IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

THE DISTRICT OF COLUMBIA, *et al*.,	*
Plaintiffs,	*
v.	*
	* **CASE No: C-15-CV-24-004781**
ENGAGE ARMAMENT LLC, *et al*.,	* **(Honorable Robert B. Rubin, Judge)**
Defendants.	*
	*

CORRECTED MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANT ENAGE ARMAMENT LLC

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Pursuant to Maryland Rule 2-322(b)(2), Defendant Engage Armament LCC ("Engage") respectfully submits this memorandum in support of its motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

A. Introduction

Defendant Engage Armament is a federally licensed and State licensed firearms dealer, located in Montgomery County, Maryland. In each count of the Complaint, Plaintiffs, the State of Maryland ("the State") and the District of Columbia ("DC" or "the District"), allege that Engage sold multiple handguns to Demetrius Minor ("Minor") over a several month period in 2021. Complaint ¶¶ 2, 62. Plaintiffs do not allege that Minor was disqualified from possessing or purchasing firearms under State or federal law. Rather, Plaintiffs allege that Minor was "an obvious straw purchaser," who, in turn is alleged to have "transferred most of those weapons to his relative, Donald Willis, a District resident with a record of violent felonies." *Id.* at ¶ 2.

The Complaint then alleges that Willis "went on to transfer many of the firearms given to him by Minor to other dangerous individuals." *Id*. ¶ 9. The Complaint alleges that one such handgun purchased from Defendant United "was used by Mr. Willis to terrorize partygoers at his ex-wife's house in the District," that another such handgun was found in Prince George's County in the possession of a suspect in a stabbing," that "[a] third was recovered in the District from a fugitive with an active warrant for assault in Prince George's County," and that "[m]any more are still on the street. *Id*. ¶10. The Complaint alleges that Mr. Minor "was rightfully prosecuted, convicted, and punished for his role in illegal straw purchasing and providing handguns to individuals, such as Mr. Willis, who were legally prohibited from possessing them." *Id*. ¶11. These allegations then form the basis of each of the five Counts of the Complaint. Those Counts are for

"Public Nuisance (Count I) (by both Plaintiffs), for "Negligence" (Count II) (by both Plaintiffs), "Negligence Per Se" (Count III) (by DC alone) and for "Negligence by Statute or Ordinance Rule" (Count IV) (by Maryland alone) and for "Negligent Entrustment" (Count V) (by both Plaintiffs).

B. Statutory Framework

1. Dealers

A federally licensed firearms dealers ("FFLs")[1] may sell long guns in Maryland, but in order to engage in the business of selling, renting or transferring regulated firearms in Maryland,[2] a FFL must also be a Maryland licensed dealer. MD Code, Public Safety, § 5-106(a). To be a Maryland licensed dealer, a person must submit an application to the Maryland State Police, MD Code, Public Safety, § 5-107, which conducts an extensive background investigation of the dealer applicant. MD Code, Public Safety, §§ 5-108, 5-109. Maryland licensed dealers are required by the State to maintain extensive records of firearm sales which the Maryland State Police may request and/or inspect upon request. COMAR § 29.03.01.43.

2. Purchaser regulations

Federal Forms: All purchasers of any firearm from an FFL are subject to federal and State background checks. A federal background check is conducted by the FBI under the National Instant Criminal Background Check System ("NICS"). 18 U.S.C. § 922(t). Purchasers must fill out a federal form, known as Form 4473, which asks a series of questions that demonstrate that the

[1] FFLs are licensed under federal law, 18 U.S.C. § 923, and are subject to regulations promulgated by the ATF. FFL applicants are required to comply with all relevant State and federal laws and are subject to an investigation by the ATF prior to the issuance of the FFL license. *Id*. at § 923(d).

[2] A "regulated firearm" is defined by MD Code, Public Safety, § 5-101(r)(1), to include all "handguns."

applicant is not a disqualified person under federal law and is the actual purchaser. See Complaint ¶¶ 40-42 (referencing Form 4473). Such Form 4473s were used by Engage for each of the sales specified by Plaintiffs in paragraph 62 of the Complaint and copies of these Form 4473s are attached to the Motion to Dismiss. See Exhibit B at B1-B138.

Federal law also requires that the dealer fill out ATF Form 3310.4 ("Report of Multiple Sale or Other Disposition of Pistols and Revolvers") in all instances in which a non-FFL purchaser buys two or more handguns within five days. 18 U.S.C. § 923(g)(3)(A); 27 C.F.R. § 478.126a. See Complaint ¶ 46 (referencing this requirement). This federal Form 3310.4 is sent to the ATF and the same information is forwarded to State law enforcement. 18 U.S. § 923(g)(3)(A). In this case, a Form 3310.4 was filed out by Engage for each sale to Minor of two or more firearms within five days.[3] Federal form 4473 is used to conduct the federal NICS background check required by 18 U.S.C. § 922(t). See 27 C.F.R. § 478.124(a). The Maryland State Police is the "point of contact" with the NICS system for handgun sales and is thus responsible for contacting the NICS system for the federal background check for all sales of handguns in Maryland. https://www.fbi.gov/file-repository/nics-participation-map-020124.[4]

State Form 77R: In addition to the federal requirements, Maryland requires that every purchaser of a handgun fill out, under penalty for perjury, an application to purchase known as State "Form 77R." MD Code, Public Safety, § 5-117. See Complaint ¶ 50 (referencing Form 77R). Through this Form 77R, the applicant must answer a series of questions that demonstrate that the

[3] See Exhibit B at B20, B28, B36, B44, B52, B60, B86, B100, B109, B117, B125.

[4] The FFL is the "point of contact" for conducting the NICS check for sales of long guns in Maryland. Sales of such long guns are not "regulated firearms" under Maryland law. MD Code, Public Safety, § 5-101(r). No sales of long guns are alleged in the Complaint.

applicant is not a disqualified person, as defined by Maryland law. The applicant electronically fills out and electronically submits the purchase application to the Maryland State Police via the applicant's account at the "licensing portal" managed by the Maryland State Police. See https://bit.ly/3NDsQ7H. Every applicant must establish a username and password with the Maryland State Police to fill out and submit this Form 77R. *Id.* "Any false information supplied or statement made in this application is a crime which may be punished by imprisonment for a period of not more than 3 years, or a fine of not more than $5,000, or both." MD Code. Public Safety, § 5-118(c). The Maryland State Police uses Form 4473 to conduct the NICS background check (Exhibit B at B2-B138) and uses Form 77R to conduct the background check of applicant using State databases, as required by MD Code, Public Safety, § 5-121.

To allow time for this investigation, MD Code, Public Safety, § 5-123(a), imposes a 7-day waiting period, providing that "[a] licensee may not sell, rent, or transfer a regulated firearm until after 7 days following the time a firearm application is executed by the firearm applicant, in triplicate, and the original is forwarded by the prospective seller or transferor to the Secretary." "An approved firearm application is valid only for the purchase, rental, or transfer of the regulated firearm listed in the firearm application." MD Code, Public Safety, § 5-125.

Designated Collector: Maryland law also provides that "[a] person may not purchase more than one regulated firearm in a 30-day period." MD Code, Public Safety, § 5-128(b). However, Maryland makes an exception for what are known as "designated collectors," providing that "[n]othwithstanding" the prohibition on multiple purchases imposed by Section 5-128, "a person may purchase more than one regulated firearm in a 30-day period if: (1) the person applies for and the Secretary approves a multiple purchase; and (2)the purchase of the regulated firearms is for a private collection or a collector series." MD Code, Public Safety, § 5-129(a).

Under State Police regulations, "[a] person shall be designated as a collector by the Secretary before applying for a multiple purchase of regulated firearms as a collector." COMAR § 29.03.01.25 A. Those regulations also provide that "[a] person may submit an application to be designated as a collector if the person: (1) Devotes time and attention to acquiring certain types of regulated firearms for the enhancement of the collector's personal collection; or (2) Possesses a Federal Collector's License (Curio and Relics)." *Id*. at B. As explained by the Maryland State Police on its website, the designated collector "status allows for multiple firearm purchases." https://bit.ly/4fljr0U. Engage has requested that the Court take judicial notice of this website. See Motion, Part I, *infra.*

Every Form 77R contains an indication on the top of the first page as to whether the purchaser is a "designated collector" within the meaning of Section 5-129, asking for a "yes" or "no" answer in the space "Designated Collector _____." See, e.g., Exhibit A at A2. Similarly, Question 24 on Form 77R asks: "If you are NOT a designated collector: Have you purchased a regulated firearm within the past 30 days?" *Id.* at A5. Because the designated collector status is conferred and controlled by the Maryland State Police, the questions on Form 77R concerning designated collector status are automatically answered by the State Police when the on-line Form 77R is being filled out and submitted by a designated collector applicant at the State Police "licensing portal." For the sales by Engage to Minor at issue in this case (Complaint ¶ 62), each Form 77R affirmatively was answered "**YES**" by the Maryland State Police to the question of whether Minor was a "designated collector"[5] and answered "**NA**" to Question 24 asking if Minor

[5] See Exhibit A at A2, A7, A12, A17, A23, A29, A35, A40, A45, A50, A55, A61, A66, A71, A78, A84, A89.

had purchased a regulated firearm in the previous 30 days.[6] Engage was thus assured that Minor was, in fact, a "designated collector" at the time of each sale and thus did not reply or need to rely on any documentation submitted by Minor.

The HQL Requirement: Under Maryland law, all purchasers of handguns, with few exceptions, must have a Handgun Qualification License ("HQL"). MD Code, Public Safety, § 5-117-1. The purchase application (Form 77R) must include "the applicant's handgun qualification license number." MD Code. Public Safety, § 5-118. To obtain an HQL, persons must apply to the Maryland State Police. The applicant must be 21 years old, be a resident of Maryland and must complete "a firearms safety training course approved by the Secretary that includes: (i) a minimum of 4 hours of instruction by a qualified handgun instructor; (ii) classroom instruction on: 1. State firearm law; 2. home firearm safety; and 3. handgun mechanisms and operation; and (iii) a firearms orientation component that demonstrates the person's safe operation and handling of a firearm; and (4) based on an investigation, is not prohibited by federal or State law from purchasing or possessing a handgun." MD Code, Public Safety, § 5-117-1(d). Each of the Form 77Rs for the sales at issue in this case indicates that Minor possessed an HQL at the same of the sale.[7]

Each applicant for an HQL must submit fingerprints taken by a State certified "live scan" vendor and must be fully investigated by the Maryland State Police before the HQL is issued. *Id.,* at § 5-117.1(f). See COMAR § 29.03.01.29. An HQL is good for 10 years. MD Code, Public Safety, § 5-117.1(i). In this case, each of the Form 77Rs applicable to the sales to Minor by Engage indicate

[6] See Exhibit B at A5, A10, A15, A21, A27, A33, A38, A43, A48, A53, A59, A64, A69, A76, A82, A87, A92.

[7] See Exhibit A at A4, A9, A14, A20, A26, A32, A37, A42, A47, A52, A58, A63, A68, A75, A81, A86, A91.

that Minor had a valid HQL at the time of the sale. See note 5, *supra*. Each of those Form 77Rs likewise indicates the "NICS number" and the date that the sale cleared the FBI NICS background check conducted by the Maryland State Police. *Id.* And each of the Form 77Rs show that the sale was "NOT DISAPPROVED" by the State Police. All these facts may be judicially noticed and Engage has requested that the Court do so. See Motion and Part I, *infra.*

3. Straw purchases

Maryland law prohibits straw purchases, providing that "[a] dealer or other person may not be a knowing participant in a straw purchase of a regulated firearm for a minor or for a person prohibited by law from possessing a regulated firearm." MD Code, Public Safety, § 5-141. Similarly, MD Code, Public Safety, § 5-134(b)(13), provides that "[a] dealer or other person may not sell, rent, loan, or transfer a regulated firearm to a purchaser, lessee, borrower, or transferee who the dealer or other person knows or has reasonable cause to believe: * * * is a participant in a straw purchase."

A "straw purchase" is statutorily defined for these purposes to mean "a sale of a regulated firearm in which a person uses another, known as the straw purchaser, to: (1) complete the application to purchase a regulated firearm; (2) take initial possession of the regulated firearm; and (3) subsequently transfer the regulated firearm to the person." MD Code, Public Safety, § 5-101(v). A "knowingly participat[ion] in the illegal sale, rental, transfer, purchase, possession, or receipt of a regulated firearm in violation of this subtitle" is punishable by up to five years imprisonment. MD Code, Public Safety, § 5-144(a)(1), (b). See *Chow v. State*, 393 Md. 431, 471 (2006) (holding that the "knowingly" requirement of Section 5-144 "requires that one have a specific intent and requires that a defendant 'knows' that the sale, rental, transfer, purchase, possession, or receipt of

a regulated firearm of which they are a participant in is in a manner that is illegal and not a legal sale.").

Federal law, in effect at the time of these alleged purchases (2021) (Complaint ¶ 62), did not expressly prohibit straw purchases.[8] Rather, federal law punished straw purchasers under 18 U.S.C. § 922(a)(6), which makes it a crime for any person "knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter." See, e.g., *Abramski v. United States*, 573 U.S. 169 (2014). The Complaint does not allege that Engage has ever been charged under any of these State or federal provisions.

C. Allegations Relating To Engage

In their complaint, Plaintiffs allege that Engage sold "twenty-five handguns" to Minor over "a five-month period." Complaint ¶ 62. The Complaint further alleges that the "vast majority" of the firearms Minor purchased from Engage were sold to "his relative, Mr. Willis," Complaint ¶ 60, who is alleged to have transferred these firearms "to other dangerous individuals." Complaint ¶ 9. However, Engage is not alleged to have sold the handgun that Willis is alleged to have used to "terrorize" persons at a party. Complaint ¶ 69. That firearm was allegedly sold by Defendant

[8] Beginning in 2022, "straw purchases" were more directly regulated federally with the enactment of Section 12004 of the Bipartisan Safer Communities Act, Pub.L. 117-159, 136 Stat 1313 (June 25, 2022), *codified in part at* 18 U.S.C. § 932.

United Gun. *Id.* Again, Engage filled out and submitted all required Form 77Rs (Exhibit A), all Forms 4473s and all Forms 3310.4s (Exhibit B).

Engage is a named plaintiff in two pending suits against Montgomery County, Maryland. In the State case, *Engage Armament v. Montgomery County*, No. 485899V (Mont. Co. Cir. Ct.), Engage prevailed in this Court and the County has taken an appeal in *Montgomery Co. v. Engage Armament*, No. ACM-REG-2319-2023 (Appellate Ct. of MD). The federal case is *MSI v. Montgomery Co*., No. 8:21-cv-01736-TDC (D.Md), and is currently on plaintiffs' appeal to the Fourth Circuit from the district court's denial of a preliminary injunction on one federal claim in *MSI v. Montgomery Co*., No. 23-1719 (4th Cir.). Those Fourth Circuit proceedings are being held in abeyance pending a decision by Maryland's appellate courts on the State law claims. The State has filed an amicus brief in support of the County in both appeals.

SUMMARY OF ARGUMENT

The Complaint is full of conclusory allegations of wrongdoing by Engage, all of which must be disregarded in adjudicating this Motion to Dismiss. The **factual** allegations are simply insufficient to demonstrate that the Complaint states a claim upon which relief can be granted on any of the five Counts. First, Complaint challenges sales that are alleged to have occurred in the spring and summer of 2021. All but one of Engage's sales took place more than three years prior to the filing of the Complaint on September 3, 2024. The State was fully aware of and specifically approved each of these sales through State Form 77R and had full authority to investigate the sales. Any such investigation would have uncovered the factual basis for all the claims alleged by Plaintiffs against Engage. Complaint ¶¶ 60-63. Indeed, all the facts alleged by Plaintiffs **are on the Form 77Rs** for these sales. The claims for these sales taking place more than three years prior to the Complaint are thus barred by the statute of limitations under MD Code, Courts and Judicial

Proceedings, § 5-101. Second, all of the harm alleged in the Complaint is either harm to the public at large or derived from such harm. Under Maryland law, it is well-established Engage did not owe any duty of care to the public. Each of the claims fails for this reason alone under controlling Maryland case law.

Third, the underlying premise for all the claims alleged in the Complaint is that Engage violated federal and State firearms laws in making sales to Minor. All the alleged harm to the public set forth in each count of the Complaint occurred as the result of criminal misuse of firearms by third parties, such as Willis and other, unidentified persons. Every one of those claims is federally preempted by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. ("PLCAA"). Specifically, plaintiffs have failed to allege facts sufficient to show that Engage "knowingly" violated State and federal laws or that the alleged harm to the public caused by the criminal misuse of the firearms sold to Minor was "proximately caused" by Engage's conduct, as expressly required by the "predicate exception" of PLCAA, 15 U.S.C. § 7903(5)(A)(iii). The Complaint fails to allege sufficient facts that Engage sold any firearm to Minor in which the actual buyer was a prohibited person under 18 U.S.C. § 922(g), (n), as required by 15 U.S.C. § 7903(5)(A)(iii)(II). It likewise fails to allege facts sufficient to show that Engage knowingly aided and abetted or conspired with Minor with respect to Minor's alleged unlawful activities, as required by 15 U.S.C. § 7903(5)(A)(iii)(I).

Finally, Plaintiffs' claim for "negligent entrustment" is barred under PLCAA's narrow exception for such claims. The Complaint does not allege (and cannot allege) that the person to whom the firearms were entrusted by Engage (Minor) ever used those firearms to inflict any physical injury or create any risk of "physical injury," as required by 15 U.S.C. 7903(5)(A)(ii). The claim for negligent entrustment is also independently barred under controlling Maryland case

law because the Complaint does not allege that Engage had any control over the firearms after they were sold to Minor. Under this case law, Engage cannot be held liable for any subsequent misuse by third parties that resulted in the claimed harm to the public. In sum, the Complaint is fundamentally flawed for multiple reasons, all of which require the Complaint to be dismissed in its entirety.

ARGUMENT

I. STANDARDS GOVERNING A MOTION TO DISMISS

The standard for adjudicating a motion to dismiss is familiar. "A trial court may grant a motion to dismiss if, when assuming the truth of all well-pled facts and allegations in the complaint and any inferences that may be drawn, and viewing those facts in the light most favorable to the nonmoving party, 'the allegations do not state a cause of action for which relief may be granted.'" *Latty v. St. Joseph's Soc'y of the Sacred Heart, Inc*., 198 Md.App. 254, 262–63 (2011), *abrogated on other grounds by Plank v. Cherneski*, 469 Md. 548 (2020), quoting *RRC Northeast, LLC v. BAA Md., Inc*., 413 Md. 638, 643 (2010).

In undertaking this review, "[a] court, however, need not accept the truth of pure legal conclusions … or of '[m]ere conclusory charges that are not factual allegations.'" *Bennett v. Ashcraft & Gerel, LLP*, 259 Md.App. 403, 451 (2023), quoting *Shenker v. Laureate Educ., Inc*., 411 Md. 317, 335 (2009). The facts set forth in a complaint must be "pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC Northeast, LLC v. BAA Md., Inc*., 413 Md. 638, 644 (2010). "Moreover, '[a]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader.'" *Id.* These principles are also reflected in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), which likewise

hold that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" on a motion to dismiss. Allegations based solely on "information and belief" are insufficient under that standard. See, e.g., *Kashdan v. George Mason University*, 70 F.4th 694, 701-702 (4th Cir. 2023); *Ahern Rentals, Inc. v. EquipmentShare.com, Inc.,* 59 F.4th 948, 954 (8th Cir. 2023).

On a motion to dismiss, this Court may also, under Maryland Rule 5-201, take judicial notice of additional facts beyond the face of the complaint that are either "matters of common knowledge or capable of certain verification." *Faya v. Almaraz*, 329 Md. 435, 443-44 (1993). See also *Abrishamian v. Washington Medical Group*, 216 Md.App. 386, 413 (2014) (same). In this case, Engage has respectfully requested that the Court take judicial notice of each Form 77R, Form 4473 and Form 3310.4 associated with the sales allegedly made by Engage, as identified in paragraph 62 of the Complaint. These business records cannot be reasonably disputed and are self-authenticating under Maryland Rule 5-902(12). See, e.g., *Mooney v. State*, 487 Md. 701, 705-706 (2024). These Forms are "capable of certain verification" and thus may be noticed. *Faya,* 329 Md. at 443-44.

Each Form 4473 shows that each sale to Minor by Engage passed a federal NICS background check required by 18 U.S.C. § 922(t).[9] The Form 3310.4s show that Engage conscientiously complied with the duty to report to the ATF all the multiple sales to Minor. See Note 3, *supra*. Each Form 77R shows that the "designated collector" question was answered in the affirmative and each Form 77R shows that the sale in question was "NOT DISAPPROVED" by

[9] See Exhibit B at B3, B9, B15, B23, B31, B39, B47, B55, B63, B69, B75, B81, B89, B95, B103, B112, B120, B128 and B134.

the Maryland State Police under State law.[10] Each Form 77R also shows that Minor had a Maryland Handgun Qualification License issued by the Maryland State Police.[11] The Form 77R for each sale are attached to the Motion to Dismiss as Exhibit A at A1-A194. The Form 4473s and Form 3310.4s for these sales are attached to the Motion to Dismiss as Exhibit B at B1-B138.[12] These Forms and facts may be judicially noticed by this Court and Engage has respectfully requested that the Court do so. See Motion.

Engage also has respectfully requested in the Motion to Dismiss that the Court take judicial notice of the criminal complaint and affidavit supporting the arrest of Minor ("Minor Criminal Complaint" and "Minor Arrest Affidavit") (Exhibit C at C1-C34), which also also expressly and repeatedly referenced in the Complaint. See Complaint ¶¶ 55 n.34, 61 n.39, 72 n.48. Indeed, it appears that the Complaint lifts virtually verbatim from the Minor Arrest Affidavit the list of sales made by Defendants to Minor and which are alleged to be wrongful in the Complaint. Compare Complaint ¶ 62 *with* Minor Arrest Affidavit ¶ 10, Exhibit C at C4-C5. That Minor Criminal Complaint and Arrest Affidavit are a "public record" of which judicial notice may be taken under Maryland Rule 5-201. See, e.g., *Abrishamian*, 216 Md.App. at 413-14 ("courts may take judicial notice of public records such as court documents"). See also *Lerner v. Lerner Corp*., 132 Md.App. 32 (2000) ("Included among the categories of things of which judicial notice may be taken are facts relating to the ... records of the court.") (citation omitted).

[10] See Exhibit A at A2, A7, A12, A17, A23, A29, A35, A40, A45, A50, A55, A66, A71, A78, A84, A89, A94 and A98.

[11] See Exhibit A at A4, A9, A14, A20, A26, A32, A37, A42, A47, A52, A58, A63, A68, A75, A81, A86, and A91.

[12] Minor's social security number on each of these Forms has been permanently redacted as required by Maryland Rule 1-322.1.

The Minor Arrest Affidavit recites a sting operation under which Engage sold a Glock 30, .45ACP pistol to Minor on November 26 and delivered to Minor on December 3, 2021. The Form 77R for that sale is reproduced as Exhibit A at A94-A98. That sale and delivery was coordinated with the ATF so that federal and State law enforcement authorities could detain and question Minor. See Minor Arrest Affidavit ¶¶ 9, 18, 20-24, 27, Exhibit C at C6, C11-C12. That questioning led to Minor's arrest and prosecution. *Id*. ¶¶ 25-41, Exhibit C at C12-C15. As Minor Criminal Complaint makes clear, Minor **was not charged** with making a straw purchase, *viz.,* was not charged with making a false statement on Form 4473 or Form 77R punishable under 18 U.S.C. § 922(a)(6).[13] See Exhibit C at C1.

Rather, Minor was charged with unlawful trafficking of firearms, *viz.,* violating federal law by unlawfully selling or transferring firearms **to others** in "violations of 18 U.S.C. §§ 922(a)(5) ('Interstate Transfer), 922(d) ('Sell or Otherwise Dispose to a Prohibited Person'), § 924(a)(1)(A) ('Illegal Dealing of Firearms'), and § 371 ('Conspiracy to Violate Federal Firearms Laws')." Minor Complaint and Affidavit ¶ 3, Exhibit C at C2, C33. The alleged conspiracy is between Minor and Willis ("CONSPIRATOR-1 in the Minor Arrest Affidavit). *Id.* at ¶¶ 5, 38, Exhibit C at C5, C15, Conclusion at C33. Plaintiffs' Complaint does not allege that any of the Defendants have been charged, either federally or by the State, with respect to any of these sales. Nor does Minor's Criminal Complaint and Affidavit allege any conspiracy or any wrongdoing by Engage (or by the other Defendants). Plaintiffs' Complaint does not allege that the Maryland State Police have

[13] Plaintiffs' legal allegation that Minor was charged with "his role in illegal straw purchasing" (Complaint ¶ 12), is wrong as a matter of law and may thus be disregarded.

subjected Engage (or any of the other Defendants) to any license revocation proceedings for any of the allegedly wrongful sales identified in the Complaint.

II. THIS ACTION IS ALMOST ENTIRELY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The Maryland general statute of limitations applicable to civil actions is set forth in MD Code, Courts and Judicial Proceedings, § 5-101, which provides that a "civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different" period. Plaintiffs assert claims in negligence, negligence per se, negligent entrustment, and public nuisance, all of which are civil actions governed by Section 5-101. The Complaint was filed on September 3, 2024. All the sales by Engage identified by Plaintiffs in the Complaint, except one, took place prior to September 3, 2021. See Complaint ¶ 62. The exception is for one sale taking place on September 15, 2021. *Id.* Plaintiffs' claims with respect to all other sales taking place prior to September 3, 2021, are barred by Section 5-101. All those claims should be dismissed.[14]

[14] This case was filed in Maryland and all the claims in the Complaint are based on allegedly wrongful sales by Defendants to Minor that took place in Maryland. Accordingly, under choice of law principles, Maryland law is controlling with respect to all the claims alleged in the Complaint. See, e.g., *Doctor's Weight Loss Centers, Inc. v. Blackston*, 487 Md. 476, 492-93 (2024) ("To determine which state's substantive law applies, because the case was filed in a Maryland court, we turn to Maryland's choice of law rule, *lex loci delicti*.") *Lex loci delicti* is Latin for the law of the place of the wrong. District of Columbia law is thus irrelevant in this case.

"Maryland follows the 'discovery rule' under which 'the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.'" *Jacobs v. Flynn*, 131 Md.App. 342, 362 (2000), quoting *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). See also *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 444 (2000) (collecting case law). Under that rule "a claimant will be charged with notice, and the statute will begin to run when: 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" *Jacobs*, 131 Md.Ap. at 362., quoting *O'Hara v. Kovens*, 305 Md. 280, 287 (1986) (brackets the Court's). See also *Bennett v. Baskin & Sears*, 77 Md. App. 56, 67 (1988) (a plaintiff "is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation"), quoting *Lutheran Hospital v. Levy*, 60 Md.App. 227, 237 (1984). See *Lumsden*, 358 Md. at 445 (same). While this question can be a jury question, "when there are no disputed issues of material fact, the question of when a plaintiff was on inquiry notice can be determined as a matter of law, and summary judgment may be appropriate." See *Bank of N.Y. v. Sheff*, 382 Md. 235, 244 (2004) ("If there is no ... genuine dispute [of material fact], however, and the question of whether the plaintiffs were on inquiry notice more than three years before their suit was filed can be determined as a matter of law, summary judgment on that issue is, indeed, appropriate.").

The Complaint allegations compel dismissal on statute of limitations grounds. The face of the Complaint, ¶ 62, lists the dates on which the sales by Engage took place and the dates on which sales by other Defendants occurred. Complaint ¶¶ 67, 73. Relying on this list, the Complaint alleges that Engage should have been aware that Minor was (allegedly) trafficking firearms

because he obtained "multiple, substantially similar commonplace semiautomatic pistol over such a short timeframe." Complaint ¶ 55. See also Complaint ¶ 57 ("By repeatedly selling handguns to Mr. Minor, each Defendant knowingly violated numerous federal and state laws and regulations."). Yet, there can be no dispute that Maryland was, in fact, aware of every one of these sales, as evidenced by the express approval of **each of these sales** by the Maryland State Police in the Form 77Rs (Exhibit A) and Form 4473s (Exhibit B), records that the State Police reviewed and possessed before **approving** each of these sales. The Form 77Rs contain **all the information and facts** that Plaintiffs now allege as supporting their claims. See Complaint ¶¶ 60-63. As noted above, the State Police act as the point of contact for purposes of the federal background check under NICS and conducts its own independent investigation of each handgun sale using the Form 77R and State databases in addition to the NICS background check.

Indeed, Maryland had more knowledge of sales to Minor than any of the Defendants. There is no allegation that these dealers were aware of sales conducted by **other** dealers. The State Police possessed actual notice (in the Form 77Rs) of all these sales but never even started an investigation. The information available to State Police included the dates of all sales, including multiple sales as well as information as to purchaser, the model, the caliber and the manufacturer of the handgun as all that information is set forth on Form 77R. See, e.g., Exhibit A at A2-A3. Plaintiffs allege that this same information should have put the defendants on notice that Minor was engaged in violations of State and federal law. Complaint ¶¶ 62-63. But if so, the same information should have likewise put the State Police on notice to start an investigation into those sales. At a minimum, such "an investigation would in all probability have disclosed" all the same information on which the Plaintiffs now rely in their Complaint. *O'Hara*, 305 Md. at 287. If these facts were insufficient for an investigation by the State Police, with all its investigatory powers over dealers, then

Plaintiffs should not be heard to argue that these facts were sufficient to put the dealers on notice of Minor's illicit activities. The State cannot have it both ways.

III. ENGAGE DOES NOT OWE A LEGALLY COGNIZABLE DUTY TO PLAINTIFFS

The Complaint alleges counts of public nuisance (Count I), negligence (Count II), negligence *per se* (Count III),[15] negligence (statute or ordinance) (Count IV)[16] and negligent entrustment (Count V). All these claims sound in tort. The rule is well established that the plaintiff must allege and prove that "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *BG&E v. Lane*, 338 Md. 34, 43 (1995), citing *Rosenblatt v. Exxon*, 335 Md. 58, 76 (1994). As detailed below, this requirement of "duty" is common to all of Plaintiffs' claims. The factual allegations of the Complaint establish that Engage owed no legally enforceable duty to Plaintiffs.

A. The Requirement of a Duty

The Complaint only alleges the existence of some nebulous duty to the general public and to the State (or D.C.) writ large. See, e.g., Complaint ¶¶ 10, 88, 102, As a matter of law, such allegations are insufficient. In *Valentine v. On Target, Inc.*, 353 Md. 544, 546-547 (1999), the Maryland Court of Appeals (now Supreme Court) granted review "to answer the question of what, if any, tort duty a gun store owner owes to third parties to exercise reasonable care in the display

[15] Count III, alleging a claim for "negligence per se," is brought only by the District of Columbia.

[16] Count IV for "Negligence (Statute or Ordinance)" is brought only by Maryland. The complaint does not purport to explain this division.

and sale of handguns to prevent the theft and the illegal use of the handguns by others against third parties." The Court answered that question by holding it could not "discern in the common law the existence of a third-party common-law duty that would apply to these facts." 353 Md. at 553. As the Court explained, "[o]ne cannot be expected to owe a duty to the world at large to protect it against the actions of third parties, which is why the common law distinguishes different types of relationships when determining if a duty exists." *Valentine*, 353 Md. at 553. The Court of Appeals reached the same result in *Warr v. JMGM Group, LLC*, 433 Md. 170 (2013), where the Court applied *Valentine* to hold that a bar owner owed no duty to third parties or to the public when an intoxicated bar patron caused an accident after leaving the bar.

Both *Valentine* and *Warr* squarely hold that "foreseeability" of the harm is not controlling for purposes of presence of a duty. *Valentine*, 353 Md. at 556 ("although the inherent nature of guns suggests that their use may likely result in serious personal injury or death to another this does not create a duty of gun dealers to all persons who may be subject of the harm"); *Warr*, 433 Md. at 183 ("When the harm is caused by a third party, rather than the first person, as is the case here, our inquiry *is not* whether the harm was foreseeable, but, rather, *whether the person or entity sued had control over the conduct of the third party who caused the harm by virtue of some special relationship*"). (Emphasis added). Thus, Maryland "jurisprudence is replete with holdings that, *regardless of any foreseeability*, *a duty does not exist to the general public,* with respect to harm caused by a third party, absent the existence of a special relationship between the person sued and the injured party or the person sued and the third party." *Id.* at 184.[17] See also *Barclay v. Briscoe*,

[17] "This 'special relationship' exception to the general bar against liability is narrowly construed." *Chang-Williams v. Dep't of the Navy*, 766 F. Supp. 2d 604, 620 (D. Md. 2011), quoting *Patton v. U.S. of Am. Rugby Football*, 381 Md. 627, 642 (2004). To have a special relationship "it must be shown" that the defendant "affirmatively acted to protect the decedent or a specific group of individuals like the decedent, thereby inducing specific reliance by an individual on the

427 Md. 270, 299-300 (2012) ("'we have repeatedly stated that 'foreseeability' must not be confused with 'duty.' The fact that a result may be foreseeable does not itself impose a duty in negligence terms'"), quoting *Ashburn v. Anne Arundel Co*., 306 Md. 617, 628 (1986).

All the harm to the public alleged in the Complaint was "caused by a third party" *viz.,* the misuse of firearms by Willis or possibly by other, unnamed persons, to whom Willis allegedly sold firearms. Complaint ¶¶ 9, 10. These actions are alleged to cause harm to the "public" whose interests are purportedly represented by the State and the District of Columbia or whose harm to Plaintiffs "(costs" associated with illegal "gun violence") is derived from the alleged harm to the public. *Id*., ¶¶ 33, 88, 93, 94, 103, 104, 109, 114, 115, 118, 122, 123, 132, Prayer for Relief ¶ B. The Complaint does not allege facts suggesting that Engage (or the other Defendants) had any "special relationship" with Minor or any other person or exercised any control over the actions of Minor, much less over the actions of Willis or the other bad actors to whom Willis allegedly sold or transferred firearms. Nothing in the Complaint purports to identify a "specific group of individuals" for whom Engage assumed any duty of care to protect or induced specific reliance. The Complaint thus fails to allege a claim upon which relief can be granted for the harm to the public alleged in the Complaint. See *City of Chicago v. Beretta U.S.A. Corp*., 213 Ill.2d 351, 553-54, 821 N.E.2d 1099, 1127-28 (2004) (holding that manufacturers and distributors of firearms do not owe a duty to the public).

[defendant's] conduct." *Patton*, 381 Md. at 642. See Restatement (Second) of Torts § 314 (1965) (listing the special relationships that give rise to a duty to protect to include common carriers, innkeepers, and a possessor of land who holds it open to the public).

B. Negligence Per Se and Negligence by Statute or Ordinance

Like Counts I and II, Counts III (negligence per se) and Count IV (Negligence Statute or Ordinance) rely exclusively on the alleged failure of Engage to comply with the host of State and federal laws regarding the sale of firearms. See Complaint ¶ 109 ("At all relevant times the Defendants were subject to a variety of legal obligations under federal and state law concerning the operation of their retail firearms businesses."); ¶ 116 ("At all relevant times, the Defendants were subject to a variety of legal obligations under federal and Maryland law concerning the operation of their retail firearms businesses."). Such allegations are insufficient as a matter of law to establish the requisite duty.

The firearms statutes cited in the Complaint impose criminal liability for violations**. None** of these statutes is alleged to provide a civil or a private cause of action and none do. Thus, nothing in the Complaint purports to assert a claim created by any of these provisions. It is well-established that a plaintiff cannot recover for alleged violations of criminal statutes through civil litigation. See, e.g., *Tribble v. Reedy*, 888 F.2d 1387 (Table), 1989 WL 126783, at *1 (4th Cir. Oct. 20, 1989) (per curiam) (absent "clear [legislative] intent to provide a civil remedy, a plaintiff cannot recover civil damages for an alleged violation of a criminal statute"); see also *Phair v. Zambrana*, No. CCB-14-2618, 2016 WL 3125081, at *3 (D. Md. June 3, 2016) (dismissing claims brought under criminal code because "criminal statutes do not give rise to civil liability"); *McMillan v. Templin*, No. CV JKB-22-1675, 2023 WL 3996477, at *7 (D. Md. June 14, 2023) (similar).

The Maryland General Assembly neither created, nor intended to create civil remedies for violations of these State law provisions. See *Fangman v. Genuine Title, LLC*, 447 Md. 681 (2016); *Erie Ins. Co. v. Chops*, 322 Md. 79, 585 (1991). Cf. See *In re Lead Paint Litigation*, 191 N.J. 405, 924 A.2d 484, 505 (2007) (holding that nothing in legislation banning lead paint suggested that

the legislature "intended to vest the public entities with a general tort-based remedy or that it meant to create an ill-defined claim that would essentially take the place of its own enforcement, abatement, and public health funding scheme"). Similarly, no court to our knowledge has held that Congress intended to create a private civil cause of action by enacting these federal criminal provisions. See, e.g., *Love v. Delta Air Lines*, 310 F.3d 1347, 1352-53 (11th Cir. 2002) (explaining that criminal statutes do not provide for private civil causes of action); *Alaji Salahuddin v. Alaji,* 232 F.3d 305, 311-12 (2d Cir. 2000) (same).

Nor are these statutes, State or federal, sufficient, unto themselves, to establish a duty. Rather, negligence per se and negligence by statute or ordinance claims require that the plaintiff be "'a member of the class that the statute or regulation was designed to protect.'" *Walton v. Premier Soccer Club, Inc*. 261 Md.App. 53, 61 (2024), quoting *Joseph v. Bozzuto Mgmt. Co*., 173 Md. App. 305, 321-22 (2007) (negligence by statute or ordinance); *Moore v. Myers*, 161 Md. App. 349, 363 (2005) (holding that statute at issue did not support a negligence *per se* claims because it was not "'designed to protect a specific class of persons which includes the plaintiff'"), quoting *di Brooks v. Lewin Realty III, Inc*., 378 Md. 70, 79 (2003) (discussing statutorily-created duties). See also *C & M Builders, LLC v. Strub*, 420 Md. 268, 282 (2011).

Here, all the statutes on which Plaintiffs rely were enacted for the protection of the public at large, rather than for a particular class of people. That reality is fatal to the Complaint. Specifically, the Complaint asserts that the class of persons protected by these statutes includes Maryland and all "its residents." Complaint ¶ 119 (Count IV). See also Complaint ¶ 110 (Count III) ("The above laws are intended to curb firearms crime, to prevent access to firearms by persons prohibited from possessing them, and to protect public safety."). The Complaint thus is based on harm to the public at large and all the alleged harm to Maryland (and the District) is derived from

the alleged harm to the public. See Complaint ¶ 32 ("Gun violence is also associated with diminished educational opportunities and outcomes, compounding the harms to District residents"); *id.,* ¶ 33 (costs to the District arising from "gun violence"); *id.,* at ¶ 35 (referring to "rates of violent crime" in Montgomery County); *id.,* ¶36 (increased crime in Prince George's County).

Such allegations fail the test set out in *Kiriakos v. Phillips*, 448 Md. 440, 457 (2016). There, the Court of Appeals held that "[t]he Statute or Ordinance Rule is not a means to establishing negligence per se but only prima facie evidence of negligence." The plaintiff still "must meet two prerequisites to establish a prima facie case in negligence: (1) show "the violation of a statute or ordinance *designed to protect a specific class* of persons [ ], and [(2)] that the violation proximately caused the injury complained of." *Id*. at 457 (brackets the Court's). Relying on *Warr*, the Court in *Kiriakos* reaffirmed that statutes enacted designed for "'the protection, health, welfare and safety of *the people of this State*'" do not meet this test as a matter of law. *Id*., at 459, quoting *Warr*, 433 Md. at 198. None of the statutes that Engage allegedly protect "a specific class of persons." These criminal firearms statutes thus fail to establish a duty enforceable in a civil action like this case. See generally, *Burger v. Healthcare Management Solutions, LLC*, 2024 WL 4737 at *8 (D. Md. 2024) (collecting Maryland case law); *Estate of Madden v. Southwest Airlines, Co*., 2021 WL 2580119 at *3 (D. Md. 2021) (same); *In re Marriott International, Inc., Customer Data Security Breach Litigation*, 2020 WL 6290670 at *8 (D.Md. 2020) (same). Dismissal of these counts is thus appropriate.

That result does not leave the State without any remedy for proven violations of these statutes. First, all these federal and state laws on which Plaintiffs rely are enforceable criminally. Tellingly, no such criminal enforcement actions have been brought against Engage (or the other

Defendants). Alternatively, the Maryland State Police has the power to revoke the dealer's license of any non-compliant dealer, including any dealer who "has knowingly or willfully participated in a straw purchase of a regulated firearm." MD Code, Public Safety, § 5-114(b)(2)(viii). Federal law enforcement authorities (the ATF) likewise may revoke the federal license of any FFL for similar reasons. 18 U.S.C. § 923(e), (g). See, e.g., *Simpson v. Attorney General*, 913 F.3d 110, 113-14 (3d Cir. 2019).[18] The Complaint does not allege that the Maryland State Police or the ATF has revoked, or even attempted to revoke, the dealer licenses of Defendants. The absence of any such enforcement efforts speaks volumes. The State and District may not use this civil action to evade the requirements imposed by these statutory and regulatory schemes.

C. Public Nuisance

Count I (public nuisance) fails for the same reasons that Counts II-IV fail, *viz.,* a lack of a judicially enforceable duty. An action for a public nuisance under Maryland common law requires that the defendant have "a duty … to physically abate the claimed public nuisances." *Fowler v. Board of County Com'rs of Prince George's Co*., 230 Md. 504, 507-08 (1963). See also *Cangemi v. United States,* 13 F.4th 115, 137 (2d Cir. 2021) ("Where liability is premised on a failure to abate a nuisance, there must be a duty to act."), citing Restatement (Second) of Torts § 824.

The intervening acts of third parties in the alleged harm effectively bars recovery for a public nuisance. See, e.g., *Citizens for Odor Nuisance Abatement v. City of San Diego*, 8 Cal.App.5th 350, 360, 213 Cal.Rptr.3d 538, 546 (Court of Appeal, Fourth Dist. 2017) ("To be

[18] All the Defendants are federally licensed firearms dealers, as well as Maryland licensed dealers Complaint ¶ 2. A federally licensed dealer must become a State licensed dealer to sell regulated firearms (handguns). MD Code, Public Safety, § 5-106; MD Code, Public Safety, § 5-107. See COMAR § 29.03.01.45C.4. (requiring that an application for a Maryland dealer's license include "[a] copy of the applicant's current valid federal firearms license"). A revocation of a federal license thus results in the revocation of a State license.

precise, public nuisance requires causation—"either by an affirmative act or by a failure to act on the part of one *who was under a duty to act to prevent or abate the nuisance*."), quoting Restatement (Second) Torts, § 824, comment. a.) (emphasis added); *City of Chicago*, 821 N.E.2d at 1133 ("If a defendant's breach of duty furnishes a condition by which injury is made possible and a third person, acting independently, subsequently causes the injury, the defendant's creation of the condition is not a proximate cause of the injury."); *id.,* at 1136 (asking whether firearms sellers "could reasonably foresee that the guns they lawfully sell would be illegally taken into the city in such numbers and used in such a manner that they create a public nuisance," ruling **"[w]e conclude not**") (emphasis added).

These principles preclude recovery here. As noted, the claimed harm to the public and the consequent alleged "public nuisance" all arise from the illegal actions of Willis and, allegedly, other unnamed individuals. As recently explained in *SUEZ Water New York Inc. v. E.I. du Pont de Nemours and Co*., 578 F.Supp.3d 511 (S.D.N.Y. 2022), "[a] manufacturer who produces a substance that, after being sold, creates or contributes to a nuisance cannot be liable for the nuisance-causing activity after the sale *unless the manufacturer somehow controls or directs the activity*." (Collecting case law). See also *In re Syngenta AG*, 131 F. Supp. 3d 1177, 1214 (D. Kan. 2015) ("the general rule that a seller may not be liable for a private nuisance caused by a product absent continuing control over the product post-sale").

Nothing in the Complaint alleges facts that support any inference that Engage had any control over Minor, or over Willis or over any other individual who acquired the firearms from Willis or Minor. Engage thus had no duty to prevent or abate any nuisances caused by these third parties. The sale of a firearm is constitutionally protected and thus cannot possibly be a public nuisance by itself. See generally *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S.

1 (2022). And, as explained, none of the statutes on which Plaintiffs rely create any duty to the public and none may be enforced civilly. Count I thus fails to allege the basic elements of a public nuisance.

IV. THE COMPLAINT IS BARRED BY THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT ("PLCAA")

A. PLCAA Preemption

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* ("PLCAA"). The law was designed to put a stop to abusive lawsuits which were seeking to hold firearms manufacturers and sellers liable for harms resulting from the criminal misuse of firearms. 15 U.S.C. § 7901(a)(3). In enacting the PLCAA, Congress found that businesses "engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products ... are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse [such] products that function as designed and intended." 15 U.S.C. § 7901(a)(5). Congress found that "[l]awsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3).

Congress further found that "[t]he liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). The central purpose of PLCAA was "[t]o 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).

PLCAA thus provides that "[a] qualified civil liability action *may not be brought* in any Federal or State court." 15 U.S.C. § 7902(a) (emphasis added). If pending, such actions "shall be *immediately dismissed* by the court in which the action was brought or is currently pending." 15 U.S.C. § 7902(b) (emphasis added). This immunity is from the "civil action" itself, not merely to liability. *Ileto v. Glock, Inc*., 565 F.3d 1126, 1142 (9th Cir. 2009), *cert. denied*, 560 U.S. 924 (2010) ("The statute thus "grant[s] immunity to certain parties against [the defined category] of claims."); *City of New York v. Beretta*, 524 F.3d 384, 398 (2d Cir. 2008), *cert. denied,* 556 U.S. 1104 (2009) ("The PLCAA immunizes a specific type of defendant from a specific type of suit."); *In re Academy, Ltd.,* 625 S.W.3d 19, 35 (Texas S.Ct. 2021) (granting mandamus relief from a trial court denial of a seller's motion for summary judgment under PLCAA, stating that the purpose of PLCAA "is not served by allowing an action barred by the PLCAA to proceed to trial" and that "requiring [the defendant]to "proceed[ ] to trial—regardless of the outcome—would defeat the substantive right" granted by the PLCAA").

PLCAA's prohibition covers this case. A "qualified civil liability action" within the meaning of the ban imposed by Section 7902 is defined to mean "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, abatement, restitution, fines, 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).[19] Thus, "the law generally preempts 'civil action[s] ... resulting from the criminal or unlawful misuse of a qualified product ... [.]'" *Travieso v. Glock Inc.,* 526 F.Supp.3d 533, 546 (D. Ariz. 2021), quoting 15 U.S.C. § 7903(5). This ban on suits expressly covers all "qualified products" which are defined to mean any "firearm" or "ammunition or any "component part of a firearm or ammunition." 15 U.S.C. § 7903(4). Because the Complaint relates only to the "misuse" of firearms by others, including Minor,[20] Plaintiffs can escape the PLCAA's foreclosure of this suit only if the matter fits into one of the PLCAA's exceptions set forth in 15 U.S.C. § 7903(5)(A). For reasons set forth below, Plaintiffs have failed to do so.

B. The Complaint Fails To Satisfy PLCAA'S Predicate Exception

1. The PLCAA exceptions

PLCAA defines "qualified civil liability action" very broadly for purposes of the ban on such actions imposed by Section 7902, but provides, in relevant part, that the term "shall not include:"

> (ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person

[19] PLCAA defines "person" to mean "any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, *including any governmental entity.*" 15 U.S.C. § 7903(3) (emphasis added).

[20] PLCAA defines "misuse" to mean "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9).

> in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.

15 U.S.C. § 7903(5)(A)(ii),(iii).

The exception found at Section 7903(5)(A)(iii) is known as the "predicate exception" and that exception 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) (emphasis added). The scope of this predicate exception is currently before the United States Supreme Court in in *Smith & Wesson Brands v. Estados Unidos Mexicanos*, No. 23-1141, *cert. granted*, --- S.Ct. ----, 2024 WL 4394115 (Oct. 4, 2024). That case squarely presents for decision the scope of the "knowing violations" and the "proximate causation" requirements imposed by predicate exception. Defendants have, by separate motion filed herewith, requested this Court to hold in abeyance a decision on the Motions to Dismiss pending a decision in *Smith & Wesson.* That motion should be granted as a decision in *Smith & Wesson* will provide guidance that could well be outcome-dispositive of this case. Holding the decision in abeyance (and staying discovery) will conserve the resources of the Court and protect against the potential waste of time and money by the parties. That conservation of resources is of critical importance to Engage, as the costs of this litigation could well force it into bankruptcy. Protecting sellers against such results is at the core of PLCAA. See 15 U.S.C. § 7901(a)(6), (b)(4); *Ileto*, 565 F.3d at 1135.

The "knowing" violation requirement ensures that the exception is tightly limited to extreme cases by excluding cases based on reckless or negligent behavior. The imposition of a

"proximate cause" requirement makes clear that Congress intended to ban suits in which the alleged harm was caused by "criminal or unlawful" use by a third party. See *Travieso,* 526 .Supp.3d at 546. Congress specifically found that suits based on harm caused by third parties would represent an improper "expansion of liability" that "would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution." 15 U.S.C. § 7901(a)(7). As one federal court of appeals noted, "Congress found egregious '[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others.'" *Ileto*, 565 F.3d at 1135, quoting 15 U.S.C. § 7901(a)(6). See also *City of New York,* 524 F.3d at 402 ("We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation, or sale' of firearms.). In *Smith & Wesson*, the Supreme Court will consider both the "knowing violation" element and the "proximate causation" element of the exception.[21]

All of Plaintiffs claims are based on the assertion that Defendants violated State and federal firearms law applicable to the sale of handguns. See Complaint, ¶ 85 (Count I) ("Each Defendant's conduct in completing these transactions was in knowing violation of numerous federal and

[21] The questions presented in *Smith & Wesson* are:

1. Whether the production and sale of firearms in the United States is the "proximate cause" of alleged injuries to the Mexican government stemming from violence committed by drug cartels in Mexico.

2. Whether the production and sale of firearms in the United States amounts to "aiding and abetting" illegal firearms trafficking because firearms companies allegedly know that some of their products are unlawfully trafficked.

Petition for certiorari at i. The Petition may be found on the Supreme Court docket at https://bit.ly/3YrHKTm (last viewed November 11, 2024).

Maryland laws and regulations."); *id.,* ¶ 99 (Count II) ("Each Defendant's conduct in completing these transactions with Mr. Minor and on information and belief, others was in knowing violation of numerous federal and Maryland laws and regulations."); *id*., ¶ 109 (Count III) ("At all relevant times the Defendants were subject to a variety of legal obligations under federal and state law concerning the operation of their retail firearms businesses."); *id.,* ¶ 117 (Count IV ("At all relevant times, the Defendants were subject to a variety of legal obligations under federal and Maryland law concerning the operation of their retail firearms businesses."); *id.,* ¶ 125 (Count V) ("Each Defendant sold or transferred firearms to Mr. Minor and, on information and belief, others, whom it knew, had reason to know, or reasonably should have known at the time of the transactions were engaged in straw purchasing or dealing in firearms without a license, both of which are violations of federal and Maryland law.").

Similarly, all of the harm is alleged to have been caused by the illegal or wrongful use of firearms by Minor and third parties. See, e.g., Complaint ¶ 89 ("The Defendants' conduct in selling handguns in violation of federal and Maryland law has created, contributed to, and maintained a public nuisance in the District, Prince George's County, and Montgomery County that unreasonably and unjustifiably endangers, renders insecure, interferes with, and obstructs rights common to the general public."); ¶ 91 ("Plaintiffs' employees and necessitate the expenditure of the Plaintiffs' funds and resources to investigate, interdict, and mitigate their use in crimes within the area."); ¶¶ 92-95). Such allegations of harm by third parties are repeated throughout the Complaint for each claim.

These claims are thus governed by the "knowing violation" and "proximate causation" requirements imposed by the predicate exception of Section 7903(5)(A)(iii). Accordingly, Plaintiffs must plead and prove facts sufficient to show that the violation of a specific statute itself

was both "knowingly" and was the "proximate cause" of the specific harm for which relief is sought. *District of Columbia v. Beretta USA, Corp.*, 940 A.2d 163, 171 (2008) ("the predicate exception requires proof that, despite the misuse of the firearm by a third person, 'the [statutory] violation was a proximate cause of the harm for which relief is sought'") (quoting 15 U.S.C. §7903(5)(A)(iii)). For the reasons set forth below, Plaintiffs here have failed to allege facts sufficient to carry that burden.

2. A "knowing violation" under federal law

Because PLCAA is a federal statute, the scope of the "knowing violation" and the "proximate causation" requirements in the predicate exception are federal questions, rather than state law questions. Indeed, Congress is presumed to have incorporated federal case law concerning these terms in acting PLCAA. See, e.g., *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) ("When 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute.") (citation omitted). That federal case law is thus controlling here.

The Supreme Court has held that "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted *with knowledge that his conduct was unlawful*.'" *Bryan v. United States*, 524 U.S. 814, 191-92 (1998), quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (emphasis added). The same point applies, *a fortiori*, to the even more demanding requirement of a "knowing violation." See *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58-60 (2007) (noting that "knowing violations are sensibly understood as a more serious subcategory of willful ones" and that "action falling within the knowing subcategory does not simultaneously fall

within the reckless alternative") (emphasis added). The "knowing" violation *mens rea* standard is thus the most demanding of all *mens rea* requirements.

For a violation be "knowing" the defendant must "know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 606 (1994). See also *Rehaif v. United States*, 588 U.S. 225, 235-36 (2019) (holding that the "knowingly" requirement on the federal ban on possession of a firearm by an illegal alien required proof that the alien actually know that he was illegally in the United States); *Liparota v. United States*, 471 U.S. 419, 426 & n.9 (1985) (a "knowingly" requirement "requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations"); *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281, 287–88 (D.C. Cir. 2015) ("Consistent with the need for a knowing violation, the FCA [False Claims Act] does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation."). As noted, Maryland law is in accord with these principles of federal law. See *Chow*, 393 Md. at 471 (construing a "knowingly" requirement to mean that a defendant must know "that the sale, rental, transfer, purchase, possession, or receipt of a regulated firearm of which they are a participant in is in a manner that is illegal and not a legal sale").

This "knowing" requirement of Section 7903(5)(A)(iii) is applicable to all actions covered by subsection 7903(5)(A)(iii) and thus applies to limit actions to cases where the seller is alleged to "have knowingly violated a State or Federal statute applicable to the sale or marketing of the product" under both subsections 7903(5)(A)(iii)(**I**) and (**II**). But, as discussed *infra,* subsection 7903(5)(A)(iii)(**II**) imposes an additional limitation on top of these general limitations. In that subsection, the "knowing" violation allowed by subsection (iii) *is further limited* to cases where the seller knowingly "aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual

buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition *under subsection (g) or (n)* of section 922 of Title 18." (Emphasis added).[22] A seller who knowingly "aided, abetted, or conspired" with respect to **other parts** of Section 922 (or any State law) are excluded from this exception and thus actions based on that sort of alleged conduct remain barred by Section 7902 of PLCAA. And even within this exception, the plaintiff must still allege and prove facts sufficient to show that the violation of Section 922(g) or (n) "was a proximate cause of the harm for which relief is sought" under Section 7903(5)(A)(iii) of which subsection (II) is a subpart. See Part II. B.3, *infra.* This exception is thus quite narrow.

These *mens rea* requirements of PLCAA are fatal to the Complaint. Plaintiffs allege that "[e]ach Defendant transacted business with Mr. Minor and others, even though they knew, consciously avoided knowing, or had reasonable cause to believe that Mr. Minor and, on information and belief others were engaged in straw purchasing, unlicensed dealing, and/or firearm trafficking." Complaint ¶ 100. See also Complaint ¶¶ 55, 82, 112, 120. On their face, those allegations go far beyond the "knowing" violation limitation imposed by PLCAA and should be dismissed on that basis alone. This PLCAA exception simply does not allow any claim based on allegations that a seller "consciously avoided knowing, or had reasonable cause to believe." Only a "knowing" violation will suffice. Those allegations are also conclusory and thus may be disregarded. See Part I, *supra*.

[22] Section 922(g) is the federal "felon in possession" statute and prohibits possession of a firearm by persons who are disqualified by reason of a conviction of a felony or a State misdemeanor punishable by more than two years imprisonment. See 18 U.S.C. § 921(a)(20)(B) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include—* * * (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less."). Section 922(n) bans possession of a firearm by "any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year."

The only **facts** alleged as a basis for these conclusory allegations are that Engage sold "multiple guns" to Minor from April 6, 2021, to September 15, 2021, and that some of these guns were "substantially similar" or identical or took place during the same time period. Complaint ¶¶ 61-63. None of these facts are sufficient to demonstrate that Engage actually "knew" that **Minor** was illegally selling or transferring guns to Willis (or to anyone else), much less demonstrate that Engage "knew" that **Willis** was transferring guns to other persons, as Plaintiffs allege. *Bryan*, 524 U.S. at 191-92. See also *Chow*, 393 Md. at 471.

The facts are all to the contrary. On its face, every sale was perfectly lawful. Minor was a State Police approved "designated collector" and as such, was statutorily permitted to purchase multiple handguns without limit and without regard to the 30-day waiting period otherwise imposed by State law. See MD Code, Public Safety, § 5-129. As noted, all designated collectors are first screened and investigated by the Maryland State Police. See COMAR § 29.03.01.25A. Multiple sales to a "designated collector" simply cannot serve as a basis for any finding that Defendants "knowingly violated" federal and State law.

Indeed, the sales to Minor were governed by still more provisions designed to ensure that the sales are lawful and Engage complied with each of these provisions. Specifically, multiple sales are subject to reporting through ATF Form 3310.4 and that form is sent directly to law enforcement. 18 U.S.C. § 923(g)(5)(A). Engage complied with this reporting requirement. See note 9, *supra*. Multiple sales are likewise included on Form 77Rs. See, e.g., Exhibit A at A18, A19, A24, A25. **Each** of the alleged sales and each of the multiple sales to Minor at issue here were also **expressly approved** by the State Police after still another background check. See *Id.*, § 5-129(c) ("On receipt of the firearm application and the application for a multiple purchase, the Secretary shall conduct a background investigation as required in § 5-121 of this subtitle."). Minor also had an HQL issued

to him by the State Police and that HQL number is on every 77R Form for sales to Minor. See note 7, *supra*. Given Minor's State approved status as a "designated collector" and the multiple investigations of Minor's background and the State Police approvals of every sale identified in the Complaint, Engage had every reason to think that the sales to Minor were lawful.

This statutory scheme and these multiple State Police approvals, fingerprinting and background checks requirements go far beyond the background check process imposed by federal law (which requires only an on-line NICS check by a dealer on each sale under 18 U.S.C. § 922(t). These provisions of federal and Maryland law are designed to screen out criminals and prevent straw purchases. Engage's reliance on and compliance with this regulatory scheme negates any suggestion that these sales were "knowing" violations of federal and State law. See *MSI v. Moore*, 1166 F.4th 211, 228 & n.18 (4th Cir. 2024) (en banc) (describing "the 77R process," noting that this "77R process" and the HQL requirement "help ensure that an applicant is not prohibited from possessing a handgun" and prevent "straw purchases").

3. Sales under subsection 7903(5)(A)(iii)(II)

The Complaint fails under other parts of the "predicate exception." Subsection (II) of Section 7903(5)(A)(iii) provides exception for a "knowing" violation of "a State or Federal statute applicable to the sale or marketing of the product" in:

> [A]ny case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.

15 U.S.C. § 7903(5)(A)(iii)(II).

The Complaint does not allege facts sufficient to show that Engage "knew" or had "reasonable cause" to believe that the "actual buyer" was a person who was prohibited from possessing firearms *under Section 922(g) and Section 922(n)* as required by Section 7903(5)(A)(iii)(II).

As noted, Section 922(g) is the "felon in possession" statute and Section 922(n) bans possession by persons under indictment. See note 22, *supra*. Plaintiffs have not alleged that Minor was a prohibited person under either of these provisions. Plaintiffs have not alleged facts sufficient to show that that Engage knew or "had reasonable cause to believe" that Minor was selling firearms to Willis, who is the **only** disqualified person alleged in the Complaint. Complaint ¶ 69. Nor does the Complaint allege facts sufficient to show that Engage knew or had reasonable cause to believe that Willis was a disqualified person under Sections 922(g) or (n), **much less** allege facts that Engage knew that Willis was reselling firearms to any other person disqualified under Sections 922(g) or (n). Indeed, other than Willis, nothing in the Complaint alleges that Minor **(**or Willis**)** resold any firearm to **any person** who was disqualified within the meaning of Sections 922(g) and (n).

Plaintiffs' conclusory allegation that Minor was a straw purchaser[23] is insufficient to come within subsection (II). Rather, because subsection (II) applies *only* to sales to persons who are disqualified under Sections 922(g) and (n), it is wholly inapplicable to sales that violate Section 922(a)(6) (the federal straw purchase statute at the time). For the same reason, the exception is also inapplicable to sales that violate any other State or federal law, including any State law that bans straw purchases, such as MD Code, Public Safety, § 5-134(b)(13), the statute on which

[23] Again, Minor was not charged with or convicted of being a straw purchaser under 18 U.S.C. § 922(a)(6). See Exhibt C at C1. Plaintiffs have not alleged that Minor has ever been charged or convicted of being a straw purchaser under State law.

Plaintiffs heavily rely. Complaint ¶¶ 48, 57, 85, 99, 109, 117. Subsection (II) likewise does not allow suits for sales to persons who are alleged to be engaged in "trafficking," or record keeping violations or any of the rest of the alleged statutory violations on which Plaintiffs purport to rely. See Complaint ¶¶ 82-86, 99, 109, 117. See Count I, Complaint ¶ 82; Count II, Complaint ¶ 99; Count III Complaint ¶ 109; Count IV, Complaint ¶ 117; Count V, ¶ 125.

Indeed, the Complaint does not even allege the basic elements of a "straw purchase" as defined by State law, MD Code, Public Safety, § 5-101(v). Specifically, the Complaint does not allege facts showing that any person "used another, known as the straw purchaser, to: (1) complete the application to purchase a regulated firearm; (2) take initial possession of the regulated firearm; and (3) subsequently transfer the regulated firearm to the person." *Id.* The only factual assertion made by the Complaint is that Minor resold or transferred firearms to Willis and, allegedly, perhaps to other persons. On its face, such conduct is trafficking, not straw purchasing, as Plaintiffs tacitly concede. See Complaint ¶ 60 (alleging that "[o]nly two of the thirty-four handguns purchased from the Defendants were found in Mr. Minor's possession, and the rest are presumed *to have been trafficked*- i.e., *illegally transferred by Mr. Minor to Mr. Willis and other prohibited possessors*") (emphasis added).

Nor were the sales to Minor straw purchases under federal law. As explained above, in 2021 (where the sales to Minor are alleged to take have taken place) federal law reached straw purchasing only through 18 U.S.C. § 922(a)(6), which makes it illegal for "any person … knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter." That

definition would cover purchasers, like Minor, who knowingly provide false answers on Form 4473. But the definition does not cover, by its terms, the seller. See *Abramski v. United States*, 573 U.S. 169, 175 (2014). In short, reduced to its substance (and disregarding conclusory allegations), the Complaint alleges that Defendants sold handguns to Minor who was then later convicted of illegal trafficking of firearms. See Exhibit C at C1. Again, any ambiguity in a complaint is construed against the pleader. *Bennett*, 259 Md.App. at 451.

4. Sales under subsection 7903(5)(A)(iii)(I)

The Complaint likewise fails under subsection (I) of Section 7903(g)(A)(iii). That subsection provides exception for a "knowing" violation of "a State or Federal statute applicable to the sale or marketing of the product" in:

> [A]ny case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product.

15 U.S.C. § 7903(5)(A)(iii)(I).

The Complaint simply does not allege facts sufficient to show that Engage "knowingly" made a false entry or failed to make "the "appropriate entry" in violation of federal or State law. To the contrary, as Exhibits A (State Form 77Rs) and B (federal Forms 4473 and 3310.4) demonstrate conclusively, Engage conscientiously filled out and submitted every single State and federal Form associated with its sales to Minor.

Seeking to evade this reality, the Complaint alleges that Engage "aided, abetted, or conspired with" Minor "in making any false or fictitious oral or written statement" with respect to these Forms. See Complaint ¶¶ 45, 57. That allegation is purely conclusory and thus insufficient. To meet PLCAA's "knowing" requirement, Plaintiffs must allege facts that would permit a jury to

find that Engage actually "knew" that Minor was, in fact, a straw purchaser and nonetheless made the sale "knowing" that Minor had lied on Form 4473 and Form 77R. But, as explained, the **only** facts alleged by Plaintiffs is that Engage engaged in multiple sales of firearms to Minor. Complaint, ¶¶ 61-63. Again, such multiple sales simply do not permit any such inference of such a "knowing violation" where (1) Minor was a "designated collector" who is expressly permitted by State law to make multiple purchases without limit; (2) where every sale for this entire time period was approved by the Maryland State Police after passing State and federal investigations; and (3) where Minor had an HQL for each sale, and thus had been subject to training in State law and was fingerprinted and investigated by the State Police.

Indeed, the Complaint even fails to allege facts sufficient to meet the elements of "aiding and abetting" or a civil "conspiracy." As the Supreme Court recently explained in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), the crime of aiding and abetting requires that Plaintiffs allege and prove facts sufficient to show that Defendants "consciously and culpably 'participate[d] in' a tortious act in such a way as to help 'make it succeed.'" 598 U.S. at 497, quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). The Court made clear that a plaintiff must allege an "affirmative act *with the intent of facilitating the offense's commission*." 598 U.S. at 490 (emphasis added). See also *Ofisi v. BNP Paribas, S.A.*, 77 F.4th 667, 674 (D.C. Cir. 2023).

Section 7903(5)(A)(iii) requires that Engage perform this "affirmative act" while knowing it was an actual violation of State or federal law. Multiple sales are lawful and thus not "culpable conduct." Beyond alleging multiple sales (Complaint ¶¶ 61-63), Plaintiffs have not alleged facts that would be sufficient demonstrate that Engage performed any "affirmative act" "with the intent of facilitating" any illegal conduct by Minor, much less alleged sufficient facts that Engage did so while "knowing" the act violated federal or State law. To the contrary, Engage actively cooperated

with federal law enforcement in the arrest of Minor once advised of the ATF's suspicion that Minor was engaged in trafficking. See Minor Criminal Complaint and Arrest Affidavit, at ¶ 9, 20-27, Exhibit C at C6, C11-C12.

Plaintiffs likewise fail to allege facts sufficient to establish that Engage "knowingly" conspired with Minor. The elements of a civil conspiracy are laid out by the D.C. Circuit in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), a case that *Twitter* holds provides "the proper legal framework for civil aiding and abetting and conspiracy liability." *Twitter*, 598 U.S. at 485. *Halberstam* makes clear that civil liability for conspiracy requires that the defendant "*does a tortious act in concert with the other or pursuant to a common design with him.*" 705 F. at 477, quoting the Restatement (Second) of Torts § 876 (1979) (emphasis the court's). Subsection 7903(5)(A)(iii)'s requirement of a "knowing" violation means that the defendant must engage in this "tortious act" while **knowing** that the "tortious act" was a violation of "a State or Federal statute applicable to the sale or marketing of the product" and then nonetheless choosing to perform the act anyway. Lawful multiple sales to Minor do not permit any such inference that Engage knew that Minor was engaged in trafficking and nonetheless entered into an agreement or "common design" to facilitate trafficking *despite* that actual knowledge. Nothing less meets the "knowing violation" requirement of Section 7903(5)(A)(iii).

The Complaint also fails to allege sufficient facts establishing the elements of a civil conspiracy. As *Halberstam* details, those elements are "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." 705 F.2d at 477. As the D.C. Circuit explained, "[i]t is only where means are employed, or purposes are accomplished, which

are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable." *Id*. See also *Halberstam*, 705 F.2d at 479 ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort."); *Beck v. Prupis*, 529 U.S. 494, 502-04 (2000) ("a civil conspiracy plaintiff must claim injury from an act of a tortious character"). Plaintiffs' allegations fail to meet these requirements.

First, there is no allegation that Engage entered into an "agreement" with Minor "to participate in an unlawful act." The only "agreement" that can be reasonably inferred from the factual allegations of the Complaint is an agreement to sell firearms in otherwise lawful arms-length sales transactions. Multiple sales to Minor that were otherwise legal simply does not permit an inference that Engage **knowingly** entered into an unlawful "common design" with Minor, much less that a sale (the only alleged "overt act" by Engage) "was done pursuant to and in furtherance of the common scheme." Any rule to the contrary would effectively convert every sale into a potential basis for a conspiracy claim if a firearm were thereafter used in a crime or the purchaser lied on the Form 4473 or Form 77R. That would be an absurd result that Congress could not have intended with the enactment of PLCAA, a statute intended to *protect* dealers from abusive suits.

Second, Plaintiffs' conspiracy allegation fails to state a claim because "a civil conspiracy plaintiff must claim injury from an act of a tortious character" of the defendant. *Beck*, 529 U.S. at 504. The multiple alleged sales by Engage to Minor were facially lawful and thus cannot be deemed "tortious." For example, in *Beck,* the Supreme Court rejected a conspiracy claim where the "alleged overt act in furtherance of their conspiracy is not *independently wrongful* under any substantive provision of the statute." 529 U.S. at 505 (emphasis added). No such "independently wrongful" act is alleged in the Complaint. Moreover, the only harm Plaintiffs allege (the harm to

public safety from "gun violence") flow from the criminal acts of third parties, such as Willis, rather than from the sales themselves. That means Plaintiffs have failed to "claim injury from an act of a tortious character." *Beck*, 529 at 502. Finally, Plaintiffs have not alleged any facts suggesting that the alleged harm was intended or the object of the alleged conspiracy. See *United States v. Root*, 585 F.3d 145, 158 (3d Cir. 2009) ("the evidence must be sufficient to show" that the harm "was one of the conspiracy's objects, and not merely a foreseeable consequence or collateral effect").

5. The federal law of proximate causation

As noted, in addition to imposing a "knowing violation" requirement, the predicate exception of Section 7903(5)(A)(iii) also affirmatively imposes a "proximate causation" requirement, thus barring any "action" against a seller of firearms unless that requirement is also satisfied. This proximate causation requirement applies to the entirety of subsection 7903(5)(A)(iii), including subsections (I) and (II). The Complaint fails under this proximate causation prong of the predicate exception.

Under federal law, the proximate causation requirement precludes claims for harms that are "too remote" from the initial, allegedly wrongful act. In *Holmes v. Securities Investor Prot. Corp*., 503 U.S. 258, 268–69 (1992), the Supreme Court held that, under federal law, "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." Thus "foreseeability alone is not sufficient to establish proximate cause." *Bank of America Corp. v. City of Miami*, 581 U.S 189, 201 (2017). That is because "foreseeability alone does not ensure the close connection that proximate cause requires." *Id.* at 202. Indeed, "[c]onditioning liability on

foreseeability . . . is hardly a condition at all," because with "a broad enough view" virtually anything "may be foreseen." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552-53 (1994).

Rather, federal proximation causation law "requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Bank of America,* 581 U.S. at 202-203, quoting *Holmes*, 503 U.S. at 268. See also *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451, 457 (2006) ("A violation of the FHA may, … "'be expected to cause ripples of harm to flow'" far beyond the defendant's misconduct" but that "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel."); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (holding that a harm is "too remote" where "*the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts*.'"), quoting *Holmes*, 503 U.S. at 268-69 (emphasis added); *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F.Supp.2d 125, 128 (D.D.C.1999) ("The doctrine of remoteness is a component of proximate cause, which in turn embraces the concept that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.'"), quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536 (1983), *affirmed in relevant part*, 249 F.3d 1068, 1073-74 (D.C. Cir.), *cert. denied,* 534 U.S. 994 (2001).

The Third Circuit's application of these principles in *City of Philadelphia v. Beretta, U.S.A. Corp*., 277 F.3d 415, 423 (3d Cir. 2002), is instructive. There, in a suit against gun manufacturers in a case decided before the enactment of PLCAA, the Third Circuit affirmed dismissal of Philadelphia's complaint that manufacturers' conduct "in the marketing and distribution of handguns" resulted in "criminal use in Philadelphia." 277 F.3d at 419. The court held that the alleged harms were "too remote" under *Holmes* and its progeny. *Id*. at 423. The court reasoned that

"[r]emoteness is analyzed through the following six factors: (1) the causal connection between the defendant's wrongdoing and the plaintiff's harm; (2) the specific intent of the defendant to harm the plaintiff; (3) the nature of the plaintiff's alleged injury and whether it relates to the purposes of tort law; (4) whether the claim for damages is highly speculative; (5) the directness or indirectness of the alleged injury; and (6) the aim of keeping the scope of complex trials within judicially manageable limits, i.e., avoiding the risks of duplicative recoveries and the danger of complex apportionment." Applying those factors, the court affirmed the district court's conclusion that "the gun manufacturers did not intend harm to plaintiffs; that plaintiffs' claims were 'entirely derivative of [those of] others who would be more appropriate plaintiffs'; that tort law preferred a more balanced approach to recovery; and that plaintiffs' damages were too speculative to permit recovery." 277 F.3d at 423.

Plaintiffs' Complaint fails for the same reasons the claims failed in *City of Philadelphia*. The harm to the public asserted by Complaint all involves the criminal misuse or illegal possession of a firearm by Willis or third parties. The sales to Minor thus did not "directly" cause any of the harm alleged in the Complaint. Each sale of a handgun to Minor was expressly allowed by the Maryland State Police, which conducted a full background investigation, including a NICS check and a review of Maryland databases. On their face, the sales were all lawful under federal and State law. Minor was free to resell those firearms legally in secondary sales that are specifically permitted under federal and State law.[24] Such secondary transactions are the very types of sales that "designated collectors," such as Minor, conduct every day. Certainly nothing in the "purposes

[24] In Maryland, such secondary sales may be conducted through a State licensed dealer or at a barracks of the Maryland State Police. See MD Code, Public Safety, § 5-124. See https://bit.ly/4eaSziy (State Police barracks guide for facilitating the transfer of regulated firearms in secondary transfers).

of tort law" favors tort liability in these sorts of circumstances. As discussed above, Maryland law makes clear that sellers, like Engage, do not owe a duty to the public at large to protect against the illegal acts of third parties, such as the illegal conduct of Willis.

Nothing in the Complaint alleges that Engage had any "specific intent" to harm the public. To the contrary, as noted, Engage cooperated with the ATF and local law enforcement in arranging a "sting" operation that resulted in the arrest of Minor once Engage had been notified by the ATF of its belief that Minor was illegally selling firearms. Minor Aff. at ¶¶ 9, 20-24, 27, Exhibit C at C6, C11, C12. The harm alleged by Plaintiffs is also speculative and diffuse. All the alleged injuries to Maryland and the District stem from costs derived from the harm to their residents. See, e.g., Complaint ¶95 ("As the direct and proximate result of the public nuisance created and maintained by the Defendants' misconduct, the Plaintiffs have suffered (and continue to suffer) injury by pending substantial money in an effort to address the societal harms caused by the Defendants' nuisance- creating activity."); Complaint ¶ 104 (seeking "the cost of the response of law enforcement and other emergency services"). Such costs are simply not recoverable under any viable theory of proximate causation. Nor are such costs recoverable under the Municipal Cost Recovery Rule. See *City of Chicago,* 821 N.E.2d at 1143-44 (holding that "the municipal cost recovery rule, also called the 'free public services doctrine,' under which public expenditures made in the performance of governmental functions are not recoverable in tort."); 64 C.J.S. Municipal Corporations § 1246 ("under the rule, public expenditures made in performance governmental functions are not recoverable in tort").

Indeed, the Complaint broadly seek damages for the inchoate "threat of gun violence" in Maryland and the District, asserting that "[t]he threat of gun violence proximately caused by the Defendants' illegal conduct affects how the area's residents and visitors choose to commute to

work or to school whether and how they participate in community activities and the degree to which they visit and patronize local businesses" as well as well as whether such persons "leave or continue to reside in the region." Complaint ¶ 89. Harm does not get more "speculative" or impossible to measure than the harm specified by these allegations. These Plaintiffs stand "too remote a distance to recover." *Holmes*, 503 U.S. at 268. See *Service Employees Intern. Union Health and Welfare Fund*, 249 F.3d at 1074 ("The remote, derivative nature of the alleged injuries, in turn, makes more difficult the determination of the amount of damages that is attributable to the alleged wrongdoing, as distinct from other independent factors.").

Similarly, the risk of "duplicative recoveries and the danger of complex apportionment" is apparent. The Complaint does not allege (nor could it) that the sales of handguns to Minor by Engage are responsible for all (or even a substantial part of) the "gun violence" or the "threat" of gun violence in the District and Maryland. And would be quite impossible to apportion damages for any such harm, either among those persons who were committing violent crime, or among all the sellers who legally (or illegally) sold firearms in use by all the criminals in Maryland and the District. The very point of proximate cause is to "avoid[] the difficulties associated with attempting to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors," *Anza*, 547 U.S. at 458, quoting *Holmes*, 503 U.S. at 269. See also *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639, 654 (2008) (same). Those "difficulties" are overwhelmingly present here. By any measure, Plaintiffs have failed to allege "proximate causation" as defined by federal law.

6. Maryland law of proximate causation

The Complaint alleges a "negligence per se" claim (Count III), a "Negligence (Statute or Ordinance") claim (Count IV), and a "Negligent Entrustment" claim (Count V). PLCAA permits

an exception for "(ii) an action brought against a seller for negligent entrustment or negligence per se." 15 U.S.C. § 7903(5)(A)(ii). Unlike the predicate exception of Section 7903(5)(A)(**iii**), PLCAA does not textually impose a proximate causation requirement for "negligent entrustment" or "negligence per se" claims permitted by Section 7903(5)(A)(**ii**). However, where (as here) such actions for negligent entrustment or negligence per se are based on a violation of "a State or Federal statute applicable to the sale or marketing of the product" then such a "case" or "action" is **expressly** covered by proximate cause and other limitations imposed by the "predicate exception" of Section 7503(5)(A)(iii). Plaintiffs may not escape the conditions and limitations imposed by the predicate exception through the artifice of labeling such claims as "negligence per se" or as "negligent entrustment." "It is well established in Maryland law that a court is to treat a paper filed by a party according to its substance[ ] and not by its label." *Tallant v. State*, 254 Md.App. 665, 682 n.13 (2022) (brackets the Court's), quoting *Corapcioglu v. Roosevelt*, 170 Md.App. 572, 590 (2006) (collecting case law). The proximate causation and knowing violation requirements imposed by Section 7903(5)(A)(iii) are thus applicable to all of Plaintiffs' claims.

In any event, Maryland imposes a "proximate causation" requirement independently of PLCAA and the Maryland law of proximate causation is broadly in accord with the federal law. See *Walton v. Premier Soccer Club, Inc*., 261 Md.App. 53, 73 (2024) ("'It is a basic principle that '[n]egligence is not actionable unless it is a proximate cause of the harm alleged.'"), quoting *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009). Maryland courts first "ask[] whether the defendant, in light of considerations of fairness and social policy, should be held liable for the injury, even when cause in fact has been established." *Asphalt & Concrete Servs., Inc. v. Perry*, 221 Md. App. 235, 261-62 (2015). On that question, Maryland courts have adopted the

Restatement (Second) of Torts, § 435 (1965), concerning whether an "intervening" negligent act or omission "rises to the level of a superseding cause[.]" *Pittway*, 409 Md. at 247-53.

Maryland has also adopted the general rule that a *criminal act* of a third party is an intervening or superseding cause that prevents liability from being assigned to the defendant as a matter of law. *See generally*, W.P. Keeton, Prosser and Keeton on the Law of Torts § 44, at 305 (5th ed. 1984) ("It must be remembered that the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant."). Maryland courts apply Section 442 of the Restatement (Second) of Torts with respect to intervening criminal or wrongful acts. *Pittway Corp.*, 409 Md. at 248-49. Under Section 442, courts are instructed to look to (1) whether the "operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;" (2) whether the intervening cause "is or is not a normal result of such a situation;" (3) whether "the operation of the intervening force is due to a third person's act or to his failure to act;" (4) whether the "intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;" and (5) "the degree of culpability of a wrongful act of a third person which sets the intervening force in motion." *Id.*

Section 442(e) of the Restatement (Second) of Torts gives heavy weight to "the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him." *Pittway*, 409 Md. at 248, citing Restatement § 442. Thus, "a third-party's criminal act often constitutes an unforeseeable superseding cause." *Mitchell v. Rite Aid of Maryland, Inc*., 257 Md.App. 273, 320 (2023). See also *Sindler v. Litman,* 166 Md.App. 90, 111-12 (2005) (applying Restatement § 442 factors); *City of Chicago*, 821 N.E. at 1136 ("'defendants' lawful commercial activity, having been followed by harm to person and

property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm'"), quoting *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.,* 309 A.D.2d 91, 103, 761 N.Y.S.2d 192, 201 (2003).

The lack of proximate causation here is confirmed by an application of the rest of the Restatement Section 442 factors. First, the Complaint does not (and could not reasonably) allege that "designated collectors" are typically criminals or engage in illegal trafficking, such as allegedly engaged in by Minor here. Nor does the Complaint allege facts (as opposed to conclusory averments that must be disregarded) that would suggest that Engage (or the other dealers) were aware of Minor's trafficking activities. Multiple purchases by collectors are hardly unusual; that is why the General Assembly created a special exception for collectors in enacting MD Code, Public Safety, § 5-129, subject to State Police oversight. The same oversight is provided under federal law in requiring that sales of two or more handguns to the same person within five days be reported using federal Form 3310.4. See 18 U.S.C. § 923(g)(3)(A). See Exhibits B. There is nothing "normal" or "foreseeable" that a "designated collector," like Minor, would turn out to be an illegal trafficker in firearms. See Restatement, § 442(b),(c). The Complaint does not allege any facts suggesting the contrary. There is no history of enforcement against such collectors cited in the Complaint, much less any allegation that Engage was aware of any such enforcement efforts.

Such trafficking of firearms by a designated collector is also a "harm different in kind from that which would otherwise have resulted" from normal sales to such designated collectors. *Id.,* at 442(a). Collectors are overwhelmingly law-abiding citizens who have been thoroughly investigated by the State Police in order to obtain that status. Minor also had a HQL and was thoroughly investigated by the State Police to obtain that license. And every sale to Minor was reported to the State Police via Form 77Rs and all the multiple sales within a five-day period were

further reported using federal Form 3310.4. Every sale was investigated and approved by the State Police using the NICS federal databases and State databases. Engage complied with every recordkeeping and reporting requirement imposed by State and federal law. The statutory scheme and these multiple State Police approvals and background checks go far beyond the process imposed by federal law (which requires only a NICS check on each sale) and are obviously designed to screen out criminals and prevent straw purchases.

The harm to the public alleged here also arose from wrongful "a third person's act[s]," Restatement, § 442(d), (e), *viz.,* the criminal actions of Willis in misusing firearms and in reselling firearms to others, and from the alleged unspecified criminal actions of unidentified others who allegedly unlawfully acquired firearms from Willis and/or Minor. Those criminal actions would have subjected Willis and these other persons to civil and criminal liability.[25] The high "degree of culpability" of Willis and these "third persons" in creating the harm alleged in this Complaint is self-evident. *Id.,* § 442(f).[26]

In sum, it would be patently unreasonable for any jury to apply the Section 442 factors of the Restatement and still find that dealers should have reasonably foreseen that a designated collector, who has been subjected to intensive background investigation to obtain that status, has been fingerprinted and subjected to still another background investigation in order to obtain the HQL, was not a law-abiding collector, but instead was illegally trafficking firearms. That conclusion is especially true where, as here, every sale was reported to and approved by the State

[25] See, e.g., MD Code, Criminal Law, § 3-202 (providing that first-degree assault with a firearm is a felony punishable by "imprisonment not exceeding 25 years").

[26] At least one of the firearms sold to Minor by Engage, a Glock 17 Gen 5 9mm pistol (Complaint ¶ 62), was not resold or transferred by Minor, as it was recovered by federal authorities from Minor's apartment. See Minor Arrest Affidavit, ¶ 41, Exhibit C at C15.

Police who conducted exhaustive background checks for each sale using State databases (Form 77R) and the federal NICS system (Form 4473). See Exhibits A & B. "'[W]hen the facts are undisputed, and are susceptible of but one inference,' the issue of proximate cause 'is one of law for the court[.]'" *Browne v. State Farm Mutual Automobile Insurance Co*., 258 Md.App. 452, 494 (2023), quoting *Lashley v. Dawson*, 162 Md. 549, 563 (1932). "The same is true for determining whether an act is a superseding cause." *Id.,* citing *Copsey v. Park*, 453 Md. 141, 166 (2017).

Stated differently, imposing liability on innocent dealers who complied with every one of the multiple procedures imposed by Maryland and federal law and whose sales to Minor were expressly approved by the Maryland State Police would essentially convert the dealers into guarantors against the criminal acts of designated collectors by subjecting them to liability for the criminal acts of third parties, like Willis. That result would effectively and unfairly impose strict liability for "every conceivable harm that can be traced to alleged wrongdoing." *Lexmark*, 572 U.S. at 132-33. See *City of Chicago*, 821 N.E.2d at 1137 ("to 'impose foresight on defendant under the particular circumstances present in this case would render it liable for anyone who drove the car, thus making it strictly liable.'") (citation omitted). See also *Ellsworth v. Sherne Lingerie, Inc*., 303 Md. 581, 586-57 (1985) (applying Restatement (Second) of Torts § 402). Plaintiffs' claims should be dismissed for failure to sufficiently allege facts supporting "proximate causation."

IV. COUNT V FAILS TO STATE A CLAIM FOR NEGLIGENT ENTRUSTMENT

Count V of the Complaint is for "Negligent Entrustment" and alleges that "[e]ach Defendant, by its employees and agents, knew, had reason to know, or reasonably should have known that firearms transferred to Mr. Minor and others involved in straw purchasing or unlicensed dealing of firearms would likely and foreseeably be used in a manner involving an unreasonable risk of physical harm to others." Complaint ¶ 129. Because PLCAA does not create

any cause of action, 15 U.S.C. § 7903(5)(C), the PLCAA exception for "negligent entrustment" is applicable only to the extent such a claim otherwise exists under State law. Maryland recognizes such a cause of action, but the scope of the State law claim for negligent entrustment is limited by PLCAA's definition of "negligence entrustment. State law claims that provide for broader liability for negligent entrustment than that permitted by the PLCAA exception are barred by the general ban on "qualified civil liability actions," 15 U.S.C. § 7902, as defined in 15 U.S.C. § 7903(5)(A), as discussed above. In this case, Plaintiffs' claim of "negligent entrustment" fails under both PLCAA **and** under the common law of Maryland.

A. The PLCAA's Negligent Entrustment Exception Allows Only A Narrow Subset Of Negligent Entrustment Actions

As noted above, Plaintiffs' "negligent entrustment" claim is premised on alleged violations of State and federal law and thus falls within the "predicate exception" of Section 7903(5)(A)(iii). But putting those limitations aside, the PLCAA exception for "negligent entrustment," 15 U.S.C. § 7903(5)(A)(ii), is subject to other limitations that narrow the scope of the exception still further. Specifically, Congress defined the term "negligent entrustment" in 15 U.S.C. § 7903(5)(B), to mean "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." The "negligent entrustment" exception thus reaches only conduct where the product is both "likely" to be used to be used by "**the person to whom the product is supplied**" and **is in fact** used by **that person** in a manner involving an "unreasonable risk of physical injury." (Emphasis added).

Here, the Complaint goes beyond that allowed by the PLCAA definition of "negligent entrustment." This exception does not allow suits for merely unreasonable conduct or for conduct

that leads to other types of injuries or to conduct by persons **other than** the person to whom the product was supplied by the Defendant. Conduct by such other persons is thus categorically excluded. The only person the Complaint alleges engaged in any conduct that posed an "unreasonable risk of physical injury" was Willis, who allegedly brandished a gun in a manner that terrorized "partygoers at his ex-wife's house" with a firearm purchased from Defendant United Gun Shop. Complaint ¶¶ 10, 69. Engage cannot be charged with that sale or with that behavior. The Complaint does not allege that any other person, including the persons to whom Willis allegedly sold the firearms, engaged in such behavior. Id..

PLCAA does not define "use the product," so the phrase is to be given its ordinary meaning as assigned by standard dictionaries. See, e.g., *Russello v. United States*, 464 U.S. 16, 21 (1983) ("This silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'") (citation omitted). Accord *Arking v. Montgomery County Planning Bd.*, 215 Md.App. 589, 606 (2013). The term "use" is an active verb that denotes conduct that "put into action" or "avail oneself of" some object ("the product"). See https://bit.ly/48JyONW (merriam-webster.com). See also Blacks Law Dictionary (11th Ed.) at 1855 (defining "use" to mean "[t]o employ for the accomplishment of a purpose, to avail oneself of"). There is no allegation that Minor "put into action" or "employed" or "availed himself of" any firearm acquired from Engage. Minor is alleged to have trafficked the firearms; he is not alleged to have "used" the firearms. Congress did not, through this negligent entrustment provision, intend to allow liability for conduct by persons who did not, in fact, "use" the firearm to inflict or create the risk of physical injury. Any broader application of this exception would conflict with Congress' stated purpose of barring actions against sellers for injuries caused by third parties.

But even assuming *arguendo* that Minor's alleged trafficking could somehow be deemed be a "use of product" in an "unreasonable risk of physical injury to the person or others" for purposes of this PLCAA exception, Engage cannot be liable under this exception unless it "knows, or reasonably should know" that the sales to Minor would create this risk by Minor. No such facts are alleged. To the contrary, Engage knew that Minor was a "designated collector," and thus understood that collectors are specifically allowed by State law to purchase multiple handguns of any amount. MD Code, Public Safety, § 5-129. All such firearms purchased by a designated collector may be legally resold or transferred through the secondary market, so the mere possibility that Minor might resell these firearms is insufficient. See MD Code, Public Safety, § 5-124. Collectors, by definition, buy and sell firearms all the time and often do so in bulk, as State law recognizes. See COMAR § 29.03.01.25. There is no factual basis in the Complaint's allegations for any suggestion that Engage knew or should have known that Minor would resell the firearms *illegally*.

Engage did know for certain that the Maryland State Police had investigated Minor when he became a "designated collector" (the investigation is required by law) and that another background investigation was conducted when Minor received the HQL after being fingerprinted and subjected to training in State firearms law (also required by law). Engage also knew for certain that every sale to Minor was approved by the State Police and that those sales faithfully were reported on federal Forms 4473 and 3310.4 and State Form 77R. Engage knew for certain that the State Police never raised a single objection to **any** of these sales. And when federal authorities requested Engage's assistance in a sting operation directed at Minor, Engage cooperated fully in bringing an end to Minor's unlawful activities. In these circumstances no reasonable jury could find that Engage knew or should have known that Minor was engaged in illegal trafficking.

B. Even Absent The PLCAA, The Negligent Entrustment Claim Does Not State A Claim Under The Common Law Of Maryland

Under Maryland law, "the doctrine of negligent entrustment" is controlled by *Broadwater v. Dorsey*, 344 Md. 548, 558 (1997). *Broadwater* involved a claim that the parents negligently entrusted an automobile to their adult child who thereafter was involved in an accident that injured a third party. That third party then sued the parents, contending that the adult child had a long history of traffic infractions, including accidents and that the parents were thus liable for negligent entrustment of the vehicle to the adult child. The Court rejected the claim of negligent entrustment, holding that "[w]e agree with our sister states that have concluded that 'the paramount requirement for liability under a theory of negligent entrustment is *whether or not the defendant had a right to control the vehicle.*'" 344 Md. at 561 (emphasis added). Since it was undisputed that the parents had no right to control the vehicle operated by their adult child, the Court ordered that judgment be entered for the parents on the claim of negligent entrustment. *Id.* at 563.

In so holding, the Court in *Broadwater* construed and relied on Sections 308 and Section 390 of the Restatement (Second) of Torts. Id. at 558. Section 390 provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Broadwater noted that under Section 308, "'[i]t is negligence to permit a third person to use a thing or to engage in an activity which is *under the control of the actor*, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.'" *Broadwater*, 344 Md. at 558, quoting Section 308 (emphasis the Court's). *Broadwater* emphasized that Sections 308 and 390 are "in *pari materia* and must be read together." *Id.* The Court thus held that "[r]eading § 308 and

§ 390 together, we hold that the doctrine of negligent entrustment is generally limited to those situations in which the chattel is under the control of the supplier *at the time of the accident*." Id. (emphasis added). The Court explained that "[o]rdinarily, without the right to permit or prohibit use of the chattel at the time of the accident, an individual cannot be liable for negligent entrustment." *Id.*

These holdings make clear that no suit for negligent entrustment is available under Maryland law unless the seller had the right to control the use of the product at the time of the harm of which the plaintiff complains. Section 390 of the Restatement also makes clear that recovery for negligent entrustment extends only to claims for "physical harm" inflicted **by the person** who was directly entrusted with the product. See *Phelan v. City of Mount Rainer*, 805 A.2d 930, 942-43 (D.C. 2002), citing *Mackey v. Dorsey*, 104 Md.App. 250, 655 A.2d 1333, 1337 (1995). These limitations are broadly in accord with the absence of a duty to public recognized in *Valentine*, *Warr* and *Kiriakos*, discussed above.

Nothing in the Complaint can be read as satisfying these requirements. The Complaint alleges facts sufficient to show only that Engage sold firearms to Minor in arms-length transactions. Engage's right and ability to control the use of those firearms ceased the moment the firearms were delivered to Minor after the 7-day waiting period had expired. The Complaint does not allege that the dealers had any control over these firearms after the sale to Minor, as required by Section 308. Section 390 of the Restatement requires that the inquiry focus solely on the person to whom the firearms were allegedly negligently entrusted. All the harm alleged in the Complaint was committed by Willis and/or by others after the sales to Minor. The Complaint does not allege that Minor inflicted or threatened any "physical harm." Under *Broadwater,* Plaintiffs' negligent

entrustment claims must be dismissed. See also *City of Chicago*, 821 N.E.2d 1136-37 (discussing negligent entrustment).

CONCLUSION

For all the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted,

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