SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; Shawanda Rogers, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M., a minor; and LATISHA ROGERS,

Plaintiffs,

-against-

META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,

Defendants.

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Index No.: 805896/2023

Hon. Paula L. Feroleto

Oral Argument Requested

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MEAN L.L.C.'S MOTION TO DISMISS THE VERIFIED COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT and C.P.L.R. §§ 3211(a)(3), 3211(a)(7) & 3211(a)(8)

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Defendant MEAN L.L.C. ("Mean") respectfully submits this memorandum of law in reply to Plaintiffs' Opposition (NYSCEF Doc. 226) ("Opp.") to its motion to dismiss pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C §§ 7901-03 ("PLCAA"), and C.P.L.R. §§ 3211(a)(3), 3211(a)(7), and 3211(a)(8).

Plaintiffs' claims against Mean are novel and extreme. They seek to blame a component part manufacturer of a replacement part for a rifle designed for lawful firearm owners to convert semi-automatic rifles that accept detachable magazines into fixed magazine rifles, for the murderous and heinous acts of a racist criminal. The avenue by which they seek to hold Mean liable is through claims of allegedly deceptive marketing materials; however, as a matter of law, Plaintiffs' claims against Mean are not grounded in the law, and therefore, must be dismissed.

I. The PLCAA Requires Dismissal

Plaintiffs argue that the PLCAA does not apply to their claims. They are mistaken.

A. PLCAA Applies Regardless of Whether the MA Lock is a Component Part

This matter is unequivocally a qualified civil liability action. Nothing in the PLCAA requires the manufacturer or seller seeking immunity be the manufacturer or seller of the specific qualified product criminally or unlawfully misused to injure the plaintiff. The party seeking dismissal must simply establish it is a "manufacturer or seller of a qualified product" in a lawsuit seeking "damages…or other relief" which results "from the criminal or unlawful misuse of a qualified product." 15 U.S.C. § 7903(5)(A). The PLCAA does not say that a manufacturer or seller only receives immunity when *its* qualified product is used criminally or unlawfully. Congress's express "purpose" in enacting the PLCAA was "[t]o prohibit causes of action against [federal firearms licensees]…for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and

intended." *Id*. § 7901(b)(1). In fact, the PLCAA includes a "trade association" as a covered entity and, of course, a trade association would never be the manufacturer or seller of a qualified product. *Id*. § 7903(5)(A). In other words, any qualifying industry member is entitled to the protections of the PLCAA when subjected to a qualified civil liability action.

Here, Mean is undoubtably a qualifying industry member as a federal firearms licensee.[1] *See* Malfa Aff. ¶9, Ex.4 (NYSCEF Docs. 154, 158). Mean's status as a federally licensed "manufacturer" cannot be disputed, is certainly "beyond substantial question," and must be accepted as true for purposes of adjudicating Mean's motion. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Thus, Mean is a qualified manufacturer that is being sued for damages arising out of the criminal misuse of a qualified product, and this is a qualified civil liability action.

Sambrano v. Savage Arms, Inc., 338 P.3d 103 (N.M. Ct. App. 2014), is instructive. In *Sambrano*, plaintiffs sued a firearms manufacturer and a "cable lock" manufacturer arising out of the criminal use of a rifle. The plaintiffs alleged that the defendants "negligently selected the [cable] lock that was not fit for its intended purpose…" which was included with the rifle by Savage. *Id.* at 104. The plaintiffs argued that Savage was not entitled to PLCAA immunity because their claims were based on "Savage's actions related to the [cable] lock rather than on [the shooter's] criminal action." *Id.* at 105. However, the court rejected this veiled argument, holding that the "allegations concerning the pairing of the Savage rifle with a [cable] lock do not alter the congressional intent [in passing the PLCAA]….[and] [e]ven assuming that the lock was defective

1 Plaintiffs take issue with Mean confirming that it is a "federally licensed firearms manufacturer," because it "seeks to inject facts about its licensing status not alleged in the Complaint." Opp. at 8, n.4. However, evidentiary material outside of the pleading's four corners can be considered on a C.P.L.R. § 3211(a)(7) motion and support dismissal by negating plaintiff's causes of action "beyond substantial question…so that it might be ruled that [petitioner] does not have [a] cause[] of action." *Jonmark Corp. v. New York State Liquor Auth.*, 161 A.D.3d 1518, 1518 (4th Dept. 2018) (citations omitted).

or unfit for its intended use, Plaintiffs' claimed damages nevertheless resulted from a third party's criminal or unlawful misuse of the rifle." *Id.* The court then held:

> **Plaintiffs specifically argue that their action is not a qualified civil liability action because the lock, as an accessory to the rifle, is not a qualified product** under 15 U.S.C. § 7903(4). Savage does not dispute that the lock was an accessory rather than a component of the rifle such that the lock does not fall within the definition of a "qualified product." **Plaintiffs' argument, however, misses the mark.** Although Plaintiffs have framed their complaint to focus upon the lock as opposed to the rifle, Montoya nonetheless used a qualified product, the rifle, as the instrument to commit the crime that resulted in the harm to Plaintiffs. As a result, the congressional intent embraces Plaintiffs' action.

Id. Just like in *Sambrano*, Plaintiffs miss the mark. Plaintiffs were injured through the criminal misuse of a rifle, which is clearly a qualified product. Thus, all licensed manufacturers and sellers of firearms, ammunition and component parts thereof included within the scope of PLCAA's protections are entitled to immunity.

B. MA Lock is a Component Part of the Rifle

Even if the Court interprets the PLCAA as requiring a defendant to show that its qualified product is at issue, Mean is still entitled to dismissal. Plaintiffs claim the PLCAA does not apply because the MA Lock is an "accessory." However, the case law cited by Plaintiffs belies this contention. Plaintiffs cite *Sambrano* and claim that "a 'component part' must be an essential or integral part of every firearm, rather than a mere firearm 'accessory.'" Opp. at 8. However, Plaintiffs' logic fails because a "cable lock" is not comparable to the MA Lock. New York regulations set forth a clear picture as to the differences between these two types of products. 9 NYCRR § 471.1(a) defines a "gun locking device" as "an attachable accessory that is resistant to tampering and is effective in preventing the discharge of a rifle…"). Additionally, a gun locking device is intended to be – and New York regulations require them to be – a "removable" device. *See id.* § 471.4 (requiring such devices to include "written instructions on its proper installation

and removal.") (emphasis added); *see also id.* § 471.2(a)(1) (requiring devices to "open only by either a numeric combination, key, magnetic key or electronic key."). The MA Lock is not intended to prevent a rifle from discharging when installed and cannot be removed by either a combination or key, there can be no comparison between the MA Lock and a cable lock or other "gun locking device."

The MA Lock replaces a firearm's magazine release button, which changes its function by affixing an otherwise detachable magazine. There can be no doubt that a magazine release button is a component part, since without it, the magazine would simply fall out of the rifle. *See* Mean's Mem. of Law (NYSCEF Doc. 165), Sec. III(A)(3) (including n.9). And if the original magazine release button is a component part, then a replacement for that component is also a component part. *See Prescott v. Slide Fire Sols., LP*, 341 F.Supp.3d 1175, 1189 (D. Nev. 2018).

Plaintiffs also claim the MA Lock is an "accessory" because it is "easily removable." Opp. at 9. However, the Complaint confirms that the MA Lock is removable with a "power drill" equipped with a "screw extractor." Compl. ¶ 521-24. Plaintiffs then make an illogical leap and state, "Surely if a rifle will work with no harm done to it after the MA Lock is removed, it is not something 'which together constitute[s] the whole' like a component; rather, the MA Lock is an accessory of 'subordinate importance.'" Opp. at 9. However, if this argument had any merit, then a grip, stock, safety mechanism, and every other part that could be removed and still allow the firearm to discharge a cartridge would also not be "component parts."

Courts that have construed "component part" under the PLCAA have done so in a manner that includes magazines. The Supreme Court of Texas has held that "both firearms *and magazines* (along with other component parts) are 'qualified products' subject to the PLCAA's general prohibition against qualified civil liability actions." *In re Academy, Ltd.*, 625 S.W.3d 19, 29 (Tex.

2021). Courts have also held that magazines are "arms" for Second Amendment purposes, even against arguments that high-capacity magazines "are not necessary to the functioning of a firearm." *Barnett v. Raoul*, No. 3:23-CV-00141-SPM, 2023 WL 3160285, at *8 (S.D. Ill. Apr. 28, 2023) (agreeing it "is not even a close call" that magazines are included within "arms" rather than "non-essential accessories"); *see also Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) ("*ANJRPC*"); *Duncan v. Bonta*, No. 17-CV-1017-BEN(JLB), 2023 WL 6180472, at *3 & n.24 (S.D. Cal. Sept. 22, 2023).

Simply put, "[b]ecause magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended," magazines are component parts of such firearms just as they are "'arms' within the meaning of the Second Amendment." *ANJRPC*, 910 F.3d at 116. If the magazine is a component part, the part that is designed and intended to lock it into place in the rifle must also be a component part, and not just an "accessory." In fact, the MA Lock has no function *apart from* serving as a component part for such firearms. *Cf. U.S. v. Gonzalez*, 792 F.3d 534, 357 (5th Cir. 2015) ("[A]n AK-47 magazine is 'useful' only when used in conjunction with [an AK-47]…As such, an AK-47 magazine plainly meets the State Department's definition of component."). And, in this case, the sole function of the MA Lock was to permanently reconfigure the rifle into a fixed magazine rifle. A part that is intended to change the rifle's functionality must be considered an integral component part.

Under the plain meaning of "component part" and the consistent interpretation of that phrase in the PLCAA, Mean's MA Lock is a "qualified product" under the PLCAA.

C. The Predicate Exception Cannot Save Plaintiffs' Case

Once the Court determines this is a qualified civil liability action, the only remaining question is whether any exception applies to allow Plaintiffs' claim to move beyond the pleading

stage. Plaintiffs wholly rely upon the predicate exception and New York's consumer protection statutes to attempt to shoehorn this case into the PLCAA's predicate exception. However, such statutes do not meet the requirements of the predicate exception.[2]

Plaintiffs point to a Connecticut case as the sole support of their argument. However, the Second and Ninth Circuits have already addressed this claim, and because this issue requires interpretation of a federal statute that federal courts have addressed and are in agreement, this Court must follow this federal precedent. *See Flanagan v. Prudential-Bache Securities, Inc.*, 67 N.Y.2d 500, 506 (1986) ("we are bound to apply the [federal] statute as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement.") In *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 394, 403 (2d Cir. 2008), the City argued that the PLCAA did not warrant dismissal because it alleged violations of New York's criminal nuisance statute. The City claimed that because this statute was "applicable to the sale of [firearms]," it fit within the PLCAA's predicate exception. The Second Circuit disagreed, finding that the criminal nuisance statute did not satisfy the predicate exception. There is no appreciable difference between New York's codified nuisance statute, and its codified consumer protection statutes, as both are generally applicable to all products and all industries. The Second Circuit's holding was premised on the following reasoning:

First, because the predicate exception contains a general phrase followed by specific examples (statutes regulating recordkeeping and prohibiting illegal purchases), the general phrase "is to be construed to embrace only objects similar to those enumerated" later. *Beretta*, 524 F.3d

[2] There is no need for this Court to reach the question of whether the PLCAA's predicate exception includes generally applicable consumer-protection laws, because Plaintiffs' Complaint utterly fails to state a viable claim under any consumer-protection law. See Section III, *infra*. Indeed, no state consumer-protection law has ever been understood in that way, and any such vague speech prohibition would flagrantly violate the First Amendment. *Smith & Wesson Brands, Inc. v. Att'y Gen. of N.J.*, No. 21-2492, 2022 WL 711244 (3d Cir. Mar. 10, 2022) (Matey, J., concurring) (applying state consumer-protection laws to prohibit truthful and non-misleading firearm advertising would raise serious concerns under the First *and* Second Amendments).

at 402. Thus, "construing the term 'applicable to' to mean statutes that clearly can be said to regulate the firearms industry more accurately reflects the intent of Congress." *Id.* New York's nuisance (and consumer protection) statute is "a statute of general applicability" (*id.* at 400), does not "regulate" the firearm industry, and is thus not the kind Congress intended to include within the predicate exception.

Second, because "Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation, or sale' of firearms" (*Beretta*, 524 F.3d at 402), and because Congress had specifically referred in its findings of fact to three federal statutes that "regulate" the industry, it must have intended to protect entities who complied with firearms-specific laws, not every law that might be applicable to this industry. Reading the predicate exception to include New York's generic nuisance statute, the court held, would lead "to a far too-broad reading of the predicate exception. Such a result would allow the predicate exception to swallow the statute…" *Id.* at 403. The same would hold true for New York's consumer protection statute.

Third, the court observed that Congress noted with disapproval that various "[l]awsuits ha[d] been commenced" seeking to hold firearms companies liable for "harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). The lawsuits that had been commenced at the time were based on generally applicable statutes prohibiting "negligent marketing," "public nuisance," **and "deceptive trade practices."** *See* Timothy D. Lytton, *Tort Claims against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo. L. Rev. at 6-50 2000).

Based on these holdings, the Second Circuit ordered the case dismissed. *Beretta*, 524 F.3d at 404; *see also Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (California's statutory tort laws

did not suffice as predicate statutes to avoid dismissal based on the PLCAA). Here, Plaintiffs misinterpret *Beretta*'s holding, gloss over *Ileto*, and ask this Court to follow a textually unsupported position adopted by a bare majority of the sharply divided Connecticut Supreme Court in *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 308 n.53 (Conn. 2019). According to the *Soto* majority, even if *most* generally applicable laws do not qualify for the predicate exception, unfair-trade-practice statutes somehow do because they generally regulate the "sales and marketing" of products. As noted above, that reading clearly fails because the predicate exception does not encompass statutes that apply to the "sale or marketing" of products *in general*. The predicate exception includes only those statutes that are applicable specifically to the sale or marketing of *firearms or ammunition*, as the three dissenting justices in *Soto* persuasively explained.[3]

Soto also has a glaring error in its reasoning. According to the majority, the predicate exception cannot be limited to laws that specifically regulate the sale or marketing of firearms, because when Congress enacted the PLCAA there were "no laws" that "expressly and directly" regulated the "marketing" of firearms. 202 A.3d at 304. Based on this premise, the *Soto* majority reasoned that "the only logical reading of [the predicate exception] is that Congress had some other type of law in mind," which must include general unfair-trade-practice laws. *Id*. But in fact, as the *Soto* majority itself admitted in a footnote, there were *multiple* statutes at the state level that specifically regulated firearms marketing.[4] Thus, the existence of many state laws that specifically

3 *See Soto*, 202 A.2d at 326-50 (Robinson, J., dissenting in part) (the "predicate exception encompasses only those statutes that govern the sales and marketing of firearms and ammunition specifically, as opposed to generalized unfair trade practices statutes.").

4 *Soto*, 202 A.2d at 304 n.43 (citing Cal. Bus. & Prof. Code § 5272.1(c)(2) (prohibiting firearms advertising in certain locations), N.J. Admin. Code § 13:54-5.6 (2007) (regulating newspaper advertising of certain firearms); R.I. Gen. Laws § 11-47-40(b) (2002) (regulating advertising of concealable firearms)). Another example comes from Massachusetts, which in 2005 prohibited firearm dealers from displaying firearms in store windows or "offer[ing] for sale" certain firearms classified as "assault weapon[s]." Mass. Gen. Laws. ch. 140, § 123 (1998).

regulated firearms marketing strongly confirms what the statutory text and structure indicate: the predicate exception is limited to laws that specifically regulate the sale and marketing of firearms in particular, not all products in general. Indeed, since unfair-trade-practice laws are primarily concerned with preventing marketplace harm to consumers and business competitors, it is highly unlikely that Congress would have considered such laws to fit within the PLCAA's predicate exception, which contemplates claims by *victims of third-party violence*—not claims by firearms *consumers or industry competitors.*

D. Plaintiffs' Reliance on G.B.L. §§ 898-a-e is Improper and Insufficient

Plaintiffs assert that "while G.B.L. §§ 349 and 350 constitute statutes sufficient to allow Plaintiffs' claims to proceed…Plaintiffs also invoke another statute in the alternative that clearly falls under the predicate exception: G.B.L. §§ 898-a through 898-e ('Accountability Statute')." Opp. at 15. However, the Complaint only asserts a claim under this statute against co-defendant Vintage Firearms, Compl. ¶¶ 665-674. The fact that Plaintiffs chose not to raise such a cause of action against Mean, particularly when they raised it against a co-defendant, should preclude Plaintiffs from trying to assert a violation of this statute by Mean to satisfy the predicate exception.[5] In any event, to rely upon Section 898-a-e to keep their claims alive against Mean, Plaintiffs still need to sufficiently allege facts in the Complaint to support the contention that Mean somehow knowingly violated that statute. They do not.

1. Sections 898-a-e Are Still Not a Firearm Specific Regulating Statute

Sections 898-a-e were enacted with the express purpose of attempting to negate the federal statutory immunity provided by the PLCAA. As noted *supra*, the Second Circuit has previously

5 Although *Williams v. Beemiller*, 100 A.D.3d 143, 149-50 (4th Dept. 2012), holds that a plaintiff need not specifically identify a predicate statute, it does require the complaint to "sufficiently allege[] facts supporting a finding that defendants knowingly violated" the statute upon which Plaintiffs rely.

held that New York's general criminal nuisance statute cannot serve as a predicate statute for purposes of the PLCAA. *See Beretta*, 524 F.3d 384. Penal Law § 240.45(1) states that a person creates a nuisance when by "conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons." G.B.L. § 898-b(1) states that:

> No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.

The language of G.B.L. § 898-b(1) is almost identical to Penal Law § 240.45(1), and simply states that the public nuisance statute applies to the "sale, manufacturing, importing or marketing of a qualified product" by a "gun industry member." This is not sufficient to satisfy the predicate exception pursuant to *Beretta* because it does not expressly regulate firearms, and does not clearly implicate the purchase and sale of firearms. Instead, it is just a restatement of a law that the Second Circuit already held does not satisfy the predicate exception.

2. Plaintiffs Concede the MA Lock is a Qualified Product

G.B.L. § 898-a(6) states that a "qualified product" "shall have the same meaning as defined in [the PLCAA]." By "invoking" G.B.L. §§ 898-a-e to argue that their claims satisfy the predicate exception, Plaintiffs have made a judicial admission that the MA Lock is a "qualified product" for purposes of both the G.B.L. and the PLCAA. Plaintiffs cannot claim the MA Lock is not a qualified product under the PLCAA, and also contend that their claims meet the predicate exception pursuant to G.B.L. §§ 898-a-e – a statute which only applies to qualified products. Stated differently, the Court should conduct a PLCAA analysis and disregard Plaintiffs' argument that the MA Lock is not a qualified product, or it must refuse to consider G.B.L. §§ 898-a-e when determining whether Plaintiffs allege a knowing violation of a predicate statute.

3. Plaintiffs Fail to State a Cause of Action under G.B.L. §§ 898-a-e

Even if the Court addresses Plaintiffs' attempt to invoke Sections 898-a-e, it will find that Plaintiffs have failed to adequately plead it as satisfying the predicate exception. The predicate exception requires a "a manufacturer or seller of a qualified product" to have "knowingly violated a State or Federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). At no point in the Complaint do Plaintiffs allege that Mean "knowingly" violated this statute. At best, Plaintiffs allege that Mean engaged in "deceptive conduct" related to its advertisement of the MA Lock, but deceptive conduct does not equate to intentionality. Compl. ¶¶ 675-93. An analysis of "deceptive" conduct will look to whether the recipient might have been misled or confused, whereas "knowing" looks to the mens rea of the author or speaker. There are no other factual allegations that would bring these claims within the ambit of Sections 898-a-e. Therefore, the Complaint fails to allege sufficient facts upon which the Court can conclude that Mean knowingly violated Sections 898-a-e.

Further, even if the Court were to find that a knowing violation was sufficiently pled, there is still no allegation that advertising and selling the MA Lock "endangers the safety or health of the public" beyond any such level of safety or health associated with the possession of the rifle at issue with, or without, the MA Lock. There is no allegation in the Complaint that the MA Lock makes a rifle more lethal or more dangerous in and of itself. Plaintiffs allege that if the MA Lock is removed illegally in New York, then a criminal in possession could also criminally possess a "large capacity magazine" and use both to intentionally commit crimes. Compl. ¶¶ 683-84, 692-93. When a criminal actor makes the conscious decision to break the law on numerous levels, that cannot be the basis to find that Mean's advertising and marketing "endangers the safety or health

of the public through the sale, manufacturing, importing or marketing of" the MA Lock. Therefore, Mean's purported misleading advertisements cannot form the bases of a Section 898-a-e violation.

4. This Court Should Stay the Litigation if Section 898-a-e is Found to be a Predicate Act

Finally, if the Court is inclined to consider G.B.L. §§ 898-a-e during the PLCAA analysis, Mean respectfully requests that the Court stay this matter pending a decision by the Second Circuit in an action challenging the constitutionality of the statute. This action, *Nat'l Shooting Sports Found., Inc. v. James*, Docket No. 22-1374 ("*NSSF v. James*"), is fully briefed and several federal courts have stayed pending litigation on these exact grounds. *See*, *e.g.*, *City of Buffalo v. Smith & Wesson Brands, Inc.*, No. 6:23-cv-06061-FPG (W.D.N.Y. Jun. 8, 2023); *Steur v. Glock, Inc*., No. 22-cv-3192 (E.D.N.Y. Aug. 2, 2022).

II. Plaintiffs Have Failed to Demonstrate Proximate Cause

Plaintiffs contend that they have demonstrated proximate cause by deliberately flouting established legal principles and asserting unsupported arguments sounding in strict liability. First, Plaintiffs argue that proximate cause is a jury question by relying upon cherry-picked language from *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016) and *Derdarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980). In doing so, Plaintiffs ignore the well-established principle that the Court of Appeals confirmed in *Hain*:

> "[T]here are instances in which proximate cause can be determined as a matter of law because 'only one conclusion may be drawn from the established facts'"

Hain, 28 N.Y.3d at 529 (*quoting Derdiarian*, 51 N.Y.2d at 315); *see also Miecznikowski v. Robida*, 278 A.D.2d 793 (4th Dept. 2000), *lv. denied* 96 N.Y.2d 709 ("Where the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission

of the defendant was a proximate cause thereof is one for the court and not for the jury.") (citations omitted).

While Plaintiffs gratuitously contend that "Mean does not assent to plaintiffs' alleged facts," Opp. at 17, it is only Plaintiffs' tenuous positions drawn from their narrow recitation of facts which are in dispute. However, as to the proximate cause question, the facts are undisputable and they demonstrate the lack of proximate cause with respect to Mean's alleged conduct:

(a) the shooter purchased a semi-automatic rifle with a MA Lock already installed from a licensed dealer;

(b) after purchasing the rifle, the shooter intentionally removed the MA Lock with a power drill and screw extractor and intentionally modified the firearm into an illegal "assault weapon";

(c) the shooter continued planning his attack months after he acquired the rifle;

(d) the shooter planned for his attack by acquiring ammunition, body armor, a ballistic helmet, illegal 30-round magazines and other items; and

(e) over three months after he acquired the rifle, the shooter committed the massacre.

Compl. ¶¶ 200-04, 208, 212-14, 471, 481-96, 522-25.

Plaintiffs argue that Mean's "providing an intentionally removeable lock to the New York market created 'a prime hazard' [that]…permitted the shooting to occur," Opp. at 16-17. This is a completely conclusory allegation, and there is no properly pled allegation of fact as to how the existence or non-existence of the MA Lock "permitted the shooting to occur." Thus, Plaintiffs seemingly gloss over the *Hain* court's affirmation of established law that "proximate cause will be found lacking where the original negligent act merely 'furnished the occasion for'—but did not cause—'an unrelated act to cause injuries not ordinarily anticipated.'" *Hain*, 28 N.Y.3d at 5309 (*quoting Derdiarian*, 51 N.Y.2d at 316). Instead, Plaintiffs ask this Court to ignore the Complaint's factual allegations regarding the homicidal third-party racist who planned the attack over several months and murdered Plaintiffs' decedents.

It is well established that "an intervening intentional or criminal act will generally sever the liability of the original tort-feasor." *Tennant v. Lascelle*, 161 A.D.3d 1565, 1566-67 (4th Dept. 2018) (*quoting Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016), *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983)). In determining whether a criminal act severs liability, "[t]he test to be applied is whether under all the circumstances the chain of events that followed [an allegedly] negligent act or omission was a normal or foreseeable consequence of the situation created by the [alleged] negligence." *Tennant*, 161 A.D.3d at 1566 (*quoting Mirand v. City of New York*, 84 N.Y.2d 44, 50 (1994)); *see also Miecznikowski v. Robida*, 278 A.D.2d 793 (4th Dept. 2000), *lv. denied* 96 N.Y.2d 709 (holding that a child's supervening act of running out onto street and remaining there in an alleged attempt to avoid being hit by another child was extraordinary and unforeseeable).

In *Tennant*, the Fourth Department determined as a matter of law that a third party's "intentional murder of a child severed the chain of causation and eliminated any liability on the defendant's part." The defendant was the victim's great-grandmother who allowed the to-be murderer to supervise the child in her home. The court rejected the plaintiffs' argument that issues of foreseeability presented questions of fact and instead concluded that the third-party murderer's actions were "extraordinary, inexplicable, and spontaneous homicidal violence." *Id.* at 1566. Here, the heinous acts committed by the racist shooter are without question extraordinary, inexplicable, and spontaneous homicidal violence. Yet Plaintiffs ask this Court to put those facts aside and instead focus only on the shooter's removal of a component part of the firearm used by the murderer, the MA Lock, for purposes of proximate cause. Plaintiffs argue that the removal of the MA Lock was "nothing 'extraordinary' or 'unforeseeable' to Mean," but then summarily contend that Mean's removal instructions somehow put the shooter's attack "in motion." Opp. at 17.

Removal might be foreseeable, but the murders were certainly not "a normal or foreseeable consequence of the situation created by the [alleged] negligence." *Tennant*, 161 A.D.3d at 1566. To accept Plaintiffs' argument would ignore the Complaint's allegations concerning the shooter's long-term planning of his attack and endorse a finding of liability simply because a subsequent criminal act is merely "conceivable."

Courts have long held that while it is "conceivable" a person might become a victim of a crime, "conceivability is not the equivalent of foreseeability" for purposes of proximate cause. *Dyer v. Norstar Bank, N.A.*, 186 A.D.2d 1083 (4th Dept. 1992) (holding an ATM owner liable to a victim of an armed robbery while using the ATM "would be to stretch the concept of foreseeability beyond acceptable limits."); *Golombek v. Marine Midland Bank, N.A.*, 193 A.D.2d 1113 (4th Dept. 1993) (same); *see also Rahman v. Parkin*, 25 Misc.3d 130(A) (2d Dept. Oct. 13, 2009) (defendant cannot be liable for a third-party's assault absent allegations that he committed an "over act in furtherance of the assault, that [he] acted in concert with [plaintiff's assailant] in planning the assault, or that [defendant] asked [the assailant] to commit the assault."). Plaintiffs do not contend that Mean knew that the shooter planned his attack, or even that Mean knew who the shooter was. In fact, the Complaint confirms the shooter purchased the rifle with the MA Lock already installed, and there is no allegation that he purchased it – or anything – from Mean directly or had any interactions with Mean whatsoever. "More than mere conjecture is required to directly link [Mean] to the assault and suggest complicity." *Radlin v. Brenner*, 286 A.D.2d 881 (4th Dept. 2001) (even assuming that a defendant made false and misleading statements to a to-be assailant, "we conclude that [defendant's] conduct was not a proximate cause of plaintiff's injuries."). "Conjecture" is all that Plaintiffs proffer to support of their nebulous proximate cause assertions.

III. Plaintiffs Have Not Stated Claims for Relief Under G.B.L. §§ 349 or 350

Plaintiffs' G.B.L. §§ 349 and 350 analysis attempts to frame Mean's alleged conduct as affecting the general "public interest" without regard to the fact that Plaintiffs were never consumers of the MA Lock. This fact alone negates causation as their claims are premised entirely upon a third-party's acquisition of a firearm with a MA Lock installed.[6] Indeed, the Court of Appeals has expressly "reject[ed a plaintiff's] assertion that it may state a cognizable section 349(h)...claim simply by alleging consumer injury or harm to the public interest." *Taylor v. Microgenics Corp.*, No. 21 CV 6452 (VB), 2023 WL 1865274 (S.D.N.Y. Feb. 9, 2023) (*quoting City of New York v. Smoke-Spirits.Com, Inc.*, 12 N.Y.3d 616, 623 (2009)).

Additionally, while a consumer-protection claim does not require reliance, courts do require that a plaintiff plead more than the attenuated theory Plaintiffs' advance. *See*, *e.g.*, *Oden v. Boston Sci. Corp.*, 330 F.Supp.3d 877, 902 (E.D.N.Y. 2018) ("[T]o properly allege causation, a plaintiff must state in his complaint that he has seen the misleading statements of which he complains before he came into possession of the products he purchased.") (citation omitted). Plaintiffs do not contend that they were exposed to any allegedly deceptive marketing statements from Mean and they certainly were not deceived by any such statements. Moreover, Plaintiffs do not allege that they purchased any Mean products, and the only case cited in Section V of Plaintiffs' Opposition brief that asserted claims on behalf of individual consumers involved persons who themselves purchased a product. *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940 (2012) (action arising out of the purchase of allegedly counterfeit bottles of wine). Two of the other cases cited by Plaintiffs, *Casper Sleep, Inc. v. Mitcham*, 204 F.Supp.3d 632 (2016), and *Guggenheimer*

6 Plaintiffs contend that Mean "does not meaningfully contest that its statements were materially misleading or consumer-oriented," Opp. at 19, however this statement is false, self-serving and misleading in the context of this C.P.L.R. § 3211 motion to dismiss.

v. Ginzburg, 43 N.Y.2d 268 (1977), are inapposite as they involved claims brought by a commercial actor (*Casper Sleep*) and NYC Consumer Affairs (*Guggenheimer*). Finally, in the fourth case cited by Plaintiffs, *Bildstein v. MasterCard Intern. Inc.*, 329 F.Supp.2d 410 (S.D.N.Y. 2004), the court granted a motion to dismiss upon finding that plaintiff's conclusory allegations failed to assert facts establishing actual injury as required by G.B.L. § 349. As such, on the facts alleged, and on the precedent cited by Plaintiffs, their G.B.L. claims against Mean fail for lack of causation.

IV. Plaintiffs Lack Standing to Assert and the Derivative Injury Rule Bars Their G.B.L. Claims

The G.B.L. argument section of Plaintiffs' Opposition brief tellingly concedes that Plaintiffs were not consumers of Mean's products. Rather, in this context they identify the shooter as the "*consumer*-shooter" and co-defendant Vintage Firearms as a "*consumer*-dealer." Opp. at 18 (emphasis added). Under Plaintiffs' reasoning, they would not have a claim against Mean if the subject rifle was neither sold by the consumer-dealer, nor purchased by the consumer-shooter. Courts have rejected this reasoning time and time again as such claims are, as a matter of law, derivative. *See*, *e.g.*, *Taylor*, 2023 WL 1865274 (finding the alleged injury derivative because had a deceived third-party consumer not been improperly induced to act, then plaintiff "would have no claim" based on the third-party's subsequent actions). Additionally, Courts reject G.B.L. claims where they are premised – as they are here – upon allegations of a misleading act that "led to further steps which eventually harmed them." *Frintzilas v. DirecTV, LLC*, 731 F.App'x 71, 72 (2d Cir. 2018) (rejecting plaintiffs' argument that "so long as their harm[] is a proximate result of defendants' misleading conduct, they have standing to bring a GBL § 349 claim.") (*citing Smokes-Spirits.Com*, 12 N.Y.3d at 623).

Plaintiffs' reliance on *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256 (1995), Opp at 20, is misplaced as the Court of Appeals, in *Smokes–Spirits.Com*, 12 N.Y.3d 616, stated that

"the *Securitron* court did not expand the class of section 349(h) plaintiffs to those persons who...can link a derivative injury to some public harm." *Id.* at 840; *see Spin Master Ltd. v. Bureau Veritas Consumer Products Services, Inc.*, No. 08-CV-923, 2011 WL 1549456, at *5 (W.D.N.Y. Mar. 7, 2011) (granting judgment on the pleadings upon rejecting plaintiff's position that it should be allowed to claim indirect damages for harm to consumers who purchased a recalled product). Furthermore, while G.B.L. § 349 includes broad language on its face (i.e., "any person" and "any violation"), courts consistently hold that "allegations of indirect or derivative injuries will not suffice" and standing will not be conferred upon derivatively injured parties. *Smokes–Spirits.Com*, 12 N.Y.3d at 623.[7]

Deer Consumer Prod., Inc. v. Little Group, 961 N.Y.S.2d 357, 37 Misc.3d 1224(A), at *13 (Sup. Ct. NY Cty. Nov. 15, 2012), is illustrative. There, the court dismissed a G.B.L. § 349 claim because the plaintiff asserted indirect or derivative losses that were the result of third parties being misled or deceived by information published on a website. The complaint alleged that the defendant "published misleading and deceptive statements [that] were directed at and affected the readerships of [a] website." The court determined that the plaintiff could not recover because the alleged deceptive acts "were aimed at the 'readerships' of the website, who then took certain action based thereon," however the plaintiff – like the Plaintiffs here – was "not part of this 'readership.'" Plaintiffs do not – and cannot – allege a single fact showing that they were deceived by Mean's alleged statements, or even that they reviewed, considered, or took any action whatsoever based upon such statements. Instead, Plaintiffs insist that Mean should never have sold the MA Lock

7 *See also id.* ("We reject the [plaintiff's] assertion that it may state a cognizable section 349(h) claim 'simply' by alleging 'consumer injury or harm to the public interest.' If a plaintiff could avoid the derivative injury bar by merely alleging that its suit would somehow benefit the public, then the very 'tidal wave of litigation' that we have guarded against since *Oswego* [*Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20] would loom ominously on the horizon) (additional citations omitted).

because a third-party could at some point in the future knowingly and intentionally commit felony offenses.

Finally, while Plaintiffs contend that there are "too many disputed facts" for the Court to dismiss their G.B.L. claims, Opp. at 19, their lack of standing to assert such claims is abundantly clear from the Complaint. And lack of standing is itself sufficient for the court to dismiss these claims as a matter of law. *Frintzilas*, 731 F.App'x at 72; *Smokes-Spirits.Com*, 12 N.Y.3d at 623; *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 N.Y.3d 200 (2004) (dismissing Section 349 claim because "the losses [plaintiff] experienced arose wholly as a result of" injuries suffered by others); *see also Bildstein*, 329 F.Supp.2d at 416 (rejecting conclusory allegations).

V. The Court Lacks Jurisdiction Over Mean

Plaintiffs argue that Mean is subject to specific personal jurisdiction in New York pursuant to C.P.L.R. §§ 302(a)(1) & (3). Neither provision authorizes this Court to exercise personal jurisdiction over Mean in connection with Plaintiffs' claims in this case.

C.P.L.R. § 302(a)(1) states, in relevant part, that a "court may exercise personal jurisdiction over any non-domiciliary…, who in person or through an agent…transacts any business within the state or contracts anywhere to supply goods or services in the state." For personal jurisdiction pursuant to Section 302(a)(1), plaintiff's cause of action must arise from the defendant's transaction of business in New York. *Agency Rent A Car System, Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996). A claim only arises from defendant's transaction of business in New York if there is a "substantial nexus between the business transacted and the cause of action sued upon." *Id.* at 31 (citation and quotation marks omitted).

Plaintiffs argue that Mean is subject to personal jurisdiction in New York because it "cannot be disputed that the MA Lock at issue was sold, bought, and removed in this State." Opp.

at 24. They are incorrect. For specific personal jurisdiction, the specific MA Lock at issue must have been sold by Mean into New York. Plaintiffs do not claim to have any evidence that Mean sold the subject MA Lock directly to someone in New York, or that someone in New York bought it directly from Mean. That is the relevant inquiry, and an issue on which Plaintiffs bear the burden of proof. The mere fact that a MA Lock ended up in New York through the stream of commerce is not sufficient for purposes of Section 302(a)(1). Plaintiffs' claim that Mean shipped other products to New York is irrelevant to a specific jurisdiction analysis because their claims do not arise from Mean's "other" shipment of products.

C.P.L.R. § 302(a)(3) states, in relevant part, that a "court may exercise personal jurisdiction over any non-domiciliary…, who in person or through an agent…commits a tortious act without the state causing injury to person or property within the state…." For jurisdiction to be proper pursuant to Section 302(a)(3), the Plaintiffs' specific cause of action must arise out of Mean's alleged tortious act. There is no evidence, or even an allegation, that Mean shipped the MA Lock at issue to a customer in New York who purchased it as a result of seeing Mean's advertisements or representations regarding the MA Lock. Without such proof, Plaintiffs have no support that their specific causes of action (G.B.L. §§ 349 and 350) arise from Mean's alleged tortious act without the state. These statutes require someone in New York to have seen Mean's advertisements and purchased the specific MA Lock at issue for specific personal jurisdiction to apply. If the MA Lock at issue was purchased by someone outside of New York and later brought to New York, there would be no "tortious conduct" by Mean outside of New York on which to base specific personal jurisdiction. Similarly, if Mean sold the specific MA Lock at issue outside of New York, there would be no basis for it to reasonably expect such act to have consequences in New York. Plaintiffs have demonstrated nothing more than the fact that Mean manufactures and sells MA

Locks, and one of them was installed on the rifle purchased by the shooter. That is not sufficient to establish personal jurisdiction pursuant to C.P.L.R. §§ 302(a)(1) or (3).

Dated: White Plains, New York
October 31, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits set forth in the agreement between counsel memorialized via e-mail on September 1, 2023. According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 6,875 words.

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