

**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 REPLY IN SUPPORT OF
MOTION TO DISMISS**

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The Internet-Defendants respectfully submit this Joint Reply in support of their Motions to Dismiss Plaintiffs' Complaint pursuant to CPLR 3211(a)(7); NYSCEF No. 112 ("Mot").

The Internet-Defendants cannot be held liable for Plaintiffs' injuries based on the theory that Gendron was radicalized by third-party content on the Internet-Defendants' services. Such liability is precluded—and dismissal is mandated—under §230, the First Amendment, and established New York State law. It has become common in the wake of public tragedies (whether shootings, drug overdoses, or even terrorist attacks) for plaintiffs to pursue theories like the ones Plaintiffs pursued here, and courts have rejected such theories time and time again because the law foreclosing such liability is so clear. The Opposition fails to show how or why this case merits any different result. Nor does it explain why the discovery Plaintiffs now seek under CPLR 3211(d) would yield facts that would make a difference to the *legal* issues requiring dismissal, which involve overarching federal immunities and constitutional limits that protect the Internet-Defendants from both ultimate liability and the burdens of litigation and discovery. Indeed, courts universally deny discovery and dismiss cases like this one because the mere fact of having to litigate when First Amendment and §230 protections are implicated chills speech and causes constitutional harms. For example, the Court of Appeals in *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 286 (2011), affirmed that such discovery is unwarranted where, as here, §230 bars a plaintiff's claim on its face.

Faced with this precedent, the Opposition largely attempts to disclaim the allegations in the Complaint that seek to hold the Internet-Defendants liable for allegedly publishing objectionable content to Gendron. Neither those disclaimers—nor the effort to frame such allegations as “product liability” or “negligence” concerning the “design” of the Internet-Defendants' services—can salvage Plaintiffs' claims. Plaintiffs are left to urge the Court to ignore

controlling precedent on §230 immunity and to depart from established law across the nation, and then to depart from established principles in First Amendment, product-liability, negligence, and causation law. Doing so is an invitation to error. Understandable sympathy for Plaintiffs' suffering does not change the fact that this is a legally straightforward case: Plaintiffs' claims against the Internet-Defendants should be dismissed with prejudice.

I. SECTION 230 BARS PLAINTIFFS' CLAIMS.

A. Plaintiffs' Preemption Argument Defies Settled Law.

Plaintiffs argue that the Court cannot apply §230 without first conducting a detailed inquiry into the propriety of federal preemption. Plaintiffs' Memo in Opposition to the Internet-Defendants' Joint Motion to Dismiss, NYSCEF No. 283 ("Opp.") 30–32. That is simply incorrect: Unlike the implied preemption cases on which Plaintiffs rely, §230 expressly preempts contrary state law. 47 U.S.C. § 230(c). In addition to disregarding the text of the statute, Plaintiffs' argument directly contravenes binding law. Consistent with the statute's text, the Court of Appeals in *Shiamili* held that the test for determining whether §230 "preempts" state law liability is simply whether (1) defendant "is a provider or user of an interactive computer service"; (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.'" 17 N.Y.3d at 287; *id.* at 288–89 (following the "national consensus" to "read section 230 as generally immunizing 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"); *accord Montanino v. New York City Dep't of Sanitation*, 2023 WL 6614687, at *4 (Sup. Ct. Oct. 5, 2023); Mot. 7–13. While this Court need not look beyond *Shiamili*, Plaintiffs' argument also ignores countless other state and federal cases that apply this same three-part test to determine whether

§230 preempts state law claims. Mot. 7–13. By contrast, none of the cases Plaintiffs cite for the “correct” preemption analysis actually involves or discusses §230. Opp. 30–32.

B. The Internet-Defendants’ Protection Under §230 Does Not Rest on Merely a “But For” Theory.

Turning to the actual test for §230, Plaintiffs do not dispute that the Internet-Defendants provide “interactive computer services.” Mot. 7. And as the Internet-Defendants have shown, moreover, Plaintiffs’ claims—which are premised on the Internet-Defendants’ alleged dissemination of (1) objectionable third-party content viewed by Gendron and (2) Gendron’s livestream video of the attack—readily meet the other two elements for §230 immunity. Mot. 9–15.

Plaintiffs’ principal response is to mischaracterize the Internet-Defendants as relying on a test that would apply §230 to any claim that would not have arisen “but for” some third-party content. Opp. 32–34. On the contrary, the reason §230 applies here is that Plaintiffs’ claims seek to hold the Internet-Defendants liable *for publishing* the third-party content that allegedly resulted in Gendron’s radicalization and Plaintiffs’ injuries. The theory underlying each of Plaintiffs’ claims is that Internet-Defendants are legally responsible for the harms allegedly caused by publishing (that is, selecting, presenting, and disseminating) objectionable third-party content to Gendron—either the material that allegedly radicalized Gendron or the video of his attack. *See* ¶¶71, 77, 618–19. Plaintiffs’ claims are “inextricably linked” to the alleged publication of this content. That is the heart of what §230 covers. Mot. 8–14; *Doe v. Grindr, LLC*, 2023 WL 7053471, at *2 (M.D. Fla. Oct. 26, 2023) (quoting *Herrick v. Grindr LLC*, 765 F.App’x 586, 591 (2d Cir. 2019)); *accord Shiamili*, 17 N.Y.3d at 289 (§230 bars “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”).

The cases Plaintiffs cite do not support their position. Opp. 33. In both *Bolger* and *Erie*, the courts held that §230 did not apply because the plaintiffs sued Amazon as the seller of defective physical products (laptop batteries and headlamps), not for publishing any content relating to those products. *Bolger v. Amazon.com, LLC*, 53 Cal.App.5th 431, 464 (2020) (“Bolger’s strict products liability claims do not depend on the content of [the] product listing, e.g., whether it was false or misleading.”); *Erie Ins. v. Amazon.com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019) (“[T]here is no claim made based on the content of speech.”). Similarly, in *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), the claims arose from a “speed filter” feature that by itself—unconnected to the publication of any third-party content—was alleged to cause the plaintiffs to drive at dangerous speeds, resulting in injury. The court in *Lemmon* justified its decision not to apply §230 on the basis that it was a “clear example of a claim that simply does not rest on third-party content”—as the plaintiffs did “not fault Snap in the least for publishing Landen’s snap.” *Id.* at 1093.

This case is fundamentally different. Plaintiffs’ claims here, unlike in *Lemmon*, *Erie*, and *Bolger*, indisputably rest on third-party content, and their core theory of the case seeks to fault the Internet-Defendants for allegedly (1) *displaying and suggesting* racist or violent third-party content that Gendron viewed, which allegedly influenced him to adopt extremist and hateful views purportedly causing him to commit murder (Opp. 56 (citing ¶¶169, 170, 172, 174)), and (2) *hosting and disseminating* livestreams or other videos of the attack online, allegedly invading Plaintiffs’ privacy and causing them emotional distress (Opp. 75 (citing ¶¶397–419)). This is core publisher liability. Mot. 8–14. Indeed, in *Lemmon*, the Ninth Circuit made clear that plaintiffs “would not be permitted under § 230(c)(1) to fault Snap for publishing other Snapchat-user content (e.g., snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior.” 995 F.3d at 1093 n.4. That is precisely what Plaintiffs impermissibly seek to do here—

hold the Internet-Defendants liable for allegedly publishing harmful third-party content that purportedly “incentivized” Gendron to commit a mass shooting. *Id.* Such claims are barred by §230.

C. Plaintiffs’ Claims Treat the Internet-Defendants as Publishers of Third-Party Content.

Plaintiffs next argue that their claims do not treat the Internet-Defendants as publishers of user content because their claims do not require the Internet-Defendants to “*alter[], delet[e], or modify[] the content of a single third-party post or communication.*” Opp. 35, 54 (emphasis in original); ¶533. This mischaracterizes both the Complaint and the law.

As an initial matter, the Complaint on its face faults the Internet-Defendants for failing to shield users like Gendron from objectionable third-party content and for failing to block the upload of, or remove, the video of the attack (*e.g.*, ¶¶599, 608, 621–28). So Plaintiffs indeed would impose liability for failing to modify or remove third-party content from view. Plaintiffs’ claims thus are barred even on their own characterization of §230. *See, e.g., Brikman v. Twitter, Inc.*, 2020 WL 5594637, at *3 (E.D.N.Y. Sept. 17, 2020) (“holding Twitter liable for failing to remove the tweets plaintiffs find objectionable would also hold Twitter liable based on its role as a publisher of those tweets”).

More fundamentally, Plaintiffs are wrong about the scope of §230. The statute is not limited to claims specifically premised on the failure to remove or alter user content. Opp. 35, 37, 54. It equally applies to claims seeking to hold providers liable for selecting, presenting, recommending, and disseminating user content. Mot. 9–10; *see* §230(c)(1). The Court of Appeals could hardly have been clearer in *Shiamili* that §230 “does not differentiate between ‘neutral’ and selective publishers”; that the “exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material”; and thus that

the immunity applies “even where the interactive service provider has an active, even aggressive role in making available content prepared by others.” 17 N.Y.3d at 289 (cleaned up).

The Second Circuit held likewise in *Force v. Facebook, Inc.*, rejecting the argument that Facebook was ineligible for §230 immunity “by virtue of simply organizing and displaying content exclusively provided by third parties.” 934 F.3d 53, 66 (2d Cir. 2019). Rather, it explained, “arranging and distributing third-party information”—including via recommendation algorithms—is “an essential result of publishing” fully protected by §230. *Id.*; accord *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019); *M.P. by & through Pinckney v. Meta Platforms, Inc.*, 2023 WL 598429, at *2 (D.S.C. Sept. 14, 2023) (all reaching the same conclusion).

Plaintiffs have no meaningful response. They try to distinguish cases like *M.P.*, 2023 WL 598429, at *3 and *Daniel v. Armslist, LLC*, 926 N.W.2d 710 (Wis. 2019), by asserting that Gendron did not seek out the harmful content that the Internet-Defendants allegedly showed him. ¶174 (cited in Opp. 55–56). Even if that were true, it would make no difference. Publishing is not limited to situations where the audience affirmatively solicits the disseminated material. *Force*, 934 F.3d at 66–67 (§230 protects “algorithms that *predict* and show the third-party content that is most likely to interest and engage users”) (emphasis added); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1356 (D.C. Cir. 2014) (§230 barred assault claim brought by attorney who “came across” an unwanted Facebook page calling for a Palestinian intifada). Plaintiffs cannot cite a single case that has adopted their theory, and it is squarely foreclosed by *Shiamili*, which held that §230 shielded a provider that actively promoted a defamatory user comment in an unsolicited attempt to provoke further commentary. 17 N.Y.3d at 285, 291.

Plaintiffs also seek to downplay *Force* as a federal decision, urging the Court to instead follow the dissent. Opp. 54. But the *Force* majority is correct; its holding follows from the Court of Appeals’ reasoning in *Shiamili*, and the contrary approach advocated by the dissent has not been followed by any court. See *Gonzalez v. Google LLC*, 2 F.4th 871, 895–97 (9th Cir. 2021) (following *Force*), *vacated on other grounds*, 598 U.S. 617 (2023); *M.P.*, 2023 WL 4853650, at *3 (same); *accord Dyroff*, 934 F.3d at 1097–98. As these cases make clear, publishing includes the act of selecting content and making it available to others—and algorithms that predict and display third-party content that users may be interested in viewing do just that and constitute publishing. *Gonzalez*, 2 F.4th at 896 (“Google’s algorithms function like traditional search engines that select particular content for users based on user inputs”); see also *M.P.*, 2023 WL 4853650, at *3. It “would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.” *Force*, 934 F.3d at 67.

Nor can Plaintiffs evade §230 with an “express disclaimer” or by otherwise asserting that they “explicitly characterize” the Internet-Defendants as “manufacturers” instead of “publishers.” Opp. 35–37. The actual allegations in the Complaint are, on their face, explicitly premised on the theory that the Internet-Defendants allegedly published offensive and harmful user content to or by Gendron. Plaintiffs cannot avoid that reality by simply declaring otherwise. If such disclaimers were controlling, §230 would never apply as plaintiffs could simply insert them in every complaint. This is just the kind of “artful pleading”—using substitute labels to avoid the statutory immunity—that courts in §230 cases consistently reject. See, e.g., *Ynfante v. Google LLC*, 2023 WL 3791652, at *3 (S.D.N.Y. June 1, 2023); *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d

413, 418 (1st Cir. 2007); *In re Facebook, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (citing *Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008)); *M.P.*, 2023 WL 598429, at *3.

Equally infirm is Plaintiffs' argument that their claims are based on the Internet-Defendants' *conduct*, rather than aimed at *content published* on the Internet-Defendants' services. Opp. 35–37. Where, as here, the purported “conduct” amounts to publication (such as selecting and presenting third-party content), §230 applies. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102–03 (9th Cir. 2009) (§230 bars claims that arise from “defendant’s status or conduct as a ‘publisher’” and protects “publishing conduct” from liability); *Obado v. Magedson*, 2014 WL 3778261, at *5 (D.N.J. July 31, 2014) (§230 “immunizes traditional publisher conduct”). That is why courts have consistently held that §230 bars claims targeting defendants’ “conduct” relating to choices about how to publish third-party content—even when the claims are repackaged as “defective” design, product-liability, or “failure to warn.”¹ Mot. 10 (citing cases); *see also Rodriguez v. OfferUp, Inc.*, 2019 WL 13247290, at *3 (M.D. Fla. Aug. 29, 2019) (failure-to-warn claims were “attempts to plead around the fact that [plaintiff] is trying to hold OfferUp responsible for content published by its users Courts in other jurisdictions have addressed this artful pleading tactic and explained why it also fails under [§230] if the warning is about user-generated content because it still goes to the heart of ‘publishing functions.’”). Time and time again, courts have explained that the labels attached to the causes of action are not controlling. *Barnes*, 570 F.3d at 1101–02. What matters instead is whether the claims are predicated on defendants’

¹ Plaintiffs cannot save their failure-to-warn claim by similarly asserting that it does not require altering, removing, or modifying user content. Opp. 56. As *Herrick v. Grindr LLC* and other cases make clear, where a failure-to-warn claim is premised on the failure to warn about the dangers of published user content (similar to Plaintiffs’ claim here), §230 applies. 765 F.App’x at 591 (distinguishing *Internet Brands* as a case where “there was no allegation that the defendant’s website transmitted potentially harmful content”).

publication of (or failure to warn about) objectionable third-party content—as Plaintiffs’ claims here so plainly are predicated. Plaintiffs offer no meaningful response.

D. The Internet-Defendants Did Not Create the Alleged Content at Issue.

Despite arguing that they are not seeking to hold the Internet-Defendants liable for content (Opp. 57), Plaintiffs further argue that some of the Internet-Defendants are “responsible in part for the creation of white-supremacist and other objectionable content on their services” and are thus “information content providers” by alleging more than 15 pages’ worth of new facts about certain services.² For example, the Opposition includes purported screenshots and text from certain Internet-Defendants’ services that show stickers, filters, music, and editing functions some Internet-Defendants offer to users as ways to edit their own content. Opp. 37–53. Plaintiffs’ attempt to use attorney affirmations to introduce supporting evidence in opposition to a motion to dismiss is procedurally improper. *See, e.g., Khaldarov v. Neighborhood Hous. Serv. of NYC*, 798 N.Y.S.2d 710 (Sup. Ct. 2004) (granting dismissal pursuant to CPLR 3211(a)(7) and disregarding papers submitted with opposition that were not in affidavit form). Even if the Court were to overlook this procedural defect, none of Plaintiffs’ new allegations provide any basis for escaping §230.

For one, Plaintiffs fail to allege any causal link between these new allegations and their injuries. Indeed, they do not (and cannot) allege that Gendron was radicalized by, for example, viewing “stickers” or using “editing functions.” These allegations are simply irrelevant to the claims Plaintiffs have asserted that Gendron’s attack was attributable to certain objectionable content that he allegedly saw on the Internet-Defendants’ services.

² Plaintiffs’ defendant-specific arguments are addressed in more depth in the Internet-Defendants’ individual briefs. Additionally, the Internet-Defendants’ briefs are not submitted on behalf of Defendant 4chan and so do not purport to address arguments on its behalf.

Beyond that, even if such a link existed, none of Plaintiffs' new allegations would provide any basis for escaping §230. Plaintiffs misconstrue what constitutes an "information content provider" under §230 by mischaracterizing *Shiamili* (Opp. 37), which recognized that "developing" content as an "information content provider" refers "not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness" or its "illegality." *Shiamili*, 17 N.Y.3d at 290; *see also Force*, 934 F.3d at 68 (material contribution test "draws the line at the crucial distinction between, on the one hand, taking actions to display actionable content and, on the other hand, responsibility for what makes the displayed content itself illegal or actionable"). Contrary to Plaintiffs' insinuation (Opp. 37), *Shiamili* held that §230 applied even though the defendant added a "heading, subheading, and illustration" to the existing user content—because what the defendant added did not contribute materially to the alleged unlawfulness or illegality of the user content. 17 N.Y.3d at 289.

Shiamili and its material-contribution requirement therefore forecloses Plaintiffs' claims even if they could have been premised on the new allegations. The content that allegedly caused Plaintiffs' injuries is the racist and violent third-party content that Gendron allegedly encountered and the livestream he created. Plaintiffs do not allege that the Internet-Defendants played any role in authoring that particular content. *Id.* at 291 ("A Web site is generally not a 'content provider' with respect to comments posted by third-party users."). Nor are the Internet-Defendants alleged to have "required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts." *Dyoff*, 934 F.3d at 1099. Beyond not being alleged in the Complaint, the alleged features highlighted in Plaintiffs' Opposition—filters, stickers, songs, and effects (Opp. 38–39, 42–45), badges and awards (Opp. 46–47, 48–49), and pre-existing templates, layouts, and fonts (Opp. 48)—are not

alleged to be “actionable” or “materially contribute” to the alleged unlawfulness or objectionable nature of any of the content at issue. *Shiamili*, 17 N.Y.3d at 293; *see also Rigsby v. GoDaddy Inc.*, 2023 WL 1489914, at *5 (9th Cir. Feb. 3, 2023) (focusing on whether defendant provided content “for the portion of the statement or publication at issue”).

To the contrary, these are just “tools meant to facilitate the communication and content of others”—the very functionality that courts have consistently held protected by §230. *Dyroff*, 934 F.3d at 1098; *accord Herrick v. Grindr, LLC*, 306 F.Supp.3d 579, 588 (S.D.N.Y. 2018) (drop-down menus and geolocational function did not contribute to what made the impersonating profiles objectionable); *Kimzey* 836 F.3d at 1270 (Yelp’s star rating system did “absolutely nothing to enhance the defamatory sting of the message”); *Ynfante*, 2023 WL 3791652, at *3 (official “Ad” label did not “directly and materially contribute to the content of the scam advertisements nor its unlawfulness”). Plaintiffs’ unpleaded material does not convert the Internet-Defendants into content providers under §230.

E. Plaintiffs Fail to Address Claims 5-12.

Finally, Plaintiffs fail to address the Internet-Defendants’ argument that §230 bars claims 5–12 (Mot. 5–15), which are based on alleged injuries arising from the video Gendron created of the attack. Plaintiffs similarly do not respond at all to the Internet-Defendants’ argument that they failed to state a claim for unjust enrichment (claims 5–6, 8). Plaintiffs therefore have waived their defense of those claims, and they should accordingly be dismissed. *See Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 A.D.3d 561, 562 (1st Dep’t 2019) (party “waived argument by failing to raise in their opposition” to motion for summary judgment).

Notwithstanding its tragic facts, this is a heartland §230 case, and the Court need go no further to dismiss Plaintiffs’ claims against the Internet-Defendants.

II. PLAINTIFFS' CLAIMS ARE BARRED BY THE FIRST AMENDMENT.

The First Amendment independently bars Plaintiffs from asserting tort claims against the Internet-Defendants for the speech that they disseminate. As with §230, Plaintiffs try to avoid dismissal under the First Amendment by mischaracterizing the claims actually set forth in the Complaint. Plaintiffs argue that they seek to hold the Internet-Defendants liable “not because of the content they host, but regardless of it.” Opp. 57. But the Complaint leaves no doubt that the claims are based on content, declaring, for example: “White Replacement Theory Caused Payton Gendron to Murder Ten Innocent Black People.” ¶¶78–89; *see also, e.g.*, ¶¶4, 535. As this and countless other allegations in the Complaint make clear, Plaintiffs’ bid to hold the Internet-Defendants liable for Gendron’s mass shooting is premised, on its face, on the theory that Defendants displayed *particular speech* carrying a *particular message* to Gendron. Plaintiffs do not dispute that the underlying speech, while abhorrent and contrary to the Internet-Defendants’ own policies, is protected by the First Amendment (Mot. 17–20), and their claims inescapably amount to forbidden content-based and viewpoint-based speech regulation. Plaintiffs’ legal arguments—about the purported distinction between conduct and speech, tort claims of general applicability, and the captive-audience doctrine—fail as a matter of law to escape the protections of the First Amendment.

A. Plaintiffs’ Claims Target Dissemination of Protected Speech—Not Conduct.

Plaintiffs’ lead argument is that they seek to hold the Internet-Defendants liable for *conduct* rather than *speech*. Opp. 58. That is doubly wrong. *First*, the Complaint indisputably premises liability on the third-party speech that Gendron allegedly viewed on some of Internet-Defendants’ services. Mot. 17–18. It is that speech, and the hateful messages it expressed, that Plaintiffs allege influenced and motivated Gendron. ¶¶4, 9–10, 78–89, 99–100, 103, 171–78, 323, 418, 535, 539, 556, 564, 574, 587, 596, 605. Had Defendants removed all the content that Gendron saw, or used

the exact same service features to present only videos promoting unity and non-violence, Plaintiffs would have no conceivable basis to seek liability. Their claims, on their face, seek to hold the Internet-Defendants liable “for what had been said” (Opp. 64–65)—for the particular message allegedly communicated by the speech Gendron viewed. Such content-based speech liability is legally indistinguishable from the long line of cases holding that the First Amendment bars tort claims against those who disseminate protected speech that allegedly leads to violence. Mot. 15–16.

Second, what Plaintiffs characterize as “conduct” are choices about what speech to publish and how to curate and present it—*i.e.*, “editorial judgments” that are themselves protected by the First Amendment. Mot. 20–21. The Complaint alleges that certain Internet-Defendants sift through content created by third parties to identify material most likely to interest a given user; display that content for viewing; and give users various ways to share the content (or their reactions to it) with others. ¶¶229, 247, 250, 266, 286, 295, 303–04, 318–19, 384, 398–404, 412–15. Labeling these quintessential publication and curatorial functions as “conduct” does not remove them from First Amendment protection any more than “publishing a newspaper is conduct because it depends on the mechanical operation of a printing press.” *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (“Speech is not conduct just because the government says it is.”); *accord Zhang v. Baidu.com Inc.*, 10 F.Supp.3d 433, 441–42 (S.D.N.Y. 2014) (rejecting similar argument that online search engine “‘is not speaking,’ but rather ‘engaging in discriminatory conduct’” by arranging and delivering search results to users); *cf. 303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023) (“website designers” engage in “expressive conduct” protected by First Amendment). Indeed, the very reason Plaintiffs claim that the Internet-Defendants’ content-curation features are tortious is because they supposedly were designed to drive engagement with

speech, and delivered specific content and viewpoints that allegedly influenced Gendron's worldview. Mot. 22–23; Opp. 61 (assailing “engagement-driven algorithms that deluged Payton Gendron with racist, antisemitic and violence promoting material”); ¶171 (alleging that the Internet-Defendants’ algorithms present “progressively more extreme and psychologically discordant content”). That is seeking to hold the Internet-Defendants liable for speech.

That the Internet-Defendants allegedly use algorithms to exercise this editorial judgment, and to select and deliver speech, is irrelevant. Opp. 59–60. Plaintiffs cite no authority, as there is none, excluding speech or speech-dissemination from First Amendment protection simply because it is assisted by software or other technology.³ *E.g.*, *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (First Amendment protects electronic video games); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 242, 258 (2002) (First Amendment protects “computer-generated images”). The only case Plaintiffs cite undermines their theory—it recognizes that “computer code conveying information is ‘speech’ within the meaning of the First Amendment.” *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449–50 (2d Cir. 2001). Indeed, Plaintiffs’ argument was squarely rejected in *Zhang*, which held that online search engines’ “editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information” are protected speech. 10 F.Supp.3d at 438–39. The use of algorithms to make those judgments changed nothing, as “algorithms themselves [are] written by human beings” and “inherently incorporate” and apply human judgments. *Id.* (citation omitted). The same is true here.

³ Plaintiffs’ Opposition (Opp. 58) asserts that the Internet-Defendants use “artificial intelligence driven algorithms.” This assertion makes no legal difference, and it has no basis in the Complaint, which alleges nothing about artificial intelligence outside of the context of Twitch livestreams. ¶¶355, 357.

B. Tort Claims of General Applicability Violate the First Amendment Where They Target Protected Speech.

Plaintiffs erect a strawman in arguing that the Internet-Defendants seek an “absolutist rule” that would have the First Amendment swallow “garden variety tort claims.” Opp. 58–59. But this case has nothing to do with fraud, misrepresentations, or medical malpractice (much less warnings about errant golf shots), and Plaintiffs’ claims would not impose merely “incidental burdens” on speech. *Id.* As discussed above, these claims directly target protected speech based on its content (and viewpoint)—they seek to hold the Internet-Defendants liable because of the allegedly harmful speech they disseminated and, more specifically, because of the objectionable ideological message that speech allegedly communicated to Gendron. “The Speech Clause has no more certain antithesis.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 579 (1995).

Plaintiffs’ invocation of generally applicable laws does not alter that conclusion. As the Supreme Court has made clear, the First Amendment applies with full force where a “generally applicable regulation of conduct” is directed at a speaker “because of what his speech communicated.” *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); accord *ACLU v. Alvarez*, 679 F.3d 583, 602 (7th Cir. 2012) (“When the expressive element of an expressive activity triggers the application of a general law, First Amendment interests are in play.”); *PETA v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815, 825–28 (4th Cir. 2023) (rejecting argument that “[l]aws that implicate a variety of conduct ... need not pass First Amendment scrutiny even when applied to speech”). The tort claim in *Snyder v. Phelps* (intentional infliction of emotional distress) was general, but its application to speech still violated the First Amendment. 562 U.S. 443, 451 (2011); accord *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891–92, 916–17, 926–27 (1982) (“the presence of activity protected by the First Amendment imposes restraints on the grounds that may

give rise to damages liability”; barring claims under general laws, including tortious interference and antitrust, premised on protected speech); Mot. 16–17 (listing cases applying First Amendment to bar general product-liability and negligence claims based on protected speech).

None of Plaintiffs’ cases dictates a different result. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), held that the First Amendment did not prohibit the enforcement of a confidentiality agreement, explaining that “any restrictions that may be placed on the publication of truthful information are self-imposed.” *Id.* at 670–72. *Cowles* did not thereby hold that “generally applicable laws by definition escape First Amendment scrutiny.” *PETA*, 60 F.4th at 826 n.4. *Weirum v. RKO Gen., Inc.*, 15 Cal.3d 40 (Cal. 1975), allowed a negligence claim against a radio station that “generate[d] a competitive pursuit on public streets” through its real-time “repeated importuning” to listeners to race to particular locations to win prizes. *Id.* at 48. Later cases limited *Weirum* to its unusual facts—and made clear that it does not apply to claims based on dissemination of dangerous speech where there “was not a ‘real time’ urging of listeners to act in a particular manner.” *McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 1004 (1988); *see Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 n.8 (9th Cir. 1991) (“publisher’s role in bringing ideas and information to the public bears no resemblance to the *Weirum* scenario”).⁴ In short, Plaintiffs cannot evade the First Amendment by misapplying products liability and other general-purpose state-tort claims to regulate the Internet-Defendants’ dissemination of protected speech.

⁴ Nothing in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), cited at Opp. 58, suggests that general tort claims fall outside the First Amendment or otherwise helps Plaintiffs here. *Zacchini* explained at length why a specific right-of-publicity claim survived First Amendment scrutiny, including its commercial nature or purpose to protect proprietary interests. *Id.* at 573-76. None of that applies here, and it is well settled that right-of-publicity claims can violate the First Amendment. *See, e.g., Sarver v. Chartier*, 813 F.3d 891, 906 (9th Cir. 2016).

C. The Narrow Captive-Audience Doctrine Does Not Apply to This Case.

Finally, Plaintiffs claim that the First Amendment does not apply because some of the Internet-Defendants' "addictive" services "deluged" Gendron with offensive third-party content. Opp. 61–63. This argument badly misinterprets the narrow captive-audience doctrine.

The captive-audience doctrine is an exception to the general prohibition against government intrusion on speech that is applied "only sparingly to protect unwilling listeners from protected speech." *Snyder*, 562 U.S. at 459 (declining to extend doctrine to unwanted protests at a funeral); accord *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736, 738 (1970) (upholding statute allowing "unwilling" homeowners to affirmatively opt out of the delivery of "unwanted" mail to their homes); *Frisby v. Schultz*, 487 U.S. 474, 475–76, 487 (1988) (upholding ordinance prohibiting targeted residential picketing because it served "the significant government interest" of protecting "unwilling listeners within their homes" from "unwanted speech"). Recipients of speech are only "captive" if they have "no ready means of avoiding" the speech, *Frisby*, 487 U.S. at 487—either because it is physically targeted at their homes, where one is "figuratively, and perhaps literally, trapped," *id.*, or they are in a particular location "as a matter of necessity, not of choice." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (citation omitted). This is a narrow rule: "Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541–42 (1980). And the exception is inapplicable where, as here, those who receive an unwanted message can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 542 (citation omitted).

Contrary to what Plaintiffs seek here, no case has ever invoked the captive-audience doctrine to allow tort claims by private litigants, like Plaintiffs, who were not themselves subjected

to the alleged unwanted communications. *Cf. Snyder*, 562 U.S. at 459. Plaintiffs’ effort to stand in Gendron’s shoes would improperly transform the doctrine—which narrowly protects personal privacy against intolerable invasion—into a tool for imposing liability on publishers for harms that third-parties might cause as a result of being *influenced* by speech they encounter. Moreover, the doctrine has never been applied to public postings on online services or the general dissemination of online speech. *Cf. Reno v. ACLU*, 521 U.S. 844, 869 (1997) (“communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden” (cleaned up)).

Plaintiffs do not and cannot allege that Gendron was physically confined in ways that made unwanted speech unavoidable, and his situation is nothing like a homeowner bombarded by residential picketers, *Frisby*, 487 U.S. at 487, a commuter who must use public transportation to get to work, *Lehman*, 418 U.S. at 302, or an individual who requires medical attention at a clinic, *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994). No one forced Gendron to create social-media accounts (¶¶162–63), and he would have had to affirmatively choose to go online and access his accounts before he could see any of the allegedly harmful speech at issue.

That is true even if the content allegedly served to Gendron resulted in his spending more time on their services and becoming fixated on speech that he otherwise might not have seen. The captive-audience doctrine is about unwanted speech that people wish to avoid but cannot *physically* escape. It has no application to speech that is engaging and enticing, such that people are drawn to and choose to view more of it, or explore more of the ideas that the speech communicates. *Cf.* ¶¶9, 11, 163, 175 (allegations that Gendron spent hours engaging with extremist content, was “inspired by” the ideology it espoused, and actively went searching for it on various platforms). A “news junkie” who cannot start the day without reading *The New York Times* or tuning into Fox News is not a “captive audience,” nor is the person who cannot stop

reading the latest Harry Potter book and misses work to finish it. Indeed, courts have repeatedly applied the First Amendment to bar liability for speech that supposedly “addicted” or exerted “mind control” over those exposed to it. *Olivia N. v. Nat’l Broad. Co.*, 126 Cal.App.3d 488, 496 (1981); *Watters v. TSR, Inc.*, 715 F.Supp. 819, 820, 823–24 (W.D. Ky. 1989), *aff’d*, 904 F.2d 378 (6th Cir. 1990); *Wilson v. Midway Games, Inc.*, 198 F.Supp.2d 167, 182 (D. Conn. 2002); *Zamora v. Columbia Broad. Sys.*, 480 F.Supp. 199, 200–01 (S.D. Fla. 1979). These cases recognize that the “force of speech” is not a permissible basis for “attempts to stifle it.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577–78 (2011); *accord Brown*, 564 U.S. at 798 (rejecting argument that the “interactive” and immersive nature of video games took them outside the First Amendment).

In short, the captive–audience doctrine has no place here, and Plaintiffs’ baseless effort to expand that narrow exception threatens to do exactly what the Supreme Court has warned against: “to slight the First Amendment’s role ‘in affording the public access to discussion, debate, and the dissemination of information and ideas.’” *Consol. Edison*, 447 U.S. at 541 (citation omitted).

III. PLAINTIFFS FAIL TO PLEAD VIABLE PRODUCT-LIABILITY CLAIMS UNDER NEW YORK LAW.

Notwithstanding Plaintiffs’ claims to the contrary (Opp. 21–23), their product-liability claims fail as a matter of law because the Internet-Defendants’ *services* are not *products*. Mot. 25 (citing *Matter of Eighth Judicial Dist. Asbestos Litig.*, 33 N.Y.3d 488, 494 (2019) (“*Terwilliger*”).

At the outset, Plaintiffs concede that “no New York court has expressly held social media apps to be products.” Opp. 17. But Plaintiffs ignore that New York (and other) courts have gone further: They have *dismissed* product-liability claims because websites and online services—including those offered by the Internet-Defendants—are not products as a matter of law. Mot. 25–26 (citing cases); *see N. Am. Van Lines, Inc. v Am. Int’l Cos.*, 11 Misc.3d 1076(A) (Sup. Ct. 2006), *aff’d*, 38 A.D.3d 450 (1st Dep’t 2007) (dismissing amended complaint where plaintiffs’ opposition

“completely fails to address defendants’ argument”). Plaintiffs fail altogether to address this authority, let alone distinguish it.

Having ignored established law, Plaintiffs instead urge the Court to apply a seven-factor test purportedly articulated in *Terwilliger* to hold, for the first time, that an intangible online social media service is a “product” under New York law. Opp. 17–18. But *Terwilliger* did not articulate any such test. Compare Opp. 17–18 (citing *Terwilliger*) with *Terwilliger*, 33 N.Y.3d at 494.⁵ Nor did *Terwilliger* address, much less adopt, the seven “policy considerations” from the Restatement (Third) of Torts, as Plaintiffs mistakenly assert. See Opp. 18. *Terwilliger*’s analysis centered on whether the tangible, mass-produced coke oven at issue was a product. 33 N.Y.3d at 496–97. It did not consider nor suggest that an intangible service or the intangible ideas it conveyed could qualify as products subject to product-liability law. And none of the other cases Plaintiffs cite (Opp. 18–20), have anything to do with assessing whether an online service is a “product” under New York product-liability law. See, e.g., *Matter of Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1 (2d Dep’t 1987) (adjudicating right to discontinue life support); *Fasolas v. Bobcat of N.Y., Inc.*, 33 N.Y.3d 421 (2019) (adjudicating whether product-liability claim could be sustained against manufacturer of a product obtained through rental market, as opposed to purchase); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 (1983) (considering whether strict product-liability claim for circular saw injury should have been submitted to jury). Plaintiffs’ argument based on “the *Terwilliger* factors” (Opp. 18–20) thus should be rejected.

⁵ The seven enumerated factors appear to be drawn, not from *Terwilliger*, but from a Reporter’s Note to a comment in the Restatement summarizing “[s]ome of the policy considerations” courts have considered when deciding whether to impose strict liability regarding *tangible* products. Consistent with the product-liability focus, the cases cited in the Note pertain to tangible things, such as HVAC units, houses and buildings, a degreasing agent, and a swimming pool. See Restatement (Third) of Torts: Products Liability §19 Reporters’ Note, cmt. a (1998).

Plaintiffs next argue that the Internet-Defendants' services should be treated as products because, under the UCC, "software that is mass-marketed is considered a good," not a service." Opp. 20. This argument fails for multiple reasons. First, whether something is a "good" under the UCC is a different inquiry than what constitutes a "product" for tort law, and Plaintiffs cite no authority otherwise. Second, the Restatement itself notes that the UCC may also treat software as a service, not a good. *See* Restatement §19 cmt. d; *see also* §19(b) ("Services, even when provided commercially, are not products."). Third, even if one were to look to the UCC for guidance, Plaintiffs would not be able to define the Internet-Defendants' services as products because the Complaint does not (and cannot) allege that they are "things ... which are movable *at the time of identification to the contract for sale*." NY UCC §2-105 (defining "Goods") (emphasis added); *e.g.*, ¶235 (alleging Instagram and Facebook as "moveable," but not in connection with a contract for sale); ¶278 (same regarding YouTube); ¶336 (Twitch); ¶364 (Snapchat); ¶379 (Discord); ¶408 (Reddit). The UCC cases cited by Plaintiffs are accordingly inapposite; they involve *sales* of software installed on tangible hardware (such as a disk or a hard drive). *See Commc'ns Grps., Inc. v. Warner Commc'ns, Inc.*, 527 N.Y.S.2d 341, 344 (Civ. Ct. 1988) (applying UCC because contract at issue provided for "a transaction of computer software equipment"); *Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, 524 A.2d 1172, 1174 (Del. 1987) (software is UCC good because "[t]he hardware and software elements are combined into a single unit—the computer system—prior to sale"). Conversely, Plaintiffs do not allege that the Internet-Defendants' services are subject to contracts for sale, let alone "moveable at the time of identification to the contract for

sale” to qualify as “goods” under the UCC, much less for the purposes of product-liability law.⁶ Opp. 20.

Plaintiffs dismiss the overwhelming weight of case law nationwide with their conclusory argument that “New York products liability law differs drastically from other jurisdictions like California.” Opp. 21 (citing *Matter of New York City Asbestos Litig. (Dummitt)*, 27 N.Y.3d 765 (2016)). But *Dummitt* merely notes differences between New York’s *duty to warn* standard and the standard in other states, 27 N.Y.3d at 798, and Plaintiffs fail to explain how this particular difference implicates whether the Internet-Defendants’ services are products. *Cf. Quinteros v. InnoGames*, 2022 WL 898560, at *7 (W.D. Wash. Mar. 28, 2022) (dismissing product-liability claim alleging video game was addictive because the game was not a product). Plaintiffs also ignore the cases (in New York and elsewhere) rejecting product-liability claims against publishers of expressive content, and indeed they fail entirely to engage with the Internet-Defendants’ argument on this score. *See* Mot. 27–28; *N. Am. Van Lines*, 11 Misc.3d 1076(A).

Nor are the Internet-Defendants’ online services “analogous” to tangible products. Opp. 20. As *Terwilliger* explained, strict product liability, and the associated risk/utility calculus, applies to situations where a manufacturer’s “wares serve a standardized purpose, such that the product’s latent dangers, if any, are known, or should be known, from the time it leaves the manufacturer’s hands.” *Terwilliger*, 33 N.Y.3d at 494; *see also* Restatement §19(a). Yet, Plaintiffs allege the opposite here: that the Internet-Defendants’ interactive services respond to individual users’ activity and recommend and disseminate “targeted” content posted by other

⁶ The UCC primarily concerns the rights of parties with respect to “commercial transactions,” NY UCC §1-103(a)(1), including the delivery, title, and warranty of goods that are bought, sold, leased, etc., NY UCC Article 2. As alleged here, however, users are not engaged in commercial transactions with the Internet-Defendants regarding their use of social media apps. *See, e.g.*, ¶240 (noting provider does not charge users a fee to use its services).

users, in varying formats. *See, e.g.*, ¶¶267, 360, 375, 397–99. Plaintiffs’ claims therefore do not concern products that “serve a standardized purpose” or that consumers experience in a standardized way, *Terwilliger*, 33 N.Y.3d at 494, such that the risk/utility analysis underlying product-liability law should apply. Opp. 22. This variability in the operation and user experience of the Internet-Defendants’ services is precisely why they are not tangible products and, moreover, are not “analogous to the distribution and use of tangible personal property.” *Terwilliger*, 33 N.Y.3d at 494 (quoting Restatement §19(a)).

Finally, Plaintiffs’ effort to evade the other cases cited by the Internet-Defendants is unpersuasive. Ignoring the Ninth Circuit’s holding in *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991), that publishing ideas and information is not subject to product-liability law, Plaintiffs contend that *Winter* pointed to computer software “as an example of a ‘highly technical tool’ whose defect supports product liability.” Opp. 21. But *Winter* merely observed, in dicta, that, like a compass that leads a user off a cliff, a navigational chart or “[c]omputer software *that fails to yield the result for which it was designed* may be another” circumstance where product liability applies. 938 F.2d at 1036 (emphasis added). Plaintiffs’ claims are not that the Internet-Defendants’ software was used like a navigational chart and that it provided incorrect technical data or directions that resulted in a physical injury. They instead seek to hold the Internet-Defendants liable for disseminating harmful ideas, a scenario that product-liability law has never covered, and that would put it in direct conflict with the First Amendment. *Id.*⁷

IV. PLAINTIFFS FAIL TO PLEAD LEGAL CAUSATION.

Plaintiffs wrongly claim that proximate cause is a “quintessentially factual” question that cannot be decided at the motion-to-dismiss stage. Opp. 26. This ignores the numerous cases

⁷ *Maynard v. Snapchat, Inc.*, 313 Ga. 533 (Ga. 2022) has no application here because the issue of whether Snapchat was a product under Georgia product-liability law was not before the court in that case or here.

finding no proximate cause on the pleadings and as a matter of law. Mot. 30. Where, as here, the pleadings do not support an inference that the injuries were a reasonably foreseeable consequence of defendants' conduct, courts routinely dismiss for lack of proximate cause. *E.g.*, *Ventricelli v. Kinney Sys. Rent A Car*, 45 N.Y.2d 950, 952 (1978) (dismissing claim because allegations "stretch the concept of foreseeability beyond acceptable limits"); *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 104 (1st Dep't 2003) (dismissing claim; "a party is simply too far removed ... to be held responsible for it").

It is particularly appropriate to decide causation on the pleadings in cases involving intervening acts, especially criminal acts by third parties. Mot. 30; *e.g.*, *Sturm*, 309 A.D.2d at 103–04; *Taylor v. Bedford Check Cashing Corp.*, 8 A.D.3d 657, 657 (2d Dep't 2004). Plaintiffs are therefore incorrect that "[u]nder New York law[,] intervening acts of third parties do[] not break the chain of legal causation flowing from the defendants' negligence." Opp. 27. To the contrary—as the cases quoted by Plaintiffs themselves demonstrate—"[a]n intervening intentional or criminal act will generally sever the liability of the original tort-feasor." *Kush by Marszalek v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983) (cited at Opp. 27).

Plaintiffs argue that their injuries were foreseeable because the Internet-Defendants knew their services could be used by third parties to spread harmful or criminal content. Opp. 28–29. Such sweeping reasoning would make any online service provider liable for injuries that are caused by virtually any criminal, tortious, or wrongful act a user committed purportedly inspired by content they allegedly encountered on an online platform. On the contrary, the relevant question is whether Plaintiffs' injuries in particular, caused by Gendron's criminal act, were reasonably foreseeable. Controlling authority dictates that, as a matter of law, they were not. *See Dyer v. Norstar Bank, N.A.*, 186 A.D.2d 1083, 1083 (4th Dep't 1992); *Tennant v. Lascelle*, 161 A.D.3d

1565, 1566 (4th Dep’t 2018); *Taylor*, 8 A.D.3d at 657. Indeed, the Complaint itself alleges conduct by others—including the firearms defendants and Gendron’s parents—that was unforeseeable to the Internet-Defendants, and which purportedly were causes of Plaintiffs’ injuries. Mot. 31; ¶¶205–26, 484–85, 492, 496, 503–28. As a matter of law, any causal connection between Plaintiffs’ injuries and the Internet-Defendants’ acts, separated by these multiple steps, is too “remote, running through several links in a chain,” to support legal cause. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 234 (2001).

Plaintiffs’ reliance on *Derdiarian* only underscores the legal insufficiency of Plaintiffs’ allegations. Opp. 26. In *Derdiarian*, a construction company’s placement of boiling hot enamel too close to its workers and passing traffic foreseeably resulted in injury to a worker when a car accident caused the enamel to spill on him. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 313 (1980). The close proximity of the enamel to both the workers and high-speed traffic made it “a foreseeable, normal and natural result” that any accident in that area could result in injury to the nearby workers. *Id.* at 316. That is not remotely analogous to the causal daisy chain alleged here: that the Internet-Defendants—by virtue of providing various global online services that publish all manner of user content—foreseeably caused Plaintiffs’ deaths and injuries in Buffalo, New York, at the hands of a shooter who was one of the billions of people who used those services and encountered content by other users online. *See 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”). The causal connection between Plaintiffs’ injuries and any of the Internet-Defendants’ alleged acts is far too “remote” as a matter of law to satisfy legal causation. Mot. 31–32.

V. PLAINTIFFS' NEGLIGENCE-BASED AND DERIVATIVE CLAIMS FAIL BECAUSE THE INTERNET-DEFENDANTS DO NOT OWE THEM A DUTY OF CARE.

Although Plaintiffs acknowledge that a duty of care is a required element of their negligence-based claims, they urge this Court to disregard New York law holding that 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. 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.” *Id.* Neither is present here.

Plaintiffs ask this Court to find a duty of care notwithstanding the lack of the required relationship. Opp. 24. But the only cases Plaintiffs cite in support of imposing a duty absent a special relationship are in the product-liability context, which (as discussed above) does not apply here. *See supra* Section III. More fundamentally, none of those cases addresses a duty to protect someone from harm imposed by the intentional criminal act of a third party. Instead, in Plaintiffs’ cases, the defendant’s product directly caused the plaintiff’s alleged injuries.⁸ That is a far cry from this case, in which a third party directly caused Plaintiffs’ injuries. In such cases, plaintiffs must plead a special relationship. *See, e.g., Purdy v. Pub. Adm’r of Westchester Cnty.*, 72 N.Y.2d 1, 8–9 (1988). Plaintiffs here have not done so—and they cannot as a matter of law. Plaintiffs

⁸ *See Sprung v. MTR Ravensburg, Inc.*, 99 N.Y.2d 468, 472 (2003) (retractable floor); *Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 409 (1985) (motorcycle); *Codling v. Paglia*, 32 N.Y.2d 330, 335 (1973) (automobile); *Codling v. Paglia*, 38 A.D.2d 154, 156 (3d Dep’t 1972), *aff’d in part, rev’d in part*, 32 N.Y.2d at 335 (automobile); *Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 58 (2d Dep’t 2003) (meat grinder); *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 65 (1962) (heat blocks); *Ciampichini v. Ring Bros., Inc.*, 40 A.D.2d 289, 290 (4th Dep’t 1973) (trailer hook); *Singer v. Walker*, 39 A.D.2d 90, 92 (1st Dep’t 1972) (hammer); *Tucci v. Bossert*, 53 A.D.2d 291, 292 (2d Dep’t 1976) (drain cleaner); *Cawley v. Gen. Motors Corp.*, 324 N.Y.S.2d 246, 246 (Sup. Ct. 1971) (automobile); *Bah v. Nordson Corp.*, 2005 WL 1813023, at *15 (S.D.N.Y. Aug. 1, 2005) (hot glue dispensing machine).

offer no response to the extensive case law rejecting requests to impose similar duties on websites or other publishers to protect users or viewers from criminal third-party conduct related to consuming expressive media. Mot. 34–36 (citing numerous cases).

Plaintiffs agree that their remaining claims are all “derivative” of their negligence and product-liability claims, and they do not dispute that these derivative claims must be dismissed if Plaintiffs’ negligence and product-liability theories fail. Opp. 64. Because Plaintiffs cannot state a claim under negligence or product-liability theories for the reasons stated above, their derivative claims for infliction of emotional distress, wrongful death, personal injury, joint and several liability, and loss of parental guidance all fail as well. Mot. 38–39.

VI. PLAINTIFFS’ INVOCATION OF CPLR 3211(d) DOES NOT SALVAGE THEIR CLAIMS.

Seeking to avoid dismissal, Plaintiffs invoke CPLR 3211(d).⁹ But CPLR 3211(d) authorizes discovery only where “affidavits submitted in opposition” reflect “that facts essential to justify opposition may exist but cannot then be stated.” The provision does not apply where the motion to dismiss concerns a “fail[ure] to state a cause of action as a matter of law” and “no amount of discovery can salvage the claim.” *Herzog v. Town of Thompson*, 216 A.D.2d 801, 803–04 (3d Dep’t 1995). In such situations, “no discovery is warranted.” *Id.* The “mere hope that discovery may reveal facts” that could “justify opposition” is insufficient. *Karpovich v. City of N.Y.*, 162 A.D.3d 996, 998 (2d Dep’t 2018).

That is exactly the situation here. The Internet-Defendants’ Motion assumes that Plaintiffs’ factual allegations are true, and the Internet-Defendants’ §230, First Amendment, and other arguments raise purely legal questions based on those factual allegations. No discovery is needed,

⁹ “CPLR 3211(d) is primarily a tool to address jurisdictional issues,” not motions to dismiss for failure to state a claim, where all facts pled are presumed true. *See Stephen Blau MD Money Purchase Pension Plan Trust v. Dimon*, 2015 WL 2127119, at *15 (Sup. Ct. May 6, 2015).

or appropriate, to resolve such a motion. That the Internet-Defendants' motion is based on §230 immunity makes Plaintiffs' unadorned request for discovery especially improper. Congress specifically intended for §230 to shield online service providers from exactly the sort of burdensome discovery that Plaintiffs seek here.¹⁰ As the First Department recognized in *Word of God Fellowship, Inc. v. Vimeo, Inc.*, 205 A.D.3d 23, 29 (1st Dep't 2022), courts are "to resolve the question of Section 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008)); *see also Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014) ("Given the role that [§230] plays in an open and robust internet by preventing the speech-chilling threat of the heckler's veto, we point out that determinations of immunity under the [§230] should be resolved at an earlier stage of litigation."); *Nemet*, 591 F.3d at 254 ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process.").¹¹

¹⁰ Plaintiffs' requests seek, for example, information about user content Gendron encountered or sent, the Internet-Defendants' leadership's knowledge about harmful user content on their services, third-party ads from alleged hate groups, third-party ads for firearms, information regarding ad targeting, information about the Internet-Defendants' knowledge about mental health issues and effects of social media use, information about the attack, and information regarding the Internet-Defendants' understanding of §230. *See Bergman Aff. Exs. 1-3, 5-6, 8* (NYSCEF No. 234-236, 238-239, 241). *None* of this information would impact the §230 analysis. Indeed, Plaintiffs' demand for information about the specific content that Gendron saw, sent, or received on each of the Internet-Defendants' services, only belies their argument that the Complaint is not based on the specific user content that Gendron allegedly encountered online.

¹¹ Under New York law, courts similarly address other legal immunities at the earliest stages of litigation. *See, e.g., Liu v. N.Y.C. Police Dep't*, 216 A.D.2d 67, 69 (1st Dep't 1995) ("Qualified immunity is an affirmative defense and an issue of law which the court should decide at the earliest possible stage of the litigation, and it may be raised and decided on a motion to dismiss prior to discovery."); *Rossi v. City of Amsterdam*, 274 A.D.2d 874, 876 (3d Dep't 2000) (rejecting claim for "additional discovery" and holding "it is well settled that the applicability of [the qualified immunity] doctrine should be determined in the early stages of litigation.").

Indeed, in *Shiamili*, the Court of Appeals directly rejected a similar effort to evade §230 with vague pleas for discovery. The trial court in that case found that §230 “did not require dismissal of plaintiff’s claims, since information as to defendants’ role, if any, in authoring or developing the content of the website is exclusively within their possession and discovery had not yet occurred.” 17 N.Y.3d at 286. But the Appellate Division “unanimously reversed, granted the motion to dismiss, and dismissed the complaint,” and the Court of Appeals affirmed that ruling: “Because the complaint here does not allege that defendants authored the defamatory content, but only that they published and edited it, the court concluded that [§230] bars Shiamili’s claim and that further discovery is unnecessary.” *Id.* *Shiamili* thus confirms that §230 motions cannot be denied just because discovery has “not yet occurred” and that such motions must be granted, with no discovery, where (as here) the facts alleged in the complaint establish that the defendants “did not author” the injurious content and the claim seeks to hold them liable for publishing such content. *Id.*

Under such circumstances, courts in New York routinely resolve §230 at the pleading stage and reject arguments that discovery is needed. *See, e.g., Montanino*, 2023 WL 6614687, at *5 (dismissing complaint under §230 and rejecting argument that defendant failed to comply with discovery); *Deer Consumer Prod., Inc. v. Little*, 32 Misc.3d 1243(A), at *9 (Sup. Ct. 2011) (dismissing complaint under §230 and finding “discovery is unwarranted” particularly absent any allegation “defendants actually wrote any part of the offending material”); *Force*, 934 F.3d at 63 n.15 (rejecting plaintiffs’ argument that the district court prematurely applied §230(c)(1) before allowing discovery because “the application of Section 230(c)(1) is appropriate at the pleading

stage when, as here, the ‘statute’s barrier to suit is evident from the face of’ plaintiffs’ proposed complaint”) (quoting *Ricci v. Teamsters Union Loc. 456*, 781 F.3d 25, 28 (2d Cir. 2015)).¹²

Plaintiffs argue that the legal issues are complicated and that relevant facts are “unknown.” Opp. 66–67. But Plaintiffs do not explain what specific, relevant facts they anticipate uncovering that would be essential to opposing the motion on §230, First Amendment, or any other grounds, as required by CPLR 3211(d). *See Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 A.D.3d 536, 537 (1st Dep’t 2013) (discovery unwarranted where plaintiff failed to specify facts justifying discovery or how discovery would be relevant to opposition to the motion to dismiss); *see also Spring v. Cnty. of Monroe*, 151 A.D.3d 1694, 1696 (4th Dep’t 2017) (“additional discovery is not warranted inasmuch as it could not remedy plaintiff’s failure to plead” a case); *Olszewski v. Waters of Orchard Park*, 303 A.D.2d 995, 996 (4th Dep’t 2003) (“plaintiff [failed to] establish that facts supporting such a theory of liability may exist but cannot now be stated”). Beyond conclusory assertions about the importance of discovery in general, Plaintiffs refer only to their attorney affirmation, which in turn attaches only previously served document demands without explaining why answers to any of those demands would be “essential” to survive the Internet-Defendants’ purely legal defenses. *See* Affirmation of Matthew Bergman (NYSCEF No. 233).¹³

¹² *See also Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016) (affirming dismissal under §230 and refusal to allow discovery into website operator’s efforts to block and screen content); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 425-26 (1st Cir. 2007) (affirming dismissal under §230 and denial of request for discovery where “[plaintiff] has not pointed to any discovery that would support a viable claim against [defendant] that falls outside of Section 230 immunity”).

¹³ Courts have further held that attorney affirmations, as submitted here, are *per se* insufficient to trigger CPLR 3211(d). *See Dworkin Constr. Corp. (USA) v. Marcus Group Inc.*, 80 Misc.3d 363, 367 (Sup. Ct. 2023) (“Nor does plaintiff demonstrate the need for disclosure through an affidavit, as required under C.P.L.R. § 3211(d), rather than an attorney’s affirmation.”).

Finally, this is not a case where Plaintiffs lack access to information to draft their complaint. The New York State Attorney General’s Office issued a public, fifty-page report on its investigation into the circumstances of Gendron’s use of online services prior to the shooting—which concluded that the Internet-Defendants were not liable. *See* NYSCEF No. 130. Plaintiffs themselves refer to the Report throughout their Complaint, and thus it is incorporated by reference. *See, e.g.*, ¶¶183, 416. Whatever additional information Plaintiffs could obtain in discovery, it would add nothing to the Complaint that could save these claims from dismissal. No amount of discovery will change that Plaintiffs’ claims fail as a matter of law.

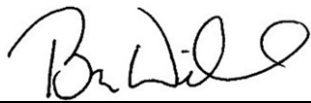
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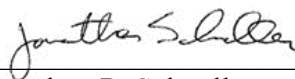
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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BARBARA MAPPS, Individually and as Executrix of the
ESTATE OF KATHERINE MASSEY; SHAWANDA
ROGERS, Individually and as Administrator of the
ESTATE OF ANDREW MACKNIEL; AM, a minor; and
LATISHA ROGERS,

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,

Defendants.

**REPLY MEMORANDUM OF LAW on behalf of ALPHABET INC., GOOGLE LLC,
AND YOUTUBE, LLC (collectively “YOUTUBE”)**

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INTRODUCTION

Plaintiffs' perfunctory opposition to YouTube's Memorandum of Law in Support of its Motion to Dismiss (NYSCEF Doc. No. 127, "YouTube MOL") does not meaningfully engage with YouTube's legal arguments setting forth additional reasons why the claims against YouTube fail. NYSCEF Doc. No. 232 ("Opposition" or "Opp.") at 68. Instead, Plaintiffs largely reiterate their baseless request for discovery pursuant to C.P.L.R. § 3211(d), asserting without explanation or elaboration that such discovery is "critical" to adjudicating the legal sufficiency of Plaintiffs' claims. *Id.* As explained in the Joint Reply, however, Section 3211(d) does not allow Plaintiffs to evade dismissal here with bare pleas for discovery (*see* Internet-Defendants' Joint Reply (NYSCEF DOC. No. 370, "Joint Reply") at 27-31), and Plaintiffs' non-response to the substance of YouTube's MOL only confirms that their claims against YouTube must be dismissed.

ARGUMENT

I. PLAINTIFFS CANNOT SAVE THEIR CLAIMS AGAINST YOUTUBE WITH UNEXPLAINED REQUESTS FOR DISCOVERY.

A. Plaintiffs' Bid for Discovery Is Baseless and Only Confirms Why Plaintiffs' Claims Against YouTube Fail as a Matter of Law.

In its Memorandum of Law, YouTube elaborated on Internet-Defendants' Joint Memorandum of Law (NYSCEF No. 112, "Joint MOL") by explaining that YouTube's allegedly defective features are not "products" under New York products-liability law and that Plaintiffs' attempt to hold YouTube liable for allegedly disseminating or suggesting to Gendron third-party videos that played some role in his mass shooting is barred by Section 230 and the First Amendment. YouTube MOL at 1-5; *see also* Joint MOL at 6-29. YouTube further explained that Plaintiffs' allegations do not, as a matter of law, plead that YouTube's allegedly defective or negligent publication activities were the proximate cause of Plaintiffs' injuries. YouTube MOL at 6-8; *see also* Joint MOL at 29-44.

Plaintiffs do not substantively respond to these YouTube-specific arguments, other than offering the entirely conclusory assertion that their “YouTube allegations ... are more than sufficient to state cognizable negligence and product liability claims arising out of Payton Gendron’s use of the YouTube Product.” Opp. at 68. That is not a legal argument, and it cannot save Plaintiffs’ claims.¹ As for Section 230, while Plaintiffs (baselessly) contend at length that *other* Internet-Defendants are “responsible in part for the creation and development of white supremacist material posted on their platforms” (Opp. at 37-53), they pointedly do *not* advance such arguments as to YouTube. Plaintiffs thus have forfeited any argument that their claims against YouTube are based on anything other than third-party content “provided by another information content provider.” 47 U.S.C. § 230(c)(1).

Beyond that, Plaintiffs assert that it is “critical” for them to obtain discovery regarding “the videos that Gendron viewed, was recommended or uploaded on YouTube” (Opp. at 68)—apparently to support their causation allegations. This is doubly wrong. *First*, such discovery would not save Plaintiffs’ claims because it could not change the fact that Gendron’s independent decision to commit an intentional criminal act would break any causal chain linking YouTube’s alleged publications to the Tops attack. YouTube MOL at 6-8; *see also* Joint MOL at 29-34, Joint Reply at 23-25.² *Second*, Plaintiffs’ supposed need to identify the specific YouTube videos that

¹ Plaintiffs’ citation to *Leon* (Opp. at 68) is unavailing. That case articulates the unremarkable proposition that on a motion to dismiss New York courts “accept the facts as alleged in the complaint as true ... and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). That is precisely why Plaintiffs’ claims against YouTube must be dismissed.

² Plaintiffs claim that Gendron’s diary supports their allegations that “YouTube’s design” caused or “inspired his racist rampage.” Opp. at 68. But the quoted language (in which Gendron writes that “I’ve just been sitting around watching YouTube and shit for the last few days,” *id.*) does not suggest that any content on YouTube—much less some YouTube design feature—triggered Gendron to commit the attack. Had Gendron written that he was “sitting around watching TV,” that would not warrant a claim against television companies for causing the attack. *See, e.g., Zamora v. Columbia Broad. Sys.*, 480 F.Supp.

allegedly “contributed to [Gendron’s] radicalization and inspired his murderous violence” (Opp. at 68) only confirms the fundamental problem with Plaintiffs’ entire case against YouTube: their claims are necessarily premised on allegedly harmful third-party content and improperly seek to hold YouTube liable for publishing and disseminating such material. Plaintiffs’ bid for discovery thus further belies their assertion that they seek to “hold Social Media Defendants liable not because of the content they host, but regardless of it.” *Id.* at 57. Claims premised on a third-party’s reaction to objectionable videos published on YouTube are barred by Section 230 and the First Amendment, are not a proper application of products-liability law, and fail for lack of legal duty and causation. YouTube MOL at 1-8; Joint MOL at 6-36; Joint Reply at 2-27.

B. Plaintiffs Offer No Substantive Response Regarding Their Invasion of Privacy Claim Against YouTube, Which Is Barred by Section 230 and Fails Under State Law.

YouTube’s MOL further explained why Plaintiffs’ invasion of privacy claim under New York Civil Rights Law § 50 et seq.—which is based on the alleged after-the-fact dissemination of Gendron’s attack video—fails as a matter of law, in addition to being barred by Section 230. YouTube MOL at 8-11; *see also* Joint MOL at 6-15; Joint Reply at 2-11. Plaintiffs do not respond to any of YouTube’s arguments or make any effort to defend this claim on the merits. They merely urge the Court, in a single unelaborated sentence, to defer ruling on this claim until “discovery is completed.” Opp. at 68. Plaintiffs do not explain what discovery they seek or why it has any bearing on the legal arguments YouTube has made for dismissal of the invasion of privacy claim. That dooms Plaintiffs’ effort under C.P.L.R. § 3211(d) to avoid dismissal. *See* Joint Reply at 27-31; *accord* *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 106

199, 202 (S.D. Fla. 1979) (dismissing claims seeking to hold television networks liable where shooter allegedly became addicted and desensitized to violence by watching defendants’ television shows).

A.D.3d 536, 537 (1st Dep’t 2013) (affirming denial of discovery under C.P.L.R. § 3211(d) where plaintiff’s claims failed as a matter of law and plaintiff failed to “specify what facts warrant further discovery or how they are relevant to his opposition to the motion to dismiss”).³

But Plaintiffs could not justify discovery on this claim even if they had tried. Their own allegations make clear that their claim falls in the heartland of Section 230 immunity (Joint MOL at 6-15), a protection that must be applied “at the earliest possible stage.” *Word of God Fellowship, Inc. v. Vimeo, Inc.*, 205 A.D.3d 23, 29 (1st Dep’t 2022) (citations omitted); *see also* Joint Reply at 2-11. No discovery could change that, and Plaintiffs do not argue otherwise. Moreover, as YouTube showed, the invasion of privacy claim independently fails because Plaintiffs’ allegations that users posted copies of Gendron’s attack video (before that content was removed by YouTube) do not, as a matter of law, amount to YouTube’s use of Plaintiffs’ images “for advertising purposes or for trade.” YouTube MOL at 9-11. Plaintiffs do not respond, other than to assert that they want discovery regarding YouTube’s alleged “receipt of advertising revenue from ... displays” of the attack video. Opp. at 68. But YouTube specifically explained that allegedly earning revenue from advertising displayed alongside user-uploaded videos—even if taken as true—would make no difference here because that would not transform such videos into advertisements or promotions *for YouTube’s business*, as required by Civil Rights Law § 50. YouTube MOL at 11 (citing, *e.g.*, *Kane v. Orange Cnty. Publ’ns*, 232 A.D.2d 526 (2d Dep’t 1996)). Plaintiffs do not cite any authority to counter the precedent YouTube cited—or even try to explain why discovery would

³ Plaintiffs’ reliance on *Meyers v. Becker & Poliakoff, LLP*, 202 A.D.3d 627 (2022), is misplaced. Opp. at 67-68. In that case, the court affirmed an order denying a motion to dismiss pending discovery because the complaint stated a cognizable claim for legal malpractice and the lower court concluded that discovery was needed to resolve the issues presented. *Id.* at 627-28. Here, by contrast, Plaintiffs’ invasion of privacy claim fails as a matter of law (in addition to being barred by federal law), and Plaintiffs have not argued, let alone established, that any discovery could compel a different conclusion.

make any legal difference. In short, Plaintiffs' opposition only confirms that Plaintiffs have no viable invasion of privacy claim against YouTube.

CONCLUSION

For these reasons, and those in YouTube's MOL and the Internet-Defendants' Joint MOL and Joint Reply, the claims against YouTube should be dismissed.

Dated: New York, New York
November 3, 2023

Respectfully Submitted,

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Dated: November 3, 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; 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. Feroletto

Oral Argument Requested

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

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INTRODUCTION

Even if Plaintiffs’ novel theories against algorithms warranted a change in law—and as explained in the Joint Reply, they do not—that would not save their claims against Amazon and Twitch, because Plaintiffs *concede* (as they must) that Gendron was *not* a “problematic user” of Twitch and was *not* “radicalized” by any Twitch algorithm. (Dkt. 283 (“Opp.”) 4-5.) Thus, in contrast to other Internet-Defendants, Plaintiffs’ claims against Amazon rise or fall solely on the strength of their theory that Twitch’s livestreaming service is “inherently dangerous” because it cannot “prevent the livestream broadcast of mass shootings.” (Opp.71.)

Plaintiffs’ livestream liability theory fails on multiple independent grounds, including under existing state products-liability law, and also under settled Section 230 and First Amendment precedents. Livestreaming—a lawful service that is used safely by hundreds of millions of consumers—simply is not “inherently dangerous” under governing law. (Opp.68, citing *Cleary v. John M. Maris Co.*, 173 Misc. 954, 957–58 (Sup. Ct. 1940) (dismissing complaint based on allegedly “inherently dangerous” product because product “produced no harmful effect” in “[m]any thousands” of other consumers).) And perhaps even more significantly, whether restyled as a product-liability issue or otherwise, Plaintiffs cannot escape the fact that their claims against Twitch target speech and the publication of speech. *See, e.g., Upsolve, Inc. v. James*, 604 F. Supp. 3d 97, 114 (S.D.N.Y. 2022) (“relabeling [speech] as conduct” does not make it so). Plaintiffs’ theory that Amazon can face liability because “Twitch has been used to livestream acts of violence”—content that is unambiguously created by third parties—is barred by Section 230, even under the improperly narrow test proposed by Plaintiffs. (Compl.¶351.) And Plaintiffs’ challenge to the design and function of livestreaming—“a communications technology” that “enables

speech”—is plainly barred by the First Amendment. *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012).

Although conceding that “whether Section 230 and the First Amendment vitiate Plaintiffs’ [claims]” are “important legal issues,” Plaintiffs urge this Court to not decide such “weighty questions” “until [after] discovery.” (Opp.66.) But for good reason, the law does not allow claims implicating the First Amendment or Section 230 to proceed past motions to dismiss. Courts must “resolve the question of §230 immunity at the earliest possible stage” – otherwise, §230 would be “nearly meaningless.” *Word of God Fellowship, Inc. v. Vimeo, Inc.*, 205 A.D.3d 23, 29 (1st Dep’t 2022) (citations omitted). Likewise, First Amendment damage is done through “burdensome litigation” alone – the mere “threat” of which can itself “chill[] speech.” *Fed. Election Comm’n v. Wisconsin Right To Life*, 551 U.S. 449, 469 (2007).

The material allegations against Amazon are limited. Discovery is not needed to establish any additional facts or to confirm that “Gendron was able to livestream his shooting”—the only allegation linking Amazon or Twitch to Gendron’s horrific crimes. (Opp.51.) Even accepting all of the material allegations in the Complaint as true, Amazon is entitled to dismissal. To hold otherwise would place this Court firmly at odds with constitutional and statutory law.

ARGUMENT

Plaintiffs’ Complaint relies on two theories for claims against Amazon: (1) the Internet-Defendants (which Plaintiffs define to include Amazon) “radicalized” Gendron with harmful content, and (2) Twitch’s livestreaming service is “inherently dangerous” because Gendron misused Twitch to livestream approximately two minutes of his horrific attack. Both theories fail as a matter of law.

I. Plaintiffs cannot state a claim on the theory that Amazon “radicalized” Gendron.

Plaintiffs ask the Court to create new exceptions to settled law to impose liability for “algorithms” that “addict” and “radicalize” teenage users. (*See, e.g.*, Opp.53-54 (arguing that Section 230 *dissents* are “more persuasive”).) For the reasons explained in the Joint Reply, those claims fail as a matter of law against all Internet-Defendants. But even if Plaintiffs could proceed to discovery with their “radicalization” theory against other Internet-Defendants, those claims cannot proceed against Amazon, because Plaintiffs concede that Gendron was *not* “radicalized” by any Twitch algorithm. (Opp.4-5.)

II. Plaintiffs’ claims based on livestreaming fail.

A. Livestreaming is not “inherently dangerous.”

In response to Amazon’s motion, Plaintiffs retreat from the specific allegations in their Complaint, claiming they are *not* trying to “impos[e] a time lapse” on livestreaming, do *not* seek to prohibit the “live dissemination of content,” and do *not* expect “Twitch’s content moderators” to monitor Twitch’s livestreams. (Opp.69.) Instead, according to Plaintiffs, their claims rely solely on the allegation that “Twitch is inherently dangerous.” (Opp.67-68.) This is the only substantive argument that Plaintiffs offer in response to Amazon’s motion. (Opp. §IV(B)(I) (“Twitch is an Inherently Dangerous Product”); *e.g., id.* at 67-69 (citing Twitch’s purported “dangers”).) But Plaintiffs’ attempt to reframe their allegations under a product-liability framework only cements the futility of their claims. As explained in the Joint Reply, internet services—including livestreaming—are not products. (Dkt. 370 (“Joint Reply”) 19-23.) Plaintiffs’ product-liability theory also fails for at least three additional reasons.

First, Plaintiffs’ Opposition effectively concedes that livestreaming is not “inherently dangerous” as that term is defined by courts. “Inherently dangerous products” are products such as “explosives” that “when negligently made” are “reasonably certain to place life and limb in

peril.” *Field v. Empire Case Goods Co.*, 179 A.D. 253, 257 (App. Div. 1917). Plaintiffs admit that “livestreaming [generally] has many legitimate use cases” and that Twitch specifically is “used by hundreds of millions of consumers.” (Opp.12; Compl.¶335.) While livestreaming has been misused on occasion, Plaintiffs’ own cases show that such outlier harms—no matter how tragic—cannot transform a service that is typically used “without resultant harm” into one that is “inherently dangerous.” *Cleary*, 173 Misc. at 957–58; *Field*, 179 A.D. at 257 (“fact that [plaintiff’s] bed had been in use for nearly a year [without] accident” showed it was “not inherently or imminently dangerous”); *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 371 (S.D.N.Y. 1996), *aff’d*, 119 F.3d 148 (2d Cir. 1997) (“hollow-point bullets” were not “inherently dangerous” as that term is used by courts); *see also* Opp.67-68 (citing *Cleary*, *Field*, and *McCarthy*).

Second, even if livestreaming was somehow “inherently” dangerous, it is not “unreasonably” so—*i.e.*, “dangerous to an extent beyond that which would be contemplated by the ordinary consumer.” *S.F. v. Archer-Daniels-Midland Co.*, 2014 WL 1600414, at *7 (W.D.N.Y. Apr. 21, 2014). Accepting *arguendo* Plaintiffs’ incorrect assertion that livestreaming is a product, a product cannot be “unreasonably dangerous” when the alleged danger arises from “an intentional and functional element of the design of the product.” *McCarthy v. Olin Corp.*, 119 F.3d 148, 155 (2d Cir. 1997). Gendron’s misuse of livestreaming for a horrific purpose does not mean there is something wrong with livestreaming itself. *Id.*; *see also Forni v. Ferguson*, 232 A.D.2d 176, 177 (1st Dep’t 1996) (while “knives may maim” or “liquor may cause alcoholism,” there is no liability unless “something [is] wrong with the product ... related to its condition”).

Third, even if Plaintiffs could establish that livestreaming was dangerous, they fail to allege an “alternative feasible design” to make it “safer.” (Dkt. 146 (“Amazon MTD” or “MTD”) 18.) In fact, Plaintiffs disclaim the only specific changes proposed in their Complaint. (Opp.69

(arguing that Plaintiffs are *not* trying to impose “a time lapse” or require “Twitch’s content moderators” to monitor livestreams). *But cf.* Compl.¶355 (alleging that Twitch should “implement[] a time lapse” so its “content moderators” could prevent objectionable livestreams).) Having retreated from these allegations, Plaintiffs now offer *no* explanation of what a “safer” design might look like. (Opp.69-71.) To the contrary, Plaintiffs double down that “[*n*]o content moderation technology exists” that could address their alleged dangers. (Opp.71.) This is exactly the kind of claim that courts regularly dismiss. *See DiBartolo v. Abbott Lab’ys*, 914 F. Supp. 2d 601, 622-23 (S.D.N.Y. 2012) (claims lacking allegations of “alternative feasible design” are “squarely rejected by New York courts”); *Clinton v. Brown & Williamson Holdings*, 498 F. Supp. 2d 639, 648 (S.D.N.Y. 2007) (rejecting “feasible” alternative cigarette design that would have amounted to a “virtual ban” on “every cigarette now on the market”).

* * *

In an attempt to avoid the dispositive arguments in Amazon’s motion, Plaintiffs abandon most of their original allegations and rest their claims on the limited theory that Twitch’s design is “inherently dangerous.” Because this narrowed theory fails on its own terms, Plaintiffs’ claims against Amazon should be dismissed in their entirety. *See Forni*, 232 A. D. 2d at 176-77 (affirming dismissal of product-defect and negligence claims where alleged defect challenged products’ “intrinsic function”); *S.F. v. Archer Daniels Midland Co.*, 594 F. App’x 11, 12 (2d Cir. 2014) (affirming dismissal of complaint when plaintiff “did not allege a safer alternative design”).

B. Section 230 also bars Plaintiffs’ “livestreaming” theory against Amazon.

Even if Plaintiffs stated a cognizable product-liability theory (and they do not), that theory would independently fail under Section 230. As Amazon explained in its motion, Plaintiffs’ claims are barred by both §230(c)(1)’s “publisher” immunity and §230(c)(2)’s immunity to “police content.” (MTD 9-11.)

Section 230(c)(2) immunizes websites for claims based on “unlawful messages that they didn’t edit or delete” and thus independently defeats Plaintiffs’ claims against Amazon. (Compl. ¶352; MTD 11.) Plaintiffs’ Opposition ***does not even address*** §230(c)(2). (See Opp.30-52).) Because Plaintiffs failed to respond, they “waive[d] any opposition to [Amazon’s] argument” and have “conceded that [their claims] should be dismissed.” *Trump v. Trump*, 189 N.Y.S.3d 430, 444-45 (N.Y. Sup. Ct. 2023); *Krupnik v. NBC Universal, Inc.*, 964 N.Y.S.2d 60 (Sup. Ct. 2010) (dismissing claims where plaintiff’s “response to the motion to dismiss” failed to address *each* “dispositive argument[]”).

Section 230(c)(1): Plaintiffs argue that §230(c)(1)’s “publisher” immunity, which bars any claims arising out “of any information provided by a [third-party],” does not apply here for two reasons.

First, Plaintiffs assert that their claims do not “implicate traditional publishing activity” because the Internet-Defendants could “fulfill their legal duty ... without altering, deleting, or modifying the content of a single third-party post.” (Opp.32, 35.) But Plaintiffs’ entire theory against Amazon and Twitch is based on a purported “fail[ure] to review, alter, or remove” Gendron’s stream. (Compl. ¶353 (faulting Twitch for failing to “shut down the broadcast before it is seen by anyone”); ¶354 (faulting Amazon for “allow[ing] [Gendron’s] livestream video”).) These are “traditional publishing activities” *even* under Plaintiffs’ improperly narrow definition. (Opp.35-37.)

Second, Plaintiffs assert that §230(c)(1) does not apply because Twitch allegedly holds a 24-hour “restrictive license” on content streamed on its platform, making Twitch a “co-owner.”

(Opp.51-52.)¹ Even if true, the “[o]wnership of content plays *no role* in [§230’s] statutory scheme.” *Finkel v. Facebook, Inc.*, 2009 WL 3240365 (N.Y. Sup. Ct. Sep. 15, 2009). In fact, state and federal courts nationwide have repeatedly, unanimously, and forcefully rejected similar “ownership” arguments and have dismissed similar claims under §230. *See, e.g., Finkel*, 2009 WL 3240365, at *1 (granting Facebook §230 immunity despite alleged “ownership interest” where there was “no claim Facebook had any hand in creating the content”); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 43 (Wash. App. 2001) (granting §230 immunity despite “Amazon’s licensing rights,” because there was “no allegation that Amazon was responsible for creating or developing the [content]”); *Small Justice LLC v. Xcentric Ventures*, 2014 WL 1214828, at *7 (D. Mass. Mar. 24, 2014) (“no authority” to support argument that “exclusive license” could “nullify CDA immunity”).

C. The First Amendment bars Plaintiffs’ livestreaming theory.

Courts protect livestreaming as a distinct form of protected expression. (MTD 12-13.) Plaintiffs not only fail to dispute these cases, but concede that “livestreaming products touch upon constitutionally protected speech.” (Opp.69-71.) Despite this admission, Plaintiffs contend that their challenge to the “design” of Twitch’s livestreaming service is not barred because it targets “conduct,” not “speech.” (Opp.71.) This supposed distinction cannot save Plaintiffs’ claims.

First, courts reject the premise that *live* broadcasting is a mere “design” choice not protected by the First Amendment. (Opp.71.) Other plaintiffs have asked courts to require broadcasters to “use a split-second tape delay” or implement a “screening system” to avoid airing objectionable content. (MTD 13.) But courts have held that such design changes would restrict

¹ In contrast, Plaintiffs argue that every Internet-Defendant *other than Amazon* is a co-publisher of content by “augment[ing] third party” posts. (*See* Opp.37-52.) While not asserted against Amazon, this theory fails under settled law. (Joint Reply 9-11.)

speech “to a degree the First Amendment does not permit.” *Rodriguez v. Fox News Network, L.L.C.*, 238 Ariz. 36, 41 (Ct. App. 2015); *see also Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317, 334 (2d Cir. 2010) (rejecting FCC’s argument that live broadcasters should “implement a more effective screening system” because “short of giving up live broadcasting altogether, no system will ever be one hundred percent effective”), *vacated on other grounds*, 567 U.S. 239, (2012).²

Second, the First Amendment protects “conduct” that facilitates “the speech process,” including, importantly, “instrument[s] of communication.” *ACLU*, 679 F.3d at 596. Thus, a restraint on conduct is unconstitutional if it burdens activities or mediums that “enable speech.” *Id.*; *see also Minneapolis Star & Trib. Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592 (1983) (tax on “the use of ink and paper” unconstitutionally burdened newspapers’ speech rights). Accordingly, even if Plaintiffs’ challenge to the “design” of Twitch’s livestream service implicated only “conduct,” that conduct is integral to an “instrument of communication” that enables protected speech. *ACLU*, 679 F.3d at 597; *see also id.* (“prohibit[ing] the use of projectors without a license” would implicate First Amendment “not because projectors constitute speech acts, but because they are integral to [speech]”).

Third, and independently, the First Amendment protects “content moderation” regardless of whether it is characterized as “conduct” (Opp.71), since moderating content is “inherently expressive,” *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1214 (11th Cir. 2022). Courts reject Plaintiffs’ black-and-white approach and protect content moderation regardless of the

² Plaintiffs criticize Amazon for citing the Second Circuit’s First Amendment analysis in *Fox* because that opinion was later vacated on unrelated grounds. But the Second Circuit itself treats *Fox*’s First Amendment analysis as good law. *See Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 158 (2d Cir. 2013) (citing *Fox*’s First Amendment analysis and noting that the opinion was “vacated and remanded *on other grounds*”).

doctrinal label attached to it. *Id.* at 1213 (whether assessing content moderation as “expressive conduct” or as “editorial judgments,” the “result is the same”).

D. Plaintiffs’ claims against Amazon fail for lack of causation.

As a matter of law and common sense, Amazon did not cause Gendron’s crimes. (Joint Reply 23-25 (under NY law, criminal acts “generally sever” causal chain).) Plaintiffs argue without merit that Gendron’s “murderous rampage” did not “break the chain of legal causation” because his crimes were “foreseeable.” (Opp.28-29.) As to Amazon, Plaintiffs argue that Amazon “knew” Twitch had been previously used to livestream crimes “when it acquired Twitch.” (Opp.28.)

Once again, Plaintiffs’ own cases show why such arguments must fail. “[C]riminal misuse”—*even if foreseeable*—“br[eaks] the chain of causation.” *McCarthy*, 916 F. Supp. at 369, 372 (dismissing complaint despite accepting as “true” that “criminal misuse” of ammunition is “foreseeable”) (cited at Opp.68); *see also Forni*, 232 A.D.2d at 74 (while “it must be acknowledged that ... [g]uns may kill,” gun manufacturers were not “proximate cause of plaintiffs’ injuries”).

Even if Plaintiffs could surmount this hurdle, they ignore another fundamental causation problem: that Gendron could have livestreamed his crimes from any number of services *even if Twitch did not exist*. (See MTD 16.) By not addressing this argument, Plaintiffs waived any opposition. *Trump*, 189 N.Y.S.3d at 444–45; *see also 430 W. 23rd St. Tenants Corp. v. 23rd Assocs.*, 155 A.D.2d 237, 239 (1st Dep’t 1989) (dismissing claim “as abandoned” given lack of response).) In fact, Plaintiffs’ Opposition *supports* Amazon’s argument by repeatedly treating all livestreaming services as interchangeable. (Opp.68 (“Social Media Defendants’ livestreaming products are implements of destruction.”); Opp.25-28.)

III. Amazon must be dismissed as a defendant.

For two additional reasons, Plaintiffs' allegations fail to establish that Amazon is properly named as a defendant. (MTD 17.)

First, Plaintiffs "impermissibly lumped" Amazon with the "Social Media Defendants," thus necessitating dismissal of claims I-VI. (*Id.*) Again, by failing to respond, Plaintiffs have conceded that claims I-VI against Amazon "should be dismissed." *Trump*, 189 N.Y.S.3d at 444-45. In fact, Plaintiffs seemingly acknowledge that those claims are not properly directed at Amazon. (Opp.at 22 (admitting that the "product liability claims are premised on the allegation that ... Social Media Defendants' products addicted Payton Gendron"); Opp.26 (characterizing the "failure to warn claim" as alleging a lack of disclosure about "addictive design and propensity to promote radicalization and violence").)

Second, Plaintiffs failed to overcome the strong presumption that Amazon cannot be liable for the acts of its subsidiary Twitch. (MTD 17.) Plaintiffs argue that their allegations that Amazon had some "control in the operation of Twitch" and "knew of Twitch's dangerous propensities" were "sufficient to pierce the corporate veil" under New York's "liberal" pleading standards. (Opp.71-72.) This argument is wrong on many levels. For starters, the general pleading standards are displaced by the "heavy burden" required to plead "particularized" facts supporting a veil-piercing theory. *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 211 (1st Dep't 2005). Moreover, Plaintiffs do not allege *any* meaningful "control" by Amazon over Twitch, much less the "complete domination" required. (Opp.72 (citing Compl.¶¶347-51, 354).) And in any event, even allegations of "complete domination" are "insufficient" absent facts showing that such domination was used specifically to "abuse the corporate form" (e.g., "transferr[ing] funds" between entities so that the one entity is "unable to pay" its debts). *245 E. 19 Realty LLC v. 245*

E. 19th St. Parking LLC, 194 N.Y.S.3d 923 (N.Y. Sup. Ct. 2023) (slip op. at 4). Nor can Plaintiffs “avoid dismissal on the mere hope that additional discovery will reveal sufficient grounds to justify piercing the corporate veil.” *Dragons 516 Ltd. v. Knights Genesis Inv. Ltd.*, 180 N.Y.S.3d 524 (N.Y. Sup. Ct. 2023) (slip op. at 22).

CONCLUSION

Plaintiffs’ Opposition makes one thing clear: Whether or not Plaintiffs’ claims should proceed against the other defendants, neither Amazon nor Twitch should remain as a defendant in this suit. No amount of discovery would change the law, and indeed, delaying dismissal would itself impinge on statutory immunity and constitutional rights. Amazon respectfully requests that its motion to dismiss be granted.

Dated: New York, New York
November 3, 2023

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Pursuant to 22 NYCRR 202.8-b

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ROBERT G. SCUMACI

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. Feroletto

Mot. Seq. No. 19

**DEFENDANT DISCORD, INC.'S REPLY
IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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I. INTRODUCTION

Every cause of action asserted by Plaintiffs fails because it seeks to hold Discord responsible for content published by third parties. As explained in Discord's motion, all such claims are barred by §230. Discord specifically cited authority from courts in New York and around the country holding §230 precludes claims based on the specific features that Plaintiffs attribute to Discord—private messaging, anonymity, connecting strangers, and content moderation—because claims based on such features are merely another way of challenging third-party content published by internet service providers such as Discord. Plaintiffs' Opposition ignores these arguments.

Nor does the Opposition respond to the critical difference between Discord and the other Internet-Defendants. Plaintiffs' theory is that Gendron acted out of hatred learned from algorithmically driven overexposure to racist content (Compl. ¶¶ 177-78), but unlike other Internet-Defendants, Discord is a real-time communications service rather than a platform centered on algorithmically driven content feeds or advertising. Plaintiffs have no basis to assert these claims against Discord.

Without a way around the inescapable conclusion that all their claims treat Discord as a publisher of third-party content, Plaintiffs advance a new argument (not in their Complaint) that Discord is essentially a coauthor of the content by materially contributing to its creation. Plaintiffs base this argument on stickers, emojis, and badges that Discord allows users to select and use, special access to servers, and its customized font. Not only are these new allegations nowhere to be found in the Complaint, they also misapply the law. Courts routinely reject claims that simply designing and providing stars, awards, or other website design choices that users can select to label or augment content constitute material contribution for the purposes

of §230. No amount of discovery could alter the conclusion that §230 bars all of Plaintiffs' claims.

Plaintiffs also now claim for the first time in their brief that Gendron was radicalized on Discord. Yet there is no allegation in the Complaint itself that Gendron viewed any racist or violent content on Discord or that he was radicalized through his activity on Discord. Nor would such an allegation be plausible in view of Gendron's admissions that he was radicalized by content that he accessed on 4chan and, to some extent, on Reddit. (NYSAG Report at 24.) And such an allegation would not save the Complaint for dismissal in any event, since it would still seek to hold Discord liable as a publisher of third-party content in contravention of §230.

Neither Plaintiffs' current nor proposed allegations support any coherent theory against Discord, and no discovery will contradict this conclusion. Thus, dismissal of Plaintiffs' claims as to Discord with prejudice is warranted.

II. ARGUMENT

A. Plaintiffs' New "Material Contribution" Theory Misstates §230 Authority and Does Not Save the Complaint from Dismissal.

All of the allegations made in the Complaint against Discord impermissibly seek to hold Discord liable for publication of third-party content. (Mot. 6-7.)¹ Seeking to avoid the well-established authority that §230 bars every one of their claims, Plaintiffs now pivot to argue, for the first time and through allegations absent from the Complaint, that Discord "materially contributed" to that content. (Opp. 37.) Specifically, Plaintiffs argue that Discord provides

¹ Because Plaintiffs do not dispute that Discord is an interactive computer service provider (Mot. at 6), Discord focuses on the second and third prongs of the standard. While Discord does not repeat all the arguments and authorities Plaintiffs ignore, their failure to respond to the specific §230 arguments Discord advanced requires dismissal. The general §230 positions Plaintiffs take in their Opposition are addressed in the Internet-Defendants' Joint Reply Brief and do not account for the unique reasons why Plaintiffs' claims against Discord fail.

“custom graphics, tools, and adornments” to users “for a subscription fee” through functionality known as “Boosting,” where servers with more boosts are granted “custom links to access the server.” (*Id.* 45-48.) The gravamen of Plaintiffs’ argument is that Discord materially contributes to hateful content because it “promotes recruitment[] and engagement” on its platform through custom “badges,” “banners,” “emojis,” and “stickers.” (Opp. 46.)²

As a threshold matter, Plaintiffs’ new allegations are nowhere to be found in the Complaint. Nor are the exhibits to the Elmore-Garcia Affirmation cited in Plaintiffs’ brief as support for the new allegations. (Opp. 46-48; Elmore-Garcia Aff. Exs. B, C, E.) New York law is clear that when a plaintiff makes new factual allegations in a memorandum of law, they “will not be considered by the court on a motion to dismiss.” *Cannonball Fund, Ltd. v. Marcum & Kliegman, LLP*, 2012 WL 9500858, at *5 (Sup. Ct. N.Y. Cnty. Apr. 6, 2012). Attempts to amend a complaint through an opposition brief are “not permissible.” *MediaXposure Ltd. (Cayman) v. Omnireliant Holdings, Inc.*, 29 Misc.3d 1215(A), at *5 (Sup. Ct. N.Y. Cnty. 2010). Moreover, nowhere in the Complaint do Plaintiffs allege that Gendron actually used the features—only available to paid subscribers, of which there is no claim that Gendron was.

In any event, even if Plaintiffs had included such allegations in the Complaint, it would not salvage their claims.³ Plaintiffs’ argument completely misapplies the law. Under the material contribution test, “a defendant will not be deemed to have developed third-party content

² Plaintiffs also attempt to shoehorn a quote about Discord’s “typeface” from its Brand Guidelines into their theory that Discord creates content. (Opp. 47-48.) Under Plaintiffs’ theory, any website that uses a customized font would fall outside the ambit of §230. This is absurd.

³ Discord’s moving brief rebutted Plaintiffs’ attempts to characterize specific platform features (private messaging, anonymity, connecting strangers, and content moderation) as dangerous and therefore outside the scope of §230 (Mot. 10-11 (citing six on-point unaddressed cases)). That Plaintiffs ignore this and now pivot to something new acknowledges that their prior allegations cannot overcome §230.

unless the defendant directly and ‘materially’ contributed to what made the content itself ‘unlawful.’” *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019). Material contribution **does not** refer to the act of merely “augmenting the content generally,” but rather to a greater contribution that warrants holding a defendant responsible as a “developer” of that content. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (material contribution where website “requir[ed] subscribers to provide [] information” about “sex, family status and sexual orientation” “as a condition of accessing its service”).

Court after court has considered *and rejected* claims that features like “awards,” “stars,” or even labels “directly and materially contribute” to harmful content. *See, e.g., Doe v. Reddit, Inc.*, 2021 WL 5860904, at *5 (C.D. Cal. Oct. 7, 2021), *aff’d sub nom. Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), *cert. denied sub nom. Does v. Reddit, Inc.*, 143 S. Ct. 2560 (2023) (Reddit’s provision of “Karma awards,” “an aggregate metric representing how many user votes a user has received” was a “neutral tool[]” and not a material contribution to illegal website content); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (Yelp’s star-rating system was a “neutral tool[]” based on “voluntary inputs”); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 834 (2002) (star next to a user’s name color-coded to indicate positive feedback received by that user did not remove eBay from the protection of §230 immunity); *Ynfante v. Google LLC*, 2023 WL 3791652, at *3 (S.D.N.Y. June 1, 2023) (adding an “official ad label” “did not directly and materially contribute to the content of a scam advertisement or its unlawfulness”).⁴

⁴ *See also Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014) (comments on third-party posts were not material contributions); *M. L. v. craigslist Inc.*, 2020 WL 5494903, at *3 (W.D. Wash. Sept. 11, 2020) (craigslist’s blurring and cropping images in the “erotic services” section of its website did not materially contribute to third-party unlawful trafficking content).

The act of “classif[y]ing” user characteristics . . . does not transform [an interactive computer service provider] into a developer.” *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003). Here, Discord badges are neutral tools used to signify the number of months a Discord user has consecutively boosted servers. (NYSCEF No. 265, Elmore-Garcia Aff. Ex. D.) §230 clearly bars Plaintiffs’ claims about these features.

The only authority Plaintiffs cite, *Shiamili v. Real Est. Grp. Of N.Y., Inc.*, 17 N.Y.3d 281 (2011), stands in plain opposition to their argument. There, the court found that the defendant’s act of adding headings and illustration when reposting third-party content “d[id] **not** materially contribute . . . to third-party statements” and affirmed the dismissal of plaintiffs’ claims as “clearly barred” by §230. *Id.* at 293 (emphasis added).

The implication of Plaintiffs’ proposed theory of liability would be that any website that does more than permit users to comment in plain text co-creates third-party content. That would subject every website to liability for its choice of, for example, fonts or colors. Claims based on these kinds of website design choices would create an impermissible “chilling effect,” making it extremely difficult for any website to function. *See Force*, 934 F.3d at 63 (“Congress . . . chose to immunize service providers to avoid any such restrictive effect”) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)). The Court should not entertain such a radical departure from settled §230 law.

And while any such claims would still be barred by §230 if made, Plaintiffs’ new argument does not remotely tie custom emojis, fonts, badges, and stickers to any allegation about Gendron’s conduct. No amendment can cure this defect, as Plaintiffs cannot plausibly allege such a connection between these innocuous features and Gendron’s murderous rampage. This alone dooms Plaintiffs’ material contribution theory.

B. Plaintiffs' Belated Attempt to Claim That Gendron Was Radicalized on Discord Would Still Impermissibly Seek to Hold Discord Liable as a Publisher of Third-Party Content.

Recognizing the omission from the Complaint, Plaintiffs argue for the first time in their brief that Discord helped radicalize Gendron. (Opp. 74.)⁵ As fully explained in the NYSAG Report that Plaintiffs incorporate by reference into the Complaint, Gendron himself admitted that he was radicalized on 4chan (and Reddit, to some extent), not Discord. (NYSCEF No. 168 at 3, 22.) Plaintiffs cannot use an opposition brief to contravene the materials they rely on in the Complaint. *See, e.g., TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 592 (S.D.N.Y. 2013) (“If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true.” (internal quotations omitted)).

Regardless, this radicalization theory does nothing more than treat Discord as a publisher of Gendron's or other users' extremist content. This is no different than the situation in *M.P. v. Meta Platforms, Inc.*, 2023 WL 5984294 (D.S.C. July 24, 2023), where the court granted a motion to dismiss claims about Dylann Roof's racist slaughter of worshipers in Charleston.⁶ This—like every other one of Plaintiffs' attempts to plead around §230—fails and does not save the Complaint from required dismissal with prejudice.

⁵ The ambiguous and conclusory section heading that “Discord Facilitated Gendron's Radicalization” does not address the issue. (Compl. Heading IV(F)(4).) Even here, Plaintiffs do not allege that Gendron interacted with any racist content, much less any that radicalized him. (Mot. 1-2.)

⁶ Plaintiffs' only response to that holding boils down to the nonsensical claim that Dylann Roof was a born-racist, whereas Gendron harbored no racial prejudice and even liked “black music” before social media turned him into a racist killer. (Opp. 4, 56.)

III. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint against Discord with prejudice.⁷

⁷ In addition to the arguments made herein, Discord adopts the Internet-Defendants' arguments in the Joint Reply Brief.

Dated: New York, New York
November 3, 2023

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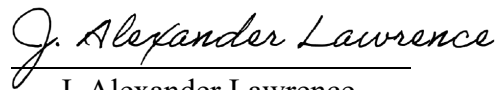
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CERTIFICATE OF COMPLIANCE

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 1961.

Dated: November 3, 2023


J. Alexander Lawrence

**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 REPLY
IN SUPPORT OF MOTION TO
DISMISS**

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106 A.D.3d 722 (2d Dep’t 2013)2, 3

I. INTRODUCTION

Plaintiffs' amended opposition supports the dismissal of **Claims 1-4, 6, 13, and 22-24** against Meta. *See* Dkt. 283, Pls.' Opposition ("Opp."). Plaintiffs' scant, one-and-a-half page response to Meta's memorandum in support of its Motion to Dismiss (Dkt. No. 131, "Br.") fails to engage with Meta's arguments, ignores the cause-in-fact requirement for causation, and resorts to repeating the same allegations that Meta has already demonstrated as deficient. Opp. 74-75. The broad-brush and conclusory statements in the Complaint are insufficient and fail to demonstrate how *Meta's* services caused Plaintiffs' injuries. Br. at 4. Tellingly, Plaintiffs are unable to point the Court to any factual allegations in the Complaint that would connect Gendron's alleged radicalization and heinous criminal conduct specifically to his use of Meta's services (there are none). Instead, Plaintiffs rely on allegations that Meta's and other Internet-Defendants' services were designed to "maximize engagement" and encourage "addictive use" by teenagers generally. Opp. 74. But even accepting this as true at the pleadings stage, this does not plead a cognizable chain of cause-in-fact (or, for that matter, proximate cause) between Meta's provision of services and Plaintiffs' injuries.

The Opposition also attempts to avert dismissal under §230 by alleging new facts about Instagram and Facebook features to argue that Meta is a "content information provider"—and thus ineligible for protection under §230. Opp. at 37–42. This tactic is unavailing because it contravenes established §230 law, and the allegations are entirely untethered from the claims in this case. Plaintiffs' claims against Meta should be dismissed.

II. ARGUMENT

A. Plaintiffs Tacitly Concede They Failed to Plead Meta was Cause-In-Fact of Plaintiffs' Injuries

Plaintiffs fail in their Opposition to identify factual allegations that would establish Meta's conduct as the cause-in-fact of Plaintiffs' injuries. Instead, Plaintiffs allege that Gendron was "addicted" to social media, based on allegations that Facebook and Instagram are designed to be addictive to teenagers, and that Facebook and Instagram feeds are designed to maximize user engagement. Opp. 74. None of these allegations go toward showing that Meta was a cause-in-fact of the May 14, 2022 mass-shooting that Gendron—as an adult (and not a teen)—prepared for and carried out, which actually inflicted Plaintiffs' injuries. Not only are these allegations not "sufficiently particularized" as to Meta, *V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 723 (2d Dep't 2013), but Plaintiffs' allegations on their face relate to addiction, which is qualitatively different from radicalization, and falls far short of pleading that Meta's services were a cause-in-fact of compelling an individual to commit mass murder. *See, e.g., Taylor v. Botnick Motor Corp.*, 146 A.D.2d 81 (3d Dep't 1989) (holding defendant's negligent registration of vehicle, which enabled it to be on the roadway, was not a cause in fact of driver's injury); *see also Clickner v. Shanley*, 141 Misc.2d 600, 605 (Sup. Ct. 1988) (holding negligence that caused vehicular accident was not cause-in-fact of subsequent additional injuries sustained at hospital due to malpractice).

Plaintiffs are also wrong on the law. Plaintiffs' primary response to Meta's cause-in-fact argument is that they "need not plead that Meta's conduct is the cause-in-fact of Plaintiffs' injuries" suffered as a result of the May 14, 2022 shooting. Opp. 74-75. Plaintiffs instead maintain that they need only plead proximate cause. *See id.* Plaintiffs misunderstand the law. "Causation incorporates at least *two separate* but related concepts; cause-in-fact and proximate cause." *Monahan v. Weichert*, 82 A.D.2d 102, 106 (4th Dep't 1981); *see Br.* at 4. Cause-in-fact is a

required element for a negligence-based claim. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 240, 750 N.E.2d 1055, 1066 (2001), *opinion after certified question answered*, 264 F.3d 21 (2d Cir. 2001). Courts have affirmed dismissals for lack of cause-in-fact. *See, e.g., Delgado v. Bretz & Coven, LLP*, 109 A.D.3d 38, 42 (1st Dep’t 2013) (affirming dismissal because a defendant’s actions “was not a but-for cause” of injury). Plaintiffs fail to address this argument and fail to distinguish the cases cited Meta in support of its position.

Plaintiffs’ reliance on *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 550, 706 N.E.2d 1163 (1998), is misplaced because that case involves proximate cause, not cause-in-fact. Opp. at 74. And as explained in the Joint Memorandum, Plaintiffs cannot establish that Meta’s conduct was a proximate cause in bringing about Plaintiffs’ injuries, either. *See* Joint Reply 23-25; *see also Monahan*, 82 A.D.2d at 106; *DeBartolo v. Coccia*, 276 A.D.2d 663, 663, (2d Dep’t 2000). The Opposition merely repeats the allegations in the Complaint, and fails to address Meta’s original argument that these allegations are deficient because they are not “sufficiently particularized,” as required by *V. Groppa* and New York pleading requirements, to show a factual causal chain between **Meta** (as opposed to other Internet-Defendants), **Gendron** (as opposed to “teens” generally), and Plaintiffs’ injuries arising out of Gendron’s criminal acts.

Plaintiffs concede, as they must, that they have not alleged that the livestream of Gendron’s attack on Facebook “was the cause-in-fact of the attack itself.” Opp. 75. They argue instead that the livestream of Gendron’s attack posted by unidentified third-parties on the Internet-Defendants’ services, including Facebook, “greatly contributed to the trauma that Plaintiffs experienced”—a causation theory that goes only toward Claims 7, 8, and 10. Opp. 75; ¶¶74-75. But Plaintiffs otherwise failed to defend those claims on their merits, waiving any argument that they should not be dismissed. *Pepenella v. Brumar Day Spa Corp.*, 143 A.D.3d 876, 877 (2d Dep’t 2016).

Specifically, Plaintiffs did not respond to the argument that Claims 7, 8, and 10 fail as against Meta because those claims inherently seek to hold the Internet-Defendants liable as publishers or speakers of the video of the attack.¹ *See* Joint Br. at 8. Nor did Plaintiffs meaningfully respond to the challenge to Claim 7 alleging Invasion of Privacy, insisting only that discovery is needed. Opp. at 68. But no amount of discovery would salvage the claim, given it fails to state a claim as a matter of law. *See, e.g.*, Dkt. No. 127, at 8-11.²

B. Plaintiffs' Argument that Meta Is an Information Content Provider Fails

Plaintiffs' argument that Meta is not entitled to CDA §230 protection on the basis that it is “responsible in part for the creation of content on its platform” and “materially contributed to the racist content that Gendron encountered on their platforms” is meritless and should be rejected by the Court. Opp. at 39. In support, Plaintiffs allege for the first time in their Opposition, via exhibits appended to an attorney affirmation, that Instagram and Facebook “allow[] users to edit a photo with different filters and effect,” “overlay music (provided by Instagram),” superimpose text, and add gifs and stickers that show the photo’s location and tag friends. Opp. at 38-39.

Plaintiffs' argument fails on both the facts and the law, including binding precedent from the Court of Appeals. *Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 289 (2011). First, Plaintiffs concede that it is “the user” who superimposes the texts, applies the filters, and overlays the music and stickers over their own content, not Meta. Opp. at 38-39. Therefore,

¹ Plaintiffs advance an argument that Twitch was a “co-owner” of the video of the attack and therefore is a “content information provider” with respect to the livestreaming claims. Opp. at 52-53. Setting aside the merits (or lack thereof) of this argument, Plaintiffs fail to advance any parallel defense of Claims 7, 8, and 10 against Meta, and therefore those claims must be dismissed at least as against Meta. *See Pepenella*, 143 A.D.3d at 877.

² Nor would any amount of discovery from Meta in any way alter the analysis or conclusion that §230, the First Amendment, and the other failures of Plaintiffs' pleadings bar their claims as a matter of law. *See* Joint Reply at Section VI.

accepting Plaintiffs’ allegations on their face, Meta is not alleged to be the information content provider—the individual user is.

As a matter of law, moreover, and as the Internet-Defendants established in the opening Joint Memorandum, none of these alleged features would convert Meta into a content provider for purposes of §230 because there is no allegation (nor could there be) that this “content” is itself racist or violent, much less contributed to Plaintiffs’ injuries. *See* Opp. at 38-39; Joint Br. at 14-15. Thus, Meta cannot be said to “develop or contribute materially to the alleged illegality of the third-party content within the meaning of [§230].” *Shiamili*, 17 N.Y.3d at 289 (cleaned up); *Ratermann v. Pierre Fabre USA, Inc.*, 2023 WL 199533, at *4 (S.D.N.Y. Jan. 17, 2023) (dismissing claims under §230 because defendant did not “materially contribute[] to ***what made the content itself unlawful.***”) (emphasis added); *Herrick v. Grindr*, 765 F. App’x 586, 590 (2d Cir. 2019) (geolocation feature does not create content under §230).

Plaintiffs mischaracterize *Shiamili* to argue that “the Court of Appeals held that by virtue of [adding headings and illustrations] ‘the Defendants appear to have been content providers’”—but the Court of Appeals held the opposite. Opp. at 37 (citing *Shiamili*, 17 N.Y.3d at 289). The Court of Appeals ***rejected*** the plaintiff’s argument that the headings, subheadings, and illustrations that the defendants added to the user content made them content providers to put them outside the scope of §230 because “that content . . . is not defamatory as a matter of law.” *Id.* And the Court held that the defendant—who was alleged to have added this non-defamatory content to defamatory third-party postings—was protected under §230. *Id.* Plaintiffs’ position is therefore simply wrong, and their freshly-raised allegations do not make Meta a §230 content provider pursuant to controlling law from the Court of Appeals.

In a last-ditch attempt, Plaintiffs append screenshots that their counsel represents (based on an article written by a third-party) show that Facebook auto-generated pages for white supremacist groups. Opp. at 39-41; Dkt. No. 242. As a threshold matter, this material is not properly submitted under affidavit and should be stricken and disregarded.³ See, e.g., *Khaldarov v. Neighborhood Hous. Serv. of NYC*, 798 N.Y.S.2d 710 (Sup. Ct. 2004) (granting dismissal pursuant to CPLR § 3211(a)(7) and disregarding papers submitted with opposition that were not in affidavit form).

Regardless, these “pages” are a red herring to distract from the insufficiency of Plaintiffs’ pleadings against Meta. As with the Instagram stickers and other features, Plaintiffs do not allege a connection between these “pages” and Plaintiffs’ injuries. There is no allegation that Gendron even used Facebook, let alone that he saw these pages, and that they somehow were a substantial factor that resulted in Plaintiffs’ injuries. See generally, Compl. Thus, these “pages,” even as alleged, do not comprise the content that allegedly gives rise to Meta’s liability under Plaintiffs’ theory of the case—and are therefore altogether irrelevant to the analysis under §230.

Even if one were to engage in the analysis, Plaintiffs still failed to allege that Meta is an “information content provider” under §230 on the basis of these blank “pages.” As alleged, the only content that can be discerned from them—the purported name of the “white supremacist groups”—is based on the input of third-party users, not Meta. Opp. 40-42. Therefore, under controlling precedent, Meta does not become an information content provider by allegedly publishing that third-party content in the format of a “page.” In *Shiamili*, the Court of Appeals affirmed the reversal of the trial court and held that the defendants did not become information

³ This material is hearsay and unauthenticated. Plaintiffs’ counsel had no basis to affirm under penalty of perjury that she has personal knowledge—based only on a third-party article’s say-so—that Exhibits 5, 6, 7, and 8 “are screenshots of pages for various hate groups that were autogenerated by Facebook.” Meta does not concede this statement and those Exhibits, and reserves all defenses.

content providers under §230 when they created a “stand-alone post” to repost and promote an allegedly defamatory user comment. 17 N.Y.3d at 285. The *Shiamili* Court expressly held that “[t]he defendants did not become “content providers” by virtue of moving one of the comments to its own post. Reposting content created and initially posted by a third party is well within “a publisher's traditional editorial functions.” *Id.* at 291. Indeed, the factual allegations here fall short even of those found to be nonactionable in *Shiamili* because Plaintiffs cannot allege here that Meta contributed any content to the “pages” other than the user-contributed title, unlike the defendants in *Shiamili* who supplied a “heading, subheading, and illustration that accompanied the posting.” *Id.* at 292 (holding defendants not liable under §230 notwithstanding additional content because the content itself was not defamatory and therefore did not contribute to the alleged illegality of the post).

The Court of Appeals’ reasoning is consistent with courts around the nation that similarly hold that an interactive computer service provider who is alleged to create or republish content based on user content is still “well within a publisher’s traditional editorial functions” protected by §230, and is not itself an information content provider. *Id.* at 291; *see, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (holding that Matchmaker was not content provider of dating profile created by users’ responses to Matchmaker’s questionnaire); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270-71 (9th Cir. 2016) (holding that rating system based on inputs from third parties and reduced by Yelp into a single, aggregate metric is at best a “neutral tool” operating on user-generated data that “did not amount to content development or creation”); *Levitt v. Yelp! Inc.*, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011) (same); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (holding a “website does not create or develop content when it merely provides a neutral means by which third parties can post information of

their own independent choosing online”). As the Court succinctly explained in *Carafano*, “Matchmaker cannot be considered an ‘information content provider’ under [§230] because no profile has any content until a user actively creates it.” 339 F.3d at 1122.

All of the claims should be dismissed against Meta pursuant to §230.

III. CONCLUSION

For the foregoing reasons and the reasons described in the Internet-Defendants’ Joint Motion to Dismiss, supporting Memoranda, and Reply Briefs, the Complaint should be dismissed against Meta in its entirety.


CERTIFICATION OF WORD COUNT LIMIT
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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. Feroletto

Motion Sequence No.

ORAL ARGUMENT REQUESTED

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

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INTRODUCTION

Plaintiffs theorize that social-media algorithms fed Payton Gendron extremist content that drove him to commit a racist massacre. As Snap’s motion to dismiss explained, that theory simply does not make sense for Snapchat. *See* NYSCEF 121 (“Snap MTD MOL”). Unlike apps that mainly feed users content, Snapchat is first and foremost a direct messaging app that lets friends exchange texts, photos, and short self-made videos. This mismatch between Plaintiffs’ theory and Snapchat’s actual features makes it all the more important for the Complaint to specifically allege the conduct that merits Snap’s inclusion in this case. Yet the Complaint neither identifies any defective feature nor explains how Snapchat supposedly caused Gendron’s crimes. Instead, Plaintiffs improperly lump Snap into collective allegations leveled against several defendants simultaneously.

Plaintiffs’ two-page Opposition (NYSCEF 283 (“Opp.”)) does not dispute that those group allegations are improper. It likewise makes no serious attempt to defend the adequacy of Plaintiffs’ individual allegations against Snap. Instead, Plaintiffs recite the Complaint’s vague criticisms of unnamed “features” that “drive addiction” and introduce users to “harmful content” and “predatory adults.” But the words “features,” “harmful,” and “predatory” neither give Snap notice of the conduct for which Plaintiffs aim to hold it liable nor tell Snap how that conduct allegedly caused Plaintiffs’ injuries. Plaintiffs thus introduce new speculation, not included in their Complaint, that “users, like Gendron *could be*” shown racist content on Snapchat’s “Discover page,” and that friends recommended to Gendron by Snapchat’s “Quick Add” feature might have somehow contributed to his radicalization. Opp. 78. Even had they appeared in the Complaint, those speculative and vague assertions would not state a claim. More important, neither the Complaint nor counsel’s affirmations state facts supporting those assertions. Counsel’s conjecture in a brief cannot cure Plaintiffs’ pleading failures.

Plaintiffs' request for discovery likewise offers no grounds for their claims against Snap to proceed. Plaintiffs hope that discovery might yield what their Complaint lacks—anything connecting Snap to their injuries. But CPLR 3211(d) does not authorize fishing expeditions based on rank conjecture. Plaintiffs lack a claim against Snap and have identified no reason to think discovery will unearth one. Their claims against Snap should be dismissed.

ARGUMENT

I. The Complaint fails to state a cause of action against Snap.

Plaintiffs' Opposition defends neither the Complaint's improper group allegations nor its sparse allegations against Snap individually. Instead, the Opposition tries to survive dismissal by leveling new allegations found nowhere in the Complaint. Those new allegations are not only procedurally improper but also deficient on their face.

A. Plaintiffs do not defend the Complaint's group pleading.

As Snap's motion noted, the Complaint is rife with collective allegations improperly conflating Snapchat with other, fundamentally different platforms. Snap MTD MOL 8-11. In their Opposition, Plaintiffs do not dispute that their collective allegations against "Instagram, YouTube, and Snapchat" and the "Social Media Defendants"—which lack "any specification as to the precise tortious conduct charged to a particular defendant"—violate New York's rule against group pleading, depriving Snap of notice to "frame a response." *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981). Those improper group allegations furnish no basis for Plaintiffs' claims against Snap to go forward. *See, e.g., ALP, Inc. v. Moskowitz*, 204 A.D.3d 454, 459 (1st Dep't 2022).

B. Plaintiffs' Snap-specific allegations fail to support an inference of tortious conduct or causation.

Unable to rely on group allegations, Plaintiffs' claims against Snap must rise and fall on their allegations against Snap individually. Yet the Opposition makes no meaningful effort to defend the adequacy of those allegations.

As Snap's motion to dismiss explained, the Complaint describes Snapchat's alleged flaws in terms too vague and conclusory to survive dismissal and makes *no* causation allegations against Snap. Plaintiffs' criticisms of unnamed "user feeds," unspecified "harmful" content, and unidentified "predatory" individuals give no notice of the allegedly flawed feature at issue. Snap MTD MOL 6-7 (quoting ¶373). And it strains credulity to suggest that commonplace functions such as notifications and ephemeral messages are addictive or otherwise harmful simply because they lead users to respond to messages. Snap MTD MOL 7-8. On top of failing to identify anything wrong with the app, the Complaint also identifies no causal theory linking Snapchat to Gendron's crimes—not one allegation that he was addicted to or ever encountered anything harmful on Snapchat. Snap MTD MOL 6-8. Plaintiffs respond to none of this. They simply repeat the Complaint's cursory allegations and offer the bare legal conclusion that they "state cognizable product liability and negligence claims." Opp. 79.

If that were true, dismissal for failure to state a cause of action would be unobtainable in New York. All a plaintiff would have to do to proceed to discovery and summary judgment is assert that some undisclosed feature of a service or product was tortious and describe the nature of the alleged flaw in highly general terms. Snap could be haled to court to answer for wrongdoing committed by any of its roughly 400 million daily users, based only on nebulous speculation that perhaps someone the criminal spoke to or some content the criminal viewed on

Snapchat played some unspecified role in their crime—or even just some unspecified role in their upbringing that led them, years later, to commit a crime.

New York’s pleading standard requires more. Plaintiffs cannot regurgitate the “material elements required for a ... cause of action”; rather, “the facts alleged in the complaint” must suffice to “put [defendant] on notice as to what plaintiff believes to be the problem.” *Flores v. Youm*, 69 Misc. 3d 1216(A), 133 N.Y.S.3d 786 (N.Y. Sup. Ct., Bronx Cnty. 2020). In a design defect case, for example, merely alleging that a prosthetic device “prematurely loosened” fails to adequately identify a defect, even if it might hint at some flaw in the product. *Id.* Because that allegation “does not describe *the design defect* that allegedly caused” the injurious results, it fails to state a tort claim. *Id.* (emphasis added; cleaned up). The same is true here: Plaintiffs’ allegations of “harmful content” on “user feeds” do not provide Snap notice of any alleged tortious shortcoming in Snapchat or how it allegedly contributed to Plaintiffs’ injuries.

C. Plaintiffs’ new allegations cannot cure the Complaint’s deficiencies.

Recognizing the inadequacy of the Complaint’s Snap-specific allegations, Plaintiffs improperly use their Opposition to inject new factual assertions into the case. The Opposition ventures three new allegations: (1) that “[i]t is through the Snapchat Discover page, where users, like Gendron *could be* repeatedly shown racist and antisemitic content, leading to radicalization,” (2) that Discover and Snapchat’s “‘Quick Add’ feature”—which recommends other users with whom a user may want to connect—“directed Gendron towards antisemitic and racist content,” and (3) that Snapchat’s design “was a substantial factor in developing” “Gendron’s social media addiction.” Opp. 78-79 (emphasis added). These unpleaded allegations fail both procedurally and substantively.

Procedurally, these assertions are irrelevant because they appear nowhere in the Complaint (or even an affirmation of counsel). The Complaint includes no allegations about

Discover or Quick Add, says nothing about Gendron’s use of Snapchat, and does not try to link Snapchat to Gendron’s alleged social-media addiction. The “court’s role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (2002). Accordingly, such “extrinsic facts set forth in the respective memoranda of counsel must be ignored.” *1010 Third Ave. Realty Corp. v. Leo-Ad Realty Corp.*, 158 N.Y.S.2d 608, 609 (Sup. Ct., N.Y. Cnty. 1957).

Beyond that fatal procedural defect, the new allegations are stated in speculative and conclusory terms that would not bring Plaintiffs any closer to stating a claim against Snap. Plaintiffs do not allege that Gendron *did* see racist or antisemitic content on Discover, but only that he possibly “*could*” have seen it or that the app might have “*directed* Gendron” to such content.¹ Opp. 78. Plaintiffs do not say *how* these features “directed” Gendron to radicalizing content, *what sort* of racist content they “directed” him to, or *where* Snapchat supposedly “directed” Gendron to view such content. Such carefully hedged conjecture—even if alleged in the Complaint—would not support a reasonable inference that a flaw in the Snapchat app caused Plaintiffs’ injuries.

Plaintiffs likewise do not allege any facts supporting their Opposition’s newfound claim that “Snapchat’s unreasonably dangerous design was a substantial factor in developing” “Gendron’s social media addiction.” *Id.* at 78-79. Even if it had appeared in the Complaint, that “vague and conclusory” allegation would fail because Plaintiffs allege no *facts* about Gendron’s Snapchat use of the app—only the “[b]are legal conclusion” that the app was a substantial factor in his alleged addiction. *McFadden v. Schneiderman*, 137 A.D.3d 1618, 1619 (4th Dep’t 2016).

¹ As Snap’s motion for sanctions explains, any suggestion that Discover itself promoted extremist content to Gendron would be sanctionably false. NYSCEF 203, 218.

And, in any event, Plaintiffs' new claim that Snapchat played some unexplained role in Gendron's alleged social-media addiction would contravene proximate cause rules barring liability for "unforeseeable" injuries that are "too tenuous and remote" from a defendant's conduct. *Hain v. Jamison*, 28 N.Y.3d 524, 531-32 (2016); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 95 (1st Dep't 2003). Plaintiffs' suggestion that Snap somehow contributed to Gendron's social-media addiction, which was "the underlying cause of his radicalization," which led to his heinous crimes, is precisely the kind of falling-domino theory of injury that the proximate-cause requirement forecloses.

In short, even if they had been properly alleged, none of Plaintiffs' new allegations would save their claims against Snap.

II. Plaintiffs identify no basis for discovery.

Plaintiffs' bid for discovery under CPLR 3211(d) likewise offers no grounds for this case to go forward. Plaintiffs express a hunch that they "will be able to locate and pinpoint specific content that was shown to Gendron" that somehow supports their theories. Opp. 79. But CPLR 3211(d) does not authorize pre-dismissal discovery based on a "mere hope that discovery may reveal facts essential to justify opposition." *Long Island Med. Anesthesiology, P.C. v. Rosenberg Fortuna & Laitman, LLP*, 191 A.D.3d 864, 864 (2d Dep't 2021) (denying CPLR 3211(d) request and collecting cases); *Spring v. Cnty. of Monroe*, 151 A.D.3d 1694, 1696 (4th Dep't 2017) (denying 3211(d) request where plaintiff made no "showing that additional discovery would disclose facts 'essential to justify opposition' to defendants' motion"). Rather, CPLR 3211(d) requires Plaintiffs to demonstrate a nonspeculative expectation, "from affidavits submitted," that discovery may yield specific "facts essential to justify opposition." Those affidavits must raise a "threshold indication beyond speculation," that "particular evidence" exists to "justify [Plaintiffs'] opposition to the motion." *Long Island Med. Anesthesiology*, 191 A.D.3d at 864.

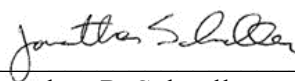
Here, the Complaint’s general and conclusory allegations that Snapchat “drive[s] addiction” and guides users to “harmful content” or “predatory adults” offer no non-speculative reason to believe discovery will improve Plaintiffs’ claims against Snap. Similarly, although one of Plaintiffs’ Counsel claims to be “very familiar with the Snapchat ... platform” (NYSCEF 242 ¶ 4), none of the attorney affirmations accompanying the Opposition identifies a single fact suggesting that discovery could cure Plaintiffs’ failure to state a claim against Snapchat. Nor do Plaintiffs cite any secondary literature, public documents or reports, or materials from Gendron’s criminal proceedings to support their demand for discovery. The only document they cite—the Attorney General’s report—*negates* their position: The AG “did *not* find graphic content on Snapchat.” Opp. 78. Plaintiffs have not made the showing required by CPLR 3211(d), and cannot delay dismissal while they embark on an undisguised fishing expedition.

CONCLUSION

Snap respectfully requests that the Court dismiss the Complaint against it with prejudice.

Dated: November 3, 2023

Respectfully submitted,
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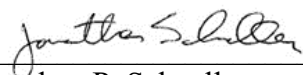
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CERTIFICATION OF WORD COUNT

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 1949 words.

Dated: November 3, 2023

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