STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

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; 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,

Plaintiffs,

v.

MEAN LLC; VINTAGE FIREARMS, LLC; RMA ARMAMENT, INC.; ALPHABET INC., GOOGLE, LLC; YOUTUBE, LLC; REDDIT, INC.; PAUL GENDRON; and PAMELA GENDRON,

Defendants,

Hon. Paula L. Feroleto
Index No. 810317/2023

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT VINTAGE FIREARMS, LLC'S MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, STAY THE PENDING PROCEEDINGS (Motion #004)

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**Pro hac vice motion forthcoming*

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Plaintiffs in the *Jones* case (No. 810316/2023) and *Stanfield* case (No. 810317/2023) file this memorandum of law in opposition to motions to dismiss filed by Vintage Firearms, LLC.[1] As explained below, dismissal is not warranted pursuant to CPLR §§ 3211 (a)(1), (3), and (7).

INTRODUCTION

When an 18-year-old racist shooter ("Shooter") killed ten people, wounded three others, and harmed dozens more at a Tops Friendly Markets ("Tops") store on May 14, 2022, he used a Bushmaster XM-15, AR-15-style rifle with detachable 30-round magazines—a gun that no party disputes was illegal under New York law. That gun was sold to him by Defendant Vintage Firearms, LLC ("Vintage"), a retail gun store located in Endicott, New York, that the Shooter visited on multiple occasions to closely examine—and then purchase—that weapon. Plaintiffs—victims and survivors of the Tops attack—have sued Vintage for its wrongful actions in connection with that sale.

In their Complaints, Plaintiffs allege that the gun Vintage sold to the Shooter was an illegal assault weapon at the time of the sale *and* at the time of the shooting. Vintage concedes only the latter. Plaintiffs have also alleged that there was good reason for Vintage to think that the Shooter should not be entrusted with such a weapon at the time of the sale. Vintage disagrees. But factual disagreements like the ones Vintage raises in its motion to dismiss are not grounds for dismissing Plaintiffs' claims at this early stage of the case. To the contrary, Plaintiffs' allegations against Vintage must be taken as true and the case must be allowed to proceed if Plaintiffs have any

[1] The memoranda of law and supporting affirmations filed by Vintage in the *Jones* and *Stanfield* cases are virtually identical. Pursuant to the parties' stipulations (*Jones* NYSCEF Doc. No. 29 and *Stanfield* NYSCEF Doc. No. 32), Plaintiffs file this consolidated opposition brief. The term "Plaintiffs" in this brief refers to the plaintiffs in both cases.

plausible claim against it. Plaintiffs have more than satisfied that standard here. Vintage's motion should be denied in its entirety.

FACTUAL BACKGROUND

Plaintiffs' claims against Vintage arise from its sale of a Bushmaster XM-15 rifle to the Shooter. At the time of the sale, the rifle had a Mean Arms Lock ("MA Lock") attached, which temporarily affixed a 10-round magazine. Jones Compl. ¶ 89; Stanfield Compl. ¶ 170. As alleged in Plaintiffs' Complaints, that rifle was an illegal assault weapon in violation of the New York Secure Ammunition and Firearms Enforcement Act of 2013 ("SAFE Act"), L. 2013, ch. 1. Jones Compl. ¶ 293; Stanfield Compl. ¶ 363.[2]

The SAFE Act prohibits the possession, manufacture, transport, or disposal of an assault weapon in New York. *See* Penal Law § 265.02(7) (possession); Penal Law § 265.10 (manufacture, transport, disposal). An assault weapon is "a semiautomatic rifle that has *an ability to accept* a detachable magazine" and one other feature. Penal Law § 265.00(22)(a). *See also* Jones Compl. ¶ 120; Stanfield Compl. ¶ 201 (p. 46-47) (emphasis added). Guidance from an official New York State website stated that any modification to a weapon to render it compliant with the SAFE Act "must be permanent" and must not be "revers[ible] through reasonable means." Jones Compl. ¶ 121; Stanfield Compl. ¶ 202 (p. 47); Affirmation of Eric Tirschwell ("Tirschwell Aff.") ¶ 16. Here, Vintage sold the Shooter a semi-automatic rifle with a pistol grip and a non-permanent lock, which the Shooter easily removed within minutes on the same day he bought the rifle. Jones Compl. ¶ 89-93; Stanfield Compl. ¶ 170-74; Tirschwell. Aff. ¶ 15.

[2] The *Stanfield* Complaint mistakenly contains two sets of paragraphs numbered from 187 to 206 and also mistakenly contains two paragraphs numbered 304. Therefore, any citation to a paragraph within the range numbered 187 to 206 or to paragraph 304 also includes a citation to the page on which that paragraph appears in the *Stanfield* Complaint.

Plaintiffs allege that Vintage personnel knew that (1) it was simple to remove the MA Lock and (2) having it on a rifle therefore did not permanently change the rifle's capability of accepting detachable magazines. Jones Compl. ¶¶ 92, 148; Stanfield Compl. ¶¶ 173, 209. Indeed, it is hard to imagine how Vintage's owner, who has owned a firearm retail store for decades, could disavow such knowledge, especially in light of his public acknowledgement —in the context of a comment of about "safety features," including presumably the MA Lock—that "gun[s] can be easily modified if you really want to do it." Jones Compl. ¶ 92 n.15; Stanfield Compl. ¶ 173 n.22.[3] Vintage also knew that New York law banned the sale of an assault weapon capable of accepting detachable magazines, but it sold the rifle to Gendron anyway. Jones Compl. ¶ 150; Stanfield Compl. ¶ 211.

It was not an accident that the Shooter acquired this rifle from Vintage; he sought it out specifically. The Shooter set his sights on a firearm that would maximize casualties, writing that he needed a firearm that could "fire ammunition as quickly as needed [and] can hold many rounds of ammunition without reloading." Jones Compl. ¶ 82; Stanfield Compl. ¶ 163. The Complaints further detail how, after realizing that New York's gun laws posed an obstacle to his acquisition of his desired weapon, he found a solution—purchasing a weapon that had the "veneer of compliance with New York law" but that still allowed him (with minor modifications using simple tools) to use it with detachable large capacity magazines in his planned massacre. Jones Compl. ¶ 94; Stanfield Compl. ¶ 175.

[3] Although the full quote from Vintage's owner is not included in the Complaints, it is provided in the Tirschwell Affirmation ¶ 3. With regard to the rifle sold to the Shooter, Vintage's owner stated: "Even with all of those safety features on it — which is the only way I sell it — any gun can be easily modified if you really want to do it."

The Bushmaster XM-15 rifle with the MA Lock that was available to purchase at Vintage fit the bill. The Complaints allege that, through online research and conversations with Vintage personnel, the Shooter learned more about the Bushmaster and the MA Lock. Jones Compl. ¶¶ 85-92; Stanfield Compl. ¶¶ 166-73. On December 21, 2021, the Shooter visited gun dealers in New York and Pennsylvania to examine AR-style rifles, noting in an online diary that he would consider buying an AR-style rifle with a fixed magazine if he could be sure that he would be able to remove the fixed magazine with tools at home. Jones Compl. ¶¶ 85-88; Stanfield Compl. ¶¶ 166-69; Tirschwell Aff. ¶ 7. On December 24, the Shooter noted that he would need to "examine the rifle VERY carefully" to assess whether an AR-style rifle with a fixed magazine could be easily altered to accept detachable magazines. Tirschwell Aff. ¶ 5. [4]

The Complaints allege that the Shooter visited Vintage on at least four occasions between December 2021 and January 2022, zeroing in on the Bushmaster XM-15 with a 10-round magazine affixed to the rifle with an MA Lock. Jones Compl. ¶¶ 88-89; Stanfield Compl. ¶¶ 169-70. The Shooter concluded that this firearm would "do very nicely'" because of its destructive capabilities and its ability to accept large capacity magazines after removal of the MA Lock. Jones Compl. ¶ 89; Stanfield Compl. ¶ 170. By this point, the Shooter knew—from online videos as well as from Vintage personnel—that removing the MA Lock was "easy enough." Jones Compl. ¶ 90; Stanfield Compl. ¶ 171. While inside Vintage, the Shooter spent considerable time with the rifle, inspecting

[4] The Shooter included information regarding his visits to Vintage in his online documents. Plaintiffs' Complaints quote and refer to relevant portions of those documents, and the Tirschwell affirmation submitted with this brief supplements the Complaints by referring to additional portions of them. For purposes of a motion to dismiss, facts alleged by Plaintiffs in the Complaints and affirmations are relevant and given favorable inferences. *See Goodwill Toys MFG, Ltd. v. I-Star Ent., LLC*, 214 A.D.3d 628, 631 (2d Dep't 2023) ("[T]he facts alleged by the plaintiff in the complaint and in the affirmations it submitted in opposition to the defendants' motion to dismiss must be construed in the light most favorable to the plaintiff, and all doubts should be resolved in favor of the plaintiff.").

the rifle and the MA Lock closely. Tirschwell Aff. ¶ 11. The Complaints also allege that the Shooter discussed the removal of the MA Lock with personnel at Vintage. Jones Compl. ¶¶ 89-90; Stanfield Compl. ¶¶ 170-71. The Shooter purchased the rifle on January 19, 2022, his fourth visit, and removed the MA Lock later that day using a screw extraction kit. Jones Compl. ¶¶ 89-93; Stanfield Compl. ¶¶ 170-74.

In February, the Shooter returned to Tops to purchase additional items and spoke with a person he referred to as "Chuck" about his "shooting experience with the bushmaster I bought from him." Tirschwell Aff. ¶ 13. In March, the Shooter returned to buy ammunition at Vintage even though "it [cost] way more than what I wanted to pay." Tirschwell Aff. ¶ 14 The Shooter explained that he "like[d] the guy at Vintage" and that "[h]e's quite a nice guy. So I was willing to help him out a bit by buying this." *Id.* The Shooter even implored the readers of his writings: "If he's still around after the attack promise me you'll buy something off him?" Tirschwell Aff. ¶ 14.

In sum, as laid out in the Complaints, Vintage sold the rifle to the Shooter despite his age (18), his preoccupation with the rifle and magazine lock, and the rifle's failure to comply with the SAFE Act. Jones Compl. ¶¶ 91-94; Stanfield Compl. ¶¶ 172-75. Vintage allowed the Shooter to examine the rifle repeatedly, Jones Compl. ¶¶ 89-91, 149; Stanfield Compl. ¶¶ 170-72, 210, and helped the Shooter understand that he could remove the MA Lock. As the Complaints allege, Vintage knew, should have known, or was willfully blind to the Shooter's intent to possess an illegal assault weapon as well as the public safety risk associated with putting that weapon in the Shooter's hands. Jones Compl. ¶ 149; Stanfield Compl. ¶ 210.

As the Complaints further allege, by selling an illegal assault weapon to the Shooter, Vintage emboldened him to carry out the attack he was planning and armed him with a weapon

that increased the lethality and duration of the attack. Jones Compl. ¶¶ 151-52; Stanfield Compl. ¶¶ 212-13. The Shooter used at least two large-capacity magazines during the shooting, firing about 60 rounds. Jones Compl. ¶ 146; Stanfield Compl. ¶ 207. If the Shooter had not had the ability to reload the Bushmaster XM-15 with detachable magazines, Plaintiffs allege he may not have been emboldened to undertake his attack. Jones Compl. ¶ 142-43; Stanfield Compl. ¶ 203-04 (p. 53-54). And if he had conducted his attack with a New York-compliant weapon (one with a *permanently fixed* ten-round magazine), Plaintiffs further allege, he would have ended or been forced to end the attack sooner or paused to partially disassemble his rifle to reload, which would have caused the shooting to unfold differently, allowing victims more time to escape and/or intervene to stop the shooting. Jones Compl. ¶ 144; Stanfield Compl. ¶ 205 (p. 54). As events actually unfolded, the Shooter fired dozens of rounds, seamlessly reloaded his rifle with a large capacity magazine, and continued firing, fatally shooting Plaintiff Wayne Jones's mother after reloading. Jones Compl. ¶¶ 115, 145. The Complaints allege that without the illegal assault weapon the Shooter purchased from Vintage, his attack at Tops would have been less deadly and traumatizing, if it happened at all. Jones Compl. ¶ 296; Stanfield Compl. ¶ 366.

Plaintiffs commenced these cases to hold Vintage, as well as other defendants, responsible for their actions in connection with the Tops attack. Plaintiff Wayne Jones sued in his capacity as the administrator of the estate of Celestine Chaney, Mr. Jones's mother, who was murdered at Tops. *See Jones v. MEAN LLC*, et. al, Case no. 810316/2023 (filed on August 15, 2023). Mr. Jones brings claims against Vintage for negligence, negligent entrustment, and violations of General Business Law § 898-b ("GBL § 898-b"). Twenty-four employees and patrons of Tops who survived the shooting with emotional and physical injuries filed a separate complaint. *See Harris Stanfield, et al., Jones v. MEAN LLC*, et. al, Case no. 810317/2023 (filed on August 15, 2023)

(amended complaint filed on September 14, 2023). The *Stanfield* Plaintiffs bring four claims against Vintage: negligence, negligent infliction of emotional distress, negligent entrustment, and violations of GBL § 898-b. The allegations regarding Vintage are virtually identical in the *Jones* and *Stanfield* cases. On November 9, 2023, Vintage moved to dismiss under CPLR 3211(a)(1), (a)(3), and (a)(7) as to both Complaints.

LEGAL STANDARD

Defendants face a high bar when seeking dismissal of claims pursuant to motions to dismiss: courts must accept the complaint's allegations as true, liberally construe those allegations, and draw all reasonable inferences in the plaintiff's favor. *JF Capital Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 764 (2015).[5] The defendant carries the burden of establishing that the complaint fails to state viable claims. *Connolly v. Long Is. Power Auth.*, 30 N.Y.3d 719, 730 (2018). Dismissal is warranted only if the complaint fails to allege facts that fit within *any* cognizable legal theory. *Lawrence v. Miller*, 11 N.Y.3d 588, 595 (2008) (emphasis added).

"In assessing a motion under CPLR 3211(a)(7) . . . a court may freely consider affidavits submitted *by the plaintiff* to remedy any defects in the complaint." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (emphasis added). On the other hand, to the extent a court considers evidentiary material submitted *by a defendant* at all, such an affidavit "will almost never warrant dismissal" unless it establishes "conclusively that [the plaintiff] has no cause of action." *Dolphin Holdings, Ltd. v. Gander & White Shipping, Inc.*, 122 A.D.3d 901, 902 (2d Dep't 2014). The criterion for dismissal is whether the plaintiff "*has* a cause of action, not whether he has stated one, and, unless

[5] Allegations made "upon information and belief" are entitled to the same treatment. They "are to be considered true for the purposes of a motion to dismiss." *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 40 (2d Dep't 1989).

it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate." *Weill v. E. Sunset Park Realty, LLC*, 101 A.D.3d 859 (2d Dep't 2012) (quoting *Sokol v. Leader,* 74 A.D.3d 1180, 1181 (2d Dep't 2010) (emphasis added)).[6]

The Fourth Department and courts within it have repeatedly rejected motions to dismiss where a defendant asserted protection from suit under the Protection of Lawful Commerce in Arms Act ("PLCAA"). *See, e.g., King v. Klocek*, 187 A.D.3d 1614, 1616 (4th Dep't 2020) (affirming denial of motion to dismiss when "complaint allege[d] sufficient facts to bring this action within the PLCAA's predicate exception"); *Williams v. Beemiller*, 100 A.D.3d 143 (4th Dep't 2012) (reversing grant of PLCAA dismissal to gun industry defendants); *Chiapperini v. Gander Mtn. Co*., 48 Misc. 3d 865, 875 (Monroe County Sup. Ct. Dec. 23, 2014) (denying dismiss when "[w]ithout the benefit of discovery, this court is not convinced that it can be definitively stated that all of these federal laws do not apply . . . . Proximate cause is normally a question of fact for a jury.").

[6] Where a defendant moves to dismiss for lack of legal capacity to sue under CPLR 3211(a)(3), a plaintiff's "competence to commence an action is presumed" and the defendant "b[ears] the burden of demonstrating that plaintiff [is] not competent." *Vasilatos v. Dzamba*, 148 A.D.3d 1275, 1276 (1st Dep't 2017). A motion to dismiss pursuant to CPLR 3211(a)(1) "may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Davis v. Henry*, 212 A.D.3d 597 (2d Dep't 2023) (quoting *Qureshi v. Vital Transportation, Inc.*, 173 A.D.3d 1076, 1077 (2d Dep't 2019)). Only evidence that is "unambiguous and of undisputed authenticity" such as judicial records, mortgages, deeds, and contracts may be considered; affidavits do not constitute documentary evidence. *Id.*

ARGUMENT

I. VINTAGE'S ATTEMPT TO CONTRADICT THE COMPLAINTS' FACTUAL ALLEGATIONS AND INTRODUCE EXTRANEOUS FACTS IS IMPROPER

Instead of arguing that Plaintiffs' claims fail as alleged, Vintage disregards many of those factual allegations in favor of its own. That is impermissible. *See JF Cap. Advisors*, 25 N.Y.3d at 764 (factual allegations in complaint must be accepted as true at motion-to-dismiss stage).

Vintage's motion to dismiss and supporting materials are replete with attempts to ignore Plaintiffs' allegations and introduce information not included in the Complaints. For example, Vintage repeatedly asserts that "the Subject Rifle was compliant with New York law at the time it was sold by Vintage." *See*, *e.g.,* Def.'s Jones Br. at 4; Def.'s Stanfield Br. at 4; List Aff. ¶ 11 (NYSCEF No. 33 in *Jones*; NYSCEF No. 41 in *Stanfield*). But the Complaints say exactly the opposite. *See, e.g.*, Jones Compl. ¶¶ 5, 147; Stanfield Compl. ¶ 208 (p. 54) (alleging that Vintage sold Shooter "illegal assault weapon" with MA Lock); *see also* Tirschwell Aff. ¶ 17 (citing an official New York State website that specified that "[a]ny AR-15 variant" manufactured by Bushmaster is classified as an assault weapon).

The Court should decline Vintage's invitation to rewrite Plaintiffs' Complaints. At this stage, the truth of Plaintiffs' allegations must be assumed, and Vintage's contrary facts should be disregarded. That extends to the supporting materials submitted by Vintage. *See Lawrence*, 11 N.Y.3d at 595 ("Affidavits submitted by a [defendant] will almost never warrant dismissal under CPLR 3211 *unless* they 'establish conclusively that [plaintiff] has no [claim or] cause of action.'" (quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976))); *Tsimerman v. Janoff*, 40 A.D.3d 242, 242 (1st Dep't 2007) ("These affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . ."). In no respect

does Vintage show that any "material fact" in the Complaints "is not a fact at all" or that "it can be said that no significant dispute exists regarding it." *Sokol,* 74 A.D.3d at 1182 (citation omitted). Here nothing in Vintage's briefs or affidavits establishes that Plaintiffs have no cause of action with regard to any of their claims.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY PLCAA AND ARE SUFFICIENT UNDER APPLICABLE NEW YORK LAW

Vintage argues that PLCAA "requires the immediate dismissal" of Plaintiffs' claims and that they are, in any event, deficient as a matter of New York law. Def.'s Jones Br. at 14-32; Def.'s Stanfield Br. at 14-32. Dismissal is not warranted, however, because two of PLCAA's exceptions—the predicate exception and the negligent entrustment exception—clearly apply, and Plaintiffs have alleged more than enough in support of their statutory claims under New York's SAFE Act and GBL § 898-e as well as their negligent entrustment and negligence claims.

A. PLCAA Expressly Provides for Claims Like Plaintiffs' To Proceed

PLCAA protects eligible defendants from "qualified civil liability action[s]" unless one of the statute's six exceptions applies. 15 U.S.C. §§ 7902(a), 7903(5)(A)(i)-(vi). Those exceptions explicitly allow for claims against defendants in the firearms industry, including dealers like Vintage, in certain circumstances. As PLCAA's text and legislative findings clearly show, gun industry defendants are not shielded from liability for harm caused by others' use of their firearms where the defendant's own illegal conduct caused harm. *See Williams*, 100 A.D.3d at 147-51 (denying gun industry defendant's motion to dismiss where defendant was alleged to have violated numerous laws leading to unlawful sale and use of gun); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 433 (Ind. Ct. App. 2007) (denying motion to dismiss, despite defendant firearm manufacturers' argument that plaintiff's lawsuit was "precisely the type of lawsuit that Congress"

meant to prohibit based on PLCAA's legislative findings, because the plaintiff alleged that "[m]anufacturers engaged in unlawful conduct").

Vintage's argument that the "[v]ery [p]urpose of the PLCAA is to [p]rohibit [c]ases [s]uch as [t]his [o]ne," Def.'s Jones Br. at 14; Def.'s Stanfield Br. at 14, ignores the carve-outs that Congress included. PLCAA's protection gives way in cases where a gun dealer's own actions are a legal cause of a plaintiff's injury, including by violating a state or federal law "applicable to the sale or marketing" of firearms or by negligently entrusting a firearm to someone. 15 U.S.C. § 7903(5)(A)(ii)-(iii). *See also Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 131, 202 A.3d 262, 309 (2019) (emphasizing that PLCAA's protection extends only to cases involving "harm that is *solely* caused by others," not actions where a gun industry actor also causes harm (quoting 15 U.S.C. § 7901(a)(6))).

As discussed below, Plaintiffs' claims fit within two of PLCAA's exceptions, which renders PLCAA's protections inapplicable to Vintage for purposes of this action. And once the Court concludes that at least *one* claim falls within *one* of PLCAA's exceptions, Plaintiffs' entire case against Vintage may proceed without a need for a claim-by-claim PLCAA analysis. *King*, 187 A.D.3d at 1616 ("In light of our conclusion that [plaintiffs] allege[] sufficient facts to bring this action within the PLCAA's predicate exception . . . , the 'action' is not subject to dismissal at this stage of the proceeding, and we do not address defendant's contentions regarding the negligent entrustment and negligence per se exceptions to immunity." (citation omitted)); *Chiapperini*, 48 Misc. 3d at 876 ("Having found one applicable PLCAA exception, the Fourth Department allowed the entire case to go forward, including a public nuisance claim." (citing *Williams v. Beemiller, Inc.*, 103 A.D.3d 1191, 1191 (4th Dep't 2013))). Vintage ignores this established principle when

arguing that Plaintiffs' negligence claims must be dismissed because they do not fit within a specific exception. *See* Def.'s Jones Br. at 26; Def.'s Stanfield Br. at 26.[7]

B. PLCAA's Predicate Exception Applies Because Plaintiffs Have Alleged That Vintage's Transfer of an Illegal Assault Weapon to the Shooter Violated Two New York Laws: The SAFE Act and GBL § 898-b

The predicate exception exempts from PLCAA's protection "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." 15 U.S.C. § 7903(5)(A)(iii); *see also Williams*, 100 A.D.3d at 148 (explaining that the "predicate exception" is so called "because a plaintiff not only must present a cognizable claim, [but] he or she also must allege a knowing violation of a 'predicate statute,' i.e., a state or federal statute applicable to the sale or marketing of firearms") (internal quotation marks omitted). Here, Plaintiffs have alleged that Vintage knowingly violated two provisions of New York law when it sold the Bushmaster XM-15 with the MA Lock to the Shooter: (1) the SAFE Act's prohibition on the sale of assault weapons under Penal Law § 265.10(3); and (2) GBL § 898-b's prohibitions on knowingly creating a condition that endangers the safety of the public and failing to establish reasonable controls to prevent the illegal possession, use, or sale of firearms. Jones Compl. ¶¶ 293-95, 303-05, 312-15; Stanfield Compl. ¶¶ 363-65, 372-74, 381-83, 389-91, 304 (p. 94). Either of these alleged violations of New York laws are directly applicable to

[7] Vintage suggests that Plaintiffs' negligence, negligent infliction of emotional distress and negligent entrustment claims cannot survive because they do not fit within PLCAA's predicate exception. Def.'s Jones Br. at 26; Def.'s Stanfield Br. at 26. There are two problems with that argument. First, as explained above, if *any* of Plaintiffs' claims falls within *any* of PLCAA's exceptions—including the predicate exception—the entire action can proceed. That is true even if the action includes general tort claims such as negligence. Second, as explained below, Plaintiffs' negligent entrustment claims fall within a separate exception to PLCAA. *See infra* Section II.D.

the sale and marketing of firearms and are clearly sufficient to satisfy PLCAA's predicate exception at the motion-to-dismiss stage.[8]

i. Vintage's Alleged Violations of the SAFE Act

The Complaints allege that the Bushmaster XM-15 rifle with the MA Lock was not permanently unable to accept detachable magazines, and it therefore was an assault weapon under New York's SAFE Act at the time of the sale. *See* Jones Compl. ¶ 141; Stanfield Compl. ¶ 202 (p. 53). Vintage knew that the MA Lock "could be removed easily and did not permanently change the weapon's capabilities," but it sold the rifle to the Shooter anyway. Jones Compl. ¶¶ 147-51, 293-94; Stanfield Compl. ¶¶ 208-12, 363-64. Vintage understood (or was willfully blind to the fact) that the Shooter sought an illegal assault weapon and helped him understand how he could remove the MA Lock and fixed magazine with simple tools. Jones Compl. ¶¶ 148-49; Stanfield Compl. ¶¶ 209-10. The Shooter removed the MA Lock the same day he bought the Bushmaster XM-15 rifle from Vintage, enabling him to use the rifle with detachable magazines to conduct his racist attack. Jones Compl. ¶¶ 141-46; Stanfield Compl. ¶¶ 202-07 (p. 53-54).

These allegations clearly spell out how Vintage violated New York's SAFE Act. The act defines "assault weapon" to include "a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of [several] characteristics," including "a pistol grip that protrudes conspicuously beneath the action of the weapon." Penal Law § 265.00(22)(a); *see also* Jones Compl. ¶ 120; Stanfield Compl. ¶ 201 (p. 46-47). A semiautomatic rifle with a pistol grip thus

[8] A case that fits within one of PLCAA's exceptions is not a "qualified civil liability action" because PLCAA states that that term "shall not include" actions falling within the enumerated exceptions. 15 U.S.C. § 7903(5)(A). *See Williams*, 100 A.D.3d at 147 (noting where "undisputed that this matter f[ell] within the PLCAA's general definition of a 'qualified civil liability action,' " that " 'qualified civil liability action' does not include 'an action' " that falls within predicate exception).

must have a magazine containing 10 rounds or fewer *permanently* affixed to the rifle. *See* § 265.00(22)(a); Jones Compl. ¶ 121; Stanfield Compl. ¶ 202 (p. 47); Tirschwell Aff. ¶¶ 15-16. The Complaints allege that the Bushmaster XM-15 that Vintage sold to the Shooter had a pistol grip and a 10-round magazine that was *not* permanently affixed. *See* Jones Compl. ¶¶ 5, 89, 147; Stanfield Compl. ¶¶ 170, 208; Tirschwell Aff. ¶ 15. Plaintiffs therefore clearly and adequately allege that Vintage's sale of that rifle to the Shooter violated the SAFE Act. *See* Penal Law § 265.10(3) ("Any person who disposes of any . . . assault weapon . . . is guilty of a class D felony."); § 265.00(6) ("'Dispose of' means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of."). This alleged violation of state law satisfies the predicate exception's requirement that Plaintiffs allege a knowing violation of "a State or Federal statute applicable to the sale or marketing of the product," under 15 U.S.C. § 7903(5)(A)(iii). *See King*, 187 A.D.3d at 1615 (holding that plaintiff's allegation that defendant violated federal and state laws pertaining to sale of ammunition—18 U.S.C. § 922(b)(1) and Penal Law § 270.00(5)—stated claim that fit within predicate exception).

In its motion to dismiss, Vintage completely ignores Plaintiffs' allegations of a SAFE Act violation, which on their own are sufficient to satisfy the predicate exception and defeat PLCAA protection. *See* Def.'s Jones Br. at 25-32; Def.'s Stanfield Br at 25-32. Vintage has therefore effectively conceded this issue. Instead, Vintage cites extraneous factual information to try to contradict the allegations in the Complaints. But the parties' apparent disagreement about whether the specific Bushmaster XM-15 sold to the Shooter with the MA Lock complied with New York law is a factual issue that cannot be decided now. *See* Def.'s Jones Br. at 29 ("The Subject Firearm was legal when sold."); Def.'s Stanfield Br. at 29 (same). As the Fourth Department held in *King*, where a purported fact is not "capable of immediate and accurate determination by resort to easily

accessible sources of indisputable accuracy," a defendant cannot "conclusively establish that plaintiffs have no cause of action," and dismissal of the plaintiffs' claim is improper. *King*, 187 A.D.3d at 1616 (citations omitted).

A criminal case, *People v. Perkins*, 58 Misc. 3d 171, 175 (Monroe County Ct. 2017), is instructive. In *Perkins*, the defendant was charged with criminal possession of an assault weapon under Penal Law § 265.02(7). *Id.* at 173. The defendant moved to dismiss that count, arguing that several rifles found in his possession "h[ad] been modified by an MR2 Kit," the installation of which, he contended, "convert[ed] a *detachable* magazine to a *fixed* magazine, thereby disqualifying MR2-modified rifles from classification as assault weapons." *Id.* at 175.[9] Noting that prosecutors took the opposite view regarding "the impact of an MR2 [kit] on the lawfulness of a semiautomatic rifle," the court denied the motion, holding that the determination regarding the classification of the rifle "should be left to the trier of fact." *Id*. at 175 n.3. The same result should follow here, where the question whether installation of the MA Lock was a "permanent" change and meant the rifle no longer "had the ability" to accept detachable magazines—and thus whether it was lawful under the SAFE Act when sold by Vintage to the Shooter—is a fact issue for a jury to decide. *See also People v. Jennings*, 279 A.D.2d 284, 285 (1st Dep't 2001) (whether shotgun constituted "firearm" was "issue of fact" for jury based on full definition of "firearm," which requires shotgun's barrel length to be shorter than 18 inches).

ii. Vintage's Alleged Violations of GBL § 898-b

Plaintiffs' allegations regarding Vintage's violation of the second New York firearms-specific law referenced in the Complaints—GBL § 898-b—are sufficient for many of the same

[9] As the court described it, "an MR2 Kit is an aftermarket apparatus intended to lock a magazine in place, removable only when a rifle is dissembled." *Perkins*, 58 Misc. 3d at 175 n.2.

reasons discussed with respect to Vintage's alleged SAFE Act violations. Indeed, the violations are overlapping in numerous respects. GBL § 898-b prohibits certain conduct by gun industry members:

> 1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.
>
> 2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.

GBL § 898-b. Plaintiffs allege that Vintage violated both parts of § GBL 898-b by selling the Bushmaster with the MA Lock to the Shooter.

Plaintiffs allege, pursuant to GBL § 898-b(1), that Vintage "knew or was willfully blind to the fact that the sale of a Bushmaster XM-15 to the Shooter equipped him with a weapon capable of semiautomatic firing using high-capacity magazines, which was illegal in New York at all relevant times, and endangered the health, safety, and comfort of members of the public." Stanfield Compl. ¶ 391 (p. 94); *accord* Jones Compl. ¶ 314.[10] Plaintiffs also allege Vintage acted "unreasonably and in a way that resulted in harm to people who reside in New York." Jones Compl. ¶ 316; Stanfield Compl. ¶ 392. This echoes what Plaintiffs have alleged with respect to the SAFE

[10] Because Plaintiffs have adequately alleged knowing violations of GBL § 898-b(1), the Court need not determine whether Vintage recklessly violated that section and need not address Vintage's argument that a reckless violation is incompatible with PLCAA. *See* Def.'s Jones Br. at 27; Def's Stanfield Br. at 27. To the extent the Court nevertheless considers the meaning of the term "recklessly" as used in GBL § 898-b(1), it should not rely on Vintage's interpretation. Contary to Vintage's argument, "[r]ecklessly" is defined by GBL § 898-a(5) as having " the same meaning as defined in section 15.05 of the penal law," and that section requires that, to have acted recklessly, a defendant must possess a criminal *mens rea* equivalent to knowledge in that the defendant must be "*aware of* and *consciously disregard*[] a substantial and unjustifiable risk." Penal Law § 15.05(3).

Act violation: Vintage sold the Shooter the Bushmaster rifle with an easily removable MA Lock, despite New York's assault-weapon ban and knowing the lock was easily removed, and helped the Shooter understand how to remove the lock with simple tools. Jones Compl. ¶¶ 147-51, 293-94; Stanfield Compl. ¶¶ 208-12, 363-64. The safety and health of New Yorkers were endangered by virtue of Vintage's conduct, as demonstrated by the horrific events at Tops on May 14, 2022. Accepting the truth of those allegations for purposes of Vintage's motion, Plaintiffs' GBL § 898-b(1) claim is more than adequate; Plaintiffs have more than adequately alleged that Vintage's conduct was either unlawful (a violation of the SAFE Act) or unreasonable (because, even if not illegal, selling such a weapon with knowledge that the lock was easily removable and that the Shooter was interested in or planning to remove the lock, and without seeking any confirmation as to the legality of the rifle as configured, fell below an objectively reasonable standard) *and* that its actions contributed "to a condition in New York state that endanger[ed] the safety or health of the public through the sale" of the rifle under GBL § 898-b(1).

Plaintiffs' claims that Vintage violated GBL § 898-b(2) are based on the same set of underlying factual allegations, namely that Vintage's sale of the Bushmaster XM-15 with the MA Lock violated a provision of the SAFE Act, Penal Law § 265.10(3), or at least facilitated the unlawful transfer and possession of an illegal assault weapon in New York. Taking those allegations as true, Vintage clearly failed to implement reasonable procedures or controls that could have prevented the sale of a semiautomatic rifle with an easily removable magazine lock that could be and likely would be—and was—possessed and used as an illegal assault weapon. Jones Compl. ¶ 315; Stanfield Compl. ¶ 304 (p. 94). As the Complaints allege, Vintage "continued to display and sell illegal weapons with easily removable locks without any reasonable controls or procedures [and] sold such a weapon to the Shooter without using reasonable controls or

procedures in conjunction with that sale and more generally." Jones Compl. ¶ 315; Stanfield Compl. ¶ 304 (p. 94).

In light of Plaintiffs' detailed allegations, Vintage's argument that Plaintiffs "never specified . . . what 'reasonable controls and procedures' Vintage purportedly failed to establish" rings hollow. *See* Def.'s Jones Br. at 30; Def.'s Stanfield Br. at 30. First, the Court need not even reach this GBL § 898-b(2) issue now if it determines that Plaintiffs have adequately alleged a violation of GBL § 898-b(1), which is itself a sufficient basis to deny the motion as to this cause of action. Second, even if the Court reaches the GBL § 898-b(2) arguments, Plaintiffs have alleged that the MA Lock provided no more than a "veneer of compliance" with New York law and that Vintage was "complicit[ ]" in helping the Shooter acquire a rifle that was banned in New York. Jones Compl. ¶¶ 94, 140; Stanfield Compl. ¶¶ 175, 201 (p. 53). A gun dealer who had adopted and followed reasonable controls and procedures to prevent the sale and possession of illegal assault weapons in New York—which Plaintiffs specifically allege Vintage did not, Jones Compl. ¶ 315; Stanfield Compl. ¶ 304 (p. 94)—would not have sold the Shooter this particular rifle knowing what Vintage knew and without ensuring that the MA Lock did in fact render the Bushmaster XM-15 SAFE Act–compliant. Further details of what specific policies and procedures Vintage could have adopted and utilized to prevent such sales are not required as a matter of pleading and instead are matters for discovery and fact-finding by a jury.

Moreover, even assuming Vintage conducted a background check on the Shooter and complied with documentation requirements in connection with the sale of the Bushmaster—facts that Vintage asserts but that are outside the Complaints and not cognizable on these motions to dismiss—such facts would not absolve Vintage of responsibility for failing to adopt reasonable controls and procedures. *Cf.* Def.'s Jones Br. at 30; Def.'s Stanfield Br. at 30. That is an

uncontroversial proposition. A gun dealer could not be said to use reasonable controls if, for example, it sold a customer an assault weapon with a detachable large-capacity magazine or if it sold 250 rifles to an individual customer, even if those customers passed a federal background check. Also irrelevant is Vintage's reliance on the apparent lack of enforcement action taken against it. *See* Def.'s Jones Br. at 30; Def.'s Stanfield Br. at 30. The mere fact that law enforcement agencies chose not to pursue action against Vintage does not mean that its conduct was lawful or reasonable in relevant ways. *Cf. United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); *Jackson v. City of Moline*, No. 02-CV-04089, 2006 WL 1554075, at *21 (C.D. Ill. June 1, 2006) ("[P]rocedural or discretionary dismissal of criminal charges prior to prosecution does not establish the factual innocence of the charged defendant."). In any event, these arguments too turn on facts that are not properly before the Court and should be disregarded for purposes of a motion to dismiss. *See supra* Part I.

iii. Allegations Regarding Vintage's Knowledge

Vintage also argues that the Complaints do not establish that Vintage *knowingly* violated state law—a requirement contained in PLCAA's predicate exception. Def.'s Jones Br. at 26; Def.'s Stanfield Br. at 26. But Plaintiffs easily satisfy those requirements at this stage of the case.

As to Vintage's knowledge, Plaintiffs allege that Vintage sold the Bushmaster XM-15 to the Shooter even though "Vintage Firearms owner Robert Donald knew that the MEAN Arms Lock could be removed easily and did not permanently change the weapon's capabilities" and Vintage knew that the SAFE Act banned the sale of illegal assault weapons. Jones Compl. ¶¶ 147-51; Stanfield Compl. ¶¶ 208-12. In addition, Plaintiffs allege that Vintage knew of the Shooter's interest in or intentions regarding removal of the MA Lock and it had no procedures or controls in

place to confirm the legality of the sale or the lack of dangerousness associated with selling the Bushmaster XM-15 to a customer like the Shooter under all of the circumstances. Jones Compl. ¶¶ 314-15; Stanfield Compl. ¶¶ 391, 304 (p. 100); Tirschwell Aff. ¶¶ 9, 11. And, as alleged in the Complaints and recognized by the New York legislature, illegal assault weapons (such as the Bushmaster XM-15) pose a danger to the public. Jones Compl. ¶¶ 314; Stanfield Compl. ¶¶ 391. *See also State Senate Introducer's Mem. in Support*, Bill Jacket, L. 2013, ch. 1, at 13 ("Some weapons are so dangerous and some ammunition devices so lethal that we simply cannot afford to continue selling them in our state."). That is more than enough.

To show that a person "knowingly" violated a statute "merely requires proof of knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998). "'[K]nowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Id.* at 192. Plaintiffs are not required to allege or show that Vintage knew that the Bushmaster XM-15 met the statutory definition of assault weapon but only that Vintage knowingly sold the rifle to the Shooter. *See, e.g.*, *People v. Steinmetz*, 177 A.D.3d 1292, 1293 (4th Dep't 2019) (finding that, to establish criminal possession of an assault weapon, prosecutors "were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles").[11]

[11] In alleging that Vintage was "willfully blind" to the fact that it was providing an illegal assault weapon to the Shooter, Jones Compl. ¶ 314; Stanfield Compl. ¶ 391 (p. 94), Plaintiffs describe a mental state "more limited in scope than negligence or recklessness, since 'a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts,' " *Matter of Scher Law Firm, LLP v. DB Partners I, LLC*, 97 A.D.3d 590, 592 (2d Dep't 2012) (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)).

C. Plaintiffs Sufficiently Alleged Proximate Cause

Vintage's primary proximate cause argument is that the Shooter's intentional shooting at Tops is an intervening and unforeseeable act that breaks the chain of causation between Vintage's conduct and Plaintiffs' injuries. Def.'s Jones Br. at 26, 31-32; Def.'s Stanfield Br. at 26, 31-32. But Vintage bears a heavy burden of showing that Plaintiffs' claims are insufficient as a matter of law because "the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries" is typically "one to be made by the factfinder." *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016). "Proximate cause is, at its core, a uniquely fact-specific determination . . . ." *Id.* at 530. Questions regarding whether a defendant's act was a "substantial cause of the events which produced the injury" and whether an intervening act is a "foreseeable consequence of a circumstance created by defendant" are for the factfinder. *Id.* at 528-29 (citations omitted). Nothing in Vintage's motion to dismiss establishes that this is a case where the factfinder should be deprived of that role.

After all, the Complaints allege that Vintage's sale of the Bushmaster XM-15 rifle to the Shooter created the circumstances under which he was emboldened to carry out—and was able to prolong—his deadly attack at Tops. Jones Compl. ¶¶ 85, 87-95, 147-152; Stanfield Compl. ¶¶ 166, 168-76, 208-13. By selling the Shooter the Bushmaster XM-15 affixed with a nonpermanent MA Lock and helping him understand how to remove the lock, Vintage equipped the Shooter with his "weapon of choice." Jones Compl. ¶ 94; Stanfield Compl. ¶ 175. As a result, the Shooter was emboldened to commit the attack and able to use detachable large-capacity magazines, which allowed him to quickly reload his rifle inside the store and inflict far more damage than would have been otherwise possible. Jones Compl. ¶¶ 115, 143-44; Stanfield Compl. ¶¶ 196 (p. 46), 204-05 (p. 54).

These allegations do not describe an intervening and unforeseeable act that warrants dismissal at the pleading stage of the case. Contrary to Vintage's argument, it is not unforeseeable or unduly attenuated from Vintage's conduct that an 18-year-old armed with an illegal assault weapon capable of accepting large-capacity magazines would harm people in a shooting. Dismissal is appropriate only when an act is "of such an extraordinary nature or so attenuates defendants' negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant.'" *In re September 11 Litig.*, 280 F. Supp. 2d 279, 301 (S.D.N.Y. 2003) (quoting *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983)); *see also Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980) (observing that "the casual connection is not automatically severed" where an intervening cause is present). That is not the case here, where the risk created by Vintage's negligent conduct "is exactly the 'risk that came to fruition.'" *Scurry v. New York City Hous. Auth.*, 39 N.Y.3d 443, 455 (2023) (quoting *Hain*, 28 N.Y.3d at 533).

In *Williams v. Beemiller*, the Fourth Department rejected a causation argument like the one Vintage makes. 103 A.D.3d at 1191-92. In *Williams*, the court held that a third-party shooter's intervening criminal act did not, as a matter of law, sever the causal connection between the alleged negligence of the gun industry defendants and the plaintiff's injury. *Id.* It reasoned that the defendants' knowing violations of law in connection with gun sales were "sufficient to raise a question of fact whether it was reasonably foreseeable" that those sales practices "would result in the shooting of an innocent victim." *Id.* at 1192. The same is true here.

Vintage's reliance on *Bell v. Board of Educ. of City of N.Y.*, 90 N.Y.2d 944, 946 (1997), is misplaced. Def.'s Jones Br. at 31; Def.'s Stanfield Br. at 31. *Bell* holds that "[t]he criminal intervention of third parties may . . . be a 'reasonably foreseeable' consequence of circumstances created by the defendant." 90 N.Y.2d at 946. There, a sixth-grade student who was left behind at

a school outing was raped on her way home, and the Court of Appeals ruled that the intervening act of rape was *not* unforeseeable as a matter of law because a factfinder could conclude that "the very purpose of the school supervision was to shield vulnerable schoolchildren from such acts of violence." *Id.* at 946-47.

Here, sadly, a mass shooting with an assault weapon is a foreseeable occurrence when appropriate measures are not taken to deny access to assault weapons by persons who pose a threat to others. *Cf. Parsons v. Colt's Mfg. Co., LLC,* No. 19-CV-01189, 2020 WL 1821306, at *6 (D. Nev. Apr. 10, 2020) (finding, in an action against the manufacturers and dealers that sold AR-15s used in the 2017 Las Vegas mass shooting, that "a reasonable fact finder could conclude that the shooter's use of an AR-15 modified to shoot automatically in a mass shooting was reasonably foreseeable"), *modified on reconsideration*, 2020 WL 2309259 (D. Nev. May 8, 2020); *Holcombe v. United States*, 516 F. Supp. 3d 660, 684-87 (W.D. Tex. 2021) (refusing to strike expert testimony that a proper background check or preventative measures could have deterred a mass shooting); *People v. Crumbley,* No. 362210, 2023 WL 2617524 (Mich. Ct. App. Mar. 23, 2023), *appeal denied,* 995 N.W.2d 339 (Mich. 2023), *and appeal denied*, 995 N.W.2d 340 (Mich. 2023) (refusing to find that a mass shooting was a superseding cause that severed proximate causation). Accordingly, it is not unforeseeable as a matter of law that Vintage's facilitation of the Shooter's acquisition of an assault weapon caused injuries of the types suffered by Plaintiffs.

D. Plaintiffs' Negligent Entrustment Claims Are Neither Barred by PLCAA Nor Insufficient Under New York Law

Plaintiffs' negligent entrustment claims against Vintage fall within a separate PLCAA exception that expressly permits such claims. See 15 U.S.C. § 7903(5)(A)(ii) (exempting from PLCAA's protection "an action brought against a seller for negligent entrustment"). 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.SC. § 7903(5)(B). New York defines negligent entrustment in very similar terms:

> The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion . . . . If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee.

Chiapperini, 48 Misc. 3d at 875 (emphasis omitted) (quoting *Earsing v. Nelson*, 212 A.D.2d 66, 70 (4th Dep't 1995)). A negligent entrustment claim is not barred by PLCAA if it meets both PLCAA's definition of negligent entrustment and the applicable state law standard. *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016). Because PLCAA does not itself create any cause of action, state law applicable to the claim controls. *See* 15 U.S.C. § 7903(5)(C) (providing a rule of construction that "no provision of this chapter shall be construed to create a public or private cause of action or remedy"); *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1132-33 (D. Nev. 2019) (observing hat "[b]ecause the PLCAA does not 'create a public or private cause of action or remedy,' . . . courts look to state law" to define negligent entrustment).

In light of the close similarities between New York's negligent entrustment cause of action and PLCAA's definition of that term, a properly pleaded cause of action under New York law suffices to meet PLCAA's exception for negligent entrustment claims. Indeed, the *Chiapperini* court compared the two negligent entrustment standards and made no differentiation at the pleading stage. *See Chiapperini*, 48 Misc. 3d at 878-80; *see also Elkins v. Academy I, LP*, 633 S.W.3d 529, 534 (Mo. Ct. App. 2021) (observing that PLCAA defines negligent entrustment "similarly" to Missouri common law and "[t]hus, a properly pleaded negligent entrustment claim against a seller of firearms . . . is recognized in Missouri common law and falls within the

exceptions to PLCAA preemption"). New York's cause of action for negligent entrustment is based on Restatement (Second) of Torts § 390 (1965), *see Splawnik v. Di Caprio*, 146 A.D.2d 333, 335 (3d Dep't 1989), and PLCAA's definition of negligent entrustment is "substantially the same" as the Restatement. *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 394 (Alaska 2013). Thus, the sufficiency of Plaintiffs' negligent entrustment claim under New York law satisfies the requirements of PLCAA's negligent entrustment exception as well.

Negligent entrustment under New York law "is based on the degree of knowledge the supplier of a chattel had *or should have* had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion." *Chiapperini*, 48 Misc. 3d at 879 (citation omitted). This degree of knowledge about an entrustee's potential use of a dangerous item, also referred to as "special knowledge," includes information that the defendant should have known of, "if [the defendant] had taken the appropriate steps in light of the red flags." *Id.* at 880.

In their Complaints, Plaintiffs allege numerous facts to support their negligent entrustment claims, all of which must be taken as true for present purposes. They allege that the Shooter visited Vintage four times in less than one month to scope out—and purchase—the illegal assault weapon he sought. Jones Compl. ¶¶ 87-88; Stanfield Compl. ¶¶ 168-69. During those visits, he repeatedly investigated and examined the Bushmaster XM-15 with the MA Lock "very closely"—and presumably in front of Vintage's personnel. Tirschwell Aff. ¶ 11. *See also id.* ¶ 9 (The Shooter wrote that, during his third visit, "[he] investigated the AR at vintage firearms more and learned that [he could] take the fixed mag out if [he got] a screw extraction kit"); *id.* ¶ 11 (during Shooter's fourth visit to Vintage, he again "investigated the AR they had very closely"). Surely an 18-year-old's fixation with an AR-15-style weapon and close examination of the magazine-locking device in front of gun store personnel is enough to raise red flags. As Plaintiffs allege, those facts establish

that Vintage should have been on notice of the Shooter's propensity to use the rifle in an improper or dangerous fashion.

But that is not all that the Complaints allege. Plaintiffs also allege that the Shooter learned how to remove the fixed magazine from the firearm after watching YouTube videos and speaking with staff at Vintage Firearms who then sold him the firearm without inquiring about whether the Shooter's use of the rifle would be lawful. Jones Compl. ¶¶ 89-91; Stanfield Compl. ¶¶ 170-72. Indeed, it is reasonable to infer that the Shooter and Vintage personnel discussed the MA Lock and its removal during one or more of the Shooter's four visits, which should have put Vintage on further notice of the Shooter's unlawful plans and dangerous propensities. Jones Compl. ¶ 89; Stanfield Compl. ¶ 170; Tirschwell Aff. ¶ 11;[12] *cf. Chiapperini*, 48 Misc. 3d at 872 (when construing negligent entrustment allegations on a motion to dismiss, plaintiff's allegations are given "*every favorable inference*" and complaint is to be given "a liberal construction") (citation omitted). Vintage's owner even later remarked to the press how guns, such as the one sold to the Shooter, could be easily modified. Jones Compl. ¶ 92; Stanfield Compl. ¶ 173. These allegations, taken together and assuming their truth, plausibly establish that Vintage negligently entrusted the Bushmaster XM-15 to the Shooter.

The *Chiapperini* case examined analogous allegations and denied the defendant gun dealer's motion to dismiss a negligent entrustment claim. In that case, the trial court allowed the plaintiffs' negligent entrustment claim to survive after determining that the gun dealer "should have known of [the shooter's] criminality if it had taken the appropriate steps in light of the red

[12] Vintage concedes in its motion that the Shooter's "discovery of the [AR-15] modification video and knowledge of the Subject Rifle being for sale at Vintage were nearly simultaneous." Def.'s Jones Br. at 12; Def.'s Stanfield Br. at 12. This further suggests that the Shooter discussed removing the lock with someone at Vintage, which then led him to continue or to bolster his research on YouTube.

flags" asserted in the plaintiffs' complaint. *Chiapperini*, 48 Misc. 3d at 880. In light of the "very early stage of the litigation," the court rejected the defendant's argument that the "red flags [were] just as capable of an 'innocuous interpretation as they [were] a criminal one.'" *Id.* The same is true here. Vintage argues it had no "special knowledge concerning [the Shooter's] propensity toward violence and criminality" and that the Shooter "is not alleged to have acted nervously, disinterested, unusually, or like he was in a rush" when he visited Vintage. Def.'s Jones Br. at 20; Def.'s Stanfield Br. at 20. But that ignores Plaintiffs' allegations regarding the warning signs that were present in this case—the Shooter's multiple, close-in-time visits, his very close examination of the Bushmaster XM-15 with the MA Lock, and the communications between Vintage and the Shooter regarding the lock's removal. At a minimum, Plaintiffs are entitled to conduct discovery into what transpired during the Shooter's visits to Vintage, what Vintage personnel knew, and the status of the Bushmaster XM-15 rifle under New York's assault weapons law. *See Chiapperini*, 48 Misc. 3d at 880 (allowing plaintiffs "to test [their] claim through discovery").

In response to these allegations, Vintage offers additional facts and contradictory conclusions—none of which is appropriate to consider on a motion to dismiss. For example, Vintage argues that the Shooter was legally cleared to purchase the Bushmaster and that there are no allegations that Vintage "engaged in any violations of state or federal law pertaining to the transaction." Def.'s Jones Br. at 20-21; Def.'s Stanfield Br. at 20. But, as discussed earlier, those arguments are not grounds for granting Vintage's motion. And in any event, a gun sale that does not violate the law can still be the basis for a negligent entrustment claim where, as here, the seller was on notice that the buyer was likely to use the gun in an irresponsible or unlawful way. *See Sickles v. Montgomery Ward & Co.*, 6 Misc. 2d 1000, 1002 (Ulster County Sup. Ct. 1957) (rejecting gun seller's argument that its legal sale of gun to parent absolved it of liability for

negligent entrustment when gun seller's employee allowed child to test gun before selling it to parent).

Vintage's legal arguments are also unavailing. Vintage contends that it owed no duty to Plaintiffs, citing *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001). But the language Vintage cites as support does not address duty *in the context of negligent entrustment*. *See* Def.'s Jones Br. at 21-23 (citing *Hamilton*, 96 N.Y.2d at 232-35); Def.'s Stanfield Br. at 21-23 (same). As to negligent entrustment, the Court of Appeals held that a gun seller "*is* under a duty to entrust [a gun] to a responsible person whose use does not create an unreasonable risk of harm to others." *Hamilton*, 96 N.Y.2d at 236 (emphasis added). To be sure, the Court recognized limitations on that duty, including by holding that "[g]eneral statements about an industry" do not suffice to establish a duty. *Id.* at 237. But that is a far cry from this case, where Plaintiffs have made specific allegations regarding Vintage's interactions with the Shooter and knowledge of the weapon he purchased.

Vintage's reliance on *Constant v. Andrew T. Cleckley Funeral Servs., Inc.*, 72 Misc. 3d 393 (Kings County Sup. Ct. 2021), does not improve its argument. *See* Def.'s Jones Br. at 23-25; Def.'s Stanfield Br. at 23-25. In *Constant*, the plaintiff sued U-Haul based on its rental of trucks to a funeral home, which used the trucks to transport corpses and lost the plaintiff's father's body. 72 Misc. 3d at 395. Although the plaintiff's complaint against U-Haul did not contain a negligent entrustment claim, the court considered the viability of such a claim in connection with U-Haul's motion to dismiss. *See id.* at 399. In doing so, the court stated that the plaintiff failed to allege a viable negligent entrustment claim because there was no suggestion that "U-Haul possessed any special knowledge concerning a characteristic or condition *peculiar to the Cleckley Funeral Home, as opposed to any other funeral home generally*, which would render its use of the U-Haul trucks illegal, improper, or dangerous." *Id.* at 400. Here, by contrast, Plaintiffs have alleged that Vintage

possessed special knowledge about the Shooter and the Bushmaster XM-15 that rendered the sale of the rifle to the Shooter illegal, improper, and dangerous.

Contrary to Vintage's assertion, a negligent entrustment claim does not involve an inquiry into who is in the "best position" to intervene to prevent criminal conduct. *See* Def.'s Jones Br. at 21-22; Def.'s Stanfield Br. at 21. It is based on the degree of knowledge the seller had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion. *Chiapperini*, 48 Misc. 3d at 879. It also does not matter that the seller "lacked authority to control" the entrustee's conduct after the sale. *See* Def.'s Jones Br. at 23; Def.'s Stanfield Br. at 23. What matters is whether the seller should have relinquished control of the chattel to the entrustee in the first place. *See Chiapperini*, 48 Misc. 3d at 879. For that reason, it is of no moment that the mass shooting at Tops occurred sixteen weeks after the Shooter purchased the Bushmaster XM-15 from Vintage. Indeed, Vintage cites no case law holding that a negligent entrustment claim fails as a matter of law where sixteen weeks elapses between the sale and misuse of a chattel, and Plaintiffs are aware of none.

III. THE U.S. CONSTITUTION DOES NOT BAR PLAINTIFFS' GBL § 898-b CLAIMS AGAINST VINTAGE

A. GBL § 898-b Is Not Unconstitutionally Vague As Applied to Vintage

Vintage asserts an as-applied vagueness challenge to GBL § 898-b, pursuant to the Due Process Clause of the Fourteenth Amendment. Mot. at 32-35.[13] Notably, the U.S. District Court for the Northern District of New York has already upheld GBL § 898-b against a facial vagueness

[13] Vintage also states, in passing, that GBL § 898-b is vague on its face, Def.'s Jones Br. at 7; Def.'s Stanfield Br. at 7, but does not offer any argument to support a facial vagueness challenge. As a general matter, where a party "engages in some conduct that is clearly proscribed[, it] cannot complain of the vagueness of the law as applied to the conduct of others. [] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of law." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 494 (1982). As explained herein, § 898-b is not vague as applied to Vintage's alleged conduct.

challenge. *Nat'l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 68 (N.D.N.Y. 2022), *appeal docketed* at No. 22-1374 (2d Cir. Jun. 24, 2022).

Contrary to Vintage's argument, Def.'s Jones Br. at 34-35, Def.'s Stanfield Br. at 34-35, it is not enough to assert that statutory language might be more specific. "Statutes need not . . . achieve 'meticulous specificity,' which would come at the cost of 'flexibility and reasonable breadth.'" *Arriaga v. Mukasey*, 521 F.3d 219, 224 (2d Cir. 2008) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). Nor does demonstrating some degree of imprecision suffice: "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Additionally, "economic regulation"—such as GBL § 898-b—"is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Vill. of Hoffman Ests.,* 455 U.S. at 498; *Matter of Indep. Ins. Agents and Brokers of N.Y., Inc. v. N.Y. State Dept. of Fin. Servs.*, 39 N.Y.3d 56, 64 (2022) (same); *see Nat'l Shooting Sports Found*, 604 F. Supp. 3d at 66 (determining that GBL § 898-b is subject to the relaxed vagueness test). Statutes like GBL §§ 898-a to 898-e that impose civil, rather than criminal, penalties are similarly granted greater latitude: "The 'void for vagueness' doctrine is chiefly applied to criminal legislation. Laws with civil consequences receive less exacting vagueness scrutiny." *Arriaga*, 521 F.3d at 222-23.

To succeed on its vagueness challenge, Vintage must establish that § 898-b either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18 (2010) (internal quotation marks omitted); *see People v. Stephens*, 28 N.Y.3d 307, 312 (2016). Vintage must make this showing "as applied to the particular facts at

issue." *Holder*, 561 U.S. at 18-19, 21 ("Of course, the scope of the [statute at issue] may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail."). On a motion to dismiss, the court assumes the truth of the facts alleged in the complaint. *See supra* at 7.[14] Vintage cannot make the required showing based on the facts alleged here.

Plaintiffs allege that Vintage violated § 898-b(1) by (i) knowingly, or with willful blindness, selling the shooter an assault weapon capable of accepting large-capacity magazines, in violation of New York's SAFE Act; by (ii) acting unreasonably in a way that resulted in harm to people who reside in New York, because even if the rifle was not illegal as sold, it was objectively unreasonable for Vintage to sell the Bushmaster XM-15 to the Shooter with the knowledge that the magazine lock was easily removed and knowing that the shooter was interested in and/or planning on removing the lock (*see supra* at 16-18); by (iii) failing to establish reasonable controls to prevent the sale of an illegal assault weapon in violation of the SAFE Act; and by (iv) facilitating the unlawful possession of an illegal assault weapon by selling the Bushmaster XM-15 with an easily removable magazine lock. *See* Jones Compl. ¶¶ 147-52, 314-15; Stanfield Compl. ¶¶ 208-13, 391-304 (p. 94). Vintage cannot establish either that GBL § 898-b did not provide sufficient notice that it prohibits such conduct or that it does not provide sufficiently clear standards to warrant enforcement with regard to such conduct.

i. GBL 898-b Provides Sufficient Notice That It Prohibits Vintage's Alleged Conduct

First, Vintage cannot establish vagueness based on lack of notice. Vintage's alleged conduct falls squarely within GBL § 898-b's scope. GBL § 898-b(1) prohibits "knowingly or

[14] To the extent that Vintage offers contrary fact allegations, they are not properly considered at this stage. *See supra* at 8-9.

recklessly creat[ing], maintain[ing] or contribut[ing] to a condition in New York state that endangers the safety or health of the public through the sale" of a firearm by "conduct either unlawful in itself or unreasonable under all the circumstances." Vintage's sale of an assault weapon in violation of the SAFE Act is clearly covered by § 898-b(1) as it was unlawful and unreasonable. In the alternative, if the rifle was not an assault weapon at the time of the sale, Vintage's sale of the Bushmaster XM-15 with an easily removable magazine lock was unreasonable. Either way, the sale endangered public health and safety. Vintage's alleged conduct likewise squarely violated GBL § 898-b(2), which requires Vintage to "utilize reasonable controls and procedures to prevent its [firearms] from being possessed, used, marketed or sold unlawfully in New York." Reasonable controls and procedures would involve either preventing the unlawful sale of an illegal assault weapon by determining in advance whether a weapon complies with the SAFE Act or preventing the sale of a semiautomatic rifle with an easily removable magazine lock to a purchaser who intends to possess or use the rifle unlawfully. A firearms dealer exercising ordinary intelligence would understand that § 898-b requires dealers in New York to take measures—including verifying that the sale of a weapon complies with the SAFE Act, including guidance provided under it—to avoid selling a semiautomatic rifle, such as the Bushmaster XM-15, to a purchaser, such as the Shooter, who intended to remove the magazine lock. The statute thus provided sufficient notice to Vintage that its alleged conduct was prohibited.[15]

[15] Vintage states, without support, that the notice inquiry should be framed "in the view of the 'ordinary' lay person's ability to read the law and know what is expected of them." Def's Jones Br. at 33; Def's Stanfield Br. at 33. What exactly Vintage means by "'ordinary' lay person" is not clear. In any event, where a statute regulates business entities, courts hearing vagueness challenges to it consider whether the statute provides a "*business person* of ordinary intelligence" with sufficient notice of prohibited conduct. *Hoffman Estates*, 455 U.S. at 501 (emphasis added); *cf. Copeland v. Vance*, 893 F.3d 101, 118 (2d Cir. 2018) (rejecting vagueness challenge by knife seller to criminal prohibition on gravity knives and stating: "As a seller of knives, Native Leather was responsible

Vintage cannot demonstrate otherwise. It contends, without support, that GBL § 898-b is constitutionally infirm because it does not specify exactly which reasonable controls or actions that it must implement. Def's Jones Br. at 34-35; Def's Stanfield Br. at 34-35.[16] That is wrong for at least two reasons. *First*, the Constitution does not demand step-by-step instructions for compliance. *See Holder*, 561 U.S. at 19 ("[P]erfect clarity and precise guidance have never been required" by the Due Process Clause") (quotation marks omitted); *Arriaga*, 521 F.3d at 224 ("Statutes need not . . . achieve 'meticulous specificity,' which would come at the cost of 'flexibility and reasonable breadth.'") (quoting *Grayned*, 408 U.S. at 110). Instead, "'[t]he test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Arriaga*, 521 F.3d at 224 (quoting *Jordan v. De George*, 341 U.S. 223, 231 (1951)). Here, GBL § 898-b, informed by other state laws and interpretive guidance, sufficiently warned Vintage that New York law proscribed the sale of an unlawful assault weapon, including a semiautomatic rifle such as the Bushmaster XM-15 with an easily removable magazine lock, and conveyed to Vintage that reasonable measures must be taken to avoid putting an AR-15 into the hands of someone who might use or possess it unlawfully. *Second*, the Complaints explain, in clear terms, why Vintage's conduct violated state law and objective reasonableness standards. Jones Compl. ¶¶ 147-51, 293; Stanfield Compl. ¶¶ 208-12, 363.

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for ensuring that its merchandise was legal, and it possessed more resources and sophistication to make that judgment than someone who uses a knife in her trade.").

[16] Vintage also complains that Plaintiffs have not sufficiently specified the reasonable controls that it should have implemented. Def's Jones Br. at 28-29; Def's Stanfield Br. at 28-29. The level of detail in Plaintiffs' Complaints may bear on the sufficiency of Plaintiffs' allegations (addressed *supra* at 17-18), but it does not affect the statutory vagueness analysis. For the same reason, Vintage's contention that Plaintiffs "falsely claim…that Vintage's sale of the Subject Rifle violated the assault weapons ban" (Def's Jones Br. at 35; Def's Stanfield Br. at 35) does not bear on the vagueness question, particularly at the motion to dismiss stage.

Moreover, an objective reasonableness standard, such as that included in both GBL § 898-b(1) (reaching conduct "unlawful in itself or *unreasonable under all the circumstances*") (emphasis added) and (b)(2) (requiring "*reasonable* controls and procedures") (emphasis added), alleviates any vagueness concerns. The Court of Appeals has explained that "an objective reasonableness standard is sufficiently definite, and even necessary to support a regulation that could otherwise be subjective." *Indep. Ins. Agents and Brokers of N.Y., Inc.,* 39 N.Y.3d at 66 (rejecting vagueness challenge to insurance regulation that included a reasonableness standard); *see also People v. Stephens*, 28 N.Y.3d at 314 (rejecting vagueness challenge to noise ordinance that included a reasonableness standard). Reasonableness is a standard "long recognized in law and life" and thus "cannot be said to be so vague and indefinite as to afford . . . insufficient notice of what is prohibited.'" *Indep. Ins. Agents and Brokers of N.Y.*, 39 N.Y.3d at 66.

Vintage's vagueness argument, at base, appears to be that its compliance with the reasonableness standard is a disputed fact question. *See* Def.'s Jones Br. at 34-35, Def.'s Stanfield Br. at 34-35 (objecting to Plaintiffs' description of Vintage's conduct). The existence of factual questions does not, however, render a claim unduly vague. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 208, 306 (2008); *see also Police Benevolent Ass'n of City of N.Y., Inc. v. City of New York*, 2023 N.Y. Slip Op. 05960, at *4 (2023) ("Many of plaintiffs' objections to the statutory language raise proof issues for any prosecution, but difficulty in proving prohibited

conduct does not render a statute void for vagueness; rather, 'indeterminacy' as to what precisely is prohibited is the fatal flaw.") (quoting *Williams,* 553 U.S. at 306).[17]

Vintage's further contention that it is "unclear what constitutes a dangerous 'condition'" within the meaning of § 898-(b)(1) fares no better. Def.'s Jones Br. at 34; Def's Stanfield Br. at 34. Even setting aside the self-evident public endangerment caused by Vintage's sale of the Bushmaster XM-15 with an easily removable magazine lock, Vintage ignores the statute's place within New York's long history of broadly declaring public nuisances to redress public harm. *See City of New York v. Smoke-Spirits.com, Inc.*, 12 N.Y.3d 616, 627 (2009) (stating that "the Legislature's authority to enact laws deeming certain activities public nuisances" is "clear"); *see also* Restatement (Second) of Torts § 821B cmt. c (Am. L. Inst. 1975) ("[A]ll of the states have numerous special statutes declaring certain conduct or conditions to be public nuisances because they interfere with the rights of the general public."). Indeed, GBL § 898-b(1) closely tracks New York's longstanding criminal public nuisance provision, which imposes criminal liability on any person who, "[b]y conduct either unlawful in itself or unreasonable under all the circumstances, [] knowingly or recklessly creates or maintains *a condition which endangers the safety or health of a considerable number of persons*." Penal Law § 240.45(1) (emphasis added); *see Copart Indus., Inc. v. Consol. Edison Co. of N.Y.*, 41 N.Y.2d 564, 568 (1977) (referencing § 240.45 in defining

[17] GBL § 898-b(1), for its part, is also insulated from vagueness by its inclusion of a "knowingly or recklessly" scienter requirement, which can "mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499 (finding licensing ordinance regulating businesses selling products "marketed for use" with certain drugs was not vague because marketing, by necessity, involves an intent element); *see also Holder*, 561 U.S. at 21 (stating that "the knowledge requirement of the statute [at issue] further reduces any potential for vagueness"); *Indep. Ins. Agents and Brokers of N.Y.*, 39 N.Y.3d at 66 (regulatory definition that included a scienter element was not vague because a regulated party "alone is in control" of its state of mind, which "rules out the possibility of violating the regulation 'by accident, inadvertence, or chance'" (citation omitted)).

common law public nuisance). "Not only has N.Y. Penal Law § 240.45 never been held to be void-for-vagueness itself, but its over fifty years of existence elucidates and narrows the application GBL § 898-b(1)." *Nat'l Shooting Sports Found.,* 604 F. Supp. 3d at 68; *cf. VIP of Berlin v. Town of Berlin*, 593 F.3d 179, 187-88 (2d Cir. 2010) (upholding ordinance classifying "sexually oriented business" as one that has a "substantial or significant portion" of its stock dedicated to adult merchandise and noting that several longstanding federal statutes incorporate similar language). In short, Vintage's contention that GBL § 898-b(1) is vague for failure to define "condition" is without merit.

ii. Section 898-b Provides Sufficiently Clear Standards For Enforcement

Vintage also cannot establish vagueness based on § 898-b's standards for enforcement. In an as-applied vagueness challenge, courts will find that a statute provides sufficient enforcement standards where it determines "either (1) that a statute as a general matter provides sufficiently clear standards to minimize the risk of arbitrary enforcement or (2) that, even without such standards, the conduct at issue falls within the core of the statute's prohibition." *Thibodeau v. Portuondo*, 486 F.3d 61, 67-68 (2d Cir. 2007) (Sotomayor, J.). Vintage's challenge, which offers almost no argument regarding § 898-b's enforcement standards, fails on both fronts.

As explained above, Vintage's alleged conduct—selling the Bushmaster XM-15 with an MA Lock without verifying the status of that rifle under the SAFE Act to a customer who expressed interest in removing the lock (Jones Compl. ¶ 315; Stanfield Compl. ¶ 304 (p. 94))—falls within the core prohibition of both § 898-b(1) and b(2). Even if this were a more marginal case, § 898-b provides sufficiently clear standards to minimize the risk of arbitrary enforcement. The two prongs of the vagueness inquiry are "closely related," *Police Benevolent Assoc.*, 2023 N.Y. Slip Op. 05960, at *4 (2023), and the features of § 898-b that mitigate vagueness under the

notice prong also limit the risk of arbitrary enforcement. In particular, Section § 898-b's inclusion of objective reasonableness standards prevents arbitrary and discriminatory enforcement. *See Indep. Ins. Agents and Brokers of N.Y.,* 39 N.Y.3d at 66 (stating that an objective reasonableness standard with an "accepted meaning long recognized in law and life" does not provide "inadequate guidelines for adjudication"); *Stephens*, 28 N.Y.3d at 314-15 (distinguishing noise ordinance with an objective reasonableness standard from noise ordinances that feature only subjective enforcement standards and thereby open the door to arbitrary and discriminatory enforcement). Similarly, GBL § 898-b(1)'s scienter element forecloses arbitrary and discriminatory enforcement. The statute requires proof of knowledge or recklessness, and regulated parties like Vintage are in sole control of their state of mind. *See Indep. Ins. Agents and Brokers of N.Y.,* 39 N.Y.3d at 66.

B. GBL § 898-b Does Not Violate the Second Amendment

Vintage's argument that GBL § 898-b violates the Second Amendment "by creating an outright legal prohibition against the selling of AR-15s" lacks merit. Def.'s Jones Br. at 35; Def.'s Stanfield Br. at 35. Vintage's sole source of authority for its claim that AR-15s are protected by the Second Amendment is an outlier district court ruling that has been stayed by the Ninth Circuit. *See Miller v. Bonta*, 2023 WL 6929336 (S.D. Cal. Oct. 19, 2023), *appeal docketed*, No. 23-2979 (9th Cir. Oct. 23, 2023), *stay granted*, No. 23-2979, Dkt. 13 (9th Cir. Oct. 28, 2023) (granting administrative stay because of similarities to *Duncan v. Bonta*, 83 F.4th 803, 805-06 (9th Cir. 2023) (en banc), in which the court found California likely to succeed on appeal in defense of its large-capacity magazine prohibition). *Miller* runs counter to the great weight of authority finding restrictions on assault weapons constitutional after *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). *See Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1179 (7th Cir. 2023) (finding Illinois and similar local assault weapon restrictions likely constitutional and rejecting argument that mere ownership numbers establish a weapon's constitutional protection); *Hartford v.*

Ferguson, No. 23-CV-05364, 2023 WL 3836230, *7 (W.D. Wash. Jun. 6, 2023) (denying plaintiffs' motion for preliminary injunction in challenge to Washington's law restricting assault weapons); *Grant v. Lamont*, No. 22-CV-01223, 2023 WL 5533522, *1 (D. Conn. Aug. 28, 2023) (same, as to Connecticut's assault weapons law), *appeal docketed*, No. 23-1344 (2d Cir. Sept. 28, 2023); *Nat'l Ass'n for Gun Rts. v. Lamont*, No. 22-CV-01118, 2023 WL 4975979, at *26 (D. Conn. Aug. 3, 2023) (same), *appeal docketed,* No. 23-1162 (2d Cir. Aug. 16, 2023); *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.*, No. 1:22-CV-00951, 2023 WL 2655150, at *3 (D. Del. Mar. 27, 2023) (same, as to Delaware's assault weapon law), *appeals docketed*, Nos. 23-1633, 23-1634, 23-1641 (3d Cir. Apr. 7, 2023). Vintage's Second Amendment challenge should be denied.[18]

C. Plaintiffs Oppose a Blanket Stay of Their Claims Pending the Second Circuit's Decision Regarding the Constitutionality of GBL § 898-b

Vintage requests a stay of the claims against it pending the Second Circuit's decision in *Nat'l Shooting Sports Found.,* a case raising a pre-enforcement facial challenge to the constitutionality of GBL § 898-b. *See* Def.'s Jones Br. at 36; Def.'s Stanfield Br at 36. Plaintiffs oppose, first and foremost because, so long as any (or all) of the negligent entrustment, negligent infliction of emotional distress, or negligence claims against Vintage are allowed to proceed, Plaintiffs will be entitled to full discovery as to the circumstances of the sale at Vintage. In that case, a stay would not save Vintage from any discovery burden or the burden of defending the case, and the Court would still be able to incorporate the Second Circuit's guidance well before the close of discovery, summary judgment motions, or trial. If, however, the Court grants Vintage's

[18] In addition, Vintage—as a gun seller—does not itself have Second Amendment rights. *See Teixeira v. County of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) (en banc) (holding that "the Second Amendment does not independently protect a proprietor's right to sell firearms"); *Gazzola v. Hochul*, 645 F. Supp. 3d 37, 64-65 (N.D.N.Y. 2022) (reaching similar conclusion), *aff'd on other grounds*, No. 22-3068-CV, 2023 WL 8494188 (2d Cir. Dec. 8, 2023).

motion to dismiss as to all of Plaintiffs' other claims against it (i.e., dismisses the negligent entrustment, negligent infliction of emotional distress, and negligence claims), such that *only* their GBL § 898-b claims remain against Vintage, Plaintiffs do not oppose a stay as to Vintage pending the Second Circuit's decision in the *Nat'l Shooting Sports Found.* case.

CONCLUSION

For the above reasons, Defendant Vintage Firearms, LLC's motions to dismiss should be denied.

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Respectfully submitted,

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**Pro hac vice motion forthcoming*

CERTIFICATE OF COMPLIANCE

I certify that the word count of this memorandum complies with the word limits agreed to by counsel and memorialized with Stipulations filed by the parties on October 20, 2023. *See* NYSCEF No. 29, in Index No. 810316/2023; NYSCEF Doc. No. 32 in Index No. 810317/2023. According to the word processing software used to prepare this memorandum, the total word count, excluding the material exempted 22 NYCRR § 202.8-b, is 13,303 words. This memorandum also complies with the typeface requirements of 22 NYCRR § 202.5(a) because it has been prepared using Microsoft Word and Times New Roman typeface, 12-point font, and 1" margins.

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