SUPREME COURT OF
THE STATE OF NEW YORK: COUNTY OF ERIE

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; SHAWANDA ROGERS, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M., a minor; and LATISHA ROGERS,

Plaintiffs,

-against-

META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC.; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,

Defendants.

Index No. 805896/2023

JOINT MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO DISMISS

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Defendants Alphabet, Inc., Google LLC, and YouTube, LLC (collectively, "YouTube"); Amazon.com, Inc.; Discord, Inc.; Meta Platforms, Inc.; Reddit, Inc., and Snap Inc. (together, the "Internet-Defendants") submit this Joint Memorandum of Law in support of their respective Motions to Dismiss Plaintiffs' Complaint pursuant to CPLR 3211(a)(7).[1]

I. INTRODUCTION

Payton Gendron committed a heinous crime when he killed ten people in a racist mass shooting at Tops Friendly Markets supermarket on May 14, 2022. Now, the families of Gendron's victims have filed suit against various online service providers, asking this court to disregard established law and hold those services liable on the theory that offensive content created by third parties influenced Gendron and contributed to his hateful ideology. Although the underlying events are tragic, the Internet-Defendants are not liable for Plaintiffs' claims. Indeed, victims of violence have attempted to assert these same theories in multiple prior cases, and courts around the country have uniformly rejected them.[2] The same result is warranted here.

First, Plaintiffs' claims are barred by the Communications Decency Act, 47 U.S.C. § 230, a federal statute that "effectuate[s] Congress's policy choice … not to deter harmful online speech through the … route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 288 (2011). No matter the label Plaintiffs attach to their claims, they seek to do exactly what

[1] The memorandum is filed on behalf of the above-named defendants. Other defendants may join the motion in whole or in part. Stipulation, NYSCEF Doc. No. 45 at 2.

[2] In addition, the New York Attorney General's Office concluded that the Internet-Defendants are not liable, following its investigation of Gendron's use of online services and the dissemination of the video of the shooting. *Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022* (Oct. 18, 2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf ("Report"). Because Plaintiffs' Complaint cites and relies on the Report, *see, e.g.*, ¶¶183, 375, 388, 391, 393, 416, 419, the Court may consider it here. *See Dragonetti Bros. Landscaping Nursery & Florist, Inc. v. Verizon N.Y., Inc.*, 144 N.Y.S.3d 333 (Sup. Ct. 2021).

§230 forbids: hold the Internet-Defendants liable as the publishers of third-party material that Gendron allegedly viewed online, and the video that he created of the attack itself. Over "a quarter of a century," courts have "addressed highly analogous claims by victims of terrorist violence … inflicted by actors who accessed and consumed hate material on social media sites," and they "have been in general agreement that the text of Section 230 should be construed broadly in favor of immunity." *M.P. by & through Pinckney v. Meta Platforms, Inc*., 2023 WL 4853650, at *2 (D.S.C. July 24, 2023) (dismissing similar claims arising from racist mass shooting at Emanuel AME Church in Charleston), *appeal docketed*, No. 23-1880 (4th Cir. Aug. 24, 2023).

Second, the First Amendment independently bars Plaintiffs' claims. All agree that the third-party speech Plaintiffs allege Gendron consumed is odious. But even odious speech is constitutionally protected, in part because courts have recognized the chilling effect of speech caused by potential tort liability. Thus, established First Amendment principles preclude Plaintiffs from imposing liability on the Internet-Defendants for the alleged consequences of protected speech they disseminate and how they present it to the public.

Third, Plaintiffs' product-liability claims fail under New York law because the Internet-Defendants' services are not "products," and the law governing dangerous and defective products has never—in New York or elsewhere—been a tool for regulating speech.

Fourth, Plaintiffs fail to allege that the purportedly defective features of Internet-Defendants' services, or their alleged negligence, are the legal cause of Plaintiffs' injuries. The Internet-Defendants' dissemination of content to countless users (allegedly including Gendron) is too remote from the events of May 14, 2022 to establish proximate cause, and any causal chain is interrupted by Gendron's independent, intervening choice to commit premeditated murder.

Fifth, Plaintiffs' negligence-based claims fail as a matter of law because the Internet-Defendants do not owe a general duty of care (to Gendron, their users, or the general public) to prevent violent crimes committed by third parties after they view information created by other users of those services.

Finally, Plaintiffs' claims for unjust enrichment, "infliction of emotional distress," wrongful death, personal injury, joint and several liability, and loss of parental guidance are damages claims that depend on the other state torts and thus fail with them. The unjust enrichment claim further fails because Plaintiffs do not allege any relationship with the Internet-Defendants, much less one that caused reliance.

The Internet-Defendants deplore Gendron's horrific attack. But settled law bars Plaintiffs from holding them liable for Gendron's criminal acts on the theory that he was inspired by third-party speech posted on their services. And courts have held that claims subject to protection from the First Amendment and Section 230 should be dismissed at the earliest opportunity.

II. BACKGROUND

The Internet-Defendants operate seven online services that are in widespread use. While they differ in various ways, these services operate as channels for all manner of information and expression; they host, arrange, and disseminate a diverse array of user-generated content, including writings, live and recorded videos, images, music and other audio recordings. Complaint ¶¶228-29, 266, 275, 327, 329, 360, 375-76, 397, 405; *accord* ¶538 (acknowledging Defendants' services "have utility to both the public and individual users"). These services offer "relatively unlimited, low-cost capacity for communication of all kinds" and thus are "integral to the fabric of our modern society and culture." *Packingham v. North Carolina*, 582 U.S. 98, 104, 107 (2017).

To organize the vast amount of content on their services, many of the Internet-Defendants may use—to varying degrees and in various ways—algorithmic tools, including some "based on

a wide range of information about the user … and the content being viewed." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 481 (2023). "So, for example, a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks, whereas someone who likes to watch professorial lectures might see collegiate debates and advertisements for TED Talks." *Id*. The Internet-Defendants also have policies against hate speech and violence and other forms of objectionable content (*e.g.*, ¶89), which they dedicate significant resources to enforce. Report at 26, 32. More information about each Internet-Defendant can be found in their concurrently-filed individual briefs.

On May 14, 2022, Payton Gendron "execut[ed] his hateful crimes" at Tops Friendly Markets. ¶¶2, 40. He spent months methodically planning, researching, and conducting reconnaissance for the attack—acting alone and driven by a hateful ideology. ¶¶2-4, 10-12, 39-42, 84-87. Plaintiffs attribute Gendron's racist worldview to content he encountered online, including content created by third-party users of some of Internet-Defendants' services.[3] ¶¶3-5, 9-11, 39, 145, 171, 173-78. Plaintiffs also allege Gendron used Twitch to livestream his attack, although Twitch terminated the livestream "less than two minutes after the first user report concerning the imminence of violence." Report at 33. Plaintiffs also allege videos of the attack began circulating online shortly after the attack (¶73), although many Internet-Defendants responded with crisis protocols and removed numerous copies. Report at 35-36.

On May 12, 2023, Plaintiffs filed this lawsuit, asserting various claims against the Internet-Defendants (and unrelated defendants). **Claims 1-4** assert product-liability theories for defective design and failure to warn against all Internet-Defendants. ¶¶529-94. These claims allege the Internet-Defendants' "products" are defectively designed because they "direct[]" "minor users"

[3] As discussed further in Amazon's joinder, Plaintiffs do not allege any such action by Twitch.

"to unwanted and escalating racist, antisemitic, and violence provoking content." ¶535. Plaintiffs allege that such speech effectively "indoctrinat[ed]" Gendron. ¶10.

Claims 5 and 6, against all Internet-Defendants, allege unjust enrichment from revenues derived from "the time Gendron spent on their platforms viewing racist … material" (¶598) and infliction of emotional distress from the alleged design defects and failure to warn. ¶¶595-606.

Claims 9, 11, and 12, against Amazon, allege product liability and intentional infliction of emotional distress relating to Twitch's livestream functionality, which Gendron used to broadcast video of his attack. ¶¶621-24, 629-40.

Claims 7, 8, and 10 arise from certain Internet-Defendants' alleged hosting and dissemination of Gendron's livestream video and its derivative recordings. **Claim 7**, against Amazon, Meta, Alphabet, and Reddit, alleges invasion of privacy under New York Civil Rights Law Section 50 *et seq.* for the unauthorized depiction of video images of the deceased Plaintiffs. ¶¶607-14. **Claim 8**, against Amazon, Meta, and Reddit, alleges unjust enrichment for profits gained from displaying Gendron's criminal acts. ¶¶615-20. **Claim 10**, against Amazon, Meta, and Reddit, alleges negligent infliction of emotional distress for failure to "implement feasible technology" to prevent circulation of Gendron's video. ¶¶625-28.

The remaining claims against the Internet-Defendants allege theories of injury and damages rather than independent causes of action: loss of parental guidance (**Claim 13**), ¶¶601-06; wrongful death (**Claim 22**, ¶¶701-04); personal injuries (**Claim 23**, ¶¶705-08); and joint-and-several liability (**Claim 24**, ¶¶709-15).

This Memorandum of Law addresses common legal issues that require dismissal of Plaintiffs' claims against the Internet-Defendants as a matter of federal and state law. Each

Internet-Defendant is separately filing an individual Memorandum of Law addressing defendant-specific issues.

III. ARGUMENT

A. Section 230 of the Communications Decency Act Bars Plaintiffs' Claims.

All of Plaintiffs' claims are barred by the Communications Decency Act, 47 U.S.C. § 230, because they seek to treat Internet-Defendants as publishers of the allegedly harmful third-party content.

Section 230 provides: "No provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Congress enacted this provision because it "recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Shiamili*, 17 N.Y.3d at 289 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)). The statute "immuniz[es] Internet service providers from liability for third-party content wherever such liability depends on characterizing the provider as a 'publisher or speaker' of objectionable material." *Id.* (citation omitted). Plaintiffs are thus barred from bringing "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Id.*; *see* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

Courts have uniformly held that §230 bars claims like these: attempts to hold online service providers liable for allegedly publishing objectionable third-party content on the theory that they inspired violence. *See Force v. Facebook*, 934 F.3d 53, 63 (2d Cir. 2019) (§230 barred claims alleging content by Hamas posted on Facebook inspired terrorist attacks); *M.P.*, 2023 WL 4853650 (same for product-liability allegations that racist user-speech on Facebook inspired mass shooting);

Gonzalez v. Google, LLC, 2 F.4th 871 (9th Cir. 2022), *vacated on other grounds*, 143 S. Ct. 1191 (2023) (same for claims against Google alleging ISIS material posted on YouTube caused terrorist attacks in Paris); *accord Daniel v. Armslist, LLC*, 926 N.W.2d 710 (Wisc. 2019) (§230 barred claims seeking to hold website liable for mass shooting).

Because the statute "protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles," §230 immunity should be resolved "at the earliest possible stage of the case." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). New York has "follow[ed] the national consensus" in interpreting "Section 230 immunity broadly, so as to effectuate Congress's 'policy choice ... not to deter harmful online speech through the ... route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" *Shiamili*, 17 N.Y.3d at 288 (citation omitted); *accord Zeran*, 129 F.3d at 330.

Section 230 applies if three conditions are met: (1) the defendant is a "provider … of an interactive computer service"; (2) the plaintiff's claims treat the defendant as the "publisher" of the relevant content; and (3) the content was "provided by another information content provider." *Shiamili*, 17 N.Y.3d at 289; 47 U.S.C. § 230(c)(1). On the face of the Complaint, each condition is satisfied here.

1. Each Internet-Defendant Is an "Interactive Computer Service" Provider.

First, each Internet-Defendant is a provider of an "interactive computer service"—*i.e.*, an "information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Plaintiffs' allegations concede this. ¶¶227, 266, 329, 375, 397. And courts have uniformly held that Internet-Defendants' services are interactive computer services. *E.g.*, *Force*, 934 F.3d at 64 (Facebook); *Franklin v. X Gear 101,*

LLC, 2018 WL 3528731, at *19 (S.D.N.Y. July 23, 2018), *report and recommendation adopted*, 2018 WL 4103492 (S.D.N.Y. Aug. 28, 2018) (Instagram); *L.W. v. Snap Inc*., 2023 WL 3830365, at *3 (S.D. Cal. June 5, 2023) (Snapchat); *Gonzalez*, 2 F.4th at 896 (Google/YouTube); *Does 1-6 v. Reddit, Inc*., 51 F.4th 1137, 1139 (9th Cir. 2022) (Reddit); *McCarthy v. Amazon.com*, Inc., 2023 WL 4201745, at *8 (W.D. Wash. 2023) (Amazon).

2. Plaintiffs' Claims Treat Internet-Defendants as the Publishers of the User-Provided Content.

Second, Plaintiffs' legal theories and causes of actions all attempt to hold the Internet-Defendants liable by treating them as publishers of two categories of user-provided content: (1) material that allegedly helped radicalize Gendron into harming Plaintiffs (*e.g.*, ¶¶529-606); and (2) video content depicting the shooting itself (¶¶599, 608, 621-628). The claims treat the Internet-Defendants as publishers of such user-provided content because liability would be based on their decisions "to publish, withdraw, postpone, or alter" the underlying content. *Shiamili*, 17 N.Y.3d at 288-89.

The statutory phrase "treat as a publisher" is construed broadly in favor of immunity. *Force*, 934 F.3d at 65 (noting "capacious conception of what it means to treat a website operator as the publisher ... of information provided by a third party"). Thus, a "publisher" of user-provided content is "one that makes public," and also "the reproducer of a work intended for public consumption." *Id.* at 65; *see also Zeran*, 129 F.3d at 332 ("publisher" includes those "making their facilities available to disseminate ... the information gathered by others" (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 803 (5th ed. 1984)).

Under §230, "what matters is not the name of the cause of action," but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1101-02 (9th Cir. 2019). "This rule

prevents plaintiffs from using 'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant." *Daniel*, 926 N.W. 2d at 724; *accord Ynfante v. Google LLC*, 2023 WL 3791652, at *3 (S.D.N.Y. June 1, 2023). Courts have repeatedly rejected attempts to plead around §230 via the same theories and causes of action alleged here. *See, e.g.*, *Force*, 934 F.3d 53; *Herrick v. Grindr LLC*, 765 F.App'x 586 (2d Cir. 2019) (dismissing product-liability claims); *M.P.*, 2023 WL 4853650, at *4 (same); *Daniel*, 926 N.W. 2d at 725-26 (negligence, negligent infliction of emotional distress, and public nuisance claims).[4]

Plaintiffs' claims, regardless of their labels, challenge the Internet-Defendants' alleged dissemination of third-party content and their alleged decisions about what content to publish—including the selection, arrangement, display, and promotion of that content (and, conversely, screening, withdrawing, and removing it) via human or technological mechanisms. ¶¶71, 77, 618-619. All of these activities—whether with respect to the content that Gendron viewed or the video of the attack—are protected by §230. *See, e.g.*, *Shiamili*, 17 N.Y.3d at 290 ("Although the statements at issue are unquestionably offensive and obnoxious, defendants are nonetheless shielded from liability by section 230."); *Force*, 934 F.3d at 65 ("Plaintiffs seek to hold Facebook liable ... for actively bringing Hamas' message to interested parties. But that … falls within the heartland of what it means to be the 'publisher' of information under Section 230(c)(1)."") (cleaned up); *Herrick*, 765 F.App'x at 590 (allegations based on "refus[al] to remove" offensive user content barred by §230) (quoting *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015)); *Klayman v. Zuckerberg*, 753 F. 3d 1354, 1359 (D.C. Cir. 2014) ("[T]he very essence of

[4] Section 230 also applies to unjust enrichment claims against defendants premised on third-party conduct on their interactive computer services. *See, e.g.*, *Franklin v. X Gear 101, LLC*, 2018 WL 4103492, at *8 (S.D.N.Y. Aug. 28, 2018); *Manchanda v. Google*, 2016 WL 6806250, at *3 (S.D.N.Y. Nov. 16, 2016).

publishing is making the decision whether to print or retract a given piece of content—the very actions for which Klayman seeks to hold Facebook liable."); *Ynfante*, 2023 WL 3791652, at *2 ("The plaintiff therefore seeks to hold Google liable for its actions related to the screening, monitoring, and posting of content, which fall squarely within the exercise of a publisher's role and are therefore subject to Section 230's broad immunity.").

Accordingly, Plaintiffs' alleged "design defect" claims fall within §230 because the purported "defects" are really just the ways the Internet-Defendants allegedly publish user content. ¶¶537, 539; *see, e.g.*, *In re Facebook, Inc.*, 625 S.W.3d 80, 94 (Tex. 2021) (describing "unanimous view" of courts that §230 bars "claims alleging that defectively designed internet products allowed for transmission of harmful third-party communications"); *Herrick*, 765 F.App'x at 590 ("[T]he manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content"); *M.P.*, 2023 WL 4853650, at *4 (allegations that algorithms directed mass-shooter to "white supremacist" content treated Facebook as publisher under §230); *Doe ex rel. Roe v. Snap, Inc.*, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) ("negligent design" claim based on alleged lack of safety features treated Snap as publisher because it "aims to hold Snap liable for communications exchanged" between users), *aff'd*, 2023 WL 4174061 (5th Cir. June 26, 2023); *L.W.*, 2023 WL 3830365, at *5-6 (dismissing product-liability claims); *Anderson v. TikTok, Inc*., 637 F.Supp.3d 276, 282 (E.D. Pa. 2022) (same).

Plaintiffs assert that their claims do not treat the Internet-Defendants as publishers of the third-party content, but instead concern the "underlying design, programming, and engineering of their platforms" and their "operations, conduct, and products." ¶¶530-33. But Plaintiffs' claims of harm from these "features" are inextricable from the third-party content with which Gendron allegedly engaged. Indeed, there could be no alleged harm if the user-provided content related to

benign topics, like gardening or chess. Although Plaintiffs purportedly target "features" of the Internet-Defendants' services, Plaintiffs' claims in fact allege that those "features" are used to publish user-provided content:

Recommendation Algorithms and Content Delivery. Plaintiffs allege that some of the Internet-Defendants used "recommendation" and "engagement" algorithms that purportedly recommended and delivered "racist, antisemitic, and violence-promoting" user-provided content to Gendron. ¶¶249; *see also* ¶176 ("[T]he algorithms driving Defendants' social media products selected progressively more violent, racist, and graphic material."); ¶173 (same); ¶250 (Meta); ¶¶174, 323 (YouTube); ¶373 (Snap); ¶¶414-15 (Reddit). But the very function of these algorithms, as alleged, is to publish third-party content. For example, the Complaint alleges that these algorithms are "successful in getting users to view recommended content" (¶297); "maximiz[e]" user engagement and "recommend[] content" (¶172); "direct[]" users to certain content (¶177); "send large volumes of carefully targeted video content to each user" (¶267); and "identify additional [content] to play," ¶274. Plaintiffs' allegations regarding these algorithms thus treat the Internet-Defendants as publishers by seeking to hold them liable for disseminating user-provided content.

Courts have uniformly held that similar claims fall squarely with §230's protections. *See, e.g., M.P.*, 2023 WL 4853650, at *3; *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019); *Gonzalez*, 2 F.4th at 896; *L.W.*, 2023 WL 3830365, at *5. This is so regardless of whether the algorithms allegedly select, recommend, or display third-party content that is engaging and well-matched to users' interests, or conversely are agnostic to users' interests. As the Court of Appeals has explained, §230 "does not differentiate between 'neutral' and selective publishers," and Congress "made a … policy choice by providing immunity even where the interactive service

provider has an active, even aggressive role in making available content prepared by others." *Shiamili*, 17 NY3d at 289.

Force, a case brought by victims of Hamas terrorist attacks, is directly on point. There, the Second Circuit held that §230 barred claims based on Facebook's use of algorithms that "suggest content to users." 934 F.3d at 66. Rejecting the argument that such algorithms render Facebook a "non-publisher," the court explained that using algorithms and other technology "designed to match [] information with a consumer's interests" is no different than exercising a decision to "place third-party content on a homepage"—a quintessential publisher function. *Id.* at 67. Indeed, it would "turn Section 230(c)(1) upside down" to hold providers liable merely because technological tools allegedly made them "especially adept at performing the functions of publishers." *Id.*

Lack of Effective Control Mechanisms and Failure to Warn. Nor can Plaintiffs circumvent §230 by making allegations that the Internet-Defendants' services: (1) failed to provide features or mechanisms to protect against Gendron's consumption or posting of harmful user-provided content, including the video of the shooting (*see, e.g.*, ¶353 (alleging failure "to shut down" livestream); ¶¶411, 544 (alleging "lack of parental controls")); or (2) failed to warn "minor users and their parents" (¶564) of the alleged design defects that make such objectionable content available. ¶¶561-71, 583-94.

These theories are "inextricably linked" to each other and treat the Internet-Defendants as publishers because they claim that the Internet-Defendants are liable because they do *not* postpone, block, or withdraw user-provided content from their services. *Herrick*, 765 F.App'x at 591; *see also Klayman*, 753 F.3d at 1359. Courts have consistently applied §230 to bar similar claims alleging lack of safety measures or warnings regarding user-provided content. *See, e.g.*, *Herrick*,

765 F.App'x at 591 ("Herrick's failure to warn claim is inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content … accordingly, it is barred by § 230."); *Doe v. MySpace, Inc.,* 528 F.3d 413, 419-20 (5th Cir. 2008) (allegations about "failure to implement basic safety measures to protect minors" were "merely another way of claiming that MySpace was liable for publishing the communications" between users); *In re Facebook, Inc.*, 625 S.W.3d at 94 (allegations about Facebook's alleged "lack of safety features" seek to hold Facebook "liable for its failure to combat" offensive third-party content); *Doe*, 2022 WL 2528615, at *14 (same); *Doe II v. MySpace Inc.*, 175 Cal.App.4th 561, 573 (2009) ("That appellants characterize their complaint as one for failure to adopt reasonable safety measures does not avoid the immunity granted by section 230."). Similarly here, the alleged "lack of control mechanisms" (¶¶542-45) and failure to warn (¶¶561-71) relate to Plaintiffs' claims only (1) "to the extent that such features would [have] ma[d]e it more difficult" for Gendron to view user-provided content; or (2) would have made it "easier" for Internet-Defendants' content moderators "to remove" such content or prevent Gendron's livestream. *Herrick*, 765 F.App'x at 590. Such claims impermissibly treat Internet-Defendants as publishers of third-party content.

Features that Allegedly Increase Engagement. Finally, the Complaint seeks to impose liability based on the Internet-Defendants' use of features such as "comments," "likes," "up-vote[s]" and "down-vote[s]," livestreaming, "stories," "ephemeral" content, "notifications," and the ability to make content private. The theory is that such features "addict" teens and minors to the Internet-Defendants' services.[5] The Complaint does not plausibly allege that these features, or Gendron's alleged addiction to the Internet-Defendants' services, caused Plaintiffs' injuries.

[5] *E.g.*, ¶282; ¶¶229-231; ¶229 (Instagram "like" feature); ¶286 (YouTube "like," comment, and share); ¶397 (Reddit comment and "up-vote" or "down-vote"); ¶¶231, 232, 368, 372 (ephemeral content); ¶¶383, 404 (features allowing content to be made private); ¶245, 287, 372 (push notifications); ¶330 (Twitch's livestreaming).

¶¶162-168. Regardless, these features are covered by §230 because they are mechanisms by which the Internet-Defendants allegedly disseminate user-provided content posted onto their services, including its format, timing, duration, audience, and amplification. ¶¶286, 397. *See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (allowing users to "post comments and respond to comments posted by others," is "[t]he prototypical service qualifying for [§230] immunity") (cleaned up); *L.W.*, 2023 WL 3830365, at *4 (dismissing claims based on "ephemeral design features"); *Dyroff*, 934 F.3d at 1098 (notifications are publisher activity because they are "tools meant to facilitate the communication and content of others").

3. The Content at Issue Was All Provided by Third Parties.

Finally, the Complaint concedes that the content was provided by other information content providers. Specifically, the content that allegedly radicalized Gendron was provided by third-party users of the services, while the livestream video of the attack was provided by Gendron (and other users who reposted it). *See, e.g.*, ¶¶3-5, 9-11, 115, 171, 173, 358, 384, 415. As the Court of Appeals has explained, "[a] Web site is generally not a 'content provider' with respect to [content] posted by third-party users." *Shiamili*, 17 N.Y.3d at 290. Indeed, *Shiamili* explicitly "reject[ed]" a plaintiff's "contention that defendants should be deemed a content provider because they created and ran a Web site which implicitly encouraged users to post negative [content]." *Id.* "Creating an open forum for third parties to post content … is at the core of what section 230 protects." *Id.* at 290-91. Other courts have similarly emphasized that merely "making information more available" does not render someone a provider of the content nor does it "amount to 'developing' that information within the meaning of Section 230." *Force*, 934 F.3d at 68; *see also Ratermann v. Pierre Fabre USA, Inc.*, 2023 WL 199533, at *4 (S.D.N.Y. Jan. 17, 2023) (dismissing claims under §230 where complaint did not allege Amazon "materially contributed to what made the

content itself unlawful"); *Herrick* 765 F.App'x at 590 (geolocation feature is not creation of content); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019) (service providers' decision to present third-party data in map format "does not constitute the 'creation' or 'development' of information").

The Complaint also contains no allegation that the Internet-Defendants developed or materially contributed to the allegedly unlawful nature of the content. "Reposting content created and initially posted by a third party is well within 'a publisher's traditional editorial functions" and does not remove the defendant from §230 protection. *Shiamili*, 17 N.Y.3d at 291. Therefore, algorithms that disseminate or suggest third-party content to users do not create, provide, or otherwise develop that content. *Force*, 934 F.3d at 70-71 ("Plaintiffs' suggestion that publishers must have no role in organizing or distributing third-party content in order to avoid 'develop[ing]' that content is both ungrounded in the text of Section 230 and contrary to its purpose."); *Kimzey*, 836 F.3d at 1271 ("[P]roliferation and dissemination of content does not equal creation or development of content."); *Dyroff*, 934 F.3d at 1098 ("These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves."); *Herrick* 765 F.App'x at 591 (app did not create content by providing "tools and functionality available equally to bad actors and the app's intended users").

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All three §230 conditions are met with respect to all of Plaintiffs' claims against the Internet-Defendants. As in the many similar cases that have come before, Plaintiffs' attempt to hold the Internet-Defendants liable for publishing objectionable third-party content is barred by §230. Because it would be futile to amend, Plaintiffs' claims must be dismissed with prejudice.

B. The First Amendment Bars Plaintiffs' Claims.

The First Amendment independently bars **Claims 1-6, 13, and 22-24,** which seek to hold the Internet-Defendants liable for Gendron's online "indoctrinat[ion]" with "white supremacist replacement theory and violent accelerationism." ¶10. While undeniably offensive, the material that allegedly shaped Gendron's ideology is constitutionally protected, and imposing liability for disseminating that speech—especially on theories of strict liability or negligence—is impermissible under the First Amendment. And where, as here, First Amendment protections are implicated, "[t]he New York Court of Appeals has explained that there is 'particular value' in resolving [such free speech] claims at the pleading stage, 'so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms.'" *Biro v. Conde Nast*, 883 F.Supp.2d 441, 457 (S.D.N.Y. 2012) (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995)); *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc.3d 974, 982 (Sup. Ct. 2004) ("mere pendency" of an action can inhibit speech).

1. The First Amendment Precludes Tort Liability for Protected Speech.

The First Amendment bars tort liability for protected speech, including hateful or offensive speech. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *accord Wilson v. Midway Games, Inc.*, 198 F.Supp.2d 167, 178-79 (D. Conn. 2002). Recognizing that "attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment," *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002), courts have repeatedly rejected civil claims—including claims based on product-liability theories—for exposing the public to protected speech that allegedly led to violence.

For example, in a case arising from the shooting at Columbine High School, plaintiffs claimed the teenaged shooters "were avid, fanatical and excessive consumers of violent … video

games," which allegedly precipitated their shooting by making "violence pleasurable" and "train[ing]" them "how to point and shoot a gun effectively." *Sanders v. Acclaim Ent., Inc.*, 188 F.Supp.2d 1264, 1268-69 (D. Colo. 2002). The court dismissed product-liability and negligence claims against the games' distributors as barred by the First Amendment. *Id*. at 1279-81; *accord Wilson*, 198 F.Supp.2d at 182 (First Amendment a "complete bar" to negligence claims alleging that addictive and violent video game caused stabbing); *Olivia N. v. NBC*, 126 Cal.App.3d 488, 494-97 (1981) (same for negligence claims alleging that broadcast of movie depicting sexual assault inspired assault); *Davidson v. Time Warner, Inc*., 1997 WL 405907, at *22 (S.D. Tex. Mar. 31, 1997) (claims against distributors of rap album that allegedly inspired listener to kill police officer); *Zamora v. Columbia Broad. Sys.*, 480 F.Supp. 199, 206 (S.D. Fla. 1979) (negligence claims alleging television programming led minor to kill neighbor).

The rule applied in these cases—prohibiting tort claims for disseminating even violent and offensive speech—protects against tort liability's "devastatingly broad chilling effect" on speech. *Watters v. TSR, Inc.*, 715 F.Supp. 819, 822 (W.D. Ky.1989), *aff'd,* 904 F.2d 378 (6th Cir. 1990); *accord McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 1003 (1988). Indeed, the "fear of damage awards" can "be markedly more inhibiting than the fear of prosecution," *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964), making courts "particularly wary of governmental restrictions [on speech] that rest 'on a common law concept of the most general and undefined nature,'" *Sanders*, 188 F.Supp.2d at 1281 (citation omitted).

2. The Speech At Issue Here Does Not Fall Into Any of the Narrow Categories of Constitutionally Unprotected Speech.

These established protections bar Plaintiffs' claims, which seek to hold the Internet-Defendants liable for disseminating speech—in particular, speech regarding the "white replacement theory," "accelerationism," and other extremist ideology provided by other users that

Gendron allegedly viewed on their services and that purportedly caused him to commit his horrific attack. ¶¶4, 9-10, 78-89, 99-100, 103; 535, 539, 564, 574, 587, 596, 605. The Internet-Defendants invest substantial resources to identify and remove content that violates their respective rules against hate speech. But Plaintiffs' attempt to impose *a tort duty* to discriminate against those viewpoints runs afoul of the "most basic" First Amendment rule—that the government may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011).

Plaintiffs' claims are not just premised on this content, they are premised on the viewpoints it expressed. ¶535. But the "government must abstain" from viewpoint-discriminatory regulation—that is, "from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *accord Matel v. Tam*, 582 U.S. 218, 234 (2017) ("First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) (government may not regulate "based on hostility—or favoritism—towards the underlying message expressed").

And, no matter how loathsome, the user speech that allegedly radicalized Gendron does not fall into any of the "traditional" categories of unprotected speech. *Brown*, 564 U.S. at 791; *see People v. Marquan M.*, 24 N.Y.3d 1, 7 (2014) (other than "fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation or statements integral to criminal conduct … speech is presumptively protected and generally cannot be curtailed by the government"). "Even hateful, racist, and offensive speech … is entitled to First Amendment protection." *Million Youth March, Inc. v. Safir*, 63 F.Supp.2d 381, 391 (S.D.N.Y. 1999); *see Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (First Amendment protects speech by KKK leader, absent an exception, promising

"revengeance" if the government "continues to suppress the white, Caucasian race"); *R.A.V.*, 505 U.S. at 392 ("messages 'based on virulent notions of racial supremacy'"); *Volokh v. James*, 2023 WL 1991435, at *6 (S.D.N.Y. Feb. 14, 2023) (law targeting "speech that 'vilifies' or 'humiliates' a group or individual based on their 'race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression' clearly implicates [] protected speech" (quoting N.Y. Gen. Bus. Law § 394-ccc(1)(a)); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 234 (6th Cir. 2015) (anti-Muslim hate speech); *Fenner v. News Corp.*, 2013 WL 6244156, at *16 (S.D.N.Y. Dec. 2, 2013) (racist cartoon); *Skokie v. Nat'l Socialist Party of Am.*, 69 Ill.2d 605, 618 (1978) (display of swastika during demonstration).

This case is like *Snyder*, which also involved hate speech. 562 U.S. at 448. There, speakers picketed a Gold Star family's funeral carrying signs with messages like "Thank God for 9/11" and "God Hates Fags." *Id.* The Supreme Court held that these messages were constitutionally protected speech on matters of public concern because they "highlighted issues of public import," such as "homosexuality in the military" and the "political and moral conduct of the United States and its citizens." *Id.* at 452. Here too, the "white replacement" theory (¶77) and other user content that Gendron allegedly viewed conveyed the speaker's "position on" "broader public issues." *Id.* at 454. The First Amendment prohibits efforts to subject such speech to tort liability. *Id.* at 460-61.

That the third-party speech here is alleged to have caused violence similarly does not remove it from the First Amendment's protections. The unprotected category of "incitement" is limited to speech *intentionally* "directed to inciting or producing" and "likely to incite or produce" "*imminent* lawless action." *Brandenburg*, 395 U.S. at 447-48 (emphasis added). "The government may not prohibit speech because it increases the chance an unlawful act will be committed at some

indefinite future time." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (cleaned up); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment"). Nothing like that is alleged here. Far from being immediate, Plaintiffs allege that Gendron's attack was caused by years of gradual radicalization, beginning "in his early teens," *i.e.*, in 2016. ¶¶162, 171. From 2016, the allegedly harmful user speech he viewed became "progressively more extreme" (¶171) then Gendron was "further radicalized" when he branched out to different websites used by "hate groups" (¶175), and he was further inspired to violence by mass shootings in 2018 and 2019 (¶¶78, 81, 180-81). "Gendron posted in [an] online forum … that he planned to commit 'murder/suicide'" in 2021 (¶209), and he began meticulous planning for the attack months before committing it in May 2022 (¶¶388, 390-91). Courts have repeatedly rejected similar claims that "persistent exposure" to media eventually culminating in acts of violence amounts to incitement or otherwise removes such speech from full First Amendment protection. *James*, 300 F.3d at 698; *accord Sanders*, 188 F.Supp.2d at 1279; *McCollum*, 202 Cal.App.3d at 1001; *Watters*, 715 F.Supp. at 823.

3. The First Amendment Bars Claims That Would Hold Online Services Liable For Presenting And Disseminating Protected Speech.

Plaintiffs cannot evade these protections by pleading claims against services that allegedly *disseminated* the speech at issue, rather than users who actually *created* the underlying content. Both "creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). And it is "well-established that a private entity has an ability to make 'choices about whether, to what extent, and in what manner it will disseminate speech.' These choices constitute 'editorial judgments' which are protected by the First Amendment." *Volokh*, 2023 WL 1991435, at *6 (quoting *NetChoice, LLC*

v. Att'y Gen., Fla., 34 F.4th 1196, 1210 (11th Cir. 2022), *cert. pet'ns filed*, Nos. 22-277, 22-393); *accord Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc*., 515 U.S. 557, 570 (1995) ("the presentation of an edited compilation of speech generated by other persons … fall[s] squarely within the core of First Amendment security"); *Rivoli v. Gannett Co.*, 327 F.Supp.2d 233 (W.D.N.Y. 2004) ("the act of publication and the exercise of editorial discretion concerning what to publish are protected by the First Amendment").

That principle fully applies to the Internet-Defendants. When these services "deliver[] curated compilations of speech created, in the first instance, by others," they "exercise editorial judgment that is inherently expressive." *NetChoice*, 34 F.4th at 1203-04, 1213. Such "decisions about what speech to permit, disseminate, prohibit, and deprioritize … fit comfortably within the Supreme Court's editorial-judgment precedents." *Id*. at 1214; *accord Volokh*, 2023 WL 1991435, at *9 ("Social media websites are publishers and curators of speech, and their users are engaged in speech by writing, posting, and creating content."); *O'Handley v. Padilla*, 579 F.Supp.3d 1163, 1187-88 (N.D. Cal. 2022) ("Twitter has important First Amendment rights that would be jeopardized by a Court order telling Twitter what content-moderation policies to adopt and how to enforce those policies."), *aff'd,* 62 F.4th 1145 (9th Cir. 2023); *cf. Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023) (holding livestreaming is "protected by the First Amendment").

Courts have therefore repeatedly held that the First Amendment bars efforts to regulate how online services moderate and disseminate third-party content—or who can use those services to receive information. *See Reno v. ACLU*, 521 U.S. 844, 874-79 (1997) (invalidating provisions of law limiting online dissemination of "indecent" and "offensive" speech to minors); *Packingham*, 582 U.S. at 109 (striking down law banning sex offenders from social-media

websites); *NetChoice*, 34 F.4th at 1210-12 (enjoining law restricting social-media services' content-moderation policies); *Volokh*, 2023 WL 1991435, at *10 (striking down New York law enacted in wake of Buffalo shooting requiring websites to develop and post policies regarding hate speech on their websites). In short, "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown*, 564 U.S. at 792 n.1. Just as Plaintiffs could not pursue tort claims against third parties who created the racist speech that allegedly shaped Gendron's ideology, the Constitution does not allow them to pursue such claims against internet services for allegedly disseminating or making that user-provided speech available to the public.

For multiple reasons, that result does not change because Plaintiffs allege that the Internet-Defendants disseminated content defectively or negligently. ¶¶530-31, 539.

First, as discussed above, the allegedly defective features of the Internet-Defendants' services are inseparable from the content of the relevant third-party speech. Plaintiffs allege that Gendron's attack was caused by his exposure to specific viewpoints on the Internet-Defendants' services—speech that allegedly caused him to develop particular views and ultimately commit acts of violence. There simply is no avoiding that these specific viewpoints are at the center of this case. *E.g.*, *Bill v. Super. Ct.*, 137 Cal.App.3d 1002, 1007 (1982) (rejecting argument that failure-to-warn claim did "not seek to impose liability on the basis of the content of the motion picture" because if showing the movie "attract[ed] violence-prone persons to the vicinity of the theater, it is precisely because of the film's content").

Second, even if Plaintiffs' claims were based only on the Internet-Defendants' tools for disseminating third-party content, the First Amendment would still apply. Plaintiffs allege that those features, including recommendation algorithms, "maximized Gendron's engagement" with

certain kinds of content, ¶9—and thereby seek to hold the Internet-Defendants liable for "selecting which users' speech the viewer will see, and in what order." *NetChoice*, 34 F.4th at 1204. This would be akin to imposing liability on a newspaper for running certain stories on the front page because that might maximize readers' engagement with a given story, enhancing its potential impacts. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Indeed, Plaintiffs' theory is that these features were particularly effective in presenting user speech, thus enhancing the impact of that speech on its audience. ¶¶247, 250, 303-04, 318-19, 384, 412-14. But holding the Internet-Defendants liable for displaying speech in an attention-grabbing way is to *describe* the First Amendment problem, not *escape* it. *Sorrell*, 564 U.S. at 578 ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.").

The same is true of features that allow users to "share videos" or "rate," "upvote," and "comment" on content. ¶¶229, 266, 286, 295, 384, 399. There is no alleged connection between these features and Gendron's attack, but imposing liability on such tools because they supposedly incentivize the "excessive" viewing of speech that gives users "too much" information, ¶¶265, 286, would "shackle the First Amendment in its attempt to secure the 'widest possible dissemination of information from diverse and antagonistic sources.'" *Sullivan*, 376 U.S. at 266. State law cannot be used to limit protected speech by imposing liability on features that make constitutionally protected speech possible or more likely. *Sorrell*, 564 U.S. at 577 ("In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime."); *cf. Project Veritas v. Schmidt*, 72 F.4th 1043, 1065 (9th Cir. 2023) ("[A] regulation that forecloses an entire medium of public expression" fails because it "infringe[s]" the First Amendment).

Third, Plaintiffs' attempt to hold the Internet-Defendants liable for disseminating speech to Gendron fails for the independent reason that Plaintiffs did not and cannot allege any Internet-Defendant acted with a culpable mental state. Because "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries," the First Amendment will often "condition liability on the State's showing of a culpable mental state." *Counterman v. Colorado*, 143 S.Ct. 2106, 2114-15 (2023). In cases involving actual incitement, for example, "the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder." *Id.* at 2115. No less culpable intent is required to make those who distribute any other speech liable for violence that it allegedly fosters. Here, however, Plaintiffs' claims are all based on theories of negligence and strict liability. This lack of allegedly intentional conduct does not provide the "precision of regulation" the First Amendment demands. *Claiborne*, 458 U.S. at 916-17, and independently requires dismissal of Plaintiffs' claims against the Internet-Defendants. *Accord Herceg v. Hustler Magazine, Inc*., 814 F. 2d 1017, 1024 (5th Cir. 1987) (First Amendment protection cannot "be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as 'bad'").

C. Plaintiffs Do Not Plead Viable Product-Liability Claims.

In addition to being barred by federal law, Plaintiffs' product-liability claims fail under New York law. Plaintiffs seek to expand New York's product-liability law in an unprecedented way by holding providers of intangible, online services liable for harm arising from the ideas and content conveyed on those services. ¶¶553-571. No New York court has applied product-liability law to services like those offered by the Internet-Defendants—much less to the dissemination of intangible ideas. Accordingly, **Claims 1-4 and 11** must be dismissed.

1. Plaintiffs' Product-Liability Claims Fail Because They Challenge Interactive Communication Services, Not Products.

Product-liability law provides redress for injuries from tangible goods and products. To state a claim, a plaintiff's "complained-of injury" must be "caused by a defect in something within" the "definition of 'product.'" Restatement (Third) of Torts: Products Liability § 19 cmt. a (1998); *Matter of Eighth Judicial Dist. Asbestos Litig.*, 33 N.Y.3d 488, 494 (2019) (quoting the Restatement; "[I]n every instance it is for the court to determine as a matter of law whether something is, or is not, a product."). And product-liability law focuses on "the tangible world." *Gorran v. Atkins Nutritionals, Inc.*, 464 F.Supp.2d 315, 324 (S.D.N.Y. 2006), *aff'd*, 279 F.App'x 40 (2d Cir. 2008) (citation omitted). A "product" is "tangible personal property distributed commercially for use or consumption." Restatement (Third) § 19(a). Conversely, "[s]ervices, even when provided commercially, are not products." *Id.* § 19(b); cmt. f.[6]

New York courts repeatedly have declined to apply product-liability law to online services, like those offered by the Internet-Defendants. *See, e.g., Eberhart v. Amazon.com, Inc.*, 325 F.Supp.3d 393, 397-400 (S.D.N.Y. 2018) (Amazon); *Intellect Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273, at *7 (Sup. Ct. Sept. 11, 2009) ("[T]his court is not persuaded that this website in the context of plaintiff's claims is a 'product' which would otherwise trigger the imposition of strict liability.").

Other courts uniformly hold likewise. *See, e.g.*, *Grossman v. Rockaway Tp.*, 2019 WL 2649153, at *4, *15 (N.J. Super. Ct. June 10, 2019) (rejecting product-liability claims premised on allegations that "Snapchat's [purported] product is designed to be addictive" and that Snapchat was "not sufficiently designed" to enforce age restrictions where there was no authority "to support

[6] Under New York law, the standard and definitions are the same whether the claim is brought under strict liability or negligence. *See Gaudette v. Saint-Gobain Performance Plastics Corp.*, 2014 WL 1311530, at *11 (N.D.N.Y. Mar. 28, 2014) (citing *Denny v. Ford Motor Co.*, 87 N.Y.2d 248 (1995)).

the conclusion that Snap's role of involvement in the events of this case constitute a 'product' rather than a 'service'"); *Ziencik v. Snap, Inc.,* 2023 WL 2638314, at *1, *4 (C.D. Cal. Feb. 3, 2023) (Snapchat is not a product); *In re Facebook, Inc*., 625 S.W.3d at 85 n.1 (noting trial court's dismissal of product-liability claim on the ground that "Facebook is not a 'product'"); *Jacobs v. Meta Platforms, Inc.*, 2023 WL 2655586, at *4 (Cal. Super. Ct. Mar. 10, 2023) ("as a social media platform that connects its users, Facebook is more akin to a service than a product"); *see also Quinteros v. InnoGames*, 2022 WL 898560, at *1, *7 (W.D. Wash. Mar. 28, 2022) (website and mobile app that enabled "interaction between online players … over chat and other message systems" offered a service, "not a product"); *Jackson v. Airbnb, Inc*., 2022 WL 16752071, at *9 (C.D. Cal. Nov. 4, 2022) (online "platform that connects users … is more akin to a service than to a product").

Notwithstanding this clear authority, Plaintiffs' Complaint tries to recharacterize the Internet-Defendants' services as "products" based largely on public statements made in the ordinary course of business. *See, e.g.*, ¶¶237, 279, 338, 366, 381, 410. But these lay statements do not purport to address the legal distinction between products and services, and certainly they cannot convert Internet-Defendants' services into tangible goods or personal property. *See, e.g.*, *Jacobs*, 2023 WL 2655586, at *3 n.1, *4 ("[T]he use by Facebook of the term 'product' does not resolve the question of whether Facebook represents a 'product' for the purposes of [product-liability] analysis"; under that analysis, "Facebook is more akin to a service than a product."); *Burghart v. S. Corr. Entity*, 2023 WL 1766258, at *3 (W.D. Wash. Feb. 3, 2023) ("Despite the fact that services are often presented [by businesses] as 'products' to purchase, they are not considered products"); Restatement (Third) § 19(b).

2. Plaintiffs' Product-Liability Claims Fail Because Plaintiffs' Harms Flow From Intangible Information or Ideas.

Plaintiffs' product-liability claims fail for the additional reason that they impermissibly seek to hold the Internet-Defendants liable for intangible information or ideas viewed on their services. *E.g.*, ¶¶529-71. Because the "purposes served by products liability law … are focused on the tangible world," it does not address "the unique characteristics of ideas and expression." *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991). This limitation helps ensure that product-liability law does not create "significant constitutional problems under the First Amendment." *James*, 300 F.3d at 695; *see, e.g.*, *Estate of B.H. v. Netflix, Inc.*, 2022 WL 551701, at *3 (N.D. Cal. Jan. 12, 2022) (product-liability law does not extend to "books, movies, or other forms of media").

Courts consistently reject product-liability claims against publishers, authors, distributors, and others involved with media and expressive content, in circumstances where plaintiffs trace their injuries to that content. *See Gorran*, 464 F.Supp.2d at 324-25 (following ideas from a diet book); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822-23 (Sup. Ct. 1981) (performing experiment described in a science textbook); *see also Beasock v. Dioguardi Enters., Inc*., 130 Misc.2d 25, 29-30 (Sup. Ct. 1985) (defendant's "publications themselves" could not "serve as the basis for the imposition of liability under a theory of … strict products liability"). For example, where a plaintiff "allege[d] the ideas and information contained in the magazine encouraged children to engage in activities that were dangerous," the court rejected the product-liability claim for targeting "intangible characteristics, not tangible properties." *Way v. Boy Scouts of Am*., 856 S.W.2d 230, 232, 238 (Tex. Ct. App. 1993); *see also* 2 Owen & Davis on Prod. Liab. § 17:28 (4th ed., 2023) (courts have "unanimously opposed extending products liability law to … 'intangible

thoughts, ideas, and messages contained within games, movies, and website materials'") (citation omitted).

That same rationale bars product-liability claims for intangible ideas conveyed by software and online technologies like video games, internet transmissions, computer source code, video streaming, and online recommendation algorithms. *See, e.g.*, *Rodgers v. Christie*, 795 F.App'x 878, 879-80 (3d Cir. 2020) (dismissing product-liability claim against creator of "algorithm" used to generate information about whether to release criminal defendants prior to trial); *Quinteros*, 2022 WL 898560, at *1, *7 (dismissing product-liability claim against creator of allegedly "psychologically addictive" "mobile app"); *James*, 300 F.3d at 701 (dismissing product-liability claim against video game developer); *Wilson*, 198 F.Supp.2d at 174 (dismissing product-liability claim against creator of allegedly addictive and violent video game); *Estate of B.H.*, 2022 WL 551701, at *1 (dismissing product-liability claim regarding allegedly harmful Netflix video streaming show); *Sanders,* 188 F.Supp.2d at 1268-69 (dismissing product-liability claim against video game makers and movie producers alleging that violent movie and video games were cause of mass shooting).

This principle forecloses Plaintiffs' product-liability claims. The Complaint alleges that content on the Internet-Defendants' services facilitated Gendron's exposure to objectionable and harmful information and ideas, which "radicalized" him into committing a heinous criminal act that, in turn, caused harm to Plaintiffs. *See, e.g.*, ¶¶534-41; ¶¶90-132 (propagation of "replacement theory"); ¶¶169-78 (use of social media directed Gendron to "progressively more extreme and psychologically discordant content"). Such claims impermissibly seek to hold the Internet-Defendants liable for the intangible ideas and information their services allegedly helped disseminate.

Moreover, Plaintiffs' product-liability claims identify purportedly "defective" user-engagement features that, themselves, constitute or concern intangible information and ideas. For example, a "like" feature is a communication from one user to another, expressing support for content. ¶¶229, 286; *see Bland v. Roberts*, 730 F.3d 368, 385-86 (4th Cir. 2013) (Facebook "likes" are both "pure speech" and "symbolic expression"). "Algorithms," "notifications," and "recommendations" similarly are intangible ways to select, present, and display information and ideas. *See, e.g.*, ¶¶251, 287 (noting YouTube's "push notifications" prompt users to watch videos); *Anderson*, 637 F.Supp.3d at 282 (an "algorithm [i]s a way to bring [content] to the attention of those likely to be most interested in it"). And any alleged lack of parental controls also concerns the ability of users to access information and ideas. ¶¶542-45; *see James*, 300 F.3d at 697 (refusing to "permit tort liability for protected speech that was not sufficiently prevented from reaching minors"). Courts have also held that livestreaming is a means of presenting information. *See Sharpe*, 59 F.4th at 681.

Because Plaintiffs' product-liability claims are based on the Internet-Defendants' "role in bringing ideas and information to the public," *Winter*, 938 F.2d at 1037 n.8, the Court should dismiss **Claims 1-4 and 11**.

D. Plaintiffs Fail To Allege Legal Causation.

Claims 1-4, 11-13, 22, and 23 should be dismissed for the additional reason that Plaintiffs cannot establish the Internet-Defendants' conduct was the legal cause of Plaintiffs' injuries. "The overarching principle governing determinations of proximate cause"—*i.e.*, legal causation—is that "a proximate cause [must be] 'a substantial cause of the events which produced the injury.'" *Hain v. Jamison*, 28 N.Y.3d 524, 528-29 (2016) (citation omitted). "[T]he chain of causation must have

an endpoint in order 'to place manageable limits upon the liability that flows from negligent conduct.'" *Hain*, 28 N.Y.3d at 528 (citation omitted).

"[A] variety of factors may be relevant in assessing legal cause … includ[ing], among other things: the foreseeability of the event resulting in injury; the passage of time between the originally negligent act and the intervening act; … whether and, if so, what other forces combined to bring about the harm; as well as public policy considerations regarding the scope of liability." *Id.* at 530. Of these factors, foreseeability is often the "most significant." *Id.* at 530; *accord Kriz v. Schum*, 75 N.Y.2d 25, 34 (1989). That an outcome may be conceivable does not make it foreseeable. *Dyer v. Norstar Bank, N.A.*, 186 A.D.2d 1083, 1083 (4th Dep't 1992); *see also Perry v. Rochester Lime Co.*, 219 N.Y. 60, 63-64 (1916) (alleged harm must be "probable" or "within the range of reasonable expectation," not merely "possible"); *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 316 (1980); *accord Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (requiring "some direct relation between the injury asserted and the injurious conduct alleged").

Legal causation may be decided on the pleadings. *See, e.g.*, *Ventricelli v. Kinney Sys. Rent A Car*, 45 N.Y.2d 950, 951-52 (1978) (affirming dismissal of complaint for failure to allege proximate cause due to intervening and unforeseen act); *Dyer*, 186 A.D.2d at 1083 (reversing denial of dismissal and finding lack of proximate cause); *Moore v. Shah*, 90 A.D.2d 389, 390 (3d Dep't 1982) (affirming dismissal for lack of legal causation). Indeed, cases involving third-party intervening acts, and especially criminal acts, are often dismissed on the pleadings for lack of proximate cause. *E.g.*, *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 103-04 (1st Dep't 2003); *Taylor v. Bedford Check Cashing Corp.*, 8 A.D.3d 657, 657 (2d Dep't 2004).

1. Plaintiffs Fail to Plausibly Allege that Internet-Defendants Legally Caused Their Injuries Because the Chain of Causation Is Too Attenuated.

The Complaint fails to allege that Plaintiffs' injuries were within the range of reasonably foreseeable consequences of the Internet-Defendants' provision of online services to their "billions" of users around the world, ¶266. *See Rivera v. New York City Transit Auth.*, 77 N.Y.2d 322, 329 (1991) ("Whether [a] defendant legally caused [plaintiff]'s injury and death depends upon whether they were reasonably foreseeable risks stemming from defendant's conduct."). Instead, the Complaint alleges a "series of new and unexpected causes" that intervened to ultimately culminate in Plaintiffs' injuries. *Perry*, 219 N.Y. at 64. For example, the Complaint alleges Plaintiffs' injuries were caused by: the "negligent entrustment" and conduct of Gendron's parents, including their purchase of a hunting rifle for Gendron and their alleged inaction in response to Gendron's violent behavior and psychiatric examination; the alleged mental health issues Gendron suffered; the alleged conduct of the firearms dealer; the alleged conduct of the firearms lock designer; and, most critically, the extraordinary conduct of Gendron himself. ¶¶205-26, 484-85, 492, 496, 503-28.

Accordingly, the "causal connection between" Plaintiffs' injuries and any Internet-Defendant's acts, separated by these multiple steps, is too "attenuated" as a matter of law to satisfy legal causation. *Martinez v. Lazaroff*, 48 N.Y.2d 819, 820 (1979); *see also Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 234 (2001) (no liability where relationship between defendants' conduct and the injury is "remote, running through several links in a chain"). None of these alleged facts and events were within the "range of reasonable expectation" to be foreseeable to the Internet-Defendants. *Perry*, 219 N.Y. at 64 (no proximate cause where child's death was caused by intervening events not "within the range of reasonable expectation" of defendant's alleged

conduct); *see also Derdiarian*, 51 N.Y.2d at 315-16 (alleged injury and intervening events must be "*associated with* the original negligence" (emphasis added)). Gendron's murder of his victims is "entirely different in character from any [harm] that would have resulted" foreseeably from the Internet-Defendants' provision of their web services. *Martinez*, 48 N.Y.2d at 820.

2. The Unforeseeable, Intervening Criminal Acts of a Third Party Break Any Causal Connection.

Proximate cause is lacking here also because Gendron's extraordinary criminal acts were an unforeseeable intervening act that severed any chain of causation. ¶¶39-68. A defendant cannot be held liable where the chain of events between their alleged conduct and the plaintiff's injuries includes an intervening act by a third party—especially a criminal act—that "is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct." *Hain*, 28 N.Y.3d at 529 (citation omitted); *see also Ingrassia v. Lividikos*, 54 A.D.3d 721, 724 (2d Dep't 2008) (no proximate cause where intervening criminal acts were "extraordinary and unforeseeable" as a matter of law); *Sturm*, 309 A.D.2d at 103 (no proximate cause between defendants' manufacture of handguns and harm caused directly by intervening criminal activity). The "unusual circumstances" presented by the "intervening, intentional, and criminal act of [a] third-party gunman" is the paradigm example of an unforeseeable intervening act that severs the causal chain. *Taylor*, 8 A.D.3d at 657. As *Taylor* explained, that criminal act and the ensuing crowd confusion "were not normal or foreseeable consequences of any situation created by the defendant," who owned a check-cashing business. *Id.* "Rather, the sequence of events leading to the plaintiff's injuries was so extraordinary and far removed from any alleged breach of the defendant's duty of care as to be unforeseeable as a matter of law." *Id.*

Here, it is difficult to conceive of conduct of a more "extraordinary nature" than Gendron's on May 14, 2022 (¶¶2, 39-68), or an event more "far removed" from the Internet-Defendants' conduct. *Taylor*, 8 A.D.3d at 657; *see also Sanders*, 188 F.Supp.2d at 1276 ("Harris' and Klebold's intentional violent acts were the superseding cause of Mr. Sanders' death" and "were not foreseeable"). New York courts have held that criminal acts—especially those involving violence—that directly inflicted plaintiffs' injuries, subsequent to the conduct of the defendants, were extraordinary and unforeseeable intervening acts that broke the chain of causation as a matter of law. *See, e.g.*, *Dyer*, 186 A.D.2d at 1083 (reversing and dismissing complaint for no proximate cause where plaintiff sued bank for injuries sustained during a robbery); *Tennant v. Lascelle,* 161 A.D.3d 1565, 1566 (4th Dep't 2018) (no proximate cause where third party murdered the victim, despite defendant's negligence in supervising victim). Gendron's criminal acts similarly broke any chain of causation.

In the context of the Internet-Defendants' services in particular, where the "amount of content" is "staggering," *Taamneh*, 598 U.S. at 480, courts have repeatedly concluded that defendants cannot "foresee how every viewer will react to third party content on their platforms." *Crosby v. Twitter, Inc.*, 921 F.3d 617, 625 (6th Cir. 2019) (internet services "do not proximately cause everything that an individual may do after viewing this endless content"). "This is especially true where independent criminal acts … are involved." *Id.* Courts confronting similar cases brought against online service providers by victims of terrorist and other violent attacks have therefore consistently found no legal causation. *See, e.g.*, *id.* at 624-26 (Google, Facebook, and Twitter did not proximately cause terrorist attack where shooter was allegedly "self-radicalized" online); *Fields v. Twitter, Inc*., 881 F.3d 739, 749-50 (9th Cir. 2018) (ISIS attack in Jordan); *Gonzalez v. Google, Inc*., 335 F.Supp.3d 1156, 1178 (N.D. Cal. 2018) (ISIS terrorist attacks in

Paris), *aff'd*, 2 F.4th 871 (9th Cir. 2021), *vacated on other grounds*, 598 U.S. 617 (2023); *Pennie v. Twitter, Inc.*, 281 F.Supp.3d 874, 888 (N.D. Cal. 2017) (mass shooting in Dallas). The same is true here. **Claims 1-4, 11-13, 22, and 23** should be dismissed for lack of legal causation.

E. Plaintiffs' Negligence-Based Claims Also Fail Because the Internet-Defendants Do Not Owe a Duty of Care.

Plaintiffs independently cannot state negligence-based claims against the Internet-Defendants because they cannot allege the Internet-Defendants owe them a cognizable duty of care. The existence of a duty of care is an element of all negligence-based claims. *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *Hamilton*, 96 N.Y.2d at 232; *see also Morgan v. Whitestown Am. Legion Post No. 1113*, 309 A.D.2d 1222, 1222 (4th Dep't 2003) (reversing denial of motion to dismiss negligence claim because plaintiff failed to plead a cognizable legal duty). Plaintiffs claim that the Internet-Defendants owed a duty "to minor and young adult users" to "prevent young users from becoming radicalized," ¶¶574-75, as well as a duty to "the public at large," ¶602. But Plaintiffs do not (and cannot) bring claims on behalf of Gendron for his own "radicalization." And the Internet-Defendants did not owe any duty to their users or "the public at large" to control Gendron.

To the contrary, "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others." *Hamilton*, 96 N.Y.2d at 233 (citation omitted); *Einhorn v. Seeley*, 136 A.D.2d 122, 126 (1st Dep't 1988) (same). A duty arises in such cases only "where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." *Hamilton*, 96 N.Y.2d at 233; *see also Pingtella v. Jones*, 305 A.D.2d 38, 42-44 (4th Dep't 2003) (granting motion to dismiss). Special relationships of this nature are rare and limited to, for example,

principal/agent, parent/child, employer/employee, owners and occupiers of premises, and common carriers and their patrons. *Einhorn*, 136 A.D.2d at 126; *Hamilton*, 96 N.Y.2d at 233.

To establish such a special relationship, the injured party must show that a defendant owed not merely "a general duty to society, but a specific duty to him"—"a duty running directly to the injured person." *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000). Plaintiffs do not allege that they have a special relationship that required the Internet-Defendants to protect them from criminal conduct by third parties. ¶¶574-76, 586-87, 602; *see also Doe v. GTE Corp*., 347 F.3d 655, 661 (7th Cir. 2003) ("Plaintiffs do not cite any case in any jurisdiction holding that a [web] service provider must take reasonable care to prevent injury to third parties.").

Instead, the only allegations that even arguably point to any specific relationship address the relationship between the Internet-Defendants and Gendron. ¶¶575-76. But Plaintiffs cannot plead, as required, that the Internet-Defendants had a relationship with Gendron that gave them actual control of his actions. *See Purdy v. Pub. Adm'r of Westchester Cnty*., 72 N.Y.2d 1, 8-9 (1988) (requiring "sufficient authority and ability to control the conduct of third persons").

Nor can Plaintiffs allege that the Internet-Defendants owe a duty of care to their users generally. ¶¶574-76, 585-86, 602. Courts consistently hold that providers of internet services do not owe a legal duty of care to their users. *See, e.g., Bibicheff v. PayPal, Inc*., 844 F.App'x 394, 395-96 (2d Cir. 2021) (affirming dismissal of negligence-based claim because PayPal did not have a special relationship with its users: "New York courts generally do not impose a duty on businesses to protect their customers from the acts of third parties absent special circumstances not alleged here."); *Herrick v. Grindr, LLC*, 306 F.Supp.3d 579, 598-99 (S.D.N.Y. 2018) (granting motion to dismiss negligence-based claim because social networking application did not have a special relationship with its users); *Dyroff*, 934 F.3d at 1101 ("No website could function if a duty

of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content."); *Beckman v. Match.com, LLC*, 743 F.App'x 142, 143 (9th Cir. 2018) (affirming dismissal of negligence-based claim because plaintiff "failed sufficiently to allege a special relationship between her and [online dating website]"); *Klayman*, 753 F.3d at 1359-60 (no special relationship between Facebook and its users).

More specifically, internet service providers do not have a duty to prevent users from publishing or consuming objectionable content. *See, e.g.*, *Taamneh*, 598 U.S. at 501 (Twitter did not have a duty to remove terrorist content posted by ISIS); *Herrick*, 306 F.Supp.3d at 585-87, 599 (social networking application did not have a duty to prevent publication of allegedly dangerous and harassing content). These cases are consistent with long-established New York law declining to extend tort duties to publishers of other types of media. *See, e.g.*, *Abraham v. Entrepreneur Media, Inc*., 2009 WL 4016515, at *1 (E.D.N.Y. Nov. 17, 2009) ("[U]nder New York law, a magazine publisher owes no duty of care to subscribers or readers …."); *McMillan v. Togus Reg'l Office, Dep't of Veterans Affairs*, 120 F.App'x 849, 852 (2d Cir. 2005) (same). The law in other jurisdictions is in accord. *See, e.g., Watters v. TSR, Inc*., 904 F.2d 378, 379, 381 (6th Cir. 1990) (rejecting argument that video game manufacturer had a "duty to warn that the game could cause psychological harm in fragile-minded children"); *James*, 300 F.3d at 687 (rejecting argument that defendants owed a duty to victims of school shooting where the shooter was allegedly "desensitized" to violence by defendants' video games, movies, and websites); *Zamora*, 480 F.Supp. at 202 (rejecting argument that television networks owed a duty to shooting victim where the shooter allegedly became addicted and desensitized to violence by watching defendants' television shows).

Claims 3-4, 6, 10, and 12 should be dismissed for failure to plead duty.

F. Plaintiffs Fail to State a Claim for Unjust Enrichment

Plaintiffs fail to state an unjust enrichment claim. To sustain an unjust enrichment claim, "a plaintiff must demonstrate that '(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.'" *Lincoln Life & Annuity Co. of N.Y. v. Wittmeyer*, 211 A.D.3d 1564, 1568 (4th Dep't 2022).

"An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) ("To the extent that [plaintiffs' traditional tort claims] succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects."). Here, Plaintiffs allege the same design defects as the bases of their product-liability and unjust enrichment claims. *Compare* ¶¶596, 616 *with* ¶¶537, 544, 562, 633. The court need go no further. Plaintiffs' unjust enrichment claims fail because the underlying product-liability claims upon which they stand fail, *see* Section C, *supra*.

Moreover, an unjust enrichment "claim will not be supported if the connection between the parties is too attenuated." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Plaintiffs must allege, at the least, a "relationship between the parties that could have caused reliance or inducement." *Id.*; *see also Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012) ("[A] plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party."). Here, Plaintiffs fail to allege any relationship with the Internet-Defendants, let alone a relationship that "could have caused reliance or inducement." *Mandarin Trading Ltd.*, 16 N.Y.3d at 182; *Joseph P. Carroll Ltd. v. Ping-Shen*, 140 A.D.3d 544, 544 (1st Dep't 2016) ("Plaintiff's failure to plead any prior relationship with defendant, let alone one that would cause inducement or reliance, precludes its unjust enrichment claim"). Plaintiffs'

allegation that the Internet-Defendants "benefited from the time Payton Gendron spent on their platforms," ¶598, is insufficient. His usage does not create a relationship between the Internet-Defendants and Plaintiffs, much less one sufficient to cause inducement or reliance.

G. Plaintiffs' Remaining Claims Fail Because There Is No Independent Basis for Liability.

Plaintiffs' remaining claims for infliction of emotional distress, wrongful death, personal injury, joint and several liability, and loss of parental guidance all require Plaintiffs to identify some independent basis for liability. ¶¶601-06, 641-44, 701-15. A cause of action for infliction of emotional distress "is not allowed if essentially duplicative of tort [] causes of action." *Lipshie v. Lipshie*, 2005 N.Y. Slip Op. 30489(U), at *6 (Sup. Ct. Apr. 19, 2005). Here, the allegations do just that: repackage existing negligence and product-liability claims. *Compare* ¶602 (alleging breach of duty of care through negligent product design and failure to warn) *with* ¶¶529-71 (alleging the same design defects) *and* ¶¶572-94 (alleging the same breach of duty). Plaintiffs' wrongful death claim fails because, under New York's wrongful-death statute, plaintiffs must "establish that [an action] could have been maintained by decedent[s] had [they] survived." *Prink v. Rockefeller Ctr., Inc.*, 48 N.Y.2d 309, 315 (1979); *see* N.Y. Est. Powers & Trusts Law § 5-4.1. Plaintiffs' claims for personal injuries, joint and several liability, and loss of parental guidance are not recognized causes of action; they are damages theories that require an antecedent basis for liability. *See Musk v. 13-21 E. 22nd St. Residence Corp.*, 2012 N.Y. Slip Op. 33021(U) (Trial Order) at *5 (Sup. Ct. 2012) ("personal injury does not, alone, grant a right to seek legal redress"); *Dellefave v. Access Temporaries, Inc.*, 2000 WL 45720, at *3 (S.D.N.Y. Jan. 19, 2000) ("Joint and several liability is a rule of contribution, not a cause of action."); *Hentze v. Curry Chevrolet Sales & Servs.*, 46 A.D.2d 800, 800 (2d Dep't 1974) (plaintiffs' allegations "for deprivation of … parental guidance … do not state causes of action").

Here, Plaintiffs allege tortious conduct, negligence, and product liability as the basis for these claims. Because those claims fail for the reasons discussed above, so too do the claims upon which they rely.

IV. CONCLUSION

The Internet-Defendants respectfully request dismissal of the claims against them.

CERTIFICATION OF WORD COUNT LIMIT
Pursuant to 22 NYCRR 202.8-b

The total number of words in the foregoing document, excluding the caption, the signature block, and any table of contents and table of authorities is 11,829 words, as calculated by the word processing system used to prepare this document; and this document complies with the word count limit as stipulated to by the parties (NYSCEF Doc. No. 45).

Dated: September 1, 2023

Dated: New York, New York
September 1, 2023

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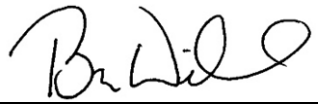
By: 

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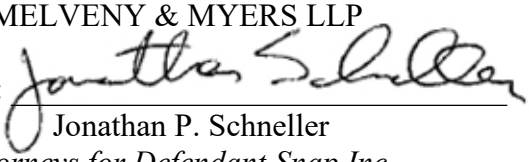
By: 
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SUPREME COURT OF
THE STATE OF NEW YORK: COUNTY OF ERIE

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; SHAWANDA ROGERS, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M., a minor; and LATISHA ROGERS,

Plaintiffs,

-against-

META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC.; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,

Defendants.

Index No. 805896/2023

META PLATFORMS, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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Defendant Meta Platforms, Inc. ("Meta") submits this Memorandum of Law in further support of its Joint Motion to Dismiss Plaintiffs' Complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7).

I. INTRODUCTION

The gravamen of claims 1-4, 6, 13, 22-24[1] is that Plaintiffs suffered injuries at the hands of Peyton Gendron as a result of third-party content disseminated by others on the Internet-Defendants' services.[2] And while the Complaint makes extensive allegations against the Internet-Defendants as a collective, it fails to sufficiently plead "particularized allegations" that establish ***Meta's*** conduct or services as the cause-in-fact of Plaintiffs' injuries. *V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 723 (2d Dep't 2013).

The Complaint's 700-plus paragraphs fail to connect Meta's provision of its Instagram and Facebook services with Gendron's alleged radicalization, let alone Plaintiffs' injuries. Indeed, the overwhelming majority of the Complaint's "[f]actual allegations as to Meta" have nothing to do with Gendron (or Plaintiffs) at all. Instead, the Complaint alleges that Meta (1) designs and promotes its services to users and teenagers and (2) offers livestreaming that could be used for malign purposes to show criminal acts in real-time; however, it was not used by Gendron here. Compl. ¶¶227-262.[3] Because Plaintiffs' allegations are vague, conclusory, and insufficiently particularized as against Meta to allege causation, the claims against Meta should be dismissed.

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[1] Claims 1-4 allege defects in the Internet-Defendants' services that caused Plaintiffs' injuries; Claim 6 alleges infliction of emotional distress from Gendron's attack; Claims 13, 22-24 allege damages arising from Plaintiffs' injuries as a result of Gendron's attack.

[2] As explained in the Joint Motion to Dismiss Plaintiffs' Complaint, "Internet-Defendants" includes Defendants Alphabet, Inc.; Google LLC; YouTube, LLC; Amazon.com, Inc.; Discord, Inc.; Meta Platforms, Inc.; Reddit, Inc., and Snap Inc.

[3] Citations to paragraph numbers herein refer to the Complaint.

II. BACKGROUND AND ALLEGATIONS

Meta operates the Facebook and Instagram services, which each serve billions of users worldwide. ¶¶23, 227-28. Both services enable users to create online accounts to connect, share, discover, and communicate electronically with friends, family, and communities all over the world. ¶¶228, 234. Facebook enables users to share and view content on their Facebook pages and profiles; Instagram provides spaces for users to post photos and videos online. ¶¶228-29.

Meta is one of many interactive computer service providers who, collectively, are alleged in the Complaint to have radicalized Gendron—by disseminating allegedly "extreme and inherently harmful" third-party content on their respective services—prior to his criminal acts that injured and killed Plaintiffs on May 14, 2022. ¶9. The Complaint does not allege that Meta or any Internet-Defendant created the content that allegedly influenced Gendron.

Many of the allegations in the Complaint refer to Meta and the other Internet-Defendants as the "Social Media Defendants" group. The Complaint alleges that "social media" broadly is the cause of the "proliferation of … racist violence." ¶101. Gendron was allegedly "exposed" to harmful third-party content that was "readily available on Defendants' social media platforms." ¶11. The Complaint further alleges that "social media companies' algorithms" disseminated "progressively more extreme content over time." ¶9. Gendron allegedly "used Defendants' social media products to plan his terrorist attack." ¶12.

The Complaint seldom specifically references Meta, Facebook, or Instagram in connection with Gendron. The Complaint's section covering "[f]actual allegations as to Meta," ¶¶227-62, does not allege facts connected to Gendron or the May 14, 2022, attack, at all. Instead, the "[f]actual allegations as to Meta" generally allege that Meta uses algorithms and features in its services designed to maximize user engagement by publishing third-party content to all users. *See, e.g.*, ¶240 (describing how service is allegedly designed to induce continuous scrolling); ¶244

(describing features that allegedly appeal to "young users' desire for validation and need for social comparison"). The Complaint also alleges Meta "fail[s] to warn teenage users and their parents about the physical and mental health risks[.]" ¶253 (emphasis added). Finally, the Complaint alleges that certain Meta executives were aware of the alleged hazards of Facebook and Instagram, but failed to take corrective action in response. ¶¶254-62.

In contrast to other defendants and services at issue in this case, the Complaint does not allege that Meta, Facebook, or Instagram radicalized Gendron. The few times the Complaint connects Gendron to Meta's services specifically relate to allegations that Gendron was a "problematic user" of "Instagram, YouTube, and Snapchat," and allegedly "began using Instagram, YouTube, and Snapchat in his early teens." ¶¶162-63. The Complaint further pleads on information and belief that Gendron was directed by "social media" to "more extreme and psychologically discordant content," including to different websites and services. ¶¶162, 171-73, 175. Finally, the Complaint asserts that, after Gendron's criminal acts on May 14, 2022, videos of the attack "were posted to Facebook" by unknown individuals. ¶¶74-75.

III. LEGAL STANDARD

On a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept all alleged facts to be true and draw all inferences in favor of the plaintiff to determine "whether the facts as alleged fit within any cognizable legal theory." *Cerciello v. Admiral Ins. Brokerage Corp.*, 90 A.D.3d 967, 967 (2d Dep't 2011). However, "[t]he allegations of the pleading cannot be vague and conclusory, [and] must contain sufficiently particularized allegations from which a cognizable cause of action reasonably could be found." *V. Groppa Pools*, 106 A.D.3d at 723; *see also McFadden v Schneiderman*, 137 A.D.3d 1618, 1619 (4th Dept 2016). "The test of the sufficiency of a

pleading is 'whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved . . . .'" *V. Groppa Pools*, 106 A.D.3d at 723.

"Causation incorporates at least two separate but related concepts: cause-in-fact and proximate cause." *Monahan*, 82 A.D.2d at 106, 442 N.Y.S.2d at 298. In addition to proximate or legal cause, therefore, to establish causation, the plaintiff must show that the defendant's alleged act or omission "was the cause in fact of [a plaintiff's] injuries." *Saulpaugh v. State*, 132 A.D.2d 781, 517 N.Y.S.2d 328, 329 (3d Dep't 1987). "Cause-in-fact refers to those antecedent events, acts or omissions which have 'so far contributed to the result that without them it would not have occurred.'" *Monahan v. Weichert*, 82 A.D.2d 102, 106, 442 N.Y.S.2d 295, 298 (4th Dep't 1981) (quoting Prosser on Torts, § 41, p. 237 (4th ed.)). The defendant's alleged conduct has to have been "a substantial factor in producing the resultant injury." *Id.*; *DeBartolo v. Coccia*, 276 A.D.2d 663, 663, 714 N.Y.S.2d 742, 742-43 (2d Dep't 2000).

IV. ARGUMENT

Claims 1-4, 6, 13, 22-24 should be dismissed against Meta because Plaintiffs fail to allege that Meta's conduct is the cause-in-fact for Plaintiffs' injuries. *See, e.g.*, *Delgado v. Bretz & Coven, LLP*, 109 A.D.3d 38, 42 (1st Dep't 2013) (affirming dismissal against one of two defendants given his conduct "was not a but-for cause" of injury); *Monahan*, 82 A.D.2d at 106. Plaintiffs have not met their burden to plead that Meta's conduct constituted "antecedent events, acts or omissions" that were a substantial factor in causing Plaintiffs' injuries that Gendron inflicted. *Id.* at 106. Plaintiffs' reliance on vague and conclusory allegations should be rejected and the Complaint dismissed as to Meta.

The claims at issue are based on the theory that Gendron was "radicalized" through "social media" and that this was a cause-in-fact of Plaintiff's injuries. The Complaint, however, alleges that Meta's services are allegedly harmful to users or teenagers generally, ¶¶227-262, or that the

"Social Media Defendants" collectively radicalized Gendron. *See, e.g.*, ¶¶558, 569, 573, 580, 591. Neither of these types of allegations is sufficient to show how Meta specifically "contributed to the result that without them it would not have occurred." *Monahan*, 82 A.D.2d at 106. Moreover, it is evident that the video of the attack—which was posted after the attack on Facebook by others—could not have been a cause-in-fact of the attack itself. *See Saulpaugh*, 132 A.D.2d at 782 (finding negligent maintenance of defective section of highway could not be cause-in-fact of accident that occurred elsewhere).

Even where the Complaint does allege that Gendron used Instagram (alongside YouTube and Snapchat) in his "early teens," ¶162, the Complaint merely asserts that the platforms directed Gendron to "more extreme" content that allegedly "promoted racism, antisemitism, and gun violence," and to *other* "sites and [] users promoting hate and violence," ¶¶171-73. Even assuming Plaintiffs' radicalization theory is viable as a matter of law (it is not), these allegations fall far short of alleging that Meta radicalized Gendron. ¶¶171-73. The Complaint does not allege that Gendron saw any particular posts on Meta's services, and falls silent regarding Instagram and Facebook in the years leading up to the 2022 attack. Moreover, Plaintiffs do not allege that Meta was the cause of Gendron obtaining firearms, purchasing equipment, or otherwise preparing and carrying out his attack.

Given the paucity of allegations that would connect Meta, specifically, with Gendron, Plaintiffs fail to allege that the attack "would not have occurred" but for Meta, or that Meta's services were a "substantial factor in producing the resultant injury." *Monahan*, 82 A.D.2d at 106. The Complaint thus fails to plead cause-in-fact.

V. CONCLUSION

For the foregoing reasons and the reasons described in the Internet-Defendants' Joint Motion to Dismiss, Counts 1-4, 6, 13, 22-24 should be dismissed against Meta.

CERTIFICATION OF WORD COUNT LIMIT
Pursuant to 22 NYCRR 202.8-b

The total number of words in the foregoing document, excluding the caption, the signature block, and any table of contents and table of authorities is 1,552 words, as calculated by the word processing system used to prepare this document; and this document complies with the word count limit as stipulated to by the parties (NYSCEF Doc. No. 45).

Dated: September 1, 2023

Dated: Menlo Park, California
September 1, 2023

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Diona Patterson, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; Barbara Mapps, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; Shawanda Rogers, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M., a minor; and LATISHA ROGERS, Plaintiffs, v. META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILECOMPANY, INC.; GOOD SMILE COMPANY US, INC; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON, Defendants.	Index No. 805896/2023 Hon. Paula L. Feroleto Motion Sequence No.: ORAL ARGUMENT REQUESTED

DEFENDANT SNAP INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Peyton Gendron's crimes are horrific—racist killings targeting not only innocent victims but also the very idea of a plural society. Plaintiffs understandably seek redress for the tragic losses Gendron caused them. But the Complaint's sparse allegations against Snap Inc. ("Snap") make plain that the Snapchat messaging app had nothing to do with Gendron's crimes and that Snap is therefore not a proper defendant in this lawsuit. Independent of the grounds for dismissal explained in the Internet-Defendants' joint memorandum of law, Plaintiffs' paucity of allegations about Snap requires that their claims against Snap be dismissed.

Plaintiffs' core theory—that algorithmic recommendation systems bombarded Gendron with hateful and violent content that drove him to murder—simply does not fit Snapchat, a messaging app whose flagship features do not recommend content but instead allow users to communicate directly with people they know. The Complaint's individualized allegations against Snap are as brief as they are vague. Taking up just 14 of the Complaint's 700-plus paragraphs, *see* ¶¶368–74, they assert that Snapchat's "recommendation algorithms and user feeds" were "designed to prioritize user engagement over safety," but Plaintiffs neither identify any offending feature nor allege that it served Gendron—or anyone else—extremist, hateful, or violent content. ¶373. In fact, the Complaint's Snap-specific allegations do not once mention Gendron or his Snapchat account. This dearth of allegations against Snap stands in stark contrast to the more detailed allegations against other Defendants.

Rather than plead any specific defect or causation theory against Snapchat, Plaintiffs opt instead to improperly lump Snapchat into group allegations against other platforms. But New York law prohibits Plaintiffs from circumventing their pleading burdens through collective allegations, which deprive defendants of particularized notice about what they allegedly did wrong and how those allegations might support a cause of action. That is the case here:

Plaintiffs' muddled allegations against "Instagram, YouTube, and Snapchat" collectively give Snap no notice of the Snapchat features Plaintiffs are challenging or how those features allegedly contributed to Gendron's crimes. *E.g.*, ¶¶162–63, 171–73, 175.

Plaintiffs' failure to either identify a defective Snapchat feature or tie it to their injuries is no accident. As Snap anticipates detailing in a forthcoming motion for sanctions against Plaintiffs' counsel, Plaintiffs' core theory of liability—that Gendron was algorithmically force-fed a stream of hate speech—is simply false as to Snapchat, which is predominantly a camera and messaging app, and which employs unique safeguards that prevent the dissemination of hate speech on the limited side-features that surface other content. Those safeguards are the reason the Attorney General's detailed report on Gendron's shooting identifies no extremist content on Snapchat and never once suggests that the app contributed to Gendron's radicalization. *See* Report at 3, 1–47.[1] What matters here, though, is that neither Plaintiffs' sparse Snap-specific allegations nor their impermissible group-pleaded allegations can state a cause of action against Snap. The claims against Snap should be dismissed.

BACKGROUND

Snap is a communications technology company that operates Snapchat—a visual messaging app for mobile phones. *See* ¶¶360–61, 366. Snapchat's primary features "allow[] users to send text, picture, and video messages called 'snaps'" to other users. ¶361. After the

[1] Affirmation of Michael A. Brady, Ex. A, *Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022* (Oct. 18, 2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf ("Report"). Because Plaintiffs' Complaint repeatedly cites and relies on the Report (¶¶183, 375, 388, 391, 393, 416, 419), the Court may consider it on this motion to dismiss. *See Dragonetti Bros. Landscaping Nursery & Florist, Inc. v. Verizon New York, Inc.*, 144 N.Y.S.3d 333 (Sup. Ct. N.Y. Cnty. 2021).

recipient views a "snap," it "disappear[s]" from the app. *Id.* Snapchat's "visual messaging" capabilities enhance users' "relationships with friends, family, and the world." ¶366.

A. Snapchat-specific allegations

Plaintiffs allege in vague terms that, in addition to these core messaging features, Snapchat also contains "[r]ecommendation algorithms and user feeds ... [that] were designed with the primary goal of maximizing user engagement." ¶373. The Complaint does not further identify or describe these "user feeds" or the "recommendation algorithms" they allegedly employ. Plaintiffs nevertheless assert that these unspecified feeds "prioritize user engagement over user safety by failing to include design alterations that would protect children from harmful content and predatory adults." *Id.* The Complaint never says what "design alterations" would make these unspecified feeds safer. Despite vaguely alleging "harmful content," the Complaint does not identify any specific kind of problematic material that appeared on Snapchat in general or Gendron's account in particular. Nor does the Complaint explain who the alleged "predatory adults" on Snapchat are or what they have to do with Gendron's crimes.

B. Plaintiffs' group allegations

The Complaint's remaining allegations say nothing at all about Snap individually but instead improperly lump Snapchat in with Instagram and YouTube—applications operated by other Defendants. Plaintiffs plead in collective terms that "Gendron began using Instagram, YouTube and Snapchat in his early teens" and "became a problematic user of these [three] products," to the point that "social media ... had a negative impact on his work, studies, relationships, and other important aspects of his life." ¶¶162–68. On information and belief, Plaintiffs allege that "Instagram, YouTube, and Snapchat … directed Gendron" to "extreme" content through "dangerously defective and unreasonably dangerous algorithms" designed to "maximize engagement." ¶¶171–72. Then, "Instagram, YouTube and Snapchat … directed him

to sites and other users promoting hate and violence." ¶173. Yet like their Snap-specific allegations, Plaintiffs' group allegations do not specify which "features" on Snapchat allegedly contained a "dangerously defective and unreasonably dangerous algorithm[]" or exposed Gendron to harmful content or individuals. Nor do they indicate what content or individuals Gendron encountered on Snapchat in particular, as opposed to "Instagram, YouTube, and Snapchat" collectively. ¶¶171–72, 371.

LEGAL STANDARD

Under CPLR 3211(a)(7), a party may move to dismiss where "the pleading fails to state a cause of action." "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).[2] Although complaints are afforded "liberal construction," Plaintiffs' allegations "cannot be vague and conclusory," and "bare legal conclusions will not suffice." *McFadden v. Schneiderman*, 137 A.D.3d 1618, 1619 (4th Dep't 2016) (alterations omitted); *Toppin v. Town of Hempstead*, 121 A.D.3d 883, 884 (2d Dep't 2014).

ARGUMENT

Although Plaintiffs fail to state a claim against any Internet-Defendant for the reasons detailed in the Internet-Defendants' joint memorandum of law, the Complaint's failure to identify any defect linking Snapchat to Gendron's crimes independently requires dismissal of the claims against Snap. Snap is the only Internet-Defendant that Plaintiffs do not even try to connect to Gendron, alleging no individualized facts about Gendron's Snapchat account, his

[2] Unless otherwise noted, all emphasis is added, and citations and internal quotation marks are omitted.

usage of the app, or the alleged connection between the app and Gendron's crimes and livestream. Their Complaint's few Snap-specific allegations criticize the Snapchat app in general terms but fail to identify any allegedly defective feature—much less link such a feature to Plaintiffs' injuries. Those barebones individual allegations cannot support an inference that Snapchat is defective or played any role in causing Gendron's conduct.

Plaintiffs' remaining allegations throw in Snapchat alongside other platforms without alleging what Snapchat, in particular, had to do with Gendron's crimes. Those collective allegations not only fail to identify a defect or causal theory against Snap but also violate the rule against group-pleading, which requires Plaintiffs to describe what Snap *individually* did wrong so that it can defend itself against a baseless attempt to hold it liable for a third party's multiple murders. Snap cannot be reasonably expected to respond to allegations that unidentified Snapchat features played some undifferentiated role in radicalizing Gendron alongside multiple other internet platforms—all the more so when, as here, Plaintiffs have made specific radicalization allegations as to other defendants but not as to Snap.

I. Plaintiffs' Snap-specific allegations fail to state a cause of action.

The few allegations specific to Snap do not describe any defect in the Snapchat platform nor do they connect any such defect to Plaintiffs' injuries. Whether styled in product liability or negligence, the crux of Plaintiffs' theory is that "algorithmically generated user feeds" on Snapchat (and other platforms) promoted racist and violent content that radicalized Gendron. ¶¶163, 373, 535 (design defect); *see* ¶563 (failure to warn); ¶577 (negligence). Under any cause of action, that theory requires Plaintiffs to allege: (1) an actionable defect or omission in the Snapchat app, *see Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 107 (1983) (defective design liability requires proof that "product [was] designed so that it was not reasonably safe"); *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297 (1992) (failure-to-warn theory

requires proof of product's "latent dangers"); *Menear v. Kwik Fill*, 174 A.D.3d 1354, 1357 (4th Dep't 2019) ("there is almost no difference between a prima facie case in negligence and one in strict [products] liability"); and (2) a causal link between any defect or omission and their injuries, *see Voss*, 59 N.Y.2d at 107 (strict liability design defect); *Matter of Eighth Jud. Dist. Asbestos Litig.*, 187 A.D.3d 1623, 1623 (4th Dep't 2020) (failure to warn); *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016) (negligence).[3] Plaintiffs fail to allege either element here.

Plaintiffs' lengthy Complaint contains only a handful of Snap-specific allegations vaguely hinting that Snapchat is defective because of algorithmic feeds of "harmful content," the presence of dangerous adults, Snapchat's use of ephemeral messaging and notifications, and Snap's lack of warning about these supposed harms. Yet Plaintiffs neither describe any of these defects with clarity nor allege a link between them and Gendron's crimes. As a matter of law, Plaintiffs' "conclusory" and "sparse" allegations are inadequate to establish that any flaw in the Snapchat app caused Plaintiffs' injuries. *McFadden*,137 A.D.3d at 1619; *Toppin*, 121 A.D.3d at 884.

Algorithmic promotion of "harmful content." Plaintiffs' allegation that Snapchat algorithmically "direct[s]" users to "harmful content" on "user feeds" is too vague and generic to

[3] Plaintiffs' remaining claims against Snap all likewise turn on defect or omission theories that flawed algorithms caused their injuries by promoting extremist content. *See* ¶596 (unjust enrichment); ¶602 (infliction of emotional distress); ¶644 (parental guidance); ¶702 (wrongful death); ¶707 (personal injuries). Plaintiffs do not name Snap in their claims for invasion of privacy, negligent infliction of emotional distress, negligent entrustment, or violations of the N.Y. General Business Law provisions. Plaintiffs likewise do not allege that video of Gendron's shooting ever circulated on Snapchat and so do not name Snap as a defendant in claims 8-12, which are unjust enrichment, defect, and negligence claims based on alleged circulation of that video.

plead a product defect or causation. ¶373; *see McFadden*, 137 A.D.3d at 1619; *Abe v. Cohen*, 115 A.D.3d 491, 491 (1st Dep't 2014). The Complaint's individual allegations against Snap do not say what Snapchat "user feeds" allegedly display "harmful content," ¶373, do not say what kind of "harmful content" those unspecified feeds display, and do not allege that Gendron ever encountered any such "harmful content" on Snapchat—let alone that Snapchat fed or directed Gendron to any ***racist or extremist*** content. Indeed, Plaintiffs' Snapchat-specific allegations do not mention Gendron or his account at all. *See* ¶¶360–74.

If Gendron "did not see any of" the content that radicalized him on Snapchat, then Snapchat "could not have been the cause of his" crimes. *Gale v. Int'l Bus. Machines Corp.*, 9 A.D.3d 446, 447 (2nd Dep't 2004). Yet Plaintiffs' individual allegations against Snap never suggest that he did. Even accepting Plaintiffs' allegations as true, the claim that some unspecified user other than Gendron might sometimes see unspecified harmful content on an unspecified Snapchat feature does not come close to establishing that Snapchat is defective or caused Gendron's crimes.

Predatory adults. Plaintiffs' allegation that Snapchat connects minor users to "predatory adults" likewise cannot support liability. ¶373. Plaintiffs do not describe any mechanism or feature by which Snapchat supposedly connects minor users to predatory adults, nor does it allege that the app connected Gendron to a predatory adult. Indeed, Plaintiffs do not allege that any particular adult besides Gendron himself played any role in Gendron's radicalization.

Ephemerality and notifications. The Complaint also alleges that Snapchat's use of notifications and the impermanence of "snaps" activate the "psychological principle of reciprocity … prompt[ing] users to open Snapchat repetitively." ¶372. Plaintiffs appear to suggest that these features "drive addiction" because they may tempt a user to respond to

messages. ¶371. But the Complaint alleges no facts that would permit the Court to equate such engagement with the clinical concept of addiction or that otherwise explain why these unremarkable features would constitute a defect. More fundamentally, Plaintiffs do not even try to link these features to Gendron's crimes. Putting aside that Snapchat is not a "product" subject to product-liability law, *see, e.g.*, *Grossman v. Rockaway Twp.*, 2019 WL 2649153, at *4 (N.J. Super. Ct. June 10, 2019), Plaintiffs' "conclusory" and "implausible" suggestion that features designed to encourage conversations between friends encourage people to commit mass murder are "insufficient to survive" dismissal under CPLR 3211. *Mackey v. My Little Saltbox, LLC*, 76 Misc. 3d 1203(A), 2022 WL 3652883, at * 5 (Sup. Ct. Wash. Cnty. Aug. 23, 2022).

Failure to warn. Plaintiffs close their Snap-specific allegations with a conclusory claim that Snapchat "failed to warn teenage users about its products' … risks includ[ing], ... dissociative behavior, social isolation, and an array of mental health disorders like body dysmorphia, anxiety, depression, and insomnia." ¶374. This allegation, too, neither identifies a particular defect in Snapchat nor connects it to Plaintiffs' injuries.

II. Plaintiffs' remaining allegations against Snap violate the rule against group pleading.

Plaintiffs try to overcome their deficient individual allegations by lumping Snap together with other Internet-Defendants in sweeping group-pleaded allegations. But New York law prohibits Plaintiffs from bypassing their obligations with such collective pleading, which fails to give Snap adequate notice of the conduct, features, or events allegedly linking Snapchat to Gendron's crimes.

"A claim involving multiple defendants must make specific and separate allegations for each defendant." *CIFG Assur. North Am., Inc. v. Bank of Am., N.A.*, 41 Misc.3d 1203(A), 2013 WL 5380385, at *3 (Sup. Ct. N.Y. Cnty. Sep. 23, 2013). Plaintiffs cannot "simply lump[]

[defendants] together … in a few, generically crafted paragraphs" without including "any substantive allegations which … separately … attribute wrongdoing specifically to" each defendant. *Rand Int'l Leisure Prod., Inc. v. Bruno*, 22 Misc. 3d 1111(A), 2009 WL 130136, at *3 (Sup. Ct. Nassau Cnty. Jan. 14, 2009). This rule prohibiting group pleading "against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant" exists to guarantee defendants "notice of the material elements of each cause of action." *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981). Where allegations violate the rule, they must be dismissed because defendants "cannot reasonably be required to frame a response." *Id.*; *see also ALP, Inc. v. Moskowitz*, 204 A.D.3d 454, 459 (1st Dep't 2022) (rejecting allegations that "plead against all defendants collectively").

Plaintiffs have violated this rule against group pleading: Besides the 14 paragraphs of vague Snap-specific allegations, *see supra* Section I, the remaining paragraphs that reference Snapchat include no "substantive allegations which refer separately to [Snap] or which attribute wrongdoing specifically to it"; instead, they lump Snapchat together with Instagram and YouTube "in … generically crafted paragraphs," *Rand*, 2009 WL 130136, at *3, ignoring these three platforms' significant differences.

Plaintiffs' only allegations that Snapchat recommended extremist content to Gendron are leveled collectively against the owners of Instagram, YouTube, and Snapchat, "without any specification" as to the "conduct charged" to any "particular defendant." *Aetna*, 84 A.D.2d at 736. Plaintiffs allege, for example, that "Gendron began using Instagram, YouTube, and Snapchat in his early teens," and "quickly became a problematic user" "[b]ecause of the dangerously defective and unreasonably dangerous algorithms powering Instagram, YouTube,

and Snapchat." ¶¶162–63. They allege that "Instagram, YouTube, and Snapchat ... directed Gendron to progressively more extreme and psychologically discordant content" through algorithms that all three "Defendants designed … to maximize engagement of users like Gendron." ¶¶171–72. They allege that these algorithms allowed "Instagram, YouTube, and Snapchat" to "target[] him with increasingly extreme and violent content" and that "Instagram, YouTube, and Snapchat" thereby "directed him to sites and other users promoting hate and violence." ¶173.

Putting aside the demonstrable falsity of these allegations as to Snap, which Snap will address in a forthcoming sanctions motion,[4] Plaintiffs' broad-brush assertions fail to "specif[y] … the precise tortious conduct charged" to Snap and so do not provide "notice of the material elements" of Plaintiffs' causes of action. *Aetna*, 84 A.D.2d at 736. General allegations that "Instagram, YouTube, and Snapchat" are collectively powered by "dangerous algorithms" do not give Snap notice of the Snapchat feature allegedly at issue or the specific nature of its alleged defect. Snap cannot reasonably be asked to respond to allegations that unidentified aspects of Snapchat—which contains a variety of "features" in addition to its primary messaging function, ¶361—promote extremist content.

[4] Snap anticipates filing a sanctions motion against Plaintiff's counsel based on their continued assertion of "material factual statements that are false." N.Y. Comp. Codes R. & Regs. § 130-1.1. Since June, Snap has conferred with Plaintiffs' counsel about the Complaint's factual misrepresentations regarding Snapchat. As explained in publicly available documents that Snap has sent to Plaintiffs' counsel (including the Snap website, incorporated by reference in the Complaint, ¶360 n.146), Snapchat does not have a feed of unmoderated algorithmically promoted content. Instead, Snapchat's side-features that recommend content at all use unique human moderation processes that prevent the dissemination of hate speech. Although Plaintiffs' improper use of group pleading to assert that Snapchat promotes hate speech therefore lacks any factual basis, Plaintiffs have refused to amend their Complaint to correct those false assertions.

Nor do Plaintiffs' group allegations cure the Snap-specific allegations' failure to explain how Snapchat allegedly caused Gendron's radicalization and Plaintiffs' resulting injuries. *See supra* at 6–8. The Complaint does not distinguish between Instagram, YouTube, and Snapchat in describing Gendron's social media use, instead alleging that Gendron began collectively using "Instagram, YouTube, and Snapchat," without distinction, at some point in his "early teens" and that he became a "problematic user" of all three at some unstated time. ¶¶162–63. Plaintiffs then allege, on "information and belief," that "social media" writ large had detrimental effects on Gendron. ¶¶164–68. Plaintiffs never specify either the nature or amount of extremist content Gendron allegedly viewed on Snapchat, alleging only that "Instagram, YouTube, and Snapchat" all "directed" Gendron to "extreme and psychologically discordant" and "violent content." ¶¶171–73. Snap has no way to know what role Snapchat in particular, separate from Instagram and YouTube, is alleged to have played in Gendron's radicalization.

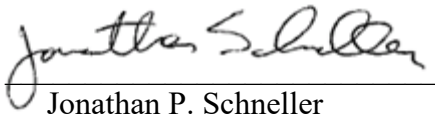
Allegations that Snapchat made some undefined contribution to Gendron's radicalization in combination with multiple other platforms fail to give the notice needed for Snap to defend itself against Plaintiffs' extraordinary contention that a defect in Snapchat motivated Gendron to commit mass murder. That failure is particularly glaring given Plaintiffs' more specific allegations about other platforms' purported contributions to Gendron's radicalization. *See, e.g.*, ¶¶251, 254, 262, 307, 315, 323, 418 (describing Gendron's use of other platforms and extremist content depicted on those platforms). If Plaintiffs had any basis to make similarly specific allegations against Snap, they no doubt would have done so. And the rule against group pleading bars them from plugging that fatal hole by substituting allegations against others as the sole grounds for liability against Snap.

CONCLUSION

Snap requests that the Court dismiss the Complaint with prejudice.

Dated: September 1, 2023

Respectfully submitted,
O'MELVENY & MYERS LLP

By: 
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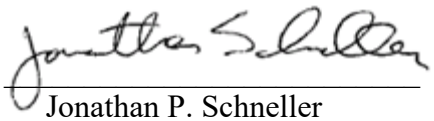
CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits set forth in the parties' stipulation. NYSCEF 45. According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 3,315 words.

Dated: By: 
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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Plaintiffs,

v. Index No.: 805896/2023

META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LCC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC.; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,

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INTRODUCTION

Like millions of Americans, Payton Gendron watched videos on YouTube. Unlike those other users, however, Gendron ultimately decided to commit mass murder. For his premeditated crimes, he was sentenced to life in prison as a competent adult. YouTube deplores Gendron's horrific attack, but it is not legally responsible for Gendron's criminal acts. Plaintiffs' allegations about YouTube, which are "on information and belief" (¶¶171, 173-75),[1] stand in contrast with the New York Attorney General's detailed investigative report, which reflects that YouTube was ***not*** "[f]ormative to [Gendron's] [i]deology of [h]ate" and worked to protect its service from extremist third-party content. Ex. A, Report at 24-26, 35-36; *see also id.* at 41 ("no … liability … likely exists" for online platforms based on the attack).[2]

Plaintiffs seek to hold YouTube liable because it allegedly "directed Gendron to progressively more radical, racist, and violent videos." ¶323. YouTube invests substantial resources removing content that violates its policies, including videos that contain hate speech or promote violence. Ex. B ("Hate speech is not allowed on YouTube.");[3] Ex. C ("content encouraging others to commit violent acts" is "not allowed on YouTube").[4] But under federal law, YouTube cannot be held liable for the third-party speech it publishes, recommends, or fails to

[1] Citations to "¶" are to the Complaint.
[2] Ex. A, *Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022* (Oct. 18, 2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf ("Report"). Plaintiffs' Complaint repeatedly relies on the Report, *see, e.g.*, ¶¶183, 375, 388, 391, 393, 416, 419, so the Court may consider it here. (Exhibits are attached to the supporting affirmation of Thomas S. Lane dated September 1, 2023).
[3] *Hate speech policy*, YouTube Help, https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436.
[4] *Violent or graphic content policies*, YouTube Help, https://support.google.com/youtube/answer/2802008?hl=en&ref_topic=9282436.

remove. Joint Mem. of Law ("MOL") (NYSCEF No. 112) at 6-24. While that is sufficient to grant YouTube's motion to dismiss, this individual memorandum further explains that: (1) the allegedly defective or tortious features of YouTube's service are means of disseminating expressive content—not tangible "products" subject to product liability law; (2) the Complaint fails to allege that these allegedly defective features proximately caused Gendron's horrific murders; and (3) Plaintiff's invasion of privacy claim under New York Civil Rights Law § 50 et seq., in addition to being barred by federal law, also fails to state a claim under New York law because Plaintiffs do not contend that YouTube used Gendron's attack video, which third-parties allegedly uploaded to YouTube in violation of its policies, "for purposes of advertising or trade."

BACKGROUND ON YOUTUBE

Alphabet Inc. owns Google LLC, which owns and operates YouTube. ¶25. YouTube is an online video platform that allows anyone with an internet connection to upload videos of their choosing and share them with the world. ¶¶265-66, 277. This "immense ocean of content" has made YouTube effectively the world's largest video library, and a global hub for news, entertainment, and information. *Twitter v. Taamneh*, 586 U.S. 471, 506 (2023). "[E]very minute of the day, approximately 500 hours of video are uploaded to YouTube," *id.* at 480 (citing statistic from 2022) and "users collectively watch more than 1 billion hours of video *every day*." *Id*. This material is almost unimaginably diverse, and it has enabled creative, educational, political, and cultural expression on a vast scale. In short, YouTube offers "relatively unlimited, low-cost capacity for communication of all kinds," allowing users to communicate about topics "as diverse as human thought." *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017) (cleaned up).

To "organize and present" this mass of content, YouTube, like other leading service providers, uses algorithms that sift through the site's billions of videos to identify the ones that

users might find most relevant based on user inputs and other information. *Taamneh*, 598 U.S. at 480. So "a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks." *Id*. at 481. Earlier this year, the U.S. Supreme Court held that allegations that YouTube hosted, failed to remove, and used its algorithms to "match[] ISIS-related content to users most likely to be interested in that content," were insufficient, as a matter of law, for YouTube and other online services to be liable for aiding and abetting acts of international terrorism committed by ISIS. *Id.* at 488. As the Court explained (*id*. at 499):

> As presented here, the algorithms appear agnostic as to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content. The fact that these algorithms matched some ISIS content with some users thus does not convert defendants' passive assistance into active abetting.

Similarly here, Plaintiffs allege that YouTube's algorithms encourage viewers to watch more videos by matching content with users' expected interests. ¶¶278, 290-91. In Gendron's case, Plaintiffs allege that he was exposed to racist and other objectionable third-party material that the Complaint only vaguely describes. Similar claims have failed when the content at issue "celebrated terrorism and recruited new terrorists" (*Taamneh*, 598 U.S. at 481), and Plaintiffs cannot escape that by framing their claims under product liability, negligence, and invasion of privacy theories.

ARGUMENT

I. PLAINTIFFS' PRODUCT-LIABILITY CLAIMS AGAINST YOUTUBE FAIL BECAUSE YOUTUBE IS A SERVICE AND A PLATFORM FOR SPEECH.

YouTube fully joins the Joint MOL's argument that online services that disseminate third-party content are not "products" for purposes of New York product-liability law. Joint MOL at 24-29. These arguments apply with special force to YouTube.

YouTube is not "tangible personal property distributed commercially for use or consumption." Restatement (Third) of Torts: Products Liability § 19(a).11 (1998). Indeed, Plaintiffs acknowledge that YouTube is "not … tangible" (¶278), is "constantly evolving" (¶293), "develops dynamically" (¶295), and that its "algorithm" is "constantly refine[d]" and "updat[ed] … 'multiple times a month'" (¶296). The Complaint does not describe a fixed and "tangible product" (¶278), but instead an adaptable service not subject to product liability law. *See* Rest. (Third) § 19(b); cmt. f. YouTube is also a means of disseminating "ideas and expression," which is not suited to the "purposes served by products liability law." *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991). That becomes clearer when evaluating the particular YouTube features that Plaintiffs highlight in their Complaint.

Recommendation Algorithm. Plaintiffs allege that YouTube's "dynamic[]" "algorithm" "discern[s] an individual user's preferences" (¶295) and "keeps users watching for longer periods" by (¶298) choosing videos the viewer might like from YouTube's massive library (¶¶290-311, 323). But such an "algorithm [i]s a way to bring [third-party content] to the attention of those likely to be most interested in it," *Anderson v. TikTok*, 637 F.Supp.3d 276, 282 (E.D. Pa. 2022), *appeal docketed*, No. 22-3061 (3d Cir. Nov. 10, 2022), reflecting "editorial decisions regarding third-party content," *Force v. Facebook*, 934 F.3d 53, 66-67 (2d Cir. 2019). Providing tailored suggestions of videos users may wish to watch based on their interests is a paradigmatic example of a *service*—not a standardized product—that disseminates information and ideas. It is no more subject to product liability law than recommendations made by a bookstore about books that a customer might like based on those she had previously purchased or browsed.

Features That Increase Engagement. The other allegedly defective features of YouTube are similarly emblematic of a service. Plaintiffs allege that "the primary way Alphabet increases

the time users spend using their [YouTube] product" is by allowing users to view a series of related videos without individually selecting each one. ¶289. The "Up Next" panel suggests additional videos based on the current video being watched (¶288), and the "auto play feature" by default causes another video to begin playing after the user finishes their current video (¶289). But the Up Next panel is just the user-facing output of the recommendation algorithm discussed above, combined with the editorial choice to play another related video. Both are clear examples of how YouTube disseminates information to users.

Plaintiffs also criticize the features of YouTube that allow users to leave a "like" or comment on a specific video (¶286), "subscribe" to a channel, and receive push notifications about new videos posted to the channel (¶287). But these are tools that allow users to speak, whether by providing a symbolic endorsement of a given video or offering more substantive feedback reflecting their opinions or observations about a video, or that provide users with information about videos that they might choose to watch.

All of these features are not only intangible, they are manifestations of YouTube's editorial decisions in publishing and curating users' speech. These are not "products," and they are thus not subject to product liability law. *See, e.g.*, *Estate of B.H. v. Netflix*, 2022 WL 551701, at *3 (N.D. Cal. Jan. 12, 2022) (product liability law does not extend to "books, movies, or other forms of media"). That is all the more so because Plaintiffs seek to hold YouTube liable *not* for the operation of these features in a vacuum, but instead based on the theory that they caused Gendron to view certain objectionable third-party videos that allegedly influenced his worldview and inspired him to commit a terrible crime. Imposing liability on the dissemination of information, ideas, and speech has never been the domain of product liability law, and courts have uniformly rejected efforts to apply product-liability theories in similar cases. Joint MOL at 27-29.

II. NONE OF YOUTUBE'S ALLEGEDLY WRONGFUL CONDUCT PROXIMATELY CAUSED GENDRON'S ATTACK.

Plaintiffs' claims against YouTube also fail for lack of proximate cause. No proximate cause exists where a defendants' conduct is too "remote" to the injury, *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 234 (2001), or where a superseding cause—such as Gendron's intentional criminal act—breaks the causal chain, *Lorenzo v. City of New York*, 192 A.D.2d 586, 589 (2d Dep't 1993). Plaintiffs must also allege harm flowing from the actions of a particular defendant—they cannot fall back on grievances about an "industry as a whole." *Gordon v. Target Corp.*, 2022 WL 836773, at *10 (S.D.N.Y. Mar. 18, 2022). Plaintiffs' allegations do not satisfy those requirements as to any of the Internet-Defendants, Joint MOL at 29-34, and particularly not as to YouTube.

As described above, Plaintiffs allege that certain YouTube features (*e.g.*, "Up Next," autoplay, comments, likes, subscriptions, and notifications) are defective because they supposedly encourage addiction to watching videos (¶¶274, 286-87, 291), and show videos to users based on "user[] preferences," which can lead, for example, to violent content being shown to users already viewing violent content. ¶¶295, 303. Yet despite Plaintiffs devoting 63 paragraphs to "factual allegations" about YouTube, only two of those paragraphs specifically mention Gendron or his alleged use of YouTube. Plaintiffs generally claim that Gendron used YouTube since "his early teens" (¶162) but they make no allegation about what features Gendron used—*e.g.*, that he subscribed to any YouTube channel, or "liked" or "commented" on any video—much less that these features caused him to become addicted or had anything to do with his subsequent attack. Thus, the Complaint's generalized allegations about YouTube's supposed defects do not plead proximate causation.

Instead, Plaintiffs simply surmise, with no factual support in the Complaint, that videos Gendron viewed on YouTube "effectuated his transition from innocuous adolescent to racist mass murderer." ¶323. But the Complaint does not identify a single specific video that Gendron supposedly watched on YouTube—and certainly not any videos that actually encouraged or directed Gendron to kill or commit other violent, illegal acts. The Complaint certainly does not allege that YouTube's algorithms or notification features suggested such videos to Gendron. Indeed, while Plaintiffs allege Gendron viewed "racist" and "violent" videos on YouTube (¶323), the Complaint makes clear that it was only on *another* platform that he "found a community of fellow racists urging him to move forward" (¶¶174-75). In short, even assuming that YouTube's recommendation and other content features were somehow defective, the Complaint offers no factual allegations that the videos allegedly displayed to Gendron caused him to plan and carry out a premeditated mass shooting, much less that such a result was a foreseeable result of those features.

As a matter of law, these allegations are not enough to establish that YouTube's dissemination of videos was the legal cause of the Buffalo shooting—or to overcome the normal rule that a deliberate third-party criminal act breaks any causal chain. Indeed, in similar cases alleging that YouTube and other online services are liable for acts of violence committed by users exposed to harmful speech on their platforms, courts have consistently found allegations of proximate cause lacking. That is so even where the third-party content at issue was allegedly specifically designed to promote terrorism and inspire acts of violence—something that Plaintiffs do *not* allege here. In *Crosby v. Twitter*, for example, the plaintiffs alleged that ISIS used YouTube and other online platforms to "attract[] new recruits and inspir[e] 'lone actor attacks.'" 921 F.3d 617, 620 (6th Cir. 2019). The Court of Appeals affirmed dismissal for lack of proximate cause.

Explaining that online services cannot "foresee how every viewer will react to third party content on their platforms," the court held that allegations that the attacker viewed ISIS content on defendants' platforms and became "self-radicalized" failed to establish foreseeability or that defendants were "a substantial factor in, or have any direct link to," the resulting terrorist attack. *Id.* at 625-26; *see also, e.g., Fields v. Twitter*, 881 F.3d 739, 741-50 (9th Cir. 2018) (allegations that Twitter knowingly hosted ISIS content intended to recruit terrorists and incite attacks failed to plead proximate causation); *Pennie v. Twitter*, 281 F.Supp.3d 874, 886-87 (N.D. Cal. 2017) (allegations that mass shooter was radicalized by Hamas content encouraging terrorist attacks insufficient to plead proximate cause); *Retana v. Twitter*, 419 F.Supp.3d 989, 996-97 (N.D. Tex. 2019) (same), *aff'd* 1 F.4th 378 (5th Cir. 2021); *cf. Sanders v. Acclaim Entm't*, 188 F.Supp.2d 1264, 1276 (D. Colo. 2002) (dismissing for lack of proximate cause claims based on publication of violent movies and video games consumed by teenaged mass shooters because "the school shooting was not a normal response to dissemination" of such material).

Similarly here, it is not foreseeable that hosting and using general-purpose algorithms to display videos that may be of interest to users—even if some of that material is offensive, racist, or violent in ways that violate YouTube's content policies—would cause a user to plan and commit a horrific mass shooting. Plaintiffs plead no facts that make YouTube's supposedly defective or negligent content features a viable legal cause of Gendron's attack.

III. THE INVASION OF PRIVACY CLAIM FAILS BECAUSE YOUTUBE DID NOT USE PLAINTIFFS' IMAGES FOR PURPOSES OF ADVERTISING OR TRADE.

Unlike the other claims against YouTube, Claim 7 arises from the alleged after-the-fact dissemination of the video depicting the attack. ¶¶607-14. Invoking New York Civil Rights Law § 50 et seq., Plaintiffs claim that unnamed YouTube users posted copies of the video that Gendron created, and they allege that Alphabet "earned advertising revenue from the showing of Gendron's

murder video." ¶612. Plaintiffs do not allege, nor could they, that YouTube solicited or wanted these videos, or that it failed to remove them when notified about their presence on the service. *See* Report at 36 (finding YouTube removed content related to the shooting within one day of posting). This claim falls in the heartland of §230 immunity—and it can and should be dismissed on that basis. Joint MOL at 6-15; *accord Ratermann v. Pierre Fabre USA*, 2023 WL 199533, at *5 (S.D.N.Y. Jan. 17, 2023) (§230 bars claims under same N.Y. invasion of privacy statute). But Plaintiffs' invasion of privacy claim against YouTube also fails on its own terms as a matter of New York law.

New York has no common-law right to privacy, so any relief must be sought under the statute (Civil Rights Law §§ 50, 51), which must be "narrowly construed" and "strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person." *Messenger ex rel. Messenger v. Gruner + Jahr Printing and Publ'g*, 94 N.Y.2d 436, 441 (2000) (cleaned up); *accord Finger v. Omni Publ'ns Int'l, Ltd.*, 77 N.Y.2d 138, 141 (1990) (explaining that the statute "was drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more") (cleaned up); *Burgin v. NFL*, 2014 WL 1760112, at *3 (S.D.N.Y. April 30, 2014) ("New York's statutory right to privacy is narrowly prescribed"). To state a claim, Plaintiffs must demonstrate "(i) usage of plaintiff's name, portrait, picture, or voice, (ii) within the state of New York, (iii) ***for purposes of advertising or trade***, (iv) without plaintiff's written consent." *Ratermann*, 2023 WL 199533, at *8 (cleaned up) (emphasis added). Here, it is clear from the face of the pleadings that YouTube did not use Plaintiffs' images "for advertising purposes or for trade." N.Y. Civil Rights Law § 50.

Established law makes clear that the statute is limited to "prohibit[ing] the use of pictures, names or portraits for advertising purposes or for the purposes of trade only, and nothing more."

Torain v. Casey, 2016 WL 6780078, at *3 (S.D.N.Y. Sept. 16, 2016) (cleaned up). "Advertising purposes" means that the publication, "taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for patronage of a particular product or service." *Beverley v. Choices Women's Med. Ctr.*, 78 N.Y.2d 745, 751 (1991). "Trade purposes" generally involve "use which would draw trade to the firm." *Kane v. Orange Cnty. Publ'ns*, 232 A.D.2d 526, 527 (2d Dep't 1996). Moreover, "not every unauthorized use of an individual's name in connection with trade or advertising constitutes a violation." *Torain*, 2016 WL 6780078, at *4. "To trigger liability," among other things, "the use of the name [or picture or portrait] must … be 'sufficiently related to a commercial end' or 'mercantile rewards.'" *Id*. (quoting *Zoll v. Jordache Enters.*, 2003 WL 1964054, at *16 (S.D.N.Y. April 24, 2003)). For example, "courts have consistently refused to construe these terms as encompassing publications concerning newsworthy events or matters of public interest," and it is equally "well settled that a picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute *** unless it has no real relationship to the article *** or unless the article is an advertisement in disguise." *Finger*, 77 N.Y.2d at 141-42 (cleaned up) (citing cases).

This case does not involve the use of Plaintiffs' images as part of any advertising or promotional effort by YouTube. Indeed, Plaintiffs do not even allege YouTube intentionally or knowingly "used" their likenesses at all. Instead, at most, the allegations suggest that copies of the attack video were uploaded to YouTube by unknown users—just as hundreds of hours of other video are uploaded every minute of every day—and that third-party ads may have appeared adjacent to some playbacks of the video. There is no allegation that YouTube encouraged or participated in the posting of these videos, and the AG Report makes clear that YouTube quickly

removed all versions of the video when it became aware of them. Report at 36. This is simply not a scenario that implicates New York's narrow commercial-appropriation statute.

The allegation that YouTube earned advertising revenue from the presence of the video, even if taken as true, does not change the analysis. It is well-settled that "an underlying motive to increase viewers and revenue does not establish use for advertising or trade purposes." *Torain*, 2016 WL 6780078, at *3; *accord Goelet v. Confidential*, 5 A.D.2d 226, 228 (1st Dep't 1958) ("While newspapers and magazines are published for profit, the use of a name or picture in such publications does not *ipso facto* fall within the statute's [] 'purposes of trade.'" (cleaned up)); *Davis v. High Soc'y Magazine*, 90 A.D.2d 374, 379 (2d Dep't 1982) (the fact that "publication or use of a name or picture is spurred by the profit motive or added to encourage sales or distribution of the publication" is "hardly a sufficient [] ingredient in determining the existence of a trade purpose"). Indeed, "not all material published in the advertising sections of a newspaper is designed to solicit customers or sell a product or service." *Kane*, 232 A.D.2d at 526-27 (publication of third-party letter in a newspaper denominated as a "Paid Advertisement" not for "advertising or trade" where "plaintiffs do not allege in their complaint that the open letter used their name to solicit customers for the funeral director or draw trade to his firm"). This case is even more straightforward: the mere dissemination on YouTube of a video depicting Plaintiffs, created and posted by third-parties, does not constitute use by YouTube of Plaintiffs' images for purposes of advertising or trade. Even apart from §230, Claim 7 fails as a matter of law.

CONCLUSION

For these reasons, and those in the Joint MOL, the claims against YouTube should be dismissed.

Dated: Buffalo, New York
September 1, 2023

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Dated: September 1, 2023

Charles E. Graney, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON, *et al.*,

Plaintiffs,

-against-

META PLATFORMS, INC., *et al.*,

Defendants.

Index No. 805896/2023

Hon. Paula L. Feroleto

Mot. Seq. No.

DEFENDANT DISCORD, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Pursuant to CPLR § 3211(a)(7), Discord, Inc. ("Discord") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint.

I. INTRODUCTION

The facts of this case are undeniably horrific. Motivated by the desire to kill black people, Payton Gendron gunned down innocent victims peacefully going about their daily lives. Discord empathizes with their families. As a matter of law, however, Discord is not responsible for this tragedy.

Plaintiffs name Discord as a defendant along with seventeen other defendants, including other social media companies, arms manufacturers and dealers, and Gendron's parents. The crux of Plaintiffs' claims against the Social Media Defendants is that Gendron was radicalized through racist content he accessed online.[1] As set forth in the Joint Motion to Dismiss (NYSCEF Doc. No. 112) ("Joint Brief") in which Discord joins, the claims fail for many reasons, including that they are barred by Section 230 of the Communication Decency Act, 47 U.S.C. § 230 ("§230").

In any event, Plaintiffs do not allege that Gendron was radicalized through Discord. Gendron has admitted how he was radicalized. The New York State Attorney General ("NYAG") conducted an independent investigation of this matter.[2] Based on Gendron's own

[1] Plaintiffs define the "Social Media Defendants" as "Meta Platforms, Snap, Alphabet, Google, YouTube, Discord, Reddit, Amazon, Good Smile, and 4chan." (Compl. ¶38.)

[2] Lawrence Aff. Ex. 1, NYAG Report. Because the NYAG Report is referenced and quoted throughout the Complaint (Compl, ¶¶183, 375, 388, 391, 393, 416, 419), the Court may consider it here. *See Dragonetti Bros. Landscaping Nursery & Florist, Inc. v. Verizon N.Y., Inc.*, 144 N.Y.S.3d 333 (Sup. Ct., N.Y. Cnty. 2021) ("[T]he Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference . . . and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference.").

statements, the NYAG concluded that Gendron was radicalized by content he accessed on 4chan and, to some extent, Reddit.

In the Complaint, Plaintiffs point to two uses of Discord by Gendron, neither of which form the basis of liability for Gendron's rampage. First, Plaintiffs note that Gendron used a Discord server that only he could access to draft his racist manifesto. (Compl. ¶40.) Any claim that an online provider failed to identify and stop someone from keeping an online journal lies at the core of §230 immunity. Second, Plaintiffs allege that Gendron livestreamed his rampage over Twitch and posted a link to that livestream to his Discord server after inviting others to view it. (Compl. ¶43.) While Plaintiffs concede that the Twitch stream was cut off within two minutes of the first shot (Compl. ¶394), any claims that the stream should have been cut off sooner (or that Discord should be held liable for the link to the Twitch stream) also lie at the core of §230 immunity.

Putting aside §230, the Complaint also fails to allege the required elements for each of the common law claims against Discord.[3] There is no plausible allegation that Discord caused the harm underlying these claims. All that Plaintiffs allege is that Gendron used Discord to draft his manifesto and to link to his Twitch livestream. And, there is no plausible allegation that Discord had a duty or could have foreseen the harm to his victims. Plaintiffs' theory would require online platforms to monitor and screen all private user activity at a massive scale, which would undermine privacy protections for all users, and simply is not feasible.

For these reasons, the Court should dismiss the Complaint with prejudice.

[3] The Complaint includes twenty-four causes of action. Ten are asserted against Discord: (1) Strict Product Liability (Design Defect); (2) Strict Product Liability (Failure to Warn); (3) Negligence; (4) Negligent Failure to Warn; (5) Unjust Enrichment; (6) Infliction of Emotional Distress; (13) Loss of Parental Guidance; (22) Wrongful Death; (23) Personal Injuries; and (24) Joint and Several Liability.

II. BACKGROUND

A. People Use Discord to Communicate With Each Other Online.

Discord is designed as a place where people can talk and hang out with each other online.[4] The service enables people to communicate with each other by sending messages and making calls. People can use Discord to share documents, pictures, videos, and other media. Users can set up community servers to communicate with each other, or servers limited to their own access.

Since getting its start in the gaming community, Discord has been adopted by "many kinds of communities, organizations, and individuals to connect with each other, including law firms, university classes, and others." (NYAG Report at 8.) As of 2020, Discord had 150 million monthly active users. (Compl. ¶376.) These are people from all walks of life. Unlike other online services, Discord does not advertise alongside algorithmically recommended content. (NYAG Report at 8) ("The platform is monetized entirely through a subscription model; there is no advertising.") Discord is simply a place where people communicate online.

B. Plaintiffs' Claims Regarding Gendron's Misuse of Discord.

Gendron's murderous attack is detailed in the Complaint and the NYAG Report. The details of the crime are so heinous that they defy rational explanation. In their understandable search for one, Plaintiffs allege that Gendron conducted this attack because he was radicalized online. Specifically, the Complaint alleges that he became radicalized by "racist and violent content" and "through exposure to hate groups and racists [sic] conspiracy mongers"—primarily on the 4chan and Reddit websites. (Compl. ¶175.) "By his own account, the shooter's path towards becoming a white supremacist terrorist began upon viewing on the 4chan website a brief

[4] Lawrence Aff. Ex. 2, *infra* at 5 n.6.

clip of a mass shooting at a mosque in Christchurch, New Zealand."[5] Section J. of the Complaint, "Gendron Was Radicalized by Defendants' Social Media Products" (Compl. ¶¶169-178), does not mention Discord once.

As to Discord, the Complaint alleges that Gendron used a server, accessible only to him, as a diary. (*Id.* ¶40.) On this server, following his purported radicalization on other platforms, Gendron outlined racist ideologies, collected racist and antisemitic propaganda, took notes regarding weapons and body armor, and made plans to carry out his vicious attack. (*Id.* ¶¶84, 390-391.) Per the Complaint, a half-hour prior to the attack, Gendron invited several other users to his server. (*Id.*) He shared with them his writings and collected content, as well as a link to a Twitch stream through which he broadcast video of his attack. (*Id.* ¶¶43, 393.)

Gendron's only other alleged use of Discord was to post to a channel about body armor and tactical gear. (*Id.* ¶392.) Although Plaintiffs claim that Discord servers exist in which users have shared racist content in violation of Discord's terms, they do not allege that Gendron had any interaction with those servers.

C. Discord Makes Great Effort to Stop Abuse of Its Services.

With more than 150 million monthly active users, some will unavoidably misuse Discord's services. Discord nevertheless goes to significant lengths to stop users from abusing its service. The Complaint acknowledges Discord's Community Guidelines, which prohibit threats to individuals or groups or organizing or supporting violent extremism, among other

[5] NYAG Report at 3.

prohibitions.[6] Discord's Terms of Service also make clear that users cannot use Discord's services to do harm to themselves or others, or anything illegal.[7]

Approximately one in every seven Discord employees dedicates their full time to trying to ensure safety on the service.[8] Their efforts include partnering with safety organizations (such as the Global Internet Forum for Countering Terrorism and Tech Against Terrorism),[9] as well as deploying technology solutions for automated and manual content moderation. (*Id.*) Discord provides user information to law enforcement when in receipt of valid legal process.[10] In cases of immediate danger, Discord works with law enforcement to hold criminals to account. (*Id.*) Discord cannot stop every crime, but it is committed to doing all it can to prevent crime.

III. LEGAL STANDARD

Discord incorporates the Joint Brief's legal standard.

IV. ARGUMENT

A. §230 Bars Plaintiffs' Claims Against Discord.

None of Plaintiffs' causes of action overcome §230 immunity. As set forth in the Joint Brief, courts consistently reject claims where plaintiffs attempt to hold online platforms liable for

[6] Lawrence Aff. Ex. 3, Plaintiffs reference Discord's Community Guidelines in the Complaint (Compl. ¶389), allowing the Court to consider it and other pages of Discord's site. *See Dragonetti Bros*, *supra* at 1 n.2; *see also Uzamere v. Daily News, L.P.*, 946 N.Y.S.2d 69 (Sup. Ct., N.Y. Cnty. 2011) (considering website that complaint incorporated by reference); *Orozco v. Fresh Direct, LLC*, 2016 WL 5416510, at *1 n.1 (S.D.N.Y. Sept. 27, 2016) (same) (citing cases).

[7] Ex. 4.

[8] Ex. 5.

[9] Ex. 6.

[10] Ex. 7.

violent extremism. *See* Joint Brief (citing *Force v. Facebook*, *Gonzalez v. Google*, and *M.P. v. Meta*).

No allegation Plaintiffs make about Discord overcomes this on-point precedent. And Plaintiffs can't make the same radicalization arguments against Discord that they make against other Defendants. Discord is a real-time communications service. Discord does not operate an advertising platform monetizing algorithmic content feeds. §230 clearly bars claims against messaging services based on third-party content. *See, e.g.*, *Bride v. Snap Inc.*, 2023 WL 2016927, at *8 (C.D. Cal. Jan. 10, 2023) (dismissing product liability and negligence claims for failure to regulate users' messaging as barred by §230); *M.L. v. Craigslist, Inc.*, 2022 WL 1210830, at *16 (W.D. Wash. Apr. 25, 2022) (dismissing product liability and negligence claims because allegations about a "messaging system" could not overcome §230); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019) (dismissing product liability and negligence claims that relied in part on allegations about a dating app's messaging function).

All of §230's elements are met here with respect to Discord.

1. Discord meets the first prong of §230 because it is an interactive computer service.

As courts have found, Discord is unquestionably an interactive computer service. *See* Joint Brief; *Stebbins v. Polano*, 2022 WL 1601417, at *3 (N.D. Cal. Mar. 8, 2022) (applying §230 to Discord).

2. Discord meets the second prong of §230 because Plaintiffs seek to hold it liable for publication of allegedly harmful content.

Plaintiffs indisputably seek to hold Discord liable as a publisher of third-party content. Plaintiffs' claims against Discord stem from Gendron's use of Discord to draft his racist manifesto and to later share details of his attack with others. Absent Gendron's communications

and content posted on Discord, Plaintiffs claim the shooting would not have occurred. (Compl. ¶¶388-91.) §230 bars these claims because they would require the Court to treat Discord as the publisher of Gendron's content.

Plaintiffs' attempt to hold Discord liable for allowing Gendron to "engage" with others is "exactly the sort of case for which [§230] provides an impenetrable shield." *Jackson v. Airbnb, Inc.*, 2022 WL 16753197, at *1 (C.D. Cal. Nov. 4, 2022) (§230 barred claims against Airbnb and Snap for gun violence). And Plaintiffs cannot artfully plead around this precedent by alleging Discord allows for user anonymity or private conversations. (*See, e.g.*, Compl. ¶386.) Such defective design framing still seeks to hold Discord liable for third-party content in violation of §230's protections. *Id.*; *see also Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1128 (N.D. Cal. 2016), *aff'd*, 881 F.3d 739 (9th Cir. 2018) (private messaging constitutes publishing activity under §230).

3. Discord meets the third prong of §230 because Gendron himself—not Discord—created and shared the content at issue.

Plaintiffs do not allege that Discord created Gendron's racist manifesto or the messages he shared. Per Plaintiffs, Gendron acted alone. §230 consequently precludes any claims alleging harm from this third-party content. *See, e.g.*, *Dyroff v. The Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (platform immunized where it "did not create or develop the posts that led to [plaintiff's son's] death"); *Sikhs for Justice "SFJ," Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015), *aff'd sub nom.*, 697 F. App'x 526 (9th Cir. 2017) (content posted by a user was "provided by" that person, not the platform).

Plaintiffs cannot overcome such precedent. In order to do so, they would have to allege that Discord "required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts." *Dyroff*, 934

F.3d at 1099. But no such allegation would be plausible here, especially considering that Discord actively *prohibits* the type of content that Gendron posted in violation of its terms.

4. Plaintiffs cannot artfully plead around §230 to state any claim against Discord.

a. Alleging product liability theories against Discord does not overcome §230.

To try to circumvent §230 immunity, Plaintiffs cloak their claims in product liability theories. Courts regularly reject this tactic. *See Herrick v. Grindr, LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (§230 precludes product liability claims arising out of third-party content); *Anderson v. TikTok, Inc.*, 2022 WL 14742788, at *4 (E.D. Pa. Oct. 25, 2022) (dismissing product liability claims because they were "'inextricably linked' to the manner in which [d]efendants choose to publish third-party user content," pursuant to §230); *Doe v. Snap, Inc.*, 2022 WL 2528615, at *13 (S.D. Tex. July 7, 2022) (dismissing negligence and product liability claims under §230 because they inappropriately sought to hold Snap liable for third-party content).[11]

"[W]hat matters is not the name of the cause of action . . . what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). Like in other gun violence cases, here Plaintiffs' allegations are not "that any particular feature encouraged the sale of guns" or gun violence, but rather that Discord "allowed [Gendron] to engage" with other people on the Internet. *Jackson*, 2022 WL 16753197, at *2. Claiming that Discord should have prevented Gendron from posting his extremist content is "exactly the sort of case for which §230 provides an impenetrable shield." *Id.*

[11] *See also Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 929-30 (N.D. Cal. 2021), *aff'd in relevant part sub nom.*, *Doe #1 v. Twitter, Inc.*, 2023 WL 3220912 (9th Cir. May 3, 2023); *In re Facebook, Inc.*, 625 S.W.3d 80, 93-95 (Tex. 2021); *L.W. v. Snap Inc.*, 2023 WL 3830365, at *5 (S.D. Cal. June 5, 2023).

This case is also distinct from the narrow circumstances where claims against online services might overcome §230. In the *Lemmon* case, for instance, the Ninth Circuit found that §230 did not bar claims for harm related to a design feature that the plaintiffs argued turned Snapchat into a speedometer, which allegedly encouraged dangerous driving. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021). The Ninth Circuit allowed the claim to proceed because the alleged harm did not flow from any user-posted content. Yet the Court emphasized that had the plaintiffs attempted to "fault Snap for publishing other Snapchat-user content" that "may have incentivized . . . dangerous behavior," this "would treat Snap as a publisher of third-party content" and "would not be permitted under [§230]." *Id.* at n.4. Plaintiffs' allegation that Discord is responsible for Gendron's murderous rampage because it hosted his writings or his Twitch stream link (Compl. ¶¶388-396) ignores the Ninth Circuit's admonition that such claims are barred by §230.

b. §230 shields each Discord-specific feature that Plaintiffs attempt to paint as dangerous.

As a threshold issue, Plaintiffs' most sensational allegations—that online services algorithmically promote radicalization to boost advertising sales—cannot be plausibly alleged against Discord. Discord is not an advertising-driven platform. (NYAG Report at 8.) *Michael N. v. Montgomery Cnty. Dep't of Soc. Servs.*, 185 N.Y.S.3d 493, 517 (Sup. Ct., Mont. Cnty. 2022) ("In matters where there are multiple defendants, vague and generalized allegations of tortious behavior does [sic] not meet the pleading requirements of CPLR § 3013").

Without this allegation, Plaintiffs' remaining attempts to characterize Discord as dangerous amount to little more than a list of features—private messaging, anonymity, connecting users together, content moderation—none of which is unique to Discord, and which courts around the country have consistently held are protected by §230.

Private messaging. Plaintiffs allege that Discord's private messaging function encourages dangerous communications. (Compl. ¶¶382-383.) As every email user knows, however, private discourse is a foundational feature of the Internet. Accordingly, offering private messaging is a protected service under §230. *See, e.g.*, *Dyroff*, *supra*; *Fields*, 217 F. Supp. 3d at 1128 ("[A] number of courts have applied [§230] to bar claims predicated on a defendant's transmission of nonpublic messages.") (collecting cases). Plaintiffs' allegation that Discord's private "opt-in" chatrooms lead to increased radicalization (Compl. ¶386) similarly is barred by §230. *See In re Zoom Video Commc'ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1030 (N.D. Cal. 2021) (with respect to §230 immunity, "it is irrelevant whether a message is directed at one recipient (like[] Direct Messaging); a small group (like [a] chat room); or the public (like[] messaging boards)"); *see also Fields*, 217 F. Supp. 3d at 1128-29.

Anonymity. The Complaint alleges, through a news article, that Discord's anonymity features are dangerous. (Compl. ¶386.) §230 precludes such a theory, as it "is not plausible" that "anonymity" itself promotes dangerous acts or crimes. *Dyroff*, 934 F.3d at 1094; *see also Bride*, 2023 WL 2016927, at *5-6 (rejecting plaintiffs' attempt to frame user anonymity as a defective design feature under §230); *Seaver v. Est. of Cazes*, 2019 WL 2176316, at *3 (D. Utah May 20, 2019) (dismissing claims under §230 against Tor based on its anonymous peer-to-peer communications protocol).

Connecting strangers. Plaintiffs allege that Discord encourages radicalization by enabling users to connect with dangerous strangers. (Compl. ¶¶382-87.) Yet, holding Discord liable for enabling people to meet others on the service would make "all social-network websites potentially liable whenever they connect their members[.]" *See, e.g.*, *Dyroff v. The Ultimate Software Grp., Inc.*, 2017 WL 5665670, at *14 (N.D. Cal. Nov. 26, 2017), *aff'd*, 934 F.3d 1093

(9th Cir. 2019). This would have a "chilling effect on the Internet by opening the floodgates of litigation." *Id.*

Content moderation. Without applying their allegation specifically to Discord, Plaintiffs claim that the Social Media Companies' content moderation is defectively designed. (Compl. ¶¶542-45.) Content moderation is quintessential protected publishing activity. Congress enacted §230 to address the "grim choice" websites faced where if they "voluntarily filter[ed] some messages[,]" they could be "liable for all messages . . . that they didn't edit or delete." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*en banc*). Any allegations that Discord's safeguards were inadequate are simply an alternate way of alleging that Discord failed to block or remove objectionable content, and thus to hold Discord liable for the harmful effects of the content posted on its service. Courts consistently hold that §230 shields online platforms from liability for "decisions relating to the monitoring, screening, and deletion of content from [their] network[s]." *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008); *see Joude v. WordPress Found.*, 2014 WL 3107441, at *6 (N.D. Cal. July 3, 2014) (§230 immunizes Internet platforms from liability for decisions whether to remove content or ban users, even where harm results).

B. None of Plaintiffs' Causes of Action Otherwise State a Claim Against Discord.

In addition to the arguments set forth in the Joint Brief, there are no unique allegations against Discord that save the common law claims from dismissal. Like other online messaging providers, Discord is not a product but rather provides Internet services. This undisputable fact alone merits dismissal of Counts 1 and 2, the product liability-based claims against Discord.

Further, Plaintiffs do not and cannot allege causation between Discord and the harm suffered by their family members. This failure to plead a required element requires dismissal of

Counts 1 through 4. While any radicalization claim would be insufficient to establish causation, there is no allegation that Gendron was radicalized on Discord. Indeed, Gendron himself admitted in the NYAG Report he was radicalized through third-party content on 4chan and, to some extent, Reddit. Not Discord. (NYAG Report at 24-26.)

Finally, Plaintiffs' negligence-based claims (Counts 3, 4, and 6) also fail because there is no plausible allegation that Discord had any duty to Gendron's victims. Even though Discord tries to stop abuse of its services, it is not liable for every user's harmful act. There is no allegation that Gendron's victims were Discord users or, if they were, that their usage created a special relationship sufficient for negligence claims. Here too, Discord is the most attenuated of all the Defendants with respect to Plaintiffs' claims.

As to the remaining counts asserted against Discord, for the reasons stated in the Joint Brief, there is no claim for unjust enrichment (Count 5), and Counts 12, 22, 23, and 24 are not standalone claims and thus must be dismissed as well.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint against Discord in its entirety with prejudice.

Dated: New York, New York
September 1, 2023

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CERTIFICATE OF COMPLIANCE

I, J. Alexander Lawrence, an attorney, hereby state that the foregoing memorandum complies with the word count limit set forth in Section 202.8-b of the Uniform Trial Rules and the Stipulation and Order in this matter in that the total number of words in the memorandum (excluding the portions exempted from the word limit) is 3,499.

Dated: September 1, 2023

J. Alexander Lawrence

J. Alexander Lawrence

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; SHAWANDA ROGERS. Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M.. a minor; and LATISHA ROGERS,

Plaintiffs,

vs.

META PLATFORMS. INC., formerly known as FACEBOOK, INC.; SNAP. INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC.; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,

Defendants.

Index No. 805896/2023

Hon. Paula L. Feroleto

REDDIT'S INDIVIDUAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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I. Introduction

Reddit incorporates and joins the Internet-Defendants' Joint Memorandum of Law in Support of Motion to Dismiss ("Joint Memorandum") in its entirety and writes separately to emphasize that the scant factual allegations made specifically against Reddit are insufficient to plead any legally cognizable claim for relief. Payton Gendron's actions and the ideology he espoused are undoubtedly abhorrent. But settled law forecloses Plaintiffs' claims against Reddit.

This case arises out of Gendron's horrific attack at the Tops Friendly Market on Jefferson Avenue. Plaintiffs have sued (among others) the Internet-Defendants, including Reddit, asserting that Gendron was "radicalized" and "indocrinat[ed]" by hateful third-party content, and that the services' sorting and presentation of that content gives rise to liability because they "direct[]" "minor users" "to unwanted and escalating racist, antisemitic, and violence provoking content." Compl. ¶ 535.

But Plaintiffs' factual allegations as to *Reddit* conflict with their theory of liability. According to Plaintiffs, Gendron's activity on Reddit was limited and gave no indication that he was planning an attack. And to the extent he is alleged to have found hateful content on the site, his writings confirm that those communities were banned for violating Reddit's sitewide policies.

Similarly, Plaintiffs' allegations regarding Reddit's sorting "algorithm" are only that Reddit sorts and displays user content to reflect the votes of its users and how recently a piece of content was posted, not Reddit's own judgments about which content to feature. Indeed, Reddit is not alleged to have targeted Gendron with any type of content, let alone having led him down an addictive "rabbit hole" of violence, extremism, racism, or antisemitism. By Plaintiffs' own allegations, Gendron's conduct was not foreseeable to Reddit, and Reddit did not cause it.

Moreover, all of Plaintiffs' claims against Reddit fall squarely within conduct immunized by Section 230 of the Communications Decency Act ("CDA"). Foundational to all of Plaintiffs' claims is the allegation that Reddit hosted or sorted objectionable user content; this is indisputably publisher conduct protected by the CDA.

In sum, for the reasons set forth herein and in the Joint Memorandum, all of Plaintiffs' claims against Reddit fail as a matter of law, and Reddit requests that they be dismissed.

II. Factual Background

A. Reddit's Communities and Its Users

Reddit is a community of online communities where Internet users (called "Redditors") connect with each other in communities (called "subreddits") organized around their members' shared interests. Reddit's service is "distinguished" from others because it is driven by users—Reddit users (or "Redditors") themselves create subreddits and define and enforce their community-specific rules.[1] Redditors also play a central role in how content is sorted and displayed on the site: any user can "upvote" or "downvote" a post or comment, reflecting their assessment of that content's quality. Significantly "upvoted" content becomes more prominent, while "downvoted" content does not. *See* Compl. ¶¶ 397-99. Through downvotes, any Redditor can reject transgressive behavior or low-quality content and contribute to it becoming less visible. Only content that receives a high proportion of upvotes in relation to downvotes can appear on the homepage of a subreddit or the "front page" of Reddit's entire site. *Id.*

[1] Office of the New York State Attorney General, Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022 at 8, 25 (October 18, 2022) ("NYAG Report"). The NYAG Report is quoted and relied upon extensively in the Complaint.

Thus, as alleged by Plaintiffs themselves, the display of content on Reddit is driven primarily by the people who use Reddit, not by a centralized algorithm designed to feed or funnel content chosen by Reddit itself. *Id.* at ¶¶ 401-402.

The quality of user content and interactions is also reflected over time through "karma," a measure of how well-regarded a Redditor is in the community based on how the broader Reddit community responds to their content and voting. *Id.* ¶ 399. Karma therefore encourages good behavior and constructiveness within subreddits, not destructiveness, hate, violence, or racism.

B. Reddit's Content Moderation and Enforcement Strategies

Reddit is also unique in its tiered, community-driven approach to content moderation. Each subreddit has its own rules, which are created by users, specific to the particular needs of that community, and enforced primarily by users who serve as volunteer moderators (called "mods"). NYAG Report at 26. Within subreddits, mods enforce their subreddit-specific rules, subject always to Reddit's site-wide enforcement of its terms and content-specific rules. Compl. ¶ 411; NYAG Report at 26. This scalable approach to content moderation empowers Redditors to self-regulate and share some responsibility for how their online communities are governed.

In addition to each subreddit's community-specific rules, Reddit's Content Policy sets global rules governing content on the entire site. *See* Attorney Affirmation of Richard A. Grimm, III in Support of the Motion to Dismiss ("Grimm Affirmation"), Ex. A. Reddit employees, or "admins," enforce these rules across the site, which specifically prohibit content that promotes hate based on identity or vulnerability, and content that encourages, glorifies, incites, or calls for violence or physical harm against an individual or group of people. Grimm Affirmation, Exs. A and B. Contrary to Plaintiffs' allegations, public documents show that Reddit has long prohibited content that "encourages or incites violence" and enforces violations of this rule (and others) by

asking users to stop, temporarily or permanently suspending accounts, restricting communities, removing content, and banning communities. Grimm Affirmation, Ex. C. Users, mods, Reddit admins, and automated tools provided by Reddit surface problematic content for moderation or deletion. *Id.* To the extent that Gendron found allegedly hateful content on Reddit, his writings confirm those communities were banned. Compl. ¶ 419.

Reddit also provides publicly available statistics about its enforcement efforts starting with the year 2018, when it reported that Reddit itself removed 173,347 pieces of content, 15.9% of which were reports of content encouraging violence or self-harm. Grimm Affirmation, Ex. D. Notably, the amount of content-specific enforcement by Reddit's users and moderators that same year was substantial—more than 50 million pieces of user content were removed. *See id.*

C. Plaintiffs' Allegations Against Reddit

Plaintiffs assert 13 claims against Reddit. The crux of most (Claims 1-6, 13, and 22-23) is that Gendron was led "down a rabbit hole" and "overwhelmed with an endless feed of videos," Compl. ¶¶ 9-10, of violent, extremist, racist, or antisemitic content, and that Reddit knew and should have foreseen that this would cause Gendron to commit his heinous crimes.

The specific factual allegations as to Reddit on the issues of foreseeability and causation boil down to a scant handful of paragraphs. With respect to his "radicalization," Gendron allegedly wrote in an online diary that "many of [his] beliefs came from reddit too," but that "[m]any subreddits I joined have been banned." *Id.* ¶ 419. Otherwise, Plaintiffs' allegations about Gendron's use of Reddit are that his "activity on Reddit" was "browsing within certain subreddits," including "subreddits dedicated to discussion of tactical gear and ammunition, all while planning his attack." *Id.* ¶¶ 418-19. Importantly, "the use of Reddit to acquire knowledge about tactical gear is not reflected in any significant way in [his] writings," NYAG Report at 25,

and "the content of most of these Reddit posts is largely exchanging information about the pros and cons of certain brand and types of body armor and ammunition." *Id.* at 30. His posts "generally lack context from which it could have been apparent to a reader that the writer was planning a murderous rampage." *Id.* Even for a comment that is "chilling in retrospect," it "is difficult to say, however, that [it] should have been flagged at the time it was made." *Id.*

Plaintiffs also allege, on information and belief and not as to Gendron, that Reddit's vote-based sorting system elevates extremist, racist, antisemitic, and violent content. Compl. ¶¶ 412-14. Notably, there is no allegation that Reddit targeted Gendron with content in any specific way, nor could there be given how Reddit's sorting algorithm and its service are alleged to work.

The rest of Plaintiffs' claims (Claims 7, 8, and 10) rely on the allegations that (1) video footage of Gendron's attack appeared on Reddit within an hour alongside advertisements, (2) the Attorney General found 17 instances of or links to the video on Reddit, and (3) Reddit took an average of eight days to respond to the NYAG's requests to take down the content. Compl. ¶ 417; NYAG Report at 36. There is no allegation that Reddit's Content Policy or other rules permitted this type of content or that Reddit declined to remove the content, and most of the allegations about Reddit's advertising are only made upon information and belief. Compl. ¶¶ 619, 627.

III. Argument

In nine of the 13 claims against Reddit (Claims 1-6, 13, and 22-23), Plaintiffs rely on the central, unsupported conclusion that Reddit led Gendron down a "rabbit hole" of hateful, violent, racist, and antisemitic content, including to maximize profits, thereby causing him to commit his heinous crimes. *See* Compl. ¶¶ 531, 538, 551, 563, 569, 580, 585, 591, 596, 602, 644, 702, 708.

That conclusion conflicts with Plaintiffs' specific factual allegations against Reddit. Looking closely at what is actually pled as to Reddit shows that Gendron's activities on Reddit were extremely limited and far attenuated from his eventual, horrific actions. This undermines Claims 1-4, 13, and 22-23. Further, Plaintiffs allege that the design of Reddit's service and its content sorting algorithm merely reflects Redditor and community behaviors, not an attempt by Reddit to feed or "recommend" to Gendron hateful, violent, racist, or antisemitic content. This runs counter to the bare conclusions in Claims 1-6, 13, and 22-23.[2]

And, ultimately, even if Plaintiffs had or could plausibly allege causation or foreseeability (which they have not) or cure their pleading deficiencies, all Plaintiffs' claims against Reddit fall squarely within the immunities provided by Section 230 of the CDA. The only conduct attributed to Reddit is that it allegedly hosted content that Gendron read or wrote, that it sorted user content based on a system of user voting and post timing, and that it was a place where users posted video of or links to a video of the attack (before they were removed by Reddit). This is quintessential publisher conduct well within Section 230's immunity.

A. Plaintiffs do not plead a viable cause of action against Reddit.

1. By Plaintiffs' own allegations, Gendron's heinous crimes were not foreseeable given his limited activities on Reddit's service.

Reddit joins the Internet-Defendants argument that Plaintiffs have not pled a causal connection as required. *See* Joint Memorandum at Section III.D. Closely reading the allegations as to Reddit further attenuates the connection between Reddit and Gendron's crimes because

[2] Three additional claims against Reddit (Claims 7, 8, and 10) do not rely on the same central allegation, but fail for the reasons in the Joint Memorandum, as well as for the reason in n.3 below. Claim 24 is for joint and several liability, and it is not a cause of action. It fails because the rest of Plaintiffs' claims fail, as argued in the Joint Memorandum.

Gendron's limited activities on Reddit could not have led Reddit (or anyone else – including the New York Attorney General) to know what he was about to do.

According to Plaintiffs, Gendron engaged in "browsing within certain subreddits," was "active within subreddits dedicated to discussion of tactical gear and ammunition, all while planning his attack," Compl. ¶ 417-18. Importantly, however, his limited activity on Reddit involved only "exchanging information about the pros and cons of certain brands and types of body armor and ammunition," *Id.* at 30, with no indication that he was "planning a murderous rampage" or otherwise engaging in problematic behavior that should be "flagged." *Id.*

Thus, the Complaint, along with the incorporated NYAG report, on their face establish the lack of foreseeability on the part of Reddit that one of its users would undertake the horrific actions that Gendron did. This in and of itself is fatal to Plaintiffs' claims against Reddit. Without any plausible allegations of foreseeability, or the other elements of causation set out in the Internet-Defendants' Joint Motion to Dismiss, Claims 1-4, 13, and 22-23 against Reddit fail.

2. There are no factual allegations that Reddit's content sorting algorithm actually served, directed, or fed Gendron radicalizing or hateful content.

Plaintiffs' complaint also lacks sufficient allegations as to Reddit specifically to support the central premise underlying Claims 1-6, 13, and 22-23, namely, that the Internet-Defendants used algorithms and addictive features to draw Gendron down a rabbit hole of hateful, violent, racist, and antisemitic content, leading to his radicalization and resulting in advertising revenue. *See, e.g.*, Compl. ¶¶ 531, 538, 551, 563, 569, 580, 585, 591, 596, 602, 644, 702, 707.

As alleged, Reddit's specific content-sorting algorithm simply reflects the upvotes and downvotes of Redditors, and the age of a post. It is not a centralized "recommendation" algorithm aimed at steering users towards specific categories of content. *See* Compl. ¶ 400-03. Because of how Reddit's algorithm is alleged to work, Plaintiffs' conclusion, for example, that

Reddit's sorting algorithm "select[s] progressively more violent, racist, and graphic material" to show to users, *see* Compl. ¶ 176, contradicts their own facts as pled.

Indeed, Reddit is not alleged to have selected anything—let alone progressively more harmful material—to feed to Gendron. Rather, Redditors curate content on Reddit by upvoting and downvoting, and Reddit's sorting ensures only that community-approved content is not featured for too long. While Gendron is alleged to have "brows[ed] within certain subreddits," far from having hateful content delivered to him, he confirmed that "[m]any subreddits [he] joined have been banned." *Id.* ¶ 419. And, of course, there is no indication that Gendron found Reddit addictive; indeed, his limited use of the platform undermines any such claim as to Reddit.

Plaintiffs' conclusion that Reddit nevertheless somehow caused (through its sorting algorithm or other site features) or could have foreseen Gendron's conduct is a necessary element to nine of the 13 claims against Reddit. Specifically, all of Plaintiffs' products liability-based and negligence-based claims, as well as his unjust enrichment claim asserting that Reddit maximizes user exposure to hateful conduct, rely on the central premise that Reddit's conduct and design features proximately caused the Plaintiffs' injuries at Gendron's hands. *See* Compl. ¶¶ 531, 538-39, 599-60, 563-64, 569-70, 573, 577, 579-80, 585-87, 591-92, 602-603, 644, 703, 704, 707.

All of these claims rely on a conclusory premise that contradicts the actual factual allegations as to how the Reddit service is designed, works, and was used by Gendron and others. They should therefore be dismissed for failing to plead sufficient facts as to Reddit.

3. All causes of action, including those that do not include the elements of foreseeability and causation, fail for additional reasons.

The remaining causes of action against Reddit (Claims 7, 8, and 10) do not rely on the same core premise but fail nevertheless for the reasons set out in the Internet-Defendants' Joint

Motion to Dismiss.[3] Claim 24, which is also asserted against Reddit, is not a cause of action but only a theory of joint and several liability. It fails because all other claims against Reddit fail.

B. Section 230 forecloses all of Plaintiffs' claims against Reddit, given the nature of the conduct alleged.

Ultimately, Plaintiffs' claims against Reddit rest on allegations that it: (1) used an algorithm to sort content based on user voting and post timing, and (2) hosted, removed, or did not remove quickly enough content that Gendron read and wrote and the video of his attack. As articulated in the Joint Motion, and for the further reasons articulated here, any and all claims based upon this type of alleged conduct are barred by Section 230 of the CDA.

1. Reddit's algorithmic sorting of content is protected.

As set forth above, by Plaintiffs' own allegations, Redditors (not Reddit) control how and where user-generated content like posts, comments, and media appear in their communities and on the broader Reddit service. *See* Compl. ¶ 403. As alleged, and unlike algorithms that might actually "recommend" types of content to a user repeatedly, Reddit uses an algorithm only to sort user content based on how recently it was posted, and the number of upvotes and downvotes it has received, not Reddit's own judgments about what content to feature. *Id.* at 401-402.

Further, regardless of how Reddit's sorting algorithm is alleged to have worked, this type of content sorting and display (and even recommendation) falls squarely within protected publisher conduct under Section 230. Indeed, as set forth in the Joint Memorandum, *see* Section

[3] In addition to the arguments in the Joint Memorandum, Claim 7 (invasion of privacy) also fails as to Reddit because Plaintiffs have not and cannot plead that the videos or links that appeared on the site (before being removed) used Plaintiffs' names or likenesses in advertising or for trade purposes. To plead invasion of privacy, a plaintiff must show use of his name, portrait, picture, or voice for advertising or trade purposes without his written consent. *Torain v. Casey*, 2016 WL 6780078, at *3 (S.D.N.Y. Sept. 16, 2018). Plaintiffs allege generally upon information and belief that Reddit "earned advertising revenue" from images of deceased Plaintiffs in third-party videos on Reddit. Even if these allegations were true, "an underlying motive to increase viewers and revenue does not establish use for advertising or trade purposes." *Id* at *8.

III.A, courts have uniformly held that even more targeted recommendation, selection, or content display algorithms are protected by Section 230. As the New York Court of Appeals has explained, Section 230 "does not differentiate between 'neutral' and selective publishers," and Congress "made a … policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Shiamili v. Real Estate Group of New York*, 17 N.Y.3d 281, 289 (2011). Here, Reddit's alleged role in when and how content is displayed on its service falls short of "active" or "aggressive." Therefore, any claim based on how Reddit sorts user content targets protected publisher conduct, and must be dismissed based on the immunity provided by Section 230 of the CDA.

2. Reddit's content moderation decisions, and those of its users, are also protected by Section 230.

Plaintiffs allege that Reddit hosted content that Gendron read and wrote, and hosted a video of the attack (or links to that video) for a period of time before taking this content down. Compl. ¶¶ 416-17. Notably, there is no allegation that Reddit's Content Policy or other rules, or those of the communities in which Gendron participated, allowed any unlawful content, and, indeed, Reddit has long prohibited content that "encourages or incites violence." *See* Attorney Affirmation at Ex. 3. Reddit's Content Policy also prohibits, among other things, content that promotes hate based on identity. *Id.* at Exs. 1 and 2. To the extent Gendron found allegedly hateful content on Reddit, his writings confirm those communities were banned. Compl. ¶ 419.

Reddit's decisions (and those of its community members and moderators) to host or remove content are protected publisher conduct immunized by Section 230. *See* Joint Memorandum at Section III.A.2; *see, e.g.*, *Shiamili*, 17 NY3d at 290 ("Although the statements at issue are unquestionably offensive and obnoxious, defendants are nonetheless shielded from liability by section 230."). While Plaintiffs identify that the NYAG Report asserted that Reddit

was an "outlier in how long it took the company to remove posts linking to the graphic video of the Buffalo shooting[,]" Compl. ¶ 416, a relative delay in removing content does not undermine Reddit's CDA immunity because "the speed at which it did so" is not actionable. *See Dehen v. Twitter, Inc.*, 2018 WL 4502336, at *4 (N.D. Cal. Sept. 19, 2018) (holding that the speed with which Twitter removed content was protected publisher conduct under the CDA). Ultimately, hate and violence have no place on Reddit. To the extent that Plaintiffs' claims rely upon allegations that Reddit could have removed such content more expeditiously, any such claims are squarely barred by Section 230.

IV. Conclusion

For these reasons, in addition to those in the Joint Memorandum, Reddit respectfully requests that the Court dismiss all Plaintiffs' claims against it with prejudice. Plaintiffs have failed to plead sufficient facts as to Reddit specifically, and Section 230 of the CDA forecloses all claims against Reddit in any event.

Dated: Buffalo, New York
September 1, 2023

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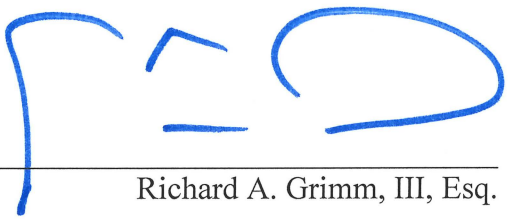
PRINTING SPECIFICATIONS AND WORD COUNT

The undersigned hereby certifies pursuant to 22 NYCRR 202.8-b that the foregoing REDDIT'S INDIVIDUAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS complies with the word count limit; was prepared on a computer using Microsoft Word; and that the word count is 3389 words as established using the word count on the word-processing system used to prepare the documents, exclusive of the caption, any table of contents, any table of authorities and signature block.

Dated: September 1, 2023



Richard A. Grimm, III, Esq.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; SHAWANDA ROGERS, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M., a minor; and LATISHA ROGERS,

Plaintiffs,

vs.

META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,

Defendants.

Index No. 805896/2023

Justice Paula L. Feroleto

Oral Argument Requested

DEFENDANT AMAZON.COM, INC.'S JOINDER BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

On May 14, 2022, Payton Gendron entered Tops Friendly Market in Buffalo and committed a horrific crime. The families of some of Gendron's victims seek to hold Defendant Amazon.com, Inc. ("Amazon") responsible for that crime under various theories: product liability (counts 1-4, 11), infliction of emotional distress (counts 6, 9, 10); invasion of privacy (count 7); negligence (count 12); and various damages theories (counts 5, 8, 13, 22–24). Plaintiffs' claims fail as a matter of law because Amazon did not cause and is not responsible for Gendron's horrific attack, and because federal constitutional and statutory law forecloses liability for Plaintiffs' claims.

Amazon does not diminish in any way Plaintiffs' grief, or the profound pain that Plaintiffs and the Buffalo community experience to this day. Indeed, Amazon agrees with the truths at the heart of Plaintiffs' complaint: this "heinous crime" must serve as a clarion call to end what has become an "endless cycle of racist and antisemitic carnage." (Complaint ¶15.) Amazon likewise agrees that to prevent future tragedies, "American society [must] become less racially biased" and must act to stop this "worldwide epidemic of racist and antisemitic mass shootings." (¶¶6, 161.)

But in a complaint that documents issues of mental health, gun violence, and radicalization, Amazon is the *only* defendant that is not alleged to have played a part in any of them.[1] Rather than allege any purposeful misconduct by Amazon or non-party Twitch,[2]

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[1] Because Plaintiffs include Amazon in the defined term "Social Media Defendants" (¶38), Amazon joins the Internet-Defendants' Joint Motion to Dismiss Plaintiffs' Complaint ("Joint Brief"). As discussed below, the arguments in the Joint Brief are even more forceful when applied to Amazon given that Plaintiffs have not even alleged (nor could Plaintiffs allege) that Gendron was addicted to Amazon or Twitch or that he was radicalized by content on either service.

[2] While Plaintiffs' allegations concern livestreaming on Twitch, Plaintiffs did not sue Twitch and have instead improperly sued Amazon (its parent company). For purposes of clarity, this motion refers to Twitch with respect to the livestreaming allegations.

Plaintiffs argue that it was wrongful to provide the "ability to livestream." (¶632; *id.* ¶179.) By contending that livestreaming is "inherently dangerous" because no "technology exists that can detect violence in time ... to shut down the broadcast before it is seen," Plaintiffs' allegations are a categorical challenge to the existence of livestreaming. (¶353.) Plaintiffs believe that livestreaming as a technology, and not any individualized wrongdoing by Amazon or Twitch, is to blame. (*See id.* at 35 ("*Livestreaming* Inspires and Facilitates Mass Shootings"); *id.* at 47 ("*Livestreaming* caused Gendron to Implement His Murderous Plan.").)

Plaintiffs' pleadings show why they did not allege individualized wrongdoing by Amazon or Twitch. Unlike with other online services referenced in Plaintiffs' complaint, Gendron hardly used Twitch. "Prior to the day of the shooting, [Gendron] used Twitch to stream *three times*, for a combined total of approximately *19 minutes*." (Report[3] at 32 (emphasis added).) And in those 19 minutes, there is "no evidence that [Gendron] violated Twitch['s] … rules," associated with "any offline hate group," or ever referenced "his plans for the shooting." (*Id.*)

Plaintiffs' pleadings also demonstrate Twitch's extensive efforts to root out misconduct on its service. (¶351 (alleging "internal discussions at senior company levels regarding implementation of ... changes" to reduce livestreamed violence).) Twitch's efforts include, but are not limited to, the imposition of system-wide policies, safety review and enforcement, user reporting, and machine detection.[4] It was these very mechanisms—a user-report system and

[3] Affirmation of Robert Scumaci, dated September 1, 2023 ("Scumaci Affirmation"), Exhibit E (*Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022*, at 33, 41 (October 18, 2022) (hereinafter "Report")). The Report is incorporated by reference into the Complaint and may be considered. *See* Joint Brief at 1 n.2.

[4] *See infra* notes 6–9 and accompanying text; *see also* Twitch, *An Open Letter from Our Heads of Safety & Community Health Product*, available at https://safety.twitch.tv/s/article/2023-An-Open-Letter-from-Our-Heads-of-Safety-and-Community-Health-Product?language=en_US.

dedicated Twitch Safety Ops team—that allowed Twitch to stop Gendron's stream "less than two minutes after the first report concerning the imminence of violence."[5] (Report at 33; ¶183.)

Notwithstanding that Twitch's Terms of Service and Community Guidelines prohibit violent content, Plaintiffs allege that Twitch's livestreaming service, a lawful technology used safely by "hundreds of millions of consumers," is "unreasonably dangerous." (¶¶335, 610.) But Plaintiffs' sweeping theory against Amazon fails for at least five reasons, in addition to those demonstrated in the Joint Brief.

First, livestreaming service providers are protected under §230. As the NY Attorney General's Office concluded after its investigation, federal law mandates that "[p]latforms that permit livestreaming" receive "the benefit of ... Section 230 protection." (Report at 45; *id.* at 43 ("Our determination is that no such liability exists under these facts, given the present state of the law.").) Recognizing "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium," Congress enacted §230 to "maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Shiamili v. Real Est. Grp. of New York, Inc*., 17 N.Y. 3d 281, 289 (2011) (cleaned up). Under a straightforward application of §230, Amazon cannot be liable for Gendron's grotesque misuse of Twitch. *See, e.g.*, *Herrick v. Grindr LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (holding that "claims based on the structure and operation" of an app are "barred by §230").

Second, livestreaming is constitutionally protected speech. *See Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023) ("livestreaming a police traffic stop is speech protected by the First Amendment"). And streaming *live* is an essential component of

[5] Nathan Grayson, *How Twitch Took Down Buffalo Shooter's Stream in Under Two Minutes*, Washington Post (May 20, 2022), available at https://www.washingtonpost.com/video-games/2022/05/20/twitch-buffalo-shooter-facebook-nypd-interview/.

*live*streaming. Thus, Plaintiffs' request to "foreclose [this] entire medium of expression" for all people—a medium increasingly used by hundreds of millions across the globe—is flatly unconstitutional. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

Third, Plaintiffs' theory of causation as to Amazon is fatally flawed. Plaintiffs' complaint alleges a multi-link chain of superseding causes, including multiple acts of criminal, negligent, illegal, reckless, and intentional conduct by Gendron and dozens of third parties. (*E.g.*, ¶¶163, 175, 222, 666, 688.) Regardless of the ultimate merit of Plaintiffs' allegations, Plaintiffs' own theory of the case shows why Amazon cannot be liable. *See Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1229 (2023) (explaining that to hold social media companies for the conduct of bad actors engaging in misconduct "would run roughshod over the typical limits on tort liability").

Fourth, Plaintiffs' claims incurably fail to meet basic pleadings standards to state a claim. For starters, although Twitch is an Amazon subsidiary, it is a distinct legal entity. Plaintiffs did not even attempt to satisfy their "heavy burden" to plead "particularized facts" to justify holding Amazon liable for the alleged acts of Twitch. *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 211 (1st Dep't 2005). Plaintiffs have likewise "impermissibly lumped" Amazon with the Social Media Defendants, despite admitting that neither Amazon nor Twitch engaged in the allegations directed at that defendant group. *RKA Film Fin., LLC v. Kavanaugh*, 171 A.D.3d 678, 678–79 (1st Dep't 2019).

Fifth, each of Plaintiffs' substantive claims against Amazon—including product liability theories, negligence theories, intentional and negligent infliction of emotional distress, unjust enrichment, invasion of privacy, and wrongful death—fails to state a claim.

FACTUAL BACKGROUND

A. Amazon Did Not Play a Role in Gendron's Alleged Radicalization.

On May 14, 2022, Payton Gendron, an 18-year-old and legal adult, used an assault-style rifle to kill 10 Black people and wound three others at Tops Friendly Market in Buffalo. (Complaint ¶1.) Gendron "methodically planned [and] researched" his attack by visiting Tops Friendly Market at least two times before May 14. (¶40.) His motivation was to kill Black people as part of a white supremacist mission. (¶42.)

Although Plaintiffs nominally lump Amazon together with the "Social Media Defendants" that allegedly contributed to Gendron becoming a violent white supremacist, Amazon (and Twitch) are entirely absent from the allegations related to Gendron's social media "addiction." (¶¶162–168.) Nor is Amazon or Twitch alleged to have fed Gendron the harmful content that radicalized him. (¶¶169–178.) Plaintiffs' own allegations thus tacitly concede that Amazon and Twitch played no part in the alleged years-long "erosion of Gendron's moral conscience and his desensitization to acts of" violence. (¶177.)

B. Twitch Prohibits Hateful Conduct and Violence.

As a popular livestreaming service (¶330), Twitch allows users to create, share, interact, and express their interests, opinions, work, and hobbies through live, ephemeral content. Twitch is committed to creating a safe online community that supports creativity and expression. To that end, Twitch maintains Terms of Service and Community Guidelines that, among other things, prohibit content that promotes, glorifies, threatens, or advocates violence or physical harm, including the "[u]se of weapons to physically threaten, intimidate, harm, or kill others."[6] Twitch

[6] Scumaci Affirmation, Exhibit B (*Terms of Service*, Twitch); Scumaci Affirmation, Exhibit C (*Community Guidelines*, Twitch). These may be considered and are incorporated into the Complaint. *See Okeke v. Cars.com*, 40 Misc. 3d 582, 585 (N.Y. Sup. Ct. Queens Cty. 2013)

is also unique among other online services in that it further prohibits use of the Twitch service by "individuals or organizations who engage off-service in ... [d]eadly violence and violent extremism" or "threats of mass violence."[7]

Twitch takes violations of its policies very seriously. Twitch employs moderation tools and processes, including machine detection, user reporting, and review and enforcement, to detect content violative of Twitch's policies.[8] Twitch's Safety Ops team, a group of highly trained and experienced professionals, review user reports and content that is flagged by machine detection tools.[9]

Like all users who register for a Twitch account, Gendron agreed to comply with Twitch's Terms of Service and Community Guidelines. Notwithstanding that Gendron clearly breached his agreement with Twitch and egregiously violated Twitch's policies, Plaintiffs seek to hold Amazon liable because it owns Twitch. (¶28.) Plaintiffs point to no wrongdoing by either Twitch or Amazon, but instead, base their claims against Amazon on the theory that the availability of livestreaming technology was "central to Gendron's decision" to carry out his crimes. (¶¶179-180, 182.)

(considering terms of service on motion to dismiss); *Dragonetti Bros. Landscaping Nursery & Florist, Inc. v. Verizon New York, Inc.*, 144 N.Y.S.3d 333 (N.Y. Sup. Ct. N.Y. Cty. 2021) ("[T]he Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference . . . and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference.").

[7] *Id.*

[8] Scumaci Affirmation, Exhibit D (*Safety at Twitch*, Twitch).

[9] *Id.*

C. Twitch Immediately Terminated Gendron's Livestream.

Shortly before 2:00 p.m. on May 14, 2022, Gendron invited several users of Defendant Discord Inc.[10] to a Discord chat room, where Gendron posted a link to a Twitch livestream. (¶43.) At approximately 2:08 p.m., Gendron began a Twitch livestream, which for approximately 22 minutes showed him driving to Tops Friendly Market. (¶¶45-46.) During this period, Twitch deployed automated tools on the livestream, including "machine learning tools to visually inspect" the broadcast. (Report at 33.) Because (as Plaintiffs admit) there was no violent conduct prior to the shooting, the "tools did not detect any content violative of [Twitch]'s policies." (*Id.*)

For most of the broadcast, Gendron's stream does not appear to have been watched by any Twitch users. (*Id.* at 33.) Then at 2:26:59 p.m., approximately 19 minutes into the 24-minute livestream, the first Twitch user entered Gendron's livestream. (*Id.* at 33.) Just before 2:30 p.m., Gendron stepped out of his car at the Tops Friendly Market. (¶46.) At approximately the same time, 2:29:49 p.m., a Twitch user reported to the Twitch Safety Ops team that Gendron was "about to shoot up a store." (Report at 33.)

Twitch's Safety Ops team acted swiftly. "[L]ess than two minutes after the first report concerning the imminence of violence," Twitch terminated Gendron's livestream and soon after "permanently banned" his account. (*Id.* at 3, 33; ¶183.) At "about 2:31 p.m.," nearly the same time that Twitch *shut down* Gendron's livestream, Buffalo police received the *first call* reporting a shooting in progress at the Tops supermarket.[11] The first responders arrived on scene about a

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[10] Discord is an instant messaging platform that enables its users to communicate and share media with each other in real time. (¶375.)

[11] Aaron Besecker, *'We Have Bodies Down Here': Police Radio Transmissions Reveal Grim Scene at Saturday's Mass Killing*, Buffalo News (May 14, 2022), available at https://buffalonews.com/news/local/crime-and-courts/we-have-bodies-down-here-police-radio-transmissions-reveal-grim-scene-at-saturdays-mass-killing/article_2335d1d0-d3c0-11ec-8bc0-4f348962ee1e.html.

minute later, at 2:32 p.m.[12] Buffalo police reported that Gendron was in custody at approximately 2:36 p.m.[13]

In the aftermath of the shooting, Twitch "work[ed] closely with several law enforcement agencies such as the FBI, Department of Homeland Security, and NYPD Cyber Intelligence Unit" to aid their investigation of Gendron's hateful crime. And although Gendron's livestream content could not be viewed or obtained on Twitch after the stream was shutdown, Twitch also worked to support law enforcement and other "industry peers" in their efforts "to help prevent any related content from spreading."[14]

D. Summary of Plaintiffs' Causes of Action Against Amazon.

The complaint asserts 16 "causes of action" against Amazon, including product liability design defect and failure to warn, negligence, unjust enrichment, intentional and negligent infliction of emotional distress, loss of parental guidance, wrongful death, and personal injuries. (¶¶529–715.) Although Plaintiffs name Amazon—not Twitch—as a defendant, Plaintiffs' allegations focus on Twitch, which Plaintiffs acknowledge is a separate entity. (¶28.) Nonetheless, Plaintiffs allege that Amazon can face liability because Amazon allegedly "placed Twitch into the stream of commerce" (¶¶333-334); earns money by selling advertising on Twitch (¶¶331); knows that Twitch is used to livestream acts of violence (¶¶350-351, 622, 636); and failed to exercise reasonable care in failing to modify Twitch to prevent acts of livestreamed violence (¶640). Although none of these allegations would be sufficient even if alleged against

[12] *Id.*

[13] *Id.*

[14] Grayson, *supra* note 5.

Twitch, Plaintiffs nowhere allege that Amazon exercises such control over Twitch that their corporate separateness should be disregarded.

ARGUMENT

I. Section 230 Immunity Bars Plaintiffs' Claims Against Amazon.

Congress enacted the Communications Decency Act in recognition of the "threat that tort-based lawsuits pose to freedom of speech" on the Internet and the need to "keep government interference in the medium to a minimum." *Shiamili*, 17 N.Y.3d at 286-89. §230 of the Act immunizes "interactive computer services"[15] from liability for publishing or moderating third-party content. *Id.* at 287-89. These protections extend to all third-party content, regardless of how laudable or heinous. *See* Joint Brief at 6-7 (discussing terrorist attacks and mass shootings). §230 "immunity is an *immunity from suit* rather than a mere defense to liability" and "it is effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) (emphasis in original) (cleaned up). To give effect to §230's purpose, "the question of [Section] 230 immunity [should be resolved] at the earliest possible stage" to avoid "costly and protracted legal battles." *Id.* Controlling law establishes Twitch's immunity from liability under §230 for any claims "arising from [its] publication of user-generated content." *Shiamili*, 17 N.Y.3d at 288. In an attempt to plead around §230, each of Plaintiffs' causes of action against Amazon relies on one of two theories.

First, Plaintiffs rely on the theory that the so-called "Social Media Defendants" used "algorithms" to direct radicalizing content to Gendron, reflecting the Social Media Defendants'

[15] Twitch is an "interactive computer service," thus §230's protections apply. *McCarthy v. Amazon.com, Inc.*, 2023 WL 4201745, at *8 (W.D. Wash. June 27, 2023).

own "statements and actions" and not third-party content immunized by §230. (*E.g.*, ¶¶156, 530.) As explained in the Joint Brief, courts have uniformly rejected this theory and concluded that §230 forecloses claims based on an online service's "algorithms." (Joint Brief at 8-12.) Regardless, Plaintiffs do not even allege that Amazon or Twitch "recommended" or "exposed" Gendron to any of the allegedly radicalizing content, by algorithm or otherwise—nor could they. (¶¶162–178; Report at 32). Gendron used Twitch to stream only three times for a combined total of approximately 19 minutes prior to the attack.

Second, Plaintiffs rely on the theory that Twitch provided Gendron with the "ability to livestream" his violent acts by (a) failing to implement a time-delay sufficient to moderate his content before dissemination (¶¶355-357) and (b) failing to "shut down" Gendron's livestream faster (¶¶632, 638). Both prongs of this "ability to livestream" theory are squarely preempted by §230. *See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 600 (S.D.N.Y. 2020) (§230 immunizes publication and moderation activities), *aff'd,* 2021 WL 4352312 (2d Cir. Sept. 24, 2021).

Time Delay. §230 forecloses Plaintiffs theory that Amazon should be held liable for failing to institute "a time lapse" to "delay" content before it can be disseminated on Twitch. (¶¶355–357.) Courts, including the New York Court of Appeals, have uniformly recognized that §230 "bar[s] lawsuits seeking to hold a service provider liable" for exercising their "traditional editorial functions," including the decision whether to "***postpone***" publication of user content. *Shiamili*, 17 N.Y.3d at 289 (emphasis added); *see also Herrick*, 765 F. App'x at 590 (holding that "claims based on the structure and operation" of an interactive computer service are "barred by §230").

Speed of "Shut Down." §230 similarly forecloses Plaintiffs' attempt to impose liability on the theory that Twitch's removal of Gendron's stream "within two minutes" permitted "still too much" time to elapse. (¶¶183, 353-355.) Indeed, §230 "plainly immunizes computer service

providers" from claims that they "unreasonably delayed in removing" offensive content. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (applying §230 for delay in removing a post, despite amount of delay being disputed fact). It also immunizes Amazon and Twitch from liability for "unlawful messages that they didn't edit or delete." *Pennie v. Twitter, Inc.*, 281 F.Supp.3d 874, 890 (N.D. Cal. 2017) (§230(c)(2) barred claims arising out of "[imperfect] efforts to remove [offensive] content," including an "image of a police officer being beheaded"). This immunity extends to imperfect efforts to remove "excessively violent" user generated content. 47 U.S.C. §230(c)(2); *see also Word of God Fellowship, Inc. v. Vimeo, Inc.*, 205 A.D.3d 23, 30 (1st Dep't 2022) (requiring online video service to consult "an expert" before deciding whether or not to remove material "would be fundamentally at odds with [§230(c)(2)'s] purpose of ... keep[ing] government interference in the medium to a minimum").

II. The First Amendment Bars Plaintiffs' Claims Against Amazon.

As explained in the Joint Brief, it is well-settled that services like Twitch that transmit speech are entitled to First Amendment protection. (Joint Brief § III.B.1). In cases that concern free speech rights, especially ones seeking injunctive relief, motions to dismiss are particularly important since "protract[ed] litigation" can "chill the exercise of constitutionally protected freedoms." *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) (cleaned up).

Specific to Amazon and Twitch, Plaintiffs contend that livestreaming is "inherently dangerous" because no "technology … can detect violence in time for Twitch to shut down the broadcast before it is seen." (¶353.) Plaintiffs would seek to prohibit livestreaming *per se* by imposing a "time lapse" to prevent the live "dissemination" of content. (¶¶353-355.) Plaintiffs further demand that Twitch's team of "content moderators" monitor each second of the many millions of third-party content channels livestreaming on Twitch so as to, presumably instantly, "identify acts of livestreamed violence, notify law enforcement, and prevent public viewing" of

violent acts. (¶355.) Such a rule would unconstitutionally inhibit speech for at least two reasons, in addition to those addressed in the Joint Brief.

A. Livestreaming Is Protected Speech.

Livestreaming is a particular form of live speech that is doubly protected as a two-sided conversation—i.e., speech from both streamers *and* their viewers. This "communicative nature" of livestreaming calls for special protection independent from "mere video recording." *Knight v. Montgomery Cnty., Tennessee*, 470 F. Supp. 3d 760, 766–68 (M.D. Tenn. 2020). Moreover, the instantaneity of livestreaming enables individuals to effectively protect and promote our most cherished civil liberties. *See Sharpe*, 59 F.4th at 681 ("livestreaming a police traffic stop is speech protected by the First Amendment" because "livestreaming disseminate[s] that information, often creating its own record"). Thus, livestreaming as a means of speech is protected by the First Amendment: "Free speech protections extend to the right to choose *a particular means* or avenue of speech in lieu of other avenues." *Project Veritas v. Schmidt*, 72 F. 4th 1043, 1064 (9th Cir. 2023). Foisting a delay on ***live***streaming would remove the essential feature of this protected means of expression—the publishing of content live, as it happens. And a time elapse would "function[] as an absolute prohibition on [this] type of expression," "infringe on an individual's right to select the *means* of [their] speech," and "effectively destroy" the "unfiltered" nature of the medium. *Id*. at 1064-65 (cleaned up) (analyzing prohibition on one-way recording of conversations); *accord Kleindienst v. Mandel*, 408 U.S. 753, 762-765 (1972) (discussing the "First Amendment right to receive information and ideas").

Even prior to the advent of livestreaming, courts protected the First Amendment right of speakers and viewers to participate in *live* speech. *E.g.*, *Am. Broad. Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1082 (2d Cir. 1977) ("if ABC is not permitted to broadcast live [election] coverage" there is "no question that irreparable harm will result ... not only to ABC but to the public which

views the events"). In announcing these protections, courts have rejected the very arguments that Plaintiffs make. For instance, "the First Amendment does not permit" courts to require even first-party broadcasters "to cut away whenever a violent or disturbing sight may be caught on camera" or to "avoid broadcasting such [content] by use of a split-second tape delay." *Rodriguez v. Fox News Network, L.L.C.*, 356 P.3d 322, 327 (Ariz. Ct. App. 2015) (rejecting claims arising from an on-air suicide following broadcast of high-speed chase). Courts likewise reject the notion that live broadcasters can be liable for airing objectionable live content because they might be able to "implement a more effective screening system." *Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317, 329, 334 (2d Cir. 2010). Because these cases were decided in the context of FCC regulation of public broadcasts where restrictions are "subject to a lower level of scrutiny," *id.*, the rationale applies with even greater force in the context of livestreaming on social media.[16]

B. Twitch's Content Moderation Is Constitutionally Protected.

Online service providers have a constitutional right to make editorial judgments, i.e., "to make choices about whether, to what extent, and in what manner [they] will disseminate speech" by their users. *Volokh v. James*, --- F. Supp. 3d ---, 2023 WL 1991435, at *1–2 (S.D.N.Y. Feb. 14, 2023). In *Volokh*, the court found social media regulations passed in New York "in response to the [Buffalo] mass shooting" were unconstitutional. *Id.* at *6. That New York law was limited in scope. Its "two main requirements" were: "(1) a mechanism for social media users to file

[16] Because of the differences between traditional broadcasters and Twitch, the reasoning of *Fox* is particularly powerful here. Notably, unlike Twitch, §230 immunity does not apply to broadcasters. Additionally, broadcasters, which typically have only one or a few broadcasts, are responsible for their own content. Conversely, Twitch hosts millions of streams with content created not by Twitch but by third parties. (¶330.) Although it would be far easier for broadcasters to implement a screening system for live content, courts have held that such a requirement would violate core First Amendment protections even in that context. Twitch cannot be required to pre-moderate millions of livestreams without infringing the protected speech of third-party users.

complaints about instances of 'hateful conduct' and (2) disclosure of the social media network's policy for how it will respond to any such complaints." *Id.* at *2. "Even though" the law did "not even require that the networks respond to any complaints or take down offensive materials," the Court held that the law unconstitutionally infringed the First Amendment. The content moderation decisions that Plaintiffs seek to impose on Twitch are precisely those that courts agree are barred by the First Amendment. *Volokh*, 2023 WL 1991435, at *7.

Twitch takes very seriously its commitment to working to keep its service safe and prevent misuse by bad actors. Twitch explicitly prohibits violence on its service and deploys many tools to catch and remove it. But as Plaintiffs acknowledge, "moderation technology" is imperfect (¶81) and violative content can slip through even the most robust content moderation programs. Even in those instances, the First Amendment protects livestreaming. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193 (1999).

III. Plaintiffs' Claims Against Amazon Fail for Lack of Causation.

Plaintiffs allege that "livestreaming caused Gendron to implement" his plan because "being able to live stream his murders" provided him "some motivation" to carry them out. (¶¶179–182 (capitalization omitted).) As explained in the Joint Brief, Gendron's intervening criminal conduct was of "such an extraordinary nature … that responsibility for the injury may not be reasonably attributed" to Amazon or Twitch. *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983); *see* Joint Brief at 32-34. But Plaintiffs' theory as to Amazon fails for at least three additional reasons.

First, Plaintiffs do not allege that Amazon (or Twitch) contributed to Gendron's alleged addiction or radicalization, or in any manner facilitated his purchase or modification of the firearms he used to commit his crime. In fact, Plaintiffs' allegations against other defendants more than suffice to disprove any proximate causation finding with respect to the alleged downstream conduct by Amazon. Plaintiffs allege that Gendron committed his horrific crime and streamed it

only *after* he became addicted to social media through allegedly "defective and dangerous algorithms" (¶163); *after* he was radicalized by a "community of fellow racists" on those websites (¶175); *after* he was given a firearm by his parents notwithstanding his previous "violent behavior" (¶698); *after* he was "recklessly" sold another firearm despite numerous "red flags" indicating that he "may use the weapon in a dangerous or illegal way" (¶¶656-58, 666); and *after* "deceptive" advertising persuaded him to illegally modify that firearm (¶¶688, 693). This alleged causal chain—none of which involved Amazon or Twitch—is far too attenuated and shows that Plaintiffs' injuries are far from "ordinarily anticipated." *Hurlburt v. Noble Env't Power, LLC*, 128 A.D.3d 1518, 1519 (4th Dep't 2015) (finding absence of proximate cause as a matter of law); *see Silber v. Motorola, Inc.*, 274 A.D.2d 511 (2d Dep't 2000) (manufacturer of cellular phone holster was not liable for injuries sustained by plaintiffs hit by driver distracted by a problem with the holster). Simply put, Twitch cannot be said to be the legal cause of a radicalized individual's decision to carry out a crime of mass violence, particularly where Twitch is not alleged to have played *any* role in that individual's radicalization.

Second, Twitch's lawful service was not the proximate cause of harms inflicted by Gendron's "downstream, unlawful use." *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 93-95 (1st Dep't 2003) (handgun manufacturers not liable for gun violence because "the causal connection between the alleged business conduct and harm is too tenuous and remote"). Twitch was just *one of several* lawful goods and services used by Gendron to livestream his atrocities, including his GoPro camera, Apple's iPhone 11, and Spectrum's Unlimited Plus data plan. (¶45; Gendron Statement at 143.[17]) To carry out his crimes, Gendron used *countless other* lawful goods,

[17] Gendron released a 120-page "manifesto" that Plaintiffs cite repeatedly. (¶¶84, 216, 390, 393, 471, nn.67–70.)

such as a "Speedout #2 drillbit" to illegally modify his weapon and his Ford Taurus to drive "over two hundred miles to Buffalo." (¶¶524, 2.) Just as GoPro, Apple, Spectrum, SpeedOut, and Ford's "lawful product[s] and service[s]" did not cause Gendron's atrocities, neither did the Twitch livestreaming service. *Spitzer*, 309 A.D.2d at 93. Nor does Plaintiffs' allegation that Twitch failed to prevent the livestream's publication constitute legal causation. As discussed above, Twitch's policies prohibit violence, both on and off the Twitch service. And Twitch employs machine detection tools, user reporting, and a specialized Safety Ops team to detect content violative of Twitch's policies. It "would run roughshod over the typical limits on tort liability" to hold Amazon liable merely because a "bad actor[] took advantage of" the Twitch service. *Twitter*, 143 S. Ct. at 1228-29 (social media companies not liable for terrorist attack because of "lack of any concrete nexus between defendants' services and the [terrorist] attack").

Third, Amazon and Twitch, specifically, cannot have caused Gendron's crimes because other livestreaming services are available. *See Gordon v. Goldman Bros.*, 130 A.D.2d 457, 458 (2nd Dep't 1987) (holding that "the boots in question [were not] in any way responsible for [plaintiff's] fall" where nothing indicated that "different boots might have prevented the accident"). Plaintiffs believe that livestreaming—as a technology writ large—is to blame. (Compl. at 47 ("*Livestreaming* Caused Gendron to Implement His Murderous Plan").) But every major social media service (and many smaller ones) offers livestreaming services. (¶134 (Facebook Live); ¶147 (Instagram); ¶231 (Periscope).) Because no matter what *Twitch* did, Gendron would have been "able to livestream" in any number of places (¶179), the Twitch service itself cannot have caused Gendron's crimes.

IV. Plaintiffs' Allegations Are Deficient and Demonstrate that Amazon Should be Dismissed as a Defendant.

Plaintiffs named Amazon as a Defendant even though the complaint contains no factual allegations of any allegedly unlawful conduct by Amazon. Instead, Plaintiffs' allegations either (1) concern Twitch, not Amazon; or (2) allege a typical parent-subsidiary relationship between Amazon and Twitch, including that Amazon earns revenue through Twitch and has some knowledge of Twitch's general business activities. (¶¶331-334). Without more, Plaintiffs' claims against Amazon must be dismissed given Plaintiffs' failure to meet their "heavy burden" to plead "particularized" facts overcoming New York's presumption of corporate separateness. *Retropolis, Inc.*, 17 A.D.3d at 211; *see also Feigen v. Advance Cap. Mgmt. Corp*., 150 A.D.2d 281, 282–83 (1st Dep't 1989) (dismissing causes of action that relied on "alter ego theory" given the "absence of specific factual allegations demonstrating fraud or other corporate misconduct").

Moreover, even if it were appropriate to hold Amazon responsible for Twitch's alleged actions (it is not), Plaintiffs failed to plead any specific facts justifying lumping Amazon together with the "Social Media Defendants." (¶¶162–78.) Plaintiffs concede that Gendron used Twitch only a handful of times and do not allege that Twitch contributed to Gendron's radicalization. (*Id.*; Report at 32 (prior to the shooting, Gendron used Twitch to stream for approximately 19 minutes total).) Because Plaintiffs "impermissibly lumped" Amazon with "others against whom specific acts had been pleaded," Plaintiffs' Claims I-VI alleged against the "Social Media Defendants" should be dismissed as to Amazon. *RKA Film Financing*, 171 A.D.3d at 678–79 (affirming dismissal of subset of defendants).

V. Plaintiffs Fail to State a Claim Against Amazon Under New York Law.

Each of Plaintiffs' specific causes of action against Amazon—i.e., product liability (counts 1-4, 11), infliction of emotional distress (counts 6, 9, 10); invasion of privacy (count 7); negligence

(count 12) and various damages theories (counts 5, 8, 13, 22–24)— fail under New York law. (*See* Joint Brief at 38-39.)

While all these claims should be dismissed for the reasons explained above and in the Joint Brief, Plaintiffs' product-liability claims (counts 1-4, 11) must be dismissed as to Amazon for a separate and additional reason. Although Plaintiffs allege that Twitch is inherently dangerous (¶¶353-355), they do not allege an alternative feasible design that preserves its essential function as a *live* means of communication. Thus, Plaintiffs' allegations are insufficient to state a claim and must be dismissed. *Burgos v. Lutz*, 128 A.D.2d 496, 497 (2d Dep't 1987) (affirming dismissal where plaintiff failed to allege feasible alternative design that "was any safer or more capable of preventing the harm that the decedent suffered than [the allegedly defective product]"); *see also Sabater ex rel. Santana v. Lead Indus. Ass'n, Inc.*, 183 Misc. 2d 759, 765 (N.Y. Sup. Ct. Bronx Cty. 2000) (dismissing design defect cause of action for alleging product was "inherently dangerous" instead of alleging alternative feasible design).

CONCLUSION

The courts must abide by their role to fairly apply the law even in the face of inconceivable anguish and devastating loss. Here, the law clearly establishes that neither Amazon nor Twitch can be liable for the claims asserted, and Plaintiffs' complaint against Amazon must be dismissed.

Dated: New York, New York
September 1, 2023

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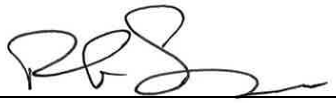
CERTIFICATION OF WORD COUNT LIMIT
Pursuant to 22 NYCRR 202.8-b

I, Robert G. Scumaci, Esq., certify that the foregoing document, excluding the caption, the signature block and any table of contents and table of authorities, as calculated by the word processing system used to prepare this document, complies with the word count limit, or the limit as otherwise stipulated by the parties, because Plaintiffs' counsel and counsel for Amazon agreed that Amazon would be permitted to file a brief of 5,500 words, rather than the 3,500 words contemplated in the July 20, 2023 stipulation. (ECF 45.)

WORD COUNT: 5456 (excluding captions, headings, tables and signature block)

DATED: Buffalo, New York
September 1, 2023



Robert G. Scumaci, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Diona Patterson, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; Barbara Mapps, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; Shawanda Rogers, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; A.M., a minor; and LATISHA ROGERS, Plaintiffs, v. META PLATFORMS, Inc., formerly known as FACEBOOK, INC.; SNAP, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; REDDIT, INC.; AMAZON.COM, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; GOOD SMILE COMPANY, INC.; GOOD SMILE COMPANY US, INC.; GOOD SMILE CONNECT, LLC; RMA ARMAMENT; VINTAGE FIREARMS; MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON, Defendants.	Index No. 805896/2023

MEMORANDUM OF LAW IN SUPPORT OF THE GOOD SMILE PARTIES' MOTION TO DISMISS PURSUANT TO NEW YORK CIVIL PRACTICE RULES AND LAWS SECTIONS 3211(a)(7)

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September 1, 2023

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PRELIMINARY STATEMENT

In the wake of Payton Gendron ("Gendron")'s intentional mass shooting on May 14, 2022, Plaintiffs have filed a sprawling 715-paragraph Complaint against Gendron's parents, a gun store, a body armor manufacturer, and a myriad of social media defendants in an attempt to manufacture third-party liability for Gendron's intentional criminal acts. Bizarrely, Plaintiffs have also sued Good Smile Company, Inc. ("Good Smile Japan") - - a Japanese collectible anime figurine manufacturer (with a principal place of business in Toyko, Japan) and two of its foreign subsidiaries, Good Smile Company US, Inc. ("Good Smile US") and Good Smile Connect, LLC ("Good Smile Connect") (collectively, the "Good Smile Parties"). In their sprawling 715-paragraph Complaint, Plaintiffs only make **thirteen** (13) total factual averments specific to any of the Good Smile Parties, which utterly fail to state any viable claims. Indeed, the myriad of ways that Plaintiffs' claims against the Good Smile Parties fail is extensive.[1]

As a threshold matter, Plaintiffs do not allege - - nor could they allege – that any Good Smile Party: (i) knew Gendron or knew about his apparent racism or had any interaction with him; (ii) had advance notice of his criminal plan, or (iii) knowingly provided him with any assistance whatsoever. Rather, Plaintiffs' seriously misplaced theory is that because Good Smile Japan - - not Good Smile US or Good Smile Connect - - ***invested*** in Defendant 4chan Community Support, LLC ("4chan Community Support"), which operates a bulletin board style online forum, and allegedly "managed" the website where third parties could post anonymous comments and content that Plaintiffs characterize as "racist" "hate speech" that further "indoctrinated" Gendron into

[1] Plaintiffs' Complaint also fails procedurally in that there is no basis to exercise personal jurisdiction against any of the Good Smile Parties consistent with CPLR §3211(a)(8) given that each such defendant has only de minimus contacts with New York - - none of which give rise to Plaintiffs' claims. As a result and as set forth in the Good Smile Parties' accompanying Consolidated Motion To Dismiss For Lack of Proper Service and Personal Jurisdiction, Plaintiffs' claims must be dismissed on that basis as well.

racism and violence, it is somehow liable for his intentional criminal acts. Tellingly, Plaintiffs do not identify a single post that Gendron specifically made or reviewed on this online forum, much less any specific post that any Good Smile Party knew about. As set forth herein and in the Internet Defendants' Joint Motion to Dismiss, Plaintiffs' ill-conceived claims against the Good Smile Parties, even taken as true, fail as a matter of well-established law that Plaintiffs simply disregard.[2]

First, as to Good Smile US and Good Smile Connect, the Plaintiffs have not even attempted to plead specific facts as to those entities, much less any actionable conduct. Indeed, Plaintiffs make a singular factual averment as to each corporate entity relating only to their corporate structure. Thereafter, the Complaint is bereft of any allegations as to what each of these two corporate entities specifically did or did not do that was actionable. See CPLR §3013; Norex Petroleum Ltd. v. Blavatnik, No. 650591/11, 2015 WL 5057693, at *13 (N.Y. Sup. Ct. Aug. 25, 2015) ("A plaintiff must allege each element as to each defendant individually, and Norex has failed to do so here"), aff'd & appeal dismissed, 151 A.D.3d 647 (1st Dep't 2017).

Second, as a matter of black-letter federal law, Plaintiffs' claims, which are based on Good Smile Japan being responsible for the third-party content on the 4chan platform, are expressly barred by Section 230 of the Communications Decency Act ("CDA") that broadly prevents liability based on third-party speech and content posted on such platforms. See 47 U.S.C. §230; Shiamili v. Real Estate Grp. of N.Y., Inc., 17 N.Y.3d 281, 289 (2011) (affirming dismissal; "We read section 230 to bar lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw,

[2] Pursuant to the July 13, 2023 Stipulation (Docket No. 45), the parties agreed that the so-called Social Media Defendants would submit a "common brief," with each individual defendant or entity also filing, as necessary, any motion to dismiss brief of no more than 3,500 words per entity to address individualized arguments. The so-called Internet-Defendants (Meta, Alphabet, Google, Snap, YouTube, Discord, Reddit, and Amazon) have filed a Joint Motion to Dismiss, which constitutes the envisioned "common brief." Because the Good Smile Parties stand on a slightly different footing than the Internet-Defendants, they rely on this consolidated motion to dismiss of 10,486 words, while relying, by reference, on arguments made by the Internet-Defendants where applicable.

postpone or alter content" (quotation omitted)); Force v. Facebook, Inc., 934 F.3d 53, 63-64 (2d Cir. 2019) (affirming dismissal of claims seeking to hold Facebook liable for terrorist acts on the theory that it gave Hamas a forum to communicate and promote its message of hate).

Third, the U.S. Supreme Court, in a strikingly similar case decided close to five months ago, unanimously rejected the notion that social media entities and individuals could be subject to tort liability for providing the platforms that bad actors, such as terrorists and criminals, use for "illegal and sometimes terrible ends" without pleading facts that there was knowing and substantial assistance provided to the bad actor. See Twitter, Inc. v. Taamneh, 598 U.S. 471, 498, 503 (2023) (reversing denial of motion to dismiss attempting to hold social media entities liable for terrorist acts that killed 38 people because they allegedly knew that terrorists were using social media platforms to recruit, radicalize and train bad actors) ("a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability")

Fourth, unable to allege any tortious act by each specific Good Smile entity, the Plaintiffs engage in an improper "lump and dump" pleading tactic on multiple levels. As a threshold matter, the Good Smile Parties are separate and distinct corporate entities from each other and from the other corporate defendants. Yet, the Plaintiffs lump all the Good Smile Parties together and then further lump all three Good Smile Parties with all nine social media defendants, without distinguishing or alleging what each of the Good Smile Parties allegedly did, as opposed to the Plaintiffs' amorphous "Social Media Defendants" group. This pleading gambit is entirely impermissible under New York law. See Barlow v. Skroupa, 173 N.Y.S.3d 98, 104 (2022) (pleading claims "against all defendants collectively, without any specification of the conduct

charged to particular defendants, . . . deprive[s] defendants of the notice regarding 'the material elements of each cause of action' to which defendants are entitled under C.P.L.R. § 3013"), aff'd, 217 A.D.3d 620 (1st Dep't 2023).

Plaintiffs further purport to treat Good Smile Japan as if it is somehow the alter-ego of 4chan because it made an investment in 4chan Community Support. However, Plaintiffs fail to plead any necessary averments under a veil-piercing theory, further requiring dismissal of their claims. See, e.g., Hymowitz v. Nguyen, 209 A.D.3d 997, 999 (2d Dep't 2022) (dismissing complaint against one defendant because the pleadings failed to allege sufficient domination or control to pierce the corporate veil); Sky-Track Tech. Co. Ltd. v. HSS Dev., Inc., 167 A.D.3d 964, 965 (2d Dep't 2018) (dismissing claim against one defendant; "Mere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to sustain a cause of action against a shareholder in its individual capacity").

Fifth, even setting aside that Plaintiffs' claims are barred under the CDA and common law tort principles when the Court drills down on Plaintiffs' individual legal claims against the Good Smile Parties, it will easily conclude that they fail given: (1) the deficient factual allegations as to each specific Good Smile entity; and/or (2) Plaintiffs claims are not viable under New York law.

STATEMENT OF RELEVANT FACTS[3]

Plaintiffs' 715-paragraph Complaint makes a grand total of 13 factual averments specific

[3] The statement of facts are based on the allegations contained in Plaintiffs' Complaint, cited as "Compl. ¶__" and the investment documents, attached hereto as Exhibit A and Exhibit B, expressly referenced in paragraph 435 of the Complaint that the Plaintiffs failed to attach for the Court. Given Plaintiffs' express reference to those documents, they are properly considered as part of this motion to dismiss. See, e.g., Lore v. New York Racing Ass'n. Inc., No. 007686-04, 2006 WL 1408419, at *2 (N.Y. Sup. Ct. May 23, 2006) ("In assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents, attached as an exhibit therefor or incorporated by reference … and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." (quotation omitted)); Dragonetti Bros. Landscaping Nursery & Florist, Inc. v. Verizon N.Y., Inc., No. 654342/2020, 2021 WL 1705799, at *2-3 (N.Y. Sup. Ct. Apr. 28, 2021) (dismissing plaintiff's breach of contract claim based off contract incorporated by reference into complaint), aff.'d, 208 A.D.3d 1125 (1st Dep't 2022).

to any Good Smile entity. See Compl. ¶¶31-33, 429-439. Other than providing basic corporate background information on Good Smile US and Good Smile Connect, the Plaintiffs make no other allegation specific to those entities. Moreover, the sparse allegations regarding Good Smile Japan appear to be based on hearsay from a 2022 magazine article that Plaintiffs' counsel knows to be incorrect based on the corporate documents that they reference in the Complaint, but fail to attach for the Court. For the Court's convenience, attached as Exhibit C is a summary chart that provides the Court with the verbatim text of Plaintiff's allegations as to each Good Smile entity.

Based on these 13 sparse averments, Plaintiffs assert ten purported legal claims against the Good Smile Parties for: Strict Product Liability for Design Defect (Count I); Product Liability Failure to Warn (Count II); Negligence (Count III); Negligent Failure to Warn (Count IV); Unjust Enrichment (Count V); Infliction of Emotional Distress (Count VI); Loss of Parental Guidance (Count XIII); Wrongful Death (Count XXII); Personal Injuries (Count XXIII); and Joint and Several Liability (Count XXIV). Each of these claims fail to state viable claims against any Good Smile Party.

One Total Allegation Concerning Good Smile Connect, LLC

Good Smile Connect is a Delaware limited liability company with a principal place of business in Los Angeles, California. Plaintiffs allege on "information and belief" that Good Smile Connect is wholly owned or managed by Good Smile US, which is, in turn, owned by Good Smile Japan. See Compl. ¶33. Plaintiffs in a conclusory fashion assert that Good Smile Connect "has purposely availed itself of New York law and Plaintiffs' injuries arise out of and relate to [Good Smile Connect's] purposeful availment" - - without providing any factual averments whatsoever to support such an empty conclusion. Id. Indeed, the Complaint is completely bereft of any factual averments as to how Good Smile Connect had any involvement with Mr. Gendron, his criminal

conduct, or with the Plaintiffs.

One Total Allegation Concerning Good Smile US

Good Smile US is a California corporation with a principal place of business in Los Angeles County, California. Plaintiffs allege on "information and belief" that Good Smile US is wholly owned or managed by Good Smile Japan. See Compl. ¶32. Plaintiffs then go to conclusorily assert - - again without any factual support - - that Good Smile US "has purposely availed itself of New York law and Plaintiffs' injuries arise out of and relate to Good Smile US' purposeful availment." Id. As is the case with Good Smile Connect, the Complaint is completely bereft of any factual averments as to how Good Smile US has any involvement with Gendron, his criminal conduct, or the Plaintiffs.

Eleven (11) Total Allegations Concerning Good Smile Japan

Good Smile Japan is a Japanese company with a principal place of business in Japan. See Compl. ¶31 Plaintiffs conclusorily assert - - again without any factual support - - that Good Smile Japan "has purposely availed itself of New York law and Plaintiffs' injuries arise out of and relate to Good Smile US' purposeful availment." Id. The Complaint alleges that "Good Smile Japan manufactures pop culture toys including the popular line of nendoroids." Id. ¶429. Thereafter, the Complaint uses the moniker "Good Smile," without defining that term and despite Plaintiffs having sued three distinct Good Smile corporate entities. Id. at ¶430-439. Plaintiffs make a series of immaterial allegations about "Good Smile's" licensing of figurines. Id. at ¶431-433.

Plaintiffs then allege that a 2022 Wired magazine article reported that Good Smile Japan was involved in an investment in 4chan in 2015 along with three other investors. Plaintiffs assert that based on "[d]ocuments obtain by the New York Attorney General in the Buffalo shooting investigation…Good Smile Company [i.e., **Good Smile Japan**] acquired a 30 percent share in

4chan for its $2.4 million investment." Compl. ¶¶434-435. Despite having those documents, Plaintiffs fail to attach them and make the assertion that "Good Smile's involvement in 4chan is not that of a passive investor but is actively involved in the management of the social media site" Compl. ¶436. That assertion is flatly contradicted by the investment documents that Plaintiffs failed to attach for the Court.

In 2015, Good Smile Japan owned a minority, non-controlling interest in 4chan Community Support an entity that operated the 4chan online platform. Under the Operating Agreement governing that investment, Good Smile Japan's investment in 4chan Community Support was $2.4 million for a 30% interest. Further, under the Operating Agreement, Hiroyuki Nishimura (a Japanese citizen) - - not Good Smile Japan - - was the named managing member with "exclusive control over the business of the Company and …the right, power and authority to execute any documents relating to the business of the Company without the prior approval of the Members." See Ex. B at §6(b) and §8 (emphasis added).

Plaintiffs' Complaint alleges that Good Smile Japan's CEO supposedly "provided, directly or indirectly, funding for 4[c]han" and that Good Smile Japan "managed" the 4chan website, without further articulation. It further alleges that former employees of Good Smile Connect raised concerns about 4chan's message boards having "connections to white supremacy and neo-Nazis." See Compl. ¶438-439. Tellingly, Plaintiffs do not allege that Good Smile Japan:

- knew Gendron or interacted with him;
- had advance notice of his criminal plan;
- knowingly provided any assistance to Gendron regarding his criminal plan; or
- knew what messages Gendron had even posted or reviewed on 4chan.

Indeed, as Plaintiffs concede, no one would know from reviewing messages/posts if

Gendron was even posting or reviewing specific messages because 4chan is a bulletin board style online forum where anyone can post comments and share images and those posting are completely anonymous. See Compl. ¶420, 422, 424. Further, Plaintiffs contend that message threads on 4chan are deleted after 72 hours. Id. at ¶428. As a result, Plaintiffs do not make any allegations regarding any specific message that Gendron posted or even reviewed, much less any posts that Good Smile Japan reviewed at any time.

Plaintiffs' Theory of Liability

According to the Complaint, "[t]he social media products that Gendron used come equipped with sophisticated algorithms designed to addict young users by taking advantage of their susceptibility to dopaminergic reinforcement. Teenagers like Gendron are not only more vulnerable to social media addiction, but are more susceptible to the racist, antisemitic, and conspiracy theories that proliferate online." Compl. ¶7. The Complaint alleges that "Gendron began using Instagram, YouTube, and Snapchat in his early teens and Reddit, Discord, and 4chan in his late teens." Compl. ¶162. As alleged in the Complaint "[b]ecause of the dangerously defective and unreasonably dangerous algorithms powering ***Instagram***, ***YouTube***, and ***Snapchat***, Gendron quickly became a problematic user of these Social Media Defendants' products." Compl. ¶163 (omitting 4chan from its "dangerous algorithm" contention) (emphasis added). According to Plaintiffs, the social media websites exposed Gendron to "hate speech" and "racist" content that "radicalized" him and converted him into white supremacy and violence. See, e.g., Compl. ¶¶3-5, 15, 115, 118, 126, 141, 148-161, 169-177, 323-324, 388-396, 418-419.

As it relates to Good Smile Japan and its investment in 4chan Community Support, the Plaintiffs' Complaint does not allege that:

- 4chan's online bulletin board style website operates or uses any sort of algorithm related to content promotion[4];
- 4chan approves third-party content;
- Gendron posted anything on 4chan, much less his specific plans for mass violence;
- Good Smile Japan, as a minority investor in 4chan, created any sort of algorithm, much less designed or manufactured any website;
- Good Smile Japan, as a minority investor in 4chan, reviewed or approved any specific user content posted on 4chan or any algorithms.

See, generally, Compl. ¶¶ 420-429.

ARGUMENT

On a motion to dismiss pursuant to CPLR §3211(a)(7), while a court must accept the facts as alleged in the complaint as true, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Myers v. Schneiderman, 30 N.Y.3d 1, 11 (2017) (emphasis added). "[T]he favorable treatment accorded to a …complaint is not limitless and, as [a result], conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." Fika Midwifery PLLC v. Independent Health Ass'n, Inc., 208 A.D.3d 1052, 1056 (4th Dep't 2022) (citation omitted) (emphasis added) (affirming grant of motion to dismiss). "[I]ndeed, a cause of action cannot be predicated solely on mere conclusory statements … unsupported by factual allegations." Bratge v. Simons, 167 A.D.3d 1458, 1461 (4th Dep't 2018) (affirming grant of motion to dismiss) (quotation omitted).

In addition, CPLR §3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of

[4] Indeed, Plaintiffs' Complaint regarding algorithms is limited to Instagram (Meta), YouTube (Alphabet), Snapchat, and Reddit. See Compl. ¶¶163, 171-175, 244-248, 267, 274, 288-289, 290-299, 372-374, 397-405, 411-415.

transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR §3013. See also Norex Petroleum, 2015 WL 5057693, at *13.

I. The Complaint Must Be Dismissed Against Good Smile US and Good Smile Connect Due To The Plaintiffs' Complete Failure To Plead Any Relevant Facts As It Relates To Those Corporate Parties

As a threshold matter, the Complaint must be dismissed as against Good Smile US and Good Smile Connect given the total sum and substance of Plaintiffs' allegations as to those specific corporate parties consists of one paragraph each, relating to their corporate existence. See Norex Petroleum, 2015 WL 5057693, at *13.

II. The Complaint's Multi-Level "Group Pleading" Requires Its Dismissal As To Each Good Smile Party

The Complaint does not adequately assert ***any*** cause of action against any Good Smile Party because the Complaint improperly lumps Good Smile Japan, Good Smile US, and Good Smile Connect together (despite the Good Smile Parties being ***three*** separate corporate entities) ***and then double downs*** on the improper lumping by further grouping the Good Smile Parties in with the nine so-called "Social Media Defendants." See Compl. ¶38. First, it is well-established under New York law that corporations are separate and distinct entities—subsidiaries are legally distinct from parents. See Maung Ng We v. Merrill Lynch & Co., Inc., No. 99 CIV. 9687 (CSH), 2000 WL 1159835, at *3 (S.D.N.Y. Aug. 15, 2000) (granting motion to dismiss; "It is beyond dispute that a corporation may not be held liable for the actions of another company merely because it has an ownership interest in it").

Second, it is equally well-established under New York law that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR §3013. Group pleadings, which are pleadings against multiple

defendants without indicating which defendant is liable for a particular action, are generally inadequate to put each defendant on notice of the claims against it. See, e.g., Aetna Cas. & Sur. Co v. Merchants Mut. Ins. Co., 84 A.D.2d 736, 736 (1st Dep't 1981) (holding a plaintiff's pleadings insufficient when the plaintiff pleads claims "against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant.").

Simply, a plaintiff must allege each element as to each cause of action as to each defendant individually. Here, the Complaint is patently insufficient because the Complaint does not specifically allege any element of any claim against any Good Smile Party, and thus, the Complaint is subject to dismissal. See, e.g., Norex Petroleum, 2015 WL 5057693, at *13; Portnoy v. Am. Tobacco Co., No. 96/16323, 2-MG, 96-16324, 1997 WL 638800, at *3 (N.Y. Sup. Ct. Sept. 26, 1997) (dismissing tobacco-related claims because "plaintiffs fail to distinguish the actions of any one defendant from those of the others") (emphasis added).

Plaintiffs' pleading deficiency is no mere technical defect, but designed to conceal the fact that they have not alleged any viable claims against each Good Smile Party. By way of limited example, in Paragraph 163 of the Complaint, Plaintiffs allege: "Because of the dangerously defective and unreasonably dangerous algorithms powering Instagram, YouTube, and Snapchat, Gendron quickly became a problematic user of these Social Media Defendants' products." Paragraph 163 lumps the Good Smile Parties into the "Social Media Defendants" when discussing social media "products" and "algorithms" despite: (i) not alleging anywhere that any Good Smile Party had any role in any algorithm or designing any website; (ii) failing to allege that 4chan even uses algorithms; and (iii) acknowledging that Good Smile Japan *manufactures and licenses collectible anime figurines*, which has nothing to do with Plaintiffs' claims.

There is no allegation that Good Smile US, Good Smile Connect, or Good Smile Japan created or deployed any algorithm for any website. Put bluntly, the Complaint, on the one hand, fails to allege - - because it cannot do so - - that any Good Smile Party created any "dangerous algorithms" for any social media site (the alleged product) yet, on the other hand, attempts to conceal this fact by lumping the Good Smile Parties with the Social Media Defendants. See Compl. ¶¶ 97, 152, 153, 156, 170. See, generally, id. ¶¶ 90-226, 529-606 (allegations against "social media defendants" that do not sufficiently describe which defendant should be on notice for particular actions). Thus, the Complaint must be dismissed.

III. Plaintiffs' Complaint Must Also Be Dismissed Because It Impermissibly Treats All The Good Smile Parties and 4chan As Alter-Egos of One Another While Utterly Failing To Plead Any Facts Supporting Veil Piercing

Similar to its "lump and dump" pleading gambit, Plaintiffs' Complaint also impermissibly treats all the Good Smile entities as alter egos of each other while completely failing to plead any facts that support disregarding the corporate form. "It is well established that mere conclusory statements that an entity is an "alter ego" of a corporation or is "dominated or controlled" by the corporation is insufficient to sustain a cause of action." DaSilva v. Am. Tobacco Co., 667 N.Y.S.2d 653, 655 (1997) (claims against corporate parents were deficient; "It is well established that mere conclusory statements that an entity is an "alter ego" of a corporation or is "dominated or controlled" by the corporation is insufficient to sustain a cause of action"); Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP, No. 03 CIV. 0613 GBD, 2004 WL 112948, at *7 (S.D.N.Y. Jan. 22, 2004) ("Outside of their conclusory allegations of control, the complaint is devoid of any factual allegations to support a finding of alter-ego. Without any supportive factual allegations, plaintiffs have failed to allege sufficient facts to avoid dismissal of their alter ego claim"). See also McCloud v. Bettcher Indus., Inc., 90 A.D.3d 1680, 1681 (4th Dep't 2011) ("[L]iability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in

the shares of its subsidiary"); Appavoo v. Phillip Morris Inc., No. 122469/97, 1998 WL 440036, at *5 (N.Y. Sup. Ct. July 24, 1998) (dismissing plaintiff's fraud claim against corporate parent because "Plaintiffs' rhetorical flourish cannot hide their total failure to plead any facts in support of their alter ego theory of liability.").

Even more troubling, Plaintiffs seek to hold Good Smile Japan liable based on the allegations against 4chan because it was a minority investor in 4chan Community Support - - again without pleading any facts supporting a veil-piercing theory. As the Court of Appeals has made clear:

> In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice'. . . a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in "bad faith" while representing the corporation.

East Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc., 16 N.Y.3d 775, 776 (2011) (affirming that plaintiff's claims were deficient) (quotation omitted). "It is well established that those seeking to pierce the corporate veil bear a heavy burden." Prichard v. 164 Ludlow Corp., No. 600828/06, 2006 WL 3626306, at *5 (N.Y. Sup. Ct. Dec. 12, 2006) (granting motion to dismiss; "Given the courts' reluctance to disregard the corporate form, complaints seeking to pierce the corporate veil require specificity in pleading"), aff'd, 49 A.D.3d 408 (1st Dep't 2008).

Here, Plaintiffs' Complaint is completely bereft of any facts that Good Smile Japan - - or any other Good Smile entity - - exercised complete dominion and control over 4chan, failed to adhere to corporate formalities, commingled corporate assets, or any other factor supporting the disregarding of corporate form. As a result, Plaintiffs' complaint must be dismissed. See, e.g.,

Barlow, 173 N.Y.S.3d at 105 (dismissing complaint based on allegations that defendant held an equity interest, she actively participated in operations, engaged in self-dealing with the company, and either knowingly or recklessly participated in fraud with the company; finding allegations "[fell] far short of indicating that she dominates Skytop Strategies, rather than participates in it, as would be expected if she holds an equity interest") (emphasis added); Hymowitz, 209 A.D.3d at 999 (dismissing complaint against one defendant for failing to allege sufficient domination or control to pierce the corporate veil); Sky-Track Tech., 167 A.D.3d at 965 (dismissing claim against one defendant; "Mere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to sustain a cause of action against a shareholder"); Print & More Assoc., Inc. v. Stenzler, No. 651318/11, 2013 WL 3723199, at *5 (N.Y. Sup. Ct. July 8, 2013) ("Here, having pleaded no facts supporting a claim that Stenzler and Harwood exercised complete domination and control over the Kidville defendants so as to abuse the corporate form, its conclusory allegation that defendants are alter egos of one another by virtue of their co-location and common ownership is insufficient to state a claim"); Lichtman v. Estrin, 282 A.D.2d 326, 328-29 (1st Dep't 2001) (affirming motion to dismiss based on conclusory allegations of domination and control); DaSilva, 667 N.Y.S.2d at 655 ("It is well established that mere conclusory statements that an entity is an 'alter ego' of a corporation or is 'dominated or controlled' by the corporation is insufficient to sustain a cause of action.").

IV. The Complaint Against The Good Smile Parties Must Be Dismissed Because Section 230 Of The Communications Decency Act Bars Plaintiffs' Claims, As A Matter of Well-Established Law[5]

Once the Court sets aside the Plaintiffs' wholesale "group pleading" deficiencies, Plaintiffs' theory, such as it is, against Good Smile Japan is that it invested in and allegedly

[5] To be clear, neither Good Smile US nor Good Smile Connect are internet service providers under the CDA, nor are they alleged to be. However, since Plaintiffs somehow seek to hold Good Smile US and Good Smile Connect liable

"managed" the 4chan website, which is an online bulletin-board style forum that Plaintiffs claim contained unidentified anonymous third-party posts that were "racist" and hateful and which further radicalized Gendron to commit his acts of violence. See Compl. ¶¶3-5, 162, 169-177, 323-324, 388-396, 418-419, 420-428. Even giving credence to this attenuated theory, it is non-viable, as a matter of well-established federal law under section 230 of the CDA.

A. The CDA Provides Absolute Immunity For All Claims Seeking To Hold Good Smile Japan As The Publisher Of Any Third-Party Posted Content On 4chan

Section 230 of the CDA expressly bars all claims for liability based on third-party content posted to websites. See 47 U.S.C. §230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section"); Shiamili, 17 N.Y.3d at 289 (affirming grant of motion to dismiss because CDA barred claims based on third-party posts; "[W]e read section 230 to bar lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content" (quotation omitted)); Force, 934 F.3d at 63-64 (affirming dismissal of claims that social media defendants were liable for terrorist acts of violence); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium."); Scott v. Moon, No. 2:19-CV-5, 2019 WL 332415, at *2-3 (W.D. Va. Jan. 24, 2019) ("the CDA establishes 'a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them.' They may not be held liable for merely enabling information created or developed by others to be posted online") (quotations omitted), aff'd, 773 F. App'x 138 (4th Cir. 2019).

for the allegations relating to Good Smile Japan's investment and alleged role in 4chan, those derivative claims against Good Smile US and Good Smile Connect would also be barred by the CDA.

Section 230 establishes that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C, §230(c)(1). As the Court of Appeals has recognized, the CDA creates immunity for a defendant from all "state law liability if: (1) it is a 'provider or user of an interactive computer service'[6]; (2) the complaint seeks to hold the defendant liable as a 'publisher or speaker'; and (3) the action is based on 'information provided by another information content provider. '" Shiamili, 17 N.Y.3d at 286 (quoting 47 U.S.C. §230(c)(1)). Moreover, the Court of Appeals has recognized:

> Both state and federal courts around the country have 'generally interpreted Section 230 immunity broadly, so as to effectuate Congress's policy choice not to deter harmful online speech through the route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages'.

Id. at 288 (emphasis added) (citation omitted). See also Force, 934 F.3d at 64 (collecting cases on the universal view that Section 230(c)(1) should be construed broadly in favor of immunity"); Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016) ("There has been near-universal agreement that section 230 should not be construed grudgingly"); Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in §230 broadly in all cases arising from the publication of user-generated content").[7]

[6] The "most common interactive computer services are websites." Shiamili, 17 N.Y.3d at 290 (citation omitted).

[7] As the federal courts in New York and around the country have routinely held, presenting claims couched under any theory, such as product liability, negligence, or negligent or intentional infliction of emotional distress, does not permit the claim to escape Section 230 immunity. See Force, 934 F.3d at 64 n.18 ("Section 230(c)(1) applies not only to defamation claims, where publication is an explicit element, but also to claims where 'the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker.' 'Thus, courts have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action, including housing discrimination, negligence, and securities fraud and cyberstalking'") (citations omitted)); Herrick v. Grindr, 306 F. Supp. 3d 579, 593 (S.D.N.Y. 2018) (claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress were barred by CDA); Murawski v. Pataki, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) ("Section 230(c) thus immunizes internet service providers from defamation and other, non-intellectual property, state law claims arising from third-party content."). See also Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016) ("[W]hat matters is not the name of the cause of action … but whether the cause of action inherently requires

As recognized by the Second Circuit and the Court of Appeals, "the seminal Fourth Circuit decision interpreting the immunity of Section 230 shortly after its enactment, *Zeran v. America Online, Inc.*, …described Congress's concerns underlying Section 230:

> The specter of ... liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress ... chose to immunize service providers to avoid any such restrictive effect.

Force, 934 F.3d at 63; See also Shiamili, 17 N.Y.3d at 287 (adopting Zeran's analysis, holding "Section 230 to bar 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial function—such as deciding whether to publish, withdraw, postpone or alter content'"); Scott, 2019 WL 332415, at *2 ("interactive computer services… may not be held liable for merely enabling information created or developed by others to be posted online").

Here, Plaintiffs have alleged that Good Smile Japan not only invested in 4chan, but "managed" the online forum, putting it squarely within the scope of Section 230's protections.[8] See Shiamili, 17 N.Y.3d at 284, 290 (element satisfied where plaintiff claimed "defendants allegedly 'administered and chose content for' a publicly accessible Web site – a blog"). See also Bride v. Snap, Inc., No. 2:21-cv-06680-FWS-MRW, 2023 WL 2016927, at *4 (C.D. Cal. Jan. 10, 2023) ("Courts have noted providers of interactive computer services include entities that create, own, and operate applications that enable users to share messages over its internet-based servers"),

the court to treat the defendant as the publisher or speaker of content provided by another" (quotation omitted)), aff'd, 881 F.3d 739 (9th Cir. 2018).

[8] Federal courts have expressly recognized that the definition of "Internet Service Provider" should be construed "expansively" and broadly to effect Congress' intent. See, e.g., Ricci v. Teamsters Union Local 456, 781 F.3d 25, 27-28 (2nd Cir. 2015); Carafeno v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) ("reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service'").

appeal filed sub nom. Estate of Carson Brick v. Yolo Techs, Inc., (9th Cir. Feb. 14, 2023); Quinteros v. InnoGames, No. C19-1402(RSM), 2022 WL 898560, at *8 (W.D. Wash. Mar. 28, 2022) (dismissing individual officer and employee defendants under CDA); Clarks v. Private Money Goldmine, No. GJH-19-1014, 2020 WL 949946, at *7-8 (D. Md. Feb. 26, 2020) (granting CDA immunity to "website defendants" that included the company operating the website, the general partner of the company operating the website, and the individual president of the general partner); Griffin v. Google, No. 2:19-CV-132, 2020 WL 6781624, at *4 (S.D. Ga. Nov. 18 2020) ("Because these companies appear to be immune from suit under the Act, Plaintiff cannot sue officers of the corporations or the board of directors in their official capacity for the same conduct"); Klayman v. Zuckerberg, 753 F.3d 1354, 1357–59 (D.C. Cir. 2014) (affirming dismissal of claims against Facebook CEO under CDA).

Moreover, Plaintiffs' claims make it clear that they seek to hold Good Smile Japan as the publisher of information on the 4chan forum that was posted by third-parties, contending that online speech "radicalized" Gendron into becoming violent and harming Plaintiffs' families. See Compl. ¶¶3-5, 162, 175, 420-428; 47 U.S.C. §§230(c)(1); 230(f)(3); Force, 934 F.3d at 63-64 (affirming dismissal of claims that Facebook's Hamas webpage allowed content that terrorists used to recruit, train, and advance violent objectives); Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 593 (S.D.N.Y. 2018) ("allegations premised on an ICS's failure to 'block, screen, or otherwise prevent the dissemination of a third party's content,' seek to hold the defendant liable in its capacity as a 'publisher'"), aff'd, 765 F. App'x 586 (2d Cir. 2019); Rakofsky v. Washington Post, No. 105573/11, 2013 WL 1975654, at *12 n.12 (N.Y. Sup. Ct. Apr. 29, 2013) (granting motion to dismiss defamation claim against two defendants based upon Section 230 immunity because the two defendants "are online service providers operating essentially a message or virtual bulletin

board" and are immune from statements posted by a third party on their sites). As a result, Plaintiffs' claims against Good Smile Japan are completely barred by Section 230 of the CDA.

B. Plaintiffs' "Dangerous Algorithm" Theory Fails Legally and Factually As To Good Smile Japan Under The CDA

Plaintiffs have attempted to circumvent the clear immunity of the CDA by conclusorily asserting that their claims are not based upon the publishing of third-party content but that social media companies' decisions surrounding the use of "dangerous algorithms" that curated and promoted that content should make them directly liable. See Compl. ¶¶7-16. Plaintiffs' theory fails against the Good Smile Parties for three reasons.

First, Plaintiffs' hollow assertion that they are not seeking to hold any defendant liable for the content of any speech posted on any platform is, on its face, empty rhetoric given that their Complaint is replete with allegations contending that the third-party "racist" content/speech on these platforms purportedly converted Gendron from non-racist peaceful individual into a racist, violent killer. See, e.g., Compl. ¶¶3-5, 15, 115, 118, 126, 141, 148-162, 169-177, 323-324, 388-396, 418-419, 420-428.

Second, as a factual matter, Plaintiffs make no allegations that any Good Smile Party was involved in any algorithm design or implementation, dangerous or otherwise, for any website, much less for 4chan. Moreover, Plaintiffs' allegations about "dangerous algorithms" tellingly do not include 4chan or any Good Smile Party. See, e.g., Compl. ¶¶420-428.

Third, as a matter of law, the Second Circuit has already rejected a nearly identical theory advanced in a strikingly similar case. See Force, 934 F.3d at 58–59, 63–71. In Force, victims, estates, and family members of victims of terrorist attacks in Israel brought an action alleging Facebook, as an operator of the social networking website, was civilly liable for aiding and abetting Hamas' acts of international terrorism; conspiring with Hamas in furtherance of acts of

international terrorism and providing material support to terrorists. The plaintiffs argued that the CDA did not apply due to Facebook's algorithms that predicted and displayed violent and terrorist-related content that was most likely to interest and engage the users on the Hamas Facebook page and therefore directly led to the deaths of the plaintiff's family members. Id. at 58-59. The Complaint further alleged that Facebook, by allowing Hamas related persons to have Facebook accounts and thereby use Facebook's built-in algorithms, aided and abetted terrorist activity. Id. at 61. The district court granted Facebook's motion to dismiss, ruling that the plaintiffs' claims were barred by the CDA. The Second Circuit affirmed.

On appeal, the plaintiffs contended that their claims against Facebook did not treat Facebook as a "publisher" or "speaker" of the content. The Court disagreed and explicitly stated that there was no basis "for concluding that an interactive computer service is not the "publisher" of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests." Id. at 66. The Court opined that "arranging and distributing third-party information inherently forms 'connections' and 'matches' among speakers, content, and viewers of content . . . Accepting plaintiffs' argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties." Id. Instead, the Court held that so long as the third-party willingly provided the content, the publisher receives Section 230 immunity regardless of the particular editorial arrangement of the content. Id. at 67.

As for a secondary argument that Facebook was the actual provider of the content because its algorithms directed users to Hamas content, the Court determined that a defendant will only be liable as a content creator if it "materially contributed" to the content. Id. at 68. The Court held

that the mere arrangement and display of third-party content "is not enough to hold Facebook responsible as the 'develop[er]' or 'creat[or]' of that content." Finally, the Court also held that any argument the plaintiffs made about the algorithms creating more visibility and availability of the complained of content did not create liability for the publisher, but instead meant Facebook was "vigorously fulfilling its role as a publisher." Id. at 69-70.

This analysis is, of course, consistent with Shiamili. First, functions or decisions that dictate where and how third-party content is displayed on a website are precisely within the scope of a "publisher's traditional editorial function, such as deciding whether to publish…or alter content," which the Court of Appeals holds is immune from liability. Shiamili, 17 N.Y.3d at 289, 291; Reit v. Yelp!, Inc., 29 Misc.3d 713, 716-17 (Sup. Ct., New York County 2010) (dismissing claims as barred by the CDA where website removed a dentist's "positive" third-party reviews and retained negative defamatory reviews; "Yelp's selection of the posts it maintains on Yelp.com can be considered the selection of material for publication, an action quintessentially related to a publisher's role").

Second, in Shiamili, the Court held that the CDA applied even though the defendants, and website administrator, took a defamatory third-party comment in an online thread and "moved the comment to a stand-alone post, prefacing it with the statement that 'the following story came to us as a …comment, and we promoted it to a post.'" Shiamili, 17 N.Y.3d at 285. In addition, to moving the comment and "promot[ing] it to a post," the defendants also added the following heading, which plaintiffs claimed implicitly encouraged users to post negative comments: "and now it's time for your weekly does of hate, brought to you unedited, once again by Ardor Realty Sucks and for the record, we are so. not. afraid." Id. at 285. The Court ruled that this conduct did not make the defendants "content providers." Id. at 291. If the human act of elevating and promoting third-

party content is non-actionable under the CDA, then, logically, the automation of that function through algorithms is also non-actionable.

V. Plaintiffs' Attenuated Claims Against The Good Smile Parties Must Be Dismissed As Violative of Basic Fundamental Tort Principles, As Recently Articulated by the U.S. Supreme Court In A Strikingly Similar Case

Plaintiffs' claims are not just barred by the CDA, but also so attenuated that they are barred under basic common law tort principles, as recently recognized by a unanimous Supreme Court in a remarkably similar case. See Twitter, Inc., 598 U.S. at 498 (reversing the denial of a motion to dismiss attempting to hold social media entities liable for terrorist acts because terrorists were allegedly using social media platforms to recruit, radicalize, and train bad actors). In that case, the plaintiffs alleged that the defendants: "knowingly allowed ISIS and their supporters to use their platforms and 'recommendation' algorithms as tools for recruiting, fundraising, and spreading propaganda." Id. at 474, 478. The Plaintiffs claimed that the defendants knew that ISIS was using their platforms for terrorist-related activity, but failed to stop it. Thus, the plaintiffs sought to hold the defendants liable for the terrorist attack that allegedly injured them, claiming that they had aided and abetted ISIS by "knowingly allowing ISIS and its supporters to use their platforms and benefit from their 'recommendation' algorithms, enabling ISIS to connect with the broader public, fundraise, and radicalize new recruits" to commit acts of violence. Id. at 481-82.

The trial court dismissed the Plaintiffs' complaint for failing to state claims, but the Ninth Circuit reversed. On further appeal, the U.S. Supreme Court reversed, agreeing with the trial court's dismissal. In so doing, the Court delved into tort law to hold that plaintiffs' theory of aiding and abetting liability far exceeded the parameters of tort law. As part of that analysis, the Court held that neither the mere creation of these online platforms, nor the passive nonfeasance in failing to remove ISIS content, nor the algorithm infrastructure of these platforms created any basis for liability:

> The fact that some bad actors took advantage of these platforms is insufficient to state a claim that defendants knowingly gave substantial assistance and thereby aided and abetted those wrongdoers' acts. And that is particularly true because a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability.

Id. at 503 (emphasis added).

As to the plaintiff's assertions in Twitter that the defendants' "algorithms go beyond passive aid and constitute active, substantial assistance," the Court disagreed.

> All the content on their platforms is filtered through these algorithms, which allegedly sort the content by information and inputs provided by users and found in the content itself. As presented here, the algorithms appear agnostic as to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content. The fact that these algorithms matched some ISIS content with some users thus does not convert defendants' passive assistance into aiding and abetting….
>
> To show that the defendants' failure to stop ISIS from using these platforms is somehow culpable with respect to the Reina attack, a strong showing of assistance and scienter would thus be required. Plaintiffs have not made that showing.

Id. at 499-500 (emphasis added).

Here, like in Twitter, the plaintiffs have made utterly no allegations of any Good Smile Party providing knowing and substantial assistance of Gendron's intentional violent acts. Indeed, Plaintiffs do not allege that Good Smile Japan knew Gendron or interacted with him in any way; knew of his criminal plan; or provided any assistance towards his acts of violence. Moreover, like in Twitter, Plaintiffs do not, and cannot, allege a viable legal duty by any Good Smile Party to them in removing or preventing online speech that they find racist or violent, or objectionable. Id. at 501-502. As a result, Plaintiffs' claims must be dismissed.

VI. Plaintiffs' Attenuated Claims Against The Good Smile Parties Must Be Dismissed As Legally and Factually Deficient

Even apart from the foregoing defects, Plaintiffs' tort claims as asserted against the Good Smile Parties fundamentally fail to state viable claims. As set forth in the accompanying Internet Defendants' Joint Motion to Dismiss, Plaintiffs' product-related and torts claims against the Social Media Defendants fail, as a matter of law, given that:

- websites are not products under New York Law (id. at pp. 24-29);
- the Social Media Defendants owe no duty to the public at large to protect against injuries inflicted by third-parties, such as Gendron (id. at pp. 34-37); and;
- the attenuated claims fail to assert viable contentions of proximate cause. (id. at pp. 30-34).

The Plaintiffs' claims against the Good Smile Parties are deficient in numerous additional respects, as detailed below.

A. The Plaintiffs' Product-Related Claims Are Legally Deficient

Plaintiffs' product-related claims (Counts I-IV) are deficient as against the Good Smile Parties for numerous reasons. First, Plaintiffs do not allege Good Smile US or Good Smile Connect manufacture, distribute, or sell any products at issue in this case.

Second, separate and apart from a website not legally constituting a "product" under New York Law, Plaintiffs do not allege that any Good Smile Party manufactured, distributed, or sold any website "product." See Spallholtz v. Hampton C.F. Corp., 294 A.D.2d 424, 424 (2d Dep't 2002) ("It is well settled that liability may not be imposed for breach of warranty or strict products liability upon a party that is outside the manufacturing, selling, or distribution chain" (quotation omitted)); Wallace v. Tri-State Assembly, LLC, 201 A.D.3d 65 68-69 (1st Dep't 2021) (dismissing negligence claim against Amazon; "there is simply no authority that would enable this Court to create a remedy based upon equitable principles as plaintiff urges. To do so would unjustifiably

contradict settled New York law limiting liability for breach of warranty to sellers and parties within the manufacturing, selling, or distribution chain. Amazon is neither, as it merely provided the website plaintiff's father used to purchase the bicycle"), leave to appeal denied, 38 N.Y.3d 906 (2022).

Third, Plaintiffs' design defect claim (Count I) fails for the additional reason that Plaintiffs have not alleged that there was a safer, feasible design that any Good Smile Party could have employed in connection with any website. This separate basis mandates dismissal. See, e.g., MacSwan v. Merck & Co., Inc., 602 F. Supp. 3d 466, 475 (W.D.N.Y 2022) ("It is well settled that … a plaintiff must 'adequately allege[] a safer alternative design'. Where a plaintiff 'has fail[ed] to allege that defendant could have designed its drug more safely', his or her design defect claims must be dismissed" (citations & quotations omitted)); Koublani v. Cochlear Limited, No. 2:20-CV-1741(DRH)(AYS), 2021 WL 2577068, *10 (E.D.N.Y. June 23, 2021) (granting motion to dismiss; "Even assuming a defect existed at the time the MRI Kit left Defendants' hands, Plaintiff's Complaint runs afoul of a design defect claim's second element: no allegations suggest a feasible, safer alternative design. Courts applying New York state law have held the absence of such allegations sufficient to grant a motion to dismiss strict liability design defect claims"); Dunham v. Covidien, LP, 498 F. Supp. 3d 549, 557 (S.D.N.Y. 2020) (dismissing design defect claims; "Courts generally require a plaintiff to allege adequately a safer alternative design").

Fourth, Plaintiffs' Failure to Warn (Count II) and Negligent Failure to Warn claim (Count IV) fail for additional reasons. As a threshold matter, "New York common law does not impose an affirmative duty to warn on bystanders." Korean Air Lines Co. v. McLean, 118 F. Supp. 3d 471, 495 n.32 (E.D.N.Y. 2015). Here, Plaintiffs do not allege that they used any website operated by any Good Smile Party. Indeed, the Complaint merely alleges that social media companies owe

"a duty to warn users and, in the case of minor users, to warn their parents . . . ." (Compl. ¶586) (emphasis added). However, the Plaintiffs are neither minor children, nor parents of any minor children alleged to have used any website operated by any Good Smile Party.

Moreover, Plaintiffs do not allege what warnings any Good Smile Party should have theoretically provided and how they would have somehow prevented Gendron's acts of violence towards the Plaintiffs. As explained by the federal court in denying default judgment against defendants who actually manufactured products:

> A failure to warn claim fails if a complaint offers no facts indicating how or why (1) the provided warnings were inadequate and (2) the absence of superior warning substantially caused the injury. Here, the Complaint merely alleges that the Valve was defective 'as a result of Defendant's failure to properly warn foreseeable users of the Valve about its limitations and dangers' and the Defendant breached its duty 'by failing to warn Astoria of the defect in the Valve.'
>
> Plaintiff asserts no facts that establish how or why the warning was inadequate or whether there was a causal connection between its inadequacy and the injury. Such statements amount to nothing more than bare legal conclusions, which are insufficient to establish a failure to warn claim.

Astoria Energy II LLC v. HH Valves Ltd., No. 17-cv-5724, 2019 WL 4120759, at *6 (E.D.N.Y. Aug. 2, 2019)(denying request for default judgment because claims were non-viable) (emphasis added).

Plaintiffs' same pleading deficiencies in this case mandate dismissal. See Dunham v. Covidien, LP, 498 F.Supp.3d 549, 560 (S.D.N.Y. 2020)(granting motion to dismiss; "And beyond conclusory statements, the plaintiff does not allege adequately that Ms. Dunham or her physicians would have chosen not to use the Mesh but for the allegedly inadequate warnings. Therefore, the plaintiff has not adequately stated a failure to warn claim.") (citations omitted); Fleming v. Endo Int'l PLC, No. 18-cv-4866 (GBD), 2019 WL 4378964, at *3 (S.D.N.Y. Aug. 27, 2019)("Plaintiff's

complaint provides only conclusory allegations that are insufficient to properly plead a failure to warn claim. . . . a plaintiff must show that the warning was inadequate and that the failure to adequately warn of the dangers of the drug was the proximate cause of his or her injuries" (citations & quotations omitted)); Black v. Covidien, PLC, No. 17-cv-6085-FAS, 2018 WL 573569, at *3 (W.D.N.Y. Jan. 26, 2018) (granting motion to dismiss; "Plaintiffs do not identify what warnings Defendant gave to Mrs. Black's physicians, how they were inadequate, or what warnings should have been given. The alleged "facts" supporting Plaintiffs' failure to warn claim are merely legal conclusions, which the court need not accept as true"); Goldin v. Smith & Nephew, Inc., No. 12-cv-9217 JPO, 2013 WL 1759575, at *5 (S.D.N.Y. Apr. 24, 2013).

B. Plaintiffs' Unjust Enrichment Claims Are Legally Deficient

Plaintiffs' Unjust Enrichment Claims (Count V) against the Good Smile Parties fail because there is simply no relationship alleged to have existed between any Good Smile Party and the Plaintiffs. This is a sine qua non requirement of an unjust enrichment claim. As the Court of Appeals has made clear in affirming the dismissal of claims brought by a buyer of a painting against a provider of appraisal letters with whom it had no relationship:

> Mandarin's unjust enrichment claim fails for the same deficiency as its other claims—the lack of allegations that would indicate a relationship between the parties, or at least an awareness by Wildenstein of Mandarin's existence. Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.

Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011). See also Sperry v. Crompton Corp., 8 N.Y.3d 204 (2007) (affirming dismissal of unjust enrichment claim against a company that sold chemicals to a tire manufacturer who then proceeded to sell tires to the plaintiff because the relationship was too attenuated).

Here, Plaintiffs do not claim, nor could they claim, that any Good Smile Party knew who the Plaintiffs were, interacted with them, or had any kind of relationship with them. Moreover, the Complaint does not allege that any Plaintiff relied upon or was induced by a Good Smile entity, nor that any Good Smile entity was enriched by such reliance or inducement. The Complaint is limited to the allegation that "The Social Media Defendants benefited from the time Payton Gendron spent on their platforms . . ." (Compl. ¶ 598). As a result, their claim for unjust enrichment fails. See, e.g., Kings Automotive Holdings, LLC v. Westbury Jeep Chrysler Dodge, Inc., No. 507892/2014, 2015 WL 4079064, at *10 (N.Y. Sup. Ct. 2015) (dismissing claim; "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party" and here, "Plaintiff and defendants had no dealings with each other"); Schroeder v. Pinterest Inc., 133 A.D.3d 12, 26 (1st Dep't 2015) (affirming dismissal; "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party" (citation omitted)); Georgia Malone & Co. v. Rieder, 19 N.Y.3d 511, 517–18 (2012) (dismissing unjust enrichment claim; "the relationship between Malone and Rosewood is too attenuated because they simply had no dealings with each other"); Sperry, 8 N.Y.3d, 216.(dismissing unjust enrichment claim; "Here, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim").

C. Plaintiffs' Infliction of Emotional Distress Claim Is Legally Deficient

Plaintiffs' Infliction of Emotional Distress Claim (Count VI) appears to be one for negligent infliction of emotional distress. See Compl. ¶602. The allegation states: "The Social Media Defendants owed a duty to exercise reasonable care and caution for the minors and young adults using their product and the public at large . . . ." (Id.) The claim suffers from similar issues of duty as the negligence and negligent failure to warn claims; there is no allegation of the duty

that a Good Smile entity owed to any specific Plaintiff. The allegations relate to a duty of care between Social Media Defendants and users of their products, parents of minor users of their products, and apparently "the public at large." The allegations of a duty to "the public at large" is not actionable under New York law. Kojak v. Jenkins, No. 98 CIV. 4412 (RPP), 1999 WL 244098, at *9 (S.D.N.Y. Apr. 26, 1999) ("Where the duty owed is not unique to the plaintiff, recovery for NIED is not available"). The Complaint does not allege any specific recognized duty that would justify holding any Good Smile entity accountable to the public at large or to any of the Plaintiffs in particular. Cf. Dana v. Oak Park Marina, Inc., 230 A.D.2d 204, 207-08 (4th Dep't 1997) (discussing some examples of when courts find a special duty for negligent infliction of emotional distress).

To the extent the allegations also attempt to make an intentional infliction of emotional distress claim, that also fails. "The tort of intentional infliction of emotional distress has four elements: '(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress.'" Leistner v. Vanini, 208 A.D.3d 1625, 1626 (4th Dep't 2022) (affirming trial courts grant of motion to dismiss because "the alleged conduct of defendants [of inadequate staffing amongst other things] falls short of the standard for intentional or reckless infliction of emotional distress") (quotation omitted).

First, liability is only appropriate where "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" Id. As the Court of Appeals has made clear, there is an "exceedingly high legal standard" for pleading an IIED claim. Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d 46, 57-58 (2016) (affirming the dismissal of IIED

claim). The posting or failure to remove allegedly false and defamatory speech "does not rise to the level of atrocity or outrageousness necessary to sustain a claim of [IIED]." Beyer v. Parents for Megan's Law, No. 13-15544, 2014 WL 3057492, at *4 (N.Y. Sur. Ct. Suffolk County May 19, 2014) (dismissing claims; failure to remove third-party content asserting that plaintiff was a sex offender and had stalked 13 year-old boy was not sufficiently outrageous). Similarly, the use of religious, ethnic, or racial epithets to denigrate a person is not sufficiently egregious conduct to sustain a claim of this type. See, e.g., Graham v. Guilderland Cent. School Dist., 256 A.D.2d 863, 864 (3d Dep't 1998) (affirming dismissal of IIED claim where teacher subjected black student to racial epithets); Leibowitz v. Bank Leumi Trust Co. of N.Y., 152 A.D.2d 169, 182 (2d Dep't 1989) (affirming dismissal of IIED claim because "the use of the religious and ethnic slurs 'Hebe' and 'kike'… did not rise to such an extreme or outrageous level").

Here, Plaintiffs have utterly failed to identify any conduct by any Good Smile Party that was remotely offensive, much less beyond the bounds of decency in a civilized society, much less directed at the Plaintiffs in any way. Indeed, to the extent that Plaintiffs seek to hold Good Smile Japan liable for an attenuated IIED claim based on investing in 4chan and further that Gendron used 4chan, they have not identified a single offensive and outrageous post made by Gendron or even reviewed by Gendron. Moreover, Plaintiffs have failed to plead that any Good Smile Party intended to cause any emotional distress, much less severe emotional distress, on any Plaintiff. Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 363 (1st Dep't 2005) ("There is no evidence that defendants intended to inflict harm upon plaintiff").

D. Plaintiffs' Wrongful Death (Count XXII) Claim Is Deficient

"The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's

death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent." Freeland v. Erie County, 204 A.D.3d 1465, 1466 (4th Dep't 2022). The alleged "wrongful act, neglect, or defect" is based upon "negligence and product liability." Compl. ¶702. The negligence and product liability claims are deficient, rendering this claim inactionable.

E. Plaintiffs' Loss of Parental Guidance (Count XIII), Personal Injuries (Count XXIII), and Joint and Several Liability (Count XXIV) Are Not Legal Claims

The remaining claims alleged against Good Smile Connect are not legal claims, but are instead types of damages and apportionment of damages. Loss of parental guidance is a type of damage available for wrongful death. See Vargas v. Crown Container Co., Inc., 155 A.D.3d 989, 993-94 (2d Dep't 2017). Personal injuries are also a type of damages available for wrongful death if a plaintiff can demonstrate that the decedent experienced cognitive awareness after the tort occurred. McDougald v. Garber, 73 N.Y.2d 246 (1989); Cummins v. County of Onondaga, 84 N.Y.2d 322 (1994). Joint and several liability is a manner of apportionment of damages. See Palermo v. Taccone, 79 A.D.3d 1616, 1619 (4th Dep't 2010). As the type and apportionment of damages is wholly dependent on a successful underlying liability claim, the claims of loss of parental guidance, personal injuries, and joint and several liability must fail because the Complaint does not successfully allege any underlying claim against any of the Good Smile Parties.

CONCLUSION

For the reasons set forth above, the Court should dismiss Plaintiffs' claims against each Good Smile Party in their entirety.

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