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.	*
	*

REPLY IN SUPPORT OF THE MOTION TO DISMISS
OF DEFENDANT ENGAGE ARMAMENT LLC

Mark W. Pennak
9613 Harford Rd., Suite C #1015
Baltimore, MD 21234-2150
Tel: (301) 873-3671
MD Atty No. 1905150005
mpennak@marylandshallissue.org

Matthew Larosiere
Law Office of Matthew Larosiere
6964 Houlton Circle
Lake Worth, FL 33467
(Admitted *pro hoc vice*)
Tel: (561) 452-7575
larosieremm@gmail.com

Attorneys for Defendant Engage Armament

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

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

ARGUMENT

I. INTRODUCTION

Plaintiffs do not dispute that "[a] court . . . 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). See Engage Mem. at 11-12. Nor do Plaintiffs dispute that facts 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). *Id.* Plaintiffs likewise have no objection to Engage's request that this Court take judicial notice of the State and federal forms and other matters under Maryland Rule 5-201, including "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). See Engage Motion at 1-2, Engage Mem. at 5, 12-13.

Plaintiffs use conclusory allegations to smear all the Defendants, asserting "that Defendants' sales to Mr. Minor are the tip of the iceberg," that Plaintiffs will likely "uncover many more examples" of illegal sales in discovery, that the ATF has determined "two of the Defendants as being among the top sellers of 'crime guns,'" and that Defendants are "the top three in-state retailers of traced crime guns." P. Mem. at 1-2. None of these wild allegations is supported by a **single** factual allegation that would support a conclusion that Engage has ever violated any federal

or State statute. See also P. Mem. at 41 (repeating the smear). These allegations are baseless and should be disregarded.

First, all of these claims are based on "trace" data that comes exclusively from the ATF[1] and such reliance is flatly prohibited by the Tiahrt Amendment, Pub.L 112-55, 125 Stat 552, 609-610 (Nov. 18, 2011).[2] As enacted by Congress, the Tiahrt Amendment addresses "the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives" and provides that such trace data as well as "any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section" "shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and ***shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State . . . or Federal court*[.]**" *Id.* (Emphasis added). See *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc*., 2024 WL 3696388 at *8 (D. Mass. 2024) (relying on the Tiahrt Amendment to reject the plaintiff's expert's reliance on ATF trace data as suffering "from a fundamental legal defect").

This legal bar imposed by the Tiahrt Amendment is sound. Merely because a "licensed distributor or dealer" sold firearms later used in crimes does not state a plausible claim that the distributor or dealer "has committed an illegal act." *City of Philadelphia v. Beretta, U.S.A. Corp*.,

[1] State and local law enforcement officers submit trace requests to the ATF using ATF Form 3312.1. See https://bit.ly/41PudbH.

[2] The Tiahrt Amendment, enacted in 2011, provides that it is applicable to "the current fiscal year and in each fiscal year thereafter." Pub. L. No. 112-55, 125 Stat. 552, 609 (2011). See *Everytown for Gun Safety Support Fund v. BATF*, 984 F.3d 30 (2d Cir. 2020) (discussing the Tiahrt Amendment).

277 F.3d 415, 424 n.14 (3d Cir. 2002) (rejecting such reliance). The ATF (the federal agency that collects the data and does the traces) is in full accord with that point. See *Hamilton v. Beretta U.S.A. Corp*., 96 N.Y.2d 222, 237-40 & n.8 (N.Y. 2001) ("ATF emphasizes that the appearance of [an FFL] or a first unlicensed purchaser of record in association with a crime gun or in association with multiple crime guns **in no way suggests** that either the FFL or the first purchaser has committed criminal acts."). (Emphasis added). See also Firearms Trace Data: Maryland - 2023 https://www.atf.gov/resource-center/firearms-trace-data-maryland-2023 ("Not all firearms used in crime are traced and not all firearms traced are used in crime" and "sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime"). That some dealers have more traces is simply a function of how many guns are sold; dealers (like Engage) who make more sales in a heavily populated urban area are going to have more gun traces than dealers who sell fewer firearms and whose sales are in rural areas. Indeed, on Plaintiffs' theory the D.C. Metropolitan Police Department would likely be liable for facilitating straw purchases. See "DC police dealt thousands of guns; ATF demands answers after concerning number found at crime scenes." https://bit.ly/4h8ZtqF (Apr. 3, 2024).

For all these reasons, Plaintiffs' reliance on inadmissible trace data as proof of misconduct is an illegal and gross misuse of the data and cannot be considered on the Motion to Dismiss. In any event, where the allegations are merely "consistent with" unlawful conduct, but there are "more likely explanations," the complaint does not "plausibly establish" a violation. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("it is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth"). Maryland law is in accord. See Engage Mem. at 11-12. The "more likely explanation" here is that Minor was an effective liar who successfully deceived Defendants no less than he deceived the

Maryland State Police which reviewed and approved each one of the sales alleged in the Complaint.

Plaintiffs' Complaint should be seen for what it is: "lawfare" to intimidate and/or bankrupt dealers through litigation costs for no reason other than to suppress the lawful sale of firearms in Montgomery County in a misplaced ideological belief that doing so will lessen "gun violence" in the County and in the District of Columbia. Whatever the merits of that belief in a nation of 50 sovereign States and more than 400 million guns in private hands,[3] the law does not permit the government to accomplish such ends through the misuse and abuse of the judicial system. Controlling federal and State precedent make clear that dealers cannot be held liable in tort for the criminal misuse of firearms by third parties over whom the dealers have no control. Abusive lawsuits designed to impose such liability led Congress to preempt such suits by enacting The Protection of Lawful Commerce In Arms Act, 5 U.S.C. § 7901 *et seq.* (PLCAA). See Engage Mem. at 26-27. This case is just another example of the very type of lawsuit that Congress intended to preempt through the enactment of PLCAA. Engage's Motion to Dismiss should be granted.

II. DISTRICT OF COLUMBIA LAW IS IRRELEVANT

Plaintiffs concede that Maryland law applies to Maryland's common law claims but invoke choice of law principles to contend that "the law of the state where the last event required to constitute a tort occurred applies; that is, the applicable law is based on where the injury occurred." P. Mem. at 7. But that principle makes clear that Maryland law controls, not District of Columbia law. Under Maryland law "[t]he place of injury is also referred to as the place where the last act required to complete the tort occurred." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 746 (2000)

[3] https://www.thetrace.org/2023/03/guns-america-data-atf-total/

(citing Restatement (First) of Conflict of Laws § 377). Maryland law likewise makes clear that the "place of injury" is dependent on the nature of the tort alleged. See *Doctor's Weight Loss Centers, Inc. v. Blackston*, 487 Md. 476, 497 (2024) ("critical to resolving the choice of law issue before us is the following question: as to each cause of action, what constitutes a sufficiently cognizable legal "injury"?).

The Fourth Circuit's decision in *Farwell v. Un*, 902 F.2d 282, 286-87 (4th Cir. 1990), is instructive on the proper application of these principles. See *Philip Morris*, 358 Md. at 746 (citing *Farwell* with approval). In *Farwell*, the Fourth Circuit applied the Maryland law of *lex loci delicti* in a medical malpractice case to hold that Maryland law applied the law of the State where the psychiatric treatment occurred, not the law of the State (Pennsylvania) where the alleged injury (the suicide of the plaintiff's decedent) occurred. As the *Farwell* court explained, under Maryland law, "the locus of a tort for choice of law purposes is that where the last act required to complete it occurred" and that was in the jurisdictions which "define in critical ways the duty of physicians" that was allegedly breached. *Id.* citing Restatement of Conflict of Laws § 380(2) (1934) ("Where by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decision of the law **of the place of the actor's conduct**, such application of the standard will be made by the forum."). (Emphasis added). Plaintiffs do not deny that the law of Maryland "define[s] in critical ways" the duty that Plaintiffs allege to have been breached by Defendants in making sales in Maryland to Minor. The "standard of care" is imposed at the location of "the actor's conduct" which, in this case, is Maryland.

Alleged injuries took place in Maryland as well. Plaintiffs' whole case is premised on the notion that straw purchases themselves are inherently harmful to society. See, e.g., Complaint ¶ 14

("Straw gun sales fuel gun violence that spreads throughout the region without regard to state boundaries."); *id*. at page 8 ("Straw sales undermine the Plaintiffs' gun laws and endanger public safety."); ¶ 29 ("Straw sales severely undermine the Plaintiffs' regulations on the sale and possession of handguns and foreseeably and substantially contribute to gun violence and gun-related crimes in the Washington, D.C. metropolitan area"); ¶ 39 ("Straw sales supply the firearms used to commit much of this gun violence."). Plaintiffs also allege other injuries quite apart from any alleged misuse of firearms in crimes of violence. See also Complaint ¶ 30 ("Unlawful gun possession adversely affects the Washington, D.C. metropolitan area"); Complaint ¶ 88 (alleging that the sales "created, contributed to, and maintained a public nuisance" in Maryland and DC); Id. ¶ 89 (alleging injury from "the threat of gun violence proximately caused by the Defendants' illegal conduct"). Each Count of the Complaint incorporates by reference these allegations. The "last act" of these alleged "torts" was "complete" at the time of sale.

That D.C. and Maryland have arguably alleged other, subsequent injuries arising from Minor's trafficking of firearms is irrelevant for these purposes. *Doctor's Weight Loss Centers*, 487 Md. at 498 ("'injury may occur even though all of the resulting damage to the patient has not yet occurred'"), quoting *Burnside v. Wong*, 412 Md. 180, 200 (2010). See also *Hill v. Fitzgerald*, 304 Md. 689, 696 (1985) ("all that is required is that the negligent act be coupled with *some harm* in order for a legally cognizable wrong—and, therefore injury—to have occurred"). (Emphasis added). Cf. *Green v. North Arundel Hosp. As'n, Inc*., 126 Md.App. 394, n.8 (1999), citing *Ebell v. Seapac Fisheries, Inc.,* 692 P.2d 956, 957–58 (Alaska 1984) (interpreting statute that placed venue in "the judicial district in which the claim arose" and holding that, in tort cases, this language placed venue where the plaintiff **first** suffered injury). (Emphasis added).

III. THE STATUTE OF LIMITATIONS

As made clear in Engage's opening memorandum (Engage Mem. at 15-18), all but one of the sales made to Minor by Engage were made more than three years prior to the filing date of the Complaint (September 3, 2024) and thus are barred by the Maryland general statute of limitations applicable to civil actions, MD Code, Courts and Judicial Proceedings, § 5-101. See Complaint ¶ 62. All those claims should be dismissed. In this respect, the law governing the statute of limitations is indisputably the law of Maryland as a statute of limitations is viewed as a procedural matter which is controlled by the law of the forum State. See *Lewis v. Waletzky,* 422 Md. 647, 664 (2011) ("we shall describe procedural provisions of law as those that generally 'restrict, limit, define, qualify, or otherwise simply modify' an existing cause of action"). "[S]tatutes of limitations are procedural for choice-of-law purposes." *Id*., citing *Doughty v. Prettyman*, 219 Md. 83, 88 (1959).

Plaintiffs rely (P. Mem. at 28) on *Akinmeji v. Jos. A. Bank Clothiers, Inc*., 399 F. Supp. 3d 466, 472 (D. Md. 2019), to assert that D.C is not subject to Maryland's statute of limitations. But *Akinmeji* supports Defendants, not Plaintiffs. *Akinmeji* states that "Maryland courts almost universally view issues pertaining to the statute of limitations as procedural, not substantive" and thus apply the limitations law of the forum State to all plaintiffs. *Id. Akinmeji* notes that Maryland will apply a foreign statute of limitations only if (1) application of the forum statue would "terminate the case" **and** (2) where the foreign statute of limitations is *specifically* applicable to a substantive law that "create[s] a new liability that does not exist at common law." *Id*., citing *Slate v. Zitomer*, 275 Md. 534, 542 (1975). Here, **all** the D.C.'s claims are common law tort actions and thus the exception for new "substantive laws," noted in *Akinmeji,* does not apply. Application of

Maryland's statute would also not "terminate the case" but merely limit District of Columbia to sales taking place after September 3, 2021.

Plaintiffs contend that the statute does not run "until Plaintiffs suffered damages" which, according to Plaintiffs "occurred after Defendants completed their course of sales to Mr. Minor." P. Mem. at 25. That argument does not help Plaintiffs. As explained above, the alleged wrong is the sale to Minor and the harm occurred at that time. See *Farwell*, 902 F.2d at 286-87. Indeed, as noted, Plaintiffs have alleged that they suffered at least some immediate injury from the sale itself. See *Rounds v. Maryland-Nat. Capital Park and Planning Com'n.*, 441 Md. 621, 654 (2015) ("For any statute of limitations analysis, the operative date is the date that a claim accrues. Generally, a claim accrues when the plaintiff suffers the actionable harm."). That **other** injuries took place after the sales are irrelevant for limitations purposes. Here, Plaintiffs admit that "the claims accrued was when Mr. Minor transferred the firearms" to Willis (P. Mem. at 26), an event that undoubtedly occurred quite soon after each sale over the six-month period in which sales were made to Minor.

In a footnote, Plaintiffs argue that the statute of limitations is inapplicable to "continuing violations." P. Mem. at 27 n.16. But a continuing violation merely starts a new limitations period for each discrete act of the continuing violation, *viz,* "'every repetition of the wrong creates further liability and *creates a new cause of action*, and a *new statute of limitations begins to run after* ***each*** *wrong perpetuated*.'" *Litz v. Maryland Dept. of Environment*, 434 Md. 623, 646 (2013), quoting *Jones v. Speed*, 320 Md. 249, 260 n.4 (1990). (Emphasis added). See also *Thomas v. County of Humboldt*, --- F.4th ----, 2024 WL 5243033 at *9 (9th Cir. Dec. 30, 2024) (same). Here, each allegedly unlawful sale to Minor was a separate wrong and thus the statute began to run separately for each sale. *Id*. The statute would thus bar claims based on any sale taking place prior to September 3, 2021.

Plaintiffs do not deny that Maryland uses the "discovery rule," but they misapply the rule to assert that Plaintiffs "did not discover their claims—and therefore the statute of limitations did not begin to run—until those firearms were recovered by law enforcement." P. Mem. at 26. Such actual discovery is not required for the statute of limitations to run. "[T]he discovery rule provides that a 'cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.'" *Rounds,* 441 Md. at 654 (citation omitted). The "wrong[s]" alleged in this case are individual sales to Minor who Plaintiffs insist was a straw purchaser for each sale. Plaintiffs do not dispute that Maryland possessed even more information concerning these allegedly unlawful sales than possessed by any of the dealers. See Engage Mem. at 17-18. Plaintiffs also do not deny that every detail on which Plaintiffs rely in their Complaint (¶¶ 61-63) as sufficient to put Engage on notice was likewise set forth in the Form 77Rs submitted to the Maryland State Police a full seven days before any firearm was delivered to Minor. See MD Code, Public Safety, 5-123(a) (imposing a 7-day waiting period); Engage Mem. 17-18.

Plaintiffs cannot reasonably dispute that they could have discovered, through an investigation or reasonable inquiry, all the patterns and types of sales that they now allege as giving rise to the alleged violations. The Maryland State Police had all the Form 77Rs for such sales and could have (and undoubtedly would have) shared all the Form 77R information with any neighboring jurisdiction upon request. See MD Code, General Provisions, § 4-325(c). The District is not entitled to sit on its hands and play dumb, especially where it alleges that "Maryland was the source of between 10% and 13% of crime guns recovered in the District and successfully traced to their state of origin." Complaint ¶ 34. Any such investigation would have produced proof that Minor was a trafficker, just as the ATF suspected (with the assistance of Engage in a sting operation) at the time Minor was detained and later charged with trafficking. See Engage Mem. at

46. Plaintiffs do not deny that they could have begun an investigation or inquiry based on those Form 77Rs alone. No more is required.

IV. ENGAGE DOES NOT OWE A LEGALLY COGNIZABLE DUTY

A. No Duty To The General Public To Prevent Misuse By Third Parties

Plaintiffs do not deny that the Complaint is based on the existence of a duty to the general public and to the State (and D.C.) writ large. See, e.g., Complaint ¶¶ 10, 88, 102. Nor do Plaintiffs deny that in *Valentine v. On Target, Inc.*, 353 Md. 544, 546-547 (1999), the Maryland Court of Appeals (now Supreme Court) held that "[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. Under *Warr*, a violation of statutes enacted designed for "'the protection, health, welfare and safety of the people of this State'" "is not sufficient to create a tort duty." 433 Md. at 198-99.

Plaintiffs assert (P. Mem. at 34-39) that a duty exists in this case under the multiple factor test articulated in *Kiriakos v. Phillips*, 448 Md. 440, 457 (2016). But that reliance is misplaced because the statute at issue in *Kiriakos* protected a "specific class" of people that included the plaintiff (an underaged minor), while the statutes at issue in this case "protect a general class of people" to whom no tort duty is owed. Specifically, in *Kiriakos*, the Court of Appeals did "not overlook or discount our recent decision in *Warr*," but rather "distinguish[ed]" *Warr* on grounds that the statute that was allegedly violated in *Kiriakos* (barring underaged individuals from possessing or consuming an alcoholic beverage at a residence) was designed to protect "a specific

class of persons" of which the plaintiff's decedent was a member. 433 Md. at 477-78, citing MD Code, Criminal Law, § 10-117. The *Kiriakos* Court reiterated its holding in *Warr* that a tort duty is not created by "a criminal statute" that "was part of a scheme designed to protect a general class of people*." Id.* at 459. The Court contrasted that situation with the statute at issue in *Kiriakos* (Section 10-117) which the Court found was focused on barring "*an individual under the age of 21 years*" from drinking at a residence and which "identifies a specific class that the General Assembly sought to protect." *Id.* at 459-60 (emphasis the Court's).

The *Kiriakos* Court similarly distinguished *Barclay v. Briscoe*, 427 Md. 270 (2012), cited with approval in *Warr,* on grounds that injury at issue in that case, as in *Warr*, was inflicted on the plaintiff by an impaired adult, stating that "[w]e cannot emphasize enough that a minor's decision to drink is not the same as an adult's." 448 Md. at 484-85. *Barley* applied the Restatement (Second) of Torts §§ 314, 315 and relied on *Valentine* to hold that an employer had no duty "'to the world at large'" to prevent an employee from driving while exhausted and thus causing an accident that injured the plaintiff. 427 Md. at 295, quoting *Valentine*, 353 Md. at 553. As the Court explained, "'[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.'" 427 Md. at 295, quoting *Lamb v. Hopkins*, 303 Md. 236, 242 (1985). As explained in *Kiriakos*, third party adults in these types of cases are "'responsible for his or her own torts.'" 448 Md. at 484, citing *Warr*, 433 Md. at 185 n.11

Plaintiffs ignore that *Kiriakos* reaffirmed *Warr* and *Barclay* and never dispute that all the criminal laws are "designed to protect a general class of people," not a "specifical class" of individuals, such as the plaintiff in *Kiriakos* who was within the "specific class" of people (underaged drinkers) that the General Assembly specifically "sought to protect" in statutory

language. *Kiriakos*, 448 Md. at 460. Plaintiffs here seek recovery on behalf of the general public**.** The general public, by definition, cannot possibly be a "specific class" of persons under *Kiriakos.* Unlike the specific statute at issue in *Kiriakos*, none of the statutes on which Plaintiffs rely define any "specific class" of persons that the statute was intended "to protect." Plaintiffs simply may not gloss over the very distinctions on which *Kiriakos* relied. See *Burger v. Healthcare Management Solutions, LLC*, 2024 WL 473735 at *8 (D.Md. 2024) (collecting Maryland case law).

Plaintiffs offer little in response to these controlling precedents. Plaintiffs do not deny that the federal and Maryland laws that they accuse Engage of violation were enacted for "the protection, health, welfare and safety of the people of this State" and are not "designed to protect a specific class of people."[4] Plaintiffs do not assert that the General Assembly identified any "specific class" of people that they sought "to protect" in enacting these criminal laws, as in *Kiriakos*. There is no allegation here that Defendants sold or provided firearms to minors. Rather, Plaintiffs merely cite *Valentine*'s statement that its ruling "does not mean a gun store owner may never be held liable to another party for negligence in the display and sale of guns." *Valentine*, 353 Md. at 558-59. P. Mem. at 10. But nothing in that dictum undercuts the Court's repeated rulings in *Valentine*, *Warr*, *Kiriakos* and *Barclay* that a seller does not owe any duty to the general public to protect against misuse of a product by third parties. For example, one can easily envision circumstances where a shop owner could owe a duty to a particular person with whom the owner

[4] Plaintiffs are reduced to relying on a general duty "to act with reasonable care" that they assert is imposed by D.C. law (P. Mem. at 39), but as noted above, D.C. law cannot be applied in case under choice of law principles and because doing so would constitute a constitutionally prohibited extraterritorial application of D.C. law to conduct taking place solely in Maryland. See Part II, *supra*. And, as explained above, Plaintiffs' assertion that Maryland courts "recognize a duty to the general public" (P. Mem. at 39) is flatly contradicted by *Valentine*, *Warr*, *Kiriakos* and *Barclay*, all of which make clear that there is no duty to the public to prevent harm committed by third parties over whom the defendant had no control.

had a "special relationship."[5] But that possibility hardly means that a duty extends to the general public for injuries inflicted by third parties; *Valentine*, *Warr*, *Kiriakos* and *Barclay* squarely *hold* that no such duty exists. Without a duty, there can be no claim for the harm alleged in this case.

Plaintiffs' heavy reliance on *Moore v. Myers*, 161 Md.App. 349, 363 (2005) (P. Mem. at 23, 34, 46, 48, 50-52, 63) is misplaced for multiple reasons. See P. Mem. at 46. The *Moore* court held that a statutory scheme there at issue established a duty on owners to secure pit bulls and the plaintiff was injured by a pit bull that the defendant failed to secure in direct violation of the statute. 161 Md.App. at 365-66. That holding and the court's reasoning were overruled in *Tracey v. Solesky*, 427 Md. 627 (2012), where the Court of Appeals held that harboring a pit bull was an inherently dangerous activity warranting strict liability. That holding was, in turn, legislatively overruled by the General Assembly with the enactment of MD Code, Courts and Judicial Proceedings, § 3-1901, which established different standards for liability for dog attacks. *Moore*'s reasoning on which Plaintiffs rely has thus been effectively abrogated twice over.

In any event, direct physical injuries to a particular plaintiff flowing from a statutory violation, such as in *Moore*, are a far cry from the alleged harm for which Plaintiffs seek recovery in this case. Here Plaintiffs seek to impose liability on dealers who made otherwise perfectly legal sales to Minor who, in turn, allegedly illegally trafficked the firearms to third parties who, in turn, engaged in illegal acts which in turn allegedly resulted in the injuries to the general public for which Plaintiffs seek recovery. As *Valentine*, *Warr*, *Kiriakos* and *Barclay* make clear, there is no

[5] Plaintiffs do not dispute that "[t]his '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). 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).

duty to protect the general public from the actions of third parties unless "the person or entity sued *had control over the conduct of the third party who caused the harm by virtue of some special relationship.*" *Warr*, 433 Md. at 183. (Emphasis added). In contrast, in *Moore*, the injuries to the plaintiff were not caused by such third parties, but rather directly by the defendant, who failed to comply with a statute. Nothing in *Moore* contradicts the rule followed in *Valentine*, *Warr, Kiriako* and *Barclay*. Indeed, *Moore* did not even cite *Valentine* and both *Warr* and *Kiriakos* post-date the 2005 decision in *Moore,* as does the 2012 decision in *Barclay*. These decisions of the Court of Appeals are controlling, not the Court of Special Appeals' superseded decision in *Moore*.

Plaintiffs argue that a duty exists because the alleged harm to the public was foreseeable in this case. P. Mem. at 41-44. But Plaintiffs ignore that 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." *Warr*, 433 Md. at 184. (Emphasis added). See also *Barclay*, 427 Md. 299-300 ("'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). Thus "[w]hen 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." *Warr*, 433 Md. at 183. Plaintiffs have no response to these binding holdings, ignoring them entirely.[6] Plaintiffs do not dispute that Engage (or the other dealers) never

[6] Plaintiffs lamely attempt to distinguish *Warr* on grounds it involved "dram shop liability" and a single act (P. Mem. at 41), but nothing in the reasoning or holding of *Warr* is so limited, as *Kiriakos'* endorsement and reading of *Warr* makes clear. Plaintiffs do not even cite, much less

exercised any "control" over Minor or Willis or over the alleged actions of any person who allegedly used firearms to cause harm to the general public. Those third parties are responsible for their "'own torts'" not Defendants." *Kiriakos*, 448 Md. at 484, citing *Warr*, 433 Md. at 185 n.11. See also *In re Marriott Int'l, Inc., Customer Data Security Breach Litigation*, 2020 WL 6290670 at *8 (D. Md. 2020) (citing *Warr* and applying "Maryland's rule that, absent a special relationship, a defendant does not owe a duty to the general public to protect them from the actions of third parties").

Plaintiffs also do not dispute that the Maryland General Assembly neither created nor intended to create civil remedies for violations of any of the State laws that Engage allegedly violated. See *Fangman v. Genuine Title, LLC*, 447 Md. 681, 694-95 (2016) ("our analysis begins with the language of the statute at hand and whether it confers a beneficial right *upon a particular class of persons*.") (Emphasis added); *Erie Ins. Co. v. Chops*, 322 Md. 79, 90 (1991) ("the presence or absence of an indication of legislative intent to create a private remedy is a very important factor to be considered by a court in determining whether to recognize a tort duty or a new private right of action"). The language of these statutes is devoid of any such indication. See *Parsons v. Colt's Manufacturing Co., LLC*, 2020 WL 1821306 at *4 (D. Nev. 2020) ("there is a presumption that a violation of a penal statute is not negligent per se absent legislative intent").

Plaintiffs purport to distinguish these cases by arguing that they involve "private defendants that relied directly on criminal or regulatory statutes (without provisions authorizing private enforcement) to seek civil damages." P. Mem. at 60 n.30. But none of the statutes on which

---

attempt to distinguish *Barclay*. Taken together *Valentine*, *Warr*, *Kiriakos* and *Barclay* and the cases on which these decisions rely all point to the same conclusion: there is no duty to protect the general public from injuries caused by crimes or torts committed by third parties over whom the defendant has no control. Plaintiffs do not deny that their claims all fail under that test.

Plaintiffs rely, including the straw purchase provisions of MD Code, Public Safety, § 5-134, contain any "provisions authorizing private enforcement." The State may, of course, pursue other enforcement mechanisms, such as criminal prosecution or license revocation by the Maryland State Police. See Engage Mem. at 23-24. Those remedies are expressly authorized by law. But Plaintiffs have not cited any case (and we have found none) that holds that the State has some sort of special privilege, not available to private plaintiffs, to enforce a criminal statute through *common law tort damages actions*. Any such rule would effectively allow the State to ignore the enforcement mechanisms that the Legislature has enacted. [7]

Plaintiffs rely on *Whitaker v. Prince George's Co*., 307 Md. 368 (1986) (P. Mem. at 58, 61), but that decision is inapposite for multiple reasons. There, the Court of Appeals ruled that "where the acts complained of constitute a breach of the criminal law, courts of equity will not for that reason alone take jurisdiction to enjoin the further continuance or prevention of threatened illegal acts." 307 Md. at 377. The Court admitted of an exception where "the enforcement of the criminal law is merely incidental to the general relief sought" but the Court explained that exception applies only where a prospective injunction would afford "a more complete remedy." *Id.* at 378. Here, there is nothing "incidental" about Plaintiffs' reliance on criminal statutes; Plaintiffs are attempting to use common law tort actions to enforce federal and State criminal law. Full stop. *Whitaker* further limits the exception to prospective injunctions and *only then* if such prospective relief is necessary to obtain "complete relief." Nothing in that holding permits suits at common law, much

[7] The 2024 Maryland General Assembly enacted Chapter 714, 2024 Md. Sess. Laws, codified at Md Code, Courts and Judicial Proceedings §3-2301, *et seq*., to impose a new obligations on firearm industry members and to create a newly defined cause of action for a "public nuisance." That enactment became effective on June 1, 2024, and is not retroactive. *Id.* § 4.

less recovery for costs of abatement, compensatory damages, punitive and exemplary damages, and attorneys' fees, all of which Plaintiffs seek here. Complaint, Prayer for Relief at 39-40.

Plaintiffs also have not shown that the statutory remedies specified by the General Assembly, Engage Mem. at 23-24, would not afford a "complete remedy" without an injunction of the type permitted by *Whitaker.* 307 Md. at 378. Plaintiffs accuse Defendants of allowing straw purchases, but such sales are obviously impossible if the dealer's license has been revoked by the Maryland State Police through proceedings conducted in accordance with statutorily prescribed legal standards. See MD Code, Public Safety, § 5-114(b)(2)(viii) (requiring a "knowing[] or willful[] participat[ion] in a straw purchase"). A revocation under these provisions is thus a completely effective remedy for any prospective harm. The General Assembly has assigned such proceedings to the "Secretary" of the Maryland State Police exclusively. *Id*. Any revocation decision of the Secretary is subject to the dealer's right to a hearing and further review under MD Code, Public Safety, § 5-115, and to judicial review under MD Code, Public Safety, § 5-116. Nothing in *Whitaker* permits Plaintiffs to sidestep these statutory requirements through suits under common law. The general rule barring injunctive suits identified in *Whitaker* thus applies.

Indeed, license revocation proceeding is the exclusive civil remedy for the type of misconduct alleged here because it is the only civil remedy the legislature has expressly created. See *Zappone v. Liberty Life Ins. Co*., 349 Md. 45, 60-63 (1998). At the very least, the administrative remedy is presumptively the "primary" remedy and that means that "a claimant cannot maintain the alternative judicial action without first invoking and exhausting the administrative remedy." *Id.* at 63. This Court should so hold. See also *Ross v. Twenty-Four/Seven Bail Bonds, LLC*, 471 F.Supp.3d 673, 680-81 (D.Md. 2020) (collecting Maryland case law and holding that exhaustion

of the administrative remedy was required where "all of Plaintiffs' claims . . . are wholly dependent" on the claimed statutory violation).

Plaintiffs wrongly assert that the General Assembly has imposed some sort of duty "to 'screen' purchasers by ensuring" that sales are not to straw purchasers. P. Mem. at 44 n.24. The statute on which plaintiffs rely, MD Code, Public Safety, § 5-134(b)(13), provides that a dealer may not sell, rent, loan, or transfer a regulated firearm to person whom a dealer "knows or has reasonable cause to believe is a participant in a straw purchaser." No duty to "ensure" anything is imposed. To the contrary, Maryland imposes a criminal penalty for a violation of Section 5-134(b)(13) only if the dealer "knowingly participates" in such sales. MD Code, Public Safety, § 5-144(a)(1) (providing that a dealer "may not (1) knowingly participate in the illegal sale, rental, transfer, purchase, possession, or receipt of a regulated firearm in violation of this subtitle"). (Emphasis added). As noted above, a similar *mens rea* standard is employed for civil dealer license revocations for straw purchases. MD Code, Public Safety, § 5-114(b)(2)(viii).

The Maryland Court of Appeals has ruled that this "knowingly participate" requirement of Section 5-144 means that the dealer 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*." *Chow v. State*, 393 Md. 431, 471 (2006). (Emphasis added). No such facts are alleged here. Plaintiffs simply ignore the standards imposed by Section 5-144 and Section 5-114(b)(2)(viii). They likewise ignore the holding in *Chow*. In short, dealers are not guarantors that their customers will not engage in trafficking or straw purchases or otherwise misuse firearms. They owe no such duty to the general public to prevent misuse of firearms by third parties, as *Valentine*, *Warr* and *Kiriakos* all make clear. Plaintiffs' claims all fail on this ground alone.

Similarly, Plaintiffs cite no decision of any court that has held that that Congress intended to create a private civil cause of action by enacting the federal criminal statutes on which Plaintiffs rely. See *J.R. v. Walgreens Boots All., Inc*., 2021 WL 4859603, at *7 (4th Cir. Oct. 19, 2021) (rejecting a private right of action for HIPAA violations), citing *Payne v. Taslimi*, 998 F.3d 648, 660 (4th Cir. 2021). The case law is clear that no such right of action is created in the absence of "unambiguous" Congressional intent to confer such rights for a "class of beneficiaries." *Health and Hospital Corp. of Marion Co. v. Talevski*, 599 U.S. 166, 183 (2023) ("Courts must employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs.") (citation omitted). See also *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); *Burger*, 2024 WL 473735 at *8; *Alaji Salahuddin v. Alaji,* 232 F.3d 305, 311-12 (2d Cir. 2000). These criminal firearms statutes thus fail to establish a duty enforceable in a civil action like this case.

B. D.C. Law Is Inapplicable

Plaintiffs argue that D.C. law applies to the District of Columbia's substantive claims (P. Mem. at 43-44), but that argument is wrong several times over. First, as discussed above, Maryland law controls Plaintiffs' common law claims under choice-of-law principles. Second, the "rules of statutory construction . . . forbid giving the state's laws extraterritorial reach." *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484, 489 (4th Cir. 2007). See also *Glass v. Kemper Corp*., 133 F.3d 999, 1000 (7th Cir. 1998) (same). Thus "State laws presumptively lack extraterritorial reach." *Huang v. Fluidmesh Networks, LLC*, 2017 WL 3034672 at *4 (N.D. Ill. 2017). See also *Cunningham v. Wallace & Graham*, 2024 WL 4826798 at *3 (M.D.N.C. 2024) (noting "a presumption against extra-territorial application of state law"); *Sullivan v. Oracle Corp*.,

51 Cal. 4th 1191, 1206-09 (2011) (upholding California's strong presumption against the extraterritorial application of California law). We have found no case that has sustained the extraterritorial reach of a State's tort law to reach conduct taking place wholly outside its borders. Plaintiffs' argument is thus wholly unsupported.

Indeed, if D.C. had attempted to sue Defendants in the District of Columbia any such suit would have failed under the Due Process Clause of the Fourteenth Amendment. The Supreme Court made clear in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano Co.,* 480 U.S. 102, 110 (1987), that a State must show a "substantial connection" with the forum state and "[t]he 'substantial connection,' . . . must come about by an action of the defendant purposefully directed toward the forum State." "A defendant's 'awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.'" *B.D. by and through Myer v. Samsung SDI Co., Ltd.,* 91 F.4th 856, 861 (7th Cir. 2024), quoting *Asahi Metal*, 480 U.S. at 112. Mere "foreseeability" that product might end up in the District is thus insufficient. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The District may not evade that constitutional limitation on its limited Home Rule powers[8] by attempting to regulate local sales taking place wholly inside Maryland between residents of Maryland.[9]

Third and not surprisingly, such extraterritorial reach of District law is also flatly banned by the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The rule, as stated in *Healy v. Beer Inst.,*

[8] See District of Columbia Self–Government and Governmental Reorganization Act, Pub. L. 93–198, 87 Stat. 774 (1973).

[9] Engage is a Maryland corporation, https://bit.ly/3ZVJp4A. Minor was a resident of Maryland on every sale (Complaint ¶ 3) and all the alleged sales by Defendants to Minor took

Inc., 491 U.S. 324, 336 (1989), is that a State may not enact or enforce legislation that "directly controls commerce occurring wholly outside the boundaries of a State." Thus "State laws that regulate extraterritorially are per se invalid under the dormant commerce doctrine, 'regardless of whether the statute's extraterritorial reach was intended by the legislature.'" *Flynt v. Shimazu*, 466 F.Supp.3d 1102 (E.D. Calif. 2020), quoting *Healy*, 491 U.S. at 336. Or, as stated in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), "[w]hen a state statute directly regulates or discriminates against interstate commerce ... [courts] generally [strike] down the statute without further inquiry." See also *Baldwin v. G. A. F. Seelig, Inc*., 294 U.S. 511 (1935); *MaryCLE, LLC v. First Choice Internet, Inc*., 166 Md.App. 481, 517 (2006) ("a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature"). D.C. may not regulate Engage's sales to Maryland residents under the Commerce Clause. Full stop.

The recent decision in *NSSF v. Bonta*, 718 F.Supp.3d 1244, 1256 (S.D. Calif. 2024), is instructive. There the court applied the Commerce Clause to strike down a California law regulating "abnormally dangerous firearms" on grounds that the statute at issue "reaches beyond California's borders and directly regulates out-of-state commercial transactions." In so holding, the court found it insufficient as a matter of law that the statute required a likelihood of an "unreasonable risk of harm . . . in California or "it was reasonably foreseeable that" that the firearm would be "possessed in California," (*id*.), holding that a State may not "'*directly* regulate[] out-of-

place in Maryland. *Id.* at ¶ 62. Indeed, federal law expressly forbids federal firearms licensees such as Engage from directly selling handguns to out-of-State residents. See 18 U.S.C. § 922(a)(5).

state transactions by those with no connection to the State.'" *Id.* at n.1, quoting *National Pork Producers Council v. Ross*, 598 U.S. 356, 76 n.1 (2023) (emphasis the court's). So too here.

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 to the general public. 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. Bd of Co. 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. Plaintiffs assert that this principle applies only where there is alleged "failure to act." P. Mem. at 32. Yet, that supposed distinction is both senseless and of no aid to Plaintiffs here. Plaintiffs allege that Defendants are "require[d] to abate" the public nuisances that Plaintiffs assert were caused by sales to Minor. Complaint, Prayer for Relief A. Plaintiffs thus seek damages from Plaintiffs for the costs that Plaintiffs allegedly incurred in abating the alleged harms. *Id.,* ¶¶ 91, 94, Prayer for Relief B. If there is no duty to abate then, under *Fowler*, Plaintiffs cannot recover on any such claims.

More fundamentally, Plaintiffs' argument is wrong because the very first element of a public nuisance is that there be "an unreasonable interference with a right common to the general public." *Tadjer v. Montgomery Co.*, 300 Md. 539, 552 (1984), quoting Restatement (Second) of Torts § 821B. That element of a public nuisance tort claim depends on "a breach of a duty" to the public. *Tadjer*, 300 Md. at 554. See also *BG&E v. Lane*, 338 Md. 34, 43 (1995) (the plaintiff must allege and prove that "the defendant was under a duty to protect the plaintiff from injury"); C*itizens for Odor Nuisance Abatement v. City of San Diego*, 8 Cal.App.5th 350, 360, 213 Cal.Rptr.3d 538,

546 n.9 (Court of Appeal, Fourth Dist. 2017). Here, *Valentine*, *Warr*, *Kiriakos* and *Barclay* all make clear that Engage owed no duty to the public to prevent or abate the misuse of firearms by third parties over whom Engage has no control.

Tadjer holds that there can be no public nuisance unless the conduct was "already proscribed by statute or regulation" or there is a "significant interference" with a public right. *Tadjier*, 300 Md. at 552, quoting Restatement (Second) of Torts § 821B. But, as pointed out above, none of the statutes on which Plaintiffs rely create any duty to the public for harm inflicted by third parties. And if there is no "duty" imposed by statute or the common law to protect the plaintiff from the alleged harm, then there is no corresponding "right" enforceable at tort. See Engage Mem. at 18. Indeed, Plaintiffs' theory of public nuisance liability falls apart where, as here, all the sales to Minor were expressly approved by the Maryland State Police as lawful. Those sales could not have been consummated if the State Police had disapproved the sales. If Plaintiffs are correct, then the State Police, no less than the dealers, created a public nuisance by approving those sales. Plaintiffs do not dispute that the lawful sale of firearms is constitutionally protected by the Second Amendment and thus cannot possibly constitute a breach of a duty and a consequent "significant interference with the public health."[10]

Plaintiffs also ignore the principle that the intervening acts of third parties in the alleged harm effectively bars recovery for a public nuisance. The test is stated in *City of Chicago v. Beretta U.S.A. Corp*., 213 Ill.2d 351, 821 N.E.2d 1099 (2004), where the Illinois Supreme Court held that

[10] *Stottlemyer v. Crampton,* 235 Md. 138 (1964), cited by Plaintiffs (P. Mem.at 12), is inapposite. The Court held in that case that alleged nuisance (driving cattle along a public road) was both legal and not a "nuisance." The case did not involve conduct of third parties. Thus, the Court had no occasion to address public nuisance law in cases, like this case, where the alleged harm to the public is due to conduct of third parties over whom the defendant had no control.

the public nuisance claims of the City of Chicago failed because "in light of public policy, we find no duty owed to the public at large." 821 N.E.2d 1126. The court explained that "[t]he negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others will be an unprecedented expansion of the law of public nuisance." *Id.* The court then went on to hold that "'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.'" *Id*. at 1136.[11] See also *SUEZ Water New York Inc. v. E.I. du Pont de Nemours and Co*., 578 F.Supp.3d 511, 546 (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); *State v. Lead Industries, Ass'n, Inc*., 951 A.2d 428, 449 (R.I. S.Ct. 2008) ("liability in a public nuisance action 'turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise'"), quoting *City of Manchester v. National Gypsum Co.*, 637 F.Supp. 646, 656 (D.R.I. 1986).

These principles cannot be sensibly limited to manufacturers, as Plaintiffs argue. P. Mem. at 44. The public policy considerations are the same, *viz.,* it would be "an unprecedented expansion of the law of public nuisance" to impose such liability "upon commercial enterprises" for harm

[11] Plaintiffs purport to distinguish *City of Chicago* on the ground that the sales by the defendants in that case "complied with all applicable laws." (P. Mem. at 31). That "distinction" fails. First, Engage's sales were likewise all perfectly compliant with State and federal law. Plaintiffs assume their conclusion in asserting to the contrary. As explained above, Plaintiffs' allegations of illegality fail to state a claim on which relief can be granted. Second, and in any event, like the City of Chicago, Plaintiffs here are attempting to impose civil liability for the harm caused by the criminal conduct of third parties over whom Defendants have no control. The imposition of such liability for third party conduct turns on the presence of a duty and proximate causation, matters addressed in *City of Chicago*, not merely the legality of the sale.

inflicted by criminal misuse of a firearm by third parties who are not under the control of the defendant. *City of Chicago*, 821 N.E.2d 1126. As the Rhode Island Supreme Court has held, "control at the time the damage occurs is critical in public nuisance cases, especially because the principal remedy for the harm caused by the nuisance is abatement." *Lead Industries*, 951 A.2d at 449. Plaintiffs do not dispute that the harm to the public alleged in this case is due to misuse or inchoate "threat" of misuse of firearms by third parties over whom Defendants had (or have) no control. Nothing in the Complaint alleges that Engage had any control over Minor, or over Willis or over any other individual who may have acquired firearms from Willis or Minor. Engage thus had no duty to prevent or abate any nuisances caused by these third parties. Again, none of the statutes on which Plaintiffs rely create any duty to prevent harm inflicted by third parties and none of these statutes may be enforced civilly.

V. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

A. The *Mens Rea* Elements of PLCAA'S Predicate Exception

1. The predicate exception is controlling

Plaintiffs do not dispute that all their claims rely on the assertation that Defendants "knowingly violated a State or Federal statute applicable to the sale or marketing of the product" and are thus subject to the conditions placed on such allegations by the "predicate exception" set out in 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs nonetheless argue that their claims for "negligent entrustment" and "negligence per se" may proceed "independently" under Section 7903(5)(A)(ii), (P. Mem. at 14), asserting "none of the Defendants disputes that the District's negligence per se claim qualifies for this PLCAA exception." P. Mem. at 19. That assertion is wrong twice over. In its opening memorandum, Engage expressly argued that where, as here, the negligence per se claim and "negligent entrustment" claim are expressly based on an alleged violation of "a State or Federal statute applicable to the sale or marketing of the product," then Plaintiffs may precede, if

at all, **only** under the predicate exception of 15 U.S.C. § 7903(5)(A)(iii). Engage Mem. at 48. Plaintiffs tacitly acknowledge that point, stating that "**Plaintiffs' Entire Case May Proceed Under PLCAA's Predicate Exception.**" P. Mem. at 15 (bold emphasis by Plaintiffs).

Plaintiffs cannot escape the limitations imposed by the predicate exception by labeling. Engage Mem. at 48. As Plaintiffs admit, both the "negligent entrustment" and "negligence per se" claims advanced **in this case** are dependent on the alleged violations of "a State or federal statute applicable to the sale or marketing of the product" and thus are subject to the limits imposed by the predicate exception imposed *for those types of claims*. As the First Circuit explained in *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc*., 491 F.4th 511, 527 (1st Cir. 2024), *cert. granted on other grounds*, 2024 WL 4394115 (Oct. 4, 2024), "the predicate exception encompasses common law claims in addition to statutory claims, as long as there is a predicate statutory violation that proximately causes the harm." The court then ruled that "our reading of the predicate exception *does not allow any claim at all to proceed* merely because it is alleged in the same case as an unrelated statutory violation." (Emphasis added).

Indeed, Plaintiffs undoubtedly have made all their claims dependent on violations of "a State or federal statute applicable to the sale or marketing of the product" because violations of other types of statutes or the common law for harms arising "from the criminal or unlawful misuse of a qualified product by the person or a third party" would be totally banned by the PLCAA's preemption of a "qualified civil liability action" under 15 U.S.C. § 7902, as that term is defined by 15 U.S.C. § 7903(5)(A). Such preemption includes (but is not limited to) suits for "public nuisance" based on the common law or a general "public nuisance" statute. See, e.g., *Ileto v. Glock, Inc.,* 565 F.3d 1126, 1135 (9th Cir. 2009), *cert. denied*, 560 U.S. 924 (2010) ("Congress clearly intended to preempt common law claims, such as general tort theories of liability"); *City of New*

York v. Beretta U.S.A. Corp., 524 F.3d 384, 404 (2008); *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 202 A.3d 262, 300-01 (2019) ("PLCAA generally affords manufacturers and sellers of firearms immunity from civil liability arising from the criminal or unlawful use of their products by third parties.").

Pointing to the PLCAA exception for negligent entrustment or negligence per se found in 15 U.S.C. § 7903(5)(A)(ii), Plaintiffs argue that their claims for negligence per se and negligent entrustment may proceed "independently" of the predicate exception. P. Mem. at 19, citing *Delana v. CED Sales, Inc*., 486 S.W.3d 316 (Mo. 2016). But that exception and *Delana* do not help Plaintiffs here. In *Delana*, the plaintiff's claim for negligent entrustment turned on the sale of a firearm to a mentally ill daughter of parents who had expressly directed the vendor not to sell any firearm to the daughter, who, after acquiring the firearm, killed one of the parents. See 486 S.W.3d at 319. Those are the kinds of claims encompassed by Section 7903(5)(A)(ii), where the claim is not based on any alleged violation of "a State or Federal statute applicable to the sale or marketing of the product" within the meaning of the predicate exception. The exception for negligence per se and negligent entrustment has no application to cases, like this case, where, as Plaintiffs concede, **all** their claims are based on alleged violations of "a State or Federal statute applicable to the sale or marketing of the product." In short, if the claim is based on a violation of "a State or Federal statute applicable to the sale or marketing of the product" then that claim can proceed ***only*** under the conditions imposed by Congress in enacting the predicate exception of 15 U.S.C. § 7903(5)(A)(iii).

2. Congress imposed a strict "knowingly" requirement

In order to satisfy the predicate exception Plaintiffs must allege sufficient facts that would permit a jury to find that plaintiffs "**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). Yet, in disregard of that federal standard, Plaintiffs argue that they "are not required to show that Defendants knew their conduct was unlawful for the predicate exception to apply." P. Mem. at 17. Plaintiffs thus contend that all they need to show is that Defendants "had 'reasonable cause to believe'" that Minor was a straw purchaser, relying on the standard set forth in MD Code, Public Safety, § 5-134(b). P. Mem. at 17. Indeed, Plaintiffs argue that federal law is not applicable at all, asserting that "it makes no sense" that federal law would control over a local law regulating firearms. P. Mem. at 18.

Plaintiffs could hardly be more wrong. The predicate exception is part of an express federal preemption statute (PLCAA) and that federal statute specifically requires a "knowing" violation. The elements of that a "knowing" requirement are governed by federal law because, under the Supremacy Clause, a federal preemption statute supersedes and controls over any standard imposed by State law.[12] When a federal statute "contains an express preemption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-63 (2000), quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). See, e.g., *Bettis v. Oscar Mayer Foods Corp*., 878 F.2d 192 n.8 (7th Cir. 1989) ("*Of course*, in determining the validity of the federal defense, the court, federal

[12] The Supremacy Clause provides that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

or state, is obliged to apply federal law"), citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 398–99 (1987). (Emphasis added).

As explained in Engage's opening memorandum (at 32-33), under federal law a violation cannot be "knowing" unless "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). See also *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"). As noted above, the Maryland Supreme Court interprets the "knowing" requirement precisely the same way. See *Chow*, 393 Md. at 471 (construing a "knowingly" requirement of MD Code, Public Safety, § 5-144(a) 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"). As thus construed, Plaintiffs claims fail because nothing in the Complaint alleges facts that Defendants actually "knew" that the sales to Minor were illegal. Stated differently, for Engage to "know" that Minor was facilitating straw purchases or engaged in trafficking, Engage would have to "know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 606 (1994). Plaintiffs must thus allege and prove that Engage actually "knew" that Minor, **in fact,** was reselling the firearms illegally. No such facts are alleged.

No doubt realizing that they cannot meet this "knowingly" standard, Plaintiffs obfuscate, asserting that they need only allege that "Defendants knew or at least had reasonable cause to believe that Mr. Minor was purchasing handguns for other people, and not for his own use or for a personal collection." P. Mem. at 17-18, citing Complaint ¶¶ 55, 63, 68, 74. But those referenced portions of the Complaint do not pass muster under a "knowing" standard. Paragraph 55 alleges

that Engage engaged in "willful blindness" and had "reasonable cause." Paragraph 63 alleges that Engage had "clear indicators" of straw purchases and that the purchases were "suspicious." Paragraphs 68 and 74 allege that the "volume, pattern and type" of the purchases were "an obvious sign" or a "obvious warning sign." Apart from being wholly conclusory (and thus entitled to no weight), none of those allegations are sufficient to show, if true, that Engage actually "knew" that it was selling firearms to Minor "in a manner that is illegal and not a legal sale" (*Chow*) or "knew" that the sale was "unauthorized by statute or regulations" (*Liparota*), or "knew" for a "fact" (*Staples*) that Minor was actually engaged in trafficking or straw purchases.

To the contrary, Plaintiffs do not dispute that Engage "knew" to a certainty that Minor was a Designated Collector who had been investigated by the Maryland State Police in order to obtain that status and was thus entitled to purchase multiple firearms at a time under State law.[13] Engage also "knew" that Minor had a Handgun Qualification License and thus "knew" that Minor had been fingerprinted and thoroughly investigated by the Maryland State Police, as required by State law. Engage also "knew" that every sale to Minor over a six-month period, including multiple sales, had been approved by the Maryland State Police and by an FBI NICS check. **All** the information alleged by Plaintiffs in the Complaint appears on the Form 77Rs and the federal forms

[13] Plaintiffs flail at a straw man, arguing that Designated Collector status "does not confer a license to participate in straw purchases or gun trafficking." P. Mem. at 13. Of course not; Engage does not assert otherwise. The "Designated Collector" status is relevant, however, on whether Engage can be charged with "knowing" that Minor engaged in such illegal activities within the meaning of the predicate exception of PLCAA. Plaintiffs likewise misfire in asserting that the guns Minor purchased were not "collectibles." *Id.* Nothing in State law imposes any such vague requirement. Designated Collectors are perfectly free to "collect" modern firearms of the same type and caliber and many do. Plaintiffs' self-serving view of what is "collectible" is irrelevant. Likewise irrelevant are the justifications given by Minor to the ATF after his arrest, (P. Mem. at 14); such statements have no bearing on whether Engage knew that Minor was trafficking.

dutifully executed and submitted by Engage. Plaintiffs have not alleged a single instance where Engage failed to make any required filing or report. See Engage Mem. at 35, 39-40.

On these facts, no jury could reasonably find that Engage actually "knew" that the sales to Minor were illegal. The Maryland State Police had all the facts alleged in the Complaint, but it never instigated any investigation, a point that Plaintiffs do not dispute. If, as Plaintiffs insist, Engage must have "known" from these alleged facts that Minor was purchasing illegally, then the Maryland State Police likewise must have "known" as well and yet the State Police did nothing. That the State Police did not even investigate these sales is telling. While Plaintiffs understandably dislike the "knowingly" standard of proof, that standard was imposed by Congress precisely because State and local governmental plaintiffs in the past have engaged in abusive lawsuits, precisely like this case. See Engage Mem. at 26. Congress was determined to put a stop to such suits and, under the Supremacy Clause, Plaintiffs are not free to evade the demanding standard chosen by Congress to further that end.[14]

3. Section 7903(5)(A)(iii)(I)

Plaintiffs fail to allege sufficient facts under Section 7903(5)(A)(iii)(I), *viz.,* that Engage "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 and abetted" or "conspired" with another 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

[14] In a footnote, Plaintiffs oddly argue that a "willful" violation in a civil context can include both knowing and reckless conduct. P. Mem. at 17 n.12. That point hardly helps Plaintiffs here because Congress expressly imposed a "knowingly" standard of proof for civil liability, not a "willful" standard. Plaintiffs do not dispute that a "knowingly" standard is more demanding than a "willful" standard.

product."[15] As explained, Engage can be charged with making a "knowingly false entry" of a record **only** if Engage actually "knew" for a "fact" (*Staples*) that Minor was a straw purchaser or engaged in trafficking. Plaintiffs tacitly acknowledge that they cannot make that showing by disavowing any need to do so. P. Mem. at 17. The Court should take that disavowal as a concession.

Plaintiffs assert (P. Mem. at 12, 16 n.11) that Engage aided and abetted or conspired with Minor to make "false or fictitious" statements within the meaning of Section 7903(5)(A)(iii)(I). But Plaintiffs have made no attempt to address, much less apply *Twitter, Inc. v. Taamneh,* 598 U.S. 471 (2023), which sets forth the controlling federal standard for "aiding and abetting" civil liability. Nor do Plaintiffs even cite, much less address *Beck v. Prupis*, 529 U.S. 494, 502-04 (2000), or the D.C. Circuit decision in in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), cases which provide "the proper legal framework for civil aiding and abetting and conspiracy liability." *Twitter*, 598 U.S. at 485. See Engage Mem. at 39-43. By expressly referring to "aiding and abetting" and "conspiracy" elements, Congress incorporated the federal standards of proof set forth in *Twitter*, *Beck* and *Halberstam* into the predicate exception, 15 U.S.C. § 7903(5)(A)(iii)(I),(II). Plaintiffs certainly 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

[15] 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)

foreseeable consequence or collateral effect"). The Complaint simply fails to meet the standards established by this controlling precedent. See Engage Mem. at 41-43.

By ignoring all this case law, including the decision of the Maryland Court of Appeals in *Chow*, Plaintiffs effectively concede that they have not and cannot meet these standards. The rule is well established that a failure to respond to legal arguments may be treated as a concession. *See In re Bestwall LLC*, 47 F.4th 233, 245 (3d Cir. 2022) ("Claimants do not dispute that those two elements have been satisfied, so we are left to consider only the arguments made by the Trusts."); *Griswold v. Coventry First LLC*, 762 F.3d 264, 274 n.8 (3d Cir. 2014) (noting that failure to brief an issue on appeal and a related concession at oral argument constitutes a forfeiture of the argument); *United States v. Osbosrne*, 807 Fed.Appx. 511, 526 (6th Cir. 2020) ("We may treat [a party's] failure to respond to the Government's assertions as a concession of their validity."), citing *Hussam F. v. Sessions*, 897 F.3d 707, 720 (6th Cir. 2018). See also *In re Incident Aboard D/B Ocean King*, 758 F.2d 1063, 1071 n.9 (5th Cir. 1985) ("[w]e treat the failure to respond to [opposing party's] arguments as a concession"). *Accord* Schlieper v. DNR, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994); *Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174.

4. Section 7903(5)(A)(iii)(II)

Plaintiffs have also failed to allege sufficient facts under the standards imposed by Section 7903(5)(A)(iii)(II). To proceed under that part of the predicate exception, Plaintiffs must allege facts that show that Engage "knowingly" (1) "aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product," and (2) "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."[16] That limiting language makes clear that all firearms disqualifications imposed by State law (including MD Code, Public Safety, 5-134) and all **other** provisions of federal law are not covered by this exception. Consequently, any alleged violations for straw purchases or trafficking are preempted by the broad preemption otherwise imposed by 15 U.S.C. § 7902.

Plaintiffs argue that "Plaintiffs allege that Defendants aided and abetted Mr. Minor's violation" because Minor allegedly supplied firearms to Willis, who is alleged to be a disqualified felon under subsection (g). P. Mem. at 16. But in their opposition to Defendants' motion to stay discovery, Plaintiffs made **exactly** the opposite assertion, stating that "Plaintiffs here have not brought claims that depend upon aiding-and-abetting liability." Plaintiffs' Response in Opposition at 2 n.2 (filed Nov. 20, 2024). The Plaintiffs thus argued that this Court need not wait for the Supreme Court to decide *Smith & Wesson Brands v. Estados Unidos Mexicanos,* No. 23-1141*, cert. granted,* --- S.Ct. ----, 2024 WL 4394115 (Oct. 4, 2024), where such "aiding and abetting" claims are presented. *Id*.

Plaintiffs may not expressly disavow a claim in one filing only to expressly reassert the **same** claim in a latter filing in the same case. Such "unseemly" tactics "'play fast and loose' with the judicial system" and should not be countenanced. *WinMark Ltd. Partnership v. Miles &*

[16] That subsection provides an exception for a "knowing" violation of "a State or Federal statute applicable to the sale or marketing of the product" in:

> (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)(iii)(II).

Stockbridge, 345 Md. 614, 620, 622 (1997), quoting *Kramer v. Globe Brewing Co*., 175 Md. 461, 469 (1938). Having been successful in their opposition to Defendants' Motion to Stay Discovery, Plaintiffs are judicially estopped from taking the opposite position in their Opposition to Defendants' Motions to Dismiss. *Montgomery County Public Schools v. Donlon*, 233 Md. App. 646, 674 (2017) (citations omitted). Alternatively, and at a minimum, this Court should revisit the denial of Defendants' joint motion and stay all further discovery until *Smith & Wesson* is decided by the Supreme Court.

In any event, Plaintiffs have not alleged facts that show that Engage "knowingly" "aided and abetted" or "knowingly" "conspired" with Minor with respect to the provision of firearms to a person disqualified under "subsection (g) or (n) of section 922 of Title 18." As noted above, Plaintiffs have not even cited (much less applied) *Twitter*, *Halberstam*, *Beck*, *Root*, or other cases that set forth the controlling federal standard for aiding or abetting or civil conspiracy. Plaintiffs thus tacitly concede that they cannot meet those standards. Plaintiffs never allege that Engage ever had any dealings with or even knew about Willis, who is the *only* felon alleged to have received firearms from Minor.

The most Plaintiffs can assert is that disqualified felons *can be* straw purchasers and thus Engage should be charged with the alleged straw purchases that Minor allegedly made on behalf of Willis. (P. Mem. at 16 n.11). But that is conjecture run wild and is hardly sufficient to satisfy Section 7903(5)(A)(iii)(II)'s *mens rea* requirement that the seller "knowingly" "aided, abetted, or conspired" with Minor "knowing, or having reasonable cause to believe" that the actual buyer was a prohibited person under "subsection (g) or (n)." As the Supreme Court squarely held in *Abramski v. United States*, 573 U.S. 169, 176 (2014), the actual buyer under the federal straw purchaser statute, 18 U.S.C. § 922(a)(6), need not be a prohibited person *of any kind*, much less prohibited

under "subsections (g) or (n)." A straw purchaser under Section 922(a)(6) is obviously not covered by subsections (g) or (n) and thus cannot fall under Section 7903(5)(A)(iii)(II). Plaintiffs do not dispute that none of the trafficking crimes with which Minor was charged are covered by subsection (g) or (n). See Engage Mem. at 14. Indeed, while Plaintiffs vaguely allege that Willis "has rightfully been held accountable by the criminal justice system" (Complaint ¶ 12), they carefully omit that Willis was charged and convicted of a conspiracy with Minor in the "Illegal Interstate Transfer of Firearms, in violation of 18 U.S.C. § 922(a)(5)," not with illegal possession under sections (g) or (n) and not with being the straw purchaser.[17] Plaintiffs' reliance on Section 7903(5)(A)(iii)(II) thus fails in every respect.

Plaintiffs assert that while Minor was never charged or prosecuted with straw purchasing under Section 922(a)(6) the absence of such charges "does not mean that he did not actually violate it." P. Mem. at 16 n.10. But the U.S. Department of Justice chose not to charge Minor with straw purchasing and it is fair to conclude that decision was for good reasons. Prosecutors are not in the least bit shy about bringing appropriate charges for gun crimes. See U.S. Attorney Manual, § 9-27.300 ("the prosecutor must select the most appropriate charges" and that "considerable care is required to ensure selection of the proper charge or charges"). Prosecutors typically "throw the book" at such defendants in the charging documents. The Minor criminal complaint documents

[17] Neither Willis nor Minor was indicted for straw purchasing or charged with a conspiracy to violate the straw purchasing statute, 18 U.S.C. § 922(a)(6). See Indictment, *United States v. Minor and Willis,* No. 22-cr-00401-APM, ECF # 32 (filed Dec. 13, 2022). Willis pled guilty to a conspiracy "to engage in the Illegal Interstate Transfer of Firearms, in violation of 18 U.S.C. § 922(a)(5)." *Id.,* ECF # 67 at 2 (filed July 26, 2023). Judgment against Willis on that charge was entered Oct. 16, 2023. *Id.,* ECF # 80. Minor has entered into an agreement for a guilty plea for "Engaging in the Business of Dealing in Firearms Without a License, in violation of 18 U.S.C. § 922(a)(l)(A)." *Id*. ECF # 50 at 1 (filed March 16, 2023). As of this writing, Minor has not been sentenced and remains free on "supervised release." *Id*., Minute Entry dated Oct. 11, 2024.

are thus quite comprehensive in specifying a long list of charged firearms offenses that federal prosecutors thought "provable or appropriate." *Id*. Straw purchasing was not among these charges, as Plaintiffs now concede. See P. Mem. at 16 n.10.

At a minimum, that absence of straw purchasing charges means that Plaintiffs erred in alleging that Minor "was rightfully prosecuted, convicted, and punished for his role in illegal straw purchasing." Complaint ¶ 12. That conceded error is as revealing as it is difficult to excuse.[18] That Minor was a straw purchaser is **central** to the Plaintiffs' theory of the case (the allegation appears throughout the Complaint and in Plaintiffs' opposition to the Motions to Dismiss). Engage can hardly be reasonably faulted for any failure to identify Minor as a straw purchaser where federal prosecutors did not charge Minor (or Willis) with that crime, even **after** a full federal investigation. That no such straw purchasing charge was ever filed is thus informative as to whether any jury could reasonably find that Engage acted in "knowing" violation of federal and state law. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) ("Jurors routinely apply their common sense").

Plaintiffs do not dispute that Minor was a Designated Collector who was vetted by the State Police and who was, as a result, statutorily entitled to purchase as many handguns as he liked under MD Code, Public Safety, § 5-129, notwithstanding the one-handgun-per-30-days limit otherwise imposed by MD Code, Public Safety, § 5-128, for purchases by persons who are not "Designated Collectors." Minor also possessed a Handgun Qualification License and thus was fingerprinted and vetted by the Maryland State Police for that reason. Plaintiffs do not dispute that the Maryland

[18] Plaintiffs' Complaint relies heavily on the charging documents under which Minor was prosecuted, see, e.g., Complaint ¶¶ 55 n.34, 61 n.39, 66 n.43, 72 n.48, and yet no such straw purchasing charges appear anywhere in those documents, a fact that should have been obvious. At a minimum, the allegation that Minor "was rightfully prosecuted, convicted, and punished for his role in illegal straw purchasing" and any allegation based on that false assertion should be struck from the Complaint.

State Police approved *each and every sale* to Minor over the six-month period in which Engage made sales to Minor, including approving the very same multiple sales on which Plaintiffs so heavily rely here. See Complaint ¶¶ 62, 67, 73. Nor do Plaintiffs dispute that these State-imposed measures are designed to prevent straw purchases and are in addition to and on top of the federal NICS background check, required by federal law, 18 U.S.C. § 922(t).

In such circumstances, purchases by such a Designated Collector cannot establish that Engage knew or had reasonable cause to believe that the "actual buyer" was a disqualified person "under subsections (g) or (n)." Designated Collectors legally buy and sell firearms in bulk to and from each other and dealers all the time, a point that Maryland State Police regulations recognize in expressly authorizing such bulk transactions by Designated Collectors. See COMAR § 29.03.01.25. Plaintiffs ignore that regulation. Plaintiffs have not pointed to a single other instance where a Designated Collector turned out to be a trafficker, *much less* a single instance where such a Collector was acting as a straw purchaser, *much less* was a straw purchaser for a person disqualified "under subsections (g) or (n)." Prescience is not required by the law. *Lashley v. Dawson*, 162 Md. 549, 160 A. 738, 744 (1932).

B. The Federal Law of Proximate Causation Is Controlling

As noted, in addition to imposing a "knowing violation" requirement, the predicate exception, Section 7903(5)(A)(iii), 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 Section 7903(5)(A)(iii), including

subsections (I) and (II). The Complaint fails under this proximate causation prong of the predicate exception.

Remarkably, Plaintiffs assert (P. Mem. at 18) that federal law does not control the scope of the predicate exception's "proximate causation" requirement, contending that "it makes no sense" for federal law to apply to "state common law." P. Mem. 18. But that is obviously wrong. As explained, under the Supremacy Clause, PLCAA's proximate causation requirement is imposed as part of a federal statute that **expressly preempts** State law. See 15 U.S.C. §§ 7902(a), 7903. That makes the proximate cause inquiry a federal question, controlled by federal law. Full stop. See *Coventry Health Care of Missouri, Inc. v. Nevils*, 581 U.S. 87, 95-96 (2017) (looking to "Congress' use" of express preemption language); *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'"), quoting *CSX Transp*, 507 U.S. at 664. Plaintiffs' refusal to acknowledge that self-evident point is effectively a concession that Plaintiffs' claims fail under the federal standard for proximate causation. Indeed, Plaintiffs ignore **all** the proximate causation Supreme Court case law on which Engage relies.[19] See Engage Mem. at 43-47. That case law is binding on this Court and requires dismissal here under PLCAA.

The controlling test for proximate causation under federal law is set forth in *Holmes v. Securities Investor Prot. Corp*., 503 U.S. 258, 268–69 (1992), which held that "a plaintiff who

[19] Plaintiffs do not dispute that the proximate causation legal standard is squarely presented for decision in Smith & *Wesson Brands v. Estados Unidos Mexicanos*, No. 23-1141, *cert. granted,* --- S.Ct. ----, 2024 WL 4394115 (Oct. 4, 2024), currently scheduled for oral argument on March 4, 2025. https://bit.ly/3ZVcRYm. See Engage Mem. at 30 n.21. Tellingly, Plaintiffs ignore the First Circuit's proximate causation rulings on review in that case undoubtedly because Plaintiffs realize that the Supreme Court likely granted certiorari to reverse.

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." The Supreme Court repeated the same point in *Lexmark Intern., Inc. v. Static Control Components, Inc*., 572 U.S. 118, 132 (2014), where the Court held 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). Here, Plaintiffs' alleged injuries to the public safety all are "derived" from the actions of third parties, *viz*., Willis and other persons who allegedly received firearms from Minor or Willis to harm public safety. The alleged costs that Plaintiffs incurred are likewise "purely derivative of misfortunes visited upon a third person by the defendant's acts." Under *Holmes* and *Lexmark,* these claims are barred by PLCAA. It is that simple.

Plaintiffs argue that "Plaintiffs' injuries 'were the *ordinary* and *foreseeable*' result of Defendants' actions." P. Mem. at 30 (emphasis Plaintiffs'). Yet, the Supreme Court made clear in *Bank of America Corp. v. City of Miami*, 581 U.S 189, 202 (2017), that "foreseeability alone does not ensure the close connection that proximate cause requires." 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). 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"); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536 (1983) ("the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing'"). The "central question" under these precedents is "whether the alleged violation led *directly* to the plaintiff's injuries." *Anza,* 547 U.S. 451, 461 (2006). (Emphasis added). An injury is "indirect" and thus not proximately caused, when "other, independent, factors" punctuate

the chain, *Holmes*, 503 U.S. at 268-69, such as when there are "separate actions carried out by separate parties." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 11 (2010). There is no proximate causation where "the conduct directly causing the harm was distinct from the conduct giving rise to the [claim]." *Id.* See also *Assoc. Gen*., 459 U.S. at 541 n.46. Plaintiffs ignore all this controlling Supreme Court precedent.

Plaintiffs likewise ignore the Third Circuit's application of these federal principles in *City of Philadelphia v. Beretta, U.S.A. Corp*., 277 F.3d 415, 423 (3d Cir. 2002), where 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. See Engage Mem. at 44-47. The court applied six factors to hold that the alleged harms were "too remote" under *Holmes* and its progeny. 277 F.3d at 423. All those factors make clear that Plaintiffs' alleged harms are too remote to qualify. Engage Mem. at 45-46. In failing to respond, Plaintiffs have conceded the point. Plaintiffs also concede (by ignoring) the holding by the Illinois Supreme Court in *City of Chicago*, that "'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.'" 821 N.E. at 1136, quoting *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc*., 309 A.D.2d 91, 103, 761 N.Y.S.2d 192, 201 (2003).

C. Maryland Law Of Proximate Causation

While Maryland law is not controlling or even applicable, Plaintiffs have likewise failed to satisfy the proximate causation requirement imposed by Maryland case law. Maryland courts have adopted the Restatement (Second) of Torts, § 442 (1965), which embodies 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. *Pittway Corp. v. Collins,* 409 Md. 218, 248-49

(2009). See Engage Mem. at 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." See *Pittway,* 409 Md. at 248-49. Plaintiffs do not dispute that **all** these factors support dismissal here. See Engage Mem. at 49-52.

Plaintiffs allow that they "do not allege that Defendants are the proximate cause of all gun-related crime in the Washington, D.C. metropolitan area," but seek recovery only for "harm caused by the numerous firearms Defendants sold to straw purchasers." P. Mem. at 21-22. Given the scope of the "harm" to the public claimed by Plaintiffs, including the alleged lack of educational achievements of students in Wards 7 and 8 of the District of Columbia (Complaint ¶ 32), and the "healthcare, emergency medical services, social services, law enforcement, incarceration, lost tax revenues, and lost communal benefits of the Plaintiffs' limited and diverted resources" (*id*. ¶ 95), even this supposedly more limited harm would be wildly speculative and impossible to measure.

A jury is not permitted to engage in "rank speculation" in assessing proximate causation. *Mallard v. Earl*, 106 Md.App. 449, 465-66 (1995). See also *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) ("[P]roximate cause issues can be decided as a matter of law . . . when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law."). Similarly, "recovery of damages based on future consequences of an injury may be had only if such consequences are reasonably probable or reasonably certain." *Pierce v. Johns–Manville Sales*

Corp., 296 Md. 656, 666 (1983) (citations omitted). There can be no recovery where, as here, the alleged injury is "too tenuous and conjectural for a valid causal finding." *Reading Industries, Inc. v. Kennecott Copper Corp.,* 631 F.2d 10, 14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981). See also *Argus, Inc. v. Eastman Kodak Co.*, 612 F.Supp. 904, 918 (S.D.N.Y. 1985) (denial of relief appropriate "where the causal connection between the violation and injury is uncertain, remote, or speculative"), citing *Brunswick Corp. v. Pueblo Bowl-O-Mat Corp*., 429 U.S. 477, 489 (1977).

Plaintiffs assert that the general rule that criminal acts are superseding does not apply where "'negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime' and 'the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.'" P. Mem. at 23, quoting selectively *Troxel v. Iguana Cantina, LLC*, 201 Md. 476, 510-11 (2011). That cited passage from *Troxel* quotes and relies on Restatement (Second) of Torts § 448 (1965). *Id.* As explained in Comment (c) to Section 448, this exception to the general rule is only applicable where the actor knew or should have realized that his "conduct would create *a temptation which would be likely to lead to* [the crime's] commission." (Emphasis added). Comment (a) thus states that "[u]nder the rule stated in this Section, the actor *is not responsible* for the harm thus inflicted *merely because the situation which his negligence has created has afforded an opportunity or temptation for its infliction*." (Emphasis added).[20] The allegedly negligent sale of firearms to Minor, without more, is thus insufficient as a matter of law under Section 448 and *Troxel*. That is all that Plaintiffs allege here.

[20] Restatement (Second) of Torts, § 448 (1965), provides in full that "[t]he act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his

Section 448 instead requires that a seller must also "know" or "should have realized the likelihood" that he was "creating" a "temptation" which was "likely to lead" the person to commit a crime. Plaintiffs allege no such facts. Plaintiffs argue strenuously that Minor was acting as a straw purchaser for Willis at the time of the sales. See, e.g., P. Mem. at 11 ("Mr. Willis used Mr. Minor, the straw purchaser, to complete the applications to purchase regulated firearms, pay the firearm dealer for the firearms, take possession of the regulated firearms, and subsequently transfer them."). But the elements of that alleged conduct obviously require a mental state and an intention *predating* the sales. See *Abramski*, 573 U.S. at 186-87. The sales thus could not have "created" any "temptation."

More generally, it is simply not "likely" that *any* dealer would "know" that it was "likely" that a thoroughly vetted Designated Collector with a Handgun Qualification License would be "tempted" to engage in felonious trafficking or straw purchases, **especially** where, as here, each and every sale in the six-month period in which the sales took place was independently approved by the Maryland State Police. Plaintiffs have not alleged that any Designated Collectors (other than Minor) have **ever** committed trafficking or straw purchasing offenses. As far as we are aware, Minor is the first. *Troxel* holds that "injuries that result from a highly extraordinary event will not be deemed foreseeable; in such a case, a court may declare the intervening force to be a superseding cause of the plaintiff's injuries." 201 Md.App. at 505, citing Restatement (Second) of Torts § 435(2) cmt. c (1965). By any measure, that Minor committed trafficking crimes was "highly

---

negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."

extraordinary." Any other conclusion would effectively and impermissibly impose strict liability. See *City of Chicago*, 821 N.E.2d at 1137 (rejecting strict liability).

Finally, the whole purpose of Section 5-129 is to permit bulk sales to a narrow class of purchasers who have been subject to prior vetting by the Maryland State Police. That vetting is designed to ensure that a person accorded the status of Designated Collector is **not** "likely" to commit straw purchasing or other crimes by buying firearms in bulk. Dealers are entitled to rely on that vetting process as well as their own experiences with Designated Collectors. Indeed, under Plaintiffs' flawed reading of Section 448, the *State Police* could be liable for harms flowing from crimes committed by Minor and Willis because the State Police "create[d] the temptation" to engage in trafficking by conferring Designated Collector status on Minor. That status allowed Minor to make bulk purchases under MD Code, Public Safety, § 5-129. Applying Section 448 to "Designated Collectors" sales would effectively repeal the Maryland Designated Collector statute, MD Code, Public Safety, § 5-129, as no dealer would ever be safe from suits for making otherwise lawful bulk sales to a Designated Collector.

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

A. Negligent Entrustment under the PLCAA

Plaintiffs do not dispute that while Maryland recognizes a cause of action for "negligent entrustment," any such claim is necessarily limited by PLCAA's definition of "negligent entrustment." P. Mem. at 19. Plaintiffs likewise do not dispute that 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 unreasonable risk of physical injury." (Emphasis added).

Plaintiffs first argue that trafficking or straw purchasing is a type of "use" covered by this language (P. Mem. at 19) but that strains "use" beyond the breaking point. See Engage Mem. at 54. The rule is well-established that courts construe statutory terms in "the specific context in which that language is used, and [in] the broader statutory structure." *Merit Management Group, LP v. FTI Consulting, Inc*., 583 U.S. 366, 378 (2018). Maryland law is in accord. See, e.g., *Board of Ed. of Harford Co. v. Sanders*, 250 Md.App. 85, 95 (2021) ("We must 'construe the statute as a whole and interpret each of its provisions in the context of an entire statutory scheme.'") (citation omitted). As thus construed, the language of this PLCAA exception does not allow the imposition of liability for conduct by persons **other than** by the person to whom the product was supplied by the defendant.

Nor does the PLCAA exception encompass conduct in which the immediate recipient is not alleged to have engaged in any conduct that did not involve the actual use or threatened use of such chattel to inflict the requisite "physical injury." See *Minnesota v. Fleet Farm LLC*, 679 F.Supp.3d 825, 842 (D. Minn. 2023) ("the present case does not meet the definition of negligent entrustment under the PLCAA because the straw purchasers did not use the firearms themselves, but rather transferred them to others who then caused the injuries"); *Soto v. Bushmaster Firearms Int'l, LLC*, 2016 WL 8115354, at *14–*15 (Conn. Super. Ct. Oct. 14, 2016) ("Congress contemplated negligent entrustment [under PLCAA] to include only direct entrustment to a shooter"). Plaintiffs have not cited a single case in which negligent entrustment liability under PLCAA or otherwise was imposed for physical injuries that were not inflicted by the person to

whom the chattel was directly entrusted, much less a case where the alleged harms were not physical injuries at all but was the type of inchoate harm to the general public alleged here.

Plaintiffs do not dispute that they seek recovery for harms to the general public attributable to "gun violence" or the "threat" of gun violence, See, e.g., Complaint ¶¶ 1, 12, 29, 31, 32, 33 35, 38, 39, 60, 69, 89, 93, 95. Again, those harms even include the alleged lack of academic achievement "in English language arts and math" by students in Wards 7 and 8 of the District of Columbia. *Id.* ¶ 32. All such alleged harm was inflicted by third parties and include harms that are not "physical injuries." See, e.g., Complaint ¶ 10 (seeking recovery for "repercussions through the Washington, D.C. metropolitan area"), ¶ 95 (seeking recovery for "societal harms"), ¶ 104 (seeking recovery for the "millions of dollars annually to respond to and investigate incidents of gun violence"). As *Valentine*, *Warr*, *Kiriakos* and *Barclay* hold, there is no duty to the general public to prevent these sorts of harms committed by third parties over whom Defendants have no control. That is no less true under the narrow negligent entrustment exception to the preemption imposed by PLCAA.

Plaintiffs' reliance (P. Mem. at 19) on *Voisine v. United States,* 579 U.S. 686, 692-95 (2016), is misplaced. There, the relevant statutory "context" was 18 U.S.C. § 922(g)(9), and the Court construed the statutory term "use . . . of physical force" in a "misdemeanor crime of domestic violence" to include "reckless assaults." To be sure, use of a product to commit a physical "assault" would also likely constitute conduct "involving unreasonable risk of physical injury" under the PLCAA exception for negligent entrustment. But in this case, Minor is not alleged to have used the handguns he purchased to commit an "assault" of *any* kind. Thus, the result and reasoning in *Voisine* does nothing to support the theory advanced by Plaintiffs here.

Even more misplaced is Plaintiffs' reliance (P. Mem. at 20) on *Smith v. United States*, 508 U.S. 223, 228-29 (1993), where the Supreme Court held that an exchange of a gun for narcotics constitutes a "use" of firearm "during and in relation to" a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(1). The Court explained that "[l]anguage, of course, cannot be interpreted apart from context," and reasoned that in the context of Section 924(c)(1), "it is both reasonable and normal to say that petitioner 'used' his MAC–10 [a firearm] in his drug trafficking offense by trading it for cocaine." 508 U.S. at 229-30. Justice Blackmun joined in the majority's opinion and concurred on grounds that Section 924(c)(1) "requires more than mere furtherance or facilitation of a crime of violence or drug-trafficking crime." *Smith*, 508 U.S. at 241 (Blackmun, J., concurring).

In this case, Plaintiffs' claim is essentially that the sales to Minor "facilitated" crimes committed by others, precisely the "use" rejected as insufficient by Justice Blackmun's understanding of the *Smith* majority's opinion in which he joined.[21] Plaintiffs have not pointed to a single case in which a negligent entrustment claim was sustained where the entrusted person did not actually use or threaten to use the entrusted chattel to inflict physical injury. Indeed, the **only** person that the Complaint alleges engaged in any "use" 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. Plaintiffs do not dispute Engage cannot be charged with that sale or with that behavior.

[21] Three members of the Court (Justice Scalia, Stevens and Souter) dissented on grounds that "we give nontechnical words and phrases their ordinary meaning," and asserted that "[t]he Court does not appear to grasp the distinction between how a word can be used and how it *ordinarily is* used." *Smith*, 508 U.S. at 242 (Scalia, J., dissenting). The majority did not dispute the dissent's point that "nontechnical words and phrases" should be given their "ordinary meaning." *Id.,* citing *Chapman v. United States*, 500 U.S. 453, 462 (1991); *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Minor v. Mechanics Bank of Alexandria*, 1 Pet. 46, 64 (1828).

The best Plaintiffs can come up with is that that nine firearms have been allegedly "recovered" by the police, P. Mem. at 32, including a mere two firearms that were allegedly discovered "in the possession" of persons who are not alleged to have inflicted or threatened any physical injury using the firearm. Complaint ¶ 102. Under federal law, it is "not reasonable and normal," *Smith*, 508 U.S. at 229-30, to construe "use" for conduct "involving unreasonable risk of physical injury" to include mere "*possession*" by *third parties*, especially where no physical injury is alleged to have occurred because of such possession.

Plaintiffs' assertion that the mere sale of a firearm to Minor creates such a risk of physical injury is just wrong. Again, Plaintiffs' theory of harm in this case depends on the *subsequent* and future *criminal* "use" of firearms independently performed by *third parties* who are multiple steps removed from any sale to Minor. As explained above, under *Valentine*, *Warr*, *Kiriakos* and *Barclay,* Engage does not have any duty to protect the general public from harm inflicted by third parties over whom Engage had no control. Plaintiffs also do not dispute that any harm from negligent entrustment must be proximately caused by the defendant's entrustment. See, e.g., *Comstock Ins. Co. v. Thomas A. Hanson & Associates, Inc*., 77 Md.App. 431, 441 (1988); *Tri-State Truck & Equipment Co., Inc. v. Stauffer*, 24 Md.App. 221, 241 (1975). As noted above, criminal acts of third parties are intervening causes. That all the alleged harm in this case is due to the alleged criminal acts of third parties over whom Engage has no control readily distinguishes this case from authorities cited by Plaintiffs. P. Mem. at 48-50. In each of those cases, the allegation was that the defendant negligently entrusted the product to the person who directly inflicted harm on himself or another person.

But even assuming *arguendo* that Minor's alleged trafficking could somehow be deemed to be a "use of product" in an "unreasonable risk of physical injury to the person or others,"

Plaintiffs do not dispute that Engage cannot be liable under this PLCAA exception unless it "knows, or reasonably should know" that sales to Minor would create this risk of harm. For all the reasons set forth above, Plaintiffs have failed to allege facts sufficient to meet this required showing. As explained, there is no factual basis alleged in the Complaint that would support a finding that Engage knew or reasonably should have known that a "Designated Collector" with a Handgun Qualification License would resell the firearms *illegally*, much less sell them illegally to violent persons or persons who were disqualified from possessing firearms. Designated Collectors are free to purchase firearms for the purpose of trading or selling such firearms to acquire other firearms for their collections. Such secondary transactions go through the same process as transactions taking place at dealers and are perfectly legal. See MD Code, Public Safety, § 5-124.

In none of the cases on which Plaintiffs rely was the alleged harm inflicted by the criminal acts of third parties. In *Young v. U-Haul Co. of D.C.,* 11 A.3d 247 (D.C. 2011), on which Plaintiffs heavily rely (P. Mem. at 8, 48, 50), the court *rejected* a negligent entrustment claim that the defendant rental company should have checked the validity of the driver's license of a renter who used the rented vehicle to inflict physical harm on the plaintiff. The court held that the claim failed because plaintiff had failed "to put forth any evidence that [rental company] knew or should have known that [the renter's] license had been suspended." The court did not impose any duty to investigate the license status. Misuse by the renter was certainly foreseeable, but that was not sufficient to impose liability.

In *Phelan v. City of Mount Rainier*, 805 A.2d 930, 942 (D.C. 2002), on which Plaintiffs also repeatedly rely (P. Mem. at 8, 50), the defendant municipality negligently entrusted its police officer with a firearm which the officer thereafter misused in private dispute to inflict physical harm on the plaintiff. The court held that the municipality was on notice that the officer was a bad

actor because of a "combination" of factors, including the "filing a false report and destruction of government property," the "many disciplinary problems as a police officer prior to the shooting" and "the level of force he used during a detention." Recovery against a municipality on those facts may be reasonably be based on a breach of the municipality's breach of its specific legal duty to train and supervise its own police force. See *Jones v. State*, 425 Md. 1, 23-26 (2012). No such facts or duty are presented here. Dealers do not train or supervise "Designated Collectors." That status is conferred by the Maryland State Police. Again, all the harm alleged here is the result of the actions of third parties over whom Engage has no control.

The alleged "obvious warning signs" on which Plaintiffs insistently reply (P. Mem. at 48-49) are simply not sufficient to put Engage on notice that Minor was in fact engaged in trafficking or straw purchases where Minor was a thoroughly vetted "Designated Collector," where Minor had been fingerprinted and investigated in order to obtain a Handgun Qualification License and where the State Police expressly approved each of those sales of different firearms over the six-month period alleged by Plaintiffs. Likewise insufficient is Plaintiffs' *ipse dixit* insistence that the handguns purchased by Minor were "non-collectible firearms." P. Mem. at 49. Plaintiffs are hardly authorities on what constitutes "collectable firearms." But that aside, nothing in State law imposes any such vague requirement. Designated Collectors under MD Code, Public Safety, § 5-129, are perfectly free to "collect" modern firearms, including the same basic kind of firearms and the same calibers, and many do.

Indeed, the vague and non-statutory standards on which Plaintiffs rely (Complaint ¶¶ 11, 61-63, 96) and would impose on dealers, would be impossible to administer or police in a non-arbitrary manner and would thus raise serious due process issues. See *Galloway v. State*, 365 Md. 599, 614 (2001) (holding that under Article 24 of the Maryland Declaration of Rights, a statute

must provide "legally fixed standards and adequate guidelines for police ... and others whose obligation it is to enforce, apply, and administer [it]" and "must eschew arbitrary enforcement in addition to being intelligible to the reasonable person"). See also *Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 362-63 (2020) (collecting cases applying Article 24 to civil cases). The Due Process Clause of the Fourteenth Amendment imposes the same restriction for the same reasons. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis").

B. Negligent Entrustment Under Maryland Law

While federal law is controlling under PLCAA, the same result obtains under the Maryland law of "negligent entrustment" as set forth in *Broadwater v. Dorsey*, 344 Md. 548, 558 (1997). See Engage Mem. at 56-57.[22] *Broadwater* squarely holds 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 product at the time the alleged use caused harm to the plaintiff. 344 Md. at 561 (citation omitted). (Emphasis added). *Broadwater* ruled that "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.* Plaintiffs do not dispute that Defendants had no "right to control" the actions of

[22] Plaintiffs do not dispute that the PLCAA does not create a cause of action, 15 U.S.C. § 7903(5)(C), and thus a negligent entrustment claim is *also* subject to any restrictions imposed by State law. See Engage Mem. at 52-53.

Minor, Willis or any other person who may have come to possess the firearms that Minor illegally trafficked and thus do not dispute that the rule established in *Broadwater* requires dismissal of their "negligent entrustment" claims.

Plaintiffs nonetheless argue that this Court should refuse to apply *Broadwater* because the case supposedly "has been repeatedly undermined by courts in Maryland." P. Mem. at 52. But the only Maryland case Plaintiffs point to is an unreported federal district court decision in *Brady v. Walmart*, 2022 WL 2987078 (D.Md. July 28, 2022). P. Mem. at 53. This Court is, of course, bound by *Broadwater*, not by a federal district court decision, especially on questions of state law on which Maryland's highest court is the final authority. See, e.g., *Miller Bldg. Supply, Inc. v. Rosen*, 61 Md.App. 187, 196 n.2 (1985) ("we are constrained by the doctrine of *stare decisis* to base our decision on binding precedents established by the Court of Appeals"). While *Brady* opined that *Broadwater*'s holding that control of the chattel is required at the time of the harm was "inconsistent with the Restatement of Torts § 390, upon which it supposedly relies," *id*., at *11, the court ultimately held that there was no need to rule on the negligent entrustment claim at all. 2022 WL 2987078 at *12. The court's discussion of *Broadwater* is thus *obiter dicta* and entitled to no weight.[23]

In any event, *Brady*'s dicta on Section 390 of the Restatement have no application to Plaintiffs' negligent entrustment claims on the facts and alleged duty presented here. In *Brady*, the

[23] The *Brady* dicta notwithstanding, *Broadwater* is not an outlier in requiring the right to control at the time of the harm. See, e.g., *Mills v. Cont'l Parking Corp.,* 475 P.2d 674, 676 (Nev. 1970) ("Although the negligent entrustment theory may apply where one who has the right to control the [the chattel] permits another to use it in circumstances where he knows or should know that such use may create an unreasonable risk of harm to others, it does not apply *when the right to control is absent*.") (Emphasis added).

plaintiffs alleged that "Defendants [Walmart] affirmatively caused the death" of plaintiffs' decedent (2022 WL 2987078 at *16 n.8), by selling a firearm to the decedent (who was a Walmart employee) even though his co-workers conducting the sale "were aware of his extensive history of mental health difficulties, including depression and suicidal ideation." *Id*. at *1. Relying on Maryland case law regarding the duty to prevent suicide specifically, the district court held that plaintiffs had stated a claim that Walmart had violated that duty because the plaintiffs "have alleged several facts which, if true, are sufficient to establish a reasonable inference that [the] suicide, using the firearm sold to him, was foreseeable." *Id.* at *16.

The facts in *Brady* were that the decedent suffered from a "serious mental health illness" which "was known to his supervisor, as well as multiple other co-workers," that the decedent's "desire to purchase a firearm to harm himself was known to multiple employees" at Walmart, that the "supervisor explicitly stated that he would take action to prohibit firearms from being sold to the decedent" but failed to include the decedent's name of persons who could not purchase firearms, and that the defendants "sold him a firearm which he used to harm himself" even though the decadent was in an "obvious inebriated state." *Brady* thus involved a defined duty specifically applicable to suicides and the negligent entrustment of a firearm to the very person who used that firearm to commit suicide. The alleged facts overwhelmingly showed that the defendant knew or should have known that the decedent would use the entrusted firearm to inflict physical injury on himself. As explained above, no analogous facts or duty are alleged here.

Finally, nothing in Section 390 of the Restatement, even as construed in *Brady*'s dicta, would permit the imposition of liability on the facts alleged in this case. Section 390 provides for liability where "the supplier knows or has reason to know to be likely *because of* his youth, inexperience, or otherwise" that the person to whom the chattel is supplied is "likely" 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." (Emphasis added). That Section thus requires actual knowledge or "reason to know" that "physical harm" was "likely" "because of" factors of which the actor was actually aware. For all the reasons set forth above, otherwise legal sales to a vetted Designated Collector like Minor cannot satisfy that standard. See *City of Chicago*, 821 N.E.2d 1136-37. Plaintiffs' negligent entrustment claims must be dismissed.

CONCLUSION

For all the foregoing reasons and for the reasons set forth in Engage's Motion to Dismiss and supporting Memorandum, the motion to dismiss should be granted.

Respectfully submitted,

/s/ Mark W. Pennak

Mark W. Pennak
9613 Harford Rd., Suite C #1015
Baltimore, MD 21234-2150
Tel: (301) 873-3671
MD Atty No. 1905150005
mpennak@marylandshallissue.org

/s/ Mathew Larosiere

Matthew Larosiere
Law Office of Matthew Larosiere
6964 Houlton Circle
Lake Worth, FL 33467
(Admitted *pro hoc vice*)
Tel: (561) 452-7575
larosieremm@gmail.com

Attorneys for Defendant Engage Armament

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 10th day of January 2025, a copy of the foregoing Reply of Engage Armament was filed electronically and served upon all counsel of record through the MDEC system.

/s/ Mark W. Pennak
Mark W. Pennak, Counsel for Engage Armament