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 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.	Index No. 805896/2023 Hon. Paula L. Feroleto Mot. Seq # 026

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT VINTAGE FIREARMS, LLC'S MOTION TO DISMISS

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Plaintiffs, individually and as administrators of the estates of Heyward Patterson, Katherine Massey, and Andre Mackniel, respectfully submit this memorandum of law in opposition to the motion of defendant Vintage Firearms, LLC ("Vintage Firearms" or "Vintage") to dismiss the complaint pursuant to C.P.L.R. §§ 3211(a)(1), (a)(3) and/or (a)(7).

PRELIMINARY STATEMENT

On January 19, 2022, after multiple trips to Vintage Firearms, Payton Gendron,[1] an 18-year-old white male, purchased a Bushmaster XM15-E2S semiautomatic rifle. The Tops shooter was a frequent customer of Vintage in 2021 and 2022, and continued to patronize the store after purchasing the rifle, including after he used a basic household drill to remove the "lock" made by MEAN L.L.C. ("Mean Arms") that was on the rifle at the time of purchase so that he could insert detachable magazines.

The Tops shooter sought out the specific rifle Vintage stocked knowing that it had been used by other mass shooters. He documented in detail the horrific reasons why he chose the weapon to accomplish his stated goal of killing as many Black people as possible. He even darkly reflected, "This is what God thought of when he sent Eugene Stoner to design and manufacture the M16 and AR-15. This will be VERY effective when I pair it with M193 ammo" – which he also bought at Vintage. Compl. ¶ 493.

While the Tops shooter wrote diary entries referencing his struggles with social interaction—likely because he was consumed with racist white supremacist propaganda and planning a massacre—he felt welcome in the Vintage store. This was a "strange" feeling for the

[1] Because — as was the case here — mass shooters are often motivated by a desire for notoriety and infamy and to inspire copy-cat crimes, a movement seeking responsible media coverage of mass shootings urges using a shooter's name only once as a reference point. *See generally* nonotoriety.com. For that reason, this brief does not repeat the name of the perpetrator of the heinous crimes committed on May 14, 2022, and instead identifies him as the "Tops shooter."

Tops shooter. Compl. ¶ 495. As he continued to read violent material online, he seemed to alienate most people. But when shopping at Vintage, the Tops shooter's experience was different. He noted it "was strange" that the person who sold him the bushmaster at Vintage "was smiling, like he wasn't completely disgusted with my presence." *Id.* He even recounted Vintage giving him free goods. Indeed, unlike any other mass shooters known to Plaintiffs' counsel, the Tops shooter felt such kinship with Vintage that he begged future readers of his diary to "promise me you'll buy something off him" after the massacre. Compl. ¶ 496.

The Tops shooter took the rifle and ammunition he purchased from Vintage, and drove hundreds of miles from his home to the East Side of Buffalo where he murdered 10 Black Buffalonians and wounded three others. Having followed simple instructions to remove the Mean Arms "lock"—and upon information and belief, having discussed the lock's removal within the Vintage store—the Tops shooter was able to significantly increase the lethality of his attack.

In its Motion to Dismiss, Vintage attempts to introduce facts that are inconsistent with Plaintiffs' complaint, despite New York law obliging this Court to accept Plaintiffs' alleged facts as true for purposes of this motion. As but one example, Vintage claims that the Tops shooter "followed YouTube instructions to illegally modify the rifle . . ." Def's Br. at 7. Yet it is not a foregone conclusion that YouTube is where the Tops shooter learned how to remove Mean's "lock." As Plaintiffs allege, the shooter "discussed the lock on the Bushmaster XM15-E2S with Vintage Firearms employees" inside Vintage's store. Compl. ¶ 501. Indeed, Vintage's new statements in its brief and List Affirmation underscore that significant questions of fact remain as to what Vintage knew about the Tops shooter and demonstrate why Plaintiffs should be permitted to seek discovery. *See Meyers v. Becker & Poliakoff, LLP*, 159 A.D.3d 858 (1st Dep't

2022) ("motion court providently exercised its discretion in denying defendant's motion to dismiss the complaint on the ground that it was premature, and correctly concluded that discovery was needed to resolve the issues presented").

Vintage further attempts to hide behind the Protection of Lawful Commerce in Arms Act ("PLCAA"). But PLCAA fails to immunize Vintage as a matter of law because this action falls squarely within two of the act's exceptions. First, PLCAA specifically exempts from protection retailers who sell a qualified product to a person they knew or should have known was likely to use the product in a manner involving unreasonable risk of physical injury. 15 U.S.C. § 7903(5)(B). Vintage's conduct here certainly fits that profile, or at a bare minimum, raises issues of fact as to this exception at this early juncture. Second, PLCAA specifically allows sellers to be held accountable for knowing violations of state or federal statutes applicable to the sale or marketing of firearms where the violation was the proximate cause of the plaintiffs' harm. Here, Vintage has violated multiple New York laws "applicable to" the sale or marketing of firearms. *Id.* at § 7903(7).

Vintage's conduct contributed to the unspeakable harms Plaintiffs have suffered. Vintage handed the Tops shooter the rifle to conduct his massacre, and ignored (or was willfully blind) to the warning signs of a loyal customer. This Court should accordingly deny Vintage's motion so discovery can proceed to uncover the truth about the relationship between Vintage and the Tops shooter.

FACTUAL BACKGROUND

Vintage Firearms is a retail gun store located at 120 Nanticoke Avenue in Endicott, New York. Compl. ¶ 481. The store describes itself as a "Dealer in collectable firearms and ammunitions. Approximately 100 guns in stock. CASH FOR GUNS: indi." Compl. ¶ 482. The

store's windows advertise "Buy- Sell-Trade" and "Revolvers-Pistols-Military Rifles." Compl. ¶ 483.

The Tops shooter sought out Vintage, and cultivated a relationship with those he found in the store. He liked being in the store, and purchasing from them, even though he found their prices to be more expensive than elsewhere. According to the Tops shooter, he was in Vintage a minimum of the following times:

- **December 21, 2021**: The Tops shooter "went to Vintage Firearms and bought some 2 boxes of some old 12 gauge game ammo." Compl. ¶ 485. At some point between December 21, 2021, and January 11, 2021, the Tops shooter identified the Bushmaster rifle he would later purchase. *Id.*

- **January 11, 2021**: The Tops shooter "investigated the AR at vintage firearms more," noting that same day a YouTube video demonstrating the "same fixed mag release at vintage firearms, says you have to [d]rill to get it out." Compl. ¶ 487. The Tops shooter writes that he "**learned** I can take the fixed mag out if I get a screw extraction kit. Then I will have to replace it with a regular mag button and spring." Compl. ¶ 489 (emphasis added). The Tops shooter insinuates that this "learning" was part of his "investigation" of the rifle. By January 18, 2022, the Tops shooter has determined that "That bushmaster at Vintage Firearms will do very nicely." Compl. ¶ 491.

- **January 19, 2022**: The Tops shooter "went to Vintage Firearms and investigated the AR they had very closely." The Tops shooter purchased the rifle from Vintage Firearms. He also purchased a sling and 20 rounds of M194 ammunition.[2] Compl. ¶ 492. The Tops shooter paid Vintage Firearms $960. *Id*. When the Tops shooter returned home that day, he "filled up an ammo can with the ammo, and worked on removing the fixed mag release on the AR." *Id.* at n.231 (citing Discord diary at 64).

- **February 23, 2022**: The Tops shooter "went to Vintage Firearm's [sic] and looked around and talked to the guy. What was strange was when I was telling the guy (Chuck?) about Matt and I's shooting experience with the bushmaster I bought from him, he was smiling, like he wasn't completely disgusted with my presence. I was able to get 4 5.56 clips and 1 of the mag loaders for my magazines from him for free." Compl. ¶ 495.

- **March 3, 2022**: The Tops shooter purchased ammunition from Vintage Firearms, even though "it is way more than what I wanted to pay." Compl. ¶ 496. The Tops shooter loyally patronized Vintage. The Tops shooter spent more than he wanted to because "I like the guy at Vintage Firearms. He's quite a nice guy. So I was willing to help him out

[2] Though the Tops shooter wrote M194 ammunition, this appears to be a typo. He likely meant M193 ammunition. Upon information and belief there is no M194 designation for ammunition.

> a bit by buying this . . . If he's still around after the attack promise me you'll buy something off him?" *Id.*

Speaking with the New York Times days after the massacre, Vintage's proprietor stated the Tops shooter "didn't stand out—because if he did, I would've never sold him the gun." Compl. ¶ 497. Vintage's proprietor concluded, "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." Compl. ¶ 502.

The Tops shooter was excited about his Vintage purchase, exclaiming, "This is what God thought of when he sent Eugene Stoner to design and manufacture the M16 and AR-15. This will be VERY effective when I pair it with M193 ammo." Compl. ¶ 493.

The Tops shooter never refers to Timbercreek Firearms in his diary or other writings. Nor does Plaintiffs' complaint ever reference Timbercreek Firearms.

LEGAL STANDARD

It is long-established that on a motion to dismiss, the court must construe the complaint liberally, accept the pleaded facts as true, and determine simply whether the facts as alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). *See also Reynolds v. Ferrante*, 107 A.D.3d 1424, 1425 (4th Dep't 2013) (noting that court must "liberally construe[]" the pleadings and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"); *Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002) (same); *Amsterdam Hosp. Grp. v . Marshall-Alan Assocs.*, 120 A.D.3d 431, 433 (1st Dep't 2014) (same).

The Court must accept not only the material allegations of the complaint, but also whatever can be reasonably inferred therefrom in favor of the pleader. *See McGill v. Parker*,

179 A.D.2d 98, 105 (1st Dep't 1992); *Foley v. D'Agostino*, 21 A.D.2d 60, 64 (1st Dep't 1964) (on CPLR 3211(a)(7) motion to dismiss "we look to the substance rather than to the form."). This test is so liberal that the standard is simply whether the plaintiff *has* a cause of action, not even whether one has been stated. *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1st Dep't 1998). The movant has the burden to demonstrate that the pleading states no legally cognizable cause of action. *Id.*

To be entitled to dismissal pursuant to CPLR 3211(a)(1), the documentary evidence proffered by the movant must "conclusively" establish the defense as a matter of law. *Leon*, 84 N.Y.2d at 88; *New York Mun. Power Agency v. Town of Massena*, 188 A.D.3d 1517, 1518 (3d Dep't 2020).

In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits and other evidence submitted ***by plaintiffs*** to remedy any defects in the complaint. *See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 591 (2005); *Leon*, 84 N.Y.2d at 88; *Cadet–Duval v. Gursim Holding, Inc.*, 147 A.D.3d 718, 719 (2d Dep't 2017). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Guggenheimer*, 43 N.Y.2d at 275; *Wiener*, 241 A.D.2d at 120. Crucially, a Court may not consider factual allegations that ***a defendant*** raises that lie beyond the complaint. *See, e.g.*, *Gould v. United Traction Co.*, 282 A.D. 812, 812 (3d Dep't 1953) (courts may not consider "allegations of the answer" when deciding motion to dismiss); *J.A. Lee Elec., Inc. v. City of New York*, 111 A.D.3d

652, 654 (2d Dep't 2014); *Evans v. Perl*, 19 Misc. 3d 1119(A), at *9 (N.Y. Sup. 2008) (same for defendant affidavits).

In considering motions to dismiss on PLCAA grounds, the Fourth Department has advised that plaintiff's pleadings are to be "afforded a liberal construction." *See, e.g.*, *King v. Klocek*, 187 A.D.3d 1614, 1615 (4th Dep't 2020) (finding plaintiff's pleading sufficiently established that defendant committed a predicate offense, "and, as a result, establish[ed] that this action is not a qualified civil liability action and not subject to immediate dismissal"); *see also Chiapperini v. Gander Mtn. Co.*, 13 N.Y.S.3d 777, 786 (Monroe Cnty Sup. Ct. Dec. 23, 2014) ("[Defendant] claims the cited federal statutes are either 'unrelated' or 'impossible' for it to have violated, or to have proximately caused [the shooter's] crimes. Without the benefit of discovery, this court is not convinced that it can be definitively stated that all of these federal laws do not apply, or were not related to [the shooter's] ambush. Proximate cause is normally a question of fact for a jury."). As noted in *Chiapperini*, courts in the Fourth Department have allowed entire complaints to proceed through litigation having found one applicable PLCAA exception, without the need for a claim-by-claim PLCAA analysis. *See id.* (citing *Williams v. Beemiller Inc.*, 103 A.D.3d 1191 (4th Dep't 2013) ("Having found one applicable PLCAA exception, the Fourth Department allowed the entire case to go forward, including a public nuisance claim.")).

Vintage's motion falls far short of New York's stringent standard for dismissal as a matter of law.

ARGUMENT

I. Vintage's Proposed Facts Are Disputed and Inconsistent with the Complaint and Cannot be Considered.

Despite New York law to the contrary, Vintage treats this motion as one for summary judgement and improperly injects new factual allegations in its motion and List Affirmation,

including 14 exhibits. Even putting aside that these exhibits do not "conclusively" establish that Vintage is without any liability whatsoever as required by CPLR 3211(a)(1), these new statements include assertions beyond Plaintiffs' complaint and are inconsistent with Plaintiffs' complaint. The court may not consider any of those allegations or accept them as true on this pre-answer motion. *Evans*, 19 Misc. 3d at *9; *Gould*, 282 A.D. at 812.

For example, as noted above, Vintage asserts that the Tops shooter "followed YouTube instructions to illegally modify the rifle . . ." Def's Br. at 7. Yet, Plaintiffs' complaint suggests that the Tops shooter could have discussed the "lock" with the people at Vintage who sold him the rifle. *See* Compl. ¶ 501.

As another example, Vintage suggests that the "'Chuck' that [the Tops shooter] referred to is most likely Charles Sherwood, owner of Timbercreek Firearms, which operates from the same location as Vintage," and states that it is "false" to assume that "Vintage had employees." Def's Br. at 26 n.7 (citing List Aff. ¶ 11); Def's Br. at 10 n.5). Plaintiffs' complaint quotes the Tops shooter as describing "Chuck" as the seller of the Bushmaster rifle. Compl. ¶ 495 ("When I was telling the guy (Chuck?) about Matt and I's shooting experience **with the bushmaster I bought from him**") (emphasis added). Plaintiffs previously assumed that Chuck was a Vintage employee. But having been alerted to the factual conflict by Vintage's vehement denial that it has no employees, there are significant questions of fact as to "Chuck" and his involvement with Vintage which merit discovery. Notably, the Tops shooter never mentions Timbercreek Firearms in any of his extensive writings, and is clear that he spoke about his shooting experience with the same person who sold him the murder weapon. Additionally, Vintage has asked the court to consider a highly redacted and practically illegible copy of what it describes as "Vintage's acquisition and disposition records pertaining to the sale of the Subject Rifle," but has

not provided fulsome discovery, including records of the Tops shooter's other purchases from the store which the Tops shooter states were from Vintage but that Vintage says were from Timbercreek Firearms. List Aff. ¶ 8, NYSCEF Doc. No. 358. Certainly, this redacted, almost unreadable document is not "conclusive" of Vintage's lack of any cognizable liability, as is required under CPLR 3211(a)(1). *See Leon*, 84 N.Y.2d at 88.

As a third example, Vintage asserts "In his Manifesto, [the Tops shooter] later explained in detail why he believed the Subject Rifle was 'probably the worst AR-15 I could've bought for this mission.'" Def's Br. at 9 n.3 (also citing List Aff. ¶ 12, Ex. 9:61–74). Plaintiffs' complaint includes contrary statements from the Tops shooter, including that "God" had the Bushmaster XM15-E2S in mind as the prototypical AR-15, and it would be "VERY" effective for the Tops shooter's "mission." Compl. ¶ 493. If anything, Vintage's own arguments underscore that there are disputed issues of fact that are the province of a jury to resolve, not the Court on a pre-answer motion.

Lastly, as discussed *infra*, Vintage makes numerous assertions indicating that, as sold, the "Subject Rifle was compliant with New York law." *See, e.g.* Def's Br. at 4. As Plaintiffs' filings in this matter have made clear, in particular NYSCEF Doc. No. 226, the Mean Arms lock that came installed on the shooter's rifle ***defies*** New York law by aiding the illegal possession of assault weapons in violation of state law.

These are but a few of the factual discrepancies that exist between Plaintiffs' complaint and Vintage's version of events. On this motion to dismiss, this Court is obligated to accept Plaintiffs' factual allegations as true and ignore all of Vintage's purportedly contrary factual assertions, and the List Affirmation in its entirety. *Evans*, 19 Misc. 3d at *9 ("Affidavits offered in support of pre-answer motion to dismiss for failure to state a claim should not be considered

by the court."); *Gould*, 282 A.D. at 812. That so many factual conflicts exist strongly suggests that the motion to dismiss is not warranted; rather, the parties should be given a chance to develop the factual record via discovery, and Defendant will have every opportunity to move for summary judgment should it so choose once discovery is complete.

II. PLCAA Permits Plaintiffs' Claims, but at a Bare Minimum, Issues of Fact Exist as to the Application of Both Pertinent Exceptions.

Contrary to Vintage's assertions, PLCAA does not provide the company with blanket immunity for its actions surrounding this litigation. For one, Vintage has itself introduced factual disputes indicating that Plaintiffs' claims against it may not comprise a "qualified civil liability action" subject to PLCAA immunity. Moreover, even if PLCAA applies to this action, Plaintiffs' claims may still proceed because they have been brought under two PLCAA exceptions: negligent entrustment and the predicate exception.

A. Material Issues of Fact Exist Regarding Whether Plaintiffs' Action Against Vintage Is a "Qualified Civil Liability Action."

PLCAA prevents "qualified civil liability action[s]," defined as "a civil action . . . against a manufacturer or seller of a qualified product . . . for damages . . . 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)(iii). A firearm is a "qualified product." *Id.* at § 7903(4). A "seller" of a qualified product is defined 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 such as a dealer under chapter 44 of Title 18." *Id*. at § 7903(6)(B). Under 18 U.S.C. § 921(a)(11)(A), a dealer is "any person engaged in the business of selling firearms at wholesale or retail," and "chapter 44 of Title 18", i.e., 18 U.S.C. § 923, governs the process for becoming a federal firearms licensee.

Vintage has introduced questions of fact regarding whether there is a "seller" as defined by PLCAA in this action. On the one hand, Vintage concedes that it sold the Tops shooter the Bushmaster XM15-E2S. Def's Br. at 4. On the other, it asserts that the shooter's conversation about his massacre training occurred inside Vintage not with a Vintage employee, but with the owner of "Timbercreek Firearms," an entity apparently "operating out of the same location" as Vintage. Def's Br. at 9 (citing List Aff. ¶ 11). The Tops shooter described that conversation as having occurred with the same person who sold him the rifle—a detail that the shooter, who was singularly focused on planning his massacre and detailed with exacting precision how he chose each tool for his murder mission down to his socks, would recall. Compl. ¶ 495. Given that a dispute exists over who sold the murder weapon to the Tops shooter, Plaintiffs do not concede that the weapon was definitively sold by a "seller" as defined by PLCAA and required for PLCAA to apply. In any event, Vintage has introduced new information, and it would be inappropriate to dismiss Plaintiffs' action at this early juncture without permitting discovery into this issue of Defendant's raising.

B. Multiple PLCAA Exceptions Allow Plaintiffs' Claims Against Vintage to Proceed.

Even assuming that the Tops shooter's rifle was sold by a "seller" and Plaintiffs case against Vintage is therefore a qualified civil liability action for PLCAA purposes, Plaintiffs claims may still proceed under multiple PLCAA exceptions.

1. Plaintiffs' Lawsuit is Permitted Under PLCAA's Negligent Entrustment Exception.

PLCAA expressly permits lawsuits against firearms dealers for negligent entrustment. 15 U.S.C. § 7903(5)(A)(ii). PLCAA defines negligent entrustment 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 to 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). New York's "tort of negligent entrustment" has been ruled to be "based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion . . . If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee." *Chiapperini*, 13 N.Y.S.3d at 789–90 (collecting cases, and comparing PLCAA's and New York's negligent entrustment standards and not distinguishing them). *See also* Restatement (Second) of Torts § 390.

This language tracks with Plaintiffs' allegations that Vintage is liable for negligent entrustment. Compl. at Fifteenth Cause of Action; ¶¶ 654–664. Plaintiffs allege that Vintage knew or should have known that selling the Tops shooter a Bushmaster XM15-E2S would result in unreasonable danger from the use of the product. Especially at this early phase, Plaintiffs should be permitted to proceed to discovery to shed additional light on what Vintage knew about the Tops shooter. Defendant's suggestion that New York has a heightened standard on a motion to dismiss—rather than the state's actual law (i.e., the court must construe the complaint liberally, accept the pleaded facts as true, and determine simply whether the facts as alleged fit into any cognizable legal theory) is misguided and should be disregarded. *See, e.g.*, Def's Br. at 15.

Plaintiffs' allegations point to Vintage's problematic conduct. New York law requires gun sellers to take appropriate steps considering red flags indicating that a customer may use a weapon in a dangerous or illegal way. N.Y. Gen. Bus. Law § 875-e. The Tops shooter was a walking "red flag." He behaved suspiciously in his daily life, at school, and online. Compl. ¶ 658. He never attempted to hide his white supremacist ideology or his reverence for white

supremacist mass shooters. The Tops shooter's writings make clear that his deeply antisocial behaviors were a turnoff to most people he encountered. It was notable to him that Vintage was an exception, a place where people weren't "completely discussed with [his] presence." Compl. ¶ 495.

The shooter spent enough time in Vintage to think that his individual purchases were significant to the business's cash flow. He bought ammunition he could have purchased at many other locations, even though it was "**way more** than what I wanted to pay" at Vintage. Compl. ¶ 496 (emphasis added). The Tops shooter was "willing to help" Vintage "out a bit by buying this." *Id.* And, though he worried that Vintage may not still be "around after the attack," if the business didn't fail, he wanted any of his supporters to "promise me you'll buy something off him." *Id.*

Vintage emphasizes that the Tops shooter purchased the rifle "sixteen weeks" before the shooting. Def's Br. at 4, 7. But Vintage neglects to highlight that the Tops shooter did not buy the rifle and then disappear. Rather, he continued to visit Vintage and was welcomed into the store to get additional supplies and chat with folks there. Some of these products were sales, and some were even gifts. Compl. ¶ 495. Vintage is not arguing that the shooter lied or tricked them into selling him the murder weapon or any of these other products. Rather than showing Vintage's innocence, this indicates that Vintage had special knowledge or should have known more about the Tops shooter. Even the quantity of ammunition purchases is, itself, indicative of Vintage's foreseeability that the Tops shooter would remove the MA Lock and use the weapon purchased in the manner that he did. Considering that the Tops shooter continued to patronize Vintage while he was training for his murder mission, talked about training with his modified firearm, and elicited a smile from at least one person inside of Vintage, Defendant should have

heeded the warning signs, rather than continuing to sell to the Tops shooter. "The tort of 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." *Hamilton v. Beretta U.S.A. Corp*., 96 N.Y.2d 222, 236–37 (N.Y. 2001) (recognizing that "[t]he owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others").[3] What is known or should have been known is a fact-intensive process that in virtually all circumstances, like here, warrants discovery.

In *Chiapperini v. Gander Mtn. Co., Inc.* defendant gun dealer moved to dismiss negligent entrustment claims. Defendant had sold firearms to a woman accompanying the eventual perpetrator of a Christmas Eve ambush and murder of volunteer firefighters in Rochester, New York. 13 N.Y.S.3d 777, 786 (Monroe Cnty Sup. Ct. Dec. 23, 2014). The dealer provided an affidavit from its "senior director of regulatory and firearm compliance, in which he provided information about [the dealer's] unified and nationwide firearms sale training program." *Id.* at 783. The dealer also argued "that it cannot be strictly liable for [the murderer's] actions of which it had no special knowledge" and that the alleged "red flags" were "just as capable of an innocuous interpretation as they [were] a criminal one." *Id.* at 790. The court squarely rejected all those arguments, finding them "unpersuasive to require dismissal at this very early stage of the litigation." *Id.* After noting that "the criterion [on a motion to dismiss] is whether the plaintiff has a cause of action, not whether he or she properly stated one," the court permitted the

[3] In *Hamilton v. Beretta*, the court rejected a negligent entrustment claim against firearms manufacturers (not dealers) based on the court's view that there was a lack of evidence in that particular case. *Id*. at 237–38.

negligent entrustment claim to proceed under that "lenient standard." *Id.* at 784. The court empathized that the gun dealer "should have known of [the murderer's] criminality if it had taken the appropriate steps in light of the red flags"—just as Plaintiffs allege Vintage should have done here. *Id.* at 790. The court concluded that "plaintiffs should be allowed to test this claim through discovery." *Id.* So too here.

Similarly, long-standing Appellate Division precedent has also permitted negligent entrustment claims involving firearms dealers. In *Splawnik v. Di Caprio*, 146 A.D. 333, 334 (3d Dep't 1989), decedent telephoned defendant, a Sheriff's Deputy and licensed gun dealer, asking for help loading a shotgun so she could shoot a rabbit in her backyard. After further discussion, the gun dealer retrieved an out-of-reach handgun in decedent's house, loaded it, turned the safety switch off, and handed it to the decedent, who used it to commit suicide. *Id.* Like the Tops shooter, the decedent was "very depressed and anxious." *Id.* Like Plaintiffs here, it was alleged that the gun dealer "knew about decedent's physical and emotional condition due to plaintiff's frequent visits to defendant's gun shop." *Id.* Like Vintage, the gun dealer argued he had no duty (in that case, to prevent decedent's suicide). *Id.* at 335. Both the Supreme Court and Third Department denied the gun dealer's motion to dismiss, noting "the complaint creates issues of fact to be determined at trial" where it was alleged that defendant breached a duty to "someone known to have dangerous or violent tendencies." *Id.* at 336. The same factual issues exist here, and Plaintiffs' claims should likewise be permitted to proceed.

The cases on which Vintage relies are inapposite. In *Constant v. Andrew T. Cleckley Funeral Servs., Inc.*, 148 N.Y.S.3d 645 (Kings Cnty. Sup. Ct. Apr. 29, 2021), plaintiff sued both a funeral home and U-Haul for causes of actions related to the loss of her "father's remains," alleging that U-Haul owed a general duty to ensure its trucks were "being rented for lawful

purposes" and a specific duty to inquire as to the large number of U-Haul trucks rented by the funeral home. *Id.* at 647. The court explained, "[t]o establish a cause of action under a theory of negligent entrustment, a defendant, as relevant herein, 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." *Id.* at 650 (cleaned up). The Court in *Constant* ruled that Plaintiff failed to meet that burden because U-Haul is a general rental company and did not have any particular knowledge about the renter-funeral home, asserting only a generalized duty. Here, Plaintiffs have made specific allegations related to the Tops shooter that are peculiar to him, peculiarities that Vintage knew or should have known as he returned to the store multiple times over the course of planning his attack.

Moreover, unlike U-Haul trucks, which are plainly not designed to transport deceased persons, the products Vintage sells are *designed* to shoot and kill, precisely what the Tops shooter did with his Bushmaster XM15-E2S. 43,000 Americans (an average of more than 116 per day) die from gun violence every year. https://giffords.org/the-issue. As opposed to the use of U-Haul trucks in *Constant*, it is a foreseeable risk that one would use a gun to shoot someone, and guarding against that possibility is within the duty of a gun seller. What's more, in cases involving firearms like *Chiapperini* and *Splawnik*, New York Courts have ruled that negligent entrustment claims could proceed because factual questions existed. And discovery may further reveal that Vintage was not just selling firearms, but knowingly selling an illegal product, in contrast to *Constant*, where the U-Haul trucks were undisputedly legal vehicles.[4]

[4] Discovery is needed to explore Vintage's statement that "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." Compl. ¶ 502. Plaintiffs' complaint alleges "If Mean Arms had not falsely advertised its product as suitable for rendering AR firearms complaint with New York State law, Vintage would not have been able to sell [the Tops shooter] a Bushmaster XM15-E2S firearm with an easily removable lock such that he could use removable magazines to fire approximately 60 shots in approximately two minutes." Compl. ¶ 683. And yet, Vintage's own statement suggests that the company may have had actual knowledge that Mean's MA Lock did not comply with the New York SAFE Act, Penal Law §

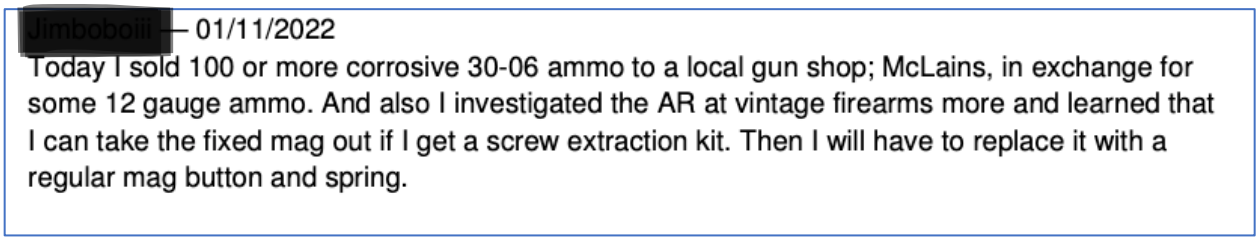
Vintage's cited cases not involving firearms also support denial. *See, e.g.*, *Graham v. Jones*, 46 N.Y.S.3d 329 (4th Dep't 2017) (denying defendant-car rental company's motion to dismiss negligent entrustment claim where plaintiff raised a triable issue of fact related to whether company had special knowledge that car renter would allow an unlicensed person to drive car); *Davis v. South Nassau Cmtys. Hosp.*, 26 N.Y.3d 563, 618 (2015) (denying defendant-hospital's motion to dismiss because hospital owed plaintiff-driver a duty to warn third-party discharged patient of potential driving impairment, because "our calculus is such that we assign the responsibility of care to the person or entity that can most effectively fulfill that obligation at the lowest cost"). Finally, *In re Academy, Ltd.*, a Texas case involving the Sutherland Springs mass shooter, should have no bearing on this court's negligent entrustment analysis, since unlike New York, "Texas does not recognize a cause of action for negligent entrustment based on the sale of property." 635 S.W.3d 19, 30 (Tex. 2021).

Regarding the New York State Police's training that Vintage completed, whether or not the Tops shooter displayed "signs of a potentially dangerous person included in the mandatory training materials" is a question of fact that cannot be resolved on a motion to dismiss. Vintage states the Tops shooter displayed "none of the signs." Def's Br. at 16. Plaintiffs have the right to probe that bald assertion with discovery, considering that all available evidence points to the fact that the Tops shooter was who he was—and consumed with his plans, he was careless about keeping them under wraps. *See, e.g.*, Compl. ¶ 216 ("I'm compromised guys! I got mail in

265.10(3). If so, Plaintiffs could allege that Vintage violated the SAFE Act as another predicate violation. As Plaintiffs' filings make clear, NYSCEF Doc. No. 226, Mean deliberately introduced a product into the New York market that undoes New York's gun safety laws by making assault weapons possessable. Of course, discovery could also reveal additional knowing violations of state and federal law, including but not limited to, consumer protection law or ATF rules.

saying I was speeding in Groveland and now my dad knows I was hours away doing something I shouldn't have. I wish I finished my manifesto and finished everything so I start the attack today. I need to destroy all evidence of my physical notes[.] Shits about to get real.").

Plaintiffs should be permitted to engage in discovery to determine the Tops shooter's behavior while he was in Vintage. Plaintiffs submit that such discovery—for example, seeking surveillance footage and taking depositions of individuals who spoke with the Tops shooter in the store—will reveal information pertinent to Plaintiffs' claims. Discovery could also reveal whether Vintage even "ask[ed] the customer questions" as the New York State Police PowerPoint advises is appropriate, as well as provide insight into other significant questions. Def's Br. at 16. For example, if Vintage claims to sell "six" assault weapons a year "at the most," is it typical for those to be sold to 18-year-olds? Compl. ¶ 523 n.233. Did the Tops shooter, an 18-year-old college freshman, fit the typical customer profile of a store that "primarily sells collectible firearms"? *Id.* Was it normal practice for Vintage to gift customers products? Why did the Tops shooter think Vintage might not still be "around" after the massacre? And when the shooter included the following entry in his diary, did the "learning" on how to remove Mean's MA Lock take place from Vintage?


[redacted] — 01/11/2022
Today I sold 100 or more corrosive 30-06 ammo to a local gun shop; McLains, in exchange for some 12 gauge ammo. And also I investigated the AR at vintage firearms more and learned that I can take the fixed mag out if I get a screw extraction kit. Then I will have to replace it with a regular mag button and spring.

Compl. ¶ 489.[5] Given the significant serious questions of fact, it would be inappropriate to grant Defendant's motion.

[5] Screenshot taken from the Tops shooter's discord diary entry quoted in the complaint. Redaction is of the Tops shooter's username.

2. Plaintiffs' Lawsuit is Permitted Under PLCAA's Predicate Exception.

PLCAA's predicate exception prevents immunity for any defendant who has knowingly violated a "State or Federal statute applicable to the sale or marketing" of a qualified product when that violation is "**a** proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). Here, as Plaintiffs allege, Vintage has violated New York statutes "applicable to the sale or marketing" of firearms, namely, New York's firearms industry accountability law, codified at General Business Law §§ 898-a–e. Compl. at Sixteenth and Seventeenth Causes of Action; ¶¶ 665–674, and that those violations proximately caused Plaintiffs' injuries. The state legislature enacted the accountability law in July 2021, almost a year before the Tops massacre, specifically to hold gun industry members accountable for harms they have brought about in New York. *See Nat'l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 55 (N.D.N.Y. 2022).

a. Plaintiffs Have Sufficiently Pled a Predicate Exception Under G.B.L. § 898-b(1).

Plaintiffs have alleged sufficient facts showing that Vintage violated § 898-b(1) by knowingly[6] contributing to a dangerous condition in New York through the sale of a qualified

[6] While § 898-b(1) prohibits "knowingly" or "recklessly" contributing to a dangerous condition, Vintage argues that only the "knowingly" standard applies because PLCAA preempts § 898-b(1). Def's Br. at 24. Vintage's argument misunderstands the requirements of § 898-b(1). Section § 898-b(1)'s reckless standard requires a showing of *criminal* recklessness, which is tantamount to knowledge. G.B.L. §§ 898-a(5) (defining "recklessly" to "have the same meaning as defined in section 15.05 of the penal law"). New York criminal law requires that, to have acted recklessly, a defendant must be "aware of and consciously disregard[] a substantial and unjustifiable risk." N.Y. Penal Law § 15.05(3); *see also United States v. Sicignano*, 78 F.3d 69, 71–72 (2d Cir. 1996) (holding that "knowledge" can be based on "awareness" of relevant facts). Thus, because § 898-b(1)'s reckless standard incorporates awareness, i.e. knowledge, it is not preempted by PLCAA's predicate exception. Moreover, a preemption analysis starts with the "assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation omitted). This presumption against preemption is especially strong in areas "traditionally occupied by the States," including the conduct governed by § 898-b(1). *United States v. Locke*, 529 U.S. 89, 108 (2000).

product. Vintage concedes that it is a "gun industry member" who sold a "qualified product" to the Tops shooter. Def's Br. at 24. The facts alleged in the complaint—and what can be reasonably inferred therefrom—are sufficient to support a finding that Vintage's conduct in selling a Bushmaster XM15-E2S to the Tops shooter equipped with an easily removeable "lock" was unreasonable and contributed to dangerous conditions present in Buffalo on May 14, 2022.

In the Tops shooter's words, he "investigated" the Bushmaster-XM at Vintage prior to purchasing it and learned that he could remove its fixed magazine. Compl. ¶¶ 488, 489. Vintage's proprietor knew that Bushmaster-XM could be easily modified into a functioning, automatic weapon more deadly than firearms allowed under New York law. Compl. ¶ 502. The day the Tops shooter purchased the firearm from Vintage along with a sling and ammunition, he further "investigated the AR they had very closely." Compl. ¶ 492. The shooter continued to patronize the store, including a month later when he spoke with someone there and discussed the training he had been doing with his weapon, from which he had already removed the fixed magazine. Compl. ¶ 495. He became friendly with Vintage employees and encouraged others to patronize Vintage, even when Vintage's prices were higher. Compl. ¶ 496. From these allegations, it can be reasonably inferred that the Tops shooter had conversations with Vintage employees on multiple occasions over the course of his meticulous planning for his attack, conversations which would have put a reasonable person on notice that he was dangerous.

Plaintiffs' allegations regarding Vintage are primarily from the Tops shooter's writings. Because they have not been afforded the opportunity of discovery, Plaintiffs do not yet know everything that was said, revealed, or implied to Vintage during its interactions with the shooter. These are facts likely in the exclusive possession of Vintage. In the interest of justice, it would be wrong to deny their § 898-b claims at this juncture based on what they have not yet had the

possibility of discovering when the facts as alleged against Vintage sufficiently support an inference that Vintage contributed to a dangerous condition in New York by selling the Tops shooter his murder weapon. *McGill*, 179 A.D.2d at 105 (Court must accept whatever can be reasonably inferred from the allegations of the complaint in favor of the pleader). Accordingly, Vintage's motion should be denied, and Plaintiffs should be afforded the opportunity to propound discover on Vintage.

b. Plaintiffs Have Sufficiently Pled a Predicate Exception Under G.B.L. § 898-b(2).

Plaintiffs have also sufficiently pled facts stating a claim against Vintage for violating § 898-b(2) by failing to institute "reasonable controls and procedures" to prevent the unlawful possession, use, sale, or marketing of firearms. The statute defines "reasonable controls and procedures" to include, among other things, "instituting screening, security, inventory and other business practices to prevent . . . sales of qualified products to . . . persons at risk of injuring themselves or others." G.B.L. § 898-a(2). Vintage clearly sold a qualified product to a person "at risk of injuring themselves or others."

The company claims nonetheless that it cannot be held liable under § 898-b(2) because it conducted a federal background check on the Tops shooter before it sold him the murder weapon and because it is not facing charges by government regulators or law enforcement in relation to the Tops shooting. Def's Br. at 28. That argument misses the mark. Under PLCAA's predicate exception, a seller can be held liable for knowing violations of a "State ***or*** Federal statute." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). The mere fact that Vintage may have complied with one requirement of federal law in no way immunizes it from its violations of state law. Section 898-b(2) requires more than the bare minimum of following federal law—it requires gun industry members who do business in New York to "establish and utilize" business practices

aimed at stemming a host of problems the presence of firearms has caused in this state, including policies to prevent firearms sales to persons at risk of injuring themselves or others. G.B.L. § 898-a(2); *see also* G.B.L. Art. 39-DDDD, Legislative Findings and intent (noting "the ease at which legal firearms flow into the illegal market, and given the specific harm illegal firearm violence causes certain New Yorkers, those responsible for the marketing of firearms may be held liable for the public nuisance caused by such activities").

Moreover, lack of criminal prosecution is not evidence of civil innocence. As addressed in *Chiapperini*, the gun dealer's "statement about never having been criminally charged in relation to the . . . sale does not foreclose civil liability, which involves a much lower standard of proof." 13 N.Y.S.3d at 788. "In our criminal justice system, the Government retains broad discretion as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Therefore, "procedural or discretionary dismissal of criminal charges prior to prosecution does not establish the factual innocence of the charged defendant." *Jackson v. City of Moline*, 2006 U.S. Dist. LEXIS 35868, at *59–60 (C.D. Ill. June 1, 2006) (citing *Ross v. Duggan*, 402 F.3d 575, 585 (6th Cir. 2004)).

As discussed, *supra*, the alleged facts support an inference that Vintage, through its interactions with the Tops shooter, contributed to a dangerous condition in New York in violation of § 898-b(1). For similar reasons, those same facts support an inference that Vintage violated § 898-b(2). Again, while Plaintiffs do not yet know what occurred in every interaction between Vintage and the Tops shooter as they have not yet been able to engage in discovery, the alleged facts show that Vintage interacted with the shooter on multiple occasions before, during, and after selling him the Bushmaster XM15-E2S, during which he was meticulously planning what would become his racist massacre. He became friendly with Vintage, and it is reasonable

to infer that his interactions put the store on notice of his dangerous disposition. Thus, Plaintiffs have sufficiently pled a § 898-b(2) claim against Vintage.[7]

3. Plaintiffs Have Alleged Facts Showing Vintage's Conduct Proximately Caused Plaintiffs' Injuries.

Vintage asserts that "Plaintiffs cannot prove proximate cause." Def's Br. at 29. Yet the cases that Vintage cites emphasize that "[t]ypically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder." *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016). *See also id.* at 529–30 ("foreseeability and proximate cause are generally questions for the fact finder"; "[p]roximate cause is, at its core, a uniquely fact-specific determination"; it is "the rare cases in which it can be determined as a matter of law.").

In *Hain v. Jamison*, the Court of Appeals built on longstanding precedent that "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the casual connection is not automatically severed." *Derdiarian v. Felix Contr. Corp*., 51 N.Y.2d 308, 315 (1980). In *Derdiarian*, a driver failed to take his epilepsy medication, suffered a seizure while diving, crashed into an excavation site and barricade, and hit a subcontractor's employee who was seriously injured by splashed boiling liquid enamel from a kettle in the work site. *Id.* at 312. The Court concluded, "we cannot say as a matter of law that defendant [driver's] negligence was a superseding cause which interrupted the link between [construction site's] negligence and plaintiff's injuries." *Id.* at 316.

[7] Regarding Vintage's assertions that claims Thirteen (loss of parental guidance), Twenty-Two (wrongful death), Twenty-Three (personal injuries), and Twenty-Four (joint and severable liability) should be dismissed because PLCAA preempts them (Def's Br. at 28–29), Plaintiffs reiterate that a factual dispute exists regarding whether PLCAA applies to this action. *Supra*, II.A. But if PLCAA does apply, because Plaintiffs have properly pled PLCAA exceptions, their entire case may proceed against Vintage. *Chiapperini*, 13 N.Y.S.3d at 786 (finding two applicable PLCAA exceptions and therefore allowing "entire complaint to proceed" including claims not brought under PLCAA exceptions); *Williams*, 103 A.D.3d at 1191 (finding one applicable PLCAA exception and allowing same).

Defendant construction company had argued that "plaintiff was injured in a freakish accident, brought about solely by [the epileptic driver's] negligence, and therefore there was no causal link, as a matter of law, between [conditions at the worksite] and plaintiff's injuries." *Id.* at 314. Vintage similarly argues that the Tops shooter's "intervening criminal action" was not "foreseeable." Def's Br. at 29. The Court of Appeals rejected defendant's arguments in *Derdiarian*, asserting that "a prime hazard" associated with the construction company's "dereliction" was the possibility that a driver's negligence could injure someone. 51 N.Y.2d at 316. Here, Vintage's "dereliction" in selling the Tops shooter a Bushmaster XM15-E2S created a "prime hazard" that he would execute the massacre he was planning. "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent." *Id.* Furthermore, where Vintage has encouraged this Court to consider a new set of facts, they can hardly claim "only one conclusion may be drawn from the established facts." *Hain*, 28 N.Y.3d at 530. Rather, Vintage "'put in motion' or significantly contribute[d] to" Plaintiffs' harms by handing the Tops shooter a deadly assault weapon that enabled him to perpetrate the massacre. *Hain*, 28 N.Y.3d at 531–32; *Derdiarian, supra* (no intervening act where the injury "flows" from the defendant's initial conduct).

III. G.B.L. § 898-b Is Constitutional as Applied to Vintage.

A. G.B.L. § 898-b Is Not Unconstitutionally Vague.

Neither prong of § 898-b is unconstitutionally vague because both provide "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007). Indeed, as the U.S. District Court for the Northern District of New York correctly held in dismissing a void-for-vagueness challenge to § 898-b, the law provides "clear 'common understanding and practices' of what type of conduct [it]

prohibits." *James*, 604 F. Supp. 3d at 68 (quoting *United States v. Holloway*, No. 20-578, 2022 U.S. App. LEXIS 4077, 2022 WL 453370, *3 (2d Cir. Feb. 15, 2022)).

1. *Section 898-b(1).* Section 898-b(1) requires Vintage to refrain from acting unlawfully or unreasonably to contribute to dangerous conditions through its gun sales. Section 898-b(1) closely tracks the language of New York's longstanding criminal public nuisance law, which imposes liability on any person who, "[b]y conduct either unlawful in itself or unreasonable under all the circumstances, [] knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons." N.Y. Penal L. § 240.45.1. The public nuisance statute has been good law since 1965, and has "never been held to be void-for-vagueness itself, but its over fifty years of existence elucidates and narrows the application of § 898-b(1)." *James*, 604 F. Supp. 3d at 68; *see also id.* at 67 (rejecting vagueness challenge because "[c]ourts regularly provide meaning to the term unreasonable"). Indeed, public nuisance statutes containing language similar to § 898-b(1) have long been a part of American law, and have been repeatedly upheld against vagueness challenges. *See, e.g.*, *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 316 P.3d 707, 714–16 (Kan. 2013) (upholding against vagueness challenge statute prohibiting "by act, or by failure to perform a legal duty, intentionally causing or permitting a condition to exist which injures or endangers the public health, safety or welfare"); *Peoples v. Speedway*, 2007 U.S. Dist. LEXIS 111645 (S.D. Ind. Feb. 16, 2007) (upholding Indiana public nuisance statute on a void-for-vagueness challenge).

Section 898-b(1), moreover, need not provide "mathematical certainty" because the Due Process Clause permits states to enact rules with "flexibility and reasonable breadth." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see also Orlando Sports Stadium, Inc. v. State*, 262 So. 2d 881, 884 (Fla. 1972) (dismissing due process challenge to Florida's public nuisance

statute and noting that "an attempt to enumerate all nuisances would be almost the equivalent as an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights").

Despite New York's longstanding history of holding companies accountable for contributing to public nuisances, Vintage argues that § 898-b(1) is unconstitutionally vague as applied to it because "it is unclear what constitutes a dangerous 'condition' that Vintage might have mistakenly created, maintained, or contributed to." Def's Br. at 32. That assertion is incredulous given the facts of this case. Plaintiffs have alleged that Vintage sold a firearm with an easily removeable lock to the Tops shooter when its interactions with the shooter provided the company reason to believe he was dangerous. Compl. ¶¶ 491, 492, 495, 496. The Tops shooter then removed the lock and used the firearm Vintage sold him to murder ten Black people and injure three in approximately two minutes. Compl. ¶ 39. The "dangerous condition" Plaintiffs have alleged that Vintage "contributed to" is glaringly apparent. Plaintiffs should be allowed to proceed with discovery to determine what Vintage knew or did not know about the Tops shooter and to what extent they contributed to the dangerous conditions present in Buffalo on May 14, 2022.[8]

2. *Section 898-b(2).* Section 898-b(2) requires firearms retailers to institute "reasonable controls and procedures" to prevent the unlawful possession, use, sale, or marketing of firearms. The statute defines "reasonable controls and procedures" to include, among other things,

[8] In an attempt to shoehorn the First Amendment into a defense, Vintage mischaracterizes Plaintiffs' § 898-b(1) allegations. Plaintiffs do not allege that merely "engaging in conversations with [the Tops shooter]" amounted to a violation of § 898-b(1). Def's Br. at 32. Plaintiffs allege that Vintage breached its duty not to contribute to a dangerous condition in New York through the sale or marketing of firearms. While the company's conversations with the shooter likely did not on their own violate § 898-b(1), it is Vintage's *actions* during and after the course of those conversations—for example, selling the shooter an AR-15 with an easily removeable lock, gifting him ammunition, failing to warn anyone of his propensity for danger—that Plaintiffs allege contributed to dangerous conditions in Buffalo.

"instituting screening, security, inventory and other business practices to prevent . . . sales of qualified products to . . . persons at risk of injuring themselves or others." G.B.L. § 898(a)(2). Plaintiffs have squarely alleged a violation of § 898-b(2)—that Vintage failed to sufficiently institute business practices to prevent the sale of its firearm to the Tops shooter when he was at risk of injuring others. That they have "never specified" a procedure that Vintage was lacking (Def's Br. at 33) is of no merit because any definition of "reasonable controls," no matter how narrow, would include not selling a Bushmaster XM-15 rifle with an easily removeable "lock" to someone a retailer has reason to believe intends to use that weapon for unlawful purposes.

Vintage appears to be attacking § 898-b(2)'s inclusion of the word "reasonable" as an unconstitutionally vague standard. But the case law is clear that a "reasonable" standard does not render a statute unconstitutionally vague. *See e.g.*, *United States v. Krumrei*, 258 F.3d 535, 538 (6th Cir. 2001) ("[A] statute is not void-for-vagueness merely because it uses the word 'reasonable' or 'unreasonable'"). Indeed, judges and juries in a variety of settings are regularly asked to determine whether a defendant acted reasonably under the circumstances. *See e.g.*, *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 315 (1994) ("'[R]easonableness' is a guide admitting effective judicial review in myriad settings, from encounters between the police and the citizenry . . . to the more closely analogous federal income tax context."); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 292 (Pa. 1975) ("Many standards in the law are no more definite than a requirement of 'reasonableness.'").

Accordingly, Vintage's void-for-vagueness arguments should be denied.

B. G.B.L. § 898-b Does Not Infringe Upon the Second Amendment.

Allowing Plaintiffs to pursue G.B.L. § 898-b claims against Vintage will not infringe upon the Second Amendment because Vintage does not have a constitutional right to sell firearms. While the Second Amendment has been interpreted to protect the right of individuals

to own firearms, it has never been interpreted to confer a freestanding right to *sell* arms. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134 (2022) ("'bear arms' refers to the right to 'wear, bear, or carry . . . for the purpose . . . of being armed and ready . . . in a case of conflict'" (quoting *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008)); *Gazzola v. Hochul*, No. 22-3068-cv, 2023 U.S. App. LEXIS 32547, at *17 (2d Cir. Dec. 8, 2023); *see also Drummond v. Robinson Twp.*, 9 F.4th 217, 230 (3d Cir. 2021) ("We know of no court, modern or otherwise, to hold that the Second Amendment secures a standalone right to *sell* guns[.]"); *Teixeira v. County of Alameda*, 873 F.3d 670, 683 (9th Cir. 2017) (en banc) ("Nothing in the text of the Amendment, as interpreted authoritatively in *Heller*, suggests the Second Amendment confers an independent right to sell or trade weapons."). Indeed, in *Heller*—the seminal decision holding that the Second Amendment protects an individual's right to possess a firearm outside of the military—the Supreme Court stressed that "nothing in [the]opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. In short, as a retail business, Vintage does not have Second Amendment rights. Because Vintage claims a burden on conduct squarely outside the Second Amendment's scope, the analysis "stop[s] there." *Bruen*, 142 S. Ct. at 2126.[9]

[9] Even if Vintage could invoke a Second Amendment right on behalf of its customers, section 898-b "only has an attenuated impact on Second Amendment rights, if any" because the statute "does not directly 'regulate the right of the people to keep and bear Arms.'" *James*, 604 F. Supp. 3d at 67 (granting motion to dismiss facial challenge to § 898). Plaintiffs' interpretation of § 898-b under the facts of this case—that a firearms retailer contributes to dangerous conditions by selling an AR-15 with an easily removeable lock to a customer when the retailer knew of or was willfully blind to that particular customer's dangerous propensities—does not "creat[e] an outright legal prohibition against the selling of AR-15s." Def's Br. at 34. And even if did, AR-15s and other assault weapons are not constitutionally protected. *See Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1179 (7th Cir. 2023) (finding state and local assault-weapon restrictions likely constitutional and rejecting argument that mere ownership numbers establish weapon's constitutional protection); *Hartford v. Ferguson*, No. 3:23-cv-05364, 2023 WL 3836230, at *7 (W.D. Wash. Jun. 6, 2023) (denying preliminary injunction in challenge to state assault-weapon restriction); *Grant v. Lamont*, No. 3:22-cv-01223, 2023 WL 5533522, at *1 (D. Conn. Aug. 28, 2023) (same).

C. No Stay as to Vintage Should be Imposed Unless this Court Dismisses Every Claim Against Vintage Except Those Invoking G.B.L. § 898.

Plaintiffs have brought seven causes of action against Vintage in this litigation (Thirteen, Fifteen, Sixteen, Seventeen, Twenty-Two, Twenty-Three, and Twenty-Four). Only two of those causes of action invoke § 898 (Sixteen and Seventeen). Thus, if the Court denies Vintage's motion to dismiss any cause of action other than those invoking § 898, the case should not be stayed, and Plaintiffs should be allowed to propound discovery on Vintage. If the Court grants Vintage's motion in its entirety except for on Causes of Action Sixteen and Seventeen, Plaintiffs agree that the proceedings against Vintage should be stayed until the Second Circuit issues an opinion in the pending facial challenge to § 898.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Vintage's motion in full.

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 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.

CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. 202.8-b(c)

Index No.: 805896/2023

I hereby certify pursuant to 22 N.Y.C.R.R. 202.8-b(c) that the word count of the attached memorandum of law is 9,835 words, exclusive of the material omitted under 22 N.Y.C.R.R. 202.8-b(b), in compliance with the word-count limit set forth in the agreement between counsel memorialized via e-mail on October 23, 2023.

DATED: December 18, 2023

/s/ John V. Elmore, Esq.
JOHN V. ELMORE, ESQ.