STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

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

Plaintiffs,

-against-

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

Defendants.

INDEX NO.: 810317/2023

Hon. Paula L. Feroleto

Oral Argument Requested

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

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Defendant Vintage Firearms, LLC, by and through its undersigned attorneys, submits this Memorandum of Law in Support of its Motion to Dismiss Complaint or, in the Alternative, Stay the Pending Proceedings until the Second Circuit resolves the constitutionality of N.Y. Gen. Bus. Law §898 in the pending matter of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374. Dismissal of all claims against Vintage Firearms, LLC, including all crossclaims made by codefendants, is proper pursuant to C.P.L.R. §3211(a)(1), (a)(3), and/or (a)(7).

INTRODUCTION

This case arises from the criminal and intentional misuse of a firearm by Payton Gendron ("Gendron"), who murdered ten people and wounded three on May 14, 2022. List Aff. ¶3; Ex. 1, Compl. ¶¶1, 196. Gendron perpetrated his criminal actions by unlawfully misusing a Bushmaster model "XM-15E2S Target" (the "Subject Rifle") he purchased from Vintage Firearms, LLC ("Vintage"), a Federal Firearms Licensee ("FFL"), after passing a required background check. List Aff. ¶8, 11; Ex. 4, Ex. 5. Gendron's purchase of the Subject Rifle occurred on January 19, 2022, over sixteen weeks prior to Gendron's criminal misuse in his murderous acts. *Id.* Although the Subject Rifle was compliant with New York law at the time it was sold by Vintage, having a fixed magazine with a ten-round capacity, Gendron later illegally modified the rifle using his father's power drill, a "Speedout" tool, and firearm parts sold by Anderson Manufacturing. *Id.*; Ex. 8, (1/14/2022); Ex. 9: 61-72. In the process, he destroyed the device that locked the magazine in place, which was manufactured by Mean Arms. *Id*. He also purchased thirty-round magazines from a flea market, which he knew were illegal to possess in New York, and used them to carry out his criminal acts. *Id.*

On the day of the shooting, ATF visited Vintage and took records related to the transaction. List Aff. ¶¶8, 15; Ex. 12. It has not been alleged that Vintage was ever found in violation of state

or federal law by government regulators, that its FFL was revoked, or that the business or owner were ever criminally charged. *Id*.

Plaintiffs seek to pin liability on Vintage simply because it legally sold the Subject Rifle to Gendron, who independently and intentionally misused the Subject Rifle in a heinous criminal act more than sixteen weeks later. Plaintiffs allege a negligent entrustment claim without supplying facts demonstrating Vintage had "special knowledge" Gendron was likely to use the Subject Rifle in an improper or dangerous fashion involving unreasonable risk of physical injury to himself or others. *Stanley v. Kelly*, 173 N.Y.S.3d 750, 752 (2022); 15 U.S.C. § 7903(5)(B).

Plaintiffs allege that Vintage sold Gendron an "illegal assault weapon" because, with the Mean Arms lock attached, "the lock could be removed in minutes, rendering the weapon a fully functioning assault weapon that is banned in New York." Ex. 1, ¶188-189(p.54[1]). Notwithstanding Plaintiffs' hyperbolic claim, the Subject Rifle was sold legally with a fixed 10-round magazine. *See* N.Y. Penal Law §§ 265.00(22), 265.02(7). Gendron illegally modified the rifle, drilling and destroying the lock in the process, and needed to separately purchase parts sold by Anderson Manufacturing in order to make the Subject Rifle accept detachable magazines. List Aff. ¶¶3,11; Ex. 1, ¶97; Ex. 8, (1/14/2022); Ex. 9: 61-72. The notion that the Subject Rifle was sold in an illegal configuration is purely ridiculous. It is the logical equivalent of alleging that Gendron purchased an illegal sawed-off shotgun from a Pennsylvania gun dealer because he bought a Mossberg 500 with a legal barrel length but could have hacksawed the barrel in minutes (no additional parts required). List Aff. ¶18; Ex. 9: 60, 79. Just as Governor Hochel explained in a press conference

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[1] Plaintiffs' Amended Complaint provides numbered paragraphs in correct succession until reaching ¶206, where it begins at ¶187 again. Therefore, where duplicative paragraph numbers exist, both the NYSCEF page number and the paragraph number citation are provided herein.

immediately after the shooting, the Subject Rifle was legal to purchase in New York, but the thirty-round magazines possessed by Gendron were not[2].

Plaintiffs make further amorphous claims, such as alleging Vintage "failed to establish reasonable controls and procedures to prevent the sale, possession, and illegal use" of the Subject Rifle, without ever identifying the alleged controls and procedures it purportedly failed to use. Ex. 1, ¶388-393. Each of Plaintiffs' claims is riddled with bald legal conclusions, speculation, and hindsight bias. Vintage is a law-abiding firearm dealer who legally sold the Subject Rifle to Gendron after he passed the required FBI NICS background check[3]. None of Plaintiffs' allegations amount to a proper basis of liability against Vintage. Plaintiffs essentially seek to hold Vintage liable for not having access to a crystal ball that would allow it to predict Gendron, who passed a background check and displayed no propensity for violence or criminality in the store, would use the Subject Rifle in a heinous criminal act more than sixteen weeks after purchase.

As is further explained in the succeeding sections, this case is precisely the sort of legal action that the Protection of Lawful Commerce in Arms Act (the "PLCAA") is designed to preempt and prohibit. 15 U.S.C. §§7901-7903. The PLCAA mandates immediate dismissal of all claims against Vintage.

SUMMARY OF ARGUMENT

Plaintiffs' claims against Vintage fail for the following primary reasons:

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[2]https://www.northcountrypublicradio.org/news/story/45888/20220516/hochul-to-propose-closing-loopholes-in-new-york-s-gun-laws

[3] As indicated on the 4473 Form (Ex. 5), the National Instant Criminal Background Check System ("NICS") approved the immediate sale of the Subject Rifle to Gendron, providing a "proceed" instruction to Vintage.

- Plaintiffs' claims are squarely prohibited by the immunity provisions of the PLCAA. 15 U.S.C. §§ 7901-7903. The instant case is a "qualified civil liability action" that "may not be brought in any Federal or State court." *Id.* at §§7902(a), 7903(5)(A).

- Although an action for negligent entrustment can be an exception to the PLCAA, Plaintiffs have alleged insufficient facts to support the conclusion that Vintage had special knowledge or should have known Gendron was likely to use the Subject Rifle in an improper or dangerous fashion involving unreasonable risk of physical injury to himself or others. 15 U.S.C. §7903(5)(B); *See also Graham v. Jones,* 46 N.Y.S.3d 329, 330 (2017); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 236 (2001); *Stanley*, 173 N.Y.S.3d at 752.

- The "predicate exception" to the PLCAA is inapplicable because Plaintiffs have failed to allege facts demonstrating that Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of firearms, ammunition, or firearms components, and that "the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. §7903(5)(A)(iii); *See also Ileto v. Glock, Inc.,* 565 F.3d 1126, 1136 (9th Cir. 2009).

- G.B.L. §898 is unconstitutionally vague both facially and as applied to Vintage, because it fails to provide a person of common intelligence "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Further, the law fails to provide a minimal standard for enforcement, thereby permitting arbitrary application and violating the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

- According to Plaintiffs, G.B.L. §898 prohibits the sale of AR-15s (even those with magazine locking devices) to members of the public who are not otherwise prohibited from firearm possession pursuant to state or federal law. Because such a prohibition is inconsistent "with the

Nation's historical tradition of firearm regulation," it violates "the Second Amendment's unqualified command." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2135 (2022).

BRIEF FACTUAL SUMMARY

On May 14, 2022, Gendron entered Tops Friendly Market in Buffalo, New York, and carried out unspeakable acts of violence that were racially motivated. List Aff. ¶¶3, 8-9; Ex. 1, Compl. ¶¶1, 196(p.52); Ex. 4, Ex. 5; Ex. 6. He murdered ten people and wounded three. *Id*. Gendron legally purchased the Subject Rifle he criminally misused from Vintage on January 19, 2023 (nearly four months prior to attack), after passing a background check. *Id*. Vintage is an FFL with a small firearm retail location[4] at 120 S. Nanticoke Avenue in Endicott, New York. *Id*. It is owned and operated by Robert Donald. *Id.* The Subject Rifle, a Bushmaster model "XM-15E2S Target," was manufactured in Windham, Maine between 1994 and 2006 according to its serial number, traveling in interstate commerce to reach New York. *Id.*

Although the Subject Rifle was compliant with New York law when it was sold by Vintage, having a fixed magazine[5] with a ten-round capacity, Gendron followed YouTube instructions to illegally modify it using a power drill, a screw extracting tool called a "Speedout," and firearm parts sold by Anderson Manufacturing. List Aff. ¶11; Ex. 8, (1/14/2022); Ex. 9: 61-72. Additionally, Gendron carried out his attack using illegal thirty-round magazines he purchased at a flea market. *Id*.

[4] Plaintiffs incorrectly refer to Vintage as a "firearms distributor" in the Complaint. Ex. 1, ¶104. Vintage is a "firearm dealer" pursuant to applicable federal law. *See* 18 U.S.C. §921(a)(11).

[5] New York law does not define the terms "fixed magazine," or "permanently fixed."

On multiple occasions, Plaintiffs allege the Subject Rifle was a prohibited "assault weapon" pursuant to New York law because it was capable of being illegally modified to accept detachable magazines, through the use of a power drill, a specialized drill attachment (the Speedout), and the installation of additional parts. Ex. 1, ¶¶315, 355, 366, 380-384. Plaintiffs essentially argue that a rifle "**capable of being illegally modified** to accept detachable magazines" is the legal equivalent to a rifle "ha[ving] an ability to accept a detachable magazine" pursuant to the "assault weapon" prohibition under §265.00(22) and §265.02(7) of the N.Y. Penal Law. This interpretation is specious. To draw another analogy, under both New York and federal law, possession of a rifle with a barrel shorter than 16 inches (referred to as a "Short-Barreled Rifle") is illegal. *See* 18 USC §§921(a)(8), 922(a)(4); N.Y. Penal Law §§265.00(3), 265.01-B. According to Plaintiffs' logic, all firearms are illegal short-barreled rifles, even those with barrel lengths exceeding 16 inches, because said barrels are easily capable of being hacksawed to a shorter length. Such an interpretation is obviously invalid. The Subject Rifle was legal until Gendron illegally modified it. List Aff. ¶11; Ex. 9, p. ("Since I live in New York, I had to buy a cucked version of this **before illegally modifying it**")(emphasis added).

On the same date Gendron carried out his attack, ATF visited Vintage to review and take records concerning the transaction. List Aff. ¶15. Plaintiffs have not alleged Vintage was found in violation of state or federal law by government officials(because Vintage wasn't), that its FFL was revoked (it wasn't), or that criminal charges ever issued pertaining to the transaction (they weren't) *Id.* The transaction was legal.

Plaintiffs spend the lion's share of the Complaint explaining how Gendron was radicalized by the social media products he was addicted to, leading to his adoption of racist and deranged conspiracy theories that ultimately caused him to carry out his criminal attack. *See* Ex. 1 generally.

Plaintiffs also allege, in detail, how Gendron's parents failed to intervene prior to the attack despite Gendron residing in their home and their knowledge of a litany of "red flags" including that Gendron had "brutalized and decapitated a cat," threated to commit a "murder suicide," spent an unhealthy amount of time on social media, was stockpiling tactical gear, and owned multiple firearms. Ex. 1*,* ¶¶123-124, 149, 180-192, 526-527. Plaintiffs explain that while Gendron lived in his parents' home, he was stockpiling "weapons, ammunition, and combat equipment" as he planned his racist attack. *Id*.

Plaintiffs further allege that RMA sold Gendron body armor without performing any screening, and had Gendron been unable to obtain body armor, he would not have proceeded with his attack or, alternatively, would have been stopped earlier. *Id.* According to Plaintiffs, RMA "marketed its products directly to civilians, including via online message boards and chat groups that appeal to delusional and racist young men, without any reasonable vetting or verification process." *Id*.

Unlike the claims against the Social Media Defendants, RMA, and Gendron's parents, the allegations against Vintage are factually thin, couched in bald legal conclusions, and supported by misstatements of law. Plaintiffs' factual allegations can be summarized as follows:

- Gendron purchased the Subject Rifle from Vintage after multiple visits to the store. The Subject Rifle had a Mean Arms lock installed. Ex. 1, ¶¶167-172, 208-213.
- "Robert Donald, owner of Vintage, knew that the MEAN Arms Lock could be removed easily and did not permanently change the weapon's capabilities[6]." *Id*.

[6] Apart from being baseless, Plaintiffs spin a New York Times article dated May 15, 2022, in which Robert Donald explained that he only sells NY-compliant firearms and stated: "Even with all of those safety features on it—which is the only way I sell it—**any gun** can be easily modified if you really want to do it." List Aff. ¶17, Ex. 13.

- Gendron learned from YouTube how to remove a fixed magazine from an AR-15 by using a power drill and believed the Subject Rifle had the same sort of fixed magazine. *Id*. He further reported learning he could remove the fixed magazine with a "Speedout" screw extraction tool attached to a power drill, and then could install a "regular mag button and spring" purchased separately. List Aff. ¶11; Ex. 8, (1/14/2022); Ex. 9: 61-72.
- Mean Arms also provided removal instructions that Gendron posted on Discord[7]. Ex. 1, ¶190-192; Ex. 8, (1/11/2022).
- Vintage allowed Gendron to "investigate" (look at) the gun and, "upon [unspecified] information and belief," "helped [Gendron] understand that he could remove the lock and fixed magazine by simply extracting its screw." Ex. 1, ¶208-213.

Even assuming all of Plaintiffs' alleged facts as true for purposes of this motion (many are flatly false), Plaintiffs' allegations fail to demonstrate that Gendron engaged in any behavior that would indicate he was dangerous or likely to engage in criminal conduct. Further, even falsely assuming that Vintage "helped [Gendron] understand that he could remove the lock," we know from Gendron's writings and Plaintiffs' own allegations that Gendron had already learned to remove the lock from YouTube. Ex. 1, ¶¶167-172; 190-192; Ex. 8, (1/11/2022). Therefore, said false allegation is immaterial. Additionally, the notion that Gendron "scouted out various gun stores, pawn shops, and flea markets—including Vintage Firearms—in an effort to locate the 'locked' gun he sought…" is directly contradicted by Gendron's own writing on Discord, which is cited by Plaintiffs. *Id*. Gendron posted the YouTube video depicting removal of a magazine lock

[7] There are multiple legitimate reasons for Mean to include instructions on lock removal. For example, a user may move to one of the majority of states that have no fixed magazine requirements. Alternatively, a person may make their AR-15 featureless, which would permit the use of detachable magazines in New York. *See* N.Y. Penal Law §§ 265.00(22), 265.02(7).

on January 11, 2022, and within the same comment stated: "Same fixed mag release at vintage firearms, says you have to drill it out to get it." *Id*. It is clear that he was not scouring gun shops in search of a particular "'locked' gun he sought" but rather, his discovery of the modification video and knowledge of the Subject Rifle being for sale at Vintage were nearly simultaneous. *Id*.

Plaintiffs make much ado about the particular rifle that was purchased, particularly its caliber and ability to accept illegal "large-capacity" magazines after it was illegally modified, making statements such as:

> The Bushmaster XM-15 is an AR-15-style rifle that fires bullets at high velocity, inflicting extreme damage to the human body. When equipped with a detachable large-capacity magazine, the gun can fire dozens of rounds without having to reload and can accept another magazine with ease after ejecting the previous one.
>
> Ex. 1, Compl. ¶164.

Plaintiffs further allege:

> if Vintage Firearms had not transferred the Bushmaster XM-15 to the Shooter, (a) the Shooter would not have been able to acquire and use a weapon that accepted detachable magazines, (b) the Shooter would not have undertaken his attack for lack of a sufficiently deadly firearm, or, (c) if the Shooter had nevertheless undertaken the attack, the Shooter's attack would have been shorter, with fewer shots fired.
> *Id*. at ¶384.

These arguments are irrelevant, speculative, and hyperbolic, particularly because, apart from the Subject Rifle being legal, **other semi-automatic rifles of the same caliber and ability to accept detachable magazines are readily available for lawful purchase in New York**. In fact, official guidance documents from the State of New York include the Ruger model Mini 14 within a list of rifles that the State explicitly deems non-assault rifles. List Aff. ¶13-14; Ex. 11. The Ruger Mini 14 is semi-automatic, chambered in 5.56 NATO/.223 Rem, and accepts detachable magazines, including readily available "large-capacity" magazines:

Mini-14® 5.56 NATO/.223 Rem. 30-Round Magazine

Item Number: 90035

Review Average:

Number of Reviews: 23

View Reviews | Review this item

$53.95
Expected on : 11/20/2023

Quantity − 1 +

I am a US Citizen or lawful permanent resident.

ADD TO CART

Id.

Unlike the Subject Rifle, the Mini 14 does not require illegal modification in order to accept detachable magazines. It is ready to accept them out of the box.

Vintage legally sold the Subject Rifle to Gendron after he passed a background check. Like other gun dealers Gendron visited, Vintage was shocked to learn of his heinous crime. List Aff. ¶18, Ex. 14(As per New Yorker article published May 22, 2022: Pennsylvania gun dealer described "nothing abnormal" about Gendron when he purchased a shotgun. Gun dealer Mohammed Farzad, an Iranian immigrant who owns "All Star Pawn Shop," saw the news and "had trouble believing it was the same man who had come to his store so frequently."). As Mr. Donald reported to the New York times: he completed a background check on Gendron and: "[h]e didn't stand out, because if he did, I would have never sold him the gun." List Aff. ¶17, Ex. 13; *see also* Ex. 1, ¶173 & fn 22.

Plaintiffs' claims fail as a matter of law and must be dismissed pursuant to the PLCAA.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST VINTAGE FIREARMS MUST BE DISMISSED PURSUANT TO THE PLCAA, 15 U.S.C. §§7901-7903

Federal law mandates dismissal of the instant lawsuit pursuant to the PLCAA. 15 U.S.C. §§7902(a), 7903(5)(A). There are no facts to support the contention Vintage negligently entrusted the Subject Rifle to Gendron, nor does the predicate exception apply to the instant case. The PLCAA requires the immediate dismissal of all claims against Vintage.

A. The Very Purpose of the PLCAA is to Prohibit Cases Such as This One

The PLCAA, enacted on October 26, 2005, prohibits the filing of a "qualified civil liability action" in any state or federal court, and mandates that any such "action that is pending on the date of enactment of this Act shall be immediately dismissed." 15 U.S.C. §7902(a)&(b). The first stated purpose of the PLCAA is:

> "To **prohibit causes of action against** manufacturers, distributors, **dealers**, and importers **of firearms** or ammunition products, and their trade associations, **for the harm solely caused by the criminal or unlawful misuse of firearm products** or ammunition products by others when the product functioned as designed and intended."

15 U.S.C. §7901(b)(1)(emphasis added).

Congress understood that firearm dealers supply essential tools for citizens to exercise constitutional rights, and in light of countless lawsuits brought against the firearm industry "seek[ing] money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals," enactment of the PLCAA was necessary "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." *Id.* at §7901(a)(3)&(b)(2). Congress further recognized the "manufacture, importation, possession, sale, and use of firearms

and ammunition in the United States are heavily regulated" and licensed dealers selling firearms to the public:

> "**are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products** or ammunition products that function as designed and intended."

15 U.S.C. §7901(a)(5)(emphasis added).

The instant action against Vintage is precisely the sort of lawsuit Congress intended to prohibit. Plaintiffs seek to hold Vintage liable for harm caused by Gendron's criminal and unlawful misuse of the firearm product he purchased. The PLCAA requires the immediate dismissal of all qualified civil liability actions, including the instant case against Vintage.

B. The Instant Case is a Qualified Civil Liability Action Prohibited by the PLCAA

The PLCAA succinctly states: "A qualified civil liability action may not be brought in any Federal or State court." §7902(a). A "qualified civil liability action" is a:

> **"civil action** or proceeding or an administrative proceeding brought by any person **against a** manufacturer or **seller of a qualified product** or a trade association, **for damages**, punitive damages, injunctive or declaratory relief, or penalties or other relief **resulting from the criminal or unlawful misuse of a qualified product by the person or a third party"**

15 U.S.C. §7903(5)(A)(emphasis added).

The instant case is undoubtedly a qualified civil liability action within the meaning of the PLCAA, because it arises from the criminal and unlawful misuse of a qualified product (the May 14, 2022, shooting) by a third party (Gendron).

i. Vintage is a Seller Protected by the PLCAA

The PLCAA defines a "seller," with respect to a qualified product, as "a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of

Title 18." 15 U.S.C. §7903(6)(B). Pursuant to 18 U.S.C. § 921(a)(11)(A), a "dealer" is defined as "any person engaged in the business of selling firearms at wholesale or retail." As a federally licensed dealer of firearms, Vintage is a "seller" pursuant to the PLCAA and is therefore protected by the Act.

ii. The Subject Rifle is a Qualified Product Pursuant to the PLCAA

The PLCAA defines a "qualified product" in relevant part as "a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code) . . . that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. §7903(4). Pursuant to 18 U.S.C. §921(a)(3)(A) & (B), a firearm is defined as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" or "the frame or receiver of any such weapon . . ." It is undisputed that Plaintiffs claim damages concerning Gendron's criminal shooting of innocent people with a firearm, a Bushmaster Model XM-15 E2S Target, which was shipped and transported in interstate commerce after being manufactured in Windham, Maine. As such, the firearm is a qualified product pursuant to the PLCAA.

iii. Plaintiffs' Claimed Damages Resulted from the Criminal or Unlawful Misuse of a Qualified Product by a Third Party

As set forth above, this case arises from the criminal or unlawful misuse of the Subject Rifle by Gendron, who used it to unlawfully carry out his attack on May 14, 2022. Accordingly, Plaintiffs' claimed damages resulted from the criminal or unlawful misuse of a qualified product (the Subject Rifle) by a third party (Gendron). Consequently, each of Plaintiffs' claims against Vintage constitutes a qualified civil liability action, specifically prohibited by the PLCAA. 15 U.S.C. §7902(a).

C. Plaintiffs Failed to Allege Facts Demonstrating an Exception to the PLCAA's General Prohibition Against Qualified Civil Liability Actions

The allegations contained within the Complaint fail to establish any of the limited exceptions to the PLCAA's immunity provision as a matter of law. The PLCAA excludes six narrow categories of claims from the broad definition of a "qualified civil liability action." Plaintiffs' Complaint alleges Vintage is liable for negligent entrustment, which is one of the enumerated exceptions. 15 U.S.C. §7903(5)(A)(ii). The only other exception that could possibly apply is the "predicate exception," which requires that a "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)(emphasis added).

As a matter of law, Plaintiffs have failed to establish either of these exceptions because:

1. Plaintiffs have not alleged a sufficient factual basis from which to conclude Vintage had special knowledge or reasonably should have known that Gendron was likely to use the Subject Rifle in an improper and dangerous manner involving unreasonable risk of physical injury. 15 U.S.C. § 7903(5)(B); *See also Graham*, 46 N.Y.S.3d at 330; *Hamilton,* 96 N.Y.2d at 236.

2. Plaintiffs have not alleged facts demonstrating Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of a "qualified product," nor have Plaintiffs demonstrated proximate cause. 15 U.S.C. §7903(5)(A)(iii).

i. The Negligent Entrustment Exception to the PLCAA Does Not Apply

a) Plaintiffs Have Failed to State a Proper Claim for Negligent Entrustment

Plaintiffs have failed to provide allegations establishing a claim for negligent entrustment pursuant to New York law and the requirements of the PLCAA. Therefore, the Court should dismiss Plaintiffs' Count Nine.

Negligent entrustment is defined in the PLCAA as:

> "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others."

15 U.S.C. §7903(5)(B).

Furthermore, the PLCAA states "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. §7903(5)(C); *see also Ileto*, 565 F.3d at 1131, 1135-36 (the "only function of the PLCAA is to preempt certain claims"). Accordingly, Plaintiffs could only meet this exception by providing sufficient facts to conclude Vintage negligently entrusted the Subject Rifle under both New York law and the PLCAA's own definition of negligent entrustment. Plaintiffs have alleged insufficient facts to meet this heavy burden. Therefore, Count Nine fails.

To establish a cause of action for negligent entrustment in New York, "the defendant must ... have some special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given] which renders [that person's] use of the chattel unreasonably dangerous" *Monette v. Trummer*, 964 N.Y.S.2d 345, 348 (2013)(quoting *Cook v. Schapiro*, 871 N.Y.S.2d 714 (2009)(citation omitted)). A claim for negligent entrustment "is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" *Stanley*, 173 N.Y.S.3d at 752 (citation omitted).

As is set forth in the "Brief Factual Summary" herein, Plaintiffs have failed to provide allegations establishing Vintage knew or should have known of Gendron's propensity to use the Subject Rifle in an improper or dangerous fashion involving unreasonable risk of physical injury. *Id. See also* 15 U.S.C. §7903(5)(B). Further, Vintage is not alleged to have provided Gendron with

the knowledge (already had it from YouTube), tools, or the parts necessary for Gendron to illegally convert the rifle. List Aff. ¶11. As per Plaintiffs' allegations and Gendron's own writings, he illegally modified the Subject Rifle using YouTube instructions, purchased the Speedout tool from Home Depot, carried out the modification using his father's power drill, and then installed firearm parts (magazine catch, spring, and button), sold by Anderson Manufacturing, that were necessary for the Subject Rifle to accept detachable magazines. *Id*. Further, Gendron purchased his illegal thirty-round magazines from Jimay's flea market- a fact Vintage is not alleged to have had knowledge of. *Id*.

Pursuant to G.B.L. §875-e, every gun dealer must take annual training which includes instruction on "How to recognize, identify, respond, and report an individual who intends to use a firearm, rifle, or shotgun for unlawful purposes, including self-harm." G.B.L. §875-e(2)(C). Within the training provided by the New York State Police, published January 27, 2023, there is only one slide covering how to identify a potentially dangerous person, stating as follows:

January 27, 2023 20

How to recognize, identify, respond & report an individual who intends to use a gun for unlawful purposes, including self-harm

It can be difficult to determine if a customer intends on using a gun it to harm someone or themselves. However, there are some signs you can watch out for:

- The customer doesn't seem interested in how the gun works, doesn't ask questions, or ask about comparisons with similar models.
- The customer is a first-time buyer who doesn't know anything about guns.
- The customer makes odd or questionable statements or acts nervous or anxious.

What can you do?

- Ask the customer questions. A conversation with the buyer may reveal any troubling motives behind the purchase.
- If in doubt, don't make the sale.
- If concerns over a certain customer persist, contact local law enforcement.

NEW YORK STATE | State Police

List Aff. ¶19-21; Ex. 15.

None of the signs of a potentially dangerous person included in the mandatory training describe characteristics displayed by Gendron. According to Plaintiffs' allegations, Gendron was a frequent customer of Vintage who was interested in the Subject Rifle's characteristics, which he "investigated." *Id*. He is not alleged to have acted nervously, disinterested, unusually, or like he was in a rush. *Id.* At no point is he alleged to have acted in an alarming manner that would put Vintage on notice of his propensity to engage in a criminal act of violence. *Id.* In fact, he was a frequent visitor of multiple firearms stores and had purchased a shotgun from another licensed dealer who reported "nothing abnormal" about his presentation. List Aff. ¶18. Yet another gun dealer, the owner of firearm retailer "All Star Pawn," described being shocked upon learning that Gendron committed the attack on May 14, 2022. *Id.* He described showing Gendron an AR-15 for possible purchase himself. *Id.*

It is not alleged Gendron was prohibited from purchasing or possessing a firearm pursuant to state or federal law when he purchased the Subject Rifle from Vintage. *See* Ex. 1 generally; *see also* 18 U.S.C. 922(g); N.Y. Penal Law § 265.17. It isn't alleged that prior to the attack on May 14, 2022, Gendron had engaged in other criminal conduct that Vintage knew or should have known about. *Id*. Taking Plaintiffs' allegation as true, that Gendron was a "frequent customer" of Vintage, that alleged fact further validates Vintage's lack of special knowledge concerning Gendron's propensity toward violence and criminality. List Aff. ¶21. It is unclear what "further vetting" Plaintiffs believe Vintage should have performed, beyond strictly complying with the law and having multiple interactions with Gendron (as Plaintiffs note). Ex. 1, ¶172.

Gendron was cleared to purchase the Subject Rifle by an FBI NICS background check. List Aff. ¶¶8, 15. It is not alleged that Vintage engaged in any violations of state or federal law pertaining to the transaction, or that Vintage faced licensing repercussions, despite ATF visiting

Vintage on the day of the shooting to review and retrieve records pertaining to Gendron's purchase. *Id*. Without alleging facts demonstrating Vintage had special knowledge or reasonably should have known Gendron was likely to use the Subject Rifle in an improper and dangerous manner involving unreasonable risk of physical injury, Plaintiffs' claim fails as a matter of law. 15 U.S.C. §7903(5)(B). Because the PLCAA preempts Plaintiffs' negligent entrustment action against Vintage, the Court should dismiss Count Nine.

b) Plaintiffs' Claim of Negligent Entrustment in the Context of the Sale of Chattel Sixteen Weeks Prior to the Buyer's Criminal Misuse Fails as a Matter of Law

Apart from Plaintiffs' failure to allege sufficient facts to satisfy the elements under both the PLCAA and New York law, Plaintiffs' negligent entrustment claim also fails based upon the lack of duty Vintage owed to Plaintiffs. "A critical consideration in determining whether a duty exists is whether the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" *Davis v. South Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015) (quoting *Hamilton,* 96 N.Y. 2d at 232-33(2001)). "A duty may not be predicated merely because it is foreseeable that persons may be killed or injured by defendants' lethal [firearm] products." *Id.* at 222-23, 232.

More than sixteen weeks elapsed between the date Gendron purchased the Subject Rifle from Vintage and his attack. List Aff. ¶11. At the time of the shooting, Vintage had no ability to exercise control over the Subject Rifle and was not in the "best position to protect against the risk of harm." *Id.* Unlike other parties, such as Gendron's parents (who allegedly were aware of ongoing concerning behavior), Vintage's interactions with Gendron were limited. *Id*. Therefore, after Vintage legally sold the Subject Rifle to Gendron, Vintage was not in the "best position" to somehow read Gendron's mind and intervene to stop his criminal conduct that would occur almost four months later. *Id*.

In determining whether a duty exists, New York Courts "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Hamilton*, 96 N.Y.2d at 232 (citing *Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994); *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402–403 (1985)). Again, a "critical consideration" in the Court's balancing analysis involves determining whether "defendant's relationship with [ ] the tortfeasor …. places the defendant in the best position to protect against the risk of harm" *Id.* (internal quotations omitted). "Foreseeability, alone, does not define duty--it merely determines the scope of the duty once it is determined to exist." *Hamilton,* 96 N.Y.2d at 232-235. (citations omitted). This is particularly true regarding firearms, where "[f]ederal law already has implemented a statutory and regulatory scheme to ensure seller 'responsibility' through licensing requirements and buyer 'responsibility' through background checks." *Hamilton,* 96 N.Y.2d at 239.

Plaintiffs must demonstrate Vintage "owed not merely a general duty to society but a specific duty to him or her, for '[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.'" *Id.* at 232 (quoting *Lauer v. City of New York*, 95 N.Y.2d 95 (2000)). "A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" *Hamilton,* 96 N.Y.2d at 233. In refusing to impose a general duty pertaining to the distribution of firearms by firearm industry members, even prior to the PLCAA's enactment, the New York Court of Appeals explained the "judicial resistance

to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 233.

The case of *Constant v. Andrew T. Cleckley Funeral Servs., Inc.,* decided by the Kings County Supreme Court, is instructive concerning the issue of duty in relation to the instant matter. 148 N.Y.S.3d 645 (N.Y. Sup. Ct. 2021). In that case, Plaintiff sued U-Haul, in addition to a funeral home and others, in relation to the funeral home's storing of bodies in unrefrigerated U-Haul trucks, in addition to losing Plaintiff's father's remains. *Id.* Regarding U-Haul specifically, Plaintiff alleged U-Haul owed a duty to the public to ensure their trucks were not rented for unlawful purposes or purposes that would endanger public welfare. *Id.* at 648. She also argued U-Haul had a duty to inquire with the funeral home as to why it was renting such a large volume of trucks. *Id.*at 648.

Despite U-Haul having a written contract with renters governing how its trucks were to be used (demonstrating retained control), the Court found that "U-Haul owed no duty to plaintiff to prevent the misuse of the U-Haul trucks by the Cleckley Funeral Home for what was essentially a criminal act… This is more so the case as U-Haul lacked authority to control the Cleckley Funeral Home's conduct." *Id.* at 648-649. The Court further explained U-Haul had no duty to inquire into the use of its trucks beyond verifying the renter possessed a valid driver's license and, once the trucks were rented, U-Haul "lacked authority to control" the funeral home's conduct. *Id.* at 649-651 (citing *Cook,* 58 A.D.3d at 664(Car dealership had no duty to prevent 80-year-old woman who possessed a valid driver's license from driving and ultimately killing plaintiff's decedent with her new car two days after purchase)).

The Court granted U-Haul's motion to dismiss, finding that absent allegations of "special knowledge" possessed by U-Haul when it rented out the trucks, Plaintiff's allegations were

"insufficient to state a cause of action sounding in negligent entrustment." *Constant,* 148 N.Y.S.3d at 648-651. The *Constant* case reaffirms the general rule that defendants, like Vintage, are generally not liable for, and owe no duty to control, the conduct of third parties. *Id.*; *see also Hamilton*, 96 N.Y.2d at 232-33; *D'Amico v. Christie*, 71 N.Y.2d 76, 88 (1987). Additionally, a duty cannot be established against a defendant who relinquished control of chattel, such as through a sale or rental arrangement, unless the defendant held "special knowledge" of the recipient's likelihood of engaging in harmful conduct, and the defendant was in the best position to intervene. *Constant,* N.Y.S.3d at 649-651; *Davis,* 26 N.Y.3d at 576; *Hamilton*, 96 N.Y.2d at 233; *See also In re Academy, Ltd.*, 625 S.W.3d 19, 23 (Tex. 2021) (Retailer who sold firearm and magazines to Sutherland Springs mass shooter not liable for negligent entrustment because "the basis for imposing liability on the owner of the thing entrusted to another is that ownership of the thing gives the right of control over its use.")

In the instant case, Vintage sold the Subject Rifle to Gendron on January 19, 2023, which he criminally misused nearly four months later, on May 14, 2022. List Aff. ¶8-11. Vintage complied with state and federal law, utilizing the system established to "ensure… buyer 'responsibility' through background checks." *Hamilton,* 96 N.Y.2d at 239; (4473). The Complaint fails to allege Vintage had "special knowledge" that Gendron would likely use the Subject Rifle in a criminal and dangerous fashion involving unreasonable risk of physical injury. *See Id.* at 236; 15 U.S.C. § 7903(5)(B); *Graham*, 46 N.Y.S.3d at 330.

Further, Plaintiffs failed to allege facts establishing Vintage was in the best position to prevent the harm based upon its relationship with Gendron. *Davis,* 26 N.Y.3d at 576; *Hamilton,* 96 N.Y. 2d at 232. Vintage's interactions with Gendron were sporadic and limited. After Gendron passed the background check and received transfer of the Subject Rifle on January 19, 2022,

Vintage had no ability to control his criminal actions more than sixteen weeks later. Gendron's parents were likely in the best position to prevent the harm because Gendron resided in their home and they were aware of a litany of "red flags," including that Gendron had "brutalized and decapitated a cat," threated to commit a "murder suicide," spent an unhealthy amount of time on social media, was stockpiling tactical gear, and owned multiple firearms. Ex. 1*,* ¶¶123-124, 149, 180-192, 526-527.

The Complaint's allegations fail to establish that Vintage owed Plaintiffs a duty pursuant to a theory of negligent entrustment. Therefore, Plaintiffs' claim for negligent entrustment fails as a matter of law and is preempted by the PLCAA. If Vintage were found liable in this context, it would be akin to imposing absolute liability on a seller of a product for any misuse by a buyer at any time in the future, even when the product is not defective. This is precisely the type of liability that the PLCAA sought to avoid. Therefore, the Court should dismiss Count Nine.

ii. The Predicate Exception to the PLCAA Does Not Apply

The PLCAA provides a narrow exception, known as the "predicate exception," permitting a plaintiff to sue a licensed firearm dealer, like Vintage, if the plaintiff's cause of action is supported by sufficient facts to meet the following elements:

> 1. The firearm dealer <u>knowingly</u> violated a state or federal statute;
>
> 2. The statute violated is applicable to the sale or marketing of qualified products; and
>
> 3. The knowing statutory violation was the proximate cause of the harm for which the plaintiff seeks relief.

15 U.S.C. §7903(5)(A)(iii); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 394, 403 (2d Cir. 2008); *Ileto*, 565 F.3d at 1136-38.

Plaintiffs have failed to allege facts establishing Vintage knowingly violated any state or federal law. *See* §7903(5)(A)(iii). Furthermore, Counts Seven, Eight, and Nine of Plaintiffs' Complaint do not allege Vintage violated a statute applicable to the sale or marketing of qualified products. *Id.* As explained by the 9th Circuit in *Ileto v. Glock*, general tort claims, even those codified into statute, are preempted by the PLCAA and the predicate exception only pertains to "statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry." 565 F.3d at 1136.

Finally, the predicate exception does not permit any of Plaintiffs' claims because Plaintiffs' allegations fail to establish Vintage was the "proximate cause of the harm for which relief is sought." 15 U.S.C. §7903(5)(A)(iii). Because Plaintiffs have failed to allege facts demonstrating the intervening criminal action by Gendron was foreseeable to Vintage, Plaintiffs cannot prove proximate cause as a matter of law. *See Bell v. Bd. of Educ., City of New York*, 90 N.Y.2d 944, 946(1997)("Where third-party criminal acts intervene between defendant's negligence and plaintiff's injuries, the causal connection may be severed, precluding liability.")(citing *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33(1983); *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980)). Therefore, each of Plaintiffs' causes of action against Vintage fails to establish the predicate exception and must be dismissed pursuant to the plain language of the PLCAA.

a) Plaintiffs' Count Ten for Alleged Violations of G.B.L. §898-b is Preempted by the PLCAA

Plaintiffs' allegations fail to establish Vintage knowingly violated §898-b when it legally sold the Subject Rifle to Gendron. List Aff. ¶8-11. Therefore, Plaintiffs' claim that Vintage violated G.B.L. §898-b fails as a matter of law. G.B.L. §898-b states:

> 1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New

> York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.
>
> 2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.

Vintage is a "gun industry member" pursuant to G.B.L. §898-a(4). The Subject Rifle is a "qualified product" according to G.B.L. §898-a(6), which incorporates the PLCAA's definition of qualified product into state law. *See* 15 U.S.C. §7903(4). Although G.B.L. §898-b(1) purports to proscribe certain actions done either "knowingly or recklessly," the predicate exception may only apply if a statute is violated "knowingly." 15 U.S.C. §7903(5)(A)(iii). It would be nonsensical to claim Vintage "knowingly" violated the statute by acting "recklessly." Therefore, in order to overcome the PLCAA's general preemption of qualified civil liability actions, Plaintiffs' allegations must provide a sufficient basis to find that Vintage knowingly engaged in each element necessary to establish a violation of G.B.L. §898-b. The instant allegations fall far short of meeting this standard.

After misstating New York's definition of a prohibited "assault weapon" multiple times throughout the Complaint (*See* Ex 1., ¶¶165, 364), Plaintiffs make an amorphous claim that Vintage violated G.B.L. §898 by selling Gendron "a weapon capable of semi-automatic firing using removable large-capacity magazines, which was illegal in New York at all relevant times, and endangered the health, safety, and comfort of members of the public." Ex. 1, ¶391.

In reality:

- The Subject Rifle was legal, having a fixed, 10-round magazine. Gendron illegally modified the rifle, drilling and destroying the lock with a specialized tool, and needed to

separately purchase parts sold by Anderson Manufacturing in order to make the Subject Rifle accept detachable magazines. List Aff. ¶11; Ex. 8, (1/14/2022); Ex. 1, ¶97. Ex. 9: 61-72.

- Vintage did not sell Gendron any illegal large-capacity magazines, nor have the instant Plaintiffs, or any other Plaintiff, alleged Vintage did. Gendron purchased the illegal magazines at a flea market. *Id*.
- New York does not have a blanket prohibition against semi-automatic rifles capable of accepting detachable magazines. N.Y. Penal Law §§ 265.00(22), 265.02(7). For example, official guidance materials from New York State demonstrate that the Ruger Mini 14 is not a prohibited "assault weapon," despite it being a semi-automatic rifle of the same caliber as the Subject Rifle that is equally capable of accepting detachable magazines (including illegal magazines with a "large capacity.") List Aff. ¶13-14; Ex. 11.

Despite the sale of the Subject Rifle being legal, the Plaintiffs have baldly asserted that Vintage "knowingly violated the requirement that it establish and use reasonable controls and procedures to prevent the sale and possession of firearms that are unlawful in New York. Vintage Firearm's duty under the law included, for example, the duty to establish reasonable controls and procedures to ensure that it sold legal, compliant products and refrained from selling assault weapons with easily removeable locks." Ex. 1, ¶304(p.100).

At no point do Plaintiffs explain the "reasonable controls and procedures" that Vintage purportedly failed to establish, nor do Plaintiffs provide precedent or authority for the characterization that the magazine lock was "easily removeable" and legally insufficient. Again, Gendron removed the lock by destroying it through the use of a power drill and specialized bit, after learning how to do so on YouTube and/or from the manufacturer. List Aff. ¶11; Ex. 1, ¶97;

Ex. 8, (1/14/2022); Ex. 9: 61-72. He then was required to install parts purchased separately from Anderson Manufacturing in order to make the rife accept detachable magazines. *Id*. Gendron knew the modification was illegal and did it intentionally. *Id*. The Subject Firearm was legal when sold.

The remainder of Plaintiffs' allegations in support of its §898-b claim consist of bald legal conclusions and vague references to Vintage purportedly acting unreasonably and/or creating a danger by selling the Subject Rifle, without Plaintiffs providing supporting legal authority or explanation. Ex. 1, 389 *et seq*.

Plaintiffs have failed to demonstrate that Vintage knowingly violated either provision of G.B.L. §898, thereby preempting Plaintiffs' Count Ten pursuant to the PLCAA. In regard to §898-b(1), Plaintiffs' allegations were required to demonstrate that Vintage knowingly engaged in specific conduct, that it knew was unlawful or unreasonable under all the circumstances, and by nature of such conduct, knowingly created, maintained, or contributed to a condition in New York State that endangered the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product. G.B.L. §898-b(1); 15 U.S.C. §7903(5)(A)(iii).

Despite Plaintiffs' attempts at supporting the §898-b(1) claim with political/public policy arguments and bald legal conclusions, they have failed to allege sufficient facts to demonstrate Vintage "knowingly violated" §898-b(1)[8]. There are no factual allegations establishing that Gendron, who passed a background check, communicated or acted in a manner to put Vintage on notice that he intended to carry out an act of violence or otherwise endanger the public with the Subject Rifle. Plaintiffs have failed to establish that Vintage knowingly violated G.B.L. §898-b(1), and Count Ten is preempted by the PLCAA.

[8] Notably, the mandatory annual training for gun dealers makes no reference to §898. List Aff. ¶20.

Plaintiffs' combined claim that Vintage violated G.B.L. §898-b(2) also fails. Plaintiffs have not provided factual allegations demonstrating Vintage knowingly failed to "establish and utilize reasonable controls and procedures" pursuant to G.B.L. §898-b(2). *See* 15 U.S.C. §7903(5)(A)(iii)(predicate exception requires knowing violation). Therefore, Count Ten should be dismissed as preempted by the PLCAA.

In accordance with G.B.L. §898-a(2), "Reasonable controls and procedures:"

> shall mean policies that include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter.

Plaintiffs never specified in the Complaint what "reasonable controls and procedures" Vintage purportedly failed to establish. Vintage utilized the appropriate documentation and federal background check process concerning the sale of the Subject Rifle to Gendron. List Aff. ¶¶8, 15. On the day of Gendron's attack, ATF visited Vintage to review the transaction documentation and obtain the original 4473 form Gendron completed. *Id*. It is not alleged Vintage was found to have violated state or federal law by government officials, nor is it alleged Vintage faced any licensing repercussions. *Id*. Without pointing to legal authority establishing, or even alleging, some sort of deficiency in the controls and procedures utilized by Vintage, Plaintiffs' §898-b(2) claim fails.

Because Plaintiffs have failed to establish a violation of the statute, Plaintiffs certainly failed to establish Vintage "knowingly" violated the law as is required by the predicate exception to the PLCAA. *See* 15 U.S.C. §7903(5)(A)(iii). Therefore, the Court should dismiss Count Ten.

b) Plaintiffs' Counts Seven and Eight are Preempted by the PLCAA and Fail as a Matter of Law

Plaintiffs' claims for negligence and negligent infliction of emotional distress are squarely preempted by the PLCAA. Ex. 1, 360-377. The claims are not based upon allegations that Vintage "knowingly violated" any state or federal law "applicable to the sale or marketing" of a qualified product. *See* 15 U.S.C. §7903(5)(A)(iii). Additionally, the claims do not constitute a theory of negligent entrustment meeting the exception to the PLCAA set forth in 15 U.S.C. §7903(5)(B). Therefore, Plaintiffs' Counts Seven and Eight are preempted by the PLCAA and fail as a matter of law. Further, in regard to the Plaintiffs' claimed damages, only pecuniary losses are available under a wrongful death theory pursuant to New York law. *Reape v. NCRNC, LLC*, 184 N.Y.S.3d 739, 741 (2023).

Counts Seven and Eight are preempted by the PLCAA and should therefore be dismissed.

c) Plaintiffs Have Failed to Allege Facts Establishing Vintage was the Proximate Cause of Plaintiffs' Claimed Injuries

For the predicate exception to apply to any cause of action, the knowing violation of state or federal statute attributed to a defendant must be the proximate cause of the harm for which relief is sought. 15 U.S.C. §7903(5)(A)(iii). A defendant proximately caused an injury when its tortious actions were the "substantial cause of the events which produced the injury." *Hain v. Jamison*, 28 N.Y.3d 524, 528-29 (2016) (internal quotation omitted). When an intervening criminal act occurs and causes injury, a defendant can only be found to have proximately caused the injury if it was foreseeable. *Id.* at 529 (internal quotation omitted) (emphasis in original). *See Bell*, 90 N.Y.2d at 946 ("Where third-party criminal acts intervene between defendant's negligence and plaintiff's injuries, the causal connection may be severed, precluding liability.")

As has been explained herein, Plaintiffs have failed to allege facts demonstrating that the intervening criminal action by Gendron was foreseeable to Vintage. Therefore, Plaintiffs cannot

prove proximate cause, constituting an additional basis under which the PLCAA prohibits all of Plaintiffs' claims.

II. G.B.L. §898-b IS UNCONSTITUTIONAL AS APPLIED TO VINTAGE IN THE INSTANT CASE

If the Court declines to dismiss Count Ten of Plaintiffs' Complaint on other grounds, the Court should find that G.B.L. §898-b, as applied to Vintage, is unconstitutional. If the Court declines to dismiss Count Ten upon constitutional grounds, the Court should stay the instant proceedings against Vintage pending the outcome of a constitutional challenge to G.B.L. §898 currently under consideration in the United States Circuit Court of Appeals for the Second Circuit in the case of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374.

G.B.L. §898-b is unconstitutional as applied to Vintage for two primary reasons:

1. The law is unconstitutionally vague in violation of the Due Process Clause because it failed to provide Vintage with "fair notice of conduct that is forbidden or required" and encourages arbitrary enforcement. *FCC*, 567 U.S. at 253.

2. The law, as constructed by Plaintiffs, prohibits the sale of AR-15s, even those with fixed magazines, to people not otherwise prohibited from purchasing a firearm pursuant to state or federal law, which is inconsistent with the Nation's historical tradition of firearm regulation, thereby violating "the Second Amendment's unqualified command." *Bruen*, 142 S. Ct. at 2129-30.

A. G.B.L. §898-b is Unconstitutionally Vague as Applied to Vintage Firearms, LLC

"The fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed [internal citation omitted] is essential to the protections provided by the Fifth Amendment's Due Process Clause [internal citation omitted] which requires

the invalidation of impermissibly vague laws." *FCC,* 567 U.S. at 253. The 'void for vagueness doctrine' addresses two primary due process concerns:

1. Regulated parties must know what the law requires "so they may act accordingly."

2. "Precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."

Id. See also Kolender v. Lawson, 461 U.S. 352, 356 (1983).

If a statute fails to provide clear language, "with sufficient definiteness that ordinary people can understand what conduct is prohibited," it is unconstitutionally vague. *Kolender*, 461 U.S. at 357; *See also Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 498 (1982). Further, if a statue does not provide minimal guidelines for the purposes of enforcement, it is unconstitutionally vague on the basis that it permits, or may even encourage, arbitrary enforcement. *Id.*

If the claim against Vintage for alleged violations of G.B.L. §898-b(1)&(2)(Count X) is permitted to move forward, despite Vintage otherwise strictly complying with state and federal law concerning the sale of the Subject Rifle, it becomes transparent that the statute is unconstitutional because it failed to inform Vintage as to what it needed to do to avoid a violation, while simultaneously failing to provide minimal guidelines for enforcement.

Applying the two-part examination of vagueness to G.B.L. §898-b reveals the naked uncertainty of what conduct was purportedly demanded of Vintage. It is important to frame the examination in the view of the "ordinary" lay person's ability to read the law and know what is expected of them.

> 1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of

> the public through the sale, manufacturing, importing or marketing of a qualified product.
>
> 2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.

G.B.L. § 898-b

In regard to §898-b(1), allowing the case to go forward would mean the Court has determined Vintage may be liable for acting "unreasonably" and thereby "knowingly" "creat[ing], maintain[ing], or contribut[ing]" to a "condition in New York State that endangers the safety or health of the public through the sale … of a qualified product." It is entirely unclear what constitutes a dangerous "condition" that Vintage might have "unreasonably" and "knowingly" created, maintained, or contributed to when it legally sold the Subject Rifle. The statute does not mandate specific actions to take or avoid. In fact, New York State's mandatory training for gun dealers doesn't even reference §898-b, which is unsurprising given that the statute fails to identify any sort of minimal standard for enforcement. List Aff. ¶19-21.

In regard to G.B.L. § 898-b(2), the statute required Vintage "establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state." The "definition" of "reasonable controls and procedures" contained in G.B.L. §898-a(2) is unhelpful because rather than defining the term, it contains a vague, non-exclusive list of policy goals without telling Vintage what it actually needs to do to comply. It is unclear what "reasonable controls" Vintage should have established and utilized, apart from its strict compliance with state and federal law.

Plaintiffs never specified in Count Ten, nor in the Complaint generally, what "reasonable controls and procedures" Vintage purportedly was lacking. Instead, Plaintiffs rely on bald and

conclusory legal conclusions without factual support, misstatements concerning the application and scope of New York's "assault weapons" prohibition (See Ex. 1, ¶¶165, 364), and falsely claim, with zero factual or legal basis, that Vintage's sale of the Subject Rifle violated the assault weapons ban. Plaintiffs' flawed legal position seems to be that an AR-15 should simply never be sold (not even with a fixed magazine), which mirrors Plaintiffs' counsel's political agenda.

If the Court declines to dismiss Count Ten, G.B.L. §898-b is void for vagueness as applied to Vintage pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The statute failed to provide Vintage with notice concerning the specific activities required or proscribed by the law. The law fails to provide a minimal standard of enforcement, thereby encouraging arbitrary application. Therefore, if it is determined Vintage could face liability pursuant to G.B.L. §898-b in this matter, the law is unconstitutional as applied.

B. G.B.L. §898-b Violates the Second Amendment if Plaintiffs' Interpretation of its Requirements is Adopted by the Court

If Plaintiffs' interpretation of G.B.L. §898-b is adopted, it violates the Second Amendment by creating an outright legal prohibition against the selling of AR-15s (even with magazine locks and restricted magazine capacity), which are firearms in common use for self-defense. "Modern semiautomatic rifles like the AR-15 platform rifle are widely owned by law-abiding citizens across the nation. Other than their looks (the State calls them 'features' or 'accessories') these prohibited rifles are virtually the same as other lawfully possessed rifles." *Miller v. Bonta*, 2023 WL 6929336, at *1 (S.D. Cal. Oct. 19, 2023). Because such a prohibition is inconsistent "with the Nation's historical tradition of firearm regulation," it violates "the Second Amendment's unqualified command." *Bruen*, 142 S. Ct. at 2129-30; *see also Miller*, 2023 WL 6929336, at *7 ("This Court has previously determined that the State's ban on modern semi-automatics has no historical pedigree.")

As a licensed seller of firearms, and a supplier of the tools necessary for individuals to exercise their rights pursuant to the Second Amendment (as recognized by the PLCAA, §7901), Vintage has proper standing to raise this constitutional challenge. *See Baker v. Carr*, 369 U.S. 186, 204, (1962). Depending on the outcome of this matter, Vintage is poised to suffer an injury in fact, both as a consequence of the damages alleged in the instant case, and of the impact an adverse determination would have on Vintage's firearm business going forward.

C. Should the Court Decline to Dismiss Count Ten of Plaintiffs' Complaint, the Court Should Stay the Instant Case

Should the Court decline to dismiss Count Ten on constitutional grounds, the Court should stay the instant proceedings against Vintage pending the outcome of a constitutional challenge to G.B.L. §898 currently pending in the Second Circuit case of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374. The United States District Court for the Western District of New York already issued stays in cases brought by the cities of Rochester and Buffalo against Vintage and various other firearms industry defendants, finding that "the efficient use of the parties' and the Court's time and resources" is a "significant consideration weighing in favor of a stay" and the Second Circuit's decision "will likely provide helpful guidance" on the application and constitutionality of G.B.L. §898. *City of Buffalo v. Smith & Wesson Brands, Inc.*, No. 23-CV-6061-FPG, 2023 WL 3901741, at *2 (W.D.N.Y. June 8, 2023). Therefore, if the Court declines to dismiss the G.B.L. §898 claims against Vintage, the Court should stay the case pending clarification from the Second Circuit.

CONCLUSION

Plaintiffs' claims against Vintage, and all crossclaims, should be dismissed pursuant to the PLCAA because the instant case constitutes a prohibited qualified civil liability action. Plaintiffs' allegations fail to establish either the negligent entrustment or predicate exceptions to the PLCAA,

thus the Act compels dismissal. G.B.L. §898-b is unconstitutional as applied to Vintage and the Court should therefore dismiss Count Ten on that additional basis. Should the Court decline to dismiss Count Ten, the Court should stay the instant action pending the outcome of *National Shooting Sports Foundation, Inc. v. James*, No. 22-1374.

Dated: Concord, New Hampshire
November 9, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum complies with the word limits agreed to by counsel and memorialized with a Stipulation filed by the parties on October 20, 2023. According to the word processing software uses to prepare this memorandum, the total word count, excluding the material omitted under 22 N.Y.C.R.R. §202.8-b(b) is 9,993 words.

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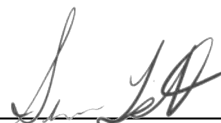

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