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# New York Supreme Court

## Appellate Division—Fourth Department

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KIMBERLY J. SALTER, individually and as Executrix of the Estate of AARON W. SALTER, JR., MARGUS D. MORRISON, JR., Individually and as Administrator of the Estate of MARGUS MORRISON, SR., PAMELA O. PRICHETT, Individually and as Executrix of the Estate of PEARL LUCILLE YOUNG, MARK L. TALLEY, JR. Individually and as Administrator of the Estate of GERALDINE C. TALLEY, GARNELL W. WHITFIELD, JR., Individually and as Administrator of the Estate of RUTH E. WHITFIELD, JENNIFER FLANNERY, as Public Administrator of the Estate of ROBERTA DRURY, TIRZA PATTERSON, Individually and as parent and natural guardian of J.P., a minor, ZAIRE GOODMAN, ZENETA EVERHART, as parent and caregiver of Zaire Goodman, BROOKLYN HOUGH, JO-ANN DANIELS, CHRISTOPHER BRADEN, ROBIA GARY, individually and as parent and natural guardian of A.S., a minor, and KISHA DOUGLAS,

*Plaintiffs-Respondents,*

*(For Continuation of Caption See Inside Cover)*

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### BRIEF FOR DEFENDANT-APPELLANT

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**Docket Nos.:**  
**CA 24-00450**  
**CA 24-00514**  
**CA 24-01334**  
**CA 24-01335**

Action No. 1  
Index No.  
808604/23

Erie County Clerk's Index Nos. 808604/23, 805896/23, 810316/23 and 810317/23

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– against –

META PLATFORMS, INC., f/k/a Facebook, Inc., INSTAGRAM LLC, REDDIT, INC, AMAZON.COM, INC., TWITCH INTERACTIVE, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, DISCORD, INC., SNAP, INC., 4CHAN, LLC, 4CHAN COMMUNITY SUPPORT, LLC, GOOD SMILE COMPANY, INC., GOOD SMILE COMPANY U.S., INC., GOOD SMILE CONNECT, LLC, RMA ARMAMENT, INC. d/b/a RMA, BLAKE WALDROP, CORY CLARK, VINTAGE FIREARMS, LLC, JIMAY’S FLEA MARKET, INC., JIMAYS LLC, and PAUL GENDRON and PAMELA GENDRON,

*Defendants,*

– and –

MEAN ARMS LLC d/b/a Mean Arms,

*Defendant-Appellant.*

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DIONA PATTERSON, individually and as Administrator of the Estate of HEYWARD PATTERSON, J.P., a minor, BARBARA MAPPS, Individually and as Executrix of the Estate of KATHERINE MASSEY, SHAWANDA ROGERS, Individually and as Administrator of the Estate of ANDRE MACKNEIL, A.M., a minor, and LATISHA ROGERS,

Action No. 2  
Index No.  
805896/23

*Plaintiffs-Respondents,*

– 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, PAUL GENDRON and PAMELA GENDRON,

*Defendants,*

– and –

MEAN LLC.,

*Defendant-Appellant.*

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WAYNE JONES, Individually and as Administrator  
of the Estate of CELESTINE CHANEY,

Action No. 3  
Index No.  
810316/23

*Plaintiffs-Respondents,*

– against –

MEAN LLC,

*Defendant-Appellant,*

– and –

VINTAGE FIREARMS, LLC, RMA ARMAMENT, INC., ALPHABET INC.,  
GOOGLE, LLC, YOUTUBE, LLC, REDDIT, INC., 4CHAN, LLC, 4CHAN  
COMMUNITY SUPPORT, LLC, PAUL GENDRON  
and PAMELA GENDRON,

*Defendants.*

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FRAGRANCE HARRIS STANFIELD, YAHNIA BROWN-MCREYNOLDS,  
TIARA JOHNSON, SHONNELL HARRIS-TEAGUE, ROSE MARIE  
WYSOCKI, CURT BAKER, DENNISJANEE BROWN, DANA MOORE,  
SCHACANA GETER, SHAMIKA MCCOY, RAZZ'ANI MILES, PATRICK  
PATTERSON, MERCEDES WRIGHT, QUANDRELL PATTERSON, VON  
HARMON, and NASIR ZINNERMAN, JULIE HARWELL, individually and as  
parent and natural guardian of L.T., a minor, LAMONT THOMAS, individually  
and as parent and natural guardian of L.T., a minor, LAROSE PALMER,  
JEROME BRIDGES, MORRIS VINSON ROBINSON-MCCULLEY, KIM  
BULLS, CARLTON STEVERSON, and QUINNAE THOMPSON,

Action No. 4  
Index No.  
810317/23

*Plaintiffs-Respondents,*

– against –

MEAN LLC,

*Defendant-Appellant,*

– and –

VINTAGE FIREARMS, LLC, RMA ARMAMENT, INC., ALPHABET INC.,  
GOOGLE LLC, YOUTUBE, LLC, REDDIT, INC., 4CHAN, LLC, 4CHAN  
COMMUNITY SUPPORT, LLC, PAUL GENDRON  
and PAMELA GENDRON,

*Defendants.*

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## **PRELIMINARY STATEMENT**

These consolidated actions arise from the criminal acts of an 18-year-old shooter, Payton Gendron (hereinafter “Shooter”), when in May 2022 he brutally murdered ten people and injured others in a racially motivated mass shooting.<sup>1</sup> Defendant-Appellant Mean L.L.C. (“Mean”) hereby appeals from the four separate Decisions and Orders of the Supreme Court, Erie County (Feroletto, J.) (“Motion Court”), which erroneously denied Mean’s motion to dismiss in a civil action brought by the victims against a varied list of defendants.

Mean manufactures a device that permits a person to convert a semi-automatic rifle from one that is illegal to sell in New York to one that is legal. Plaintiffs seek to blame Mean, a federally licensed firearm and component part manufacturer, for the murderous and heinous acts of a racist criminal. The Mean product at issue, the MA Lock, affixes a 10-round magazine to the frame of a rifle. It was designed for lawful firearm owners in certain states who otherwise need to convert semiautomatic rifles that accept detachable magazines into ones with fixed-magazines in order to comply with the law. In New York, semi-automatic rifles can have certain aesthetic features (i.e., pistol grip, muzzle break) depending on whether the magazine is fixed or detachable. While the MA Lock affixes the magazine so that

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<sup>1</sup> By this Court’s Order dated October 28, 2024, the Court consolidated the appeal of this action (CA 24-00450) together with the appeals in CA 24-00514, CA 24-01334 and CA 24-01335 for purposes of perfection and argument.

it cannot be removed during normal operations, it is removable using specialized tools, including a drill and special drill bit.

Prior to this incident, the Shooter legally purchased a semi-automatic rifle from a federally licensed dealer in New York with the MA Lock already installed on the rifle. However, included in the Shooter's careful, cold-blooded and hate-filled plan to murder innocent persons, was the criminal and unlawful modification of his rifle, by removing the MA Lock, a component part of the rifle when he purchased it, with replacement parts he ordered online and magazines with ammunition capacities that exceeded New York's limit.

Plaintiffs' claims against Mean should have been dismissed at the pleading stage for multiple reasons, as they are precluded by a federal statute and well-settled tort law in New York. First, Plaintiffs' claims are precluded by the Protection of Lawful Commerce in Arms Act, 15 U.S.C §§ 7901-03 ("PLCAA"). Congress enacted the PLCAA for the express "purpose" to "prohibit causes of action against [federal firearms licensees, such as Mean]... for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1). Plaintiffs' claims are precisely the type that Congress sought to bar in enacting the PLCAA. Plaintiffs were injured through the criminal misuse of the rifle and ammunition as the instruments to commit the crime that resulted in the harm to

Plaintiffs. As a result, there is no question that the congressional intent embraces Plaintiffs' civil action, when applied to any federal firearms licensee like Mean.

In declining to apply the PLCAA, the Motion Court erroneously concluded that the MA Lock was merely an “accessory” on the rifle since the “firearm was still able to function” (R. 30-31), and that somehow created an exception to the application of the PLCAA to Mean. Respectfully, the Motion Court's holding is flawed for several reasons. Initially, the plain language of the PLCAA requires it be applied whenever a Qualified Civil Liability Action is brought against a firearm or ammunition manufacturer or seller. A court cannot exclude a qualified manufacturer or seller simply because it did not manufacture or sell the firearm or ammunition used to commit the underlying criminal act.

Furthermore, an application of the PLCAA warrants dismissal here since the MA Lock is undoubtedly a qualified product. The PLCAA defines a “qualified product” as a firearm, ammunition, “or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.” 15 U.S.C. § 7903(4). A “component part” of a firearm is one that is integral to its proper function. See *Prescott v. Slide Fire Sols., LP*, 341 F.Supp.3d 1175, 1189 (D.Nev. 2018) (holding that a bump stock is a qualified product as defined by the PLCAA). The MA Lock is the critical component part that makes the rifle legal to possess in certain states, including New York.

Moreover, the Motion Court failed to appreciate that the “firearm was still able to function” (R. 30-31, 50, 70) without the MA Lock *only* because the Shooter had installed a replacement “lower parts kit” including a magazine release button. The removal of the MA Lock absent this replacement magazine release button would cause the magazine to simply fall out of the rifle, completely disabling the firearm’s ability to function as a semi-automatic firearm. The MA Lock serves as an important component of the rifle in that it affixes the magazine in place and converts an otherwise illegal rifle into one that is legal in New York.

Once the Court finds that Plaintiffs’ cases are Qualified Civil Liability Actions and that Mean is entitled to its protection, the next question is whether Plaintiffs’ claims fit within any exception – they do not, requiring dismissal of the Complaints. Below, Plaintiffs mainly relied on the predicate exception, but that is inapplicable since it applies only to claims based on firearms-specific laws, not laws of general applicability. None of Plaintiffs’ claims satisfy this requirement. Further, the predicate exception includes narrow proximate cause language, which Plaintiffs likewise cannot adequately plead. Finally, the negligence *per se* exception, which only applies to *sellers*, does not apply to Mean, which is a manufacturer.

Even if the PLCAA does not apply to the claims against Mean, or that Plaintiffs are able to artfully plead an exception, which they do not, dismissal is still necessary for the independent reasons since Plaintiffs: [1] could never establish

proximate cause under New York common law given the heinous acts committed by the racist Shooter which are without question extraordinary, inexplicable homicidal violence and far too attenuated from any action or inaction on the part of Mean; and [2] lack standing to assert, and substantively fail, to state G.B.L. Section 349 and 350 claims.

Finally, dismissal is appropriate on the additional and independent ground that the Court lacks jurisdiction over Mean, a Georgia limited liability company with its principal place of business located in Georgia. The mere fact that a MA Lock fortuitously ended up in New York through the stream of commerce is not sufficient to exercise jurisdiction over Mean.

For the foregoing reasons, even taking the allegations in the Complaints as true, they simply fail to state any claim against Mean as a matter of law. The well-established legal principles – particularly the PLCAA – should be resolved now. The Motion Court’s decisions should be reversed, and the Complaints dismissed in full as to Mean.

## QUESTIONS PRESENTED

1. Are Plaintiffs' claims barred by the PLCAA?

The Motion Court erroneously found that the PLCAA does not apply to Mean or Mean's MA Lock, despite the well-established bedrock principles and Congressional intent that warrants dismissal of this action under the PLCAA.

2. Are any of the PLCAA's narrow exceptions to the definition of a Qualified Civil Liability Action applicable to Plaintiffs' claims?

The Motion Court did not address this question, and the Record reflects that these issues were fully briefed by both sides and none of the PLCAA's exceptions apply, requiring dismissal.

3. Assuming *arguendo* that Plaintiffs' claims against Mean are not barred by the PLCAA, were Mean's actions the proximate cause of Plaintiffs' injuries?

The Motion Court erroneously found that Plaintiffs' claims could stand, despite the Shooter's many crimes during his planning and execution of the plan precluding proximate cause as a matter of law.

4. Can Plaintiffs' claims under G.B.L. §§ 349 and 350 withstand a motion to dismiss?

The Motion Court erroneously declined to dismiss these claims, despite the fact that Plaintiffs lack standing and, in any event, their claims substantively fail.

5. Are Plaintiffs' public nuisance claims actionable against Mean?

The Motion Court erroneously declined to dismiss these claims, despite their improper nature.

6. Does the Court have jurisdiction over Mean?

The Motion Court erroneously answered that jurisdiction over Mean was proper, despite Mean's Georgia principal place of business and lack of pertinent connections to New York.

## STATEMENT OF FACTS

### A. BACKGROUND

#### i. NY PENAL CODE § 265.00(22)(a)

By way of background, New York law provides that a semi-automatic rifle with the ability to accept a detachable magazine is legal in New York if it does not have one of several delineated otherwise prohibited features in combination with the detachable magazine. See, NY Penal Law § 265.00(22)(a). This can be accomplished as easily as installing grips specifically designed to comply with New York law, such as the Thorsden stock, which does not change the functionality of the rifle (R. 84, 335-348, 349-354, 368, 382, 1840). Conversely, it is undisputed that a semi-automatic rifle with one of more of the prohibited characteristics is still legal in New York so long as it has a fixed magazine (R. 83). *Id.* § 265.00(22)(g)(ii). Indeed, New York law specifically excludes from the definition of an “assault weapon” a “semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition.” *Id.* § 265.00(22)(g)(ii). Whether a semi-automatic rifle has a detachable or fixed magazine is not determinative of whether it is legal to

possess in New York (R. 330-334, 1490, 1840).<sup>2</sup> Importantly, neither the Penal Code nor any other New York laws or regulations define the terms “detachable magazine,” “fixed magazine,” or “permanently fixed.”

The New York State Police’s published guidance on compliance with Penal Code § 265.00(22)(a) specifically advises that “dealers and manufacturers will know what weapons can and cannot be sold,” (R. 330) and that licensed firearm dealers “may continue to possess” “guns defined as assault weapons and magazines that can contain more than ten rounds” and “*can also permanently modify these guns and magazines and sell them in state* [emphasis supplied]” (R. 333).

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<sup>2</sup> Photos illustrating the difference between semiautomatic rifles that are legal in New York are included in the Record (R. 1840). As demonstrated by the comparison, a semiautomatic rifle with one of more of the prohibited characteristics is also legal in New York so long as it has a fixed magazine. In contrast, a rifle that does not have an otherwise prohibited characteristic under New York law may utilize a detachable magazine (R. 1840). In any case, the two sampled rifles shoot the same caliber ammunition with the same rate of fire, have the same 10-round magazine capacity, and were equally available for the shooter to purchase (R. 1489-1491, 1825-1829).

ii. The Shooter's Crime

On May 14, 2022, this 18-year-old Shooter carried out a horrific racially motivated hate crime at Tops Friendly Market in Buffalo, New York, wherein he killed ten people and wounded numerous others (R. 93-94, 119). The Shooter spent “months” planning the incident by researching which ammunition, firearms, and body armor to use (R. 129, 153-154, 161-163). In fact, he drove twice from his home – over 200 miles away – to survey the Tops location as a potential target of his plan (R. 93, 1545-1546).

In preparing to commit the crime, five months before the shootings, on January 19, 2022, the Shooter purchased a used semi-automatic rifle from Vintage Firearms in Endicott, New York, after completing the required paperwork and passing the federal background check (R. 114, 993, 1002, 1246, 1491). At the time of purchase, the rifle came already installed with an MA Lock, which permanently affixed the magazine to the rifle (R. 1002).<sup>3</sup>

Significantly, the Record lacks evidence that Vintage Firearms violated any law as a result of the sale of the rifle with the MA Lock pre-installed. The Record further lacks any evidence or allegations that any New York State government entity determined the MA Lock did not permanently affix the magazine to such rifles prior

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<sup>3</sup> Many modern firearms – including handguns, rifles, carbines, shotguns, etc. – include a magazine for storing ammunition. Magazines may be integral (i.e., fixed) to the firearm or, as is more common, may be detachable (R. 989).

to this incident. To the contrary, the sale of the rifle with the MA Lock by Vintage Firearms was entirely legal, as demonstrated by: [1] that lack of any claim by State law enforcement or Federal government regulators that Vintage Firearms violated any laws; [2] the fact that its Federal Firearms License (i.e., ability to maintain its business) has not been suspended or revoked; and [3] the fact that the business or its principals were never criminally charged in connection with its sale of the rifle with the MA Lock pre-installed (R. 382, 640).

iii. Mean Manufactures and Sells the MA Lock

Mean, a federally licensed firearms manufacturer based in Woodstock, Georgia, manufactures and sells the MA Lock, a replacement component part for semi-automatic AR-type rifles (R. 81, 327-328, 374 [FN 11], 487-488, 839-840, 880, 1261). The MA Lock is designed for lawful firearm owners who wish to convert a semi-automatic rifle that accepts detachable magazines into one with a fixed magazine, typically to enable lawful firearm purchasers to comply with certain states' so-called "assault weapons" laws, which may otherwise restrict certain characteristics on semi-automatic rifles sold with the ability to accept detachable magazines (R. 81, 115, 168, 169, 386).

The MA Lock is installed by removing all components of the magazine release button except the magazine catch, and replacing it with the MA Sleeve (R. 82, 329). Then, after engaging the magazine in place in the magazine well, the installer

continues to turn the head of the MA Lock until it shears off, leaving the lock permanently installed (R. 82, 329). When the MA Lock is installed, it permanently fixes the magazine to the rifle and prevents it from being removed during normal operation, because it replaces the standard magazine release button (i.e., a push button device that temporarily holds an ammunition magazine in the magazine well of the rifle's lower receiver) (R. 82, 168, 329). It is undisputed that once installed, the MA Lock can be removed only by disassembling the rifle and drilling out and destroying the MA Lock's bolt shaft that holds the MA Lock assembly together (R. 82, 172-173, 329). As a result, the MA Lock itself is destroyed during removal (R. 82, 172-174, 329).

iv. The Shooter Removed and Replaced the MA Lock

Leading up to the shooting, the Shooter purchased a replacement Anderson Manufacturing lower parts kit for an AR-15 style rifle (R. 85-86, 166, 172, 174, 359-362). A "lower parts kit" includes substantially all internal components of the rifle's fire control system (i.e., trigger, hammer, selector, magazine release button/spring, and bolt catch) (R. 172, 359-362). The Shooter subsequently removed the MA Lock at home using a drill and a "screw extractor," which is a specialized "bit meant for extracting stripped screws" (R. 172-174, 501, 772, 1022, 1541). Specifically, the shooter used "a Cobalt Speedout #2 drillbit and [his] dad's power drill to take out" the MA Lock (R. 174, 772). He then modified his rifle by replacing the now

destroyed MA Lock with a “regular mag[azine] button and spring” and purchasing “high capacity” magazines that are illegal to possess in New York (R. 115, 124, 172-173, 767, 772, 910).

## **B. THE LITIGATION**

Four groups of Plaintiffs, comprised of survivors of the attack and family members of the victims, commenced suit in Erie County Supreme Court, naming numerous defendants, including Mean (R. 88-263, 661-802, 997-1125, 1494-1647). Plaintiffs did not sue the Shooter. As relevant to Mean, Plaintiffs pleaded a mix of theories sounding in tort and General Business Law (“GBL”) §§ 349 and 350 (R. 88-263, 661-802, 997-1125, 1494-1647).

Mean moved to dismiss each action pursuant to the PLCAA and C.P.L.R. §§ 3211(a)(3), 3211(a)(7), and 3211(a)(8) (R. 77-78, 651-652, 984-985, 1481-1482).<sup>4</sup> As relevant here, the Motion Court erroneously rejected the well-established immunity afforded under the PLCAA and, instead, held that the “PLCAA does not prevent this personal injury lawsuit” (R. 30, 50). In so holding, the Motion Court erroneously concluded that the MA Lock is an “accessory” and erroneously found that the MA Lock “is not an integral part of the gun because the lock could be and was removed and the firearm was still able to function” (R. 30-31, 50, 70) – despite

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<sup>4</sup> Following the filing of Amended Complaints by the Plaintiffs in *Jones* and *Stanfield*, the parties re-submitted their earlier motion papers, leading to the Court largely adopting its earlier decisions, dated February 22, 2024 and February 23, 2024, respectively (R. 44-45, 64-65).

that the firearm was only able to function since the Shooter had installed a replacement “lower parts kit” (R. 85-86, 166, 172, 174, 359-362). All four the Motion Court’s orders involving Mean are included in these consolidated appeals (R. 8-18, 26-36, 44-56, 64-76).

## LEGAL ARGUMENT

### POINT I

#### **PLAINTIFFS' CLAIMS ARE BARRED BY THE PLCAA**

##### **A. Mean is Entitled to the Benefit and Purpose of the PLCAA Regardless of Whether the MA Lock is a Component Part**

The PLCAA prohibits the institution of a “qualified civil liability action” in any state or federal court. 15 U.S.C. §§ 7902(a). This prohibition forecloses all of Plaintiffs’ claims against Mean in these actions.

Congress enacted the PLCAA with the stated purpose to “prohibit causes of action against manufacturers . . . of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.” *Id.* § 7901(b)(1). In this regard, in enacting the PLCAA, Congress made the explicit finding that businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products 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. *Id.* §§ 7901(a)(3)-(5). Stated otherwise, any qualifying industry member is entitled to the PLCAA’s protections when a firearm is criminally or unlawfully misused to injure a plaintiff.

Therefore, the party seeking dismissal must simply establish it is a “manufacturer or seller of a qualified product” in a lawsuit seeking “damages...or other relief” which results “from the criminal or unlawful misuse of a qualified product.” 15 U.S.C. § 7903(5)(A). The PLCAA does not limit the immunity provided to a manufacturer/seller to only cases in which “its” qualified product is used, but anytime a qualified product is misused. Any qualifying industry member – *including trade associations which do not manufacture or sell any qualified products* – is entitled to the PLCAA’s protections when a firearm is criminally or unlawfully misused to injure a plaintiff.

Here, Plaintiffs never present any meaningful challenge of the fact that Mean is undoubtedly a qualifying industry member as a federal firearms licensee (R. 81, 327-328, 374 [FN 11], 487-488, 839-840, 880, 1261). Mean’s status as a federally licensed “manufacturer” cannot be disputed, is certainly “beyond substantial question,” and must be accepted as true for purposes of adjudicating Mean’s motion. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Thus, Mean is a qualified manufacturer that is being sued for damages arising out of the criminal misuse of a qualified product – these are Qualified Civil Liability Actions.

Accordingly, Plaintiffs’ Complaints against Mean run afoul of the stated objectives of the PLCAA. Given these established principles, a reversal of the Motion Court’s orders are warranted under the PLCAA.

## **B. The MA Lock is a Qualified Product**

Even if this Court looks beyond the plain language of the PLCAA and its stated purpose, Plaintiffs' claims against Mean still fail for the independent reason that the MA Lock is a qualified product under the PLCAA. The PLCAA defines a "qualified product" as a firearm, ammunition, "or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4). A "component part" of a firearm is one that is integral to its proper function. See *Prescott v. Slide Fire Sols., LP*, 341 F.Supp.3d 1175, 1189 (D.Nev. 2018) (holding that a bump stock is a qualified product as defined by the PLCAA). Just like a stock, barrel, trigger, bolt, or hammer, a magazine is unquestionably a component part of a firearm. See *In re Academy, Ltd.*, 625 S.W.3d 19, 29 (Tex. 2021) ("As explained, both firearms and magazines (along with other component parts) are 'qualified products' subject to the PLCAA's general prohibition against qualified civil liability actions...").

In *Prescott*, the court relied upon federal definitions and concluded that "a 'stock' is a component part" because it "is an integral component of a rifle as it permits the firearm to be fired from the shoulder." 341 F.Supp.3d at 1189. Just like there is no "rifle" without a "stock," there is no "semiautomatic" function without a magazine. The *Prescott* court further noted that "after-market installation, as well as

after-market enhancement, do not necessarily convert a component into an accessory.” 341 F.Supp.3d 1175, 1189-90 (D.Nev. 2018).

More recently, the court in *Lowy v. Daniel Def., LLC* (No. 1:23-CV-1338, 2024 WL 3521508, at \*3 (E.D. Va. July 24, 2024)) further expanded on the concept that manufacturers of replacement parts are entitled to the protections of the PLCAA. In *Lowy*, the plaintiffs alleged that the replacement magazines and grips which were substituted in place of the original ones were no longer considered component parts, and therefore, the replacement magazines and grips manufactured by other entities were somehow excluded from the PLCAA’s protections. The *Lowy* court rejected this argument, explaining as follows (*Lowy v. Daniel Def., LLC, supra* at \*3 [internal citation omitted]):

[W]hen a firearm user substitutes the original components of their firearm for defendants' magazines and grips, defendants' magazines and grips then become component parts of the newly assembled firearm. As manufacturers of component parts, the PLCAA extends to qualified civil liability actions against these [magazine and grip] manufacturers like the other defendants.

Here, the Motion Court must have glossed over the MA Lock’s function and purpose in concluding that the MA Lock is an “accessory” and erroneously finding that it “is not an integral part of the gun because the lock could be and was removed and the firearm was still able to function” (R. 30-31, 50, 70). The Motion Court’s reasoning and conclusion is flawed on several fronts.

First, the Motion Court failed to appreciate that the firearm was still able to function *only* because the Shooter had installed a replacement “lower parts kit,” which included a magazine release button/spring, and bolt catch (R. 85-86, 166, 172, 174, 359-362). In this regard, in order for a firearm with a magazine to fire, the magazine must somehow be fixed to the rifle – either by way of a temporary magazine release button (i.e., as originally designed) or a fixed non-releasable magazine (i.e., as with the MA Lock). Absent some type of locking mechanism, the magazine simply falls out of the rifle (R. 373, 463). Contrary to an accessory’s purpose, the MA Lock materially affects the rifle’s function by affixing an otherwise detachable magazine and allowing the firearm to function as designed (R. 81, 115, 168, 169, 386).

Next, the allegations in the Complaints establish that the MA Lock does not just “enhance” the function of a rifle, it materially changes its function because its intended use involves converting an illegal rifle into one that is legal in certain states with “assault weapons” restrictions (R. 81, 115, 168, 169, 386). The MA Lock is not designed to (and does not) prevent the “discharge of a rifle” (R. 462). It replaces the magazine release button and fixes, or “locks,” a magazine in place, thereby eliminating the user’s ability to remove and replace a magazine during normal use (R. 81, 115, 168, 169, 386). It cannot be removed during normal reloading, and

removal requires the use of a power drill and specialized drill bit that results in the destruction of the MA Lock (R. 82, 172-174, 329).

Additionally, the New York Attorney General’s Office conceded that parts of a firearm like the MA Lock are component parts under the PLCAA. On November 3, 2023, a panel of the Second Circuit Court of Appeals heard oral argument in *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374 (2d Cir.), an appeal currently pending, concerning the PLCAA’s preemption of G.B.L. §§898-a-e and the statutes’ constitutionality (R. 1297-1298).<sup>5</sup> During the argument, the Office of Attorney General explained the State’s interpretation of “qualified product” in the PLCAA’s statutory definitions (R. 1297-1298):

One thing to be really clear about here is that it’s not just about the manufacturers of guns and ammunition. A qualified product – and *Congress intentionally made this extraordinarily broad. A qualified product includes any component part of a firearm or an ammunition. So if you, you know, manufacture a piece of – this is why I cannot answer his questions because, if you manufacture a piece of vulcanized rubber and you ship it out of state and somebody else attaches it to their firearm, that’s also considered a qualified product.*”<sup>6</sup> (emphasis added).

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<sup>5</sup> The full audio recording of the November 3, 2023, oral argument is publicly available on the Second Circuit’s website and can be accessed at:

<https://ww3.ca2.uscourts.gov/decisions/isysquery/46ddb431-c701-44c4-8c9e-e24572234dfe/1/doc/22-1374.mp3>

<sup>6</sup> See *id.*, beginning at time stamp 00:50:03.

If the Attorney General interprets “a piece of vulcanized rubber” which some third-party later attaches to a firearm to be a qualified product, then surely the MA Lock must be considered a qualified product, and the State of New York believes it is.

Further, to the extent that the MA Lock was removed, the Complaints confirm that the MA Lock is only removable with a “power drill” equipped with a “screw extractor” (R. 172-174, 501, 772, 1022, 1541). As established, the rifle was only able to function during the incident without the MA Lock because the shooter replaced it with other component parts (R. 85-86, 166, 172, 174, 359-362). By this same reasoning, a grip, stock, and every other part that “could be” removed and still allow the rifle to discharge one cartridge would also not be “component parts” (R. 84). This would be an absurd result, and appears to be the rationale adopted by the Motion Court.

The Motion Court’s reliance on *Sambrano v. Savage Arms, Inc.*, is misguided – especially since this case actually supports dismissal of the Complaints against Mean. 2014- NMCA 113, 338 P.3d 103, (N.M. App. 2014). In *Sambrano*, the plaintiffs alleged that Savage, a rifle manufacturer, “negligently selected the [cable] lock that was not fit for its intended purpose...” which was included with the rifle.<sup>7</sup>

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<sup>7</sup> The MA Lock here and the “cable lock” in *Sambrano* are two completely different products with entirely different purposes. As depicted by the photos in the Record, the cable lock is an attachable accessory that is intended to work as a gun locking device to prevent the discharge of a firearm (R. 462). In stark contrast, the MA Lock is not designed to (and does not) prevent the discharge of a rifle. It simply replaces the magazine release button and fixes a magazine in place, thereby eliminating the user’s ability to remove and replace a magazine.

338 P.3d at 104. Plaintiffs argued that Savage was not entitled to PLCAA immunity because their claims were based on its role as the lock distributor/seller, not as the rifle's manufacturer. *Id.* at 105. Plaintiffs make the same argument here by claiming that the PLCAA does not apply because their claims are based on Mean's actions related to the MA Lock, and not the shooter's criminal use of a rifle. However, the *Sambrano* court rejected this veiled argument, holding that "allegations concerning the pairing of the Savage rifle with a [cable] lock do not alter the congressional intent [in passing the PLCAA]...[and] [e]ven assuming that the lock was defective or unfit for its intended use, Plaintiffs' claimed damages nevertheless resulted from a third-party's criminal or unlawful misuse of the rifle." *Id.* The court then held [emphasis supplied] (*Sambrano v. Savage Arms, Inc.*, 2014-NMCA-113, ¶ 10, 338 P.3d 103, 105):

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

Just like in *Sambrano*, Plaintiffs were injured through the criminal misuse of a rifle, which is clearly a qualified product. Thus, all licensed manufacturers/sellers of firearms, ammunition and component parts thereof included within the scope of

the PLCAA were entitled to immunity in *Sambrano*, whether or not they sold allegedly defective accessories with the qualified products, and they are entitled to it here.

In short, under the plain meaning of “component part” and the consistent interpretation of that phrase in the PLCAA context, Mean’s MA Lock is a “qualified product” under the statute, requiring an application of the PLCAA as Congress had intended. Accordingly, it is respectfully submitted that the Decisions and Orders appealed from should be reversed, together with an order dismissing the Complaints against Mean.

### **C. None of the Narrow Exceptions to the PLCAA are Applicable**

As Qualified Civil Liability Actions subject to dismissal pursuant to the PLCAA, the only remaining question is whether an enumerated exception applies to salvage Plaintiffs’ cases. Before the Motion Court, Plaintiffs argued that the Complaints somehow trigger two (of only six) narrow categories of claims that could be potentially excluded from the protections of the PLCAA and the definition of a qualified civil liability action (15 U.S.C. § 7903(5)(A)(ii)-(iii):

- (i) an action brought against a seller for...negligence per se;
- (ii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including

- (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
- (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under [18 U.S.C. §§ 922(g) or (n)];

As demonstrated below, neither of these exceptions apply to save Plaintiffs' claims.

i. The Predicate Exception is Inapplicable

The PLCAA's "predicate exception" applies when a federal firearms licensee "knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms...or component parts for firearms...], and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). G.B.L. §§ 349 and 350 – the only statutory causes of action Plaintiffs assert were violated – are generalized consumer protection statutes. The PLCAA does not allow claims based on generally applicable laws, such as public nuisance and consumer-protection statutes, because those are the types of claims that prompted Congress to pass the PLCAA.

The plain text, structure, and context of the PLCAA confirm that the predicate exception applies only to claims based on firearms-specific laws, not laws of general applicability. It is a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” *Deal v. U.S.*, 508 U.S. 129, 132 (1993). Here, all of the relevant context—including the statutory structure, purpose, and history—confirm that the predicate exception is narrowly limited to firearms-specific laws. Considering the firearms-specific examples set forth in the PLCAA, the meaning of the predicate exception is “narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated.” *U.S. v. Williams*, 553 U.S. 285, 294 (2008); *see also* 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

a. The Predicate Exception Recognizes Only Firearms-Specific Statutes, And Not Plaintiffs’ G.B.L. Sections 349 and 350 Claims

Plaintiffs’ claims under the general G.B.L. Sections 349 and 350 do not fall within the firearm-specific ambit of the predicate exception (R. 250-251, 794-795, 832-833, 1093-1096). These sections prohibit “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]...” G.B.L. § 349(a). “These statutes on their face apply to virtually all economic activity, and their application has been correspondingly broad.” *Karlin v.*

*IVF Am., Inc.*, 93 N.Y.2d 282, 290 (1999). Both sections are broadly worded to protect the public from any form of deceptive business practices. *Himmelstein, McConnel, Gribben, Donoghue & Joseph, LLP, v. Matthew Bender & Co.*, 37 N.Y.3d 169, 177 (2021). They are not firearms-specific statutes that can be used to satisfy the PLCAA’s predicate exception.

One lawsuit that Congress focused on when debating passage involved statutory claims for public nuisance and negligence in California. *See Iletto*, 565 F.3d 1126 (9th Cir. 2009) (noting that Congress considered “this very case as the type of case they meant the PLCAA to preempt”). In *Iletto*, a case arising out of a highly publicized mass shooting, plaintiffs argued that California’s statutory tort laws sufficed as predicate statutes to avoid dismissal based on the PLCAA. 565 F.3d at 1136. The Ninth Circuit disagreed and concluded that the predicate exception cannot sensibly be interpreted to “cover[] all state statutes that *could be applied* to the sale or marketing of firearms.” *Id.* at 1135-36 (emphasis in original). That would violate the cardinal rule that statutory provisions should not be read in a way that “would frustrate Congress’ manifest purpose.” *U.S. v. Hayes*, 555 U.S. 415, 427 (2009).

In *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 394, 403 (2d Cir. 2008), the City responded to defendants’ motion to dismiss by arguing that the PLCAA did not warrant immediate dismissal because it alleged violations of New York’s criminal nuisance statute. The Second Circuit reached the same conclusion one year

before *Ileto*, explaining that the predicate exception cannot refer to all general laws that are merely “capable of being applied,” because that would make the exception “far too[]broad.” *City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 394, 403 (2d Cir. 2008). It “would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets.” *Id.* Avoiding this type of nonsensical result is exactly why the Supreme Court has instructed courts to “read [statutory] exception[s] narrowly in order to preserve the primary operation of” the general rule. *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). There is no appreciable difference between the codified nuisance statute, and its codified consumer-protection statutes, as both are generally applicable to all products and all industries. Allowing Plaintiffs’ claims to survive this legal challenge using G.B.L. §§ 349 and 350 as predicate acts would completely frustrate Congress’s intent in passing the PLCAA, and would essentially make the PLCAA a nullity.

Even assuming *arguendo* that Sections 349 and 350 trigger the predicate exception – which Mean argues they do not – Plaintiffs must still prove that Mean “knowingly violated” the statute and the violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs cannot sustain either of these independent and necessary prongs of the predicate exception analysis. First, no court has ruled that a firearm with the MA Lock installed is illegal, and no

criminal or other enforcement action has been taken against dealers who sell – or individual owners who possess – such firearms. Stated differently, if an AR-type rifle with the MA Lock installed is a prohibited “assault weapon,” the New York State Police would have prohibited all dealers from selling such firearms. Semi-automatic AR-type rifles with MA Locks installed have never been prohibited “assault weapons” under New York law. In fact, had the MA Lock been in place on the day of the shooting, it could not be legally possessed with a 30-round magazine and, significantly, it would have been impossible for the MA Lock to be used this way. The only way to utilize these illegal magazines was to illegally remove *and replace* the MA Lock with a traditional magazine release button. Thus, if New York State did not “know” that the MA Lock did not sufficiently convert these firearms into legal firearms in New York, how could Mean have known this information. The Record is devoid of any such notice to Mean.

Similarly, Plaintiffs cannot show that Mean’s alleged violation of these statutes proximately caused the harm. Here, the focus under Sections 349 and 350 is on “the seller’s deception and its subsequent impact on consumer decision-making, not on the consumer’s ultimate use of the product.” *Himmelstein*, 37 N.Y.3d at 177. However, Plaintiffs allege no consumer decision-making based on Mean’s advertising, whether by themselves or by the shooter. In fact, Plaintiffs were not consumers of the MA Lock or even viewed any advertisement for the product before

filing these actions. This, as a threshold matter, negates Plaintiffs' Section 349 and 350 claims because they are "directed at wrongs against the consuming public." *Singh v. City of New York*, 40 N.Y.3d 138, 147, 217 N.E.3d 1, 7, *reargument denied*, 40 N.Y.3d 975, 219 N.E.3d 362 (2023) (*quoting Oswego Laborers' Loc. 214 Pension Fund v. Mar. Midland Bank, N.A.*, 85 N.Y.2d 20, 24 (1995)). Plaintiffs are not the consuming public of the MA Lock, and at bottom, Sections 349 and 350 are not intended to prevent the criminal or unlawful misuse of otherwise legal products.

And finally, Plaintiffs' claims further fail since the PLCAA imposes a freestanding proximate cause requirement as a matter of federal law, which means that federal proximate cause standards apply. When Congress incorporates "proximate cause" into a federal statute, it has a "well established" meaning that allows liability only if "the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 201 (2017). Significantly, since Congress incorporated a proximate cause requirement into the predicate exception, it does not allow any claim unless the plaintiff can show a "close connection" between the alleged harm and the violation of the predicate statute. *Id.* New York's common law extending proximate cause beyond this "close connection" cannot be used. Here, it is undisputed that the initial purchaser and/or installer of the MA Lock did not use the subject rifle with the MA Lock to harm Plaintiffs, or anyone for that matter. The Shooter purchased the rifle

with the MA Lock already installed. As such, Plaintiffs cannot successfully hurdle this federal proximate cause requirement as a matter of law.<sup>8</sup>

Because Plaintiffs' claimed damages are beyond those contemplated by Sections 349 and 350, they fail the requirement that a knowing violation of a firearms-specific statute be the proximate cause of their harm to satisfy the PLCAA's predicate exception.

b. The SAFE Act Does Not Meet the Predicate Exception

Realizing the holes in the G.B.L. related argument, Plaintiffs asserted before the Motion Court that Mean somehow "aided" the Shooter's SAFE Act violations of Penal Law §§ 115.00(1) and 20.00. Meaning, somehow by supplying a method for lawful owners of firearms to conform to New York's "assault weapons" law, they allowed the Shooter to acquire this rifle and then, somehow, were part of his plan to remove and destroy the MA Lock, install replacement products from some other entity, and then purchase high-capacity magazines, again from other unknown entities. This argument is without merit. First, generalized aiding and abetting statutes are clearly not sufficient to be classified as predicate statutes, and squarely fall within the *Beretta* and *Ileto* proscriptions on the use of such generalized statutes

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<sup>8</sup> This Term, the United States Supreme Court is expected to address the scope of the PLCAA's proximate cause requirement in the predicate exception and how it should be applied in these types of cases. See *Smith & Wesson Brands, et al. v. Estados Unidos Mexicanos*, 23-1141 (Order List: 603 U.S. \_\_).

to avoid dismissal based on the PLCAA. *See* Sec. I(D), *supra*. Next, the level of intent required to adequately plead a violation of Sections 115.00(1) and 20.00 is legally insurmountable for Plaintiffs in these cases. Further, despite Plaintiffs’ protestations to the contrary, there are no well-pled facts or applicable law to support a claim that use of the MA Lock to fix a magazine to a rifle in New York violates the SAFE Act. The Shooter did not violate the SAFE Act until he removed the MA Lock, while keeping the other associated features that were only permissible with a fixed magazine set-up. It was not until the Shooter intentionally removed the MA Lock after he purchased the rifle that the SAFE Act was violated. This is a matter of law, and should be determined at this early stage of the litigation to comply with Congress’s intent in passing the PLCAA. Plaintiffs’ argument using aiding and abetting to circumvent the PLCAA is a ruse.<sup>9</sup>

ii. The Negligence Per Se Exception Is Inapplicable

The PLCAA’s “negligence *per se*” exception does not apply to Mean as a manufacturer. This exception covers only claims against *sellers*, not manufacturers. 15 U.S.C. § 7903(5)(A)(ii) (exempting only those claims “brought against a seller for negligent entrustment or negligence *per se*” (emphasis added)). As relevant here,

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<sup>9</sup> The use of the federal aiding and abetting statute to circumvent the PLCAA is also before the United States Supreme Court this term in *Smith & Wesson Brands, et al. v. Estados Unidos Mexicanos*, 23-1141 (Order List: 603 U.S. \_\_\_).

a “seller” is a firearms “dealer” (as defined in 18 U.S.C. § 921(a)(11)) who is “licensed to engage in business as such a dealer” under federal law. 15 U.S.C. § 7903(6). This contrasts with “manufacturer[s],” who are “engaged in the business of manufacturing the product in interstate or foreign commerce and who [are] licensed to engage in business as such a manufacturer.” *Id.* § 7903(2). In this case, Mean is a licensed “manufacturer,” not a “dealer.”

Even assuming *arguendo* that the negligence *per se* exception applies to Mean, this argument still relies on the violation of a statute – a threshold which, as heretofore established, Plaintiffs cannot meet. *Fagan v. AmerisourceBergen Corp.*, 356 F.Supp.2d 198, 214 (E.D.N.Y. 2004); *Prohaska v. Sofamor, S.N.C.*, 138 F.Supp.2d 422, 448 (W.D.N.Y. 2001); *Dubai Islamic Bank v. Citibank, N.A.*, 126 F.Supp.2d 659, 668 (S.D.N.Y. 2000); *German v. Federal Home Loan Mortgage Corp.*, 896 F.Supp. 1385, 1396 (S.D.N.Y. 1995); *Martin v. Herzog*, 228 N.Y.2d 164, 168-69 (1920). Accordingly, this exception to the PLCAA does not apply to save Plaintiffs’ claims.

## **POINT II**

### **DISMISSAL IS STILL WARRANTED EVEN IF AN EXCEPTION APPLIES**

Assuming *arguendo* that the predicate exception applies, which it does not, Plaintiffs still must show proximate cause as an essential element for all of their individual tort claims. Allowing this case to survive a proximate cause analysis based

on the well-pled facts would extend the notion of legal cause beyond anything before. Mean did not sell the Shooter anything. Mean did not manufacture the rifle or ammunition. Mean did not sell the Shooter the car he used to drive to Buffalo. Mean did not sell the Shooter the gas he used in his car to get to Buffalo. Mean did not sell the Shooter his computer he used to research the products and his targets. Arguably, all such entities are more closely connected than Mean to this event, but still, none are defendants in this case; nor should they be.

Dismissal is warranted under a New York common law proximate cause analysis. It is well established that “an intervening intentional or criminal act will generally sever the liability of the original tort-feasor.” *Tennant v. Lascelle*, 161 A.D.3d 1565, 1566-67 (4th Dept. 2018) (quoting *Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016), *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983)). A third party’s “criminal act” is the paradigmatic example of such an unforeseeable intervening act. *Turturro v. City of New York*, 28 N.Y.3d 469, *supra*.

In determining whether a criminal act severs liability, “[t]he test to be applied is whether under all the circumstances the chain of events that followed [an allegedly] negligent act or omission was a normal or foreseeable consequence of the situation created by the [alleged] negligence.” *Tennant*, 161 A.D.3d at 1566 (quoting *Mirand v. City of New York*, 84 N.Y.2d 44, 50 (1994)); *see also Miecznikowski v. Robida*, 278 A.D.2d 793 (4th Dept. 2000), *lv. denied* 96 N.Y.2d 709 (holding that a

child's supervening act of running out onto street and remaining there in an alleged attempt to avoid being hit by another child was extraordinary and unforeseeable).

Under these principles, the Shooter's extraordinary planning, actions and crimes break any causal chain as a matter of law. Plaintiffs do not contend that Mean knew that the Shooter planned his attack, or even that Mean knew who the Shooter was. "More than mere conjecture is required to directly link [Mean] to the assault and suggest complicity." *Radlin v. Brenner*, 286 A.D.2d 881 (4th Dept. 2001) (even assuming that a defendant made false and misleading statements to a to-be assailant, "we conclude that [defendant's] conduct was not a proximate cause of plaintiff's injuries."). "Conjecture" is all that Plaintiffs proffer to support their nebulous proximate cause assertions, and that is not enough.

### **POINT III**

#### **PLAINTIFFS' REMAINING CLAIMS SIMILARLY FAIL**

##### **A. Plaintiffs' G.B.L. Sections 349 And 350 Claims Must Be Dismissed**

Plaintiffs' Section 349 and 350 claims must be independently dismissed pursuant to C.P.L.R. §§ 3211(3) and 3211(7) because Plaintiffs lack standing to bring such claims and the Complaints otherwise fails to state cognizable legal claims.

##### **1. Plaintiffs' Claims Are Derivative**

Derivative injury claims are not actionable under Sections 349 and 350. Plaintiffs are neither consumers of Mean's products, nor are they direct competitors

of Mean. Plaintiffs' alleged damages are, at best, derivative of other consumers' exposure to the alleged misleading statements and are, therefore, not actionable. *See Voters for Animal Rights v. D'Artagnan, Inc.*, No. 19-CV-6158(MKB), 2021 WL 1138017 (E.D.N.Y. Mar. 25, 2021).

In *Frintzilas v. DirecTV, LLC*, 731 F.App'x 71, 72 (2d Cir. July 20, 2018), plaintiff landlords alleged that defendant media providers' standard practice was to deceive tenant-subscribers into signing misleading consent forms, and then armed with the consent forms, defendants installed their hardware in plaintiffs' buildings, which in turn harmed the landlord. While there were intervening steps between defendants' deceptive action and plaintiffs' harm, plaintiffs argued that so long as their harm (installation) is a proximate result of defendants' misleading conduct, they have standing to bring a Section 349 claim. The Second Circuit disagreed, stating that standing under Section 349 requires a direct rather than a derivative injury. The court found that plaintiffs must "plead that they have suffered actual injury caused by a materially misleading" act, not that a misleading act led to further steps which eventually harmed them. *Id.* Indeed, similar to the claims in this matter, the plaintiffs in *Frintzilas* attempted to avoid their standing problem by arguing that the tenant-subscribers suffered no injury; which might be argued here as to the Shooter. However, the Second Circuit rebuked such an argument stating, "but if this is true

(and it seems to be), plaintiffs cannot assert a claim under G.B.L. § 349, which requires that a materially misleading statement be made in the first place.” *Id.*

Since the Plaintiffs and their decedents were not customers of Mean, the harm, if any, is derivative of theoretical harm sustained by consumers of the MA Lock at issue.

## 2. Plaintiffs Fail to State Claims Under G.B.L. Sections 349 and 350

Courts have articulated the following elements necessary to establish claims for both deceptive practices under Section 349 and deceptive advertising under Section 350 (*Ortho Pharm. Corp. v. Cosprophar, Inc.*, 828 F. Supp. 1114, 1129 (S.D.N.Y. 1993), *aff'd*, 32 F.3d 690 (2d Cir. 1994)):

- (i) defendants engaged in conduct that was misleading in a material respect;
- (ii) the deceptive conduct was ‘consumer oriented;’ and
- (iii) plaintiff was injured ‘by reason of’ defendant’s conduct.

“A material misrepresentation is made when a statement ‘is likely to mislead a reasonable consumer acting reasonably under the circumstances.’” *Anunziatta v. Orkin Exterminating Co., Inc.*, 180 F.Supp.2d 353, 361 (N.D.N.Y. 2001) (citing *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 30 (2000)). “The test is an objective one...[w]hether a representation is material and whether it is likely to mislead a reasonable consumer may be determined as a matter of law.” *Id.* “To satisfy the ‘by reason of’ requirement, plaintiff[] need[s] only allege that the defendant[’s] material deceptive act[s] caused the injury.” *In re: Methyl Tertiary Butyl Ether Prods. Liab.*

*Lit.*, 175 F.Supp.2d 593, 631 (S.D.N.Y. 2001) (internal quotation marks and citation omitted).

A plaintiff need not have actually relied on the alleged deceptive conduct to assert a claim under Sections 349 and 350; however, a plaintiff seeking recovery under these statutes must show a causal connection between the defendant's alleged conduct and the plaintiff's injury. *See id.* Here, Plaintiffs allege that Mean represented that the MA Lock is sufficient to transform an otherwise illegal "assault weapon" in New York into a legal one, by affixing the magazine to the rifle (R. 88-263, 661-802, 997-1125, 1494-1647). Nothing more, nothing less. Whether or not this is accurate, or whether a finder of fact would find that Mean's advertising of the MA Lock was misleading in this regard, any such finding cannot be causally related to a third-party using a rifle that was formerly equipped with such a part, to intentionally shoot and murder multiple people. This argument is even more absurd when you consider that the Shooter could have purchased the same rifle in New York with a detachable magazine, but simply missing the other features that have no effect on the rifle's function, and then illegally used the 30-round magazines, with or without installed the prohibited features. "But-for cause" is a stretch here – and it would be the best Plaintiffs can allege in this situation – and is fatally insufficient to state claims for violations of Sections 349 or 350. *City of N.Y. v. Smokes-Spirits*, 12 N.Y.3d 616, 618-19 (2009).

Furthermore, it is clear from the Complaints' allegations with respect to the Shooter's "knowledge" of the MA Lock, that he was fully aware of the MA Lock's purpose, utility, function, and versatility (R. 1020-1021). Thus, there can be no dispute that when the shooter purchased the subject rifle with the MA Lock, he knew it had been installed to comply with New York's "assault weapons" ban, he knew that removing it would certainly result in it being illegal in New York, and he knew replacement parts would be necessary to make the rifle functional again. As such, there was nothing "misleading" in Mean's advertising or marketing, the alleged deception that the MA Lock made an illegal "assault weapon" into a legal semiautomatic rifle was not "consumer oriented," and above all else, Plaintiffs were not damaged as a result of Mean's alleged advertising or marketing-related conduct.

#### **B. Plaintiffs' Negligence and Public Nuisance Claims Must Be Dismissed**

Plaintiffs' negligence and public nuisance claims must also be independently dismissed. As heretofore established, Shooter's heinous acts are without question extraordinary, inexplicable, and methodical homicidal violence and far too attenuated from any action or inaction on the part of Mean that lead to Plaintiffs' harm. Similarly, Plaintiffs' public nuisance claims also fail since they do not meet the requirements to bring a public nuisance claim as private persons because "[c]onduct does not become a public nuisance merely because it interferes with...a large number of persons" and the complaints fail to allege facts to support

“interference with a public right.” *Monaghan v. Roman Catholic Diocese of Rockville Ctr.*, 165 A.D.3d 650, 653 (2d Dept. 2018), *lv dismissed* 32 N.Y.3d 1192 (2019). Plaintiffs have not identified one incident where the MA Lock caused harm to the public. They also cannot point to even one person who possessed a rifle with an MA Lock installed who was arrested for illegally possessing an “assault weapon” in New York, or anywhere else around the country.

In *Monaghan*, the court explained that a “public right is one common to all members of the general public [and]...is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.” *Id.* (citation omitted). The *Monaghan* court rejected a complaint that alleged “the infringement of, at most, a common right of a particular subset of the community, i.e., a group of Roman Catholic parishioners in the area of the Diocese who attended or were active in the priest’s parishes.” *Id.* Like *Monaghan*, Plaintiffs’ public nuisance claim against Mean must be rejected because the complaints center on common rights held by a subset of members of the Buffalo community who shopped at and were present at a particular supermarket at a particular date/time that was *specifically targeted* by a murderer, and it does not otherwise allege injuries arising from interference with a collective right belonging to *all members of the public*. *Id.*

Likewise, in two other cases, *NAACP v. Acusport Inc.*, 271 F. Supp. 2d 435, 496 (E.D.N.Y. 2003), and *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91, 92-93 (1st Dept. 2003), the Eastern District of New York and the First Department, respectively, dismissed those plaintiffs' public nuisance claims against firearms manufactures stating that the sale of the firearms at issue were legal and the legislature was better suited to address the societal problems concerning the already heavily regulated firearms industry. *See NAACP*, 271 F.Supp.2d at 497-99; *Sturm, Ruger*, 309 A.D.2d at 92-94. Here too, Plaintiffs cannot establish a particular danger to them that is greater or more significant than that of the general public. Accordingly, their public nuisance claims are improper and must be dismissed.

#### **POINT IV THE COURT LACKS JURISDICTION OVER MEAN**

Plaintiffs argue that Mean is subject to specific personal jurisdiction in New York pursuant to C.P.L.R. §§ 302(a)(1) & (3). Neither provision authorizes this Court to exercise personal jurisdiction over Mean – a Georgia LLC – in connection with Plaintiffs' claims in this case (R. 327-328).

C.P.L.R. § 302(a)(1) states, in relevant part, that a “court may exercise personal jurisdiction over any non-domiciliary..., who in person or through an agent...transacts any business within the state or contracts anywhere to supply goods or services in the state.” For personal jurisdiction pursuant to Section 302(a)(1), plaintiff's cause of action must arise from the defendant's transaction of business in

New York. *Agency Rent A Car System, Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996). A claim only arises from defendant's transaction of business in New York if there is a "substantial nexus between the business transacted and the cause of action sued upon." *Id.* at 31 (citation and quotation marks omitted).

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

C.P.L.R. § 302(a)(3) states, in relevant part, that a "court may exercise personal jurisdiction over any non-domiciliary..., who in person or through an agent...commits a tortious act without the state causing injury to person or property within the state...." For jurisdiction to be proper pursuant to Section 302(a)(3), the Plaintiffs' specific cause of action must arise out of Mean's alleged tortious act. There is no evidence, or even an allegation, that Mean shipped the MA Lock at issue

to a customer in New York who purchased it as a result of seeing Mean's advertisements or representations regarding the MA Lock. Without such proof, Plaintiffs have no support that their specific causes of action (G.B.L. §§ 349 and 350) arise from Mean's alleged tortious act without the state. These statutes require someone in New York to have seen Mean's advertisements and purchased the specific MA Lock at issue for specific personal jurisdiction to apply. If the MA Lock at issue was purchased by someone outside of New York and later brought to New York, there would be no "tortious conduct" by Mean outside of New York on which to base specific personal jurisdiction. Similarly, if Mean sold the specific MA Lock at issue outside of New York, there would be no basis for it to reasonably expect such act to have consequences in New York. Plaintiffs have demonstrated nothing more than the fact that Mean manufactures and sells MA Locks, and one of them was installed on a rifle, that at some point made its way to New York, and was eventually purchased by the Shooter. That is not sufficient to establish personal jurisdiction pursuant to C.P.L.R. §§ 302(a)(1) or (3).

Accordingly, the Decisions and Orders appealed from should be reversed on this additional basis.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the Decisions and Orders appealed from be reversed, dismissing the Complaints in their entirety as against Mean, with costs and disbursements, and such further relief as the Court deems just under the circumstances.

Dated: White Plains, New York  
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Respectfully submitted,



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## PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 1250.8(f) and (j) that the foregoing brief was prepared on a computer.

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