THE STATE OF MARYLAND, et al., ***Plaintiff*,** **v.** **ENGAGE ARMAMENT LLC, et al.,** ***Defendants*.**	**In The Circuit Court For** **Montgomery County, Maryland** **Case No.: C-15-CV-24-004781** **Honorable Ronald B. Rubin**

ATLANTIC GUNS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Dated: January 10, 2025

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INTRODUCTION

Atlantic Guns Inc. has demonstrated that Plaintiffs failed to allege sufficient facts showing that AGI knew or should have known that Demetrius Minor was a straw purchaser. Instead of refuting this clear showing, Plaintiffs double down on their conclusory allegations with conclusory arguments, asserting that Mr. Minor was somehow an "obvious" straw purchaser but admitting that they would need discovery to support their claims. Plaintiffs' excuse that discovery is necessary to support a cause of action contradicts Maryland's pleading requirements and cannot save their action.

The facts as to AGI are clear. AGI sold four handguns to Mr. Minor, a designated collector and prior customer, between July and August 2021, and transferred those handguns to Mr. Minor only after he had completed the ATF Form 4473s and MSP 77Rs and the Maryland State Police had reviewed and allowed the transfers, stating that the sales to Mr. Minor were "Not Disapproved." Months after the sales, Mr. Minor admitted to trafficking firearms and was convicted. Plaintiffs allege no facts showing AGI's knowledge that Mr. Minor was trafficking. Instead, the facts alleged are entirely consistent with multiple handgun purchases by any of Maryland's many Designated Collectors.

Plaintiffs have now unveiled the true purpose of filing this action: to obtain discovery "to uncover more examples of Defendants having ignored red flags associated with [straw purchaser sales]" beyond the alleged firearm transactions with Mr. Minor. *See* Pl. Mem. 1. But they fail to show AGI ignored any red flags. Plaintiffs instead rely on trace data from the ATF, which they cannot because the Tiahrt Amendment forbids Plaintiffs as a matter of law from relying on trace data in a civil action.

Plaintiffs' reply does not overcome their failure to allege facts showing that AGI knew or should have known that Mr. Minor was a straw purchaser. By failing to satisfy this knowledge

requirement, Plaintiffs cannot establish AGI's violation of any statute, breach of any duty, or proximate causation. Unable even to meet the "knew or should have known" standard for their common law tort claims, Plaintiffs cannot establish the higher "knowing" standard to show an exception to the immunity provided to AGI by the Protection of Lawful Commerce in Arms Act.

Plaintiffs' reply also fails to surmount the other legal bars to the Complaint. Plaintiffs' claims are barred by the statute of limitations because the harm alleged occurred more than three years before the filing of the Complaint. The Municipal Cost Doctrine bars their request for reimbursement of governmental costs. Plaintiffs are not permitted to pursue criminal law enforcement through civil litigation. And, finally, the absence of factual allegations supporting their claims, as well as the timing and the costly nature of this lawsuit, demonstrate Plaintiffs' bad faith and requires the dismissal of the Complaint under Maryland's Anti-SLAPP law.

ARGUMENT

I. The Tiahrt Amendment prohibits Plaintiffs' use of trace data; therefore, Plaintiffs' claims must be limited to Mr. Minor's alleged straw purchases.

Plaintiffs spent the bulk of their Complaint focusing on the Defendants' firearm transfers to Mr. Minor, who they conclude was an "obvious" straw purchaser based on indicators that apply to law-abiding customers and straw purchasers alike, and certainly apply to any Designated Collector making multiple purchases. Plaintiffs fail to demonstrate that Mr. Minor was not a Designated Collector or that his purchases were in any way inconsistent with the multiple purchases permitted as a matter of law for Designated Collectors. Instead, they pivot to asserting that their claims are much broader than just Mr. Minor's transactions and they seek to hold AGI responsible for any firearm transfers that it ever made to any straw purchaser.

In their more expansive reading of the Complaint, they argue that AGI generally knew or should have known that it was selling firearms to unidentified straw purchasers. Plaintiffs rely on

the illegally disclosed firearm trace data derived from the Bureau of Alcohol, Tobacco, Firearms and Explosives' Firearm Tracing System ("FTS"), which listed AGI as being part of ATF's "Demand 2" Program. But the Tiahrt Amendment bars Plaintiffs' attempt to use trace data from the ATF in a civil action. *See* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011) (codified at 18 U.S.C. § 923 note).

When a party's claims or defenses implicate a statute, the Court begins its analysis with the plain language of the statutory text, "which must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim or policy of the Legislature in enacting the statute." *Berry v. Queen*, 469 Md. 674, 687 (2020). Plaintiffs' attempt to expand their claims to obtain damages for AGI's sales to individuals other than Mr. Minor based on trace data is barred under the Tiahrt Amendment's plain language.

The Tiahrt Amendment prohibits the disclosure of:

> the contents of the **Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or 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, except to: (1) a Federal, State, local, or tribal law enforcement agency, or a Federal, State, or local prosecutor; or (2) a foreign law enforcement agency solely in connection with or for use in a criminal investigation or prosecution; or (3) a Federal agency for a national security or intelligence purpose; unless such disclosure of such data to any of the entities described in (1), (2) or (3) of this proviso would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1), (2) or (3) shall knowingly and publicly disclose such data; and all such data **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 (including the District of Columbia) or Federal court or in an administrative proceeding** other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives to enforce the provisions of chapter 44 of such title, or a review of such an action or proceeding;

See 125 Stat. 552, 609–610 (emphases added).

The Tiahrt Amendment's use of the words "shall" and "immune" are dispositive. "As this Court and the intermediate appellate court have reiterated on numerous occasions, the word 'shall' indicates the intent that a provision is mandatory." *Perez v. State*, 420 Md. 57, 63 (2011). The plain definition of "immune" connotes "exemption from a duty or liability." IMMUNE, Black's Law Dictionary (12th ed. 2024). Considering the unequivocal language of the statutory mandate, the Tiahrt Amendment is clear—any use of trace data or information required to be kept under 18 U.S.C. § 923(g), which includes importation, production, shipment, receipt, sale, multiple sales reports, etc., cannot be relied on or disclosed in any manner, in any civil action. *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc*., No. CV 21-11269-FDS, 2024 WL 3696388, at *8 (D. Mass. 2024) (relying on the Tiahrt Amendment to reject an expert's reliance on ATF trace data as suffering "from a fundamental legal defect"), 633 F. Supp. 3d 425 (D. Mass. 2022), *rev'd and remanded*, 91 F.4th 511 (1st Cir. 2024), *cert. granted*, No. 23-1141, 2024 WL 4394115 (U.S. Oct. 4, 2024).

The Tiahrt Amendment has been added as a rider to almost all of the consolidated appropriations acts of Congress since (at least) 2003. *See, e.g*., Consolidated Appropriations Act, 2010, Pub. L. No. 111–117, 123 Stat. 3034, 3128–29; Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844, 1903–904; Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809, 2859–60; Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, 118 Stat. 3, 53; Consolidated Appropriations Act, 2003, Pub. L. 108-7, 117 Stat. 11, 473. The purpose of the Tiahrt Amendment was to codify the ATF's litigating position in *City of Chicago v. U.S. Department of Treasury*, 297 F.3d 672 (7th Cir. 2002), where the ATF denied a request to produce trace data in a civil lawsuit against FFLs. In response, congressional members expressed concern that the release of trace data "would not only pose a risk to law enforcement and homeland

security, but also to the privacy of innocent citizens." H.R. Rep. No. 575, 107th Cong., 2d Sess. 20 (2002). In 2004, the Tiahrt Amendment was amended to prohibit the use of trace data in any civil action. There is no legislative history other than a Policy Statement by the Republican Study Committee, dated July 22, 2003, on the FY 2004 CJS Appropriation, which stated that the provision would "prevent the release of confidential law enforcement data such as multiple sales reports and unredacted firearms trace data that had **never** been released until last year after lawyers took ATF to court on a fishing expedition to gather evidence for lawsuits against the gun industry." (emphasis in original). This statement, and indeed the 2004 language itself, appear to be predicated on *N.A.A.C.P. v. Acusport Corp.,* 210 F.R.D. 268 (E.D.N.Y. 2002). In that case, ATF was issued a third-party subpoena for nationwide, unredacted firearms trace data for use in a civil lawsuit similar in theory to the underlying civil lawsuit being pursued in *City of Chicago*. In 2006, the Tiahrt Amendment added the language "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 upon such data, in any civil action pending on or filed after the effective date . . . ." Since the creation of the Tiahrt Amendment, its goal has been to preclude the use of any trace-related data in civil litigation and it has been revised in response to a party's attempt to use the trace data outside of a criminal action, as Plaintiffs attempt to do here.

Relying solely on trace data to contend that ATF identified Defendants as being the top sellers of traced firearms, an identification which is based solely on FTS trace data, *see* Pl. Mem. 1–2, 5, Plaintiffs seek to expand this action well beyond the four AGI firearm transfers to Mr. Minor alleged in the Complaint, admitting they seek to obtain "discovery and collect further evidence of gun recoveries to more specifically tie [AGI] to [Plaintiffs'] specific harms." Pl. Mem. 51. This is exactly the kind of "fishing expedition" the Tiahrt Amendment forbids.

Nor can Plaintiffs evade the Tiahrt Amendment's prohibition by claiming that Maryland identified AGI as a top seller of traced firearms because that information could only be derived from ATF trace data. Pl. Mem. 5, 41. The ATF National Tracing Center (NTC) is the country's only firearm tracing facility. *See* Fact Sheet National Tracing Center, Bureau of Alcohol, Tobacco, Firearms and Explosives (Feb. 2015), https://bit.ly/3sNZBVo. As a result, the NTC is the only governmental agency that can request firearm tracing from FFLs, so all firearm trace requests by law enforcement are first submitted to the NTC. National Tracing Center, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/firearms/national-tracing-center (last visited Jan. 8, 2025). Based on the firearm information provided by the law enforcement agency, NTC notifies the FFL who sold the firearm in question. The FFL then responds to the trace request by providing information regarding the identity of the firearm purchaser. NTC then responds to the requesting law enforcement agency. Without the NTC providing trace data to Maryland law enforcement, which may include the identity of the FFL who sold the firearm originally, Maryland could not conclude that AGI sold any traced firearms. Plaintiffs' reliance on Maryland's identification of AGI as an alleged top seller of traced firearms is barred by the Tiahrt Amendment.

The Tiahrt Amendment expressly precludes the use of trace data in a civil action or disclosure of FFLs associated with the trace data to prevent reputational damage to FFLs because trace data alone can be misleading and highly prejudicial. In a Letter to the ATF, signed by 31 Members of Congress following the ATF's unlawful disclosure of information from FTS, the signatories explain that releasing trace data harms law-abiding FFLs, like AGI, because the information "lacks the context of a trace." *See* **Ex. A.**

Plaintiffs' use of the phrase "crime guns" is misleading. *See, e.g.,* Pl. Mem. 2, 5. Firearms may be traced for many reasons other than having been used in the commission of a crime. For

example, the ATF's 2021 trace data for Maryland includes "carrying concealed weapon" as one of the top categories for firearm traces. The ATF's 2021 trace data "carrying concealed weapon" category is the legal carrying of a firearm by non-prohibited persons. Firearms Trace Data: Maryland – 2021, Bureau of Alcohol, Tobacco, Firearms and Explosives, https://www.atf.gov/resource-center/firearms-trace-data-maryland-2021#criteria (last visited Jan. 8, 2025). The Letter to the ATF explains that there are "many reasons why an FFL may have a high number of traces," including situations where the "FFL has a high volume of sales" "which inherently makes it more likely to have sold firearms [that] show up in traces." **Ex. A**. A civil suit against an FFL simply based on the number of traced firearms, which likely includes traces of legally possessed firearms, is forbidden both by the Tiahrt Amendment and PLCAA. *See infra* pp. 25–28.

Plaintiffs may not use trace data to expand their claims beyond AGI's four firearm transfers to Mr. Minor. Nor may Plaintiffs use trace data to compensate for their failure to allege facts showing that AGI knew or should have known that Mr. Minor was a straw purchaser. Plaintiffs seemingly argue that because ATF identified AGI as the seller of 25 or more traced firearms, it must somehow be presumed to have aided and abetted Mr. Minor in his straw purchasing scheme. *See* Pl. Mem. 10, 41, Such a presumption, or even an inference, is untenable as a matter of law and logic. Under Plaintiffs' reasoning, Maryland State Police could be sued for allowing the sales of traced firearms (especially since Maryland State Police is the only entity that actually knew how many firearms Mr. Minor was purchasing from various FFLs). But more pointedly, the District's Metropolitan Police Department, which acted as the District's FFL in 2020 and 2021, could also

be sued for selling 25 or more traced firearms.[1] Surely if the District's chief law enforcement agency, when standing in the shoes of an FFL, could not prevent its own sale of so-called "crime guns," no adverse inference can arise from any FFL's sale of traced firearms. The Tiahrt Amendment is intended to preclude such consequences and flatly disallows what Plaintiffs attempt here.

Plaintiffs' effort to use trace data in this civil action to bolster their inadequate factual allegations regarding AGI's sales to Mr. Minor and expand their claims for alleged straw purchase sales to those other than Mr. Minor fails as a matter of law because it relies solely on trace data that cannot be used for this purpose.

II. Plaintiffs fail to allege the necessary elements for their tort claims.

A. Plaintiffs do not allege facts demonstrating that AGI knew or should have known that Mr. Minor was a straw purchaser.

The lynchpin to Plaintiffs claims is AGI's knowledge that Mr. Minor was purchasing handguns for someone other than himself. Without such allegations, none of Plaintiffs claims may proceed. Rather than demonstrate how their allegations meet Maryland's pleading standards, Plaintiffs blithely argue that AGI knew or should have known that Mr. Minor was a straw purchaser because he was an "obvious" straw purchaser. This ipse dixit conclusion fails to show, however, how Mr. Minor was an "obvious" straw purchaser other than parroting general indicators of straw purchasing. Plaintiffs never argue that Mr. Minor exhibited those indicators to AGI. The only

[1] *See* Ted Oberg, Rick Yarborough, & Steve Jones, *DC police dealt thousands of guns; ATF demands answers after concerning number found at crime scenes*, News 4 Washington (Apr. 2, 2024), https://www.nbcwashington.com/investigations/dc-police-dealt-thousands-of-guns-atf-demands-answers-after-concerning-number-found-at-crime-scenes/3582252/ (last visited Jan. 7, 2025); "Crime Guns" -- D.C.'s MPD Under an ATF Cloud, NRA-ILA, https://www.nraila.org/articles/20240408/crime-guns-dc-s-mpd-under-an-atf-cloud (last visited Jan. 7, 2025); Mark Chesnut, *So the D.C. Police Department Came Under ATF Scrutiny*, NRA America's 1st Freedom (Apr. 13, 2024), https://www.americas1stfreedom.org/content/so-the-d-c-police-department-came-under-atf-scrutiny/ (last visited Jan. 7, 2025).

indicator they cite that AGI knew—buying multiple handguns in a thirty-day period—is an indicator any Designated Collector would present. On a motion to dismiss, Plaintiffs cannot rely on such conclusory statements and unreasonable inferences. *MCB Woodberry Dev., LLC v. Council of Owners of Millrace Condominium, Inc.*, 253 Md. App. 279, 296 (2021).

Plaintiffs' claims fail because they do not allege any facts that AGI knew or should have known that Mr. Minor was a straw purchaser.

i. Plaintiffs argue that AGI knew Mr. Minor was an "obvious" straw purchaser but fail to offer sufficient supporting facts.

Plaintiffs' causes of action rely on AGI's alleged violation of the straw purchaser statutes, *see, e.g.,* Compl. ¶¶ 85, 99; Pl. Mem. 15–17, but Plaintiffs fail to allege facts showing a violation of those statutes. All the statutes Plaintiffs cite contain one critical element: that AGI may not sell a firearm to a person that it knows or has reasonable cause to believe is a participant in a straw purchase. *See* Md. Code Ann., Pub. Safety § 5-134(b)(13); Md. Code Regs. 29.03.01.08 (codifies Md. Code Ann., Pub. Safety § 5-134(b)(13) prohibition as a regulation); *see also* 27 C.F.R. § 478.128 (prohibiting a person from "knowingly" making a false statement or representation on a firearm license application). Even the criminal aiding and abetting statutes Plaintiffs cite require a showing that the aider had knowledge. *See Rosemond v. United States*, 572 U.S. 65, 77 (2014) ("We have previously found that intent requirement [of aiding and abetting is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense.").

Instead of alleging any facts to support their claims, Plaintiffs ask this Court to conclude that AGI knew or should have known that Mr. Minor was a straw purchaser because his conduct exhibited "obvious warning signs" and "obvious red flags" of a straw purchaser. Pl. Mem. 10–12.

Neither of these assertions supports Plaintiffs' conclusion that AGI knew that Mr. Minor was a straw purchaser.

Plaintiffs repeated and strained assertions that Mr. Minor's conduct exhibited "obvious" warning signs and red flags of a straw purchaser are nothing more than a conclusion without supporting facts. Plaintiffs allege that it was "obvious" to AGI that Mr. Minor—who made four purchases of 9mm handguns of different makes and models in a short period—was engaged in straw purchasing. *See, e.g.,* Compl. ¶ 8; Pl. Mem. 10–11. Plaintiffs then generally describe the red flags of a straw purchaser, to include (1) purchasing a large number of firearms in a short period of time; (2) purchasing the same or similar firearms (especially commonplace or non-collectible firearms) within a short period of time; (3) taking photos or videos in the store; (4) not being able to answer questions as to why the person was purchasing the firearm; and (5) paying in cash. Pl. Mem. 11. But Plaintiffs utterly fail to establish a factual nexus to show how Mr. Minor's conduct would put AGI on notice that Mr. Minor was a straw purchaser.

Plaintiffs attempt to impute knowledge of the thirty other handgun sales by the other Defendants to AGI (*see* Pl. Mem. 3–4), but Plaintiffs do not allege facts showing that AGI had knowledge of any other sales to Mr. Minor beyond those AGI transferred to him. Plaintiffs argue that the four handguns AGI sold to Mr. Minor, a prior customer and Designated Collector, is a large number of handguns purchased in a short period and, therefore, meets the first straw purchaser indicator. *Id.* at 49. Plaintiffs then argue that the handguns AGI sold to Mr. Minor were similar commonplace non-collectible concealed-carry striker-fired 9mm pistols and, therefore, meet the second straw purchaser indicator. *Id.* But most, if not all, Designated Collectors — allowed by law to purchase multiple handguns in a thirty-day period — are likely to meet these criteria. Plaintiffs do not allege that Mr. Minor presented the remaining indicators to AGI.

Plaintiffs' factual allegations as they relate to AGI amount to the following:

- Mr. Minor admitted to firearm trafficking. Compl. ¶ 60.
- AGI transferred four handguns to Mr. Minor between August 4 and September 4, 2021. *Id.* at ¶ 73.
- All of the four handguns AGI transferred to Mr. Minor were 9mm pistols, but none were the same make and model. *Id.*
- Two of the four handguns AGI transferred to Mr. Minor were recovered in the District by MPD, although none were recovered in connection with a crime involving firearm violence. *Id.* at ¶ 75.

None of these facts, separately or collectively, show that AGI had knowledge that Mr. Minor was a straw purchaser before transferring the four firearms to him. On a motion to dismiss "[m]ere conclusory charges that are not factual allegations need not be considered." *MCB Woodberry Dev., LLC,* 253 Md. App. at 296. Conclusory allegations and uncertainties "must be construed against" the Plaintiffs. *Shenker v. Laureate Education, Inc.*, 411 Md. 317, 335 (2009).

Because Plaintiffs have failed to allege any facts showing that AGI knew Mr. Minor was a straw purchaser, their claims must fail.

ii. Plaintiffs' allegations do not create a reasonable inference that AGI knew or should have known that Mr. Minor was a straw purchaser.

Despite failing to allege any facts showing that AGI knew that Mr. Minor was a straw purchaser prior to selling him the four handguns at issue in this case, Plaintiffs appear to make the illogical contention that Mr. Minor's subsequent admission of firearm trafficking somehow gives rise to the inference that AGI was on notice that Mr. Minor was a straw purchaser. Pl. Mem. 11. While Plaintiffs are correct that the Court considers factual allegations in a light most favorable to Plaintiffs on a motion to dismiss, it does not mean that the Court is "obliged to torture the evidence or to attempt the deduction therefrom of illogical and unreasonable inferences." *Isen v. Phoenix Assur. Co. of New York*, 259 Md. 564, 574 (1970). Nor must the Court construe any ambiguity in the Complaint to benefit Plaintiffs. *Manikhi v. Mass Transit Admin*., 360 Md. 333, 345 (2000)

("[A]ny ambiguity or want of certainty in [the] allegations must be construed against the pleader."). But this is what Plaintiffs seek. Without making any logical argument as to why, they ask this Court to impute to AGI Mr. Minor's own knowledge of his intent to traffick AGI's handguns.

Whether Mr. Minor knew that he was a straw purchaser in violation of federal and Maryland law is irrelevant to Plaintiffs' claims against AGI. His knowledge cannot be imputed to AGI. Plaintiffs must allege facts showing that AGI knew Mr. Minor was a straw purchaser. AGI knew at the time of transferring firearms to Mr. Minor that (i) he denied under penalty of perjury being a straw purchaser and (ii) the Maryland State Police allowed the transfers, confirming he was not a prohibited purchaser and, as a Designated Collector, was permitted by law to purchase multiple handguns in a thirty-day period. Plaintiffs do not allege that Mr. Minor informed AGI that he intended to traffick the firearms he purchased from AGI prior to AGI transferring the handguns to him, nor that there were any other indicators on any such intent. AGI reasonably relied on the Maryland State Police to confirm both that Mr. Minor was not prohibited and was a Designated Collector, as well as Mr. Minor's sworn representations in the ATF Form 4473s and MSP 77Rs that he was not purchasing for anyone other than himself. Tellingly, Plaintiffs concede that Mr. Minor "falsely represented to Defendants that he was the 'actual transferee/buyer' of the handguns." Pl. Mem. 11. Mr. Minor's subsequent admission to ATF that he was a straw purchaser cannot establish AGI's knowledge of that fact months earlier or raise an inference that AGI should have known.

Plaintiffs also argue that AGI knew Mr. Minor was a straw purchaser because the "volume, type, and pattern of Mr. Minor's purchases in such a short period of time was an obvious warning sign that he was purchasing these handguns to transfer to others and not for himself." *See* Compl ¶ 95; Pl. Mem. 36. Plaintiffs' inference of knowledge from the sale of four handguns without more

is unreasonable in the case of a Designated Collector who is allowed by statute to make multiple handgun purchases within thirty days (and certainly would be expected to do so, which is why the designation exists). *See* Md. Code Ann., Pub. Safety § 5-129. The attributes that Plaintiffs claim should have alerted AGI to Mr. Minor's straw purchaser status are the same attributes any law-abiding Designated Collector would present—purchasing multiple handguns within a month. Plaintiffs ask this Court to infer that any FFL who sells to a Designated Collector who does nothing more than purchase four handguns over the course of a month is on notice that the Designated Collector is a straw purchaser.[2] This would be an unprecedented inference not reached by any other court cited by Plaintiffs. None of the cases Plaintiffs cite set the bar that low.

Plaintiffs cite *United States v. Carney*, 387 F.3d 436 (6th Cir. 2004), for the proposition that AGI aided and abetted Mr. Minor in his violation of federal firearm laws. But in *Carney*¸ the United States included allegations that the FFL had actual knowledge that straw purchasing was afoot. The court noted that the FFL had completed multiple in-person transactions where the prohibited purchaser entered the store with different women posing as purchasers and "assum[ed] exclusive control over selecting, paying for, and carrying out the firearms [the prohibited purchaser] wanted, and aiding his female confederate in the fraudulent completion of the ATF [4473s]." *Id.* at 450.

Plaintiffs also cite *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1235 (Ind. 2003), to support their position that other courts have allowed similar claims against

[2] Plaintiffs also argue that the AGI should have known that Mr. Minor was a straw purchaser because he stated he was unemployed on his Form 77R. Plaintiffs appear to argue that if a person purchases a firearm and fills out a Form 77R stating he is unemployed, then the FFL cannot sell the firearm because he is a straw purchaser. This argument is spurious. There is no exception to Designator Collector status for the unemployed. Nor is unemployment a recognized indicator of a straw purchaser. Furthermore, MSP obviously was not concerned about Mr. Minor's employment status, as they approved the sales.

FFLs to proceed. But, in *King*, the plaintiffs specifically alleged that the FFLs had knowledge of straw purchasing:

> [the complaint alleges] the police employed a variety of techniques in these operations. In general, an undercover officer first told a dealer's salesperson that he could not lawfully purchase a gun, for example, because he had no license or had been convicted of a felony, and a second undercover officer then made a purchase with the clerk's knowledge that the gun would be given to the first.

Id. at 1228.

Similarly, Plaintiffs cite *Brady v. Walmart Inc.*, No. 8:21-CV-1412-AAQ, 2022 WL 2987078, at *12 (D. Md. July 28, 2022), as an example of a case where the court allowed a civil case to proceed against an FFL. But again, *Brady* included specific allegations that the defendant had knowledge that it should not sell the firearm to the purchaser and ignored that obligation, triggering its civil liability. *Id*. at *9 (plaintiffs alleged that the FFL, through its employees, "were aware that [the purchaser] suffered from a serious mental health illness which would have made his possession of a firearm illegal under Maryland law," referencing conversations between the purchaser and the FFL's employees.). Unlike in *Carney*, *King,* and *Brady*, where facts were alleged showing that the FFL knew that it should not have sold the firearm to the purchaser, Plaintiffs rely instead on vague indicators that would apply to law-abiding purchasers in general and especially to any Designated Collectors like Mr. Minor. The cases Plaintiffs cite only underscore that they have failed to meet the pleading requirements showing that AGI had knowledge that Mr. Minor was a straw purchaser.

B. Plaintiffs fail to allege facts establishing AGI's duty to the world.

i. AGI does not have a duty to protect the general public from the independent criminal acts of third parties without knowledge of the risk.

Plaintiffs have failed to show that AGI owes a duty to the world for the actions of third parties over which it has no control. *See Valentine v. On Target, Inc.*, 353 Md. 544, 546–47 (1999)

(stating 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."). This is especially so where Plaintiffs fail to allege any facts that AGI knew of the risk in providing the items that allegedly caused harm to Plaintiffs or that AGI had control of the third-party tortfeasors' conduct. *Warr v. JMGM Group, LLC*, 433 Md. 170, 183 (2013) (finding that where a third party causes the alleged harm, the court looks to "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."); *Pendleton v. State*, 398 Md. 447, 488 (2007) (finding that absent knowledge of the person's history of conduct and sufficient factual allegations attributing the knowledge to the state, there is no duty giving rise to a cause of action for negligence); *Mackey v. Dorsey*, 104 Md. App. 250, 258 (1995) (the "principal feature of [negligent entrustment] is the [defendant's] knowledge" of the entrustee's propensity to use the instrumentality dangerously).

Plaintiffs do not address *Pendleton* and *Mackey*'s knowledge requirements, nor do they deny that *Valentine* and *Warr* preclude the broad duty Plaintiffs wish to impose here. Instead, Plaintiffs attempt to distinguish *Valentine*, but this attempt only emphasizes the failings in their Complaint. Plaintiffs argue that unlike the defendant in *Valentine* who lacked knowledge that its firearms would be stolen, AGI has been identified as a top source of traced firearms and, therefore, knew that straw purchasers frequented its store. But this attempt fails for two reasons. First, Plaintiffs are barred from using trace data in a civil suit by the Tiahrt Amendment for the reasons demonstrated above. *See supra* pp. 2–8. Second, Plaintiffs' claims against AGI cannot be based on general notice that straw purchasers exist but rather on facts showing that AGI was on specific notice of Mr. Minor's straw purchaser status before selling to him, and Plaintiffs failed to allege sufficient facts.

Plaintiffs argue that *Warr*'s requirement of a special relationship to hold a defendant liable for the acts of a third party should not apply because D.C. law does not require a special relationship to hold AGI liable for third-party criminal conduct. This argument fails first because D.C. law does not apply. Under Maryland choice of 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) (citing Restatement (First) of Conflict of Laws § 377). Plaintiffs allege that they were harmed when AGI sold firearms to Mr. Minor, an "obvious" straw purchaser. *See* Compl. ¶ 14; Pl. Mem. 5. These sales all occurred in Maryland and once AGI sold a firearm to Mr. Minor, the last act to complete the alleged tort occurred in Maryland. *See* Restatement of Conflict of Laws § 380(2) (1934) ("Whereby 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).

But even if this Court applies D.C. law to the District's claims, Plaintiffs must meet the heightened showing of foreseeability to hold AGI liable for the criminal acts of third parties, which includes knowledge of the third-party tortfeasor's character and predilections. *See Miango v. Democratic Republic of the Congo,* 243 F. Supp. 3d 113, 140 (D.D.C. 2017) (recognizing that foreseeability requires more precision" than just establishing "a general possibility" that a crime could occur). To meet this heightened showing, Plaintiffs must establish that AGI had notice that Mr. Minor was a straw purchaser and sold firearms to him anyway. Plaintiffs fail to meet this burden.

ii. Plaintiffs fail to establish duty because they fail to allege facts demonstrating AGI's knowledge at the time of the four firearm transfers to Mr. Minor and, therefore, cannot establish foreseeability.

While Plaintiffs recognize that the foreseeability analysis is essential to determine whether a duty exists, they misconstrue Maryland's factors. Maryland courts consider the following applicable factors in determining whether a duty is owed to a particular plaintiff:

> (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered the injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise reasonable care with resulting liability for breach.

Kennedy Krieger Inst., Inc. v. Partlow, 460 Md. 607, 633 (2018).

Based on these factors, Plaintiffs argue that they established the duty elements for their claims. They are wrong.

a. Plaintiffs have not established the foreseeability of harm, which is necessary to establish AGI's duty to them.

As to the first and fifth factors, Plaintiffs argue that they met the factors by alleging the danger of selling firearms to straw purchasers, which will likely result in those firearms being sold to prohibited purchasers, thereby increasing criminal activity. Plaintiffs then argue that AGI was aware of the danger posed by straw sales yet sold firearms to Mr. Minor, who they claim was an obvious straw purchaser, and that AGI knew or had reason to know was a straw purchaser. But as discussed above, *see supra* pp. 8–14, Plaintiffs' circular logic does not substitute for alleging facts that would create a reasonable inference that AGI knew Mr. Minor was a straw purchaser. Rather, it would apply to any FFL selling a firearm to any customer.

"Foreseeability as a factor in the determination of the existence of a duty involves a prospective consideration of the facts existing at the time of the negligent conduct." *Collins v. Li,*

176 Md. App. 502, 568 (2007), *aff'd sub nom. Pittway Corp. v. Collins*, 409 Md. 218 (2009). Plaintiffs ignore this and instead conclude that AGI knew of Mr. Minor's straw purchaser status because of several innocuous indicators applicable to almost any Designated Collector and the fact that Mr. Minor, months after he purchased firearms from AGI, admitted to the ATF that he trafficked those firearms. *Cf. Minnesota v. Fleet Farm LLC*, 679 F. Supp. 3d 825, 844–45 (D. Minn. 2023) (plaintiffs alleged that the straw purchasers took photos and videos in connection with their firearm purchases and the FFL sold multiple firearms to the same straw purchaser in a single day). Plaintiffs' post hoc logic is contradicted by case law.

b. Plaintiffs' alleged injuries are purely economic losses and they have failed to allege the requisite intimate nexus.

As to the second and third factors, Plaintiffs conclude that AGI caused their alleged harm and that because their alleged harm involves the risk of death and personal injury, a close connection between AGI and Plaintiffs need not be alleged. Pl. Mem. 36–37. But again, Plaintiffs misconstrue the factors and ignore the nature of the injury alleged in the Complaint. First, Plaintiffs have not been damaged by AGI's firearms because they have not been associated with firearms violence. *See infra* pp. 21–24. Second, Plaintiffs' alleged injuries based on firearm violence are purely economic, despite their arguments otherwise.

Plaintiffs allege that they are injured because they have incurred **costs**, which include "the costs of healthcare, emergency medical services, social services, law enforcement, incarceration, lost tax revenues, and lost communal benefits of the Plaintiffs' limited and diverted resources." *See, e.g.,* Compl. ¶ 95; Pl. Mem. 5. Yet Plaintiffs failed to allege facts to establish a close connection between AGI and Plaintiffs' claimed losses. Without this connection, no risk of harm associated with Mr. Minor's use of the handguns was foreseeable. Without the foreseeability of the risk of physical harm at the time of the sales to Mr. Minor and no actual physical harm occurring

as a result of the sales, Plaintiffs have failed to show anything but economic losses. Plaintiffs argue that harm is the risk of death associated with selling firearms to straw purchasers, stating that in assessing harm, the context is "the *nature of the risk of harm* created by the defendant's conduct—not the harm that actually materialized." *Cash & Carry Am., Inc. v. Roof Sols., Inc*., 223 Md. App. 451, 464 (2015). But again, Plaintiffs failed to allege any facts supporting the premise that AGI had reason to believe Mr. Minor was a straw purchaser. Where only economic losses remain, an "intimate nexus between the parties as a condition to the imposition of tort liability" is required. *Id.* And Plaintiffs have failed to make this showing.

c. AGI's conduct is not morally blameworthy.

Factors four and five look to whether society ascribes moral blame to a defendant's conduct, considering in part whether a defendant's conduct is prohibited by law. Plaintiffs fail to meet this burden. Plaintiffs argue that it is morally wrong for AGI to sell firearms to a person it knows or has reason to know is a straw purchaser, citing Md. Code Ann., Pub. Safety §§ 5-123(a), 5-124(a)(1). Plaintiffs short circuit the very statutes and cases they cite, utterly ignoring their knowledge requirement. Plaintiffs have failed to allege facts sufficient to show that AGI sold firearms to a person known or believed to be a straw purchaser. AGI's sales to Mr. Minor are not morally blameworthy.

C. Plaintiffs fail to allege facts showing that AGI's four firearm transfers to Mr. Minor proximately caused Plaintiffs' alleged injuries.

Causation is essential to each of Plaintiffs' claims. *Valentine*, 112 Md. App. at 691 ("to recover in negligence, it is incumbent upon appellant to establish not only the breach of a duty owed by appellee but also that the breach was the proximate cause of his damages"); *Collins v. Tri-State Zoological Park of W. Maryland, Inc.,* 514 F. Supp. 3d 773, 781 (D. Md. 2021) (in assessing a public nuisance claim, the court looks to whether the defendant's conduct imposes or

causes an injury to the public); *Hector v. Bank of New York Mellon*, 473 Md. 535, 559 (2021) (applying proximate cause analysis in negligence per se case). Central to causation is foreseeability. *Li*, 176 Md. App. at 536. And the test for foreseeability "encompasses what a person of ordinary prudence should realize, not what he or she actually did know or realize." *Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship*, 375 Md. 522, 541 (2003).

As shown above in discussing the duty element, Plaintiffs fail to demonstrate foreseeability. Plaintiffs argue only that AGI's actions were a "but for" cause in producing the harm alleged because AGI sold the firearms to Mr. Minor, and he later trafficked them. Plaintiffs argue that they do not need to establish that AGI had control over Mr. Minor or the firearms because his act of trafficking the firearms does not supersede AGI's negligence in selling them to him because without AGI selling them to Mr. Minor, Plaintiffs would not be injured. Plaintiffs have not established that AGI's four firearm sales to Mr. Minor were the legal cause of their alleged injuries, particularly where those injuries stem from the acts of a third party. Plaintiffs argue that AGI's four handgun sales to Mr. Minor contributed at least slightly to Plaintiffs incurring costs in response to the prevalence of illegal firearms, citing *Moore v. Myers*, 161 Md. App. 349, 367 (2005). But *Moore* is distinguishable. *Moore* involved an adult's negligent entrustment of a pit bull to a child and violation of an ordinance requiring the dog to be restrained when outside and under the control of an adult. The *Moore* plaintiff alleged that the adult was aware that the child could not control the pit bull and, as a result of the negligent entrustment, the uncontrolled pit bull chased the victim, causing her to run into the street and be hit by a car. The court found that the driver who negligently struck the victim was not a superseding cause. In deciding not to sever the dog owner's causation, the court relied on the owner's knowledge that the child could not control the dog.

Conversely, in *McGuiness v. Brink's Inc.*, 60 F. Supp. 2d 496 (D. Md. 1999), the court held that an armored car service that issued a firearm to its employee could not have reasonably foreseen the employee's illegal loan of the firearm to a third party and the third party's subsequent criminal use of it to shoot the victim. The service's action was not the proximate cause of the victim's injuries under Maryland law, because the plaintiff failed to allege that the armored car service knew or should have known that the employee would provide the firearm to a third party who engaged in a criminal act.

Here, Plaintiffs' claims are more similar to *McGuiness* than *Moore* because they fail to allege sufficient facts showing that AGI knew or should have known that Mr. Minor was a straw purchaser who would traffick the firearms to prohibited purchasers. Without this showing, Plaintiffs have failed to allege proximate cause. *Kiriakos v. Phillips*, 448 Md. 440, 470 (2016). And, without establishing causation, Plaintiffs' claims must fail. *See Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F. 3d 536, 540 (3d Cir. 2001) (finding no public nuisance because the harms were not sufficiently foreseeable); *Valentine*, 112 Md. App. at 691 ("to recover in negligence, it is incumbent upon appellant to establish not only the breach of a duty owed by appellee but also that the breach was the proximate cause of his damages"); *Tri-State Zoological Park of W. Maryland, Inc.,* 514 F. Supp. 3d at 781 (in assessing a public nuisance claim, the court looks to whether the defendant's conduct imposes or causes an injury to the public).

D. Plaintiffs were not damaged by AGI's firearm transfers to Mr. Minor.

Allegations of facts showing harm are essential for tort claims. *See Valentine*, 112 Md. App. at 691 (requiring an injury to allege negligence); *Tri-State Zoological Park of W. Maryland, Inc.*, 514 F. Supp. 3d at 781 (requiring an injury to assert a public nuisance claim). Plaintiffs allege they were harmed by AGI's violations of federal and state firearm laws when AGI transferred four

firearms to Mr. Minor. Plaintiffs claim that as a result they incurred "the costs of healthcare, emergency medical services, social services, law enforcement, incarceration, lost tax revenues, and lost communal benefits of the Plaintiffs' limited and diverted resources." *See* Compl. ¶¶ 95, 104; Pl. Mem. 5. Yet no facts are alleged demonstrating how either of the two AGI recovered handguns caused any injuries or harm.

i. Maryland does not allege any injuries associated with AGI's sales to Mr. Minor.

Maryland claims it incurred harm related to the cost associated with ameliorating firearm violence caused by straw purchases in its jurisdiction. *Id.* None of AGI's handguns sold to Mr. Minor were recovered in Maryland or alleged to have caused harm here. Maryland nevertheless argues that AGI harmed it because one of the handguns sold to Mr. Minor was recovered in the "possession of a fugitive with an active warrant for assault from Prince George's County." *Id.* at ¶ 102; Pl. Mem. 22. But Maryland fails to point out that the firearm was recovered in D.C. Compl. ¶ 10. Maryland does not show how it incurred any costs from AGI's sales to Mr. Minor from this incident.

Maryland attempts to surmount the failure to allege any harm caused by AGI's sales to Mr. Minor by grouping Maryland's alleged injuries with those of the District. But this tactic is insufficient to establish the essential element of an injury required for Plaintiffs' negligence-based or public nuisance claims. *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 711 (2002) (upholding dismissal of the plaintiff's complaint because they failed to establish specific facts against the defendant and instead grouped "all [defendants] into the same pot."). Maryland cannot bring its present claims without showing that **Maryland** incurred an actual injury caused by AGI's sales to Mr. Minor. Further, the mere possibility that Maryland may incur harm associated with AGI's sales to Mr. Minor does not save Maryland's claims. *Gresham v. Baltimore*

Police Dep't, 261 Md. App. 723, 738 (2024) (dismissing complaint because "theoretical and amorphous possibilities [of a future harm] do not comprise a justiciable controversy").

ii. AGI's sales to Mr. Minor did not harm the District.

Unlike Maryland, the District alleges that two of the firearms AGI sold to Mr. Minor were recovered in its jurisdiction. *See* Compl. ¶ 75. But the District fails to allege how it was harmed by the recovering the two firearms.

The first firearm is alleged to have been recovered along with drugs. The District speculates that the handgun was used in the facilitation of illegal drug distribution within the District. *See, e.g.*, Compl. ¶ 102; Pl. Mem. 22. But such speculation is not a fact and cannot be considered on a motion to dismiss. *Lloyd v. Gen. Motors Corp*., 397 Md. 108, 121 (2007) ("conclusory charges that are not factual allegations may not be considered").

This is further borne out in *Ileto v. Glock Inc.,* 349 F.3d 1191 (9th Cir. 2003), a case Plaintiffs cite. In *Ileto*, the plaintiffs sued various firearm manufacturers and dealers for public nuisance and negligence following a shooting incident perpetrated by an illegal firearm purchaser. The *Ileto* plaintiffs alleged facts showing that the FFLs created an illegal secondary market for firearms by purposefully over-saturating the legal firearm market to take advantage of resales to distributors that they knew or should have known would, in turn, sell to illegal buyers. On appeal, the Ninth Circuit determined that the plaintiffs' claims could proceed against some but not all the defendants based on whether the firearm was actually used in the commission of the shooting. *Id.* at 1213. While the Ninth Circuit noted that all the defendants had sold either firearms or ammunition that ended up in the illegal purchaser's possession and were on him at the time of the shooting, the plaintiffs could not allege any injuries associated with the possession of a firearm not used in this shooting. *Id.*

As in *Ileto,* the District could not be damaged by a handgun found in the presence of drugs because that co-location may be mere happenstance. The same applies to AGI's only other recovered handgun, which was found in possession of a fugitive. Plaintiffs allegedly incurred "costs of healthcare, emergency medical services, social services, law enforcement, incarceration, lost tax revenues, and lost communal benefits of the Plaintiffs' limited and diverted resources." *See, e.g.,* Compl. ¶ 95. Yet, the District does not even allege any nexus showing exactly how the recovered handguns caused it to incur those costs. The District does not allege that it investigated whether the first recovered handgun facilitated illegal drug sales. In any event, any costs associated with the two recovered handguns were costs the District would have incurred in executing its police powers and protecting its citizens **without regard to the presence of a handgun**, and the District does not argue otherwise. This is not like the other recovered handguns cited by Plaintiffs in the Complaint that were alleged to have been used to commit a crime. This Court should apply the same reasoning in *Ileto*, where it found that plaintiffs could not be injured by the presence of a handgun that was not used to commit a crime.

The District fails to allege any facts showing injury or costs associated with the presence of two recovered AGI handguns.

E. Plaintiffs' public nuisance claims also fail.

Plaintiffs argue that their public nuisance claims survive because they have alleged that AGI's sales to straw purchasers were an unreasonable interference with a public right under the Restatement (Second) of Torts § 821B. Section 821B provides that public nuisance can be established by showing (a) a significant interference with public health or safety, or (b) a violation of a statute, or (c) conduct of a continuing nature. Plaintiffs have failed to allege sufficient facts supporting these grounds.

First, Plaintiffs have not alleged sufficient facts showing causation. *See supra* pp. 16–21. Second, Plaintiffs have not alleged sufficient facts showing AGI knew or should have known during or prior to its four firearm sales to Mr. Minor that Mr. Minor was a straw purchaser. *See supra* pp. 8–14. Finally, Plaintiffs' claims against AGI are limited to the four firearms AGI sold to Mr. Minor. Plaintiffs cannot rely on or use information derived from trace data to allege that AGI has engaged in other straw purchase sales. *See supra* pp. 2–8. The conduct is not continuing in nature.

Plaintiffs do not address *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021), which recognized that public nuisance is an inapt vehicle to hold defendants liable for selling goods. Nor do Plaintiffs address *Modisette v. Apple Inc.*, 30 Cal. App. 5th 136, 140 (2018), which held it would be inappropriate to hold a defendant liable for nuisance for the negligent acts of independent third parties.

Plaintiffs' failure to establish the perquisites for nuisance requires the dismissal of Plaintiffs' nuisance claim.

III. PLCAA preemption provides AGI immunity from this lawsuit because Plaintiffs do not allege a knowing violation of state or federal law.

A. The Predicate Exception does not apply.

Plaintiffs do not address and therefore concede that this action is a "qualified civil liability action" as defined by 15 U.S.C. § 7902(b). The rule is well established that a failure to respond to legal arguments may be treated as a concession. *See Okudo v. Fam. Dollar Stores, Inc.,* No. CV SAG-21-991, 2021 WL 2805837, at *3 n. 2 (D. Md. July 6, 2021) ("when a party responds to some but not all arguments raised in a motion to dismiss or motion for summary judgment, such that the court can appropriately infer abandonment of those arguments to which the party fails to respond."); *Grice v. Colvin*, 97 F. Supp. 3d 684, 707 (D. Md. 2015) ("By her failure to respond to

defendant's argument in a motion to dismiss, the plaintiff abandons her claim.") (internal citations omitted).

Further, Plaintiffs do not dispute that their invocation of the predicate exception requires facts showing that AGI "knowingly violated a State or Federal statute applicable to the sale or marketing of the product" as a prerequisite to avoiding PLCAA's immunity protections. 15 U.S.C. § 7903(5)(A)(iii). Yet, Plaintiffs ignore the statute's express requirement that a "knowing" violation occur. Instead, Plaintiffs argue that a lesser showing is sufficient. Pl. Mem. 17. Plaintiffs are wrong. Plaintiffs' reading of the statute renders the word "knowingly" nugatory.

When a federal statute "contains an express pre-emption 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); *see also, 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 or state, is obliged to apply federal law"). Cannons of statutory interpretation forbid courts "to construe a statute so that a word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory." *Mayor & City Council of Baltimore v. Thornton Mellon, LLC*, 478 Md. 396, 431 (2022).

To succeed under the predicate exception, Plaintiffs "not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock, Inc.*, 565 F. 3d 1126, 1132 (9th Cir. 2009) (affirming that the plaintiffs' claims against defendant Glock, Inc. were barred by PLCAA after reviewing PLCAA's text and considering legislative history and testimony). As *Ileto* noted, PLCAA has a preemptive effect and, when considering that effect, the court is "guided by the rule that '[t]he purpose of Congress is the ultimate touchstone.'" *Id.* at

1137–38. PLCAA requires more than Maryland's "should have known standard" to support Plaintiffs' tort claims. It requires a knowing violation. 15 U.S.C. § 7903(5)(A)(iii). As explained by Judge Berzon's concurrence in *Ileto*:

> The PLCAA's predicate exception does not limit its application to suits for "violations of State or Federal statutes that require knowing conduct"; rather, it applies to suits for "knowing[ ] violation[s][of] . . . State or Federal statute[s]." 15 U.S.C. § 7903(5)(A)(iii). The difference is material: The PLCAA's actual knowledge requirement can quite reasonably be read to create a mental-state overlay, a heightened requirement that a plaintiff must meet if his lawsuit is to proceed under the new PLCAA regime, regardless of whether the underlying statute requires such a mens rea.

Ileto, 565 F. 3d at 1156 (Judge Berzon, concurring in part); *see also Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc*., 91 F.4th 511, 528 (1st Cir. 2024) (recognizing the "heightened mens rea requirement in the predicate exception" needed to establish knowledge). Plaintiffs have not met this burden because they have failed to meet even the lesser "known or should have known" standard, let alone the higher "knowing" standard. *See supra* pp. 8–14, 16–18.

Nevertheless, Plaintiffs argue that AGI aided and abetted Mr. Minor's violation of various provisions of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, and that this falls within PLCAA's predicate exception. Pl. Mem. 15. For civil aiding and abetting liability, the defendant must have knowledge at the time it provides assistance that the principal's actions are illegal, and the defendant continues to assist the principal. *Twitter, Inc. v. Taamneh,* 598 U.S. 471, 485 (2023) (citing *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983)). For Plaintiffs to prevail, they must show that AGI knew Mr. Minor was a straw purchaser intending to firearms and, despite this knowledge, sold firearms to him and, in completing the sale, made false entries on the Form 77Rs and Form 4473s with the intent to cause Plaintiffs harm. Plaintiffs do not meet this burden. *See United States v. Root*, 585 F.3d 145, 158 (3d Cir. 2009) ("the evidence must be

sufficient to show" that the harm "was one of the conspiracy's objects, and not merely a foreseeable consequence or collateral effect").

Plaintiffs also have failed to allege sufficient facts showing that AGI's sales to Mr. Minor have proximately caused their injuries, an express requirement under PLCAA. *See supra* pp. 19–21. Critically, the United States Supreme Court has granted certiorari on this very question of proximate causation under PLCAA in *Smith & Wesson Brands v. Estados Unidos Mexicanos*, No. 23-1141, cert. granted, --- S. Ct. ----2024 WL 4394115 (Oct. 4, 2024). Even if Plaintiffs could show AGI's knowledge, which they have not, the harms Plaintiffs allegedly suffered are too remote for AGI to be liable. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014).

B. The negligence exceptions do not apply.

PLCAA's negligence exceptions do not save Plaintiffs' negligence entrustment, negligent per se, and negligent (statute or ordinance) claims because Plaintiffs have failed to allege sufficient facts to support those claims. *See supra* pp. 8–24. To state a claim for negligent entrustment, a defendant must entrust "an instrumentality capable of doing serious harm if misused, to one whom he **knows, or has strong reason to believe**, to intend or to be likely to misuse it to inflict intentional harm." *Valentine*, 112 Md. App. at 687 (citing Restatement (Second) of Torts § 302B, Example E, 92) (emphasis added). Critically, Mr. Minor was not accused of using the firearms to inflict intentional harm. He illegally trafficked the firearms to third parties. To state a claim for negligence per se or negligence based on a statutory violation, Plaintiffs must adequately allege "(a) the violation of a statute or ordinance designed to protect a specific class of persons which includes the plaintiff, and (b) that the violation proximately caused the injury complained of." *Hector*, 473 Md. at 559. In Maryland, though "a statutory violation is evidence of negligence," it

"does not constitute negligence per se, unless a statute expressly makes it so." *Absolon v. Dollahite*, 376 Md. 547, 557 (2003).

Plaintiffs have failed to allege facts showing the necessary knowledge requirement to bring these claims. *See supra* pp. 8–14. Nor have they shown a duty. *See supra* pp. 14–19. Courts have dismissed similar attempts to hold a defendant liable for the illegal conduct of third parties. *See e.g., Valentine,* 353 Md. at 553 (finding it unreasonable to hold a firearm dealer as having a duty to the world to protect against the illegal actions of third party). Nor have Plaintiffs alleged facts showing that AGI's four firearm sales to Mr. Minor were the proximate cause of their injuries. *See supra* pp. 19–21.

IV. Plaintiffs' claims fail for independent substantive reasons.

A. The statute of limitations bars this action.

AGI sold its last handgun to Mr. Minor on August 28, 2021. AGI transferred that final handgun to Mr. Minor on September 4, 2021. AGI Mem. 43–45. Plaintiffs filed this action on September 3, 2024. Using the date AGI sold the handgun, all of Plaintiffs' claims are barred by Maryland's appliable three-year statute of limitations. Md. Code Cts. & Jud. Proc. § 5-101. Even based on the date AGI transferred the final handgun to Mr. Minor, that final transfer is the only firearm that arguably falls within the statute of limitations. But that handgun—a Taurus PT 24/7—was recovered from Mr. Minor and is not alleged to have been trafficked, a point the Plaintiffs do not contest.

Plaintiffs argue that the statute of limitations is inapplicable to "continuing violations," asserting that the statute is "tolled." Pl. Mem. 27 n.16. This misstates that rule. Continuing violations provide a new statute of limitations for every subsequent wrong. *Litz v. Maryland Dept. of Environment*, 434 Md. 623, 646 (2013). Plaintiffs concede that the earliest Plaintiffs' claims could have accrued was when Mr. Minor transferred the firearms to a prohibited person. Pl. Mem.

26. But this concession does not help them because Mr. Minor's earliest transfer to a prohibited person occurred on or about August 19, 2021, more than three years before they brought the Complaint. *See* AGI Mem. Ex. E p. 32 (ATF affidavit). And even if a new statute began running upon the last transfer, no harm came from of that. *See supra* pp. 21–24.

Plaintiffs then downplay Maryland's contemporaneous knowledge of AGI's firearm sales to Mr. Minor, arguing it is a question of fact not appropriate for resolution on a motion to dismiss. Pl. Mem. 28. But Maryland law states otherwise. *See Litz,* 434 Md. at 642 (dismissing the plaintiff's nuisance claims on a motion to dismiss as being time-barred because the plaintiff was aware of the defendants' alleged nuisance, which was presumed to continue indefinitely, more than three years before filing the action). If AGI had reason to know Mr. Minor was a straw purchaser based on the pattern of firearm purchases with AGI, then Maryland should have known that Mr. Minor was a straw purchaser, especially given Maryland State Police's contemporaneous knowledge of all of Mr. Minor's firearm purchases from all Defendants. AGI Mem. 44.

Finally, Plaintiffs argue that, even if the District were aware of the harm from AGI's purchases prior to September 3, 2021, its claims cannot be barred by Maryland's statute of limitations, citing *Akinmeji v. Jos. A. Bank Clothiers, Inc*., 399 F. Supp. 3d 466, 472 (D. Md. 2019). Pl. Mem. 28. But the statute of limitations is procedural and controlled by the forum state's law. *See Lewis v. Waletzky,* 422 Md. 647, 664 (2011). *Akinmeji* does not provide an applicable exception to this rule. *Akinmeji*, 399 F. Supp. 3d at 472 (Maryland will apply a foreign statute of limitations only 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"). Here, the District's statute of limitations is not specifically applicable to any new substantive law.

The only alleged transaction arguably not barred by the statute of limitations involved a handgun that was not trafficked. The statute of limitations bars this action.

B. The Municipal Cost Doctrine bars Plaintiffs' recovery.

AGI demonstrated that Plaintiffs cannot recover their ordinary governmental expenses in providing taxpayers with emergency services. AGI Mem. 45. Plaintiffs do not dispute this but instead argue that the municipal cost rule is outdated and does not apply because Plaintiffs are not municipalities. Pl. Mem. 55. Plaintiffs are wrong.

In *D.C. v. Beretta U.S.A. Corp.*, No. CIV.A. 0428-00, 2002 WL 31811717, at *38 (D.C. Super. Ct. Dec. 16, 2002), the District asserted a public nuisance claim against the defendants seeking the same ordinary expenses and relief from firearm violence that it seeks here. Noting well-established case law precluding the District from filing the action for the broad purpose of municipal cost recovery, the Superior Court dismissed the District's claims. The District appealed, and the Court of Appeals affirmed in part, recognizing that the District could not advance its public nuisance and negligence claims based on costs incurred for municipal necessities and because the District's harms were too remote. *D.C. v. Beretta, U.S.A., Corp*., 847 A.2d 1127, 1140 (D.C. 2004), *reh'g en banc granted, opinion vacated sub nom*. *D.C. v. Beretta, U.S.A.*, 868 A.2d 858 (D.C. 2004), *and superseded on reh'g en banc*, 872 A.2d 633 (D.C. 2005).

Although courts have allowed governments to recover expenditures where the misconduct is continuous, that exception does not apply here. Plaintiffs' claims are based on four firearms AGI sold to Mr. Minor. The District recovered two, one is in the possession of the ATF who obtained it from Mr. Minor, and the whereabouts of the fourth is unknown. No continuous acts alleged by Plaintiffs would exempt them from the Municipal Cost Doctrine. *See supra* pp. 5–8.

The Municipal Cost Doctrine requires the dismissal of the Plaintiffs' claims as an improper attempt to recover ordinary government expenses.

C. Plaintiffs cannot pursue criminal law enforcement in a civil case.

Plaintiffs cannot maintain this action because the criminal statutes they rely on do not provide the relief they seek and instead provide that a knowing violation of the statute will result in either imprisonment, a fine, or both. AGI Mem. 41. Nor may Plaintiffs seek discovery in this civil action beyond that they would be permitted in a criminal enforcement action. *McSurely v. McClellan*, 426 F.2d 664, 671–72 (D.C. Cir. 1970) ("civil discovery may not be used to subvert limitations on discovery in criminal cases, either by the government or by private parties") (citing *United States v. Parrott*, 248 F. Supp. 196, 199–202 (D.D.C.1965)). Plaintiffs sidestep this limitation, arguing that they may use criminal statutes to support of their common-law causes of action. Pl. Mem. 60. Yet, "the [Maryland] Attorney General possesses no common law powers." *Philip Morris Inc. v. Glendening*, 349 Md. 660, 674 (1998). And neither Maryland nor the District may abuse the civil process to gain an advantage unavailable to them in criminal enforcement actions. Plaintiffs ignore this and fail to address the Maryland or federal factors in determining whether the legislature intended to provide the government authority to sue under a criminal statute as discussed in *Fangman v. Genuine Title, LLC*, 447 Md. 681, 694 (2016). *See* AGI Mem. 41.

D. Anti-SLAPP Law requires dismissal of the Complaint.

i. The Complaint was brought in bad faith.

AGI has shown that the lawsuit was brought in bad faith based on (1) the timing of the Complaint in proximity to the Fourth Circuit's dismissal *Maryland Shall Issue, Inc. v. Moore*, Nos. 21-2017 and 21-2053, ___ F.4th ___, 2024 WL 3908548, at *2 n. 6 (4th Cir. Aug. 23, 2024) ("HQL Action"), and AGI's pending petition for certiorari, as well as AGI's opposition to Maryland's new public nuisance law, (2) the lack of sufficient factual allegations, (3) the exorbitant damages sought

by Plaintiffs, and (4) the overly broad and oppressive discovery requests served on it in this action. AGI Mem. 47–50.

Plaintiffs argue that the timing of the Complaint was not related to an adverse ruling because Maryland won (Pl. Mem. 64), but this argument ignores that AGI was the only party held to have standing to contest Maryland's Handgun Qualification License laws and has proceeded with a certiorari petition in that case. Plaintiffs had knowledge of their harm for years but filed this action at the last minute only after notice that AGI would appeal to the Supreme Court. AGI Mem. 48.

Plaintiffs argue that Maryland did not propound the discovery at issue, and therefore, the discovery requests cannot support a finding of bad faith. Pl. Mem. 65. Maryland's choice not to file discovery against AGI is a ruse that only shows its collusion with the District and confirms its own bad faith in bringing the claims against AGI. As Maryland stated in open Court during the October 6, 2024, scheduling conference, it does not have all of the facts necessary to bring their claims, necessitating the discovery. This is further amplified by the absence of allegations showing the AGI had knowledge that Mr. Minor was a straw purchaser before transferring firearms to him. *See supra* Sec. II.

AGI has sufficiently alleged that this action was brought in bad faith.

ii. Plaintiffs intend to inhibit AGI's protected advocacy.

Plaintiffs attempt to drive AGI out of business by bringing this baseless action against it. This attempt to silence AGI is based on its advocacy in the HQL Action and its legislative testimony opposing unreasonable firearm legislation. AGI Mem. 52. Like the court recognized in *MCB Woodberry Dev., LLC*, 265 A.3d at 1150, costly legal challenges can inhibit free speech and quell a party's desire to petition the government. Contrary to Plaintiffs' claims, AGI does not seek immunity from every action that involves violations of firearm statutes. But this action fails to

meet the pleading requirements by alleging facts showing that AGI had knowledge that Mr. Minor intended to traffick handguns bought from AGI. This action was meant to intimidate AGI, Maryland's most vocal dealer advocate for sensible firearm laws and Second Amendment rights. The Complaint is materially related to AGI's advocacy and meant to stifle it, and should be dismissed as an impermissible SLAPP suit.

CONCLUSION

For the reasons set forth, AGI respectfully requests this Court dismiss the Complaint with prejudice under Maryland Rule 2-322(b) and award AGI its costs, including attorney fees.

Dated: January 10, 2025

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2025, a copy of the foregoing was filed on MDEC, which will cause a copy to be served on all counsel of record.

/s/John Parker Sweeney
John Parker Sweeney