IN THE SUPREME COURT OF THE STATE OF DELAWARE

LISA SUMMERS, Personal Representative of the Estate of KESHALL ANDERSON, KISHA BAILEY, Individually and as the Legal Guardian of JORDAN DOMINIQUE ROBINSON, JR., a minor, MICHAEL BAILEY, Individually, Plaintiffs, Appellants, v. CABELA'S WHOLESALE, LLC., a Nebraska Corporation registered in Delaware, CABELA'S WHOLESALE, INC., a Nebraska Limited Liability Company registered in Delaware, Defendants, Appellees,	No. 170,2019 ON APPEAL FROM THE FINAL ORDER AND JUDGEMENT DATED DECEMBER 10, 2018 OF THE SUPERIOR COURT OF DELAWARE C.A. No. N18C-07-234 VLM

APPELLANTS' CORRECTED REPLY TO APPELLEE'S ANSWERING BRIEF

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I. Summary of Argument

Cabela's concedes that 11 Del. C. § 1448A does not protect gun dealers unless they engage in "compliant transfers" of guns, and that compliance requires providing correct information to the NICS background checks system. According to the allegations, that must be accepted as true, Cabela's purposefully provided incorrect information to NICS: Cabela's certified and provided Hardwick's name as the actual purchaser of the gun, even though Cabela's knew that she was not the actual purchaser, but was a straw purchaser buying for an unknown, actual purchaser. That was illegal – one of the most serious violations a gun dealer can commit – and disentitles Cabela's to any special exemption from civil liability.

Cabela's wrongly claims that federal law allows (if not encourages) dealers to abet straw purchases by submitting for NICS background checks whatever information a straw purchaser provides. In truth, a dealer commits a crime when it certifies and submits a purchaser to NICS when it knows she is a straw purchaser (as in this case). Cabela's also invites the Court to defy Delaware notice pleading law by rejecting well-pled allegations that it "knew" Hardwick was a straw buyer. And Cabela's fails to acknowledge law which holds that a gun dealer who is "willfully blind" to indicators of a straw sale may be deemed to know the buyer is a straw.

Delaware law does not immunize unlawful straw sellers like Cabela's. Nor do the United States or Delaware Constitutions allow Delaware to deprive victims of gun industry negligence of all avenues for civil redress.

II. Cabela's Illegal Sale Was Not A Compliant Transfer So Cabela's Is Not Entitled To Protection Under 11 Del. C. § 1448A

Cabela's and the trial court agree that Cabela's is not entitled to protection under § 1448A(d) unless the sale of the firearm to Hardwick was a "compliant transfer." *See* Cabela's Answering Brief ("Ans. Br.") at 2-3, 15; Trial Court Opinion, Ex. B. to Op. Br. at 13-14, 17. Summers alleges that the transfer was not "compliant," so Cabela's is not entitled to dismissal.

A. Cabela's Submitted "Incorrect Information" To NICS In Violation Of 28 C.F.R. § 25.ll(b)(I)

For a transfer to be "compliant" under § 1448(A)(a), Cabela's must follow federal NICS regulations, including 28 C.F.R. § 25.1-25.ll. Ans. Br. at 2-3, 15; Ex. B. to Op. Br. at 13-14, 17. These regulations prohibited Cabela's from "purposefully furnishing incorrect information to the [NICS] system to obtain a 'Proceed' response, thereby allowing a firearm transfer." 28 C.F.R. § 25.ll(b)(I). Summers' allegations establish that Cabela's violated 28 C.F.R. § 25.ll(b)(I) by furnishing NICS with incorrect information by providing Hardwick's name as the actual buyer, when it knew she was actually a straw buyer.

Cabela's misstates the facts and the law in claiming that "Summers' allegations themselves support" finding that its sale to Hardwick was a "compliant

transfer." Ans. Br. at 10. On the contrary, Summers alleges, *inter alia*, that Cabela's:

- "did not comply with its legal obligations;"
- "falsely certified that Brilena Hardwick was the actual purchaser;"
- "knew or should have known that a straw purchase was underway;"
- "maintained [] false records in its store, concealing the truth and misleading law enforcement about the legality of the sale and the name of the purchaser;" and
- "knowingly violated state and federal [gun] laws, including, but not limited to" 11 Del.C. § 1448(A).

First Amended Complaint ("the Complaint"), A-057-059 at ¶¶ 45-55, A-062 at ¶ 74. Those allegations must be taken as true. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002). They establish that Cabela's knew Hardwick was not the actual purchaser but was a straw purchaser buying for someone else, yet Cabela's submitted her name to NICS as the actual purchaser to complete an illegal straw sale.

Disturbingly, Cabela's contends that this egregious violation of federal law is "compliant" because the identity of the supposed buyer cannot be "incorrect information." Ans. Br. at 12-13. The opposite is true: "[n]o piece of information

is more important under federal firearms law than the identity of a gun's [actual] purchaser—the person who [ultimately] acquires a gun as a result of a transaction with a licensed dealer." *Abramski v. United States*, 573 U.S. 169, 193 (2014); *see also United States v. Carney*, 387 F.3d 436, 446-450 (6th Cir. 2004) ("a licensed dealer's willful recordation of false data [the identity of straw purchasers], instead of the accurate data, is both the moral and the functional equivalent of the willful recordation of no information at all regarding the legally required matters [the identity of the actual purchaser]." 28 C.F.R. § 25.11 prohibits purposefully furnishing any type of "information" to complete a gun sale, which unquestionably includes the most important fact – the name of an actual buyer.

Cabela's suggests that the law only requires it to relay to NICS whatever information Hardwick wrote on the Form 4473. *See* Ans. Br. at 5-6; *see also id*. at 13, 16-17. If Cabela's were right, federal law would effectively allow gun dealers to willing be willing accomplices to straw purchasers, since they will almost certainly pass a NICS checks (which is why they are recruited as straw buyers). Cabela's is wrong. Federal law imposed on Cabela's the duty to first "determine the lawfulness of the transaction" and certify the accuracy of Hardwick's representations on the Form 4473 and its belief that the sale was lawful. *See* A-051-053 at ¶¶ 14-19; A-128. Only then should a name be submitted to NICS. ATF and the gun industry emphasize that a critical responsibility of gun dealers is

to screen for straw purchasers, and they cannot simply rely upon the potential purchaser's answers on the Form 4473 when assessing whether a given sale is lawful. *See* A-055 at ¶¶ 27-32.

Cabela's even suggests that the FBI counseled it to submit to NICS Hardwick's false answer that she was the actual buyer, unless (and perhaps even if) she admitted she was a straw purchaser. The truth is that dealers can stop a sale at any point, and a responsible dealer would stop a sale and notify law enforcement if it knows or has reason to believe a purchaser is a straw. *See id.* at ¶ 32. The FBI does not instruct gun dealers to violate federal law by certifying false information and facilitating straw purchases.

B. Cabela's Purposefully Provided A Straw Purchaser's Identity To NICS In Order To Get A False "Proceed" And Profit From An Illegal Sale

1. Contrary to Cabela's Claims, The Allegations Establish That Cabela's Purposefully Violated Federal Firearms Law

Cabela's wrongly claims that "Summers does not, and could not in good faith, allege that Cabela's acted criminally by submitting Hardwick's name to NICS with a *purposeful* intent to fool the system into generating a 'proceed' response and allowing an illegal firearm purchase." Ans. Br. at 14 (emphasis in original). Not true. *See* A-057-059 at ¶¶ 45-55, A-062 at ¶ 74. Cabela's misstates Summers' allegations and defies Delaware notice pleading law.

Summers alleges that when Cabela's submitted Hardwick's name to NICS, Cabela's "knew or should have known" Hardwick was a straw purchaser. A-057-058 at ¶¶ 45-47. The court was required to accept as true that Cabela's "knew" Hardwick was a straw purchaser, regardless of the alternative "or should have known" allegation. Other allegations show Cabela's purposeful conduct, including that it could not legally certify Hardwick as the actual purchaser but nonetheless falsely certified her as the actual purchaser, concealed the truth and misled law enforcement. *See* A-058-059 at ¶¶ 51-54. The only reason for Cabela's to submit the name of a person it could not certify as the actual purchaser was to purposefully complete an illegal, sham sale.[1]

Cabela's invites the Court to defy Delaware's notice pleading law, which does not allow dismissal unless it is certain that plaintiff cannot recovery under any reasonably conceivable set of circumstances susceptible of proof. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002); *Klein v. Sunbeam Corp.* 94 A.2d 385, 391 (Del. 1952). The allegations (and reasonable inferences derived

[1] Summers goes further and alleges that Cabela's has a history of supplying straw purchasers, including its Delaware store, supporting an inference that it has a practice of purposefully supplying the criminal gun market. *See* A-060-061 at ¶¶66-71.

therefrom) clearly establish that Cabela's purposefully provided incorrect information to NICS.

Even the trial court, at oral argument, understood that "what has been pled [is] . . . an allegation of criminal conduct." Ex. B to Op. Br. at 49. However, the trial court erred by ultimately refusing to accept this allegation and improperly weighing supporting allegations.

Cabela's defends the trial court's clear error by claiming that Summers' allegations that Cabela's knew Hardwick was a straw purchaser are "[c]onclusory" and can be disregarded. Ans. Br. at 14. They are not. An unsupported "conclusory allegation" would be, for example, "Cabela's acted fraudulently." An allegation that "Cabela's knew" is a specific assertion of fact. While Summers laid out even more facts to support this allegation, a complaint "need not set out in detail the facts upon which it is based" so long as it provides defendants fair notice. *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1252 (Del. 2004).

The authority Cabela's cites does not suggest that Summers' allegations are insufficient or conclusory. For instance, in *Alston v. Admin. Office of the Courts*, the plaintiff "did not allege any specific acts taken by the defendants reflecting

racism, fraud, or corruption."[2] 181 A.3d 614, 614 (Del. 2018). In contrast, Summers specifically alleged that Cabela's "knew," and then described, in detail, how Cabela's "willfully blinded" itself to clear "red flags" of a straw purchase and thereby knowingly entered the name of a straw purchaser into NICS. *See* A-057-058 at ¶¶ 41-47.

There is no authority to support what the trial court did – rejecting, *on a motion to dismiss*, a specific allegation that Cabela's knew Hardwick was a straw buyer, weighing Summers' detailed description of pre-discovery supporting facts on which a jury could find that Cabela's knew, and then finding those facts unpersuasive. Where a plaintiff provides sufficient notice of her claim, dismissal is inappropriate and she is entitled to discovery. *See Delle Donne*, 840 A.2d at 1252. As neither the trial court nor Cabela's has even claimed that Summers did not provide sufficient notice, it was an error to dismiss.

2. Cabela's "Willful Blindness" To Obvious "Red Flags" Of A Straw Purchase Constitutes Knowledge That Hardwick Was A Straw Purchaser

[2] Appellant's other cases are also inapposite. *Spence v. Spence*, 2012 Del. Super. LEXIS 188 (April 20, 2012) applied a heightened pleading standard for a malicious prosecution claim that is "viewed with disfavor" and subject to "special scrutiny." 2012 Del. Super. LEXIS 188, at *8-9 (Apr. 20, 2012). *Grobow v. Perot*, 539 A.2d 180 (Del. 1988) dealt with efforts by plaintiffs to overcome a presumption that the business judgment rule applied to justify a given transaction. 539 A.2d 180, 187-88 (Del. 1988).

Cabela's not only invites the Court to reject allegations that Cabela's "knew" Hardwick was a straw purchaser, but it fundamentally misunderstands the law of "willful blindness." "Willful blindness" *establishes knowledg*e that is sufficient to even support a criminal conviction – including for a dealer who aids and abets a straw purchase.

Carney upheld a gun dealer's conviction for aiding and abetting false statements by a felon and/or associated straw purchasers and endorsed a "deliberate ignorance" (*i.e*., "willful blindness") jury instruction. 387 F.3d 436, 448-50 (6th Cir. 2004). The Court noted that "[t]he plain language of the pattern instruction authorizes a jury to find 'knowledge' based upon *circumstantial* proof which compels the conclusion that the defendant(s) *must have known* the fact at issue because it was 'obvious' - *as opposed to* having merely been negligent by failing to discover or realize the subject fact which they *should have known." Id*. at 449; *see also United States v. Nosal*, 844 F.3d 1024, 1039 (9th Cir. 2016) (upholding deliberate ignorance instruction stating that a defendant acted "knowingly" if he "was aware of a high probability" and "deliberately avoided learning the truth"); *United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (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'") (instructional error required reversal).

"Willful blindness" to obvious "red flags" indicating straw sales or gun trafficking has repeatedly been found to constitute knowingly unlawful misconduct by gun sellers in civil suits, disentitling them from protection under the Protection of Lawful Commerce in Arms Act ("PLCAA," 15 U.S.C. §§ 7901-7903) – a law Cabela's cites as "instructive." Ans. Br. at 36. *See, e.g., City of Gary v. Smith & Wesson Corp.* 2019 Ind. App. LEXIS 228 (May 23, 2019) ("*Gary II*"); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007); *Chiapperini v Gander Mtn. Co., Inc.*, 13 N.Y.S.3d 777 (N.Y. Sup. Ct. 2014); *Coxie v. Academy, Ltd.*, No. 2018-CP-42-04297, Order on Motion to Dismiss (S.C. Ct. Cmmn. Pl. July 29, 2019); *Fox v. L&J Supply, LLC*, No. 2014-24619, Order on Motion For Summary Judgment (Pa. Ct. Cmmn. Pl. Nov. 26, 2018). These cases recognize that a dealer can be found to have knowingly supplied a straw purchaser in violation of law where the dealer was presented with "red flags" of a straw purchase, notwithstanding its predictable protestations of ignorance.

While Cabela's dismisses these cases as "immaterial" because they do not apply § 1448A, those cases apply federal gun laws that Delaware law incorporates. And one case – *Gary II* – involved PLCAA and an Indiana immunity law that the

trial court cited and (incorrectly) viewed as "guid[ing]" its analysis. *See* Ex. B. to Op. Br. at 14-15.[3]

3. Summers' Allegations Of Cabela's Knowing Violations Of Law Were More Than Sufficiently Established By Supporting Allegations

Even if the trial court could reject Summers' allegation that Cabela's knew Hardwick was a straw purchaser, the "red flags" detailed in the Complaint were sufficient to support Cabela's knowledge, even without additional evidence that may be uncovered during discovery. Cabela's claims that it would be "unreasonable" to infer that it knew Hardwick was a straw buyer ignores allegations of "red flags" including Hardwick's erratic behavior and cell phone use (A-057-058 at ¶¶ 41-47), that are recognized indicators of straw sales. Indeed, in *United States v. Carranza,* speaking on a cell phone was one fact on which an agent based his belief that an individual was a straw buyer and was receiving direction from the actual buyer. 2011 U.S. Dist. LEXIS 100951 (D. Nev. Aug. 5, 2011) *rec'd adopted by* 2011 U.S. Dist. LEXIS 101113, at *32-35 (D. Nev. Sep. 7, 2011). Cabela's invites the Court to ignore these allegations, and view each "red

[3] The trial court correctly recognized that a "key difference" between the Indiana and Delaware immunity laws is that the Indiana law does not explicitly precondition immunity on compliance with NICS regulations including 28 C.F.R. § 25.11. *See* Ex. B. to Op. Br. at 17. Because of this critical difference, this law provides no guidance for interpreting the Delaware law.

flag" in isolation when they must be viewed in aggregate. *Compare* Ans. Br. at 15-16 *with* Op. Br. at 18; *see also Carney*, 387 F.3d at 450 (discussing multiple individual indicators of criminality that were part of a "highly incriminating *modus operandi*").

Even if these pre-discovery facts did not support Cabela's knowing provision of a straw purchaser's name to NICS, a court may not dismiss a complaint if the claims could be supported by potential supplemental facts that plaintiffs might be able to uncover through discovery. *See Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952); *see also Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970); *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. Ct. 1972). This rule applies with full force in deciding if a complaint alleges sufficient facts to illustrate that it is conceivable that immunity does not apply. *See Esposito v. Townsend*, 2013 Del. Super. LEXIS 26, at *15-16 (Feb. 8, 2013); Hale *v. Elizabeth W. Mumphrey Sch., Inc.* 2014 Del. Super. LEXIS 246, at *15-18 (May 20, 2014). Summers is entitled to discovery to seek additional facts.

III. Cabela's Broad Reading Of § 1448A Conflicts With The Intent Of The General Assembly And Applicable Canons Of Statutory Construction

A. Cabela's Reading Would Produce An Absurd Result That Contradicts The Intent of The General Assembly

The goal of statutory interpretation is to further legislative intent and avoid absurd results that undermine that intent. *See State* v. *Cooper,* 575 A.2d 1074, 1076 (Del. 1990) ("Literal or perceived interpretations, which yield illogical or absurd results, should be avoided in favor of interpretations consistent with the intent of the legislature."); *United States v. Bryan,* 339 U.S. 323, 338-339 (1950) ("[T]he Court will not reach [a] result if it is contrary to the congressional intent and leads to absurd conclusions."); Antonin Scalia & Bryan Gardner, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 63-66 (2012) ("*Reading the Law*") (interpretation that advances overall goal of the statute is favored).

The overall goal of the General Assembly in passing HB35, the bill which became §§ 1448A and 1448B, was to curtail the flow of weapons to felons and others who should not have them by expanding background checks to unlicensed gun sales. *See* Synopsis of HB35, attached as Ex. A at ("when the sale or transfer of a firearm does not involve a licensed dealer, no background check is required [under federal law]. This is an enormous loophole—one in which convicted felons, minors and other prohibited purchasers can readily avoid background checks and more easily acquire guns").

The interpretation suggested by Cabela's and the trial court creates an absurd result in which the General Assembly, while making it more difficult for criminals to obtain firearms, rewarded dealers who illegally divert guns to criminals. The legislative history Cabela's relies upon rebuts this position by emphasizing that the protection conferred in § 1448A was only intended to apply to "persons who follow the law" in the background check process. Ans. Br. at 21 (quoting A-133); *id*. at 24 (quoting A-174).[4]

While principles of statutory construction and the presumption against preemption compel Summers' narrow reading of the law's protection, Cabela's argues that the Court should disregard these principles because § 1448A is not "ambiguous" as to whether this case falls within the scope of its protection. Ans. Br. at 18-19, 20-22. A statute "is ambiguous if it is susceptible of two [or more] reasonable interpretations." *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011). Section 1448A(d)'s conditioning protection on compliance with the NICS regulations and the legislative intent to not protect unlawful sellers at least creates ambiguity as to whether the General Assembly intended to bar

[4] Further, §1448 should be read to not apply to sales by dealers to private parties. *See* Op. Br. at 23-25.

cases like this one. Canons of statutory construction must be applied to resolve any ambiguity.

B. Cabela's Reading Creates Surplusage; Summers' Reading Does Not

Cabela's apparent argument that its transfer was "compliant" even if it did not provide NICS with the correct name of the actual purchaser renders 28 § C.F.R. 25.11 surplusage that must be ignored in reading § 1448A. *See* Appellants' Op. Br. at 21-22. Cabela's counterargument that Summers' reading creates surplusage is incorrect. The requirement that transfers be compliant means that dealers who comply with the law have a defense (including from common law claims that do not require a legal violation), while those who do not comply do not. That does not make the statute a nullity.

Delaware courts have repeatedly refused to dismiss claims on immunity grounds where complaints alleged sufficient facts to show that a prerequisite to immunity was not or might not be established under a conceivable set of circumstances, without concern that this renders the immunity a nullity. *See Esposito v. Townsend,* 2013 Del. Super. LEXIS 26, at *15-16 ("all that was necessary for Plaintiffs' claim to survive a motion to dismiss" on immunity grounds was for the complaint to "allege[] sufficient facts to demonstrate the possibility and conceivability" of the fact that the act therein did not meet the prerequisite "good faith" requirement for application of immunity); *Hale*, 2014 Del. Super. LEXIS

246, at *15-18 (the court "[could not], at the pleading stage, state definitively that there is no conceivable set of circumstances" under which immunity would not apply despite a “scant” record; the court denied a motion to dismiss and found it proper to allow an opportunity for "preliminary discovery."). Cabela’s simply ignores these cases.

IV. Appellants' Public Nuisance Claim Should Not Be Dismissed

Cabela's argues that Summers' public nuisance claim should be dismissed because, it claims, Summers did not argue that public nuisance can apply to sales at the trial court. Ans. Br. at 25-26. Cabela's fails to mention that the reason that Summers did not specifically argue that Delaware law recognizes public nuisance claims for sales is that Cabela's did not raise that argument in its motion to dismiss. Cabela's argument for dismissal of the nuisance count was that § 1448A "provides [Cabela's] a complete defense." *See* A-047. Summers was not obligated to address arguments not raised by defendant. In its reply brief in support of its motion to dismiss ("Rep. Br."), Cabela's (improperly) raised, for the first time, a new argument that Delaware common law limits public nuisance claims to the use of land – and then only in a footnote. *See* A-204, n. 6. As briefing was over, Summers had no opportunity to respond in writing.

Summers brought a public nuisance claim, and the trial court properly considered it. Summers did not waive this argument.

V. Section 1448A Violates The Delaware And United States Constitutions

Section 1448A's constitutional flaws require the Court to apply the doctrine of constitutional avoidance, under which Summers' narrower interpretation of § 1448A (which avoids these concerns) must be accepted if it is "plausible." *See Clark* v. *Martinez,* 543 U.S. 371, 381 (2005). Cabela's only argument that the doctrine does not apply is that the constitutional arguments against § 1448A are "weak." Ans. Br. at 28-29. That is incorrect.

A. Section 1448A Violates The "Open Courts" Provision Of The Delaware Constitution (art. I, § 9)

Cabela's argues against Summers' Open Courts (and Due Process) challenges by suggesting they hinge on Summers having "'vested'" rights. *See* Ans. Br. at 30-31. Not true. Regardless of whether Summers' claim to specific Delaware tort claims "vested" before the enactment of § 1448A, the Open Courts provision provides that all citizens of Delaware shall have access to a reasonably adequate remedy for unlawful harm.[5] Even if the General Assembly may extinguish a common law claim, it may not eliminate all remedies.

[5] The Due Process challenge overlaps to some degree with the Open Courts challenge in that both require that existing common law remedies may not be extinguished without the provision of a reasonably just alternative remedy.

Cabela's claims that *Gallegher v. Davis*, 183 A. 620 (Del. Super. Ct. 1936) and *Young v. O.A. Newton & Son Co.*, 477 A.2d 1071 (Del. Super. Ct. 1984) do not support the proposition that the Open Courts provision prevents the General Assembly from extinguishing all common law claims without providing any means for meaningful redress. Cabela's even cites *Young* for the proposition that "when a common law cause of action has been abolished, the Delaware Constitution does not require that an alternate method of compensation be provided." Ans. Br. at 29-30. Cabela's is wrong; that is *exactly* what these cases show.

Young states that the "test is whether the[re is an] alternate method of compensation [which] assures that the injured [party] will receive *reasonable compensation* for his injury." 477 A.2d at 1076-78 (emphasis added). And *Gallegher* states: "the legislature may not abolish the common law right of action to recover damages for negligent injury without substituting another substantially adequate remedy." 37 Del. at 392.

While Cabela's claims that § 1448A does not violate the Open Courts provision because it allows victims to obtain meaningless judgments against often penniless and/or dead criminals (*see* Ans. Br. at 32), this is not a "substantially adequate remedy."

B. Section 1448A Violates The Due Process Clause Of The Fourteenth Amendment To The United States Constitution

As with the Open Courts provision, the key question under federal Due Process is not whether a particular claim is vested, but whether a reasonably adequate alternative replaced claims that were extinguished by the General Assembly. Because there is none, § 1448A violates the Due Process Clause.

Cabela's takes issue with Summers' citation of *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) as supporting her position, noting that the Court, as dicta, suggested that it was not holding that Due Process requires provision of a reasonable alternative remedy. *See* Ans. Br. at 34. But that does not counter the fact that the Court only approved the statute after extensively analyzing the alternate compensation scheme provided by Congress and finding that "[t]his panoply of [alternative] remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by [the act]." 438 U.S. at 93.[6] And Cabela's ignores that after *Duke Power*, Justice Marshall explained that "our cases demonstrate that there are limits on governmental authority to abolish 'core'

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[6] *Duke Power* considered the Due Process Clause of the Fifth Amendment but "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 n.1 (D.D.C. 2003) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-50 (1954).

common-law rights . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (J. Marshall concurring).

Cabela's invites this Court to view cases construing PLCAA as "instructive" because it incorrectly views these cases as supporting its Due Process arguments *See* Ans. Br. at 36.[7] Cabela's ignores the courts that have found that PLCAA does violate or would violate Due Process if read to bar certain claims. *See City of Gary v. Smith & Wesson Corp.*, No. 45D05005-CT-00243, 4 (Ind. Super. Ct. Oct. 23, 2006) ("Due Process is violated when Congress abolishes an existing remedy and provides no alternative."), attached as Ex. B *see Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, (Wis. Cir. Ct. Mar. 24, 2014), attached as Ex. C (similar).

[7] *District of Columbia v. Beretta U.S.A. Corp.* expressly refused to consider the alternative remedy argument. 940 A.2d 163, 177 n.8 (D.C. Ct. App. 2008) ("we need not consider the plaintiffs' subsidiary claim that due process at least requires Congress to supply an alternative remedy before it may eliminate a cause of action retroactively"). *Delana v CED Sales*, Inc., actually allowed a negligent entrustment claim to proceed under PLCAA, so any potential deprivation of Due Process rights was far less egregious than would be the case if § 1448A is read to bar all of Summers' claims. 486 S.W.3d 316 (Mo. 2016).

The Due Process Clause does not allow Delaware legislature to deprive gun violence victims of all right to a reasonably adequate remedy.

C. Section 1448A Violates The Equal Protection Clause Of The Fourteenth Amendment

There is no question that §1448A (according to Cabela's) mandates unequal, discriminatory treatment by depriving victims of gun industry misconduct of any remedy from tortfeasors like Cabela's while preserving all remedies for victims of similar misconduct by actors in other industries. Cabela's only defense is to claim that this discrimination nonetheless survives rational basis review. But rational basis is not the rubber stamp Cabela's suggests.

Cabela's is unable to distinguish *McBride v. General Motors Corp*., which struck down a tort statute on rational basis review. 737 F. Supp. 1563 (M.D. Ga. 1990); *see also City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432 (1985) (striking down zoning ordinance on rational basis review). *McBride* makes clear that to survive rational basis review, a justification for discrimination within a statute must not be patently illogical and insufficient to explain the differential treatment. *See* 737 F. Supp. at 1578. The only "rational basis" advanced by the trial court – or Cabela's – for the General Assembly purportedly singling out gun violence victims from victims of the misconduct of other industries is "incentiviz[ing]" "compliant transfers" that adhere to state and federal law.

See Ex. B. to Op. Br. at 30-31; *see also* Ans. Br. 37-38. This justification cannot withstand scrutiny.

First, § 1448A fundamentally fails to accomplish this supposed purpose. It shields dealers who break Delaware and federal law by knowingly supplying the criminal market through improperly running NICS background checks on obvious straw purchasers. Second, Delaware's interest in having businesses selling potentially harmful items comply with the law is not unique to the gun industry. It is irrational to immunize gun dealers who negligently and unlawfully transfer firearms, but to allow unlimited liability for other industries who engage in similarly negligent and/or unlawful transfers of other dangerous products. Just as the state's proffered justification of raising revenue could not rationally explain taking no money from one class of plaintiffs in *McBride* (*see* 737 F. Supp. at 1578), a desire to limit liability for the sellers of dangerous products does not support limiting liability for the firearms industry while leaving unlimited liability for manufacturers of opioids, bb guns, or other products on identical legal theories.

CONCLUSION

Summers respectfully request that this Court reverse the trial court, reinstate all of Summers' claims, and remand this case to the trial court for further proceedings.

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