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

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

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Defendant Vintage Firearms, LLC ("Vintage") submits this memorandum of law in reply to Plaintiffs' Opposition (NYSCEF Doc. 390)("Opp.") to Vintage's Motion to Dismiss Complaint or, in the Alternative, Stay the Pending Proceedings (referred to as Vintage's "Motion to Dismiss" herein). For the reasons set forth herein, and within Vintage's memorandum supporting its Motion to Dismiss, all of Plaintiffs' claims against Vintage should be dismissed.

I. SUMMARY OF REPLY

The primary thrust of Plaintiffs' opposition to Vintage's Motion to Dismiss[1] is their argument that Plaintiffs might possibly find a factual basis to claim exception to the PLCAA in discovery, so therefore, they should be permitted to proceed. *See* Opp. p. 3. Such an argument is fundamentally flawed. Plaintiffs' claims are squarely preempted by the Protection of Lawful Commerce in Arms Act (the "PLCAA"), 15 U.S.C. §§7901-7903, which specifically states that "qualified civil liability actions" like the instant case "may not **be brought** in any Federal or State court." 15 U.S.C. §7902(a)(emphasis added). Plaintiffs' Complaint fails to allege specific facts to establish an exception to the PLCAA, and the PLCAA does not authorize costly fishing expeditions (in fact, its expressly prohibits them). 15 U.S.C. §§7901, 7902. Therefore, Vintage is entitled to immediate dismissal. *Id*.

At this juncture, Plaintiffs are entitled to the assumption that the factual allegations in their Complaint are true and are accorded every favorable inference. "Such favorable treatment, however, 'is not limitless.'" *Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC*, 64 N.Y.S.3d 389 (2017), aff'd, 31 N.Y.3d 1090 (2018)(*citing Tenney v. Hodgson Russ*, LLP, 97

[1] Plaintiffs fictitiously cast Vintage's Motion to Dismiss as a motion for summary judgment despite Vintage's Motion centering around Plaintiffs' sparse factual allegations. Although Vintage is confident it would win on a Motion for Summary Judgment, Vintage seeks to avail itself of the protection afforded it by the PLCAA to avoid incurring financial ruin in defense of baseless accusations- just as Congress intended. *See* 15 U.S.C. §§7901, 7902.

A.D.3d 1089, 1090 (2012)(Explaining that "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration"). As explained by the Third Department:

> "Notwithstanding the broad pleading standard, **bare legal conclusions with no factual specificity** do not suffice to withstand a motion to dismiss."

Id.(emphasis added)(Citing *Godfrey v Spano*, 13 N.Y.3d 358, 373 (2009)(further citation omitted).

"Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" *Id.*(Quoting *Connaughton v Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).

In their opposition, Plaintiffs continue making bald legal conclusions without alleging a sufficient factual basis. To meet the negligent entrustment exception to the PLCAA, Plaintiffs were required to allege specific facts demonstrating Vintage had "special knowledge" Peyton Gendron ("Gendron") was likely to use the Bushmaster XM-15E2S (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). Plaintiffs failed to provide such facts, but instead allege without explanation: "Vintage's conduct here certainly fits that profile." Opp. p. 3, et al.

To meet the predicate exception to the PLCAA, Plaintiffs needed to allege facts demonstrating Vintage "*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." §7903(5)(A)(iii)(emphasis added). Plaintiffs reference G.B.L. §898, but fail to specify alleged conduct by Vintage that violated the law. In pursuit of their claim for violation of §898-b(2), Plaintiffs baldly allege: "Vintage Firearms failed to establish reasonable controls to prevent

the sale, possession, and illegal use of its Bushmaster XM15-E2S rifle," without ever alleging what "reasonable controls" Vintage was purportedly lacking. *Plaintiffs' Verified Complaint*[2], ¶672-674 et al., May 12, 2023. Plaintiffs further allege Vintage knowingly violated §898-b(1), when it legally sold the Subject Rifle to Gendron, but fail to specify how Vintage knowingly "contributed to a dangerous condition." There are no factual allegations establishing that Gendron, who passed a NICS background check[3], communicated or acted in a manner to put Vintage on notice he intended to carry out violence or otherwise criminally misuse the Subject Rifle. Essentially, Plaintiffs seek to prohibit the sale of AR-15s in New York all together by establishing such sales as an automatic violation of §898-b(1).

The PLCAA does not permit costly and time-consuming discovery in connection with a qualified civil liability case unless an exception to the general prohibition is properly supported with factual allegations at the outset. "For the claims to survive a motion to dismiss, an exception to the statute must apply." *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F. Supp. 3d 425, 445 (D. Mass. 2022).

The PLCAA does not permit the continuation of prohibited litigation based upon speculation that Plaintiffs could possibly find supporting facts in discovery. *See* Opp. p. 18. If such were the case, the purpose of the PLCAA would be undermined because licensed firearm sellers, who Congress intended to immunize, would be subjected to costly litigation in every qualified civil liability case. Further, discovery "is not intended to be a fishing expedition, but rather is meant

[2] Hereinafter cited as "Compl. ¶_".

[3] As depicted on Gendron's Firearm Transaction Form (the "4473"), a form kept in the usual course of business as required by federal law (28 CFR § 25.1 et seq.), submitted as Exhibit 5 to Vintage's Motion, Gendron passed the background check conducted by the FBI's National Instant Criminal Background Check System ("NICS") before being transferred the Subject Rifle on January 19, 2022.

to allow the parties to flesh out allegations for which they initially have at least a modicum of objective support." *Cleveland-Goins v. City of New York*, 1999 WL 673343, at *2 (S.D.N.Y. Aug. 30, 1999).

Plaintiffs pursue liability against Vintage simply because it legally sold the Subject Rifle to Gendron, who misused the Subject Rifle sixteen weeks later when he engaged in intentional criminal conduct. Plaintiffs' action is precisely the type that Congress preempted with the PLCAA. *See* 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. Therefore, Vintage is entitled to dismissal as a matter of law.

II. ARGUMENT

"**A qualified civil liability action may not be brought in any Federal or State court.**" 15 U.S.C. §7902(a).

The PLCAA directly prohibits Plaintiffs from proceeding with the instant action against Vintage. It is beyond genuine dispute that Plaintiffs' action against Vintage, a licensed seller of a qualified product (the Subject Rifle), for damages resulting from Gendron's criminal misuse of the qualified product, is a "qualified civil liability action" preempted by federal law. *See* 18 U.S.C. §7903(5). Just as the District of Massachusetts explained recently in the case of *Estados Unidos Mexicanos v. Smith & Wesson Brands*, *Inc*.:

> There is no doubt that the general prohibition of the PLCAA applies to this lawsuit. It is unquestionably a "qualified civil liability action"—that is, "a civil action or proceeding ... brought by any person against a manufacturer or seller" of a firearm "for damages, punitive damages, injunctive or declaratory relief," or other relief, "resulting from the criminal or unlawful misuse" of a firearm by the person or a third party." 15 U.S.C. § 7903(5)(A). Such a lawsuit "may not be brought in any Federal or State court." *Id*. § 7902(a). Accordingly, **for the claims to survive a motion to dismiss, an exception to the statute must apply.**

633 F. Supp. at 445(emphasis added).

Plaintiffs' Complaint is devoid of specific factual allegations establishing the negligent entrustment or predicate exceptions to the PLCAA, so it must be dismissed. 15 U.S.C. §§7902, 7903. Unlike the cases cited by Plaintiffs, which were permitted to proceed upon specific factual allegations that objectively constituted violations of predicate statutes, the instant Plaintiffs have not alleged specific conduct by Vintage that violated the law, nor have they alleged facts to demonstrate Vintage had special knowledge Gendron was dangerous and planned to hurt people. *See King v. Klocek*, 187 A.D.3d 1614 (2020)(Alleged facts established knowing illegal sale of handgun ammunition to someone under the age of 21 in violation of 18 U.S.C. §922(b)(1) and N.Y. Penal Law § 270.00(5)); *Chiapperini v. Gander Mountain Co.,* 13 N.Y.S.3d 777, 780 (N.Y. Sup. Ct. 2014)(Alleged facts established knowing illegal straw purchase to a prohibited person in violation of 18 U.S.C. §922(g) et. al).

Congress explicitly found that sellers such as Vintage: "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). For that reason, Congress halted lawsuits exactly like this one; "**commenced against** manufacturers, distributors, **dealers**, and importers of firearms that operate as designed and intended, **which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals**." 15 U.S.C. §7901(a)(3)(emphasis added).

The PLCAA mandates immediate dismissal of Plaintiffs' lawsuit.

A. The PLCAA Immunizes Vintage and Preempts Plaintiffs' Claims, it is Not Simply a Defense for Vintage to Raise After Discovery

The PLCAA specifically immunizes Vintage from the commencement of the instant lawsuit. 15 U.S.C. §§7901(a)(3), 7902(a). If Plaintiffs' qualified civil liability action against Vintage is permitted to continue, the small firearm retailer will be subjected to exactly the sort of

scenario the PLCAA was designed to avoid; costly litigation arising from the criminal actions of a third party. *See* 15 U.S.C. §§7901,7903. The PLCAA confers Vintage an immunity from being sued in actions like the instant one; it is not simply a defense. As Plaintiffs' Counsel Giffords Law Center explains on its website, the PLCAA "provides **broad immunity**" to licensed sellers of "firearms, ammunition, or component parts of a firearm or ammunition.[4]" (emphasis added).

As explained by the U.S. Court of Appeals for the Ninth Circuit:

> "The PLCAA generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products. The PLCAA affects future and pending lawsuits, and **courts are required to 'immediately dismiss[ ]' any pending lawsuits preempted by the PLCAA**."

Ileto v. Glock, Inc., 565 F.3d 1126, 1131 (9th Cir. 2009)(Citing 15 U.S.C. §7902(b))(emphasis added).

Despite the PLCAA entitling Vintage to immediate dismissal, Plaintiffs repeatedly argue that discovery should proceed so they can search for facts supporting their foundationless claims. Opp. p. 2-3,7-12,14,16-18,20,22,26,29. In a nutshell, Plaintiffs contend that because Gendron was harboring racist ideology, was secretly planning an attack, shopped at Vintage, purchased the Subject Rifle from Vintage sixteen weeks prior to the attack, and had friendly interactions at Vintage, Vintage must have known Gendron was dangerous and is therefore liable for selling him the Subject Rifle. Plaintiffs base their claim for liability upon nonspecific conjecture.

Without alleging any particular way that Vintage purportedly held "special knowledge" about Gendron's propensity to use the Subject Rifle in an improper manner creating "unreasonable risk of physical injury," Plaintiffs argue Vintage's Motion should be denied "so discovery can

[4] https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/ (Subsection entitled "Summary of Federal Law")

proceed to uncover the truth about the relationship between Vintage and the Tops shooter." Opp. p. 3; S*ee* 15 U.S.C. § 7903(5)(B); *See also Graham*, 46 N.Y.S.3d at 330; *Hamilton,* 96 N.Y.2d at 236. Again, in a seeming admission that they have no basis to assert that Vintage ignored "warning signs," Plaintiffs argue: "Plaintiffs should be permitted to engage in discovery to determine the Tops shooter's behavior while he was in Vintage." Opp. p. 18. Plaintiffs further argue: "Defendant will have every opportunity to move for summary judgment should it so choose once discovery is complete." Opp. p. 10.

Plaintiffs miss the point of the PLCAA entirely. It is not merely a defense to be raised after discovery has been completed. The PLCAA immunizes Vintage from being the target of a "qualified civil liability action" in the first instance. It requires "immediate dismissal." *Ileto,* 565 F.3d at 1131(Citing 15 U.S.C. §7902(b)). It does not authorize Plaintiffs to use discovery to go fishing for possible exceptions to the PLCAA that Plaintiffs cannot support at the outset. *See Estados Unidos Mexicanos*, 633 F. Supp. 3d at 445("[F]or the claims to survive a motion to dismiss, an exception to the [PLCAA] must apply.") The focus of the PLCAA is to protect firearm retailers like Vintage from being subjected to costly litigation arising from the criminal conduct of third parties. Plaintiffs' claims require immediate dismissal pursuant to the plain text of the law. 15 U.S.C. §7902(a).

B. Plaintiffs Have Not Alleged Facts Establishing Any Exception to the PLCAA

"Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" *Mid-Hudson Valley Fed. Credit Union, 6*4 N.Y.S.3d at 389 (Quoting *Connaughton*, 29 N.Y.3d at 142).

Even when taking Plaintiffs' allegations as true for purposes of Vintage's Motion, Plaintiffs have stated insufficient facts to conclude that any exception to the PLCAA is applicable. When determining a Motion to Dismiss, although Plaintiffs' alleged facts are entitled to the benefit of every favorable inference, "[t]he allegations of the pleading cannot be vague and conclusory [ ] but must contain sufficiently particularized allegations from which a cognizable cause of action reasonably could be found." *V. Groppa Pools, Inc. v. Massello*, 964 N.Y.S.2d 563, 564–65 (2013)(citing *Mazzei v. Kyriacou*, 98 A.D.3d at 1090). The favorable treatment afforded to Plaintiffs at this juncture "is not limitless" and "[n]otwithstanding the broad pleading standard, **bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss**." *Mid-Hudson Valley Fed. Credit Union*, *PLLC*, 64 N.Y.S.3d at 389(emphasis added); *See also Tenney*, 97 A.D.3d at 1090(Explaining that "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration"). Further, statements made "upon information and belief" must be supported by a good-faith basis that is specified by Plaintiffs. *Lipsky v. Com.-Pac., Inc.*, 134 N.Y.S.2d 147, 150 (Sup. Ct. 1954)(Explaining that facts alleged by a plaintiff "upon information and belief" must provide sources of claimed knowledge.)

In the instant matter, Plaintiffs have failed to provide specific factual allegations that, when assumed to be true, would establish the negligent entrustment or predicate exception to the PLCAA. Therefore, the PLCAA's general preemption of qualified civil liability actions applies and Plaintiffs are prohibited from subjecting Vintage to a costly discovery exercise in search of an exception. Pursuant to the PLCAA, Plaintiffs' claims "may not be brought in any Federal or State Court" and must be immediately dismissed. 15 U.S.C. §7902; *See also Ileto*, 565 F.3d at 1131.

i. Plaintiffs Have Failed to Sufficiently Allege Facts to Establish the Negligent Entrustment Exception to the PLCAA

In order to establish the negligent entrustment exception to the PLCAA, Plaintiffs must allege sufficient facts to meet the elements of a negligent entrustment claim pursuant to both New York law and the definition within the PLCAA. 15 U.S.C. §7903(5)(A)(ii). The PLCAA does not create a cause of action for negligent entrustment, it simply permits such claims to proceed under independent state law if certain elements are met. 15 U.S.C. §7903(5)(C); *see also Ileto*, 565 F.3d at 1131, 1135-36 (the "only function of the PLCAA is to preempt certain claims"); *Phillips v. Lucky Gunner*, *LLC*, 84 F. Supp. 3d 1216, 1225 (D. Colo. 2015) ("Although the PLCAA identifies negligent entrustment as an exception to immunity, it does not create the cause of action.")

To properly state a cause of action for negligent entrustment in New York, facts must be alleged that establish:

1. The Defendant has special knowledge concerning a characteristic or condition of the person to which the chattel is entrusted;

2. Based upon the Defendant's special knowledge, the Defendant knows or should know that the person has a propensity to use the chattel in an improper or dangerous fashion; and

3. The Defendant entrusts the chattel to the person notwithstanding.

Monette v. Trummer, 964 N.Y.S.2d 345, 348 (2013); *Cook v. Schapiro*, 871 N.Y.S.2d 714 (2009); *Stanley*, 173 N.Y.S.3d at 752 (citation omitted).

The 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 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).

Plaintiffs cannot meet the negligent entrustment exception to the PLCAA because they have failed to provide any facts from which to conclude Vintage had "special knowledge" concerning Gendron and knew, or reasonably should have known, that Gendron was likely to use

the Subject Rifle in an improper or 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.

Plaintiffs have alleged: "[t]here were numerous 'red flags' surrounding Payton Gendron's interactions with others overall" and that Vintage "should have been aware of the warning signs and risks of selling a high-powered rifle to Payton Gendron." Compl. ¶654-664. Despite such conclusory statements, Plaintiffs provide no specific allegations detailing that Gendron ever communicated or acted in a manner during his visits to Vintage that would have provided Vintage with special knowledge of his propensity to use the Subject Rifle in an improper or dangerous manner. 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. Compl. ¶¶481-502, 654-664. Plaintiffs have not alleged that he acted nervously, disinterested, unusually, or like he was in a rush. *Id.* According to Plaintiffs, he had relevant conversation about target shooting when he visited Vintage on February 23, 2022[5], a month after he purchased the Subject Rifle. *Id*. Plaintiffs have not alleged that Gendron acted in an alarming manner while he visited Vintage or otherwise put Vintage on notice of his propensity to engage in a criminal act of violence[6]. *Id.*

[5] It is unclear why Plaintiffs reference Gendron visiting Vintage twice after purchasing the Subject Rifle (February 23, 2022 & March 3, 2022). Vintage's interactions with Gendron after the date of the alleged "entrustment," although described innocuously, are irrelevant to the negligent entrustment analysis.

[6] As noted in Vintage's memorandum supporting its Motion to Dismiss and included at Exhibit 14 therewith, pursuant to G.B.L. §875-e, New York now conducts required annual training with FFLs, which includes how to spot a potentially dangerous person. The training's description of a potentially dangerous person further highlights Plaintiffs' failure to allege sufficient facts for their negligent entrustment claim. Plaintiffs criticize Vintage for including such training materials, and then simultaneously attempt to utilize §875-e against Vintage in a conclusory way, despite §875-e not becoming effective until December 2, 2023, long after Vintage sold Gendron the Subject Rifle. *See* Opp. p. 12,17,18.

The case of *Phillips v. Lucky Gunner, LLC*, is informative to the instant analysis. 84 F. Supp. 3d at 1220-1225. In that case, Plaintiffs argued that Lucky Gunner was liable for negligent entrustment because it sold thousands of rounds of ammunition to an individual through an online order, without engaging in any vetting process, who later used the ammunition to carry out a mass shooting in Aurora, Colorado. *Id*. Much like the standard for negligent entrustment in New York, a supplier of chattel in Colorado is liable for negligent entrustment if such supplier has special knowledge from which the supplier "knows or has reason to know" the recipient will likely use the chattel "in a manner involving unreasonable risk of physical harm to himself and others." *Id*. at 1225. Again like New York, in Colorado there is no general duty "to control the conduct of a third person" to prevent harm to others, nor is there a duty to investigate the background of the person to whom chattel is entrusted. *Id*. at 1225-1227(citation omitted); *Hamilton,* 96 N.Y.2d at 233; *See also Constant v. Andrew T. Cleckley Funeral Servs., Inc.,* 148 N.Y.S.3d 645 (N.Y. Sup. Ct. 2021); *Cook*, 58 A.D.3d at 664.

In *Phillips*, the U.S. District Court for the District of Colorado dismissed Plaintiffs' claims in their entirety, finding Plaintiffs failed to sufficiently allege facts establishing the elements of negligent entrustment under both Colorado law and the PLCAA, as is necessary to establish exception from the PLCAA's general preemption of qualified civil liability claims. *Phillips*, 84 F. Supp. 3d at 1225. Pursuant to the PLCAA, the Court explained that Plaintiffs failed to allege facts demonstrating that Lucky Gunner "had 'actual knowledge' of [the shooter's] mental condition or his intentions" and failed to alleged facts demonstrating that Lucky Gunner "reasonably should have known anything about [the shooter's] purposes in making his online purchases." *Id*. at 1225–26.

In the matter at hand, the facts favor dismissal to an even greater extent than in the *Phillips* case. In the instant case, Vintage conducted an FBI background check on Gendron, which he passed. Additionally, unlike Lucky Gunner, Plaintiffs allege that Vintage had conversations with Gendron, but fail to make any specific allegation that Plaintiff communicated or acted in a way to provide Vintage with special knowledge of his propensity to use the Subject Rifle in an improper or dangerous manner involving unreasonable risk of physical injury.

Because Plaintiffs have failed to allege specific facts demonstrating each element of the negligent entrustment exception to the PLCAA, like the *Phillips* case, the instant case should be immediately dismissed. *See Mid-Hudson Valley Fed. Credit Union, 6*4 N.Y.S.3d at 38. ("Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim.").

ii. Plaintiffs Have Failed to Sufficiently Allege Facts to Establish the Predicate Exception to the PLCAA

Plaintiffs have alleged insufficient facts to establish the predicate exception to the PLCAA. Therefore, Plaintiffs' action against Vintage must be dismissed. 15 U.S.C. §7902(a).

To establish the predicate exception, Plaintiffs were required to allege facts that, when assumed true, establish the following elements:

> 1. The firearm dealer knowingly 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)(emphasis added); *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.

As explained in greater detail within Vintage's memorandum supporting its Motion to Dismiss, Plaintiffs attempt to rely on G.B.L. §898 to establish the predicate exception but, even assuming for the sake of argument that §898 is a proper predicate statute, Plaintiffs have not sufficiently alleged facts to demonstrate a knowing violation by Vintage, nor have they established proximate cause of Plaintiffs' claimed harm. Plaintiffs make conclusory allegations, such as claiming Vintage violated §898-b(2) when it "failed to establish reasonable controls to prevent the sale, possession, and illegal use of its Bushmaster XM15-E2S rifle." Compl. ¶674. Yet, Plaintiffs never specify what "reasonable controls" were allegedly required by law but lacking at Vintage, nor do they allege facts from which a knowing violation could be found. *See Id.* at ¶671-674 & Compl. generally.

Plaintiffs hollowly conclude, with grossly insufficient supporting factual detail, that Vintage violated §898-b(1) by "contributing to a condition that endangered the New York state public through its sale of a Bushmaster XM15-E2S to Gendron" and "it was unreasonable for Vintage Firearms to sell an AR-15 to Gendron." Compl. ¶668-670. Plaintiffs go on to baldly claim: "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[7]." *Id*.

[7] Plaintiffs' vague allegations against Vintage concerning discussions it allegedly had with Gendron about his modified Subject Rifle have morphed over time. First, Plaintiffs claimed Vintage discussed the Subject Rifle with Gendron after he modified it and had "discussed the lock" with Gendron. Compl. ¶499, 501. Later in the Complaint, within the Count for alleged violation of §898-b(1), Plaintiffs first claimed Vintage had conversation with Gendron about how he "might modify" the Subject Rifle and then discussed the modified rifle with Gendron after he modified it. *Id*. at ¶670. Now that Plaintiffs are facing a motion to dismiss, Plaintiffs allege, upon unspecified "information and belief," that Gendron "discussed the lock's removal within the Vintage store." Opp. p. 2, 18. Plaintiffs even snip a small section of Gendron's Discord Diary to make it appear as though he might have learned to modify the Subject Rifle at Vintage, while removing multiple earlier entries on the same date where Gendron details learning to remove the lock from YouTube and includes the removal instructions from the Mean MA package. Plaintiffs squarely assert in their Complaint that Gendron learned to remove the device from YouTube (¶487, 513-520) and instructions included in Mean Arms packaging. *Id*. at ¶525 ("Gendron followed Mean Arms's explicit lock removal instructions, doing just as

Plaintiffs entirely fail to allege facts specifying how Vintage "knowingly" acted in an unreasonable or unlawful fashion and knowingly "created, maintained, or contributed to a dangerous condition" by selling the Subject Rifle to Gendron, after he passed a background check. Plaintiffs further do not allege how Vintage "knowingly" acted in an unlawful or unreasonable manner and knowingly "created, maintained, or contributed to a dangerous condition" by purportedly discussing with Gendron how he might modify the Subject Rifle and/or discussing the Subject Rifle with Gendron after he had modified it. Plaintiffs fail to specify what they claim was discussed, their allegations have continually morphed over time, and they simultaneously place blame directly onto YouTube and Mean Arms for supplying the alleged "modification instructions." *See* Compl. ¶487, 513-525, 681, 684; *see also Lipsky*, 134 N.Y.S.2d at 150(Explaining that facts alleged "upon information and belief" must provide sources of claimed knowledge). Plaintiffs supply no basis to find Vintage knowingly violated §898-b(1).

Additionally, it would not be unlawful for Vintage to discuss how to remove the Mean MA locking device with Gendron, particularly where the device could be removed for lawful purposes such as converting the rifle to a "featureless" variety that could legally accept detachable magazines in New York. *See* N.Y.P.L. §265.00(22). In fact, to make the Subject Rifle a New York-compliant featureless variety, he simply needed to remove the pistol grip because the stock was not adjustable, and the barrel could not accept a muzzle device. *Id*.; Compl. ¶491. The constitutional implications concerning the vagueness of §898 as applied to Vintage by Plaintiffs, as well as the implications of their attempt to restrict speech, are discussed in greater detail in Vintage's memorandum supporting its Motion to Dismiss.

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the company recommended"); *See also* ¶521, 681, 684.

Attempting to save their factually devoid Complaint, Plaintiffs cite to two New York PLCAA cases[8] that are starkly different from the case at hand. In the Fourth Department matter of *King v. Klocet* cited by Plaintiffs, the Court upheld the denial of the Defendants' motion to dismiss on the basis that Cabela's was accused of specific conduct that constituted knowingly selling handgun ammunition to an individual who was under the age of twenty-one which, if proven true, objectively violated 18 U.S.C. §922(b)(1) and N.Y. Penal Law §270.00(5). 187 A.D.3d at 1614. That individual later used the ammunition in a murder. *Id*. Therefore, the Court found that sufficient facts were alleged from which the predicate exception would apply. *Id*.

In the matter of *Chiapperini v. Gander Mountain Co.*, Plaintiffs' claims survived a motion to dismiss centered on the PLCAA, again because there were facts clearly alleging a knowing statutory violation pertaining to the "sale or marketing" of a qualified product, thereby meeting the requirements of the predicate exception. 13 N.Y.S.3d at 780. In that case, it was alleged that Gander Mountain allowed a convicted felon, prohibited from firearm possession pursuant to 18 U.S.C. §922(g), to transparently straw purchase firearms through his girlfriend in violation of the Gun Control Act. *Id*. The felon was allowed to select the firearms for purchase, pay for them, and walk out with the firearms in his arms, while the nonprohibited girlfriend completed the 4473 Form and background check. *Id*. The felon later used the firearms in the West Webster Christmas Eve ambush that killed and injured first responders. *Id*. Again, unlike the instant Plaintiffs, the *Chiapperini* Plaintiffs alleged a detailed factual basis that, if proven true, would constitute a knowing violation of a predicate statute, therefore establishing the predicate exception.

[8] Plaintiffs also cite to *Splawnik v. Di Caprio*, 146 A.D. 333, 334 (1989), but Vintage does not address said case comprehensively because, apart from having transparently distinct facts from the matter at hand, the PLCAA did not exist at the time of that decision.

Unlike the *King* and *Chiapperini* cases, in the instant case, Plaintiffs fail to allege that Vintage engaged in any specific conduct that would constitute a knowing violation of a predicate statute. Vintage sold the Subject Rifle to Gendron, who was a nonprohibited purchaser of legal age, after a NICS background check cleared the transaction to "proceed." "Plaintiffs have not pleaded facts that support their allegation that [any predicate] statute was 'knowingly' violated. *Phillips*, 84 F. Supp. 3d at 1224. "There is no allegation that [Vintage] had any knowledge of the allegations made about [Gendron's] conduct and condition before the shootings." *Id*. Therefore, the instant action against Vintage must be dismissed as preempted by the PLCAA. 15 U.S.C. §7902.

In the case of *City of New York v. Beretta U.S.A. Corp.*, the Second Circuit undertook a detailed analysis of the predicate exception, as well as the sorts of statutes and allegations that could establish the predicate exception. 524 F.3d at 403. In so doing, the Court found that New York's criminal public nuisance law, N.Y.P.L. §240.45, was not an appropriate predicate statute within the meaning of the PLCAA, while simultaneously holding that some statutes of "general application" could be appropriate predicates. *Id*. at 400.

The Court further explained:

> The general language contained in section 7903(5)(A)(iii) (providing that predicate statutes are those "applicable to" the sale or marketing of firearms) is followed by the more specific language referring to statutes imposing record-keeping requirements on the firearms industry, 15 U.S.C. § 7903(5)(A)(iii)(I), and statutes prohibiting firearms suppliers from conspiring with or aiding and abetting others in selling firearms directly to prohibited purchasers, 15 U.S.C. § 7903(5)(A)(iii)(II). Statutes applicable to the sale and marketing of firearms are said to include statutes regulating record-keeping and those prohibiting participation in direct illegal sales. Thus, the general term—"applicable to"—is to be "construed to embrace only objects similar to those enumerated by" sections 7903(5)(A)(iii)(I) and (II).

Id. at 402.

The criminal nuisance law rejected by the Court as an improper predicate statute prohibits conduct in a strikingly similar manner to G.B.L. §898-b(1). *See* N.Y.P.L. §240.45. As stated by the instant Plaintiffs in their opposition: "Section 898-b(1) closely tracks the language of New York's longstanding criminal public nuisance law." Opp. p. 25.

New York's criminal nuisance law prohibits conduct whereby an actor:

> "by conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers a considerable number of persons."

N.Y.P.L. §240.45.

G.B.L. §898-b(1)'s prohibition 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."

Other than purporting to be directed at the firearms industry, §898-b(1) appears to be even vaguer than the criminal nuisance law it "closely tracks," which was rejected as an improper predicate statute by the Second Circuit. §898-b(1) fails to specifically regulate "record-keeping" or "participation in direct illegal sales" and is not an "object similar to those enumerated by sections 7903(5)(A)(iii)(I) and (II)." *Beretta*, 524 F.3d at 402. Therefore, §898-b(1) is not a proper predicate statute.

Regardless, Plaintiffs claims cannot survive Vintage's Motion to Dismiss because Plaintiffs have failed to allege facts demonstrating any knowing violation of law at all. Plaintiffs' lawsuit against Vintage is a qualified civil liability action and Plaintiffs failed to allege facts to establish any exception. *Estado Unidos Mexicanos,* 633 F. Supp. 3d at 445("[F]or the claims to survive a motion to dismiss, an exception to the statute must apply"); *See also Jefferies v. D.C.*,

916 F. Supp. 2d 42, 43 (D.D.C. 2013) ("The law is very clear: The Protection of Lawful Commerce in Arms Act ("PLCAA") explicitly bars this kind of suit"). Plaintiffs' claims against Vintage must be dismissed.

C. Plaintiffs Cannot Point to Any Material Fact Disputes Precluding Dismissal

Plaintiffs' "bare legal conclusions with no factual specificity do not suffice to withstand [Vintage's] motion to dismiss." *Mid-Hudson Valley Fed. Credit Union*, PLLC, 64 N.Y.S.3d at 389. Plaintiffs' opposition to Vintage's Motion primarily contains a mixture of unsupported legal conclusions, non-sequiturs, red herrings, and speculations about what Plaintiff might learn from discovery. Plaintiffs only make a handful of strenuous attempts to conjure alleged factual disputes, each of which are immaterial and/or not genuinely disputed. So as not to belabor the point, Vintage briefly addresses what Plaintiffs allege to be factual disputes as follows:

- **How Gendron allegedly learned to modify the Subject Rifle is immaterial**. Plaintiffs' Complaint alleged that Gendron learned to remove the Mean MA device on YouTube and then "Gendron followed Mean Arms's explicit lock removal instructions, doing just as the company recommended." Compl. ¶487,513-525. Now suddenly, Plaintiffs claim upon unspecified "information and belief" that Gendron "discussed the lock's removal within the Vintage store." Opp. p. 2, 18. Even taking this new allegation as true, it is immaterial to the claims at hand because there are lawful reasons to remove the lock[9], and having discussion about the same is not unlawful.

- **Who Gendron allegedly interacted with on February 23, 2022, is immaterial**. Plaintiffs' Complaint cites Gendron's Discord Diary in reference to his visiting the Vintage location on February 23, 2022, and having a friendly discussion about target shooting with

[9] The fixed magazine could lawfully be removed to create a "featureless" AR-15 or if someone planned to move to nearly any other state in the U.S. *See* N.Y.P.L. §§ 265.00(22).

someone he believed to be named Chuck. Plaintiffs referred to Chuck as an "employee" of Vintage. In Vintage's memorandum supporting its motion to dismiss (*see also* Ex. 8 therewith), Vintage volunteered that it has no employees and that another FFL, Timbercreek Firearms, owned by Chuck Sherwood, operates from the same location. Therefore, it is likely that Gendron was referencing that "Chuck." As Vintage explained in its memorandum, even assuming Vintage had employees who spoke to Gendron as Plaintiffs suggested, a friendly conversation about target shooting more than a month after the alleged "entrustment" is totally immaterial to the claims alleged by Plaintiffs. *See Mem. Law. Vintage' Mot. Dism. or Stay*, p. 10, fn 5, p. 27, fn 7.

- **Who sold the Subject Rifle is not disputed.** In a bizarre twist, Plaintiffs allege a factual dispute concerning who sold the Subject Rifle, despite alleging it was Vintage in their Complaint (Compl. ¶35,492), and despite Vintage both acknowledging and providing documentation confirming it made the sale[10]. Opp. p. 10-11. Taking a step deeper into the rabbit hole, Plaintiffs allege that because "a dispute exists over who sold the [Subject Rifle]" the instant case might not be a qualified civil liability action preempted by the PLCAA, thereby allowing Plaintiffs to sue Vintage for selling the Subject Rifle. *Id*. Vintage does not dispute that it sold the Subject Rifle to Gendron. Further, if Vintage had not sold the Subject Rifle to Gendron, it wouldn't be seeking the PLCAA's protection because Plaintiffs would not have sued it.

- **Gendron's opinion of the Subject Rifle is immaterial**. In various places in his writing, Gendron makes comments about liking the Subject Rifle. At other times, he describes the

[10] Vintage submitted Acquisition and Disposition records as Exhibit 4 to its Memorandum supporting its Motion to Dismiss, and Gendron's 4473 Form as Exhibit 5, in order to provide pertinent information concerning the transaction of the Subject Rifle through business records kept in the usual course of business and required by federal law. *See* 27 CFR 478.125(e). The records were redacted to protect the personal information of third parties, as explained in List Aff. ¶8.

subject rifle as "the worst." Gendron's opinion of the Subject Rifle has no bearing on Plaintiffs' claims, nor does it constitute a factual dispute. *See* Opp. p. 9.

- **Plaintiffs' lack of factual basis for its claims and speculation over what could be found in discovery do not create a material fact dispute**. Plaintiffs make statements acknowledging a lack of factual basis for their claims such as stating: "Plaintiffs should be permitted to engage in discovery to determine the Tops shooter's behavior while he was in Vintage." Opp. p. 18. Plaintiffs speciously frame this lack of factual basis as a factual dispute or "question of fact." *Id*. Despite Plaintiffs' characterizations, Plaintiffs' lack of knowledge and supporting factual allegations for their lawsuit against Vintage do not comprise a "factual dispute," nor do they preclude dismissal. In fact, Plaintiffs' "bare legal conclusions with no factual specificity" support dismissal. *See Mid-Hudson Valley Fed. Credit Union, PLLC*, 64 N.Y.S.3d at 389.

Plaintiffs' allegations are grossly insufficient to meet either the predicate exception or the negligent entrustment exception to the PLCAA. Therefore, the instant lawsuit against Vintage must be immediately dismissed. 15 U.S.C. §7902.

D. Prohibiting the Sale of AR-15s Would Violate the Second Amendment and Vintage Has Standing to Raise the Issue

Plaintiffs argue Vintage lacks standing to raise a constitutional issue with Plaintiffs' interpretation of G.B.L. §898, because the Second Amendment "has never been interpreted to confer a freestanding right to sell arms." Opp. p. 27-28. Plaintiffs fail to recognize that Vintage has standing to raise this important constitutional issue due to the harm it would suffer as a result of Plaintiffs' flawed legal interpretation being accepted, paired with its ability to advocate for its customers, as has been recognized by federal courts. For example, in the case of *Kole v. Village of Norridge*, where Plaintiff claimed a violation of the Second Amendment based upon Defendant

Village impeding Plaintiff's attempt to open a gun store, the Northern District of Illinois rejected Defendant's argument that Plaintiff lacked standing because the Second Amendment did not protect the right to sell firearms, explaining:

> "The Court does not need to resolve that issue now, however, because **even if the Second Amendment does not protect the sale of firearms directly, Plaintiffs can still pursue a claim that the Agreement and Revised Ordinance infringe their customers' personal right to keep and bear arms.**"

941 F. Supp. 2d 933, 945 (N.D. Ill. 2013)(emphasis added).

The *Kole* decision cited to Seventh Circuit precedent from the case of *Ezell v. City of Chicago*, where the Court of Appeals found that Action Target, a designer and builder of firing ranges who sought to supply its services in Chicago, had standing to assert Second Amendment violations on behalf of individuals who sought to utilize its services. 651 F.3d 684, 696 (7th Cir. 2011) ("Action Target, as a supplier of firing-range facilities, is harmed by the firing-range ban and is also permitted to 'act[ ] as [an] advocate[ ] of the rights of third parties who seek access to' its services.")(Quoting *Craig v. Boren*, 429 U.S. 190, 195 (1976)(Further citations omitted); *See also Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 211 (4th Cir. 2020).

According to Plaintiffs, G.B.L. §898 and New York's ban on "assault weapons," prohibit the sale of AR-15s (even those with magazine locking devices and restricted magazine capacity) to members of the public who are not otherwise prohibited from firearm possession pursuant to state or federal law. "Modern semiautomatic rifles like the AR-15 platform rifle are widely owned by law-abiding citizens across the nation. Other than their looks (the State calls them 'features' or 'accessories') these prohibited rifles are virtually the same as other lawfully possessed rifles." *Miller v. Bonta*, 2023 WL 6929336, at *1 (S.D. Cal. Oct. 19, 2023). 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; *see also Miller*, 2023 WL

6929336, at *7 ("This Court has previously determined that the State's ban on modern semi-automatics has no historical pedigree.")

Therefore, if Vintage is found to have violated G.B.L. §898 and/or New York's Assault Weapons ban simply because it sold an AR-15 (with a magazine locking device and restricted capacity) to a nonprohibited person, then New York law is unconstitutional.*See* N.Y.P.L. §265.00(22). Therefore, Vintage's Motion to Dismiss should be granted on that additional basis.

III. CONCLUSION

Plaintiffs have brought a qualified civil liability action against Vintage and have failed to allege sufficient facts to establish any exception to the PLCAA's general preemption. Therefore, the instant action against Vintage must be dismissed. As is further described in Vintage's memorandum supporting its Motion to Dismiss, should the Court decline to dismiss Counts Sixteen and Seventeen of Plaintiffs' Complaint, the instant action should be stayed pending the outcome of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374, in which the Second Circuit is reviewing the constitutionality of G.B.L. §898.

Dated: Concord, New Hampshire
January 15, 2024

Respectfully submitted,

LEHMANN MAJOR LIST, PLLC

Sean R. List, Esq.
(Admitted *Pro Hac Vice*)
6 Garvins Falls Road
Concord, NH 03301
(603) 715-2516
sean@nhlawyer.com
www.gun-lawyer.com
Counsel for Defendant
Vintage Firearms, LLC

Darlene L. Donald, Esq.
510 N. Rogers Ave., Apt. 1
Endicott, NY 13760-2238
(315) 727-4607
darlenedonald@hotmail.com
Counsel for Defendant
Vintage Firearms, LLC

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 6,991 words.

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January 15, 2024

Sean R. List, Esq.