STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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 ANDREW 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.

INDEX NO.: 805896/2023

Hon. Paula L. Feroleto

Oral Argument Requested

DEFENDANT VINTAGE FIREARMS, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, STAY THE PENDING PROCEEDINGS

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Defendant Vintage Firearms, LLC, by and through its undersigned attorneys, submits this Memorandum of Law in Support of its Motion to Dismiss Complaint or, in the Alternative, Stay the Pending Proceedings until the United States Circuit Court of Appeals for the Second Circuit resolves the constitutionality of N.Y. Gen. Bus. Law §898 in the pending matter of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374. Dismissal of all pending claims against Vintage Firearms, LLC, including all crossclaims made by codefendants, is proper pursuant to C.P.L.R. §3211(a)(1), (a)(3), and/or (a)(7).

INTRODUCTION

This case arises from the criminal and intentional misuse of a firearm by Payton Gendron ("Gendron"), who murdered ten people and wounded three others on May 14, 2022. List Aff. ¶3; Ex. 1, Compl. ¶¶1-16, 35. Gendron perpetrated his criminal actions by unlawfully misusing a Bushmaster model "XM-15E2S Target" (the "Subject Rifle") that he purchased from Vintage Firearms, LLC ("Vintage"), a Federal Firearms Licensee ("FFL"), after passing a required background check. List Aff. ¶8, Ex. 4, Ex. 5. Gendron's purchase of the Subject Rifle occurred on January 19, 2022, over sixteen weeks prior to Gendron's criminal misuse of the firearm in his murderous acts. *Id.* Although the Subject Rifle was compliant with New York law at the time it was sold by Vintage, having a fixed magazine with a ten-round capacity, Gendron later illegally modified the rifle using a power drill, and purchased thirty-round magazines at a flea market prior to committing his criminal acts. List Aff. ¶¶3, 12; Ex. 1, Compl. ¶¶1-16; Ex. 9: 61-72.

On the day of the shooting, ATF visited Vintage and took records related to the transaction. List Aff. ¶¶8, 14; Ex. 4, Ex. 5, Ex. 11. It has not been alleged that Vintage was ever found in violation of state or federal law by law enforcement or government regulators, that its FFL was revoked, or that the business or owner were ever criminally charged. List Aff. ¶15.

Plaintiffs seek to pin liability on Vintage simply because it legally sold the Subject Rifle to Gendron, who later misused the Subject Rifle independently when engaged in intentional criminal conduct that harmed Plaintiffs. Without explaining how the sale was purportedly deficient, Plaintiffs rely on bald legal conclusions such as claiming Vintage "failed to establish reasonable controls to prevent the sale, possession, and illegal use of its Bushmaster XM15-E2S rifle." Ex. 1., Compl. ¶674. Plaintiffs allege negligent entrustment without supplying facts demonstrating that Vintage had "special knowledge" that Gendron was likely to use the Subject Rifle in an improper or dangerous fashion involving unreasonable risk of physical injury to himself or others. *Stanley v. Kelly*, 173 N.Y.S.3d 750, 752 (2022); 15 U.S.C. § 7903(5)(B). At no point do Plaintiffs specify what Vintage allegedly should have done differently, or what "reasonable controls" should have been established beyond Vintage's own strict compliance with applicable law. Plaintiffs ultimately seek to hold Vintage liable for not having access to a crystal ball.

As a matter of law, Plaintiffs' Complaint fails to make factual allegations against Vintage that give rise to legal liability. Each of Plaintiffs' claims are preempted and prohibited by the Protection of Lawful Commerce in Arms Act (the "PLCAA"). 15 U.S.C. §§7901-7903. Therefore, the Court should dismiss Plaintiffs' claims against Vintage in their entirety.

SUMMARY OF ARGUMENT

Plaintiffs' claims against Vintage fail as a matter of law for the following primary reasons:

- Plaintiffs' claims are squarely prohibited by the immunity provisions of the PLCAA. 15 U.S.C. §§ 7901-7903. The instant case is a "qualified civil liability action" that "may not be brought in any Federal or State court." *Id.* at §§7902(a), 7903(5)(A).

- Although an action for negligent entrustment can be an exception to the PLCAA, Plaintiffs have alleged no factual basis to support the conclusion that Vintage had special

knowledge or should have known that Gendron was likely to use the Subject Rifle in an improper or dangerous fashion involving unreasonable risk of physical injury to himself or others. 15 U.S.C. §7903(5)(B); *See also Graham v. Jones,* 46 N.Y.S.3d 329, 330 (2017*)*; *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 236 (2001); *Stanley*, 173 N.Y.S.3d at 752.

- The "predicate exception" to the PLCAA is inapplicable because Plaintiffs have failed to allege facts demonstrating that Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of firearms, ammunition, or firearms components, and that "the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. §7903(5)(A)(iii); *See also Ileto v. Glock, Inc.,* 565 F.3d 1126, 1136 (9th Cir. 2009). In fact, Plaintiffs have failed to allege facts demonstrating a legal violation at all, even absent knowledge and proximate cause.

- G.B.L. §898 is unconstitutionally vague both facially and as it applies to Vintage because it fails to provide a person of common intelligence "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Further, the law fails to provide a minimal standard for enforcement, thereby permitting arbitrary application and violating the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

- According to Plaintiffs, §898 serves to prohibit the sale of AR-15s to members of the public who are not otherwise prohibited from firearm possession pursuant to state or federal law. Because such a prohibition is inconsistent "with the Nation's historical tradition of firearm regulation" it violates "the Second Amendment's unqualified command." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2135 (2022).

BRIEF FACTUAL SUMMARY

After many months of meticulous planning, on May 14, 2022, Gendron entered Tops Friendly Market in Buffalo, New York, and carried out unspeakable acts of violence that were racially motivated. List Aff. ¶7. He murdered ten people and wounded three others. *Id*. Gendron legally purchased the Subject Rifle he criminally misused in his attack from Vintage on January 19, 2023, after passing a background check[1]. List Aff. ¶8. The Subject Rifle, a Bushmaster model "XM-15E2S Target," was manufactured in Windham, Maine between 1994 and 2006 according to its serial number, therefore traveling in interstate commerce to reach New York. List Aff. ¶8-9; Ex. 6. Vintage is an FFL with a small firearm retail store located at 120 S. Nanticoke Avenue in Endicott, New York. List Aff. ¶10; Ex. 7. It is owned and operated by Robert Donald. *Id.* Another FFL, Timbercreek Firearms, operates a firearm retail business from the same physical location, and is owned by Charles Sherwood. List Aff. ¶11; Ex. 8.

Gendron's purchase of the Subject Rifle occurred on January 19, 2022, nearly four months prior to his murderous acts. List Aff. ¶12. Although the Subject Rifle was compliant with New York law when it was sold by Vintage, having a fixed magazine[2] with a ten-round capacity, Gendron followed YouTube instructions to illegally modify the rifle using a power drill and screw extracting tool known as a "Speedout." *Id*. Additionally, Gendron carried out his attack using thirty-round magazines he purchased at a flea market. *Id*.

On the same date Gendron intentionally misused the Subject Rifle in his criminal acts, ATF visited Vintage to review and take records concerning the transaction. List Aff. ¶14-15. Plaintiffs have not alleged Vintage was ever found in violation of state or federal law by government

[1] As indicated on the 4473 Form at Exhibit 5, the National Instant Criminal Background Check System ("NICS") approved the immediate sale of the Subject Rifle to Gendron, providing a "proceed" instruction to Vintage regarding the pending sale.
[2] New York law does not define what "fixed" means in terms of a firearm magazine.

regulators, that its FFL was revoked, or that criminal charges ever issued pertaining to the transaction (which was legal). *Id.*

Plaintiffs alleged Gendron "was motivated by racist, antisemitic, and white supremacist propaganda recommended and fed to him by the social media companies whose products he used." List Aff. ¶3; Ex. 1. Compl. ¶3-5. The majority of the 144-page Complaint explains, in intricate detail, how Gendron's social media use and the deficiencies inherent to his chosen social media products caused him to carry out his criminal acts. *See* Ex. 1 generally. Plaintiffs also allege, in detail, how Gendron's parents failed to intervene prior to the attack despite their knowledge of a litany of "red flags" including that Gendron had dismembered a cat, posted online he planned to commit "murder suicide," was investigated by police, was stockpiling tactical gear, and owned multiple firearms. *Id.* at ¶221-226.

Unlike the claims against the Social Media Defendants and Gendron's parents, the allegations against Vintage are factually thin and couched in bare legal conclusions. The scope of Plaintiffs' factual allegations against Vintage, most of which reference Gendron's Discord Diary or Manifesto, can be summarized as follows:

- Gendron was a "frequent customer" of Vintage in 2021 and 2022. *Id.* at ¶484.
- He bought two boxes of "old 12 gauge ammo" from Vintage on December 21, 2021. *Id.* at ¶485.
- On January 11, 2022, he learned from YouTube how to remove a fixed magazine from an AR-15 by using a power drill and believed Vintage had a rifle for sale with the same sort of fixed magazine. *Id.* at ¶486-489. He further reported learning he could remove the fixed magazine with a "Speedout" screw extraction kit attached to a power drill, and then could install a "regular mag button and spring." *Id.*

- Gendron decided on January 14, 2022, he would purchase the Subject Rifle from Vintage. *Id.* at ¶490-491. On January 18, 2022, he posted that the Subject Rifle "will do very nicely" before explaining it had a fixed stock, fixed magazine, and could not accept a muzzle device. *Id.*
- On January 19, 2022, he posted he bought the Subject Rifle, a sling and twenty rounds of ammunition from Vintage. *Id.* at ¶492-493. He was happy with his purchase. *Id.*[3]
- On February 23, 2022, Gendron posted he had returned to Vintage, talked to a man named Chuck (likely the owner of Timber Creek Firearms operating out of same location- See List Aff. ¶11) and told him about a target shooting experience he recently had with his friend. List Aff. ¶3; Ex. 1, Compl. ¶495. Gendron reported the man smiled at him and gave him "4 5.56 clips and 1 of the mag loaders for my magazines"[4] for free *Id.*
- On March 3, 2022, Gendron posted he purchased some ammunition from Vintage and "like[d] the guy at Vintage." *Id.* at ¶496.
- After the shooting, Robert Donald, owner of Vintage Firearms, reported to the New York Times that he had completed a background check on Gendron, and explained: "He didn't stand out, because if he did, I would have never sold him the gun." *Id.* at ¶497-502; List Aff. ¶16; Ex. 12. Mr. Donald explained he only sells NY-compliant firearms and stated:

[3] In his Manifesto, Gendron later explained in detail why he believed the Subject Rifle was "probably the worst AR-15 I could've bought for this mission." List Aff. ¶12, Ex. 9: 61-74. Despite the rifle having a fixed magazine, it lacked "tactical features" banned by NY law specific to rifles with detachable magazines. List Aff. ¶13, Ex. 10. The Subject Rifle had a 20-inch heavy barrel (rather than 16-inch standard) that was unthreaded, no muzzle device, a fixed stock, and an old-fashioned fixed, carry-handle rear sight. List Aff. ¶12.

[4] None of these items are illegal pursuant to NY law. We know from Gendron's Manifesto that he carried out his attack using thirty-round magazines, illegal in NY, that he purchased from a flea market prior to purchasing the Subject Rifle. *Id.*

"Even with all of those safety features on it—which is the only way I sell it—**any gun** can be easily modified if you really want to do it." *Id.* (emphasis added).

- Plaintiff further alleges that, "upon information and belief," Gendron discussed having modified the Subject Rifle's fixed magazine with Vintage employees after having done it, had talked about the lock with employees, and "revered Vintage Firearms employees."[5] List Aff. ¶3; Ex. 1, Compl. ¶499-501.

None of Plaintiffs' allegations demonstrate Vintage knew or should have known Gendron was secretly planning to illegally misuse the Subject Rifle in a criminal manner or was likely to cause physical harm to others. In fact, Plaintiffs' allegation that Gendron appeared at Vintage multiple times over several months and made prior purchases would indicate an even lesser likelihood he was dangerous because Gendron was comfortable visiting the shop and had not engaged in any known crimes between visits. *Id*. at ¶484-502. Gendron passed the NICS background check and Plaintiffs allegations fail to establish he acted in a manner that would notify Vintage of his criminal intent. List Aff. ¶8. He illegally modified the Subject Rifle using instructions from YouTube, and ultimately carried out the attack using illegal magazines purchased from a flea market. List Aff. ¶12. Vintage legally sold the Subject Rifle and, like other gun dealers Gendron visited, was shocked to learn of his heinous crime. List Aff. ¶17; Ex. 13. (As per New Yorker article published May 22, 2022: Owner of Pennsylvania Guns and Ammo described "nothing abnormal" about Gendron when he purchased a shotgun. Gun Dealer Mohammed Farzad, an Iranian immigrant who owns "All Star Pawn Shop," saw the news and "had trouble believing it was the same man who had come to his store so frequently.")

[5] Falsely assuming for the purposes of this Motion that Vintage had employees, alleged conversations between Gendron and employees after the date of the firearm sale (the alleged "entrustment") have no, or incredibly minimal, relevancy to Plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST VINTAGE FIREARMS MUST BE DISMISSED PURSUANT TO THE PLCAA, 15 U.S.C. §§7901-7903

Federal law mandates dismissal of the instant lawsuit pursuant to the PLCAA. 15 U.S.C. §§7902(a), 7903(5)(A). There are no facts to support the contention Vintage negligently entrusted the Subject Rifle to Gendron, nor does the predicate exception apply to the instant case. The PLCAA requires the immediate dismissal of all claims against Vintage.

A. The Very Purpose of the PLCAA is to Prohibit Cases Such as This One

The PLCAA, enacted on October 26, 2005, prohibits the filing of a "qualified civil liability action" in any state or federal court, and mandates that any such "action that is pending on the date of enactment of this Act shall be immediately dismissed." 15 U.S.C. §7902(a) & (b). The very first stated purpose of the PLCAA is:

> "To **prohibit causes of action against** manufacturers, distributors, **dealers**, and importers **of firearms** or ammunition products, and their trade associations, **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."

15 U.S.C. §7901(b)(1)(emphasis added).

Congress understood that firearm dealers supply essential tools for citizens to exercise constitutional rights, and in light of countless lawsuits brought against the firearm industry "seek[ing] money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals," enactment of the PLCAA was necessary "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." *Id.* at §7901(a)(3) & (b)(2). Congress further recognized the "manufacture, importation, possession, sale, and use of firearms

and ammunition in the United States are heavily regulated" and licensed gun dealers selling firearms to the public:

> "**are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products** or ammunition products that function as designed and intended."

15 U.S.C. §7901(a)(5)(emphasis added).

The instant action against Vintage is precisely the sort of lawsuit Congress intended to prohibit. Plaintiffs seek to hold Vintage liable for harm caused by Gendron's criminal and unlawful misuse of the firearm product he purchased. The PLCAA requires the immediate dismissal of all qualified civil liability actions, including the instant case against Vintage.

B. The Instant Case is a Qualified Civil Liability Action Prohibited by the PLCAA

The PLCAA succinctly states: "A qualified civil liability action may not be brought in any Federal or State court." § 7902(a). 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, 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)(emphasis added).

The instant case is undoubtedly a qualified civil liability action within the meaning of the PLCAA, because it arises from the criminal and unlawful misuse of a qualified product (the May 14, 2022, shooting) by a third party (Gendron).

i. Vintage is a Seller Protected by the PLCAA

The PLCAA defines a "seller," with respect to a qualified product, as "a dealer (as defined in section 921(a)(11) of Title 18) 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." 15 U.S.C. §7903(6)(B). Pursuant to 18 U.S.C. § 921(a)(11)(A), a "dealer" is defined as "any person engaged in the business of selling firearms at wholesale or retail." As a federally licensed dealer of firearms, Vintage is a "seller" pursuant to the PLCAA and is therefore protected by the Act.

ii. The Subject Rifle is a Qualified Product Pursuant to the PLCAA

The PLCAA defines a "qualified product" in relevant part as "a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code) . . . that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. §7903(4). Pursuant to 18 U.S.C. §921(a)(3)(A) & (B), a firearm is defined as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" or "the frame or receiver of any such weapon . . ." It is undisputed that Plaintiffs claim damages concerning Gendron's criminal shooting of innocent people with a firearm, a Bushmaster Model XM-15 E2S Target, which was shipped and transported in interstate commerce after being manufactured in Windham, Maine. As such, the firearm is a qualified product pursuant to the PLCAA.

iii. Plaintiffs' Claimed Damages Resulted from the Criminal or Unlawful Misuse of a Qualified Product by a Third Party

As set forth above, this case arises from the criminal or unlawful misuse of the Subject Rifle by Gendron, who used it to unlawfully carry out his attack on May 14, 2022. Accordingly, Plaintiffs' claimed damages resulted from the criminal or unlawful misuse of a qualified product (the Subject Rifle) by a third party (Gendron). Consequently, each of Plaintiffs' claims against Vintage constitute a qualified civil liability action, specifically prohibited by the PLCAA. 15 U.S.C. § 7902(a).

C. Plaintiffs Failed to Allege Facts Demonstrating an Exception to the PLCAA's General Prohibition Against Qualified Civil Liability Actions

The allegations contained within the Complaint, assumed to be true for the purposes of this Motion, fail to establish any of the limited exceptions to the PLCAA's immunity provisions as a matter of law. The PLCAA excludes six narrow categories of claims from the broad definition of a "qualified civil liability action." Plaintiffs' Complaint alleges Vintage is liable for negligent entrustment, which is one of the enumerated exceptions. 15 U.S.C. §7903(5)(A)(ii). The only other exception that could possibly apply is the "predicate exception," which requires that a "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." *Id.* §7903(5)(A)(iii)(emphasis added).

As a matter of law, Plaintiffs have failed to establish either of these exceptions because:

1. Plaintiffs have not alleged a sufficient factual basis from which to conclude Vintage had special knowledge or reasonably should have known that Gendron was likely to use the Subject Rifle in an improper and dangerous manner involving unreasonable risk of physical injury. 15 U.S.C. § 7903(5)(B); *See also Graham*, 46 N.Y.S.3d at 330; *Hamilton,* 96 N.Y.2d at 236.

2. Plaintiffs have failed to allege facts demonstrating Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of a "qualified product" (firearm, ammunition, or components of either). 15 U.S.C. §7903(5)(A)(iii). In fact, Plaintiffs have failed to allege facts demonstrating a legal violation at all, even absent knowledge and proximate cause.

i. The Negligent Entrustment Exception to the PLCAA Does Not Apply

a) Plaintiffs Have Failed to State a Proper Claim for Negligent Entrustment

Plaintiffs have failed to provide allegations establishing a proper claim for negligent entrustment pursuant to New York law and the requirements of the PLCAA. Therefore, the Court should dismiss Plaintiff's Count Fifteen.

Negligent entrustment is defined in the PLCAA as:

> "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others."

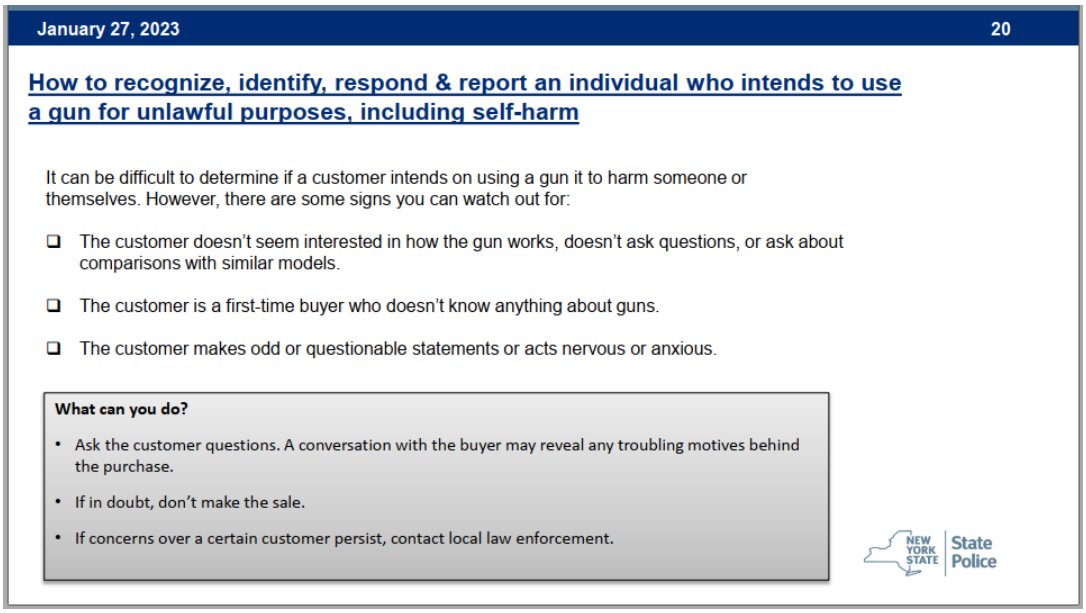
15 U.S.C. §7903(5)(B).

Furthermore, the PLCAA states "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. §7903(5)(C); *see also Ileto*, 565 F.3d at 1131, 1135-36, 1138(noting the "only function of the PLCAA is to preempt certain claims"). Accordingly, Plaintiffs could only meet this exception by providing a sufficient factual basis to conclude Vintage negligently entrusted the Subject Rifle to Gendron under both New York law and the PLCAA's own definition of negligent entrustment. Plaintiffs have alleged insufficient facts to meet this heavy burden. Therefore, Count Fifteen fails as a matter of law.

To establish a cause of action for negligent entrustment in New York, "the defendant must ... have some special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given] which renders [that person's] use of the chattel unreasonably dangerous" *Monette v. Trummer*, 964 N.Y.S.2d 345, 348 (2013)(quoting *Cook v. Schapiro*, 871 N.Y.S.2d 714 (2009)(citation omitted)). A claim for negligent entrustment "is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" *Stanley*, 173 N.Y.S.3d at 752 (citation omitted).

As is set forth in the "Brief Factual Summary" section of this Memorandum, Plaintiffs have failed to provide allegations establishing Vintage knew or should have known of Gendron's propensity to use the Subject Rifle in an improper or dangerous fashion involving unreasonable

risk of physical injury. *Id. See also* 15 U.S.C. §7903(5)(B). In accordance with New York law, every licensed gun dealer and the employees and agents of each gun dealer must partake in an annual training program pursuant to G.B.L. §875-e. Pursuant to the law, the training must include instruction concerning: "How to recognize, identify, respond, and report an individual who intends to use a firearm, rifle, or shotgun for unlawful purposes, including self-harm." G.B.L. §875-e(2)(C). The training currently provided was published by the New York State Police on January 27, 2023, and consists of a PowerPoint presentation containing twenty-nine slides. List Aff. ¶18, Ex. 14. There is a single slide addressing how to identify a potentially dangerous person. *Id.* The slide contains the following information:



None of the signs of a potentially dangerous person included in the mandatory training materials describe characteristics displayed by Gendron. According to Plaintiffs' allegations, Gendron was a frequent customer of Vintage, both before and after he purchased the Subject Rifle on January 19, 2022, who was knowledgeable about firearms and had friendly interactions while patronizing the store. List Aff. ¶3; Ex. 1, Compl. ¶¶481-502, 654-664. He is not alleged to have

acted nervously, disinterested, unusually, or like he was in a rush. *Id.* He had relevant conversation about target shooting. *Id*. At no point is he alleged to have acted in an alarming manner that would put Vintage on notice of his propensity to engage in a criminal act of violence. *Id.* In fact, he was a frequent visitor of multiple firearms stores and had purchased a shotgun from another licensed dealer who reported "nothing abnormal" about his presentation. List Aff. ¶17. Yet another dealer, the owner of firearm retailer "All Star Pawn," described being shocked upon learning that Gendron committed the attack on May 14, 2022. *Id.* He described showing Gendron an AR-15 for possible purchase himself. *Id.*

It is not alleged Gendron was prohibited from purchasing, possessing, or owning a firearm pursuant to state or federal law when he purchased the Subject Rifle from Vintage. *See* Ex. 1 generally; *see also* 18 U.S.C. 922(g); N.Y. Penal Law § 265.17. It isn't alleged that prior to the attack on May 14, 2022, Gendron had engaged in other criminal conduct that Vintage knew or should have known about. *Id*. Taking Plaintiffs' allegations as true, that Gendron visited Vintage on multiple occasions and made purchases of the Subject Rifle and ammunition on separate dates, such facts further validate Vintage's lack of special knowledge concerning Gendron's propensity toward violence and criminality. List Aff. ¶3; Ex. 1, ¶¶481-502, 654-664. Gendron allegedly made multiple purchases over time without engaging in any alarming or known criminal behavior. *Id.*

Gendron was cleared to purchase the Subject Rifle by an FBI NICS background check. List Aff. ¶¶8, 14. It is not alleged that Vintage engaged in any violations of state or federal law pertaining to the transaction, or that Vintage faced licensing repercussions, despite ATF visiting Vintage on the day of the shooting to review and retrieve records pertaining to Gendron's purchase. *Id*. Without alleging facts demonstrating Vintage had special knowledge or reasonably should have known Gendron was likely to use the Subject Rifle in an improper and dangerous manner involving

unreasonable risk of physical injury, Plaintiffs' claim fails as a matter of law. 15 U.S.C. § 7903(5)(B). Because the PLCAA preempts Plaintiffs' negligent entrustment action against Vintage, the Court should dismiss Count Fifteen.

b) Plaintiffs' Claim of Negligent Entrustment in the Context of the Sale of Chattel Sixteen Weeks Prior to the Buyer's Criminal Misuse Fails as a Matter of Law

Apart from Plaintiffs' failure to allege sufficient facts to satisfy the elements under both the PLCAA and New York law, Plaintiffs' negligent entrustment claim also fails based upon the lack of duty Vintage owed to Plaintiffs. "A critical consideration in determining whether a duty exists is whether the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" *Davis v. South Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015) (quoting *Hamilton,* 96 N.Y. 2d at 232-33(2001)). "A duty may not be predicated merely because it is foreseeable that persons may be killed or injured by defendants' lethal [firearm] products." *Id.* at 222-23, 232.

When the May 14, 2022, shooting occurred, more than sixteen weeks had elapsed since Gendron purchased the Subject Rifle from Vintage on January 19, 2022. List Aff. ¶8. At the time of the shooting, Vintage had no ability to exercise control over the Subject Rifle and was not in the "best position to protect against the risk of harm." *Id.* Unlike other parties, such as Gendron's parents (who allegedly were aware of ongoing concerning behavior), Vintage's interactions with Gendron are alleged to have been incredibly limited. *See* Ex. 1, Compl. ¶481-502. Therefore, after Vintage legally sold the Subject Rifle to Gendron in compliance with state and federal law, including subjecting Gendron to a NICS background check that he passed, Vintage was not in the "best position" to somehow read Gendron's mind and intervene to stop his criminal conduct that would occur almost four months later. List Aff.

In determining whether a duty exists, New York Courts "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Hamilton*, 96 N.Y.2d at 232 (citing *Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994); *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402–403 (1985)). Again, a "critical consideration" in the Court's balancing analysis involves determining whether "defendant's relationship with [ ] the tortfeasor …. places the defendant in the best position to protect against the risk of harm" *Id.* (internal quotations omitted). "Foreseeability, alone, does not define duty--it merely determines the scope of the duty once it is determined to exist." *Hamilton,* 96 N.Y.2d at 232-235. (citing *Pulka v Edelman*, 40 N.Y.2d 781, 785 (1976); *Eiseman v State of New York*, 70 N.Y. 2d 175, 187 (1987)). This is particularly true regarding firearms, where "[f]ederal law already has implemented a statutory and regulatory scheme to ensure seller 'responsibility' through licensing requirements and buyer 'responsibility' through background checks." *Hamilton,* 96 N.Y.2d at 239.

Plaintiffs must demonstrate the Defendant "owed not merely a general duty to society but a specific duty to him or her, for '[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.' *Id.* at 232 (quoting *Lauer v. City of New York*, 95 N.Y.2d 95 (2000)). "A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" *Hamilton,* 96 N.Y.2d at 233. In refusing to impose a general duty pertaining to the distribution of firearms by firearm industry members, even prior to the PLCAA's enactment, the New York Court of Appeals explained the "judicial resistance

to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 233.

The case of *Constant v. Andrew T. Cleckley Funeral Servs., Inc.,* decided by the Kings County Supreme Court, is instructive concerning the issue of duty in relation to the instant matter. 148 N.Y.S.3d 645 (N.Y. Sup. Ct. 2021). In that case, Plaintiff sued U-Haul, in addition to a funeral home and others, in relation to the funeral home's storing of bodies in unrefrigerated U-Haul trucks, in addition to losing Plaintiff's father's remains. *Id.* Regarding U-Haul specifically, Plaintiff alleged U-Haul owed a duty to the public to ensure their trucks were not rented for unlawful purposes or purposes that would endanger public welfare. *Id.* at 648. She also proceeded with a theory that U-Haul had a duty to inquire with the funeral home, knowing the nature of its business, as to why it was renting such a large volume of trucks. *Id.*at 648.

Ultimately, despite U-Haul having a written contract with the funeral home governing how its trucks were permitted to be used (demonstrating some measure of retained control), the Court found that "U-Haul owed no duty to plaintiff to prevent the misuse of the U-Haul trucks by the Cleckley Funeral Home for what was essentially a criminal act… This is more so the case as U-Haul lacked authority to control the Cleckley Funeral Home's conduct." *Id.* at 648-649. The Court further explained that U-Haul had no duty to inquire into the use of its trucks beyond verifying the renter possessed a valid driver's license and, once the trucks were conveyed to the funeral home, U-Haul "lacked authority to control" the funeral home's conduct. *Id.* at 649-651 (citing *Cook,* 58 A.D.3d at 664(Car dealership had no duty to prevent 80-year-old woman who possessed a valid driver's license from driving and ultimately killing plaintiff's decedent with her new car two days after purchase)).

The Court granted U-Haul's motion to dismiss, finding that absent allegations of "special knowledge" possessed by U-Haul when it rented out the trucks, Plaintiff's allegations were "insufficient to state a cause of action sounding in negligent entrustment." *Constant,* 148 N.Y.S.3d at 648-651. The *Constant* case reaffirms the general rule that defendants, like Vintage, are generally not liable for, and owe no duty to control, the conduct of third parties. *Id.*; *see also Hamilton*, 96 N.Y.2d at 232-33; *D'Amico v. Christie*, 71 N.Y.2d 76, 88 (1987); *Purdy v. Public Adm'r of County of Westchester*, 72 N.Y.2d 1, 8 (1988). Additionally, a duty cannot be established against a defendant who relinquished control of chattel, such as through a sale or rental arrangement, unless the defendant held "special knowledge" of the recipient's likelihood of engaging in harmful conduct, and the defendant was in the best position to intervene. *Constant,* N.Y.S.3d at 649-651; *Davis,* 26 N.Y.3d at 576; *Hamilton*, 96 N.Y.2d at 233; *See also In re Academy, Ltd.*, 625 S.W.3d 19, 23 (Tex. 2021) (Retailer who sold firearm and magazines to Sutherland Springs mass shooter not liable for negligent entrustment because "the basis for imposing liability on the owner of the thing entrusted to another is that ownership of the thing gives the right of control over its use.")

In the instant case, Vintage sold the Subject Rifle to Gendron on January 19, 2023, which he criminally misused nearly four months later, on May 14, 2022. List Aff. ¶¶7-8, 12-15. Vintage complied with state and federal law, utilizing the system established to "ensure… buyer 'responsibility' through background checks." *Hamilton,* 96 N.Y.2d at 239; (4473). The Complaint fails to allege Vintage had any sort of "special knowledge" providing it notice that Gendron would likely use the Subject Rifle in a criminal and dangerous fashion involving unreasonable risk of physical injury. *See Id.* at 236; 15 U.S.C. § 7903(5)(B); *Graham*, 46 N.Y.S.3d at 330.

Further, Plaintiffs failed to allege facts establishing Vintage was in the best position to prevent the harm based upon its relationship with Gendron. *Davis,* 26 N.Y.3d at 576; *Hamilton,* 96 N.Y. 2d at 232. Vintage's interactions with Gendron were sporadic and limited. Ex. 1, Compl. ¶481-502. When Gendron criminally misused the Subject Rifle nearly four months after purchase, Gendron's parents were likely in the best position to prevent the harm, particularly because, according to Plaintiffs, Gendron resided in their home and they knew he: threatened to commit "murder suicide" online, had been investigated by the police, dismembered a cat less than two months before the shooting, and was stockpiling tactical gear and firearms. *Id*. at ¶209-226.

The Complaint insufficiently alleges facts to establish that Vintage owed Plaintiffs a duty pursuant to a theory of negligent entrustment. Therefore, Plaintiffs' claim for negligent entrustment fails as a matter of law and is preempted by the PLCAA. If Vintage were found liable in this context, it would be akin to imposing absolute liability on a seller of a product for any misuse by a buyer at any time in the future, even when the product is not defective. This is precisely the type of liability that the PLCAA sought to avoid. Therefore, the Court should dismiss Count Fifteen.

ii. The Predicate Exception to the PLCAA Does Not Apply to Plaintiffs' Claims

The PLCAA provides a narrow exception, known as the "predicate exception," permitting a plaintiff to sue a licensed firearm dealer, such as Vintage, if the plaintiff's cause of action is supported by sufficient facts to meet the following elements:

> 1. The firearm dealer <u>knowingly</u> violated a state or federal statute;
>
> 2. The statute violated is applicable to the sale or marketing of qualified products; and
>
> 3. The knowing statutory violation was the proximate cause of the harm for which the plaintiff seeks relief.

15 U.S.C. §7903(5)(A)(iii); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 394, 403 (2d Cir. 2008); *Ileto*, 565 F.3d at 1136-38.

Plaintiffs have failed to allege facts establishing Vintage violated any state or federal statute at all. *See* §7903(5)(A)(iii); Ex. 1, Compl. ¶¶641-44; 654-84; 701-15. Even if they had, Plaintiffs have not alleged a sufficient factual basis to conclude that Vintage violated any such statute "knowingly." *Id.* Furthermore, Counts Thirteen, Fifteen, Twenty-Two, Twenty-Three, and Twenty-Four of Plaintiffs' Complaint do not allege Vintage violated a statute applicable to the sale or marketing of qualified products. *Id.* As was explained by the 9th Circuit in the case of *Ileto v. Glock*, general tort claims, even when codified into statute, are preempted by the PLCAA and the predicate exception only pertains to "statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry." 565 F.3d at 1136.

Finally, the predicate exception does not permit any of Plaintiffs' claims because Plaintiffs' allegations fail to establish that Vintage was the "proximate cause of the harm for which relief is sought." 15 U.S.C. §7903(5)(A)(iii). Because Plaintiffs have failed to sufficiently allege facts demonstrating that the intervening criminal action by Gendron was foreseeable to Vintage, Plaintiffs cannot prove proximate cause as a matter of law. *See Bell v. Bd. of Educ., City of New York*, 90 N.Y.2d 944, 946(1997)("Where third-party criminal acts intervene between defendant's negligence and plaintiff's injuries, the causal connection may be severed, precluding liability.")(citing *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33(1983); *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980)). Therefore, each of Plaintiffs' causes of action against Vintage fail to establish the predicate exception and must be dismissed pursuant to the plain language of the PLCAA.

a) Plaintiffs' Count Sixteen for Alleged Violations of G.B.L. §898-b(1) & 898-e is Preempted by the PLCAA and Fails as a Matter of Law

Plaintiffs' claim that Vintage violated G.B.L. §898-b(1) & 898-e[6] fails as a matter of law. G.B.L. §898-b(1) states:

> "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."

Vintage is a "gun industry member" pursuant to G.B.L. §898-a(4). The Subject Rifle is a "qualified product" according to G.B.L. §898-a(6), which simply incorporates the PLCAA's definition of qualified product into state law. *See* 15 U.S.C. §7903(4). Although G.B.L. §898-b(1) purports to proscribe certain actions done either "knowingly or recklessly," the predicate exception to the PLCAA may only apply if a statute is violated "knowingly." 15 U.S.C. §7903(5)(A)(iii). It would be nonsensical to claim that Vintage "knowingly" violated the statute by acting "recklessly." Therefore, in order to overcome the PLCAA's general preemption of qualified civil liability actions, Plaintiffs' allegations must provide a sufficient basis to find that Vintage knowingly engaged in each element necessary to establish a violation of G.B.L. §898-b(1). That means Plaintiffs were required to allege that Vintage knowingly engaged in specific conduct, that it knew was unlawful or unreasonable under all the circumstances, and by nature of such conduct, knowingly created, maintained, or contributed to a condition in New York State that endangered the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product. G.B.L. §898-b(1); 15 U.S.C. §7903(5)(A)(iii).

[6] G.B.L. §898-e purports to create a private cause of action for any violation of the Chapter, including for violations of §898-b(1). Because §898-e does not alter the analysis of the claim pursuant to the PLCAA, in light of the Supremacy Clause of the United States Constitution (art. VI, cl. 2), the section is not addressed separately herein.

Plaintiffs' allegations fail to establish that Vintage knowingly violated §898-b(1), when it legally sold the Subject Rifle to Gendron after he passed a NICS background check. List Aff. ¶7-14. As is set forth in greater detail in the Brief Factual Summary Section herein, Plaintiffs' allegations pertaining to Count Sixteen are generally as follows: a.) Gendron learned how to modify the Subject Rifle's fixed magazine from a YouTube video; b.) Gendron determined that Vintage was selling a firearm with a fixed magazine similar to the one in the video; c.) Gendron purchased the Subject Rifle from Vintage on January 19, 2022; and d.) on February 23, 2022, Gendron returned to Vintage and had a positive conversation with an "employee" named Chuck about target shooting, who smiled at him and allegedly supplied him with "4 5.56 clips and 1 of the mag loaders for my magazines from him for free (sic)." Ex. 1, Compl. ¶¶484-495, 661.

The Complaint purports to make the above allegations by referencing Gendron's Discord Diary, which has not yet been made available to the Defendants in full. Regardless, the allegations fail to provide a sufficient basis from which a knowing violation of §898-b(1) could be found. In fact, Plaintiffs provided no basis upon which Vintage would have had any sort of notice that Gendron, who allegedly patronized Vintage and other gun stores frequently, planned to carry out criminal and violent actions with the Subject Rifle. *Id.* Therefore, Count Sixteen fails.

Despite the insufficiencies within the alleged facts, at ¶670 of the Complaint, Plaintiffs do their best to slant their previously stated facts, transforming them into the following statement:

> "It was unreasonable for Vintage Firearms to entertain conversations regarding how Gendron might modify the weapon he purchased at Vintage Firearms, and to discuss the modified weapon with Gendron after he had modified the weapon and was training for the Tops massacre."
>
> Ex. 1, Compl. ¶670.

The allegations at ¶670 of the Complaint appear to be a reinvention of the facts previously alleged by Plaintiffs, perhaps in an attempt to force-fit the prior allegations into a cause of action

against Vintage under G.B.L. §898-b(1). Apart from the allegation that Gendron visited Vintage on February 23, 2022, and had a conversation about target shooting with an "employee" named Chuck[7] who smiled, there are no allegations or citations otherwise in the Complaint alleging Gendron talked to anyone at Vintage about how "Gendron might modify" the Subject Rifle or that he was "training for the Tops massacre," as ¶670 seems to falsely imply. *See* Ex. 1, ¶484-495. Despite Plaintiff's use of false implication and hyperbole, the statement at ¶670 still fails to establish a knowing violation of the statute.

Interestingly, the mandatory annual training program provided by the New York State Police to licensed firearm dealers makes no reference to G.B.L. §898 at all and provides only one slide (slide no. 20) purportedly identifying signs exhibited by purchasers who harbor criminal or harmful intent. List Aff. ¶18; Ex. 14; *See also* G.B.L. §875-e(2)(C). The slide explains: "[i]t can be difficult to determine if a customer intends on using a gun [ ] to harm someone or themselves. However, here are some signs you can watch out for…" *Id.* The slide then describes that a suspicious customer is one who is disinterested in how the gun works, doesn't ask questions, doesn't ask about comparisons with other models, doesn't know anything about guns, makes odd statements, and/or acts nervously. *Id.* At no point does the training reference the characteristics displayed by Gendron as alleged by Plaintiffs, who have described him as visiting Vintage multiple times, being knowledgeable about firearms, talking about relevant topics like target shooting, and someone who carefully considered which firearm he would like to buy before making his purchase. Ex 1., Compl. ¶¶484-502, 657-670.

[7] Again, the "Chuck" that Gendron referred to is most likely Charles Sherwood, owner of Timbercreek Firearms, which operates from the same location as Vintage. List Aff. ¶11. Regardless, a conversation about target shooting while shopping at a gun store is hardly suspicious.

In summary, despite Plaintiffs providing ample innuendo and bald conclusions of law, there are no factual allegations establishing that Gendron, who passed a NICS background check, communicated or acted in a manner to put Vintage on notice that he intended to carry out an act of violence or otherwise endanger the public with the Subject Rifle. Therefore, Plaintiffs have entirely failed to establish that Vintage knowingly violated G.B.L. §898-b(1), and Count Sixteen is preempted by the PLCAA. The Court should dismiss the claim as a matter of law.

b) Count Seventeen for Alleged Violations of §898-b(2) & 898-e Fails as a Matter of Law

Plaintiffs' claim that Vintage violated G.B.L. §898-b(2) & 898-e fails on its face. Plaintiffs have not provided factual allegations, even when taken as true for purposes of this Motion, demonstrating that Vintage knowingly failed to "establish and utilize reasonable controls and procedures" pursuant to G.B.L. §898-b(2). *See* 15 U.S.C. §7903(5)(A)(iii)(predicate exception requires knowing violation). Therefore, Count Seventeen should be dismissed as preempted by the PLCAA.

G.B.L. §898-b(2) states:

> "All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state."

In accordance with G.B.L. §898-a(2), ""Reasonable controls and procedures:"

> "shall mean policies that include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter."

Plaintiffs never specified in their Complaint what "reasonable controls and procedures" Vintage purportedly failed to establish. In fact, the allegations contained within Count Seventeen consist entirely of bald legal conclusions. Ex. 1, Compl. ¶671-674 (stating, without explanation: "Vintage Firearms failed to establish reasonable controls to prevent the sale, possession, and illegal use of its Bushmaster XM15-E2S rifle.")

Vintage utilized the appropriate documentation and federal background check process concerning the sale of the Subject Rifle to Gendron. List Aff. ¶8-15. On the day of Gendron's attack, ATF visited Vintage to review the transaction documentation and obtain the original 4473 form Gendron completed. *Id*. It is not alleged Vintage was found to have violated state or federal law by government regulators or law enforcement, nor is it alleged Vintage faced any licensing implications. *Id*. Without pointing to any legal authority establishing, or even alleging, some sort of deficiency in the controls and procedures utilized by Vintage when it sold the Subject Rifle to Gendron, Plaintiffs' §898-b(2) claim fails. Furthermore, because Plaintiffs have failed to establish a violation of the statute, they most definitely have failed to establish that Vintage violated the law "knowingly," as is required by the predicate exception to the PLCAA. *See* 15 U.S.C. §7903(5)(A)(iii). Therefore, the Court should dismiss Count Seventeen as a matter of law.

c) Plaintiffs' Claims for Wrongful Death and Loss of Parental Guidance Fail

Plaintiffs' Claims for Wrongful Death and Loss of Parental Guidance are preempted by the PLCAA. Neither claim is based upon allegations that Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of a qualified product. *See* 15 U.S.C. §7903(5)(A)(iii). Additionally, neither claim constitutes a theory of negligent entrustment meeting the exception to the PLCAA set forth in 15 U.S.C. §7903(5)(B). Therefore, both claims are

preempted by the PLCAA and fail as a matter of law. The Court should dismiss Counts Thirteen and Twenty-Two of Plaintiffs' Complaint.

d) Plaintiffs' Claims for "Personal Injuries" and "Joint and Several Liability" Fail

Plaintiffs' Claims for "Personal Injuries" and "Joint and Several Liability" fail as a matter of law because neither constitutes an independent cause of action based upon allegations that Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of a qualified product. *See* 15 U.S.C. §7903(5)(A)(iii). Additionally, neither claim constitutes a theory of negligent entrustment. *See* 15 U.S.C. §7903(5)(B). Therefore, both claims are preempted by the PLCAA and fail. The Court should dismiss Counts Twenty-Three and Twenty-Four of Plaintiffs' Complaint.

e) Plaintiffs Failed to Allege Facts Establishing Vintage was the Proximate Cause of Plaintiffs' Injuries

For the predicate exception to apply to any cause of action, the knowing violation of state or federal statute attributed to a defendant must be the proximate cause of the harm for which relief is sought. 15 U.S.C. §7903(5)(A)(iii). A defendant proximately caused an injury when its tortious actions were the "substantial cause of the events which produced the injury." *Hain v. Jamison*, 28 N.Y.3d 524, 528-29 (2016) (internal quotation omitted). When an intervening criminal act occurs and causes injury, a defendant can only be found to have proximately caused the injury if it was foreseeable. *Id.* at 529 (internal quotation omitted) (emphasis in original). *See Bell*, 90 N.Y.2d at 946 ("Where third-party criminal acts intervene between defendant's negligence and plaintiff's injuries, the causal connection may be severed, precluding liability.")

As has been explained herein, Plaintiffs have failed to allege facts demonstrating that the intervening criminal action by Gendron was foreseeable to Vintage. Therefore, Plaintiffs cannot prove proximate cause and the PLCAA prohibits all of Plaintiffs' claims.

II. G.B.L. §898-b IS UNCONSTITUTIONAL AS APPLIED TO VINTAGE IN THE INSTANT CASE

If the Court declines to dismiss Counts Sixteen and Seventeen of Plaintiffs' Complaint on other grounds, the Court should find G.B.L. §898-b, as applied to Vintage, unconstitutional. Alternatively, should the Court decline to dismiss Counts Sixteen and Seventeen on constitutional grounds, the Court should stay the instant proceedings against Vintage pending the outcome of a constitutional challenge to G.B.L. §898 currently under consideration in the United States Circuit Court of Appeals for the Second Circuit in the case of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374.

G.B.L. §898-b is unconstitutional as applied to Vintage for two primary reasons:

1. The law is unconstitutionally vague in violation of the Due Process Clause because it failed to provide Vintage with "fair notice of conduct that is forbidden or required" and encourages arbitrary enforcement. *FCC*, 567 U.S. at 253.

2. The law, as constructed by Plaintiffs, prohibits the sale of an AR-15 to a person who is not otherwise prohibited from purchasing a firearm pursuant to state or federal law, which is inconsistent with the Nation's historical tradition of firearm regulation, thereby violating "the Second Amendment's unqualified command." *Bruen*, 142 S. Ct. at 2129-30.

A. G.B.L. §898-b is Unconstitutionally Vague as Applied to Vintage Firearms, LLC

"The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed [internal citation omitted] is essential to the protections provided by the Fifth Amendment's Due Process Clause [internal citation omitted] which requires the invalidation of impermissibly vague laws." *FCC,* 567 U.S. at 253. The 'void for vagueness doctrine' addresses two primary due process concerns:

1. Regulated parties must know what the law requires "so they may act accordingly."

2. "Precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."

Id. See also Kolender v. Lawson, 461 U.S. 352, 356 (1983).

If a statute fails to provide clear language, "with sufficient definiteness that ordinary people can understand what conduct is prohibited," it is unconstitutionally vague. *Kolender*, 461 U.S. at 357; *See also Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 498 (1982). Further, if a statue does not provide minimal guidelines for the purposes of enforcement, it is unconstitutionally vague on the basis that it permits, or may even encourage, arbitrary enforcement. *Id.*

If the claims against Vintage for alleged violations of G.B.L. §898-b(1)&(2) are permitted to move forward, despite Vintage otherwise strictly complying with state and federal law concerning the sale of the Subject Rifle, it becomes transparent that the statute is unconstitutional because it failed to inform Vintage as to what it needed to do to avoid a violation, while simultaneously failing to provide minimal guidelines for enforcement.[8]

Applying the two-part examination of vagueness to G.B.L. §898-b reveals the naked uncertainty of what conduct was purportedly demanded of Vintage. It is important to frame the examination in the view of the "ordinary" lay person's ability to read the law and know what is expected of them.

> 1. 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.

[8] The statute permits enforcement of a violation by either the New York Attorney General (§898-d) or private parties such as the instant Plaintiffs (§898-e).

> 2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state

G.B.L. § 898-b

In regard to §898-b(1), Vintage certainly did not engage in conduct that was "unlawful in itself" and Plaintiffs have not alleged otherwise. *See* Ex. 1, Compl. generally. Therefore, allowing the case to go forward would mean the Court has determined Vintage may be liable for acting "unreasonably" and thereby "knowingly" "creat[ing], maintain[ing], or contribut[ing]" to a "condition in New York State that endangers the safety or health of the public through the sale … of a qualified product." Apart from constituting an impressive jumble of word salad, it is unclear what constitutes a dangerous "condition" that Vintage might have mistakenly created, maintained, or contributed to. The statute does not mandate specific actions to take or avoid. In fact, New York State's mandatory training for gun dealers doesn't even reference §898-b, which is unsurprising given that the statute fails to identify any sort of minimal standard for enforcement. List Aff. ¶18; Ex. 14.

According to Plaintiffs, Vintage was "unreasonable" in violation of the statute by engaging in conversations with Gendron, which Plaintiff describes in hyperbolic fashion. Ex. 1, Compl. ¶670 (compare with ¶¶484-495, 661). This is notable because the First Amendment is implicated by such a claim. As stated by the Supreme Court: "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC*, 567 U.S. at 253-54. It is clear that G.B.L. §898-b(1) is unconstitutionally vague and therefore void as applied to Vintage.

In regard to G.B.L. § 898-b(2), the statute required Vintage "establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used,

marketed or sold unlawfully in New York state." G.B.L. §898-a(2) defines "reasonable controls and procedures" as:

> "polices that include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter.

The "definition" contained in G.B.L. §898-a(2) is unhelpful because rather than defining the term, it contains a vague, non-exclusive list of policy goals without telling Vintage what it actually needs to do to comply. It is unclear what "reasonable controls" Vintage should have established and utilized, apart from its strict compliance with state and federal law, that would have further prevented the intentional criminal misuse of the Subject Rifle by Gendron. Plaintiffs never specified in Count Seventeen, or in the Complaint generally, what "reasonable controls and procedures" Vintage purportedly was lacking. Instead, Plaintiff's rely on bald and conclusory legal conclusions without factual support. See Ex. 1, Compl. ¶671-674.

In summary, if the Court declines to dismiss Counts Sixteen and Seventeen, both provisions of G.B.L. §898-b are void for vagueness as applied to Vintage pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The statute failed to provide Vintage, or any person of common (or higher) intelligence, with notice concerning the specific activities required or proscribed by the law. The law fails to provide a minimal standard of enforcement, thereby encouraging arbitrary application. As applied to Vintage according to Plaintiffs, the law even goes so far as to prohibit unspecified "unreasonable" speech. *Id*. at ¶670. Therefore, if it is determined Vintage could face liability pursuant to G.B.L. §898-b in this matter, the law is unconstitutional as applied.

B. G.B.L. §898-b Violates the Second Amendment if Plaintiffs' Interpretation of its Requirements is Adopted by the Court

If Plaintiffs' interpretation of G.B.L. §898-b is adopted, it violates the Second Amendment by creating an outright legal prohibition against the selling of AR-15s, firearms in common use for self-defense, even when the intended purchaser is not otherwise prohibited by state or federal law. *See Ex. 1*, Compl. ¶191 (Plaintiffs concede that AR-15s are owned by millions of people in the U.S.). Because such a prohibition is inconsistent "with the Nation's historical tradition of firearm regulation" it violates "the Second Amendment's unqualified command." *Bruen*, 142 S. Ct. at 2129-30.

As a licensed seller of firearms, and a supplier of the tools necessary for individuals to exercise their rights pursuant to the Second Amendment (as recognized by the PLCAA, §7901), Vintage has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, (1962). Depending on the outcome of this matter, Vintage is poised to suffer an injury in fact, both as a consequence of the damages alleged in the instant case, and of the impact an adverse determination would have on Vintage's firearm business going forward.

C. Should the Court Decline to Dismiss Counts Sixteen and Seventeen of Plaintiffs' Complaint, the Court Should Stay the Instant Case

Should the Court decline to dismiss Counts Sixteen and Seventeen on constitutional grounds, the Court should stay the instant proceedings against Vintage pending the outcome of a constitutional challenge to G.B.L. §898 currently pending in the Second Circuit case of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374. The United States District Court for the Western District of New York already issued stays in cases brought by the cities of Rochester and

Buffalo against Vintage and various other firearms industry defendants, finding that "the efficient use of the parties' and the Court's time and resources" is a "significant consideration weighing in favor of a stay" and the Second Circuit's decision "will likely provide helpful guidance" on the application and constitutionality of G.B.L. §898. *City of Buffalo v. Smith & Wesson Brands, Inc.*, No. 23-CV-6061-FPG, 2023 WL 3901741, at *2 (W.D.N.Y. June 8, 2023). Therefore, if the Court declines to dismiss the G.B.L. §898 claims against Vintage, the Court should stay the case pending clarification from the Second Circuit.

CONCLUSION

Plaintiffs' claims against Vintage should be dismissed pursuant to the PLCAA because the instant case constitutes a prohibited qualified civil liability action. Plaintiffs' allegations fail to establish either the negligent entrustment or predicate exceptions to the PLCAA, so the Act compels dismissal. G.B.L. §898-b is unconstitutional as applied to Vintage and the Court should therefore dismiss Counts Sixteen and Seventeen on that additional basis. Should the Court decline to dismiss Counts Sixteen and Seventeen, the Court should stay the instant action pending the outcome of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374.

Dated: Concord, New Hampshire
November 3, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum complies with the word limits agreed to by counsel and memorialized via electronic mail on October 23, 2023. According to the word processing software uses to prepare this memorandum, the total word count, excluding the material omitted under 22 N.Y.C.R.R. §202.8-b(b) is 9,912 words.

Dated: Concord, New Hampshire
November 3, 2023

Sean R. List, Esq.