



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

Plaintiffs, )

v. )

C.A. No. N18C-07-234 VLM )

CABELA'S WHOLESALE, INC., a )  
Nebraska Corporation registered in Delaware, )  
Now Doing Business as CABELA'S )  
WHOLESALE, LLC, )  
a Nebraska Limited Liability Company )  
registered in Delaware. )

Defendant. )

**OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS'**  
**FIRST AMENDED COMPLAINT**

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## Statement of the Case

### I. Statement of the Nature of the Proceedings

Defendant Cabela's Wholesale, Inc., now doing business as Cabela's Wholesale, LLC ("Cabela's") knowingly violated federal and state gun laws when it sold a handgun to a "straw purchaser" who was buying a gun for someone else, to enable the actual purchaser to evade the Brady background check requirements and recordkeeping required by gun laws. Cabela's knew or should have known: that the ostensible purchaser was actually a straw; that making the sale would violate one of its most important legal duties as a licensed gun dealer; and that it was highly foreseeable that a gun sold to such a straw purchaser would be used by a criminal in a violent crime. Which is precisely what happened; the handgun Cabela's chose to sell to a straw purchaser was used to murder Keshall ("KeKe") Anderson, an innocent victim, on the streets of Wilmington.

The law requires that those facts must be accepted as true at this stage of the proceedings. Nor does Cabela's contest, at this stage, that it can be liable under Delaware law of negligence, negligence per se, negligent entrustment, negligent training and supervision, and public nuisance for the damages caused by its negligent and illegal sale – the death of KeKe, and its consequences to her family. Nonetheless, Cabela's argues in its Motion to Dismiss Plaintiffs' First Amended Complaint ("Mot."), that the Delaware Legislature has barred any court or jury from

hearing this case or holding Cabela's liable for the foreseeable consequences of its illegal, negligent and reckless conduct. Cabela's is wrong.

Cabela argues that the same Delaware Legislature that enacted one of the most progressive, pro-gun violence prevention laws in the country – that expanded the Brady background check requirements from only sales by licensed gun dealers to all gun sales – also chose to immunize licensed gun dealers who subvert the Brady law and supply criminals with guns through illegal, unlawful and negligent sales. But Delaware does not broadly immunize gun dealers, certainly not when they violate gun laws. The motion should be denied.

## II. Summary of Facts

### **A. Cabela's Duties As A Federally Licensed Firearms Dealer**

By choosing to apply for and become a federally firearms licensee (“FFL”), Defendant Cabela's chose to act as a “‘principal agent of federal enforcement’ in ‘restricting [criminals’] access to firearms’” and accepted “the responsibility to ‘[e]nsure that, in the course of sales or other dispositions . . . weapons [are not] obtained by individuals whose possession of them would be contrary to the public interest.’” *Abramski v. United States*, 134 S. Ct. 2259, 2271 (2014) (quoting *Huddleston v. United States*, 415 U.S. 814, 824 -825 (1974)). See Mot. Exhibit 1, Plaintiffs' First Amended Complaint (“Compl.”) at ¶ 10.

Cabela's, when it chose to become a licensed gun dealer, voluntarily assumed duties to carefully follow all federal and state firearms laws and regulations, to implement reasonable safety measures and act as a gate-keeper to prevent illegal sales. *Id.* at ¶¶ 10-36. A core duty that Cabela's assumed when it became a licensed gun dealer was to prevent and never to engage in a straw sale, that is a firearms sale in which a buyer falsely certifies that he or she is the actual purchaser of a firearm despite buying the weapon for another individual. *Id.* Straw purchases undercut and evade gun laws by enabling people to obtain guns without any background check or record of sale – because only the straw buyer has her criminal background checked and only her name is on the transaction records. Cabela's knew or should have known that “straw purchases” are one of the primary ways that guns are diverted from licensed dealers to felons and other dangerous individuals for criminal uses. *See Compl.* at ¶ 11.

Cabela's knew or should have known that, as a licensed gun dealer, it had obligations to certify the accuracy of the information provided by each purchaser on the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) Form 4473 (“Form 4473”) required for every firearms sale that occurs at an FFL. *Compl.* at ¶¶ 14-19. The Form 4473 includes explanatory notes and a certification statement reiterating these duties,<sup>1</sup> thus recognizing the need for dealers to independently

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<sup>1</sup> *See* Mot. Exhibit 3, p. 3-6 of Form 4473 (revised April 2012).

assess the lawfulness of any firearms transfer, pay attention to all circumstances of a transfer and potential indicators of straw sales, not rely solely on representations made by a potential purchaser on a Form 4473, and not selling or transferring a firearm to a person who may be a straw purchaser. *Compl.* at ¶¶ 25-32.

Furthermore, Cabela's knew or should have known that the gun industry trade association National Shooting Sports Foundation ("NSSF") and ATF have made clear that dealers should not simply rely on a purchaser's statements on the Form 4473 and the Brady background check results, and underscore the importance of not selling to a prospective purchaser when there is any suspicion or indicator that the purchaser is a "straw purchaser." NSSF and ATF have jointly developed a program called "Don't Lie for the Other Guy" that reinforces to FFLs their duties in preventing unlawful sales and protocols to screen out potential unlawful sales. *Id.*

Of critical importance to prevent straw sales as Cabela's engaged in here, the NSSF and ATF have emphasized that, rather than not simply rely on a prospective purchaser's representations on Form 4473, gun dealers should ask prospective purchasers a set of questions beyond those on Form 4473. *Id.* For example, responsible gun dealers will train their employees to ask prospective purchasers questions about their experience with and intended use of the guns, and whether they are buying the gun(s) for themselves. *Id.* These practices both help dealers provide customers with the product that best meets their needs and help screen for potential



“straw purchasers” and support the FFL’s obligation to confirm the lawfulness of every gun sale they make. *Id.*

Cabela’s also knew or should have known that federal and Delaware law prohibit it from aiding and abetting the making of false statements or providing false documents in connection with the sale of a firearm. *Id.* at ¶¶ 12-15 Similarly, Cabela’s knew or should have known that the ATF and NSSF have made clear that gun dealers violate their duties where they ignore indicators of a “straw purchase” or otherwise unlawful sale. *Id.* at ¶ 29. A responsible gun dealer, when presented with such “red flags,” will call law enforcement to enable further investigation of the situation. *Id.* at ¶ 31. Thus, as an FFL, Cabela’s chose to assume duties to responsibly sell firearms including, but not limited to:

- a. always pay attention to indicators of “straw sales”;
- b. never sell a gun if it has reason to know that the buyer is a “straw purchaser” or is otherwise prohibited from purchasing a gun;
- c. always ask potential “straw purchasers” questions beyond those on Form 4473 in order to try to identify and stop “straw purchases”;
- d. call law enforcement to investigate if it believes an illegal sale is occurring or has occurred;
- e. make sure it is running a background check on the actual purchaser of the firearm and not a “straw purchaser” and

- f. appropriately train and supervise employees to comply with the law and industry standards of acting with reasonable care.

In this case, Plaintiff alleges – and at this stage in the proceedings this Court must accept as true – that Cabela’s violated these duties and did not act with reasonable care, and thereby proximately caused precisely what the gun laws and industry standards intended to prevent – a dangerous criminal obtained a handgun from Cabela’s, and used it to murder an innocent person, causing Plaintiffs’ harm.

**B. Cabela’s Violation Of Its Duties In Facilitating The “Straw Sale” At Issue And The Resultant Shooting**

Due to a lengthy criminal record, convicted felon John Kuligowski (“Kuligowski”) was barred from purchasing or possessing a firearm on July 28, 2016. *See Compl.* at ¶¶ 37, 57. On that date, aware that he would not pass the criminal background check required under federal and Delaware law, Kuligowski solicited Brilena Hardwick (“Hardwick”) to buy an Iberia Firearms JCP, .40 caliber Smith & Wesson pistol (“the handgun”) and a box of bullets for him from Cabela’s Christiana Mall location in Delaware. *Id.* at ¶ 38. Kuligowski drove Hardwick to and from the Christiana Mall Cabela’s location, and waited in the parking lot during the “straw purchase.” *Id.* at ¶ 41.

The circumstances made it obvious that this was not an ordinary or legal sale. On information and belief, while inside the store Hardwick ran up and down the aisles, and she remained in regular cell phone communication with Kuligowski

through both text messages and phone calls in order to coordinate the “straw purchase.” *Id.* at ¶ 42. Cabela’s knew or should have known that a purchaser on a cell phone is one indicator of a straw sale, as the purchaser may be communicating with the actual buyer – as occurred here. *See id.* at ¶¶ 42, 88. However, upon information and belief Cabela’s did not ask Hardwick any questions about her cell phone use, or anything else to screen for straw purchasers. Instead, when she came to the counter to complete the purchase of the handgun, Hardwick provided false information on the Form 4473 associated with the purchase of the handgun by listing a false address and falsely certifying that she, and not Kuligowski, was the actual purchaser of the handgun, and Cabela’s accepted and certified those records. *Id.* at ¶¶ 43-44.

Based on Hardwick’s erratic behavior and evident coordination with another individual about the purchase of the handgun, it was obvious that a “straw purchase” was underway. *Id.* at ¶¶ 42, 45. As a result, Cabela’s knew or should have known, and had actual or constructive knowledge, that the information Hardwick provided on the Form 4473 was not the correct information for the actual purchaser of the firearm and that supplying Hardwick’s information to National Instant Criminal Background Check System (“NICS”) would be a violation of Cabela’s duty to run a background check on the actual purchaser. *Id.* at ¶¶ 47-55. Cabela’s also knew or should have known that supplying a firearm to Hardwick was inherently dangerous

because “straw purchases” are one of the primary mechanisms by which actors on the criminal market gain access to firearms. *Id.* at ¶¶ 11, 46.

Cabela’s “willfully blinded”<sup>2</sup> itself to the clear “red flags” showing that Hardwick was a “straw purchaser” and submitted Hardwick’s information to law enforcement to have them run a NICS background check on Hardwick despite these indicators of danger. *Id.* at ¶¶ 42, 54. Cabela’s failed to call law enforcement, ask questions, or otherwise halt the “straw sale” of the handgun. *Id.* at ¶¶ 47-52. Instead, Cabela’s ignored red flags of a straw sale, ran a background check and falsely certified on Form 4473 that Hardwick was the actual buyer of the handgun despite actual or constructive knowledge to the contrary. *See id.* ¶ 52

After Hardwick provided the handgun to Kuligowski, in the Cabela’s store parking lot, he supplied the firearm to the criminal market, enabling other criminal actors access to the handgun. *Id.* at ¶¶ 58-59. Two minor criminals acquired the gun from the criminal market and used the handgun in a drive-by shooting in Wilmington, Delaware on September 18, 2016. *Id.* This shooting claimed the life of Plaintiff KeKe Anderson, a 19-year-old innocent bystander walking on a public street. *Id.* at ¶¶ 60-62. KeKe left behind a 6-month old son. *Id.* at ¶ 63.

Cabela’s decision to blind itself to the clear “red flags” showing that

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<sup>2</sup> See *infra* at p. 10 and 15.

Hardwick was acting as a “straw purchaser” was both negligent and unlawful. Cabela’s intentionally and directly violated, and/or knowingly aided and abetted, violations of numerous federal and Delaware firearms laws—including the federal Gun Control Act and 11 Del. C. § 1448A—and monetarily profited off of supplying the criminal firearms market. *Compl.* at ¶¶ 12-36, 72-76, 79; *see also* 11 Del. C. § 271(2) (a party is criminally liable for the actions of another where he intentionally facilitates the crime either by 1) aiding another or 2) failing to prevent the criminal act despite having a duty to prevent it).

The facts also support finding Cabela’s liable for conspiracy to violate gun laws. *See* 11 Del. C. § 512 (an individual is guilty of a felony conspiracy offense where, with the intent to “promote or facilitate” a felony like those felonies involved in a “straw purchase,” the individual “[a]grees to aid another person or persons in the . . . commission of the felony. . . and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy”).

“Willful blindness” to “red flags” of a straw purchase indicating criminality can establish “knowledge” for the purposes of accomplice liability. *See United States v. Carney*, 387 F.3d 436, 448-450 (6th Cir. 2004) (upholding seller’s conviction for aiding and abetting false statements inherent in a “straw purchase” where the seller “either knew that [the person using straw purchaser(s)] was the actual buyer of the guns or had been deliberately ignorant of that fact”); *United*

*States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (accomplice’s knowledge of a fact can be proven by “willful blindness,” such as “evidence that the defendant was confronted with ‘red flags’ but nevertheless said, ‘I don’t want to know what they mean’”); *see also United States v. Nosal*, 844 F.3d 1024, 1039 (9th Cir. 2016); *In re Grandell*, 189 A.3d 1288, 20 (Del. 2018) (“Respondent acted, at a minimum, with ‘willful ignorance’ and, thereby, acted knowingly.” in the context of a lawyer disciplinary proceeding). Cabela’s, like the firearms seller in *Carney*, cannot escape liability for its negligent and unlawful actions in knowingly facilitating a “straw purchase” despite being presented with obvious indicators of Hardwick’s criminal activity.

### **Statement of the Questions Involved**

- I. Does 11 Del. C. § 1448A(d) provide blanket immunity for Defendant Cabela’s and bar Plaintiffs’ claims as alleged in the First Amended complaint?

### **Argument**

- I. **Summary Judgment Standard**

When this court assesses the sufficiency of Plaintiffs’ complaint against a motion to dismiss for failure to state a claim, “all well-pleaded allegations must be accepted as true.” *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). “The test for sufficiency is a broad one, that is, whether a plaintiff may recover under any

reasonably conceivable set of circumstances susceptible of proof under the complaint.” *Id.*; see also *Haskins v. Kay*, 2008 Del. LEXIS 571, 5 (Del. Supr.) (“[A]ll inferences [from the complaint] must be viewed in a light most favorable to the plaintiff.”) Where discovery may enable a plaintiff to establish one or more facts which would allow for his or her claims to proceed, this Court should not grant a motion to dismiss without giving the plaintiff a “reasonable opportunity for discovery.” *Marvel v. Prison Indus.*, 884 A.2d 1065, 1070-1071 (Del. Super. Ct. 2005) (denying motion to dismiss where plaintiff had not been afforded the opportunity to establish, through discovery, the existence of a state insurance policy which could establish that the state had waived sovereign immunity); See also *Haskins v. Kay*, 963 A.2d 138 (Del. 2008) (reversing motion to dismiss a claim where plaintiff had not had an opportunity for discovery).

II. Cabela’s Has No Immunity Under 11 Del. C. § 1448A Because Cabela’s Did Not Comply With Delaware Law

For purposes of this motion to dismiss, Cabela’s does not contest that it can be found to have negligently sold and entrusted the handgun, that it knowingly violated federal and state gun laws in selling the handgun, and that, as a foreseeable result of the negligent and illegal sale, KeKe Anderson was killed with the handgun. See Mot. at ¶¶ 6-11.

Cabela's instead argues that Delaware law nonetheless immunizes it from liability for its negligent and illegal acts. Cabela's claims that the Delaware legislature, in one of the most progressive gun violence prevention measures in the nation, enacted one of the most regressive, anti-gun violence prevention measures in the nation. Cabela's claims that the Delaware legislature gave gun dealers sweeping immunity from liability for their own wrongful conduct that subverts Delaware and federal gun laws when it enacted a package of new legislation that became 11 Del. C. §§ 1448A and 1448B. Cabela's is wrong.

Delaware law does not specially protect gun dealers who violate the law, and the addition of § 1448B did not change that. That legislation had a wholly unrelated purpose, and opposite intent; it was aimed at expanding gun laws by requiring background checks for gun sales by unlicensed persons. The legislative history confirms that the legislature intended to protect gun owners engaged in private sales that, under §1448B, would be subject to a background check done by an FFL.

Even assuming *arguendo* that the legislation provided some protection to dealers when they conduct background checks for gun sales in transactions other than between unlicensed persons, neither § 1448A nor any other law provide protection to gun dealers who violate Delaware law. Indeed, if Cabela's interpretation was correct, the Delaware legislature created an incentive to subvert the background check requirement in legislation intended to strengthen it, by



immunizing gun dealers who facilitate straw purchases and enable real buyers to evade the background check requirement – as happened in this case. On the contrary, the statute makes clear that, at most, Cabela’s is only protected if, in selling the firearm, it acted in “[c]ompliance” with all parts of 11 Del. C. § 1448A. *See* 11 Del. C. § 1448A(d).

Cabela’s did not comply with all parts of 11 Del. C. § 1448A, and is not entitled to immunity under Delaware law. Section 1448A lays out the requirements for a “[c]omplian[t]” background check and makes clear that “[n]o . . . licensed dealer shall sell, transfer or deliver from inventory any firearm . . . to any other person . . . without conducting a criminal history background check *in accordance with regulations promulgated by the United States Department of Justice pursuant to the National Instant Criminal Background Check System ("NICS"), 28 C.F.R. §§ 25.1-25.11 . . .*” (emphasis added).

Cabela’s Motion to Dismiss simply ignores this language. Cabela’s engages in some sleight of hand to inaccurately suggest that the mere act of running a NICS background check on Hardwick, the straw purchaser, automatically rendered it “[c]omplian[t]” and entitles it to immunity. Mot. at 4-5, ¶¶ 8, 10. Cabela’s does this in a purported block quote of 11 Del. C. § 1448A(d) in which Cabela’s inserts “[NICS criminal history records check]” after “Compliance with this section,” to falsely imply that the two terms are synonymous, and “compliance with” the statute

is satisfied merely by conducting a “NICS criminal history records check”. Mot. at 4, ¶ 8. That is incorrect. A background check does not satisfy the law.

In fact, § 1448A specifically incorporates the regulations promulgated by the Department of Justice (“DOJ”) and says that a Federal Firearms Licensee (“FFL”) is not in “[c]ompliance” with the Delaware statute unless the FFL abides by those DOJ regulations. 11 Del. C. §1448A(a). Simply going through the motions of a background check on a straw purchaser is not sufficient to be “compliant” with Delaware law when a dealer is presented with “red flags” showing that the person being subjected to the background check is not the actual purchaser.

Plaintiffs have alleged that Cabela’s did not comply with Delaware law and the referenced federal regulations when running the background check on Hardwick, the straw purchaser. For one, Cabela’s violated 28 CFR § 25.11(b)(1)—which defines a prohibited “misuse” of NICS as including “FFLs, or individuals’ purposefully furnishing incorrect information to the system to obtain a ‘Proceed’ response, thereby allowing a firearm transfer.” 28 CFR § 25.11(b)(1). Cabela’s “willfully blinded” itself to “red flags” revealing the fact of Hardwick’s “straw purchase,” and then knowingly provided “incorrect” data to the NICS system—namely the name and associated data for an obvious “straw purchaser”—in order to get a “Proceed” response and sell the firearm without checking the records of the actual purchaser. *See Compl.* at ¶¶ 42, 54 (“Upon information and belief, Cabela’s

submitted Brilena Hardwick's name to law enforcement to have them run a NICS background check on Brilena Hardwick, the straw purchaser/buyer.”). Because Cabela's knowingly provided NICS with "incorrect information" about the actual purchaser in violation of one or more DOJ regulations incorporated into 11 Del. C. § 1448A(a), they were not in “[c]ompliance” with 11 Del. C. § 1448A(a) and they are ineligible for the protection of the immunity shield in 11 Del. C. § 1448A(d) – even if that immunity is read broadly.

Form 4473, which Cabela's recognizes has been “incorporated . . . by reference” into the Complaint (Def. Mot. at ¶2), makes clear that Cabela's violated the law by engaging in a straw sale. It is noteworthy that the Form 4473 specifically rejects a similar, overly formalistic interpretation of federal law as limiting a seller's duty to simply running a background check – on someone, even if it isn't the actual buyer of the gun. Form 4473 (**Questions(s) 21, 22, 23 NICS BACKGROUND CHECKS:**) states:

**WARNING:** Any seller who transfers a firearm to any person they know or have reasonable cause to believe is prohibited from receiving or possessing a firearm violates the law, even if the seller complied with the background check requirements of the Brady law.

*See* Mot., Exhibit 3 at P. 5 of 4473. Form 4473 also makes clear that Cabela's retained the legal authority to deny a sale even if the ostensible (“straw”) buyer passed a background check. *See* Mot., Ex. 3 at P. 6 of 4473 (“If NICS provides a

“*proceed*” response, the transaction *may* proceed.” (emphasis added)). Cabela’s ignored the warning and failed to exercise the discretion discussed on the Form 4473.

At the very least, Plaintiffs’ allegations present a plausible set of circumstances under which Cabela’s lack of “[c]ompliance” with 11 Del. C. § 1448A(a) removes any protection conditionally provided to Cabela’s by 11 Del. C. § 1448A(d). *See Spence v. Funke*, 396 A.2d at 968 (Del. 1981); *Haskins v. Kay*, 963 A.2d 138 (Del. 2008). As a result, this Court should reject Cabela’s Motion to Dismiss and grant Plaintiffs an opportunity for further discovery to establish facts supporting their claims. *See id.*; *see also Marvel v. Prison Indus*, 884 A.2d 1065, 1070-1071 (Del. Super. Ct. 2005).

### III. Section 1448A Must Be Narrowly Construed Since It Purports To Abrogate Common Law Rights

According to Cabela’s, 11 Del. C. § 1448A abrogates some common law tort rights by depriving some gun violence victims of their rights to recover from gun dealers for damages caused by their negligent and unlawful acts. When a court interprets a statute that abrogates the common law to some degree, “statutory provisions are [to be] strictly construed to avoid further unintended abrogation of the common law.” *Nationwide Mut. Ins. Co. v. Wooters*, 1996 Del. Super. LEXIS 113, 14-15 (Del. Super 1996). “[T]he common law is not repealed by statute unless the legislative intent to do so is plainly or clearly manifested” and “any such repeal is not effected to a greater extent than the unmistakable import of the [statutory]

language used.” *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122 (Del. 2009).

This court must apply those principles when construing §1448A. By its plain language, 11 Del. C. § 1448A(d) at most only abrogates the common law right of plaintiffs to recover where the defendant complies with all parts of 11 Del. C. § 1448A, including the referenced DOJ regulation(s) -- that Cabela’s violated. Cabela’s proposes reading the statute as broadly abrogating common law rights of injured plaintiffs even where an FFL knowingly provides an obvious “straw purchaser’s” information to the NICS system in violation of DOJ regulation(s).

Cabela’s interpretation both contradicts the plain language of the statute and runs contrary to the principles of “strict[] constru[ction]” that must be applied to 11 Del. C. § 1448A. *See Nationwide Mut. Ins. Co. v. Wooters*, 1996 Del. Super. LEXIS 113, 14-15 (Del. Super. 1996). Plaintiffs’ interpretation, by contrast, recognizes that the Delaware legislature did not “plainly or clearly” attempt to extinguish Plaintiffs’ claims, such that this Court is bound to view them as surviving the immunity provided by 11 Del. C. § 1448A(d). *See A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122 (Del. 2009).

#### IV. Cabela’s Interpretation Of 11 Del. C. § 1448A Is Inconsistent With The Intent Of The Delaware Legislature

Legislation should be read to further the overall legislative intent; any interpretation that would run counter to the overall legislative intent should be

avoided. See *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990) (“Literal or perceived interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations consistent with the intent of the legislature.”); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) (announcing that it is the “equally well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.”); *United States v. Bryan*, 339 U.S. 323, 338-339 (1950) (“[T]he Court will not reach [a] result if it is contrary to the congressional intent and leads to absurd conclusions.”) (rejecting overly-literal reading where it would lead to an “irrational” result that contradicted the overall legislative intent). Cabela’s position that 11 Del. C. § 1448A(d) should be read to provide broad immunity to gun dealers who negligently and unlawfully supply criminals by going through the motions of conducting a background check on a “straw purchaser” is flatly contrary to the overarching violence-prevention purpose animating 11 Del. C. § 1448A.

The intent of House Bill 35 (“HB 35”), which later became 11 Del. C. §§ 1448A, 1448B, was to extend the background check requirement to gun sales by unlicensed persons. HB 35 addressed the loophole in federal law that only required Brady background check requirements for direct sales by FFLs to private parties and not to gun transfers between non-FFLs. 18 U.S.C. § 922(t). HB 35 was designed to

enhance public safety by making sure that background check requirements apply to *all* gun sales in Delaware--including transfers between private parties.

As HB 35 was only targeted at changing the legal requirements for firearms transfers *between private parties*, it was not intended to alter the rules for firearms sales between FFLs and private parties. *See* 11 Del. C. § 1448B(a) (referring to “*unlicensed person*”) (emphasis added). Licensed firearms dealers only factor into HB 35’s statutory scheme when they are called upon to facilitate firearms transfers by providing background check services in sales between unlicensed persons. *See id.* The legislative intent of HB 35 was not to alter the rules applicable to FFLs when they sold guns to their customers – transactions which were not affected by HB 35’s background check requirement.

The idea that the Delaware legislature, in trying to promote public safety and prevent guns from being diverted into the criminal market, intended to immunize gun dealers who ignore “red flags” indicating that they are running a background check on a “straw purchaser” is baseless. While Cabela’s cites the Synopsis of House Amendment No.7 (“Amendment 7”) to HB 35 —the amendment which gave rise to the limited immunity described in 11 Del. C. § 1448A(d), *see* Mot. at 4, ¶ 8— the Synopsis actually emphasized that the goal of this provision was to “encourage[] compliance [with laws applicable to firearms sales] by ensuring that **persons who follow the law** cannot be held liable for damages for actions that take place after a

**lawful** transfer.” Mot., Exhibit 4 (emphasis added). But Cabela’s chose to engage in an obviously *unlawful* transfer and did not follow the law.

The legislative intent behind the “expansion” cited by defendants (Mot. at ¶ 8) in Amendment No. 7 to House Bill 35, as described on the house floor by sponsor Peter Schwartzkopf, suggests that the expansion was aimed at protecting private sellers. House Amendment No. 7 to House Bill 35, “expanded the liability in making it very clear that if we as the state are going to tell people to comply with certain things to sell a gun for *private gun sales* and we *should protect them*.” (Plaintiffs’ Exhibit 1, House Floor Debate Transcript, March 28, 2013 at 6:20-7:3) (emphasis added). There is no evidence that the legislature intended for 11 Del. C. § 1448A(d) to apply to, or remove accountability for, FFLs like Cabela’s when they are running a background check on a “straw purchaser” involved in a direct sale like the sale of the handgun to Hardwick.

It makes sense, as a matter of policy and logic, that the Delaware legislature would choose to treat private sellers, and sales made by a licensed gun dealer, differently. When an FFL is directly selling to a customer, it has a greater financial stake in the transaction and more opportunity to observe and interact with the buyer than when it is facilitating a transfer between third parties who have decided on a sale, and simply needs an FFL to do a background check. There is both more



incentive to proceed with an illegal sale and more opportunity to prevent an illegal sale in the direct sales context.

While the language in 11 Del. C. § 1448A(d) may appear overly broad, it should not be read to create a result contrary to the overall legislative intent by applying to direct sales from an FFL to a private party. This court should narrowly construe the scope of sales to which 11 Del. C. § 1448A(d) applies in order to effect this overall legislative intent.

V. Defendants' Broad Reading of Statutory Immunity Should Be Rejected Under The Principle of Constitutional Avoidance

"Where a possible infringement of a constitutional guarantee exists, the interpreting court should strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities." *Delaware v. Baker*, 720 A.2d 1139, 1144 (Del. 1998). *See also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (court should adopt "plausible" interpretation that avoids constitutional concerns). As explored below, Defendant's interpretation of 11 Del. C. § 1448A(d) would raise substantial constitutional concerns; thus, the doctrine of constitutional avoidance supports adopting Plaintiff's interpretation.

VI. In The Alternative, If 11 Del. C. § 1448A(d) Does Bar Plaintiffs' Claims, It Is Unconstitutional

Assuming *arguendo* that 11 Del. C. § 1448A(d) is read to bar Plaintiffs'

claims, it is unconstitutional under both the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and the “open courts” provision of the Delaware Constitution (Del. Const. art I, § 9).

**A. Reading § 1448A to Bar Plaintiffs’ Claims Would Run Afoul of Del. Const. Art I, § 9’s Protection of The Right To A Remedy For Injury**

If 11 Del. C. § 1448A(d) is read to bar Plaintiffs’ claims, then 11 Del. C. § 1448A(d) deprives all victims of negligent and unlawful conduct by an FFL of any common law remedy without a viable substitute in a situation where the relevant gun dealer conducts a pro forma background check. This would remain true even where, as here, the FFL intentionally, negligently and/or unlawfully conducts the background check on an obvious “straw purchaser.” By depriving a specific class of plaintiffs of all common law remedies without a viable substitute, this reading of 11 Del. C. § 1448A(d) would violate Del. Const. Art I, § 9, which provides that “every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law.”

Delaware courts have recognized the principle that “the legislature may not abolish the common law right of action to recover damages for negligent injury without substituting another substantially adequate remedy.” *See Gallegher v. Davis*, 37 Del. 380, 392 (Del. Super. 1936); *over’d on other grounds by Wagner v. Shanks*, 56 Del. 555 (1963); *Young v. O.A. Newton & Son Co.*, 477 A.2d 1071, 1076 (Del. Super. Ct. 1984) (quoting and applying this language from *Gallegher*). No

Delaware court of which Plaintiffs are aware has ever held that the legislature may utterly deprive victims of negligence from any remedy against a tortfeasor, as Cabela's contends § 1448A does here. To do hold would render Delaware's Open Courts provision into a near nullity.

Further, although the *Young* court ultimately upheld the challenged statute, it engaged in a meaningful, substantive analysis of whether the statute provided sufficient alternative compensation, and observed that “test is whether the[re is an] alternate method of compensation [which] assures that the injured [party] will receive reasonable compensation for his injury.” *See id.* at 1078. Section 1448(A) runs afoul of Del. Const. art I, § 9 as it provides *no* “alternate method of compensation”—let alone an adequate one—for the common law right(s) abrogated by the legislature. *See Id.*

**B. Reading § 1448A to Bar Plaintiffs' Claims Would Run Afoul of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution**

For similar reasons, Defendants' statutory construction would run afoul of federal Due Process. While courts have held that certain common law rights of action may be modified or extinguished by legislative action, the Supreme Court has not approved of wholesale denial of any remedy for injured plaintiffs. In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), the Supreme Court upheld a federal compensation system for nuclear power victims only after

extensively analyzing the alternate compensation scheme and then finding that the law did “provide a reasonably just substitute for the common-law or state tort law remedies it replace[d].” *See id.* at 88. If due process allowed legislatures to deprive parties of all civil redress without a substitute, the Court would not have gone through this analysis.<sup>3</sup>

The Court’s recognition that a legislature cannot deprive victims of serious wrongdoing of any satisfactory remedy under the United States Constitution is consistent with the Supreme Court’s long-standing recognition that “[w]here there is a legal right, there is also a legal remedy by suit or action at law.” *Marbury v. Madison*, 5 U.S. 137, 163 (1896) (quoting Sir William Blackstone, Commentaries 23 ); *see also Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (“a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive the person suffering the loss of due process of law.”); *Poindexter v. Greenhow*, 114 U.S. 270 (1885) (“No one would contend that a law of a state, forbidding all redress by

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<sup>3</sup> While *Duke Power* considered the Due Process Clause of the Fifth Amendment—rather than the Fourteenth Amendment-- “the Fifth Amendment to the Constitution . . . provides due process protections . . . coextensive with the due process protections of the Fourteenth Amendment.” *Tibbs v. Williams*, 263 F. Supp. 2d 39, 40 (D.D.C. 2003).

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

**C. Reading § 1448A to Bar Plaintiffs’ Claims Would Run Afoul of The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution**

Depriving victims of gun industry negligent and criminal conduct of remedies also violates the Equal Protection clause of the 14<sup>th</sup> Amendment. In *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), the court held a Georgia tort reform statute was unconstitutional on equal protection grounds under both the state and federal constitutions because it discriminated between claimants in products liability and non-products liability cases by affording them starkly different legal remedies without a rational basis. Similarly, there is no rational basis to deny remedies for victims of wrongful gun industry conduct, or to immunize gun dealers who choose to profit off the criminal gun market – when victims and perpetrators of far less dangerous or culpable acts of negligence by sellers of products from b.b. guns to cigarettes are fully subject to the law’s benefits and costs.

**Conclusion**

For the foregoing reasons, Defendant Cabela’s Motion should be denied in full, and Plaintiffs should be permitted to proceed to discovery.

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