DOCKET NO. FBT-CV-15-6048103-S	:	SUPERIOR COURT
	:	
DONNA L. SOTO, ADMINISTRATRIX (ESTATE OF VICTORIA L. SOTO), ET AL.	:	JUDICIAL DISTRICT
	:	OF FAIRFIELD
V.	:	
	:	AT BRIDGEPORT
BUSHMASTER FIREARMS INTERNATIONAL, LLC, ET AL.	:	APRIL 14, 2016

MEMORANDUM OF DECISION
RE: MOTIONS TO DISMISS #119, #122, #125

I
BACKGROUND

On January 26, 2015, the plaintiffs, William Sherlach, Natalie Hammond, and the administrators or executors[1] of the estates of Victoria L. Soto, Dylan C. Hockley, Mary J. Sherlach, Noah S. Pozner, Lauren G. Rousseau, Benjamin A. Wheeler, Jesse McCord Lewis, Daniel G. Barden, and Rachel M. D'Avino, filed this action for damages and injunctive relief against the defendants, Bushmaster Firearms International, LLC, Freedom Group, Inc., Bushmaster Firearms, Bushmaster Firearms, Inc., Bushmaster Holdings, LLC, Remington Arms Co., LLC, and Remington Outdoor Company (collectively, Remington defendants); Camfour, Inc. and Camfour Holding, LLP (collectively, Camfour defendants); and Riverview Sales, Inc. and David LaGuercia (collectively, Riverview defendants). On January 15, 2015,[2] the

[1] The names of the administrators and executors of the estates are as follows: Donna L. Soto, administratrix of the estate of Victoria L. Soto; Ian and Nicole Hockley, co-administrators of the estate of Dylan C. Hockley; William Sherlach, executor of the estate of Mary J. Sherlach; Leonard Pozner, administrator of the estate of Noah S. Pozner; Gilles J. Rousseau, administrator of the estate of Lauren G. Rousseau; David C. Wheeler, administrator of the estate of Benjamin A. Wheeler; Neil Heslin and Scarlett Lewis, co-administrators of the estate of Jesse McCord Lewis; Mark and Jacqueline Barden, co-administrators of the estate of Daniel G. Barden; and Mary D'Avino, administratrix of the estate of Rachel M. D'Avino.

[2] While this action was not filed in this court until January 26, 2015, the action was, in fact, commenced by service of process on the defendants at various dates in December of 2014 and January of 2015. Accordingly, the Remington defendants were able to file a motion for

Remington defendants, with the consent of the Camfour and Riverview defendants, removed the case to the United States District Court for the District of Connecticut on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332.[3] The plaintiffs filed a motion to remand, and the District Court, *Chatigny, J.*, ultimately agreed with the plaintiffs, and ordered the case to be remanded to this court on October 9, 2015.

In their thirty-three count amended complaint dated October 29, 2015, the plaintiffs allege the following facts. On the morning of December 14, 2012, Adam Lanza entered Sandy Hook Elementary School located in Newtown, Connecticut, carrying a Bushmaster AR-15 rifle, model XM15-E2S. Lanza then used the weapon, which was designed for military use and engineered to deliver maximum carnage with extreme efficiency, to kill twenty-six people, including the plaintiffs' decedents, and to wound others, in less than five minutes. The weapon had been bought by Lanza's mother to give to and/or share with her son.

The plaintiffs further allege that the defendants, all makers and sellers of the Bushmaster XM15-E2S, know that civilians are unfit to operate AR-15s, and yet continue selling the Bushmaster XM15-E2S to the civilian market, disregarding the unreasonable risks that the weapon poses "outside of specialized, highly regulated institutions like the armed forces and law enforcement," in an effort to continue profiting from the weapon's sale. In addition, the defendants knew, or should have known, the following: the sale of assault rifles like the XM15-E2S to the civilian market posed an unreasonable and egregious risk of physical injury to others, as a mass casualty event was within the scope of the risk created both by the Remington

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removal to federal court on January 15, 2015, before the filing of the action in this court actually occurred.

[3] Title 28 of the United States Code, § 1332, provides in relevant part: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) Citizens of different States . . . ."

defendants' marketing and by the defendants' sale of the XM15-E2S to the civilian market; there was an unreasonably high risk that the XM15-E2S would be used in a mass shooting to inflict maximum casualties before law enforcement was able to intervene; schools are particularly vulnerable to—and frequently targets of—mass shootings; the utility of the XM15-E2S for hunting, sporting, or self-defense was negligible in comparison to the risk that the weapon would be used in its assaultive capacity; and the XM15-E2S, when used in its assaultive capacity, would be likely to inflict multiple casualties and serious injury.

The plaintiffs also allege that, despite this knowledge, the Remington defendants "unethically, oppressively, immorally, and unscrupulously marketed and promoted the assaultive qualities and military uses of AR-15s to civilian purchasers," and all of the defendants "unethically, oppressively, immorally, and unscrupulously promoted the sale of AR-15s with the expectation and intent that possession and control of these weapons would be shared with and/or transferred to unscreened civilian users following purchase, including family members." Moreover, the Remington defendants knew, or should have known, that the Camfour defendants' use of the product—supplying it to dealers who sell directly to civilians—involved an unreasonable risk of physical injury to others, while the Camfour defendants knew, or should have known, that the Riverview defendants' use of the product—supplying it to the civilian population—involved an unreasonable risk of physical injury to others.[4]

[4] The amended complaint also expressly alleges that the Camfour defendants and the Riverview defendants are qualified product sellers within the meaning of 15 U.S.C. § 7903 (6). Section 7903 (6) of title 15 of the United States Code provides in relevant part: "The term 'seller' means, with respect to a qualified product—(A) an importer . . . who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code . . . ; (B) a dealer . . . who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code . . . ; or (C) a person engaged in the business of selling ammunition . . . in interstate or foreign commerce at the wholesale or retail level."

Counts one through nine and thirteen through thirty of the amended complaint sound in wrongful death[5] against the three groups of defendants on behalf of the plaintiffs' decedents. These counts allege that the defendants' conduct was a substantial factor resulting in the injuries, suffering, and death of the plaintiffs' decedents in that the decedents suffered terror, ante-mortem pain and suffering, destruction of the ability to enjoy life's activities, destruction of earning capacity, and death. These counts also allege that as a result of the injuries and deaths of the plaintiffs' decedents, their estates incurred funeral expenses to their financial loss. Counts ten through twelve sound in loss of consortium against the three groups of defendants by William Sherlach, the husband of Mary J. Sherlach. Finally, counts thirty-one through thirty-three are brought against the three groups of defendants by Natalie Hammond, alleging that the defendants' conduct was a substantial factor resulting in the injuries of Hammond in that she suffered terror; pain and suffering; severe, permanent, and painful injuries to her left calf, foot, thigh, and hand; destruction of the ability to enjoy life's activities; and destruction of earning capacity. Hammond also alleges she incurred medical expenses to her financial loss. Within each of these counts, the plaintiffs allege that the defendants' conduct constituted a knowing violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On December 11, 2015, the Remington defendants, Camfour defendants, and Riverview defendants each filed a motion to dismiss the amended complaint for lack of subject matter jurisdiction on the grounds that (1) they are immune from the plaintiffs' claims by virtue of the

[5] The wrongful death claims are brought pursuant to General Statutes § 52-555, which provides in relevant part: "(a) In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7901 et seq. (2005),[6] and (2) the plaintiffs lack standing to pursue claims against them for alleged violations of CUTPA. Each of the motions was accompanied by a memorandum of law in support. On January 25, 2016, the plaintiffs filed an omnibus objection to the defendants' motions to dismiss, and on February 16, 2016, the three groups of defendants each filed a reply memorandum of law.[7] Oral arguments on the motions were heard on February 22, 2016, at which time the court reserved judgment.

II
DISCUSSION

"[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013); see also Practice Book § 10-30. When considering a motion to dismiss, the determination of whether the court has jurisdiction "must be informed by the established principle that every presumption is to be indulged in favor of jurisdiction." (Internal quotation marks omitted.) *Gurliacci* v. *Mayer*, 218 Conn. 531, 543, 590 A.2d 914 (1991). "Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction." *St. George* v. *Gordon*, 264 Conn. 538, 545, 825 A.2d 90 (2003).

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[6] Title 15 of the United States Code, § 7902 (a), provides that "[a] qualified civil liability action may not be brought in any Federal or State court." A "qualified civil liability action" is "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . ." 15 U.S.C. § 7903 (5) (A) (2005).

[7] The plaintiffs then filed a surreply addressed solely to the Remington defendants' argument on February 22, 2016. Pursuant to Practice Book § 11-10 (c), however, which took effect on January 1, 2016, "[s]urreply memoranda cannot be filed without the permission of the judicial authority." As the plaintiffs did not seek permission from the court to make such a filing, the court will not consider their surreply.

As a threshold matter, the court recognizes the plaintiffs' assertion that the defendants' arguments concern the legal sufficiency of the plaintiffs' claims rather than the court's jurisdiction and, accordingly, that the motions to dismiss should be construed as motions to strike pursuant to Practice Book § 10-39 and denied. "[T]he primary difference between the granting of a motion to dismiss for lack of subject matter jurisdiction and the granting of a motion to strike is that only in the latter case does the plaintiff have the opportunity to amend its complaint." *McCutcheon & Burr, Inc.* v. *Berman*, 218 Conn. 512, 527-28, 590 A.2d 438 (1991). "Although our case law supports the concept of allowing a motion to dismiss to be treated as a motion to strike in situations in which the trial court has done so; see, e.g., *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 501-502, 815 A.2d 1188 (2003); it does not support the concept of *requiring* trial courts to do so, when they have not done so." (Emphasis in original.) *Gold* v. *Rowland*, 296 Conn. 186, 226, 994 A.2d 106 (2010) (*Schaller, J.*, concurring and dissenting). Moreover, "generally, pleadings are not to be filed out of the order specified in [Practice Book § 10-6], and the filing of a pleading listed later in the order set out by § [10-6] waives the right to be heard on a pleading that appears earlier on the list."[8] *Sabino* v. *Ruffolo*, 19 Conn. App. 402, 404, 562 A.2d 1134 (1989).

The court does not disagree with the proposition that, in a case where a defendant's motion to dismiss is focused solely on the legal sufficiency of the complaint, it may be appropriate to treat the motion as a motion to strike. In the present case, however, the defendants' motions specifically challenge the court's jurisdiction over the subject matter of the present action. As more fully discussed hereinafter, the defendants claim that PLCAA deprives

[8] The proper order of pleadings provided for in Practice Book § 10-6 "shall be as follows: (1) The plaintiff's complaint. (2) The defendant's motion to dismiss the complaint. (3) The defendant's request to revise the complaint. (4) The defendant's motion to strike the complaint. . . ."

this court of jurisdiction to entertain the present action, an issue of first impression in Connecticut's state courts, and they further claim that the plaintiffs lack standing to raise claims pursuant to CUTPA. Indeed, in response to the plaintiffs' argument that the motions to dismiss should be treated as motions to strike, the defendants have reaffirmed that at this juncture, they are solely raising the issue of the court's jurisdiction, not challenging the legal sufficiency of the complaint. Given the potential waiver issues involved with treating these motions to dismiss as motions to strike, the way in which the defendants have framed their arguments under a motion to dismiss standard, and the fact that the defendants disagree with the court treating the motions to dismiss as motions to strike, it is neither practical nor desirable for the court to consider the defendants' motions as anything other than motions to dismiss. Accordingly, the court will confine its analysis to the matter appropriately within the purview of a motion to dismiss, namely, whether the court has jurisdiction over the plaintiffs' claims.

A
PLCAA

Because a motion to dismiss, under the Connecticut rules of practice, is used to challenge the court's jurisdiction to hear and decide the claim, the court must first determine whether PLCAA is a jurisdictional statute. The defendants argue that jurisdictional principles are embodied in the plain language of PLCAA as well as Congress's stated purposes for PLCAA. The plaintiffs contend that PLCAA does not implicate subject matter jurisdiction as "it is undisputed that this court is competent to adjudicate causes of action sounding in negligent entrustment and CUTPA."

"By its terms, [PLCAA] bars plaintiffs from courts for the adjudication of qualified civil liability actions, allowing access for only those actions that fall within [PLCAA's] exceptions." *New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008), cert. denied, 556 U.S. 1104,

129 S. Ct. 1579, 173 L. Ed. 2d 675 (2009). More specifically, PLCAA provides that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902 (a) (2005). It then defines "qualified civil liability action" as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . ." 15 U.S.C. § 7903 (5) (A) (2005). A "qualified product" under PLCAA "means a firearm . . . including any antique firearm . . . or ammunition . . . or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903 (4) (2005).

PLCAA also sets forth several exceptions to the definition of qualified civil liability action. In relevant part, PLCAA provides that "[t]he term 'qualified civil liability action' . . . shall not include . . . (ii) an action brought against a seller for negligent entrustment or negligence per se; (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . ." 15 U.S.C. § 7903 (5) (A) (2005). In the present case, the plaintiffs base their wrongful death claims on theories of negligent entrustment pursuant to 15 U.S.C. § 7903 (5) (A) (ii), and on violations of CUTPA pursuant to 15 U.S.C. § 7903 (5) (A) (iii).

The issue of whether PLCAA is jurisdictional has been squarely addressed by the Court of Appeals for the Second Circuit in *New York* v. *Mickalis Pawn Shop*, 645 F.3d 114 (2d Cir. 2011). In *Mickalis*, the Second Circuit discussed PLCAA at length, and, in particular, whether the federal statute implicates subject matter jurisdiction. The Second Circuit ultimately held that

"PLCAA's bar on 'qualified liability action[s]' . . . does not deprive the court of subject-matter jurisdiction. The language of the PLCAA 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [district courts].' . . . Instead, it provides only that '[a] qualified civil liability action may not be brought in any Federal or State court.' . . . Although the phrase 'may not be brought' suggests absence of jurisdiction, the phrase is not equivalent to a clear statement of Congress's intent to limit the power of the courts rather than the rights of litigants. . . . In the absence of such a clear statement, we must treat the PLCAA as speaking only to the rights and obligations of the litigants, not to the power of the court." (Citations omitted; internal quotation marks omitted.) Id., 127.

"In general, [the Connecticut Supreme Court] look[s] to the federal courts for guidance in resolving issues of federal law. See, e.g., *Joo* v. *Capitol Switch, Inc.*, 231 Conn. 328, 332-36, 650 A.2d 526 (1994) (considering federal court precedent to interpret federal statute); see also *Schnabel* v. *Tyler*, 230 Conn. 735, 743 and n.4, 646 A.2d 152 (1994) (noting that court looks to Second Circuit precedent when interpreting federal statute). Decisions of the Second Circuit Court of Appeals, although not binding on [the Connecticut Supreme Court], are particularly persuasive." *Turner* v. *Frowein*, 253 Conn. 312, 340-41, 752 A.2d 955 (2000).

Given the lack of appellate authority in the state of Connecticut on the issue of whether PLCAA implicates subject matter jurisdiction, and given that Connecticut state courts look to the federal courts for guidance in resolving issues of federal law, the court finds the holding in *Mickalis* to be highly persuasive. The court acknowledges that the defendants cite to a Connecticut trial court case, *Gilland* v. *Sportsmen's Outpost, Inc.*, Superior Court, judicial district of Hartford, Docket No. X04-CV-09-5032765-S (May 26, 2011, *Shapiro, J.*), appeal dismissed, Appellate Court, Docket No. AC 33926 (November 17, 2011), cert. denied, 303

Conn. 938, 36 A.3d 696 (2012), in support of their argument that PLCAA is properly raised on a motion to dismiss. In *Gilland*, however, the Superior Court characterized the motion before it as a "motion to dismiss and/or strike the plaintiffs' second amended complaint" and then went on to decide the hybrid motion under a motion to dismiss standard without providing any reasoning for doing so. In the absence of any analysis by the *Gilland* court as to whether PLCAA implicates subject matter jurisdiction, and in light of the fact that trial court decisions are not binding, the court does not find the *Gilland* decision persuasive on this point.

The defendants also argue that the subject matter jurisdiction discussion in *Mickalis* is not relevant to the present issue because it concerns the subject matter jurisdiction of federal district courts, which are courts of limited jurisdiction under the federal constitution, unlike Connecticut state courts. In *Mickalis*, however, the Second Circuit was not deciding whether the District Court lacked subject matter jurisdiction to hear the plaintiffs' claims due to that court's limited jurisdiction; it was deciding whether the District Court lacked subject matter jurisdiction to hear the claims due to the statutory language of PLCAA. Given that the pertinent language of PLCAA under analysis in *Mickalis* provides that "[a] qualified civil liability action may not be brought in any *Federal or State* court"; (emphasis added) 15 U.S.C. § 7902 (a) (2005); the court finds that the Second Circuit's reasoning is highly relevant and applicable to state courts as well as federal courts.

Moreover, this court is influenced by the fact that other federal courts that have considered PLCAA as a defense[9] have done so in the context of a motion to dismiss under Rule

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[9] See, e.g., *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d 404 (noting that defendants brought motion to dismiss before District Court under Rule 12 [b] [6]); *Phillips* v. *Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1220 (D. Colo. 2015) (decided in context of Rule 12 [b] [6] motion); *Jefferies* v. *District of Columbia*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013) (same); *Ileto* v. *Glock, Inc.*, 194 F. Supp. 2d 1040, 1045 (C.D. Cal. 2002) (same), rev'd in part, 349 F.3d 1191 (9th Cir. 2003).

12 (b) (6) of the Federal Rules of Civil Procedure.[10] Rule 12 (b) (6) is used to challenge the legal sufficiency of a pleading, not the court's jurisdiction, and its equivalent in the state of Connecticut is our motion to strike. See *DeLaurentis* v. *New Haven*, 220 Conn. 225, 239-40, 597 A.2d 807 (1991) ("such a motion [to dismiss pursuant to Rule 12 (b) (6)] is similar to our motion to strike . . . and permits the court to dismiss the complaint for failure 'to state a claim upon which relief can be granted'" [citation omitted]).

The defendants additionally argue that the court does not have subject matter jurisdiction over the present action because the plaintiffs' wrongful death claims do not fall within the statutory exceptions to PLCAA—namely, the negligent entrustment exception, 15 U.S.C. § 7903 (5) (A) (ii), and the predicate exception, 15 U.S.C. § 7903 (5) (A) (iii). The defendants contend that as a matter of statutory construction, the plaintiffs' claims of negligent entrustment must fail. With respect to the predicate exception, the defendants argue that CUTPA is not applicable to the sale or marketing of firearms. In response, the plaintiffs maintain that the issues raised by the defendants are not jurisdictional, and the defendants are attacking the legal sufficiency of the plaintiffs' claims.

Indeed, the defendants' arguments concern a statutory restriction on certain causes of action. Our Supreme Court, presented with a similar conundrum, has concluded that a challenge to whether a plaintiff may advance a claim within a statutory exception is more appropriately made in a motion to strike, not a motion to dismiss. In *Gurliacci* v. *Mayer*, supra, 218 Conn. 541, the court was asked to determine whether a motion to dismiss was the correct procedural vehicle with which to challenge a complaint that alleged a negligence claim that was barred by the

[10] Rule 12 (b) (6) of the Federal Rules of Civil Procedure provides in relevant part: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses: . . . failure to state a claim upon which relief can be granted . . . ."

fellow employee immunity rule of General Statutes (Rev. to 1983) § 7-465,[11] which bars an action by a municipal employee covered by workers' compensation against a fellow employee for injuries caused by the fellow employee's negligence, unless that fellow employee's conduct was wilful and malicious. The Supreme Court held that, although the plaintiff failed to allege facts that fell within the recognized exceptions to § 7-465, the trial court was not required to grant the defendant's motion to dismiss because that statute did not deprive the court of jurisdiction over the plaintiff's negligence claim. Id., 544.

The *Gurliacci* court's explanation of the relationship between the court's jurisdiction and the statutory exceptions is instructive: "Subject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong. . . . We begin with the premise that the Superior Court has subject matter jurisdiction over negligence suits between fellow employees where the injury arose when the employee was acting outside the scope of employment or wilfully or maliciously. General Statutes § 7-465. The question, therefore, is whether the failure of the plaintiff to allege sufficient facts to fall within either of these two exceptions deprived the court of subject matter jurisdiction, so that a motion to dismiss was the proper procedural vehicle, or whether such a pleading failure merely deprived the complaint of a legally sufficient cause of action, so that a motion to strike was the proper procedural vehicle. That determination must be informed by the established principle that every presumption is to be indulged in favor of jurisdiction." (Citations omitted; internal quotation marks omitted.) *Gurliacci* v. *Mayer*, supra, 218 Conn. 542-43.

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[11] "General Statutes (Rev. to 1983) § 7-465 (a) provides that '[i]f an employee . . . has a right to benefits or compensation under chapter 568 [the Workers' Compensation Act] by reason of such injury . . . caused by the negligence or wrong of a fellow employee while both employees are engaged in the scope of their employment for such municipality, such employee . . . *shall have no cause of action against such fellow employee* to recover damages for such injury or death unless such wrong was wilful and malicious.'" (Emphasis in original; footnote omitted.) *Gurliacci* v. *Mayer*, supra, 218 Conn. 541-42.

Under that analytical framework, the court concluded that "the fact that the plaintiff's complaint failed to allege facts that would have removed it from the operation of the fellow employee immunity rule merely reflects that the complaint failed to state a legally sufficient cause of action." Id., 544. Indeed, interpreting the language of § 7-465 to be jurisdictional would have required a bizarre result, because such an interpretation, "taken to its logical conclusion, would require a trial court, after trial, to dismiss for lack of subject matter jurisdiction a complaint that at the outset properly alleged an exception to the fellow employee immunity rule, if the factfinder ultimately concluded that the defendant employee was neither (1) acting outside the scope of his employment or (2) acting wantonly or maliciously. Thus, the court would be compelled to conclude that it had no subject matter jurisdiction over the case that it had tried solely because the plaintiff failed to establish an essential element of his cause of action." Id., 544-45.

The Supreme Court has subsequently reaffirmed this analysis. Specifically, Chief Justice Rogers, writing for the court in the case of *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012), stated: "[T]he failure to allege an essential fact under a particular statute goes to the legal sufficiency of the complaint, not to the subject matter jurisdiction of the trial court. . . . This conclusion is consistent with the rule that every presumption is to be indulged in favor of jurisdiction . . . is consistent with the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . by allowing the litigant, if possible, to amend the complaint to correct the defect . . . and avoids the bizarre result that the failure to prove an essential fact at trial deprives the court of subject matter jurisdiction." (Citations omitted; internal quotation marks omitted.) Id., 579.

Returning, then, to the issue of whether the plaintiffs' claims fall within the exceptions to PLCAA, the court begins with the premise that the Superior Court has subject matter jurisdiction over a wrongful death action where the injury arose out of conduct by the defendants. The question, therefore, is whether the failure of the plaintiffs to allege sufficient facts to fall within either PLCAA's negligent entrustment exception or its predicate exception would deprive the court of subject matter jurisdiction, so that a motion to dismiss would be the proper procedural vehicle, or whether such a pleading failure merely would render the complaint legally insufficient, so that a motion to strike would be the proper procedural vehicle. In light of the foregoing, the arguments concerning the availability of the PLCAA exceptions to the plaintiffs' claims are directed to the legal sufficiency of the complaint, and would be properly the subject of a motion to strike, not a motion to dismiss. Thus, at this juncture, the court need not and will not consider the merits of the plaintiffs' negligent entrustment theory or CUTPA's applicability to the sale or marketing of firearms.

For these reasons, the court concludes that any immunity that PLCAA may provide does not implicate this court's subject matter jurisdiction. The court further concludes that the plaintiffs' failure, if any, to bring this action within an exception to PLCAA goes to the legal sufficiency of the complaint rather than the court's jurisdiction. Accordingly, the defendants' motions to dismiss, in which they claim that the court lacks subject matter jurisdiction, cannot be granted on the basis of PLCAA.

B
CUTPA

The defendants next argue that the court does not have subject matter jurisdiction to hear and adjudicate claims brought pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., because the plaintiffs lack standing to assert them. More

specifically, they contend that the plaintiffs are not competitors, consumers, or other business persons with a consumer or commercial relationship to the defendants, and that the plaintiffs have not suffered the type of financial injury that CUTPA was enacted to redress.[12] In response, the plaintiffs argue that this issue is not jurisdictional and that the defendants are making legal sufficiency arguments.

"The issue of standing implicates this court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words statutorily aggrieved, or is classically aggrieved. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation. . . . A statute need not specifically provide that certain persons come within its protection in order to establish aggrievement as long as that protection may be implied fairly." (Citations omitted; internal quotation marks omitted.)

[12] General Statutes § 42-110g provides in relevant part: "(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages. . . ."

Eder Bros., Inc. v. *Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 368-70, 880 A.2d 138 (2005).

With respect to standing under CUTPA, our Supreme Court has explained that "[w]here . . . the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347-48, 780 A.2d 98 (2001). "CUTPA, like other statutory and common-law claims, is subject to the remoteness doctrine as a limitation on standing." Id., 373.[13]

The defendants do not argue, however, that the plaintiffs lack standing under CUTPA because their injuries are too indirect, remote, or derivative. Rather, they argue that the plaintiffs lack standing because our case law dictates that the plaintiff's interest must be that of a consumer, competitor, or other business person. "Although frequently discussed in terms of 'standing,' the issue of whether the plaintiff has a legally protected interest that the defendant's action has invaded, if the contention is at least arguable, goes to the merits rather than to whether the persons whose standing is challenged is a proper party to request an adjudication of the issue." (Footnote omitted.) R. Langer, J. Morgan, & D. Belt, 12 Connecticut Practices Series: Unfair Trade Practices (2015-2016 Ed.) § 3.6, p. 177. "[I]n *Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 [(1970)], the [United States] Supreme Court . . . distinguished the concepts of 'standing' and 'legal interest,' noting

[13] Indeed, if a plaintiff has suffered only a remote injury, then that plaintiff would not have standing, and the court, in turn, would lack jurisdiction to resolve the claim regardless of whether the claim is for a CUTPA violation or some other theory of relief. Such was the result in *Ganim* v. *Smith & Wesson Corp.*, supra, 258 Conn. 313, a case brought by the city of Bridgeport and its mayor against various handgun manufacturers, trade associations, and retail gun sellers, alleging violations of CUTPA, among other claims. In *Ganim*, the plaintiffs were held to lack standing because the harms the city and mayor claimed resulted directly to them, including additional expenses for police and emergency services and victimization of city's citizens, were too indirect, remote, and derivative with respect to the conduct of the defendants. See id., 365.

that '[t]he "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Ducharme* v. *Putnam*, 161 Conn. 135, 139, 285 A.2d 318 (1971). The question of who—consumer, competitor, business relation, and/or an additional class of persons—has a protectable interest pursuant to CUTPA reflects a challenge to the plaintiffs' legal interests, not standing, and thus does not affect the court's subject matter jurisdiction over the plaintiffs' wrongful death claims. Accordingly, the defendants' motions to dismiss cannot be granted on this ground.[14]

With regard to the defendants' additional argument that the plaintiffs do not have standing to bring CUTPA claims because they do not allege financial injury damages, but, rather, personal injury damages, such an issue does not implicate subject matter jurisdiction. Indeed, none of the cases the parties cite in support of or in opposition to this argument have discussed the issue in jurisdictional terms and/or on a motion to dismiss. See, e.g., *Builes* v. *Kashinevsky*, Superior Court, judicial district of Fairfield, Docket No. CV-09-5022520-S (September 15, 2009, *Bellis, J.*) (issue addressed in context of motion to strike); *Rodriguez* v. *Westland Properties, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-02-077228 (March 17, 2004, *Upson, J.*) (same); *Mola* v. *Home Depot USA*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV-98-0167635-S (October 29, 2001, *Mintz, J.*)

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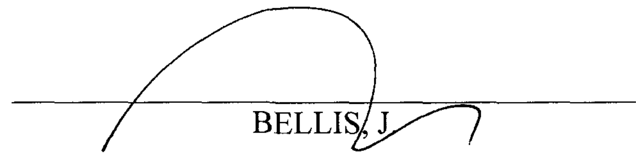
[14] This determination is further supported by other cases in which courts addressing the issue have not done so in jurisdictional terms. For example, in *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 656 A.2d 1009 (1995), the Supreme Court discussed whether CUTPA violations can arise only from consumer relationships in the context of a motion to set aside the jury verdict. Likewise, in *Pinette* v. *McLaughlin*, 96 Conn. App. 769, 901 A.2d 1269 (2006), the Appellate Court discussed whether a plaintiff must have at least *some* business relationship with the defendant in order to state a claim under CUTPA in the context of a motion for summary judgment. See also *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 881 A.2d 937 (2005) (issue addressed in context of motion to strike).

(same); *Abbhi* v. *AMI*, Superior Court, judicial district of New Haven, Docket No. CV-96-0382195-S (June 3, 1997, *Silbert, J.*) (19 Conn. L. Rptr. 493) (same). Because the question of whether the types of damages alleged are permitted under CUTPA goes to the legal sufficiency of the allegations in the complaint, it is not a ground on which the case can be dismissed.

III
CONCLUSION

For the foregoing reasons, the defendants' motions to dismiss are denied.



BELLIS, J.