase," it presumably "intends the same meaning,'" *Link v. Shelton,* 186 Conn. 623, 627 (1982), indicates that "damages" includes wrongful death damages and personal injury damages. *See* RA5, § 52-555 (recovery for

wrongful death described as "just damages");[14] RA9, § 52-584 ("damages for injury to the person. . . ."). "Damages" plainly does not mean "only economic damages" or "monetary damages" – it means full recompense for death and personal injury as well.

The remainder of § 42-110g(a) supports this construction. The standing requirement of "ascertainable loss of money or property" eliminates plaintiffs whose loss is ephemeral: "CUTPA is not designed to afford a remedy for trifles." *Hinchliffe v. Am. Motors Corp.*, 184 Conn. 607, 614 (1981). The damages clause then provides a complete remedy that includes personal injury or death damages to the plaintiff harmed by an unfair trade practice. *See* 12 Conn. Prac. Series, § 6.7, at n.17 ("a majority of trial courts addressing the issue have held that damages for personal injuries can be recovered under CUTPA").[15] Defendants collapse the two phrases, reading the statute as if "actual damages" were not there – but each phrase must be given full meaning.[16] The legislature's choice to modify

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[14] The damages modifiers "actual" in § 42-110g(a) and "just" in § 52-555 confirm this reading. As early as 1856, the Court used these terms interchangeably: "[t]he term 'just damages' can mean only the value of what the plaintiff has lost; an estimated equivalent for detriment, or injury. A sum given beyond actual loss is not damages awarded, but a penalty inflicted." *Beecher v. Derby Bridge & Ferry Co.*, 24 Conn. 491, 494 (1856); *see also State v. O'Bryan*, 318 Conn. 621, 633 (2015) (dictionary meaning of "actual" is "existing in fact or reality").

[15] *See Bank of New Orleans & Trust Co. v. Phillips*, 415 So. 2d 973, 976 (La. Ct. App. 1982) (construing unfair trade practices act containing similar ascertainable loss and actual damages clauses to encompass emotional distress damages); *Pope v. Rollins Protec. Services Co.*, 703 F.2d 197, 204-05 (5th Cir. 1983) (personal injury damages arising from unfair trade practice violation allowed); *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293, 1304 (D. Minn. 1988) (same); *Maillet v. ATF-Davidson Co., Inc.*, 552 N.E.2d 95, 99 (Mass. 1990) (same); *Maurer v. Cerkvenik-Anderson Travel, Inc.*, 181 Ariz. 294, 297 (1994) (death damages arising from unfair trade practice violation allowed); *Duncavage v. Allen*, 147 Ill. App.3d 88, 101-02 (1986) (same).

[16] The Court has already said "[a]scertainable loss of money or property" does not mean "actual damages," because "use of different terms within the same sentence of a statute plainly implies that differing meanings were intended." *Hinchliffe*, 184 Conn. at 612-13.

"ascertainable loss" with "of money or property" and not to modify "actual damages" with the same phrase must also be given full weight. Once the ascertainable loss is established – and defendants concede that it is established here, Def. Br. at 42 – a CUTPA plaintiff may prove her losses due to the defendant's unfair trade practices and recover fully.

Lastly, the FTC, whose statements guide the construction of CUTPA, considers physical injury to be within its purview: "Unwarranted health and safety risks may also support a finding of unfairness."[17] Construing CUTPA to exclude remedy for the devastating mixture of physical, psychological and financial harm that plaintiffs allege would "thwart [the Act's] intended purpose," an outcome to be avoided. *See Concept Assoc. v. Bd. of Tax Review*, 229 Conn. 618, 624 (1994). Such a construction would also "lead to absurd results," *id.*, because CUTPA provides for "actual damages," and Connecticut's public policy considers death a compensable injury. *See Broughel v. Southern New England Tel.* 73 Conn. 614, 617 (1901) (wrongful act causing death is "an invasion of the right to life, the first and highest of all rights"). In sum, "actual damages" includes death damages.

C. The CUTPA Claims Are Not Time-Barred

§ 52-555 controls the limitations period for wrongful death CUTPA claims. *Pellecchia v. Conn. L.& P.,* 139 Conn. App. 88, 90 (2012) (adopting the reasoning of *Pellecchia v. Conn. L. & P.,* 52 Conn. Supp. 435, 443 (2011)). Remedial in function, § 52-555 creates the right to be compensated for death in Connecticut. "The wrongful death statute [§ 52-555] . . . is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought." *Lynn v. Haybuster Mfg.,*

[17] https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness; *see also* Pl. Opening Br. at 44 n.34 (citing FTC decisions concerned with risks to physical safety).

Inc., 226 Conn. 282, 295 (1993). Unless the legislature says otherwise, § 52-555's limitations period governs every wrongful death claim, regardless of the underlying liability theory. *Pellecchia*, 139 Conn. App. at 90 (adopting trial court's ruling applying § 52-555 limitations to negligence, recklessness and CUTPA claims); *Dawson v. Kuehn*, 47 Conn. Supp. 241, 246-47 (2001) (§ 52-555, not § 52-584, governs medical negligence wrongful death limitations).

The legislature knows how to preempt § 52-555 when it wishes to. Section 52-577a, the product liability limitations period, and § 52-584a, governing actions against architects and engineers use the word "death." Consequently, their limitations periods supercede § 52-555. If, like 42-110g(f), a limitations provision is silent, that is "strong evidence that the legislature did not intend . . . to preempt § 52-555." *See Greco v. United Tech. Corp.*, 277 Conn. 337, 349 (2006). Sections 52-577 (torts), 52-584 (negligence, recklessness) and 42-110g(f) (CUTPA) – are "silent" concerning death and death damages.[18] Thus *Pellecchia* was right to find that § 52-555 controls death damages claims premised on negligence, recklessness and CUTPA – liability theories that otherwise would be governed by §§ 52-584 and 42-110g(f).[19]

While they do not mention that § 52-555's "jurisdictional" limitations period imposes "a heavy burden" on them to establish § 52-555 is preempted, *Greco*, 277 Conn. at 350,

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[18] Each of these closely related provisions has a three-year outer limitations period, which until 1991 matched the three-year wrongful death repose period. *Compare* RA6, § 52-577; RA9, § 52-584; A247, § 42-110g(f), *with* RA28, P.A. 91-238. In 1991, however, the legislature expanded the death damages repose period to five years.

[19] Defendants' proposal that both statutes should apply is completely misguided. Where two limitations periods could apply, the Court decides between them. It does not apply both. *Doe v. Boy Scouts of Am. Corp.*, 323 Conn. 303, 342 (2016) (determining which limitations statute applied); *Greco*, 277 Conn. at 349 (same).

defendants insist that the CUTPA limitations period is jurisdictional. Def. Br. at 35. Even if the Court might otherwise lack jurisdiction because time had run under § 42-110g (and it has not), § 52-555 independently grants jurisdiction. In *Ecker v. Town of W. Hartford*, 205 Conn. 219, 232 (1987), the Court held that "the [wrongful death] remedy exists only during the prescribed period [set by § 52-555] and not thereafter." *Ecker* rightly states that the death remedy "exists" during the prescribed period – that is, § 52-555 confers jurisdiction over a wrongful death claim during that time, no matter the underlying theory of liability.[20]

When a motion to strike is granted, the plaintiff must be afforded "the mandated opportunity to cure the defective pleading." *Mueller*, 312 Conn. at 645-46. If the Court holds that § 42-110g controls, it must remand the case to allow plaintiffs to allege in greater detail defendants' continuous course of conduct[21] leading to December 14, 2012.

D. Plaintiffs Allege CUTPA Claims, Not Product Liability Claims

Plaintiffs' CUTPA claims are not product liability claims because plaintiffs do not allege the XM15-E2S is defective. The CPLA's exclusivity provision "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); *cf. Hurley v. Heart Physicians, P.C.*, 278 Conn. 305, 324 (2006) ("CUTPA" allegations of defective design and failure to warn were in fact CPLA

[20] Although they are in derogation of the common law, death statutes also "represent a remedial policy that has become firmly imbedded in modern jurisprudence," and should be so construed. 3A *Sutherland Statutory Construction* § 73:5 (7th ed.).

[21] *See Fichera v. Mine Hill Corp.*, 207 Conn. 204, 209-10 (1988) (acknowledging that a "duty continued to exist after the cessation of the 'act or omission' relied upon" when there was "some later wrongful conduct of a defendant related to the prior act"); *Giglio v. Conn. Light & Power Co.,* 180 Conn. 230, 242 (1980) ("repeated instructions and advice given to the plaintiff" concerning a furnace that had been left in a defective condition tolled statute).

claim). The Court recently said: "all product liability claims require proof of a 'defective condition unreasonably dangerous' to the user or consumer[.]" *Bifolck v. Philip Morris, Inc.*, 324 Conn. 362, 408 (2016) (emphasis supplied). A product defect claim would plead a design flaw or negligence in failing to divulge risk. That is not this case.

The Court has already concluded that the CPLA was not designed to eliminate "claims that previously were understood to be outside the traditional scope of a claim for liability based on defective product." *Gerrity*, 263 Conn. at 128. It reached this holding by relying on the legislative history of § 52–572n(a), the exclusivity provision. § 52–572n(a) was meant to "cut down on the number of counts in a complaint" and "simplify" the "limits by establishing one primary time limit." RA39, 22 S .Proc., Pt. 14, 1979 Sess. at 4637. "[S]trict liability, warranty, negligence and contract . . . would all be now merged into one cause of action which has been created by statute." RA41, *id.* at 4639.[22] CUTPA is intentionally not on this list – CPLA exclusivity "is not intended to affect other state statutory schemes such as . . . the state unfair trade practices act." RA39, *id.* at 4637.

The CPLA and CUTPA, moreover, were plainly intended to provide coextensive coverage in some situations. CUTPA's text evinces an intent to confer remedies in connection with product sales. *See* A247, § 42-110a(4) (CUTPA applies to "sale" of "any . . . commodity"). Consumer protection statutes concerning product sales invoke CUTPA as

[22] *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172 (2016) and *Merrill v. Navegar*, 26 Cal. 4th 465 (2001), do not change these conclusions. *Izzarelli*, like *Bifolck*, treats proof of defect as the heart of a product case. *Merrill* is decided under California law and did not involve an Unfair Trade Practices Act violation claim. In addition, plaintiffs' claim here makes allegations not present in *Merrill*, such as the allegations that defendants marketed their products with the intent that unscreened users, such as family members, access them.

an enforcement mechanism.[23] CUTPA has its own legislative *raison d'être*, its own legal test (the cigarette rule), and some different damages provisions, all of which militate against the conclusion that a CUTPA claim involving personal injuries but alleging unfair trade practices as opposed to product defect is necessarily a CPLA claim.[24]

E. CUTPA Is an Appropriate Predicate Statute

The predicate provision recognizes "State or Federal" predicates "applicable to the sale or marketing" of firearms. A240-A241, 15 U.S.C. § 7903(5)(A)(iii). By making the availability of a predicate provision claim dependent in part on state statutory enactments and their judicial construction, PLCAA defers to the particular law developed by each state. PLCAA anticipates that predicates will vary from state to state, and so will the judicial gloss. Defendants profited by marketing and selling AR-15s in Connecticut. PLCAA consequently requires them to answer for violations of our state's statutes "applicable to the sale or marketing" of firearms – quintessentially CUTPA, a statute that applies to all sales and marketing of any commodity in Connecticut.

Misreading *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), the Second Circuit case construing the predicate provision, defendants assert that a statute of general application cannot serve as a predicate. Def. Br. at 45-46. *Beretta* rejected that argument:

> The Firearms Suppliers argued that a predicate statute must explicitly mention firearms and that a general statute could not serve as a predicate

[23] *E.g.* RA2, § 14-106d (sale of nonfunctional airbag a CUTPA violation); RA4, § 42-115r (alteration of tires a CUTPA violation).

[24] Defendants argue that because some of plaintiffs' allegations support a risk-utility analysis, plaintiffs must plead CPLA claims. Def. Br. at 37-38. The allegations they point to as "product" claims go to establish reasonableness of risk, an element of the preserved negligent entrustment claim – the "seller knows, or reasonably should know" the entrustee is likely to "use the product in a manner involving unreasonable risk of physical injury to the person or others." A241, 15 U.S.C. § 7903(5)(B). Had defendants wanted to separate these allegations from the CUTPA allegations, they should have filed requests to revise.

> statute even if a state's highest court were to construe that statute as applicable to firearms. . . . We disagree with this argument and . . . do not construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations by state courts.

Beretta, 524 F.3d at 396.[25]

Beretta recognized that the key question in construing 15 U.S.C. § 7903(5)(A)(iii) is what "applicable" means: "The core of the question is what Congress meant by the term 'applicable.'" *Beretta*, 524 F.3d at 399. Rather than using its dictionary meaning, *Beretta* narrowed that meaning in certain respects.[26] The Second Circuit concluded:

> In sum, we hold that the [predicate exception]: (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.

Id. at 404. The ruling ("we hold") is crystal clear: the Court definitively acknowledged two categories of predicate statute that do not "expressly regulate firearms."

Defendants misrepresent *Beretta* when they explain its supposed reasoning as to why the New York nuisance statute would not serve as a predicate. Def. Br. at 45-46 (citing

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[25] This construction defers appropriately to state legislatures and judiciaries, a choice mindful of the value of federalism. And this interpretive choice fits PLCAA's overall approach, which avoids federalizing claims made against the firearms industry, *see* 15 U.S.C. § 7903(5)(C), leaving state law to determine if a cause of action and remedy exist.

[26] Judge Katzmann's thoughtful dissent is also persuasive, and it hews more closely to the plain meaning rule. Indeed, of the four Second Circuit judges who considered the predicate provision (Judges Miner, Cabranes, Katzmann, and Weinstein in the District Court), all agreed that "applicable" is a broad term meaning "capable of being applied." Two judges (Judges Katzmann and Weinstein) would have simply implemented that meaning. *Beretta*, 524 F.3d at 404-05; *City of New York v. Beretta*, 401 F. Supp. 2d 244, 261 (E.D.N.Y. 2005); *see also Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 (Ind. App. 2007) (holding that the predicate provision unambiguously encompasses statutes "applicable to the sale or marketing" of firearms); *but see Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (reaching a much more restrictive construction than *Beretta*).

524 F.3d at 404). *Beretta* does not say how exactly the nuisance statute failed. Defendants' conclusion that it failed merely because it was of general application is unlikely.[27] The court had determined that "[w]e find nothing in [PLCAA] that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception." 524 F.3d at 399-400. The better reading is that the statutory nuisance claim failed because New York high courts disapproved such a claim, *see Hamilton v. Beretta U.S.A.*, 96 N.Y.2d 222, 230-31, 240 (N.Y. 2001); *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-95 (N.Y. App. Div. 2003), not because the New York statute was phrased generally.[28]

Applying *Beretta*'s test, CUTPA is a statute "that courts have applied to the sale and marketing of firearms," because *Salomonson v. Billistics, Inc.*, 1991 WL 204385, A380-A390, so applied it, because *Ganim* indicated its applicability, and because the Court should so hold here. CUTPA also "clearly can be said to implicate the purchase and sale of firearms." Under *Beretta* categories (2)(a) and (3), CUTPA is an appropriate predicate.

III. CONCLUSION

For these reasons, the Court must reverse the ruling of the trial court. Should the Court accept any of defendants' critiques of the pleadings not accepted by the trial court, it must remand to give plaintiffs the opportunity to plead over.

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[27] Even if this were so, CUTPA is a much stronger predicate candidate. The nuisance statute applied only incidentally to commerce, while CUTPA explicitly regulates trade and commerce of any commodity in Connecticut. *See* §§ 42-110a, 42-110b, 42-110g.

[28] Defendants now reject this reading of the New York law. In *Beretta* – in which Remington and Camfour were both parties – they argued, apparently successfully but to their current chagrin – exactly the same reading of these cases as plaintiffs argue here. RA62-RA63, *Beretta* Appellants' Brief, at 33-34, n.17.

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify, on this 9th day of June, 2017, the following:

1. The Brief and Appendix comply with the format requirements of Rule of Appellate Procedure § 67-2;

2. The printed Brief and Appendix were mailed postage prepaid to:

   The Honorable Barbara Bellis
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3. The Brief and Appendix have been redacted and do not contain any names of other personal identifying information that is prohibited from disclosure.

4. The printed Brief and Appendix are true copies of the Brief and Appendix that were submitted electronically.

5. Pursuant to the requirements of Rule of Appellate Procedure § 62-7, the electronically filed Brief and Appendix were delivered electronically to the last known e-mail address of each counsel of record and paper copies of the Brief and Appendix were mailed, postage prepaid, to:

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