SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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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; 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,

-against-

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

Defendants.

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Index No.: 810317/2023

Hon. Paula L. Feroleto

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MEAN L.L.C.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT AND C.P.L.R. §§ 3211(a)(3), 3211(a)(7) & 3211(a)(8)

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Defendant MEAN L.L.C. ("Mean" or "Defendant") respectfully submits this memorandum of law in support of its motion to dismiss plaintiffs' claims and causes against it pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C §§ 7901-03 ("PLCAA"), and C.P.L.R. §§ 3211(a)(3), 3211(a)(7), and 3211(a)(8).

I. SUMMARY OF THE ARGUMENT

Plaintiffs' claims against Mean must be immediately dismissed because they are barred by the PLCAA, a federal preemption statute that protects Mean from even having to present a defense to the allegations in the Complaint. According to the Complaint's factual allegations, there are no applicable exceptions to the PLCAA that could allow this case to proceed against Mean. Even if the claims were not preempted, they must still be dismissed because plaintiffs lack standing to assert claims against Mean for violations of General Business Law ("G.B.L.") Sections 349 and 350, and otherwise fail to state claims for negligence, negligent infliction of emotional distress ("NIED"), negligence *per se*, public nuisance or violations of Sections 349-350. Plaintiffs' claims should also be dismissed because this Court lacks personal jurisdiction over Mean. Dismissal of the cross-claims asserted by the Gendrons and RMA Armament is warranted for the same reasons.

II. BACKGROUND

On May 14, 2022, ten people were murdered and others injured through the intentional and criminal acts of an 18-year-old person ("shooter").[1] Affirmation of Peter V. Malfa, Esq. ("Malfa Aff.") ¶ 3, Ex.1, Amended Complaint ("Compl.") ¶¶ 1, 2, 196-99. The shooter carried out this heinous act with a semiautomatic rifle, designated as a Bushmaster XM15. Compl. ¶¶ 163-64, 194.

[1] To avoid creating further notoriety for the murderer, his name will not be used in this motion.

Plaintiffs commenced this action on August 15, 2023, naming Mean, a federally licensed firearms manufacturer based in Georgia. *Id.* ¶¶ 93-94.[2]

Mean manufactures and sells the "MA Lock," a component part for semiautomatic AR-type[3] rifles. The MA Lock is designed for lawful firearm owners who wish to convert semiautomatic rifles that accept detachable magazines into fixed magazine rifles.[4] This modification would typically be done to comply with certain states' so-called "assault weapons" laws restricting certain characteristics on semiautomatic rifles with the ability to accept detachable magazines.[5] The MA Lock permanently replaces a rifle's magazine release button.[6] A magazine release button is designed to temporarily lock a magazine in place. Malfa Aff. ¶ 13. When the MA Lock is installed in place of the magazine release button, it permanently fixes the magazine to the rifle and prevents it from being removed just by using one's finger or tool during normal operation and use.[7] The MA Lock cannot be removed from the rifle without the use of specialized tools which are not provided by Mean. *Id.* ¶¶ 17-18. The MA Lock is destroyed during the removal process and cannot be reused. *Id.* ¶ 17.

New York law defines an "assault weapon" as a semiautomatic rifle that has both: "an ability to accept a detachable magazine"; and at least one of the following characteristics:

> (i) a folding or telescoping stock; (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon; (iii) a thumbhole stock; (iv) a second handgrip or a protruding grip that can be held by the non-trigger hand; (v) a bayonet mount; (vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator; (vii) a grenade launcher…

[2] Malfa Aff. ¶ 9, Ex.4 (FFLeZCheck result).
[3] *Id.* ¶ 11, n.3 ("AR" stands for "ArmaLite rifle." ArmaLite was the company that originally developed the rifle in the 1950s).
[4] *Id.*; Compl. ¶¶ 94, 145.
[5] Malfa Aff. ¶ 12.
[6] *Id.* ¶ 14; *id.* Ex.5 (Installation Instructions); Compl. ¶¶ 166-67, 204, 187(2), 191(2).
[7] Malfa Aff. ¶¶ 15-16. Once installed, the MA Lock can be removed only by disassembling the rifle and drilling out and destroying the bolt shaft that holds the MA Lock assembly together; Compl. ¶¶ 166-67, 187(2), 191(2).

Penal Code § 265.00(22)(a). Stated differently, a semiautomatic rifle with the ability to accept a detachable magazine is legal in New York if it does not have any of the prohibited features. This is easily accomplished using aftermarket kits.[8] For example, there are grips specifically designed to comply with New York law, such as the Thorsden stock (https://www.thordsencustoms.com/frs-15-gen-iii-rifle-a2-stock-kits.html), which do not in any way change the functionality of the rifle, are less permanent than the MA Lock, and which the shooter could have also purchased and installed. Similarly, 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. Malfa Aff. ¶¶ 28-31; *id.* Ex.9 (Thordsen stock). The photos below illustrate the difference between two such rifle configurations, which are both legal in New York:

	
DS-15 M4 Style Fixed Magazine (not capable of accepting a detachable magazine)	DS-15 M4 Style Featureless (capable of accepting a detachable magazine)

Both of these 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. Malfa Aff. ¶¶ 29-31; *id.* Ex.10 (DS-15 Fixed), Ex.11 (DS-15 "Featureless"). Thus, contrary to plaintiffs' insinuation that rifles with detachable magazines are illegal in New York (Compl. ¶¶ 165, 203), whether a semiautomatic rifle has a detachable or fixed magazine is not determinative of whether

[8] An example of such a rifle conversion kit can be found at https://ddsranch.com/new-york-state-compliance-parts/ and an example of a New York compliant complete semiautomatic rifle at https://www.recoilweb.com/video-overview-of-the-black-rain-ordnance-new-york-rifle-42549.html. Malfa Aff. ¶¶ 27-28, 31, Ex.8 (component parts/kits).

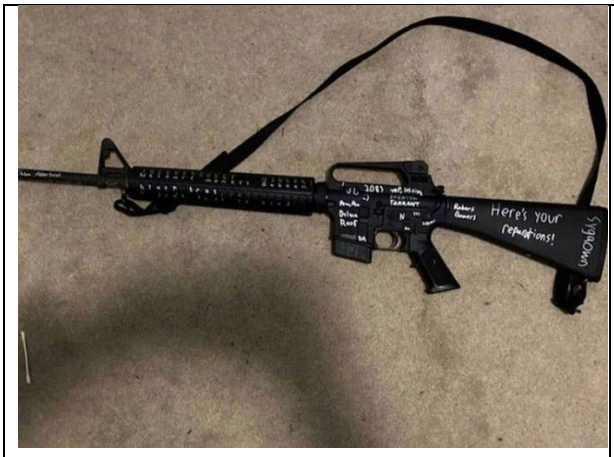
it's legal to possess in New York. The DS-15 "Featureless" rifle depicted above can accept a detachable 30-round magazine, which would be illegal to possess in New York, but its ability to accept such magazines does not make it an "assault weapon."

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," Malfa Aff. ¶¶ 22-24, Ex.6 (NYSP Guidance to Owners), 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***." Malfa Aff. ¶¶ 22-23, 25, Ex.7 (NYSP Guidance to Dealers) (emphasis added). Importantly, however, neither the Penal Code nor any other New York laws or regulations define the terms "detachable magazine," "fixed magazine," or "permanently modify." *Id.* ¶ 26.

Prior to the shooting, the shooter purchased an AR-15-style rifle with an already installed MA Lock permanently affixing a 10-round magazine, thereby making it compliant with New York law. Malfa Aff. ¶ 32; Compl. ¶¶ 166-70, 172. He also purchased a replacement Anderson Manufacturing lower parts kit for an AR-15 style rifle. *Id.* ¶ 33; *Patterson* Verified Complaint ¶ 490; *Salter* Complaint ¶¶ 306, 362. A "lower parts kit" includes substantially all internal components for a rifle (i.e., trigger, hammer, selector, magazine release button/spring, and bolt catch).[9] The shooter subsequently "took the weapon home and removed the lock that same day" using a drill and a specialized "bit meant for extracting stripped screws." Compl. ¶¶ 171, 202. He then modified his rifle by replacing the now destroyed MA Lock with a "regular mag[azine] button and spring." Malfa Aff. ¶ 33; *Patterson* Verified Complaint ¶¶ 522-24; *Salter* Complaint ¶ 348.

[9] Malfa Aff. ¶ 33, Ex.12 (https://andersonmanufacturing.com/stainless-steel-hammer-trigger-lower-parts.html).

Photographs of the shooter's rifle reveals that it had only one of the seven prohibited characteristics listed in Penal Code § 265.00(22)(a): a "pistol grip that protrudes conspicuously beneath the action of the weapon." Malfa Aff. ¶ 34. Accordingly, even after making this modification (removal of the MA Lock), the shooter's rifle would have still been legal to possess if he had simply removed the pistol grip (which would be accomplished by using a screwdriver to remove one screw/bolt). *Id.* ¶ 35. In fact, if the shooter had simply replaced the existing stock with a New York compliant stock, which is also accomplished by removing one screw/bolt, his rifle would have been legal to possess, even after removing the MA Lock and replacing it with the magazine release button. *Id.* ¶ 36. The photos below illustrate a comparison between the shooter's rifle and a legal rifle in New York:

	
Not Legal in NY	Legal in NY

Based on the factual allegations in the Complaint, which the Court must assume are true for purposes of deciding this motion, the shooter purchased a New York-compliant semiautomatic rifle, but then illegally converted it into an illegal "assault weapon" using tools that are not provided by Mean and not traditionally required to maintain or repair a firearm. Further, the shooter illegally acquired and possessed "large capacity magazines." Compl. ¶ 194.

The Complaint asserts six causes of action against Mean: (1) negligence; (2) NIED; (3) violation of Section 349; (4) violation of Section 350; (5) negligence *per se*; and (6) public nuisance. Plaintiffs seek economic and non-economic damages, punitive damages, costs, injunctive relief and other relief. All causes of action brought against Mean must be dismissed.

III. ARGUMENT

A. PLAINTIFFS' CLAIMS AGAINST MEAN MUST BE IMMEDIATELY DISMISSED PURSUANT TO THE PLCAA

1. Purpose of the PLCAA

The PLCAA, which was enacted on October 26, 2005, prohibits the institution of a "qualified civil liability action" in any state or federal court. 15 U.S.C. §§ 7902(a). One of the stated purposes of the PLCAA is 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). The following are among several explicit findings that Congress made regarding the necessity to enact the PLCAA:

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. []...
- 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 that have been shipped or transported in interstate or foreign commerce 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). Based upon the above findings, and to achieve the above purpose, the PLCAA prohibits the filing of a qualified civil liability action in any state or federal court.

2. This Case is a Qualified Civil Liability Action

As defined by the PLCAA, and subject to six limited exceptions, a "qualified civil liability action" is a "civil action...brought by any person against a manufacturer...of a qualified product…for damages, punitive damages, injunctive or declaratory relief, or penalties or other relief resulting from the criminal or unlawful misuse of a qualified product by…a third party…" 15 U.S.C. § 7903(5)(A). Based on the allegations in the Complaint, this case is a civil proceeding brought by a person (plaintiffs) against a manufacturer (Mean) of a qualified product (a component part of a firearm) for damages resulting from the criminal or unlawful misuse of a qualified product (the removal of the MA Lock creating an illegal "assault weapon" in New York and/or the intentional shooting and assault of plaintiffs and murder of other persons) by a third party (the shooter).

3. PLCAA Applies Regardless of Whether the MA Lock is a Component Part

Nothing in the PLCAA requires the manufacturer or seller seeking immunity be the manufacturer or seller of the specific qualified product criminally or unlawfully misused to injure the plaintiffs. 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 say that a manufacturer or seller only receives immunity when *its* qualified product is used criminally or unlawfully. Congress' express "purpose" in enacting the PLCAA was "[t]o prohibit causes of action against [federal firearms licensees]…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).

Here, Mean is undoubtably a qualifying industry member as a federal firearms licensee. Malfa Aff. ¶ 9. 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, this is a qualified civil liability action filed against Mean, a qualified manufacturer, arising out of the criminal use of a qualified product.

4. The MA Lock is a Qualified Product

While Mean is entitled to the protections Congress provided under the PLCAA based on the shooter's criminal use of a qualified product, it is also entitled to such protection because the MA Lock is 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) (emphasis added). 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 trigger, bolt, hammer, or buffer tube, a magazine for a semiautomatic firearm is unquestionably a component part of such 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…"). The terms "rifle" and "semiautomatic rifle" are defined separately under both federal and state law. *See* 18 U.S.C. § 921(a)(7) ("…'rifle' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned

and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger."); *id.* § 921(a)(29) ("…'semiautomatic rifle' means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge."). *Compare with* Penal Law § 265.00(11) (defining "rifle" the same as federal law with additional language for muzzle loaders) and *id.* § 265.00(21) (defining "semiautomatic" the same as federal law with additional language for shotguns and pistols). Without a magazine, there is no "next round" available to be chambered, and the "semiautomatic" design feature of such a rifle will not function; the rifle simply becomes a single-shot rifle. 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 MA Lock, or any other component part that creates a fixed-magazine rifle, and the magazine release button, which temporarily holds a detachable magazine in place, are integral to a semiautomatic rifle's proper function because, without one of them installed, the rifle will not function as intended.[10] Without the MA Lock, or some other part to affix the magazine, the firearm will not function as intended as a semiautomatic rifle because the magazine would fall out and there will be no "next round" to be automatically chambered. Furthermore, in New York, the MA Lock is an integral component part of a semiautomatic rifle that has any one of the features outlined above because without it the firearm is illegal to possess.

[10] The MA Lock is "dedicated irrevocably" because the only way to remove it is to disassemble the rifle's action, destroy the MA Lock, remove its remnants from the rifle, and then replace it with other parts. *See Auto-Ordnance Corp. v. U.S.*, 822 F.2d 1566, 1570 (Fed.Cir. 1987).

The Complaint alleges that "[t]he Shooter went to Vintage Firearms again on January 19, 2022…reexamined the Bushmaster XM-15 with the MEAN Arms Lock and purchased it." Compl. ¶ 91. It further alleges that "[a]fter purchasing the gun…the Shooter took the weapon home and removed the lock that same day." *Id.* ¶ 93. Thus, the shooter purchased the rifle with a MA Lock already installed, the rifle was legally sold to him, and he ***intentionally*** removed the MA Lock and replaced it with a separately purchased magazine release assembly.[11] The shooter's replacement of the MA Lock was an intentionally illegal conversion of a fixed-magazine semiautomatic rifle into a banned "assault weapon" because he did not remove the pistol grip, the only prohibited feature in New York that was installed on the rifle. The MA Lock, which is designed to be dedicated irrevocably for use as a component of a fixed-magazine semiautomatic rifle, and essential for the firearm to function in that capacity, is a qualified product pursuant to the PLCAA.

5. Mean is a Manufacturer

The PLCAA defines a manufacturer, with respect to a qualified product (i.e., a component part of a firearm such as the MA Lock), in relevant part as "a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under [federal law]." 15 U.S.C. § 7903(2). Mean is a "manufacturer" pursuant to the PLCAA.[12]

6. Plaintiffs' Damages Resulted from the Criminal Use of a Qualified Product by a Third Party

The Complaint alleges that the shooter illegally converted his fixed-magazine rifle into an "assault weapon" under New York law by destroying and criminally removing the MA Lock that

[11] Malfa Aff. ¶¶ 32-33.
[12] Compl. ¶¶ 16-17; Malfa Aff. ¶ 9, Ex.4 (ATF FFLeZCheck); *see also* https://www.atf.gov/resource-center/2021-annual-firearms-manufacturers-and-export-report-afmer identifying Mean as holding a type-07 manufacturer's federal firearms license.

came installed on the rifle when he bought it. Compl. ¶¶ 166, 170-74. The shooter then used his now illegal rifle to intentionally shoot at several plaintiffs. Accordingly, plaintiffs' injuries resulted from the criminal use (illegal modification and shooting) involving a qualified product (the MA Lock and rifle) by a third-party (the shooter). Plaintiffs' claims against Mean are therefore considered to constitute a qualified civil liability action and the PLCAA divests the court of jurisdiction requiring the immediate dismissal of all causes of actions and claims brought against Mean. *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F.Supp.3d 425, 441-442 (D.Mass. 2022) ("Statutes that completely prohibit certain types of actions or that address[] a court's competence to adjudicate a particular category of cases are best read as jurisdiction-stripping statute[s]" and "[t]he PLCAA, therefore, is a jurisdictional statute." (internal quotations and citation omitted)).

B. NONE OF THE NARROW EXCEPTIONS TO THE DEFINITION OF A QUALIFIED CIVIL LIABILITY ACTION ARE APPLICABLE

Once the Court determines plaintiffs' lawsuit is a qualified civil liability action, it must analyze the following two (of only six) narrow categories of claims that the PLCAA excludes from the definition of a qualified civil liability action and therefore does not bar:

> (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)];

15 U.S.C. § 7903(5)(A)(ii)-(iii).

1. Plaintiffs' Negligence, NIED and Public Nuisance Claims Do Not Fall Within the PLCAA's Narrow Exceptions

There is no exception for general common law negligence or public nuisance claims.[13] Congress chose to insulate federal firearms licensees from such claims resulting from a third-party's criminal misuse of a firearm or component thereof. 15 U.S.C. § 7902(a) ("A qualified civil action may not be brought in any Federal or State court."). This makes perfect sense because if negligence or public nuisance qualified as exceptions, the PLCAA would have no practical effect. Accordingly, plaintiffs' common law negligence and public nuisance claims are clearly barred by the PLCAA and must be dismissed. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009) (PLCAA preempts general negligence claims); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016) ("PLCAA expressly preempts all general negligence actions seeking damages resulting from the criminal or unlawful use of a firearm"); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) ("reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplusage").

Based on the Complaint's allegations, only two exceptions need to be addressed by the Court. First, plaintiffs' negligence *per se* claim, however since Mean is a "manufacturer" (as

[13] If the Court finds that plaintiffs' common law negligence claim survives notwithstanding Mean's arguments herein, plaintiffs' NIED cause of action (Count II) should still be dismissed as duplicative of Count I, as both claims "involve identical conduct, seek the same relief, and are duplicative." *Curtis v. Gates Community Chapel of Rochester, Inc.*, No. 6:20-CV-06208(EAW), 2023 WL 1070650, at *5 (W.D.N.Y. Jan. 27, 2023); *see also Martirano v. Marriott International, Inc.*, 80 Misc.3d 609, 626 (2023).

defined by the PLCAA) and this exception only applies to "sellers," this avenue is closed. The only other exception that could conceivably be implicated is the PLCAA's so-called "predicate exception." However, that exception does not apply to Mean or the MA Lock for several reasons.

2. **Negligence *Per Se***

a) The Negligence Per Se Exception Does Not Apply to Manufacturers

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, 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."[14] The Complaint does not – and cannot – allege that Mean is a "dealer" as required to be a "seller" under § 7903(6).

b) Plaintiffs' Negligence Per Se Claim is Legally Insufficient

The term "negligence *per se*" is not defined in the PLCAA. Common law negligence *per se* is defined as the violation of a statute, designed to protect a limited class of persons, of which plaintiff is a member, from the specific type of harm that in fact occurred as a result of its violation, and where there is an express or implied private cause of action arising from its violation. *Fagan v. AmerisourceBergen Corp.*, 356 F.Supp.2d 198, 214 (E.D.N.Y. 2004); *Prohaska v. Sofamor,*

[14] *See* n.12, *supra*.

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).

When the violation of a statute constitutes negligence *per se*, the statute creates the duty and the violation establishes the defendant's breach of that duty as a matter of law, but plaintiff is still required to prove that the breach was the proximate cause of his injuries. *Wilkinson v. Russell*, 182 F.3d 89, 99 (2d Cir. 1999); *German*, 896 F.Supp. at 1396-97; *Capriotti v. Consolidated Rail Corp.*, 878 F.Supp. 429, 434 (N.D.N.Y. 1995).

The mere "[v]iolation of a statute, however, does not automatically constitute negligence *per se*. Only statutes designed to protect a definite class of persons from a particular hazard, which persons within the class are incapable of avoiding, can give rise to negligence *per se* for violation of the statute."[15] *German*, 896 F.Supp. at 1396 (internal citation omitted). *See also Wolfson v. Glass*, 301 A.D.2d 843, 844 (3d Dept. 2003) (noting that negligence *per se* arises from violation of a statute designed for the "protection of a certain class of individuals").

The only statutes upon which the plaintiffs rely to support their negligence *per se* cause of action are G.B.L. Sections 349 and 350. As set forth in Section III(B)(3), *infra*, Mean could not have violated either such statute and, even if plaintiffs set forth plausible facts to support such a violation (they have not), those causes of action must still be dismissed for lack of proximate cause and the derivative nature of their claims. If those claims fail on their own (and they do), they cannot

[15] Examples of statutes, the violation of which constitutes negligence *per se* include: failure to stop for a red light, *Lowell v. Peters*, 3 A.D.2d 778, 780 (3d Dept. 2004); driving without required corrective lenses, *Dalal v. City of N.Y.*, 262 A.D.2d 596, 597 (2d Dept. 1999); and driving without headlights and failing to use flares or other emergency devices when stopped on the highway, *McConnell v. Nabozny*, 110 A.D.2d 1060, 1060 (4th Dept. 1985). These statutes all set forth a clearly defined duty designed for the protection of a limited class of persons, other drivers.

be used to support a negligence *per se* claim. *See In re GEICO Customer Data Breach Litig.*, No. 21-CV-2210-KAM-SJB, 2023 WL 4778646, at *16 (E.D.N.Y. July 21, 2023) (*cf. Johnson v. Hunter Warfield, Inc.*, No. 22-CV-122, 2022 WL 1421815, at *4 n.4 (N.D.N.Y. May 5, 2022) ("[P]laintiff's...negligence per se claim fails because it is based on an alleged violation of the FDCPA, which the Court has already determined is meritless.").

3. 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 – 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 the PLCAA was enacted to foreclose.

a) The Predicate Exception Recognizes Only Firearms-Specific Statutes

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. Read in isolation, there are only two textually permissible readings of a "statute applicable to the sale or marketing of" firearms. 15 U.S.C. § 7903(5)(A)(iii). First, it could refer broadly to all laws that are "[c]apable of being applied" to firearms sales and marketing. BLACK'S LAW DICTIONARY (11th ed. 2019). Or, more narrowly, the term "applicable" could mean—especially in reference to "a rule, regulation, law, etc."—"affecting or relating to a particular person, group, or situation; having direct relevance." *Id*. On this reading, the predicate exception applies only to claims under laws that specifically regulate firearms *in particular*.

When the predicate exception is read in context, the narrower meaning is clearly the right one. 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.

A broad reading of the predicate exception would allow precisely the type of claim that Congress sought to bar when it enacted the PLCAA. Congress noted with disapproval that various "[l]awsuits ha[d] been commenced" seeking to hold firearms companies liable for "harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). The lawsuits that had been commenced at the time were based on generally applicable statutes prohibiting "negligent marketing," "public nuisance," and "deceptive trade practices." *See* Timothy D. Lytton, *Tort Claims against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo.L.Rev. at 6-50 2000). One lawsuit that Congress focused on involved statutory claims for public nuisance and negligence in California. *See Ileto*, 565 F.3d 1126 (noting that Congress considered "this very case as the type of case they meant the PLCAA to preempt"). In *Ileto*, 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).

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).

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).

b) Plaintiffs Have Not Plausibly Alleged a Violation of Any Firearms-Specific Statute

The only statutes that plaintiffs claim Mean violated are G.B.L. Sections 349 and 350. Compl. ¶¶ 198, 329-344. 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.

c) Mean Could Not Knowingly Violate Sections 349 or 350

Plaintiffs allege that Mean advertised the MA Lock as a device capable of making firearms comport with New York's "assault weapons" law. Compl. ¶ 203. 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. The reasonable inference to be drawn from these law enforcement agencies' actions – or lack thereof – is clear: semiautomatic AR-type rifles with MA Locks installed have never been prohibited "assault weapons" under New York law.

While New York law does not define "fixed magazine," states with similar statutory schemes define "fixed magazines" as ammunition devices that cannot be removed "without disassembly of the weapon." *See* CONN. GEN. STAT. § 53-202a(4); CAL. PENAL CODE § 30515(b); MD. CODE, CRIM. LAW § 4-301(i). In the Complaint, plaintiffs concede that the MA Lock can only be removed by using a special bit and power drill. Compl. ¶ 190-91. Plaintiffs claim that their damages were caused by the shooter's ability to use detachable large capacity magazines during the shooting. *Id.* ¶ 204. However, plaintiffs acknowledge that while the MA Lock was installed on the shooter's rifle, it could not be used with a 30-round magazine. The only way to utilize these illegal magazines was to illegally remove *and replace* the MA Lock. Plaintiffs try to wedge a *post hoc* rationalization that the shooter's rifle was illegal after he removed the component part that made it legal into a theory of false advertising. They do this entirely without any plausible

allegation that Mean knowingly violated New York law, which fails to meet the requirements of the predicate exception.

d) Plaintiffs Cannot Establish Proximate Cause Even if Sections 349 and 350 Are Predicate Statutes

The predicate exception not only requires that a firearms-specific statute be *knowingly* violated, but also that the alleged violation be a proximate cause of the harm. Here, plaintiffs claim that Mean "committed violations of Section 349(a)…by directing advertising towards New York consumers that was materially misleading regarding whether the installation of the Mean Arms Lock would bring a semiautomatic rifle into compliance with the SAFE Act." Compl. ¶ 332. They also claim, "MEAN Arms' violations of section 349(a)…caused harm to the public interest because its deceptive marketing had the effect of allowing the receipt, sale, and transfer of semiautomatic rifles that properly are classified as assault weapons, thereby thwarting effective enforcement of New York law by state and local law enforcement agencies and threatening public safety by allowing for the proliferation of these dangerous and unlawful firearms." *Id*. ¶ 333. The same language is used by plaintiffs as to Section 350. *Id*. ¶ 339-40. However, the focus of 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. Plaintiffs allege no consumer decision-making based on Mean's advertising, whether by them, or by the shooter.

Plaintiffs were not consumers of the MA Lock, nor do they allege that they contemplated purchasing the MA Lock or viewed any advertisement for the product before filing this action. This should, as a threshold matter, negate their Section 349 and 350 claims because they are "directed at wrongs against the consuming public." *Singh v. City of N.Y.*, __N.E.3d__, 2023 WL

3098734, at *3 (NY Apr. 27. 2023) (*quoting Oswego Laborers' Loc. 214 Pension Fund v. Mar. Midland Bank, N.A.*, 85 N.Y.2d 20, 24 (1995)). Sections 349 and 350 are not intended to prevent the criminal or unlawful misuse of otherwise legal products. Plaintiffs do not plausibly allege that their damages were caused by the shooter's decision to purchase a rifle with an MA Lock installed and to subsequently remove it; as their alleged damages stem from the shooter's subsequent criminal actions. The shooter could have just as easily and legally purchased a similar rifle with the ability to accept a detachable magazine; and then purchased either illegal 30-round magazines, or legal 10-round magazines, and used them to perpetrate the crime. Malfa Aff. ¶¶ 30, 35-36. Moreover, the Complaint even concedes that the shooter could have "undertaken the shooting with the MEAN Arms Lock permanently affixed to his rifle." Compl. ¶ 205(2).

In addition, 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). Thus, since Congress incorporated a proximate cause requirement into the predicate exception, it does not allow any claim unless the plaintiffs can show a "close connection" between the alleged harm and the violation of the predicate statute. *Id*.

The Supreme Court has held, "[P]roximate cause 'generally bars suits for alleged harm that is "too remote" from the defendant's unlawful conduct.'" *Id.* at 202. The federal remoteness doctrine applies under all types of federal laws and it has firm grounding in the common law. *See*, *e.g.*, *Petitions of Kinsman Transit Co*., 388 F.2d 821, 825 & n.8 (2d Cir. 1968) (even where harm "foreseeable," causal link "too tenuous and remote to permit recovery"). Further, the Supreme

Court has recognized that proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged." *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010). "A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Id*. And "[t]he general tendency of the law, in regard to damages at least, is *not to go beyond the first step*" in the causal chain. *Id*. at 10. Here, the first step between any alleged violation of a predicate statute is the purchase of the MA Lock by some unknown purchaser, in or outside of New York. Since it is admitted that the shooter purchased the subject rifle with the MA Lock already installed, the initial purchaser and/or installer did not use the subject rifle with the MA Lock to harm plaintiffs, or anyone for that matter. As such, there is no need for this Court to analyze whether a specific predicate statute was violated, because even if that were the case (which it is not), plaintiffs cannot successfully hurdle this federal proximate cause requirement as a matter of law.

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.

C. MEAN'S ALLEGED ACTS DID NOT PROXIMATELY CAUSE PLAINTIFFS' DAMAGES

Even if plaintiffs could satisfy the predicate exception (they have not), the Complaint does not and cannot allege that Mean's acts were the proximate cause of their injuries under New York law. The gravamen of proximate cause is that a defendant's negligence proximately causes a plaintiff's injury when "it is a substantial cause of the events which produced the injury." *Hain v. Jamison*, 28 N.Y.3d 524, 528-29 (2016) (internal quotation omitted). Where a question of proximate cause involves an intervening act, it must be determined "whether the intervening act is

a *normal or foreseeable consequence* of the situation created by the defendant's negligence." *Id.* at 529 (emphasis in original).

In *Hain*, the Court of Appeals identified two features common to cases holding that intervening acts break the chain of causation: (1) cases in which the intervening act was unforeseeable; or (2) "the defendant's actions did not 'put in motion' or significantly contribute to 'the agency by which the injuries were inflicted,'" but "merely fortuitously" placed a plaintiff in a position in which the intervening negligence independently harmed the plaintiff. 28 N.Y.3d at 531-32. In *Maheshwari v. City of N.Y.*, the plaintiff was attacked at a music festival and sued the concert producers and City for negligence for insufficient security. 2 N.Y.3d 288, 291-93 (2004). There the Court of Appeals held that plaintiff did not establish proximate cause because the violent attack was not foreseeable and far removed from the defendants' conduct, breaking the causal nexus. *Id.* at 295. "The attack was extraordinary and not foreseeable or preventable in the normal course of events." *Id.* Here, to hold Mean responsible based on general marketing or consumer protection statutes and/or common law negligence or nuisance claims for the shooter's intentional and murderous actions clearly exceeds any reasonable expectation of the misuse of Mean's MA Lock, and as a matter of law must break the chain of causation.

In *Morales v. City of N.Y.*, victims of arson sued the gas station which sold the arsonist the gasoline used to burn a social club. 70 N.Y.2d 981, 983 (1988). The plaintiffs alleged that the defendant sold gas in a container that did not conform with City regulations. *Id.* The Court of Appeals held that there was no legal connection between the regulatory violation and the injury, but was instead a "technical [violation] bearing no practical or reasonable causal connection not the injury sustained." *Id.* at 984. The plaintiffs alleged that the harm might not have occurred had the defendant refused to sell gas in an unapproved container. However, the Court stated the purpose

of the regulation was not to make it more difficult to buy untanked gasoline at night, but to make transport and storage of gas safe by preventing accidental leaks or explosion. *Id.* Like the defendant in *Morales*, Mean's alleged violation of consumer protection statutes has no legal connection to the shooter's intentional attack. The purpose of Sections 349 and 350 is to ensure that businesses do not defraud their customers, not to ensure that third parties do not intentionally violate the state's "assault weapons" ban and commit murder. *See also Jantzen v. Leslie Edelman of N.Y., Inc.*, 221 A.D.2d 594 (2d Dept. 1995) (holding that a technical violation by defendant selling a shotgun did not prove the "practical or reasonable causal connection" that led to a police officer being killed with that shotgun); *see also Quiroz v. Leslie Edelman of N.Y., Inc.*, 224 A.D.2d 509 (2d Dept. 1996) (holding that "the sale of the firearm merely furnished the condition for the unfortunate occurrence [and] [t]hus, as a matter of law, there can be no finding of proximate cause.").

The shootings at the Tops Market are extraordinary and far removed from Mean's manufacture and sale of a device designed and intended to help lawful firearm owners comply with certain states' firearms laws. While the shooting was allegedly more deadly due to the shooter's use of a detachable magazine, as noted previously, detachable magazines for semiautomatic rifles are legal in New York, and the installation and subsequent illegal removal of the MA Lock did not put into motion, or substantially contribute to, the harm the shooter created. The causal chain is too attenuated to find that Mean proximately caused plaintiffs' injuries, and therefore the Complaint must be dismissed as to Mean.

D. DERIVATIVE INJURY CLAIMS ARE NOT ACTIONABLE UNDER G.B.L. SECTIONS 349 AND 350

Plaintiffs' Section 349 and 350 claims must be independently dismissed pursuant to C.P.L.R. §§ 3211(3) and 3211(7) because they lack standing to bring such claims and the Complaint 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). This lack of direct duty and injury is even more pronounced when plaintiffs seek damages for emotional injuries only. *See Nieblas-Love v. New York City Housing Auth.,* 165 F.Supp.3d 51 (2016).

The Court of Appeals has explained that injuries which are too remote or derivative of a consumer's injuries are not cognizable injuries. *Blue Cross v. Philip Morris*, 3 N.Y.3d 200, 208 (2004) (holding "that a third-party payer has no standing to bring an action under [Section] 349 because its claims are too remote" and "that what is required [under Section 349] is that the party actually injured be the one to bring suit"). In this matter, if the shooter had been charged with possession of an illegal "assault weapon" with the MA Lock installed on his rifle, or otherwise damaged in this regard, he may have theoretically had standing to bring a claim against Mean pursuant to Sections 349 or 350. "An injury is indirect or derivative when the loss arises solely as a result of injuries sustained by another person." *Id.* Furthermore, "a plaintiff may not recover damages under [Section] 349 for purely indirect or derivative losses that were the result of third

parties being allegedly misled or deceived." *In re Nassau County Consol. MTBE (Methyl Tertiary Butyl Ether) Prod. Liab. Lit.*, 29 Misc. 3d 1219(A), 918 N.Y.S.2d 399, 2010 WL 4400075, at *17 (Sup. Ct. Nassau Cty. Nov. 4, 2010), *judgment entered*, 2011 WL 12521632 (Sup. Ct. Nassau Cty. May. 7, 2011). As such, derivative claims are those arising from injuries to other persons **or** deceptions made by defendant to other persons.

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 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:

(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.

See Ortho Pharm., 828 F.Supp. at 1128-29.

"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. 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. "But-for cause" is the best plaintiffs can allege in this situation, but it is 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 Complaint's 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. Compl. ¶¶ 86-90. 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 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.

E. PLAINTIFFS' PUBLIC NUISANCE CLAIM MUST BE DISMISSED

1. Plaintiffs Fail to Allege a Viable Action for Public Nuisance

While plaintiffs' public nuisance cause of action should clearly be dismissed pursuant to the PLCAA, even without such authority, a private citizen generally has no such claim/cause of action. For a private individual to bring a public nuisance suit that individual must establish that the effect or inconvenience of the nuisance is greater on him or her than any other person. *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435, 497 (E.D.N.Y. 2003). Plaintiffs' public nuisance claim, as it relates to criminal conduct of a third-party and the illegal use of firearms, has been litigated in several cases which applied New York substantive law. The closest case on point is *Smith v. Atlantic Gun & Tackle*, 376 F.Supp.2d 291 (E.D.N.Y. 2005). *Smith* was a case brought under

public nuisance and negligent entrustment theories emanating from a shooting at a Wendy's restaurant. *See id.* at 292. In *Smith*, two men murdered five Wendy's employees and shot two others during a robbery. *Id*. On a motion for summary judgment by the retailer and distributor of the pistol used in the incident, the District Court dismissed plaintiff's public nuisance claim, stating that "plaintiff cannot establish particular danger to this plaintiff, as distinguished from all other New York City residents, from the alleged nuisance prior to the killing." *Id*.

In two other cases, *NAACP v. Acusport*, 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 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, much like *Smith*, plaintiffs cannot establish a particular danger to them that is greater or more significant than that of the general public. Accordingly, their public nuisance claim is improper and must be dismissed.

F. THE COURT LACKS JURISDICTION OVER MEAN

The Complaint cursorily asserts personal jurisdiction over Mean, individually and in combination with other defendants. Compl. ¶¶ 16-19, 52-55. In short, the only alleged bases for personal jurisdiction over Mean is that "[a]ll defendants live or conduct business in the State of New York and/or have purposefully availed themselves of the jurisdiction of this Court by residing in and/or transacting business in this State." *Id.* at ¶ 52. Plaintiffs further claim that "MEAN…registered to do business within the State of New York, conducted business in New York, and/or profited off of their activities directed toward the State of New York." *Id.* at ¶ 53.

However, these allegations sound in general personal jurisdiction, and clearly Mean is not subject to general personal jurisdiction in New York. Further, there are insufficient allegations to tie Mean into this case in New York based on specific personal jurisdiction.

"[T]o demonstrate personal jurisdiction over a defendant...the plaintiff must show either that the defendant was present and doing business in New York within the meaning of C.P.L.R. § 301,' 'or that the defendant committed acts within the scope of New York's long-arm statute, C.P.L.R. § 302.'" *Dingeldey v. VMI-EPE-Holland B.V.*, No. 15-CV-916-A(F), 2016 WL 6273235, at *2 (W.D.N.Y. Sept. 28, 2016), *report and recommendation adopted*, 2016 WL 6248680 (Oct. 26, 2016). "When a defendant objects to the court's exercise of personal jurisdiction, the ultimate burden of proof rests upon the plaintiff." *Serota v. Cooper*, 216 A.D.3d 1019, 1020 (2d Dept. 2023); *see also Matter of William A.*, 192 A.D.3d 1474, 1475 (4th Dept. 2021) ("the ultimate burden of proof rests with the party asserting jurisdiction"). Here, plaintiffs have failed to allege sufficient contacts, or that any such contacts have a relationship to the causes of action asserted to subject Mean to personal jurisdiction in this Court.

1. General Jurisdiction

Mean is a Georgia limited liability company with its principal place of business located in Georgia. Compl. ¶ 93. "[A] court may assert general jurisdiction over foreign (sister-state or foreign country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). It is not enough for a company to engage in regular and systematic sales within a state to subject it to general jurisdiction within that state. Those sales most be so great and so continuous, that the forum state is essentially the company's "home." As such, courts have held that the states of incorporation

and principal place of business are essentially the only jurisdictions where a corporation can be sued using a general jurisdiction analysis. *See Daimler AG v. Bauman*, 571 U.S. 117 (2015). Mean is not incorporated in New York and its principal place of business is not located in New York. As such, there is no general jurisdiction in New York over Mean.

2. Specific Jurisdiction

Specific jurisdiction permits a court to exercise jurisdiction only where the suit arises out of, or relates to, the defendant's contacts with the forum state. *See Bristol-Myers Squibb Co. v Superior Ct. of California, San Francisco County*, 582 U.S. 255 (2017). If a defendant committed a tortious act outside of New York,[16] the plaintiff must rely on C.P.L.R. § 302, and show that: (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce. *Penguin Group (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295, 302 (2011); *see also LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210 (2000).

When a defendant timely asserts that there is a lack of personal jurisdiction, "a New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: (1) the action is permissible under the long-arm statute (C.P.L.R. § 302); and (2) the exercise of jurisdiction comports with due process." *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 528 (2019). If either one is lacking, the action cannot proceed. *Id.* Due process requires that there be minimum contacts with the forum and "that the maintenance of the suit does not offend

[16] There is no allegation in the Complaint that Mean committed a tortious act within New York.

traditional notions of fair play and substantial justice." *Id.* (*citing Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945)).

Plaintiffs allege "MEAN Arms manufactures and sells the MEAN MA Lock…which at all relevant times it marketed as a device capable of bringing firearms into compliance with New York laws prohibiting assault weapons." Compl. ¶ 94. Plaintiffs allege, without factual support, that "[u]pon information and belief, until early May 2023, MEAN Arms regularly shipped the MEAN Arms Lock to purchasers in New York." *Id.* Importantly, plaintiffs do not allege that Mean sold the MA Lock that was allegedly installed in the shooter's rifle when he purchased it, either directly to a person or company within the State of New York.

The U.S. Supreme Court has held that:

> a defendant's placing goods into the stream of commerce with the expectation that they will be purchased by consumers in the forum State may indicate purposeful availment. But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors seek to serve a given State's market.

J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881-82 (2011) (internal citations and quotation marks omitted) (finding that expectation lacking). In *J. McIntyre* the Court went on to state, "the defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, *it is not enough that the defendant might have predicted that its goods will reach the forum State*." *Id.* at 882 (emphasis added). This is the case here. Mean may have "predicted" its MA lock would reach New York, but that is not enough. Plaintiffs must establish that Mean "targeted" New York. The Complaint's factual allegations do not suggest that Mean did so. The closest plaintiffs come is a citation to a "FAQ" on Mean's website that refers to New York. Compl. ¶ 205. However, when read in full, this statement cannot

be deemed an effort by Mean to target the New York market. One note embedded in the "FAQ" section of a website is insufficient as a matter of law for Mean to have "targeted" the New York forum. As such, this Court lacks personal jurisdiction over Mean, and plaintiffs' claims against it must be dismissed.

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits set forth in the agreement among counsel memorialized in the stipulation filed on October 18, 2023 (NYSCEF Doc # 31). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 9,935 words.

Dated: White Plains, New York
November 9, 2023

By: _____
Peter V. Malfa