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 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) (Motion #006)

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**Pro hac vice motion forthcoming*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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 MEAN LLC.[1] As explained below, dismissal is not warranted pursuant to CPLR §§ 3211(a)(3), (7), and (8).

INTRODUCTION

MEAN LLC ("Mean") offered and sold workarounds to state gun safety laws, including New York's. It developed a product specifically for "states with intrusive laws requiring fixed magazines" and referred to states with laws prohibiting the possession and sale of assault weapons as "non-free states." For Mean, the New York Secure Ammunition and Firearms Enforcement Act of 2013 ("SAFE Act"), L. 2013, ch. 1, was one of those "intrusive laws." Under the SAFE Act, a semiautomatic rifle, such as an AR-15 with a standard pistol grip, is an illegal assault weapon if it is capable of accepting detachable magazines.

Mean marketed its magazine lock, the MA Lock, as a "complete fixed magazine solution" that "once installed . . . satisfies CA and NY state law." And its marketing worked: MA Locks and AR-15s with MA Locks installed were available for purchase by New York consumers. But the "solution" Mean offered was nothing more than a veneer. Under the SAFE Act, an AR-15 with a pistol grip must have a fixed magazine that holds no more than ten rounds. And that fixed magazine must be permanently installed on the rifle, thereby rendering the rifle incapable of accepting detachable magazines. Knowing this, Mean claimed in its marketing that the MA Lock "permanently" locks a fixed magazine in place on an AR-15 rifle. But that claim was demonstrably false—as Mean's own statements reveal. Mean openly and repeatedly advised consumers that the

[1] The memoranda of law and supporting affidavits filed by Mean in the Jones and Stanfield cases are virtually identical. Pursuant to the parties' stipulations (*Jones* NYSCEF Doc. No. 28 and *Stanfield* NYSCEF Doc. No. 31), Plaintiffs file this consolidated opposition brief.

MA Lock could be removed easily with simple tools. Mean's message to New Yorkers was clear: This product gives your rifle the appearance of compliance with New York law but the functionality of an illegal assault weapon.

Predictably, Mean's conduct had deadly consequences. A young man motivated by racist hatred ("the Shooter") used the MA Lock to circumvent New York's ban on assault weapons. He sought an AR-15 capable of accepting detachable magazines to use in a mass shooting of Black New Yorkers at a Buffalo neighborhood grocery store because he sought to kill as many Black people as possible. He learned that the MA Lock could be removed easily from an AR-15 and so scouted out just such a rifle, finding a Bushmaster XM-15 with the MA Lock at a local gun dealer. The Shooter then easily removed the MA Lock.

On May 14, 2022, the Shooter used the Bushmaster XM-15 rifle with detachable 30-round magazines to carry out his hateful attack at a Tops Friendly Markets store in Buffalo, killing ten Black people, including Plaintiff Jones' mother, Celestine Chaney, wounding three people, and injuring and severely traumatizing dozens more employees and patrons caught in the line of fire, including the 24 Plaintiffs in the *Stanfield* case.

Mean moves to dismiss Plaintiffs' claims for negligence, negligent infliction of emotional distress, negligence per se, public nuisance, and for violations of Gen. Bus. Law §§ 349 and 350 ("GBL §§ 349 and 350"), asserting that these claims are deficient on the following grounds: (1) they are barred by the Protection of Lawful Commerce in Arms Act ("PLCAA"); (2) Mean's conduct did not proximately cause Plaintiffs' damages; and (3) Plaintiffs have not stated claims. Plaintiffs in the *Jones* case (No. 810316/2023) and *Stanfield* case (No. 810317/2023) file this consolidated opposition to Mean's motion. As explained below, Mean's arguments are not grounds for dismissal, especially at this early stage of the case.

FACTUAL BACKGROUND

New York's assault weapons law (the SAFE Act) prohibits the possession, manufacture, transport, or disposal of an assault weapon. 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 at least one other characteristic, including a "pistol grip." Penal Law § 265.00(22)(a); Jones Compl. ¶ 120; Stanfield Compl. ¶ 201 (p. 46-47).[2] Guidance from a 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.") ¶ 5.

As set forth in the Complaints, Mean directed its marketing of the MA Lock to New York consumers. For example, it stated on its website that the MA Lock "provides a true solution to fixed magazine laws," including New York law, by installing a fixed magazine "permanently" to a semiautomatic rifle. Jones Compl. ¶¶ 124-25; Stanfield Compl. ¶¶ 205-06 (p. 48). Mean mocked New York firearms laws by referring on its social media account to "AR fans languishing in non-free states" while also emphasizing that the MA Lock would "permanently" fix a magazine to a rifle. Jones Compl. ¶ 126; Stanfield Compl. ¶ 187 (p. 48). On the Mean website, a "FAQS" page stated: "We designed our MA Lock product as a complete fixed magazine solution. Once installed, it cannot be removed with a tool, which satisfies CA and NY state law." Jones Compl. ¶ 124; Stanfield Compl. ¶ 205 (p. 48). Through its marketing, Mean led New York consumers to believe

[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.

that installing the MA Lock on an AR-15-style rifle would bring a rifle into compliance with New York's SAFE Act. Jones Compl. ¶ 138; Stanfield Compl. ¶ 199 (p. 52).

But the MA Lock did not "effect a 'permanent' change" that keeps a fixed magazine in place and would thereby bring an AR-15-style rifle into compliance with the SAFE Act. Jones Compl. ¶ 134; Stanfield Compl. ¶ 195 (p. 51). Instead, Mean "knowingly created the mere illusion of compliance and offered New Yorkers a way to circumvent the [assault weapons] law." Jones Compl. ¶ 58; Stanfield Compl. ¶ 145.

Even as it represented that the MA Lock permanently fixed a magazine to a rifle and "c[ould] not be removed with a tool," Mean told social media users that the MA Lock could be removed "quickly" using "simple tools." Jones Compl. ¶¶ 124-25, 128; Stanfield Compl. ¶¶ 205-06 (p. 48), 189 (p. 49). It announced on Facebook that "the MA Lock is completely reversible (with NO permanent changes required . . .)." Jones Compl. ¶ 128; Stanfield Compl. ¶ 189 (p. 49). It promised YouTube users that it would post an instructional video demonstrating how to remove the MA Lock. *Id.* Mean even provided instructions for removing the MA Lock *on the product's packaging*. Jones Compl. ¶ 130; Stanfield Compl. ¶ 191 (p. 49-50). As Mean's instructions stated, removal of the MA Lock could be accomplished using a drill with "any brand of screw extractor from your local hardware store." Jones Compl. ¶ 130; Stanfield Compl. ¶ 191 (p. 49-50).

Mean's deceptive and false marketing about the permanence of the MA Lock facilitated an illegal secondary market in assault weapons in New York. Jones Compl. ¶ 135; Stanfield Compl. ¶ 196 (p. 51-52). The Shooter took advantage of these circumstances by purchasing a rifle with the MA Lock installed, which he easily removed. Jones Compl. ¶¶ 140-41; Stanfield Compl. ¶¶ 201-02 (p. 53).

Mean's deceptive and false marketing played a substantial role in the Shooter's purchase of the Bushmaster XM-15 that he used in the shooting. Jones Compl. ¶¶ 139-40; Stanfield Compl. ¶¶ 200-01 (p. 53). From online sources, the Shooter—who sought a firearm that could "hold many rounds of ammunition without reloading" in order to maximize casualties—learned of a product made by Mean that allowed for circumvention of New York's assault weapons law. Jones Compl. ¶¶ 81-82; Stanfield Compl. ¶¶ 162-63. The Shooter learned that if he acquired an AR-15 with the MA Lock installed he could remove the lock, which held a 10-round magazine in place, and then use large-capacity magazines with the rifle. Jones Compl. ¶ 85; Stanfield Compl. ¶ 166. He found a Bushmaster XM-15 rifle with a pistol grip and a 10-round magazine held in place by the MA Lock at a local gun dealer, Vintage Firearms. Jones Compl. ¶ 89; Stanfield Compl. ¶ 170; Tirschwell Aff. ¶ 8. After concluding that the "bushmaster at Vintage Firearms will do very nicely" due to the presence of "the mean arms fixed mag release," the Shooter purchased the Bushmaster XM-15 rifle and removed the MA Lock the same day. Jones Compl. ¶¶ 89-93; Stanfield Compl. ¶¶ 170-74. He knew both that the MA Lock gave the Bushmaster XM-15 the *appearance* of compliance with New York law and that he could easily remove the lock so that he could use large-capacity magazines in his planned massacre. Jones Compl. ¶ 94; Stanfield Compl. ¶ 175.

On May 14, 2022, the Shooter attacked innocent members of the Buffalo community, armed with the Bushmaster XM-15. He started in the Tops parking lot, shooting and killing three individuals, before firing several shots through the store window and entering the Tops. Jones Compl. ¶ 115; Stanfield Compl. ¶ 196 (p. 46). Once inside, the Shooter shot two shoppers, including Ms. Chaney, before he quickly and easily reloaded his rifle by inserting a second detachable magazine. *Id.* The Shooter then shot Ms. Chaney again. Jones Compl. ¶¶ 115, 145;

Stanfield Compl. ¶¶ 196, 206 (p. 46, 54). He used at least two large-capacity magazines during the attack, firing about 60 rounds. Jones Compl. ¶ 146; Stanfield Compl. ¶ 207 (p. 54).

As alleged in Plaintiffs' Complaints, Mean bears responsibility for the mass shooting at Tops. If the Shooter had been unable to reload with detachable magazines, he may not have been emboldened to undertake his attack. Jones Compl. ¶ 143; Stanfield Compl. ¶ 204 (p. 54). And, if he had committed the shooting with a NY-compliant rifle (*i.e.*, a rifle with a permanently fixed 10-round magazine that complied with the SAFE Act), the Shooter would have been forced to pause in the middle of his attack to partially disassemble his rifle to reload, which would have caused the shooting to unfold differently, likely allowing victims more time to escape or intervene to stop the shooting. Jones Compl. ¶ 144; Stanfield Compl. ¶ 205 (p. 54). Thus, Mean's misconduct was a substantial factor leading to the occurrence of the attack and to worsening its scale.

On November 10, 2023, Mean moved to dismiss under CPLR §§ 3211(a)(3), (7)), and (8). This consolidated memorandum of law is filed in opposition to Mean's motions and on behalf of two sets of Plaintiffs. First, Wayne Jones is the administrator of the estate of Celestine Chaney. Mr. Jones brings five claims against Mean for negligence, negligence per se, public nuisance, and violations of GBL §§ 349 and 350. Second, 24 employees and patrons of Tops who survived the shooting with emotional and physical injuries bring the same five claims against Mean, as well as a claim for negligent infliction of emotional distress.

LEGAL STANDARD

Defendants face a high bar when seeking dismissal of claims pursuant to motions to dismiss. In evaluating such motions, courts must accept the complaint's allegations as true, liberally construe those allegations, and draw all reasonable inferences in the plaintiff's favor. *JF Cap. Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 764 (2015) (discussing motions to

dismiss under CPLR § 3211(a)(7)). 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, 728 (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).[3]

ARGUMENT

I. MEAN'S MOTIONS TO DISMISS IMPROPERLY DISREGARD THE COMPLAINTS' FACTUAL ALLEGATIONS AND RELY ON CONTRARY ASSERTIONS THAT CANNOT WARRANT DISMISSAL

Instead of arguing that Plaintiffs' claims fail as alleged, Mean disregards many of those factual allegations in favor of its own and argues that, under *its* alleged facts, Plaintiffs' claims fail. That is impermissible. *See JF Cap. Advisors,* 25 N.Y.3d at 764 (factual allegations in a complaint must be accepted as true at the motion-to-dismiss stage). For example, Mean asserts that Plaintiffs allege that "the rifle [with the MA Lock] was legally sold" to the Shooter. *See* Def.'s Jones Br. at 12; Def.'s Stanfield Br. at 12. But the Complaints say exactly the opposite. *See, e.g.*, Jones Compl. ¶ 5 (alleging that the Shooter purchased an "illegal assault weapon" with the MA Lock from Vintage Firearms); Stanfield Compl. ¶ 208 (similar allegation). Mean uses the same tactic when discussing the functionality and removability of the MA Lock. Whereas the Complaints allege that Mean sold "an easily removable lock that does not effect a 'permanent' change" to the gun (Jones Compl. ¶ 134; Stanfield Compl. ¶ 195), Mean insists that "[t]he MA Lock cannot be removed . . . without the use of specialized tools," and claims that "[w]hen the MA

[3] 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). The standard is similarly high for a defendant moving to dismiss on the grounds that the court lacks personal jurisdiction under CPLR § 3211(a)(8). In that scenario, "a plaintiff 'need only demonstrate that facts "may exist" to exercise personal jurisdiction over the defendant[s].'" *Tucker v. Sanders*, 75 A.D.3d 1096, 1096 (4th Dep't 2010) (citation omitted).

Lock is installed . . . , it permanently fixes the magazine to the rifle." Def.'s Jones Br. at 4; Def.'s Stanfield Br. at 4.

The Court should decline Mean's invitation to rewrite Plaintiffs' Complaints and to ignore Plaintiffs' allegations. At this stage, the truth of Plaintiffs' allegations must be assumed and Mean's contrary facts must be disregarded. That extends to supporting materials submitted by Mean. *See Lawrence*, 11 N.Y.3d at 595 ("[a]ffidavits submitted by a [defendant] will almost never warrant dismissal under CPLR 3211 *unless* they 'establish conclusively that [petitioner] has no [claim or] cause of action.'") (quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976)). Mean does not even come close to showing that a "material fact" in the Complaints "is not a fact at all" and that "no significant dispute exists regarding it." *Sokol v. Leader*, 74 A.D.3d 1180, 1182 (2d Dep't 2010) (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)). Nothing in Mean's affidavit conclusively establishes that Plaintiffs have no cause of action.[4]

II. PLCAA IS INAPPLICABLE

Mean argues that PLCAA "divests the court of jurisdiction requiring the immediate dismissal of all causes of action and claims brought against Mean." Def.'s Jones Br. at 13; Def.'s Stanfield Br. at 13. As explained below, PLCAA does not apply to the claims Plaintiffs have asserted, nor does it deprive the Court of jurisdiction.

a. Background Regarding PLCAA

PLCAA requires dismissal of a "qualified civil liability action" that is asserted against a defendant eligible for PLCAA protection in a particular case, unless one of PLCAA's six

[4] Mean did not move to dismiss based on documentary evidence under CPLR 3211(a)(1). Regardless, dismissal would be improper because "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." *Tsimerman v. Janoff*, 835 N.Y.S.2d 146, 147 (1st Dep't 2007).

exceptions applies. 15 U.S.C. §§ 7902, 7903(5)(A)(i)-(vi). A civil claim against a PLCAA-protected defendant constitutes a "qualified civil liability action" when it arises from a third party's criminal or unlawful misuse of that defendant's firearm, firearm component, or ammunition. *See id*. § 7903(5)(A) (defining a "qualified civil liability action").

PLCAA does not offer total immunity from civil liability. First, as described below, some civil claims against industry members fall entirely outside PLCAA's scope. That can be due to the case not meeting the definition of a "qualified civil liability action," for example. Second, even for claims that fall within PLCAA's scope, Congress carved out a number of meaningful exceptions that may allow those claims to proceed. *Id.* § 7903(5)(A). Those exceptions include actions for negligence per se and actions that fall within what is referred to as the "predicate exception." *Id.* § 7903(5)(A)(ii), (iii). The predicate exception removes the bar for "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 . . . ." *Id*. § 7903(5)(A)(iii).

Mean asserts that PLCAA is a jurisdictional statute, but almost every court that has considered the question has reached the opposite conclusion. *See, e.g.*, *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 127 (2d Cir. 2011) ("PLCAA's bar on 'qualified civil liability action[s],' does not deprive courts of subject-matter jurisdiction.") (citation omitted). The reason is straightforward: "The language of the PLCAA 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [district courts].'" *Id.* (quoting *Henderson v. Shinseki*, 562 U.S. 428, 438 (2011)). PLCAA "speak[s] only to the rights and obligations of the litigants, not to the power of the court." *Id. See also Soto v. Bushmaster Firearms Int'l, LLC*, No. FBTCV156048103S, 2016 WL 2602550, at *5 & n.9 (Conn. Super. Ct. Apr. 14, 2016) (following *Mickalis* and

collecting cases). The sole case cited by Mean holds to the contrary, but it is an outlier. Def.'s Jones Br. at 13, Def.'s Stanfield Br. at 13 (citing *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F. Supp. 3d 425 (D. Mass. 2022)).[5]

Mean also contends that its motions to dismiss, which raise PLCAA issues, should be granted because PLCAA "protects Mean from even having to present a defense to the allegations in the Complaint." Def.'s Jones Br. at 3; Def.'s Stanfield Br. at 3. Contrary to Mean's contention, however, the Fourth Department and courts within it have repeatedly denied motions to dismiss where a defendant has invoked 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"); *Chiapperini v. Gander Mountain Co.*, 48 Misc. 3d 865, 875-87 (Monroe County Sup. Ct. Dec. 23, 2014) (denying dismissal on PLCAA grounds before discovery).

b. Plaintiffs' Suits Against Mean Are Not Qualified Civil Liability Actions

PLCAA defines a "qualified civil liability action" as a "civil action . . . brought by any person against a manufacturer . . . of a qualified product . . . for . . . relief, resulting from the criminal or unlawful misuse of a qualified product by . . . a . . . third party . . . ." 15 U.S.C. § 7903(5)(A). Mean argues that the device at issue here—the MA Lock—is a "qualified product," and that Plaintiffs' suits are therefore qualified civil liability actions. Def.'s Jones Br. at 10-12; Def.'s Stanfield Br. at 10-12. Mean also advances the novel argument that it is entitled to blanket immunity under PLCAA because it is a manufacturer of *some* qualified products, even if those are

[5] The district court's decision in the *Estados Unidos Mexicanos* case is on appeal to the First Circuit. *See* No. 22-1823 (1st Cir. argued July 24, 2023).

not the qualified products at issue in this case. Def.'s Jones Br. at 9-10; Def.'s Stanfield Br. at 9-10. Mean is wrong on both counts.

i. The MA Lock Is Not A Qualified Product

PLCAA's use of the term "qualified product" is defined with reference to the federal Gun Control Act:

> The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), 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). Because the relevant provision of the Gun Control Act defines "*firearm*" as a weapon capable of firing a single shot, *see* 18 U.S.C. § 921(a)(3) ("The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted *to expel a projectile by the action of an explosive*; (B) the frame or receiver of any such weapon . . . .") (emphasis added), the phrase "component part of *a firearm*" must be understood to mean a "component part" of a weapon capable of firing a single shot. "Component part" is not defined within PLCAA or the Gun Control Act, but at least one court has held that "component" means "an essential part" and "part" means "an essential portion or integral element." *Prescott v. Slide Fire Sols., LP*, 341 F. Supp. 3d 1175, 1188 (D. Nev. 2018) (relying on dictionary definitions), *cited in* Def.'s Jones Br. at 10 and Def.'s Stanfield Br. at 10.[6]

This same parsing of the term "component part of a firearm" was the basis for a Nevada court's recent denial of PLCAA protection to the manufacturer of a large-capacity magazine. In

[6] *Prescott* also recognized that some devices are better categorized as "accessories"—meaning "'thing[s] of secondary or subordinate importance,' or 'object[s] or device[s] that [are] not essential . . . but adding to the beauty, convenience, or effectiveness of something else." *Prescott,* 341 F. Supp. 3d at 1188 (quoting Merriam-Webster's Collegiate Dictionary 255, 7 (11th ed. 2003)).

that case, the manufacturer admitted that the firearm involved in the case could operate without a magazine. Order Regarding Defendant's Motion to Dismiss, *Green v. Kyung Chang Ind. USA, Inc.*, No. A-21-838762-C, 2022 WL 987555, at *1 (Nev. 8th Jud. Dist. Clark County Mar. 23, 2022), *mandamus denied*, *Kyung Chang Ind. USA, Inc. v. Dist. Ct. (Jones)*, No. 84844 (Nev. Mar. 14, 2023), *cert. denied*, No. 22-1206 (U.S. Oct. 2, 2023) (Tirschwell Aff., Exhibit A). The court reasoned that "the 100 round gun magazine . . . is not a 'component part' within the PLCAA because it is not required for the subject gun to operate and fire projectiles, the subject firearm is capable of firing without any magazine inserted, and the 100-round magazine was not included with the firearm by the manufacturer." *Id.*

The same is true here. The MA Lock is not a "component part of a firearm" because it is not essential to a firearm's capacity to fire a single shot. The Complaints allege that the MA Lock "fixe[s] a 10-round magazine to the gun," that the "Bushmaster XM-15 was equipped with the [MA] Lock," and that the MA Lock "is an easily removable, non-permanent lock." Jones Compl. ¶¶ 85, 94, 128; Stanfield Compl. ¶¶ 166, 175, 189 (p. 49). Indeed, the proposition that a firearm can fire a single shot without a magazine is an uncontroversial one. *See, e.g.*, *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 386 (D.R.I. 2022) ("a firearm can fire bullets without a detachable magazine"). Mean concedes this with respect to an AR-15 rifle. Def.'s Jones Br. at 11; Def.'s Stanfield Br. at 11 ("the rifle simply becomes a single-shot rifle" without the MA Lock or some other part to affix the magazine).

Instead of arguing that the MA Lock is a "component part" of a "firearm," as defined by the Gun Control Act through PLCAA, Mean pivots and argues that the MA Lock is a "component part" of a "*semiautomatic rifle*" like the AR-15. Def.'s Jones Br. at 10-11; Def.'s Stanfield Br. at 10-11 (emphasis added). But the definitions of "semiautomatic," "rifle," and "semiautomatic rifle"

under federal and state law do not shed light on the essential function of a "firearm," as PLCAA defines that term, which is by reference to the Gun Control Act's definition of "firearm"—a weapon that can fire a single shot.

This case, like *Kyung Chang Industry*, "is distinguishable from cases where courts have decided that specific parts that are required for the gun to operate or function, such as a stock on a long rifle, are in fact 'component parts' within PLCAA." 2022 WL 987555, at *1 (citing *Prescott*, 341 F. Supp. 3d 1175). In *Prescott*, the parties *agreed* that a rifle's stock is a "component part," disputing only whether a bump stock, which replaces a rifle stock and "allows a user to discharge ammunition rounds in rapid succession," constituted a "component part." 341 F. Supp. 3d at 1189. Because a bump stock simply replaced what the parties conceded was a component part, the court concluded that a bump stock must likewise be a component part. *Id.*[7] Similarly, in *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021), also cited by Mean, the parties did not dispute that the magazine at issue was a component part under PLCAA. *Id.* at 26.

Here, Plaintiffs very much do not agree that magazine locks, including "easily removable" ones like the MA Lock, are component parts under PLCAA.[8] Mean cites no case where a court has held that a magazine lock is a "component part of a firearm." Because the MA Lock is not essential for a "firearm" (as that term is defined in the Gun Control Act) to operate, it is akin to a

[7] In addition, the *Prescott* court relied on various materials, including ATF guidance that "identifie[d] a stock as a component part of a rifle," and court decisions, when deciding that bump stocks are component parts of a firearm. 341 F. Supp. 3d at 1188-89. No such supporting material has been cited by Mean in this case, nor would it be dispositive if it did.

[8] Mean also cites *Auto-Ordnance Corp. v. United States*, 822 F.2d 1566, 1570 (Fed. Cir. 1987). Def.'s Jones Br. at 11 n.10; Def.'s Stanfield Br. at 11 n.10. But that case is irrelevant to PLCAA. It examined whether adjustable sights sold with certain carbines constituted parts subject to the excise tax on firearms under 26 U.S.C. § 4181 as "component parts," or whether those items were instead nontaxable "accessories" consistent with the tax regulations then in effect. *Auto-Ordnance*, 822 F.2d at 1567.

type of firearm accessory, and accessories are not qualified products under PLCAA. *Sambrano v. Savage Arms, Inc.*, 338 P. 3d 103, 105 (N.M. Ct. App. 2014) (where parties agreed that a rifle lock was an accessory, PLCAA did not bar claims against the lock distributor).

Mean's "qualified product" arguments are flawed for the additional reason that it would be premature for the Court to determine now as a matter of law that the MA Lock is a "component part of a firearm." The Complaints do not allege that the MA Lock is essential to the operation of a "firearm." And Mean's contrary assertions are not entitled to be considered or accepted as true on a motion to dismiss. *See Lawrence*, 11 N.Y.3d at 595. Mean's attempt to offer additional facts demonstrates only the existence of a potential disputed issue of fact and the need for discovery into factual information, such as the mechanics of the MA Lock and the functioning of a rifle after its removal. *See King,* 187 A.D.3d at 1616 (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) (citations omitted).

ii. MEAN does not enjoy blanket protection from suit under PLCAA

Mean insists that PLCAA requires dismissal of a civil action against it—whether or not the MA Lock is a qualified product—so long as *any manufacturer* of any qualified product used in connection with the shooting would be entitled to PLCAA's protection, even if there is no allegation pertaining to a qualified product manufactured or sold by Mean. *See* Def.'s Jones Br. at 9-10, Def.'s Stanfield Br. at 9-10 (citing 15 U.S.C. § 7903(5)(A)).

PLCAA's coverage is not so broad: "The PLCAA preempts specified types of liability actions; it does not provide a blanket protection to specified types of defendants." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1145 (9th Cir. 2009). A "logical reading" of PLCAA "require[es] a nexus

between the basis of the allegations and the nature of the defendant's business." *Id.* at 1146. Here, that nexus is lacking. As alleged in the Complaints, Mean manufactured an easily removable lock and marketed it deceptively and duplicitously. The fact that Plaintiffs were harmed when the Shooter used a qualified product (rifle) manufactured by a different entity (Bushmaster) does not allow Mean to step into Bushmaster's shoes for purposes of PLCAA. PLCAA's protection is not transferable among manufacturers in that way. *See id.* Tellingly, Mean cites no case law in support of this argument and no court has ever adopted it. Here, Plaintiffs have alleged that Mean is liable for acts it took in connection with the MA Lock, a non-qualified product. Whether the rifle manufacturer—a non-party—could claim PLCAA's protection is entirely beside the point.

Plaintiffs' claims are not "qualified civil liability actions" for the additional reason that they do not seek "relief[ ] resulting from the criminal or unlawful misuse of a qualified product by . . . a . . . third party . . ." 15 U.S.C. § 7903(5)(A). To be sure, as the Complaints allege, the Shooter criminally and unlawfully misused the Bushmaster XM-15 to carry out his massacre. But by that time, the MA Lock had been removed from the rifle by the Shooter, consistent with Mean's instructions. *See* Jones Compl. ¶ 141; Stanfield Compl. ¶ 202 (p. 53). And as the Complaints clearly allege, that act of removing the lock was not itself "criminal or unlawful misuse," because even with the lock on, the AR-15 still "ha[d] an ability to accept a detachable magazine," in violation of N.Y. Penal Law § 265.00(22)(a). Jones Compl. ¶¶ 120 & n.23, 127, 131-35; Stanfield Compl. ¶¶ 201 & n.30 (p. 46-47), 188 (p. 48-49), 192-96 (p. 50-52) (alleging that the Shooter's AR-15 was already an assault weapon when he purchased it because the MA Lock did not permanently lock the magazine in place); *see also* Jones Compl. ¶ 121, Stanfield Compl. ¶ 202 (p. 47) (citing SAFE Act website specifying that any modification had to be "permanent" to comply with New York law). Indeed, the Complaint clearly alleges that the MA Lock's easy removal—

with directions provided right on the back of the box—was certainly one of its intended "uses." Jones Compl. ¶¶ 128-30; Stanfield Compl. ¶¶ 189-91 (p. 49-50).[9]

III. EVEN IF PLCAA APPLIES, PLAINTIFFS' CLAIMS MAY PROCEED UNDER ONE OF THE STATUTE'S EXCEPTIONS

Even assuming PLCAA's applicability, Plaintiffs' claims against Mean can proceed because they fall within two of PLCAA's exceptions: the predicate exception and the negligence per se exception. *See* 15 U.S.C. § 7903(5)(A)(ii), (iii). And once the Court concludes that at least *one* claim falls within *one* of PLCAA's exceptions, Plaintiff's entire case against Mean may proceed without the need for a claim-by-claim PLCAA analysis. *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 151 (4th Dep't 2012) ("In light of our conclusion that this action falls within the PLCAA's predicate exception and therefore is not precluded by the [PLCAA] . . . we need not address plaintiffs' further contention that this action falls within the PLCAA's negligent entrustment or negligence per se exception.") (citations omitted), *opinion amended on reargument*, 103 A.D.3d 1191 (4th Dep't 2013); *Chiapperini*, 48 Misc. 3d at 876 ("[T]his court finds two applicable PLCAA exceptions thereby permitting the entire [c]omplaint to proceed through litigation, without the need for a claim-by-claim PLCAA analysis."). Applying that principle here,

[9] *Sambrano v. Savage Arms*, 338 P. 3d 103 (N.M. Ct. App. 2014), cited by Mean in prior briefing, is not to the contrary. In that decision, the court granted PLCAA protection to the manufacturer of the rifle used in the shooting (Savage Arms), even though the complaint focused on the manufacturer's bundling of the rifle with a defective lock, but expressly stated that "PLCAA does not preclude Plaintiffs' claims against NAD, the lock distributor." *Id.* at 105. Here, Plaintiffs seek relief against the lock manufacturer (Mean), not the rifle manufacturer (Remington), and PLCAA and *Sambrano* therefore provide Mean with no protection. To the extent Mean argues that PLCAA should be read to provide even broader protection than the expansive (and questionable) interpretation in the *Sambrano* case—i.e., to immunize licensed manufacturers of products other than firearms any time a shooting is carried out with a firearm made by a different licensed manufacturer—any such reading is unsupported by PLCAA's plain text and this Court should not to be the first to adopt such a dramatic expansion of PLCAA's scope.

all of Plaintiffs' claims (including its negligence and public nuisance claims) can proceed if either the predicate exception or negligence per se exception apply. Both do.

a. The Predicate Exception Applies

The predicate exception provides an avenue for cases like these to proceed. It permits "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). Plaintiffs have more than satisfied those requirements at the motion to dismiss stage. They have alleged that Mean committed knowing violations of three statutes that fall within the predicate exception—criminal facilitation and aiding and abetting of New York's prohibition on the transfer and possession of assault weapons, deceptive trade practices under GBL § 349, and false advertising under GBL § 350—and that those violations proximately caused Plaintiffs' injuries. *See, e.g.*, Jones Compl. ¶ 251; Stanfield Compl. ¶ 312.

Mean argues that the predicate exception's use of the language "applicable to the sale or marketing of [the product]" means that only violations of firearms-specific laws suffice. Def.'s Jones Br. at 17; Def.'s Stanfield Br. at 17. There are two problems with this argument. First, although Mean never mentions it, Plaintiffs have alleged violations of a firearms-specific law—specifically, the SAFE Act, by facilitating and aiding and abetting violations of that state statute. Those violations are independently sufficient reasons for the Court to deny the PLCAA-based arguments in Mean's motion to dismiss. Second, Mean cites no case law that establishes a rule that only "firearms-specific" statutes can satisfy PLCAA's predicate exception. The leading case on the predicate exception says otherwise. *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 119-158 (Conn. 2019).

i. Mean's Alleged Facilitation of SAFE Act Violations Is a Sufficient Predicate

Plaintiffs' Complaints allege that Mean violated the SAFE Act by facilitating and aiding and abetting the Shooter's unlawful possession of an assault weapon:

> MEAN Arms knowingly facilitated and aided and abetted the illegal possession and restoration of fully functioning assault weapons in New York. It did so by selling an easily removable lock that does not effect a "permanent" change, by falsely marketing the lock as not easily removable and as New York-compliant, and by simultaneously providing instructions on how to quickly and easily remove the lock.

Jones Compl. ¶ 134; Stanfield Compl. ¶ 195 (p. 51). *See also* Jones Compl. ¶¶ 58, 251, 260; Stanfield Compl. ¶¶ 145, 312, 349. Plaintiffs' allegations are sufficient to make out violations of Penal Law §§ 115.00(1) and 20.00 by facilitating and intentionally aiding the Shooter's SAFE Act violation.

A defendant violates Penal Law § 115.00(1) by "believing it is probable that he is rendering aid . . . to a person who intends to commit a crime, [the defendant] engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony[.]" As alleged in the Complaints, Mean believed it was probable that it was helping New Yorkers violate the SAFE Act: Mean's conduct "knowingly created the mere illusion of compliance and offered New Yorkers a way to circumvent the [assault weapon] law." Jones Compl. ¶ 58; Stanfield Compl. ¶ 145. Mean provided the means or opportunity for New Yorkers to violate the SAFE Act when it "marketed and sold its products . . . to customers in New York," "targeted New York customers" with marketing materials, and "regularly shipped the [MA Lock] to purchasers in New York." Jones Compl. ¶ 17; Stanfield Compl. ¶ 94. And Mean aided the Shooter's unlawful possession of an assault weapon: Mean's deceptive and false marketing created an illegal secondary market in assault weapons, Jones Compl. ¶ 135; Stanfield

Compl. ¶ 196 (p. 51-52), which the Shooter took advantage of to purchase a Bushmaster XM-15 with the MA Lock installed. Jones Compl. ¶¶ 139-41; Stanfield Compl. ¶¶ 200-02 (p. 53). As explained, *supra* at 4-5, that rifle was an assault weapon because the MA Lock did not permanently install a fixed magazine on it. The Shooter therefore violated the SAFE Act's (Penal Law § 265.02(7)'s) prohibition on assault weapon possession. *See also* Jones Compl. ¶¶ 120, 134; Stanfield Compl. ¶¶ 195, 201 (p. 46-47, 51).

A defendant violates Penal Law § 20.00 when the defendant "solicits, requests, commands, importunes, or intentionally aids" another person to engage in an offense, and when the defendant does so "with the mental culpability required for the commission" of that offense. Here, as the allegations described above show, the Complaints sufficiently allege that Mean's marketing importuned or intentionally aided the Shooter's unlawful possession of an assault weapon. Mean accomplished that, according to the Complaints, through its marketing and its dissemination of instructions for removing the MA Lock that enabled the use of detachable magazines. Jones Compl. ¶¶ 128-30; Stanfield Compl. ¶¶ 189-91 (p. 49-50). Mean's motivation was clear. The Complaints cite social media posts demonstrating Mean's disdain for gun safety laws, which reveal its intention to help New Yorkers like the Shooter possess illegal assault weapons. *See* Jones Compl. ¶¶ 126, 136; Stanfield Compl. ¶¶ 187, 197 (p. 48, 52).

These allegations suffice at this stage. *See Williams*, 100 A.D.3d at 150 (determining that complaint sufficiently alleged that gun manufacturer and dealer were accomplices to Gun Control Act violations where plaintiffs alleged that defendants "supplied handguns to [a gun trafficker] even though they knew or should have known that he was distributing those guns to unlawful purchasers for trafficking into the criminal market"); *Chiapperini*, 48 Misc. 3d at 876 (finding that, where plaintiff alleged that a gun dealer aided and abetted a gun buyer's false statements, the gun

dealer's "denial of any aid and assistance simply creates an issue of fact worthy of discovery"). Indeed, Mean does not even address the allegations of SAFE Act violations, much less conclusively refute them, in its motions to dismiss. And Mean's disagreement with Plaintiffs' *factual* allegation that the rifle with an MA Lock is an illegal assault weapon is not grounds for finding that Plaintiffs have not cleared the legal hurdle of alleging a violation of state law. *See King*, 187 A.D.3d at 1615-16 (declining to dismiss on PLCAA grounds where defendant ammunition seller disputed plaintiffs' allegation that the ammunition used in a shooting was handgun ammunition).

Mean's violations of Penal Law §§ 115.00(1) and 20.00 clearly (and without dispute) fall within the predicate exception because, when criminal facilitation or aiding and abetting violations are alleged, it is the underlying statute—the offense being facilitated—that is relevant when analyzing whether the violation is "applicable to" the sale or marketing of firearms. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 432-33 (Ind. Ct. App. 2007) (holding that violations of federal aiding and abetting and criminal conspiracy statutes could be predicate violations if the underlying violation was of a firearms law). Moreover, the fact that Plaintiffs' Complaints do not include specific citations to Penal Law §§ 115.00 and 20.00 is immaterial. *Cf. Williams*, 100 A.D.3d at 149 (finding that a complaint need not specify the statutes that were allegedly violated as long as the complaint "sufficiently alleges facts supporting a finding that [the] defendant[ ] knowingly violated" the law).

ii. Violations of GBL §§ 349 and 350 Satisfy the Predicate Exception

Violations of GBL §§ 349 and 350 also clearly fall within the predicate exception because, as the *Soto* court concluded, consumer protection laws "such as the [Federal Trade Commission] Act and state analogues that prohibit the wrongful marketing of dangerous consumer products such

as firearms represent precisely the types of statutes that implicate and have been applied to the sale and marketing of firearms." *Soto*, 331 Conn. at 126-27 (finding that the Connecticut Unfair Trade Practices Act ("CUTPA") meets the predicate exception). Other courts have held the same. *See Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1138–39 (D. Nev. 2019) (finding that Nevada's Deceptive Trade Practices Act may serve as a predicate statute); *Doyle v. Combined Sys., Inc.*, No. 3:22-CV-01536-K, 2023 WL 5945857, at *11 (N.D. Tex. Sept. 11, 2023) ("[T]he Court joins the courts holding that prohibitions on unfair or deceptive trade practices are exempt from the PLCAA under the predicate exception."). Not one has held otherwise.

After conducting an exhaustive analysis of PLCAA's text and legislative history, the *Soto* court held that "applicable to" encompasses consumer protection laws. In reaching that conclusion, the court first looked to the "ordinary, dictionary meaning" to find that "applicable to" simply means "capable of being applied." *Soto*, 331 Conn. at 119 (quoting *Applicable*, Black's Law Dictionary (10th ed. 2014)). Using that definition, the court stated: "If Congress had intended to create an exception to PLCAA for actions alleging a violation of any law that is capable of being applied to the sale and marketing of firearms, then there is little doubt that state consumer protection statutes such as CUTPA would qualify as predicate statutes." *Id*. This, the *Soto* court observed, was how "[t]he only state appellate court to have reviewed the predicate exception construed it[.]" *Id.* (citing *Smith & Wesson Corp.*, 875 N.E.2d at 431, 434-35 & n.12). On the other hand, if Congress had meant to limit the predicate exception to firearms-specific statutes, it could have done so explicitly. *Id.* at 120.[10]

[10] PLCAA's statutory framework further supports the broader reading. As the *Soto* court found, Congress must have been aware that, when it enacted PLCAA, "no federal statutes directly or specifically regulated the marketing or advertising of firearms," though it noted that a few state laws regulated advertising with respect to certain categories of firearms or the location of the advertising. *Soto*, 331 Conn. at 121-22 & 122 n.43. Mean has argued in related cases that *Soto*

Soto further explained that a regulatory agency's use of a consumer protection law to target firearms marketing and sales shows that a statute fits within the predicate exception. *Id*. at 126. The *Soto* court noted that the Federal Trade Commission's enforcement actions of earlier years resulted in consent decrees against firearms sellers and an order to a marketing company "to refrain from predatory and misleading advertising regarding various consumer products, including firearms*." Id.* Here, GBL §§ 349 and 350 are materially indistinguishable from CUTPA. They serve as "mini-FTC" statutes and are used to address deceptive and misleading conduct in various industries. *See People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11. N.Y.3d 105, 120 (2008).[11]

The *Soto* court reviewed the Second Circuit's decision in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), and found that its reasoning was consistent with the *Soto* Court's own analysis. *Soto*, 331 Conn. at 124-25. Like *Soto*, *Beretta* rejects the notion that only "firearms-specific" statutes meet the predicate exception by finding "nothing in [PLCAA] that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception." 524 F.3d at 399-400. Thus, *Beretta* does not support Mean's

committed a "glaring error" on this point, asserting—falsely—that *Soto* had stated that "when Congress enacted the PLCAA there were 'no laws' that 'expressly and directly' regulated the 'marketing' of firearms." Reply Memorandum of Law in Support of Defendant Mean L.L.C.'s Motion to Dismiss the Verified 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) at 10-11, *Patterson v. Meta Platforms, Inc.*, No. 805896/2023, NYSCEF Doc. No. 346 (Erie Sup. Ct. Oct. 31, 2023). In fact, the *Soto* court explained—accurately—that there were no such *federal* laws at the time, while noting a few exceptions in state law. *See Soto*, 331 Conn. at 121-22 & 122 n.43.

[11] The fact that GBL §§ 349 and 350 have broad applicability does not mean that they do not "implicate the purchase and sale of firearms." In fact, they have been used in actions against firearms-related defendants in the past. For example, the New York Attorney General has sued Mean for violating GBL §§ 349 and 350 through its "advertising . . . that installing an MA Lock on a semiautomatic rifle, that otherwise may be an illegal assault weapon under New York law, makes the weapon legal." Tirschwell Aff. ¶ 4. In addition, she has issued cease-and-desist letters to firearms website operators in reliance on GBL §§ 349 and 350. *Id*. ¶ 7. This type of regulatory use of a consumer protection law to target firearms marketing and sales is persuasive evidence that a statute fits within the predicate exception. *See Soto*, 331 Conn. at 126.

argument that "firearms-specific" laws are required to satisfy the predicate exception, Def.'s Jones Br. at 17-19; Def.'s Stanfield Br. at 17-19, because *Beretta* concluded that the exception "encompasses" laws that courts have applied to the sale and marketing of firearms and laws that "do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." 524 F.3d at 404. GBL §§ 349 and 350 check both of these boxes.

Nor does *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009), assist Mean's argument. *See* Def.'s Jones Br. at 18; Def.'s Stanfield Br. at 18. *Ileto* rejected the argument that the predicate exception is met only by a "violation of a statute that pertained *exclusively* to the sale and marketing of firearm." 565 F.3d at 1134-35 (emphasis in original). Instead, as the *Soto* court noted, *Ileto* recognized that PLCAA allows firearm manufacturers and sellers to be liable for violations of sales and marketing regulations, including CUTPA. *Soto*, 331 Conn. at 129 n.53, 152 (citing *Ileto,* 565 F.3d at 1137). *Ileto*'s holding that PLCAA forecloses "general tort theories of liability" that have been codified as statutes, *see* 565 F.3d at 1135-36, simply has no application to claims like the ones Plaintiffs have brought pursuant to New York's long-standing "mini-FTC Act." Mean also argues that *Ileto* stands for the proposition that claims for negligence and public nuisance are foreclosed by PLCAA. Def.'s Jones Br. at 14; Def.'s Stanfield Br. at 14. But *Ileto* held only that codified common law tort theories may not themselves serve as predicate exception statutes. *Ileto*, 565 F.3d at 1136. Here, Plaintiffs do not rely on codified negligence and public nuisance laws to meet the predicate exception; they rely on violations of the SAFE Act and GBL §§ 349 and 350.

As further support for its argument that the predicate exception does not apply, Mean cites a hodgepodge of statutory interpretation principles. *See* Def.'s Jones Br. at 18-19; Def.'s Stanfield Br. at 19. But it does not explain how those principles lead to the conclusion that only firearms-specific laws can serve as predicate exception statutes. As explained above, *Soto*'s reasoning

provides a thorough and convincing case for the opposite conclusion. Because Plaintiffs have adequately alleged violations of state statutes "applicable to the sale or marketing of the product," Mean is not entitled to PLCAA protection.

iii. PLCAA's Proximate Cause Requirement Does Not Bar Plaintiffs' Claims

In a final attempt to avoid the predicate exception's application to Plaintiffs' claims, Mean argues that the Complaints do not allege facts sufficient to establish proximate cause. Def.'s Jones Br. at 21-25; Def.'s Stanfield Br. at 21-25. Because the predicate exception includes the requirement that the alleged "violation was a proximate cause of the harm for which relief is sought," 15 U.S.C. § 7903(5)(A)(iii), Mean argues that the exception imposes a "federal proximate cause" hurdle that Plaintiffs fail to clear. Def.'s Jones Br. at 22-23; Def.'s Stanfield Br. at 22-23. Mean is wrong for at least three reasons. *First*, Mean's argument that PLCAA "imposes a freestanding proximate cause requirement as a matter of federal law," Def.'s Jones Br. at 22, Def's Stanfield Br. at 22, appears to be made out of whole cloth. Mean cites no case with that holding, and Plaintiffs are aware of none. *Second*, a review of case law applying PLCAA at the motion to dismiss stage shows that courts do not apply an additional layer of federal proximate cause. Instead, they apply state law proximate cause standards when considering motions to dismiss. *See Chiapperini*, 48 Misc. 3d at 875; *Brady v. Walmart Inc.*, No. 8:21-CV-1412-AAQ, 2022 WL 2987078, at *13 (D. Md. July 28, 2022) (applying state law of proximate cause applicable to negligence after finding that predicate exception was met). And *third*—as discussed *infra* at 33-36—Plaintiffs have sufficiently alleged proximate cause as a matter of New York law.

The trial court's decision in *Chiapperini* is illustrative. There, the defendant gun seller argued that the alleged predicate exception violations did not proximately cause a gunman's attack. The court presumed that state law proximate cause standards applied so that, at least on a motion

to dismiss, "the fact that plaintiff might ultimately fail on some alleged violations does not render the initial pleading defective." 48 Misc. 3d at 875. Crucially, the court found that, without discovery, it could not be definitively determined that the alleged violations did not relate to the attack. *Id.* The court noted that "[p]roximate cause is normally a question of fact for a jury." *Id.*

In any event, whether PLCAA's predicate exception imposes a separate federal proximate cause element is of no consequence here, where the inquiry at the pleading stage would look the same under either state or federal law. This is because, as the Supreme Court stated in one case cited by Mean, "[p]roximate-cause analysis is controlled by the nature of the statutory cause of action." *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 201 (2017) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2017)); *see* Def.'s Jones Br. at 22; Def.'s Stanfield Br. at 22. Consistent with that guidance, the Court applied a proximate-cause analysis specific to the claim at issue, a violation of the federal Fair Housing Act. *Bank of Am.*, 581 U.S. at 201-03. Turning to the statute at issue in this case, PLCAA expressly does *not* create a cause of action. 15 U.S.C. § 7903(5)(C) ("[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."). Thus, the proximate-cause analysis would be supplied by the various state law claims Plaintiffs have asserted against Mean, meaning that New York's proximate cause law applies.

b. PLCAA's Negligence Per Se Exception Also Applies

Plaintiffs have asserted negligence per se claims against Mean, which are predicated on the violations of GBL §§ 349 and 350 discussed *infra* at 26-32. Negligence per se claims are specifically exempted from PLCAA protection. 15 U.S.C. § 7903(5)(A)(ii); *Chiapperini*, 48 Misc. 3d at 874 (finding, on a motion to dismiss, that a negligence per se claim against a gun dealer was "not preempted by the clear language of [PLCAA]"). Negligence per se is not defined by PLCAA

and courts apply the law of the forum state to determine whether the exception is met. *See Brady*, 2022 WL 2987078, at *12. *See also, e.g.*, *Corporan v. Wal-Mart Stores E., LP*, No. 16-CV-02305-JWL, 2016 WL 3881341, at *4 (D. Kan. July 18, 2016).

Mean argues that PLCAA's negligence per se exception does not apply to it because it is a manufacturer, not a dealer. Def.'s Jones Br. at 15; Def.'s Stanfield Br. at 15. That ignores the fact that licensed manufacturers are authorized to operate as dealers under the federal regulations that implement the licensing provisions of the Gun Control Act. *See* 27 C.F.R. § 478.41(b) ("[I]t shall not be necessary for a licensed importer or a licensed manufacturer to also obtain a dealer's license in order to *engage in business on the licensed premises as a dealer* in the same type of firearms authorized by the license to be imported or manufactured.") (emphasis added). Moreover, Mean *is* a seller of the MA Lock and other firearms-related products and shipped those products directly to customers. Jones Compl. ¶ 17; Stanfield Compl. ¶ 94. Thus, Mean is both a manufacturer and a seller. And, as discussed *infra* at 32-33, Plaintiffs state valid negligence per se claims under New York law.

IV. PLAINTIFFS HAVE STATED CLAIMS AGAINST MEAN UNDER GBL § 349, § 350 AND THE NEGLIGENCE PER SE DOCTRINE

a. Plaintiffs Have Plausibly Alleged that MEAN Violated GBL § 349 and § 350

To make out statutory claims for deceptive practices and false advertising under New York law, Plaintiffs must "allege that [Mean] has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff[s] suffered injury as a result of the allegedly deceptive act or practice." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941 (2012).

Mean argues that Plaintiffs have not satisfied any of these elements based on its selective reading of the Complaints and case law. As to the first element, Mean asserts that "the alleged deception that the MA Lock made an illegal 'assault weapon' into a legal semiautomatic rifle was

not 'consumer oriented[.]'" Def.'s Jones Br. at 29; Def.'s Stanfield Br. at 29. The basis for that assertion is unclear. In any event, it contradicts the allegations in the Complaints, which describe several ways in which Mean's marketing of the MA Lock was directed toward consumers. For example, Mean's website touted that the MA Lock was "[d]eveloped for states with intrusive laws requiring fixed magazines" and directed it towards consumers in New York by representing (falsely) that installing the MA Lock would bring an assault rifle into compliance with New York's assault weapons law. Jones Compl. ¶¶ 123-126; Stanfield Compl. ¶¶ 204-06, 187 (p. 47-48). In addition, Mean interacted with social media users to assure them of the MA Lock's removability and promised to post an instructional video on YouTube demonstrating how to remove the MA Lock, and its packaging described how to do so with ease. Jones Compl. ¶ 128-30; Stanfield Compl. ¶ 189-91 (p. 49-50). These allegations plausibly show that Mean's marketing practices were consumer-oriented; they were unquestionably "directed to the consuming public and the marketplace." *See Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 150 N.Y.S.3d 79, 85 (N.Y. 2021); *see also Casper Sleep, Inc. v. Mitcham*, 204 F. Supp. 3d 632, 644 (S.D.N.Y. 2016) (finding that a company's website statements were consumer-oriented).

Plaintiffs have also alleged facts sufficient for the second element—the materially misleading nature of Mean's conduct. To begin, this issue is not even ripe for a determination at this stage: whether a practice is materially misleading is "usually . . . a question of fact." *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 478 (S.D.N.Y. 2014). Nevertheless, Mean contends that its marketing was not misleading because *the Shooter* knew about the MA Lock's purpose, utility, and function. Def.'s Jones Br. at 28; Def.'s Stanfield Br. at 29. But the determination of the "materially misleading" element does not depend on the Shooter's

knowledge or understanding. Rather, it turns on whether Mean's practices were "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A.*, 623 N.Y.S.2d 529, 533 (1995). The Complaints plausibly allege that a reasonable customer would be misled. They state that Mean's website provided false advice to New York consumers when it informed them that installing an MA Lock on a rifle would make that rifle compliant with New York law, when it told them the MA Lock "cannot be removed with a tool," Jones Compl. ¶¶ 124-125, Stanfield Compl. ¶¶ 205-06 (p. 48), and when it told them that installation of the MA Lock "permanently" keeps a fixed magazine in place. Jones Compl. ¶¶ 125-26; Stanfield Compl. ¶¶ 206, 187 (p. 48). As the Complaints allege, Mean failed to advise consumers that the MA Lock was *not* a permanent fix and therefore did *not* bring an assault weapon into compliance with New York law. Jones Compl. ¶ 138; Stanfield Compl. ¶ 199 (p. 52-53). Based on Mean's conduct, a reasonable consumer would have believed Mean's representations that the MA Lock rendered an assault rifle compliant with the SAFE Act. Jones Compl. ¶ 133; Stanfield Compl. ¶ 194 (p. 51).[12] In other words, Mean's representations about how the MA Lock would impact a rifle's legal status was materially misleading because this information was "important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) (quoting *Novartis Corp. v. F.T.C.*, 223 F.3d 783, 786 (D.C. Cir. 2000)).

Plaintiffs have also alleged a sufficient "causal connection" between Mean's marketing of the MA Lock and Plaintiffs' injuries, which is the third and final element. Mean disagrees. *See*

[12] That a reasonable purchaser of the MA Lock might be misled does not mean that a licensed and experienced gun dealer would be misled. In fact, the Complaints allege that gun dealer Vintage Firearms understood that the MA Lock was not a permanent change, did not make the rifle compliant with NY's SAFE Act, and that Vintage was complicit with Mean's deceptive claims. Jones Compl. ¶ 140; Stanfield Compl. ¶ 201 (p. 53).

Def.'s Jones Br. at 28; Def.'s Stanfield Br. at 28-29. But the Complaints clearly and plausibly connect Mean's marketing to Plaintiffs' injuries by showing that Mean's conduct directly facilitated the Shooter's access to the type of firearm he desired (and subsequently used) to undertake his racist massacre.

Mean's false and deceptive claims allowed for the availability of illegal assault weapons in New York, including at the dealer from which the Shooter bought his AR-15 rifle. Jones Compl. ¶¶ 139-40; Stanfield Compl. ¶¶ 200-01 (p. 53). Knowing that a rifle with the MA Lock could be acquired in New York because the lock gave the rifle the (fake) "veneer of compliance with New York law" (Jones Compl. ¶ 94; Stanfield Compl. ¶ 175) *and* that the MA Lock was easy to remove with a drill, the Shooter sought to acquire a rifle with the MA Lock to later use with detachable magazines when carrying out the Tops attack. Jones Compl. ¶¶ 86-90; Stanfield Compl. ¶¶ 167-71.[13] The MA Lock provided the Shooter with the ability to obtain his "weapon of choice"—a rifle that would accept removable large-capacity magazines to allow him to fire more rounds more quickly without having to pause to reload a fixed magazine. Jones Compl. ¶¶ 94-95; Stanfield Compl. ¶¶ 175-176. Plaintiffs were injured as a result. Jones Compl. ¶¶ 115, 143-46; Stanfield Compl. ¶¶ 196 (p. 46), 204-07 (p. 54) (alleging that the Shooter's ability to use removable magazines allowed him to quickly reload his rifle inside the store and inflict far more damage than would have been possible with a rifle with a fixed magazine). These factual allegations demonstrate that Mean's marketing was a substantial cause of Plaintiffs' harms. Simply put, without the MA Lock, the Shooter more likely than not would not have been able to obtain an

[13] Mean's deceptive marketing reached the Shooter: he noted in his diary that the MA Lock was a "cheap and easy way to make your AR-15 NY and CA compliant…for now." Jones Compl. ¶ 86; Stanfield Compl. ¶ 167.

assault weapon with removable magazines that is illegal in New York, and thus would not have been able to carry out a massacre at the scale of the one he perpetrated.

b. Plaintiffs Have Standing to Bring Claims for MEAN's Violations of GBL § 349 and § 350

Plaintiffs have standing to bring claims under GBL § 349 and § 350 because they were directly injured by Mean's marketing and this matter affects the public interest in New York. Contrary to Mean's contention, Plaintiffs are not required to be "consumers of Mean's products" or "direct competitors of Mean" to have standing to bring GBL §§ 349 and 350 claims. Def.'s Jones Br. at 26; Def.'s Stanfield Br. at 26. Section 349(h) broadly allows a right of action to "any person who has been injured by reason of any violation of this section." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (quoting GBL § 349(h)). "The critical question . . . is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor." *Id.* Here, Plaintiffs allege that they have been injured as a result of Mean's violations of GBL §§ 349 and 350. *See*, *e.g.*, Jones Compl. ¶¶ 115, 143-44; Stanfield Compl. ¶¶ 196 (p. 46), 204-05 (p. 54).[14] And they also allege that Mean's conduct had a significant effect on the public interest in New York: Mean's false representations regarding the "permanen[ce]" of the MA Lock allowed the product to be marketed, sold and used in New York, permitted the continued circulation of non-compliant AR-15 rifles within the state, and provided the Shooter with the weapon he sought to carry out his deadly attack. Jones Compl. ¶¶ 135, 140-41; Stanfield Compl. ¶¶ 196 (p. 51-52), 201-02 (p. 53). That is clearly sufficient.

[14] Plaintiffs' personal injuries are cognizable under GBL §§ 349 and 350. *See, e.g.*, *Doe v. Uber Tech., Inc.*, 551 F. Supp. 3d 341, 372 (S.D.N.Y. 2021) (plaintiff's sexual assault qualified as an injury under § 349(h)); *Carias v. Monsanto Co.*, No. 15-CV-03677, 2016 WL 6803780, at *10 (E.D.N.Y. Sept. 30, 2016) (finding personal injuries cognizable under §§ 349 and 350); *Oswego Laborers' Loc. 214 Pension Fund*, 623 N.Y.S.2d at 533 (no reliance required).

Mean invokes *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200 (2004), in support of its argument that Plaintiffs' claims are "too remote or derivative." Def.'s Jones Br. at 26; Def.'s Stanfield Br. at 26. That case does not improve Mean's argument. In *Blue Cross*, the Court of Appeals found that an insurer lacked standing to bring § 349 claims against tobacco companies for costs the insurer incurred in paying out medical claims to smokers, holding that the insurer's claims were "indirect because the losses it experienced arose wholly as a result of smoking related illnesses suffered by those [smoker] subscribers." 3 N.Y.3d at 207. The Court of Appeals' decision sought to ensure that "the party actually injured be the one to bring suit." *Id.* at 208. Here, the injured parties are Plaintiffs.

Because "the party actually injured" is the proper plaintiff in a consumer-protection action, courts have denied motions to dismiss consumer-protection claims brought by non-consumers who have suffered harms *independent* of harms suffered by direct consumers. For example, New York counties were allowed to proceed with a GBL § 349 claim against an opioid manufacturer for its deceptive practices in promoting off-label use of a drug that misled consumers and doctors about the benefits of the drug and its addictiveness. *In re Opioid Litig.*, No. 400000/2017, 2018 N.Y. Slip Op. 31229, at *7 (Suffolk County Sup. Ct. Jun. 18, 2018). The counties incurred "direct financial losses," including payments on behalf of Medicaid patients, social services, and drug addiction treatment programs. *Id.* at *7-8. The court held that those independent injuries were different from the insurer's derivative injuries in *Blue Cross*; while an insurer could recover its indirect losses through subrogation claims, the plaintiff counties "ha[d] no other means of seeking compensation for the pecuniary harms they allegedly suffered as a result of [the opioid manufacturer's] conduct." *Id.* at *8. *See also In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 667-69 (N.D. Cal. 2020) (refusing to dismiss a New York school

district's GBL § 349 claim against the vape maker JUUL on similar grounds and stating that "[t]he deception of the students is a harm that occurred independent of the harm suffered by [the school district]"); *M.V.B. Collision, Inc. v. Allstate Ins. Co.*, 728 F. Supp. 2d 205, 217-18 (E.D.N.Y. 2010) (allowing auto-repair shop to sue insurance company for deceptive statements made to consumer-insureds). Here, Plaintiffs' injuries are independent of harm suffered by consumers who purchased AR-15 rifles with the MA Lock installed based on the mistaken belief or hope that those firearms were not assault weapons. Just as Plaintiffs' harms are not too indirect to bring claims under GBL §§ 349 and 350, Plaintiffs' claims are not "too remote" from Mean's unlawful conduct, as Mean contends. Def.'s Jones Br. at 22; Def.'s Stanfield Br. at 22. *See, e.g.*, *Soto*, 331 Conn. at 291 (finding "remoteness" doctrine inapplicable where "it is the direct victims of gun violence who are challenging the [gun manufacturer's] conduct" that allegedly violated the state consumer protection law).

c. Plaintiffs Have Plausibly Alleged a Negligence Per Se Claim

Mean also asserts that the alleged violations of GBL §§ 349 and 350 cannot support a negligence per se claim. Def.'s Jones Br. at 16-17; Def.'s Stanfield Br. at 16-17. That is plainly incorrect—a violation of the duty of care imposed by GBL § 349(a) has been found to be "sufficient to support a claim of negligence per se." *Sanchez v. Ehrlich*, No. 16-CV-08677, 2018 WL 2084147, at *8 (S.D.N.Y. Mar. 29, 2018). "As a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability." *Elliott v. City of New York*, 95 N.Y.2d 730, 734 (2001). GBL § 349 "sets a standard of care by prohibiting specific practices, such as those alleged by Plaintiff, and provides a private right of action to injured parties." *Sanchez*, 2018 WL 2084147, at *7. Plaintiffs' claims for negligence per se based on Mean's violations of GBL § 350 should also be allowed to proceed because the GBL §§ 349 and

350 claims "have the same elements," *IGT v. High 5 Games, LLC*, No. 17-CV-09792, 2019 WL 1651608, at *6 (S.D.N.Y. Mar. 29, 2019), and both provide a private cause of action to any person who has "been injured by reason of any violation" (GBL §§ 349(h); 350-e(3)) of the respective sections. Plaintiffs are appropriate parties to bring claims premised on violations of GBL §§ 349 and 350 for the reasons discussed above, and Plaintiffs are the parties most affected by Mean's deceptive and false marketing.

V. PLAINTIFFS' PROXIMATE CAUSE ALLEGATIONS ARE SUFFICIENT

Mean's primary proximate cause argument is that the Shooter's intentional shooting at Tops is an intervening act that "break[s] the chain of causation" between Mean's conduct and Plaintiffs' injuries. Def.'s Jones Br. at 23-24; Def.'s Stanfield Br. at 23-24. But Mean bears a heavy burden of showing that Plaintiffs' claims must be dismissed at this stage as 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 [a] defendant" are for the factfinder. *Id.* at 529. Nothing in Mean's motion to dismiss establishes that this is a case where the factfinder should be deprived of that role.

After all, the Complaints show that Mean's deceptive and false marketing created the circumstances under which assault weapons could be acquired in violation of the SAFE Act. Jones Compl. ¶ 135; Stanfield Compl. ¶ 196 (p. 51-52). Mean marketed the MA Lock as a "permanent" solution to the ban on assault weapons while also providing instructions on how to remove the lock with a drill and screw extractor. Jones Compl. ¶¶ 124-25, 128-30; Stanfield Compl. ¶¶ 205-

06 (p. 48), 189-91 (p. 49-50). The Shooter exploited the conditions Mean created to purchase an assault weapon from which he easily removed the MA Lock. Jones Compl. ¶¶ 140-41; Stanfield Compl. ¶¶ 201-02 (p. 53). The Shooter was emboldened to undertake the attack at Tops, and he ultimately caused more death and trauma through his use of detachable magazines than he otherwise would have been capable of. Jones Compl. ¶¶ 143-44; Stanfield Compl. ¶¶ 204-05 (p. 54).

These allegations do not describe an intervening act that provides grounds for dismissal at this early stage of the case. For a court to find that an intervening act breaks the chain of causation at this stage, the act must be "of such an extraordinary nature or so attenuate[d from] defendants' negligence [and] 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)).[15] An intervening criminal act does not sever liability where the act was "reasonably foreseeable," *id.* at 302, and when the risk created by a defendant'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). Mean created a foreseeable risk that an assault weapon possessed in New York would be used in a mass shooting—and that is what happened.

Derdiarian v. Felix Contracting Corporation reinforces the highly fact-specific nature of the intervening act inquiry. 51 N.Y.2d 308 (1980). In *Derdiarian*, a driver who failed to take his epilepsy medicine suffered a seizure and crashed through a construction-site barricade, propelling

[15] In *In re September 11 Litigation*, the court found that the September 11 terrorist attacks, though "certainly horrific," could not as a matter of law excuse the owners and operators of the World Trade Center buildings of all liability based on the plaintiffs' allegations that they were negligent in failing to provide adequate fireproofing and evacuation procedures that may have saved lives. 280 F. Supp. 2d at 302.

a construction worker into the air and into boiling liquid splattered from a kettle also hit by the car. *Id.* at 312. The court rejected the notion that what the defendant construction company termed a "freakish accident" that was "solely" caused by the driver broke a causal link between the injury and the unsafe work conditions on the site. *Id.* at 314-15. As the court held, "the causal connection is not automatically severed" as a matter of law where an intervening cause is present. *Id.* at 315. The unsafe conditions on the construction site had raised the "possibility that a driver will negligently enter the work site and cause injury to a worker." *Id.* at 316.

The cases cited by Mean do not support its proximate cause argument. *See* Def.'s Jones Br. at 24-25; Def.'s Stanfield Br. at 24-25. For example, this case is unlike the "random criminal attack" at issue in *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294 (2004). That case involved an attack at a music concert where the defendants "took reasonable measures to deal with issues of crowd control and other forms of disorderliness" and could not be said to have been a substantial cause of the attack. *Id.* at 294-95. Other cases cited by Mean were summary judgment decisions and provide no relevant analysis of whether the intervening criminal act issue broke the causal chain. *See Jantzen v. Leslie Edelman of N.Y., Inc.*, 221 A.D.2d 594 (2d Dep't 1995); *Quiroz v. Leslie Edelman of N.Y., Inc.*, 224 A.D.2d 509 (2d Dep't 1996).

Nor is *Morales v. City of New York* helpful to Mean. 70 N.Y.2d 981 (1988). In *Morales*, the plaintiffs sued a gas station for injuries caused by arson because the gas station had violated a city ordinance by filling a plastic milk container with gas. *Id.* at 983. The court held that the causal connection between the ordinance—which was designed to promote safe storage of gasoline—and the arson was too attenuated. *Id.* at 984. Here, Mean's deceptive and false marketing enabled violations of the SAFE Act, legislation that recognized that "[s]ome weapons are so dangerous and some ammunition devices so lethal that we simply cannot afford to continue selling them in our

state." State Senate Introducer's Mem. in Support, Bill Jacket, L. 2013, ch. 1, at 13. Armed with just such a dangerous weapon, the Shooter inflicted mass carnage. Jones Compl. ¶ 58; Stanfield Compl. ¶ 145.

The Complaints' allegations are more than sufficient to show that Mean's violations were a "substantial factor in the sequence of responsible causation." *Servants of Jesus & Mary, Inc. v. Nat'l Comm. for Nat'l Pilgrim Virgin of Canada*, No. 18-CV-00731, 2022 WL 2438965, at *4 (W.D.N.Y. Mar. 31, 2022).

VI. PLAINTIFFS HAVE STATED A PUBLIC NUISANCE CLAIM

To assert a claim for public nuisance, a plaintiff must allege: "(1) the existence of a public nuisance; (2) conduct or omissions by a defendant that create, contribute to, or maintain that public nuisance; and (3) particular harm suffered by plaintiff different in kind from that suffered by the community at large." *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 390 (E.D.N.Y. 2004).

As to the first and second elements, Plaintiffs allege that Mean created a public nuisance by deceptively marketing and distributing the MA Lock in New York, in violation of GBL §§ 349 and 350, even though Mean knew or should have known that its conduct facilitated the transfer and possession of illegal assault weapons in New York, a condition that endangers the safety and health of the people of New York. Jones Compl. ¶¶ 266-68; Stanfield Compl. ¶¶ 354-56. As to the third element, Plaintiffs allege that they suffered particular harm, namely the injuries inflicted on them during the Tops attack. In other words, Plaintiffs have alleged that they suffered special injuries, which are different in kind from any injury to the general public, as a result of the Shooter's ability to acquire an illegal assault weapon with the MA Lock installed. Jones Compl. ¶¶ 269-72; Stanfield Compl. ¶¶ 357-59. Similar allegations by a victim of gun violence were

sufficient to state a cause of action for public nuisance in *Williams v. Beemiller*, 103 A.D.3d 1191, 1192 (4th Dep't 2013).[16]

In addition, Plaintiffs have adequately pleaded causation with respect to its public nuisance claim. In a public nuisance action, causation hinges on "proof that a defendant, alone or with others, created, contributed to, or maintained the alleged interference with the public right." *AcuSport*, 271 F. Supp. 2d at 492. Under the causation inquiry in a public nuisance claim, "defendants may be found liable for conduct creating in the aggregate a public nuisance" and "intervening actions, even multiple or criminal intervening actions, need not break the chain of causation." *Id.* at 493. Plaintiffs have alleged sufficient facts to clear this low bar, which is inherently "a fact-specific inquiry." *Id.*

[16] The three cases cited by Mean involved claims that are distinguishable. *See* Def.'s Jones Br. at 29-30; Def.'s Stanfield Br. at 29-30. In *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91 (1st Dep't 2003), the Attorney General's public nuisance claim against gun manufacturers failed because the claim would have held the defendants liable for lawful distribution of non-defective products. *Id.* at 102. By contrast, Plaintiffs allege that Mean's deceptive trade practices and false advertising—which constitute statutory violations—created the public nuisance that injured them. And *Smith v. Atl. Gun & Tackle, Inc.*, 376 F. Supp. 2d 291 (E.D.N.Y. 2005), and *N.A.A.C.P. v. AcuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003), do not stand for the proposition that Plaintiffs' public nuisance claims are "improper and must be dismissed." Def.'s Jones Br. at 30; Def.'s Stanfield Br. at 30. Those cases, which address whether the plaintiffs had a special injury different from that of the public, were decided at later stages of litigation. *Smith* involves a summary judgment decision. There, the court allowed a negligence claim (regarding an illegally purchased gun) to proceed but dismissed the overlapping public nuisance claim because of its potential to cause prejudice and confusion for the jury. 376 F. Supp. 2d at 292-93. The *AcuSport* case involves a post-trial ruling in which the court determined that the plaintiffs failed to show *by clear and convincing evidence at trial* that its members suffered special injuries. 271 F. Supp. 2d at 451. As the same judge observed in a subsequent decision, the *AcuSport* plaintiffs "did not bring any claims arising out of the manufacture, distribution or sale of a particular firearm alleged to have been illegally used in a shooting causing harm to the plaintiff." *Bryco Arms*, 304 F. Supp. 2d at 393. Here, Plaintiffs have adequately pleaded that they suffered an individualized and special injury— physical and emotional injury—from a particular rifle that the Shooter acquired due to dangerous conditions created by Mean. *See id.* at 392-93 (noting that "[p]hysical injuries to particular persons are generally sufficient to constitute harm different in kind under New York law" and listing cases "finding that emotional injuries can constitute special injury").

VII. THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS ASSERTED IN THE *STANFIELD* COMPLAINT SHOULD NOT BE DISMISSED AS DUPLICATIVE

In a footnote, Mean argues that the *Stanfield* Plaintiffs' claims for negligent infliction of emotional distress ("NIED") are duplicative of their claims for negligence. Def.'s Stanfield Br. at 14 n.13. Generally, where "the conduct and resulting injury" alleged in support of two separate claims are "identical," one of the claims should be dismissed. *Deer Park Enters., LLC v. Ail Sys., Inc.*, 57 A.D.3d 711 (2d Dep't 2008). Where a distinct injury is alleged, however, both claims can survive. That is the case here; each claim is supported by distinct injuries.

The negligence count in the *Stanfield* Complaint alleges that Plaintiffs suffered physical injuries. Three of the *Stanfield* Plaintiffs sustained traditional physical injuries. Stanfield Compl. ¶ 17 (scraped knee), ¶¶ 20-22 (injured wrist requiring surgery), ¶ 45 (burns to back and shoulder). All of the *Stanfield* Plaintiffs also "suffered … physiological injuries manifesting in continuing psychological symptoms . . . ." Stanfield Compl. ¶ 314. As alleged and supported by social science research, exposure to a mass shooting often causes physiological changes in survivors' brains—in other words, physical harm. Stanfield Compl. ¶¶ 140-42. This type of physical harm—like more traditional types of physical injuries—is appropriately alleged in a negligence claim rather than an NIED claim. *See Ewing v. Roslyn High Sch.*, No. 05-CV-127, 2009 WL 10705995, at *6 (E.D.N.Y. Mar. 31, 2009) (noting that "where there is no physical injury and the only harm in a negligence claim is emotional distress, the claim is one for negligent infliction of emotional distress").

The NIED claim identifies a different injury. It seeks recovery for the "severe emotional distress" that the *Stanfield* Plaintiffs suffered. Stanfield Compl. ¶ 327. A claim premised on emotional harm is distinct from other tort remedies, even where the underlying conduct giving rise to injury is the same. *Hanly v. Powell Goldstein, LLP*, No. 05-CV-05089, 2007 WL 747806, at *6

n.9 (S.D.N.Y. Mar. 9, 2007), *aff'd sub nom. Hanly v. Powell Goldstein*, *L.L.P.*, 290 F. App'x 435 (2d Cir. 2008). *See also Lewis Fam. Grp. Fund LP v. JS Barkats PLLC*, No. 16-CV-05255, 2021 WL 1203383, at *9 (S.D.N.Y. Mar. 31, 2021) (NIED claim may also be non-duplicative of other claims if the claims "arise from different injuries"). For this reason, the negligence and NIED claims are not duplicative. Neither case cited by Mean addresses this issue. *See Curtis v. Gates Cmty. Chapel of Rochester, Inc.*, No. 6:20-CV-06208, 2023 WL 1070650, at *5 (W.D.N.Y. Jan. 27, 2023) (plaintiff failed to defend her NIED claim against an argument that it was duplicative); *see also Martirano v. Marriott Int'l, Inc.*, 80 Misc. 3d 609, 626 (New York Sup. Ct. July 31, 2023) (no discussion of the nature of plaintiff's injury). In any event, at the pleading stage, separate negligence and NIED claims are not duplicative because the elements of the claims are different. *See Farrell v. U.S. Olympic & Paralympic Comm.*, 567 F. Supp. 3d 378, 389-09 (N.D.N.Y. 2021); *Est. of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 338 (N.D.N.Y. 2016), *abrogated on other grounds by Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017).

VIII. THIS COURT HAS PERSONAL JURISDICTION OVER MEAN

Mean—a company that developed, marketed, and sold a product specifically for use in New York—now argues that it cannot be subject to personal jurisdiction in New York in an action relating to that product. Def.'s Jones Br. at 30-34; Def.'s Stanfield Br. at 30-34. That is not a colorable argument.

Mean's manufacture and sale of the MA Lock, which is the subject of Plaintiffs' claims, satisfies New York's long-arm statute. That statute provides for jurisdiction over a defendant who "transacts any business within the state." CPLR 302(a)(1). This basis for jurisdiction has two elements: that the defendant transacted business within the state, and that the cause of action arose

from that transaction of business. *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005). Knowingly shipping goods into New York places a case "squarely within CPLR 302(a)(1)," *Anderson Dev. Corp. v. Isoreg Corp.*, 154 A.D.2d 859, 860 (3d Dep't 1989), as does selling goods to residents of New York through a website, *see, e.g.*, *Halas v. Dick's Sporting Goods*, 105 A.D.3d 1411, 1412 (4th Dep't 2013). If the transaction of business is "purposeful" and there is a "substantial relationship" between "the transaction and the plaintiff's claim," jurisdiction exists. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). "This inquiry is 'relatively permissive' and does not require causation . . . The claim need only be 'in some way arguably connected to the transaction.'" *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 329 (2016) (citations omitted).

Plaintiffs' allegations are more than sufficient to make a prima facie case of personal jurisdiction. In addition to manufacturing and selling products that were designed to comply with New York law and consequently sold in New York, Mean "marketed and sold its products . . . to customers in New York," "targeted New York consumers" with marketing materials, and "regularly shipped the [MA Lock] to purchasers in New York." Jones Compl. ¶ 17; Stanfield Compl. ¶ 94. Mean's argument that jurisdiction is lacking ignores several of these allegations.

This Court also has jurisdiction under CPLR 302(a)(3). Jurisdiction is proper under that provision if: (1) the defendant "committed a tortious act outside the State;" (2) "the cause of action arises from that act;" (3) "the act caused injury to a person or property within the State;" (4) the "defendant expected or should reasonably have expected the act to have consequences in the State;" and (5) the "defendant derived substantial revenue from interstate or international commerce." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000).[17]

[17] Mean agrees that this is the proper standard under section 302(a)(3) but fails to identify which prong of the test—if any—it believes Plaintiff has failed to allege. *See* Def.'s Jones Br. at 32; Def.'s Stanfield Br. at 32.

Here, Plaintiffs unquestionably meet the first three elements by alleging that Mean's tortious conduct with regard to the MA Lock—even if it occurred in Georgia—resulted in Plaintiffs' injuries in New York.[18] To meet the fourth element, Mean "need only reasonably foresee" that its tortious activity "would have direct consequences within the State." *LaMarca*, 95 N.Y.2d at 215. Here, the Complaints allege that Mean, by directly marketing the MA Lock as a "solution" to New York's assault weapons law, would have foreseen—and, indeed, intended—that its marketing and sales would cause AR-15s with the MA Lock installed to be bought and sold in New York, in violation of New York's assault weapons law. Jones Compl. ¶¶ 17, 125, 134-35; Stanfield Compl. ¶¶ 94, 206 (p. 48), 195-96 (p. 51). The fifth element is satisfied here as well. Mean's interstate sales of products directed at customers outside Georgia (including New York) suffice. Mean's conduct did not involve business operations exclusively "of a local character," which is what the fifth factor addresses. *See LaMarca*, 95 N.Y.2d at 215 (quoting *Ingraham v. Carroll*, 90 N.Y.2d 592, 599 (1997)).

Mean's assertion that "one note embedded in the 'FAQ' section of a website cannot be deemed sufficient as a matter of law for Mean to have 'targeted' the New York forum," Def.'s Jones Br. at 33-34; Def.'s Stanfield Br. at 33-34, cannot withstand scrutiny. To suggest that Mean did not target New York ignores the MA Lock's *raison d'être*. As Plaintiffs alleged, the MA Lock was specifically developed for use in the handful of states, including New York, that prohibit firearms with certain prohibited features and the capacity to accept detachable magazines. Jones Compl. ¶ 123; Stanfield Compl. ¶ 204 (p. 47). The *purpose* of the MA Lock is to provide a veneer

[18] Mean's negligence, criminal facilitation and aiding of violations of New York's assault weapons law, violations of GBL § 349 and 350, and creation of a public nuisance with respect to its manufacture, marketing, sale, and distribution of the MA Lock from Georgia and into New York caused injury to Plaintiffs in New York. *See* Jones Compl. ¶¶ 16-17; Stanfield Compl. ¶¶ 93-94.

suggesting that a firearm is compliant with the laws of such states. *See* Jones Compl. ¶¶ 120-26; Stanfield Compl. ¶¶ 201-06, 187 (p. 46-48). Moreover, as Mean acknowledges, its website specifically named New York as a state whose laws were "satisfie[d]" by the lock. Jones Compl. ¶ 125; Stanfield Compl. ¶ 206 (p. 48). In designing and selling the MA Lock, Mean was plainly targeting the New York market.

Finally, Mean observes that Plaintiffs "do[ ] not allege that Mean sold the MA Lock that was allegedly installed in the shooter's rifle … directly to a person or company within the State of New York." Def.'s Jones Br. at 32-33; Def.'s Stanfield Br. at 33. But the precise route that the lock took from Mean's factory to the Shooter's rifle does not affect the personal-jurisdiction analysis. *See, e.g.*, *Archer-Vail v. LHV Precast Inc.*, 209 A.D.3d 1226, 1229 (3d Dep't 2022) ("[D]ue process does not require a strict causal link between the *specific* product that caused harm and the defendant's forum contacts.") (emphasis in original). "[W]hen a corporation cultivates a market for a product in a state and that product [causes harm] there, jurisdiction is appropriate regardless of where the product was sold, designed or manufactured." *Id.* And this is true whether Plaintiffs proceed under section 302(a)(1) or 302(a)(3). *See id.* at 1228 (finding CLPR 302(a)(3) satisfied even though defendant initially sold product in another state); *Aybar v. US Tires & Wheels of Queens, LLC*, 211 A.D.3d 40, 50 (2d Dep't 2022) (finding CPLR 302(a)(1) satisfied even though defendant initially sold product in another state). Mean designed the MA Lock with states like New York in mind, cultivated a market for the MA Lock in New York, and sold the MA Lock directly into the state. Jones Compl. ¶ 17; Stanfield Compl. ¶ 94. That is enough for personal jurisdiction over Mean when one of its MA Lock results in injury in New York, no matter where that lock was originally sold.

CONCLUSION

Plaintiffs respectfully request that the Court deny Mean's Motions to Dismiss in their totality.

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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 18, 2023. *See* NYSCEF Doc. No. 28, in Index No. 810316/2023; NYSCEF Doc. No. 31 in Index No. 810317/2023. According to the word processing software used to prepare this memorandum, the total word count, excluding the material exempted by 22 NYCRR § 202.8-b, is 14,840 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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