COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. No. SJC-13747

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

META PLATFORMS, INC. AND INSTAGRAM, LLC,
Defendants-Appellants.

ON DIRECT APPELLATE REVIEW FROM AN ORDER OF THE SUPERIOR COURT FOR SUFFOLK COUNTY, NO. 2384CV02397-BLS1

BRIEF OF PLAINTIFF-APPELLEE COMMONWEALTH OF MASSACHUSETTS

ANDREA JOY CAMPBELL
Attorney General

Christina Chan, BBO # 677703
Jared Rinehimer, BBO # 684701
Assistant Attorneys General
Public Protection and Advocacy Bureau

David C. Kravitz, BBO # 565688
State Solicitor

One Ashburton Place
Boston, Massachusetts 02108
christina.chan@mass.gov, (617) 963-2912
jared.rinehimer@mass.gov, (617) 963-2594
david.kravitz@mass.gov, (617) 963-2427

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STATEMENT OF THE ISSUES

1. Whether, under the doctrine of present execution, Section 230 of the Communications Decency Act, 47 U.S.C. §230 ("Section 230" or "CDA") entitles Meta to an interlocutory appeal of an order denying its motion to dismiss, where nothing indicates congressional intent to confer immunity from suit.

2. If this appeal is proper, whether Section 230 bars the Commonwealth's unfair and deceptive claims under G.L. c. 93A, and its public nuisance claim, which allege Meta's own product design causes harm irrespective of third-party content displayed on the Instagram platform.

3. If this appeal is proper, whether the First Amendment bars the Commonwealth's claims where the harm alleged flows from Meta's product design decisions and false and misleading statements, not from expressive speech.

4. If this appeal is proper, whether the Commonwealth has plausibly alleged claims for unfair and deceptive conduct under Chapter 93A and for public nuisance.

STATEMENT OF THE CASE

This purported interlocutory appeal is from an order of the Superior Court (Krupp, J.) denying Meta's motion to dismiss the Commonwealth's Complaint. The Complaint alleges that Meta's business practices were unfair under G.L. c. 93A, § 2 (Counts I and III, "unfairness claims"); deceptive under G.L. c. 93A, § 2 (Counts II and III, "deception claims"); and created a public nuisance as a result of those acts (Count IV). *See* RA1/109-121. In its unfairness claims, the Commonwealth alleges that Meta unfairly maximizes its advertising revenue through psychologically manipulative design features that it knows override young users' ability to regulate their time on the platform, and results in problematic use and mental and physical harm. RA1/42-62, 100-106. In its deception claims, the Commonwealth alleges that despite knowing such harm, Meta has serially mispresented to the public the safety of its platform and its efforts to invest in and prioritize youth well-being and safety. RA1/62-100. In its public nuisance claim, the Commonwealth alleges that Meta's unfair and deceptive conduct has substantially and unreasonably interfered with the well-being of thousands of Massachusetts youth, giving rise to a youth mental health crisis that the Commonwealth must address. RA1/106-109, 118-121.

Meta moved to dismiss the Commonwealth's claims, arguing they are barred by Section 230 and the First Amendment, and the Commonwealth failed to

plausibly allege Chapter 93A or public nuisance claims. In a thorough and well-reasoned opinion ("Order"), the Superior Court rejected Meta's arguments. *See* Add 66-93.

Meta then moved the Superior Court to report its Order to the Appeals Court under Mass. R. Civ. P. 64(a). RA1/502. Simultaneously, Meta petitioned a single justice of the Appeals Court pursuant to G.L. c. 231, §118, ¶1, for permission to take an interlocutory appeal from the Order (Appeals Court No. 2024-J-724), RA2/517, and also noticed a purported appeal of the Order, claiming a right to do so under the doctrine of present execution (Appeals Court No. 2024-P-1473). RA1/499. The single justice stayed the petition in No. 2024-J-724 pending the outcome of the motion to report. RA2/515.

On January 9, 2025, the Superior Court denied the motion to report, finding no "reason to delay this matter" with an interlocutory appeal because, *inter alia*, the Commonwealth's deception claims did not implicate Section 230 or the First Amendment, and denying Meta's motion to dismiss was "consistent with the majority of, and the most cogent, decisions on the topic from around the country." RA2/512-13. Thereafter, the single justice in No. 2024-J-724 vacated the stay. RA2/516.

Meta then filed an application for direct review in No. 2024-P-1473. RA3/532. The Commonwealth did not oppose direct review but responded that the doctrine of present execution is inapplicable. RA3/564.

This Court granted direct review and consolidated the single justice petition with this appeal. RA3/574-75. This Court also denied Meta's request to pursue an interlocutory appeal of all issues decided by the Superior Court, and reserved the issue of an interlocutory appeal under Section 230. RA3/576.

STATEMENT OF FACTS

Meta is the largest social media company in the world. RA1/28-29 ¶17. It owns, develops, designs, markets, and operates the social media platform, Instagram. RA1/29 ¶¶18-19. Over 33 million young people in the U.S. use Instagram, including over 300,000 daily active users in Massachusetts between the ages of 13–17. RA1/23, 33 ¶¶6, 34. Meta derives substantially all its revenue from monetizing the data collected from its users and the time they spend on the platform to sell targeted third-party advertisements. RA1/37 ¶51.

Meta's Unfair Acts (Counts I and III): To build a pipeline of users whose data, time, and attention can be monetized to sell more ads, thereby realizing more revenue, Meta designs and deploys features that it knows exploit vulnerabilities of the teenage brain, knows overrides teenagers' ability to regulate their time on the

platform, and knows cause addictive overuse that results in mental and physical harms. RA1/42-59, 103-106 ¶¶68, 71-133, 134-141, 359-368.

Incessant Notifications and Intermittent Variable Rewards: When a user is not logged into Instagram, Meta "pushes" an incessant stream of audiovisual and haptic signals and alerts (e.g., pop-up banners on a phone's homescreen and/or sounds and vibrations) to notify users of activity on the platform to prompt them to return. RA1/45-49 ¶¶84-96. These "high volume" notifications leverage teens' "fear of missing out" ("FOMO"), "overload" and "overwhelm" young users, and "compel[] [them] to re-open and re-visit the Instagram platform repeatedly throughout the day and at night." RA1/49 ¶93. Meta's own research shows that these notifications disrupt and "psychologically harm[] young users by" "caus[ing] inattention and hyperactivity, and reduc[ing] productivity and well-being" even when they stop using Instagram or are not on their phone at all. RA1/49 ¶96.

In addition, Meta employs a "intermittent variable reward" (IVR) schedule to send users dopamine-inducing notifications (e.g., that someone "liked" a user's post) at optimized times, interspersed with dopamine gaps, to build anticipation and craving, which strengthens the desire to keep returning to the platform—much like the psychological manipulation techniques of slot machines. RA1/55 ¶¶126-133. This habit loop and craving for dopamine engineered by Meta increases depression

and anxiety, and alters young users' brain structure, maturation, and neurological development. RA1/103-106 ¶¶359-367.

Infinite Scroll and Autoplay: Because Meta's "infinite scroll" and "autoplay" formats present a never-ending feed of posts with no end point, and create a harmful flow state that users are unable to escape, young users find it difficult to leave the platform. RA1/50-52 ¶¶100, 103-107. This frictionless design architecture intentionally turns the user's experience into "a bottomless flow" which "fully immerse[s] users, distorts their perception of time," eliminates the opportunity to pause, reconsider, or leave, and causes passive consumption that is "generally worse for wellbeing." RA1/51, 58-59 ¶¶102, 137-140.

Ephemeral Features: Meta also intentionally designs ephemeral, time-sensitive aspects on its platform to make posts available to view for only a limited time. Such features prey upon young users' FOMO and "especially sensitive fear of social exclusion" to compel them to return to the platform to view posts before they disappear. RA1/53 ¶116. Meta knows its ephemeral design induces "problematic and habitual use, contribut[ing] to mental health harms to young users," and renders "young users [] unable to extricate themselves" from the platform. RA1/55 ¶123.

Ineffective Age Assurance Measures: Despite Meta's policy prohibiting underage users from its platform and pledge to inhibit such use, it knowingly uses

ineffective age verification processes resulting in the widespread use of its platform by those under 13 years old. RA1/96-100 ¶¶324-343. Meta knows underage users "should not be using [its] service" because they "fundamentally lack the skill to engage with social media in safe ways." RA1/93, 101 ¶¶304, 348. Despite this knowledge, Meta has failed to meaningfully prevent the hundreds of thousands of underage users it knows are on its platform from being subjected to its severe harms. RA1/101 ¶351.

The above arsenal of addictive-by-design tactics has been recognized by the U.S. Surgeon General as dangerous for our youth: "[I]f we tell a child, use the force of your willpower to control how much time you're spending, you're pitting a child against the world's greatest product designers . . . [It's] just not a fair fight." RA1/22-23 ¶4. Indeed, Meta internally knows its manipulative designs "addict[] and overwhelm[] young users who 'can't help themselves' from returning to the platform," and "cause[] young users mental and physical harm," yet continues to employ them. RA1/57-59 ¶¶134-141.

Meta's Deceptive Acts (Counts II and III): Despite knowing the harms its platform causes, Meta has made false, incomplete, or otherwise misleading statements and omissions regarding its platform's safety and its internal business efforts to prioritize user safety and well-being. Meta made such deceptive

statements in media interviews, public Facebook posts, at public events, in official statements and reports on its company website, and in congressional testimony.

Meta's misrepresentations notably include that its platform is not addictive, RA1/62-63 ¶¶156-159, that it does not harm children, RA1/67 ¶174, that youth well-being is its "number one priority," RA1/67 ¶173, that it does not "prioritize profit over safety and well-being," RA1/68 ¶176, and that it is "especially focused" on preventing underage use. RA1/96 ¶324.

These statements are belied by Meta's repeated internal decisions to deprioritize youth well-being, RA1/66-86 ¶¶170-265, its internal data showing that its platform operates to addict and harm kids RA1/49, 55, 57-59, 64, 69, 74, 78-83 ¶¶96, 124, 134-140, 162-163, 181, 201-203, 227-233, 242-248, 252, and its internal acknowledgment that it "do[es] very little to keep" underage users off the platform. RA1/96 ¶325. For example, Meta's senior staff frequently emphasized that well-being initiatives were "understaffed" and "underinvested," that the company "lack[ed] … a roadmap of work that demonstrates we care about well-being," and that additional investment was "necessary to stand behind our external narrative of well-being on our apps." RA1/68-72 ¶¶179-195. Meta also repeatedly refused to make design changes it knew could improve young users' well-being because it would impact profits. RA1/72-77 ¶¶197-222 (refusing to hide "Like" counts on

posts even though it was "one of the clearest things" it could "do to positively impact [] well-being" because of "non-trivial revenue impacts"); RA1/77-79 ¶¶223-239 (refusing to remove harmful cosmetic surgery filters because of "clear[] demand").

Public Nuisance (Count IV): Meta's actions have substantially and unreasonably interfered with the well-being of hundreds of thousands of Massachusetts' youth it has purposefully addicted to its platform. RA1/118 ¶¶410-412. This addiction, according to Meta's own data, has caused widespread mental and physical harm to children. RA1/57-59, 102-106 ¶¶134-141, 352-368. The Commonwealth has been left to grapple with the extent of that harm. RA1/106-109, 119-121 ¶¶369-374, 414, 419.

STANDARD OF REVIEW

This Court "review[s] the denial of a motion dismiss under Mass. R. Civ. P. 12(b)(6) de novo." *Marsh v. Mass. Coastal R.R.*, 492 Mass. 641, 645–46 (2024). "In doing so, [the Court] accept[s] as true all well-pleaded facts alleged in the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor, and determining whether the allegations plausibly suggest that the plaintiff is entitled to relief." *Id.* (citation omitted).

Because Meta's Section 230 and First Amendment arguments are affirmative defenses, to prevail at this stage Meta must definitively establish that all the

Commonwealth's facts, as pled, do not plausibly show any actionable conduct outside the scope of those defenses. *See State Room, Inc. v. MA-60 State Assocs.*, 84 Mass. App. Ct. 244, 248 (2013) ("[T]he appearance on the face of the complaint … of information constituting a *conclusive* affirmative defense will justify dismissal.") (emphasis added); *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006) (facts establishing an affirmative defense must be "definitively ascertainable from the complaint" and "establish the affirmative defense with certitude.").

SUMMARY OF THE ARGUMENT

Meta's interlocutory appeal is improper because Section 230 provides immunity from liability, not suit. Nothing in the statutory text, legislative history, or congressional purpose of Section 230 indicates an intention to confer immunity from suit, and Meta identifies no substantial public interest justifying interlocutory appeal. *Infra* pp. 23-33.

The Superior Court correctly found that Section 230 is not implicated where the Commonwealth alleges harms caused by Meta's *own* actions as a product designer in engineering psychologically manipulative tools to exploit children's developing brains. These design elements—and the harm they cause—are independent of the content on Instagram. And Section 230 affords Meta no protection for its *own* misleading statements about its product's safety. *Infra* pp. 33-

44.

The Superior Court correctly found the First Amendment does not bar the Commonwealth's claims where Meta's harmful design elements are not expressive speech but commercial tools that operate to manipulate kids into addictive and excessive use, regardless of content. And the First Amendment does not protect Meta's false and misleading statements. *Infra* pp. 44-50.

The Commonwealth's unfair and deceptive claims are sufficiently pled. The Complaint alleges that Meta, a publicly-traded, Fortune-50 company, targeted its exploitative tools at Massachusetts teens to monetize their data, time, and attention for business reasons, namely, advertising profit. A direct financial exchange between Meta and users is not a required element under Chapter 93A, §2. *Infra* pp. 50-55.

The Commonwealth's public nuisance claim is sufficiently pled. It alleges that Meta's unfair and deceptive conduct has caused a youth mental health crisis among the many thousands of Massachusetts teens whom it has purposefully addicted to its platform, impairing the public right to "preserv[ed] health and safety." *Infra* pp. 55-57.

ARGUMENT

I. Meta Is Not Entitled to an Interlocutory Appeal.

Section 230 does not entitle Meta to interlocutory review of the Superior Court's Order under the doctrine of present execution. That doctrine applies only "in narrowly limited circumstances," in order "to avoid piecemeal appeals from interlocutory decisions that will delay the resolution of the trial court case, increase the over-all cost of the litigation, and burden our appellate courts." *Patel v. Martin*, 481 Mass. 29, 32 (2018). Such circumstances are lacking here.

The statutory text and the overwhelming weight of authority hold that Section 230 confers immunity only from liability, not from suit. And even if Section 230 could be read to confer immunity from suit, Meta cannot identify any important public interest that justifies immediate interlocutory review before the trial court proceedings have concluded. Meta's purported interlocutory appeal should therefore be dismissed.

A. The Text of Section 230 Confers Immunity From Liability, Not Suit.

The text of the operative provision of Section 230, subsection (c), describes protection from liability, not suit.[1] Paragraph (c)(1) discusses how providers and

[1] As this Court has explained, "[t]hat the statute speaks only of liability and does not specifically spell out immunity from suit is not dispositive," *Lynch v. Crawford*, 483

(footnote continued)

users of interactive computer services "shall be treated"; it says nothing about how or when that determination should be made. 47 U.S.C. §230(c)(1). And paragraph (c)(2)'s immunity-conferring language reads "[n]o provider or user of an interactive computer service *shall be held liable*" if subparagraphs (A) and (B) are satisfied. 47 U.S.C. §230(c)(2) (emphasis added). Indeed, paragraph (c)(2) bears the title "Civil Liability," further emphasizing subsection (c)'s focus on ultimate liability, not complete freedom from the burdens of litigation.

The remainder of Section 230 similarly lacks any apparent intention to confer immunity from suit. Section 230(a) sets forth five congressional "findings," which generally extol the virtues of the internet as, for example, "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. §230(a)(3). And Section 230(b) declares that "the policy of the United States" is to "promote the continued development of the Internet and other interactive computer services," to "preserve the vibrant and competitive free market" for those services "unfettered by Federal or State regulation," and to encourage the development and use of technologies that

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Mass. 631, 633 (2019), but the ultimate question is "whether the Legislature intended to grant immunity from suit," *id.*, and it remains true that "the statutory language" is "the principal source of insight into legislative purpose." *Dental Serv. of Mass., Inc. v. Comm'r of Rev.*, 479 Mass. 304, 306 (2018) (citation, alteration, and internal quotation marks omitted).

enhance "user control over what information is received" and that allow families and schools to control "children's access to objectionable or inappropriate online material." *Id.* §230(b). Not a word of these congressional findings or policy statements concerns the burdens of litigation.

The legislative history of Section 230, too, lacks any apparent intention to shield entities like Meta from the burdens of litigation. To the contrary, the conference report of the Congress that adopted Section 230 states that the "section provides 'Good Samaritan' protections from civil *liability* for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material." S. Rep. No. 104-230, at 194 (emphasis added). The report goes on to explain that Section 230 was intended to advance "the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." *Id.* There is no hint of a congressional purpose to confer immunity from suit rather than liability. *Cf. Lynch*, 483 Mass. at 639-40 (looking to congressional findings and legislative history stating intention to protect against "unwarranted litigation costs" and to provide "freedom from suit" in determining that statute conferred immunity from suit).

Meta does not and cannot refute any of these points. Instead, Meta relies solely on paragraph (e)(3)'s bar on certain "cause[s] of action" being "brought." 47 U.S.C. §230(e)(3); *see* Meta Br. 20-21. That language does not confer immunity from suit for at least two reasons. First, "reading the text in its entirety reveals that [paragraph] (e)(3) is merely a preemption provision." *Gen. Steel Domestic Sales v. Chumley*, 840 F.3d 1178, 1182 (10th Cir. 2016); *see also Klayman v. Zuckerberg*, 753 F.3d 1254, 1356 (D.C. Cir. 2014) (noting §230(e)(3)'s "preemptive bite"); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1090 (9th Cir. 2021) (noting that §230(e)(3) "explicitly preempt[s] any state or local law inconsistent with this section"). Subsection (e), entitled "[e]ffect on other laws," consists of five paragraphs, each of which explains the extent to which Section 230 does or does not affect the enforceability of various other laws. Paragraph (e)(3)'s first sentence provides that States may "enforc[e] any State law that is consistent with this section," but its second sentence says that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §230(e)(3). "[E]xamin[ing] all the provisions of [the] statute, not just isolated phrases," *Lynch*, 483 Mass. at 639, reveals that both sentences of paragraph (e)(3) serve the same function as the rest of subsection (e): explaining which laws Section 230 does and does not preempt.

Second, Meta's argument that the "cause of action" language would be surplusage unless it is construed to confer immunity from suit rather than liability, Meta Br. 21, fails, because the paragraph contains surplusage either way. If Meta is correct, then "no liability may be imposed" is surplusage, because immunity from suit necessarily precludes the imposition of liability. So the surplusage point is a wash.

In short, nothing in the text, findings, policy statements, or legislative history of Section 230 indicates any intention to shield interactive computer services from the burdens of litigation.

B. The Overwhelming Weight of Authority Confirms That Section 230 Does Not Confer Immunity From Suit.

Numerous courts have already considered whether Section 230 guarantees providers an interlocutory appeal. The overwhelming majority have concluded that it does not.

First, Meta and other social media companies are defendants in cases around the country that are very similar to this one. Add. 99-683. In several of those cases, defendants have attempted to take an interlocutory appeal from orders denying their motions to dismiss based on Section 230. In none of those cases has a defendant succeeded: appellate courts in Nevada, New Hampshire, Tennessee, Utah, and

Vermont have denied interlocutory appeals based on arguments virtually identical to those Meta advances here.[2]

Second, the only federal court of appeals to have squarely decided this question held that Section 230 "provides immunity from liability, not suit." *Chumley*, 840 F.3d at 1179-80.[3] Meta's claim that "multiple federal courts of appeals have interpreted Section 230 as providing immunity from suit," Meta Br. 21, is simply wrong. Those cases mention the issue only in dicta, as they were all appeals from final judgments and had no need to consider the availability of interlocutory appeal. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) ("The district court granted the motion to dismiss….");

[2] *See State of New Hampshire v. Meta Platforms, Inc.*, No. 2025-0022 (N.H. Feb. 18, 2025) (Add. 689); *Instagram, LLC v. Utah Div. of Consumer Protection*, No. 20240875-SC (Utah Oct. 18, 2024) (Add. 684); *Meta Platforms, Inc. v. Eighth Judicial District Court*, No. 89920 (Nev. Jan. 27, 2025) (Add. 685); *Tennessee v. Meta Platforms, Inc.*, No. M2024-00877-COA-R9-CV (Tenn. Ct. App., July 10, 2024) (Add. 690); *State of Vermont v. Meta Platforms, Inc.*, No. 24-AP-295 (Vt. Dec. 23, 2024) (Add. 691).

[3] Meta's claim that *Chumley* "failed to engage with" an earlier Tenth Circuit decision, *Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000), Meta. Br. 22 n.5, is unfortunate: *Chumley* squarely addressed that decision, correctly noting that "[o]ur description of the CDA as providing immunity from suit in our case of *Ben Ezra* … did not resolve this question, as this issue was not before us in that case." *Chumley*, 840 F.3d at 1181 n.2. *Ben Ezra*, like the other federal cases upon which Meta relies, was an appeal from a final judgment. 206 F.3d at 984.

Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) ("The district court … dismissed the federal claims … [and] declined to exercise supplemental jurisdiction over the state law claims."); *Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("The district court granted the defendants' motion for summary judgment….").[4] Most of Meta's state cases, too, were appeals from final judgments. *See Banaian v. Bascom*, 281 A.3d 975, 980 (N.H. 2022) ("[W]e uphold the trial court's granting of the motions to dismiss…."); *Hassell v. Bird*, 420 P.3d 776, 781 (Cal. 2018) (case on appeal from denial of motion to set aside default judgment); *Doe* v. *America Online, Inc.*, 783 So. 2d 1010, 1012-13 (Fla. 2001) (noting that "[t]he trial court granted AOL's motion to dismiss," and reviewing certified questions unrelated to interlocutory appeal). Only the Texas Supreme Court's outlier decision in *In re Facebook, Inc.*, holds that Section 230 confers immunity from suit. *See* 625 S.W.3d 80, 87 (Tex. 2021). But *In re Facebook* relied—incorrectly, as explained above—on the "cause of action" language in paragraph (e)(3), and also on cases like *Nemet* that did not resolve the issue. *Id.* This Court should decline Meta's invitation to follow *In re Facebook*'s unpersuasive reasoning and should instead conclude, like

[4] The issue is pending before the Ninth Circuit in *California v. Meta Platforms, Inc.*, No. 24-7032.

every other court to have squarely considered the question, that an interlocutory appeal does not lie.

C. No Important Public Interest Justifies an Interlocutory Appeal in This Case.

Even if Section 230 could be read to authorize an interlocutory appeal in some cases, it would not do so here. Meta offers only one justification for interlocutory appeal: "an entitlement to protection from the burden of litigation." Meta Br. 19 (citation and internal quotation marks omitted); *see also id.* at 23. That is not enough. As the Supreme Court has held, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is effectively unreviewable if review is to be left until later." *Will v. Hallock*, 546 U.S. 345, 353 (2006); *see also Rodriguez v. City of Somerville*, 472 Mass. 1008, 1010 (2015) (holding that interlocutory appeal on presentment "furthers [an] important public interest" and citing *Will*). Meta does not, and cannot, identify any "substantial public interest" that would be advanced by shielding it from the burden of litigation.

The Sixth Circuit, facing a similar situation, concluded that even "[a]ssuming" that Section 230 offers "immunity from suit, it is still necessary to determine if an immunity claim … is sufficiently important to warrant an immediate appeal." *Jones v. Dirty World Entertainment Recordings LLC*, No. 12-5133, 2012 WL 13418361,

at *1 (6th Cir. May 9, 2012). Noting that the defendants there "failed to demonstrate how a substantial public interest will be imperiled by delaying their appeal until after the district court enters a final order," the court dismissed the interlocutory appeal. *Id.* Meta, like the *Dirty World* defendants, identifies no "substantial public interest" that "will be imperiled" by awaiting the trial court's final resolution of the case. *Id.*

Indeed, any interest in protection from the burdens of litigation is especially weak here. First, as Meta has acknowledged, "discovery is ongoing" in this case and will continue regardless of whether Meta's interlocutory appeal proceeds. RA3/543-44 (Meta DAR App.) ("Given the unique circumstances of the case—including the coordination of discovery in this matter with the discovery in the ongoing Federal multidistrict litigation—Meta has not sought a stay of discovery in the Superior Court while this appeal is pending."). Second, as the Superior Court observed in denying Meta's motion to report, parts of the Commonwealth's case are outside the scope of Meta's Section 230 and First Amendment defenses. *See* RA2/513 ("For example, the claim that Meta violated G.L. c. 93A by its own various false public statements rests on long-established caselaw outside the scope of the CDA and is not subject to a First Amendment challenge."). Thus, Meta's Section 230 and First Amendment defenses cannot fully resolve this case.

In sum, even if Section 230 might authorize interlocutory appeal in some cases—and, as explained above, it does not—there is no reason to entertain such an appeal in this case. This appeal should be dismissed.

II. Section 230 Does Not Bar the Commonwealth's Claims.

If this Court concludes that it has jurisdiction, it should affirm the Superior Court's conclusion that, because the Commonwealth's claims do not seek to hold Meta liable for content posted by others, Section 230 does not bar them.

As to unfairness, the Superior Court correctly concluded that Section 230 does not apply because "the Commonwealth is seeking to hold Meta liable for its own injurious conduct (creating and employing tools to addict young users and engaging in ineffective age verification), not that of any other party." Add. 78. And as to deception, the Superior Court correctly found that, because the Commonwealth's claims are based on Meta's own false statements, Section 230 is not implicated at all. Add. 75. At least 18 decisions from 14 other states' trial courts have concluded similarly based on virtually identical claims against Meta and other social media platforms. Add. 99-458, 505-683.

A. Section 230 Does Not Bar the Commonwealth's Unfairness Claims.

Under this Court's 3-pronged test, Section 230 immunity extends only to claims that are both "*based on* information provided by *another* information content

provider" (Prong 2); **and** "*treat* the defendant *as the publisher* or speaker of *that* information" (Prong 3). *Massachusetts Port Auth. v. Turo Inc.*, 487 Mass. 235, 240 (2021) (emphasis added).[5] Because the Commonwealth's claims do not allege harm arising from "information provided by" others, the Commonwealth's unfairness claims satisfies neither Prongs 2 or 3.

1. Prong 2: The Commonwealth's Claims Are Not "Based On" Third-Party Content.

The Superior Court correctly found Prong 2 is not satisfied because the Commonwealth's unfairness claims allege harm directly chargeable to Meta's own actions—i.e., creating addictive tools that manipulate teens into spending more time than they would otherwise choose on the platform. Add. 76-79. These claims cannot be "'based on'" third-party content, as Prong 2 requires, because each user sees a unique set of custom-tailored content (i.e., no user sees the same content as another), yet the alleged harm of addictive use is common to *all* users no matter what content the user sees. As another court put it in rejecting Meta's similar Section 230 defense, "[w]hether [users] are watching porn or puppies, the claim is that they are harmed by the time spent, not by what they are seeing." *Vermont v. Meta*, No. 23-cv-04453, Slip Op. at 12 (Vt. Super. Ct. July 29, 2024) (Add. 677).

[5] The Commonwealth does not dispute that Meta qualifies as an "interactive computer service" provider under Prong 1.

Numerous courts, including virtually every other state court that has analyzed similar claims asserting harms from the psychologically manipulative qualities of Meta's or another platform's design features *themselves* have also concluded Section 230 does not bar such claims.[6] For example, the California Superior Court rejected

[6] *See Tennessee v. Meta Platforms, Inc.*, No. 23-1364-IV, Slip Op. at 24 (Tenn. Super. Ct. Oct. 17, 2024) (Add. 614) (Section 230 not bar where "it is the design and the way Instagram functions that makes it addictive and thus harmful to consumers …not the content itself."); *Vermont v. Meta*, Slip Op. at 10 (Add. 675) (Section 230 not bar to claim "that the intentional *addictiveness* [of the platform design] itself harms Young Users' mental health, separate and apart from the *content* of what they see.") (emphasis in original); *Utah v. Meta Platforms, Inc.*, No. 230908060, Slip Op. at 11 (Utah 3d Dist. July 25, 2024) (Add. 639) (Section 230 not bar because "the Division's claims rest on the Defendant's own acts: their use of features and practices to target children into spending excessive amounts of time on their platforms"); *Arkansas v. Meta Platforms, Inc.*, No. 57CV-23-47, Slip Op. at 5 (Ark. Cir. Ct. June 13, 2024) (Add. 103) (Section 230 not bar where alleged that "the design features of Meta's platforms themselves are hazardous to adolescents because the features are designed to addict and exploit the frailties of developing brains."); *District of Columbia v. TikTok, Inc.*, No. 2024-CAB-006377, at Tr. 65-66 (D.C. Super. Ct. Feb. 24, 2025) (Add. 180-181) (Section 230 not bar where harmful "addiction is not to the content, but to th[e] expectation and anticipation [of dopamine] which is specifically engineered by" the platform); *New Hampshire v. TikTok, Inc.*, No. 217-2024-CV-00399, Slip Op. at 26-27 (Merrimack Super. Ct. July 8, 2025) (Add. 336-337) (Section 230 not bar where claims alleged liability "not in the way [TikTok's features] publish certain content, but in the way they manipulate young minds causing addiction, FOMO, and other psychological effects."); *New Hampshire v. Meta Platforms, Inc. et al.*, No. 217-2023-CV-00594, Slip Op. at 25-26 (Merrimack Sup. Ct. Dec. 10, 2024) (Add. 279-280**)** (Section 230 not bar where alleged that "Meta's product design features, in and of themselves, are harmful to New Hampshire children regardless of the substance of the third-party content displayed."); *Montana v. Meta Platforms et al.*, Case No. BDV-2024-797, Slip Op. at 26 (Mont. Dist. Ct. July 7, 2025) (Add. 588) (Section 230 not bar because "the

(footnote continued)

a Section 230 defense where "[t]he features themselves allegedly operate to addict and harm minor users of the platform regardless of the particular third-party content viewed," as "Section 230 does not shield [d]efendants from liability for the way in which their platforms actually operate." *Social Media Cases*, No. 22STCV21355, 2023 WL 6847378, at **31, 33 (Cal. Super. Oct. 13, 2023) (Add. 533-535). The Ninth Circuit similarly concluded that Prong 2 is not met where a "negligent design claim faults [defendant] solely for [the platform's] architecture" and "stand[s] independently of the content that [the platform]'s users create." *Lemmon*, 995 F.3d at 1093.

State's claim is based on Meta's actions, namely: 'creating and marketing an app that is intentionally addictive"); *District of Columbia v. Meta Platforms*, No. 2023-CAB-6550, Slip Op. at 20 (D.C. Super. Ct. Sept. 9, 2024) (Add. 146) (similar); *Oklahoma v. Meta Platforms, Inc.*, No. CJ-2023-180, Slip Op. at 6 (Okla. Dist. Ct. Nov. 20, 2024) (Add. 452) (similar); *New Mexico v. Meta Platforms Inc. et al.*, No. D-101-CV-2023-02838, Slip Op. at 2 (N.M. 1st Jud. Dist. Ct. June 21, 2024) (Add. 361) (similar); *Utah v. TikTok, Inc.*, Case No. 230907634, Slip Op. at 13 (Utah 3d Dist. Nov. 12, 2024) (Add. 658**)** (similar); *Arkansas v. TikTok Inc.*, No. 12CV-23-65, Slip Op. at 13-14 (Ark. Cir. Ct. May 15, 2024) (Add. 124-125) (similar); *Nevada v. TikTok, Inc.*, No. A-24-886127-B, Slip Op. at 7-8 (Nev. Dist. Ct. Sept. 24, 2024) (Add. 242-243) (similar); *New York v. TikTok, Inc. et al.*, No. 452749/24, Tr. at 66 (N.Y. Sup. Ct. May 28, 2025) (Add. 430) (similar); *Illinois v. TikTok Inc. et al.*, Case No. 2024CH09302, Slip Op. at 19-20 (Cook Cty Cir. Ct. June 12, 2025) (Add. 228) (similar); *South Carolina v. TikTok Inc. et al.*, No. 2024-CP-40-06018, Slip Op. at 10-11 (Ct. of Common Pleas, 5th Jud. Cir. May 6, 2025) (Add. 558-559) (similar). *But see Oregon v. TikTok Inc. et al*, No. 24CV-48473, Slip Op. at 19-25 (Or. Cir. Ct. July 22, 2025) (Add. 459).

Indeed, each of Meta's unfair product design features operates to induce addictive use and its attendant harms by impairing and interfering with young users' autonomy and ability to regulate their amount of time spent on the platform, irrespective of third-party content viewed. As described *supra* pp. 16-19, Meta's incessant, high volume "push" notifications, delivered on an optimized IVR schedule, create dopamine cravings that compel teens to compulsively engage with and return to the app and disrupt attention and sleep even while off the platform; Meta's frictionless infinite scroll and autoplay formats create a "bottomless flow" that eliminates young users' opportunity to pause, reconsider, or leave, and induces harmful "passive consumption"; and Meta's ephemeral design format induces teenagers' fear of social exclusion and a compulsive need to return to the platform to view posts before they disappear. All of these features operate to override young users' agency *regardless* of the content viewed. Further, Meta's ineffective age verification processes harms the thousands of underage users it allows on the platform who, by virtue of their age, lack the skill to engage with it safely; this too is *unrelated* to any third-party content. *See In re Social Media Adolescent Addiction/Pers. Inj. Prod Liab. Litig.*, 702 F. Supp. 3d 809, 830 (N.D. Cal. 2024) (platforms can take age-verification steps "that would not impact their publication of third-party content" or "require defendants [to] change how or what speech they

disseminate").

Meta advances the erroneous view that, simply because its addiction-inducing features are "tied to the display" of third-party content, this means the Commonwealth's "claims depend on [third-party] content" sufficient to meet Prong 2. *See, e.g.*, Meta Br. 26 ("[I]f there were no videos to play, there would be no 'autoplay.' Nor does the Complaint allege how users would be addicted to Instagram if there was no content on the service."). This is emphatically wrong. Courts have consistently rejected such a "but-for" test in determining Section 230 immunity. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) ("Section 230 does not create immunity simply because publication of third-party content is relevant to or a but-for cause of the plaintiff's harm."); *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("It is not enough that third-party content is involved;" courts "reject[] use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content."); *Henderson* v. *Source for Public Data, L.P.*, 53 F.4th 110, 122-123 (4th Cir. 2022) ("for [immunity] to apply we required that liability attached to the defendant on account of some improper content within their publication;" "we do not apply a but-for test").

In fact, the Commonwealth has not found—nor has Meta identified[7]—any case in which a court granted Section 230 immunity when the harm alleged could not be traced to the "improper character" of the speech published. *Henderson*, 53 F.4th at 122-123; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (noting that because an "original culpable [third] party" who posts the content can be held accountable for the harm it causes, Section 230 reflects Congress's decision not to "impos[e] tort liability on companies that serve as intermediaries for other parties' potentially injurious messages"). In every case that Meta relies upon, "Prong 2 was conceded, undisputed, or satisfied" (Add. 78) because the case alleged harm caused by improper content provided by third parties.[8]

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[7] The Superior Court correctly found unpersuasive the single decision in Meta's favor on this issue, *In re Social Media*, 702 F. Supp. 3d at 825 ("MDL"), because that court "did not explicitly conduct a Prong 2 analysis" and its findings were inconsistent with the most cogent decisions around the country "that reache[d] the opposite conclusion." Add. 78-79; *accord* Add. 99-458, 505-683. Other courts have declined to follow the MDL court's decision for similar reasons. *See, e.g., District of Columbia v. Meta*, Slip Op. at 18-19 (Add. 144-145); *Vermont v. Meta*, Slip Op. at 11-12 (Add. 676-677).

[8] *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20–21 (1st Cir. 2016) (sex traffickers' advertisements); *Force v. Facebook, Inc.*, 934 F.3d 53, 59 (2d Cir. 2019) (third-party terrorist content); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098–99 (9th Cir. 2019) (drug dealer's post selling narcotics); *Estate of Bride v. Yolo Technologies, Inc.*, 112 F.4th 1168, 1180 (9th Cir. 2024) (third-party bullying and harassing content); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (third-party negative business review); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098–99 (9th Cir. 2009) (ex-boyfriend's explicit posts); *M.P. v. Meta Platforms Inc.*, 127

(footnote continued)

Where, like here, the harm is chargeable to the defendant's own injurious actions (here, Meta's exploitative product design), Section 230 immunity is routinely denied. *See Turo Inc.*, 487 Mass. at 241; *Roommates.com*, 521 F.3d at 1167; *Lemmon*, 995 F.3d at 1092-93; *Airbnb, Inc. v. City of Bos.*, 386 F. Supp. 3d 113, 122 (D. Mass. 2019); *Moving & Storage, Inc. v. Panayotov*, No. 12-12262-GAO, 2014 WL 949830, at *2 (D. Mass. Mar. 12, 2014) (Prong 2 not met where harm "d[id] not arise from the content of [third-party customer] reviews" but instead defendants' "ill-intentioned" manipulation of "[t]he manner in which [they] were presented"); Add. 99-458, 505-683.

F.4th 516, 521-524 (4th Cir. 2025) (third-party "extremist and racist" content); *FTC v. Match Grp., Inc.*, No. 3:19-CV-2281-K, 2022 WL 877107, at *7 (N.D. Tex. Mar. 24, 2022) (third-party fraudulent communications); *Doe v. Snap, Inc.*, No. H-22-00590, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) (third-party sexually explicit content); *Doe (K.B.) v. Backpage.com, LLC*, 768 F. Supp. 3d 1057, 1062 (N.D. Cal. Mar. 3, 2025) (third-party sex trafficking content); *V.V. v. Meta Platforms, Inc. et al.*, 2024 WL 678248, at *8 (Conn. Super. Ct. Feb. 16, 2024) (adult predator's communications); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1118 (N.D. Cal. 2016) (third-party terrorist content); *Herrick v. Grindr LLC*, 765 F. App'x 586, 590-91 (2d Cir. 2019) (ex-boyfriend's harassing content); *In re Facebook, Inc.*, 625 S.W.3d 80, 93 (Tex. 2021) (sex traffickers' messages); *L.W. v. Snap Inc.*, 675 F. Supp. 3d 1087, 1096 (S.D. Cal. 2023) (third-party child sexual abuse material); *Lama v. Meta Platforms, Inc.*, 732 F. Supp. 3d 214, 221 (N.D.N.Y. 2024) (third-party bullying content); *Doe v. Grindr Inc.*, 128 F.4th 1148, 1152–53 (9th Cir. 2025) (third-party messages and child sexual abuse material).

2. Prong 3: The Commonwealth's Claims Do Not Treat Meta as a Publisher or Speaker.

As the Superior Court correctly found, Prong 3 is not met because the Commonwealth is "not seek[ing] to hold Meta liable for its conduct as a publisher or speaker, i.e., for its publication decisions," but rather in "'its distinct capacity as a product designer.'" Add. 81 (quoting *Lemmon*, 995 F.3d at 1092). This is because Meta's product designs "in and of themselves" directly "cause its young users to become addicted or participate on the platform at an inappropriate age" "*regardless* of their associated content." *Id*. As such, the "Commonwealth is seeking to hold Meta liable for its own conduct, not that of a third-party." Add. 82. Numerous courts around the country have rejected Section 230 defenses in similar cases. *See New Hampshire v. Meta,* Slip Op. at 25 (Add. 279) (Meta's liability springs from its capacity as a product "manufacturer" in designing an unsafe product which is "independent of Meta's role as a publisher of third-party content"); *Utah v. Meta*, Slip Op. at 11 (Add. 639) (where claims rest on Meta's "own acts" in using "features and practices to target children into spending excessive amounts of time on their platforms," they "do not seek to treat Meta as a publisher or speaker"); *Social Media Cases*, 2023 WL 6847378, at *32 (Add. 534) ("Where [Meta's features] manipulate[] third party content in a manner that injures a user," Meta is "allegedly liable for [its] own actions, not for the content of third-party postings"); *Illinois v.*

TikTok, Slip Op. at 20-21 (Add. 229-230) (where harmful addiction "is not to the content, but to [the] expectation and anticipation [of dopamine] which is specifically engineered by" the platform's "content-agnostic technology," Defendants are not treated "as a publisher or speaker, but as a product maker.") (cleaned up).

Courts routinely reject assertions, like Meta's, of extravagant immunity from all claims relating to publication. *E.g.*, *Henderson*, 53 F.4th at 122-123 (Section 230 "does not provide blanket protection from claims just because they depend in some way on publishing information"); *Airbnb*, 386 F. Supp. 3d at 120 n.5 (rejecting that the "First Circuit has adopted a dramatically broader interpretation of § 230" that "protects all decisions a company makes that in any way implicate the overall design and operation of its online platform."); *Lemmon*, 995 F.3d at 1094 (rejecting Section 230 defense where "even if [defendant] is acting as a publisher in releasing [the platform] and its various features to the public, [plaintiff]s' claim still rests on nothing more than [defendant]'s own acts.").

B. Section 230 Does Not Apply to the Commonwealth's Deception Claims.

As the Superior Court correctly held, because the Commonwealth's deception claims seek to hold Meta responsible for its own misleading speech, Section 230 is not implicated at all. Add. 75. A website "remains liable for its own speech." *Turo Inc.*, 487 Mass. at 240; *Hiam v. HomeAway.com, Inc.*, 267 F. Supp. 3d 338, 346–47

(D. Mass. 2017) ("[C]laims based on a publisher's representations about its publishing conduct are not immunized under Section 230."). Here, Counts II and III allege Meta publicly misrepresented the safety of its platform, its efforts to protect the well-being of young users, and its age-verification efforts which created a misleading impression that had the capacity to impact users' and their families' ability to make informed decisions related to their platform usage. RA1/62-101. The Superior Court correctly found that because the "Commonwealth's [deception] claims are based on these purportedly false statements, they are not subject to Section 230 immunity." Add. 75.[9]

Meta misconstrues the Commonwealth's deception claims as alleging injury from harmful third-party content that Meta failed to adequately warn about, protect against, moderate, monitor, or remove. Meta Br. at 36-40. That is wrong: the harm alleged from Meta's false, incomplete, or otherwise misleading statements is the inability of consumers to make an informed decision about their platform use

[9] Meta makes no Section 230 argument as to misrepresentations regarding Meta's "off-platform" business decisions unrelated to third-party content. *See, e.g.*, RA1/64-65 ¶¶164-169 (misled it does not set goals to increase time spent, when it in fact does); RA1/68-72 ¶¶179-195 (misled it prioritizes well-being when it failed to invest); RA/83-86 ¶¶255-265 (misled it prioritizes well-being when it launched ineffective time management tools). Moreover, Meta mischaracterizes the Complaint's reference to examples of specific content present on Meta's platform (Meta. Br. at 25) as alleging harm from such content, when, in fact, it is only to demonstrate the false and misleading nature of Meta's own statements.

(RA1/91-92 ¶¶298-299)—*not* that they were harmed by specific content on the platform.[10]

Section 230 accordingly "poses no bar" to such claims because Meta could avoid future liability without changing the third-party content it publishes—"that is, Meta could simply stop making statements that have a tendency to mislead due to their omission of inconsistent or contrary information." *DC v. Meta*, Slip Op. at 13, 22 (Add. 139, 148); *Arkansas v. TikTok*, Slip Op. at 13 (Add. 124) (State's deception claims "demand[] only that [social media companies] be honest with consumers about what content the app contains.").

III. The First Amendment Does Not Bar the Commonwealth's Claims.

Because the Commonwealth's claims are based on Meta's own unlawful commercial conduct and misleading speech, the First Amendment does not bar them.[11] As to the Commonwealth's unfairness claims, the Superior Court correctly

[10] For this reason, all Meta's "failure to warn" cases are distinguishable. Meta Br. at 36-39. *See In re Soc. Media*, 702 F. Supp. 3d at 834 (Section 230 not bar failure to warn claim where claims not based on Meta's "publication of [third-party content], but [on] [its] knowledge, based on public studies or internal research, of the ways that [its] products harm children."); *Social Media Cases*, 2023 WL 6847378, at *48 (Add. 547) (Section 230 not bar failure to warn claims because the "adverse effects that allegedly should have been disclosed result from Meta's own conduct, not from any particular content displayed.").

[11] Meta fails to develop and thus waives any argument for broader protection under the Massachusetts Constitution (Meta Br. 40 n.12).

found such claims are "principally based on conduct and product design, not on expressive content."[12] Add. 84. And as to deception, the Superior Court correctly held that the First Amendment does not protect Meta's untruthful statements to the public under well-established law. *Id*. Virtually every state court to have analyzed similar claims has found the same.[13]

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[12] It further correctly noted that "[e]ven if . . . some expressive element" is implicated, "the claim may very well be permitted under the intermediate scrutiny test" for commercial speech, but that determination is appropriately addressed at "a later stage of the litigation." Add. 84. That ruling was especially appropriate given that the First Amendment is raised here as an affirmative defense and therefore can justify dismissal at this stage only if its merit is conclusively established from the face of the complaint. *State Room*, 84 Mass. App. Ct. at 248.

[13] *See Vermont v. Meta*, Slip Op. at 13 (Add. 678) (First Amendment not bar where Meta not liable for its "role as an editor of content" but rather "its alleged role as a manipulator of Young Users' ability to stop using the product"); *Social Media Cases*, 2023 WL 6847378, at *37 (Add. 538) (First Amendment not bar where harm alleged was "caused by [plaintiffs'] addiction to Defendants' platforms themselves, not simply to exposure to any particular content visible on [its] platforms."); *Illinois v. TikTok*, Slip Op. at 24-25 (Add. 233-234) (First Amendment not bar claims "based on TikTok's alleged role in manipulating young users' brain chemistry to induce compulsive and excessive use of the TikTok Platform" as it "challeng[es] non-expressive conduct, not a manifestation of the Defendants' expression"); *Utah v. TikTok*, Slip Op. at 14-15 (Add. 659-660) (First Amendment not bar where claim "does not seek to curtail any speech but rather to curtail" the "content-neutral" "addictive features challenged" which do not "convey any message or viewpoint"); *Nevada v. TikTok*, Slip Op. at 8-9 (Add. 243-244) (First Amendment not bar claim "based on specific content-neutral design features [] that are intrinsically addictive to children and cause harm," which "exist independent of any editorial judgment by TikTok" and "do not involve speech at all," but rather "TikTok's *actions* in designing and operating its platform.") (emphasis in original); *New Hampshire v. Meta*, Slip Op. at 27 (Add. 281) (similar); *Oklahoma v. Meta*, Slip Op. at 7 (Add.

(footnote continued)

Unfairness. Because the Commonwealth's unfairness claims seek to hold Meta liable for its role as a product designer in embedding addictive qualities into its platform features, the First Amendment does not bar the Commonwealth's claims. The harm arises from the manner in which Meta's platform operates; not the expressive content users see.

Meta's nearly-exclusive reliance on *Moody v. NetChoice*, 603 U.S. 707 (2024) for its First Amendment defense is unavailing. *See* Meta Br. 41-45. *Moody* is about social media platforms' content moderation and algorithm procedures. *See* 603 U.S. at 717 (noting that "government efforts to alter an *edited* compilation of third-party expression" implicate the First Amendment (emphasis added)); *id*. at 728 ("Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay."). Here, the Commonwealth makes no effort to alter Meta's content moderation or algorithm-creating procedures, or otherwise influence what content Instagram displays. Rather, it faults Meta's choice to design its platform with psychologically manipulative characteristics, affecting *how* children are drawn to the platform and addicted to it, not *what* they are shown while using the platform.

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453) (similar); *District of Columbia v. Meta*, Slip Op. at 25 (Add. 151) (similar); *Utah v. Meta*, Slip Op. at 13 (Add. 641) (similar); *New Mexico v. Meta*, Slip Op. at 2 (Add. 361) (similar); *New Hampshire v. TikTok*, Slip Op. at 29 (Add. 339) (similar); *South Carolina v. TikTok*, Slip Op. at 12 (Add. 560) (similar).

Again, the Commonwealth's claims are independent of content. Further, by its own words, *Moody* did not address the type of algorithm designed to maximize user time spent by "automatically" "giving [users] content they appear to want, without any regard to independent content standards" for which it noted, "the First Amendment implications might be different." *Id.* at 736 n.5, 746 (Barrett, J., concurring), 781-82 (Alito, J., concurring in judgment). That is why multiple state courts have found *Moody* inapplicable here; this Court should do the same.[14]

Deception. Meta does not (and cannot) dispute that the First Amendment offers no protection for its own misleading speech or omissions. Instead, it

[14] *See, e.g.*, *New York v. TikTok*, Tr. at 70 (Add. 434) (*Moody* inapplicable where design features alleged to "automatically, and without expressive curation, create an addictive environment that entices users to stay on the app to the detriment of their own health."); *District of Columbia v. TikTok*, Tr. at 74-76 (Add. 189-191) (*Moody* "doesn't warrant dismissal" where "the District claims are content-neutral" and "TikTok is not . . . expressing any message by allowing its users to continue to scroll from one video to the next" or "by sending notifications to children" during the school and night hours); *District of Columbia v. Meta*, Slip Op. at 26-27 (Add. 152-153) (distinguishing *Moody* as "unhelpful to Meta" because it "involved state regulations of online platforms' decisions to remove or deprioritize posts based on the posts' content or viewpoint," which are "concerns not present" with the addictive "design features at issue here"); *Vermont v. Meta*, Slip Op. at 14 (Add. 679) (finding *Moody* "does not change the result here" because "[u]nlike *Moody*, where the issue was government restriction on content, . . . it is not the substance of the speech that is at issue here"); *Tennessee v. Meta*, Slip Op. at 25 n.4 (Add. 615) (similar); *Oklahoma v. Meta.*, Slip Op. at 7 (Add. 453) (similar); *Montana v. Meta*, Slip Op. at 27-28 (Add. 590) (similar); *Illinois v. TikTok*, Slip Op. at 22-23 (Add. 233) (similar).

misconstrues the Commonwealth's deception claims as "failure to warn" claims seeking to compel specific speech and attempts to apply inapplicable defamation, fraud and antitrust caselaw to claim its statements are not actionable.

Contrary to Meta's assertion, the Commonwealth's deception claims do not seek to "force Meta" to "make the Commonwealth's preferred warnings about the services' alleged risks and harms" (Meta Br. at 50-51) or implement its "preferred age-verification measures" (Meta Br. at 45-46). The Commonwealth simply asks that Meta be truthful and accurate in its voluntary statements about the platform. *See DC v. TikTok*, Tr. at 78-79 (Add. 193-194) (rejecting that claim was "compel[ling] speech to give warnings" where alleged that users and parents "are simply unaware of the potential risk[s] of the platform" and thus "misled by TikTok's assertions that everything on the platform is child safe."). For this reason, Meta's reliance on *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024) and other First Amendment cases is misplaced. Unlike here, those cases compelled or restricted particular messages or speech from particular speakers or based on specific viewpoints, or otherwise alleged harm from specific expressive content.[15]

[15] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 243 (1974) (compelled particular speech); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 14-16 (1986) (compelled particular speech); *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (compelled particular speech);
(footnote continued)

Meta's reliance on cases holding statements of opinion to be protected by the First Amendment, Meta Br. at 47-48, was not developed below, and involves factual issues not subject to resolution at this stage. Further, Chapter 93A caselaw is clear that statements of "opinion" are actionable where it "may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least there are no facts that are incompatible with it." *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995). Additionally, Meta's argument that the *Noerr-Pennington* anti-trust doctrine applies to its statements made to Congress is a factual question not resolved at this stage.[16] *MJ's Mkt., Inc. v. Jushi Holdings, Inc.*, 766 F.

NetChoice, LLC v. Bonta, 113 F.4th 1101, 1113 (9th Cir. 2024) (compelled particular speech); *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 787-88 (2011) (restricted particular speaker and viewpoint); *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1122-23 (D. Utah 2024) (disfavored particular speaker's speech); *Students Engaged in Advancing Tex. v. Paxton*, 765 F. Supp. 3d 575, 595-596 (W.D. Tex. Feb. 7, 2025) (chilled certain speech); *NetChoice, LLC v. Griffin*, No. 5:23-CV-5105, 2025 WL 978607, at *8, 13 (W.D. Ark. Mar. 31, 2025) (deterred speech); *NetChoice, LLC v. Yost*, No; 2:24-cv-00047, 2025 WL 1137485, at *15 (S.D. Ohio Apr. 16, 2025) (restricted specific speakers' speech); *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2025 WL 807961, at *15 (N.D. Cal. Mar. 13, 2025) (compelled certain speech); *Volokh v. James*, 656 F. Supp. 3d 431, 441-443 (S.D.N.Y. 2023) (compelled specific speech); *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822-823 (W.D. Ky. 1989) (alleged harm from particular speech); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2022) (alleged harm from particular speech); *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1187–88 (N.D. Cal. 2022) (9th Cir. 2023) (alleged harm from particular speech).

[16] The Commonwealth further submits that the *Noerr-Pennington* doctrine does not apply in this context where courts have limited the doctrine's applicability to

(footnote continued)

Supp. 3d 197, 213–14 (D. Mass. 2025). And Meta remains liable for its countless identical or substantially similar misleading statements made in settings outside of Congress, such as in news media, posted on Meta's website, or on its CEO's Facebook page. RA1/62-63, 66-68, 86-87 ¶¶156, 171-173, 176-177, 266-270.

IV. The Commonwealth's G.L. c. 93A Claims Are Sufficiently Pled.

A. Meta's Unfair and Deceptive Acts Occurred in Trade or Commerce.

Meta's unfair and deceptive acts occur "in the conduct of any trade or commerce" where its exploitative tactics to addict kids to its platform fuel its billion-dollar, advertising-revenue-based business model—which relies on increasing user time spent to show more ads, collect more data, and sell more targeted advertising opportunities.

Accordingly, the Superior Court correctly found, irrespective of the fact that access to the Instagram platform is "free" to users, Meta is "engaged in trade or commerce" where it "offers and distributes its social media services to millions of Massachusetts users, including over 300,000 teens, in exchange for the collection of personal data, which it then uses to sell targeted advertising opportunities to third parties[,] and derives revenue from selling this advertising." Add. 91. Thus, "the

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antitrust actions (where the doctrine originated). *See, e.g., Andrx Pharm., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1233 (11th Cir. 2005).

provision of Instagram accounts serves a commercial end" sufficient for G.L. c. 93A to apply. *Id.*; *Lantner v. Carson*, 374 Mass. 606, 611 (1978) (the phrase "in the conduct of any trade or commerce" "must be read to apply to those acts or practices which are perpetrated in a business context."); *Dushkin v. Desai*, 18 F. Supp. 2d 117, 125 (D. Mass. 1998) (A defendant who "seek[s] to gain financially from their unfair practices," "unquestionably" satisfies the trade or commerce requirement) (citation omitted); *Poznik v. Massachusetts Med. Pro. Ins. Ass'n*, 417 Mass. 48, 53 (1994) ("Chapter 93A imposes liability on persons seeking to profit from unfair practices.").

Meta's claim that it does not act in "trade or commerce" because users use Instagram "free of charge" (Meta Br. at 57) fails where Chapter 93A's plain language does not require an exchange of money nor has any Massachusetts court ever so held. *See* G.L. c. 93A, § 1 (defining "trade" and "commerce" to include "the advertising…or distribution of any services and any property"); *Rafferty v. Merck & Co.*, 479 Mass. 141, 161–62 (2018) ("a plaintiff need not have purchased [a] product directly from the defendant" so long as plaintiff "used the product . . . and was injured as a result."). Moreover, such argument lacks merit when users in fact *do* exchange what is of considerable value for access to Meta's services: their time,

attention, and data.[17] *See New Hampshire v. Meta,* Slip Op. at 33 (Add. 287) (trade or commerce met where "consumers . . . access Meta's Social Media Platforms in exchange for a price – Meta's collection of their personal data."); *DC v. Meta,* Slip Op. at 32 (Add. 158) ("Meta receives something of very significant value in return for the use of its platforms: the right to monetize its users' time and data"); *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 753 F. Supp. 3d 849, 909–10 (N.D. Cal. 2024) ("A social media company cannot exempt itself from consumer-protection law because its consumers exchange their personal data and time for a product or service rather than cash for goods").[18]

[17] Indeed, Meta's Terms of Use for Instagram expressly states, "[i]nstead of paying to use Instagram, by using the [s]ervice covered by these Terms, you acknowledge that we can show you ads that businesses and organizations pay us to promote on and off the Meta Company Products," and that "[w]e use your personal data, … to show you ads." RA1/37 ¶51.

[18] *See also Tennessee v. Meta*, Slip Op. at 32-33 (Add. 622-623) (trade or commerce met where Meta collects data from consumers which it "monetizes by selling targeted advertising"); *Vermont v. Meta* at 15-16 (Add. 680) (trade or commerce met where users "agree[] to give Instagram access to personal information for advertising purposes in exchange for using the site."); *New Hampshire v. TikTok*, Slip Op. at 33 (Add. 343) ("While [TikTok] does not charge for its product, it receives valuable consideration in the form of personal information"); *Utah v. Meta*, Slip Op. at 13-14 (Add. 641-642) (same); *Oklahoma v. Meta*, Slip Op. at 9 (Add. 455) (same); *New Hampshire v. TikTok*, Slip Op. at 32-333 (Add. 342-343) (same); *South Carolina v. TikTok*, Slip Op. at 8 (Add. 556) (same).

B. Counts I, II, and III Sufficiently Allege Unfair and Deceptive Conduct.

Meta does not and cannot seriously contest that the Complaint's allegations fall within G.L. c. 93A, § 2's definition of "unfair or deceptive" conduct. As the Superior Court properly found, the Commonwealth sufficiently alleges Meta's conduct is unfair where Meta designs and employs features "that it knows encourage addictive use by teenagers" (Count I) and that it fails to meaningfully ensure that children under 13 cannot use the platform despite knowing how harmful it is for children (Count III). Add. 86-87; RA1/109-113, 115-117 ¶¶376-388, 398-406.

Such conduct comfortably: (1) falls "within at least the penumbra of some common-law, statutory, or other established concept of unfairness;" (2) is "immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers." *Columbia Plaza Assocs. v. Northeastern Univ.*, 493 Mass. 570, 587 (2024). *See FTC v. Sperry & Hutchinson*, 405 US 233, 243 (1972) (vendor who deployed a gambling element to hook kids into buying its inferior candy unfairly exploited children); *Commonwealth v. Purdue Pharma*, No. 1884CV01808BLS2, 2019 WL 5495866, at *1 (Mass. Super. Sept. 17, 2019) (manufacturer's "abus[ive]" tactics to get vulnerable individuals prescribed addictive opioids at "greater frequency," "ever-higher [] doses," and "for longer [] durations" was unfair).

Numerous state courts analyzing the same conduct by Meta or a different

social media platform have found that it is unfair under similar state consumer protection laws. *See, e.g.*, *Utah v. Meta*, Slip Op. at 14 (Add. 642) ("manipulating" and "exploit[ing]…neurological vulnerabilities in children" in order to maximize time spent is unfair); *New Hampshire v. Meta*, Slip Op. at 37 (Add. 291) (Meta's "knowing exploitation of children's health" and "psychological vulnerabilities for financial gain" is unfair); *Illinois v. TikTok*, Slip Op. at 14 (Add. 223) ("creating an application meant to addict minors falls within the penumbra of various [state] laws to shield minors from products and services that tend to be used addictively, such as drugs, alcohol, and gambling.").

As to deception (Count II), the Superior Court properly concluded that Meta's repeated misrepresentations about its platform's safety and its efforts to promote young users' well-being were not mere opinions but were, in light of Meta's inconsistent, contemporaneous actions, "at the very least misleading half-truths" that "created an over-all misleading impression through failure to disclose material information." Add. 89 (citing *Aspinall v. Philip Morris Co., Inc.*, 442 Mass. 381, 394-95 (2004)). Because these statements and omissions "could reasonably be found to have caused [users and families] to act differently" with respect to their platform use, they are actionable under c. 93A. Add. 90; *Aspinall*, 442 Mass. at 394; *Purdue*, 2019 WL 5495866, at *1 (actionable deception claim where despite

knowledge of harm, Purdue "downplay[ed] its opioids' propensities for addiction," "minimize[d] the dangers" of its drugs and "ma[d]e false representations regarding their safety"); *Commonwealth v. Exxon Mobil Corp.*, No. 1984CV03333BLS1, 2021 WL 3493456, at *13 (Mass. Super. June 22, 2021) (actionable deception claim where Exxon "convey[ed] a false impression that [it] [was] more environmentally responsible than it really [wa]s" and "falsely depict[ed] ExxonMobil as a leader in addressing climate change [] without disclosing [its] minimal investment [] in clean energy").

V. The Commonwealth's Public Nuisance Claim is Sufficiently Pled.

Because Meta's actions have interfered with the public right to "preserv[ed] health and safety" by promoting addictive use of its platform among hundreds of thousands of Massachusetts teens, the Commonwealth has sufficiently alleged a public nuisance claim. *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 34 (2006) ("preservation of [members of the public's] health and safety" is a "right common to the general public").

As the Superior Court correctly found, "Massachusetts courts have allowed public nuisance claims concerning dangerous products" that, as here, are alleged to have substantially contributed to a public health crisis. Add. 92. *See, e.g.*, *Purdue*, 2019 WL 5495866, at *2 (denying motion to dismiss public nuisance claim that

pharmaceutical company's abusive marketing tactics to procure addictive use of its drug "significantly contributed to the opioid epidemic in Massachusetts"); *Evans v. Lorillard Tobacco Co.*, No. 04-2840A, 2007 WL 796175, at *18–19 (Mass. Super. Feb. 7, 2007) (denying motion to dismiss public nuisance claim that cigarette manufacturer's marketing tactics to promote addictive use of its cigarettes by teens significantly interfered with the public health and safety)*; City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *13-14 (Mass. Super. July 13, 2000) (denying motion to dismiss public nuisance claim that gun manufacturer knowingly created and supplied an illegal, secondary gun market that fueled a gun violence epidemic). The fact that a public nuisance claim's "legal theory is unique in the Commonwealth . . . is not reason to dismiss at this stage of the proceedings." *Smith & Wesson*, 2000 WL 1473568, at *14.[19]

Here, the U.S. Surgeon General has pronounced a "youth mental health crisis" driven by excessive social media use among the millions of U.S. teens (and hundreds

[19] While a public nuisance claim has "traditional[ly]" involved water or land (Meta Br. at 52-53), given Instagram's ubiquitous use among the public, it is not a far stretch to say that online social media is effectively the new public "land" frontier in the virtual reality space. Whether occurring offline or online, the pervasive harm to millions of teens' "health and safety" is substantial and real. *Cf. Roommates.com LLC*, 521 F.3d at 1164 (cautioning against "creat[ing] a lawless no-man's land on the Internet").

of thousands of Massachusetts teens) who are lured to being on Instagram almost constantly. RA1/22, 108 ¶¶3-4, 374. This "injury of direct and substantial character" to the public's right to "preserv[ed] health and safety" is "special" and particularized to minors and children, whose still-developing brains, minimal ability to self-regulate, and other vulnerabilities render them uniquely susceptible to Meta's psychologically manipulative tactics to compel them to spend more time on the platform than they otherwise choose, and thus is distinct from that of the public at large. *Sullivan*, 448 Mass. at 35-36.

As alleged, Meta's unfair and deceptive conduct in addicting kids to its platform has impaired the public's right to their health and safety and has contributed to harms to youth that the Commonwealth has expended efforts to repair, address, and abate. RA1/106-108 ¶¶369-374; *see Dartmouth v. Silva*, 325 Mass. 401, 404 (1950) (sustaining public nuisance claim "where the interference with a public right [] is of such a nature that a town may be put to expense in repairing" the harm caused).

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal. Alternatively, the Court should affirm the Superior Court's Order denying Meta's Motion to Dismiss.

Respectfully submitted,
ANDREA JOY CAMPBELL
ATTORNEY GENERAL

_/s/ Christina Chan_____
Christina Chan (BBO #677703)
Jared Rinehimer (BBO # 684701)
Assistant Attorney Generals
Public Protection and Advocacy Bureau
David C. Kravitz (BBO #565688)
State Solicitor
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2912
(617) 963-2594
(617) 963-2427
christina.chan@mass.gov
jared.rinehimer.@mass.gov
david.kravitz@mass.gov

Date: August 11, 2025

CERTIFICATE OF COMPLIANCE

I, Christina Chan, hereby certify to the best of my knowledge that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,999 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word 365 (version 2502).

/s/ Christina Chan
Christina Chan
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2025, I filed and served the attached Brief of the Appellee in *Commonwealth v. Meta Platforms, Inc et al.*, No. SJC-13747, via the Massachusetts Appellate Court's electronic Odyssey File & Serve site, and also served copies on the following counsel of record by e-mail:

Felicia Ellsworth
Simon J. Williams
Wilmer Cutler Pickering
Hale and Dorr LLP
60 State Street
Boston, MA 02109
felicia.ellsworth@wilmerhale.com
simon.williams@wilmerhale.com

Christian Pistilli
Paul Schmidt
Mark W. Mosier (*pro hac vice* pending)
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
cpistilli@cov.com
pschmidt@cov.com
mmosier@cov.com

Attorneys for Defendants Meta Platforms, Inc. and Instagram, LLC

/s/ Christina Chan
Christina Chan (BBO #677703)
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Christina.chan@mass.gov
(617) 963-2912

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NOTICE

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 23-2397-BLS1

COMMONWEALTH
Plaintiff

vs.

META PLATFORMS, INC., & another[1]
Defendants

MEMORANDUM AND ORDER ON MOTION TO DISMISS

The Commonwealth contends that Meta Platforms, Inc. and Instagram, LLC (together, "Meta") violated G.L. c. 93A, § 2, and created a public nuisance, by designing and using addictive design features on Instagram to exploit children's psychological vulnerabilities, and falsely represented to the public that its features were not addictive and that Meta prioritized youth health and safety. Meta has now moves to dismiss for failure to state a claim. For the reasons set out below, that motion is denied.

BACKGROUND

A. The Commonwealth's Factual Allegations[2]

Meta owns, develops, designs, markets, and operates Instagram, a social media platform that enables users to post and share images and videos, and allows them to interact with other users. Instagram is accessible through web browsers or through a smart phone application ("app"). Most Instagram users access the platform through the app. More than 33 million young

---

1 Instagram, LLC.

2 This is a brief summary of the Complaint's factual allegations, which span 88 pages.

KeyCite Yellow Flag
Proposed Legislation

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Currentness

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

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(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

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(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

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(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added Pub.L. 104-104, Title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub.L. 105-277, Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739; Pub.L. 115-164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13925

Ex. Ord. No. 13925, May 28, 2020, 85 F.R. 34079, which related to moderation of content posted on social media platforms, was revoked by Ex. Ord. No. 14029, § 1, May 14, 2021, 86 F.R. 27025.

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1 So in original. Probably should be “subparagraph (A)”.

47 U.S.C.A. § 230, 47 USCA § 230
Current through P.L. 119-18. Some statute sections may be more current, see credits for details.

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IN THE CIRCUIT COURT OF POLK COUNTY, ARKANSAS
CIVIL DIVISION

STATE OF ARKANSAS, ex rel.
TIM GRIFFIN, ATTORNEY GENERAL PLAINTIFF

VS. NO. 57CV-23-47

META PLATFORMS, INC.; FACEBOOK HOLDINGS, LLC;
FACEBOOK OPERATIONS, LLC; META PAYMENTS, INC.;
FACEBOOK TECHNOLOGIES, LLC; INSTAGRAM, LLC;
and SICULUS, INC. DEFENDANTS

RULING ON DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

The state filed its first amended complaint on October 30, 2023. Defendants filed a motion to dismiss the first amended complaint or "FAC" on November 29, 2023. The court held a hearing on the motion to dismiss on April 17, 2024. The parties then each submitted proposed findings for the court to consider before making its determination. The parties submitted six issues for the court to consider (1) whether Arkansas has specific personal jurisdiction over the defendants, (2) whether the state's claims are barred under Section 203 of the Communications Decency Act, (3) whether the state's claims are barred by the first amendment, (4) whether the state has plead facts sufficient to set out claims for relief under theories of public nuisance, (5) the Arkansas Deceptive Trade Practices Act, and (6) the doctrine of unjust enrichment.

I. Arkansas has specific personal jurisdiction over Meta

The court need not address the landmark cases on the issue of personal jurisdiction, nor should it make an unnecessary attempt to discuss the distinctions between general and specific jurisdiction. The parties agree that if the court has jurisdiction at all that the plaintiff must establish that the court has specific personal jurisdiction over the defendants. The parties also agree on which test that this court must apply. In their respective briefs and arguments the parties have argued that the court must determine whether or not (1) the defendants purposefully availed

themselves of the privilege of acting in the forum state or causing a consequence in the forum state; (2) whether or not the cause of action arises from or relates to the defendants' contacts with the forum state; and (3) whether or not the acts of the defendants or the consequences caused by the defendants have a substantial enough connection with the forum state to make the exercise of personal jurisdiction over the defendant reasonable. *Lawson v. Simmons Sporting Goods, Inc.* 2019 Ark. 84.

Defendant argues that Meta has not purposefully availed itself of the privilege of acting in Arkansas. The argument Meta makes is a nuanced one. It argues that it did not target its activities at the State of Arkansas. If the court understands Meta's arguments correctly, Meta seems to suggest that its business model is as passive as a community bulletin board located in another state. Anyone from anywhere can post any message on the face of such a board. In making its argument, Meta understands that it must draw a distinction between its own activities and the activities of third party advertisers who use its services to offer products to Arkansas consumers. Meta obviously couches its argument in such a way as to make it appear to be factually similar to the sporting goods store in *Lawson* whose only contact with Arkansas was to solicit business from Arkansans using the medium of an Arkansas-based publication.

The plaintiffs argue that Meta's activities and tools involve much more interaction with and manipulation of Arkansans than a passive newspaper circular. Plaintiff argues that Meta "specifically and purposefully directed activity toward Arkansas's youth." They allege that Meta purposefully targets Arkansans by "collecting data"--including location data--on all young Meta users who utilize Meta's service within the borders of this state. They allege that Meta makes advertising revenue by selling the data they collect to companies who are eager to use targeted information to tailor their ads to consumers. It is the court's belief that the interactive nature of Meta's platform standing alone might not give rise to personal jurisdiction; however, its collection of

data and use of that data to create sharpened opportunities to enable advertisers to hawk goods to specific users within the state of Arkansas satisfies the "purposeful availment" requirement.

Likewise, Meta argues that the plaintiff's claims "do not arise from or relate to Meta's alleged contacts with Arkansas." It argues that there is no connection between Arkansas and the specific claims at issue as required by *Lawson*. However, the allegations in this case are nothing like the allegations made in *Lawson*. In *Lawson*, Justice Wood, writing for the court, was careful to home in on the facts—after all in a lawsuit the facts do indeed matter. Lawson involved a claim of negligence against a Louisiana merchant for a slip and fall that occurred in a store located in the State of Louisiana.[1] Dismissal was warranted because the advertising in Arkansas had no connection with the negligence claim.

The allegations in this case demonstrate that it is a horse of a different color when compared with *Lawson*. The plaintiff has argued that Meta's features and targeted activities toward young Arkansans have significantly injured them by causing various harms and psychological injuries as well as addiction to the platform. While it remains to be seen if these allegations can be satisfactorily proven, the allegations contained in the first amended complaint are sufficient to qualify as suit-related conduct.

Finally, the court must decide whether the exercise of jurisdiction over Meta would be reasonable. The court concludes that it would. Meta has made a substantial amount of gross sales and income receipts in Arkansas. These receipts come in part from its targeted ad sales in the state, a portion of which are complained of in this action, Meta has employees who work in, reside in, and have income taxes withheld in and paid to the state because of the employees' connection

[1] If Lawson were a deceptive trade practice case, I speculate that it is unlikely that the result would have been the same.

to the state. Based upon the advertising revenue and the way it is allegedly obtained, Meta could reasonably anticipate being summoned to court in Arkansas in an action over these particular allegations.

Based upon the foregoing, the defendant's motion to dismiss for want of personal jurisdiction is denied.

II. Section 230 of the Communications Decency Act does not bar the state's claims

Defendants argue that the State's claims are barred under 47 U.S.C. § 230. Section 230's "Good Samaritan" provision states that, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." To determine whether or not Section 230's Good Samaritan provision applies a court must decide(i) if the party is a provider or user of an interactive computer service; (ii) if the state is seeking to treat the defendants, under a state law cause of action, as publisher or speaker of information; (iii) and that the information is provided by another information content provider.

There is not—probably only because it could not be seriously argued—a dispute on the first element. Meta is a provider of an interactive computer service. This being the case, the parties have trained their arguments on the second element of § 230.

According to the defendants, the state is seeking to treat Meta as a publisher or speaker of information posted to its platforms by third-party users. As evidence to back their contention, they direct the court's attention to the portions of the first amended complaint where dissemination of information provided by third party users is discussed. (See, p.6 of proposed order of dismissal) Relying on several cases,[2] the defendants also believe that § 230 immunity applies to this case

[2] The court understood the defendants to rely primarily on *Dyroff v. Ultimate Software Group, Inc.,* 934 F.3d. 1093 (2019), and *Force v. Facebook, Inc.,* 934 F.3d 53 (2019). Both of those cases were dismissed because

because they argue that at its essence the state's complaint is about how information is curated and published before it is delivered to users.

The state contends that it is not complaining about the content itself rather it claims to concern itself with the design features of the platforms.[3] The state alleges that Meta's platforms are designed in such a way as to exploit areas of vulnerability to adolescent users of Meta's services. The allegations in the complaint are not aimed at the content itself rather the allegations are aimed at alleged harm caused by the design features themselves. The State alleges that it is merely attempting to hold Meta liable for its own conduct.

It is the court's opinion that § 230's immunity does not apply in this case. The State is not seeking to treat Meta as a publisher or speaker of information, rather it is alleging that the design features of Meta's platforms themselves are hazardous to adolescents because the features are designed to addict and exploit the frailties of developing brains. If that is ultimately proven to be true, the nature of the content shared on the platforms is irrelevant. This case is properly understood as a dispute over whether the design features of Meta's platforms harm adolescents.

III. The first amendment does not bar the state's complaint

The first amendment arguments advanced by the parties are similar in nature to the arguments advanced in support of their respective arguments regarding § 230. Defendants argue that the state's claims run afoul of the first amendment to the constitution because they claim that the state is attempting to impose a restraint on their editorial judgment and their method of

---

the claims for liability were based upon actions that speakers took using the format that the interactive computer service as a megaphone, i.e. selling heroin and causing the death of a user of the interactive computer, and Hamas' coordinating of terrorist acts using an interactive computer service when the attacks themselves caused American citizens to die.

[3] The state principally relies on *Lemon v. Snap, Inc*. 995 F.3d 1085 (2021) and several trial court decisions deciding issues like those before this court. In Lemon, an interactive computer service was not dismissed from a lawsuit because it created a Speed Filter for users to utilize while operating or riding in a motor vehicle.

disseminating speech. The state claims that it is not aiming its fire at speech, content moderation, or organization of content rather it claims that the allegations in the complaint are aimed at alleged harms caused by the design features of Meta's platforms.

The court believes that this case is about conduct rather than speech. Here, the language from a decision of the Eleventh Circuit is instructive "[p] ut simply, with minor exceptions, the government cannot tell a private person or entity what to say or how to say it." *NetChoice v. Att'y Gen*., 34 F. 4th 1196, 1203 (11th Cir. 2022). The complaint does not seek to restrain speech, interfere with editorial function, or compel a publisher to publish content against its will; therefore, the first amendment does not require dismissal.

IV. Meta's platform cannot constitute a public nuisance

The defendants allege that the State's public nuisance claim against them must fail because the acts complained of in this case are conducted through the medium of an internet website or application. They ask the court to hold that public nuisance claims are limited to cases involving land or property use. To support their argument, they cite a decision from the Eastern District of Arkansas that quickly and efficiently dispatched a claim for public nuisance against pharmaceutical companies because the companies "[were] not landowners." *Independence County v. Pfizer, Inc.* 534 F. Supp. 2d. 882, 890 (E.D. Ark. 2008) *Independence County* adopted the definition of "nuisance" from *Milligan v. Gen. Oil Co.* 293 Ark. 401 (1987) to reach its decision. The definition recited in Milligan is "[n]uisance is defined as conduct by one landowner which unreasonably interferes with the use and enjoyment of the lands of another and includes conduct on property which disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property." (Id. at 404) A few common examples are enterprises that emit unreasonable noise or noxious odors, bookmaking operations, bootlegging operations, and theatres. Thus, it is the

defendants' contention that an act may not be abated as a nuisance unless the act itself is carried out on land.

The state claims that the court's authority to enjoin a nuisance is not tethered to real property provided that the nuisance is a public nuisance. It asks the court to focus its attention on Meta's activities that it alleges threaten public health, safety, and morals.

The real property tethered definition of "nuisance" advanced by the defendants appears to show up without citation to precedent for the first time in *Ark. Rel. Guidance Fdn v. Needler*, 252 Ark. 194, 196 (1972). The rule announced and applied in *Needler* is recited again in *Milligan* as settled law and is cited in other cases thereafter. (See also, *Aviation Cadet Museum, Inc. v. Hammer*, 373 Ark. 202, 207 (2008).) Thus, it would appear that the Arkansas Supreme Court has declared that nuisance is a land based caused of action as urged by the defendants.

To get around the "land-based rule" of *Needler*, the state asks the court to distinguish between public and private nuisance.[4] The problem child for the state is, again, *Needler*. The distinction Needler drew between a public and private nuisance "is simply the extent of the injury." *Ark. Rel. Guidance Fdn. v. Needler*, 252 Ark. 194, 196 (1972). Thus, it would appear to the court that the land-based rule applies in both public and private nuisance cases. The nuisance claim is, therefore, dismissed.

[4] *Webber v. Gray*, 307 S.W. 2d 80 (1957) is a factually interesting case that did not bind nuisance law to land. *Webber* focused upon the court's power to abate harassing acts when there exists no adequate remedy at law. It should be noted that *Webber* was decided before harassment was criminalized. Since *Webber* was decided prior to *Needler*, the court believes that the language contained in *Needler* relegated nuisance to a land based cause of action.

V. Deceptive trade practices

The state alleges that Meta's activities violate three portions of the Arkansas Deceptive Trade Practices Act. First, the state claims that Meta utilized deceptive and unconscionable trade practices that included "knowingly making false representations as to the characteristics – specifically the safety and addictiveness – of Meta's services and platforms in violation of Ark. Code Ann. § 4-88-107(a)(1)." Meta counters that subsection (a)(1) is not applicable because it only applies to "goods or services." Clearly Meta's interpretation of (a)(1) is correct because Meta's platform neither meets the definition of a "good" nor does it meet the definition of a "service" as set out in the ADTPA.

Is the platform offered by Meta a "good" for the purpose of ADTPA?

The ADPTA defines "goods" as "tangible property, coupons or certificates whether bought or leased." (Ark. Code Ann. § 4-88-102(4)) The words "bought or leased" present a barrier that the state must attempt to circumnavigate. So, to avoid the plain language that Meta offers as a defense, the state resorts to a novel argument—that Meta's platform is "bought or leased" by consumers who pay no money, but instead render consideration in the form of data which Meta exploits to turn its profits. The state's argument fails because Meta's platforms are not anything approaching "tangible property, coupons, or certificates." Therefore, the court rejects the state's contention that Meta's platforms are a "good" for the purposes of ADTPA.[5]

Is the platform offered by Meta "services" as contemplated in ADTPA?

The ADTPA defines "services" as "work, labor, or other things purchased that do not have physical characteristics." Though Meta's platforms are a "service" in the common usage of the

[5] The state cites no authority to support its contention that Meta provides a "good or goods."

word, this court finds that they are not "services" under the ADTPA because they are not "purchased." The Arkansas Supreme Court has adopted the following definition of the word "purchase:" [a] purchase is a transmission of property from one person to another by voluntary act and agreement on valuable consideration." Erxlebren v. Horton Printing Co. 283 Ark. 272, 275 (1984). Justice Hubbell, writing for the Erxlebren majority, derived this definition by consulting Black's law dictionary. Id. There has been considerable debate in the public square regarding whether personal data generated on the internet is personal property,[6] but there is no consensus on the issue. This court finds that users purchase nothing directly from Meta, therefore, the court must decline to extend the ADTPA to this portion of the state's argument.

Do the pleadings set out sufficient allegations that Meta's activities violate § 4-88-107(8)?

For its second ADTPA claim, the state argues that Meta's actions violate § 4-88-107(8) which states that it is unlawful and prohibited to knowingly take "advantage of a consumer who is reasonably unable to protect his or her interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement, or a similar factor." Here, the state alleges that "the Defendants knowingly took advantage of vulnerable adolescent users who were reasonably unable to protect their own interests because of their young age, ignorance of the facts which Defendants had in their possession and control, and inability to understand the addictive and harmful consequences of using Meta's platforms." (FAC ¶ 251) Because the ADTPA is broadly construed, the state's allegations survive the motion to dismiss.

[6] The United States Senate considered the "Own Your Own Data" Act during the 116th Congress, but the bill did not become law.

Do the pleadings set out sufficient allegations that Meta's conduct violates § 4-88-107(a)(10)?

Finally, the state asks the court to deny Meta's motion to dismiss because the totality of Meta's "conduct described [in the complaint] also constitutes unconscionable[7] and deceptive acts or practices which Defendants undertook in furtherance of their business, commerce, or trade and attempts to profit at the cost of the decimated mental health of teen users in violation of Ark. Code Ann. § 4-88-107(a)(10). The false representations, fraud, concealments, omissions and suppressions of damaging information were deceptive and constituted a repeated course of unconscionable conduct contrary to public policy and the public's interest which continues to this day." (FAC ¶ 256-257) Ark. Code Ann. § 4-88-107(a)(10) is often referred to as ADTPA's "catch-all provision." (see, *State v. R&A Investment Co.,* 336 Ark. 289, 295 (1999)) Generally, "[a]n act is unconscionable if it affronts the sense of justice, decency, and reasonableness." Howard W. Brill, Arkansas Law of Damages §17:18 (6th Ed. 2014) Because the "catch-all" provision" has been broadly construed to encompass acts not specifically named in the act or even envisioned by the General Assembly, the claims set out in the state's complaint, which must be accepted as true in the current analysis, are sufficient to survive a motion to dismiss.

VI. Unjust enrichment

Arkansas law on unjust enrichment is based upon the notion that "one person should not be free to unjustly enrich himself at the expense of another." Howard W. Brill, Arkansas Law of Damages §31:2 (6th Ed. 2014) In this action, the legal theory advanced by the state is that Meta's platforms are dangerous because they are designed to be addictive--especially so to younger users. The argument continues that Meta, through deception and omission and suppression of

[7] The Arkansas Supreme Court has stated that 'unconscionability' is not precisely defined in the law." *LegalZoom.com, Inc. v. McIllwain*, 2013 Ark. 370, 6. In the context of contract law, it seems that the cases focus upon the inequality of bargaining positions between parties to a contract as a part of an unconscionability analysis.

facts, fraudulently concealed those alleged addictive features from the unsuspecting public. Once Meta got its unwary victims addicted to its platforms, its coffers were swelled with advertising revenue because the addictive nature of the platforms caused these vulnerable Arkansans to stay on the platforms longer. Thus, the state claims that the user's addiction to Meta drove its advertising revenue even higher.

In the court's judgment, a claim for unjust enrichment is not available under the specific facts alleged in the complaint. It is the court's opinion that the State cannot assert an unjust enrichment claim because it does not allege that Defendants were enriched by Arkansas or its citizens. The basis of the state's complaint is that Meta profits from its malevolent practices, but the alleged malevolent practices do not generate monies or property from the state or its citizens.

Taking the allegations of the complaint as true, Meta's practices stimulate users to engage with Meta longer thereby increasing the value of advertising, but it cannot seriously be argued that Meta is not entitled to receive the advertising revenue from the ***advertisers***. The Arkansas Court of Appeals has held that "[o]ne is not unjustly enriched by receipt of that to which he is legally entitled." *Smith v. Whitener*, 42 Ark. App. 225, 228 (1993) When one is found to have been unjustly enriched at the expense of another, he or she must restore the item or sum of money (or said another way--pay restitution) wrongly received back to the person or entity from whom it was wrongly received. Considering the allegations set out in the state's complaint against these standards, the state does not allege that Meta is not entitled to payment for the advertising revenues that it has received from the advertisers, rather it complains about the way the revenues were earned. Under the state's theory, Meta received neither money nor property from the users of its platforms that could be restored to the State or to Arkansas residents on whose behalf it sues, and there is no basis for a claim of unjust enrichment.

IT IS SO ORDERED this the _____ day of June 2024.

ELECTRONIC SIGNATURE

Case Title: STATE OF ARKANSAS VS. META PLATFORMS, INC ETAL

Case Number: 57CV-23-47

Type: ORDER OTHER

So Ordered

James A. Riner, 18th West Judicial Circuit Judge

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IN THE CIRCUIT COURT OF CLEBURNE COUNTY, ARKANSAS
CIVIL DIVISION

STATE OF ARKANSAS, ex rel. TIM GRIFFIN, ATTORNEY GENERAL — **PLAINTIFF**

v. — **Case No. 12CV-23-65**

TIKTOK INC.; TIKTOK PTE. LTD.; BYTEDANCE INC.; and BYTEDANCE LTD. — **DEFENDANTS**

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Before the Court is the Defendants' Motion to Dismiss the State's First Amended Complaint. The matter has been fully briefed, and this Court held a hearing on the Motion on February 7, 2024. For the reasons set forth below, Defendants' Motion to Dismiss the First Amended Complaint is **DENIED**.

I. Procedural History

The State filed its original Complaint on March 28, 2023. On June 13, 2023, Defendants moved to dismiss the State's original Complaint. The State responded to the Defendants' Motion to Dismiss on August 9, 2023. On August 18, 2023, the Defendants filed a Motion for Protective Order, Stay of Discovery, and Extension of Time pending disposition of their Motion to Dismiss.

On October 4, 2023, the State filed its First Amended Complaint. On November 8, 2023, the Defendants moved to dismiss the First Amended Complaint. The State responded to the Defendants Motion to Dismiss the First Amended Complaint on December 1, 2023. The Court held a hearing on the Motion to Dismiss the First Amended Complaint on February 7, 2024. At

the hearing, the Court requested that each party prepare a proposed order concerning Defendants' Motion to Dismiss the First Amended Complaint. The Court also stayed discovery until it ruled on Defendants' pending Motion to Dismiss the First Amended Complaint.

II. LEGAL STANDARD

When presented with a motion to dismiss, a court must treat the facts alleged in the complaint as true and view them in the light most favorable to the non-moving party. *Perry v. Baptist Health*, 358 Ark. 238, at 244–248, 189 S.W.3d 54, 57–60 (2004). All reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.* In determining whether to dismiss, it is improper for the court to look beyond the complaint. *Battle v. Harris*, 298 Ark. 241, at 243, 766 S.W.2d 431, 432 (1989); *Smith v. Eisen*, 97 Ark. App. 130, 138–39, 245 S.W.3d 160, 168 (2006). Thus, the court may dismiss only where the complaint fails to include "(1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled." Ark. R. Civ. P. 8(a). Arkansas's appellate courts have further noted that the standard imposed upon the pleading party is "lenient." *Clayton v. Batesville Casket Co., Inc.*, 2015 Ark. App. 361, at 6, 465 S.W.3d 441, 445.

III. ANALYSIS

Defendants have moved to dismiss on several grounds. First, Defendants argue that this Court does not have personal jurisdiction over each of the Defendants. Second, Defendants argue that the State has not pleaded the essential elements of a violation of the Arkansas Deceptive Trade Practices Act ("ADTPA"), Ark. Code Ann. § 4-88-101 *et seq.* Third, Defendants argue that Section 230 of the Communications Decency Act bars the State's claims. Finally, Defendants argue that

the State's unjust enrichment claim fails a matter of law. The Court will address each of these arguments in turn.

1. This Court has specific personal jurisdiction over the Defendants.

Defendants argue that they have not purposefully availed themselves of doing business in Arkansas. Arkansas courts have personal jurisdiction to the maximum extent allowed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Lawson v. Simmons Sporting Goods, Inc.*, 2019 Ark. 84, at 6, 569 S.W.3d 865, 869–70 (citing Ark. Code Ann. § 16-4-101(A–B)). In order to establish specific personal jurisdiction: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from or relate to the defendant's contacts with the forum state; and (3) the acts of the defendant or consequences caused by the defendant must have substantial enough connection with the forum state to make the exercise of personal jurisdiction over the defendant reasonable. *Id.* at 9–10, 569 S.W.3d at 871 (citing *Ficarelli v. Champion Petfoods USA, Inc.*, No. 3:18-cv-00361, 2018 WL 6832075, at *3 (M.D. Tenn. Dec. 28, 2018)). The Court finds that the State's First Amended Complaint pleads sufficient facts to establish specific personal jurisdiction over the Defendants.

First, Defendants have purposefully availed itself of the privilege of doing business in Arkansas because Defendants "serve[] a market for a product" in Arkansas, namely, the market for social media applications. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021). The TikTok app has been downloaded at least hundreds of thousands of times in Arkansas. First Am. Compl. ¶ 21. Defendants are serving content to and collecting data from all of those devices and accounts located in Arkansas. First Am. Compl. ¶ 21. The State has also alleged that Defendants know and rely on the location of its Arkansas users to target them with

content and advertisements, creating an Arkansas-specific experience inside the TikTok app. First Am. Compl. ¶¶ 22–24. In this way, Defendants have designed its app to encourage Arkansas users to return to the app frequently and for long durations, which increases Defendants' ability to earn advertising revenue. First Am. Compl. ¶¶ 22–23, 48, 51. All this activity is in service of continuing bilateral contractual relationships that Defendants have entered into with at least hundreds of thousands of Arkansas users—relationships that the State alleges many Arkansans would not have agreed to absent the deceptive statements that are the subject of this lawsuit. *See, e.g.*, First Am. Compl. ¶ 13, 31, 62, 66, 69, 218; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985) (finding purposeful availment where a defendant "has created 'continuing obligations' between [it]self and residents of the forum," including when "transacted solely by … wire communications").

In addition, Defendants have availed themselves of the financial rewards of operating within the State of Arkansas. First Am. Compl. ¶ 25. For the period of May 1 through August 31, 2023, Defendant TikTok, Inc. reported to the Arkansas Department of Finance and Administration taxable sales in Arkansas of $1,808,956 and state and local remittances of vendor use taxes totaling $70,313. First Am. Compl. ¶ 26. Defendant TikTok, Inc. also has employees located in Arkansas. First Am. Compl. ¶ 27. In 2021, TikTok, Inc. employed two people in Arkansas with combined wages of $567,874.71. First Am. Compl. ¶ 27 In 2022, TikTok, Inc. employed five people in Arkansas with combined wages of $547,395.32. First Am. Compl. ¶ 27. Defendants are also doing business *with the State of Arkansas*. First Am. Compl. ¶ 32. Over the past five years, Defendants have sold $284,967.06 in advertising to the Arkansas Department of Health that was, in part, estimated to reach 500,000 English-speaking TikTok users ages 13–24 located in the State of

Arkansas in one instance and 300,000 TikTok users ages 16–24 located in the State of Arkansas in another. First Am. Compl. ¶ 32.

Defendants have also targeted Arkansas as a market for TikTok. First Am. Compl. ¶ 34. They have awarded grant money to Arkansas educators as part of their effort to persuade Arkansas parents that TikTok is safe and appropriate for young people. First Am. Compl. ¶ 34. TikTok has internally identified Arkansas as a "Key Market[]," for "pushing our safety narratives among parenting audiences" and "[d]riv[ing] perception among elite audiences of TikTok as a place where parents feel comfortable for their teens, and want to join." First Am. Compl. ¶ 34. An internal TikTok document specifically lists Arkansas as one of the places where TikTok seeks to "[b]uild trust and establish TikTok as a safe and welcoming place for parents, families, and teens to create, share, and watch videos." First Am. Compl. ¶ 34.

Defendants dispute that these contacts constitute "purposeful availment" because in its view, Defendants' allegedly unlawful actions and allegedly deceptive statements and omissions did not occur in Arkansas and did not specifically target Arkansas. Def.'s Br. in Supp. of Mot. to Dismiss at 12–14. Defendants misunderstand the relevant legal test, however, and cannot hide behind the scale of its business operations to evade personal jurisdiction in Arkansas.

"[W]hat matters" for specific personal jurisdiction "is [TikTok's] structuring of its own activities so as to target the [Arkansas] market." *NBA Props., Inc. v. HANWJH*, 46 F. 4th 614, 624 (7th Cir. 2022). The fact that Arkansans have downloaded the TikTok app is not the "result of random, fortuitous, or attenuated contacts." *Id.* (quoting *Burger King Corp.*, 471 U.S. at 475). It is the direct result of Defendants' business and how it has "structured" its operations to "invite" downloads in Arkansas, as detailed above. *NBA Props.*, 46 F. 4th at 625; *see also Doffing v. Meta*, 2022 WL 3357698, at *4 (D. Or. July 20, 2022). Defendants expected, if not encouraged, the

Arkansas contacts that give rise to this case: representations to Arkansas consumers about the safety of the TikTok app and the accessibility of users' digital data. These representations induced Arkansans to enter into continuous bilateral contracts with Defendants that provided the company with the valuable consideration it seeks—user data in exchange for the use of its app. This data allows Defendants to target Arkansans with location-based advertisements, which are central to their business model. Moreover, Defendants' collection of data and targeted advertisements depends on minors' consistent use of the app. Thus, TikTok's alleged addictiveness is also central to its contacts with Arkansans.

Second, the State's claims "relate to" Defendants' contacts with Arkansas. *Ford Motor Co.*, 141 S. Ct. at 1025–26. Arkansans download the TikTok app in the Apple App Store, Google Play Store, or Microsoft Store. *E.g.*, First Am. Compl. ¶ 3–8, 13–17, 52–69. When they do, they are presented with Defendants' allegedly false age-rating representations. *Id.* Every Arkansas user therefore receives this information when they consider whether to download the TikTok app, and that means that these allegedly false and deceptive representations and omissions relate to Defendants' contacts with Arkansas—the thousands of Arkansas user downloads of the TikTok app.

Third, as a global company doing business throughout the United States, it is entirely reasonable for TikTok to expect that it could be haled into court in Arkansas, especially considering TikTok profits handsomely off Arkansas minors. TikTok does not dispute this aspect of the specific personal jurisdiction analysis. Further, Arkansas has a strong interest in providing a forum for the adjudication of claims under the Arkansas Deceptive Trade Practices Act, a broad remedial statute. The Court finds that the State has pleaded sufficient facts to establish specific personal jurisdiction over Defendants.

2. *The State has pleaded claims under the Arkansas Deceptive Trade Practices Act.*

Defendants claim that the State's ADTPA claims fail for several reasons. First, Defendants claim that their questionnaire responses for the TikTok platform, its age ratings, its public statements, and its statements about Restricted Mode are statements of subjective opinion that cannot lead to liability under the ADTPA. Def.'s Br. in Supp. of Mot. to Dismiss at 22. Defendants also claim the State has not alleged that the questionnaire responses and statements about Restricted Mode are false or misleading in any material respect. *Id.* Defendants further argue that the State's claim based on the platform's addictiveness fails because the State has not alleged a consumer-oriented act that is misleading in a material respect, nor an actionable omission. *Id.* Finally, Defendants claim that all of the State's ADTPA claims must be dismissed because the TikTok app is not a good or service or that Defendants' acts were "consumer-oriented." *Id.* For ease of reference, the Court references the below table that outlines the State's claims.

Count #	**Claim Description**	**Statutory or Legal Basis**
Count I	Misrepresentation as to Alcohol, Tobacco, and Drug References	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count II	Misrepresentation as to Sexual Content and Nudity	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count III	Misrepresentation as to Mature and Suggestive Themes	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count IV	Misrepresentation as to Profanity and Crude Humor	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count V	Misrepresentation as to 12+ Age Rating in the Apple Store	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)

Count #	Claim Description	Statutory or Legal Basis
Count VI	Misrepresentation as to the T for Teen Rating in the Google Play and Microsoft Stores	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count VII	Cumulative Deceptive Representations	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count VIII	Misrepresentation as to Restricted Mode	Ark. Code Ann. § 4-88-107(a)(1), (10)
Count IX	Deception and Omission of Material Facts Related to Content and Age Ratings	Ark. Code Ann. § 4-88-108(a)(1–2)
Count X	Deception and Omission of Material Facts from TikTok's Community Guidelines	Ark. Code Ann. § 4-88-108(a)(1–2).
Count XI	Addictiveness—Unconscionability, Misrepresentations, and Omissions	Ark. Code Ann. § 4-88-107(a)(1), (10), (12)
Count XII	Unjust Enrichment	Common Law

A. The TikTok App is a service under the ADTPA.

The ADTPA applies to "services," among other things, and defines "services" as "work, labor, or other things purchased that do not have physical characteristics." Ark. Code Ann. § 4-88-102(7). Notably, the ADTPA does not define "purchase." *See id.* The State has adequately alleged that the TikTok app is a service. Although Defendants do not charge a monetary fee for the use of the TikTok app, users provide valuable consideration to TikTok—their data. First Am. Compl. ¶ 31. Consumers agree, by bilateral contract, to provide their valuable personal data to Defendants in return for their use of the TikTok app. *E.g.*, First Am. Compl. ¶¶ 21–24, 51, 181–89. This

contractual exchange is central to TikTok's business model. *E.g.*, First Am. Compl. ¶¶ 11, 31, 51, 181. The State has adequately pleaded that the TikTok app is a "service" under the ADTPA.

B. Defendants' alleged misrepresentations in Counts I through X are actionable under the ADTPA.

The Court concludes that the State has pleaded sufficient facts to show Defendants' misrepresentations were specific, concrete, and actionable under the ADTPA. Defendants ask this Court to hold that the words "infrequent, frequent, mild, intense, and safe" are inherently subjective and thus constitute non-actionable statements of opinion. Even assuming *arguendo* that some exception for statements of opinion exists in the ADTPA, Defendants' argument is belied by the specific facts alleged in the First Amended Complaint. For example, the State's First Amended Complaint alleges that material such as videos related to "pegging" are rampant on TikTok. *E.g.*, First Am. Compl. ¶ 95. It strains credulity to suggest that minors should view content related to pegging—a point Defendants themselves cannot seriously dispute given the content of their Community Guidelines. Words like "infrequent, frequent, mild, intense, and safe" are not inherently subjective and relative, but instead turn on context and relevant facts. For example, it is a fact, not an opinion, that bleach is not safe for use on hands. *See, e.g.*, *Thompson v. Proctor and Gamble Co.*, No. 18-CV-60107, 2018 WL 5113052, at *2 (S.D. Fla. Oct. 19, 2018). Similarly, the State challenges specific, concrete, and factual representations that Defendants have made about the safety of its product; these representations are central to its business model. Said simply, it is not possible to paint words such as "infrequent, frequent, mild, intense, and safe" in one broad stroke as Defendants request.

The same is true for the age ratings. The State has alleged that the age ratings are important to get minors on its platform and secure Defendants' profits. *E.g.*, First Am. Compl. ¶ 11. Defendants tell people that the TikTok app is safe for minors—specifically, those 12+—through

its age ratings. First Am. Compl. ¶ 12. Yet even Apple itself has told Defendants that TikTok contains frequent or intense mature content. First Am. Compl. ¶ 15. Undoubtedly, any consumer who views the age ratings, which are based on Defendants' own assertions about their product, is entitled to rely on them when they decide what is appropriate for themselves or their children. In fact, the State alleges that Defendants tout their app store age ratings in public statements. First Am. Compl. ¶ 65. In other words, the State alleges that Defendants *want* consumers to treat these age ratings as conveying concrete, factual information on which they can rely.

Defendants also claim that the State must prove just how "frequent" inappropriate content is in order to successfully challenge the alleged misrepresentations. Def.'s Br. in Supp. of Mot. to Dismiss, at 31–32. First, the State has repeatedly alleged that several categories of mature content on TikTok is not "infrequent," as TikTok claims. *See, e.g.*, First Am. Compl. ¶¶ 12, 16–17, 18–19, 20–21. On a motion to dismiss, that allegation is sufficient to establish that Defendants have made a deceptive or false statement. Defendants' objection goes to the *degree* of falsity or deception, which is not necessary for the State to establish at this early stage. This is a motion to dismiss and not a motion for summary judgment. The State is not required to plead this level of detail at this stage of the litigation. Second, because the State challenges Defendants' claim that certain mature content on the TikTok app is "infrequent/mild," the State can show that the inappropriate content is *either* frequent *or* intense to allege deception or falsity. In other words, the State can establish that the inappropriate content is intense regardless of its frequency. The State has pleaded sufficient facts alleging that the TikTok app contains intense content in several mature categories. *E.g.*, First Am. Compl. ¶¶ 80, 94–98. Third, the State has alleged that TikTok places users in filter bubbles that cause some users to be bombarded by a large volume of mature content. First Am. Compl. ¶ 145–148. The overall proportion of mature content on TikTok as a

whole is irrelevant to users who fall into such filter bubbles and see frequent, intense mature content as a result.

Finally, the State has pleaded sufficient facts to show that Defendants' promotion of Restricted Mode deceives Arkansas consumers. *E.g.*, First Am. Compl. ¶¶ 170–177. While Defendants ask this Court to weigh the facts at this stage, it is inappropriate to do so. *See* Def.'s Br. in Supp. of Mot. to Dismiss, at 35–37. Defendants may disagree with the State's assertions in its First Amended Complaint, but they are sufficient to proceed to discovery.

The bottom line is that the State has pleaded sufficient facts to show that Defendants' representations are actionable under the ADTPA and has plausibly stated a claim that Defendants violated the ADTPA. For these reasons, the Court denies Defendants' Motion to Dismiss as to Counts I through X.

C. Count XI, the State's addictiveness claim, is actionable under the ADTPA.

Defendants claim that the State's addictiveness claim must be dismissed because "claims of omission" cannot be brought under Ark. Code Ann. § 4-88-107(a). Def.'s Br. in Supp. of Mot. to Dismiss, at 38. Defendants, however, mischaracterize the State's claim. The State clearly pleaded its addictiveness claim under the umbrella of unconscionability, misrepresentation, and omissions. First Am. Compl. ¶ 369. The State pleaded its addictiveness claim under Ark. Code Ann. § 4-88-107(a), not Ark. Code Ann. § 4-88-108. *Id.* Therefore, the Court rejects Defendants' attempt to apply the materiality requirement found in Ark. Code Ann. § 4-88-108 to the State's addictiveness claim. Def.'s Br. in Supp. of Mot. to Dismiss, at 38. Nevertheless, despite Defendants' claims, Ark. Code Ann. § 4-88-107 *et. seq.* covers omissions. *See* Ark. Code Ann. § 4-88-107(a) ("Deceptive and unconscionable trade practices made unlawful and prohibited by this chapter include, *but are not limited to*, the following. . .").

An act is unconscionable if it affronts the sense of justice, decency, and reasonableness. *Gulfco of Louisiana, Inc. v. Brantley*, 2013 Ark. 367, at 9, 430 S.W.3d 7, 13 (citing *Baptist Health v. Murphy*, 2010 Ark. 358, at 27, 373 S.W.3d 269, 287). The State has pleaded sufficient facts that show Defendants created and marketed a purposefully addictive app that was designed to harm children for its own profit. This is an unconscionable business or trade practice under the ADTPA. *E.g.*, First Am. Compl. ¶¶ 189–90, 363–372.

Moreover, the State has sufficiently pleaded that Defendants misled people about the safety of its app for minors. Despite Defendants' assertions of safety, the State alleges that Defendants know minors are especially susceptible to addiction and the mental health harms associated with addiction to the app. First Am. Compl. ¶¶ 367–69. In addition, despite knowing about the app's addictiveness, Defendants continued tailoring their app to optimize the time users spent using it, including by adopting "many coercive design tactics that detract from user agency such as infinite scroll, constant notifications, and the 'slot machine' effect," and it did so while knowing that minors would be "particularly sensitive" to these features and would have "minimal ability to self-regulate effectively" when confronted with them. First Am. Compl. ¶¶ 181–86. Defendants' assertion that "addiction" cannot be defined rings especially hollow given that Defendants' own documents describe this problem with the TikTok app. First Am. Compl. ¶¶ 188–90.

Finally, the State has pleaded sufficient facts showing Defendants should have disclosed TikTok's addictiveness to minors—a fact that Defendants have internally studied, analyzed, and acknowledged. *E.g.*, First Am. Compl. ¶ 189. These facts, if proven, would affront a sense of justice, decency, and reasonableness. The State has thus plausibly alleged an unconscionable business or trade practice under the ADTPA. *E.g.*, First Am. Compl. ¶¶ 189–90, 363–372. The Court denies Defendants' Motion to Dismiss as to Count XI.

3. The State has alleged sufficient facts that show Defendants engaged in facilitation that states a claim under Ark. Code Ann. § 4-88-107(a)(12).

Defendants argue that the State has not alleged sufficient facts that show Defendants engaged in facilitation to state a claim under Ark. Code Ann. § 4-88-107(a)(12). This Court has found that the State has pleaded sufficient facts that show Defendants violated the ADTPA. Therefore, the Court finds that the State has pleaded sufficient facts that show facilitation under the ADTPA.

4. Section 230 of the Communications Decency Act does not bar the State's claims.

Defendants argue that they are immune from suit under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, but Section 230 does not bar the State's claims. Section 230 protects providers of Internet services from liability for content created by "*another* information content provider." 47 U.S.C. § 230(c)(1). Under Section 230, an internet service provider like TikTok is not "legally responsible for information that third parties created" and is "liable only for speech that is properly attributable to" it. *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 1997)); *see also Demetriades v. Yelp, Inc.*, 175 Cal. Rptr. 3d 131, 145 (Cal. Ct. App. 2014). Here, Defendants made their age-rating and content representations themselves. The First Amended Complaint is agnostic on whether TikTok should contain frequent and intense content about drugs, alcohol, tobacco, sex, nudity, and profanity. The First Amended Complaint demands only that TikTok be honest with consumers about what content the app contains. That does not come within the purview of Section 230.

Likewise, the State's claims relating to the TikTok app's addictiveness are not barred by Section 230. Defendants represent to consumers that the TikTok app is safe for minors. Yet,

Defendants know from their own studies that the app's addictive nature harms minors. Here again, the State is not attempting to hold Defendants liable for the content on the platform. The State's allegations establish that Section 230 of the Communications Decency Act does not bar the State's claims.

5. The State has pleaded sufficient facts to support Count XII, its unjust enrichment claim.

Defendants claim that the State's unjust enrichment claim should be dismissed because a contract exists between the users of the TikTok app and the Defendants. Def.'s Br. in Supp. of Mot. to Dismiss, at 48. The State has alleged that the alleged contracts, the Terms of Service, were wrongfully induced due to Defendants' misrepresentations about the safety of the TikTok app for minors. Pl.'s Resp. to Def.'s Mot. to Dismiss, at 38. Defendants retort that, even if true, that would make the contracts *voidable*, not void, and an unjust enrichment claim cannot lie where a contract is merely voidable. That question of substantive contract interpretation would require the Court to weigh facts and, ultimately, make a factual determination as to the nature of the contracts between Defendants and Arkansas users. That determination is not appropriate for a motion to dismiss. At this point, given the totality of the allegations in the State's First Amended Complaint, this Court finds that the State has pleaded sufficient facts to support a claim for unjust enrichment. This Court denies Defendants' Motion to Dismiss as to Count XII.

IV. CONCLUSION

At this stage, this Court declines to weigh the evidence. This Court must take the State's allegations as true and view them in a light most favorable to the State. The State has pleaded sufficient facts to establish specific personal jurisdiction. Defendants target Arkansas minors and profit substantially off their data. There is nothing unfair or unexpected about Defendants being subject to this Court's jurisdiction. Moreover, the State has pleaded sufficient facts to show that

Defendants violated the ADTPA and to state a claim for unjust enrichment. Finally, Section 230 does not bar the State's claims. Defendants' Motion to Dismiss is denied in its entirety.

IT IS SO ORDERED.

THE HONORABLE HOLLY L. MEYER
16th Circuit Judge, Division 1

May 15, 2024

Prepared by:
Matthew M. Ford, Ark. Bar No. 2013180
Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201-2610
Telephone: (501) 320-3069
Fax: (501) 682-8118
Matthew.Ford@ArkansasAG.gov

Counsel for Plaintiff

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	)	
Plaintiff	)	
	)	**Case No. 2023-CAB-6550**
v.	)	
	)	**Judge Neal E. Kravitz**
	)	
META PLATFORMS, INC., *et al*.,	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

The District of Columbia filed this action on October 24, 2023 against Meta Platforms, Inc. and Instagram, LLC (collectively "Meta") alleging past and ongoing violations of the District of Columbia Consumer Protection Procedures Act, D.C. Code §§ 28-3901 to 28-3913 ("CPPA"). The District alleges that Meta intentionally manipulates children into compulsive and excessive use of Facebook and Instagram, Meta's flagship social media platforms, through the use of design features specifically intended to exploit children's heightened vulnerabilities to addictive technologies. The District claims that Meta actively seeks to ensnare children in the overuse of its platforms for the purpose of maximizing its profits from advertising revenue, and that it does so despite its knowledge, based on extensive internal and external studies, that compulsive and excessive use of social media is directly linked to profoundly negative outcomes for youth, including depression, anxiety, insomnia, diminished academic performance, and even suicide.

The complaint alleges two counts of CPPA violations. In the first, the District alleges that Meta engages in unfair trade practices, in violation of D.C. Code § 28-3904, by designing its social media platforms to include features it knows are psychologically and physically harmful to

children. In the second, the District alleges that Meta engages in deceptive trade practices, in violation of D.C. Code §§ 28-3904(e), (f), and (f-1), by making false misrepresentations and material omissions that have a tendency to mislead in its statements regarding the safety of Facebook and Instagram. The District seeks a permanent injunction prohibiting Meta from engaging in unfair and deceptive trade practices that harm District consumers, including children, and from making false and otherwise misleading statements about the safety of its social media platforms. The District also seeks restitution or damages, civil penalties, and reasonable attorney's fees and costs.

Count I: Unfair Trade Practices

As indicated, the District alleges in Count I that Meta commits unfair trade practices in violation of the CPPA by seeking to maximize its advertising revenue at the expense of the health and well-being of its youngest subscribers through the use of addictive and manipulative design features intended to hook children into spending as much time as possible on its social media platforms—platforms that are readily available to children and other users through applications ("apps") on their smartphones, tablets, and other devices. The complaint identifies the following as the most addictive and manipulative design features employed by Meta:

- "Personalization algorithms" allow Meta to provide each child user with personalized content tailored to the particular child's previous use of the platform. The District alleges that Meta provides the personalized content using a sequencing method referred to by psychologists as a "variable reinforcement schedule" or "variable reward schedule." Compl. ¶ 59. The schedule refers to a periodic pattern that delivers specific types of content known to be of interest to the particular user and is targeted to trigger a release of dopamine at unpredictable intervals. Compl. ¶ 60. The District alleges that Meta predicts what content will generate a dopamine response in a particular user and then tailors the user's feed so that content likely to elicit a dopamine response is provided on a variable schedule. Compl. ¶ 62. The District analogizes Meta's approach to that of a slot machine—alternately providing and withholding rewards to

induce addictive behavior. Compl. ¶ 61. The District alleges that personalization algorithms result in longer usage for children and that they push young users to more extreme content. Compl. ¶¶ 64, 66. The longer periods of usage, and the resulting greater amounts of data collected, the District alleges, increase Meta's advertising revenue at the expense of children's health.

- "Alerts" are notifications Meta provides to its users on their smartphones. Compl. ¶ 68. The District alleges that the alerts, including vibrations and visual and sound notifications, enable Meta to interrupt its users at any time of the day or night for the purpose of luring them back to its platforms. Compl. ¶¶ 69-70. According to the District, alerts are disruptive for users of all ages but are especially harmful to children, who, because of their greater vulnerability to distraction and psychological manipulation, suffer inattentiveness, hyperactivity, and reduced productivity and well-being as a result of the alerts. Compl. ¶ 72. The District alleges that Meta sends alerts to children during the school day, interrupting their ability to concentrate on their schoolwork, and at night, preventing them from sleeping enough to be able to function at their best. Compl. ¶¶ 74, 107. The District cites a recent study showing that teenagers received a median of 237 notifications on their smart phones each day, 23% of which arrived during school hours, and 5% of which arrived during sleeping hours on school nights. Compl. ¶¶ 74, 107. The alerts employed by Meta, the District alleges, have an impact on the brains of children similar to that of stimulating drugs. Compl. ¶ 72.

- "Infinite scroll" involves the partial display of additional content at the bottom of a user's screen. Compl. ¶ 76. The feature prevents the user from viewing a single post without also seeing the top portion of the next post in the user's feed. *Id*. The teasing of future content continues indefinitely, inducing the user to continue scrolling without pause and, the District alleges, making it difficult for children to disengage from the platform because the feed lacks a natural end point. Compl. ¶¶ 76, 78. Similar to the infinite scroll feature, the District alleges, Meta also employs an "autoplay" feature intended to keep children glued to Facebook and Instagram by automatically moving to the next "story" once one story is complete. Compl. ¶ 80.

- "Ephemeral content" is material Meta makes available on its platforms only temporarily. Compl. ¶ 83. Examples include "stories," which are available for viewing for a short time, and "Instagram live" videos, which are streamed in real time and not thereafter available. Compl. ¶¶ 84-86. Meta notifies users of the

availability of ephemeral content through push notifications and tells them the content will soon disappear forever. Compl. ¶ 83. The District alleges that the feature is intended to induce a fear of missing out ("FOMO") in children and to create a sense of urgency that encourages children to check their social media accounts on a frequent basis to avoid missing posts of interest. Compl. ¶¶ 83, 89.

- "Reels" uses Meta's algorithms to present short-form videos that are individually tailored to users' known interests. Compl. ¶ 90. Individual videos in a reel last fifteen to ninety seconds and are presented as an infinite stream; like the infinite scroll, they play automatically and perpetually as the user swipes up. Compl. ¶ 91. The District alleges that the addition of reels in 2020 and 2021 increased the addictive design of Facebook and Instagram and was created for the express purpose of attracting and increasing youth engagement. Compl. ¶¶ 90, 92. According to the District, the manner in which Reels are presented ensures that a child using Facebook or Instgram will not navigate away from the platform due to boredom. Compl. ¶ 91.

The District alleges that these design features foster compulsive and excessive use of Meta's platforms. The complaint cites internal data from Meta in 2019 showing that 55% of Meta's users in the United States suffered from problematic use, defined by Meta as "serious, negative impacts on sleep, relationships, work, or lives, combined with lack of control over [Facebook] use," while 3.1% of its users suffered from "severe" problematic use. Compl. ¶ 97. The District alleges that these harms are particularly acute in children, Compl. ¶ 98, and that the increased use of Meta's platforms is connected with significant psychological harms, including higher rates of major depressive episodes, anxiety, sleep disturbances, and suicide, Compl. ¶96, and with distinct changes in brain development that can adversely affect emotional regulation and impulse control, Compl. ¶ 103. According to the District, the frequency of suicidal thoughts in children has increased dramatically in recent years in parallel with the increase in children's use of social media. Compl. ¶¶ 111, 114.

The District also alleges that Meta is well aware of extensive psychological and survey data showing that its social media products harm children. For example, the District cites a 2021 study conducted in-house by Meta indicating that 6% of teen girls in the United States and 13% of those in the United Kingdom traced their desire to commit suicide or otherwise harm themselves to their use of Instagram. Compl. ¶ 128. Other internal Meta documents cited by the District describe the unique vulnerability of teenagers to features designed to cause addiction. As examples, the District quotes Meta researchers who have stated in internal reports that "[t]een brains are much more sensitive to dopamine," Compl. ¶ 119, that teenagers therefore "have a much harder time stopping [excessive use of Meta's platforms] even though they want to," *id.*, and that teenagers talk about their use of Meta's products like "addicts" and "wish they could spend less time caring about it, but they can't help themselves," Compl. ¶ 124.

Finally, the District alleges that Meta steadfastly refuses to take any action to mitigate its platforms' known harms to children. Specifically, the District alleges that Meta's leaders have repeatedly rejected steps recommended by the company's own internal researchers aimed at limiting the extent of the harm, such as by removing the most addictive design features described above, and that Meta's leaders have done so because they prioritize the company's profit over the safety and well-being of the children who use the company's platforms. Compl. ¶ 134.

Count II: Deceptive Trade Practices

The District alleges in Count II that Meta commits deceptive trade practices in violation of the CPPA by affirmatively misrepresenting to its consumers that its social media platforms are safe for children and by omitting from its statements and otherwise concealing from the public the known adverse effects on children of its addictive design features. The misrepresentations and omissions alleged in the complaint fall into the following categories:

- Meta falsely claims that its social media platforms are safe and age-appropriate for young people and that the platforms are not designed to take advantage of children's addictive tendencies, despite Meta's possession of information establishing precisely the opposite. Specifically, the District alleges that Meta officials and publications have falsely stated, among other things, that Meta does not set goals for increasing the amount of time users spend on its platforms, Compl. ¶¶ 43, 44, 88, 143, 148; that it does not quantify a lifetime monetary value for a child's use of its products, Compl. ¶ 46; and that it did not study dopamine feedback loops for the purpose of keeping users trapped on its platforms, Compl. ¶¶ 5, 119, 141.

- Meta knowingly misrepresents the appropriateness of its social media platforms for children and conceals the known risk that its platforms will expose children to harmful content. The District alleges, for example, that Meta claims it "age-gates" (limits children's access to) content understood to be inappropriate for young people, Compl. ¶ 149, even though Meta's own internal documents reveal, to the contrary, that Meta amplifies on its platforms psychologically and emotionally gripping content relating to eating disorders, violence, negative self-perception and body image, bullying, and other subjects harmful to children. Compl. ¶ 153. For example, the complaint cites internal Meta research showing that when a user follows anorexia-related content, the personalization algorithms provide the user additional anorexia-related content. Compl. ¶ 155. The complaint also alleges that Meta publicly characterizes Instagram as a source of support for teenagers struggling with thoughts of suicide and self-harm, Compl. ¶ 158, even though Meta's officials are fully aware, and have acknowledged internally, that the more time a user spends on Instagram, the more likely the user is to be exposed to admissions of suicide and self-harm. Compl. ¶ 154. The complaint states further that Meta claims its platforms are a source of support for teens struggling with mental health issues, Compl. ¶ 158, even though it knows that 13.5% of teen girls who use Instagram say the platform makes thoughts of suicide and self-harm worse, 17% say the platform makes eating issues worse, and one in three say Meta makes their body image issues worse, Compl. ¶ 156.

- Meta knowingly omits from its statements and conceals the existence and prevalence of adult predators who contact children via its social media platforms. In particular, the District alleges that Meta has failed to tell children or their parents that predatory adults pretending to be teens interact with minors on the platforms and prepare minors for "sextortion or CEI [child exploitive imagery] trading." Compl. ¶¶ 161, 166. The District alleges further that Meta

fails to warn children and their parents of the risks of adult predators notwithstanding a 2020 internal Meta report expressly finding that Instagram has "minimal child safety protections" and that the "interoperability" design feature of Meta's platforms increases the ability of predators to discover minors across apps. Compl. ¶ 162.

- Meta knowingly misleads consumers, including parents, about design features that promote body dysmorphia (a mental health condition that causes obsessive thoughts about perceived flaws in one's appearance) and eating disorders in children. As one example, the District alleges that Meta has told parents it has taken steps to combat body dissatisfaction and eating disorders, Compl. ¶ 168, when in fact Meta knows its platforms' visual selfie camera filters, which simulate facial plastic surgery, actively encourage body dysmorphia in young girls. Compl. ¶ 170. As another example, the District alleges that Meta's own employees recommended that a temporary ban on the visual selfie camera filters (put in place based on internal data showing the filters' negative psychological effects on teenage girls) be made permanent, Compl. ¶ 171, but that Meta's founder vetoed a permanent ban, falsely stating that he had seen "no data" suggesting the filters are harmful, Compl. ¶ 175. The complaint quotes a senior Meta staffer who noted her disagreement with this decision in a message to Meta's founder: "I don't think it's the right call given the risks . . . I just hope that years from now we will look back and feel good about the decision we made here." Compl. ¶ 176.

- Meta knowingly misleads consumers about the harms children face from features on its social media platforms that encourage social comparisons. As one example, the District alleges that Meta's "likes" feature, which allows users to tap a heart or a thumbs-up icon, causes unhealthy social comparisons among teenagers, Compl. ¶ 181, 182, and that showing users "like counts" exacerbates the problem, Compl. ¶ 183. Yet despite Meta's knowledge of the mental health effects of "likes" and "like counts," the District alleges, Meta's senior leadership has chosen to maintain this harmful feature while deceptively representing to the public that Meta favors the well-being of its users whenever it is faced with a choice between features that promote addictive user engagement and those that promote user well-being. Compl. ¶ 185. The District alleges further that Meta chose not to implement a proposal known as Project Daisy to remove "like counts" from Instagram posts, and that it falsely claimed its decision was based on user preferences rather than on concerns about a likely adverse impact on its revenue. Compl. ¶¶ 187, 193, 196.

- Meta knowingly misleads consumers concerning the safety of its social media platforms for children by making statements that omit, obscure, and misrepresent contrary internal research findings. The complaint describes several unpublished internal studies the District alleges Meta has hidden from the public, including a 2019 study finding that Instagram is addictive and creates low-level mental anxiety that can become more serious over time, Compl. ¶ 204; a 2019 study finding that one in two Instagram users experienced at least one mental-health-related issue in the preceding thirty days, Compl. ¶ 205; a 2020 internal literature review finding that Instagram worsened body dissatisfaction to a greater extent than the end of a relationship or the loss of a job, Compl. ¶ 206; a 2021 internal report finding that 68% of teenage girls experience negative social comparison on Instagram, Compl. ¶ 208; internal 2021 research showing that the personalization algorithm increases exposure to "negative appearance comparison-provoking" content, Compl. ¶ 209; and internal survey data showing that 6.7% of surveyed Instagram users in 2021 had seen self-harm content within the preceding seven days, Compl. ¶ 220, while 16.9% of users between thirteen and fifteen years old had seen content relating to self-harm on Instagram in the same period, *id.* The District alleges that Meta makes misleading statements contrary to the findings of these unpublished internal reports, such as a third quarter 2021 CSER Report in which Meta claimed that on Instagram "less than 0.05% of views were of content that violated our standards against suicide & self-injury," Compl. ¶¶ 218-219, thereby creating the misleading impression that Instagram users only very rarely experience content relating to suicide and self-injury, Compl. ¶ 221.

Meta's Motion to Dismiss

The case is now before the court on Meta's motion to dismiss the complaint for failure to state a claim on which relief can be granted. *See* Super. Ct. Civ. R. 12(b)(6). Meta makes three main arguments: first, that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, bars all of the unfair trade practice claims in Count I and the omissions-based deceptive trade practice claims in Count II because the challenged claims seek to treat Meta as the publisher of third-party content; second, that the First Amendment precludes the unfair trade practice claims in Count I because the District is seeking to hold Meta liable for organizing, disseminating, and otherwise exercising editorial judgment over protected third-party speech; and third, that the

complaint fails to state actionable claims under the CPPA because the statute does not apply to services provided free of charge, because the District has not alleged a substantial injury to the users of Meta's platforms, and because the misrepresentations alleged in the complaint are non-actionable puffery and/or constitutionally protected speech. Finally, Meta argues that there is no basis under the CPPA for the District to seek disgorgement as a remedy.

The District has filed an opposition to Meta's motion, and Meta has filed a reply. The parties presented oral arguments on June 6, 2024, and both parties have filed supplemental briefs and notices of additional authority.

The court has carefully considered the arguments of the parties and the many precedents the parties have brought to the court's attention. For the following reasons, the court concludes that Meta's motion to dismiss must be denied.

II. GOVERNING LEGAL STANDARD

A complaint is subject to dismissal under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure for failure to state a claim on which relief can be granted if it does not satisfy the requirement, set forth in Rule 8(a)(2), that it contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543~~-44~~ (D.C. 2011). The notice pleading rules do "not require detailed factual allegations," *id*. at 544 (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)), and all factual allegations in a complaint challenged under Rule 12(b)(6) must be presumed true and liberally construed in the plaintiff's favor, *Grayson v. AT&T Corp.*, 15 A.3d 219, 228-29 (D.C. 2011) (en banc). Nevertheless, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," and the plaintiff must plead "factual content that allows the court to draw the reasonable inference that

the defendant is liable for the misconduct alleged." *Potomac Dev. Corp.*, 28 A.3d at 544 (internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 678). Although a plaintiff can survive a Rule 12(b)(6) motion even if "recovery is very remote and unlikely," *Grayson*, 15 A.3d at 229 (quoting *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009), the "factual allegations must be enough to raise a right to relief above the speculative level," *OneWest Bank, FSB v. Marshall*, 18 A.3d 715, 721 (D.C. 2011) (internal quotation marks and brackets omitted). Conclusory allegations "are not entitled to the assumption of truth," and "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Potomac Dev. Corp.*, 28 A.3d at 544 (quoting *Iqbal*, 556 U.S. at 664).

III. SECTION 230

Congress enacted the Communications Decency Act of 1996 ("CDA") to modernize protections against obscenity and harassment in the digital age. S. Rep. No. 104-23, at 59 (1995); *see* Congressional Research Service, "Section 230: An Overview," January 4, 2024, at 1-2. The CDA contained provisions that increased the penalties for obscene, indecent, harassing, and other wrongful uses of telecommunications facilities by persons who knowingly and intentionally create and send prohibited messages or otherwise use telecommunications devices to harm others. S. Rep. No. 104-23, at 59. The statute also contained an immunity provision that was specifically intended to "exclude from liability telecommunications and information service providers and systems operators who are not themselves knowing participants in the making of or otherwise responsible for the content of the prohibited communications." *Id.*

The CDA's immunity provision is codified at 47 U.S.C. § 230, giving rise to the term "Section 230 immunity." Section 230 states, in subsection (c)(1), that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information

provided by another information content provider." Section 230 states further, in subsection (e)(3), that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §§ 230(c)(1), (e)(3). Together, subsections (c)(1) and (e)(3) provide immunity for telecommunications and information service providers and systems operators from claims that seek to treat them as publishers of information provided by other content providers. *See, e.g.*, *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 n.3 (11th Cir. 2006).

The question before this court is whether Section 230 immunizes Meta as a matter of law from any of the District's claims. Meta argues that Section 230 bars the District's unfair trade practice claims alleged in Count I because those claims are based on design features by which Meta makes publishing decisions regarding the organization, display, and dissemination of third-party content. Meta argues that Section 230 bars the omissions-based deceptive trade practice claims alleged in Count II because those claims are premised on the publication of third-party content. The District argues in opposition that Section 230 immunity is inapplicable because neither category of claims seeks to treat Meta as the publisher or speaker of any particular third-party content.

The parties agree that the Ninth Circuit's decision in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), sets forth the proper analytical framework for determining whether the immunity provisions of Section 230 apply in any given set of circumstances. *Barnes* created a three-part test, holding that Section 230 immunizes from liability "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." 570 F.3d at 1100-01. The parties agree further that Meta satisfies the first prong of the *Barnes*

test, as Meta is unquestionably an interactive computer service provider. The parties dispute whether Meta satisfies the second and third prongs.

Meta contends that the District is seeking to treat it as a publisher—thereby satisfying the second prong of the *Barnes* test—because its use of the challenged design features constitutes publishing activity and because it would have to change the manner, extent, and timing of its publication of third-party content if it were held liable in this case. Meta contends that the District seeks to treat it as a publisher of third-party content—thereby satisfying the third prong of the *Barnes* test—because it could not be held liable on the District's claims were it not for its publication of third-party content. Specifically, Meta argues that the addiction of children alleged in the complaint would not occur but for the third-party content published on its platforms. Meta thus contends that Section 230 bars all of the unfair trade practice claims alleged in Count I and the omissions-based deceptive trade practice claims alleged in Count II, the latter of which Meta argues are inextricably linked to its failure to edit or remove third-party content. Both sets of claims, Meta contends, seek to treat it as a publisher of third-party content and therefore fall within the reach of Section 230 immunity.[1]

The District argues, to the contrary, that the second and third prongs of the *Barnes* test are not satisfied because its complaint seeks neither to treat Meta as a publisher nor to hold Meta liable for any particular third-party content. In particular, the District argues that Meta's use of the challenged design features is not traditional publishing activity; that the remedies sought in the complaint would require Meta to change only the way it publishes content, not the content itself; that its claims cannot be brought against the content creators; and most important, that its

[1] Meta does not argue that Section 230 bars the deceptive trade practice claims in Count II based on alleged affirmative misrepresentations. Those claims, Meta argues, must be dismissed under the First Amendment and for failure to state a claim under the CPPA. The court will address those arguments below, in Sections IV and V, respectively.

claims alleged in Count I arise not from any particular third-party content but from the harmful effects of the addictive design features employed by Meta. As for the omissions-based claims alleged in Count II, the District argues that Section 230 poses no bar to Meta's liability because the claims do not seek to treat Meta as a publisher of third-party content and because Meta could avoid liability in the future without changing the third-party content it publishes—that is, Meta could simply stop making statements that have a tendency to mislead due to their omission of inconsistent or contrary information.

The case presents a potentially close question on the second prong of the *Barnes* test. The parties make interesting arguments on whether Meta's creation and use of the challenged design features constitutes publishing activity, and the case law, all of it non-binding, yields no definitive answer. *Compare, e.g., In re Soc. Media Adolescent Addiction/Personal Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 831, 833-34 (N.D. Cal. Nov. 14, 2023), *with Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997), and *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091-93 (9th Cir. 2021); *see also Utah Div. of Consumer Prot. v. Meta, No. 230908060*, slip op. at 11-12 (Utah 3d Dist. Ct. July 25, 2024). In the end, the court need not decide whether Meta has satisfied the second prong of the *Barnes* test, because the court concludes that Meta has not satisfied the third prong, at least not as a matter of law at the pleading stage.

Again, the third prong of the *Barnes* test requires a social media company claiming immunity under Section 230 to establish that the plaintiff, through its state law claims, seeks to treat the company as the publisher of "information provided by another information content provider"—*i.e.*, of third-party content. Neither the Supreme Court nor the District of Columbia Court of Appeals has had occasion to decide the merits of a dispute over the third prong of the *Barnes* test or otherwise to interpret the reach of Section 230 immunity. This court thus looks to

persuasive case law from other jurisdictions. That case law leads to the conclusion that a social media company satisfies the third prong of the *Barnes* test and thereby qualifies for immunity under Section 230 only for harms arising from particular third-party content displayed on the company's platforms.

The Ninth Circuit's decision in *Lemmon* is particularly instructive. The court held in *Lemmon* that Section 230 did not bar the plaintiffs' claim against an interactive computer service provider in part because the claim did not seek to hold the provider liable for third-party content. 995 F.3d at 1093. Two sets of parents sued Snap, the provider of the social media site Snapchat, over the deaths of their teenage sons, who died in a car crash minutes after uploading a snap on the platform with a filter showing the car's speed (more than 100 miles per hour). *Id*. at 1087-88. The plaintiffs alleged that Snap negligently designed its speed filter in a way that incentivized users to drive at dangerous speeds. *Id*. at 1097. Snap claimed immunity under Section 230. *Id*. The court rejected the Section 230 defense, holding that "[b]y its plain terms, and as the last part of the *Barnes* test recognizes, § 230(c)(1) cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties." *Id*. at 1093. The court explained that the plaintiffs' "claim [did] not turn on information provided by another information content provider" in that it "[did] not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sen[t]" or, more specifically, on "the content of [the late teenager's] particular snap." *Id*. at 1093-94 (internal quotation marks omitted). The court noted that "[t]hose who use the internet . . . continue to face the prospect of liability, even for their 'neutral tools,' so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools." *Id*. at 1094. The court emphasized that it was not the third-party content that caused the plaintiffs' injuries: "[t]he danger is not the Snap [message using the

Speed Filter] itself. Obviously, no one is harmed by the post. Rather, the danger is the speeding." *Id*. at 1093 (quoting the plaintiffs' amended complaint).[2]

Most courts that have considered the scope of the immunity provided by Section 230 have used language consistent with that used in *Lemmon*. Indeed, the 11th Circuit observed in *Almeida* that "[t]he majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable *for information* originating with a third-party user of the service.'" 456 F.3d at 1321 (emphasis added) (quoting *Zeran*, 129 F.3d at 330); *see Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (same); *Herrick v. Grindr LLC*, 765 Fed. App'x 586, 590 (2d Cir. 2019) (focusing on whether the claims in the case are "based on information provided by another content provider" and seek to "treat [the provider] as the publisher or speaker of the offensive content"); *see also Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016); *Henderson v. Source For Pub. Data, L.P.*, 53 F.4th 110, 123 (4th Cir. 2022); *Doe v. MySpace Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008); *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019); *cf. Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1251 (D.C. 2016) (noting, in dictum, that the D.C. Circuit has stated that Section 230 immunity applies if, among other things, the "statement *on which liability is based* is 'provided by another content provider'" (emphasis added) (quoting *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)).

[2] The court also held that the second prong of the *Barnes* test was not satisfied, because the plaintiffs' claim treated Snap as a product designer rather than a publisher. *Lemmon*, 995 F.3d at 1092. The court made clear, however, that "even if Snap [were] acting as a publisher in releasing Snapchat and its various features to the public," the plaintiffs' claim still would not be barred by Section 230 because it "is not predicated on information provided by another information content provider." *Id*. at 1094 (internal quotation marks omitted).

The immunity created by Section 230 is thus properly understood as protection for social media companies and other providers from "intermediary" liability—liability based on their role as mere intermediaries between harmful content and persons harmed by it. *See Herrick*, 765 Fed. Appx. at 590 (holding that the defendant provider was entitled to Section 230 immunity as an intermediary because a third-party's content was "precisely the basis of [the plaintiff's] claims that [the provider's platform] is defective and dangerous"); *Internet Brands, Inc.*, 824 F.3d at 852 (holding that the defendant provider could not be held liable as an intermediary for third-party content because the defendant did not transmit any harmful messages). As the Fourth Circuit has explained, "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330-31.

Citing a long list of cases, Meta nonetheless asserts that courts have overwhelmingly found social media companies and other internet content providers categorically immune under Section 230 for their use of algorithms, notifications, and other design features like those at issue in this case. Meta reads far too much into these other cases. Other than a recent ruling by the judge presiding over related multi-district litigation—to be addressed below—all of the decisions on which Meta relies were issued in cases in which plaintiffs sought to hold providers liable for specific (and harmful) third-party content. Other than the multi-district litigation, none of the cases cited by Meta held that Section 230 bars liability where, as here, the third-party content is irrelevant to the claim.[3]

[3] *See Backpage.com*, 817 F.3d at 16-17 (sex trafficking ads); *Herrick*, 765 Fed. App'x at 588 (profile impersonating someone); *Nemet Chevrolet, Ltd. v. Consumeraffairs.Com, Inc.*, 591 F.3d 250, 252 (4th Cir. 2009) (negative customer reviews of plaintiff's business); *Zeran*, 129 F.3d at 328 (defamatory messages); *Dyroff v. Ultimate Software Grp.*, Inc., 934 F.3d 1093, 1095 (9th Cir. 2019) (posts coordinating a drug deal); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016) (negative reviews of plaintiff's business); *Barnes*, 570 F.3d at 1098 (revenge porn); *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d

The cases relied on by Meta are thus fully consistent with this court's conclusion that Section 230 protects against liability only "for information originating with a third-party user." *Johnson*, 614 F.3d at 791; *see Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019) (same). As the court stated in *Lemmon*, 995 F.3d at 1094, "while providing content-neutral tools does not render an internet company a 'creator or developer' of the downstream content that its users produce with those tools, our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools."

1102, 1108 (9th Cir. 2007) (copyrighted images); *Almeida*, 456 F.3d at 1318 (misappropriated photograph); *Marshall's Locksmith*, 925 F.3d at 1265 (scam posts); *Klayman*, 753 F.3d at 1355 (Facebook page that incited violence); *Doe v. Grindr Inc.*, No. 2:23-CV-2093-ODW, 2023 U.S. Dist. LEXIS 230505, at *8-10 (C.D. Cal. Dec. 28, 2023) (profile content, including user age); *M.P. v. Meta Platforms, Inc.*, 692 F. Supp. 3d 534, 537 (D.S.C. 2023) (white supremacist content), *remanded on other grounds*, *M.P. v. Meta Platforms Inc.*, No. 23-1880, 2023 U.S. App. LEXIS 24059, at *1-2 (4th Cir. Sep. 7, 2023); *McCarthy v. Amazon.com, Inc.*, 679 F. Supp. 3d 1058, 1064-65 (W.D. Wash. 2023) (post selling sodium nitrite); *L.W. v. Snap, Inc.*, 675 F. Supp. 3d 1087, 1093 (S.D. Cal. June 5, 2023) (child sex abuse material); *Bride v. Snap, Inc.*, No. 2:21-CV-6680-FWS-MRW, 2023 U.S. Dist. LEXIS 5481, *2 (C.D. Cal. Jan. 10, 2023) (harassing messages), *aff'd in part, rev'd in part sub nom., Est. of Bride v. YOLO Techs., Inc.*, No. 23-55134, 2024 U.S. App. LEXIS 21229, at *1 (9th Cir. Aug. 22, 2024); *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 278 (E.D. Pa. 2022) (self-asphyxiation videos), *rev'd in part*, *Anderson v. TikTok, Inc.*, No. 22-3061, 2024 U.S. App. LEXIS 21771, at *5 (3d Cir. Aug. 27, 2024) (holding that Section 230 did not bar the plaintiff's claims); *Doe v. Snap, Inc.*, 2022 U.S. Dist. LEXIS 119560, *1-2 (S.D. Tex. July 7, 2022) (sexually explicit messages and photos), *aff'd*, *Doe v. Snap, Inc.*, No. 22-20543, 2023 U.S. App. LEXIS 16095, at *3 (5th Cir. June 26, 2023); *FTC v. Match Grp.*, Inc., No. 3:19-CV-2281-K, 2022 U.S. Dist. LEXIS 52960, at *4, 23-26 (N.D. Tex. Mar. 24, 2022) (third-party communications perpetuating scams); *Rodriguez v. OfferUp, Inc.*, No. 8:19-CV-1290-T-30SPF, 2019 U.S. Dist. LEXIS 247480, at *5-6 (M.D. Fla. Aug. 29, 2019) (misleading advertisement that led to violent robbery and shooting); *Force v. Facebook, Inc.*, 934 F.3d 53, 59 (2d Cir. 2019) (posts allegedly inciting terrorist attacks); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1120 (N.D. Cal. 2016) (radicalizing propaganda allegedly linked to terrorist attacks), *aff'd on other grounds*, 881 F.3d 739, 750 (9th Cir. 2018) (declining to decide whether Section 230 barred the plaintiffs' claims); *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998) (defamatory statement); *In re Facebook*, 625 S.W.3d 80, 84-85 (Tex. 2021) (grooming messages allegedly aimed at luring victims into sex trafficking), *cert. denied sub. nom., Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1087 (2022); *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 255 (Cal. Ct. App. 2017) (posts that allegedly incited violence).

The only other case relied on by Meta, *Prager Univ. v. Google LLC*, 301 Cal. Rptr. 3d 836 (Cal. Ct. App. 2022), is inapposite. Prager University sued Google for deplatforming its YouTube posts because of its conservative views, and Google claimed immunity under Section 230. *Id.* at 843-44. The case thus involved a provider's claim of immunity for its actions *restricting* access to (rather than publishing) third-party content. Indeed, although the judge in the case found Google immune under § 230(c)(1), *id.* at 847, the immunity question was properly governed by § 230(c)(2).

The case law also refutes Meta's argument that the third prong of the *Barnes* test is satisfied as long as the District's claims would not exist but for Meta's publication of third-party content. Meta asserts, in this regard, that the District's claims based on addictive design features seek to hold it liable for third-party content, giving rise to Section 230 immunity, because there would be nothing for children to become addicted to if not for the third-party content Meta publishes. But-for causation, however, is not sufficient to implicate Section 230 immunity. As the court explained in *Internet Brands, Inc.*:

> [H]osting [the plaintiff's] user profile on [its] website . . . could be described as a "but-for" cause of [the plaintiff's] injuries. Without it, Flanders and Callum would not have identified her and been able to lure her to their trap. But that does not mean the failure to warn claim seeks to hold Internet Brands liable as the "publisher or speaker" of user content.
>
> Publishing activity is a but-for cause of just about everything [the defendant] is involved in. It is an internet publishing business. Without publishing user content, it would not exist. As noted above, however, we held in *Barnes* that the CDA does not provide a general immunity against all claims derived from third-party content.

824 F.3d at 853; *see also Henderson*, 53 F.4th at 123 (stating that the finding that the defendant's publication of information and "the content of the information published" were but-for causes of the plaintiff's claims was not alone sufficient to trigger Section 230 immunity, "as we do not apply a but-for test.").

As indicated above, the related multi-district litigation is the one case cited by Meta in which a court has found Section 230 immunity applicable even though the claims in the case are not based on any particular third-party content. In *In re Soc. Media Adolescent Addiction*, the court considered whether Section 230 barred claims, similar to those alleged here, based on the addictive effects of design features employed by Meta and other social media providers. 702 F. Supp. 3d 809. The court granted the defendants' motion to dismiss most of the claims, holding

that the claims were barred by Section 230 because they stemmed from the defendants' publishing activities. *Id*. at 831, 833-34. The court did not squarely address the contrasting view, advanced by the District and adopted by this court, that Section 230 provides immunity only for claims based on the publication of particular third-party content. *See id*. This court respectfully declines to follow the decision of the judge in the multi-district litigation, as that decision is inconsistent with this court's reading of the case law and the purpose of the Section 230 immunity provisions.

Indeed, other courts that have recently considered assertions of Section 230 immunity in cases involving the same types of claims have ruled consistently with this court's interpretation of the reach of the statute. In *Netchoice, LLC v. Reyes*, No. 2:23-cv-00911-RJS-CMR, LEXIS 129686, at *2-5 (D. Utah July 22, 2024), a trade association representing internet companies including Meta sued the State of Utah over a statute that banned social media companies from using autoplay, infinite scroll, and push notifications and empowered the state to bring civil actions to enforce the ban. The court rejected Netchoice's argument that actions brought under the Utah statute were invalid under Section 230, holding that the Utah statute lacked "a critical component"—specifically, "an effort to hold a website liable for content produced by third-party users"—present in cases in which Section 230 immunity was found to apply. *Id.* at *14. Because the Utah statute did not make social media companies liable *for* third-party content, the court held, the statute did not run afoul of Section 230. *Id*. at *14. *See also State v. Meta Platforms, Inc.*, No. 23-CV-4453, LEXIS 146, *15-16 (Vt. Super. Ct. July 28, 2024) (holding that Section 230 does not bar the plaintiff's claims against Meta based on its allegedly defective features because "[w]hether [users] are watching porn or puppies, the claim is that they are harmed by the time spent, not by what they are seeing"—*i.e.*, the plaintiff is "not seeking to hold

Meta liable for any content provided by another entity"); Pl.'s Not. of Supp. Auth. Ex. A, *State of Tenn. v. Meta et al.*, slip op. at 19 (Tenn. Chancery Ct. 20th Dist. March 13, 2024) (holding that Section 230 does not bar the plaintiff's claims against Meta because "the features themselves allegedly operate to addict and harm Young Users, regardless of the particular third-party content viewed by the Young Users"); *In re Coordinated Proceeding Special Title Rule 3.550 Soc. Media Cases*, 2023 Cal. Super. LEXIS 76992, *99 (Super. Ct. Cal. Oct. 13, 2023) (holding that Section 230 does not bar the plaintiffs' claims against Meta and other social media companies "based on the allegedly addictive qualities of the interactive features of [their] social media sites" because the companies "are allegedly liable for their own actions, not for the content of third-party postings").

The court therefore concludes that Section 230 provides Meta and other social media companies immunity from liability under state law only for harms arising from particular third-party content published on their platforms.

This interpretation of the statute leads to the further conclusion that Section 230 does not immunize Meta from liability for the unfair trade practice claims alleged in Count I. The District alleges that it is the addictive design features employed by Meta—and not any particular third-party content—that cause the harm to children complained of in the complaint. Compl. ¶ 242. As in *Lemmon*, therefore, the District does not seek to "blame [the provider] for the content that third parties generate" on its platforms, only for the "tools" the provider uses to present whatever content third parties provide. 995 F.3d at 1094. Given that Section 230 immunity is limited to liability for harms arising from particular third-party content, the statute provides no protection to Meta here, at least not at the pleading stage, at which the court is required to accept as true the well-pled facts alleged in the complaint.

The court reaches the same conclusion regarding the omissions-based deceptive trade practice claims alleged in Count II. Through those claims, the District seeks to hold Meta liable for concealing information in its possession about harmful third-party content on its platforms that would have contradicted Meta's public statements about its platforms' safety, and for omitting information in its possession about the prevalence of sexual predators on its platforms and the dangers to children of certain design features, including its plastic surgery filter. Again applying the *Barnes* three-part analytical framework, the court concludes that Section 230 provides no refuge to Meta because none of the omissions-based deceptive trade practice claims seeks to treat Meta as a publisher of any particular third-party content.

The court notes that both parties refer to these allegations as "failure to warn" claims and discuss cases from other jurisdictions that address the availability of Section 230 immunity from tort claims based on a defendant's common law duty to warn certain types of plaintiffs of certain types of harms. Such "failure to warn" claims may give rise to Section 230 immunity if they are the functional equivalent of claims that would be barred by the statute—*i.e.*, if they seek to hold internet service providers liable for failing to provide warnings about offensive or otherwise tortious third-party content on their platforms. Arguably, such claims might be understood as efforts to treat the providers as publishers of the harmful third-party content, potentially giving rise to Section 230 immunity.

But that is not what the District seeks to accomplish through its omissions-based deceptive trade practice claims. A deceptive omission claim under the CPPA "does not require a plaintiff to plead and to prove a duty to disclose information." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 444 (D.C. 2013). Rather, under the CPPA a plaintiff need prove only that the defendant omitted material information and that the omission had a tendency to mislead

consumers. *Id.* ("Under [D.C. Code] § 28-3904(f), [the plaintiff] must show that the omitted information is material and has a tendency to mislead."). The CPPA thereby effectively imposes a duty on all merchants to disclose information if the information is material and if a failure to disclose the information has a tendency to mislead. Case law cited by the parties regarding common law failure to warn claims is thus inapplicable to the statutory claims at issue in this case.

A closer look at the claims themselves establishes that the claims are not based on Meta's publication of particular third-party content. The District alleges that Meta's omissions about the prevalence of harmful third-party content on its platforms are actionable under the CPPA because the omitted information contradicted Meta's affirmative representations about the safety of its platforms and rendered those representations misleading. *See, e.g.*, Compl. ¶ 149 (alleging that Meta claims it 'age-gates' inappropriate content for children while failing to disclose that it serves children age-inappropriate content). The deceptiveness of these omissions is tied to Meta's own allegedly false, incomplete, and otherwise misleading representations, not to Meta's publication of any particular third-party content. The third prong of the *Barnes* test therefore is not satisfied. Indeed, contrary to an assertion in its brief, Meta would not have to change the content it publishes or engage in any content moderation to avoid liability for future omissions claims. Rather, Meta can simply stop making affirmative misrepresentations about the nature of the third-party content it publishes, or it can disclose the material facts within its possession to ensure that its representations are not misleading or deceptive within the meaning of the CPPA. *See Est. of Bride*, No. 23-55134, 2024 U.S. App. LEXIS 21229, at *18 (9th Cir. Aug. 22, 2024) (holding that Section 230 did not bar the plaintiffs' misrepresentation claims—based on an allegation that the defendant failed to ban users who bullied or harassed others after stating it

would do so—even though "online content [was] involved in these facts, and content moderation [was] one possible solution").

The District's claim that Meta has unlawfully omitted information it obtained from internal and external reports about the prevalence of sexual predators on its platforms similarly falls outside the scope of Section 230 immunity. The claim seeks to impose liability on Meta based on its failure to disclose information about the dangers posed by predatory users of its platforms and the ability of those predatory users to connect with children on the platforms. *See* Compl. ¶ 165 (alleging that Meta is aware that a "top privacy problem (based on prevalence and severity) on Instagram is receiving messages from unwanted people"); Compl. ¶ 160 ("Because it fails to disclose these known risks to children and their parents, Meta allows them a false sense of security."). The focus of this claim is on Meta's failure to disclose its knowledge of the sexual predators who are able to contact minors over its platforms, not on the content of any messages those sexual predators send. The claim therefore does not seek to hold Meta liable for any particular third-party content.

Meta, moreover, could avoid liability for such claims in the future without engaging in content moderation. It could disclose the information it has about the prevalence of sexual predators operating on its platforms, and it could take steps to block adult strangers from contacting minors over its apps. Indeed, the District alleges that Meta planned to work on "block[ing] unconnected adults on [Facebook] and [Instagram] from initiating messages with minors on [Facebook]" but that "it does not appear Meta ever implemented the 'block.'" Compl. ¶ 163.

Finally, the District alleges that Meta omitted information about known harms of its design features, including its plastic surgery filter.[4] Compl. ¶ 170-78. The District's claim is fairly understood as alleging that Meta's omissions are unlawful given its statements suggesting that its platforms do not foster eating disorders, *see* Compl. ¶ 167-69, or as alleging that Meta had a duty to disclose the harms of its features and failed to do so, *see* Compl. ¶ 178. Either way, the claim is not barred by Section 230. If the claim seeks to hold Meta liable for omissions that make its statements about eating disorders misleading, then, as with the omissions regarding the prevalence of harmful third-party content on Meta's platforms, the claim seeks to hold Meta liable for its own false, incomplete, and otherwise misleading representations, not for its publication of any particular third-party content. If the claim seeks to hold Meta liable for breaching a duty to disclose the harms of its platforms' features, including the plastic surgery filter, then the claim is based on Meta's own conduct, not on any third-party content published on its platforms.

For all of these reasons, the court concludes that Section 230 does not bar any of the District's claims as a matter of law at the pleading stage.

IV. FIRST AMENDMENT

Meta contends that the unfair trade practice claims alleged in Count I of the complaint are barred by the First Amendment because the District seeks to hold the company liable for organizing, disseminating, and otherwise exercising editorial judgment over protected third-party

[4] Meta's motion to dismiss specifically cites the District's claim about its plastic surgery filter, *see* Compl. ¶ 178, but Meta's broad language and the way it quotes the complaint suggests it may be referring to all alleged omissions relating to harmful design features. *See* MTD at 15 (citing Compl. ¶ 178 as saying "'Meta ha[d] . . . an obligation to disclose the[] risks and harms' of "harmful features'"). To the extent Meta seeks the dismissal of claims based on omissions relating to other design features, the court's analysis would lead to the same conclusion the court reaches with regard to the claim based on omissions relating to the plastic surgery filter.

speech. Meta contends further that the deceptive trade practice claims alleged in Count II also run afoul of the First Amendment to the extent the District seeks to hold the company liable for its officials' statements of opinion and privileged testimony to Congress.

The court will address Meta's First Amendment challenge to the unfair trade practice claims in this section. It will address Meta's First Amendment challenge to the deceptive trade practice claims in the course of its discussion of the CPPA in Section V.

As an initial matter, the court is not persuaded that the District's unfair trade practice claims implicate the First Amendment. The District seeks to hold Meta liable for the company's use of addictive design features aimed at maximizing the amount of time children spend on its social media platforms. The District does not seek to hold Meta liable for any of the content hosted on those platforms or for any message expressed or intended through the use of the design features at issue. Asked at oral argument to identify such a message, Meta's counsel pointed out (correctly) that Meta's content moderation activities express a message. Meta's content moderation activities are not at issue in this case, however, and Meta's counsel was unable to articulate any message expressed or intended through Meta's implementation and use of the challenged design features.

In a variety of contexts, the Supreme Court has afforded First Amendment protection to the "editorial function itself." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 737 (1996). The Court's decisions prohibit the government from requiring newspapers to afford a right of reply to political candidates, *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974); from forcing a company to offer a forum for alternate viewpoints in its newsletter; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4, 20-21 (1986); and from compelling parade organizers to include a group that advocates a message with

which the organizers disagree, *Hurley v. Irish-American Gay*, 515 U.S. 557, 559, 581 (1995). These cases are not controlling here, however, because all of them involved state action that interfered with messaging or other expressive conduct—a critical element that is not present in the case before this court.

Nor are the many other cases cited by Meta helpful to its cause, as every one of them in which the court found challenged conduct to be protected by the First Amendment involved an identifiable message. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 593, 596-97 (2023) (marriage website design expresses views on marriage and same-sex marriage); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021) (donating money to specific charities expresses a view); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752-53 (8th Cir. 2019) (wedding videography expresses views on marriage and same-sex marriage); *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1187-88 (N.D. Cal. 2022), *aff'd sub nom.*, *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023) (Twitter's actions in removing, suspending, or adding disclaimers about posts were inherently expressive because "[t]hese decisions operated 'together with numerous decisions regarding other tweets and users to more broadly shape and develop the nature, tone, and substance of the ongoing dialogue that Twitter seeks to foster and present on its platform.'") (quoting Twitter's reply brief).

And although the Supreme Court's recent decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), is informative, it is similarly unhelpful to Meta. In *Moody*, the Court remanded decisions of the Fifth and Eleventh Circuits for reconsideration of facial challenges to state laws that would restrict the ability of social media companies to engage in content moderation. *Id.* at 2399. In an effort to ensure proper First Amendment analyses on remand, the Court noted that "[d]eciding on the third-party speech that will be included in or excluded from a compilation—

and then organizing and presenting the included items—is expressive activity of its own." *Id*. at 2402. Relying on *Hurley*, moreover, the Court stated that "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* at 2402.

Moody, however, involved First Amendment concerns that are not present in the case before this court. In particular, *Moody* involved state regulations of online platforms' decisions to remove or deprioritize posts based on the posts' content or viewpoint. *Id.* at 2395-96. Deprioritizing content relates to "the organizing and presenting" of content, *id.* at 2402, as do the design features at issue here. But the reason deprioritizing specific content or content providers can be expressive is not that it affects the way content is displayed; it can be expressive because it indicates the provider's relative approval or disapproval of certain messages. The Court stated:

> [A social media feed] is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality.

Id. at 2405; *see also id.* at 2408 ("Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, *communicating different values and priorities*. But under the First Amendment, that is a preference Texas may not impose.") (emphasis added).

The Supreme Court, moreover, expressly limited the reach of its holding in *Moody* to algorithms and other features that broadly prioritize or deprioritize content based on the *provider's* preferences, and it emphasized that it was not deciding whether the First Amendment applies to algorithms that display content based on the *user's* preferences. "We therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the

content they appear to want, without any regard to independent content standards." *Id*. at 2404 n.5 (citing *post*, at 2 (Barrett, J., concurring)).

Meta nonetheless asks this court to focus on the Supreme Court's statements in *Moody* that content moderation activity is "expressive activity of its own" and that "a narrow, succinctly articulable message is not a condition of constitutional protection." These statements are of course significant, given the court that made them, but they do not aid Meta's case. As discussed, the District's unfair trade practice claims challenge Meta's use of addictive design features without regard to the content Meta provides, and Meta has failed to articulate even a broad or vague message it seeks to convey through the implementation of its design features. So although regulations of community norms and standards sometimes implicate expressive choices, the design features at issue here do not.

Moreover, even if the District's prosecution of its unfair trade practice claims implicated the First Amendment, the court could not find, at least not at the pleading stage, that the District's pursuit of the claims violates the First Amendment as a matter of law. Intermediate scrutiny must be applied when a statute implicates expression but is content-neutral. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (Turner I); *see also 303 Creative LLC*, 600 U.S. at 626, 630 (citing *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968)). To satisfy that constitutional standard, the "law must further a substantial governmental interest that is unrelated to the suppression of expression," *Moody*, 144 S. Ct. at 2407 (internal quotation marks omitted), and that "'would be achieved less effectively absent the regulation,'" *303 Creative LLC*, 600 U.S. at 626 (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006)).

The District easily satisfies this standard at the pleading stage. The CPPA is a content-neutral statute focused on the protection of consumers. The District's stated interest in prosecuting its claims is the protection of children from the significant adverse effects of the addictive design features on Meta's social media platforms. The District's interest has nothing to do with the subject matter or viewpoint of the content displayed on Meta's platforms; indeed, the complaint alleges that the harms arise without regard to the content served to any individual user. Compl. ¶ 242. Meta, moreover, has not suggested any reason to believe that the "manifest purpose" of the District's claims is "to regulate speech because of the message it conveys." *Turner I*, 512 U.S. at 645.

The court therefore has little difficulty concluding that the allegations in Count I of the complaint would be sufficient at the pleading stage to survive intermediate scrutiny even if the court were to find that the District's prosecution of its unfair trade practice claims somehow burdens Meta's expressive activity. The District has a substantial interest in protecting the city's children from the dire mental health effects of Meta's addictive design features, *see Moody*, 144 S. Ct. at 2403 (recognizing that an emerging danger of social media is its effects on adolescents' mental health), and its interest is unrelated to the suppression of expression. The District alleges, moreover, that Meta has steadfastly refused to modify its use of the addictive design features in response to the many internal and external studies that have exposed the dangers of those features to children. It therefore appears that the District's interest in protecting the city's children would be achieved less effectively without this litigation.

For all of these reasons, Meta's request for the dismissal of the unfair trade practices claims on First Amendment grounds must be rejected.

V. CONSUMER PROTECTION PROCEDURES ACT

The CPPA protects consumers against false, deceptive, and unfair business practices. *Earth Island Institute v. The Coca-Cola Co.*, No. 22-CV-0895, 2024 D.C. App. LEXIS 330, at *17 (D.C. August 29, 2024). It is "a broad consumer protection statute, meant to 'assure that a just mechanism exists to remedy all improper trade practices.'" *Id*. (quoting D.C. Code § 28-3901(b)(1)). It "establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia," and it is to be "construed and applied liberally to promote its purpose." D.C. Code § 28-3901(c).

Meta nonetheless contends that the complaint fails to state plausible claims for relief under the CPPA. Specifically, Meta argues that (1) the CPPA does not apply to its conduct because users have free access to its social media platforms and its provision of services thus does not constitute a "sale, lease or transfer" of consumer goods or services; (2) the District has not alleged the type of economic or monetary harm necessary to establish the "substantial injury" required for unfair trade practice claims; (3) the District's deceptive trade practice claims are based on non-actionable "puffery" and on other speech protected by the First Amendment; and (4) disgorgement is not a remedy available to the District under the statute.

The court will address each of these arguments in turn.

Applicability of CPPA to Meta's Free Services

Despite the statute's intended breadth, the reach of the CPPA is not unlimited. By its express terms, and as relevant here, the CPPA applies to trade practices only to the extent they relate to the "sale, lease or transfer" of consumer goods or services. *See* D.C. Code § 28-3901(a)(6) (defining "trade practice" as "any act which does or would create, alter, repair,

furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services").

Meta argues that its services are not sold, leased, or transferred within the meaning of § 28-3901(a)(6) because they are provided free of charge to the users of its social media platforms. In particular, Meta contends that the free access it provides to its users clearly is not a "sale" or a "lease" of its platforms and services and that it also cannot plausibly be considered a "transfer" because no ownership interest in its platforms or services is transferred to its users. Meta argues, in this regard, that under the *ejusdem generis* principle of statutory construction the terms "sale," "lease," and "transfer" should be interpreted consistently to require payment and the conveyance of an ownership or other property interest. *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1139 (D.C. 2016) ("The canon of *ejusdem generis* counsels that the meaning of a catchall term [in a statute] is informed by the list of words preceding it.").

The court is not persuaded by Meta's reliance on the canon of *ejusdem generis*. "Transfer" is not a "catchall term" found at the end of a list of more specific terms in § 28-3901(a)(6). It is one of three specific terms listed in the statute. The canon of *ejusdem generis* therefore provides no guidance here.

As to the merits of Meta's argument, the court agrees that the use of Meta's social media platforms does not involve a "sale" or a "lease." But the terms "sale" and "lease" must refer to different types of transactions than the term "transfer," else "transfer" would be superfluous and would add nothing to the scope of the statute's reach. *See D.C. Bd. of Elections v. District of Columbia*, 866 A.2d 788, 795 (D.C. 2005) ("A basic principle [of statutory construction] is that each provision of the statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous.") (quoting *United States Parole Comm'n v.*

Noble, 693 A.2d 1084, 1107-08 (D.C. 1997)). Indeed, it would be illogical to require the conveyance of an ownership or other property interest where the provision of services, as opposed to goods, is at issue. The providers of services ordinarily do not, and cannot, transfer property interests in their services to their customers. The Court of Appeals appears to agree, at least implicitly, having repeatedly applied the CPPA in cases involving the provision of services through which no transfer of property interests appears to have occurred. *See, e.g.*, *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1002, 1008 (D.C. 2020) (medical services); *Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714, 717, 733 (D.C. 2003) (cable television services).

The CPPA, moreover, defines the term "consumer" as "a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services." D.C. Code § 28-3901(a)(2)(A). The inclusion of the term "receive" in addition to the terms "purchase" and "lease" in the definition of "consumer" strongly suggests the legislature's intention that the statute cover circumstances in which a person receives goods or services free of charge or in return for something of value other than a direct monetary payment. Here, of course, the District alleges that Meta receives something of very significant value in return for the use of its platforms: the right to monetize its users' time and data.

The court thus concludes that the complaint plausibly alleges a "transfer" of consumer goods and services within the meaning of D.C. Code § 28-3901(a)(6) even though Meta does not charge a fee for the use of its social media platforms. At least at the pleading stage, therefore, Meta's argument that the CPPA is inapplicable to the conduct alleged in the complaint must be rejected.

Substantial Injury

Meta contends next that the unfair trade practice claims alleged in Count I fail as a matter of law because the District has not alleged economic or monetary harm, a necessary component of the "substantial injury" required to prove claims of unfair trade practices. The court concludes otherwise.

The CPPA does not expressly require a showing of "substantial injury." It provides that in construing the term "unfair or deceptive trade practice" due consideration must be given to the interpretations by the Federal Trade Commission ("FTC") and the federal courts of the term "unfair or deceptive act or practice" in the Federal Trade Commission Act ("FTC Act"). D.C. Code § 28- 3901(d). The FTC Act in turn provides that the FTC may not "declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). The FTC has determined that "'ordinarily' 'emotional impact and other more subjective types of harm' would not make a practice unfair," *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (quoting Letter from FTC to Senators Ford and Danforth, 39 (Dec. 17, 1980)), and federal case law suggests that monetary harm is usually required for a showing of substantial injury, *see, e.g.*, *FTC v. Direct Mktg. Concepts, Inc*., 569 F. Supp. 2d 285, 299 (D. Mass. 2008) ("In most cases 'substantial injury' involves monetary harm.").

Monetary harm, however, is not always a necessary component of "substantial injury." The FTC determined in *In re Int'l Harvester Co*., 104 F.T.C. 949, 1064 (F.T.C. Dec. 21, 1984), that farm equipment caused substantial injury where a design flaw led to severe burns "resulting

in mobility limitations, lasting psychological harm, and severe disfigurement." The FTC held that health risks caused by the equipment, rather than any monetary injury, supported a finding of substantial injury, explaining that "unwarranted health and safety risks may also support a finding of unfairness." *Id*. at 1061. The FTC expressly noted that "i[n] an extreme case . . . where tangible injury could be clearly demonstrated, [even] emotional effects might possibly be considered as the basis for a finding of unfairness." *Id*. at 1073 n.36. Federal courts have reached the same conclusion, holding that non-monetary, and even non-tangible, harms can be sufficient for a finding of substantial injury. *See, e.g.*, *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1395 (M.D. Fla. 2018) ("[N]either the legislative history nor the current law requires proof of tangible harm to the exclusion of intangible harm."); *see also FTC v. Wyndham Worldwide Corp*., 799 F.3d 236, 246 (3d Cir. 2015) ("[T]he FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs.").

Taken as true at the pleading stage, as they must be, the allegations in the complaint are sufficient to place this case in the category of unusual cases in which "substantial injury" can be established without proof of economic harm. The District alleges that Meta's addictive design features significantly increase rates among children of major depressive episodes, anxiety, sleep disturbances, and other mental health disorders, including suicide. Compl. ¶ 96. The District alleges further that Meta knows of the devastating effects its design features have on the mental health of children and nonetheless persists in its efforts to maximize the amount of time children spend on its platforms for the purpose of harvesting as much data and selling as many targeted ads as possible. Comp. ¶¶ 1, 96, 106, 179, 241. The court concludes that the District has presented a plausible claim of "substantial injury" based on allegations of non-economic harm.

The FTC and at least one federal court have determined, moreover, that an injury can be "substantial" within the meaning of the FTC Act "if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm." *Roca Labs*, 345 F. Supp. 3d at 1397 (quoting "FTC's Policy Statement on Unfairness," Sen. Comm. on Commerce, Science and Transportation (Dec. 17, 1980), p. 5). The District alleges that Meta's practices pose dangers to the "55,580 daily active teenage users and 94,656 monthly active teenage users" of Meta's platforms in the District. Compl. ¶ 30. Therefore, even if the alleged injuries were too small to constitute "substantial injury" when considered on an individual basis, the District has alleged a plausible claim that the injuries are large enough to do so when viewed collectively.

The District's failure to allege economic or financial harm thus does not require the dismissal of its unfair trade practice claims at the pleading stage.

Commercial Puffery and Protected Speech

Meta argues that the District's deceptive trade practice claims in Count II fail as a matter of law to the extent they are based on affirmative misrepresentations because the false statements alleged in the complaint are either non-actionable statements of commercial puffery, protected by the First Amendment right to petition the government, or pled without the level of specificity required for claims alleging fraud. The court disagrees.

1. Puffery

"Puffery is a legal doctrine that posits some statements are of a type that no reasonable consumer would rely upon them, because there is a certain amount of bluster or 'sales talk' that is to be expected when pushing one's wares." *Earth Island Institute*, No. 22-CV-0895, 2024 D.C. App. LEXIS at *24. Puffery "includes 'the exaggerations reasonably to be expected of a

seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.'" *Id*. at 25-26 (quoting *Pearson v. Chung*, 961 A.2d 1067, 1076 (D.C. 2008)).

The doctrine's reach, however, is more limited than Meta suggests. While commercial puffery may be non-actionable under the CPPA on the theory that a "general assertion, incapable of measurement, is unlikely to lead reasonable consumers astray," *Meta Platforms, Inc. v. District of Columbia*, 301 A.3d 740, 759 (D.C. 2023), the puffery doctrine is not automatically applicable any time the truth or falsity of a statement cannot be precisely determined. "That is too rigid a view." *Earth Island Institute*, 2024 D.C. App. LEXIS at *28. Rather, "businesses cannot insulate themselves from suit simply by avoiding concrete claims." *Id*. "Vague and ambiguous statements, incapable of being strictly true or false, may yet be actionable as misrepresentations," since "a statement literally true is actionable [under the CPPA] if made to create a false impression." *Id*. at *28-29 (citing *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 990 (D.C. 1980)). The text of the CPPA makes clear, after all, that the statute "prohibits not just false statements, but those that have any 'tendency to mislead,' including by 'fail[ing] to state a material fact,' or 'us[ing] innuendo and ambiguity as to a material fact.'" *Id*. at *29 (quoting D.C. Code §§ 28-3904(a)-(h)).

The puffery rule, moreover, "'has not been a favored one,' and except in rare cases, the question of whether a statement is an 'actionable misrepresentation' or mere puffery must be 'left to the jury.'" *Id*. at *24 (quoting Prosser & Keeton on Torts § 109 at 757 (5th ed. 1984)). Unless the statement at issue is "so patently hyperbolic that it is implausible for a reasonable consumer to be misled," the statement must "be subject to a 'fact-intensive inquiry' on how a reasonable buyer would be affected" by it, making dismissal of a CPPA claim at the pleading

stage improper. *Id*. at *25 (quoting *MacNaughton v. Young Living Essential Oils, LC*, 67 F.4th 89, 98 (2d Cir. 2023)).

Some of Meta's statements cited in the complaint may be too vague and unverifiable to form the bases of deceptive trade practice claims. Others, including what appear to be internal "talking points," may not have been published to third parties and thus may turn out to be non-actionable even if demonstrably false. But many of the statements attributed to Meta and its top officials in the complaint are not so patently hyperbolic that it would be implausible for a reasonable consumer to be misled by them. Others are sufficiently detailed, quantifiable, and capable of verification that, if proven false, they could support a deceptive trade practice claim. And contrary to Meta's argument, the category of actionable statements under the CPPA includes false and misleading statements of goals or aspirations, as "[a]n aspirational statement can be reasonably 'interpreted to be a representation about the defendant's present intent . . . to act as stated.'" *Id.* at *31-32 (quoting 3 Dobbs *et. al*, The Law of Torts § 678 at 690 (2d ed. 2011)).

The following are just a few examples of the statements alleged in the complaint that are legally sufficient to state plausible deceptive trade practice claims:

- Meta founder Mark Zuckerberg's public statement in 2019 that Meta does not allow "teams [to] set goals around increasing time spent on [Meta's] services." Compl. ¶ 143. The complaint alleges that Meta does in fact set such goals. Compl. ¶¶ 43, 44, 88, 148.

- Mr. Zuckerberg's public statement in 2018 denying that Meta had studied dopamine feedback loops as a means of keeping users trapped on their platforms. Compl. ¶ 141. The complaint alleges that Meta did in fact perform such studies and that Meta utilizes dopamine feedback loops to keep users trapped. Compl. ¶¶ 5, 119.

- Testimony before Congress of Antigone Davis, Meta's Global Head of Safety, in 2021 suggesting that Meta does not identify the lifetime monetary value of children who use its products by stating that is

"just not the way we think about it." Compl. ¶ 46. The complaint alleges that an internal Meta email from 2018 identifies the "lifetime value" of a thirteen-year-old teen using Meta's products as roughly $270.00. Compl. ¶ 45.

- Meta's statement in its 2023 Responsible Business Report that "[w]e want people to connect with others in a safe, positive and supportive environment and leave our apps feeling good about the time they spend on them." Compl. ¶ 140. The complaint alleges that Meta employees have acknowledged that Instagram's ranking algorithm takes youth "into negative spirals & feedback loops that are hard to exit from." Compl. ¶ 66. The complaint alleges further that Meta's features exploit teenagers who are uniquely vulnerable to addictive technologies. Compl. ¶¶ 2, 119.

- Meta's statements touting its platforms' "time-management tools" as ways for users to control their use of its products. Compl. ¶ 133. The complaint alleges that Meta knows its time-management tools are ineffective. *Id.*

- Ms. Davis's 2021 testimony before Congress that "we do not direct people towards content that promotes eating disorders." Compl. ¶ 169. The complaint alleges that Meta's personalization algorithm serves anorexia-related content to users who have previously viewed such content. Compl. ¶ 155.

The District's deceptive trade practice claims therefore must be allowed to proceed to the fact-intensive inquiries contemplated by the case law on the way a reasonable buyer would be affected by Meta's allegedly false and misleading statements.

2. First Amendment/Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine provides First Amendment protection for statements made in furtherance of "attempt[s] to persuade the legislature or the executive to take particular action with respect to a law." *E.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965). Statements to the public in support of publicity campaigns advocating for government actions

can be similarly protected. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499-500 (1988).

The First Amendment, however, "does not 'cover activity that was not genuinely intended to influence government action,'" *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (quoting *Allied Tube*, 486 U.S. at 508 n.10), and it does not protect "deliberately false or misleading statements," *Philip Morris USA Inc.*, 566 F.3d at 1123-24; *see also Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) ("However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods."). In *Philip Morris USA Inc.*, for example, the D.C. Circuit held that false statements regarding the dangers of cigarettes were not protected by the First Amendment, even though the statements were made in furtherance of a public campaign. 566 F.3d at 1124.

As set forth in detail above, the District has plausibly alleged in the complaint that at least some of Meta's statements to Congress and the public were deliberately false or misleading. This is sufficient at the pleading stage to avoid dismissal based on First Amendment protections.

3. Heightened Pleading Standard for Fraud Claims

Rule 9(b) of the Superior Court Rules of Civil Procedure provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Meta cites a single decision of the United States District Court for the District of Columbia for the proposition that CPPA claims premised on misrepresentations and omissions are subject to the heightened pleading standard of Rule 9(b) because they "sound in fraud." *See Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 464 (D.D.C. 1997). Meta argues that the District's deceptive trade practice claims are not pled with sufficient particularity.

Meta's argument is foreclosed by more recent case law from the District of Columbia Court of Appeals. The Court of Appeals expressly stated in *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999 (D.C. 2020), that the CPPA "overcomes the 'pleadings problem associated with common law fraud claims' by abridging the elements needed to prove a CPPA violation." *Id*. at 1004 (quoting *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1073 n.20 (D.C. 2008)); *see also Saucier*, 64 A.3d at 442. Based on this binding appellate case law, Superior Court judges have repeatedly declined to apply Rule 9(b)'s heightened pleading standard to CPPA claims premised on alleged misrepresentations. *See District of Columbia v. Hofgard*, No. 2015-CA-3354-B, 2015 D.C. Super. LEXIS 15, *13 (D.C. Super. Ct. Aug. 8, 2015) ("[A]s multiple Superior Court judges have held, Rule 9(b) does not apply to a complaint alleging violations of the CPPA.") (collecting cases). Indeed, at least one more recent federal court decision has reached the same conclusion—that "imposing the particularized pleading requirements of Rule 9(b) on such claims would undermine the [CPPA's] purpose." *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 91 (D.D.C. 2016).

The court therefore declines to apply Rule 9(b)'s heightened pleading standard to the District's deceptive trade practice claims.

Disgorgement

In its prayer for relief, the District asks the court to order Meta "to pay restitution or damages in accordance with D.C. Code § 28-3909." Compl. at page 58. Meta acknowledges that § 28-3909(a) authorizes the District, through the Office of the Attorney General, to seek "the restitution of money or property," but it argues that restitution is unavailable here because none of the consumers alleged to have been harmed by its products has paid or otherwise lost any

money or property using them. Meta contends that what the District really is requesting is disgorgement, a remedy Meta argues the District is not authorized to seek under the CPPA.

Meta's argument regarding the availability of restitution or disgorgement as a remedy is best understood as a motion to strike pursuant to Rule 12(f) of the Superior Court Rules of Civil Procedure. Rule 12(f) provides, in relevant part, that the court "may strike from a pleading . . . any redundant, immaterial, or scandalous matter."

The court is not persuaded that the District's request for restitution should be stricken. "[R]estitution today is a general term for diverse kinds of recoveries aimed at preventing unjust enrichment of the defendant and measured by the defendant's gains." *Divver v. D.C. Dep't of Ins., Sec. & Banking*, 306 A.3d 595, 608 (D.C. 2023) (quoting Dan B. Dobbs, *Law of Remedies, Damages, Equity, Restitution* § 1.1 (2d ed. 2001)). "[R]estitution's central purpose," therefore, "is not simply to make a victim whole, but also to disgorge the wrongdoer of ill-gotten funds." *Id*. Thus, even if Meta is correct that what the District really seeks here is disgorgement, the court cannot say that the District's request so clearly falls outside the Attorney General's authority under the CPPA that the request should be stricken as redundant, immaterial, or scandalous.

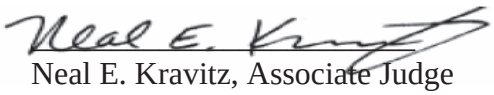
VI. CONCLUSION

For the foregoing reasons, it is this 9th day of September 2024

ORDERED that Meta's motion to dismiss is **denied**. It is further

ORDERED that Meta has until September 23, 2024 to file an answer to the complaint. *See* Super. Ct. Civ. R. 12(a)(4)(A). It is further

ORDERED that the case remains set for an initial scheduling conference on October 4, 2024 at 9:30 a.m. As the court and parties have discussed previously, the parties are encouraged to try to reach agreement on a proposed scheduling order to be jointly submitted to the court.



Neal E. Kravitz, Associate Judge
(Signed in Chambers)

Copies to:
Adam R. Teitelbaum, Esq.
Jimmy R. Rock, Esq.
Kevin J. Vermillion, Esq.

John J. DeBoy, Esq.
Timothy C. Hester, Esq.
Christian J. Pistilli, Esq.

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, ***Plaintiff,*** **v.** **TIKTOK INC.**, ***Defendant.***	**Case No.: 2024-CAB-006377** **Judge Ebony M. Scott** **Next Event: Remote Mediation** **February 10, 2026 at 9:00 a.m.**

ORDER

This matter was before the Court on February 24, 2025, for a Motion Hearing, and on February 28, 2025, for a Scheduling Conference.

At the **February 24, 2025, Motion Hearing**, for the reasons stated on the record, the Court took several actions.[1] First, the Court denied Defendant TikTok Inc.'s Motion to Dismiss or in the Alternative, Opposed Motion to Stay, filed on November 22, 2024. Second, the Court denied as moot: (1) Defendant TikTok Inc.'s Opposed Motion to Seal Confidential Portions of Defendant TikTok Inc.'s (i) Motion to Dismiss or, in the Alternative, Opposed Motion to Stay, and (ii) Opposed Motion for Protective Order, filed on November 22, 2024; (2) Defendant TikTok Inc.'s Opposed Motion for Protective Order, filed on November 22, 2024; and (3) Defendant TikTok Inc.'s Opposed Motion for Leave to File Under Seal Confidential Portions of its Reply Brief in Support of its Motion to Dismiss or in the Alternative, Opposed Motion to Stay, filed on January 9, 2025. Third, the Court granted-in-part and denied-in-part Defendant TikTok Inc.'s Partially

[1] The Court attaches to this Omnibus Order a transcript of the February 24, 2025 Motion Hearing in which the Court issued its ruling on the Motion to Dismiss.

Unopposed Motion to Seal Complaint, filed on October 30, 2024. Fourth, the Court held in abeyance Plaintiff District of Columbia's Opposed Motion for Entry of Protective Order, filed on December 17, 2024, and ordered that the Parties meet and confer on the outstanding issues ahead of the February 28, 2025 Initial Scheduling Conference.

At the **February 28, 2025, Initial Scheduling Conference**, for the reasons stated on the record, the Court: (1) granted-in-part and denied-in-part Plaintiff District of Columbia's Opposed Motion for Entry of Protective Order, filed on December 17, 2024; (2) granted Defendant TikTok Inc.'s Consent Motion to Extend Defendant's Time to Answer Complaint, filed on February 27, 2025; and (3) granted-in-part and denied-in-part Plaintiff District of Columbia's Opposed Motion for Entry of Proposed Scheduling Order, filed on February 27, 2025.

With respect to Plaintiff District of Columbia's Opposed Motion for Entry of Protective Order, the Court denied the District's Motion with respect to the provision regarding expert witnesses and ordered that the Protective Order shall mirror the Protective Order entered in *District of Columbia v. Meta Platforms, Inc.*, No. 2023-CAB-6550 (D.C. Sup. Ct. Jan. 29, 2024), as it pertains to expert witnesses. Accordingly, the Court ordered that the District submit an updated Proposed Protective Order incorporating language consistent with paragraph 35 and its sub-parts of the Protective Order in *Meta*.

Accordingly, it is this **28th day of February, 2025**, hereby:

ORDERED that Defendant TikTok Inc.'s Motion to Dismiss or in the Alternative, Opposed Motion to Stay is **DENIED**; it is further

ORDERED that Defendant TikTok Inc.'s Opposed Motion to Seal Confidential Portions of Defendant TikTok Inc.'s (1) Motion to Dismiss or, in the Alternative, Opposed Motion to Stay, and (2) Opposed Motion for Protective Order is **DENIED AS MOOT**; it is further

ORDERED that Defendant TikTok Inc.'s Opposed Motion for Protective Order is **DENIED AS MOOT**; it is further

ORDERED that Defendant TikTok Inc.'s Opposed Motion for Leave to File Under Seal Confidential Portions of its Reply Brief in Support of its Motion to Dismiss or in the Alternative, Opposed Motion to Stay is **DENIED AS MOOT**; it is further

ORDERED that Defendant TikTok Inc.'s Partially Unopposed Motion to Seal Complaint is **GRANTED-IN-PART** and **DENIED-IN-PART**. The Court **GRANTS** the Motion as to the following paragraphs, or portions thereof, that are the subject of Defendant's request for filing under seal: ¶¶ 44, 57, 60, 69, 91, 134, 136, 192. The Court finds that the redactions in those paragraphs which Defendant has sought to maintain as redacted **SHALL REMAIN SEALED** and redacted from the public version of Plaintiff's Complaint; it is further

ORDERED that Plaintiff **SHALL FILE** a version of the Complaint consistent with this Order on the public docket on or before **March 3, 2025**; it is further

ORDERED that Plaintiff District of Columbia's Opposed Motion for Entry of Protective Order is **GRANTED-IN-PART** and **DENIED-IN-PART**; it is further

ORDERED that Plaintiff District of Columbia **SHALL SUBMIT** an updated Proposed Protective Order incorporating language consistent with paragraph 35 and its sub-parts of the Protective Order in *Meta* on or before **March 3, 2025**; it is further

ORDERED that Defendant TikTok Inc.'s Consent Motion to Extend Defendant's Time to Answer Complaint is **GRANTED**; it is further

ORDERED that Defendant TikTok Inc. **SHALL FILE** an Answer to Plaintiff District of Columbia's Complaint on or before **March 26, 2025**; it is further

ORDERED that Plaintiff District of Columbia's Opposed Motion for Entry of Proposed

Scheduling Order is **GRANTED-IN-PART** and **DENIED-IN-PART**; and it is further

ORDERED that the following deadlines are in effect until further order of this Court:

Event	Deadline
Exchange Fact Witnesses	08/27/2025
Proponent's Rule 26(a)(2)(B) Report	09/10/2025
Opponent's Rule 26(a)(2)(B) Report	10/16/2025
Discovery Requests	10/27/2025
Close of Discovery	11/25/2025
Filing Motions	12/26/2025
Dispositive Motions Decided	01/26/2026
Mediation	02/10/2026 at 9:00 a.m.
Pretrial	To be set upon completion of ADR

This Order may not be modified except by leave of Court upon a showing of good cause. Stipulations by counsel will not be effective to change any deadlines in the Order without Court approval. Failure to comply with this Order and the deadlines set forth herein may result in dismissal, default judgment, refusal to let witnesses testify, refusal to admit exhibits, the assessment of costs and expenses, including attorney's fees, or other sanctions.

SO ORDERED.

Associate Judge Ebony M. Scott
(Signed in Chambers)

Copies via Odyssey to:

Adam Teitelbaum, Esq.
adam.teitelbaum@dc.gov
Counsel for Plaintiff

Kevin Vermillion, Esq.
kevin.vermillion@dc.gov
Counsel for Plaintiff

Brittany Nyovanie, Esq.
Brittany.nyovanie@dc.gov
Counsel for Plaintiff

Jorge Bonilla-Lopez, Esq.
jorge.bonillalopez@dc.gov
Counsel for Plaintiff

Jimmy R. Rock, Esq.
jrock@edelson.com
Counsel for Plaintiff

Theo Benjamin, Esq.
tbenjamin@edelson.com
Counsel for Plaintiff

Emily Penkowski Perez, Esq.
epenkowski@edelson.com
Counsel for Plaintiff

John Feeney-Coyle, Esq.
jfeeneycoyle@edelson.com
Counsel for Plaintiff

Martha F. Hutton, Esq.
mhutton@omm.com
Counsel for Defendant

Stephen D. Brody, Esq.
sbrody@omm.com
Counsel for Defendant

Jonathan D. Hacker, Esq.
jhacker@omm.com
Counsel for Defendant

Anne T. Marchitello, Esq.
amarchitello@omm.com
Counsel for Defendant

Daniel M. Petrocelli
dpetrocelli@omm.com
Counsel for Defendant

Lauren F. Kaplan
lkaplan@omm.com
Counsel for Defendant

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,	:	Docket Number: 2024 CAB 006377
vs.	:	
TIK TOK, INC.,	:	
Defendant.	:	Monday, February 24, 2025
		Washington, D.C.

The above-entitled action came on for a Motion hearing before the HONORABLE EBONY M. SCOTT, Judge, in Courtroom Number 219.

APPEARANCES:

On Behalf of the Plaintiff:

JIMMY R. ROCK, Esquire
BRITTANY N. NYOVANIE, Esquire
KEVIN VERMILLION, Esquire
Washington, D.C.

On Behalf of the Defendant:

JOHNATHAN D. HACKER, Esquire
MARTHA F. HUTTON, Esquire
ANN MARCHITELLO, Esquire
Washington, D.C.

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remains the same, which is just one of judicial modesty. It's just urging courts to stay their hand when another agency is doing the job a statute tells the agency to do.

There's no reason to jump ahead in this case and proceed unless and until we get an answer from DISB. Thank you.

THE COURT: Okay. Thank you. We'll just take a short recess. When I return, I will give my ruling on the record. Okay, thanks.

(Recess from 11:26 a.m. until 12:07 p.m.)

THE DEPUTY CLERK: Calling the matter of District of Columbia versus TikTok, Inc., 2024 CAB 6377.

All parties are present.

FINDINGS OF THE COURT

THE COURT: Okay. The Court has had an opportunity to consider the oral argument of counsel, as well as the briefing in this matter, and took an opportunity during the short recess to review some of the cases that relied upon at today's oral argument and the Court is ready to rule.

So of course, at the outset, the Court is guided by the 12(b)(6) standard. And dismissal under this standard is warranted where the complaint fails to allege the elements of a legally viable claim. And in deciding a Rule 12(b)(6) motion, the Court must accept all of the

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allegations in the complaint as true here, must accept the allegations as alleged by the District in its complaint as true, and construe all inferences in favor of the District.

So to survive a motion to dismiss, a claim must have facial plausibility. That simply means factual content that allows the Court to draw inferences, or to draw the reasonable inference that the defendant, here TikTok, is liable for the alleged misconduct. And so guided by that broad framework, the first question the Court must consider is whether Section 230 of the Communications Decency Act, what we've been referring to as the CDA, bars Counts I through III of the complaint.

So the CDA, the Act, which was enacted in 1996, contains provisions that increases the penalties for conduct, for indecent conduct, harassing conduct, obscene conduct, and other wrongful uses of telecommunications by persons who knowingly or intentionally created said prohibited messages, or otherwise used communications in a harmful way. To harm others, in fact.

And the statute, which has been the subject of a lot of our conversations, includes an immunity clause and an immunity provision which is intended to exclude from liability, telecommunications and information service providers and system operators who are not themselves

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knowing participants in the making of, or otherwise responsible for the content of the prohibited communications.

And the immunity provisions are codified in Section 230, what has been called or referred to as Section 230 immunity. In that section, in subsection (C)(1) says that, "No provider or user of an interactive computer service shall be treated" -- excuse me -- "as the publisher or speaker of any information provided by another information" contact -- or "content provider."

Further along in the statute in subsection (E)(3), the statute says that, "No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section." And so when one combines these two provisions, they provide immunity for telecommunications and information service providers and systems operators that seek to treat them as publishers of information provided by other content providers.

It seems, at least from this record, that both parties agree that the decision in the *Barnes* case, *Barnes v. Yahoo*, which comes from our Ninth Circuit in 2009, sets forth the proper analytical framework for determining whether this Section 230 immunity applies at any given set of circumstances. And so *Barnes* creates a test, a three-

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part test, holding that Section 230 immunizes from liability: one, a provider or user of an interactive computer service; two, whom a plaintiff seeks to treat under a state law -- state cause of action as a publisher or speaker; or three, of information provided by another information content provider.

Now, with respects to all count, there does not seem to be dispute in this record, that the first *Barnes* element is satisfied here, namely that TikTok is a provider of interactive computer services. As to the second opinion, there's been some discussion in the briefings by the parties and at oral argument related to Judge Kravitz's decision in *Meta*, the 2023 case. I think it's 2023 CAP 6550, I believe. And the Court agrees with Judge Kravitz on this issue, and that is that whether or not the defendant is attempting to -- or whether the plaintiff -- excuse me -- is attempting to treat TikTok as a publisher is really a close question and it need not be resolved now at the pleading stage, as the Court finds that the third prong of the test, namely whether the District is or has sought to treat TikTok as the publisher of third-party content is sufficiently established on the record.

And so looking at each of the counts, starting with Count I, of course we know Count I alleges these

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addictive design features such as the recommendation engine, the infinite scroll, the push notifications, the filters, the coins. And which do not, according to the District, involve traditional publishing activity like reviewing, editing, and deciding whether to publish or withdraw from publication third-party content.

Their recommendation engine, which has been referred to the algorithm, the District alleges that the platform uses this algorithm to provide content recommended for each user. This algorithm then curates a personalized video stream and facilitates excessive platform use. This is going to take me quite a few minutes to get through this and so just be ready, okay?

It'll probably take me about three hours. I am joking. It won't take me that long. So the District is not seeking to ascribe liability on TikTok because of the content that is produced by the algorithm. This is the District's argument. The District is contending instead that TikTok is liable for this anticipation of dopamine.

These dopamine hits, again, akin to the slot machine that the Court mentioned during our earlier colloquy with TikTok's attorney. And that this anticipation of dopamine, which the algorithm is designed to provide as a reward, is the issue. And so the addiction is not to the content, but to this expectation

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and anticipation which is specifically engineered by the algorithm as an ultimate goal of the engine.

And that's in paragraph 70 of the District's complaint. And the ultimate goal is, in disrupting what has been termed this habit loop, this cue routine and reward. And so that is the loop that causes disruption and harm. And so the engine, according to the District, is designed to give young users immediate gratification and boosts rewards, encouraging this excessive routine use of the app.

Next, there's the infinite scroll. And this is described as a function that allows new videos to automatically and constantly load each time a user watches a third-party generated video. That comes from paragraph 77 of the complaint. And this design element is -- it facilitates extended use by users of the platform and the same content, displayed another way, would not have this effect.

So the District is not seeking liability against TikTok and accepting the allegations as true, as the Court must at this juncture, for publishing third-party content. So what is the Court saying? It is not about the content; it's about the ease of the access to the content, which was -- undergirded the colloquy the Court had at the onset with TikTok's attorney.

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The push notification. So here, the District challenges the use of these push notifications to alert new users, or to alert to new messages -- excuse me -- to provide updates and to suggest new videos, which according to the District, entices users to reopen the app. This is at paragraph 82.

Advertising the content on the app or trying to entice users, as the District alleges, to open this app back up. The Court finds, based upon the allegations, it's not third-party content. It is not about the content, but indeed, it's about TikTok's own actions here. Same is true for the filters. The District alleges that the filters and the effects, with which the platform users can edit their content, are unsafe for users because one can't -- a user can alter their appearance. That's in paragraph 86.

The decision to apply filters to users' content without consent, or even to supply them at all, is TikTok's decision. It's not a decision of the user. And so again, it's not about the content, it's about what TikTok affirmatively provides to users, and that it is done automatically.

TikTok LIVE. Well, according to the District, this feature permits users to use these virtual coins to purchase virtual gifts, which they can then use to express

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appreciation to other users for their content. And these gifts allegedly function like social recognition of reward signal, similar to likes on other social media application. And so the District's claims, the Court finds, are not seeking liability for the content, which is on TikTok LIVE; but for TikTok's decision, its own decision, to combine this live feature with this digital coin to create monetary incentives in live streaming, which introduces a variable reward that the Court mentioned, which is effective in changing or driving predicted behavior or even changes in behavior. That's in paragraph 97.

And so Count I is not challenging TikTok's content moderation policies, which counsel argued today are achieved through the algorithm, but how TikTok promotes and displays the content that it has already approved for the app to keep children addicted. And so going back to this line, whether users are watching porn or puppies -- not this judge's words -- the claim is not that they are harmed by the time spent, not by what they are -- they are harmed by the time spent and not what they are seeing. That comes from the *D.C. v. Meta* case.

So as to Count II, the complaint states in paragraph 211, "That TikTok has had an understanding of the increased risk of fraud and other criminal activity,"

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and that it created -- "and it was created by" adding -- "combining this live streaming feature with a virtual monetary system in TikTok LIVE."

Paragraph 212 discusses TikTok's failures to take measures to mitigate the risk of fraud, sexual exploitation, and financial harm that LIVE creates. It has maintained the design -- according to the District, it has maintained these design features that create these risks. And they have -- TikTok has failed to implement compliance programs common for the industry and required under federal law.

And so Count II seeks to hold TikTok liable for its own conduct, which has been characterized as the District as brokering this illegal -- or brokering unlawful transactions through its live streaming features. And so the District seeks liability, as the Court understands and accepts as true, for TikTok's decision, its own decision, to combine this live streaming function with the monetary function because TikTok knows that the combination facilitates unlawful or illegal activities.

And so the District is not suing TikTok for accountability for the fraud, sexual exploitation of minors which has been alleged by the District and alleged to be occurring online. But it's suing TikTok for facilitating these transactions, acting as the conduit, if

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you will, by providing the platform which makes them possible.

Certainly, the CDA does not protect brokering illegal transactions online as alleged in the complaint. In fact, the courts have refused to extend the CDA immunity to online platforms that sound -- and this has been discussed; it was mentioned in the briefing. The particular cases, I believe it were -- it was virtual casino chips for legal gambling or these short-term rental transactions for unregistered properties in violation of ordinances.

And this comes from the *In re: Apple* case, the *In re: Facebook's* simulated casino style games case, and many cases cited by the parties in their briefings. And so the Court agrees with the plaintiff here, that Counts I and II do not arise from third-party content, and in fact, are rather content neutral.

As the addictive features, not the content that is being pushed, is responsible for the harms alleged, and the courts have held that where the claim does not depend on publishing or speaking, Section 23(C), which creates this immunity that TikTok seeks, becomes irrelevant and the Court agrees.

As to Count III, the concern, as I understand it, is related to allegations about statements made that

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were explicitly or implicitly misleading about the safety of the platform. And so for example, in the complaint, paragraph 221, the District alleges that TikTok claims it is deeply committed to being a safe and positive experience for people under the age of 18 when, according to the District, and the Court accepts it as true, that District -- that TikTok knows it is profiting from the sexual exploitation of minors. The Court disagrees with TikTok that these statements are puffery. This was not the subject of our argument today. It was such a part, just a little, at the last motion hearing. But it was certainly briefed in the papers.

And so the Court disagrees with TikTok that these statements are puffery, are not actionable because their truth or falsity, as TikTok alleges, cannot be precisely determined. Count III seeks to hold TikTok liable for its own statements and not for anyone else's. And so that means, according to the District and the Court agrees, that TikTok could satisfy its duty under the CPPA by avoiding the misrepresentations or the misleading omissions without reviewing, editing, or withdrawing any third-party content on its application.

The Court took a look at the -- the *Demetri v. Yelp* case. It's a 2014 case. In there, a plaintiff alleged that Yelp, an online publisher of business

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reviews, falsely advertised that reviews passed through a filter, ultimately providing consumers with the most trusted reviews.

The Court found that the CDA did not apply because the plaintiff target Yelp's own statements regarding the accuracy of its filter, not the third-party reviews themselves. That is what's happening here. And so the District is not seeking to hold TikTok accountable as a publisher of harmful conduct -- or content, excuse me. The District is seeking liability for the alleged affirmative statements and omissions, which tend to mislead users and their parents into thinking that the platform is safe for children, when TikTok knows that it in fact is not.

AS the plaintiff notes in the briefing, not argued orally, the protections of the CDA cannot become part of a per se test. That is, that where an entity publishes other people's views, they are automatically insulated from all suits. And where the claim does not depend on publishing or speaking, Section 2030(C) of the CDA is irrelevant. And therefore, the CDA does not provide immunity to TikTok in this matter, and dismissal is not warranted under this theory.

The second question then becomes whether or not Counts I through III should be dismissed on First

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Amendment grounds. Now, of course the First Amendment protects a platform from when it compiles the third-party speech it wants in the way that it wants, and thus offering this expressive conduct or this expressive product, I think is what *Moody* says, which most reflects its own views and priorities. Of course, it's the *Moody v. Net Choice* case from 2024.

In a variety of context, the Supreme Court has afforded First Amendment protection to the editorial function itself. And TikTok listed a host of cases that stand for this proposition. The Court's decision -- the Court's decisions prohibiting the Government from requiring newspapers to afford a right to reply -- I think that's the *Miami Herald* case. There's other cases where entities were prevented from forcing a company to offer a forum for alternative viewpoints and a newsletter, or from compelling parade organizers to include a group that advocates a different message. I believe that comes from -- the latter comes from the *Hurley* case, and so that's clear in this record. It's certainly clear in this jurisdiction.

So looking at Count I, II, and III in particular, relying on *Moody* as done in the briefings and as done today, TikTok argues that the challenge design features each involved the platform's method of displaying

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content. And these features are -- help TikTok exercise its traditional publishing and editing discretion to select and shape other parties' expression into its own curated speech products. Now, while *Moody v. Net Choice* -- while the Court agrees that it is in fact quite informative, it doesn't warrant dismissal here of Counts I, II, or III.

As the Court mentioned, during its colloquy with Counsel, *Moody* specifically considered state action which sought to regulate the content which online platforms removed or deprioritize. These regulations were squarely on the basis in *Moody* of the content published, and implicated the online platform's First Amendment rights because the platform has the right to select, based upon its own preferences, the content which it publishes.

And so what's important here is that in *Moody*, the Supreme Court stated, and without resorting to recollection, "We therefore do not deal here with the feeds whose algorithms respond solely to help users act online, giving them the content they appear to want without any regard to independent content standards." And that's at 2401; that's in note 5, I believe. And so the Court -- as the Court mentioned, during its colloquy, clearly stopped short of determining whether an algorithm based on the user's preferences warrants similar First

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Amendment preferences. Now here, the District claims are content-neutral.

The recommendation engine -- while the Supreme Court has only found an algorithm to be -- and this is what we're talking about when we're speaking of the recommendation engine, the algorithm. So the Supreme Court has only found an algorithm to be worthy of First Amendment protection where it's creating some kind of a message on its operator's behalf.

And although TikTok's message, as counsel stated during argument, need not be clear or cognizable, even articulate, it must in fact be its own message. Here, it is that of the users, based upon the allegations in the complaint. In terms of infinite scroll, TikTok is not on this record at this juncture, expressing any message by allowing its users to continue to scroll from one video to the next without having to search or select a video.

The push notifications. Well, the District's allegations are not simply about the use of the notifications all together, as the Court understands them, but about the use of the notifications and the way that is going to be harmful to children, i.e. sending notifications during the school day, at all hours of the night, and inhibiting their sleep and focus in school.

Such allegations are not about the content of

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the advertisement or even a type of advertisement being pushed by these notifications, but the manner in which these notifications or these advertisements are transmitted. And so TikTok on this record, at this juncture, simply cannot be said to be expressing a message by sending these notifications to children during these hours. And the fact that the app could transmit these same notifications at other hours is indicative of the fact that speech here is simply not at issue.

Filters. Well, TikTok, on this record at this juncture has not shown that it's expressing any message by providing filters for its users to use. The coins, well, as the Court understands it, based upon the District's pleading, it provides the opportunity for users to engage in financial transactions. This is not speech. Even if it were, the Court would apply the intermediate scrutiny standard. And of course, that standard must be applied when a statute implicates expression, but it's content neutral. And that comes from a whole host of Supreme Court cases. The *Turnner Broad Systems* (phonetic) case, the *Creative LLC* case, *United States v. O'Brien, Runsfield v. Form*, et cetera.

And so here, the Court finds that the CPA is content-neutral. It's a content-neutral statute focused on the protection of consumers. Here, the focus is that

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of children consumers. And the District's interests in prosecuting the claims, its claims is to protect these children, these users, from the significant harms of these addictive features, and the District's interests has nothing to do with the content based upon this record.

Count II. Well, although liking, briefly -- this wasn't argued but this was certainly discussed -- which could be likened to paying based upon approval or appreciation, has been understood to be an expressive activity. That comes from the *Bland* case, *Bland v. Roberts*. It was deep and expressive activity of the person liking the post, not the entity which provided the platform. It was the conduit on which the individual liked the post.

Count III. Contrary to TikTok's argument, the District, based upon the pleadings which the Court must accept as true, is not seeking an order requiring TikTok to regulate the content on its app in a manner more consistent with the stated policies. Any such allegations of the complaint are simply indicators of the fact that TikTok knew that the content at issue did not comport the policies it itself publicly expressed.

And so rather, as the Court understands it and as supported by the allegations of the complaint, the District contends that the public statements made in

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omissions were meant to mislead users in violating -- in violation rather, of the CPPA.

Now, *Meta Platforms v. D.C.* and this was cited by the District. And this is 301, Atlantic 740. It's a 2023 case. This was cited by the District, I believe, in opposition regarding the compelled speech question. It's in the record in some place. But the District says that it's investigating only whether -- in that case, whether Meta's representations regarding efforts to prevent and remove vaccine information from the Facebook platform, violates the consumer protection statute, the CPPA. And there was no suggestion -- this is from the *Meta* case, that the District is investigating whether Meta's moderation policies or efforts to police them were unlawful or insufficient in themselves, except to the extent that they belie Meta's representations. The Court finds this to be persuasive and akin to and similar to the issues that the Court is faced with in this case.

Now, there was some mention about whether or not it is considered compelled speech to give warnings. This was briefed in the pleadings. While this case is different, from this Court's perspective, from the cases that TikTok cites, one of one of them is the *Olivia v. National Board* case, I believe, and that is because the District is not seeking warnings to prevent copycat

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behaviors, not seeking tort liability for copycat behavior on a failure to warn theory, or even, as the Court understands the allegations, to hold TikTok accountable for the content which it publishes or pushes. But the District is alleging that the user, the parents are simply unaware of the potential risk of the platform and further misled by TikTok's assertions that everything on the platform is child safe.

In addition to these affirmative statements made by TikTok, according to the District, the admissions are misleading. These include failing to inform children and parents about the risk that children will encounter extensive harmful material on the app, the risk that children will encounter or be coerced into sexually exploitative activities on TikTok, the risk that children will be taken advantage of financially by live gifting, TikTok's use of coercive features and design tactics that limit user agency, particularly that of children. This is all found in paragraph 222 of the complaint.

So the affirmative statements make the omissions misleading here is what the District is alleging. The plaintiff, the District cites to *Earth Island*, among many other cases, to support this proposition, and that case says that the First Amendment does not prohibit the state from ensuring that the stream of commercial information

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flow cleanly as well as freely. And the speech that *Earth Island* targets is Coca-Cola's commercial speech about its goods and services. It was alleged in that case that Coca-Cola cultivated a sustainability narrative in an effort to sell its particular products, and because *Earth Island* plausibly alleges that commercial speech would mislead reasonable consumers, the court found that Coca-Cola's First Amendment claim was a nonstarter.

The Court finds the same is true here. And contrary to the issue cited by TikTok on these issues, one of them was the Wisconsin case, the *Democratic Party of the United States v. Wisconsin*. It's a 1981 case. The District is not expressing approval or disapproval over a particular expression that it deems unwise or irrational, which is the subject of that *Wisconsin* case.

Additionally, TikTok cites to the *Thomas v. Review Board of Indiana*. This is in the Employment Service Division. I believe this was a 1981 case, as well, from our Supreme Court. And TikTok cites to this for the proposition that, like religious expression, expressive activity need not be acceptable, logical, consistent, or comprehensive to others in order to merit First Amendment protections. But this case dealt exclusively with religious expression, stating that the state cannot deny the free exercise of rights based on

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which beliefs it deems sensible.

From the case law that TikTok cites, it is clear that a speaker need not have a clear message in order to warrant First Amendment protection, but that they must have a message based upon their own interest and their viewpoint nonetheless. The record does not demonstrate at this juncture that TikTok, in fact, has a viewpoint or a message here. Even in TikTok's example of a book publisher making decisions based upon readership, such function is still rooted, it's undergirded, supported by a decision to publish or not to publish, indicating some sort of opinion as to the relevance of the book in the current climate.

TikTok's features, specifically the algorithm, publishes everything and sorts it depending on the preference of the reader and creates this curated load or this package for the particular reader. Such actions do not express any kind of view of the content on behalf of TikTok.

Therefore, the Court finds that the First Amendment affords no protection from liability for TikTok at this stage.

So this brings us to the claims under the CPPA and whether or not the District has stated a claim under the CPPA. The CPPA establishes an enforceable right to

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what has been deemed truthful information from merchants about consumer goods or services that would be purchased, leased, or received in the District. And this jurisdiction and many others have found or opined that the CPPA is to be construed liberally and applied liberally to promote its purpose. And so even despite the intended breadth of the end reach of the CPPA, it certainly is not limited. And by its own express terms, and as relevant here, the CPPA applies to trade practices only to the extent that they relate to the sale, the transfer, or the lease of consumer goods and services.

In the *DC v. Meta* case, the 2024 case, the Court found that users were exchange -- Judge Kravitz found that users were exchanging their time and their data for use of the platform, and that such exchange was a transfer under the CPPA. At this pleading stage, the Court agrees. Judge Kravitz, in his opinion, opined that the CPPA defined the -- well, it's not his opinion. He looked at the definition of the CPPA and pointed out that consumer is defined as a person who, other than for purposes of resale, does or would purchase, lease, or receive consumer goods or services, and that this inclusion of the term receive in addition to purchase, according to Judge Kravitz, and lease, and the definition of consumer, strongly suggests the intent of our legislator to cover

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circumstances in which a person receives goods or services free of charge in return for something of value other than a direct monetary payment.

The Court agrees at this juncture, but finds that whether or not the app is indeed free has not been conclusively established, but it does not have to be at the pleading stage, as the Court must accept the allegations in the complaint as true.

Well, what about the unfair practices under the CPPA? The CPPA does not expressly require a showing of substantial injury and understanding or construing the term unfair or deceptive trade practice. And due consideration must be given to interpretations by our Federal Trade Commission and the federal courts of the term unfair act or deceptive practice in the FTC. And so the FTC, in turn, provides that it, the FTC, may not declare unlawful any act or practice on the grounds that such act or practice is unfair, unless the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable, which is important here, by consumers themselves and not outweighed by countervailing benefits to consumers or competition.

The FTC has determined that ordinarily emotional impact and other more subjective types of harms as how it's been characterized would not make a practice unfair.

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And that can be seen in the *FTC* case coming from our circuit in 1985. *Financial Services Association v. FTC*. Monetary harm, however, is not always a necessary component of substantial injury. The FTC determined in In re *International Harvester Company*, it's a 1984 case, that farm equipment caused substantial injury where the design -- in that case, a design flaw led to severe burns and resulting in mobility limitations. I believe there was lasting psychological harm and severe disfigurement.

Well, the FTC in that case held the health risk caused by the equipment, rather than any monetary injury, supported a finding of substantial injury, explaining that unwarranted health and safety risks may also support a finding of unfairness. In order for there to be an unfair practice, the case law is very clear that the practice must cause or is likely to cause injury, substantial injury to consumers, which is not reasonably avoidable and not outweighed by other benefits.

And so coming to the issue of free and informed choice, a topic that was discussed today during oral argument, as the Court mentioned, the Court is not entirely conclusive on whether or not the monetization of TikTok LIVE means that the app is not free. The complaint certainly alleges that TikTok is not free and thus involved consumer sales under the CPPA. And that's

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because, according to the District, TikTok earns money. And I don't think this is disputed by TikTok, that it earns monetary commissions from in-app purchases and from the transmission of money between live users through their virtual coins and gifts.

The District alleges that young consumers did not have a free and informed choice to use TikTok, as they were misled into thinking that the platform was safe and that once users joined the app, TikTok's addictive features, which we've discussed at length, exploit their neurological vulnerabilities to keep them engaged, to keep them in this loop, and consumers cannot reasonably avoid these unfair practices, just as TikTok intended.

Also, the fact that these issues have been reported on other -- and have been reported on and that other social media sites which are similar allegedly have similar deficiencies is simply insufficient here to overcome the 12(b)(6) standard.

Well, what about the deceptive practices? As it relates to misrepresentations, again, under the CPPA, the District's complaint alleges that there are misrepresentations of provably false statements, like TikTok is safe from children. Well, this is a distinction here when discussing or considering puffery, which has been unfavored in this jurisdiction and others. While

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some of TikTok's language, as TikTok argued in its briefing, could indicate an aspiration for safety, Plaintiff alleges that even this aspiration was false, because TikTok knew that these harmful effects were occurring and chose to do nothing at least sufficient. The Court finds this allegation sufficient to survive this 12(b)(6) motion.

And so there's other sufficient allegations here that create a plausible claim which must be present in the record. I'll name a few. So contrary to TikTok community guidelines, which claim that TikTok is deeply committed to being a safe and positive experience for minors, TikTok internally admitted that its features are causing severe psychological harm. This is in the complaint, paragraphs 88 and 116. This is, again, the District's allegation that contrary to TikTok's claims from its CEO, TikTok has clear community guidelines and that executives do not make any ad hoc decisions to deal with bad actors. TikTok acknowledged leaks in their moderation tools due to existing policy gaps and under-moderation, which exposes users' children to harm and discomfort. This is found in paragraphs 118 and 211. Or excuse me, 121 of the complaint.

Zero tolerance policy. There was discussion about that in the briefings. TikTok publicly promotes

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that the company knows moderation quality is low across several, or excuse me, contrary to the zero tolerance policy TikTok publicly promotes. TikTok knows moderation quality is low across several policy categories, including sexual abuse, minors, sexual solicitation, so on and so forth. And this is found at the complaint, paragraphs 123 to 124, 129, and 136.

And so the Court finds that the claims at this juncture, and accepting all of the allegations in the complaint are true, do provide or do have facial plausibility such that 12(b)(6) shall not defeat the plaintiff's claims at this time.

Let me mention quickly the 9(b) standard. There was an argument that the 9(b) standard is applicable for frauds. And of course 9(b) anticipates a higher pleading standard. One has to plead with particularity when making allegations of fraud. The District, or excuse me, TikTok, contends that that standard is applicable here. Well, the Court agrees with Judge Kravitz in his opinion, looking at the *Frank Kinney v. District Hospital Partners* (phonetic) case. It's a binding Court of Appeals case from our jurisdiction, a 2020 case, that this case indicates that the CPPA was created to avoid these pleading requirements and traditional fraud causes of action to make it easier for litigants who believe they have been harmed by

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particular practices to sue under the CPPA, including the intent to deceive, and that the Rule 9(b)'s purpose is to put the defendant on proper notice of the allegedly fraudulent statements.

Let me talk quickly about the *Grindr* case. We had some discussion about *Grindr*. The Court took another look at it during the short recess. TikTok, as I understand it, uses *Grindr* in relation to two main points. One is that the Court held that targeting speech between users on the app violates the immunity provision of the CDA, Section 230. And two, that statements must be targeted to specific issues of safety to shed CDA 230 liability on the misrepresentation theory.

Well, regarding the first issue, as the Court understands it, *Grindr* considered a more removed harmful activity, namely speech between users that could lead to illegal activity. In *Grindr* there was speech between users, which led, unfortunately, to a rape in the real world outside of the application. Here, in alleging a harm and illegal financial transactions themselves, such as paying for sexual acts of minors or in perpetuating a fraud, there is a clear difference. The Court agrees with the argument made by the District's attorney.

So while TikTok alleges that sending financial gifts is akin to likes, that may be the case if the

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transactions themselves were not illegal as alleged by the District. Moreover, relating to the misrepresentation theory in *Grindr,* the affirmative statements focused on in *Grindr*, the Court asked counsel whether or not there were affirmative statements in *Grindr*. Counsel said, oh, yes, there are. Well, the affirmative statements in *Grindr* that were focused on was that the app was designed to create a safe and secure environment for its users. It's not a -- it's not a specific promise, as TikTok noted, but a description of its moderation policies.

Here, the statements alleged by the District are much more specific promises. The Court went over some of the statements enumerated by the District in its complaint earlier, but as it relates to why the Court believes the statements here are much more specific, the Court took a look at some of those statements.

So for example, the District argues that TikTok worked to address -- TikTok has stated that it worked to address issues with its recommendation engine, including filter bubbles, as early as 2020. TikTok's policies are strict and apply to everyone and everything. TikTok prohibits content about bullying, drugs, mature themes, disordered eating and weight loss, suicide and self-harm, and content that exploits children. TikTok identifies and proactively removes content that violates these policies.

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These statements are much more specific than those that the Court contemplated in *Grindr*. And even a statement that TikTok LIVE or any part of TikTok is safe is more specific than the aspirational claim and *Grindr* describing, as the Court understands, what *Grindr* strives to do or what the policy is designed to do. The sorts of statements the District is considering are specific representations as to what TikTok is actually doing today.

And so based on the foregoing, the CPPA claims survive.

Now lastly, moving to Counts IV and V, which are the claims under the MTA, the Court agrees with the District that the MTA creates and what the District has described as an overlapping enforcement regimen whereby DISB may institute an administrative cease and desist proceeding pursuant to D.C. Code 26-1022(a), and that under the MTA, the civil enforcement provisions, the Office of the Attorney General has the power to bring proceedings to recover all amounts due to the District under the civil penalty provision.

Nothing in the statute, and counsel was candid when the Court inquired on this issue, nothing in the statute requires the civil enforcement to stay the proceeding, or requires this Court to stay the proceedings while DISB makes a determination.

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And there was talk about the *Harmon* case and how perhaps this was a bit different. The Court disagrees. In *Harmon*, the USAO indicted a defendant under a section of the MTA. I think it was 26-102(c) of the MTA for engaging in unlicensed money transmission acts by trading virtual currency in the District, even though at the time of the indictment DISB had never determined that the defendant needed a license, and so the defendant and *Harmon* sought reconsideration based upon DISB's view of the MTA's application of the situation. But the Court concluded that the letter was only an informal opinion about the status of a single company and did not purport to express broader principles about the application of the MTA contained flawed and abbreviated research and reasoning, and at the end of the day, it refused to dismiss the indictment, relying upon its own construction of the MTA licensing requirements.

There is no dispute in this record that TikTok does not have a license under the MTA. This undergirds both counts. For this reason alone, the claims have facial plausibility here. Even so the defendants have not presided or have not presented, excuse me, viable arguments as to the merits, only that the Court should hold off until the administrative process concludes. But the Court is simply not convinced that it should,

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especially considering that DISB's inquiry, at whatever stage it finds itself, does not preclude this Court's judicial review.

There was some conversation today by counsel for TikTok about primary jurisdiction, and the primary jurisdiction doctrine applies whenever enforcement of a claim requires the resolution of the issues under which, under a particular regulatory scheme, have been placed within the special competence of an administrative body. This comes from the *Lawlor* (phonetic) case and its progeny. And the doctrine is really grounded in the teaching that cases that raise an issue of fact, not within the conventional wisdom of the finder of fact or judges, should be left to the discretion of administrative agencies, and that the administrative agency should not be passed over, akin to the arguments made by counsel during oral argument.

Well, number one, the Court can make a determination as to whether or not the MTA has been violated. It's not without the conventional experience or wisdom of the Court, because either one has a license or they don't. And here, there is no license in the record, or there's no indication that TikTok has a license, and TikTok has not produced any evidence that DISB engaged in any formal administrative action against it that could

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even ripen, rather, attach an informal inquiry from DISB.

The Court does acknowledge that the November 6th, 2024 letter does indicate that TikTok may be or that the Department has concerns related to TikTok engaging in certain money transaction activities and intends to conduct a comprehensive review of the various activities and asks for a meeting and additional documentation.

The record has not established that there has been any further movement, whether there has been an informal or even a formal undertaking beyond what we see here in this record.

And so given the record at this stage, there's simply no basis to stay consideration of these counts and certainly not to dismiss them, given the lack of argument as to the merits.

The Court will say that if DISB, in fact, undertakes an administrative proceeding, TikTok can raise this issue again. I'm going to deny the request. Of course, it's not without prejudice.

And so based upon the rulings of the Court, the Court finds that all claims have facial plausibility and TikTok's motion will be denied.

And so moving to the second motion, and that is the 1122 opposed motion for protective order, one of the reasons for the request was that TikTok did not want to be

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CERTIFICATE OF TRANSCRIBER

I, DeAnne Ridge, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of DISTRICT OF COLUMBIA v. TIKTOK, INC., Docket Number: 2024 CAB 006377, in said Court, on the 24th day of February, 2025.

I further certify that the foregoing 184 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 26th day of February, 2025.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. TIKTOK INC., TIKTOK U.S. DATA SECURITY INC., TIKTOK LLC, TIKTOK PTE. LTD., TIKTOK LTD., BYTEDANCE INC., and BYTEDANCE LTD., Defendants.	Case No. 2024CH09302 Judge Michael T. Mullen

MEMORANDUM OPINION AND ORDER

This is an action brought by the Illinois Attorney General under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, ("ICFA") (Count I) and the Uniform Deceptive Trade Practices Act, 815 ILCS 510/1, *et seq.*, ("UDTPA") (Count 2) against the owners and operators of the popular social media application TikTok. More specifically, this action is brought against defendants TikTok Inc., TikTok U.S. Data Security Inc., TikTok LLC, TikTok Pte. Ltd., TikTok Ltd., ByteDance Inc., and ByteDance Ltd. (the "Defendants"). This matter comes before the Court on the Defendants' combined section 2-619.1 motion to dismiss (the "Motion") the Complaint filed by Plaintiff the People of the State of Illinois (the "State"). The Court has reviewed the briefs and supplemental authorities submitted by the parties and heard the parties' oral arguments. For the reasons discussed below, the Defendants' motion is denied.

I. Background

In 2017, ByteDance released TikTok as a video-hosting application. Complaint ("Compl.") ¶ 51. Today, TikTok is among the most widely used social media applications in the world. *See id.* ¶¶ 64-66. The "TikTok Platform" is an online entertainment platform that allows users to create,

share, and comment on videos. *Id.* ¶¶ 50-54. The central feature of TikTok is its "For You" feed. *Id.* ¶ 96. Each individual user has a different "For You" feed that serves the user with an endless stream of videos provided by TikTok's "Recommendation System." *Id.* The Recommendation System is comprised of a complex set of algorithms that work together to predict how to maximize user engagement. *Id.* ¶ 100. The Recommendation System's predictions are based on behavioral patterns and data trends gleaned from users' interactions with the videos. *Id.* ¶¶ 104-05. The Recommendation System does not detect a video's content or identify why a user might decide to watch (or skip) a video. *Id.* ¶¶ 98-99. Therefore, the Recommendation System does not, because it cannot, determine what users subjectively want to see. *Id.* ¶ 96. As the Recommendation System does not know or understand the contents of the videos it serves, the State's allegations describe this system as "content-agnostic." *Id.* ¶ 101.

The State alleges that TikTok is designed to create compulsive and excessive use by young users, *i.e.*, children (individuals under the age of 13) and teenagers (individuals aged 13 to 17). *Id.* ¶¶ 1-3. The State further alleges that the Defendants have *targeted* children and teenagers with coercive-by-design features to keep young users on the TikTok Platform as long as possible in order to sell advertisements and catalog their data. *Id.* ¶¶ 1, 3, 67-79, 82, 122, 144, 154. The State alleges that the Defendants are aware that the TikTok Platform is particularly compelling but harmful to young users as it is designed to override their autonomy and increase time spent on the TikTok Platform. *See id.* ¶¶ 1, 80-95. The State additionally alleges that TikTok Platform features also drive compulsive and excessive use by young users, which the Defendants know is detrimental to young users' mental health. *Id.* ¶¶ 5, 118-56, 195, 199, 208, 213-14, 361. These features include filters that interact with videos, push notifications, and the "For You" feed's endless stream of

videos. *Id.* The State alleges that the Defendants' development and deployment of these technologies amount to unfair business practices under the ICFA. *Id.* ¶ 362.

The State further alleges that the Defendants have misled the public about its Platform. The State alleges that the Defendants have made false statements about TikTok's features, as well as the company's overall goals as to how the TikTok Platform is used. *Id.* ¶¶ 230-358. TikTok's officials – including their CEO – allegedly made deceptive public statements in Congressional testimony, as well as at TED Talks (filmed at TED conferences and released online), in full-page newspaper advertisements, and in official statements on their company website. *Id.* The State alleges that these false and misleading statements violate both the ICFA and the UDTPA, 815 ILCS 510/2, which is incorporated into the ICFA. *Id.* ¶¶ 361, 369; 815 ILCS 505/2.

More specifically, the State alleges that the TikTok platform is "unfair" because certain features cause user-generated content on the TikTok Platform to become "addict[ive]," leading younger users to engage with excessive content. Compl. ¶¶ 362-65. The State alleges a number of features are unfair:

- **Recommendation system.** The State challenges the TikTok Platform's use of algorithms to review and select videos for each user, presenting each with a personalized stream of videos. *Id.* ¶¶ 96-117;
- **Effects.** The State challenges "[e]ffects" that allow user-creators to edit how their videos appear. *Id.* ¶¶ 119-20;
- **Autoplay and "infinite scroll."** The State challenges the use of features that allegedly "automatically begin[] to play" videos in a user's feed when the user opens the application, *id.* ¶¶ 121-23, and that "load and serve new videos for the user to view as the user scrolls through their feed," *id.* ¶¶ 124-27;

- **TikTok Stories and LIVE.** The State challenges TikTok Stories, which allows users to post videos that remain visible on the TikTok Platform for 24 hours, *id.* ¶¶ 127-28, and TikTok LIVE, a feature that allows users to livestream videos, *id.* ¶¶ 127-31;
- **Push notifications.** The State challenges "push notifications," which "alert a user" to activity within the TikTok Platform. *Id.* ¶¶ 132-44; and
- **Likes, comments, and other interactions.** The State challenges features that allow users to interact with each other, by "lik[ing]" or commenting on videos. *Id.* ¶¶ 145-56.

The State further alleges that the Defendants have inadequately and inaccurately described the alleged risks and harms of using the TikTok Platform. *Id.* ¶¶ 361, 369. The State's deception claims allege misrepresentations concerning the following topics:

- **Safety of TikTok Platform design features.** The State alleges that the Defendants misrepresented and concealed that TikTok Platform features promote "compulsive, prolonged, and unhealthy use by young users." *Id.* ¶¶ 157-227, 361(A)-(C), (F), 362(A), 369(A)-(B), (D)-(E);
- **Efficacy of TikTok Platform "safety tools."** The State alleges that the Defendants misrepresented the efficacy of various TikTok Platform safety "features" and "processes for protecting young users." *Id.* ¶¶ 228-356, 361(D), (G), 369(C), (F). Specifically, the State challenges representations about the efficacy of TikTok Platform "screentime management tools," *id.* ¶¶ 231-65, and content management features, *id.* ¶¶ 266-88, and the Defendants' alleged inconsistent application and enforcement of TikTok Platform content-moderation policies, such as its "Community Guidelines," *id.* ¶¶ 289-356; and
- **TikTok Platform's safety priorities.** The State alleges that the Defendants misrepresented that it "prioritized young users' health and safety." *Id.* ¶¶ 357-58, 361(E).

In response to the State's Complaint, the Defendants moved to dismiss the State's Complaint in a combined motion pursuant to Code of Civil Procedure section 2-619.1, 735 ILCS 5/2-619.1, raising arguments under 735 ILCS 5/2-619 ("Section 2-619") and 735 ILCS 5/2-615 ("Section 2-615").[1] In essence, the Defendants argue that dismissal is warranted under Section 2-619, as the State's claims are precluded by both Section 230 of the Communications Decency Act, 47 U.S.C. § 230, and the First Amendment to the United States Constitution, U.S. Const. amend. I. The Defendants further argue that dismissal is required under Section 2-615 as the State has failed to plead properly the required elements of an ICFA claim. The motion has been fully briefed. Following the close of briefing, the Court allowed both parties to cite to supplemental authorities and then heard oral arguments from the parties' very able counsel.

II. Analysis

A. Standard of Review

The Defendants' motion has been brought pursuant to Section 2-619.1 of the Code of Civil Procedure, which permits Section 2-615 and Section 2-619 motions to be brought in a single motion. *See* 735 ILCS 5/2-619.1 (2024). Although the Section 2-615 and 2-619 motions may be combined, they may not be commingled. A motion to dismiss filed under Section 2-615 of the Code challenges the legal sufficiency of the complaint based upon defects apparent on its face. 735 ILCS 5/2-615 (2024); *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47. The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action for which relief may be granted. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). In making this determination, all well-pled facts in the complaint and all reasonable inferences that may be drawn from those facts,

[1] Although the Defendants do not specifically identify under which subpart of Section 2-619 this motion has been brought, the Court assumes that the Defendants' motion is brought under Section 2-619(a)(9), which provides that an asserted claim is barred by "other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).

are taken as true and are to be construed in a light most favorable to the plaintiff. *Khan*, 2012 IL 112219, ¶ 47; *Young v. Bryco Arms*, 213 Ill. 2d 433, 441 (2004). A 2-615 motion does not admit conclusions of law or conclusory factual allegations unsupported by specific facts alleged in the complaint. *Zander v. Carlson*, 2020 IL 125691, ¶ 25. A cause of action should not be dismissed unless it is clearly apparent that no set of facts can be proved that would entitle a plaintiff to recover. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). However, a court may not rely on extrinsic material when ruling on a Section 2-615 motion. *Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 91 (1996).

In contrast, a motion to dismiss under Section 2-619 admits the legal sufficiency of all well-pled facts but allows for the dismissal of claims barred by affirmative matter that defeats those claims or avoid their legal effect. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 83 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006)). "Affirmative matter" encompasses any defense other than a denial of the essential allegations of the plaintiff's claim. *Khan*, 2012 IL 112219, ¶ 18. For this reason, a Section 2-619 motion admits as true all well-pled facts and all reasonable inferences drawn from those facts. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). Additionally, a cause of action should not be dismissed under Section 2-619 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003).

B. The Defendants' 2-615 Motion

The Consumer Fraud Act is a regulatory and remedial statute designed to protect consumers against unfair and deceptive business practices. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002). "It is to be liberally construed to effectuate its purpose." *Id.* at 417. Section 7 of the ICFA authorizes the Attorney General to sue any person utilizing methods, acts, or

practices declared to be unlawful under it and to seek a multitude of remedies including injunctive relief, restitution, and civil penalties. 815 ILCS 505/7. To state a claim under the ICFA, "the Attorney General need allege only that: (1) a defendant is engaged in a trade or commerce; and (2) the defendant is engaged in unfair deceptive acts or practices in the conduct of that trade or commerce." *People ex rel. Hartigan v. All Am. Aluminum & Constr. Co.*, 171 Ill. App. 3d 27, 34 (1st Dist. 1988). The State, through the Attorney General, has sufficiently pled that the Defendants have engaged in both deceptive and unfair conduct.

i. The Complaint sufficiently pleads deceptive acts.

A. The Consumer Fraud Act.

The State has sufficiently alleged that the Defendants violated the ICFA through deceptive statements regarding TikTok Platform features and the company's intent to keep users on the TikTok Platform for as long as possible. *See* Compl. ¶¶ 157-358. To state a claim for deceptive conduct under the ICFA, the State must allege that: (1) the Defendants committed a deceptive act or practice; (2) the Defendants intended for consumers to rely on that deceptive act or practice; and (3) the deception occurred in the course of trade or commerce. *People ex rel. Madigan v. United Constr. of Am.*, 2012 IL App (1st) 120308, ¶ 16.

The Defendants maintain that the State has failed to plead the first element, *i.e.*, that the Defendants committed a deceptive act or practice. An act or practice is deceptive under the Consumer Fraud Act if it has the tendency or capacity to deceive. *Harwood v. Piser Mem'l Chapels*, 102 Ill. App. 3d 514, 518 (1st Dist. 1981). In its Complaint, the State has identified numerous statements made by the Defendants' representatives that, if proven, would meet this standard. These allegations include:

- A full-page advertisement in the *Washington Examiner*, along with similar advertisements in newspapers like the *Washington Post*, stating that "Teen accounts automatically have a daily screen time limit of 60 minutes," though, the State alleges, this "limit" is easily circumvented by entering a passcode and, thus, is not really a limit at all. It is reasonable to infer that the purpose of this advertisement was to convince parents that their teens would be unable to spend more than one hour per day on TikTok, inducing them to allow their teens to use it. The words "automatically" and "limit" have well-understood, concrete meanings, and the phrase "[o]nly on TikTok" represents that this is a feature differentiating TikTok from other social media applications that have no purported limits. When paired with the State's allegations that this "limit" could be easily disabled for the remainder of any given day, the Complaint sufficiently alleges that this advertisement was deceptive. Compl. ¶¶ 241-44, 256-63.
- Congressional testimony by Michael Beckerman, TikTok's Vice President and Head of Public Policy, and statements by Shou Chew, TikTok's CEO, at a TED Talk touting "Take a Break" videos and "Family Pairing," which were purportedly created to be time-management tools. The State alleges, however, that TikTok acknowledged that these referenced tools are merely "useful talking points" and are "not altogether effective" at actually managing compulsive use or time spent on the TikTok Platform. *Id.* ¶¶ 162-67, 259-64.
- Congressional testimony by CEO Chew describing TikTok's approach to its product as a "safety-by-design mentality, even if those features limit [TikTok's] monetization opportunities," while the State alleges TikTok's internal records established that its business model was actually designed to optimize time spent on the TikTok Platform.

Indeed, the company's internal metrics for success regarding several "safety features" measured drops in time minors spent on the TikTok Platform and sought to *minimize* any drop in time spent by minors to no more than 5%. *Id.* ¶¶ 249-55.

- Official media statements representing that TikTok had not found any evidence of a dangerous "Blackout Challenge" on the application, although, the State alleges that months before these statements were made, TikTok's internal records described the "Blackout Challenge" as a "high risk trend." *Id.* ¶¶ 296-304.

Taking these well-pled allegations as being true, as is required when determining whether to grant or deny a 2-615 motion, the State has clearly set forth explicit statements regarding TikTok Platform's design and safety features that extend well beyond "mere puffery." These statements are not "subjective characterizations" as the Defendants argue when quoting *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 173-74 (2005). "Puffing in the usual sense signifies meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud." *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 73 (2007).

In the State's Complaint, it is clearly and factually alleged that the statements:

i. were public representations about specific features of the TikTok Platform;

ii. described how the company designed its product and intended consumers to engage and react to its product; and

iii. demonstrated whether the company was aware of dangerous content on the TikTok Platform.

The Complaint alleges that each of these statements were false and contradicted by TikTok's own documents. At this stage of the proceedings, it is reasonable to infer that the Defendants intended for consumers to rely on identified statements considering their public nature

and that some were contained within paid advertisements that clearly emphasized the alleged safety of the TikTok Platform. Further, the State's Complaint alleges that during testimony at a Congressional hearing (which had been convened to determine TikTok Platform safety) CEO Chew emphasized that TikTok's cited features ensured the safe and appropriate use of its product. A reasonable inference is that CEO Chew's testimony demonstrates both the importance of this information and that the Defendants intended for consumers to rely on the accuracy and truthfulness of the information conveyed.

Although the Defendants argue that the State is attempting to have this Court find that an otherwise lawful good or service itself constitutes an unfair act or practice, the well-pled allegations support the State's identified cause of action and is not novel as the Defendants argue. The State's Complaint sufficiently alleges claims for deceptive conduct in violation of the Consumer Fraud Act.

B. The Uniform Deceptive Trade Practices Act.

In its Complaint, the State alleges that the Defendants violated Sections 2(a)(5), (7), and (12) of the UDTPA. Section 2(a)(5) makes it unlawful to represent that a good or service has characteristics, uses, or qualities that the good does not have. 815 ILCS 510/2(a)(5). The State alleges that TikTok represented that the TikTok Platform had certain features designed to limit the time young users spend on it when these features are actually ineffective. For example, the State alleges in its Complaint that Beckerman testified before Congress that TikTok has "a responsibility, along with parents, to make sure that [TikTok is] being used in a responsible way" and that Chew stated at a TED talk that the Defendants' "goal is not to optimize and maximize time spent." Compl. ¶¶ 159-60. The State alleges that these cited statements misrepresented the nature of the TikTok Platform, as the Defendants designed it to do just the opposite – "target users' time and attention"

and "exploit psychological vulnerabilities to keep young users compulsively using the TikTok Platform." *Id.* ¶ 161.

Section 2(a)(7) makes it unlawful to represent that goods or services are of a particular standard or quality when they are really of another. 815 ILCS 510/2(a)(7). Chew's cited testimony before Congress that TikTok "launch(ed)…products with a safety-by-design mentality, even if those features limit our monetization opportunities," is contradicted by TikTok's cited internal metrics for success that reasonably establish that the opposite is true. Compl. ¶¶ 249-55. For example, the State alleges that TikTok's guidelines are to stay within "guardrails" for new safety features to only allow a maximum of a 5 % drop in stay time for young users. *Id.* ¶¶ 252-53.

Section 2(a)(12) makes it unlawful to engage in conduct that creates a likelihood of confusion or misunderstanding. 815 ILCS 510/2(a)(12). The State's Complaint contains allegations as to how the Defendants have misled consumers regarding the 60-minute "limit" for teen accounts that are easily circumvented and which, in fact, do not create any real limit at all. The State's Complaint sufficiently alleges claims for conduct in violation of the UDTPA, which is a violation of Section 2 of the ICFA.

ii. The Complaint sufficiently pleads unfair business practices.

Illinois courts consider three factors to determine if conduct constitutes an unfair business practice in violation of the ICFA. "These factors are: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers." *Robinson*, 201 Ill. 2d at 417-18 (citing *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)) (the "*Sperry* factors"). "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the

degree it meets one of the criteria or because to a lesser extent it meets all three." *Id.* at 418 (quoting *Cheshire Mortgage Serv's, Inc. v. Montes*, 612 A.2d 1130, 1143 (Conn. 1992)).

The State identifies several technologies developed and deployed by the Defendants to teens that it claims constitute unfair business practices. These technologies, all of which were pushed to and used by teens, include: (1) an algorithm that recommends an endless stream of new and diversified videos on users' "For You" feeds meant to create a "slot machine" type of effect of producing dopamine reactions in young users' brains; (2) "effects" that are overlayed on top of videos to alter users' appearances; (3) autoplay of videos; (4) live and ephemeral videos; (5) push notifications; and (6) interactive features such as "likes" and comments. Compl. ¶¶ 96-156. The State claims that these features drive young users to compulsive and excessive use of the TikTok Platform and that TikTok is aware that they are detrimental to teens' mental health. *Id.*

Construing the Complaint in the light most favorable to the State, the Court finds that these allegations satisfy all three *Sperry* factors at least to some extent. *First*, a practice satisfies the "immoral, unethical, oppressive, or unscrupulous" *Sperry* factor if it is so oppressive that it leaves consumers with little alternative but to submit to it. *Robinson*, 201 Ill. 2d at 418. The State argues that this *Sperry* factor is satisfied through its allegations that the TikTok Platform is designed to keep young users on it by taking advantage of their dopamine reward systems and creating social consequences for those who do not use the TikTok Platform excessively. Compl. ¶¶ 80–156. While the Defendants argue that consumers always have a choice as to whether to use a service that is on the market, it is reasonable to infer, given the facts as alleged in the Complaint, that this choice is illusory for teens because of social pressure and the immaturity of their developing brains. The State alleges that the Defendants specifically target children, who have unique psychological vulnerabilities, with algorithmic models and features meant to keep them on the TikTok Platform

as long as possible. *Id.* ¶¶ 3, 67–156. Further, the State alleges that studies have shown that 63 % of Americans aged 13-17 reported using TikTok, with most teens reporting using it daily. *Id.* ¶¶ 66, 210.

The cases cited by the Defendants to rebut this factor, *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill . 2016), and *Ristic v. Machine Zone, Inc.*, No. 15 CV 8996, 2016 U.S. Dist. LEXIS 127056 (N.D. Ill. Sept. 19, 2016), are distinguishable. Both cases dealt with the general addiction of adults, not claims based on the deliberate targeting of minors' brain chemistry and their uniquely sensitive "fear of missing out" of what their peers are doing. Indeed, the one court to apply Illinois law to a claim similar to this one found both *Phillips* and *Ristic* inapplicable. *See California v. Meta Platforms, Inc. (In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.)* (the "*Social Media MDL*"), 753 F. Supp. 3d 849, 895-97 (N.D. Cal. Oct. 15, 2024).

Second, a practice may satisfy the "substantial injury" *Sperry* factor by doing a small harm to a large number of people or raising a significant risk of concrete harm. *Id.* at 895-96. The State satisfies this criterion through numerous allegations showing that the Defendants have knowledge that the coercive nature of the TikTok Platform is harmful to young users but refuse to change the TikTok Platform to prevent such harm. Compl. at ¶¶ 169–229. The Defendants again argue that *Phillips* and *Ristic* show that this criterion is not satisfied because the courts in those cases found that the adult plaintiffs could have reasonably avoided the costs of buying more virtual coins from those gambling sites. Def. Motion at 15; *Phillips,* 173 F. Supp. 3d at 743; *Ristic,* 2016 U.S. Dist. LEXIS 127056 at *12. But the State's Complaint alleges that the Defendants target the psychological vulnerabilities of young users by designing the TikTok Platform's features to override their ability to engage with it in a non-compulsive manner. Compl. at ¶¶ 134, 138, 161,

223(d), 362(C), 363. The State also alleges that significant percentages of users are on TikTok "several times a day" or "almost constantly." *See id.* ¶¶ 66, 210. Consequently, the known harms of the TikTok Platform cannot reasonably be avoided by young users, at least based on the well-pled facts contained in the Complaint. Unsurprisingly, similar arguments that TikTok has made in other jurisdictions have been rejected. *See, e.g., Social Media MDL*, 753 F. Supp. 3d at 898-99; *Commonwealth v. Meta Platforms, Inc.*, No. 23-2397-BLS1, 2024 Mass. Super. LEXIS 161 (Sup. Ct. Mass. Oct. 17, 2024); *Dist. of Columbia v. Meta Platforms, Inc.*, No. 2023-CAB-6650, 2024 D.C. Super. LEXIS 27 at *50–51 (Sup. Ct. D.C. Sept. 9, 2024).

Finally, to satisfy the "public policy" *Sperry* factor, a practice needs to at least fall within the penumbra of a common-law or statutory concept of unfairness. *See Doctors Direct Ins., Inc. v. Bochenek*, 2015 IL App (1st) 142919, ¶ 34. The State argues that creating an application meant to addict minors falls within the penumbra of various Illinois laws to shield minors from products and services that tend to be used addictively, such as drugs, alcohol, and gambling: 1) the Juvenile Court Act of 1987, art. IV, 705 ILCS 405/4-1; 2) the Juvenile Drug Court Treatment Act, 705 ILCS 410; and 3) the Illinois Gambling Act, 230 ILCS 10, *et seq*. The Court agrees that the State's claim falls within this penumbra sufficiently to satisfy the public policy *Sperry* factor.

The well-pled allegations contained within the State's complaint satisfy each *Sperry* factor. Therefore, the Complaint states a sufficient claim for unfair conduct in violation of the ICFA. The motion to dismiss pursuant to Section 2-615 must be denied.

C. The Defendants' 2-619 Motion

The Defendants' threshold argument contained in its 2-619 motion, is that even if the State's allegations set forth viable claims under ICFA or UDTPA, those claims are barred by Section 230 of the Communications Decency Act and the First Amendment. The Defendants

recognize that the State has made allegations relative to TikTok Platform's "own conduct," but argue that the cited conduct is actually conduct that constitutes the acts of deciding which third-party videos to display to each user and how to display them. The Defendants maintain that as such, the acts are expressive publishing activity protected by both Section 230 and the First Amendment.

i. Section 230 of the Communications Decency Act does not bar the State's claims.

Section 230 generally protects online platforms from being held liable as the "publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1). Section 230 makes clear that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider[,]" and it preempts any state law inconsistent with that provision. 47 U.S.C. §§ 230(c), (e)(3). These provisions immunize online platforms from both suit and liability for any alleged harms arising out of "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); *Winter v. Facebook, Inc.*, 2021 U.S. Dist. LEXIS 224836, at *8 (E.D. Mo. Nov. 22, 2021) (collecting cases).

Section 230's protections are broad and extend to "causes of action of all kinds[,]" *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019), ranging from claims arising from a provider's "exercise of its editorial and self-regulatory functions," *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), to claims arising from providing users with "a forum with[in] which to communicate" and "failure to delete content," *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019). To avoid chilling the expressive activity that online platforms facilitate, courts "agree" that "close cases . . . must be resolved in favor of" protecting online platforms. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*,

521 F.3d 1157, 1174 (9th Cir. 2008) (en banc). As the Defendants correctly argue, courts should apply Section 230 at the pleading stage, as the statute protects online platforms "from ultimate liability," and also "from having to fight costly and protracted legal battles." *Id.* at 1175; *see, e.g., Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 738 (9th Cir. 2024).

Section 230 was passed in the wake of a New York Court's decision in *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (Nassau Cnty. Sup. Ct. May 24, 1995), which held that an internet forum website was liable for defamation by a third-party user as the website moderated out some, but not all, potentially defamatory statements of that user. *Zeran*, 129 F. 3d at 331. "The amendment was intended to overrule *Stratton* and provide immunity for 'interactive computer service[s]' that make 'good faith' efforts to block and screen offensive content." *FTC v. LeadClick Media, LLC*, 838 F. 3d 158, 173 (2d Cir. 2016).

While Section 230 has been broadly applied across various causes of action sounding in state tort law, its text and subsequent application clearly show that it is meant to immunize liability based on the substance of third-party content. It is not a "get-out-of-jail-free card" for websites that permit user-submitted content. *Doe v. Internet Brands, Inc.*, 824 F. 3d 846, 853 (9th Cir. 2016). Nor was it "meant to create a lawless no-man's-land on the Internet." *Roommates.com, LLC*, 521 F. 3d at 1164.

Within the not so distant past, many state courts have been presented with motions similar to the Defendants' present motion that seeks the involuntary dismissal of the State's Complaint based on Section 230 immunity. In several cases in which State Attorneys General have brought claims under the relevant state consumer fraud acts against TikTok and Meta, courts have declined to dismiss the Complaints based on arguments that Section 230 provided those entities with immunity. *See, e.g., State of Vermont v. Meta Platforms, Inc.*, No. 23-CV-4453, 2024 Vt. Super.

LEXIS 146 at *15–16 (Vt. Super. Ct. July 28, 2024); *Iowa v. TikTok Inc.*, No. EQCE089810, at 20–21 (Iowa Dist. Ct. Aug. 26, 2024); *Dist. of Columbia v. Meta Platforms, Inc.*, No. 2023-CAB-6650, 2024 D.C. Super. LEXIS 27 (Sup. Ct. D.C. Sept. 9, 2024); *Nevada v. TikTok Inc.*, No. A-24-886127-B, at 99 (Nev. Dist. Ct. Sept. 24, 2024); *Utah Div. of Consumer Prot. v. TikTok Inc.*, No. 230907634, at 13 (Utah Dist. Ct. Nov. 12, 2024); *Commonwealth*, 2024 Mass. Super. LEXIS 161; *Utah Div. of Consumer Prot. v. TikTok Inc.*, No. 240904292 at 9-10 (Utah Dist. Ct. Feb. 20, 2025); *Dist. of Columbia v. TikTok, Inc.*, No. 2024-CAB-006377 (Super. Ct. D.C. Feb. 24, 2025); *State of Washington v. TikTok, Inc., et al*, No. 24-2-23100-5 SEA (Super. Ct. Wash Mar. 28, 2025); *South Carolina v. TikTok, Inc.*, No. 2024-CP-40-06018 (Ct. of Com. Pleas S.C. May 6, 2025).[2]

The Defendants maintain that each court has made the same fundamental mistake. According to the Defendants, each court interpreted the underlying claims as attacks on the Defendants' own conduct. The Defendants assert that the focus should be on the substance of the third-party videos on the Defendants' platform.

The parties agree that the Ninth Circuit's three-prong test in *Barnes v. Yahoo!, Inc.* provides the proper framework to analyze a Section 230 defense. Under this test, Section 230 applies if: (1) the defendant is a provider or user of an interactive computer service; (2) whom a plaintiff seeks to treat as a publisher or speaker under a state law cause of action; and (3) of information provided by another information content provider. *Barnes,* 570 F. 3d at 1100-01. There is no dispute that the Defendants are providers of an interactive computer service; therefore, the first prong of the identified test is satisfied.

"The second and third prongs of *Barnes* require [courts] to consider each cause of action alleged 'to determine whether a plaintiff's "*theory of liability* would treat a defendant as a

[2] The Court fully recognizes that, although each cited decision was well reasoned, none of the cited decisions are binding on this Court.

publisher or speaker of third-party content."'" *Doe v. Grindr, Inc.*, 128 F.4th 1148, 1151 (9th Cir. 2025) (quoting *Calise v. Meta Platforms, Inc.*, 103 F. 4th 732, 740 (9th Cir. 2024)) (quoting *Barnes*, 570 F. 3d at 1101)) (emphasis in original). The Defendants argue that their actual conduct was a decision they made to determine what third-party content should be published to each user. Therefore, the Defendants maintain that any claims raised by the State (in this or any other cited case) is necessarily based on the substance of the third-party content.

The scope of Section 230 is broad, barring any "lawsuit[] seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions." *Zeran*, 129 F.3d at 330. These "protected" functions encompass any "activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Roommates.com, LLC*, 521 F.3d at 1170-71. The functions include "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content," *Barnes*, 570 F.3d at 1102, as well as "editorial decisions and functions ancillary to the decision to make content available." *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 827 (N.D. Cal. 2023) ("In re Soc. Media I").

The "ordinary meaning" of "publisher" includes an online platform's use of "tools such as algorithms that are designed to match [third-party] information with a consumer's interests." *Force*, 934 F.3d at 66. The reason for this broad definition is that a key function of an online platform is to decide what content to select, how to organize it, and how to present it to users. Decisions that are "part and parcel of [a website's] overall design and operation"—and that "reflect choices about what content can appear on the website and in what form"—"fall within the purview of traditional publisher functions." *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016) (citation omitted).

In each decision the Defendants have cited to support dismissal based on Section 230, the plaintiff's theory of liability was based on the substance of third-party user content and the allegations that the defendant was liable because of that content. *See, e.g.*, *Nasca v. ByteDance Ltd.*, Index No. 607250/2023, slip op. (N.Y. Sup. Ct. Apr. 15, 2025) (the claim was based on plaintiff's son committing suicide after viewing user-submitted content promoting suicide and self-harm); *Grindr, Inc.*, 128 F. 4th at 1152 (the claim was based on direct messages on a dating application that led to adults having inappropriate encounters with the minor plaintiff); *M.P. v. Meta Platforms, Inc.*, 127 F. 4th 516, 521 (4th Cir. 2025) (the claim was based on Dylan Roof being radicalized by white supremacist propaganda he viewed on Facebook); *Force*, 934 F. 3d at 65 (the claim was based on Facebook "giving Hamas a forum with which to communicate and for actively bringing Hamas' message to interested parties").

The State's theory of liability as set forth in its Complaint does not treat the Defendants as the publisher or speaker of third-party content. The State alleges that it is *not* seeking to hold the Defendants liable for content created by "another information content provider," but instead for the Defendants' own alleged unfair and deceptive statements and acts. This is true both regarding the alleged addictive-by-design features of the TikTok Platform, as well as the alleged misleading or deceptive claims made by TikTok regarding the safety of the TikTok Platform for children and teenagers.

The alleged unfair conduct consists of technologies developed and deployed by the Defendants. These technologies are analogous to the defendant-developed speed filter at issue in *Lemmon v. Snap*, 995 F. 3d 1085, 1094 (9th Cir. 2021), and the defendant-developed questionnaire at issue in *Roommates.com, LLC*, 521 F. 3d at 1164, neither of which were protected by Section 230. For example, the State alleges that the Recommendation System is designed to create a "slot

machine" type effect in users' brains such that the arrival of a new video creates a dopamine reaction, leading to compulsive use in anticipation of more dopamine. Compl. ¶¶ 138-39. "And so the addiction is not to the content, but to this expectation and anticipation which is specifically engineered by the algorithm as an ultimate goal of the engine." *See Tr. of Mar. 28, 2025 Ruling, Wash. v. TikTok, Inc.*, No. 24-2-23100-5 SEA at 57. The State's theory of liability is therefore based on the Defendants' own conduct, not the substance of any third-party user content.

The Defendants maintain that the State's claim *is* in fact based on third-party user content, at least regarding the Recommendation System. According to the Defendants, when the Recommendation System serves a video in a user's "For You" feed, it is "publishing" that video to that user based on the substance of the video and the users' preferences. The Defendants argue that the Complaint explicitly alleges this. At oral argument, Defense counsel pointed to Paragraphs 112 and 113 of the State's Complaint as examples of allegations that are based on the Recommendation System being aware of the substance of the content of the video. These paragraphs allege that the system creates a unique score for each video that creates a weighed prediction as to whether a user will engage with the video. Compl. ¶¶ 112-13. Defense counsel argued that this could not be done without understanding the content of the videos.

The Defendants appear to be seeking an inference that these paragraphs allege that the Recommendation System is aware of the substance of videos. The Complaint's allegations make no such assertion, and such an inference would also contradict prior Complaint allegations. In fact, the Complaint *does* allege that scoring is done without understanding the content of the videos. Neither paragraphs 112 nor 113 allege that the system is aware of the substance of a given video. To determine the nature of the State's cause of action, the Court must consider the whole of the Complaint and not focus on isolated paragraphs. *See Borcia v. Hatyina*, 2015 IL App (2d) 140559,

¶ 37. The State's allegations about the Recommendation System describe it as "content-agnostic" – that it does not know to concentrate on content based on a shared substantive trait between videos. Compl. ¶¶ 101-03. Instead, the Complaint alleges that the Recommendation System relies on patterns of user engagement as opposed to the substance of the videos. *Id.* ¶¶ 104-16.

The second prong of the *Barnes* test is also unmet as the State's theory of liability does not treat the Defendants as a "publisher or speaker," but as a product maker. "Although the statute does not define 'publisher,'" courts have interpreted the term to refer to an individual or entity who "*mak[es] the decision* whether to print or retract a given piece of content," as this decision-making function represents "the very essence of publishing." *Klayman v. Zuckerberg*, 753 F. 3d 1354, 1359 (D.C. Cir. 2014) (emphasis added). It protects decisions about "whether to exclude material that third parties seek to post online." *Roommates.com, LLC*, 521 F.3d at 1170–71. These authorities demonstrate that there must be a nexus between a defendant's decision to publish or remove content and the specific substance of that content for Section 230 to apply. Based upon the well-pled allegations, no such nexus exists.

None of the Complaint's allegations pertain to any aspect of the TikTok Platform that could reasonably be related to any decision making as to content exclusion. Therefore, the Defendants cannot be considered a "publisher" under Section 230 because the State's unfairness claim concerns the TikTok Platform's content-agnostic technology that does not involve any decision-making regarding the substance of videos. Section 230 does not bar the State's unfairness claim.

Section 230 also does not immunize the Defendants' alleged deceptive statements. The State's deception claim does not concern the Defendants' role as a publisher of third-party content. Put another way, the State's allegations are based on the Defendants' *own* deceptive statements, not those of a third party. In contrast, the Defendants argue that the State's deception claim is based

on the Defendants' failure to remove harmful third-party content. A fair reading of the Complaint makes clear that the deception claim does not seek to hold the Defendants liable for failing to remove third-party content as aggressively as their own policies would require. Rather, the Defendants' failure to remove third-party content is only relevant to the extent that the Defendants have issued statements potentially misleading the public into concluding that the Defendants remove certain types of content despite their failure to do so. Compl. ¶¶ 289–305. A similar argument was rejected in *Demetriades v. Yelp, Inc.*, in which a plaintiff alleged that the Yelp website falsely advertised that its user-submitted reviews passed through a filter to provide consumers with the most trusted reviews. *Demetriades*, 228 Cal. App. 4th 294, 300–01 (2014). The court found that Section 230 did not apply as the plaintiff's claim targeted Yelp's "own statements regarding…its filter," not the third-party reviews themselves. *Id.* at 313. Likewise, the deception claim here targets the Defendants' own statements, not any third-party statements.

The Court has reviewed the well written and reasoned decisions cited by the Defendants in *M.P. v. Meta Platforms Inc.*, 127 F.4th at 524-27, *Grindr, Inc.*, 128 F.4th at 1152-55, and *Angelilli v. Activision Blizzard, Inc.*, 2025 U.S. Dist. LEXIS 7724 (N.D. Ill. Apr. 23, 2025). In this case, the State focuses on the Defendants' statements. Again, it is the Defendants' own statements that are being used to support the deception claim relative to specific features and/or company goals. The Defendants' cited statements are allegedly false and are contradicted by TikTok's internal records. Based upon a thorough review of the State's Complaint and viewing the State's Complaint in the light most favorable to the Plaintiff, it is reasonable to conclude based on specific factual allegations that the State does not seek to treat the Defendants as publishers of third-party content. Rather, the State seeks to hold the Defendants responsible for their own design features that determine what videos to display, how to display them and how users can interact with the videos.

The Court has concluded that as both the State's unfairness and deception claims do not seek to treat the Defendants as a publisher of the third-party content published on the TikTok platform, the protections afforded by Section 230 do not apply.

ii. The First Amendment does not bar the State's claims.

The Defendants further argue that the First Amendment bars the State's claims. More specifically, the Defendants argue that the First Amendment prohibits the State's challenge to the manner in which the TikTok Platform selects and organizes third-party content. In support of their position, the Defendants cite the recent decision in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), in which the Court struck down a challenge seeking to impose liability for protective expressive activity. The Defendants also argue that the State's deception claims would compel the Defendants to warn about potential harms from viewing third-party content on the TikTok Platform in violation of the First Amendment.

The First Amendment protects a platform's "exercise of editorial control and judgment" in selecting content for publication and the speech on the platform itself. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). *Moody* stemmed from a facial challenge to Florida and Texas statutes that regulated content moderation. The Supreme Court confirmed that expressive editorial judgments made by traditional publishing entities apply equally to online platforms, like the TikTok Platform, and are protected by the First Amendment. As the Court observed, a platform's choices about "which third-party content" an online platform's viewer feed "will display"—"or how the display will be ordered and organized"—are what "give the feed a particular expressive quality." *Moody*, 603 U.S. at 738-40. The *Moody* Court made very clear that the First Amendment prohibits a state's attempt to regulate or "alter[]" how an online platform chooses "the views [it] will, and will not, convey." *Id.* at 737. The Court, however, specifically excluded "feeds

whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards." *Id.* at 736, n.5. *Moody*'s holding explicitly excluded the type of claim that is framed within the State's Complaint. *See Vermont v. Meta*, 2024 Vt. Super. LEXIS 146 at *18 (distinguishing *Moody*).

As to the unfairness claim, the Defendants assert that the State is challenging the Defendants' editorial control and judgment over what content to show to users. Generally, a state actor's interference with a newspaper's editorial control and judgment, *i.e.*, the choice of material that appears in a newspaper or the treatment of public issues and public officials, violates the First Amendment's guarantees to a free press. *Tornillo*, 418 U.S. at 258. The State's claims, however, are not based on the substance of any content appearing on the TikTok Platform.

The State specifically alleges that the Defendants' content-agnostic technology does not know or engage with the substance of the content it serves. Compl. ¶¶ 101-03. Rather, the claim is based on TikTok's alleged role in manipulating young users' brain chemistry to induce compulsive and excessive use of the TikTok Platform. *See Vermont*, 2024 Vt. Super. LEXIS 146 at *17 (noting that Meta's First Amendment argument "fails to distinguish between Meta's role as an editor of content and its alleged role as a manipulator of Young Users' ability to stop using the product."). The State's deception claims are based on the Defendants' own alleged false and misleading commercial speech, not how the Defendants moderate content. "[T]he Supreme Court has repeatedly emphasized that the first amendment is not a bar to State regulation prohibiting false, misleading or deceptive commercial speech." *Scott v. Assoc. for Childbirth at Home, Inter.*, 88 Ill. 2d 279, 287 (1981) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 774 (1976)). A fair reading of the allegations contained within the State's

Complaint and viewing the well-pled allegations in the light most favorable to the State, the State is challenging non-expressive conduct, not a manifestation of the Defendants' expression.

The Defendants further argue that the First Amendment bars the deception claim as the ultimate injunctive relief would necessarily be compelled speech. Yet, the State has not presently requested this Court for the extraordinary remedy of injunctive relief. Consequently, this argument is clearly premature. As importantly, the State's Complaint does not request the relief as characterized by Defendant. The specific injunctive relief requested in the State's Complaint is an injunction "to prevent future violations of the Consumer Fraud Act." Compl. at 81, ¶ B. The Court will not order any injunctive relief unless the State properly establishes the need for such a remedy.

The Court concludes that the State does not seek to impose liability impermissibly for protective expressive activity. The Court further concludes that the State's unfairness and deception claims do not violate the Defendants' First Amendment protections as they do not seek to "regulate" or "alter[]" "editorial choices" that the TikTok Platform makes in providing a third-party content viewing experience. The Defendants' Section 2-619 motion is therefore denied.

III. Conclusion

The State has sufficiently alleged claims for both deceptive and unfair conduct under the ICFA and deceptive conduct under the UDTPA. These claims are not barred either by Section 230 of the Communications Decency Act or the First Amendment. The Defendants' Section 2-619.1 motion to dismiss is therefore denied.

WHEREFORE, it is hereby ordered that:

1. The Defendants' Combined Motion to Dismiss the State's Complaint pursuant to 735 ILCS 5/2-619.1 is denied in its entirety.

2. The Defendants shall file their Answer to the Complaint within 21 days of the date of this order and no later than July 3, 2025.

3. The previously set status date of July 8, 2025 at 1:30 p.m. stands, and the parties may appear via Zoom pursuant to the below instructions:

ZOOM INSTRUCTIONS
Zoom Meeting ID: 966 9558 1801
Zoom Meeting Password: 160424
Zoom Call-in Number: 312-626-6799

DATE: 6-12-2025

SO ORDERED:

Judge Michael T. Mullen

Judge Michael T. Mullen
JUN 12 2025
Circuit Court-2084

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11/8/2024 3:50 PM

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CLERK OF THE COURT

ORDR

AARON D. FORD, ESQ.
Attorney General
ERNEST FIGUEROA, ESQ.
Consumer Advocate
MARK J. KRUEGER, ESQ. (#7410)
Chief Deputy Attorney General
State of Nevada, Office of the Attorney General, Bureau of Consumer Protection
100 North Carson Street
Carson City, Nevada 89701-4717
T: (702) 684-1100; F: (702) 684-1108
mkrueger@ag.nv.gov

MICHAEL J. GAYAN, ESQ. (#11135)
m.gayan@kempjones.com
J. RANDALL JONES, ESQ. (#1927)
r.jones@kempjones.com
DON SPRINGMEYER, ESQ. (#1021)
d.springmeyer@kempjones.com
KEMP JONES, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
T: (702) 385-6000; F: (702) 385-6001

N. MAJED NACHAWATI, ESQ.
mn@ntrial.com (*pro hac forthcoming*)
BRIAN E. MCMATH, ESQ.
bmcmath@ntrial.com (*admitted pro hac vice*)
PHILIP D. CARLSON, ESQ.
pcarlson@ntrial.com (*admitted pro hac vice*)
NACHAWATI LAW GROUP
5489 Blair Road
Dallas, Texas 75231
T: 214-890-0711; F: 214-890-0712

DAVID F. SLADE, ESQ.
slade@wh.law
(*Admitted pro hac vice*)
WH LAW
1 Riverfront Place, Suite 745
North Little Rock, Arkansas 72114
T: (501) 404-2052; F: (501) 222-3027

Attorneys for Plaintiff State of Nevada

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

TIKTOK, INC.; BYTEDANCE INC.; BYTEDANCE LTD.; TIKTOK, LTD.; TIKTOK LLC,

Defendants.

Case No.: A-24-886127-B
Dept. No.: XXXI

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S CONDITIONAL COUNTERMOTION

Hearing Date: September 24, 2024
Hearing Time: 9:30 a.m.

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

Plaintiff State of Nevada ("the State") contends in this case that Defendants TikTok Inc., ByteDance Inc., ByteDance Ltd., TikTok Ltd., and TikTok LLC (collectively "TikTok") violated Nevada law by designing and using addictive and harmful features to exploit children's psychological vulnerabilities, and falsely represented to the public that its features were not addictive and that TikTok prioritized youth health and safety. TikTok moved to dismiss the State's Complaint, and the State responded, including with a conditional counter-motion for leave to, if needed, conduct jurisdictional discovery and/or amend the complaint for any portions of the complaint dismissed by the Court.[1] For the reasons set out below, TikTok's motion is granted in part and denied in part, and the State's counter-motion for leave to conduct jurisdictional discovery is denied as moot and for leave to amend is granted.

BACKGROUND

A. The State's Factual Allegations[2]

TikTok is one of the world's largest social media platforms, with nearly 100 million monthly active users in the U.S. Nearly all of TikTok's revenue comes from advertising targeted to its users and based on data collected about them. According to the State, this revenue is largely determined by the amount of time TikTok users are exposed to advertising, and TikTok therefore is incentivized to maximize the amount of time its users spend on the platform.

The State's complaint (Doc. ID# 1) alleges that TikTok responded to this incentive by adding features that addict and consume the attention of Nevada's children under 18 years old ("Young Users") to the detriment of their wellbeing, including low-friction variable rewards, Compl. ¶¶ 99-115, social manipulation, Compl. ¶¶ 116-137, ephemeral content, Compl. ¶¶ 138-144, push notifications, Compl. ¶¶ 145-155, harmful filters, Compl. ¶¶ 156-167, and ineffective and misleading parental controls and wellbeing initiatives. Compl. ¶¶ 168-172. The State alleges that these design features, and the resulting excessive and compulsive use of TikTok, lead to a

[1] Many of the Parties' submissions and briefs were filed with partial redactions or under seal by order of the Court. To the extent the Court cites or incorporates the Parties' filings in this case, it incorporates in full all of the cited portions of the filings which are sealed and/or redacted in the public record.

[2] This is a brief summary of the Complaint's factual allegations, which span 88 pages and which the Court accepts as true solely for purposes of ruling on TikTok's motion to dismiss the Complaint.

variety of harms to Young Users, including harm to mental health, Compl. ¶¶ 195-199, harm to body image, Compl. ¶¶ 200-206, problematic internet use, Compl. ¶¶ 204-205, harm to physical health, Compl. ¶¶ 206-210, harm to privacy, Compl. ¶¶ 211-216, and risk to personal safety. Compl. ¶¶ 217-219.

Next, the State alleges that TikTok has made and continues to make misrepresentations to the public that its platform is safe and prioritizes the safety and well-being of Young Users, while at the same time materially omitting and otherwise concealing the known harms and risks that the platform poses to Young Users. Compl. ¶¶ 220-282.

Finally, the State alleges that, while TikTok's policies and public statements claim that children under 13 years old ("Youngest Users") are not permitted to use the platform, TikTok knowingly attracts Youngest Users to remain on the platform through specific design and enforcement choices. Compl. ¶¶ 283-297.

DISCUSSION

The State's complaint asserts claims under Nevada law based on:

1. Nevada Deceptive Trade Practices Act (NDTPA), N.R.S. §§ 598.0903 through 598.0999 (Count I – Deceptive Acts or Practices, Compl. ¶¶ 298-321, and Count II – Unconscionable Acts or Practices, Compl. ¶¶ 319(sic)-333, together referred to as the "NDTPA Claims");
2. Product Liability (Count III – Design Defect, Compl. ¶¶ 332(sic)-338, and Count IV – Failure to Warn, Compl. ¶¶ 338(sic)-346, together referred to as the "Product Liability Claims");
3. Negligence (Count V, Compl. ¶¶ 346(sic)-354); and
4. Unjust Enrichment (Count VI, Compl. ¶¶ 354(sic)-359)

In its Motion to Dismiss (Doc. ID# 22), TikTok moves to dismiss the State's complaint on the grounds that Nevada courts lack personal jurisdiction over TikTok, the State's claims are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, and that the State's claims are barred by the First Amendment. TikTok also argues that each of the State's claims

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

must be dismissed because the State failed to plead the necessary elements to state a claim under the NDTPA or common law. Finally, TikTok argues that Counts III through VI must be dismissed because the State lacks standing necessary to assert those common law and equitable claims. In its Opposition to the Motion to Dismiss (Doc. ID# 49) ("State's Opposition"), the State counter-moves, if necessary, for leave to conduct jurisdictional discovery and/or to amend its Complaint and re-plead any claims which the Court finds to be inadequately plead.

For the reasons stated below, the Court DENIES TikTok's motion to dismiss the Complaint based on lack of personal jurisdiction, Section 230, and the First Amendment, DENIES TikTok's motion to dismiss Counts I and II under the NDTPA, and GRANTS TikTok's motion to dismiss Counts III through VI. The Court DENIES as MOOT the State's counter-motion for leave to conduct jurisdictional discovery and GRANTS the State's motion for leave to amend its Complaint regarding Counts III through VI.

I. LEGAL STANDARD

When a nonresident defendant challenges personal jurisdiction at the pleading or motion to dismiss stage under NRCP 12(b)(2), "the plaintiff need only make a prima facie showing of personal jurisdiction." *Tricarichi v. Coop. Rabobank, U.A.*, 135 Nev. 87, 91, 440 P.3d 645, 649 (2019) (citation and quotation marks omitted). In reviewing evidence of personal jurisdiction, the Court "must accept properly supported proffers as true and resolve factual disputes in the plaintiff's favor." *Id*. at 90, 440 P.3d at 649.

Under NRCP 12(b)(5), a court will dismiss a plaintiff's complaint for failure to state a claim "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). "All factual allegations of the complaint must be accepted as true," and courts "must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party]." *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994).

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

II. PERSONAL JURISDICTION

As a preliminary matter, the parties agree that this Court has no general personal jurisdiction over TikTok, and instead focus their arguments on the question of specific personal jurisdiction. The Court will therefore not consider whether it has general personal jurisdiction over TikTok in this case.

In Nevada, a court may exercise specific jurisdiction over a nonresident defendant only if (1) the defendant purposely availed itself of the privilege of acting in Nevada state or purposely directed its conduct to Nevada; (2) the claims arise out of or relate to the defendant's contact with Nevada; and (3) exercise of jurisdiction "would not offend the traditional notions of fair play and substantial justice." *In re Paul D. Burgauer Revocable Living Tr.*, 138 Nev. Adv. Op. 79, 521 P.3d 1160, 1165 (2022); *Tricarichi v. Cooperative Rabobank, U.A.*, 135 Nev. 87, 91 (2019). The State bears the burden under the first two factors, and TikTok bears the burden under the third factor. *See Trump v. Eighth Judicial District Court*, 109 Nev. 687, 700 (1993) ("[W]here a defendant who purposely has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.") (citation and quotations omitted).

The Court is persuaded by the State's arguments and evidence regarding personal jurisdiction in its Opposition, adopts in full the State's arguments in Section I of that Opposition as the opinion of the Court, and finds that the contacts pled therein satisfy *Tricarichi*. (State's Opp., Doc. ID# 49, pgs. 6-12).

Here, the allegations and evidence provided by the State show that TikTok purposely availed itself of the privilege of acting in Nevada and maintains a continuous and systematic Nevada presence in several ways. TikTok is present in Nevada continuously, hundreds of thousands of times, because its apps are downloaded to phones and/or other devices located here (*see* Doc ID# 49, State's Opp., Factual & Procedural Background, pg. 2 ("***First***…")). *See South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 181 (2018) ("a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A

website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones."). In addition to the United States Supreme Court's recognition in *Wayfair* that an app on a phone can be a physical presence, the Nevada Supreme Court has explained that "[i]t is not necessary for a defendant to physically enter the forum; use of the telephone can be sufficient for 'purposeful availment.'" *Peccole v. Eighth Jud. Dist. Ct.*, 111 Nev. 968, 971, 899 P.2d 568, 570 (1995) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481 (1985)). The Court therefore finds that TikTok "continuously and deliberately exploited [Nevada's] market," and therefore TikTok "must reasonably anticipate being haled into [Nevada's] court[s] to defend actions based on products causing injury there." *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351, 364 (2021) (citations, brackets, and quotations omitted).

Next, the Court finds that the State's claims arise out of and/or relate to TikTok's physical presence in this state as pled in the State's Opposition, Doc ID# 49, pgs. 2-4. As described in the 88-page Complaint and the State's Opposition, the presence of TikTok's app on Young Users' devices in Nevada are what gives rise to the State's claims and the harms alleged in this case.

Finally, TikTok failed to meet its burden to show that the traditional notions of fair play and substantial justice would be offended by the Court exercising personal jurisdiction over it for the State's claims because TikTok's contacts with the state and alleged misrepresentations and omissions were done knowingly, as described in the Complaint and the State's Opposition.

The Court therefore DENIES TikTok's motion to dismiss based on a lack of specific personal jurisdiction. For that reason, the Court also DENIES as MOOT the State's conditional counter-motion for leave to conduct jurisdictional discovery.

III. SECTION 230

The so-called "Good Samaritan" provision of the Communications Decency Act, 47 U.S.C. § 230(c)(1) ("Section 230") provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This section serves to immunize website operators and Internet

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

service providers from liability for third-party content, material, or speech that may be posted on their website. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). That immunity extends to claims that seek to hold a service provider liable based on its exercise of "traditional editorial functions." *Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003). Section 230 therefore requires a dismissal of a claim where (1) the defendant is a "provider . . . of an interactive computer service," (2) allegedly harmful content was "provided by another information content provider" and not the defendant, and (3) the claim at issue seeks to treat the defendant as a "publisher or speaker" of that content. 47 U.S.C. § 230(c)(1); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019). Nevertheless, providers of interactive computer services like TikTok are not immunized from liability for their *own* actions when designing their platforms so long as that liability is supported independent of the content of third-party postings. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021).

The Court is persuaded by the State's argument that Section 230 does not immunize TikTok from the State's claims. The claims in this case do not meet the second and third prongs of the Section 230 immunity test, for the reasons articulated in *Lemmon*. There, the Ninth Circuit explained that "while providing content-neutral tools does not render an internet company a 'creator or developer' of the downstream content that its users produce with those tools, our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools." 995 F.3d at 1094. "[T]he CDA was not meant to create a lawless no-man's-land on the Internet." *Id.* Thus, "[t]hose who use the internet . . . continue to face the prospect of liability, even for the 'neutral tools,' so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools." *Id.* Relying on *Lemmon*, as well as the standard applicable to a motion to dismiss, the Court concludes that Section 230 does not bar any of the State's claims. *Dyroff*, 934 F.3d at 1097. In this case, the State does not seek to place TikTok in the shoes of third-party content creators; rather, the Complaint places TikTok in its own shoes for designing its platform in a way that it knows to be harmful to children and teens,

and for making its own misrepresentations and material omissions about the safety of its platform. TikTok's liability in this case does not depend on any of the third-party content posted or distributed by its platform, but rather the harmful design features of the platform itself. To comply with the duties alleged in the Complaint, TikTok would not need to alter any third-party content or otherwise engage in publication activities. Instead, it would need to change only *its own* misstatements, omissions, marketing, platform development, and design decisions.

The Court therefore DENIES TikTok's motion to dismiss based on Section 230 immunity.

IV. FIRST AMENDMENT

The First Amendment protects "the creation and dissemination of information," *Sorrell v. IMS Health Inc.*, 564 U.S. 522, 570, and "exercise of editorial control and judgment" in deciding how and whether to publish content. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). These First Amendment protections also apply to online platforms and the editorial decisions those platforms make about how to edit and compile third-party speech. *Moody v. Netchoice, LLC*, 144 S.Ct. 2383, 2409 (2024) (*citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995)). Nevertheless, "[t]he fact that the publisher handles news . . . does not afford the publisher a particular constitutional sanctuary in which he can and with impunity violate laws regulating his business practices." *Associated Press v. U.S.*, 326 U.S. 1, 7 (1945).

The Court is persuaded by the State's argument that the First Amendment does not apply to its claims against TikTok in this case, and that at most TikTok's challenged conduct is unprotected under the commercial speech doctrine. Contrary to TikTok's assertion, the State does not challenge TikTok's "content-moderation," or "decisions about what content to include, exclude, moderate, filter, label, restrict, or promote." Mot. at p. 23 (Doc. ID# 22) (*citing O'Handley v. Padilla*, 579 F.Supp.3d 1163, 1186-87 (N.D. Cal. 2022) (*aff'd sub nom. O'Handley v. Weber*, 62 F.4th 1145, 1163 (9th Cir. 2023)). The State's Complaint is not focused on the substance of any third-party content or speech, nor on any of TikTok's editorial judgments about which speech to edit, compile, and feature on its platform. Instead, a significant portion of the

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

State's Complaint is based on the specific content-neutral design features of the TikTok platform that are intrinsically addictive to children and cause harm. These design features are not speech and exist independent of any editorial judgment by TikTok and the State's allegations based on those design features do not involve speech at all, but TikTok's *actions* in designing and operating its platform. Therefore, the First Amendment does not touch on the State's design feature allegations and claims.

The only portion of the State's Complaint which does implicate speech of any kind are the State's allegations that TikTok made deceptive statements about the safety of its platform for children and material omissions about the risks of harm it knew the platform poses. These allegations, too, are not barred by the First Amendment. Under the commercial speech doctrine, states are free to regulate advertising and other commercial speech to the extent it is "inherently misleading." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Misleading advertising or speech may be prohibited entirely. *Id*. False and misleading commercial speech is afforded no protection by the First Amendment, and the State may pursue such claims.

The Court therefore DENIES TikTok's motion to dismiss based on First Amendment protection.

V. FAILURE TO STATE CLAIMS

In addition to its arguments to dismiss the State's Complaint wholesale on the basis of lack of personal jurisdiction, Section 230, and the First Amendment, TikTok argues that each of the State's individual claims have been inadequately plead or fail as a matter of law. The Court will address each category of claims in turn.

A. NDTPA Claims (Counts I and II)

First, TikTok argues that this Court should read the State's NDTPA claims under the heightened pleading standard found in NRCP 9(b) instead of the ordinary pleading standard found in NRCP 8. It follows, TikTok argues, that the State's Complaint fails to adequately plead sufficient facts to meet the heightened particularity standard under NRCP 9(b).

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

The Court is persuaded by the State's argument citing *Besinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165 (2010), *Poole v. Nevada Auto Dealership Invs., LLC*, 135 Nev. 280, 286-87 (Ct. App. 2019), and *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct.*, 138 Nev. Adv. Op. 55 (2022), for the proposition that NDTPA claims are subject to the ordinary pleading standard in NRCP 8. While "some deceptive trade practices [under the NDTPA] sound in fraud, . . . [this Court] cannot conclude that deceptive trade practice claims are subject to a higher burden of proof absent a legislative directive." *Betsinger*, 126 Nev. at 165.

Applying that pleading standard to the State's Complaint and construing all factual allegations in favor of the State (as the Court must at the motion to dismiss stage), the Court is convinced that TikTok's inclusion of addictive and harmful design features in its platform, as alleged in the State's Complaint, take advantage of the lack of knowledge, ability, experience or capacity of TikTok's Young Users to a grossly unfair degree, and therefore constitute "unconscionable practice[s]" actionable under the NDTPA. N.R.S. § 598.0923(1)(e), 2(b)(1). Likewise, the Court is convinced that under the correct standard of review TikTok's deceptive statements about the safety of its platform for Young Users and material omissions about the nature of risks of harm posed to Young Users, as alleged in the State's Complaint, constitute "deceptive acts or practices" actionable under the NDTPA, N.R.S. § 598.0915(15); N.R.S. § 598.0923(2).

Next, TikTok argues that the State's NDTPA Claims (Counts I and II) must be dismissed because the TikTok platform is offered to users for "free," and therefore does not fall under the ambit of the NDTPA. The NDTPA applies to deceptive or unconscionable acts occurring in connection with "goods or services for sale or lease." N.R.S. §§ 598.0915, 598.0923. Under the NDTPA, a "'Sale' includes any sale, offer for sale or attempt to sell *any property* for *any consideration*." N.R.S. § 598.094 (emphasis added).

The Court is persuaded by the State's argument that TikTok users provide consideration to TikTok in the form of their user data in exchange for license to use the TikTok platform. A user's license to use the TikTok platform is not "free," because it comes only in return for the

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

user's data. This transaction is governed by TikTok's terms of service, which permit TikTok to obtain user data to, "among other things, . . . customize your ad experience." This exchange of data for the use of the platform meets the definition of "any consideration" under the NDTPA, and brings use of the TikTok platform within the scope of transactions regulated by the NDTPA.

Furthermore, TikTok also engages in direct monetary transactions with its users in the form of virtual coins which users can purchase and send to their favorite TikTok video creators as a gift. These transactions clearly involve the sale of property for consideration and are done in connection with TikTok users' use of the platform.

The Court finds that each of these three types of transactions, both standing alone and together, are sufficiently connected to the State's claims to bring those claims within the scope of the NDTPA.

The Court therefore DENIES TikTok's motion to dismiss Counts I and II of the State's Complaint.

B. Products Liability Claims (Counts III and IV)

TikTok argues that the State's products liability claims fail because the State lacks standing to assert these claims, and the State has failed to allege that the TikTok platform is a "product" for products liability purposes. The Court agrees.

First, the State has not met its burden to demonstrate that it has standing to assert its products liability claims. Accordingly, the Court concludes the State lacks standing to pursue its products liability claims.

Second, the State's products liability claims also fail for the independent reason that the State has not alleged that the purported harm was caused by a "product." *Schueler v. Ad Art, Inc.*, 136 Nev. 447, 452 (Nev. App. 2020). "The determination of whether something constitutes a product for purposes of [a product liability claim]" is a question for the Court, and should be conducted on a case-by-case basis. *Id.* Nevada courts "*must* apply section 402A of the Second Restatement [of Torts], including the public policy objectives of the doctrine, as well as the relevant precedents interpreting section 402A." *Id.* at 455 (emphasis in original). Courts are also

permitted to use appropriate definitions as guidance when determining whether something is a "product," including the definition found in the Restatement (Third) of Torts. *Id.*

The Second Restatement states that products are "tangible items, such as tires, automobiles, and insecticides." Restatement (Second) of Torts § 402A comment d. The Third Restatement similarly defines "a product as tangible personal property distributed commercially for use or consumption," and reinforces the need for a case-by-case analysis by stating that "[o]ther items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to [that] of tangible personal property." *Schueler*, 136 Nev. at 455 (quoting Restatement (Third) of Torts: Prod. Liab. § 19 (Am.Law Inst. 1998)).

The Court is persuaded by TikTok's argument that the State has failed to plead sufficient facts to show that the TikTok platform is a "product" in the context of 402A of the Second Restatement of Torts, and the public policy objectives underlying the doctrine of strict products liability claims.

The Court therefore GRANTS TikTok's motion to dismiss Counts III and IV, and GRANTS the State's motion for leave to amend its Complaint regarding Counts III and IV.

C. Negligence and Unjust Enrichment (Counts V and VI)

The Court also agrees with TikTok that the State has not demonstrated that it has standing to pursue its common law claim for negligence and equitable claim for unjust enrichment. The State relies on the same three statutes discussed above, none of which authorize the State to pursue claims for negligence or unjust enrichment on behalf of Nevadans. And the State has not alleged any facts indicating that TikTok owed a legal duty to the State for negligence purposes, nor has it alleged that TikTok was unjustly enriched at the State's expense. Absent such facts, the State cannot establish that it has standing to pursue its negligence or unjust enrichment claims.

The Court therefore GRANTS TikTok's motion to dismiss Counts V and VI, and GRANTS the State's motion for leave to amend its Complaint regarding Counts V and VI.

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

Therefore, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that TikTok's Motion to Dismiss is **DENIED** as to the defenses of lack of specific personal jurisdiction, Section 230, and First Amendment and Counts I and II and **GRANTED** as to Counts III through VI.

Further, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the State's Countermotion is DENIED as MOOT as to the request to conduct jurisdictional discovery and **GRANTED** as to the request for leave to amend the Complaint for Counts III through VI. The State shall file its Amended Complaint, if any, within 7 days from the entry of this Order.

IT IS SO ORDERED

Dated this 8th day of November, 2024

21D 7E3 52CC 6847
Joanna S. Kishner
District Court Judge

Submitted by:

KEMP JONES, LLP
/s/ Michael Gayan
Michael J. Gayan, Esq. (#11135)
J. Randall Jones, Esq. (#1927)
Don Springmeyer, Esq. (#1021)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

NEVADA OFFICE OF THE ATTORNEY GENERAL
Aaron D. Ford, Esq.
Attorney General
Ernest Figueroa, Esq.
Consumer Advocate
Mark J. Krueger, Esq. (#7410)
Chief Deputy Attorney General
100 North Carson St.
Carson City, NV 89701-4717

NACHAWATI LAW GROUP
N. Majed Nachawati, Esq.*
Brian McMath, Esq.**
Philip Carlson, Esq.**
5489 Blair Rd.
Dallas, TX 75231

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP JONES, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

WH LAW
David F. Slade, Esq.**
1 Riverfront Place, Suite 745
North Little Rock, AR 72114

**Pro hac vice forthcoming*
***Admitted pro hac vice*

Attorneys for Plaintiff State of Nevada

Approved:

CAMPBELL & WILLIAMS
/s/ J. Colby Williams
J. Colby Williams, Esq.
Philip R. Erwin, Esq.
710 South Seventh Street, Suite A
Las Vegas, Nevada 89101

Blaine Evanson (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, California 90071

Shaun Mathur (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 94111-3715

Attorneys for Defendants TikTok Inc., ByteDance Inc., ByteDance Ltd., TikTok Ltd., and TikTok LLC

From:	Colby Williams
To:	Brian McMath; bevanson@gibsondunn.com; akuhn@gibsondunn.com
Cc:	Mark J. Krueger; Raquel Fuilghum; Samantha Feeley; Anthony T. Walsh; Philip Carlson; Brian Moore; J. Randall Jones; Don Springmeyer; Michael Gayan; Joseph Laurita; David F. Slade
Subject:	Re: State ex rel. Ford v. TikTok - Agreed Order on TikTok"s Motion to Dismiss
Date:	Friday, November 8, 2024 2:29:51 PM
Attachments:	2024.11.08 - Proposed Order Re TikTok MTD - Final For Submission (CW Edits).docx

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Brian,

Thank you for sending. You have my authorization to apply my e-signature.

Note – I moved the order block up, and moved our signature block below plaintiffs' counsels' block to conform to local practice. I trust these non-substantive formatting edits are a non-issue.

Best regards,
Colby

From: Brian McMath <bmcmath@ntrial.com>
Date: Friday, November 8, 2024 at 1:46 PM
To: Colby Williams <jcw@cwlawlv.com>, bevanson@gibsondunn.com <bevanson@gibsondunn.com>, akuhn@gibsondunn.com <akuhn@gibsondunn.com>
Cc: Mark J. Krueger <MKrueger@ag.nv.gov>, Raquel Y. Fulghum <rfulghum@ag.nv.gov>, Samantha B. Feeley <SFeeley@ag.nv.gov>, Anthony T. Walsh <AJWalsh@ag.nv.gov>, Philip Carlson <pcarlson@ntrial.com>, Brian Moore <bmoore@ntrial.com>, r.jones@kempjones.com <r.jones@kempjones.com>, Don Springmeyer <d.springmeyer@kempjones.com>, Michael Gayan <mjg@kempjones.com>, Joseph Laurita <j.laurita@kempjones.com>, David F. Slade <slade@wh.law>
Subject: State ex rel. Ford v. TikTok - Agreed Order on TikTok's Motion to Dismiss

Good afternoon counsel,

Attached is a clean version of what we understand to be the parties' agreed-upon form of order resolving your client's Motion to Dismiss filed in this case. Please let us know if we may affix your signature and submit to chambers.

Thanks much.

Brian E. McMath, CIPP/US
Partner

Public Entity Litigation

D: 214-430-3655 **O:** 214-890-0711 **C:** 505-280-6068

NLG NACHAWATI LAW GROUP

5489 Blair Rd. / Dallas, TX 75231
ntrial.com

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DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada, Plaintiff(s)	CASE NO: A-24-886127-B
vs.	DEPT. NO. Department 31
TikTok, Inc., Defendant(s)	

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This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 11/8/2024

Jon Williams	jcw@cwlawlv.com
Philip Erwin	pre@cwlawlv.com
Samuel Mirkovich	srm@cwlawlv.com
Matthew Wagner	maw@cwlawlv.com
Monique Lunnon	m.lunnon@kempjones.com
John Chong	jyc@cwlawlv.com
Jon Jones	r.jones@kempjones.com
Michael Gayan	m.gayan@kempjones.com
Nicole McLeod	n.mcleod@kempjones.com
Crystal Balaoro	cbb@cwlawlv.com
Don Springmeyer	d.springmeyer@kempjones.com

Katrina Stark	k.stark@kempjones.com
Ernest Figueroa	Efigueroa@ag.nv.gov
Mark Kruegar	mkrueger@ag.nv.gov
Raquel Fulghum	rfulghum@ag.nv.gov
Anthony Walsh	ajwalsh@ag.nv.gov
Christine Brady	cbrady@ag.nv.gov
Perla Hernandez	phernandez@ag.nv.gov
Dorianne Potnar	dpotnar@ag.nv.gov
Majed Nachawati	mn@ntrial.com
Brian McMath	bmcmath@ntrial.com
Philip Carlson	pcarlson@ntrial.com
Nicholas Hagenkord	nsh@cwlawlv.com
Ali Lott	a.lott@kempjones.com
Ariana Reed	anr@cwlawlv.com
Pamela McAfee	p.mcafee@kempjones.com
Joseph Laurita	j.laurita@kempjones.com
Leslie Gualajara	lmg@cwlawlv.com
Gale Pearson	gpearson@ntrial.com
Michael Gorwitz	mgorwitz@ntrial.com
Veronica McNeme	vmcneme@ntrial.com
Ann Saucer	asaucer@ntrial.com
Laura Rios	l.rios@kempjones.com
Alyssa Kuhn	akuhn@gibsondunn.com

Alexander Southwell	asouthwell@gibsondunn.com
Winston Chan	wchan@gibsondunn.com
David Slade	slade@wh.law
Shaun Mathur	SMathur@gibsondunn.com
Francesca Bergeret-Simpson	f.bergeret-simpson@kempjones.com
Sam Feeley	sfeeley@ag.nv.gov
Naomie Saint-Sume	nsaintsume@ntrial.com
Michaela Hohwieler	mhohwieler@ntrial.com
Brian Moore	bmoore@ntrial.com
Matthew Bush	mbush@ntrial.com
Sidney Jing	sjing@ntrial.com
ONvJ Media	media@ournevadajudges.com
Bonan Link	blink@ntrial.com
Kevin Parish	kparish@ntrial.com

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

THE STATE OF NEW HAMPSHIRE

v.

META PLATFORMS, INC. and INSTAGRAM, LLC

Docket No.: 217-2023-CV-00594

ORDER

The plaintiff, the State of New Hampshire, brings this suit against the defendants, Meta Platforms, Inc. and Instagram, LLC for violations of the Consumer Protection Act ("CPA"), products liability, and negligence. The State's claims arise out of Meta's use of certain design features and the impact of those features on children in New Hampshire. Meta moves to dismiss. The State objects. The Court held a hearing on this matter on June 13, 2024. The parties submitted notices of supplemental authority following the hearing. For the following reasons, Meta's motion is DENIED.

I. Standard

In reviewing a motion to dismiss, the Court "assume[s] the truth of the facts as alleged in the plaintiff's pleadings and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Barufaldi v. City of Dover, 175 N.H. 424, 427 (2022). The Court "need not assume the truth of statements in the plaintiff's pleadings, however, that are merely conclusions of law." Sanguedolce v. Wolfe, 164 N.H. 644, 645 (2013). "The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery."

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Barufaldi, 175 N.H. at 427. "This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law." Id. "The trial court may also consider documents attached to the plaintiff's pleadings, or documents, the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." Id. The Court will grant the motion "if the facts pled do not constitute a basis for legal relief." Id.

II. Background

Meta is a Delaware corporation. (Compl. ¶ 19.) Meta owns and operates the social media platform, Facebook, and owns and operates the social media platform, Instagram, through its wholly-owned subsidiary, Instagram, LLC. (Id. ¶ 20.) Instagram, LLC is also a Delaware corporation. (Id. ¶ 21.) The Court refers to the defendants collectively as "Meta" and to Facebook and Instagram as the "Social Media Platforms" or the "Platforms."

A. Usage of the Social Media Platforms

In 2023, Facebook had over 226 million active monthly users in the United States, representing 68% of the population, including over ten million of those users under eighteen. (Id. ¶ 49.) Nearly one million of those users lived in New Hampshire, representing 68% of residents, including 34,063 users under eighteen, representing 13.49% of the under-eighteen population. (Id. ¶¶ 27, 49.) That same year, Instagram had over 192 million active monthly users in the United States, over 58% of the population, with 32,389,032 under eighteen. (Id. ¶ 50.) 733,019 of those users lived in New Hampshire, representing over 52% of residents, including 89,339 users under eighteen, representing 35% of the under-eighteen population. (Id. ¶¶ 27, 50.) In April

2023, Meta's internal data showed that 55,885 New Hampshire teenagers were active daily Instagram users. (Id. ¶ 52.) In 2022, 62% of teenagers reported using Instagram. (Id. ¶ 51.) The rate is higher for teenage girls. (Id.) Almost half of those teenagers reported checking Instagram at least once a day, 27% reported checking it several times a day, and 10% reported checking it almost constantly. (Id.)

B. Meta's Advertising

To fully access the Social Media Platforms, users must agree to Meta's Terms of Use. (Id. ¶ 35.) By doing so, users consent to Meta collecting and using their data for monetization and creation of personalized algorithms. (Id.) Meta then sells advertising space to marketers and, utilizing user data, allows them to target users by location, demographics, interests, and behaviors. (Id. ¶ 29.) Meta also allows advertisers to target "designated market areas," which include Manchester, New Hampshire. (Id. ¶ 30.) In 2023, Meta derived $542,835,568 from advertisement revenue from users with ties to New Hampshire. (Id.) In addition to paying for advertisements, advertisers directly contract with "content creators," including children, to promote their products on Instagram. (Id. ¶ 47.)

Meta's monetization centers on maximizing the amount of time users spend on the app and the amount of data collected from each user. (Id. ¶ 33.) Meta intentionally designs its Social Media Platforms to maximize user engagement, and, thus, maximize profits. (Id.) Meta monetizes user data by (1) selling targeted advertising and (2) feeding users personalized algorithms to maximize their time spent on the app. (Id. ¶ 34.)

Meta is financially motivated to attract and maintain children on its Social Media Platforms because teenagers are "one of the most valuable advertising demographics." (Id. ¶ 42.) Since at least 2015, Meta has focused on increasing the time teens spend on its Social Media Platforms. (Id.) In 2019, one of Instagram's quarterly goals was to hit two million hours of teen watch time on IGTV (Instagram's former long-form video feature). (Id. ¶ 44.) Further, an internal email circulated in September 2018 revealed that Meta discusses its youngest users in terms of their "lifetime value" to the company. (Id. ¶ 45.) However, Meta has publicly denied placing monetary value on children. (Id. ¶ 46.) In 2021, Senator Amy Klobuchar asked Antigone Davis, Meta's Global Head of Safety, what Meta believed the lifetime monetary value of children users was, to which Ms. Davis responded, "that's just not the way we think about it" and "[t]hat's just not how we think about building products . . . for young people." (Id.) Instagram has become Meta's most successful social media platform in attracting and retaining child users. (Id. ¶ 48.) Because of that, the State alleges that "Meta intentionally includes manipulative design features in its Social Media Platforms that it knows are particularly effective in increasing compulsive and excessive use in teens." (Id. ¶ 53.)

C. Alleged Addictive Features

The State alleges that "Meta intentionally includes manipulative design features in its Social Media Platforms that it knows are particularly effective in increasing compulsive and excessive use in teens." (Id. ¶ 53.) Thus, the State asserts that Meta employs these design features to trick children into spending as much attention and time as possible on its Social Media Platforms and maximize Meta's profits. (Id. ¶ 56.) The United States Surgeon General has identified certain harmful design features that

overlap with those included in the State's complaint, including personalization algorithms, alerts, infinite scroll, and Reels. (Id.)

i. Personalization Algorithms

Meta uses personalization algorithms across its Social Media Platforms, including on Instagram's Main Feed (the scrolling presentation of content immediately visible upon opening the app) and Explore Feed (another scrolling presentation of algorithmically curated content that can be optionally guided by a user's input of text in a search box). (Id. ¶ 57.) In 2016, Meta changed Instagram's user feeds to incorporate personalization algorithms. (Id. ¶ 58.) Previously, users' feeds were in reverse chronological order. (Id.)

The personalization algorithms serve users categories of content based on a sequencing method psychologists refer to as "variable reinforcement schedules" or "variable reward schedules." (Id.) Variable reward schedules work by periodically delivering types of content in an unpredictable pattern that trigger a release of dopamine in the user. (Id. ¶ 60.) Dopamine is a neurotransmitter released in anticipation of a potential reward and is associated with pleasure. (Id.) However, dopamine neurons only fire for a relatively short period of time and, afterwards, an individual may become "disheartened and disengaged." (Id.) Meta's personalization algorithms manipulate the dopamine responses in its child users, inducing them to engage repeatedly with Meta's products. (Id. ¶ 61.)

The State alleges that personalization algorithms are particularly effective on, and dangerous to, children because they have incomplete brain maturation, lack of impulse control, and reduced executive functions. (Id. ¶ 63.) The personalization

algorithm's ability to learn more about the user as they scroll allows it to display more of what will keep the user hooked, known as "presence amplification," pushing them into a "rabbit hole" of increasingly more extreme content. (Id. ¶¶ 65, 67.) When a user experiences preference amplification the absence of other, more moderate information makes it difficult for the user to get out of a rabbit hole. (Id. ¶ 68.) In 2021, Meta internally acknowledged how Instagram's personalization algorithms take children "into negative spirals & feedback loops that are hard to exit from." (Id.)

ii. Alerts

When a user installs the Instagram app on their phone, Instagram employs a range of alerts in response to certain in-app activities. (Id. ¶ 70.) Alerts are delivered to a user's phone via vibrations, visuals, sounds, in-app notifications, and emails. (Id. ¶ 71.) These alerts are designed to increase children's engagement by taking advantage of neurological and psychological phenomena to trigger sudden dopamine releases. (Id.) The alerts allow Meta to disrupt its users at any time to encourage them to return to the Social Media Platforms. (Id. ¶ 72.) The notifications trigger users' fear of missing out ("FOMO") and leads to them consistently checking the Social Media Platforms. (Id. ¶ 77.)

Alerts are harmful for children and Meta knows that "smartphone notifications cause inattention and hyperactivity among teens, and they reduce productivity and well-being." (Id. ¶ 74 (brackets omitted).) Research has shown teenagers check their phone on average 51 times per day, with some teens checking their phone over 400 times per day. (Id. ¶ 76.) During that period, the teenagers received a median of 237 notifications on their phones per day, with some users receiving as many as 4,500 in a day. (Id.)

While users are able to disable notifications, they are enabled by default and the addictive elements of the Social Media Platforms are a barrier for children to take the step to disable them. (Id. ¶¶ 71, 77.)

iii. Infinite Scroll and Autoplay

In 2016, Instagram debuted "infinite scroll." (Id. ¶ 78.) Infinite scroll is a method of content delivery that partially displays additional content at the bottom of the user's screen, such that the user is typically unable to look at a single post in isolation, and automatically loads new content as the user scrolls. (Id.) This format makes it difficult for children to disengage with the Social Media Platform because there is no natural end point. (Id. ¶ 79.) Meta does not allow users to turn off infinite scroll. (Id. ¶ 80.) Similarly, Meta uses an "autoplay" feature on Instagram "Stories," which keeps the user watching unless the user takes affirmative action to disengage. (Id. ¶ 81.) Facebook users are able to turn off autoplay but disabling the feature on Instagram is difficult for users. (Id. ¶ 82.)

iv. Ephemeral Content

In 2016, Meta started implementing ephemeral content features in its Social Media Platforms. (Id. ¶ 84.) Ephemeral content is only temporarily available to users with notifications and visual design cues indicating that the content will soon disappear forever. (Id. ¶ 85.) This type of content encourages users to frequently check the Social Media Platforms and induces a sense of FOMO in children. (Id. ¶¶ 84–85.) Two examples of ephemeral content are Instagram's "Stories," which contains content that is only available for a short time, and "Instagram Live," which contains content only available while the creator is live-streaming. (Id. ¶¶ 87–88.) Meta informs users of

Instagram Live content by sending a push notification to users that reads, "[@user] started a live video. Watch before it ends!" (Id. ¶ 89.) An executive summary circulated internally in 2016 indicated that the goals of live content were to increase the time users spent watching these videos, specifically teenagers. (Id. ¶ 90.)

v. Reels

In 2020 and 2021, Meta introduced "Reels" which present short-form videos based on data collected from each user. (Id. ¶ 92.) Similar to infinite scrolling, Reels automatically plays as the user swipes the screen to the next video. (Id. ¶ 93.) As of April 2023, Reels were limited to 15 to 90 second video clips. (Id.) The short nature of the videos and the frameless way it fills a user's screen ensure the user will not get bored and close the app. (Id.) Meta's investment in Reels was specifically designed to attract and increase youth engagement. (Id. ¶ 94.)

D. Use of the Social Media Platforms and Corresponding Harm to Children

The State alleges that the harms the Social Media Platforms cause all users are particularly acute in children. (Id. ¶ 101.) During adolescence, children's risk-taking behavior is at its peak and their self-esteem is vulnerable. (Id. ¶ 102.) Children's brain regions associated with a desire for risk-taking, attention, peer feedback, and reinforcement are sensitive and regions associated with maturity and impulse control are not fully developed. (Id.) For these reasons, teenagers are more susceptible to misinformation, peer pressure, and false images on social media. (Id.) The United States Surgeon General has recognized that "the current body of evidence indicates that while social media may have benefits for some children and adolescents, there are ample indicators that social media can also have a profound risk of harm to the mental

health and well-being of children and adolescents." (Id. ¶ 104.) Meta has considered but rejected design changes after finding that those changes would decrease the danger of harm to children, but also decrease engagement. (Id. ¶ 105.)

Children who use social media for at least five hours per day are many times more likely to have clinically relevant symptoms of depression than non-users. (Id. ¶ 106.) During the same period in which social media use increased, the rate of teenagers suffering from severe mental health problems and suicide, both nationally and in New Hampshire, also increased by significant margins. (Id. ¶¶ 116–17, Figures 2 and 3.) Frequent social media use has been associated with distinct changes in the developing brain in the amygdala, which is vital for impulse control and emotional regulation and could increase adolescent sensitivity to reward and punishment. (Id.) These brain changes track the changes experienced by people who become addicted to gambling or drugs. (Id. ¶ 107.) Frequent social media use is also linked to disruptions in children's sleep, which can cause or worsen depression and anxiety. (Id. ¶ 109–10.) Meta has been aware since 2019 that excessive social media use is correlated with sleep problems. (Id. ¶ 111.) In 2021, more than 75% of New Hampshire teenagers reported getting fewer than eight hours of sleep on an average school night, with more than 20% reporting getting five or fewer hours of sleep. (Id. ¶ 113.)

E. Meta's Knowledge of the Harms Caused by its Social Media Platforms

The State alleges that Meta is aware that a majority of its users suffer from problematic use of Social Media Platforms and that such use has a serious effect on users' sleep, relationships, mental health, and general well-being. (Id. ¶¶ 100, 111.) The State alleges that Meta is aware that teenagers are more susceptible to its

addictive design features and are more likely to excessively use its Platforms. (Id. ¶¶ 122–25.)

Meta's internal data supports these allegations. In 2020, internal Meta statistics showed that teenagers are 40% more likely to spend five or more hours per day, and at least 28 hours per week, on Instagram than non-teenagers. (Id. ¶ 123.) Meta's internal research concluded,

> Teen brains are much more sensitive to dopamine, one of the reasons that the risk of drug addiction is higher for adolescents and it's the same thing that keeps them scrolling and scrolling. Due to the immature brain, they have a much harder time stopping even though they want to—our own product foundation research has shown teens are unhappy with the amount of time they spend on our app.

(Id. ¶ 125.) In 2020, Meta started a project to better understand teenagers, including their brain development. (Id. ¶ 126.) Meta's research resulted in similar conclusions to those outlined supra Section D. (See generally id. ¶¶ 126–38.)

While the Social Media Platforms have "time-management tools," including notifications and reminders to stop scrolling, most users dismiss them. (Id. ¶ 140.) Meta knows those tools are ineffective at counteracting compulsive and excessive use. (Id.) Meta has considered but rejected design changes after finding that those changes would decrease the danger of harm to children, but also decrease engagement. (Id. ¶¶ 105, 141.)

F. Meta's Alleged Misrepresentations

Meta, through its own publications, public statements, and testimony of corporate officers, has stated that well-being of its users is a top priority. (Id. ¶¶ 144 ,150.) However, the State alleges these public statements are at odds with Meta's internal surveys, research, and reports, and, in some cases, with its own officers' testimony. (Id.

¶¶ 144-229.) Specifically, the State alleges Meta has made misrepresentations regarding the safety of the Social Media Platforms, (id. ¶¶ 144–46, 165,) Meta's intention to prioritize well-being over user engagement, (id. ¶¶ 205–29,) and the prevalence of user exposure to harmful and predatory content served by Meta's algorithms, (id. ¶¶ 146–64.)

III. Analysis

The State brings claims against Meta for violations of the CPA (RSA 358-A:2) for unfair acts or practices for its manipulative and addictive design features (Count I), violations of the CPA (RSA 358-A:2) for deceptive practices (Count II), strict products liability for defective design (Count III), strict products liability for failure to warn (Count IV), and negligence (Count V). Meta moves to dismiss all claims, arguing that this Court lacks personal jurisdiction over it, Section 230 of the federal Communications Decency Act and the First Amendment of the United States Constitution bar the State's claims, the two CPA counts fail to state a claim, and the State lacks standing to pursue its common law claims for strict products liability and negligence and does not state a viable claim under those theories. The Court addresses each argument in turn.

A. Personal Jurisdiction

The standard of review on a motion to dismiss for lack of personal jurisdiction varies according to the case's procedural posture. Seward v. Richards, 174 N.H. 401, 406 (2021). "While the general rule applicable to motions to dismiss is that all facts properly pleaded by the plaintiff are deemed true . . . when those facts relate to personal jurisdiction, the plaintiff must offer affirmative proof." Staffing Network, Inc. v. Pietropaolo, 145 N.H. 456, 457 (2000). In the absence of an evidentiary hearing, the

Court applies a prima facie standard to determine whether personal jurisdiction is met. Id.

"Determining whether a court may exercise personal jurisdiction over a defendant contemplates a two-part analysis." Seward, 174 N.H. at 407. "First, the State's long-arm statute must authorize such jurisdiction. Second, the requirements of the federal Due Process Clause must be satisfied." Id. New Hampshire's long-arm statute, RSA 510:4, authorizes the exercise of personal jurisdiction to the extent permissible under the Due Process Clause. Id. Accordingly, the Court's analysis depends upon due process. Id.; RSA 510:4, I.

"Under the Federal Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant if the defendant has minimum contacts with the forum, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Seward, 174 N.H. at 407. "Minimum contacts is not necessarily a numbers game; in order to be subject to the jurisdiction of the forum state, a nonresident need only have one contact with the forum, so long as the contact is meaningful." Id. "Jurisdiction can be 'general,' where the defendant's contacts with the forum State are continuous and systematic, or 'specific,' where the cause of action arises out of or relates to the defendant's forum-based contacts." Id. Here, the parties solely address whether the Court can exercise specific personal jurisdiction over Meta. Accordingly, the Court focuses its analysis on that inquiry.

"To determine whether exercising specific personal jurisdiction over the defendant[] comports with due process, [the Court] examine[s] whether: (1) the contacts relate to the cause of action; (2) the defendant[] ha[s] purposefully availed [itself] of the

protection of New Hampshire's laws; and (3) it would be fair and reasonable to require the defendant[] to defend the suit in New Hampshire." Seward, 174 N.H. at 407–08. "Each factor must be evaluated on a case-by-case basis, and all three factors must be satisfied for the exercise of jurisdiction to be constitutional." Id. at 408. "Questions of specific jurisdiction are always tied to the particular claims asserted." Id.

The Court begins with the relatedness factor. "To satisfy the relatedness factor, there must be more than just an attenuated connection between the contacts and the claim; the defendant's in-state conduct must form an important, or at least material, element of proof in the plaintiff's case." Id. at 409. "The relatedness test is a flexible, relaxed standard, and the court's assessment of relatedness is informed by the concept of foreseeability." Id. For tort claims, the relatedness inquiry "focuses on whether the defendant's in-forum conduct caused the injury or gave rise to the cause of action." United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 622 (1st Cir. 2001). Further, to satisfy specific personal jurisdiction, "a plaintiff must link the defendant's suit-related conduct to the forum. Mere market exploitation will not suffice." Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 324 (5th Cir. 2021).

Meta argues that the State's claims do not relate to Meta's contacts with New Hampshire. The State's claims arise out of Meta's alleged addictive design features and its misrepresentations and omissions. Meta contends that this conduct did not occur in New Hampshire and, therefore, it cannot serve as a basis for personal jurisdiction. Meta rejects any attempt by the State to rely on its advertising and marketing to support personal jurisdiction because its advertising and marketing does not serve as a basis for the State's claims. (Id.) The State responds that its claims

arise directly out of Meta's contacts with New Hampshire, namely; its relationships with hundreds of thousands of New Hampshire residents, including children; the design features it implements on Social Media Platforms used by New Hampshire residents; and its deceptive conduct which has played a role in inducing New Hampshire residents' use of the Platforms.

In Walden v. Fiore, 571 U.S. 277, 279 (2014), the Supreme Court held that a Nevada court could not "exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada" where "the defendant had no other contacts with Nevada." The Walden Court noted that its holding was consistent with Calder v. Jones, 465 U.S. 783 (1984). Walden, 571 U.S. at 289–90. In Calder, the Court held that a California court could exercise personal jurisdiction over Florida defendants whose "intentional, and allegedly tortious, actions were expressly aimed at California." 465 U.S. at 785–86. Under Walden and Calder, the proper inquiry is not merely whether New Hampshire residents suffered an injury but whether Meta's conduct connects it to New Hampshire in a "meaningful way." Walden, 571 U.S. at 290.

The Supreme Court has referred to the following as a "paradigm example": the defendant "extensively promoted, sold, and serviced" vehicles in the forum states and the plaintiffs resided in the forum states, used the allegedly defective vehicles in the forum states, and suffered injuries in the forum states. Ford Motor Co. v. Mont Eighth Jud. Dist. Ct., 592 U.S. 351, 366 (2021). These facts created an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place." Id. at 370.

Meta's contacts with New Hampshire relate to the State's claims alleging harm caused by Meta's implementation of features on its Social Media Platforms used by New Hampshire residents and Meta's misrepresentations which have induced New Hampshire residents to use its Social Media Platforms. In coming to this conclusion, the Court relies on the following facts pleaded by the State. Meta offers an interactive Social Media Platform accessible to New Hampshire citizens. While users need not pay to use the Platforms, Meta harvests users' personal data. (Compl. ¶ 34.) Meta then sells targeted advertising, based on that collected data, and employs addictive features on the Platforms to increase the amount of user time spent, increasing the amount of data Meta can collect and sell advertising for. (Id.) It is this core business model which is alleged to have harmed New Hampshire children. Meta's contacts with New Hampshire—its service agreements with users, collection of personal data, and sale of advertising based on that data—are inherently connected with the use of addictive design features at issue in this matter which further its business model. In a similar manner to Ford Motor Co., Meta extensively promotes its Platforms in the forum state, enters service agreements and collects data of residents of the forum state, and those residents use Meta's Platforms in the forum state and suffered injuries in the forum state. Cf. 592 U.S. at 366.

The Court disagrees with Meta that its geographically targeted advertising and marketing are unrelated to the State's claims. Meta permits advertisers to target designated market areas, including Manchester, New Hampshire, and otherwise target users based on their location, demographics, interests, and behaviors. (Compl. ¶¶ 29–30, 38–39.) Meta is able to offer targeting advertising by harvesting users' data. (Id.)

This incentivizes Meta to keep users on its Platforms for the maximum amount of time to increase the amount of data harvested. To keep users on its Platforms, Meta employs the addictive design features that form the basis of the State's claims. This distinguishes the State's claims from matters in which a plaintiff's claims in no way relate to a defendant's use of geographically targeted advertising. See Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 321 (5th Cir. 2021) (holding that the defendant's use of geographically targeted advertising did not relate to the plaintiff's libel claim).

Put simply, Meta derives its profits from users viewing and interacting with advertisements on its Social Media Platforms. To drive engagement, Meta designs and employs the addictive design features that form the basis of the State's claims. For this reason, Meta's targeted advertising efforts are not only related but integral to the State's claims.

For the foregoing reasons, assuming the facts alleged in the State's complaint as true and construing all inferences in the State's favor, the State has demonstrated the relatedness factor of the specific personal jurisdiction test.

The Court next turns to the purposeful availment prong of the specific personal jurisdiction test. "The second prong of the due process analysis considers whether the defendants have purposefully availed themselves of the protection of New Hampshire's laws." Seward, 174 N.H. at 411–12. "To satisfy the second requirement, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protection of that state's laws and making the defendant's involuntary presence before the state's

courts foreseeable." Id. ¶ 412. "Purposeful availment requires both foreseeability and voluntariness." Id. "Voluntariness requires that a defendant's contacts with the forum state proximately results from actions by the defendant." Id. "The contacts must be deliberate and not based on the unilateral actions of another party, and cannot be merely fortuitous, but rather, the defendants must have purposefully directed actions at New Hampshire." Id. "Foreseeability requires that the contacts must be of a nature such that a defendant could reasonably anticipate being haled into court here." Id.

Meta argues that its alleged conduct does not demonstrate that it purposefully availed itself of the protection of New Hampshire's laws because the conduct was not specifically directed at New Hampshire. The State responds that Meta purposefully directed commercial activities to New Hampshire by, (1) advertising, marketing, and distributing its Social Media Platforms to New Hampshire consumers and making substantial profits from selling user data, (2) entering into contracts with each of its New Hampshire users, and (3) encouraging children in New Hampshire to use its products.

In Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773–74 (1984), the Court found that there was specific jurisdiction over the defendant publisher where it had no employees or offices in the forum, did not expressly aim its publication or conduct at the forum, and magazine sales in the forum made up only a small fraction of the defendant's total sales, but the defendant circulated 10,000 to 15,000 copies of its magazine to subscribers in the forum each month. The Court reasoned that the defendant "continuously and deliberately exploited" the forum's market. Keeton, 465 U.S. at 781. Because the defendant produced "a national publication aimed at a nationwide audience," there was "no unfairness in calling it to answer for the contents of

that publication wherever a substantial number of copies are regularly sold and distributed." Id.

The Keeton Court's reasoning applies here, despite Meta's arguments distinguishing operating the Social Media Platforms from physically distributing magazines. Meta's Platforms are accessible to New Hampshire users. More than that, in exchange for the use of the Platforms, Meta harvests users' personal information and sells it to advertisers, which advertise on the Platforms. See uBID, Inc. v. GoDaddy, Inc., 623 F.3d 421, 427–28 (7th Cir. 2010) (determining that website operator defendant had minimum contacts with the forum because it exploited the forum's market and engaged in extensive national advertising, despite the fact that it did not specifically target forum residents through advertising). Like the publisher in Keeton, Meta has specific connections with New Hampshire and furthers those connections each time it contracts with users to offer its Platforms in exchange for their data. This is voluntary contact with the forum state and its citizens. See Seward, 174 N.H. at 412. While Meta argues that its contacts with New Hampshire are based on the unilateral activity of New Hampshire users, its harvesting and sale of New Hampshire users' data causes the Court to disagree. For these reasons, it is foreseeable that Meta's contacts with New Hampshire are such that it should reasonably anticipate being haled into court here. See id.

The parties dispute the applicability of the sliding scale framework outlined by Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). The Court need not rely on Zippo's sliding scale framework because, as discussed, Meta has done more than operate a website accessible in the forum. This is not a case where the

defendant operates a website simply visible in the forum, see McBee v. Delica Co., Ltd., 417 F.3d 107, 124 (1st Cir. 2005), or an interactive website, see Gullen v. Facebook.com, Inc., No. 15 C 7681, 2016 WL 245910, at *3 (N.D. Ill. Jan. 21, 2016).[1] Rather, the State alleges that Meta designed an addictive application, collects personal data from New Hampshire users, sells that personal data to advertisers, and profits from advertisers' ability to target their advertisements to New Hampshire users based on their location and preferences learned from the data collected by Meta. (Compl. ¶¶ 36–38.) This is conduct directly targeted to New Hampshire. Meta's engagement in similar conduct elsewhere does is irrelevant to this Court's analysis. Therefore, the Court concludes that Meta has purposefully availed itself of jurisdiction in New Hampshire courts.

Lastly, the Court addresses the fairness and reasonableness of exercising jurisdiction over Meta. The third and final prong of the specific personal jurisdiction test asks, "whether it would be fair and reasonable to require the defendants to defend the suit in New Hampshire." Seward, 174 N.H. at 413. "For this determination, [the Court] examine[s] the five so-called 'gestalt factors,' which are: the burden on the defendant; the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies." Id.

[1] While Facebook.com was the defendant in Gullen, there were no similar facts, as are present in the State's complaint, about the defendant's profits derived from the forum, its collection of data for the purposes of advertising, or its sale of that data to advertisers.

Meta argues that forcing it to litigate in New Hampshire is unfair because its place of business in California is an appreciable distance from New Hampshire and attorneys general from 33 other states are pursuing similar litigation in a consolidated action in California (the "MDL Litigation"). See In re Social Media Adolescent Addiction/Personal Injury Prod. Liability Litig., No. 4:23-cv-05448-YDR, 4:23-cv-05885-YGR (N.D. Cal. Oct. 15, 2024). Meta asserts that efficiency calls for litigating the State's claim with the others in California. The State contends that the burdens of modern travel are minimal and that it is not unfair to require Meta to defend itself in the forum wherein the State seeks to protect hundreds of thousands of forum consumers.

The Court begins with the first gestalt factor: the burden on the defendant. While Meta is headquartered in California, it is a large corporation capable of defending itself anywhere. Meta's Social Media Platforms, Facebook and Instagram, had over 418 million combined users in the United States in 2023. "Because suit in a foreign jurisdiction always burdens a foreign company, the defendant must establish that the Court's exercise of jurisdiction would be onerous in a special, unusual, or other constitutionally significant way." State v. N. Atlantic Refining Ltd., 160 N.H. 275, 286 (2010). The Court cannot say, with Meta's vast reach including into New Hampshire as outlined supra, that exercising jurisdiction would be special, unusual, or constitutionally significant. With respect to the second factor, New Hampshire has a strong interest in obtaining relief in its courts for harms allegedly committed against its citizens. See Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 31 (1st Cir. 1988). Further, "New Hampshire also has a strong interest in protecting the legitimacy of its court judgments." Seward, 174 N.H. at 413. The third factor also weighs in favor of

exercising jurisdiction because the State's interest in obtaining convenient and effective relief is furthered by providing it a means to pursue redress in its home courts. The fourth factor weighs against exercising jurisdiction because the most efficient resolution is the consolidated litigation of other similar suits in the multi-district litigation venued in California district court. Finally, exercising jurisdiction supports the "shared interest of the several states in furthering fundamental substantive social policies." The states have an interest in protecting their citizens from harm and obtaining relief in their own courts.

Accordingly, having considered the gestalt factors, the Court determines it is fair and reasonable to exercise jurisdiction over Meta.

Altogether, the Court determines it can exercise specific personal jurisdiction over Meta because it has purposefully availed itself of the Court's jurisdiction, its contacts with New Hampshire are related to the conduct underlying the State's claims, and it is fair and reasonable to exercise jurisdiction here. Seward, 174 N.H. at 407. Having found that the Court may exercise personal jurisdiction over Meta, the Court turns to Meta's arguments on the merits.

B. Section 230 of the Communications Decency Act

Meta argues that Section 230 of the Communications Decency Act ("Section 230") bars the State's claims because they treat Meta as a publisher of third-party content. Because Section 230 is an affirmative defense, dismissal is only proper if Meta's immunity is evident from the face of the complaint. Teatotaller, LLC v. Facebook, Inc., 173 N.H. 442, 449 (2020) (quoting Force v. Facebook, Inc., 934 F.3d 53, 63 n. 15 (2d Cir. 2019)).

In 1996, Congress enacted Section 230 "to promote the continued development of the Internet" and "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material," among other policies. 47 U.S.C. § 230(b)(1), (4). To achieve these goals, Section 230 immunizes interactive computer service providers, like Meta, from legal claims that treat them as a publisher or speaker of third-party content. See 47 U.S.C. § 230(c)(1), (e)(3). While courts have interpreted Section 230 to "broadly immunize internet companies from liability . . . this immunity is not limitless." Calise v. Meta Platforms, Inc., 103 F.4th 732, 736 (9th Cir. 2024).

To determine whether Section 230 immunity applies to a given case, courts employ a three-prong test. Under this test, Section 230 only protects "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." Teatotaller LLC, 173 N.H. at 450 (quoting Universal Commc'n v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007)); see also Calise, 103 F.4th at 740; Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021); Barnes v. YAHOO!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

It is undisputed that Meta is a provider of an interactive computer service and therefore satisfies the first prong. To analyze the second and third prongs, the Court must determine whether it is evident from the face of the complaint that each of the State's claims treat Meta as a publisher or speaker of third-party content. This determination rests upon the State's theory of liability in each count. See Teatotaller,

LLC, 173 N.H. at 451; Calise, 103 F.4th at 740 (stating that courts must "examine each claim to determine whether a plaintiff's theory of liability would treat a defendant as a publisher or speaker of third-party content") (emphasis in the original). Thus, the Court must examine Meta's duty under the State's theories of liability. As explained by the Ninth Circuit in Calise,

> We must therefore examine two things in looking at duty. First, what is the "right" from which the duty springs? If it springs from something separate from the defendant's status as a publisher, such as from an agreement, or from obligations the defendant has in a different capacity, then [Section 230] does not apply. Second, we ask what is this duty requiring the defendant to do? If it obliges the defendant to "monitor third-party content"—or else face liability—then that too is barred by [Section 230].

Id. (cleaned up).

In Lemmon, the Ninth Circuit examined the duty of social media companies to design reasonably safe products. There, the parents of two boys who died in a high-speed car accident sued Snap, Inc. ("Snap"), alleging that Snap negligently designed its social media platform, Snapchat. Lemmon, 995 F.3d at 1087. Like Instagram and Facebook, Snapchat is a social media platform that allows users to share photos and videos with other Snapchat users. See id. at 1088. To promote user engagement, Snapchat provides users with rewards such as "trophies, streaks, and social recognitions," but does not tell users how to earn these rewards. Id. At the time, Snapchat had developed a "speed filter," which allowed users to superimpose their real-life speed atop user-created content. Id. The plaintiffs alleged Snapchat knew or should have known that its users believed that Snapchat would reward them for posting a "snap" at 100 miles per hour or over. Id. at 1089. While Snapchat warned users not to use the filter while driving, the warnings proved ineffective. Id. at 1090. The trial

court dismissed the plaintiffs' amended complaint, ruling that Section 230 barred their claim. Id.

On appeal, the Ninth Circuit reversed the trial court's decision and concluded that the plaintiffs' claim did not treat Snap as a publisher or speaker of third-party content because the cause of action focused on Snap's duty, as a manufacturer, to design a reasonably safe product. Id. at 1091–92. The court explained,

> [The plaintiffs'] negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. Snap's alleged duty in this case thus "has nothing to do with" its editing, monitoring, or removing of the content that its users generate through Snapchat.

Id. at 1092 (cleaned up). In its analysis, the court conceded that Snap, in some capacity, acted as a publisher or speaker of third-party content, but concluded that was not enough to confer immunity under Section 230. Id. The court explained,

> That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the [plaintiffs] seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in Internet Brands, Snap "acted as the 'publisher or speaker' of user content by" transmitting [the boys'] snap, "and that action could be described as a 'but-for' cause of [the boys'] injuries." This is unsurprising: Snap "is an internet publishing business. Without publishing user content, it would not exist. But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the [plaintiffs'] claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content."

Id. at 1092–93 (citing Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016)).

The Court finds this reasoning persuasive and applicable here. While the State's complaint alleges that New Hampshire children are exposed to harmful content while using the Social Media Platforms, the thrust of the State's allegations in Counts I, III, and V are based on Meta's duty as a manufacturer to design reasonably safe products and allege that Meta's own conduct regarding the design of those products is defective.[2] This duty is independent of Meta's role as a publisher of third-party content. While the Northern District of California decided differently in the MDL Litigation, wherein Meta is a defendant, see In re: Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F.Supp.3d 809, 830–33 (N.D. Cal. 2023), the Court finds its decision today to be consistent with persuasive authority, as well as the language and purpose of Section 230, see 47 U.S.C. § 230(b)(3), (4); Calise, 103 F.4th at 736 (reasoning that immunity under Section 230 is not limitless); Lemmon, 995 F.3d at 1092–93 (holding that Section 230 did not bar negligent design claim); Internet Brands, 824 F.3d at 853 (holding that Section 230 did not bar failure to warn claim).

To be clear, Section 230 protects Meta against any claims where the alleged harm arises from the substance of third-party content posted on the Social Media Platforms. See Force, 934 F.3d at 66 (finding Facebook was protected under Section 230 for harm resulting from Hamas content); Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1098 (9th Cir. 2019) (finding the defendant was protected under Section 230 when a user died from fentanyl toxicity after purchasing fentanyl from another user on the defendant's online service). However, the State alleges that Meta's product design features, in and of themselves, are harmful to New Hampshire children regardless of the

[2] The Court separately analyzes whether the Social Media Platforms are "products" in Section V, infra, regarding products liability.

substance of the third-party content displayed. (Compl. ¶¶ 238, 241-44, 249, 281-84, 301, 315.) Thus, the Court determines that Section 230 does not bar the State's claims within Counts I, III, and V.

To the extent that Meta argues that Section 230 immunizes them against aspects of Counts II, IV, and V involving Meta's alleged misrepresentations and failures to warn, the Court disagrees. These counts are not based on Meta's role as a publisher of third-party content. Rather, the duty alleged to be breached arises out of Meta's knowledge that its products harm New Hampshire children. Thus, Section 230 does not bar these claims. See Doe v. Internet Brands, Inc., 824 F.3d 846, 852–53 (finding that Section 230 does not bar failure to warn claims); In re Social Media Adolescent Addiction/Personal Injury Pro. Liability Litigation, 702 F. Supp. 3d 809, 834 (N.D. Cal. 2023) (same); Hiam v. HomeAway.com, Inc., 267 F. Supp. 3d 338, 346–47 (D. Mass 2017); aff'd, 887 F.3d 542 (1st Cir. 2018) (reasoning that claims based on publisher's own speech are not barred by Section 230).

IV. First Amendment

Meta contends that the First Amendment and Part I, Article 22 of the New Hampshire Constitution protect its editorial discretion to disseminate third-party speech and, thus, bar the State's claims. The State contends that its claims are not barred because the conduct challenged is not protected speech but, rather, Meta's implementation of addictive design features. However, Meta argues that because its "content publication algorithms and other design choices are simply the means by which Meta presents and arranges speech, they 'fall squarely within the core of the First

Amendment security.'" (Def.'s Memo. ISO Mot. to Dismiss at 16) (citing Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 570 (1995)).

Like Section 230, the First Amendment protects publishers' discretion to disseminate third-party speech and categorically protects publishers from liability for injuries arising out of that speech. See Miami Hearld Pub'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); Moody v. NetChoice, LLC, 144 S.Ct. 2383, 2393 (U.S. 2024) (comparing social media company's content moderation to traditional publishers' editorial choices, which "also select and shape other parties' expression into their own curated speech products"). Many courts, including the MDL court, have held that certain publishing decisions made by social media companies trigger First Amendment scrutiny. See In re Social Media Adolescent Addiction/Personal Injury Pro. Liability Litigation, 702 F. Supp. 3d at 836 (applying First Amendment protection to the timing and clustering of notifications of Meta's own content); NetChoice, LLC v. Florida, 34 F.4th 1196, 1203–04, 1210 (11th Cir. 2022) (finding that social media companies engaged in protected speech when they expressed their political views through content moderation practices).

Thus, the First Amendment, like Section 230, immunizes Meta against any claims alleging harm arising from the substance of third-party content, as that conduct falls within a traditional publishing role. See Tornillo, 418 U.S. at 258; Reno v. ACLU, 521 U.S. 844, 870 (1997). However, because the Court has concluded that the thrust of the State's claims seeks to hold Meta accountable for the harm caused by the alleged addictive design features themselves, regardless of the substance of the third-party content disseminated, the Court similarly finds that the First Amendment does not bar

the State's claims. See In re Social Media Adolescent Addiction/Personal Injury Pro. Liability Litigation, 702 F. Supp. 3d at 836 (stating that Meta's briefing ignored that "much of the conduct alleged by plaintiff does not constitute speech or expression" and "d[id] not explain how holding them liable in that context would be akin to making them liable for speech").

V. Consumer Protection Act

The State asserts two claims alleging that Meta violated New Hampshire's Consumer Protection Act ("CPA"), RSA 358-A:2. In the first, Count I, the State alleges that Meta violated the CPA by intentionally incorporating addictive design features and algorithms into its Social Media Platforms despite its knowledge of the harm children suffer from those features. (Compl. ¶ 238.) The State also alleges, in Count II, that Meta violated the CPA by engaging in deceptive acts or practices, in particular: (1) deceptively representing that the Social Media Platforms are safe and failing to disclose and/or concealing information indicating the Platforms are not safe; (2) misrepresenting that the Social Media Platforms are not designed to hook children; and (3) misrepresenting that Meta prioritizes user well-being over profits. (Compl. ¶¶ 260–62.)

Meta moves to dismiss both CPA claims on the following grounds: (1) the State failed to identify unlawful conduct that took place in New Hampshire; (2) Meta is exempt from CPA liability because it falls under the CPA's publisher exception; (3) the alleged unfair or deceptive practices are not alleged to have occurred in the conduct of trade or commerce; (4) both counts fail to state a claim; and (5) the State is not entitled to restitution. The Court addresses each argument in turn.

a. Conduct in or Directed at New Hampshire

Meta contends that the State's CPA claims must fail because the State has not alleged that the underlying conduct occurred in New Hampshire. Meta cites the fact that its principal place of business is in California and the State does not allege that Meta maintains offices, employees, or assets in New Hampshire. The State responds that the "offending conduct" occurred within New Hampshire because Meta's alleged misrepresentations were received by New Hampshire consumers and Meta's design features affected New Hampshire users.

RSA 358-A:2 makes unlawful the use of "any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." "Trade" and "commerce" include "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state." RSA 358-A:1, II; LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 96 (2007) (emphasizing the broad sweep of the CPA indicated by the language, "any trade or commerce directly or indirectly affecting the people of this state"). "The limitation in RSA 358-A:2 to 'conduct of any trade or commerce within this state' has been interpreted to mean that the statute only applies to offending conduct that took place in New Hampshire." Environamics Corp. v. Ferguson Enter., Inc., No. Civ. 00-579-JD, 2001 WL 1134727, at *4 (D.N.H. Sept. 24, 2001).

The following decisions demonstrate a spectrum of whether a defendant's conduct satisfies the "within this state" element of the CPA. In LaChance, the New

Hampshire Supreme Court held that the plaintiffs, who were purchasers of smokeless tobacco products from retail stores across New Hampshire, could bring a CPA claim against the defendants, who manufactured smokeless tobacco products and marketed them through in-store displays. 156 N.H. at 89 (addressing whether the plaintiff's claims satisfied the "trade or commerce" requirement, not specifically addressing the territorial requirement). In Environamics, the court determined that the "within this state" requirement was satisfied where the defendant shipped a contaminated product to New Hampshire. 2001 WL 1134727, at *4. Alternatively, the Precourt Court ruled that the defendant's conduct was not within the State of New Hampshire where it shipped its beef to a New York company which then incorporated the defendant's beef into another product which it distributed to New Hampshire. Precourt v. Fairbank Reconstruction Corp., 856 F. Supp. 2d 327, 344 (D.N.H. 2012).

The Court determines that the State's allegations support that the conduct underlying the claims against Meta has a sufficient New Hampshire nexus. The Court begins with the State's claims arising out of Meta's design features. In 2023, Facebook and Instagram had 34,063 and 89,339 New Hampshire users under eighteen, respectively. (Compl. ¶¶ 49–50.) Meta also derived $542,835,568 from ad revenue sourced from New Hampshire users in 2023. (Id. ¶ 40.) Further, as explained above, supra Section A, Meta's algorithms are influenced by the data collected from New Hampshire users. To say that Meta's alleged unfair or deceptive act or practice of incorporating addictive design features and algorithms into its Social Media Platforms used by tens of thousands of New Hampshire children is not conduct within this state is not credible. Turning to the State's claims arising out of Meta's alleged

misrepresentations, the Court determines that the conduct likewise occurred "within this state" because New Hampshire children are alleged to have suffered from the impacts of Meta's misrepresentations and omissions. (See id. ¶¶ 32, 261.) Certain alleged misrepresentations are included on Meta's website, accessed by the tens of thousands of New Hampshire child users and New Hampshire adult users on a regular basis. (See id. ¶ 145.) For these reasons, the Court views the State's allegations as similar to those in LaChance and Environamics, satisfying the CPA's territorial requirement at the pleading stage.

The Court's decision is in accord with other jurisdictions that determined the CPA's territorial requirement was satisfied on a claim alleging a nationwide scheme under which New Hampshire citizens have suffered despite the conduct not directly occurring in New Hampshire. See In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 761 (E.D. Penn. 2014); In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 244, 234–35 (M.D. Penn. 2010); In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 231 (S.D.N.Y. 2012).

b. Publisher Exemption Under RSA 358-A:3, IV

Meta contends that it is exempt from liability under RSA 358-A because it is a publisher under RSA 358-A:3, IV. The State argues that the exemption is inapplicable because the State seeks to hold Meta liable for its use of addictive design features and for its misrepresentations, not as a publisher of third-party content.

RSA 358-A:3 exempts certain persons or conduct from liability under RSA 358-A. One of those exceptions, RSA 358-A:3, IV, exempts from liability, "[p]ublishers, broadcasters, printers, or other persons engaged in the dissemination of information or

reproduction of printed or pictorial matter who publish, broadcast, or reproduce material without knowledge of its deceptive character." Cf. Karpinski v. Union Leader Corp., No. 18-cv-1214-PB, 2019 WL 3203144, at *8 (D.N.H. July 16, 2019) (analyzing RSA 358-A:3, IV where the suit arose out of the substance of an article published by the defendant newspaper).

The Court agrees with the State. For similar reasons outlined, supra Section B, addressing Meta's Section 230 arguments, the State seeks to hold Meta liable not for its publishing of certain content, but rather for the addictive features it implements into its Social Media Platforms and for the alleged misrepresentations it has made to the public. The State's CPA claims do not arise out of Meta's publishing of deceptive material. For that reason, RSA 358-A;3, IV does not apply.

c. Conduct of Trade or Commerce

Meta argues that its alleged conduct does not constitute "conduct in any trade or commerce" because the State does not, and cannot, allege that users pay to use the Social Media Platforms. The State responds that Meta has engaged in "trade or commerce" in New Hampshire by exchanging the use of its Social Media Platforms for users' personal data.

"To determine whether the [CPA] applies to a particular transaction, [the Court] analyze[s] the activity involved, the nature of the transaction, and the parties to determine whether a transaction is a personal or business transaction." Hughes v. DiSalvo, 143 N.H. 576, 578 (1999) (declining to extend to the CPA to isolated sales of property by owners). The CPA defines "trade" and "commerce" as, "the advertising,

offering for sale, sale, or distribution of any services or any property . . . ." RSA 358-A:1. The Court must engage in statutory interpretation of the term "sale" in the CPA.

When engaging in statutory interpretation, the Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to it plain and ordinary meaning." State v. Doyle, 176 N.H. 594, 597 (2024). The Court "give[s] effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The Court "construe[s] all parts of a statute together to effectuate its overall purpose" and attempts to construe all parts "in harmony with the overall statutory scheme." Id.

"Sale" is defined as "[t]he action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration." Oxford English Dictionary, "Sale," July 2023; Matter of Carter, 2024 N.H. 30, ¶ 9 ("When a term is not defined in a statute, [the Court] look[s] to its common usage, using the dictionary for guidance."). It is also defined as, "[t]he transfer of property or title for a price." Black's Law Dictionary, "Sale," (12th ed. 2024). Upon review of the plain meaning of "sale," the Court cannot say that it requires an exchange of money. The Court declines to read words into the statute the legislature did not see fit to include. See Doyle, 176 N.H. at 597. Rather, a sale could be an exchange wherein consumers are able to access Meta's Social Media Platforms in exchange for a price—Meta's collection of their personal data. While Meta does not charge for its product, it receives valuable consideration in the form of person information. The State has alleged such an exchange, satisfying the "trade or commerce" element of the CPA at the pleading stage. (See Compl. ¶ 34.) The Court's conclusion is in accordance with the purpose of the

CPA: “to ensure an equitable relationship between consumers and persons engaged in business.” Hughes, 143 N.H. at 578.

The Court notes that Meta originally relied upon a trial court decision from an Indiana court interpreting a similar state statute. See Indiana v. Tiktok, Inc., No. 02D02-2212-PL-400, 2023 WL 8481303, at *6 (Ind. Ct. Super. Nov. 29, 2023). That court determined that Tiktok’s operation of an app, free to users, was not a “consumer transaction” under Indiana’s comparable consumer protection act because users did not exchange money for use of the app. Id.; see also Ind. Code § 24-5-0.5-2(1) (defining a “consumer transaction” as “a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible”). The Court of Appeals of Indiana reversed the trial court’s decision, determining that Tiktok’s business model of exchanging access to its content library for end-user personal data was a “consumer transaction.” State v. Tiktok, Nos. 23A-PL-3110, 23A-PL-3111, 2024 WL 4340387, at *8–9 (Ind. Ct. App. Sept. 30, 2024). The court concluded that, “the plain and ordinary definition of the word ‘sale,’ which is not otherwise defined in the DCSA, includes any consideration to effectuate the transfer of property, not only an exchange of money.” Id. at *9 (noting that an interpretation limiting the definition of the word “sale” to exchanges for money narrows the scope of the act beyond its plain terms, contrary to its requirement of liberal interpretation). The Court adopts a reasoning similar to that of the Indiana Court of Appeals, here.

d. Failure to State a Claim

Meta argues that the State fails to state a claim under either of its CPA counts. It contends that the State has failed to allege facts demonstrating the “rascality” of Meta’s

conduct or that New Hampshire citizens suffered substantial injury from Meta's acts. The State responds that its allegations of Meta's conduct meet New Hampshire's rascality test and that the alleged harms to New Hampshire children's mental health suffices as substantial injury.

The CPA proscribes unfair and deceptive trade practices in general, RSA 358-A:2, and sets forth a list of specific types of conduct that qualify as unfair or deceptive trade practices, RSA 358-A:2, I–XVIII. Fat Bullies Farm, LLC v. Devenport, 170 N.H. 17, 24 (2017). Although the general provision is broadly worded, the New Hampshire Supreme Court has recognized that not all conduct in the course of trade or commerce falls within the scope of the CPA. Id.

"In determining which commercial actions not specifically delineated are covered by the act," the Court employs the "rascality" test. Id. "Under the rascality test, the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Id. In addition to the rascality test, New Hampshire courts look to the federal courts' interpretation of the Federal Trade Commission Act for guidance. Id. The Federal Trade Commission considers: "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers . . . ." Id. The New Hampshire Supreme Court has found the rascality test unmet when a defendant was alleged to have engaged in conduct

common in the particular industry in which the parties engaged. See Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H. 363, 371 (2009).

i. Count I

In Count I, the State alleges that Meta committed unfair acts in violation of the CPA by intentionally incorporating addictive design features and algorithms into its Social Media Platforms despite knowledge of the harms suffered by child users of those features. (Compl. ¶ 238.) Meta contends that the State fails to state a claim on Count I because Meta's alleged manipulative and addictive design features are not unique to its Social Media Platforms and the State has not alleged a "substantial injury." The State disagrees that Meta's design features need to be unique to be actionable under the CPA. The State further asserts that non-monetary harm can suffice as a substantial injury, establishing an unfair act or practice.

Meta's contention that its design features do not satisfy the rascality test because they are well known to the public and other social media services use similar features is unpersuasive to the Court. Of note, the fact that other social media services use similar features is not a fact pleaded in the complaint. For that reason, the Court cannot consider it. See Barufaldi, 175 N.H. at 427; Hair Excitement, Inc., 158 N.H. at 371 (reviewing the trial court's decision of the plaintiff's CPA claim on the merits, not at the motion to dismiss stage). Further, while Meta's design features may be well known, the State alleges that Meta misrepresented and omitted information about the design features' addictive nature. Accordingly, in viewing the facts in the light most favorable to the State, the Court cannot rule that the addictive nature of Meta's design features is known and understood by the public.

Therefore, the Court is left with the State's allegations that Meta intentionally incorporated addictive design features and algorithms into its Social Media Platforms. The State alleges Meta did so with an understanding of the harms suffered by children using the Platforms. Finally, the State alleges that Meta's acts and omissions have exploited children's psychological vulnerabilities for Meta's financial gain. The knowing exploitation of children's health for financial gain rises to "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Hair Excitement, Inc., 158 N.H. at 369.

The Court next addresses Meta's argument that the State has not alleged a substantial injury. Relying on the Federal Trade Commission's test to determine whether conduct is unfair or deceptive, the New Hampshire Supreme Court requires a showing that the conduct causes substantial injury to consumers. Fat Bullies Farm, Inc., 170 N.H. at 24. The Court is unaware of precedent from the New Hampshire Supreme Court substantively analyzing the meaning or scope of "substantial injury." Accordingly, the Court turns to other jurisdictions' interpretations of the Federal Trade Commission Act.

In 1985, the Court of Appeals for the District of Columbia relied on a policy statement from the Federal Trade Commission which stated, "in most cases substantial injury would involve monetary harm and that 'ordinarily' emotional impact and other more subjective types of harm would not make a practice unfair." Am. Fin. Serv. Ass'n v. F.T.C., 767 F.2d 957, 972 (D.C. Cir. 1985). Further, the Commission's policy statement clarified that it is "not concerned with trivial or merely speculative harms." Id. The Commission also noted in correspondence with United States senators that it does

not "cover subjective examples of harm such as emotional distress or offenses to taste or social belief." Id. at n.18. However, an act or practice can cause 'substantial injury' by doing "a small harm to a large number of people, or if it raises a significant risk of concrete harm." Id.; F.T.C. v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010).

The State has alleged harm sufficing to establish substantial injury under the CPA. The State alleges that use of Meta's Social Media Platforms "results in psychological and health harms among children, including increased rates of major depressive episodes, anxiety, sleep disturbances, suicide, and other mental health concerns." (Compl. ¶ 99.) The State also alleges that frequent social media use has been associated with distinct changes in the amygdala region of a developing brain. (Id. ¶ 106.) Even accepting a classification of the harms alleged by the State as "emotional distress," such allegations establish a substantial injury. The harm suffered by New Hampshire child users of the Social Media Platforms is not subjective or trivial. Rather, the State alleges that use of the Platforms causes serious injury to teenagers' health. This alleged harm is sufficiently concrete, see Neovi, Inc., 604 F.3d at 1157 (requiring that an injury be "concrete" to satisfy the substantial injury test), and serious to constitute substantial injury. See District of Columbia v. Meta Platforms, Inc., No. 2023-CAB-6550, at *34 (D.C. Super Ct. Sept. 9, 2024) (holding that the District alleged a substantial injury by alleging that Meta's addictive design features significantly increase rates of major depressive episodes anxiety, sleep disturbances, and other mental health disorders, including suicide, among children); F.T.C. v. Accusearch, Inc., No. 06-CV-105-D, 2007 WL 4356786, at *8 (D. Wy. Sept. 28, 2007) (ruling that, "while the substantial injury requirement may not *ordinarily* be met from emotional impact that

is 'trivial or merely speculative,' the evidence presented to the Court demonstrates a host of emotional harms that are substantial and real and cannot be fairly classified as either trivial or speculative"). Further, were the Court to accept the proposition that the harm alleged by the State is "small," which the Court is disinclined to do, a large number of people suffer from the harm, and, thus, the State has alleged a substantial injury. See id.

Accordingly, the State has stated a claim upon which this Court may grant relief on Count I of its complaint.

ii. Count II

In Count II, the State alleges that Meta made misrepresentations to consumers, specifically: (1) deceptively representing that the Social Media Platforms are safe and failing to disclose and/or actively concealing information that they are not; (2) misrepresenting that the Social Media Platforms are not designed to hook children; and (3) misrepresenting that Meta prioritizes user well-being over profits. (Compl. ¶ 262.) Meta argues that its subjective, generalized statements about the safety of the Social Media Platforms are statements of opinions or goals and cannot form the basis for a deceptive practices claim. Meta also contends that Count II fails because the State did not allege with specificity that its misrepresentations were false or misleading, the State's allegations about Meta's prioritization of time spent are not material, and Meta's statements to Congress are not actionable. The State disagrees, arguing that it alleged Meta's misrepresentations and omissions with sufficient specificity based on actionable deceptions.

First, the Court addresses Meta's argument that the State's deceptive practices claim must be pleaded with specificity. Meta relies on a New Hampshire superior court decision from 1999, a decision from the District Court for the District of New Hampshire, and a New Hampshire Supreme Court decision. First, the superior court order only briefly addresses the plaintiff's CPA claim and does not set out a standard of review separate from the plaintiff's claim for fraud. See Nichols v. Gen. Motors Corp., No. 99-C-566, 1999 WL 33292839, at *4–5 (N.H. Super. Ct. Dec. 13, 1999). Second, the federal court's decision applied a heightened pleading standard to the plaintiff's CPA claim after determining that a federal procedural rule required such standard for claims sounding in fraud. Micronics Filtration Holdings, Inc. v. Miller, No. 18-cv-303-JL, 2018 WL 4845749, at *6 (D.N.H. 2018). This Court need not consider rulings from other courts applying federal procedural rules rather than the rules this Court is bound by. Finally, Meta's reliance on Jay Edwards, Inc. v. Baker, 130 N.H. 41, 46–47 (1987), is misplaced because that decision specifically addresses the standard of review for claims of fraud, and does not discuss broader applicability of the standard to claims such as CPA claims.

Consequently, the Court applies the traditional standard of review on a motion to dismiss to Meta's motion to dismiss Count II of the State's complaint. See LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 93–100 (2007) (employing the typical motion to dismiss framework to resolve an appeal of a trial court's grant of the defendant's motion for judgment on the pleadings—which are treated like motions to dismiss in New Hampshire—of the plaintiff's CPA claim); Snierson v. Scruton, 145 N.H. 73, 80–81 (2000) (applying a specificity test to the plaintiff's fraud and negligent

misrepresentation claims and then ruling that the plaintiff's CPA allegations "support[ed] a claim of unfair or deceptive trade practices" and not mentioning a specificity requirement).

The Court turns to Meta's argument that the State's claims arising out of alleged misrepresentations regarding the Social Media Platforms' safety are non-actionable statements of opinion, not misstatements of fact. The Court disagrees. Accepting the State's allegations as true, Meta's statements about the Social Media Platforms' safety went beyond mere puffery. See Hughes v. Panasonic Consumer Elecs. Co., Civ. Act. No. 10-846, 2011 WL 2976839, at *12 (D.N.J. July 21, 2011) (finding that alleged statements regarding "industry leading" characteristics were mere puffery insufficient to satisfy federal pleading standards). Rather, Meta is alleged to have known of the specific harms the Platforms caused child users and yet Meta reiterated the safety of the Platforms. Similarly, Meta prioritized users' time spent on the Platforms, knowing of the harm extended use of the Platforms caused, while making statements of its prioritization of safety and well-being. This goes beyond statements of corporate optimism. The Court finds these statements actionable because Meta is alleged to have known of specific harms, omitted the information from its public statements, and represented the opposite. Such conduct is subject to liability under the CPA.

The cases Meta cites are inapposite. See Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067–68 (9th Cir. 2001) (ruling that the plaintiff's claim for negligent misrepresentation was non-actionable where the plaintiff denied discussing the quality or nature of medical care on the cruise ship; the central issue of the claim). In particular, the Court finds decisions related to car manufacturers or ride-sharing

application companies' statements about the safety of their products distinct.[3] A reasonable consumer understands the inherent danger in operating a car and receiving a car ride from a stranger. However, the same is not true for use of social media applications. The State alleges that Meta knew about dangers posed by the Social Media Platforms and misrepresented or omitted key facts about the Platforms' safety. For that reason, a reasonable consumer does not have the same understanding of the dangers of social media as they might of the dangers of cars. To put it plainly, the dangers posed to users by Meta's addictive design features are far less visible or obvious than those posed by riding in cars with strangers. The Court also notes that several of the cases cited by Meta involve securities actions in which the analysis focused on the understanding of a reasonable investor. Here, the Court must determine whether a reasonable consumer may have been misled by Meta's statements. Viewing the State's allegations in the light most favorable to it, the Court concludes a reasonable consumer may have been so misled. Accordingly, the Court is not persuaded by Meta's arguments and finds the State's allegations actionable.

Meta breaks down the rest of its argument into categories of statements related to: (1) prevalence of harmful content; (2) Project Daisy; (3) filters; (4) Meta's prioritization of time spent; and (5) other allegations generally alleging that Meta "deceived" and "misled" the public, consumers, and external researchers and regulators. The State responds that particular statements or practices can deceive

[3] See In re Lyft Inc. Sec. Litig., 484 F. Supp. 3d 758, 770 (N.D. Cal. 2020); Azoulai v. BMW of N. Am. LLC, No. 16-cv-00589-BLF, 2017 WL 1354781, at *8 (N.D. Cal. 2017); In re Ford Motor Co. Sec. Litig., Class Action, 381 F.3d 563, 571 (6th Cir. 2004); Greater Houston Trans. Co. v. Uber Tech., Inc., 155 F. Supp. 3d 670, 683 (S.D. Tex. 2015); XYZ Two Way Radio Serv., Inc. v. Uber Tech., Inc., 214 F. Supp. 3d 179, 183–84 (E.D.N.Y. 2016).

while being vague or technically true. The State asserts that it has alleged a concerted, global effort to deceive through Meta's various statements about certain aspects of the Social Media Platforms. The State refers to similar allegations made against tobacco companies related to statements about the health hazards posed by consumption of their products. See King v. Philip Morris, Inc., No. 990C0856, 2000 WL 34016358, at *10 (N.H. Super. Ct. Nov. 2, 2000).

The Court is inclined to agree with the State that the proper approach is to view Meta's statements as a whole to determine whether the State has stated a claim that the statements are misrepresentations violative of the CPA. The Court concludes that the State has done so. The State has alleged that Meta's statements about the Social Media Platforms were designed to minimize the harmful effects Meta was aware the Platforms had on child users. (Compl. ¶ 4.) The Court's analysis is whether Meta's conduct attained "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Fat Bullies Farm, LLC, 170 N.H. at 24. Meta's statements, whether they concerned the prevalence of harmful content, Project Daisy, filters, its prioritization of time spent on the Platforms, or more general deceiving or misleading statements, aimed to conceal the negative impacts of social media use on children, portray the Platforms as safe for children and indicate that Meta prioritized child safety. These statements are misleading such that they reach the required level of rascality at the pleading stage.

The Court lastly addresses Meta's arguments regarding statements it is alleged to have made in testimony to Congress. Meta contends that it cannot be liable for such statements because the First Amendment bars claims based on efforts to petition the

government, including congressional testimony, and any statements made to Congress were not made "in the conduct of any trade or commerce" as required by RSA 358:A-2.

Meta's first argument relies on the Noerr-Pennington doctrine which is "rooted in the Petition Clause of the First Amendment" and protects "an attempt to persuade the legislature or the executive to take particular action with respect to a law." United States v. Philip Morris USA Inc., 566 F.3d 1095, 1123 (D.C. Cir. 2009). The doctrine only covers activity "genuinely intended to influence government action." Id. Additionally, neither the doctrine nor the First Amendment protect petitions predicated on fraud or deliberate misrepresentation. Id. (collecting cases). Because the State has stated a claim that Meta's statements were misrepresentations, in violation of the CPA, they are not entitled to protection under Noerr-Pennington. The Court assumes the truth of the State's allegations: that Meta made statements to Congress which it knew were false or misleading. Accordingly, neither the Noerr-Pennington doctrine nor the First Amendment protect Meta's statements because they constitute deliberate misrepresentation.[4] See id.

The Court is likewise not persuaded by Meta's argument that the statements it made to Congress were not within "trade or commerce," and, consequently, are not actionable under the CPA. The CPA applies to "persons engaged in trade or commerce." Hughes v. DiSalvo, 143 N.H. 576, 578 (1999) (quoting Chase v. Dorais, 122 N.H. 600, 601 (1982)). "Remedies under the [CPA] are not available where the transaction is strictly private in nature, and is in no way undertaken in the ordinary

[4] The Court assumes, without deciding, that the Noerr-Pennington doctrine applies in this context as a defense to the State's CPA claim. However, the Court recognizes that some courts, see, e.g., Andrx Pharm., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1233 (11th Cir. 2005), have limited the applicability of the doctrine to antitrust actions (where the doctrine originated).

course of a trade or business." Id. (cleaned up). Assuming all of the facts in the State's complaint as true, and construing all inferences in the State's favor, Meta's statements to Congress were a part of its overall scheme to conceal known harm stemming from children's use of the Social Media Platforms. (Compl. ¶ 143–44, 188, 205–06.) As discussed, this is a key aspect of Meta's business model. Therefore, the State has pleaded sufficient facts to state a claim under the CPA arising from Meta's statements about the Platforms' safety.

e. Restitution

Finally, Meta alleges that the State is not entitled to restitution on its CPA claims because no user is alleged to have paid to use Meta's services. The State disagrees, arguing that restitution need not be compensatory but may also be used to disgorge wrongdoers of funds unlawfully obtained.

RSA 358-A:4, III(a) permits the attorney general to bring suit against any person the attorney general has reason to believe has committed a violation of RSA 358-A. In that suit, the attorney general "may petition the court for an order of restitution of money or property to any person or class of persons injured thereby." RSA 358-A:4, III(a).

The New Hampshire Supreme Court has not addressed the scope of restitution under RSA 358-A:4, III(a). In certain actions, New Hampshire has recognized the broader reach of restitution, including the disgorgement of the benefit derived by a defendant. See In re Haller, 150 N.H. 427, 430 (2003) ("Restitution is an equitable remedy typically applied to contracts implied in law to disgorge the benefit of unjust enrichment."). In the criminal context, the legislature has specifically defined restitution as "money or service provided by the offender to compensate a victim for economic loss

. . . ." RSA 651:62, V. Black's Law Dictionary defines "restitution" as "an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done." RESTITUTION, Black's Law Dictionary (12th ed. 2024).

In the Court's view, this determination requires an understanding of whether Meta has wrongfully received revenue from third-party advertisers from the increased time youth users spent on the Social Media Platforms as a result of Meta's alleged violations of the CPA. The State's allegations indicate this inquiry would be answered in the affirmative, but the Court cannot definitively rule from the face of the complaint. Accordingly, it declines to resolve this dispute at this juncture.

VI. Products Liability and Negligence

The State alleges that Meta is liable for the defective design of its Social Media Platforms (Count III), its failure to warn about the risks associated with use of the Social Media Platforms (Count IV), and its negligence in its design, manufacturing, marketing, distributing, and labeling of its Social Media Platforms (Count V). Meta moves to dismiss all three state common law claims, arguing that the State lacks standing to pursue such claims and each count fails to state a claim as a matter of law. The State contends it has parens patriae standing to pursue its claims and it stated a claim under each theory. Meta also argues that the State's strict products liability claims fail as a matter of law because the Social Media Platforms are not "products," that the State's negligence claim fails because the State has not alleged that Meta violated a duty of care, and that all of the State's common law claims fail because it did not sufficiently allege proximate causation. The Court addresses each issue in turn.

a. Standing

"Parens patriae literally means 'parent of the country,' and refers traditionally to the role of the state as sovereign and guardian of persons under legal disability." State v. City of Dover, 153 N.H. 181, 185 (2006). The theory is "a concept of standing utilized to allow the state to protect 'quasi-sovereign' interests such as health, comfort and welfare of its citizens, interstate water rights, and the general economy of the state." Id. at 185–86. To satisfy parens patriae standing, "[f]irst, the state must assert an injury to a 'quasi sovereign' interest, an interest apart from the interests of particular private parties. Second, the state must allege injury to a 'substantial segment' of its population." Id. at 186. The Court addresses each inquiry in turn.

"Quasi-sovereign" interests are those "that the State has in the well-being of its populace," which must be "sufficiently concrete to create an actual controversy between the State and the defendant." Id. (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982)). For example, states have a quasi-sovereign interest "in the abatement of public nuisances, instances in which the injury to the public health and comfort is graphic and direct." Id. Courts have "generally interpreted the health and well-being category of quasi-sovereign interests broadly." Id. "A state also has a quasi-sovereign interest in preventing any injury or potential injury to the general health and well-being of its residents." Id.

In Dover, the New Hampshire Supreme Court ruled that "the State has a quasi-sovereign interest in protecting the health and well-being, both physical and economic, of its residents with respect to the statewide water supply." Id. The Court reasoned that "[t]he control and elimination of water pollution is a subject clearly within the scope of

the State's constitutional police power." Id. The Court also relied on the State's interest, as articulated by RSA 481:1, in providing "careful stewardship over all the waters lying within its boundaries." Id. Thus, the Court concluded that the State had a quasi-sovereign interest in protecting its waters from methyl tertiary butyl ether contamination. Id.

The State contends it has a quasi-sovereign interest in protecting children from Meta's operation of the Social Media Platforms which the State has alleged causes significant harm to New Hampshire children. The State has a quasi-sovereign interest in the health of its citizens. Id. The State has alleged that Meta's Social Media Platforms harm children. (Compl. ¶¶ 104–117.) In New Hampshire, 13.49% of the under-eighteen population are active monthly Facebook users and 35% are active monthly Instagram users. (Id. ¶¶ 49–50.) Teenagers in New Hampshire have also suffered from declining mental health since 2011. (Id. ¶¶ 118–19.) The State has an interest in protecting the mental health of its youngest population. The Court sees no reason to distinguish between physical and mental health in this context. See Dover, 153 N.H. at 186 (stating that the state has a quasi-sovereign interest in the physical health of its citizens); Snapp, 458 U.S. at 607 (same). Therefore, the Court determines that the State has pleaded sufficient facts to satisfy the quasi-sovereign interest prong of the parens patriae standing test.

The second inquiry is "whether a sufficiently substantial segment of the population is affected by the challenged conduct." Dover, 153 N.H. at 187. In Dover, 13.2% of the statewide water supplies were contaminated, corresponding to hundreds of public water systems and approximately 40,000 private water supplies. Id. The

Court determined that the foregoing data demonstrated that the contamination directly affected a substantial portion of the population of New Hampshire. Id. The Court noted that the State "clearly" met the substantial segment test. Id.

Over a third of minors in New Hampshire are active Instagram users and 13% actively use Facebook. While there is no particular number which satisfies the substantial segment prong, see People v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 812 (N.D.N.Y. 1996) ("There is no numerical talisman to establish parens patriae standing . . . ."), the proportion of New Hampshire citizens impacted by Meta's Social Media Platforms exceeds the proportion impacted in Dover. If the State "clearly" met the prong in Dover, then the State has met the same prong under the facts alleged here. Further, while the State alleges teenage usage of the Social Media Platforms in 2023, future users will also be impacted by the same alleged products liability and negligence, increasing the segment of the population affected. See New York, by James v. Niagara-Wheatfield Central Sch. Dist., __ F.4th __, __, No. 22-2178-cv, 2024 WL 4487669, at *7 (2d Cir. Oct. 15, 2024) (permitting consideration of future individuals who may be injured by the defendant's actions in the analysis of the substantial segment prong of the parens patriae test); Com. of Massachusetts v. Bull HN Info. Sys., Inc., 16 F. Supp. 2d 90, 97 (D. Mass. 1998) (recognizing the state's quasi-sovereign interest in preventing potential injury to the general health and well-being of its residents). Accordingly, the Court determines that the State has pleaded sufficient facts to satisfy the substantial segment of the parens patriae standing test.

Some jurisdictions consider a third prong to the parens patriae test, requiring the State show that individuals could not obtain complete relief through private suits. See

Dover, 153 N.H. at 187. The reasoning underlying the third prong is to ensure that the state's interest is "sufficiently severe and generalized, it must stand apart from the interests of particular parties–in other words, the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens." New York v. Facebook, Inc., 549 F. Supp. 3d 6, 22 (D.D.C. 2021) (citing Snapp, 458 U.S. at 607). However, the New Hampshire Supreme Court has not applied this prong in its consideration of whether the State has standing. See Dover, 153 N.H. at 187 (declining to place the burden on the State to show whether the cities could obtain complete relief through the State's suit). The Court has only employed the test when determining what types of damages the State may recover in a parens patriae suit. See State v. Hess Corp., 161 N.H. 426, 436–37 (2011) (ruling on an interlocutory transfer of a partial motion for summary judgment).

The Court declines to apply the third prong to the preliminary determination of the State's parens patriae standing at the motion to dismiss stage. Therefore, because the State has met the two prongs of the parens patriae standing test, the State may pursue its common law claims against Meta on behalf of its citizens.

b. Whether the Social Media Platforms are "Products"

Meta argues that the State's strict products liability claims fail because the Social Media Platforms are not products and the harm the State alleges stems from intangible information and ideas, not products. The State contends that categorizing the Social Media Platforms as products is a better reasoned approach, the Platforms are more appropriately considered products in the products/services dichotomy, and the harm the State alleges arises from design elements of the Platforms, not third-party content.

The New Hampshire Supreme Court has not defined what a product is under strict products liability. However, it has adopted the Restatement (Second) of Torts to analyze other questions under strict products liability. See Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 831 (2005). The parties both rely on the Restatement (Third) of Torts which specifically addresses what constitutes a product. The Court likewise relies on the Restatement (Third) of Torts because of the New Hampshire Supreme Court's previous reliance on the Restatement's approach, the Restatement (Second) of Torts' silence on the issue of defining a product, and the parties' joint reliance on the Restatement (Third) of Torts.

The Restatement (Third) of Torts defines a product as, "tangible personal property distributed commercially for use or consumption." Restatement (Third) of Torts: Prod. Liab. § 19 (1998). Further, "[s]ervices, even when provided commercially, are not products." Id. However, items such as electricity are products "when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules state in the Restatement." Id.

Given the nature of the State's claims, the Social Media Platforms are products. The State alleges that the Platforms' design features harm users. Meta's business model is operating social networking applications which allow users to share and view content and communicate with other users. (Compl. ¶ 20.) However, the Social Media Platforms are the vehicle through which Meta effectuates that business model. Meta designs, develops, programs, markets, distributes, and profits from the Social Media Platforms. (Id. ¶ 299.) For this reason, the Platforms are akin to the distribution and

use of tangible property. See Restatement (Third) of Torts: Prod. Liab. § 19 (1998). Further, the Platforms are not services. While users may experience a customized display when engaging with the Platforms, the design features are uniform. Consequently, Meta is not performing a unique service for every user of its Platforms.

Other jurisdictions are in accord with the Court's analysis. In Brookes v. Lyft Inc., the court ruled that the Lyft application was a product because, while Lyft's business model was a transportation network company in which it connects riders with drivers, Lyft designed and distributed the Lyft application to carry out that business model. No. 50-2019-CA-004782-MB, 2022 WL 19799628, at *3 (Fla. Cir. Ct. Sept. 30, 2022). The court also noted that the plaintiff's claim was based on the design of the application which Lyft designed, distributed, and placed into the stream of commerce. Id. at *4; see also In re Uber Technologies, Inc., Passenger Sexual Assault Litig., __ F. Supp. 3d __, __, No. 3084 CRB, 2024 WL 4211217, at *23 (N.D. Cal. Aug. 15, 2024) (finding the Uber application a product because the alleged defects in the application have similar plausible analogues in tangible products); T.V. v. Grinder, LLC, No. 3:22-cv-864-MMH-PDB, 2024 WL 4128796, at *26 (M.D. Fla. Aug. 13, 2024) (recommending a finding that the defendant social networking application is a product because it designed its app for its business, made design choices for the app, placed the app in the stream of commerce, distributed the app in the global marketplace, marketed the app, and generated revenue and profits from the app); cf. In re Social Media Adolescent Addiction/Personal Injury Pro. Liability Litigation, 702 F. Supp. 3d at 849 (adopting a defect-specific approach to determine whether the challenged functionalities of the defendants' social media were products). But see Social Media Cases, No. JCCP 525,

22STCV21355, 2023 WL 6847378, at *16 (Cal. Super. Oct. 13, 2023) (determining that social media was not a product because applying the doctrine of products liability to social media does not align with the goals of the doctrine and interactions between social media companies and their users are different from traditional product sales).

The Court does not address at length Meta's argument that the State only alleges harm from intangible information delivered by the Social Media Platforms. As discussed supra, Section B, the State's claims are based on the Social Media Platforms' alleged defective and dangerous features, not the information contained therein. Accordingly, the State's products liability claim is based on harm caused by the product: the Social Media Platforms themselves.

c. Duty of Care

Meta argues that the State's negligence claim fails because it does not allege a duty of care that Meta violated. The State responds that Meta owes a duty to everyone, and in particular its users, to exercise reasonable care not to subject others to an unreasonable risk of harm. Specifically, the State points to the duty to design reasonably safe products and the duty to warn of foreseeable risks in the chosen design.

"To recover for negligence, the plaintiff must demonstrate that the defendant owes a duty to him, that the defendant breached that duty, and that the breach proximately caused injury to him." Robinson v. 1 Bouchard Street Realty, ___ N.H. ___, ___, 2024 N.H. 59, ¶ 7. "Absent a duty, there is no negligence." Id. "Whether a duty exists in a particular case is a question of law." Id. "When charged with determining whether a duty exists in a particular case, [the Court] necessarily encounter[s] the

broader, more fundamental question of whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Grady v. Jones Lang LaSalle Constr. Co., 171 N.H. 203, 207 (2018). "In making this determination, [the Court] consider[s] whether the societal importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant from extended liability." Id.

"A person injured by a product may proceed against the seller or manufacturer of the product under a theory of negligence." 8 McNamara, New Hampshire Practice: Personal Injury — Tort and Insurance Practice § 8.09 (2024) (citing State v. Exxon Mobil Corp., 168 N.H. 211, 233–36 (2015)). "A manufacturer has a duty to act in a reasonable way in designing and manufacturing a product." Id. Thus, because Meta has designed a product, placed that product in the stream of commerce, marketed it, and profited from it, Meta has a duty to reasonably design the Social Media Platforms.

Meta argues that interactive communication services like the Platforms do not owe a duty of care for content publication or consumption. Meta also contends that it does not owe a duty to prevent harm caused by third parties. The Court's review of the State's claim for negligence, (see Compl. ¶¶ 314–20), indicates that the State bases its negligence claim on Meta's alleged design, manufacture, marking, distribution, and labeling of the Social Media Platforms and the resulting compulsive and excessive use of the Platforms. The claim does not mention harm caused by Meta's publication or users' consumption of content or harm caused by third parties. Accordingly, the Court finds Meta's arguments irrelevant. However, to the extent the State seeks to hold Meta liable for content it publishes on its Social Media Platforms, such liability is barred by Section 230, see supra Section III(B). On the other hand, for the reasons articulated

throughout this order, Meta can be held liable for its implementation of certain design features.

d. Proximate Causation

Meta argues that all of the State's common law claims fail because it does not sufficiently allege proximate causation. The State contends that its allegations—that (1) Meta's use of addictive design features causes users, particularly teenagers, to engage with the Social Media Platforms compulsively and excessively; and (2) compulsive and excessive use of the Platforms causes harm to children's mental health—suffice to establish proximate causation. The State acknowledges that its theory is broad but argues that it has provided detailed factual support.

"Proximate causation requires a court to determine whether the defendant should be legally liable for what he has caused." Fish v. Homestead Woolen Mills, Inc., 134 N.H. 361, 364 (1991). "Liability for negligence is imposed only for injuries resulting from the particular hazard against which the duty of due care required protection to be given." Id. Generally, proximate causation is a question of fact. Cecere v. Loon Mountain Recreation Corp., 155 N.H. 289, 295 (2007).

The Court determines that, in viewing the facts alleged in the light most favorable to the State and taking all reasonable inferences in its favor, the State has alleged proximate causation. In its complaint, the State has laid out how social media impacts young users' mental health, (Compl. ¶¶ 104–117), that New Hampshire teenagers use the Social Media Platforms, (id. ¶¶ 49–50), and that New Hampshire teenagers' mental health has declined since 2011, corresponding with Meta's acquisition of Instagram, (id. ¶¶ 98, 118–19). The State has alleged that Meta is aware of the addictive nature and

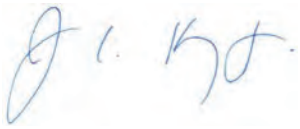
harmful impacts of the design of its Platforms. (Id. ¶¶ 69, 78, 111, 122, 125, and 136.) Viewing these allegations together, the State has sufficiently pleaded that Meta's alleged design and implementation of addictive and dangerous features and misrepresentations and omissions about the safety of the Platforms proximately caused the worsening of teenage mental health in New Hampshire.

VII. Conclusion

For the foregoing reasons, Meta's motion to dismiss is DENIED.

SO ORDERED.

December 10, 2024
_____
Date



_____
John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/11/2024

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

THE STATE OF NEW HAMPSHIRE

v.

TIKTOK INC.

Docket No.: 217-2024-CV-00399

ORDER

The plaintiff, the State of New Hampshire, brings this action against the defendant, TikTok, Inc. ("TTI"), arising out of the alleged harms suffered by New Hampshire citizens from TTI's design and operation of the social media platform, TikTok ("TikTok" or the "App"). TTI moves to dismiss. The State objects. The Court held a hearing on April 11, 2025. The parties filed notices of supplemental authority before and after the hearing. For the following reasons, TTI's motion to dismiss is GRANTED as to Count VI but otherwise DENIED.

I. Standard

In reviewing a motion to dismiss, the Court "assume[s] the truth of the facts as alleged in the plaintiff's pleadings and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Barufaldi v. City of Dover, 175 N.H. 424, 427 (2022). The Court "need not assume the truth of statements in the plaintiff's pleadings, however, that are merely conclusions of law." Sanguedolce v. Wolfe, 164 N.H. 644, 645 (2013). "The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery."

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Barufaldi, 175 N.H. at 427. "This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law." Id. The Court will grant the motion "if the facts pled do not constitute a basis for legal relief." Id.

II. Background

The Court derives the following facts from the State's amended complaint.

TTI runs the application, TikTok. (Am. Compl. ¶ 4.) TTI is incorporated in California with its principal place of business also in California. (Id. ¶ 31.) TTI is a subsidiary of the Chinese company ByteDance, Ltd. ("ByteDance"). (Id. ¶ 4.) TikTok is one of the most popular and fastest-growing social media platforms in the world. (Id.) TikTok allows users to create, upload, and/or view 15 to 60-second-long videos. (Id. ¶ 53.)

A. TTI's Connections with New Hampshire

In New Hampshire, there are over 1.2 million registered TikTok accounts (close to 90% of the state's population). (Id. ¶¶ 5, 36.) More than a quarter of all registered accounts in New Hampshire belong to users under the age of 23 and over 92,000 of the accounts belong to children aged 13 to 17. (Id.) Of the accounts registered to New Hampshire users, 620,404 of them are "content creators," meaning users who actively publish videos and livestreams. (Id. ¶ 36.) Nationwide, TTI has reached a market penetration of 95% of users under the age of 17. (Id. ¶ 63.)

TTI promotes TikTok in New Hampshire through running television commercials designed to get New Hampshire residents to use the App. (Id. ¶ 37.) Between August 1, 2020 and December 31, 2023, TTI spent $1,112,651 on advertising and promoting

TikTok in New Hampshire. (Id. ¶ 42.) From 2020 to 2023, the number of New Hampshire users boomed from 417,105 to over 1.2 million. (Id.)

TTI sells advertising space to marketers and allows them to tailor advertising to New Hampshire consumers. (Id. ¶ 43.) Between June 2022 and November 2023, TTI generated profits of $221,015 from advertisements that businesses, including New Hampshire entities, selected to show only to New Hampshire users. (Id. ¶¶ 43–44.)

TTI also allows users, including New Hampshire users, to purchase products directly from the App. (Id. ¶ 45.) In September 2023, TTI launched the TikTok Shop, an e-commerce feature where consumers can find and purchase products. (Id.) TTI charges a service fee for each transaction. (Id.) The State alleges that TTI's collection of service fees is connected to the following cycle: TTI implements addictive design features, TTI's deceptive representations entire more New Hampshire children to use the App, the design features and misrepresentations encourage child users to spend more time on the App, which leads to them viewing more advertisements and engaging in e-commerce, which results in additional service fees TTI collects. (Id.) Between March 2022 and October 2023, TTI made $1,676,645 from New Hampshire TikTok Shop sales. (Id. ¶ 47.) TTI also profited from New Hampshire sales through TikTok LIVE, totaling $5,159,291 from March 2022 to October 2023. (Id. ¶ 48.)

TTI has also paid New Hampshire content creators a total of $884,667 between September 2023 and November 2023. (Id. ¶ 50.)

TTI has built connections with New Hampshire entities including by awarding grants to Parent Teacher Associations in Derry, providing funding to Nashua public

services through the CDC, and consulting with the University of New Hampshire. (Id. ¶ 51.)

B. TikTok

When a user signs up for a TikTok account, in exchange for access to the platform, the user must agree to TikTok's Terms of Services, including TikTok's Privacy Policy. (Id. ¶ 6.) The Privacy Policy alerts users to the fact that TikTok will show the user suggestions, promote the Platform, and customize the user's ad experience, using the user's information. (Id.)

TTI collects users' data while they use the App. (Id. ¶ 7.) The more time a user spends on the App, the more data TTI collects, and the more money TTI makes. (Id.) TikTok's design features exploit children's underdeveloped psychological and neurological controls to compel them to spend more time on TikTok. (Id. ¶ 11.) TikTok's addictive design features deliberately alter the physical brain chemistry of New Hampshire's child users. (Id. ¶ 39.) Children's dopamine systems' particular sensitivity coupled with the unfinished development of the prefrontal cortex makes 13 to 17-years-old TikTok users highly susceptible to risky behaviors, temptations, and manipulations of their reward system. (Id. ¶ 67.) The U.S. Surgeon General has warned that unchecked use of social media like TikTok has "a profound risk of harm to the mental health and well-being of children and adolescents." (Id. ¶ 16.)

Children aged 13 to 17 report using social media at a near universal rate and 30% of them characterize their usage as excessive. (Id. ¶ 13.) Specific to TikTok, users 13 to 17-years-old check the App nearly 17 times per day and spend, on average, almost 2 hours a day on TikTok. (Id. ¶¶ 14, 60, 75 (similar data for New Hampshire

users).) Many users are spending 4 or more hours on the App daily. (Id. ¶ 14.) In 2021, over 37% of New Hampshire high schoolers reported 5 hours or more of screen time on an average school day. (Id. ¶ 16.) The compulsive and prolonged use of TikTok increases the chances of experiencing poor mental health outcomes, including symptoms of depression and anxiety and experiencing lower life satisfaction. (Id. ¶¶ 70, 72–73.) In 2019, users aged 14 and under consumed more videos per user per day than any other age group on TikTok. (Id. ¶ 299.)

At the same time TikTok launched and grew, New Hampshire children's mental health declined. (Id. ¶ 74.) In 2021, almost half of New Hampshire's high school students self-reported feeling persistently sad or hopeless, which was a 75% increase from 2011 and a 57.8% increase from 2017. (Id.) Similarly, between 2017 and 2021, the percentage of New Hampshire high school students who reported seriously considering suicide jumped from 16.1% to 24.7%. (Id.) Lastly, the percentage of New Hampshire high school students who reported attempting suicide increased from 5.9% to 9.8%. (Id.)

Late night usage among child users is also problematic. Among TikTok users, more than 20% of children are active on TikTok late at night (between 12:00 a.m. and 5 a.m.), preventing sleep critical to healthy development. (Id. ¶¶ 15, 75.) In New Hampshire, children aged 13 to 17 spend over 2 hours a day on the App, with the average daily session time peaking at 3:00 a.m. to 4 a.m. (Id.) The use of technology, especially social media, within one hour of bedtime is associated with sleep disruptions and insufficient sleep is associated with interruptions to neurological development in adolescent brains. (Id. ¶ 71.)

TTI employs certain design features to manipulate users into staying on the App. (Id. ¶ 8.) Those features include: (1) algorithms that leverage user data to feed them personalized content recommendations; (2) infinite scroll; (3) push notifications with built in vibrations and "buzzes"; (4) filters and effects that create idealizations of unattainable appearances for users; and (5) a virtual currency system known as "TikTok Coins" that incentivizes spending and does not implement anti-money laundering safeguards. (Id.) TTI acknowledges how features like these are "powerful coercive design tactics that [it realized] tend to benefit companies and advertisers more than users." (Id. ¶ 77.)

TikTok's design features exploit children's underdeveloped psychological and neurological controls to compel them to spend more time on TikTok. (Id. ¶ 11.) TikTok's addictive design features deliberately alter the physical brain chemistry of New Hampshire's child users. (Id. ¶ 39.) Children's dopamine systems' particular sensitivity coupled with the unfinished development of the prefrontal cortex makes 13 to 17-years-old TikTok users highly susceptible to risky behaviors, temptations, and manipulations of their reward system. (Id. ¶ 67.)

i. Recommendation Engine

TTI uses the data it collects from users to further its personalization algorithms to create a unique customized experience for each user. (Id. ¶ 38.) No two TikTok users have the same experience. (Id.) This customized recommendation engine is known as the "For You" feed. (Id. ¶ 79.) The recommendation engine collects data from the user and uses that data to rank content based on how likely a user is to engage with it and curates a personalized stream of videos to keep the user engaged. (Id.) TikTok's recommendation engine is "content neutral," meaning it does "not understand content"

and functions by "predict[ing] the likelihood of different user engagements with a video." (Id. ¶ 80.) The goal of the recommendation engine is to find videos a user is most likely to watch to the end, like, or comment on, keeping them hooked on the App for as long as possible and coming back for more. (Id. ¶ 82.) A side effect of the recommendation engine is filter bubbles created when the engine learned a user's video preferences and reinforces those preferences by recommending increasingly more extreme versions of those videos. (Id. ¶ 85.)

TTI knows that the App's Recommendation Engine promotes LIVE streams where users make sexual content in exchange for gifts. (Id. ¶ 25.) Despite TTI knowing that the Recommendation Engine "incentivizes sexual content," it allows such incentivization because "[t]ransactional sexual content hits most of [TTI's] business metrics of success & is pushed to TopLives." (Id.)

ii. Infinite Scroll

TikTok employs "infinite scroll," which continuously previews and suggests new content. (Id. ¶¶ 90, 92.) This feature provokes children's fear of missing out ("FOMO") by building anticipation of discovering something new which creates a feeling that others might be having rewarding experiences on the App when one is absent. (Id. ¶ 92.) The feeling of FOMO can trigger anxiety and result in sleep deprivation. (Id.) TTI has internally admitted that it wants to "create FOMO" because it generates "acquisition" and is therefore good for business. (Id. ¶ 93.)

iii. Push Notifications

Push notifications alert users of new messages, updates about "in-app news," and new videos. (Id. ¶ 94.) TTI acknowledges that these notifications "encourage

users to open the App and stay longer." (Id.) The push notifications use haptics which employ vibrations, buzzes, and light sounds to draw users' attention back to the App. (Id. ¶ 95.) TTI has described these notifications as "an effective marketing tool as it helps to recall users." (Id.) The notifications drive users into checking the App routinely at all hours of the day. (Id.) In particular, TTI has stated that it "send[s] notifications to users during the school day and in some cases, up until midnight, which could interfere with sleep." (Id. ¶ 96.)

iv. Filters and Effects

TikTok offers "filters" and "effects" that alter a user's appearance by lightening and smoothing their skin, changing their eye color, enlarging their lips, and modifying their facial features by creating a skinnier face or smaller nose. (Id. ¶ 99.) The filters use artificial intelligence to cosmetically reshape a user's face in a hyper-realistic way, blurring the line between what is real and fake. (Id.) TikTok features hundreds, if not thousands, of these filters and, in some instances, turns them on for users and minors by default, without their consent. (Id. ¶ 103.)

Beauty filters pose a significant risk of causing severe psychological harm to minors. (Id. ¶ 102.) TTI has acknowledged that the filters have a "high risk of harming U18 [under 18 year old] users." (Id.) This is because teenagers are "more susceptible to harm when it comes to the usage and consumption of beauty filters as they are developing their self-image, are at a critical period for developing body dysmorphia and eating disorders, and are more easily pressured by the opinions of others." (Id.) TTI has also acknowledged that default beauty filters have a "high potential from a research

perspective to lead to negative body image and body dysmorphia symptoms, especially among teenage girls." (Id. ¶ 104.)

TikTok's filters in particular increase young female users' risk for eating disorders, depression, anxiety, low self-esteem, and negative body image. (Id. ¶ 107.) The American Society of Plastic Surgeons has noted that platforms like TikTok are driving the popularity of plastic surgery overall and that there is a rise in teenagers seeking medical intervention to alter their appearance. (Id. ¶ 110.) TikTok's recommendation engine is known to push plastic surgery videos and body altering videos to young users within minutes of using the App. (Id. ¶ 111.)

v. Currency System and TikTok LIVE

TikTok LIVE is a feature that allows a user (host) to begin a livestream with the touch of a button, offering live interaction with any user watching the livestream (followers). (Id. ¶ 18.) LIVE videos are not saved thus inducting a sense of urgency in children. (Id. ¶ 239.) By 2022, 20% of the 83 million daily TikTok users watched LIVE every day. (Id. ¶ 251.) In 2023, TTI netted 1.7 billion dollars in one quarter from LIVE with an expectation that it could capture up to 77 billion dollars a year from LIVE alone by 2027. (Id.)

The minimum age requirement to go LIVE and receive gifts is currently 18 years old but was formerly 16 years old until 2022. (Id. ¶ 243.) However, because users can provide a false birthdate when creating their account, minors are able to access LIVE. (Id.) Users 13 or older have always been able to view LIVE videos but, after 2019, only users 18 or old are able to purchase and send gifts on LIVE. (Id. ¶ 244.)

During a livestream, followers can send virtual gifts to the host using TikTok Coins. (Id. ¶¶ 18, 241.) Coins are an unmonitored and unregistered virtual currency purchased with U.S. dollars for use on the App. (Id.) TTI takes up to a 50% commission on these virtual gifts. (Id. ¶¶ 20, 253.) In 2023, TTI netted $1.7 billion globally in a single quarter from LIVE. (Id. ¶¶ 20, 253.) TTI's 2022 internal investigation revealed that LIVE "enable[d the] exploitation of live hosts" and that TTI profited significantly from allowing users to use its virtual currency system for "transactional gifting" involving nudity and sexual activity. (Id. ¶ 24.)

TTI conducted an internal investigation which confirmed that users under the minimum age requirement could host LIVE sessions on TikTok, TTI received "significant revenue from "transactional gifting" generated through transactions for sexual content, and TikTok's algorithms were optimized to amplify gifting for sexual content. (Id. ¶¶ 234, 270–71.) The LIVE feature leads to financial harm, encourages addiction and impulsive purchasing, and exposes minors to repeated sexualized content. (Id. ¶ 235.) TTI has conceded that it is not able to age-gate livestreams because it lacks the functional capacity to do so. (Id. ¶ 246.)

Children also financially suffer from LIVE through predatory "giftbaiting" wherein LIVE hosts coerce users to purchase and donate digital gifts to the host in exchange for some future action the host never takes. (Id. ¶ 261.) The use of gifting through LIVE has also been linked to money laundering because criminals can use the gifting feature to engage in cross border capital transfers. (Id. ¶¶ 264, 278, 281.)

vi. Time Management and Parental Controls

TTI has marketed time control features as useful ways to keep users' usage of the App in control despite its awareness of the ineffectiveness of those features. (Id. ¶ 113.) Since at least October 2019, TTI deployed the "You're In Control" feature, described as an educational video series that presents TikTok's safety and privacy controls in an accessible and easy to understand fashion. (Id. ¶ 114.) One of the controls, "Take a Break," is a screen time tool that allows users to schedule a video reminder to take a break from using TikTok. (Id. ¶ 115.) TTI has internally acknowledged that the feature "has very low friction involved with it" and it "allows users to easily skip past it and not be mindful of their time spent on TikTok." (Id.) TTI knows that only 12% of users actually close TikTok within 5 minutes of watching a Take a Break video, while 55% of users stay longer than 45 minutes after seeing one. (Id. ¶ 117.)

TTI has also implemented parental controls into the App, including one called "Restricted Mode" which TTI markets as a way for parents to "limit the appearance of content that may not be appropriate for all audiences." (Id. ¶ 120.) Restricted Mode allows parents to enter a personal passcode to ensure their children are viewing content TTI represents as more age-appropriate. (Id.) However, TikTok feeds users under Restricted Mode content that is "often still too mature for that space" including material tagged for "Sexy Themes" and "Profanity." (Id. ¶ 121.) Further, users under Restricted Mode can "still search for and follow links that would be filtered out of the FYP [For You Page] by Restricted Mode." (Id. ¶ 122.) Those users also have access to live streams with mature content. (Id.) Another parental control feature, "Family Pairing" is intended

to allow parents to link their own TikTok account to their teens' to set controls. (Id. ¶ 123.) But, teen users can disable the feature without a PIN code. (Id. ¶ 124.)

C. Allegations of Harm and Misrepresentations

TTI publishes Community Guidelines on its website, and they are available to users through the Terms of Service. (Id. ¶ 133.) The Community Guidelines assure users and the parents of minor users that TikTok is designed as a safe environment for all users. (Id.) Since TikTok's launch in the United States, the Community Guidelines have represented that TTI "takes child safety with the utmost seriousness" and is "deeply committed to TikTok being a safe and positive experience for people under the age of 18." (Id. ¶¶ 133, 195.) The Community Guidelines state that content in violation thereof will be removed, including content "showing, promoting, or engaging in youth sexual or physical abuse or exploitation," content "that may put young people at risk of exploitation, or psychological, physical, or developmental harm," content "showing, promoting, or sharing plans for suicide or self-harm," content "showing or promoting disordered eating and dangerous weight loss behaviors," content featuring "dares, games, tricks, inappropriate use of dangerous tools, and eating substances that are harmful to an individual's health," and content "showing, possessing, or using drugs." (Id. ¶ 135.)

TTI has made public statements, including through articles and posts published on its "Newsroom," in TikTok's Community Guidelines and in testimony to Congress about TikTok's moderation processes and their effectiveness (id. ¶¶ 136–39, 154), the prevalence of child sexual abuse material ("CSAM") (id. ¶¶ 169, 171) and content about drugs (id. ¶ 224), its efforts to quash predatory and grooming behavior toward child-

users (id. ¶ 182), the safety of its recommendation system (id. ¶ 195), its efforts to curb filter bubbles (id. ¶ 200), its disallowance of dangerous challenges (id. ¶¶ 204, 207, 210), and the effectiveness of its age-gating (id. ¶¶ 213–15, 218).

Despite these statements, TTI knows that gaps and flaws in its enforcement and detection system including policy grey areas, lack of time and resources for moderators, and lack of training for context in moderation, result in inconsistent and unequal application of the Community Guidelines. (Id. ¶ 143; see also id. ¶¶ 144–46, 149–50.) This leads to the availability of content on TikTok promoting dangerous weight-loss activities (id. ¶¶ 155–58), featuring sexually explicit activities (id. ¶¶ 159–60), including hateful or harassing behavior (id. ¶¶ 166–68), featuring CSAM (id. ¶¶ 169–81), featuring child predatory behavior (id. ¶¶ 183–194), promoting dangerous challenges (id. ¶¶ 207–212), and depicting drugs or other controlled substances (id. ¶¶ 225–29). In particular, exploitative CSAM has a 26% leakage rate, or, in other words, 1 in 4 violative content appears on the App and is not caught by the moderation processes. (Id. ¶ 173.) TikTok has also failed to curb the presence of filter bubbles, resulting in the presentation of graphic, violent, and distressing content to children. (Id. ¶¶ 199–202.)

TikTok also fails to meaningfully enforce its age restrictions. (Id. ¶ 213.) When users sign up for the App, they must self-report their date of birth before gaining access. (Id. ¶ 216.) By relying on the user, the App incentivizes child users to input a false date of birth. (Id.) TTI is aware that up to 70% of users aged 13 to 15 report their age at 18 or older to avoid the age-gating feature. (Id. ¶ 217.) Until 2022, young users could also bypass the age verification process by using their Facebook or Google credentials to set up an account. (Id. ¶¶ 308, 313.) Between September 2020 and March 2022, TTI

removed 71,021,950 accounts suspected to belong to users under the age of 13. (Id. ¶ 307.) TTI is aware of other accounts belonging to users under the age of 13. (Id. ¶¶ 310–12 318–25.)

One impact of TikTok's ineffective age verification is TikTok's collection of data from users under the age of 13. (Id. ¶¶ 27, 289.) TTI collects personal data, including the name, address, email address, persistent identifiers, geolocation information, advertising information, and photographs or videos from users. (Id. ¶ 287.) Since March 2019, two versions of the App have existed: (1) "Kids Mode" for the use of children who report their age to be under 13; and (2) the standard version of the App. (Id. ¶ 293.) Kids Mode is designed for younger users and features limited content, no access to direct messages, no ability to comment, and no ability to upload content. (Id.) TTI collects data from users on both versions of the App. (Id. ¶ 294.) TTI does not seek parental consent before collecting personal from users on the standard version of the App. (Id.) Because, as discussed above, users under 13 years old are able to access the standard version of TikTok, TTI collects their personal data without parental consent. (Id. ¶¶ 324, 338–341.)

TTI likewise allegedly misleads New Hampshire consumers by passing itself off as an American company. (Id. ¶¶ 28, 347–48.) In TikTok's terms of service, it states that it is a "myth" that decisions about TikTok are made in Beijing and that TikTok is not available in mainland China and it has established Los Angeles and Singapore as headquarters. (Id. ¶ 348.) TTI's CEO has also stated to Congress that TTI has never shared, or received a request to share United States user data with China. (Id. ¶ 349.) However, ByteDance originally developed the source code for TikTok's

recommendation engine. (Id. ¶¶ 86, 356.) Further, ByteDance, which is headquartered in Beijing retains heavy control over TTI. (Id. ¶ 351.) ByteDance still directs TTI's budget, operates its internal document storage platform, and handles media criticism directed at TikTok. (Id. ¶ 353.) The United States government has cited the risk that ByteDance and TikTok may pose to national security because China may coerce them to covertly manipulate TikTok's recommendation engine to shape the information received by Americans, including children. (Id. ¶ 87.)

III. Analysis

The State brings claims against TTI for six counts of Violations of the Consumer Protection Act ("CPA"), two counts of strict products liability, and one count of negligence. TTI moves to dismiss, arguing the Court lacks personal jurisdiction over it, Counts I–III and VII–IX must be dismissed because they seek to hold TTI liable for expressive conduct, and the State's claims fail to state a cause of action.

A. Personal Jurisdiction

The standard of review on a motion to dismiss for lack of personal jurisdiction varies according to the case's procedural posture. Seward v. Richards, 174 N.H. 401, 406 (2021). "While the general rule applicable to motions to dismiss is that all facts properly pleaded by the plaintiff are deemed true . . . when those facts relate to personal jurisdiction, the plaintiff must offer affirmative proof." Staffing Network, Inc. v. Pietropaolo, 145 N.H. 456, 457 (2000). In the absence of an evidentiary hearing, the Court applies a prima facie standard to determine whether personal jurisdiction is met. Id.

"Determining whether a court may exercise personal jurisdiction over a defendant contemplates a two-part analysis." Seward, 174 N.H. at 407. "First, the State's long-arm statute must authorize such jurisdiction. Second, the requirements of the federal Due Process Clause must be satisfied." Id. New Hampshire's long-arm statute, RSA 510:4, authorizes the exercise of personal jurisdiction to the extent permissible under the Due Process Clause. Id. Accordingly, the Court's analysis depends upon due process. Id.; RSA 510:4, I.

"Under the Federal Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant if the defendant has minimum contacts with the forum, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Seward, 174 N.H. at 407. "Minimum contacts is not necessarily a numbers game; in order to be subject to the jurisdiction of the forum state, a nonresident need only have one contact with the forum, so long as the contact is meaningful." Id. "Jurisdiction can be 'general,' where the defendant's contacts with the forum State are continuous and systematic, or 'specific,' where the cause of action arises out of or relates to the defendant's forum-based contacts." Id. The State asserts a theory of specific personal jurisdiction over TTI. Accordingly, the Court focuses its analysis on that inquiry.

"To determine whether exercising specific personal jurisdiction over the defendant[] comports with due process, [the Court] examine[s] whether: (1) the contacts relate to the cause of action; (2) the defendant[] ha[s] purposefully availed [itself] of the protection of New Hampshire's laws; and (3) it would be fair and reasonable to require the defendant[] to defend the suit in New Hampshire." Seward, 174 N.H. at 407–08.

"Each factor must be evaluated on a case-by-case basis, and all three factors must be satisfied for the exercise of jurisdiction to be constitutional." Id. at 408. "Questions of specific jurisdiction are always tied to the particular claims asserted." Id.

TTI disputes that the first two factors—relatedness and purposeful availment—are met.

i. Purposeful Availment

To satisfy the purposeful availment prong of the test, "the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protection of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable." Id. at 412. "Purposeful availment requires both foreseeability and voluntariness." Id. "Voluntariness requires that a defendant's contacts with the forum state proximately results from actions by the defendant." Id. "The contacts must be deliberate and not based on the unilateral actions of another party, and cannot be merely fortuitous, but rather, the defendants must have purposefully directed actions at New Hampshire." Id. "Foreseeability requires that the contacts must be of a nature such that a defendant could reasonably anticipate being haled into court here." Id.

TTI argues that, by making an interactive website generally accessible to users worldwide, it has not purposefully availed itself to the jurisdiction of New Hampshire in particular. The State responds that TTI purposefully directs commercial activities to New Hampshire, as evidenced by its ubiquitous presence in the State—over one million New Hampshire users representing nearly 90% of New Hampshire residents—and its customization of the App for each of those users combined with its cultivation and

exploitation of user data to target advertising to those users.

In Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773–74 (1984), the Court found that there was specific jurisdiction over the defendant publisher where it had no employees or offices in the forum, did not expressly aim its publication or conduct at the forum, and magazine sales in the forum made up only a small fraction of the defendant's total sales, but the defendant circulated 10,000 to 15,000 copies of its magazine to subscribers in the forum each month. The Court reasoned that the defendant "continuously and deliberately exploited" the forum's market. Keeton, 465 U.S. at 781. Because the defendant produced "a national publication aimed at a nationwide audience," there was "no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." Id.

The Keeton Court's reasoning applies here, despite the digital, rather than physical, nature of TTI's connections with New Hampshire. TTI does not just operate an online platform accessible to New Hampshire residents. In exchange for access to the App, TTI harvests users' personal information, sells that information to advertisers, who then use it to advertise on the App. See uBID, Inc. v. GoDaddy, Inc., 623 F.3d 421, 427–28 (7th Cir. 2010) (determining that website operator defendant had minimum contacts with the forum state because it exploited the forum's market and engaged in extensive national advertising, even though it did not specifically target forum residents through advertising). Like the defendant publisher in Keeton, TTI has specific connections with New Hampshire and furthers those connections each time it contracts with users to offer its App in exchange for their data. This is voluntary contact with the

forum state and its residents. See Seward, 174 N.H. at 412. It should have been foreseeable to TTI that such contact with New Hampshire would cause it to be haled into court here. See id.

The decisions TTI relies on to distinguish this matter from the Court's order in State of New Hampshire v. Meta, Inc., 217-2023-CV-00594, Doc. 58 (Dec. 10, 2024) (Kissinger, J.)[1] do not feature the type of engagement with the forum state as alleged here. See (TTI's Memo. iso Mot. to Dismiss at 10); Hasson v. FullStory, Inc., 114 F.4th 181, 190 (3d Cir. 2024) (allegation that the defendant "knowingly armed its website with software that initiates a broad-spectrum wiretap" did not establish purposeful availment because the defendant targeted a national audience and the defendant simply operated a website accessible in the forum state); Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 320 (5th Cir. 2021) (allegation that the defendant operated a universally accessible website and residents of the forum state visited the site, clicked ads, and bought things from the site, did not establish purposeful availment); Rosenthal v. Bloomigdales.com, LLC, 101 F.4th 90, 97 n.1 (1st Cir. 2024) (same). As stated, rather than just operating an interactive website in the forum, as was alleged in the cases TTI relies upon, TTI reached further into the forum by harvesting the personal data of its New Hampshire users, profiting from the sale of that data, and permitting advertisers to complete the cycle by using that data to advertise on the App based on users' preferences.

One of the decisions TTI relies upon warrants additional discussion. TTI cited

[1] State of New Hampshire v. Meta, Inc., involves similar claims by the State against Meta for harms impacting New Hampshire children allegedly caused by Meta's social media platforms. The Court's December 10, 2024 Order addressed many of the same arguments raised in the briefing on TTI's motion to dismiss, and, for that reason, is cited by the parties in this matter.

AMA Multimedia, LLC v. Wanat, 970 F.3d 1201, 1211 (9th Cir. 2020) for the proposition that, in the online context, an alleged practice of collecting user data in a state and then selling advertisements to third parties does not show purposeful direction toward a forum. However, the Ninth Circuit overruled the relevant portion of AMA since TTI filed its memorandum. See Briskin v. Shopify, Inc., 135 F.4th 739, 756–58 (9th Cir. 2025). In Briskin, the plaintiff alleged that the defendant targeted forum consumers to "extract, collect, maintain, distribute, and exploit for its own profit," consumer payment information and "all other personal identifying information that it extracts." Id. at 755–56. In overruling AMA's "forum-specific focus" and "differential targeting" concepts, the Ninth Circuit ruled that "an interactive program 'expressly aims' its wrongful conduct toward a forum state when its contacts are its 'own choice and not random, isolated, or fortuitous,' Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021), even if that platform cultivates a 'nationwide audience for commercial gain,'" id. at 758. The Briskin Court acknowledged that its analysis could result in personal jurisdiction in all 50 states: "[R]equiring differential targeting would have the perverse effect of allowing a corporation to direct its activities toward all 50 states yet to escape specific personal jurisdiction in each of those states for claims arising from or relating to their relevant contacts in the forum state that injure that state's residents." Id.

The Court agrees with the Briskin Court's reasoning. TTI's cyclical relationship with New Hampshire users—offering access to the App, operating it in such a way to keep users present on the App, harvesting users' data, selling that data, and allowing advertisements targeted to users based on that data—is not "random, isolated, or fortuitous." Id.

Accordingly, the State has alleged sufficient facts to meet the purposeful availment prong of the specific personal jurisdiction test.

ii. Relatedness

"To satisfy the relatedness factor, there must be more than just an attenuated connection between the contacts and the claim; the defendant's in-state conduct must form an important, or at least material, element of proof in the plaintiff's case." Seward, 174 N.H. at 409. "The relatedness test is a flexible, relaxed standard, and the court's assessment of relatedness is informed by the concept of foreseeability." Id. For tort claims, the relatedness inquiry "focuses on whether the defendant's in-forum conduct caused the injury or gave rise to the cause of action." United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 622 (1st Cir. 2001). To satisfy specific personal jurisdiction, "a plaintiff must link the defendant's suit-related conduct to the forum. Mere market exploitation will not suffice." Johnson, 21 F.4th at 324.

In Walden v. Fiore, 571 U.S. 277, 279 (2014), the Supreme Court held that a Nevada court could not "exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada" where "the defendant had no other contacts with Nevada." The Walden Court noted that its holding was consistent with Calder v. Jones, 465 U.S. 783 (1984). Walden, 571 U.S. at 289–90. In Calder, the Court held that a California court could exercise personal jurisdiction over Florida defendants whose "intentional, and allegedly tortious, actions were expressly aimed at California." 465 U.S. at 785–86. Under Walden and Calder, the proper inquiry is not merely whether

New Hampshire residents suffered an injury but whether TTI's conduct connects it to New Hampshire in a "meaningful way." Walden, 571 U.S. at 290.

The Supreme Court has referred to the following as a "paradigm example": the defendant "extensively promoted, sold, and serviced" vehicles in the forum states and the plaintiffs resided in the forum states, used the allegedly defective vehicles in the forum states, and suffered injuries in the forum states. Ford Motor Co., 592 U.S. at 366. These facts created an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place." Id. at 370.

TTI argues that the State's claims arise out of alleged national contacts, rather than New Hampshire-specific contacts. It contends that the State's claims do not arise out of contacts TTI has directed to New Hampshire. The State explains that TTI's contacts with New Hampshire are directly related to the State's claims because TTI's purpose is to profit off of advertisement sales. To maximize that profit, TTI implements business practices designed to keep users on the App as long as possible to be able to show them more advertisements. The State argues that TTI's connections with New Hampshire—harvesting user data, selling it to advertisers, and then showing users advertisements based on that data—is intertwined with the alleged addictive design features and misrepresentations and omissions which are designed to keep child users on the App.

Generally, the State's claims against TTI arise out of TTI's alleged implementation of addictive design features which are harmful to children and TTI's alleged misrepresentations and omissions which entice young users to use the App and parents to authorize such use. In a similar manner to Ford Motor Co., TTI extensively

promotes TikTok in the forum state, enters service agreements and collects residents' data of the forum state, and those residents use the App in the forum state and suffered injuries in the forum state. Cf. 592 U.S. at 366. While TTI might use the same methods nationwide, it uses them in New Hampshire which is alleged to have harmed New Hampshire residents. Accordingly, TTI's in-state conduct is connected to the State's claims in a "meaningful way," Walden, 571 U.S. at 290, and forms an important, element of proof in the State's case, Seward, 174 N.H. at 409.

iii. Reasonableness

The third and final prong of the specific personal jurisdiction test asks, "whether it would be fair and reasonable to require the defendants to defend the suit in New Hampshire." Seward, 174 N.H. at 413. Because TTI does not argue that this prong is unmet, the Court need not address it in substance.

Having found TTI's arguments on personal jurisdiction unpersuasive, its motion to dismiss on that ground is DENIED.

B. Section 230 of the Communications Decency Act

TTI argues that Section 230 of the Communications Decency Act ("Section 230") bars Counts I–III and VII–IX because they treat TTI as a publisher of third-party content. Because Section 230 is an affirmative defense, dismissal is only proper if TTI's immunity is evident from the face of the complaint. Teatotaller, LLC v. Facebook, Inc., 173 N.H. 442, 449 (2020) (citing Force v. Facebook, Inc., 934 F.3d53, 63 n.15 (2d Cir. 2019)).

In 1996, Congress enacted Section 230 "to promote the continued development of the Internet" and "to remove disincentives for the development and utilization of

blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material," among other policies. 47 U.S.C. § 230(b)(1), (4). To achieve these goals, Section 230 immunizes interactive computer service providers, like TTI, from legal claims that treat them as a publisher or speaker of third-party content. See 47 U.S.C. § 230(c)(1), (e)(3). While courts have interpreted Section 230 to "broadly immunize internet companies from liability . . . this immunity is not limitless." Calise v. Meta Platforms, Inc., 103 F.4th 732, 736 (9th Cir. 2024).

To determine whether Section 230 immunity applies to a given case, courts employ a three-prong test. Under this test, Section 230 only protects "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." Teatotaller, LLC, 173 N.H. at 450 (quoting Universal Commc'n v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007)); see also Calise, 103 F.4th at 740; Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021); Barnes v. YAHOO!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

TTI does not dispute that it is a provider of an interactive computer service (TikTok). Consequently, the Court must determine whether the State's claims treat TTI as a publisher or speaker of information provided by another information content provider. See Teatotaller, LLC, 173 N.H. at 450. This determination rests upon the State's theory of liability in each count. See id. at 451; Calise, 103 F.4th at 740 (stating that courts must "examine each claim to determine whether a plaintiff's theory of liability would treat a defendant as a publisher or speaker of third-party content") (emphasis in

the original). The Court must examine TTI's duty under the State's theories of liability. As the Ninth Circuit explains in Calise,

> We must therefore examine two things in looking at duty. First, what is the "right" from which the duty springs? If it springs from something separate from the defendant's status as a publisher, such as from an agreement, or from obligations the defendant has in a different capacity, then [Section 230] does not apply. Second, we ask what is this duty requiring the defendant to do? If it obliges the defendant to "monitor third-party content"—or else face liability—then that too is barred by [Section 230].

Id. (cleaned up).

In Lemmon, the Ninth Circuit examined the duty of social media companies to design reasonably safe products. The parents of two boys who died in a high-speed car accident sued Snap, Inc. ("Snap"), alleging that Snap negligently designed its social media platform, Snapchat. Lemmon, 995 F.3d at 1087. Like Instagram and Facebook, Snapchat is a social media platform that allows users to share photos and videos with other Snapchat users. See id. at 1088. To promote user engagement, Snapchat provides users with rewards such as "trophies, streaks, and social recognitions." Id. At the time, Snapchat had developed a "speed filter," which allowed users to superimpose their real-life speed atop user-created content. Id. The plaintiffs alleged Snapchat knew or should have known that its users believed that Snapchat would reward them for posting a "snap" at 100 miles per hour or over. Id. at 1089. While Snapchat warned users not to use the filter while driving, the warnings proved ineffective. Id. at 1090. The trial court dismissed the plaintiffs' amended complaint, ruling that Section 230 barred their claim. Id.

On appeal, the Ninth Circuit reversed the trial court's decision and concluded that the plaintiffs' claim did not treat Snap as a publisher or speaker of third-party content

because the cause of action focused on Snap's duty, as a manufacturer, to design a reasonably safe product. Id. at 1091–92. The court explained,

> [The plaintiffs'] negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. Snap's alleged duty in this case thus "has nothing to do with" its editing, monitoring, or removing of the content that its users generate through Snapchat.

Id. at 1092 (cleaned up). In its analysis, the court conceded that Snap, in some capacity, acted as a publisher or speaker of third-party content, but concluded that was not enough to confer immunity under Section 230. Id. The court explained,

> That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the [plaintiffs] seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in Internet Brands, Snap "acted as the 'publisher or speaker' of user content by" transmitting [the boys'] snap, "and that action could be described as a 'but-for' cause of [the boys'] injuries." This is unsurprising: Snap "is an internet publishing business. Without publishing user content, it would not exist. But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the [plaintiffs'] claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content."

Id. at 1092–93 (citing Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016)).

The Court finds this reasoning persuasive and applicable here. While true that the State's allegations discuss New Hampshire children's exposure to harmful content on the App, the thrust of the State's allegations in Counts I, II, VII–IX is its contention that TTI designed an unsafe product and provided it to children, causing harm. The State points to features such as the recommendation engine, push notifications, infinite

scroll, and TikTok LIVE, not in the way they publish certain content, but in the way they manipulate young minds causing addiction, FOMO, and other psychological effects. TTI has a duty to design a reasonably safe product. The State alleges that it failed this duty. TTI's duty to design a reasonably safe product is independent from its role as a publisher of third-party content. While the Northern District of California decided differently in the MDL Litigation, see In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d 809, 830–33 (N.D. Cal. 2023), the Court's decision is consistent with persuasive authority, as well as the language and purpose of Section 230, see 47 U.S.C. § 230(b)(3), (4); Calise, 103 F.4th at 736 (reasoning that immunity under Section 230 is not limitless); Lemmon, 995 F.3d at 1092–93 (holding that Section 230 did not bar negligent design claim); Internet Brands, 824 F.3d at 853 (holding that Section 230 did not bar failure to warn claim).

To be clear, Section 230 protects TTI against any claims where the alleged harm arises from the substance of third-party content posted on TikTok. See Force, 934 F.3d at 66 (finding Facebook was protected under Section 230 for harm resulting from Hamas content); Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1098 (9th Cir. 2019) (finding the defendant was protected under Section 230 when a user died from fentanyl toxicity after purchasing fentanyl from another user on the defendant's online service). However, the State alleges that the App's product design features, in and of themselves, are harmful to New Hampshire children regardless of the substance of the third-party content displayed. (Am. Compl. ¶¶ 366–75, 379, 392, 402, 497–500, 503–06, 517–20, 530.) The State makes this clarification in its complaint. (Id. ¶ 382 ("While users may also suffer other harms from third-party content on TikTok's App, the harms

to children in New Hampshire . . . result, at least in part, from TikTok's unilateral and intentionally addictive design choices, and not from third-party content on the App."). The Court determines that Section 230 does not bar Counts I, II, VII, VIII, and IX.

The State's other claims, Counts III, V, VI, arise out of TTI's alleged misrepresentations and omissions, or, in the case of Count IV, how TTI collects certain data. These counts are not based on TTI's role as a publisher of third-party content. Thus, Section 230 does not bar these claims. See Internet Brands, Inc., 824 F.3d at 852–53 (finding that Section 230 does not bar failure to warn claims); In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d at 834 (same); Hiam v. HomeAway.com, Inc., 267 F. Supp. 3d 338, 346–47 (D. Mass 2017); aff'd, 887 F.3d 542 (1st Cir. 2018) (reasoning that claims based on publisher's own speech are not barred by Section 230).

C. First Amendment

TTI argues that the First Amendment of the United States Constitution and Part I, Article 22 of the New Hampshire Constitution bar the State's claims by protecting TTI's editorial discretion to disseminate third-party speech. The State disputes TTI's argument, clarifying that its claims relate to TTI's implementation of addictive design features and misrepresentations and omissions about the safety of those features. The State contends that such claims do not seek to impose liability for TTI's First Amendment protected activity. TTI argues that the State's claims for alleged deception and failure-to-warn are constitutionally barred because they essentially seek to compel TTI's speech by warning users about the alleged risks and harms of the App.

Like Section 230, the First Amendment protects publishers' discretion to disseminate third-party speech and categorically protects publishers from liability for injuries arising out of that speech. See Miami Herald Pub'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); Moody v. NetChoice, LLC, 603 U.S. 707, 713 (2024) (comparing social media company's content moderation to traditional publishers' editorial choices, which "also select and shape other parties' expression into their own curated speech products"). Many courts, including the MDL court, have held that certain publishing decisions made by social media companies trigger First Amendment scrutiny. See In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d at 836 (applying First Amendment protection to the timing and clustering of notifications of Meta's own content); NetChoice, LLC v. Florida, 34 F.4th 1196, 1203–04, 1210 (11th Cir. 2022) (finding that social media companies engaged in protected speech when they expressed their political views through content moderation practices).

The First Amendment, like Section 230, immunizes TTI against any claims alleging harm arising from the substance of third-party content, as that conduct falls within a traditional publishing role. See Tornillo, 418 U.S. at 258; Reno v. ACLU, 521 U.S. 844, 870 (1997). TTI has a First Amendment right to decide what content to include, exclude, moderate, filter, label, restrict, or promote. O'Handley v. Padilla, 579 F. Supp. 3d 1163, 1186–87 (N.D. Cal. 2022). However, because the Court has concluded that the thrust of the State's claims seeks to hold TTI accountable for the harm caused by the alleged addictive design features themselves, regardless of the substance or organization of the third-party content disseminated, the Court similarly finds that the First Amendment does not bar the State's claims. See In re Social Media

Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d at 836 (stating that Meta's briefing ignored that "much of the conduct alleged by plaintiff does not constitute speech or expression" and "d[id] not explain how holding them liable in that context would be akin to making them liable for speech").

The First Amendment likewise does not bar the State's deception and failure-to-warn claims. There is no First Amendment protection for false, misleading, or unlawful commercial speech. See Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995) ("[T]he government may freely regulate commercial speech that concerns unlawful activity or is misleading."). Under this principle, TTI has no First Amendment protection for its allegedly misleading statements, misrepresentations, or omissions.

Turning to TTI's argument that the State's failure-to-warn claim seeks to compel TTI's speech in violation of the First Amendment, the Court disagrees. TTI relies on NetChoice, LLC v. Bonta, 113 F.4th 1101, 1117 (9th Cir. 2024) for the proposition that businesses cannot be compelled to "opine on potential harm to children" caused by its product. In Bonta, the defendant challenged a state law requirement mandating covered entities create reports for each online service, product, or feature likely to be accessed by children and identifying "any risk of material detriment to children that arise from the data management practices of the business." Id. at 1116. Because the law compelled specific speech, the Ninth Circuit concluded that it triggered First Amendment review and that the report requirement likely failed strict scrutiny. Id. at 1121.

The State's allegations and failure-to-warn claim are distinct from the law at issue in Bonta. The State does not seek to compel TTI to opine about the potential harm to

children caused by their use of the App. The State alleges that TTI is liable because there are foreseeable harms which could have been reduced or avoided by providing reasonable warnings, omission of those warnings rendered the App not reasonably safe, and TTI's failure to warn caused children serious harm. (Am. Compl. ¶¶ 521–24.) In its prayer for relief, the State does not seek to compel any particular speech from TTI. (See id. at 146.) A First Amendment bar to a claim like the State's would essentially bar all failure-to-warn claims. The Court finds no support in the law for such an application. See Social Media Cases, No. JCCP5255, 22STCV21355, 2025 WL 1364052, at *10–11 (Cal. Jan. 8, 2025) ("The First Amendment does not bar the Plaintiffs' duty to warn claims based on dangers allegedly created by Defendants in the operation of their platforms.").

For these reasons, dismissal of the State's claims on First Amendment grounds is not appropriate.

D. Consumer Protection Act

TTI moves to dismiss the State's claims under the CPA, RSA 358-A (Counts I-VI), arguing: (1) the State fails to allege a business or commercial transaction; (2) Counts I and II fails because the App can reasonably be avoided by users; (3) Count III and VI fail because the State does not allege actionable deception with particularity; and (4) Counts IV and V fail because they are preempted by federal law. The Court addresses each argument in turn.

i. Commercial or Business Transaction

TTI argues that the State's CPA claims fail because the CPA applies only to business or commercial transactions, and the State does not allege any such

"transaction." TTI bases its argument on the fact that the App is free to users—in that it does not charge a fee for use. The State responds that there is a transaction between TTI and users: TTI provides use of the App in exchange for users' personal data. The State contends that the App is not truly "free."

"To determine whether the [CPA] applies to a particular transaction, [the Court] analyze[s] the activity involved, the nature of the transaction, and the parties to determine whether a transaction is a personal or business transaction." Hughes v. DiSalvo, 143 N.H. 576, 578 (1999) (declining to extend to the CPA to isolated sales of property by owners). The CPA defines "trade" and "commerce" as, "the advertising, offering for sale, sale, or distribution of any services or any property . . . ." RSA 358-A:1. The Court must engage in statutory interpretation of the term "sale" in the CPA.

When engaging in statutory interpretation, the Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to it plain and ordinary meaning." State v. Doyle, 176 N.H. 594, 597 (2024). The Court "give[s] effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The Court "construe[s] all parts of a statute together to effectuate its overall purpose" and attempts to construe all parts "in harmony with the overall statutory scheme." Id.

"Sale" is defined as "[t]he action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration." Oxford English Dictionary, "Sale," July 2023; Matter of Carter, 2024 N.H. 30, ¶ 9 ("When a term is not defined in a statute, [the Court] look[s] to its common usage, using the dictionary for guidance."). It is also defined as, "[t]he transfer of property or title for a

price." Black's Law Dictionary, "Sale," (12th ed. 2024). Upon review of the plain meaning of "sale," the Court cannot say that it requires an exchange of money. The Court declines to read words into the statute the legislature did not see fit to include. See Doyle, 176 N.H. at 597.

A sale could be an exchange wherein consumers are able to access the App in exchange for a price—TTI's collection of their personal data. See In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 753 F. Supp. 3d 849, 909–10 (N.D. Cal. 2024) ("A social media company cannot exempt itself from consumer-protection law because its consumers exchange their personal data and time for a product or service rather than cash for goods"); State v. Meta Platforms, Inc., No. 23-cv-4453, 2024 WL 3741424, at *15 (Vt. Sup. Ct. July 28, 2024) ("Instagram is clearly engaging in commerce when it provides Instagram to Vermonters"). While TTI does not charge for its product, it receives valuable consideration in the form of personal information. The State has alleged such an exchange, satisfying the "trade or commerce" element of the CPA at the pleading stage. (See Am. Compl. ¶ 494.) To exclude in-kind transactions such as that between TikTok users and TTI from the definition of "sale" would be to ignore the reality of modern transactions. The Court's conclusion is in accordance with the purpose of the CPA: "to ensure an equitable relationship between consumers and persons engaged in business." Hughes, 143 N.H. at 578.

ii. "Unfair" Act or Practice

TTI argues that the State fails to state a claim under the CPA for Counts I and II. The State responds that its allegations of TTI's profiting from its purposeful

implementation of addictive design features which harm child users support its CPA claims.

The CPA proscribes unfair and deceptive trade practices in general, RSA 358-A:2, and sets forth a list of specific types of conduct that qualify as unfair or deceptive trade practices, RSA 358-A:2, I–XVIII. Fat Bullies Farm, LLC v. Devenport, 170 N.H. 17, 24 (2017). Although the general provision is broadly worded, the New Hampshire Supreme Court has recognized that not all conduct in the course of trade or commerce falls within the scope of the CPA. Id.

"In determining which commercial actions not specifically delineated are covered by the act," the Court employs the "rascality" test. Id. "Under the rascality test, the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Id. In addition to the rascality test, New Hampshire courts look to the federal courts' interpretation of the Federal Trade Commission Act for guidance. Id. The Federal Trade Commission considers: "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers . . . ." Id. The New Hampshire Supreme Court has found the rascality test unmet when a defendant was alleged to have engaged in conduct common in the particular industry in which the parties engaged. See Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H. 363, 371 (2009).

TTI contends that the State's allegations fail the rascality test because they "boil down to the fact that [the State] does not like the [App] and would prefer that younger users spend less time on it." (TTI's Memo. iso Mot. to Dismiss at 31.) TTI misconstrues the State's allegations and ignores the standard the Court must apply on a motion to dismiss. Viewing all inferences in the State's favor, it alleges that TTI knowingly implemented addictive design features attractive to minors, ignored the psychological impacts on minor users, and profited from minors' continued and obsessive use of the App while their mental health suffered as a result of the use. The State's allegations go far beyond that it does not like the time children spend on the App. This conduct reaches a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Fat Bullies Farm, 170 N.H. at 24; cf. Beer v. Bennett, 160 N.H. 166, 171 (2010) (defendant's acts met the rascality test where "he made representations, knowing he lacked sufficient knowledge to substantiate them, to induce the plaintiff's purchase"). The profiting off of children to their detriment offends public policy, satisfying the first prong of the FTC considerations. See id.

TTI also argues that the State cannot meet the second prong of the FTC considerations because TTI's conduct was not coercive. To the extent the second prong requires coercion, the State has alleged it here. There is no doubt, as TTI argues, that users voluntarily download and sign up to use the App. However, once they begin using the App, construing all inferences in favor of the State, they are coerced to continue using the App by the addictive design features that prey on minor users' psychological vulnerabilities. For this reason and those articulated previously, TTI's alleged conduct is immoral, unethical, oppressive, and/or unscrupulous. See id.

Finally, the Court turns to the third FTC consideration: whether TTI's conduct causes substantial injury to consumers. TTI argues that any injury sustained by TikTok consumers was reasonably avoidable and, therefore, the State's CPA claim fails. See 15 U.S.C. § 45(n) (". . . act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves . . ."). "In determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 753 F. Supp. 3d at 896. The cases TTI relies upon do not involve minors and their unique susceptibility to addictive designs. It is not whether New Hampshire children could have avoided the alleged harm by never downloading and signing up for TikTok. It is whether they could have avoided the harms posed by prolonged and obsessive use of the App, which, as alleged by the State, TTI induces them into with addictive design features. Construing all inferences in favor of the State, it is not reasonable to conclude that New Hampshire child users could have avoided the harms caused by the App.

For the foregoing reasons, the State has alleged sufficient facts to satisfy the "rascality" test under the CPA. See Fat Bullies Farm, 170 N.H. at 24.

iii. Deceptive Act or Practice

TTI contends that dismissal of Counts III and VI[2] is appropriate because the State failed to satisfy the heightened pleading standards for fraud, the relevant statements are not actionable because they are general, aspirational, corporate puffery, or non-verifiable statements of opinion, and the State's own allegations undercut and

[2] TTI refers to "Count 8" which the Court infers as a typographical error. (See Def.'s Memo. iso Mot. to Dismiss at 36.)

contradict the contention that TTI acted deceptively.

First, the Court is not persuaded that the State's CPA claims must be alleged with particularity. TTI cites no authority wherein courts have applied a particularity pleading standard to CPA claims. The way in which the New Hampshire Supreme Court has treated CPA claims does not indicate to this Court that it would apply a heightened pleading standard. See LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 93–100 (2007) (employing the typical motion to dismiss framework to resolve an appeal of a trial court's grant of the defendant's motion for judgment on the pleadings—which are treated like motions to dismiss in New Hampshire—of the plaintiff's CPA claim); Snierson v. Scruton, 145 N.H. 73, 80–81 (2000) (applying a specificity test to the plaintiff's fraud and negligent misrepresentation claims and then ruling that the plaintiff's CPA allegations "support[ed] a claim of unfair or deceptive trade practices" and not mentioning a specificity requirement).

Regarding Count III, the State has sufficiently alleged a violation of the CPA. It lays out the representations TTI has made about the safety of the App. (Am. Compl. ¶ 416 (a)–(j).) The State alleges statements TTI has made in the App's Community Guidelines, (id. ¶¶ 128, 133–35, 142), on its website, (id. ¶¶ 129, 136), and through its officers including its CEO, (id. ¶¶ 130, 137–39). The State then alleged, by category of information, how TTI's representations were misrepresentative of the truth. (See generally id. at 48–75.) TTI's statements were not "mere puffery." See Private Jet Serv. Grp., Inc. v. Sky King, Inc., No. 05-cv-98-JD, 2006 WL 2864057, at *5 (D.N.H. Oct. 4, 2006) ("Mere puffery that does not represent that the company adheres to particular standards or requirements is not actionable under [the New Hampshire

CPA].”); (Am. Compl. ¶¶ 135 (TTI’s statements affirmatively asserting what content it does not allow), 136 (TTI’s statements making promises and announcements about the App’s safety), 137 (TTI’s CEO discussing TTI’s strict prohibitions and removal policies). TTI’s alleged statements were specific and assertive. Taken as true, the State’s allegations are sufficiently specific and actionable under the CPA.

Briefly, regarding TTI’s arguments that the State’s allegations undercut its own claims, such arguments rely on information outside the scope of the amended complaint, (TTI’s Memo. iso Mot. to Dismiss at 42–43), or fail to construe the State’s allegations in its favor, as the Court must when ruling on a motion to dismiss, see Barufaldi, 175 N.H. at 427. For those reasons, the Court finds TTI’s arguments unavailing.

Turning to Count VI, the Court is not persuaded that the State’s allegations state a claim under the CPA. In Count VI, the State alleges that TTI violated the CPA by “deceiv[ing] users about the geographic origin of its products . . . by misrepresenting in this State that [TTI] is a company located, controlled, and/or headquartered in the United States when it continues to be controlled by its China-based parent company, ByteDance.” (Am. Compl. ¶ 480.) The State does not allege a specific misrepresentation from TTI about its “geographic origin.” The State alleges that TikTok’s Terms of Service state that the App “is provided by TikTok Inc. in the United States,” that TikTok is not available in mainland China, that TTI’s headquarters are in Los Angeles and Singapore, and that TTI has never shared, or received a request to share, United States user data with the Chinese government and its data centers are located outside of China. (Id. ¶¶ 348–49, 358.) The State alleges that these statements

are deceptive because TTI remains heavily controlled by ByteDance, TTI instructs its employees to downplay ByteDance and "the China association, and TTI relies on access to ByteDance's resources, expertise, and code to operate. (Id. ¶¶ 350–52.)

The State's allegations are insufficient to allege that TTI misrepresented its geographic origin. TTI may have made efforts to publicly disentangle itself from ByteDance and the Chinese government. However, its efforts to appear independent do not go as far as actionable misrepresentations about its corporate connection to ByteDance, and through it, the Chinese Government. The State does not allege that TTI's statements about the App being provided by TikTok Inc. in the United States, TikTok not being available in mainland China, TTI's headquarters in Los Angeles and Singapore, and that TTI has never shared, or received a request to share, United States user data with the Chinese government, are false. Without specific representations tied with facts supporting the falsity of those representations, the State does not have an actionable CPA claim against TTI regarding its geographic origin. See Fat Bullies Farm, 170 N.H. at 24

For that reason, Count VI is DISMISSED.

iv. COPPA Preemption

TTI moves to dismiss the State's CPA claims (Counts IV and V) arising out of TTI's alleged improper collection of data from users under 13 years old because such claims are preempted by the federal Children's Online Privacy Protection Act ("COPPA"). TTI argues that the State's claims are "inconsistent" with COPPA and, thus, preempted. TTI also contends that the State's claims are barred because COPPA specifically authorizes states to bring actions in federal court to enforce its provisions.

The State responds that its claims, brought under the CPA but which reference COPPA, are consistent with the COPPA scheme and, because they are CPA claims, may be brought in state court.

The Court agrees with the State in both respects. First, the State's claims are not "inconsistent" with COPPA. Under COPPA and its regulations, companies that operate websites and online services marketed toward children must provide certain disclosures about their data collection activities and must safeguard the confidentiality, security, and integrity of the children's personal online information. 15 U.S.C. § 6501–06; 16 C.F.R. §§ 312.1–13; see also Jones v. Google LLC, 73 F.4th 636, 641 (9th Cir. 2023). While COPPA does not provide a private right of action, it permits state attorneys general, who must notify the Federal Trade Commission ("FTC"), to bring civil actions in federal court as parens patriae. 15 U.S.C. § 6504(a). COPPA's preemption provision states: "No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section." Id. § 6502(d).

The State's CPA claims referring to COPPA are not preempted because they are not "inconsistent" with COPPA's requirements, but rather track them. Jones, 73 F.4th at 642 (reading the term "inconsistent" in the preemption context "to refer to contradictory state law requirements, or to requirements that stand as obstacles to federal objectives"). The Jones Court held that "COPPA's preemption clause does not bar state-law causes of action that are parallel to, or proscribe the same conduct forbidden by, COPPA." Id. at 644. Because the State's claims seek to hold TTI liable for conduct

COPPA hold companies liable for, the claims are substantively consistent with COPPA and, thus, not preempted.

The Court turns to TTI's argument that, because COPPA specifically outlines a procedure for state attorneys general suing in parens patriae to enforce COPPA, the State's suit, which does not comply with those requirements, is inconsistent with and, thus, preempted by COPPA. The Court disagrees. The State's CPA claims rely on TTI's alleged violations of COPPA to demonstrate TTI's allegedly unfair acts. (See Am. Compl. ¶¶ 433, 435–36, 444, 460, 470.) The State is not seeking to enforce COPPA or obtain relief under the Act. Thus, it need not comply with Section 6504(a)'s requirements, including filing in federal court and notifying the FTC. Again, permitting states to use COPPA violations as evidence supporting violations of state law is not inconsistent with COPPA. See Jones, 73 F.4th at 642 ("[P]reemption clauses did not bar state tort or contract laws imposing obligations similar or identical to the substantive federal requirements.").

Accordingly, COPPA does not preempt Counts IV and V.

E. Products Liability

TTI moves to dismiss the State's claims for strict and negligent products liability (Counts VII–IX) arguing the State lacks standing to pursue these claims and that the App is not a "product." The Court addresses its arguments in turn.

i. Standing

The State brings this suit under parens patriae standing. "Parens patriae literally means 'parent of the country,' and refers traditionally to the role of the state as sovereign and guardian of persons under legal disability." State v. City of Dover, 153

N.H. 181, 185 (2006). The theory is "a concept of standing utilized to allow the state to protect 'quasi-sovereign' interests such as health, comfort and welfare of its citizens, interstate water rights, and the general economy of the state." Id. at 185–86. To satisfy parens patriae standing, "[f]irst, the state must assert an injury to a 'quasi sovereign' interest, an interest apart from the interests of particular private parties. Second, the state must allege injury to a 'substantial segment' of its population." Id. at 186. The Court addresses each inquiry in turn.

"Quasi-sovereign" interests are those "that the State has in the well-being of its populace," which must be "sufficiently concrete to create an actual controversy between the State and the defendant." Id. (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 602 (1982)). For example, states have a quasi-sovereign interest "in the abatement of public nuisances, instances in which the injury to the public health and comfort is graphic and direct." Id. Courts have "generally interpreted the health and well-being category of quasi-sovereign interests broadly." Id. "A state also has a quasi-sovereign interest in preventing any injury or potential injury to the general health and well-being of its residents." Id.

In Dover, the New Hampshire Supreme Court ruled that "the State has a quasi-sovereign interest in protecting the health and well-being, both physical and economic, of its residents with respect to the statewide water supply." Id. The Court reasoned that "[t]he control and elimination of water pollution is a subject clearly within the scope of the State's constitutional police power." Id. The Court also relied on the State's interest, as articulated by RSA 481:1, in providing "careful stewardship over all the

waters lying within its boundaries." Id. Thus, the Court concluded that the State had a quasi-sovereign interest in protecting its waters from contamination. Id.

The State argues it has a quasi-sovereign interest in protecting the interests of New Hampshire children suffering from the consequences of TTI's alleged addictively designed App and its misrepresentations and omissions about the App. TTI contends that the State's interest is indistinguishable from those of the individual New Hampshire residents who could bring suit on the same grounds and that the State has not suffered unique damages but, rather, is seeking to collect damages for harms done to third parties (New Hampshire minor users of the App).

The State has a quasi-sovereign interest in the health of its residents, including mental health. The facts the State alleges support a quasi-sovereign interest in the mental health consequences experienced by minors using social media, including TikTok. Almost half of New Hampshire teenagers (44.2%) reported symptoms of clinical depression and feeling persistently sad or hopeless. (Am. Compl. ¶ 3.) This represented a 57.8% increase from 2017. (Id.) Also between 2017 and 2021, the percentage of New Hampshire high school students who reported seriously considering suicide increased by 53.4% and the amount who actually attempted suicide increased by 66.1%. (Id.) The total amount of TikTok users in New Hampshire increased from 417,105 in 2020 to over 1.2 million in 2023. (Id. ¶ 42.) As of 2023, 92,481 of those New Hampshire users were aged 13 to 17. (Id. ¶ 36.) The compulsive and prolonged use of TikTok that minors exhibit, (id. ¶ 69), increases the risk of experiencing poor mental health outcomes, including depression and anxiety, (id. ¶ 70).

The State has an interest in protecting the mental health of its youngest population. The Court sees no reason to distinguish between physical and mental health in this context. See Dover, 153 N.H. at 186 (stating that the State has a quasi-sovereign interest in the physical health of its citizens); Alfred L. Snapp & Son, Inc., 458 U.S. at 607 (same). The health and well-being category of quasi-sovereign interests has been interpreted broadly. Dover, 153 N.H. at 186. The State's interest is especially heightened when it is suing on behalf of children. See Dist. of Columbia v. ExxonMobil Oil Corp., 172 A.3d 412, 442 n.13 (D.C. 2017) (Easterly, J., dissenting) (referring to the general proposition that states have a common law parens patriae authority over children). TTI's argument that the State does not have a quasi-sovereign interest in the health of its citizens is antithetical to New Hampshire precedent. See Dover, 153 N.H. at 186. Therefore, the Court determines that the State has pleaded sufficient facts to satisfy the quasi-sovereign interest prong of the parens patriae standing test.

The second inquiry is "whether a sufficiently substantial segment of the population is affected by the challenged conduct." Dover, 153 N.H. at 187. In Dover, 13.2% of the statewide water supplies were contaminated, corresponding to hundreds of public water systems and approximately 40,000 private water supplies. Id. The Court determined that the foregoing data demonstrated that the contamination directly affected a substantial portion of the population of New Hampshire. Id. The Court noted that the State "clearly" met the substantial segment test. Id.

More than a quarter of all registered accounts in New Hampshire belong to users under the age of 23 and over 92,000 of the accounts belong to children aged 13 to 17. (Id. ¶¶ 5, 36.) While there is no particular number which satisfies the substantial

segment prong, see People v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 812 (N.D.N.Y. 1996) ("There is no numerical talisman to establish parens patriae standing . . . ."), the number of New Hampshire children using TikTok exceeds the number of New Hampshire residents impacted in Dover, see 153 N.H. at 187 (contamination impacted approximately 40,000 water supplies). If the State "clearly" met the prong in Dover, then the State has met the same prong under the facts alleged here. Further, while the State alleges minors' usage of the App in 2023, future users will also be impacted by the same alleged products liability and negligence, increasing the segment of the population affected. See New York, by James v. Niagara-Wheatfield Central Sch. Dist, 119 F.4th 270, 282–83 (2d Cir. 2024) (permitting consideration of future individuals who may be injured by the defendant's actions in the analysis of the substantial segment prong of the parens patriae test). Accordingly, the Court determines that the State has pleaded sufficient facts to satisfy the substantial segment of the parens patriae standing test.

TTI has asks the Court to consider a third prong of the parens patriae test, requiring the State to show that individuals could not obtain complete relief through private suits. Some jurisdictions include this additional step to determine whether standing is established. See Dover, 153 N.H. at 187. The reasoning underlying the third prong is to ensure that the State's interest is "sufficiently severe and generalized, it must stand apart from the interests of particular parties—in other words, the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens." New York v. Facebook, Inc., 549 F. Supp. 3d 6, 22 (D.D.C. 2021) (citing Snapp, 458 U.S. at 607). However, the New

Hampshire Supreme Court has not applied this prong in its consideration of whether the State has standing. See Dover, 153 N.H. at 187 (declining to place the burden on the State to show whether the cities could obtain complete relief through the State's suit). The Court has only employed the test when determining what types of damages the State may recover in a parens patriae suit. See State v. Hess Corp., 161 N.H. 426, 436–37 (2011) (ruling on an interlocutory transfer of a partial motion for summary judgment). The Court declines to apply the third prong of the parens patriae test at the motion to dismiss stage. While the State's ability to recover certain categories of damages might ultimately be limited, those potential limitations do not impact the State's standing to pursue its products liability claims.

In sum, the Court concludes that the State has parens patriae standing to pursue its strict and negligent products liability claims.

ii. "Product"

Lastly, TTI argues that the App is not a "product" and, thus, TTI cannot be subject to products liability claims arising out of the design of the App. The State responds that treating social media as a product is consistent with New Hampshire law and the Restatement.

The New Hampshire Supreme Court has not defined what a product is for purposes of strict products liability. However, it has adopted the Restatement (Second) of Torts to analyze other questions under strict products liability. See Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 831 (2005). Both parties additionally rely on the Restatement (Third) of Torts which specifically addresses what constitutes a product. The Court likewise relies on the Restatement (Third) of Torts because of the New

Hampshire Supreme Court's previous reliance on the Restatement's approach, the Restatement (Second) of Torts' silence on the issue of defining a product, and the parties' joint reliance on the Restatement (Third) of Torts.

The Restatement (Third) of Torts defines a product as, "tangible personal property distributed commercially for use or consumption." Restatement (Third) of Torts: Prod. Liab. § 19 (1998). Further, "[s]ervices, even when provided commercially, are not products." Id. However, items such as electricity are products "when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules state in the Restatement." Id.

Given the nature of the State's claims, TikTok is a product. The State alleges that the App's design features harm minor users. TTI's business model is operating TikTok which is a social media platform that allows users to create, upload, and view 15 to 60-second videos. (Am. Compl. ¶ 53.) However, the App is the vehicle through which TTI effectuates that business model. TTI designs, develops, programs, markets, distributes, and profits from the App. (Id. ¶ 495.) For this reason, the App is akin to the distribution and use of tangible property. See Restatement (Third) of Torts: Prod. Liab. § 19 (1998). TTI's argument that products are limited to tangible, physical items, is contrary to the law. See id. Further, the App is not a service. While users may experience a customized display when engaging with it, the design features themselves are uniform. Consequently, TTI is not performing a unique service for every user of the App. Because the Restatement distinguishes between services and products, TTI is thus more likely a product.

Other jurisdictions are in accord with the Court's analysis. In Brookes v. Lyft Inc., the court ruled that the Lyft application was a product because, while Lyft's business model was a transportation network company in which it connects riders with drivers, Lyft designed and distributed the Lyft application to carry out that business model. No. 50-2019-CA-004782-MB, 2022 WL 19799628, at *3 (Fla. Cir. Ct. Sept. 30, 2022). The court also noted that the plaintiff's claim was based on the design of the application which Lyft designed, distributed, and placed into the stream of commerce. Id. at *4; see also In re Uber Technologies, Inc., Passenger Sexual Assault Litig., 745 F. Supp. 3d 869, 905 (N.D. Cal. Aug. 15, 2024) (finding the Uber application a product because the alleged defects in the application have similar plausible analogues in tangible products); T.V. v. Grinder, LLC, No. 3:22-cv-864-MMH-PDB, 2024 WL 4128796, at *26 (M.D. Fla. Aug. 13, 2024)[3] (recommending a finding that the defendant social networking application is a product because it designed its app for its business, made design choices for the app, placed the app in the stream of commerce, distributed the app in the global marketplace, marketed the app, and generated revenue and profits from the app); cf. In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d at 849 (adopting a defect-specific approach to determine whether the challenged functionalities of the defendants' social media were products). But see Social Media Cases, No. JCCP 525, 22STCV21355, 2023 WL 6847378, at *16 (Cal. Super. Oct. 13, 2023) (determining that social media was not a product because applying the doctrine of products liability to social media does not align with the goals of the doctrine and interactions between social media companies and their users are

[3] Grinder is an unadopted report and recommendation to which the defendant objected before the parties stipulated to dismissal with prejudice.

different from traditional product sales).

To the extent TTI argues that the State's claims arise out of harm caused by intangible information produced by third parties onto the App, which is then seen by New Hampshire minor users, the Court has already discussed and disagreed with that argument supra, Sections B and C. The State's claims are based on the App's alleged defective and dangerous features, not the information contained therein. Accordingly, the State's products liability claim is based on harm caused by the product: TikTok itself.

IV. Conclusion

For the foregoing reasons, TTI's motion to dismiss is GRANTED as to Count VI but is otherwise DENIED.

SO ORDERED.

July 8, 2025
Date

John C. Kissinger, Jr.
Presiding Justice

FILED 1st JUDICIAL DISTRICT COURT
Santa Fe County
6/21/2024 11:14 AM
KATHLEEN VIGIL CLERK OF THE COURT
Jacqueline Rosales Juarez

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

STATE OF NEW MEXICO, EX REL.,
RAÚL TORREZ, ATTORNEY GENERAL,

Plaintiff,

v. NO. D-101-CV-2023-02838

META PLATFORMS, INC.; INSTAGRAM, LLC;
META PAYMENTS, INC.; META PLATFORMS
TECHNOLOGIES, LLC; and
MARK ZUCKERBERG,

Defendants.

ORDER DENYING THE
META DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on the Motion to Dismiss (the "Motion") filed by Defendants Meta Platforms, Inc.; Instagram, LLC; Meta Payments, Inc.; and Meta Platforms Technologies, LLC (collectively, "Meta" or the "Meta Defendants"). The Meta Defendants filed the Motion on March 1, 2024, along with Declarations of Nicholas Wong and Bradley W. Davis in support of the Motion. Plaintiff State of New Mexico (the "State") filed its opposition brief on March 19, 2024, along with several attachments. The Meta Defendants filed their reply brief on April 8, 2024. The Meta Defendants filed a Notice of Supplemental Authority on May 24, 2024, and the State filed a Notice of Supplemental Authority on May 28, 2024. The Court heard oral argument on the Motion on May 30, 2024.

Having reviewed and considered the Motion and attached declarations, the opposition brief and attachments thereto, the reply brief, the arguments of counsel and all authority cited by the parties both in their briefs, in their notices of supplemental authority and at oral argument, the Court **DENIES** the Motion in its entirety for the reasons that follow:

1. The Court finds that based on Rule 1-012(B)(6) and notice pleading standards the Motion is **DENIED**.

2. With respect to Meta's arguments concerning *personal jurisdiction*, the Court finds that there are sufficiently pled activities in New Mexico in terms of data harvesting, advertisements, apps on phones and targeting of New Mexico consumers to render the Complaint inappropriate for dismissal on Rule 1-012(B)(6) grounds.

3. With respect to Meta's arguments concerning application of *Section 230*, the Court understands that there are considerable issues related to the difference between design and other non-publisher activities and publisher activities, such as decisions about content, curation, and the like. Applying the standards applicable to a Rule 1-012(B)(6) motion, the Court DENIES Meta's Motion.

4. With respect to Meta's arguments concerning application of the *First Amendment*, Meta's counsel pointed out at oral argument that the issues largely overlap with the Section 230 arguments and analysis, and there is ambiguity concerning whether Meta's conduct constitutes a decision or judgment related to content or product design non-speech issues. Applying the standards applicable to a Rule 1-012(B)(6) motion, the Court DENIES Meta's Motion.

5. With respect to Meta's arguments concerning the elements of *public nuisance*, the Court notes that a spectrum exists between Judge Mathew's analysis in *State of New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541 (1st Jud. Dist. June 15, 2022), and, for example, the decision of the Oklahoma supreme court in *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 724-25 (Okla. 2021), concerning the existence of a public right. Applying the standards applicable to a Rule 1-012(B)(6) motion, the Court DENIES Meta's Motion.

SERENA R. WHEATON
ASSISTANT ATTORNEY GENERAL
New Mexico Department of Justice
Consumer & Environmental Protection Division
201 Third St. N.W., Suite 300
Albuquerque, NM 87102
Phone: (505) 490-4846
Email: swheaton@nmag.gov

LINDA SINGER (*pro hac vice*)
DAVID I. ACKERMAN (*pro hac vice*)
MOTLEY RICE LLC
401 9th St., NW, Suite 630
Washington, D.C. 20004
Phone: (202) 232-5504
Email: lsinger@motleyrice.com
Email: dackerman@motleyrice.com

Attorneys for Plaintiff the State of New Mexico

Approved as to form:

COVINGTON & BURLING LLP

By: *Approved as to Form via Email 06/18/24 @ 1:00pm MT*
Nathan E. Shafroth *(pro hac vice)*
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
Tel: (415) 591-7053
nshafroth@cov.com

Timothy C. Hester *(pro hac vice)*
One City Center
850 Tenth Street, NW
Washington, DC 20002-4956
Tel: (202) 662-5324
thester@cov.com

- and –

HOLLAND & HART LLP
John C. Anderson
Olga M. Serafimova
110 North Guadalupe, Suite 1
Santa Fe, New Mexico 87501
Tel: 505.988.4421
jcanderson@hollandhart.com
omserafimova@hollandhart.com

Attorneys for Defendants

In The Matter Of:

PEOPLE OF THE STATE OF NEW YORK v. TIKTOK

May 28, 2025

NYS SUPREME COURT - CIVIL BRANCH
60 Centre Street, Room 420
New York, New York 10007

Original File 3M0528PEOPLE-NY.txt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM PART 45

----------X

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

- against -

TIKTOK INC., TIKTOK LLC, TIKTOK U.S. DATA SECURITY INC., TIKTOK PTE. LTD., TIKTOK, LTD., BYTEDANCE INC., BYTEDANCE LTD.,

Defendants.

----------X

INDEX NO. 452749/24

60 Centre Street
New York, New York
May 28, 2025

BEFORE:

THE HON. ANAR RATHOD PATEL, J.S.C.

APPEARANCES:

FOR THE PLAINTIFF:

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
28 Liberty Street
New York, New York 10005
BY: KEVIN WALLACE, Asst. Attorney General
ALEX FINKELSTEIN, Asst. Attorney General
NATHANIEL KOSSLYN, Asst. Attorney General

FOR THE DEFENDANTS:

O'MELVENY & MYERS LLP
1301 Avenue of the Americas, Suite 1700
New York, New York 10019
BY: STEPHEN D. BRODY, ESQ., (pro hac vice)
JONATHAN D. HACKER, ESQ. (pro hac vice)
VINODH JAYARAMAN, ESQ.

JACK L. MORELLI
Senior Court Reporter

PROCEEDINGS

THE COURT: Good morning. We're here on the case of People of the State of New York versus TikTok Inc., et al. Index 452749 of 2024.

Counsel, your appearances, please.

MR. WALLACE: Kevin Wallace, from the Office of Attorney General.

MR. FINKELSTEIN: Alex Finkelstein, for the plaintiffs.

MR. BRODY: Steve Brody, for the defendants.

MR. HACKER: Jonathan Hacker, for the defendants.

MR. JAYARAMAN: Vino Jayaraman, for the defendants.

THE COURT: And?

MR. KOSSLYN: Nathaniel Kosslyn, for the plaintiffs.

THE COURT: Okay, counsel, thank you so much for your e-mail yesterday with respect to how we're going to proceed today. I'm fine with those times. So we'll proceed with that schedule. We'll make use of the lectern over here for speaking. And anything else before we get started?

MR. BRODY: Mr. Hacker and I propose to split the argument for the defendants. He's going to take about 13 minutes to focus on Section 230 immunity, and I plan to

take about seven minutes of the 20 to address the parens patriae standing, product in the product liability claim, as well as potentially touch on the COPPA preemption issue.

Obviously, we stand on everything that we've asserted in the brief. If the Court has questions about any of the other arguments, we'll be happy to address them.

THE COURT: Understood. Thank you, Mr. Brody.

MR. WALLACE: Your Honor, just to add, on behalf of the plaintiffs, we were also going to divide our argument. I will be responding for the Office of the Attorney General on the topics of the 230 immunity, the First Amendment, and then parens patriae. And to the extent that we're going to discuss whether or not TikTok constitutes a product.

Mr. Finkelstein will be handling, to the extent that they come up, any issues dealing with the adequacy of the allegations, as to the other claims including the misrepresentation claims.

But realistically, we also stand on our papers. So if something isn't covered by the plaintiffs, we may well not cover it either.

THE COURT: Very well.

MR. HACKER: Good morning. May it please the

Court, the State's claims allege that certain users suffer harm from viewing third-party speech on the TikTok platform, because of the way in which the platform publishes that third-party speech.

According to the State, New York law requires the platform to publish third-party videos users are less likely to watch, in a different order, not as frequently, for longer periods of time and/or with State mandated breaks in between the videos.

If the State prevails on those claims, this Court, Your Honor, will be required to revise and supervise the TikTok platform's algorithm and other publication tools, to fundamentally alter the experience, the user experience, of both creating and viewing third-party content published on the platform, to ensure that users find that experience less engaging than they do today.

Those claims on their face as pleaded by the State unambiguously target publishing activity and they are, therefore, barred by Section 230, as well as by the First Amendment.

Now, at the start, Your Honor, I will acknowledge that trial courts in some other jurisdictions have allowed similar claims against internet platforms to proceed. But several of those ruling are on appeal,

including in cases where state high courts took the unusual step of granting discretionary interlocutory review. But perhaps more important, Your Honor, this Court is differently situated.

In this case, unlike in the others, there is already a decision of the New York Court of Appeals in the Shiamili case, I'll talk about in a moment, establishing the controlling standard under Section 230. And a decision of the regional circuit, the 2nd Circuit, applying, elaborating that standard in a case with ultimately materially indistinguishable facts.

Those New York discussions establish guideposts that should help this Court steer clear of the one consistent error running through DC versus Meta, and similar decisions cited by the State, which is the premise that State claims survive Section 230, merely so long as they allege harms from the platform's, quote, "own conduct," end quote.

What the other decisions misunderstand, Your Honor, and what the New York Court of Appeals had already made clear in Shiamili, is that Section 230 does apply if the platform's own conduct is the selection of which third-party videos to display, and how to display them. Because that conduct is quintessential publishing conduct protected by Section 230.

- J L M -

THE COURT: But here it's not just about the selection, right? I mean, as I understand it, the complaint alleges at least six design features that are unique to the TikTok platform. So, I don't think that we can say it's merely the selection. It's the infinite scroll, the beauty filters, all of that combination.

MR. HACKER: First of all, the selection, the algorithm is clearly the core of the State's claims. That's what they spent the most time on. They call it themselves the central feature, so that's critical here.

I do agree that they challenge other features. But all of those reasons we can explain and discuss, are also publishing features. Because they are decisions in the main, decisions about how to display content. We can go through each of them, and we invite the Court to look at them individually, like the social media MDL court did, and consider each of them. But I think that when you do, you'll recognize that each of them, the algorithm is the easiest and most important. It's clearly about selection of what content to publish and what content to exclude. The other ones, for example, autoplay, infinite scroll --

THE COURT: Isn't the whole point that the content that's published, according to those algos, is based on the user's preferences, not on TikTok's preferences?

- J L M -

MR. HACKER: That's correct. But it doesn't change the fact that that makes it publishing activity. That's absolutely entirely clear. I mean, Force, the Force discussion, the 2nd Circuit's case in Force, has a very good discussion about this when it talks about the matchmaking algorithm that Facebook was using. It's basically the same idea. And the Court there says, that selecting which content to display and how, including a decision to select content based on a user preference, rather than some political ideology of the platform, selecting content and which ones to give to this user and which ones to exclude from that user, is still publishing by definition. What Force says is, "Arranging and distributing content to form connections and matches between third-party speakers and reader viewers is an essential result of publishing."

It's just like a newspaper organizing articles by topic or editions by geography. The newspaper doesn't care, it's just trying to figure out how to identify for users, if you're interested in sports, where you're going to find sports. If you're from the suburbs of Seattle and you take the suburban edition. That's not a judgment about the content, it's a prediction about what content the user is likely to identify.

The fact that an algorithm is automated may --

this is what Force says, might make, "The algorithm might make more matches than other traditional print media editorial decision, but it would, quote, 'turn Section 230 upside down,' end quote, to deny Section 230 immunity just because platforms are, quote, 'especially adept at performing the functions of publishers.'"

So, the algorithm is very good at identifying what a particular viewer would like to read, or in this case, view. But that's still a decision that a publisher makes about which content to provide to this viewer, which content to postpone, which content to delay.

THE COURT: You're comparing it to, in the traditional sense, a newspaper, right? If we're talking about some sort of feature in a periodical that allows the user to engage in sports articles, for example, that's one thing. But here, when you add that with infinite scroll, for example, the issue is you have users who are addicted then, because they just keep going, going and going and going, regardless of content.

MR. HACKER: But what is the user addicted to? What the user to is addicted to the videos that the algorithm is choosing to identify for that user.

THE COURT: I think that's the fundamental discrepancy in this case, right? I think that the straight argument is, that it's content agnostic, right?

- J L M -

I think that the line from Judge Scott's decision in the DC case was, it doesn't matter if it's puppies or pornography, an addiction is an addiction and you're just keeping users engaged on TikTok.

MR. HACKER: But, again, Force answered that. An addiction is an addiction to videos because of the videos you're selecting. Let me -- pardon me. Here is what Force says, quote, "The algorithms take the information provided by," in that case, "Facebook users and match it to other users, based on objective factors applicable to any content. Whether it concerns soccer, Piccaso or plumbers." This is the puppies or porn line.

The Force case recognizes that, but it understands that Judge Scott, and other decisions, are literally getting this backwards. Force goes on to say, "Merely arranging and displaying other's contents on Faceback through such algorithm, even if content is not actively sought by other users, is not enough to hold Facebook responsible as the developer or creator of that content."

And the reason is, as Force and Shiamili explain, arranging and distributing content is classic publishing. It doesn't matter, it's not about whether we absolutely recognize, as the Force case recognized, it doesn't matter if it's Picasso or puppies or golf or

movies, whatever it might be. The point is, according to the State, the algorithm is trying to identify content and select content which is publishing, based on the user preference.

Here is what they -- this is their own words, paragraphs 66 and 67 of the complaint, explaining why they think that the algorithm is bad. "The central feature of the TikTok platform is its recommendations system, which is a complex series of algorithms that powers the For You feed. Users do not know what the next video will be, and they struggle to resist the pull to continue using the platform to find out." That's the addiction theory, Your Honor.

The next paragraph, "As one expert has explained, the platform is able to find the piece of content you're vulnerable to that will make you click, that will make you watch. But it doesn't mean that you will really like it. It's just the content that's most likely to make you stay on the platform."

That's their theory. They say, again, the paragraph pages one and two of their brief, "The algorithms feed users short form videos on topics that will keep young people watching." That's their theory of the problem here, is that the algorithm is selecting content that viewers are most likely to find engaging.

- J L M -

Now they say, it doesn't necessarily mean content they'll like it, but it's contents that they will find engaging. That's the theory of addiction. But the theory of addiction, the only conduct, to use their phrase, is publishing. Those are publishing choices to give a viewer a particular video that they will find engaging and decide to give them, you know, not a different video, because they are less likely to find that engaging.

THE COURT: Going back to my earlier question, right, which is, I don't read the complaint or the State's position to be, as I think that perhaps have been analyzed in other decisions, that you look at each of these features in a vacuum, right? We talked about that. So, it's not the algo in and of itself that's problematic, you got this algo that's feeding someone, let's take sports, something innocuous, but then you add in the likes, the comments, the scrolls, and that is what lends itself to this addiction, right?

MR. HACKER: I don't disagree with that characterization of what they think the problem is. The problem analytically is all of that conduct, whether viewed individually or collectively, is a publishing process. It's what a publisher does. Here is what the MP Court said in the 4th Circuit. "Decisions about whether

and how to display certain information provided by third parties are traditional editorial functions of publishers, notwithstanding the various methods they use in performing that task."

So, we've talked about the algorithm which cannot be described in any other way as decisions about what third-party content to publish. Then you look at the other features that are challenged, again, individually or collectively. Each of them is a publishing decision similar in kind to what a newspaper does in deciding where to put an article.

THE COURT: The beauty filter is a publishing decision?

MR. HACKER: I'm sorry?

THE COURT: The beauty filter is a publishing decision?

MR. HACKER: That's a tool provided to a creator. We're not the ones who filter. We provide the tools so that a creator can edit his or her own content. So, it's a classic publishing tool. You say to creators, here, you want to -- this is third-party content, your content. Here is something you can use. So that when we publish it, it will look the way you want it to look; that's the filter.

The autoplay and infinite scroll literally,

explicitly decisions about how long videos are going to play, when they are going to pop up, whether there is a break between them. In a sense, infinite, so called infinite scroll is just like a TV channel, right? You're not forced to change channels. The content just keeps getting provided to you.

THE COURT: It's not though, right? Because there is a big difference between putting on a show for your child, versus giving them TikTok, right? The difference is, they are going to watch the show and then the show is going to end, right? But the TikTok platform is designed to just keep it going.

MR. HACKER: Not quite. The TikTok platform, it's like -- I don't want to overstate it. There are absolutely differences. But these are short form videos that come one after the other. The user has to make a choose to move onto the next video. But on TV when the show is over, a next show comes on.

THE COURT: But that show isn't intended to keep the viewer addicted.

MR. HACKER: If the publisher, the TV channel, the broadcaster is really good at his job, they are trying to find shows that users will find most engaging. That's what they always do and they have always done that. It just so happens, this is what MP and Force are saying, the

internet platforms are really good at it, because they can curate and make a personalized selection of TV shows, if you will, short form videos, that viewers are most likely to find engaging.

So, it's the same process as before, it's just narrowed down, focused on individual users. And they are better at, because they have more information about the user's preference, about identifying what they are most likely to find engaging. But that -- the fact that they are better at it doesn't change the fact that it's still a decision about what content to select and how to provide it to them. That's -- the story is the live content, right? Their argument is that it's unlawful in the State of New York to only publish a live video. And apparently their argument is that you have to keep it in the memory so that people can pull it up at a different time. Their argument is --

THE COURT: Their argument is actually, and don't let me misstate it, but that there are misrepresentations about, right? I mean, it's not the live video itself.

MR. HACKER: That's a categorically different argument. They are arguing that live itself, just its existence is bad. Because that's their FOMO point. That users have to jump on and see it because they're never

going to see it again. It's just an argument that you cannot have a live only video in the State of New York. You choose to do that. You can't choose to publish it that way. You have to make a different publishing choice.

The deception arguments are in a different category, because those are claims about things that we represent to the public about the safety of the platform and the way that the platform works.

I do want to leave time for my colleague, Mr. Brody. But I'll just commend this Court to the Grindr decision, which really summarizes the way 230, deception claims work under 230. There is sort of a categorical difference between Section 230 does not immunize specific promises about specific acts, particularly to specific users. But it does immunize general statements and general asserted nondisclosures that are about the safety of the platform and the general policies. Because that's just a backdoor way of challenging the policies themselves which 230 protects.

THE COURT: Thank you.

MR. HACKER: Thank you.

MR. BRODY: Good morning. I will try to do this in seven minutes or less.

THE COURT: We always have a little bit of flexibility.

- J L M -

MR. BRODY: I think it's important to start in talking about parens patriae standing, which is applicable to Count Seven, Eight and Nine of the complaint, by noting that Section 230 immunity is equally applicable to each of those counts. Each of those counts purport to state claims for harms to individual users of the platform. Harms that those users allegedly had suffered as a result of their exposure to third-party content published platform.

But at a threshold level, the Attorney General lacks standing to pursue the parens patriae claims for product liability or for negligence. And it is clear and explicit in the complaint in each of those counts, that what the Attorney General is seeking to recover for here are alleged harms to individual users, even going so far as to assert a punitive damages claim in each of those counts.

It fails for a very simple threshold reason, which is that the Attorney General must establish that aggrieved individuals do not have an adequate remedy at law. They clearly do here. We know that. Because aggrieved individuals are pursuing claims against the defendants here and other social media platforms in two coordinated proceedings that are currently pending.

So, the State can't meet the requirement to show

the foundational element for parens patriae standing, and this is actually really the core principle, it's a judicial recognition of the power of the State to prevent injury to those without the ability to pursue an adequate remedy of law.

That's not pled in the complaint. But this isn't just a pleading failure because, again, as we know, they are, in fact, individuals are, in fact, and have the ability to pursue product liability and negligence claims. I think that the two State By Abrams cases that are cited in the briefing, that each reach a separate result on the facts of those cases, are really instructive as to this point.

The case involving the Conciliation and Appeals Board found no parens patriae standing, where individuals who were impacted, who should have had their rents reduced due to a board determination of a diminution in services, could bring claims for those rent reductions on their own.

That stands in contrast to the People By Abrams versus 11 Cornwell Company case, that involved a case that the state brought in the parens patriae capacity against a partnership, a real estate partnership, that bought a property to keep the state from developing a home for intellectually disabled citizens. And there the Court specifically said, the individuals would not be able to

obtain complete relief because they would likely not be able to show that they had standing to bring a claim under housing discrimination laws, because they would be unable to show that they were likely to be impacted by this facility not opening, where the facility was going to house, I think, eight to ten residents. So in that case clearly the requirement was met. It's very clear that it's not here, and those two cases illustrate that for us.

THE COURT: What about with respect to future users?

MR. BRODY: Excuse me?

THE COURT: Futures users at TikTok?

MR. BRODY: So, future users, it's entirely speculative. I think that with respect to future users you have to go back to the idea that these are product liability claims. And the requirement of a product liability claim is that, you show a design defect, a failure to warn, a manufacturing defect. And we'll talk about manufacturing defects that harmed the user.

So, the notion of a potential hypothetical future user having the ability to assert a product liability claim is foreign to product liability law. It's foreign to negligence law. And it's in a situation where the State's claims are derivative of the individuals on whose behalf they are purporting to bring them. You can't

say, well, there might be somebody in the future who can't bring a claim today, who might want to bring a product liability claim in the future.

If that person becomes the user of a platform and wants to bring a claim, that person will have the ability to seek redress in the event that person is harmed. This is not a case where every single person who uses the application is, the platform, is alleged to have suffered harm.

Now, Count Seven and Eight separately fail based on the threshold -- separate threshold issue, which is that an online entertainment web site, online entertainment platform, is not a product for purposes of product liability law. And although the State cites Patterson and Amagel, neither one of those cases actually analyzed the issue. Analyzed is this a tangible personal product, tangible personal item, which is what the restatement, their torts speaks to in addressing what a product is. That's Section 19. A product is tangible personal property distributed commercially or for use or consumption.

It significantly, when you look at Comment D to the restatement, what Comment D does is, it explains that something like a newspaper, information that is being transmitted is not a product for purposes of product

liability.

So, take the New York Times or even the online version of the New York Times, that is not going to qualify as a product.

THE COURT: So, it has to be tangible.

MR. BRODY: It has to be a tangible product. There are limited exceptions that the restatement recognizes, electricity --

THE COURT: But you would agree that other Courts have found, and I think that some of these decisions are cited with Mr. Wallace's affirmation, that online platforms such as, I think, that Lyft, for example, those have been found to be products for purposes of product liability claims, right?

So, where have those Courts gone wrong when we're talking about today, where we've got Uber, Lyft, all these sorts of online platforms?

MR. BRODY: I think where they have gone wrong is drawing a distinction that cannot be drawn here. Which is, and in the Uber and Lyft cases, the distinction that has been drawn is, well, this is something that somebody basically has to have it physically up in their vehicle and be looking at it, or is unable to, you know, is unable to provide -- so Lyft, the case basically is, you're driving around and you have to be looking at this thing.

- J L M -

I don't think that makes it a product, and I don't think that under the restatement meets the definition of a product for product liability. But I do think that that is where the Court drew a distinction that this Court cannot draw, with respect to something that allows somebody to view third-party content.

So, I do want to last address, and I know that I'm over time --

THE COURT: Of course.

MR. BRODY: -- by about a minute and a half here. I want to address the fact that the State has kind of changed its COPPA claim to say, we're not actually alleging a violation of the COPPA statute. We are asserting that you, defendants, misrepresented that you complied with COPPA.

Now, that's a distinction without a difference. And you can't transform a claim for noncompliance with the law into a claim that you misrepresented your compliance with a Federal Law. And you certainly can't do that without requiring this Court to consider whether the defendants in this case, in fact, violated COPPA.

COPPA has an express preemption provision. It states that you cannot bring claims that are inconsistent with --

THE COURT: How is this inconsistent, though,

right? Because while they are not alleging a violation of COPPA, because of the reasons as set forth in your briefing, we haven't provided notice, there is a preemption clause, which I don't believe that the State disputes. But essentially the argument is, that you collected young user data without parental consent. How is that inconsistent with COPPA?

MR. BRODY: Because the State's claim is that the defendants violated COPPA by doing so. That's their basis.

THE COURT: But in the Jones v. Google case they allow that.

MR. BRODY: But -- and this is where you have to draw the distinction between the statute itself as applicable to the Attorney General. And the Jones v. Google case, which was addressing claims by private citizens, the statute speaks explicitly to the fact that if a State Attorney General believes that a defendant is violating -- is engaging in any conduct that violates the COPPA rule or its regulations, not explicitly, you know, violates the statute, but any conduct that violates it, it can bring an action in Federal Court. The State hasn't done that here. It cannot bring that action at a time when the Commission, the FTC, is bringing a claim, as is the FTC through DOJ is here, having filed in August before

the State filed in October. And it's very, very, easy to see why that is entirely inconsistent with the COPPA scheme that Congress set up and envisioned. Where Congress determined that in a case where the Federal government is pursuing a COPPA claim, the Federal government will be prosecuting that claim. And the Court hearing that claim will be the one to decide whether the defendant has violated the COPPA statute.

If this case were to proceed under the claims that have been pled, the Attorney General would be asking this Court to decide whether defendants have violated COPPA, and then in their view, lied about COPPA compliance, I guess, as they have refashioned it in opposition to the motion to dismiss. And that would be entirely inconsistent with what Congress envisioned for how these claims have to be decided. And that's explicit in 15 U.S.C. 6504 D.

THE COURT: So, if I were to find that the allegations in the complaint that essentially are alleging a violation of COPPA, right, that those are preempted, then what do we do? We just strike those allegations from the complaint because there is no cause of action for it, right? And this is where we get into the rubric that defendants have come up with these theories versus the actual counts.

- J L M -

MR. BRODY: Well, I think it's important in this case for the reason that, given Section 230 immunity that applies here, given the First Amendment argument, if you -- it doesn't give the Attorney General the ability to come to court and say, well, but, we're alleging that the defendants collected data from children under the age of 13 in violation of privacy laws. There is no -- they can't come in and argue, well, that part should go forward as a carve out to the Section 230 immunity, that has to be out of the case. We would ask the Court to strike those allegations, and to say that the alleged noncompliance with COPPA cannot be a part of this case going forward, because it is preempted and it's inconsistent with the statute.

THE COURT: Would anything, though, prevent the allegations that are, I kind of view the COPPA allegations as two buckets, right? One is misrepresentations about collecting young user data, and then two is misrepresenting compliance with COPPA, right?

So, if we find ultimately that that second bucket is preempted, any reason why the first bucket doesn't stay in, misrepresentations about collecting data?

MR. BRODY: Right. So, misrepresentations about collecting data is just misrepresenting that the company is complying with COPPA. It's really a distinction

without a difference.

THE COURT: But under our Consumer Protection Law, isn't that a claim that they can pursue, right? I mean, our GBL 349 and 350 are consumer oriented market, right? Give material facts that would be misleading to a reasonable consumer and allege injury. That's all they have to show.

MR. BRODY: Well, I think in this case, though, the problem is, what they are showing is you violated COPPA. And then, oh, you turned around and you lied about whether you were violating COPPA or not.

First of all, there is, I don't -- they point to paragraph 285 of the complaint as this supposed support for this theory. There is nothing in 285 or paragraph 285 of the complaint that says, here is what the defendant said about their compliance with COPPA.

They do have a general statement, I think in paragraph 255 of the complaint, where it says, you know, where they say that.

THE COURT: So, 285 I think is a different issue that has to do with operational independence. But I just want to make sure I'm following the paragraph you want me to look at.

MR. BRODY: I think that 255, if I recall correctly, is the other place. And I'm doing this from

memory, I apologize. Where they say, there is a representation about non-collection of private information. But, again, that's based on, if you look at every single one of the counts in their complaint, it's about -- and it's Subsection C of every single one, paragraph 300, Subsection C, I think is the first one under the General Business Law, and same thing under the Executive Law. They say precisely noncompliance with Federal law, with Federal Privacy Law, right? And that's what the complaint is. It's that the allegation that the platform complies with Federal Law is --

THE COURT: Right, but 255 is different from that, right? 255 identifies -- I'll just read it into the record. "As early as 2018, the platform privacy policy stated, quote, 'the platform is not directed at children under the age of 13,'" end quote.

And then they go on in the complaint to talk about all things the platform does to target children under 13. I'm so trying to understand why those allegations wouldn't survive.

MR. BRODY: Well, that's, I mean, that's a separate question. Because the child directed claim, taking that as a potentially separate claim, is clearly barred by Section 230. Because that's seeking to hold the company liable for what it publishes on the web site.

- J L M -

If you look at, I mean, if you look at, going back to the cases that Mr. Hacker talked about. If you look at Grindr, for example, it's, in fact, directly on point as to why this would fall under Section 230. Because you're talking about an alleged statement about the third-party content on the platform. And ultimately it hinges on, and we see this through that entire section of the complaint, it hinges on the allegation that the third-party content that is published on the TikTok platform is, in fact, directed to children under the age of 13. And so, to try to find any daylight between that claim and Section 230, for the reasons that the Grindr court explained, is something that is impossible to do.

THE COURT: Thank you, Mr. Brody.

MR. BRODY: Thank you.

MR. WALLACE: Thank you, Your Honor. Kevin Wallace, for the New York Attorney General.

I'd like to begin by focusing on where we are procedurally, which is on a motion to dismiss, and what the burden is on a motion to dismiss. I'm going to start focusing on the Section 230 immunity argument. Because 230 immunity is an affirmative defense. We have decisions from Federal Courts in New York, noting that dismissal is only appropriate if the preemption is obvious on the face of the complaint.

- J L M -

Now, the defendants rightly point out that Courts will often decide Section 230 immunity at the pleading stage, in order to protect web sites from what they describe as costly and protracted legal battles. I actually prefer the other quote from Roommates, which describes forcing web sites to face death by 10,000 duck bites, but we get the idea. That a suit in itself is a harm that has an effect on the web site they are to be protected from.

I think that realistically protecting TikTok from a lawsuit, and from this lawsuit, is not realistic. Broadly speaking, the cases are proceeding against TikTok and other social media platforms on the same theories as laid out in this complaint. And we can talk about each of the theories in a little bit more detail. But the decisions from both State and Federal Courts, from private and governmental plaintiffs, are virtually unanimous. That looking at the misrepresentation claims, that those claims in the complaint, they are not barred by 230. And we kind of cite to those cases.

THE COURT: Am I correct in, and I know that both parties have provided some supplemental authority, has any Court yet found that 230 bars the claims in misrepresentation claims?

MR. WALLACE: Misrepresentation, I don't believe

so.

THE COURT: And of course, Mr. Brody, feel free to address that when you go up as well, but I don't believe so.

MR. WALLACE: I would certainly say that the weight of authority, whether it's unanimous or not, is certainly on the misrepresentation claims are allowed to proceed.

Now, on the failure to warn claims, like those in Count Eight of the complaint, I will cite to Judge Gonzalez Rogers in the Northern District of California MDL. She observed that, quote, "Among all the litigation against social media companies proceeding in parallel to this MDL, not one Court has yet to hold that Section 230 bars such failure to warn theories in general."

Then even on claims like the product liability design defect, Count Seven, and the negligence claim on Count Nine, almost no Courts are dismissing those claims in their entirety.

Now, we think that the Courts, like the D.C. Superior Court, Massachusetts Superior Court and the California State Court that let claims proceed regardless of the 230 prohibition, they have the better of the argument. But even Judge Gonzalez Rogers in the Northern District of California, who found that certain features

were protected by Section 230, found that other features at issue were not protected.

So, features that were not protected included appearance altering filters; platform features that hindered time restriction; failure to implement effective parental controls and notifications, age verification steps. So those features, even though she thought other features of the application were protected by 230, were allowed to proceed. Which would mean that those claims, even if the Court were to adopt, say, the approach that Judge Rogers took, the claims themselves, some portion of them would survive. So, the goal of protecting TikTok from potential -- even having to answer to a claim, that really falls away.

Now, the specific details of how the algorithm works, how the features work, those are going to be in the case, even if some of the substantive claims go away, and we're looking at misrepresentation.

So, what we're really looking at is trying to parse what they call theories of liability and early stage on undeveloped record. And while that sometimes happens in 230 proceedings, that's not really appropriate here. In fact, you know, under the CPLR Section 3025, we're allowed to amend the complaint or we can amend the complaint to conform to the evidence. So, even if the

Court were to decide on the face of the complaint, maybe this affects publishing or maybe it chills the First Amendment right, discovery will still proceed in the same way, and we still revisit these issues at a late stage of litigation, either in summary judgment or at trial.

But what I do want to say is, that the majority of the Courts looking at these issues, have found that 230 does not preclude these kinds of claims. So, even features like the For You feed or the infinite scroll, and that would include both the Court in DC versus Meta, and the State JCCP Coordinated Proceeding in California, which I don't know that we cited or came up in the briefing, but that is at 2003 WL 6847378. And at page 31 it supposedly says that, "As in Lemmon, plaintiff's claims based on the interactive operational feature of defendant's platforms do not seek to require that the defendants publish or de-publish third-party content that is posted on those platforms. The features themselves allegedly operate to addict and harm minor users of the platform, regardless of the third-party content viewed by the minor."

That's really the key. That our complaint is effective regardless of the specific video that anyone is looking at that. And that's the analysis under Barnes. And I just want to talk about Barnes, because I believe Mr. Hacker said that New York is in a different position

than some of the other states.

THE COURT: Because that case cites Barnes.

MR. WALLACE: Shiamili adopts Barnes, which I think that every case, Barnes has like a universal approval rate by Courts. And virtually every case cited by the People and by the defendants is applying the Barnes test.

THE COURT: Yes.

MR. WALLACE: And I think that TikTok is really focusing on the second factor of Barnes. No one is debating factor one, right? It's an interactive computer service. TikTok, I think, is focusing on two, as to whether they're being treated as a publisher or a speaker. And I think that, I think that you look at the courts in D.C. and other locations, are really looking at that third factor, whether they are being held liable for information provided by another information content provider. Whether they are being held liable for something that another person put up on the web site.

On two, maybe it is kind of a close issue. I think that maybe it would benefit from more factual develop to decide whether what they are doing fits in the classic publishing rubric. But here, the way that the complaint is pled, the claims are based on the design features, not the content itself. The features that

operate independently of whatever specific video is being shown.

I think that the two cases that defendants cited in their reply brief that came after the briefing had already started, Grindr and MP, sort of highlight that.

In Grindr, the 9th Circuit case, the harm was caused by specific third-party content. Messages from adult men that facilitated sexual encounters with minor. The duties alleged there, and the Court described it, quote, "Would require Grindr to monitor third-party content and prevent adult communications to minors."

I don't think that our claims require the monitoring or the taking down of any particular piece of content, it's how it gets presented.

MP, again, that case alleged that the plaintiff had been harmed when a third party read specific content from another third party. So, that they were reading racist indoctrination, and that led them to engage in a mass shooting. That is relating to the specific type of content that the user viewed.

The Court there in the 4th Circuit described as, quote, "Demonstrating the claim would require, quote, 'demonstrating that the algorithm prioritizes one type of content over another.'"

Again, we're here agnostic on the specific

content.

THE COURT: Am I right to be thinking about it as, and I had asked defendants' counsel about this earlier, I don't think that I could -- I don't necessarily adopt the analysis of, well, we've got to look at each feature separately. I think that the whole point is this product or platform, depending on what the Court decides, has adopted an array of feature that constitute some platform in the product. So, I think it's a combination of features in and of itself that makes it so addictive. It's not just a gray feed, it's not just the filters.

MR. WALLACE: I think that's correct. And I think that in the end if we're looking at, are we -- is the case going to bump up against 230 immunity, that's really on, well, what is the relief? And we're not -- we've proposed some relief. We have claims for relief that are in our complaint. But we're still awaiting factual development. We're still awaiting expert reports. And the Court on most of these claims is sitting in equity and will have an ability to craft a particular relief that is not just up or down on legal damages. So, the 230 immunity issues can be accommodated throughout the case and they don't need to be dealt with at this stage.

I think that looking at the -- it sort of works both holistically or individually, to skip ahead a little

bit to the question of, is this a product. There is sort of not a clear answer from the Courts, either the decisions cited by the defendants or us, it's to, is an app also a product or is it something else. And, you know, in the MDL, Judge Gonzalez Rogers on the private plaintiffs looked at, I'm going to treat sort of each of these features that I am allowing to go forward unchallenged as a product, and very detailed analysis. So, you're sort of -- you can look at it holistically. I think that it sort of reaches the same point and you break it up a little bit.

I will just add that realistically, because of the features though, this case is much more similar to the Lemmon case out of the 9th Circuit, where the product was the filter, and that harm came to users from accessing the filter. Obviously here we have claims over filters. Those are sort of the easiest to see. Are they something that is a product, a creation of the platform versus is this something that is based on a user content, the kind of Grindr type case.

Now, I think that the ways that the plaintiffs are describing it is, that our claims are seeking to hold them liable for a publication of third-party content just because that's what the app is designed to do. That but for the publication of the third-party material, there is

no app really, there is no claim. But that's not really the way that the Courts have been analyzing this. You know, that sort of view was rejected by the Lemmon Court. And this is at pages 1092 to 1093. Saying that, "Snap in that case was an internet publishing business. Without publishing user content, it would not exist. But the publishing content is a but for cause of just about everything that Snap is involved in. That does not mean that the plaintiff's claims specifically seeks to hold Snap responsible in its capacity as a publisher or speaker. The duty to design a reasonably safe product is fully independent of Snap's role in monitoring and publishing third-party content."

So, to the extent that the defendants are trying to draw a factual distinction with Lemmon, that the harm comes from viewing the content and not the feature of application, I would just note that Mr. Hacker cited paragraph 66 of the complaint in the language, "That users don't know what the next video will be." So they are not addicted to any one video. It's not they have to watch the same video of puppies, it's the way that it's being fed to them. So, I think that that really is the kind of thing that brings us more onto the Lemmon side of the case law and less onto the Grindr side.

I think it's even more self-evident when you

look at, and this is discussed in the Force case, the sort of Stratton Oakmont New York State case that prompted 230 to be passed in the first place. Which essentially ruled that because Prodigy had tried to filter some content, they were responsible for whatever made it onto the platform. And the goal was, well, TikTok, any platform may not get everything. They may make decisions about what we're going to allow. But if they try and fail, we want them to still try.

The goal really on 230 was the protection of children. So it's at least a little bit ironic that now we have actions proceeding by states and private parties seeking to protect youth and, you know, 230, it's maybe the unintended consequence, but that's the claim that the defendants have, that it's basically serving to limit the protections available to youth and to parents. I think that I will leave it there.

I think that we didn't discuss the First Amendment. I think that I'll just say this very briefly on the Moody case, which is, I think that even the majority opinion recognized that sort of facial treatments of algorithms and laws that might of affect how the algorithm operates, doing it on a facial basis was not a great idea. They sent it back to the circuit courts. And that they acknowledged that on a preliminary record there

are differences in the products that Facebook was offering. This on 725 to 726. And that curating a feed and transmitting direct messages, one might think involved different levels of editorial choice. So that one creates an expressive product and the other doesn't.

So, I think it really is suggesting we need to get in there and deal with what the algorithm looks like. I think that's really brought out by Justice Barrett's concurrence, raising questions about how does the app and the algorithm operate. Is there use of AI? Is there foreign ownership? None of those are sort of facially addressed.

To the extent the First Amendment is an affirmative defense, it's up to the defendants to bring forward those facts and show that really what we're looking at is expressive content and it needs to be protected.

The last point I will hit is just on the two questions of parens patriae and product liability. On parens patriae, a hundred percent the State is able to, it is a quasi-sovereign interest that the State has. So that can mean, we are protecting interests that go beyond just the people who have already been harmed, it can include future users. The suggestion would seem to be that parens patriae, the State doesn't have a significant

quasi-sovereign interest in making sure that each successive group of users of a product aren't harmed. That the proposal is, the product is out there, teens can use it. They can get harm and they can sue. And that's very different from the two cases they cite, where there was a confined group of people that were affected and could get economic damages. Or in the one case that didn't, there was no economic damage because they might have lost housing.

So, I think it definitely, the State has a quasi-interest in protecting -- you know, thousands of kids every year are getting phones and using platforms, in protecting them. Also, there are harms to the citizens of the State and to the people who use this, that don't result in monetary harm that can be recovered through the cases. People may not have developed, manifested an economic harm that can be recovered through a case, but may still obtain other harms. And I think that we described those in our complaint.

THE COURT: So, on the issue of harm and injury, right, specific to the operational independence claims, what's the harm there, right? So, the allegation is that the platform is misrepresented, that a foreign government has access to their data, right?

MR. WALLACE: Yes.

- J L M -

THE COURT: What's the injury there that's required under our Consumer Protection?

MR. WALLACE: I think that the injury, and Mr. Finkelstein can say if I bollix this up a little bit, but I think that it would be to the extent that consumer relies upon a representation. And I think that issue of data security and access to foreign powers are certainly in the news enough, that it could affect consumer decisions. Because those are misrepresentation claims only, there is not a substantive claim to that.

THE COURT: Right.

MR. WALLACE: Going onto the product, I would just say, that the defendants assert there is a universal rule that their application is not a product. And that's definitely not the case. The complaint alleges it's a product and that there is specific defects within the products. The Lemmon case, which we think that they're closest to, that was a product liability claim. Judge Gonzalez Rogers in the social media claim, and this is the private plaintiffs' decision which is at 702 F.Supp3d 809, conducts an extensive analysis starting at page 837 of, "Are these products?" She chooses to go feature by feature and determine, is this feature a product that can be subject to product liability.

I think it sort of gets to the same place,

because for each feature that is being alleged to harm someone, is that a product? Yes. But to your point, is the amalgamation of all these something that is a product that is just different from a static web site where people go.

THE COURT: Or any other social media platform for that matter, right?

MR. WALLACE: Precisely. And I will just add, that the tangible, the question of whether or not it's tangible is not determinative. And here, you know, TikTok is also distinguished it is an application. You go to the app store in Google or Apple and you don't purchase it but you download the application. And so this bears more to the hallmarks of a product than others. And I certainly don't think that the sort of categorical standard that the plaintiff set out really would preclude the claim.

I think that Mr. Finkelstein was going to address a couple of points, and also address the question about COPPA.

THE COURT: Thank you, Mr. Wallace.

MR. FINKELSTEIN: Good morning, Your Honor. May it please the Court, I would just like to go back to your point earlier, that you have it absolutely right. That you should look at our complaint through the lens of the claims, as opposed to TikTok's theories. That even if one

misrepresentation, omission, deception is valid under any of our claims, that the claims would survive. And that several State Courts and the Federal MDL have also looked at similar allegations, and that these claims have all survived, as you mentioned earlier.

But just to focus on the COPPA related issue. Like we, as you were looking into the complaint, paragraphs 252 through 255, mention some of the misrepresentations that the defendants have made about their data collection from children under 13, and about whether or not they are directed to children. And the MDL has found that this is not barred by Section 230 because data collection is not a publishing function.

Another thing is that their effort to distinguish Jones is just not relevant here. The fact that it was a private plaintiff in Jones versus The State Attorney General is not a relevant distinction. The California case --

THE COURT: But why is it not a relevant distinction?

MR. FINKELSTEIN: Because the reasoning is whether the cause of action is inconsistent with COPPA and whether it's a private plaintiff or a State AG bringing a consumer protection claim regarding misrepresentations as to the compliance with COPPA, either way it is not

inconsistent with the statute to hold TikTok to their representations regarding --

THE COURT: So, your position is that you would not have to establish a violation of COPPA in order to assert this claim that there was a misrepresentation about compliance with COPPA?

MR. FINKELSTEIN: I think that we -- so we [sic] said that the platform is not directed at children under the age of 13. And they also said that they will delete the information and terminate the account. In other words, that we do not collect data.

THE COURT: I'm looking at paragraph 254, "TikTok also violates Federal Law that governs children privacy known as the COPPA Act," right? So, as I was saying earlier with Mr. Brody, there are kind of two allegations with respect to misrepresentations about the platform being directed to children. It's whether or not it actually targeted children 13 and under, even though there are policy statements saying it does not. And then there is compliance with COPPA, those are kind of separate issues, right?

MR. FINKELSTEIN: I think that's right, that's fair to say. But if it's a representation about whether you are complying, that that can be different. But if someone were to write FDA approved on their product, when

it wasn't FDA approved, the Court could just look to strike this, just to strike the advertisement and not take the product off the market.

THE COURT: Okay.

MR. FINKELSTEIN: If the Court doesn't have any other questions, then I think that we'll rest on our papers.

THE COURT: Nothing further. Thank you, counsel. Let's just pause there for five minutes.

(Pause)

THE COURT: Mr. Brody or Mr. Hacker.

MR. BRODY: We're going to do this backwards, Your Honor. I think I only need about two minutes and then Mr. Hacker will use the rest of our rebuttal time.

First on parens patriae standing. The State suggestion that there are some sort of ethereal harms out there is inconsistent with the requirements of a failure to warn, design defect or negligence claim, which actually requires proof of harm caused by the allegedly offending and challenged conduct, that doesn't work.

The idea that these are claims brought on behalf of future users also doesn't meet the standard for parens patriae standing, because there is no way to show that the future user who happened to be harmed as a result and to suffer that element, would not be able to bring their own

claim if they were, in fact, harmed. And the complaint itself specifically states those claims in terms of causing harm to young users who actually do use the platform in New York. That's paragraph 338.

As an example, in the design defect claim, paragraph 348, in the failure to warn claim as to the product, I will just address the point that was made about downloading an app to try and draw a distinction. That is not a distinction that applies and makes something a product. Just as, you know, receiving a newspaper doesn't make the newspaper a product, for purposes of product liability law. Having a newspaper land on your doorstep, downloading an app to your phone, it's impossible to draw a distinction. The restatement would not recognize that distinction for product liability law.

Finally, as to COPPA preemption, I will note that the Attorney General did not have an answer to the question from the Court as to whether proceeding with the claim of an alleged misrepresentation about compliance with COPPA, would require the Court to actually decide the underlying COPPA question. The Attorney General didn't have an answer to that question and clearly the Court would.

THE COURT: Thank you, Mr. Brody.

MR. HACKER: Thank you for your patience, Your

Honor. It's been a long morning. Just a few points to wrap things up.

I want to start with Your Honor's point, which I fully appreciate, that as you read the complaint, it's the combination of factors, not just of the algorithms selecting that make it, allegedly make it addictive. I don't actually think it's clear whether the State would say any one of them. But I have no problem with reading them as alleging only the combination, because that just presents the question under 230, it doesn't answer any question under 230.

Looking at them as a combination of factors presents the question, are the factors that they say are harmful individually or in combination, publishing acts. Are they acts of publishing third-party content in particular? That has to be answered to determine whether or not this combination is subject to immunity. And Shiamili and Force give us the standard for that. And I think it's important to kind of level set back with Shiamili, because I think that the State is misunderstanding Barnes factors two and three. Then, yes, Shiamili cites Barnes, but it describes the relevant factor I think in a very helpful way. It says, "Section 230 of bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional

editorial function, such as deciding whether to publish, withdraw, postpone or alter content. Immunity applies even when the ISP has an active, even aggressive role, in making available content prepared by others."

Then Force elaborates that in Footnote 18. It says, "Section 230 applies to, quote, "Claims where the duty that the plaintiff alleges that the defendant violated" -- I think it's so helpful to think of what the alleged duty is, "violate, derives from the defendant's status or conduct as the publisher or speaker of third-party content."

So, you're always asking when they say there is a problem that the defendant has done something wrong, the question every time is, okay, is the thing that is done wrong an act of publishing third-party content? That's the only question. It's either answered yes or it's answered no. And Shiamili and Force and a hundred other cases, say there is a sort of an exception to that.

This is Barnes Section 3, which is, well, when the act you're looking at, the act of what would otherwise be publishing, is actually the platform publishing its own content. You're not publishing third-party content, you're publishing your own content. That's when even though it might be publishing, it's not immunized by 230. Because 230 only protects the acts of publishing

third-party content. So, that's the question.

Then the State, you know, fairly and candidly admits, that its argument there really turns on what you understand the Lemmon case to be and the Lemmon distinction, right? They are wrapping themselves in Lemmon and saying, well, in that case the features themselves caused the harm. And they think that they're like Lemmon. But Lemmon is a perfect illustration why these claims are immunized by 230. This conduct is immunized by 230, and not the conduct in Lemmon. In Lemmon the harm was from the features, yes, the features themselves. Because the features themselves operated by incentivizing creators to create dangerous and harmful content. Nobody had to -- no third-party content had to be published, and no third-party content had to be viewed.

So, the Lemmon court says, that's not publishing third-party content, it's just the features themselves that causes harm without any act of publication of third-party content. And the Grindr case comes along, and others too, but Grindr makes this distinction perfectly clear. In fact, Lemmon itself in Footnote 4 says explicitly, now if the plaintiffs were complaining about the videos published on the platform and viewing videos, and the viewing the videos caused the harm, Section 230 would apply. But that, of course, is exactly what the

State is alleging here. They say, well, no, Grindr and MP and other cases are different because they are about particular content. And this is a huge and critical misunderstanding of 230.

You see this also in Judge Scott's decision and some of the other decisions. Nothing in 230 says anything, not one word about liability for, quote, "particular content" or "specific content," or as the State just now put it, any one video being the problem. Literally to the contrary, Section 230 says, it immunizes against liability for any information provided by a third-party provider. If any information, it's broad and it's, I think, going back to where I started with Shiamili and Force and other cases.

The point is, 230 is providing immunity for acts of publishing third-party content. There are two questions -- three. The first one being, is it an interactive service provider? But then the question is, well, were you publishing? And is the thing that you were publishing third-party content? That's the end of the inquiry. 230 doesn't ask, are you trying to impose liability for specific videos, for particular videos, particular type of videos?

What was going on in MP and Grindr and in other cases where the Court applied 230, was not about

particular racist videos. And in MP or Grindr, particular abusive communications. Those communications, those videos, were not actionable in and of themselves. That's why the claims weren't about specific content. When you read the cases, the problem that was being asserted was the mix of content that -- and the State properly quoted, I think that it was from Grindr, the failure to monitor and take down videos that would end up causing harm. They weren't objectionable in themselves, but the mix was inappropriate was the allegation.

In MP there was too much racialized content, there should have been less, different. And in MP there was too much of the abusive communication, should have been less and different. And that's the allegation here. The harm is different. The harm is that the videos you are selecting and the way that you're presenting them, choosing to present them through these other features, is causing a different harm. It's not the racist ideation or child abuse, it's harm of addiction.

THE COURT: The harm here doesn't derive from the content, though. I think that that's, you know, kind of where this feels different than some of those other cases. The harm here derives from the addiction.

MR. HACKER: But to be very clear, Your Honor, there is no addiction without the content. What they are

addicted to, their argument -- and this is why I read from those passages. Look at page one, two of their own brief. The harm is the selection of videos that users are likely to find engaging. If the publishing function didn't choose videos that the user would likely to find so engaging, and present them in a way through the other features that they found engaging, there would be no harm. So, it's not addiction in the abstract. The algorithm doesn't create an addiction because somebody comes in and says, it's a fancy algorithm, I'm addicted to it. The algorithm causes the alleged addiction because of the content that's selected. That's their allegation.

So, the harm comes from the content. They say, well, no it's not from specific content, it's not from racist content or sexual content. But what it is from, by their account, is from addictive content. They want the platform to publish different videos to individual users.

THE COURT: They don't want kids to be on the platform all the time.

MR. HACKER: Well, if they could ban the platform, they would. But that's clearly a violation of all kinds of provisions. What they want is to get to that result by changing the stream of videos, right? They are not trying to impose a, you can only be on the platform for one hour a day. What they are saying is, because the

videos that are fed into the For You feed are so engaging, the content is so engaging, children become, users become addicted to it, right? The way to change that, by their allegation, this is not me saying it, it's their story, is that users need to be fed different videos, at different times, with different ancillary publishing devices, so that they don't become addicted.

THE COURT: I don't buy that. And I don't think that the complaint says this. I don't think that the allegation or theory is, let the kids stay on TikTok for as long as they are. Let's put aside the misrepresentations about time, but let's show a different thing. That's not the allegation here. And I don't think that's the save either.

I think that the allegation is, you are purposely employing devices, not you, TikTok, is purposely employing devices which, you know, we can quibble later about whether it's one feature or the cocktail of features that are designed to keep them engaged in the platform, which I understand maybe that's a publisher's job. But, again, we're not talking about a newspaper, we're talking about -- go ahead.

MR. HACKER: It's engaged them, I mean, I take everything you say as an accurate description. But with respect, it's omitting two key factors. Engaged on the

platform doing what? And how are they engaged? What gets them engaged? Doing what? Is viewing third-party content? So, that's the job of a publisher, to publish third-party content. They can't dispute that that's the issue here, that's what causes that. And the how they are doing that, is by sending to each user, identifying videos they are most likely to find engaging. Publishing decisions. That's -- and I totally agree with you, they are not saying, we want -- we're going to impose a separate time limit on watching. What they are saying is, we want to get to the result. Our problem is users, teen users are watching too many videos, right? They are watching too many videos. There are no other harms like Lemmon. Not about viewing videos, they're watching too many videos. And if TikTok will change its algorithm so that different videos are selected and present them in a different way, then users won't find it so engaging and watch it less.

THE COURT: How does the algo work? The algo takes the user's preferences and is automatically calibrated to spit out features or -- how does it work?

MR. HACKER: The algorithm is one of the features, right? And at a high level, I'm not an engineer, but basically, and this is their allegation, the way that the algorithm works is, it takes a variety of

factors about a user's preference, their past viewing, their amount of time they spend on certain videos, other information that they could obtain about John Doe's viewing preferences. That's kind of on one side. And on the other side, there is the whole universe of content that is theoretically available on the TikTok platform. And the algorithm has a way of cutting through all that and narrowing down and saying, here is John Doe. We know John Doe's set of preferences. Here is the videos that John Doe is most likely to like, to find engaging, whatever that means --

THE COURT: So, it's really --

MR. HACKER: -- and here is videos that won't be, so we're going exclude those.

THE COURT: So, it's really then the user's kind of editorial choices in some way, right? It's the user saying, here are my choices what I like, and the algorithm is automatically calibrated according to those inputs?

MR. HACKER: I wouldn't say automatic, it's human beings that design the algorithms to match. Yes, it's a matchmaking. I really commend this Court to the discussion of how matchmaking works in the Force case. I don't believe that the State disagrees with that as what's going on. And it is the user preference. But the publication choice is, one, deciding that what you want to

publish is based primarily on user's preference and not other things, you know, it's not a conservative magazine or a nature magazine. It's a general interest platform that says to users, if you use our platform, and said to creators, if you put your material on our platform, we're going to match it with users who will most likely to find engaging. And it is a set of choices. This is the publication part of it. It is a set of decisions of the algorithm through its digitized mechanisms, makes in deciding this video, John Doe will like this video. He might like this one, so we'll put it later in the queue. You'll hate this one, we're never going to show it to him. That's the process.

I mean, it's -- I don't think that it's possible to describe publishing in any other way, as all the cases do, including the Shiamili, as a process of deciding what content to include, to postpone or exclude. And that's what the algorithm is doing in an automated way.

But, again, Force and MP tell us, I think it's pretty obvious to me, that just because it's really good at it, doesn't mean it's not publishing. It is a set of decisions designed to decide what content to publish.

Then you mentioned, so the algorithm doesn't trigger the other features. Not as far as I know or as far as they allege. The other features are all, we can go

through each of them, are all decisions about how to display the content that the algorithm has selected. So, that's endless scroll, the --

THE COURT: Likes.

MR. HACKER: The Likes, the communication between users. If you look at the Dyroff case from the 9th Circuit, it goes through a number of these and very effectively explains why they are all classic publication. What a publisher does is decide, when you get a third-party submission if you're a general interest magazine, what you decide, in addition to deciding is this a good article, will this appeal to my general interest readers? That one will not, I'm going to choose this one.

So, I've selected this one based on prediction about what my readers' preferences. Then you make a decision where in the magazine am I going to put it. How many, you know, pages will I devote to it. What font size am I going to use. What articles am I going to put it next to that are likely to engage a reader to keep reading. Those are classic, traditional media decisions.

THE COURT: But the difference is, those aren't specific to that one user, right? That's general --

MR. HACKER: Exactly. That's a descriptive difference. But for purposes of 230, it's not a legal difference, it's just a way in which it makes them so

effective.

I would just add, you've been very generous with time. I just want to make one last point because the question you raised about the deception claims and whether any Court had found that Section 230 bars misrepresentations. I would say Grindr is a very good example of a case that is not different from this one in substance, for the reasons I've explained. I do accept that, you know, there is literally like the same claims have been asserted in other cases. And Courts have allowed the deception claims to go forward there. But those same Courts have always allowed the substantive claim to go forward.

If you've decided that the substantive claim is not immunized by 230, I think that it just follows that the misrepresentation claim wouldn't be -- the question would be, once you recognize that the substantive claims are attacking publishing of -- conduct that is publishing of third parties, then the misrepresentation claims are just perfectly ancillary to that. Because they are just another way of saying, well, you are implicitly or explicitly saying it's safe when it's not. For all the reasons that we've challenged the underlying claims, and so they can't -- they sort of stand and fall together, would be our submission on that.

- J L M -

With that, I guess that I will end where they started, which is the fact at the pleading stage, I think that counsel correctly acknowledged, all the cases that say, sort of the point of 230 is to eliminate not only liability but also litigation because of the cost and the chilling effect of publishing activity. And that's exactly what we have here. Thank you for your time, Your Honor.

THE COURT: My pleasure. Thank you, counsel.

Counsel, thank you so much for that excellent argument. It's 12:20 now. I would like to break and come back at 2:30 to render a ruling from the bench. If it is an inconvenience to come back in person, I'm happy to do it virtually. I'll leave it to you entirely what you want to do, whatever you want.

MR. WALLACE: The Attorney General is available in person.

MR. BRODY: We'll come back.

THE COURT: Let's come back and be ready to roll at 2:30. Thank you very much. I appreciate it. Thank you.

(Luncheon recess taken)

(Court stands in recess until 2:30 p.m.)

- J L M -

A F T E R N O O N S E S S I O N

THE COURT: Good afternoon. We're back on the record in the People of the State of New York versus TikTok Inc., et al., Index 452749 of 2024.

Counsel, anything before the Court puts its decision on the record?

MR. HACKER: Yes, Your Honor. Jonathan Hacker, for the defendant. One minor housekeeping matter, regardless of housekeeping. In the argument you asked, Mr. Wallace and I addressed this question, of whether any Court had dismissed just deception, misrepresentation. Neither of us recall one example of the Court that did do that, which was in the Washington case.

THE COURT: Okay.

MR. HACKER: The Court otherwise denied the motion to dismiss, but did carve out, literally in writing, statements that the platform is, quote, "Safe, well-moderated and appropriate for children." And the Court said those were protected from liability by Section 230, citing Grindr.

THE COURT: Citing what?

MR. HACKER: Grindr. There is no other analysis.

THE COURT: That would have been very recent.

MR. HACKER: Yes, it was March 28.

- J L M -

THE COURT: Thank you so much for running that down.

MR. HACKER: Thank you.

THE COURT: I'm going to ask you bear with me.

Plaintiff commenced this action on October 8 of 2024 with the filing of the summons and complaint which asserted nine causes of action. Count One seeks to enjoin repeated or persistent fraudulent business conduct under Executive Law Section 6312, including misrepresenting to consumers, expressly and by implication, that its platform is safe and appropriate for teens and preteens.

Misrepresenting to consumers, expressly and by implication, the effectiveness and built-in features designed to combat addictive use, harms, including parental controls, community standards and age verification.

Misrepresentating to consumers, expressly and by implication, that the platform is not directed to children under 13 years old, and complies with Federal Privacy Law. And failing to disclose the adverse health consequences of the TikTok app and platform.

Counts Two and Four assert violations of New York General Business Law 349. Counts Three and Five assert violations of General Business Law 350. Count Six asserts a violation of Federal Trade Commission Act

Section 5, which prohibits unfair or deceptive acts or practices in or affecting commerce by -- and then it refers to those same categories, misrepresentations, I just read into the record, which there are four counts.

Seven asserts a product liability claim for design defect. Count Eight asserts a product liability claim for failure to warn. And Count Nine asserts a negligence claim.

Defendants seek to dismiss the complaint pursuant to CPLR 3211 (a) 7. Defendants characterize the counts, which are apparently six consumer protection counts brought under New York State law. And three product liability claims based on their own formulated rubric as being asserted under three theories. The first is the platform safety theory. The second is the child direction theory. Third, operational independence theory. The Court observes that the complaint does not assert causes of action specific to the second or third theories.

The defendants' characterization of the allegations in the complaint and attendant theories for imposing liability, as elucidated by oral argument today, turns on a failure to recognize that this case is not about content, it is about a cocktail of design features that are unique to the TikTok product, and alleged to cause harm to young people, and for which TikTok is

alleged to have made material misrepresentations to the New York public.

These design features include, as alleged in the complaint, the For You feed or recommendation system, autoplay, infinite scroll, ephemeral content, which refers to TikTok stories and LIVE, push notifications, likes, comments, other attractions and effects, such as designs and beauty filters.

In this respect, the Court finds that the defendants cannot avail themselves of the protection offered to publisher's content and in the traditional sense. Rather, the complaint sufficiently alleges that TikTok employ as series of addictive design features to maximize young user engagement with the platform, and which results in harms to young users. And that TikTok misrepresented the safety of its platform to convince the New York public that it was safe for young users.

Plaintiff's theory of the case, as set forth in the complaint, is content neutral and focuses on the defendants' application to design, which renders the application itself addictive and harmful to young users.

I'm just going to road map and go through each of the arguments that we went through today. The headline is, I am denying the motion to dismiss with respect to the nine counts. However, as we discussed during oral

argument today, I'm going to strike the portions of the complaint that allege misrepresentations for violation of COPPA and the operational independent misrepresentations. I am come back to that at the end, but I didn't want to keep everyone on pins and needles.

A motion to dismiss pursuant to 3211 (a) 7, pleadings are to be afforded a liberal construction. Allegations are to be taken and true. The plaintiff is afforded every possible inference. Any determination is made only as to whether the facts as alleged fit within any recognizable legal theory. That's CSC Holdings v. Samsung Electronics case, from the New York State Court of Appeals, 2021. The test is whether the proponent of the pleading has a cause of action, not whether he has stated one.

On Leon v. Martinez, Court of Appeals, 1994, starting with Section 230 of the Federal Communications Decency Act, the Court finds it does not immunize TikTok from liability, because the causes of action are not premised on third-party content and/or TikTok as a mere publisher of third-party content.

Under Section 230, "No provider or user of an interactive computer service shall be treated as a publisher, speaker of any information provided by another information content provider."

- J L M -

DECISION

The Court applies the three-point standard set forth in Barnes v. Yahoo to determine whether Section 230 immunity applies. Barnes determined that Section 230 only protects from liability when, one, a provider or user of an interactive computer system; two, from a plaintiff seeking to treat under, a state law cause of action, as a publisher or speaker; three, of information provided by another information content provider.

The Barnes court held that, quote, "What matters is whether the cause of action inherently requires the Court to treat the defendant as a publisher or speaker of content provided by another. To put it another way, Court's must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendants' status or conduct as a publisher or speaker," end quote.

In this respect the Barnes court determined that the CDA does not provide general immunity from liability deriving from third-party conduct. See also Lemmon v. Snap. That's the 9th Circuit case from 2021. Which held, quote, "CDA immunity is also unavailable in this case because the parents negligent design claim does not turn on information provided by another information content provider," end quote. See also Homeaway.com, Inc. versus the City of Santa Monica, also from the 9th Circuit of

2019, which held that "It is not enough that third-party content is involved." And Courts reject use of a but for test that would provide immunity under the CDA solely, because a cause of action would otherwise have accrued but for third-party content.

Interestingly and consistent with Mr. Wallace's remarks today during oral argument, New York Courts have recognized that Section 230 prohibits holding an interactive computer service provider liable for any action voluntarily taken in good faith to restrict access to or availability of material that provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable.

Accordingly, Courts have construed Section 230 as authorizing broad immunity. That is from the Word of God fellowship, Inc. versus Vimeo. That is a First Department case from 2022. Here, the allegations are unrelated to the third-party content on TikTok, but focus exclusively on the design feature of the application that leads to compulsive and excessive use. See DC v. Meta case, Westlaw 11921682, which held that third-party content was irrelevant to the claim.

Contrary to defendants' characterization, the activity at issue is not limited to determining what third-party content to publish. See the Reply at page

three.

Defendants rely on the Shiamili v. Real Estate group of New York case. This is the New York Court of Appeals in 2011. Where the Court determined that the defendants were not alleged to be authors of the defamatory content, but that they published, edited the content and therefore, Section 230 immunity applied. The Shiamili Court considered that defendants did not become content providers by virtue of moving comments, reposting third-party content or adding headlines and illustration, which the Court determined, quote, "Did not materially contribute to the defamatory nature of the third-party statements," end quote. That is simply not what is being alleged here.

Defendants' arguments are premised on the notion that they're being held liable for failing to block or remove content. I refer you to defendants' memorandum of law, page 10, or that the design features alleged are merely a form of publishing activity. That is not so. The plaintiff seeks to hold the defendants liable for their own actions and misrepresentations thereto.

The TikTok app features that are being challenged, as the Court has previously observed, agnostic to the content being published. As Judge Scott aptly held in a companion case brought in the Superior Court of

District of Colombia, state entities seek to hold, quote, "TikTok liable for this anticipation of dopamine," end quote. It is not the additional content, quote, "But to this expectation and anticipation which is specifically engineered by the algorithm as an ultimate goal of the engine," end quote. In Judge Scott's words, users are being harmed by the time spent, and not by what they are seeing.

The allegations asserted in connection with Counts One through Six do not constitute information provided by another information content provider, rather the allegations in paragraphs 298 to 323, for example, are specific to defendants' misrepresentations about its safety and appropriateness for young users. Its built-in design features to combat addictive behavior. That it was not targeting children under 13 years. And failure to disclose the adverse health consequences associated with the platform and its use. See the Demetriades v. Yelp case from California Court, 2014.

Accordingly, to the extent that the defendants rely on the two recent cases that we discussed today, the MP v. Meta case from the 4th Circuit, and the Doe v. Grindr case from the 9th Circuit, for the proposition that design features are a means of determining how to publish third-party content to each user, were free to --

- J L M -

defendants' opposition to page three, excuse me.

The Court finds that both cases are distinguished because the harms alleged in those complaints arose from third-party content. Whereas here, the harms alleged arise from the defendants' own conduct and perhaps their own formulated content. All of which is intended to maximize user engagement to reap greater advertising revenues.

Counts Seven, Eight and Nine likewise, are not shielded by Section 230, because the harms caused by the alleged design defects, based upon the design features we discussed and as alleged in paragraph 65 through 145 of the complaint, had nothing to do with third-party content that TikTok publishes. Courts have routinely held that Section 230 does not preclude liability arising from design features. I refer you to the Lemmon v. Snap case and the DC v. Meta case.

Accordingly, the Court finds that Section 230 does not bar plaintiff's claims.

I'm now going to turn to the issue of First Amendment. The Court finds that the First Amendment does not shield plaintiff's claims, because the defendants' actions as alleged in the complaint, do not constitute protected speech. The defendants' argument is premised on the Supreme Court decision in Moody versus NetChoice,

which held that, quote, "To the extent that social media platforms create expressive products, that receive the First Amendment protection. The First Amendment offers protection when an entity engaging in an expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. The editorial function itself is an aspect of speech. Or said just a bit differently, an entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity."

The case here is not limited to curing third-party content or the exercise of editor discretion, let alone to curtail speech. Rather, the complaint alleges TikTok's algorithms and design features automatically, and without expressive curation, create an addictive environment that entices users to stay on the app to the detriment of their own health.

The Court in Moody also expressly limited the reach of its holding to algorithms and other features that broadly prioritize or deprioritize content based on the provider's preferences. And it emphasized that it was not deciding whether the First Amendment applied to algorithms that display content based on the user's preferences. And that's, as we discussed from oral argument today, from Justice Barrett's concurrence.

- J L M -

DECISION

The Court finds that the complaint does not seek to hold defendants liable for portraying necessarily their own editorial choices, but rather, as plaintiff alleges, the editorial choices of the user, such that the user becomes trapped in an addictive echo chamber of self-fulfillment and positive reenforcement.

Defendants' argument that the algorithm is another form of curation or editing protected by Section 230 and the First Amendment, ignores the reality of the algorithm itself. Which as alleged, utilizes user's preferences and the virality of certain content to automatically recommend content. Absent discovery in this case, the Court could not determine at this stage whether the defendants themselves edit and/or curate the speech versus the algorithm and the users acting as the curators. As alleged, defendants' sole input is to create an algorithm that continuously curates videos for each user based on the user's own preferences. This explains the very notion behind the For You page, in that it is for you. See the complaint at paragraph 66 through 69.

Accordingly, the Court finds that the First Amendment does not bar plaintiff's claims.

I'm now going to turn to standing to assert the product liability claims. Under the doctrine of parens patriae, a state has standing to bring a cause of action

that otherwise properly can be brought only by private parties, if the state can articulate an interest apart from the interest of the particular private parties' express the quasi-sovereign interest and allege injury to a sufficiently substantial segment of the population. That's from the People versus Grasso, 836 NYS2d 40, First Department, 2007.

New York's profound interest in protecting possible future victims, as well as the specified complainant, was grounds for giving a parens patriae standing in the People by Vacco versus Mid Hudson Medical Group, that's from the Southern District of New York, 1995.

To assert parens patriae standing, the State or Commonwealth must articulate a quasi-sovereign interest distinct from the interest of the particular private parties, such as an interest in health and well-being, both physical and economic, of its residents in general. That's from Purdue Pharma versus Kentucky, 704 F.3d 208, 215, 2nd Circuit of 2013. Here the complaint sufficiently alleges a quasi-sovereign interest, in that the actions of TikTok threatened the health and welfare of the citizens of the State of New York, and particularly of young users.

The plaintiff sufficiently alleges that it seeks redress for injuries to current, former and future preteen

and teen users of TikTok, who are otherwise unable to obtain complete relief.

I refer you to the complaint paragraph seven, wherein plaintiffs allege there are over 9.2 million active TikTok platform users in New York. Over 1.6 million active users in New York under the age of 18.

Accordingly, the Court determines that plaintiff has standing to sue parens patriae. The Court further finds that TikTok is a product, as contemplated under New York law, for purposes of asserting a products liability claim. Under New York law, social media platforms have been held to be a product for purposes of products liability. Here, given the nature of the Attorney General's claims, i.e., that TikTok's design features harm users. TikTok is appropriate deed as a product, in that it designs, develops, markets, distributes its platform through employing certain design features. And the products liabilities claims are not premised on the third-party conduct -- content, excuse me. Other jurisdictions are in accord with this Court's determination.

I refer you to the case of New Hampshire v. Meta, pages 52 and 53 of that decision, which draws upon companion cases that determine that the platform, such as Lyft, Uber, Grindr and other social media platforms, are

products for purposes of sustaining products liability claims.

The New York cases cited by defendants do not support their contention that social media platforms do not constitute products, as the injuries sustained by the plaintiffs in those cases were unrelated to the specific alleged defects in the platform and web site.

I refer you to the Eberhart v. Amazon case from the Southern District in 2018, wherein the Court determined, the coffeemaker that caused the plaintiff Eberhart's injury was purchased on Amazon.com, where it was described as a CoffeeGet6 cup 27 ounce French Press Coffee Maker, with thick heat resistent glass. The Court found that Amazon offers evidence that the coffeemaker was offered for sale by a company operating under the same name, CoffeeGet.

Likewise, in Intellect Art Multimedia versus Milewski, which is from the New York County Supreme Court, 2009, the Court found that it was plaintiff -- sorry, defendant Milewski's purported posting that gave rise to plaintiff's injuries, not certain design choices, as is the case in the action before this Court.

I'm now going to turn to New York's Consumer Protection Laws. The Court finds that the plaintiff sufficiently alleges actionable misrepresentations under

GBL 349 and 350. New York's Consumer Protection Act was enacted to provide consumers with a means of redress for injuries caused by unlawfully deceptive acts and practices. This legislation, much like its Federal counterpart, the Federal Trade Commission Act is intentionally broad, applying to virtually all economic activity. The statute seeks to secure honest marketplace, where trust and not deception prevails. This from Goshen v. Mutual Life Insurance Company of New York, New York Court of Appeals, 2002.

Pursuant to GBL Section 349 and 350, and Executive Law 63 (12), plaintiffs must allege that defendants' conduct is consumer oriented, misleading in a material way under a reasonable consumer standard, and resulted in an actual injury.

Here, the complaint alleges specific misrepresentations that TikTok consistently told users that it was safe and appropriate for teens and preteens, and in various public forums, in addition to on applications itself. See paragraph 170 through 172 of the complaint. That built-in feature is combined to combat addictive use and other harms, including parental controls, community standards, and age verification were effective. That TikTok was not directed to children under 13 years old, and complied with Federal Privacy Law. And

by failing to disclose the adverse health consequences of the TikTok app and platform.

Contrary to defendants' characterization, these misrepresentations are alleged with specificity and alleged to satisfy a reasonable consumer standard. For example, in written testimony to Congress on March 23rd of 2023, CEO Shou Chew, who previously explained that he is responsible for all strategic decisions at TikTok stated, safety and wellness, in particular for teens, is a core priority for TikTok. See complaint at paragraph 172.

Another example, paragraph 178 of the complaint asserts that an ad that teen accounts automatically have a daily screen time limit of 60 minutes, does not convey that the time limit could be easily bypassed either temporarily or by inputting a passcode, or permanently by disabling the tool. See paragraph 179.

At paragraph 207, the complaint identifies statements about TikTok's refresh feature, which would lead to a completely new feed. But it does not disclose, but TikTok does not disclose that the algorithm, that refresh feature was temporary, before reverting the user back to their previous feed setting and preferences. See paragraph 208.

These specific misrepresentations, along with other examples included in the complaint, establish that

defendants and/or their representative, made this representation sufficient to survive the present motion to dismiss.

I'm now going to turn to the child protection claim and the COPPA preemption issue. The Children's Online Privacy Protection Act of 1998 is a Federal law intended to protect the privacy and personal identifying information of children age 13 and younger. It explicitly permits that, quote, "In any case in which the attorney general of a state has reason to believe that an interest of the residents of that state has been or is threatened or adversely affected by engagement of any person in a practice that violates any regulation of the Commission prescribed under Section 6502 (b) at the top of this title, the state, as parens patriae, may bring a civil action on behalf of the residents of the state in the district court of the United States of appropriate jurisdiction.

"The before filing an action under paragraph (1) of COPPA, however, with the attorney general, shall provide to the Commission written notice of that action and a copy of the complaint for that action."

The statute also includes a preemption clause that provides, "No State or local government may impose any liability inconsistent with the treatment of those

activities or actions under the section." That's at Section 6502 (d)

Plaintiff alleges consumer protection claims that TikTok did two things with respect to these child protection claims. First, that it misrepresented the platform's compliance with COPPA. And, two, that the platform was directed at children -- that it misrepresented that the platform was directed at children under 13 years of age. The plaintiff alleges that TikTok violates COPPA by collecting personal information for users 13 and younger, without first obtaining parental consent. Although the complaint does not assert any cause of action for violation of COPPA. That's at paragraphs 280 and 284.

With respect to the allegations that plaintiff -- that defendants target users 13 and under, plaintiff identifies various accounts and creators that are marketed towards children on the platform and contain child-oriented subject matter, such as My Little Pony, Pokemon, Preteens Tonight Show, LOLSurprise, Bluey and Kids Bop.

Defendants rebut that plaintiffs are trying to circumvent the notice requirements of COPPA, which plaintiffs do not plead that they satisfied by pleading via consumer protection claims.

- J L M -

DECISION

Both parties rely on the Jones v. Google case from the 9th Circuit. In which the 9th Circuit considered whether a group of plaintiffs, their children suing via guardians, could sue under state law claims, alleging that Google collected their personal information and behavior without consent. On appeal the Court addressed whether COPPA preempts state law claims based on underlying conduct that also violates COPPA's regulations. Although the children pled on the state law causes of action, the Court found that they also allege that Google's data collection activities violated COPPA and accordingly, the Court held that COPPA's preemption clause did not bar the state law causes of action that are parallel to or prescribe the same conduct forbidden by COPPA.

The defendants distinguish this case because it was brought on behalf of private plaintiffs and not subject to the procedural scheme under COPPA.

Here, the Court finds that plaintiff has sufficiently alleged that TikTok has made misrepresentations that they do not target children 13 years and younger. However, in order for plaintiff to sustain a claim that there is misrepresentation of COPPA, they necessarily have to show a violation of COPPA. They don't plead that they do so. Nor do they plead that they have complied with the procedural scheme under COPPA.

- J L M -

Accordingly, the Court will strike the portions of the complaint that assert misrepresentations for failure to comply with COPPA.

Now, with respect to the operational independence claims. The plaintiff alleges that TikTok made statements that are intended to and do create the impression that TikTok operates independently of Bytedance outside of China, and beyond the reach of the Chinese govenment. But TikTok is deliberately misleading consumers with this false impression. That's from the complaint, paragraph 289.

The plaintiff brings no standalone cause of action with respect to TikTok's relationship to ByteDance and/or its independence from Chinese control. Rather, plaintiff appears to allege liability under New York's Consumer Protection Law. See complaint at paragraph 297. At bottom, the plaintiff seeks to hold TikTok liable for making affirmative representations about the accessibility of user data by Chinese owned entities.

However, to state a claim under New York's deceptive trade practices and consumer protection statutes, a plaintiff must allege that it has engaged in consumer oriented conduct that is misleading, and that plaintiff suffered injury as a result of the alleged deceptive act or practice. See Cooper v. Anheuser-Busch

from the Southern District of New York, 2021.

Here, the complaint does not allege any actual injury suffered by plaintiff as a result of these misrepresentations associated with TikTok's operational independence. Accordingly, the Court strikes those portions of complaint that alleges misrepresentations thereto.

So with that, based upon the submissions in connection with this motion, and based upon oral argument, the Court denies defendants' motion to dismiss Counts One through Nine of the complaint. But as I indicated from the outset, will strike those paragraphs in the complaint with respect to misrepresentations of compliance with COPPA and operational independence.

In our short form order that we'll cut today or tomorrow, I will include the actual paragraphs we are striking so that it's clear on the record, okay?

So with that, let me ask Mr. Brody, when would you like to get your answer in?

MR. BRODY: I would ask for 30 days, Your Honor.

THE COURT: Mr. Wallace, is that reasonable?

MR. WALLACE: No objection from Attorney General.

THE COURT: Defendant shall have 30 days from today's date to file the answer.

- J L M -

Before we adjourn for the day, anything else we need to discuss?

MR. WALLACE: I don't think so. Nothing from plaintiff, Your Honor.

THE COURT: Everything on discovery is going?

MR. BRODY: It's going.

THE COURT: Okay, very good. Very good. Counsel, again, I want to thank you for your time today, your excellent preparation and argument. I think that both of you, both sides have memorized every paragraph in the complaint, which is apparent, so I thank you for that.

Last but not least, if you would obtain a copy of today's transcript, file it NYSCEF within 30 days. Thank you.

(Proceedings concluded)

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

Jack L. Morelli

JACK L. MORELLI, CM, CSR

- J L M -

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IN THE DISTRICT COURT OF OSAGE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.*, GENTNER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA,	)	
Plaintiff,	)	NOV 20 2024
vs.	)	**Case No. CJ-2023-180**
META PLATFORMS, INC. f/k/a FACEBOOK, INC., and INSTAGRAM, LLC,	)	**Judge Stuart Tate**
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS

The State filed its Petition on October 24, 2023 ("Petition" or "Pet."), alleging that Defendants Meta Platforms, Inc. f/k/a Facebook, Inc., and Instagram, LLC ("Meta") intentionally designed their Facebook and Instagram Platforms ("Platforms") to be addictive to adolescent users. The State alleges that the design itself, as well as Meta's various misrepresentations and omissions regarding the Platforms, amounted to unfair and deceptive trade practices prohibited by the Oklahoma Consumer Protection Act ("OCPA"), 15 O.S. §§ 751-763. Meta filed a motion to dismiss on January 25, 2024 ("Motion") raising four issues for determination by the Court: (1) whether Oklahoma has specific personal jurisdiction over Meta; (2) whether the State's claims are barred by Section 230 of the Communications Decency Act; (3) whether the State's claims are barred by the First Amendment of the United States Constitution; and (4) whether the State pled facts sufficient to set out cognizable claims for relief under the OCPA. The purpose of a Motion to Dismiss "is to test the law that governs the claim, not the underlying facts." *Fox v. Mize*, 2018 OK 75. "The court examines only the controlling law, not the facts." *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. "At the motion to dismiss stage, a court must "take all factual allegations in the petition as true

and draw all reasonable inferences therefrom." *Cates v. Integris Health Inc.*, 2018 OK 9. Motions to Dismiss are generally viewed with disfavor. *Lockhart v. Loosen*, 1997 OK 103. A Plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which it may be entitled. *Darrow v. Integris Health, Inc.*, 2008 OK 1. "If relief is possible under any set of facts that can be gleaned from the petition, the motion to dismiss should be denied." *Id.*, ¶ 7, 412 P.3d at 101. *Fox v. Mize*, 2018 OK 75. Unless the Court finds Oklahoma can prove no set of facts which warrant relief without doubt the Motion to Dismiss may not be sustained. *Nicholson v. Stitt*, 2022 OK 35. Relief is appropriate only when no cognizable legal theory will support the claims or that there are insufficient alleged facts to support any cognizable legal theory. *Id.* A petition may be dismissed for two reasons as a matter of law. First, when there is a lack of any cognizable theory, and second, when there are insufficient facts under a cognizable theory. See *Ridings v. Maze*, 2018 OK 18, and *Wilson v. State ex rel. State Election Board*, 2012 OK 2. It is proper to challenge the sufficiency of the petition asserting failure to give fair notice of the factual basis for jurisdiction. When challenging jurisdiction in a motion to dismiss, the plaintiff need only make a prima facia showing of personal jurisdiction. *Powers v. District Court of Tulsa County*, 2009 OK 91.

Having considered the parties' written submissions and oral argument, the Court finds as follows:

I. Oklahoma Has Specific Personal Jurisdiction Over Meta.

General jurisdiction is not at issue in this case. Oklahoma is not the state of incorporation or principal place of business of Meta. See *Daimler AG v. Bauman*, 571 US 117 (2014). The U.S. Supreme Court decided the case of *International Shoe Co. v. Washington*, 66 S. Ct. 154 in 1945. This decision significantly shaped the concept of personal jurisdiction in the United States. Prior to *International Shoe*, courts primarily relied on a strict territorial approach, requiring physical presence within the state for jurisdiction to apply. However, *International Shoe* introduced a new standard based on "minimum

contacts." The central idea behind *International Shoe* is that a court can assert personal jurisdiction over an out-of-state defendant if that defendant has sufficient minimum contacts with the forum state. These contacts must be such that it is fair and reasonable to subject the defendant to the state's jurisdiction. The Court emphasized that due process considerations under the Fourteenth Amendment require a connection between the defendant and the forum state. Thus began the idea of hailing litigants into a jurisdiction – not their home state – to answer claims. Post *International Shoe*, Courts could exercise specific jurisdiction over a defendant when the lawsuit arises from the defendant's contacts with the forum state. The evolution of the limits of jurisdiction since 1945 reveal whether jurisdiction over Meta is appropriate in this case. In response to *International Shoe*, states enacted "long-arm statutes." These statutes extend the personal jurisdiction of state courts over non-residents who engage in certain activities within or related to the state, even if they lack physical presence there. Jurisdiction is proper in Oklahoma on any basis consistent with the Constitution of this state and the Constitution of the United States. 12 O.S. §2004(F). Oklahoma courts may exercise specific personal jurisdiction over a non-resident defendant so long as: (1) the defendant "purposefully directed its activities at the residents of the forum"; (2) the claims asserted "arise out of or relate to" those activities; and (3) the exercise of personal jurisdiction would not "offend traditional notions of substantial justice and fair play." *Montgomery v. Airbus Helicopters, Inc.*, 2018 OK 17, ¶ 16, 414 P.3d 824, 829; *see also Galier v. Murco Wall Prod., Inc.*, 2022 OK 85, 528 P.3d 293, *cert. denied*, 143 S. Ct. 1086 (2023). The burden of proof rests on the State as plaintiff, but the State need only make a prima facie showing. *Id.*

A. Meta Purposefully Directed Its Activities at Oklahoma Residents.

Meta argues that it does not purposefully direct its activities to Oklahoma residents, but rather it merely offers Oklahomans access to its Platforms, as it does for users in any state. The State alleges Meta had extensive and purposeful contacts with Oklahoma residents. For instance, the State alleges

that Meta: (1) enters into Terms of Service contracts with millions of Oklahomans to use its Platforms[1]; (2) collects the personal data of Oklahoma users and uses that information to sell targeted advertising to those Oklahomans[2]; (3) registered to do business in Oklahoma and interacts with Oklahoma political subdivisions, school districts, and health and fire departments to expand its reach into Oklahoma; (4) recruited and employs Oklahomans to work in the functional areas of Meta that are directly implicated in the State's allegations; and (5) solicited and paid Oklahoma users to create content on its Platforms to increase user engagement, maximize the amount of personal data Meta collects, and maximize Meta's ability to monetize that data by selling targeted advertisements. The State further alleges that Meta's sales of targeted advertisements using Oklahomans' personal data has exceeded $560,000,000, with more than $28,000,000 of those ad sales targeting minors.

The Court finds the State's allegations are sufficient to show that Meta "purposefully directed its activities" to Oklahoma residents. Meta's "contacts with Oklahoma were not random, isolated, or fortuitous[,]" but rather Meta "chose to reach out...and deliberately exploit the market in Oklahoma[.]" *Galier*, 2022 OK 85,¶ 18, 528 P.3d at 299.

B. The State's Claims Arise Out of or Relate to Meta's Contacts with Oklahoma.

Meta argues that the State's claims are unrelated to Meta's contracting with, advertising to, and collecting data from Oklahoma residents. The Court finds this argument unpersuasive. As alleged by the State, Meta's business model is driven by offering highly targeted, data-driven advertising using massive databases of information collected from consumers, including Oklahomans, who use its Platforms[3]. Pet., ¶¶ 67-70. The State further alleges that Meta seeks to capture and retain the attention

[1] It is estimated in 2020 Meta had reached 80% of Oklahomans under 35 years old. From 2019 to 2021 Meta showed a growth from 800,000 daily active users to more than 1,200,000 active users.

[2] Meta collected data for Instagram usage by Oklahoma users including the amount of time daily active teens spent on Instagram per day, teen "penetration" data, the ratio of teens who were active daily versus monthly, story participation rates, amount of "feed media" consumed per day by daily active teen users, "stories" active teen daily users consumed every day, market saturation reports for users under 35, percentage of Facebook Android monthly active users who are also on Instagram, and the reduction in monthly active users over a two month period.

[3] Oklahoma alleges the customized user experience is specific enough to target Osage County citizens with Osage County Tourism Department and Fairfax Community Foundation advertisements.

of adolescent users in particular, including those in Oklahoma, because that demographic is its most profitable. *Id.*, ¶¶ 75-87. Meta has allegedly (1) made this a priority despite knowing of the myriad harms that compulsive use can cause, (2) misled the public about the safety of its Platforms, and (3) concealed information about their harmful effects.

In short, the State alleges that Meta targeted adolescent Oklahomans who used its Platforms for those users' advertising value and did so in ways that violated the OCPA. It remains to be seen if the State can prove its allegations, but it has sufficiently pled that its claims arise out of Meta's contacts with Oklahoma residents. *See, e.g., Galier*, 2022 OK 85,¶ 24, 528 P.3d at 300 (quoting *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1027 (2021)).

C. The Court's Exercise of Personal Jurisdiction Over Meta Does Not Offend Traditional Notions of Substantial Justice and Fair Play.

Finally, the Court finds that exercising specific personal jurisdiction over Meta is fair and reasonable under the circumstances of this case. Meta has entered into contracts with millions of Oklahomans to use its Platforms in exchange for their personal data. As a result, Meta earned more than half a billion dollars from targeted ad sales. Meta has recruited and employed Oklahomans, some of whom may have personal knowledge of the facts underlying the claims and defenses in this litigation. Based on its significant contacts with Oklahoma, Meta could reasonably anticipate being haled into court in Oklahoma and any burden associated with defending itself in Oklahoma court would be minimal. *See Galier*, 2022 OK 85,¶ 27, 528 P.3d at 301.

As a result of the foregoing, the Motion is denied as it pertains to personal jurisdiction.

II. The State's Claims Are Not Precluded by 47 U.S.C. § 230.

Meta argues that it is entitled to immunity pursuant to Section 230 of the federal Communications Decency Act ("Section 230"), which provides in pertinent part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). For Meta to

benefit from Section 230 immunity against the State's claims, it must meet three elements. "First, immunity is available only to a provider or user of an interactive computer service. Second, the liability must be based on the defendant's having acted as a publisher or speaker. Third, immunity can be claimed only with respect to information provided by another information content provider." *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009) (internal citations omitted).

Meta has provided the Court with several cases that find immunity under Section 230. Those cases are distinguishable and relate clearly to third-party content. Oklahoma is not attempting to hold Meta responsible for any third-party content in this suit. Therefore, the second element is dispositive here. The State has made clear that it is not seeking to treat Meta as "publisher or speaker" of information. Instead, it is seeking to hold Meta accountable for unlawfully designing its Platforms in a manner Meta knew to be harmful—for example, to induce compulsive use among adolescents in particular—and then presenting its Platforms as safe for adolescent use[4]. As the Arkansas Circuit Court correctly held in denying a similar motion to dismiss by Meta: "If that is ultimately proven to be true, the nature of the content shared on the platforms is irrelevant. This case is properly understood as a dispute over whether the design features of Meta's platforms harm adolescents."[5] While not dispositive, it is worth noting that other state courts faced with this same argument in cases brought by state Attorneys General have, without exception, reached the same conclusion, as reflected in the record before the Court. Meta misunderstands the fundamental difference between functioning as a conduit serving the digital social ether and the hugely influential and impactful digital platforms over which Meta has deliberate and exclusive design control, the design of which is at issue here. Accordingly, the Court finds that Meta has failed to establish the second element of immunity under 47 U.S.C. § 230 as a matter of law, and the Motion is therefore denied.

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[4] Oklahoma alleges numerous internal communications acknowledging the platform designs themselves were harmful and efforts to address the design elements by individuals or groups of individuals within Meta were discounted, dismissed, or stopped.

[5] "Ruling on Defendants' Motion to Dismiss First Amended Complaint," *Arkansas v. Meta Platforms, Inc. et al.*, Circuit Court of Polk County, Arkansas Case No. 57CV-23-47 ("Arkansas Ruling").

III. The State's Claims Are Not Precluded by the First Amendment.

Meta suggests that the State's claims are barred by the First Amendment. But the First Amendment does not shield a company from liability related to making intentional misrepresentations. *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) ("Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."). Further, the State's claims related to design of the Platforms involve Meta's conduct, not speech. As its claims are pled, the State seeks hold Meta liable for its design of the Platforms, regardless of the content served to their users, and for its alleged misrepresentations and omissions about that design. As with Meta's Section 230 argument discussed above, state courts have been unanimous in rejecting this argument as well, as reflected in the record before the Court.

The U.S. Supreme Court's decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 219 L. Ed. 2d 1075 (2024), does not change the analysis. *Moody* involved Florida and Texas laws restricting social media companies' ability to censor or otherwise disfavor posts on their platforms. Here, the State is not seeking to put any restrictions on content delivered on the Platforms. And in any event, the Supreme Court in *Moody* vacated "both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge." *Id.* at 2394. The Supreme Court also made clear that: "We... do not deal here with feeds whose algorithms respond solely to how users act online giving them the content they appear to want, without any regard to independent content standards." *Id.* at 2404 n. 5. Here, the State's claims relate to Meta's algorithms and various design elements built to induce compulsive use by young users. Therefore, by the Supreme Court's own words, *Moody* is inapplicable.

Accordingly, Meta has failed to establish that the State's claims are barred by the First Amendment as a matter of law, and the Motion is denied.

IV. The State Has Sufficiently Pled Facts Supporting Its Claims Under the OCPA.

Meta moves to dismiss the State's claims on five grounds specific to the OCPA. Meta argues that (1) it simply publishes third-party content and is therefore not subject to the OCPA under 15 O.S. § 754, (2) its conduct did not occur "primarily and substantially" in Oklahoma, (3) the use of Meta's Platforms does not involve a "consumer transaction," (4) the State's claims were brought outside the applicable statute of limitations, and (5) the State failed to allege deceptive conduct on Meta's part.

With the understanding that "the OCPA is remedial in nature" and therefore "is to be liberally construed to effectuate its underlying purpose," *Patterson v. Beall*, 2000 OK 92, ¶ 28, 19 P.3d 839, 846, the Court finds Meta's arguments unpersuasive at this stage.

A. The OCPA Exemption for Publishers Does Not Apply to Meta's Conduct.

By its terms, the OCPA does not apply to publishers or others whose otherwise unlawful conduct "involves information that has been disseminated or reproduced on behalf of others without knowledge that it is an unlawful practice[.]" 15 O.S. § 754. Meta argues that the State is attempting to hold it liable for disseminating third-party content, which is specifically excluded from the OCPA. But this argument mischaracterizes the State's claims. Oklahoma's claims are content indifferent and focused on the design of Meta's platforms. The State alleges that Meta designed its own Platforms to be addictive and that it deceptively promoted them as safe for adolescents despite internal research showing otherwise. *E.g.*, Pet., ¶¶ 197, 214, 230. The claims as alleged by the State focus on Meta's own wrongful conduct rather than any unlawful practices by users of its Platforms.

B. Meta's Conduct Occurred Primarily and Substantially in Oklahoma.

The OCPA applies to unlawful practices that occur in Oklahoma. However, if the location of the unlawful practice is difficult to pinpoint or occurs in multiple states, then it must occur "primarily and substantially" in Oklahoma to be actionable under the OCPA. *See Cont'l Res., Inc. v. Wolla Oilfield*

Servs., LLC, 2022 OK 40, 510 P.3d 175. It is unclear from the record where the actual design of the Platforms took place, to the extent that can be ascertained at all. What is clear is the State alleges that Meta sought young Oklahomans to become Platform users, that those users were affected by Meta's design choices, and that Meta made misrepresentations and omissions about the safety of its Platform design. At the pleading stage, the State has sufficiently alleged that this conduct, as it relates to Meta's consumer transactions with young Oklahomans, took place primarily and substantially in Oklahoma.

C. Use of Meta's Platforms Involves a Consumer Transaction Under the OCPA.

The OCPA is intended to proscribe unlawful conduct in the context of a "consumer transaction," defined broadly as the "advertising, offering for sale or purchase, sale, purchase, or distribution of any services or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever located, for purposes that are personal, household, or business oriented." 15 O.S. § 752(2). Meta argues that the use of its Platforms does not involve a consumer transaction because its Platforms are used free of charge. However, while users do not pay money to Meta, they must allow Meta to collect vast amounts of personal data in exchange for using the Platforms. Pet., ¶¶ 55-64. While a typical consumer transaction likely involves the payment of money, there is no such requirement in the OCPA. Accordingly, this bargained-for exchange to use Meta's Platforms satisfies the broad definition of "consumer transaction." *Accord State of Indiana v. TikTok Inc., et al.*, __ N.E.3d __, 2024 WL 4340387, *8-9, Case Nos. 23A-PL-3110 & 3111 (Ct. App. Ind. Sept. 30, 2024).

D. The State's Claims Are Not Barred by a Statute of Limitations.

Meta argues that the State's claims are barred by a one-year statute of limitations found in 12 O.S. § 95(A)(4). The Court disagrees.

1. ***A General Statute of Limitations Does Not Apply Against the State Acting in Its Sovereign Capacity to Enforce a Public Right.***

Oklahoma law has long recognized that general statutes of limitations do not apply to actions brought by the State in its sovereign capacity to vindicate public rights. *See, e.g., State ex rel. Cartwright v. Tidmore*, 1983 OK 116, 674 P.2d 14. There is no dispute that the State brings these claims in its sovereign capacity. Meta argues only that the State's claims affect a class of individuals—users of Meta's Platforms—rather than the public generally. The State counters that it enforces the OCPA to protect all Oklahoma citizens from being targeted by unfair and deceptive trade practices, a clear public right.

The Court is persuaded that through these claims the State seeks to vindicate a public right. The Attorney General has exclusive authority to enforce the OCPA as *parens patriae* to protect the integrity of the marketplace in Oklahoma. *See State, ex rel., Edmondson v. BP America Inc., et al.*, CIV-09-0945, 2009 WL 10695372, at *2 (W.D. Okla. Oct. 29, 2009) ("Specifically, the Court finds that the [OCPA] provides enforcement mechanisms, not available to any particular citizen of Oklahoma, which allows the State to vindicate public rights in its quasi[-]sovereign capacity."). The fact that certain citizens might benefit more than others from the State's claims does not transform this public right into something less. *See State v. LG Electronics, Inc.*, 375 P.3d 636, 642-43 (Wash. 2016) (en banc) (rejecting limitations periods on state actions "merely because private individuals would benefit").

2. *Even if a Statute of Limitations Applies, the State's Claims Are Timely.*

In addition, the Court finds that the State's claims are timely even if a limitations period applies. First, the State sufficiently alleges that Meta's unlawful conduct is ongoing to this day. Pet., ¶¶ 28, 270, 346. Second, the State and Meta agree that they entered a tolling agreement going back to December 20, 2020. The Petition includes multiple allegations of unlawful conduct that occurred after this date. *E.g., id.*, ¶¶ 267, 282, 286, 290, 298, 325, 326, 335.

D. The State Has Alleged Actionable Deceptive Conduct Under the OCPA.

Under the OCPA, an unlawful deceptive trade practice is "a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person." 15 O.S. § 752(13). Meta contends that its alleged misrepresentations regarding the safety and design of its Platforms do not rise to this level, but instead are mere opinions or "puffery". In response, the State points to specific representations—and material omissions—as alleged in the Petition. For instance, the State alleges, *inter alia*, that Meta falsely claims that it does not build its products to be addictive (Pet. ¶ 375), that it does not direct people toward content that promotes eating disorders (Pet. ¶ 328), and that it does not allow its teams to set goals around increasing time spent on the Platforms (Pet. ¶¶ 339–340).

Motions to dismiss for failure to state a claim are "generally disfavored and granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory." *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. At this point in the proceedings, the Court must take as true all of the State's allegations along with all reasonable inferences that can be drawn therefrom. *Id.* With this in mind, as well as the requirement that the OCPA be "liberally construed," *see Patterson v. Beall*, 2000 OK 92, ¶ 28, 19 P.3d at 846, the Court concludes that the State's allegations have sufficiently met the standard required to plead a deception claim under the OCPA.

For the foregoing reasons, Meta's Motion is DENIED.

Dated: November 19, 2024

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of November, 2024 I mailed by first class mail postage prepaid a copy of the foregoing instrument to:

Megan Rodgers
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112

Mark W. Mosier
COVINGTON & BURLING LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001-4956

Robert G. McCampbell
Nicholas ("Nick") V. Merkley
GABLEGOTWALS
BOK Park Plaza
499 West Sheridan Avenue, Suite 2200
Oklahoma City, OK 73102

Robert J. Carlson
Caleb J. Smith
Oklahoma Office of the Attorney General
15 West 6th Street, Suite 1000
Tulsa, OK 74119

Ethan A. Shaner
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 N.E. 21st Street
Oklahoma City, OK 73105

Brenda Mullin
Bailiff

Multnomah County Circuit Court
Original Sent to File Room

FILED
JUL 22 2025
CIRCUIT COURT
MULTNOMAH COUNTY, OREGON

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

STATE OF OREGON, ex rel. ELLEN F. ROSENBLUM, Attorney General for the State of Oregon, Plaintiff, v. TIKTOK INC., a California corporation; TIKTOK U.S. DATA SECURITY INC., a Delaware corporation; TIKTOK LLC, a Delaware limited liability company; and BYTEDANCE INC., a Delaware corporation, Defendants.	No. 24CV-48473 **OPINION and ORDER on DEFENDANTS TIKTOK INC., TIKTOK U.S. DATA SECURITY INC., TIKTOK LLC, and BYTEDANCE INC.'S MOTION TO DISMISS**

INTRODUCTION

The State of Oregon brings this action under the Oregon Unlawful Trade Practices Act against Defendants TikTok Inc., TikTok U.S. Data Security Inc., TikTok LLC, and ByteDance Inc. (collectively, "TikTok"). TikTok moves to dismiss the complaint for lack of personal jurisdiction, because the alleged misconduct constitutes expressive activity protected under federal law and the First Amendment, and for failure to state a claim under the Oregon Unlawful Trade Practices Act.

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ORDER

For the reasons discussed herein, Defendants' Motion to Dismiss is DENIED in part, and GRANTED in part.

Defendants' Motion to Dismiss for lack of personal jurisdiction is DENIED. The Attorney General has established minimum contacts with the forum that are adequately "related to" each claim to support this court's exercise of personal jurisdiction over TikTok.

Section 230 of the Communications and Decency Act (§ 230) bars the entirety of the Attorney General's first claim because it targets acts of publication that have been immunized from liability by an act of Congress. Regarding the Attorney General's second claim, § 230 bars any misrepresentation claim based upon TikTok's purported failure to properly moderate content, make false claims regarding platform safety, or fail to adhere to its "community guidelines." However, where the complaint alleges misrepresentations about safety products or features, those claims may proceed. Regarding the Attorney General's third claim, § 230 bars any omission allegations concerning purported failures to disclose harmful information about children's use of the product, generalized dangers to children from using the product, or its compliance with its internal community guidelines. However, § 230 does not bar the Attorney General from reasserting claims that TikTok failed to disclose information about the effectiveness of safety tools it publicly promoted.

The First Amendment also bars the entirety of the Attorney General's first claim because it seeks to impose liability on the platform's publishing and editing functions, which are protected as expressive conduct. However, the First Amendment does not bar the Attorney General's second claim given that Oregon courts have already concluded that the Oregon Unlawful Trade Practices Act (UTPA) prohibition on misrepresentations in consumer

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products is consistent with the First Amendment. The court also holds that the First Amendment bars liability for TikTok's general failure to affirmatively disclose purported dangers or defects. Yet, insofar as the Attorney General is alleging misrepresentation by omission regarding specific safety features, those allegations survive First Amendment scrutiny.

Finally, the court concludes that the Attorney General has sufficiently pleaded facially valid UTPA claims.

FACTS[1]

The Attorney General's allegations against TikTok broadly fall into three categories: unconscionable conduct, misrepresentations, and omissions. The misrepresentations and omissions primarily relate to the platform's effect on children, and whether TikTok took sufficient steps to address those harms.

Regarding unconscionable conduct, the Attorney General alleges TikTok's platform uses various practices to form addictive habits in young users. Some of those practices include a content recommendation system and an "infinite scroll" function intended to give users a continuous flow of content based on their prior interactions. Compl. ¶¶ 63, 64, 71. This endless feed immerses users, making it harder for them to manage their time on the app. *Id.* ¶ 72. The platform also utilizes intermittent variable rewards ("IVRs") — "likes," "follows," and "comments" (*Id.* ¶¶ 54, 55); "stories"—videos only available for 24 hours; "LIVE"—live

[1] The court's recitation of facts is taken from the complaint (Compl.), Defendants' Motion to Dismiss (Defendants' Motion), Attorney General's Response to Defendants' Motion to Dismiss (Attorney General's Response), and Defendants' Reply Brief in Support of Motion to Dismiss (Defendants' Reply). Of course, where contested between the parties, only facts in the complaint are assumed true, and the Attorney General is entitled to the benefit of all inferences that can reasonably be drawn from those facts. The court does not adopt any facts articulated in this opinion as true for any other purpose.

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streams only available while happening; and "push notifications"—messages sent to users outside the app to prompt engagement. *Id.* ¶¶ 72-79.

The Attorney General couples these allegations with claims that TikTok is aware of the damage caused to young people by excessive social media usage, including interference with productivity, loss of analytical ability, and increased anxiety. Despite this knowledge, TikTok repeatedly rejected internal safety recommendations. *Id.* ¶¶ 115, 119. For instance, in 2022, TikTok employees designed a "non-personalized feed" to address user safety and compulsive usage. The feature was ultimately abandoned due to its potential negative business impacts. *Id.* ¶ 120. According to the Attorney General, even when TikTok did take steps to increase user safety, those steps were consistently balanced against the company's usage metrics. For example, a September 2021 document limited the impact of any safety features to a "maximum 5% drop-in stay time." *Id.* ¶ 161.

Regarding the misrepresentation allegations, the Attorney General contends TikTok misrepresents both the platform's risks to young users and its efforts to mitigate them. For example, CEO Shou Chew testified before Congress in 2023 that "Safety and wellness-in particular for teens-is a core priority for TikTok." *Id.* ¶ 139. Discussing content moderation, CEO Chew testified that "anything that is violative and harmful we remove." Consistent with those assurances, TikTok has repeatedly professed that its "community guidelines" are utilized to ensure that content containing seductive performances by minors, drugs, gore, and physically dangerous behavior is removed or not allowed. *Id.* ¶ 139. However, despite these assurances, such content is frequently marked "not recommended" rather than removed and remains on the platform. *Id.* ¶ 213.

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The Attorney General has also taken issue with TikTok's platform description on Apple's App Store and Google Play. TikTok represented itself as having "Infrequent/Mild" instances of sexual content and nudity, alcohol, tobacco, or drug use/references. *Id.* ¶ 241. These representations earned the platform a "12+" age rating on the App Store and a "Teen" rating on Google Play. The Attorney General alleges that these representations are inconsistent with the findings of a study by *The Wall Street Journal,* where nearly three dozen automated accounts registered to user aged 13 to 15 were shown pornography, sex shop ads, and videos regarding drug and alcohol use. *Id.* ¶¶ 240-251.

Regarding the omission allegations, the Attorney General claims TikTok withholds information from users and parents by omitting key details about the efficacy of its safety tools. As one such example, CEO Chew spoke in April 2023 at a TED Talk about how users on the platform for too long are sent videos encouraging them to log off. While holding out these safeguards in public, leadership behind the scenes viewed the function as merely a "good talking point" and "not altogether effective." *Id.* ¶¶ 145, 146. The Attorney General also alleges TikTok omits important information regarding its content moderation. For example, TikTok does not disclose to users that its content moderation policies are generally only applied to videos and that moderators only review 0.25% of user comments. *Id.* ¶ 227. Also, to promote the adequacy of its moderation, TikTok publishes its "proactive removal" rate, which measures the rate at which content is removed once identified, but not how much harmful content is detected overall. Internally, these metrics are considered "largely misleading" as they do not account for missed content. *Id.* ¶ 228. Similarly, TikTok advertises a 60-minute daily screen limit on teen accounts. However, TikTok fails to mention that this limit does not function as a hard cap, but rather as a

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stop sign, with teens able to resume using the app after entering a passcode. The limit can also be disabled entirely. *Id.* ¶¶ 150-153.

Finally, the Attorney General focuses upon TikTok's various editing features, arguing that programs such as "Retouch" pose various dangers for which the company fails to provide adequate warnings to users or their parents. *Id.* ¶ 172. Employees have suggested implementing various safeguards, including banners signifying modified videos or providing educational information about image disorders, but these suggestions have not been implemented. *Id.* ¶ 171.

OPINION

TikTok urges this court to dismiss the complaint on four grounds. First, TikTok argues this court lacks personal jurisdiction over TikTok. Second, TikTok argues § 230 immunizes online platforms, including itself, from liability for the publication of third-party content. Third, TikTok argues its publication activities are entitled to First Amendment protection. Fourth, TikTok argues the Attorney General has failed to state valid claims under the UTPA.

I. Personal Jurisdiction

When a defendant moves to dismiss for lack of personal jurisdiction, a plaintiff bears the burden to allege and prove facts sufficient to establish jurisdiction over a particular defendant. *Cox v. HP*, 368 Or. 477, 501 (2021) (*Cox I*). When evaluating personal jurisdiction, a court must "assume the truth of all well-pleaded allegations in the record" and "construe[s] pleadings and affidavits liberally to support jurisdiction." *Munson v. Valley Energy Inv. Fund, U.S., LP*, 264 Or. App. 679, 700 (2014) (quotations omitted). Circumstantial evidence and reasonable inferences must be construed in plaintiffs' favor. *State v. Fancher*, 27 Or. App. 91 (1976). Plaintiffs, however, cannot rest on conclusory allegations. *Sutherland v. Brennan*, 131 Or. App. 25, 30 (1994). The test is not mechanical but instead calls for a "highly realistic"

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approach that recognizes that specific jurisdiction "can be established in a wide variety of circumstances." *M.C. v. Quest Glob., Inc.,* 328 Or. App. 378, 83 (2023). If the motion is based upon matters outside the pleadings, "all parties will be given a reasonable opportunity to present affidavits, declarations, and other evidence, and the court may determine the existence or nonexistence of the facts supporting the asserted defenses or may defer any determination until further discovery or until trial on the merits." ORCP 21A(2)(b). Importantly, personal jurisdiction is claim-specific, meaning the Attorney General must establish each claim independently.[2]

In Oregon, personal jurisdiction over nonresidents is governed by ORCP 4. ORCP 4D confers personal jurisdiction when an in-state injury arises from an out-of-state act or omission. ORCP 4L, known as the catch-all provision, covers any circumstances not specified in the specific provisions of ORCP 4B through K and for which it is permissible to exercise jurisdiction over a nonresident. "Oregon courts may only extend personal jurisdiction to the extent it is compatible with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Cox I,* 368 Or. at 480–81. Because Oregon's long-arm statute "confers jurisdiction to the extent permitted by due process," the analyses under the long-arm statute and federal Due Process Clause "collapse into one." *Id.*

The United States Supreme Court has articulated two independent tests for personal jurisdiction that satisfy due process: (1) the "traditional test," also known as the "minimum

[2] While the Ninth Circuit has yet to answer whether personal jurisdiction is claim-specific, a review of relevant authorities instructs that it is. For example, in *Evergreen Int'l Airlines, Inc. v. Anchorage Advisors, LLC*, 2012 U.S. Dist. LEXIS 118737, *26 (2012), the Honorable Paul Papak found that it was based on his evaluation of sister circuits. In *Fiore v. Walden*, 688 F.3d 558, 593 (9th Cir. 2012), Judge Ikuta, writing for the dissent, noted that "[w]e analyze personal jurisdiction on a claim-by-claim basis." Consequently, this court will undertake an independent evaluation of each of the Attorney General's three claims for personal jurisdiction.

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contacts" or "purposeful availment test," *see Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985), and (2) the "effects test," *see Calder v. Jones,* 465 U.S. 783 (1984).[3] Under the traditional test, a plaintiff must show that the defendant has "minimum contacts" with the forum such that it "purposefully avail[ed] itself of the privilege of conducting activities within the forum" and "invoke[ed] the benefits and protections of [the forum's] laws." *Toys "R" Us, Inc. v. Step Two, S.A.,* 318 F.3d 446, 451 (3rd Cir. 2003). Second, a plaintiff's claims must "arise out of or relate to" at least some of those contacts, evidencing "a strong relationship among the defendant, the forum, and the litigation," *Hepp v. Facebook,* 14 F.4th 204, 208 (3d Cir. 2021). Oregon courts have similarly articulated the test as: (1) a defendant has "minimum contacts" with Oregon; (2) the litigation "arises out of or relates to" the minimum contacts; and (3) the exercise of jurisdiction comports with "fair play and substantial justice."[4] *M. C.,* 328 Or. App. at 382-83.

To establish "minimum contacts," an Oregon plaintiff must establish: (1) "the defendant must have purposefully directed its activities at this state," and (2) "the litigation must arise out of or relate to at least one of those activities." *Robinson v. Harley Davidson Motor Co.,*

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[3] To establish personal jurisdiction under the *Calder* "effects" test, the Attorney General would have to allege and establish that TikTok's tortious conduct was "focused" on Oregon. *Keeton v. Hustler Mag., Inc.,* 465 U.S. 770, 780 (1984). Unlike the traditional test, the *Calder* "effects" test requires a plaintiff to plead facts establishing that: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum; and (3) the defendant expressly aimed his tortious conduct at the forum. *See Calder,* 465 U.S. at 788-89. While the *Calder* effects test and the purposeful availment tests are generally analytically distinct, the Ninth Circuit has occasionally blurred the line. *See Briskin v. Shopify, Inc.,* 2025 U.S. App. LEXIS 9410, *22 (9th Cir. 2025) ("[O]ur cases do not impose a rigid dividing line between "purposeful direction and purposeful availment, and the first prong of the personal jurisdiction test 'may be satisfied by purposeful availment, by purposeful direction, or by some combination thereof.").

[4] Regarding the third prong, TikTok bears the burden to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *M. C.* 328 Or. App. at 385. The fair play and substantial justice inquiry is fact-specific and requires balancing several articulated factors. Neither of TikTok's pleadings sought to address this prong. The court holds that TikTok has failed to establish that exercising personal jurisdiction over it would not comport with fair play and substantial justice.

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354 Or. 572, 594 (2013) (en banc), *abrogated on other grounds by Cox I.* Minimum contacts exist "when the defendant has purposefully availed itself of the privilege of conducting activities in Oregon or purposefully directed its activities at residents of Oregon." *M. C.*, 328 Or. App. at 383. The purpose of the "minimum contacts" requirement is to prevent "foreign defendants from being hailed into local courts because of 'random, fortuitous, or attenuated contacts' with the forum state or the 'unilateral activity' of a plaintiff." *Id.* In *State ex rel Michelin v. Wells,* 294 Or. 296, 302 (1982), the Oregon Supreme Court held that the term "minimum" means "at least one contact with the forum state which is substantively relevant to the cause of action."

Along with "minimum contacts," a plaintiff seeking to establish personal jurisdiction in Oregon must also show that the instant litigation is "related to" the minimum contacts. *See Robinson,* 354 Or. at 594. The "related to" requirement can be met in two ways: (1) if there is a "but-for" causal link between the defendant's actions and the plaintiff's claims, and litigation was "reasonabl[y] foreseeab[le]" under the circumstances, or (2) if there is a close enough "relationship among the defendant, the forum[], and the litigation," such as when a defendant "systematically served" a market. *Cox I,* 368 Or at 493 &" 503. For this prong, the Attorney General must establish that its allegations of "coercive design tactics" and misleading statements about consumer safety "relate to" the purported minimum contacts.

The Attorney General contends it has established personal jurisdiction for three independent reasons. *See* Compl. ¶¶ 10-11.3. First, the Attorney General contends that thousands of Oregonians use the platform "every hour of each and every day." Attorney General's Response at 24. Second, the Attorney General contends that thousands of user agreements between Oregon consumers and TikTok establish more than sufficient minimum contacts. Third, the Attorney General asserts that TikTok sells advertising specifically targeted at Oregonians and

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numerous Oregon-based businesses. As discussed *supra*, for a finding of personal jurisdiction, these contacts must "relate to" the tortious conduct alleged in each count.

A. The Attorney General Has Alleged Conduct Establishing Personal Jurisdiction for the Unconscionability Claims (Count 1).

The Attorney General urges the court to find personal jurisdiction for its unconscionability claim based on TikTok's substantial advertising efforts within the state, coupled with the reality that thousands of Oregonians have entered into user agreements with TikTok, many of whom use the platform each day to produce and consume content. However, it is not enough that Oregonians use TikTok, even if some of that use is due to TikTok's extensive advertising efforts. Instead, the Attorney General must show that TikTok's contacts are "related to" its unconscionability claims. The "related to" requirement can be met in either of two ways: (1) there is a "but-for" causal link between TikTok's efforts to engage Oregon consumers and the Attorney General's unconscionability allegations, and this litigation was "reasonably foreseeable" as a consequence, or (2) TikTok's relationship with Oregon and Multnomah County is sufficiently extensive that this court can conclude that TikTok "systemically serves" the jurisdiction. *See Cox I*, 368 Or. at 493, 503.

Comparing this case to a multitude of similar lawsuits involving online companies, TikTok urges the court to reject the Attorney General's interpretation of *Cox I* because such a broad conception of personal jurisdiction within the context of a globally available online platform would destroy the very concept of personal jurisdiction. "The State does not allege that any of the design features that allegedly render the platform unconscionable were developed in Oregon or were used to single out Oregon residents in particular for special treatment." Defendants' Motion at 9. According to TikTok, a website operator cannot be said to have

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"purposefully directed" conduct toward a forum state if it "simply wants as many responses as possible but is indifferent to the physical location of the responder." Defendants' Motion at 10 (*citing XMission, L.C. v. Fluent LLC,* 955 F.3d 833, 847 (10th Cir. 2020)). If "accessibility" of a website "alone" were enough to establish jurisdiction, then "jurisdiction would have no limit." *Johnson v. TheHuffingtonPost.com, Inc.,* 21 F.4th 314, 320 (5th Cir. 2021) (Holding that forum residents "clicking ads and buying things" on website insufficient to establish jurisdiction.).

TikTok urges the court to look to *XMission, L.C.,* a case involving a digital marketing company sued by an internet service provider because the marketing company was sending thousands of spamish emails through the internet service provider's servers. Seeking dismissal, the *XMission, L.C. d*efendants argued Utah lacked personal jurisdiction given that the emails were sent nationwide. The *XMission, L.C.* court agreed: "Purposeful direction may. . . be established . . . when an out-of-state defendant's intentional conduct targets and has substantial harmful effects in the forum state." *XMission, L.C.,* 955 F.3d at 845 (citations omitted). According to *XMission, L.C,* for personal jurisdiction, an internet provider must have deliberately directed its conduct at an audience in the forum state or intended to harm residents of the forum state.

Similarly, in *Johnson v. TheHuffingtonPost.com, Inc.,* 21 F.4th 314, 320 (5th Cir. 2021), a Texas resident sued the Huffington Post for calling him a white nationalist and Holocaust denier. Dismissing the case for lack of personal jurisdiction, the Fifth Circuit first focused on whether the website was "interactive"—that is, whether the site interacted with its visitors, sending and receiving information from them. Finding that the Huffington Post was, the *Johnson* court next evaluated whether the forum state was "the focal point both of the [alleged libel] and the harm suffered." *Johnson,* 21 F.4th at 318. "HuffPost is interactive, but its story about

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Johnson has no ties to Texas. The story does not mention Texas. It recounts a meeting that took place outside Texas, and it used no Texan sources. Accordingly, we lack jurisdiction over HuffPost with respect to Johnson's libel claim." *Id.* at 319.

Despite neither being strictly on point nor binding precedent, the challenge facing the Attorney General is amply demonstrated in *Johnson* and *XMission, L.C.* Even if TikTok undertook extensive targeted advertising efforts in the state, and those efforts resulted in more users being exposed to the platform and its allegedly coercive design features, is that sufficient for personal jurisdiction if the platform features themselves were not *focused exclusively on* Oregonians? The court understands *Cox* does not require such an explicitly direct link. "As *Ford Motor Co.* makes clear, due process will not '*always* require proof of causation—i.e. proof that the plaintiff's claim came about because of the defendant's in-state conduct.' There will be at least some cases in which the 'relationship among the defendants, and the litigation' is 'close enough to support specific jurisdiction' in the absence of a but-for causal link.'" *Cox I,* 368 Or. at 494 (citations omitted). Suggesting that trial courts should focus equally on foreseeability and but-for causation, *Cox I* emphasized that "[t]he animating principle behind the relatedness requirement is the notion of a tacit quid pro quo that makes litigation in the forum reasonably foreseeable." *Id.* (citing *Robinson*, 354 Or. at 594).

In *Briskin v. Shopify*, 135 F.4th 739 (2025), the Ninth Circuit, *en banc*, recently reinforced this court's conclusion that *Cox I* does not require the allegedly coercive design features to have been exclusively focused on Oregonians. Focusing on the *Calder* effects test, the *Briskin* court rejected many of the same arguments TikTok is making here. *Briskin* involved a class action brought by a California man alleging that the online retailer Shopify had implanted browser cookies that tracked his physical location, collected his shopping habits, and created a

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consumer profile that Shopify then sold. Shopify argued the suit lacked personal jurisdiction because the allegedly tortious conduct was encoded into its products, accessed by every internet user that utilized its services, and no conduct was directed at California consumers. Much like TikTok, Shopify argued that any harm incurred by plaintiffs was mere happenstance arising from the California consumers' choice to do business with a merchant that contracted with Shopify. The *Briskin* court not only rejected the argument, it overruled any precedent that could be construed as supporting it:

> We now take this opportunity to overrule [any] cases that require some sort of differential treatment of the forum state for a finding of "express aiming" of the defendant's allegedly tortious conduct. Such a requirement runs contrary to longstanding Supreme Court authority. Moreover, requiring differential targeting would have the perverse effect of allowing a corporation to direct its activities toward all 50 states yet to escape specific personal jurisdiction in each of those states for claims arising from or relating to their relevant contacts in the forum state that injure that state's residents. We, therefore, hold that an interactive platform "expressly aims" its wrongful conduct toward a forum state when its contacts are its "own choice and not random, isolated, or fortuitous," even if that platform cultivates a "nationwide audience[] for commercial gain."

Id. at *40-41.

Turning from causation to foreseeability—the second evaluation required under *Cox I*—this court notes TikTok's pleadings mostly disregard the company's sustained, extensive advertising and outreach in the Portland area. TikTok has sought to run advertising through many Oregon organizations and businesses, including the University of Oregon, Oregon State University, the Oregon Tourism Commission, Columbia Sportswear, Dave's Killer Bread, Lithia Motors and its Oregon dealerships, Nike, the Portland Trail Blazers, Portland Leather Goods, Les Schwab, Stash Tea, and the Tillamook County Creamery Association. In particular, TikTok has fostered a close relationship with Portland's two professional soccer teams, entering a multiyear marketing and content partnership that included local radio spots, "TikTok for Good" soccer scarves, and the placement of the TikTok logo on player uniforms. These efforts establish

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that TikTok "purposefully availed itself of the privilege of conducting activities in Oregon or purposefully directed its activities at residents of Oregon." *M.C.*, 328 Or. App. at 383.

As alleged, a multitude of Oregonians entered into user agreements with TikTok, and thereafter consume content on the platform, due to TikTok's advertising efforts. Given that these individuals spend thousands of hours on TikTok, it is "reasonably foreseeable" that TikTok may be sued in Oregon courts over the platform's design features. Furthermore, it is eminently clear that there is a close relationship with the forum that TikTok "systemically serves." For these reasons, the court concludes that the Attorney General has established minimum contacts with the forum and these contacts are sufficiently "related to" the unconscionability claims to establish personal jurisdiction. Defendants' Motion to Dismiss Count 1 is DENIED on this ground.

B. The Attorney General Has Sufficiently Alleged Foreseeability to Establish Personal Jurisdiction for the Affirmative Misrepresentation Claims (Count 2).

The Attorney General's second claim alleges that TikTok made several affirmative misrepresentations in public statements regarding the safety of its products. *See* Compl. ¶¶ 139-147. As personal jurisdiction is claim-specific, for the Attorney General to establish personal jurisdiction for its second claim, the Attorney General must establish that these misrepresentations "arise out of or relate to" the minimum contacts. In other words, it is not enough that the Attorney General alleges thousands of Oregonians use TikTok and TikTok made deceptive statements. Rather, the Attorney General must credibly allege that TikTok's deception led to Oregon user engagement and that this litigation was "reasonably foreseeable." *See Cox I*, 368 Or. at 493 and 503. Also, unlike the court's evaluation of the unconscionability claim, the court cannot rely on TikTok's substantial in-state advertising efforts to establish minimum

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contacts or foreseeability. While the Attorney General could credibly claim a direct causal link between TikTok's advertising and user engagement, there is no corresponding but-for link between TikTok's misrepresentations and its advertising efforts. Even if TikTok's allegedly deceptive statements and its advertising efforts move in the same direction, one does not establish the other.

In *Ford Motor Co. v. Montana Eight Jud. Dist. Ct.*, 592 U.S. 351, 365 (2021), two product-liability suits were consolidated stemming from car accidents in separate jurisdictions involving cars manufactured and sold outside those jurisdictions. While Ford acknowledged its vast business empire "purposefully avail[ed] itself of the privilege of conducting activities" within each forum, the company nonetheless argued its activities in each forum were insufficiently connected to the suits given that the specific cars involved in each crash had not been designed, manufactured, or sold in that state. Writing for the Court, Justice Kagan ultimately rejected Ford's causation-only approach:

> None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum." The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. . .. [W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct.

Ford Motor Co., 592 U.S. at 362. Turning to Ford's advertising efforts, Justice Kagan had little trouble concluding that given Ford's expansive business efforts within each forum, the respective trial court's findings of specific jurisdiction were warranted.

In *Cox v. HP Inc.*, 317 Or. App. 27, 33 (2022) ("*Cox II*"), a plaintiff sued several companies after he was injured when a hydrogen generator exploded. One of those companies, Proton Energy Systems, successfully moved to dismiss for lack of personal jurisdiction because

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their component part was neither manufactured nor shipped into Oregon. Mindful of *Ford Motor Co. 's* instruction that there must be a "strong relationship among the defendant, the forum, and the litigation," the appellate panel framed the inquiry as three questions: (1) whether the defendant's Oregon contacts "connected it to other prospective purchasers," (2) whether the defendant's Oregon contacts were so systemic as to connect the defective product to sales or marketing efforts in Oregon, and (3) whether the protection of Oregon laws benefited the defendant in bringing its product to market. Given that there was little evidence the defendant had marketed its products in Oregon, linked its marketing efforts to the purchase of that specific product, or defendant benefited from Oregon laws, the *Cox II* panel rejected personal jurisdiction.

TikTok urges the court to conclude the same based upon the Attorney General's purported failure to establish, with any degree of reasonableness, that Oregonian's contacts with TikTok are "related to" the misrepresentations. As TikTok points out, each deceptive act alleged by the Attorney General occurred outside the state, none of the statements were focused on Oregon consumers, and each statement was general and discussed a product universally available. For TikTok, this level of generalized conduct can hardly be construed as purposeful availment.

While the court readily acknowledges that the causal link between TikTok's public statements and Oregonians' decision to use the platform is tenuous, the court's reading of *Cox I, Cox II, Ford Motor Co,* and *Shopify, Inc.*, nonetheless compel the conclusion that personal jurisdiction is appropriate. Specifically, the court finds that the nature and extent of the alleged misrepresentations, combined with the volume of TikTok's daily commercial activity in Multnomah County, satisfies *Cox I* and *Shopify, Inc.* At this stage, well-pleaded facts in a

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complaint are assumed true and the nonmoving party is entitled to the benefit of all inferences that can reasonably be drawn from those facts. *See, e.g.*, *Granewich* 329 Or. at 51. The Attorney General's complaint alleges, among various provisions, that "[a]s of December 2023, TikTok had [redacted] Oregon users who self-identified as 13–17 years old, and [redacted] Oregonians older than 18. Of those, [redacted] of the 13–17-year-olds and [redacted] of those older than 18 were active at least monthly." Compl. ¶ 35. "TikTok tells users in the United States, including in Oregon, particularly youth and parents, that its platform is safe, well-moderated, and appropriate for young users." *Id.* ¶ 137.[5] The Attorney General alleges that TikTok's misrepresentations not only caused consumer harms the UTPA aims to remedy, but also contributed to some of those Oregon users (or their parents) signing up for the platform. Both *Ford* and *Shopify, Inc.*, suggest that kind of causal connection can be sufficient. *See Ford Motor Co.*, 592 U.S. at 362 ("[O]ur most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum."); *Shopify, Inc.*, 135 F.4th at *40-41 ("We, therefore, hold that an interactive platform 'expressly aims' its wrongful conduct toward a forum state when its contacts are its 'own choice' and not 'random, isolated, or fortuitous,' even if that platform cultivates a 'nationwide audience[] for commercial gain.'"). Similarly, the court finds *Cox II's* three-part analysis supports a finding of personal jurisdiction in this circumstance, especially the conclusion that Oregon's laws afford TikTok substantial benefits in the dissemination of its product.

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[5] *See also* Compl. ¶ 37 ("The average revenue generated per Oregon user in 2022 and 2023 was [redacted] per month.") (*emphasis in original*); *Id.* ¶ 12 ("Venue is appropriate in Multnomah County because TikTok has committed acts prohibited by the UTPA in Multnomah County, and a large number of young users harmed by TikTok's acts or omissions reside in Multnomah County.").

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For the foregoing reasons, the court concludes that the Attorney General has established minimum contacts with the forum and that those contacts are adequately "related to" the misrepresentation claim to establish personal jurisdiction. Defendants' Motion to Dismiss Count 2 (and Count 3) is DENIED on this ground.[6]

II. Section 230 of the Communications Decency Act

The operative section of § 230, titled "Protection for Good Samaritan blocking and screening of offensive material," is divided into two working parts. The first broadly states that no service provider "shall be treated as the publisher or speaker of any information provided by another information content provider," or, more colloquially, by a third-party user of the service. § 230(c)(1). The second protects actions taken by a service provider to moderate and restrict material it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." § 230(c)(2). The law expressly preempts any state laws with which it may conflict. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with [the Act]"). Although § 230 is broad, it does not provide "a general immunity from liability deriving from third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009). It does, however, ensure that online platforms are immune from liability for any harms arising out of "reviewing, editing, and deciding whether to publish or withdraw from publication third-party content." *Smith v. Airbnb, Inc.*, 316 Or. App. 378, 383 (2021). As applied to state law claims, § 230 "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of

[6] The court adopts the same factual and legal analysis regarding the Attorney General's omission claims as it does for the misrepresentation claims and comes to the same conclusion.

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information provided by another information content provider." *Smith*, 316 Or. App. at 385 (citing *Barnes*, 570 F.3d at 1100-01.). The second prong requires an evaluation of whether a plaintiff's claims are grounded in the defendant's status or conduct as a publisher. The third prong requires an evaluation of whether the cause of action targets "content provided by another." *Barnes*, 570 F.3d at 1102. In short, a website cannot be held liable "for material posted on the website by someone else." *Smith*, 316 Or. App. at 384 (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir 2016)). However, services can still be liable under traditional tort theories if those theories do not require the services to exercise some kind of publication or editorial function. *Barnes,* 570 F.3d at 1102. After all, § 230 immunity is extraordinarily powerful, granting complete immunity where it applies and, in the process, preempting even the will of the people as expressed in their state legislatures. Consequently, a court must "ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." *Barnes,* 570 F.3d at 1102. If it does not, a suit may proceed.

A. § 230 Bars the Attorney General's Unconscionability Claims (Count 1).

The fundamental allegation of the Attorney General's unconscionability claim is that various platform features are "addictive," meaning they entice younger users to spend excessive time viewing content generated by third-party users. Recognizing the § 230 hurdle, the Attorney General crafted the Complaint to focus its allegations away from third-party content and towards "coercive design tactics." Compl. ¶¶ 255-61. "The Attorney General [] 'alleges physical and mental health harm to young users from [TikTok's] design features themselves … and not from the viewing of any specific third-party content…" Attorney General's Response at 30 (citations omitted). Placed within the context of the second *Barnes* inquiry, the

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Attorney General argues the unconscionability claims are treating TikTok less as a publisher and more as a website engineer distributing coercively designed products such as infinite scroll, autoplay, and incessant notifications.

The "ordinary meaning" of "publisher" includes an online platform's use of "tools such as algorithms that are designed to match [third-party] information with a consumer's interests." *People of Illinois, v. TikTok Inc., et al.*, No 2024CH09302, *18 (Cook Cty. Ch. Div., June 12, 2025) (*citing Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2nd Cir. 2019)). The reason for this broad definition is that a key function of an online platform is to decide what content to select, how to organize it, and how to present it to users. *Id.* Decisions that are "part and parcel of [a website's] overall design and operation"—and that "reflect choices about what content can appear on the website and what form"—"fall within the purview of traditional publisher functions." *Id.* (*citing Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016).

In *Airbnb, Inc.*, the Oregon Court of Appeals analyzed § 230 immunity within the context of vicarious and premises-liability claims involving a property rented out through Airbnb. Specifically, plaintiff contended that the trial court erred when it granted § 230 immunity because "Airbnb acted as a curator of its website entries" by "creating a special search category" for listings with hot tubs and "highlighting" those listings; "adding icons" to rental listings with hot tubs; asking "targeted questions" and "encourage[ing] individuals to specify whether their property has a hot tub, which is displayed in the listing," and allowing individuals listing their property to "choos[e] answers from drop-down menus." *Airbnb, Inc.*, 316 Or. App. at 382. In other words, the plaintiff argued that since Airbnb was curating the content of others, § 230 immunity was inappropriate. Focusing on when a service provider becomes a content provider, the *Airbnb, Inc.* panel articulated the inquiry as an evaluation of whether a provider "helps to

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develop [the] unlawful content" and whether it "contributes materially to the alleged illegality of the [content]." *Id.* at 387. As an example, immunity would be potentially lost if a website operator edited a user's post to change its meaning, thereby transforming an innocent message into a libelous one. Turning to Airbnb's conduct, as there was no allegation that the website had materially contributed to the alleged unlawfulness of the advertisement, the court concluded that § 230 immunity was appropriate.

In *M.P. v. Meta Platforms, Inc.*, 127 F.4th 516 (4th Cir. 2025), the Fourth Circuit addressed a set of similar issues after the high-profile killing of nine parishioners by Dylann Roof at the Mother Emanuel AME Church in Charleston, South Carolina. One of the decedent's children sued Facebook, alleging that Facebook's algorithm recommended harmful content that contributed to the radicalization of Roof. According to the plaintiff, Facebook's algorithm reflected design choices made by the company, and those choices played a substantial role in Roof's radicalization because they ensured Roof received more radicalized content. *M.P.*, 127 F.4th at 521. In other words, the plaintiff sought to evade § 230 by arguing that the gravamen of the lawsuit was not the content that Roof had consumed, but the algorithm and design choices made by Facebook. The Fourth Circuit rejected the characterization:

> While there is widespread concern about Facebook's use of its algorithm to arrange and sort racist and hate-driven content, acts of arranging and sorting content are integral to the function of publishing. ... The fact that Facebook uses an algorithm to achieve the same result of engagement does not change the underlying nature of the act that it is performing. Decisions about whether and how to display certain information provided by third parties are traditional editorial functions of publishers, notwithstanding the various methods they use in performing that task.

M.P., 127 F.4th at 526.

In the recent case, *Doe v. Grindr Inc.*, 128 F.4th 1148 (2025), the Ninth Circuit arrived at a similar place, albeit by a slightly different path. *Grindr Inc.* involved a 15-year-old boy who

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had signed up for the Grindr dating app by representing him as being over 18 years old. Thereafter, the plaintiff alleges he was consecutively raped by four men he met on the platform. To evade § 230, the plaintiff crafted his claims focused on the platform's purported safety features and public pronouncements about those features. "The theory underpinning Doe's claims for defective design, defective manufacturing, and negligence faults Grindr for facilitating communication among users for illegal activity, including the exchange of child sexual abuse material." 128 F.4th at 1152-53. Crucial to this court's analysis, the plaintiff's claims in *Grindr Inc.* focused on product design claims—alleging that Grindr breached a duty not to design or manufacture defective products that matched minors with predators, matched users based on geographic data, and allowed Doe to communicate with abusive adults. *Id.* The Ninth Circuit rejected the plaintiff's effort to turn the focus away from content dissemination and toward product design: "Though defendant 'used features and functions, including algorithms, to analyze user posts on [the website] and recommended other user groups,' these neutral features were 'meant to facilitate the communication and content of others' and were 'not content in and of themselves.'" *Id.* at 1098. Because Grindr was acting in its capacity as a publisher, and third-party communications caused harm to the victim, the Ninth Circuit held that Grindr was immune. *See also Angelilli v. Activision Blizzard, Inc.*, 2025 WL 1184247, *3-4 (N.D. Ill. Apr 23, 2025) ("To the extent Plaintiffs bring claims premised on the addictiveness of these user-generated games, Section 230 shields Roblox Corp. from liability....Section 230 immunizes social media platforms from claims premised on the socializing effects and impacts of speech by the platform's users."); *contra People of Illinois, v. TikTok Inc., et al.*, No 2024CH09302, *19-21 (Concluding TikTok is not a publisher of third-party content because complaint alleges platform algorithm is content agnostic).

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The Attorney General urges this court to look to a different Ninth Circuit case, an Oregon district court case, and a case out of the D.C. Circuit. In *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), a decedent estate sued the parent company of Snapchat over allegations the popular platform led to a deadly vehicle accident. Specifically, plaintiffs alleged that the "Speed Filter," an application that enabled Snapchat users to record their speed, incentivized the decedents to race in a manner that ultimately led to their death. Rejecting the defendants' claims of § 230 immunity, the *Lemmon* court found the parents' amended complaint did not seek to hold Snap liable for its conduct as a publisher or speaker because the platform feature which was alleged to have caused the harm didn't involve anyone viewing content. Unfortunately for the Attorney General, *Lemmon*, unlike the case-at-bar, involved harms that occurred solely due to a design feature of the platform itself. By comparison, the Attorney General's allegations of certain "coercive design tactics" —infinite scroll, autoplay, and incessant notifications—involve harms caused not by the design of the platform itself, but by consuming too much third-party content disseminated through its features.

In *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814 (D. Or. 2022), an eleven-year-old sued the owners of a free online chat room after the minor was sexually assaulted by a man met on the site. The plaintiff alleged negligence due to product defects and a lack of warning. Rejecting § 230 immunity, Judge Mosman agreed with the plaintiff that the publication of content was ultimately immaterial because liability stemmed not from the content exchanged, but from the negligent design of a product that *matched* minors and adults. "Plaintiff's contention is that the product is designed [in] a way that connects individuals who should not be connected (minor children and adult men) and that it does so before any content is exchanged between them." *Omegle.com*, 614 F. Supp. at 820. Like the claims at issue in *Lemmon*, Judge Mosman concluded

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that the central contention in *Omegle* was not that content had harmed the plaintiff, but that the affirmative act of matching adults and minors had.[7]

In *Dist. of Columbia v. Meta Platforms, Inc.*, No. 2023-CAB-6550, 2023 WL 11921682, at *1 (D.C. Super. 2023), the District of Columbia sued Meta Platforms, Inc., and Instagram, LLC, upon substantially the same grounds as the instant suit, including alleged unfair trade practices due to addictive and manipulative design features that increase children's time on the platforms. Substantially relying upon *Lemmon*, the Honorable Neal E. Kravitz agreed with the district that § 230 immunity only applies to "harms arising from particular third-party content published on their platforms." *Meta Platforms, Inc.*, 2023 WL 11921682, *10. While this court acknowledges that the controversy before Judge Kravitz is directly analogous, and thus so is his analysis, this court respectfully declines to follow his decision just as he declined to follow the decision of another judge with whom he disagreed. The Attorney General's cabining of § 230 immunity only to the viewing of particularly harmful third-party content is not only inconsistent with *Airbnb Inc.*, *Grindr Inc.*, and *M.P.*, but it also fails to address the reality that the gravamen of the Attorney General's claims is that the harm caused to children stems from viewing *content*.[8] "Compulsive use of the Platform is harmful, especially [to] younger users. Compulsive use correlates with many negative mental health effects, such as loss of analytical skills, memory formation, contextual thinking, conversational depth, and empathy, as well as increased anxiety." Compl. ¶ 6. Even assuming every word of that is true, it is true because of TikTok's effective

[7] Post *Grindr* and *M.P.*, it is unclear to this court whether even this rationale would survive § 230 scrutiny.

[8] In *People of Illinois, v. TikTok Inc., et al.*, No 2024CH09302, *19-21, the Honorable Michael T. Mullen considered whether, for purposes of § 230, TikTok should be considered a publisher or, alternatively, a software design firm with a faulty platform. While Judge Mullen's opinion was thoughtful and thorough, this court does not subscribe to his conclusion. TikTok's use of a content-agnostic algorithm does not mean it is not a publisher of third-party content; rather, it means it's a content-agnostic publisher.

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efforts at content publication and dissemination. Through § 230, the United States Congress decided to immunize those acts from liability.

Despite the Attorney General's efforts to characterize this case differently, the court agrees with TikTok that the entirety of the Attorney General's allegations of unconscionable conduct involve TikTok's publishing acts. The platform's "algorithms," "autoplay," "infinite scroll," and incessant notifications are all content amplification features meant to publish content in a manner that increases user engagement. Even "Retouch" and its other filters, products that alter third-party content, are themselves content-neutral.[9] None change the content in such a way as to reasonably conclude that TikTok is now the content creator.[10] As the primary function of § 230 is to confer immunity over decisions related to the publishing of third-party content, and because that conduct is the gravamen of the Attorney General's unconscionability claim, Defendants' Motion to Dismiss Count 1 is GRANTED on this ground.

B. § 230 Confers Immunity Regarding Some of the Attorney General's Affirmative Misrepresentation Allegations (Count 2).

Section (e) of the UTPA provides that a company engages in an unlawful practice if, as a part of its business, it represents that services have "uses, benefits, quantities or qualities" that the services do not have. The Attorney General alleges that various safety assurances made by TikTok's CEO, on its website, and in publications were false and misleading, and therefore constituted prohibited acts. TikTok responds that any promises about user safety and data

[9] *See Angelilli* 2025 WL 1184247, *3 ("This is true even though Roblox provides users with tools to create these games, as a service provider does not become liable as a content creator simply because it 'provides neutral tools that a user exploits' to tortious ends.").
[10] *See* Compl. ¶ 64 (TikTok's recommendation system is content-agnostic or, in TikTok's own words, "content-neutral." A TikTok document states that the recommendation system "doesn't care about the content – it doesn't have an agenda. It doesn't qualitatively understand" what content it shows users.).

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security, and alleged non-compliance with those promises, involved editorial decisions made by the platform about content dissemination entitled to § 230 immunity.

> Numerous courts have held that § 230 bars claims seeking to hold platforms liable for not removing third-party content as aggressively as their own policies allegedly require. This is true no matter how the claim is styled—including, as here, when the Attorney General styles the claim as one challenging "deceptive" acts or practices or the "failure to disclose.

Defendants' Motion at 20-21 (citations omitted). According to the Attorney General, TikTok has it "exactly backwards" because the Attorney General's claim does not require TikTok to make any editorial decisions, but rather to refrain from misrepresenting the decisions it does make. "The UTPA prohibits TikTok from representing to consumers that it takes certain steps to ensure user safety that it does not, in fact, take. … TikTok can correct these misrepresentations without changing how it monitors, approves, or deletes third-party content." Plaintiff's Response at 35 (citations omitted).

In *Grindr Inc.*, along with his defective design claims, the plaintiff alleged: "[n]egligent misrepresentation, as Grindr negligently misrepresented that the App was designed to create a safe and secure environment for its users." 128 F.4th at 1152. Ultimately upholding § 230 immunity, the *Grindr Inc.* panel focused this portion of its inquiry on whether the plaintiff's theory of liability was based on general statements regarding safety and content moderation or more specific promises or representations about safety features. If liability were tied to general promises like creating a "safe and secure environment for its users," such statements are too vague and too closely related to content creation to support liability. However, if a provider makes specific promises such as agreeing to take down indecent profiles impersonating a plaintiff, *see Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009), or promises to unmask the identities of users sending harassing messages, *see Estate of Bride ex rel. Bride v.*

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YOLO Techs., Inc., 112 F.4th 1168, 1173 (9th Cir. 2024), then a company can be held accountable for the specific promise or representation. As *Grindr Inc.* involved efforts to attach liability to general statements about a safe and secure platform, the Ninth Circuit affirmed conferral of § 230 immunity.

By comparison, in *Estate of Bride,* three minor children and the estate of a fourth child brought claims related to a Snapchat application, which they alleged led to extreme harassment and bullying. According to the plaintiff, because a central feature of the application was anonymity, Snapchat promised to ban and unmask users disseminating inappropriate content or sending harassing messages. However, it turned out those promises were ineffective, and little effort was put into enforcing them. Refusing to confer § 230 immunity, the *Estate of Bride* panel concluded the crucial distinction came down to whether the platform was being held liable for a specific promise or representation, or whether the plaintiff was seeking to attach liability to the more generic act of content moderation. "While yes, online content is involved in these facts, and content moderation is one possible solution for YOLO to fulfill its promise, the underlying duty being invoked by the Plaintiffs is the promise itself. Therefore, the misrepresentation claims survive." 112 F.4th at 1179.

In this case, the allegations regarding affirmative misrepresentations can be properly classified into two groups, only one of which enjoys § 230 immunity. Insofar as the Attorney General alleges TikTok failed to properly moderate content, made false claims regarding platform safety, or failed to adhere to its own "community guidelines," *Grindr Inc.* applies, and those allegations must be dismissed.[11] However, where the complaint alleges specific misrepresentations about particular safety products or features, the court concludes

[11] These include the allegations set forth in the Compl. ¶¶ 139(a) – (e), (g), ¶¶ 141-143, ¶¶ 206-224, ¶ 208, ¶ 209, ¶ 210, and ¶ 211.

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Estate of Bride applies and those claims may proceed.[12] If the Attorney General seeks to issue an amended complaint, it must evaluate whether each claim is a credible allegation of a specific misrepresentation tied to a specific safety design feature. General assurances about product safety, even towards children, are too analogous to the promise in *Grindr Inc.* that the company was creating a "safe and secure environment for its users." 128 F.4th at 1154.

C. § 230 Bars Some of the Allegations in the Attorney General's Omission Claims (Count 3).

Throughout the complaint, the Attorney General alleges TikTok violated the UTPA when it repeatedly and systemically failed to disclose known harms to its young users and their parents. Corporate liability due to lack of disclosure can occur in two different contexts. A failure to warn claim generally involves a common-law duty to warn customers about known harms. An omissions-based deceptive trade practice claim, by comparison, is tied to affirmative statements with a tendency to mislead. Focusing on various cases analyzing failure to warn claims under § 230, the Attorney General argues knowing commercial omissions are never entitled to § 230 immunity.[13] TikTok emphatically disagrees, arguing not only that § 230 applies, but also that immunity in commercial omissions cases is broad.

In *Grindr Inc.*, the plaintiff sought liability over the company's purported failure to warn Doe about the general risk of child sexual exploitation on the platform. The *Grindr Inc.* court, interpreting *Estate of Bride* to mean that service providers only have a duty to warn when a

[12] These include the allegations set forth in the Compl. ¶¶ 145-158 and ¶¶ 170-205. The question of immunity for ¶ 139(f), and ¶¶ 160-169 will depend on if TikTok made specific inaccurate statements about them.

[13] *See* Attorney General's Response at 35-36 ("TikTok's 'failure to warn' cases are [] unpersuasive, [sic] because the Attorney General alleges that TikTok failed to disclose known material defects in its app, including 'coercive design tactics' and harmful beauty filters, not that it failed to warn users about 'bad' third-party content.").

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provider is aware of a "known conspiracy operating independent of the site's publishing function," concluded that § 230 immunity applies. According to *Grindr Inc.*, when an internet publisher has knowledge regarding "a general possibility of harm" involving one of its products, § 230 ensures it cannot face liability for the decision to not publicize that danger. "Doe does not allege that Grindr had independent knowledge of a conspiracy, and Grindr's role as a publisher of third-party content does not give it a duty to warn users of 'a general possibility of harm resulting from the *App.*" 128 F.4th at 1154. *Grindr Inc.* instructs that while a company may be held liable for a failure to warn, the danger must be specific, identifiable, and actionable. Insofar as the Attorney General alleges TikTok failed to publicize its knowledge and concerns regarding its products' "general possibility of harm," *Grindr Inc.* compels this court to dismiss those allegations under § 230. *See also, Estate of Bride,* 112 F.4th 1168 at 1180-81 ("[T]here was no conspiracy to harm that could be defined with any specificity. It was merely a general possibility of harm resulting from use of the YOLO app, which largely exists anywhere on the internet. We cannot hold YOLO responsible for the unfortunate realities of human nature.").

In *Meta Platforms, Inc.*, Judge Kravitz reached a different conclusion.[14] After discussing the difference between a failure to warn claim and a commercial omission claim, Judge Kravitz concluded that § 230 protection only applies to failure to warn claims. "The deceptiveness of

[14] The Attorney General also urges the court to look to *Omegle* and *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). While *Omegle* did involve allegations related to a failure to warn, Judge Mosman did not address the issue in his opinion. In *Internet Brands, Inc.*, an aspiring model sued a website used in the modeling industry after she was raped by two individuals that lured her in with a fake audition. Filing the suit in state court, Doe alleged negligence by failure to warn because when Internet Brands bought the platform, they learned that it had been involved in litigation related to the two rapists and how they were utilizing the website for criminal purposes. The assault occurred a couple of months after the company became aware of the criminal activity. On appeal, the Ninth Circuit reversed the district court's dismissal. Noting that Jane Doe herself posted her profile, her lawsuit did not seek to hold the company liable for anything in that profile, nor blame them for failing to remove any postings, the court concluded that the lawsuit wasn't about content. Despite the Attorney General's insistence to the contrary, there is little relevant to the current inquiry the court can draw from *Internet Brands, Inc.*

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these omissions is tied to Meta's own allegedly false, incomplete, and otherwise misleading representations, not to Meta's publication of any particular third-party content. . .. Meta would not have to change the content it publishes or engage in any content moderation to avoid liability for future omissions claims. Rather, Meta can simply stop making affirmative misrepresentations about the nature of the third-party content it publishes, or it can disclose the material facts within its possession to ensure that its representations are not misleading or deceptive within the meaning of the CPPA." *Meta Platforms, Inc.*, 2023 WL 11921682, at *11. The court interprets *Grindr Inc.* as compelling the opposite result.

Substantively the same as the court's holding regarding affirmative misrepresentations, the court interprets *Grindr Inc.* as requiring the dismissal of any omission allegation regarding child usage, generalized dangers to children from using the product, its design features, or from the platform's compliance with community guidelines—acts which are related to the immunized publication of third-party content.[15] However, the court holds that § 230 does not bar the State from re-alleging any omission claims related to the efficacy of safety tools it affirmatively touted.[16]

III. The First Amendment in the Internet Age

"[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles [of the First Amendment] do not vary." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011). The First Amendment serves as a defense against claims that seek to attach liability to constitutionally protected speech. *Snyder v. Phelps*, 562 U.S. 443, 458-59

[15] These include the allegations set forth in the Compl. ¶ 140, ¶ 144, ¶ 159, ¶¶ 170-173, and ¶¶ 225-252.
[16] These include the allegations set forth in the Compl. ¶¶ 145-158 and ¶¶ 170-205. The question of immunity for Compl. ¶ 139(f), and ¶¶ 160-169 will depend on if TikTok made specific inaccurate statements about them.

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(2011). Both the "creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). To the extent that social-media platforms create expressive products, they receive First Amendment protection. *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024). That protection extends to an entity compiling and curating others' speech into an expressive product of its own. *Id.* at 731. Deciding which speech will be included or excluded from a compilation—and then organizing and presenting the included items—is also an expressive activity. None of that changes just because a compiler includes most items and excludes just a few. *Id.* at 732. Furthermore, the government cannot get its way just by asserting an interest in better balancing the marketplace of ideas. *Id.* In case after case, the Supreme Court has barred the government from forcing a private speaker to present views it wished to spurn to rejigger the expressive realm. *Id.* at 733.

A. The First Amendment Bars the Attorney General's Unconscionability Claims (Count 1).

The First Amendment protection for expressive editorial judgments made by traditional media and publishing entities applies equally to online platforms that disseminate and make expressive choices about how to display third-party user-generated content. *Moody,* 603 U.S. at 738. The First Amendment protects more than "the choice of material to go into a newspaper" or the programs a television news network chooses to run. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). It also protects "decisions made as to limitations on the size . . . of the paper" and the arrangement of its contents, which are "editorial" judgments about *how* the material is presented. *Id.* A platform's expressive choices about "which third-party content" an online platform's viewer feed "will display," or "how the display will be ordered and organized" are what "give the feed a particular expressive quality." *Moody,* 603 U.S. at 738. The First Amendment prohibits a state's attempt to regulate or alter how an online platform chooses

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"the views [it] will, and will not, convey." *Id.* at 738 – 39. According to Justice Kagan, regulations that seek to impose any kind of content moderation, including promoting or de-platforming purportedly noxious viewpoints, impermissibly interfere with protected speech:

> The individual messages may originate with third parties, but the larger offering is the platforms. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which are less so). And in the aggregate, they give the feed a particular expressive quality.

Id. at 738. Over and over again, the Supreme Court has afforded First Amendment protection to the "editorial function itself." *See, e.g., Denver Area Educ. Telcoms. Consortium v. FCC,* 518 U.S. 727, 737 (1996), *Miami Herald Pub. Co.,* 418 U.S. at 258. This includes protections against forcing a company to offer a forum for alternative viewpoints in its newsletter. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm 'n,* 475 U.S. 1, 4, 20-21 (1986); *Hurley v. Irish-American Gay,* 515 U.S. 557, 559, 581 (1995).

TikTok argues the Attorney General's claim is a disguised effort to regulate how TikTok disseminates content, and in so doing, infringes on the "editorial choices" that the platform makes when it publishes third-party content. Defendants' Motion at 22 (citing *Moody,* 603 U.S. at 726-743). Accordingly, the Attorney General's efforts to impose liability for platform features that curate and disseminate speech violate the First Amendment because they attach liability to the platform's publication function. "These features are how the platform exercises its '[t]raditional publish[ing] and edit[ing]' discretion to 'select and shape other parties' expression into [its] own curated speech products.'" Defendants' Motion at 22-23 (citing *Moody,* 603 U.S. at 717).

The Attorney General responds that it is not seeking to generate liability for content dissemination, only "coercive design tactics" that express nothing. Efforts to encourage children

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to use the platform constantly and compulsively through various content-agnostic programming don't implicate First Amendment protections because the app isn't considering content and doesn't have an agenda, nor commercial or political goals. "That TikTok is in the business of distributing videos does not shield it from liability for its non-expressive conduct; as the Supreme Court has held, 'speech accompanying punishable conduct does not transform conduct into expression." Plaintiff's Response at 36-37 (citation omitted). Furthermore, as the Attorney General points out, all the cases cited by TikTok, including *Moody*, involve challenges to governmental regulation of content, not efforts to hold a company liable for the dissemination of content.[17]

In *Angelilli,* the Honorable April M. Perry sought to determine whether Roblox, a popular video game, was entitled to First Amendment protections against claims that its world-building features were designed to be addictive for adolescent brains. After determining that § 230 shields Roblox Corp. from liability for hosting third-party content, Judge Perry evaluated whether Roblox's content—its characters, skins, and game creation tools—also enjoys First Amendment protection. Concluding that they do, Judge Perry was emphatic in rejecting one of the primary arguments now put forth by the Attorney General, namely that Roblox Corp was being held liable for conduct, not the dissemination of content. "[T]he primary tortious conduct alleged by Plaintiffs is the way the Roblox world and its characters are designed, and the First Amendment is not so feeble that it can be circumvented by framing acts of creation as 'conduct' rather than expression." 2025 WL 1184247, *5. Judge Perry was equally dismissive of

[17] *See Meta Platforms*, 2023 WL 11921682, *12 ("These cases are not controlling here, however, because all of them involved state action that interfered with messaging or other expressive conduct-a critical element that is not present in the case before this court.").

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the plaintiff's argument that Roblox can prevent injuries to its consumers without changing content:

> This is about as persuasive as saying the First Amendment would not be implicated by a mandate that authors not end chapters on cliffhangers because moving a chapter heading does not affect a book's content. The reason video games allegedly injured Plaintiffs is because they were so engaging that D.G. could not stop playing. If Plaintiffs' allegations are accepted as true, to remove the engaging elements of the game would be to fundamentally alter a user's playing experience."

Id. at *6. The court finds itself far more aligned with the analysis of Judge Perry in *Angelilli* than Judge Kravitz in *Meta Platforms.* First Amendment protections are not solely predicated upon whether the speaker intends to convey a message.[18] As the Attorney General acknowledges, it cannot lawfully "tell media companies what content they could or could not publish." Attorney General's Response at 38. That is just as true if the Attorney General were trying to suppress certain viewpoints as if it were trying to control *how* the media presents its content. If the Attorney General were to prevail on its claims, TikTok's platform would need to change its recommendation system so as to make it less "compulsive." In other words, TikTok would be required to change how it publishes content to customers. A platform's expressive choices about "which third-party content" an online platform's viewer feed "will display," or "how the display will be ordered and organized," are what "give the feed a particular expressive quality." *Moody*, 603 U.S at 738.[19] The First Amendment protects more than "the choice of material to go into a

[18] *Contra Meta Platforms*, 2023 WL 11921682, *13 ("[T]he District's unfair trade practice claims challenge Meta's use of addictive design features without regard to the content Meta provides, and Meta has failed to articulate even a broad or vague message it seeks to convey through the implementation of its design features. So although regulations of community norms and standards sometimes implicate expressive choices, the design features at issue here do not.").

[19] The court acknowledges the limits of quoting from *Moody* as the opinion expressly limited its reach to algorithms and other features that prioritized or deprioritized content based on the provider's preferences, noting that it was not deciding whether the First Amendment applies to algorithms that display content based on the user's preferences: "We therefore do not deal here with feeds whose algorithms respond solely to how users act online-giving them the content they appear to want, without any regard to independent content standards." *Id.* at 736, n.5.

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newspaper" or the programs a television news network chooses to run. *Miami Herald Pub. Co.*, 418 U.S. at 258. It also protects "decisions made as to limitations on the size . . . of the paper" and the arrangement of its contents, which are "editorial" judgments about how the material is presented. *Id.* Just as the Attorney General cannot manufacture liability against the Oregonian for editorial decisions regarding how it disseminates information, it cannot sue TikTok for it either. The court holds that the Attorney General's unconscionability claim violates the First Amendment, and wholly independent of this court's holding regarding § 230, Defendants' Motion to Dismiss Count 1 is GRANTED. [20]

B. The First Amendment Does Not Bar the Attorney General's Affirmative Misrepresentation Claims (Count 2).

Rather than offering a substantive argument as to why the First Amendment bars the Attorney General's misrepresentation claims, TikTok seeks to merge its misrepresentation claims into its more substantive omission arguments. TikTok seeks to frame the debate as one of deception in general, rather than addressing specific alleged misrepresentations. TikTok argues the Attorney General's claims would impermissibly require TikTok to warn its users about the alleged risks of the platform, a form of relief barred by the First Amendment. The court disagrees. In *State ex rel. Rosenblum v. Living Essentials, LLC*, 371 Or. 23, 51 & 58-59 (2023), the Oregon Supreme Court held that the UTPA prohibition on misrepresentations in consumer products is consistent with the First Amendment. "[W]e conclude that paragraph (1)(e)'s prohibition on false representations about the 'sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities' of a good, service, or real estate, made in the course of

[20] The First Amendment also bars liability for expressive content generated by TikTok employees themselves on so-called shadow accounts unless the Attorney General can credibly allege the content tortiously injured Oregonians. *See* Compl. ¶¶ 111-113.

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business, is not facially unconstitutional." *State ex rel. Rosenblum*, 371 Or. at 51. As TikTok makes no substantive arguments for why its position or the Attorney General's claim is distinguishable, Defendants' Motion to Dismiss Count 2 is DENIED on this ground.

C. The First Amendment Bars Some of the Attorney General's Omission Claims (Count 3).

The Attorney General's omission claims can be properly understood as coming in two distinct flavors: (1) TikTok's failure to provide contrary information when, or following, affirmatively touting features of the platform, especially safety features; and (2) the failure to disseminate information about the harmful effects of over usage of the platform by young people. TikTok seeks to conflate the two inquiries into the more general affirmative duty to disclose harmful information about itself. Unsurprisingly, the Attorney General chooses to focus on those portions of the allegations that highlight when TikTok made purportedly affirmative representations while hiding contrary information. As is often the case, each party is correct about the skirmish on the battlefield of its choosing.

TikTok directs the court to *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024) for the proposition that states cannot require online providers of third-party content to warn users about general risks associated with those platforms. *Bonta* involved a challenge to California's Age-Appropriate Design Code Act, a set of regulations that required online platforms to file periodic reports with the California Attorney General self-disclosing any products or services that were likely to be accessed by children and the kinds of harm that could result. The *Bonta* panel began its review by noting that "[i]t is well-established that the First Amendment protects 'the right to refrain from speaking at all, and that 'the forced disclosure of information, even purely commercial information, triggers First Amendment scrutiny.'" 113 F.4th at 1117 (citations omitted). Rejecting an argument put forth by California that the regulation wasn't

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censorship because it required the reporting of harms and data management practices, not content, the *Bonta* panel held that First Amendment scrutiny was required even when laws deputize private actors to disclose information about themselves. Applying strict scrutiny because the law regulated far more than just commercial speech—it required businesses to opine on harms caused by third-party speech disconnected from any economic transaction—the *Bonta* panel struck down the law. "[T]he [statute] appears to meet none of the three *Bolger* factors: (1) the reports are not advertisements, (2) they require businesses to go beyond opining about their products or services to opine on highly controversial issues of public concern and then take steps to censor material that the company has deemed sufficiently harmful, and (3) businesses do not have a clear economic motivation to provide these opinions or perform this state-required censorship." *Id.* at 1120 (*citing Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

As *Bonta* involved a facial challenge to a statutory reporting obligation rather than a suit seeking to attach liability, the court acknowledges that an analytical comparison is not straightforward. Nonetheless, the *Bonta* Panel's instruction that states cannot compel a platform to speak by forcing it to warn users about alleged "risks" of the platform's features and its user-generated content endures even within this different context. "Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so." *Nat'l Ass'n of Mfrs. v. S.E.C.*, 800 F3d 518, 530 (D.C. Cir. 2015). Insofar as the Attorney General's omission claims seek to attach liability to TikTok's failure to "disclose" alleged "defects and nonconformities" that

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supposedly caused "compulsive and unhealthy use of addiction to [the platform]," that relief is not permitted under the First Amendment.[21]

Turning to the safer ground of misrepresentation by omissions, the Attorney General argues that this kind of commercial speech is not afforded free speech protections. "If commercial speech is misleading or related to illegal activity, it is not entitled to protection." *Bonta*, 113 F.4th at 1119. "Under the First Amendment, states may regulate false or deceptive commercial speech." *Living Essentials, LLC,* 371 Or. at 58. The first test for determining whether a regulation of commercial speech violates the First Amendment is to evaluate whether the speech is misleading, that is whether it is "more likely to deceive the public than to inform it." *Id.* at 59. As the Attorney General correctly points out, the UTPA itself expressly imposes liability on a business that "fails to disclose any known material defect or material nonconformity" when delivering goods or services. ORS 646.608(1)(t). In so much as the Attorney General's claims involve specific statements made by TikTok about product safety that were misrepresentations by omission, these allegations do not violate the First Amendment.[22]

IV. The Unlawful Trade Practices Act

Oregon's pleading standards require that a complaint contain "[a] plain and concise statement of the ultimate facts constituting a claim for relief." ORCP 18A. Courts will dismiss a claim where a plaintiff "fail[s] to state ultimate facts sufficient to constitute a claim" and/or where a plaintiff fails to commence an action "within the time limited by statute." ORCP 21A(1)(h) and (i). When a party urges dismissal under ORCP 21(A)(1)(h) and (i), the

[21] These include the allegations set forth in the Compl. ¶140, ¶144, ¶159, ¶¶ 170-173, and ¶¶ 225-252.
[22] These include the allegations set forth in the Compl. ¶¶ 145-158 and ¶¶ 170-205. The question of immunity for Compl. ¶ 139(f), and Compl. ¶¶ 160-169 will depend on whether TikTok made specific inaccurate statements about them.

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reviewing court must focus on the text of the complaint, the facts in the complaint are assumed true, and the nonmoving party is entitled to all reasonable inferences from those facts. *See, e.g., Granewich v. Harding,* 329 Or. 47, 51 (1999). A plaintiff need only plead ultimate facts which are "fact[s] from which legal conclusions are drawn." *Fearing v. Bucher*, 328 Or. 367, 375 fn.5 (1999). To survive a motion to dismiss for failure to state a claim, a complaint must include some allegation of material fact regarding each material element of the claim. *McAlpine v. Multnomah Cnty.*, 131 Or. App. 136, 138 (1994). However, "[e]ven vague allegations on an element of a claim for relief are sufficient to survive a motion to dismiss." *Bank of New York Mellon v. Lash*, 303 Or. App. 456, 462 (2020).

A. The Attorney General Sufficiently Alleges Unconscionability Under UTPA (Count 1).

The UTPA provides that a person engages in an unlawful trade practice if the person "[e]mploys an unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation." ORS 646.607(1). Section 646.605(9) supplies a non-exhaustive list of unconscionable tactics. "Unconscionable" as used in the statute "takes its meaning from the legal doctrine of unconscionability." *Gordon v. Rosenblum*, 361 Or. 352, 366 (2017). Oregon courts have applied that doctrine in "a variety of contexts" to "avoid enforcing or creating circumstances that are unfair, unjust, or shocking to the conscience, such as when one person exploits a more favorable bargaining position to take advantage of another." *Id.* at 361-62. "Under Oregon law, the bar for establishing unconscionability has, historically, been a high one." *Meunier v. Nw. Mut. Life Ins. Co.*, 51 F. Supp 3d 1023, 1033 (D. Or. 2014). However, the legislature intended the courts to "interpret the UTPA liberally to protect consumers." *Clark v. Eddie Bauer LLC,* 371 Or. 177, 186 (2023). Unconscionable tactics "include but are not limited to" several articulated

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stratagems, such as knowingly "tak[ing] advantage of a customer's physical infirmity, ignorance, illiteracy or inability to understand the language of the agreement." ORS 646.605(9).

For the Attorney General, taking advantage of children is consistent with the examples provided in the statute's text, and using UTPA in the manner they now seek is consistent with the goal of ensuring minors are not taken advantage of within the marketplace. The Attorney General alleges that TikTok has implemented "coercive design tactics" to exploit young users' unique psychological vulnerabilities, and in so doing, caused compulsive use of platform in violation of the UTPA and its statutory protections for Oregon consumers.

TikTok urges this court to dismiss the claim for several reasons, the most fundamental of which is that the Attorney General is seeking to use UTPA to accomplish policy objectives in a manner wholly inconsistent with the statute's text, legislative history, and case law. Interpreting the Attorney General's allegations as broadly as possible, TikTok characterizes the Attorney General's position as being that the platform itself is unconscionable. "[T]he State claims that the platform *itself*, as it is currently designed, is unconscionable. To Defendants' knowledge, no Oregon court has ever held that a lawful good or service itself constitutes an 'unconscionable tactic.' This court should not be the first." TikTok's Motion at 27. According to TikTok, if Oregon wants to ban TikTok, it must do so through the political process. However, if the Attorney General is allowed to utilize the UTPA to generate liability for product design features, then this court is assisting in effectuating an end-around the legislative process to bar a popular product. TikTok rhetorically asks, what stops the Attorney General from doing the same against any product it deems unsavory? "If a good or service is so manifestly harmful that (in the State's view) it is unconscionable to offer it for public consumption at all—even though the

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Legislature has not seen fit to ban it—then consumers can use their own agency and decide not to use it." Defendants' Motion at 28-29.

Stepping away from policy arguments for a moment, this court focuses, as it must, on the language of the UTPA. TikTok is correct that neither ORS 646.607(1) nor ORS 646.605(9) list out unconscionable product features. Consequently, this court must "look at the common law doctrine of unconscionability" to determine whether a product feature can be considered unconscionable within the meaning of the UTPA. *See Gordon,* 361 Or. at 361-62. At common law, unconscionability is an equitable doctrine that allows courts to avoid enforcing or creating circumstances that are unfair, unjust, or shocking to the conscience, such as when one person exploits a more favorable bargaining position to take advantage of another. *Id.* Although today the doctrine appears most often in contract law,[23] historically the doctrine has been applied in many areas of law where courts sought to avoid what they perceived as unfair outcomes. *Id.* at 362. Oregon courts have followed that pattern and applied the doctrine in a variety of contexts. For example, the Court of Appeals has held that a remedy may be appropriate when a person "takes unconscionable and inequitable advantage" of another by appropriating information learned through a contractual relationship. *Kamin v. Kuhnau*, 232 Or. 139, 155 (1962). In probate proceedings, a court may consider as void dispositions in a will that result from a person taking "unconscionable advantage" of the testator. *Moran v. Bank of Calif., N.A.*, 206 Or. 358, 371 (1956). When sitting in equity, a court may deny relief to a party whose unconscionable conduct constitutes "unclean hands." *Taylor et ux v. Grant et al*, 204 Or. 10, 26

[23] "Procedural unconscionability refers to the conditions of contract formation and focuses on two factors: oppression and surprise." *Livingston v. Metropolitan Pediatrics, LLC*, 234 Or. App. 137, 151 (2010). Substantive unconscionability, by comparison, "generally refers to the terms of the contract, rather than the circumstances of formation, and focuses on whether the substantive terms contravene the public interest or public policy." *Bagley v. Mt. Bachelor, Inc.*, 356 Or. 543, 555 (2014).

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(1955). In property disputes, "any form of unconscionable conduct, artifice, concealment, or questionable means" may justify imposing a constructive trust. *Marston v. Myers et ux*, 217 Or. 498, 509 (1959), And when construing statutes, a court may seek to avoid "unconscionable results." *Parr v. Dept. of Revenue*, 276 Or. 113, 116 (1976).

In *Gordon*, while the primary question—whether there existed a consumer relationship between the parties—is inapplicable here, the Court of Appeals had occasion to address how trial courts should interpret "unconscionable tactics" given the UTPA's common-law ancestry. "In light of the common-law history of the doctrine, which shows extensive application, and the statutory history, which shows an expanding meaning at the time the UTPA was enacted, we cannot conclude that the doctrine of unconscionability or the term 'unconscionable tactics' has such a limitation. Thus, the meaning of the term 'unconscionable tactics' itself provides no basis for excluding plaintiffs' conduct from the reach of the UTPA." *Id.* at 363-64. While not strictly binding given the different facts and legal arguments, the court interprets *Gordon's* analysis as determinative. Just as the *Gordon* court dismissed the defendant's efforts at cabining UTPA to specifically enumerated theories, this court is compelled to dismiss TikTok's efforts to do the same. Like *Gordon*, this case involves allegations of unconscionable tactics employed towards potential consumers. At this stage of litigation, that constitutes a sufficiently valid UTPA claim to proceed. Defendants' Motion to Dismiss Count 1 is DENIED on this ground.

B. The Attorney General Sufficiently Alleges Misrepresentation and Deception Under the UTPA (Counts 2 & 3).

ORS 646.608(1)(b) makes it unlawful to "cause[] likelihood of confusion or misunderstanding" as to a product's "source, sponsorship, approval, or certification." Section (1)(e) further provides that it is unlawful to "represent[]" that products have certain

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attributes—that is, "sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities"—that they "do not have." The word "representation" is defined in the UTPA as "any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact." ORS 646.608(2). Thus, the crux of a violation under ORS 646.608(1)(e) is a misleading assertion about various attributes that, by their nature, can have the potential to affect a purchasing decision, such as sponsorship, approval, characteristics, ingredients, uses, benefits, quantities, or qualities. The statute does not expressly say whether it is limited to attributes that have that potential, or whether it reflects a legislative judgment that every misrepresented characteristic—regardless of how innocuous—has the potential to mislead and should constitute a violation of the UPTA. At the very least, the plain text does not foreclose the former interpretation. *State ex rel. Rosenblum v. Living Essentials, LLC,* 313 Or. App. 176, 187-188 (2021) (reversed on other grounds). Under the UTPA, only statements that "are specific and objective, that is, susceptible to being proven true or false, such that they are likely to induce [sic] consumer reliance," are actionable. *State ex rel. Rosenblum v. Living Essentials, LLC*, 335 Or. App. 30, 43 (2024). Statements that are merely "general, exaggerated, or subjective" are not. *See id.*

TikTok urges the court to dismiss the second and third claims because the Attorney General's theories of deception often rely upon generic terms and phrases such as "[s]afety and wellness—in particular for teens—is a core priority for TikTok"; "we take safety, especially for teenagers, extremely seriously"; and "it's important that our platform remain a safe, supportive, and joyful place for our community." Compl. ¶¶ 139(b), (d), (g). Relying primarily upon *Living Essentials, LLC*, TikTok urges this court to reject any effort by the state to attach liability to vague, "general," and indefinite terms. Defendants' Motion at 33 (citing *Living*

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Essentials, LLC, 335 Or. App. at 43). The same is true for statements specifically concerning the platform's safety features, such as that "[w]e launch great products with a safety-by-design mentality." Compl. ¶ 159. For TikTok, these sorts of statements—that a particular feature is made with a "safety-by-design mentality"—do not suggest a specific quality but are general, subjective statements "reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." *Living Essentials, LLC*, 335 Or. App. at 43.

Like the court's conclusion above, the Attorney General urges the court to reject TikTok's position primarily because of the phase of litigation. More specifically, the Attorney General argues that TikTok is really making an argument regarding "puffery," and therefore it should be addressed at a later stage in the proceedings. "[W]hether a statement is puffery is a question of fact," which is not normally appropriate for resolution on a motion to dismiss. *Living Essentials, LLC,* 335 Or. App. at 42; *see also Guirma v. O'Brien*, 259 Or. App. 778, 787 (2013) ("questions of fact" could not "be resolved on a motion to dismiss"). Furthermore, according to the Attorney General, TikTok is cherry-picking portions of statements, most of which include far more actionable and specific promises. The Attorney General points to two specific examples:

- TikTok represents that it removes certain content that violates its Community Guidelines. Compl. ¶ 207. TikTok either removes this content or it does not. (In many cases, it does not.) *Id.* ¶ 213; see *Living Essentials, LLC*, 335 Or. App. at 46 ("Amino acids either improve focus and mood, or they do not.").
- TikTok represents that it imposes an automatic 60-minute screentime limit on teen users. Compl. ¶ 149. TikTok either limits teens' use to 60 minutes, or it does not. (It does not.) *Id.* ¶ 150.

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Plaintiff's Reply at 45. The court agrees. Determinations about how customers will interpret TikTok's various public statements are fact-intensive inquiries best left to other phases of this proceeding. Defendants' Motion to Dismiss Counts 2 and 3 are DENIED on this ground.

So ORDERED.

This 13th day of June 2025.

Hon. Bryan B. Francesconi
Multnomah County Circuit Court

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2023 WL 6847378 (Cal.Super.) (Trial Order)
Superior Court of California.
Los Angeles County

SOCIAL MEDIA CASES.

Nos. JCCP 5255, 22STCV21355.
October 13, 2023.

COORDINATED PROCEEDING SPECIAL TITLE (RULE 3.550).
***1** This Ruling Relates to: 22STSCV40543; 22STCV26778; CV2022-1472
Department 12
Spring Street Courthouse

Defendants' Demurrer to Master Complaint and Three Short Form Complaints

Honorable Carolyn B. Kuhl, Judge.

The issue in this case is whether a social media company may maximize its own benefit and advertising revenue at the expense of the health of minor users of that social media company's applications or websites. Plaintiffs here allege that, as children or minor teenagers, they became addicted to the social media platforms Facebook, Instagram, Snapchat, TikTok and/or YouTube. Their addictions, they contend, resulted from allegedly manipulative features of those interactive media which sought to maximize the amount of time these young people spent on the sites and thereby maximize advertising revenue for Defendants here, who created and operated these platforms. Plaintiffs allege that as a result of their addiction, they suffered depression and anxiety, engaged in self-harm, became suicidal, and developed eating disorders.

The central question raised by the motion before the court at this stage of the litigation is whether the law provides a remedy for the harm Defendants' policies allegedly caused Plaintiffs. In order to make this determination, the court must explore whether the common law provides a remedy for the harms alleged and then address whether federal law or the Constitution bars any such remedy.

The court determines that Defendants' social media platforms are not "products" for purposes of product liability claims, but that Plaintiffs have adequately pled a cause of action for negligence that is not barred by federal immunity or by the First Amendment. Plaintiffs also have adequately pled a claim for fraudulent concealment against Defendant Meta. The Demurrer is overruled as to these claims but sustained as to all other claims.

I. Summary of Factual Allegations

Plaintiffs in this coordinated proceeding are minor users of social media platforms (or parents of those users) who allege they have suffered various types of harm as a result of the use of the platforms. Plaintiffs bring their claims against multiple Defendants that designed and operated the social media platforms: Facebook, Instagram, Snapchat, TikTok, and YouTube. Facebook and Instagram are owned, designed, and operated by a group of Defendants who are referred to collectively herein as "Meta." Snapchat is owned, designed, and operated by Defendant Snap Inc. (Snap). TikTok is owned, designed, and operated by multiple Defendants who are referred to collectively herein as "ByteDance." YouTube is owned, designed, and operated by multiple Defendants referred to collectively herein as "Google."

On May 16, 2023, Plaintiffs filed their Master Complaint. The Master Complaint alleges 13 causes of action:

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(1) Strict Liability - Design Defect (against all Defendants);

(2) Strict Liability - Failure to Warn (against all Defendants);

(3) Negligence - Design (against all Defendants);

(4) Negligence - Failure to Warn (against all Defendants);

***2** (5) Negligence (against all Defendants);

(6) Negligent Undertaking (against all Defendants);

(7) Fraudulent Concealment and Misrepresentation (against Meta);

(8) Negligent Concealment and Misrepresentation (against Meta);

(9) Negligence per se (against all Defendants);

(10) Sex and Age Discrimination (against all Defendants);

(11) Wrongful Death (against all Defendants);

(12) Survival Action (against all Defendants); and

(13) Loss of Consortium and Society (against all Defendants).

Each Plaintiff or family also filed a short-form complaint that adopts some or all of the allegations of the Master Complaint, specifies each Plaintiff's injuries, and adds individual allegations concerning the social media platforms used by the Plaintiff and how those platforms injured him or her. The current Motion concerns the allegations of the Master Complaint as it applies to three specified short-form complaints.

The Master Complaint consists of 300 pages of allegations and cannot be fully summarized by the court here. While directing the reader to the many allegations in the Master Complaint, this court nonetheless offers a (relatively) short overview of certain important aspects of the Master Complaint to provide a context for the court's ruling.

“Instagram, Facebook, TikTok, Snap, and YouTube employ many similar defective and dangerous product features that are engineered to induce more use by young people—creating an unreasonable risk of compulsive use and addiction. For instance, all five apps harvest user data and use this information to generate and push algorithmically tailored “feeds” of photos and videos. And all five include methods through which approval can be expressed and received, such as likes, hearts, comments, shares, or reposts.” (Mast. Compl., ¶ 80, internal footnotes omitted.)

“Defendants' apps are designed and engineered to methodically, but unpredictably, space out dopamine-triggering rewards with dopamine gaps. The unpredictability is key because, paradoxically, intermittent variable rewards (or ‘IVR’) create stronger associations (conditioned changes in the neural pathway) than fixed rewards. Products that use this technique are highly addictive or habit forming.” (Mast. Compl., ¶ 81.)

“Defendants' apps are designed to purposely withhold and release rewards on a schedule its algorithms have determined is optimal to heighten a specific user's craving and keep them using the product. Defendants incorporate IVR into the design

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and operations of their respective products in various ways by linking a user's action (like pulling a lever) with a variable reward." (Mast. Compl., ¶ 84, internal quotation marks, brackets, and footnotes omitted.) "[E]ach of Defendants' products exploits this physiological reaction among its users, typically using Mikes,' 'hearts,' or other forms of approval that serve as the reward and are purposefully delivered in a way to create stronger associations and maximize addiction." (Mast. Compl., ¶ 86.)

"Defendants' apps addict young users by preying on their already-heightened need for social comparison and interpersonal feedback-seeking. Because of their relatively undeveloped prefrontal cortex, young people are already predisposed to status anxieties, beauty comparisons, and a desire for social validation. Defendants' apps encourage repetitive usage by dramatically amplifying those insecurities." (Mast. Compl., ¶ 91, internal footnotes omitted.)

***3** "The design of Defendants' apps also encourages unhealthy, negative social comparisons, which in turn cause body image issues and related mental and physical disorders. Given adolescents' naturally vacillating levels of self-esteem, they are already predisposed to comparing 'upward' to celebrities, influencers, and peers they perceive as more popular. Defendants' apps turbocharge this phenomenon." (Mast. Compl., ¶ 94.)

"That is made worse by appearance-altering filters built into Defendants' apps, which underscore conventional (and often racially biased) standards of beauty, by allowing users to remove blemishes, make bodies and faces appear thinner, and lighten skin-tone." (Mast. Compl., ¶ 94, internal footnotes omitted.)

These defective features of Defendants' social media products "can cause or contribute to (and, with respect to Plaintiffs, have caused and contributed to) the following injuries in young people: eating and feeding disorders; depressive disorders; anxiety disorders; sleep disorders; trauma- and stressor-related disorders; obsessive-compulsive and related disorders; disruptive, impulse-control, and conduct disorders; suicidal ideation; self-harm; and suicide." (Mast. Compl., ¶ 96.)

Plaintiffs allege that the social media platforms were designed "to addict minors and young adults, who were particularly unable to appreciate the risks posed by the products, and particularly susceptible to harms from those products." (Mast. Compl., ¶ 830.) "[E]ach Defendant knew or, by the exercise of reasonable care, should have known that Plaintiffs would use these products without inspection for [their] addictive nature." (Mast. Compl., ¶ 832.)

"Each Defendant defectively designed its respective products to take advantage of the chemical reward system of users' brains (especially young users) to create addictive engagement, compulsive use, and additional mental and physical harms." (Mast. Compl., ¶ 833.)

"Each Defendant failed to test the safety of the features it developed and implemented for use on its respective products. When each Defendant did perform some product testing and had knowledge of ongoing harm to Plaintiffs, it failed to adequately remedy its respective product's defects or warn Plaintiffs." (Mast. Compl., ¶ 834.)

"Children and teenagers are among the ordinary consumers of each of the Defendant's products. Indeed, each Defendant markets, promotes, and advertises its respective products to pre-teen and young consumers. Pre-teen and young consumers, and their parents and guardians, do not expect Defendants' products to be psychologically and neurologically addictive when the products are used in its intended manner by its intended audience. They do not expect the algorithms and other features embedded by each Defendant in its respective products to make them initially and progressively more stimulative, to maximize young consumers' usage time. They do not expect each Defendant's revenues and profits to be directly tied to the strength of this addictive mechanism and dependent on young consumers spending several hours a day using their respective products." (Mast. Compl., ¶ 835.)

"Each of the Defendant's respective products are likewise defectively designed in that it creates an inherent risk of danger; specifically, a risk of abuse, addiction, and compulsive use by youth which can lead to a cascade of harms. Those harms include but are not limited to dissociative behavior, withdrawal symptoms, social isolation, damage to body image and self-worth,

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increased risky behavior, exposure to predators, sexual exploitation, and profound mental health issues for young consumers including but not limited to depression, body dysmorphia, anxiety, suicidal ideation, self-harm, insomnia, eating disorders, death, and other harmful effects." (Mast. Compl., ¶ 836.)

***4** "Alternative designs were available that would reduce minors' addictive and compulsive engagement with each of the Defendants' respective products, and which would have served effectively the same purpose of Defendants' products while reducing the gravity and severity of danger posed by those products' defects." (Mast. Compl., ¶ 839.)

For example, Plaintiffs allege that Defendants could have changed the design of their social media products to include such features as "[r]obust age verification," "[e]ffective parental controls," "[d]efault protective limits to the length and frequency of sessions," and tools to prevent child sexual exploitation, among others. (Mast. Compl., ¶ 838.)

The alleged purpose of Defendants' actions was to increase revenue. Plaintiffs allege: "Defendants deliberately embedded in their products an array of design features aimed at maximizing youth engagement to drive advertising revenue. Defendants know children are in a developmental stage that leaves them particularly vulnerable to the addictive effects of these features. Defendants target them anyway, in pursuit of additional profit." (Mast. Compl., ¶ 2.) Plaintiffs allege that Defendants' platorms are "designed, marketed, and operated" in order "to maximize the number of children who download them and use them compulsively." (Mast. Compl., ¶ 52.) Plaintiffs further allege:

> Children are more vulnerable users and have more free time on their hands than their adult counterparts. Because children use Defendants' products more, they see more ads, and as a result generate more ad revenue for Defendants. Young users also generate a trove of data about their preferences, habits, and behaviors. That information is Defendants' most valuable commodity. Defendants mine and commodify that data, including by selling to advertisers the ability to reach incredibly narrow tranches of the population, including children. Each Defendant placed its app(s) into the stream of commerce and generated revenues through the distribution of those apps at the expense of the consuming public and Plaintiffs.

(Mast. Compl., ¶ 52.)

While these allegations are written to apply to each of the platforms at issue here, Plaintiffs also provide more specific allegations regarding each Defendant; these individualized allegations also allege that Plaintiffs' harms were caused by the design and operation of the platforms. The allegations regarding Snapchat can be summarized as follows.

Plaintiffs allege that Snapchat's design features are addictive to minor users:

> Once Snap entices children to use its product, it uses a series of product features that are designed to addict children. As laid out below, those features can be broadly grouped into two categories that exploit techniques discussed earlier in this Complaint. The first are social metrics and other similar psychological manipulation techniques. The second are features designed to encourage endless passive consumption of content on the Snapchat product. These features, in tandem with each other and the other harmful features described throughout this section and Complaint, induce addiction, compulsive use, and other severe mental and physical harm to the child users of the Snapchat product, including Plaintiffs.

(Mast. Compl., ¶ 439.)

Plaintiffs provide allegations regarding the design feature "Snap Streak":

***5** 457. Snap Streaks contribute to feelings of social pressure and anxiety when users lose or break a Streak. Researchers have found that losing a Streak can cause feelings of betrayal for some users, especially girls, who reported "negative" feelings when losing a Streak with one of their friends.

458. In 2018, Snap conducted its own internal research on Snap Streaks, which found that over a third of users reported it was "extremely" or "very important" to keep a Streak going, and some users reported that the stress level to keep a Streak was "intolerable" or "large." Snap's users reported that Streaks are equally important to "Likes" on Instagram

459. As this research demonstrates, Streaks are important to users. However, these design features do not enhance the communication function of the product. Instead, they exploit users' susceptibility to social pressure and to the compulsive accumulation of other rewards, including Snap Score points and Charms.

(Mast. Compl., ¶¶ 457-459, internal footnotes omitted.)

Plaintiffs provide allegations regarding Snapchat's push notifications:

> In addition to Snapchat's in-app reward features, Snap also sends push notifications and emails to encourage addictive engagement and increase use. Notifications are triggered based on information Snap collects from, and about, its users. Snap "pushes" these communications to users excessively and at disruptive times of day. Snap has even designed the format of these notifications to pull users back onto its app by preying on their fear of missing out—never mind the consequences to their health and well-being.

(Mast. Compl., ¶ 460.) Plaintiffs allege that Snap has designed its platform to make it difficult for users to discontinue use. (Mast. Compl., ¶ 461.) Plaintiffs include allegations regarding Snapchat's design feature "Spotlight":

468. In November 2020, Snap launched "Spotlight," a feature that pushes to users "an endless feed" that Snap curates from its 300 million daily Snapchat users. Spotlight functions and appears nearly identical to TikTok, with similar addictive qualities and harms. Snapchat's Spotlight feature allows users to make videos that anyone can view, and Snap pays users whose Spotlight videos go viral, thus serving as yet another reward system that encourages user engagement. After Snap introduced Spotlight, user time spent on the product increased by over 200%.

469. In February 2022, Snap CEO Evan Spiegel told investors that users are spending more time on Spotlight than almost any other aspect of Snapchat. A year prior, Snap announced "Spotlight Challenges," which provided users with cash prizes for creating Spotlight videos with specific lenses, sounds, or topics, further integrating the user into the Snap ecosystem. Snap claims it paid out more than $250 million in cash prizes to Spotlight Challenge participants in 2021 alone.

(Mast. Compl., ¶¶ 468-469, internal footnotes omitted.)

Like other Defendants in this coordinated proceeding, Snap allegedly has design features that allow users to use lenses and filters, the use of which leads to emotional and mental harm. (Mast. Compl., ¶¶ 484-485.) Plaintiffs allege:

> A 2017 study found that these features made Snapchat one of the worst social media products for the mental health of children and adolescents, behind only Instagram. In recent years, plastic surgeons have reported an increase in requests for alterations that correspond to Snapchat's filters. This has led researchers to coin the term "Snapchat Dysmorphia," in which

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> the effect of Snapchat's filters triggers body dysmorphic disorder. The rationale underlying this disorder is that beauty filters on Snapchat create a "sense of unattainable perfection" that leads to self-alienation and damages a person's self-esteem. One social psychologist summarized the effect as "the pressure to present a certain filtered image on social media [which] can certainly play into [depression and anxiety] for younger people who are just developing their identities."

***6** (Mast. Compl., ¶ 486, internal footnotes omitted; brackets in original.) The provision of such "lenses" and "filters" is alleged to be a tool provided to Plaintiffs for Plaintiffs themselves to produce pictures for Snapchat.

Plaintiffs also allege harm related to Defendants' platforms' age verification— or lack thereof. "None of the Defendants conduct proper age verification or authentication. Instead, each Defendant leaves it to users to self-report their age. This unenforceable and facially inadequate system allows children under 13 to easily create accounts on Defendants' apps." (Mast. Compl., ¶ 57.) Plaintiffs thus seek to hold Defendants liable for "[f]ailing to implement effective protocols to block users under the age of 13." (Mast. Compl., ¶ 930(a).) With respect to Meta, Plaintiffs also offer allegations regarding the use of age verification when a parent seeks to have a minor user's account deleted:

> Meta imposes unnecessary barriers to the removal of accounts created by children under 13. Since at least April 2018, Instagram and Facebook both accept reports of accounts created by children under 13. However, before an Instagram or Facebook account is deleted, Meta requires verification that the child is under the age of 13.

(Mast. Compl., ¶ 249, internal footnotes omitted.)

Plaintiffs also allege that Defendants' platforms are designed to make it difficult for minor users' parents to control their children's use of the platforms. Defendants have allegedly failed "to implement effective parental controls." (Mast. Compl., ¶ 930(c).) Plaintiffs allege that minor users are able to secretly make accounts without their parents becoming aware. (See, e.g., Mast. Compl., ¶ 493.) For example, Plaintiffs allege as follows with respect to Snapchat's "My Eyes Only" feature:

> This feature enables and encourages users to hide harmful content from their parents in a special tab that requires a passcode. Content cannot be recovered from "My Eyes Only"—allegedly even by Snap itself.

(Mast. Compl., ¶ 476.)

As explained more fully below, the fact that Plaintiffs have adequately alleged that their harms were caused by the design features of Defendants' platforms is critical to this court's decision. But some allegations of the Master Complaint can be read to state that Plaintiffs' harms are caused by the actual content found on Defendants' platforms, rather than just the design features of those platforms.

For example, the question of whether harm to Plaintiffs is caused by the design of the platforms or by the allegedly harmful third-party content found on those platforms is raised by the allegations that certain Plaintiffs have developed eating disorders. Plaintiffs allege:

> In 2020, clinical research demonstrated an observable link between youth social media use and disordered eating behavior. The more time young girls spend using Defendants' products, the more likely they are to develop disordered eating behaviors. And the more social media accounts adolescents have, the more disordered eating behaviors they exhibit.

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(Mast. Compl., ¶ 116, internal footnotes omitted.) Such allegations can be read to suggest that an eating disorder like anorexia is caused by the design of the platforms themselves. But Plaintiffs also offer allegations suggesting that eating disorders are caused by the third-party content found on Defendants' platforms. For example, Plaintiffs allege that content such as "thinspiration" and "fitspiration" "lowered self-esteem, even in those with a self-perceived healthy weight." (Mast. Compl., ¶ 118.) The Master Complaint also alleges that Meta approved an advertisement that promotes an " 'Ana Tip' [with 'ana' being a euphemism for anorexia] instructing the viewer to 'visit pro-ana sites to feed your motivation and reach your goal' when feeling hungry." (Mast. Compl., ¶ 359.)

***7** In addition to filing a Master Complaint, Plaintiffs also have filed individual, short-form complaints that provide more detail for the many individual minor users who were allegedly harmed by Defendants' platforms. There are three such short-form complaints that are relevant to the instant proceeding: (1) the Amended Short Form Complaint For Damages And Demand For Jury Trial, *M.C. ex rel. Cramblet v. Meta Platforms, Inc., et al.,* Case No. 22STCV40543 (M.C. SFC); (2) the Amended Short Form Complaint For Damages And Demand For Jury Trial, *J.P., et al. v. Meta Platforms, Inc., et al.,* Case No. 22STCV26778 (J.P. SFC); and (3) the Amended Short Form Complaint For Damages And Demand For Jury Trial, *J.S., et al. v. Meta Platforms, Inc., et al.,* Case No. CV2022-1472 (J.S. SFC) (collectively, Short-Form Complaints). The three Plaintiffs concerned in the Short-Form Complaints incorporate the allegations of the Master Complaint, but offer more individualized information regarding their particular use of Defendants' platforms and the alleged individual harms they each suffered as a result of that use. [1]

[1] Although the Master Complaint refers to injuries allegedly caused by child predators, by child sexual abuse material, and by dangerous "challenges" found on social media (see, e.g., Mast. Compl., ¶¶ 137, 613), none of the Short-Form Complaints that are at issue in the current Motion alleges that a Plaintiff suffered injury from such causes.

In the M.C. SFC, the minor M.C. brings claims against all Defendants for his or her alleged use of Instagram, Snapchat, TikTok, and YouTube. (M.C. SFC, ¶ 3.) Plaintiff M.C. alleges that his or her harms include addiction/compulsive use, anorexia, depression, suicidality, attempted suicide, and a "[r]educed inclination or ability to sleep." (M.C. SFC, ¶ 5.) Plaintiff M.C. seeks to recover pursuant to the First through Tenth Causes of Action (i.e., Plaintiff M.C. does not allege a cause of action for wrongful death, a survival cause of action, or a cause of action for loss of consortium).

In the J.P. SFC, the minor M.P. brings claims against Meta and ByteDance based on Plaintiff M.P.'s use of Instagram and TikTok. (J.P. SFC, ¶¶ 3-4.) Plaintiff M.P. alleges that his or her harms include addiction/compulsive use, anorexia, depression, and "[l]ong-term physical harms arising as foreseeable result of eating disorder." (J.P. SFC, ¶ 5.) The J.P. SFC alleges the First through Tenth, and the Thirteenth Causes of Action from the Master Complaint. (J.P. SFC, ¶ 6.)

In the J.S. SFC, the minor L.J.S. brings claims against Meta for his or her use of Facebook and Instagram. (J.S. SFC, ¶¶ 3-4.) Plaintiff L.J.S. also brings his or her claims based on use of the Meta product "Oculus." (J.S. SFC, ¶ 4.) Plaintiff L.J.S. alleges that his or her harms include addiction/compulsive use, bulimia, binge-eating, depression, anxiety, suicidality, and "physical injuries suffered as a result of use of the Oculus Virtual Reality headset." (J.S. SFC, ¶ 5.) [2] The J.S. SFC alleges the First through Ninth, and Thirteenth Causes of Action from the Master Complaint.

[2] Allegations regarding Plaintiff L.J.S.'s use of the Oculus virtual reality headset are not addressed in this ruling. On June 16, 2023, by way of a post on the Case Anywhere message board, this court approved the parties' proposal "that any demurrer briefing addressing the supplemental Oculus allegations be held in abeyance until after [this court] has ruled on the initial demurrers."

Defendants now demur to the Master Complaint and to the three Short-Form Complaints with respect to the First through Tenth, and Thirteenth Causes of Action, contending that Plaintiffs have failed to state facts sufficient to constitute a cause of action

against Defendants. Plaintiffs alleging claims in the M.C. SFC and the J.P. SFC have decided to withdraw their Tenth Cause of Action; similarly, Plaintiffs from the J.P. SFC and the J.S. SFC have agreed to withdraw their Thirteenth Cause of Action. (Pls' Opp., at p. 75.) Consequently, this ruling addresses only the First through Ninth Causes of Action as alleged in the Master Complaint and Short-Form Complaints.

***8** Snap has filed a supplemental brief in support of the Demurrer in an attempt to demonstrate that Plaintiffs' claims are especially defective against Snap given the way in which Snapchat functions.

II. Procedural Standard for Challenges to a Complaint by Demurrer

Defendants' Demurrer is not an invitation for the court to determine the veracity of any of the factual allegations in the Master Complaint. Defendants' Demurrer thus plays the rather "limited role" of testing the "legal sufficiency" of the Master Complaint and the Short-Form Complaints. *(Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Here the court—as well as Defendants-must treat all of the factual allegations in the Master Complaint as true. "The sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action—not whether they are true. Thus, no matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer. (Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Group) Ch. 7(I)-A ¶ 7:44.)

It is important to stress that "a general demurrer may not be sustained … as to a portion of a cause of action." *(Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167, disapproved of on other grounds by *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905.) This basic rule of California civil procedure means that the court must limit its inquiry to the question whether there are sufficient factual allegations in the Master Complaint upon which a particular cause of action properly can be based; if such factual allegations exist, then the court is not permitted to dismiss that cause of action based on some additional factual allegations that, alone, would not properly support that cause of action. As the Third District Court of Appeal explained, if a "demurrer should [be] overruled based on some of [the] factual allegations [found in the plaintiff's complaint], [the court] need not address the sufficiency of the other factual allegations contained in the complaint[]." *(Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 522, fn. 9.) The proper way for a defendant to attack certain *portions* of a cause of action is by filing a motion to strike. (*Id.*)

This basic character of demurrers was explained in *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680 (*PH II*). There, the appellate court, without even reaching the "merits," reversed the trial court's decision to sustain the defendant's demurrer, given that the trial court had failed to follow the basic "rule that a party may not demur to a portion of a cause of action … ." (*Id.* at p. 1681.) The plaintiff alleged two causes of action for legal malpractice that were based on "several distinct incidents of alleged malpractice." (*Id.*) The defendants in *PH II* "demurred to one, identical portion of the two causes of action, which involved a single incident of alleged malpractice" which the plaintiff conceded was unmeritorious. (*Id.*) But the plaintiff contended that its causes of action for malpractice could nonetheless rest on other, separate incidents of alleged malpractice by the defendants. (*Id.* at p. 1682.) The trial court sustained the demurrer to the portions of the two causes of action based on the unmeritorious incident without leave to amend, "on the ground that failure to pursue a worthless claim is not actionable malpractice." (*Id.*)

***9** The appellate court in *Ph II* reversed the trial court and found that the defendants' demurrer "was not procedurally proper." (*Id.*) The court explained that, in such circumstances, the proper procedural vehicle is a motion to strike. (*Id.* at pp. 1682-1683.)

Because Defendants here have filed a demurrer, the foregoing principles of California civil procedure must govern this court's ruling. If there are any allegations that would be sufficient to support a cause of action, then Defendants' Demurrer must be overruled as to that cause of action.

III. Nature of Defendants' Principal Legal Challenges

Defendants argue that each of the causes of action alleged in the Master Complaint fails to state a claim. In addition, Defendants argue that the entirety of Plaintiffs' case is barred by a federal statute—section 230 of the Communications Decency Act, 47 U.S.C. § 230 (Section 230)—and by the provisions of the United States and California Constitutions protecting freedom of speech (First Amendment). Defendants, in their briefs and at oral argument, begin by analyzing caselaw interpreting Section 230 and the First Amendment. However, as explained further below, in order to determine whether a state law cause of action is barred by either Section 230 or the First Amendment, the proper approach is to analyze the elements of a particular cause of action and then to determine whether the gravamen of the cause of action impermissibly imposes liability on a basis that is statutorily or constitutionally precluded.

Therefore, the court will first consider whether California law provides a basis for relief under each cause of action pleaded by Plaintiffs. Then the court will consider the restrictions imposed by Section 230 and by the First Amendment, and whether either bars a particular cause of action.

Nevertheless, in order to provide a more thorough and cohesive analysis, the discussion below begins with some general principles that govern the immunity provided by Section 230 and the protections provided by the First Amendment when state courts seek to impose tort liability affecting speech.

A. Section 230

Section 230 of the Communications Decency Act (CDA), titled "Protection for private blocking and screening of offensive material," was passed by Congress in 1996. In part the statute was meant to overrule a decision of a New York state court that had held an internet service provider liable as a publisher of offensive content because it deleted some offensive message board posts and not others. (See *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 851-852 (*Internet Brands); Hassell v. Bird* (2018) 5 Cal.5th 522, 534 (*Hassell).*) Congress sought to spare internet service providers the "grim choice" between doing nothing to remove offensive content and removing some but not all offensive content. (*Internet Brands, supra,* at pp. 851-852.)

In a section entitled "Protection for 'Good Samaritan' blocking and screening of offensive material,"[3] Section 230 states that no provider of an interactive computer service may be held liable for either (a) a voluntary good faith action to restrict access to materials that the provider considers "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," or (b) any action to enable information content providers or others the technical means to restrict access to such materials. (47 U.S.C. § 230, subd. (c)(2)(A)-(B).) Under that same heading, Congress provided additional protection for information service providers, which has proven more difficult to interpret:

[3] The court in *Internet Brands, supra,* 824 F.3d at p. 851, looked to the heading of subdivision (c) of Section 230 to guide its consideration of the purposes of Section 230.

***10** Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(*Id.* § 230, subd. (c)(1).)

Defendants seek protection from the claims asserted in this case based on this language of Section 230. It is conceded by all parties that Defendants are "provider[s] … of an interactive computer service" within the meaning of subdivision (c)(1) of Section 230.[4]

[4] "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." (*Id.* § 230, subd. (f)(2).)
"The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." (*Id.* § 230, subd. (f)(4).)

Congress expressly stated its policy goals in enacting Section 230. Subdivision (b) of Section 230 states that "[i]t is the policy of the United States" to promote continued development of the internet and interactive computer services and to preserve "the vibrant and competitive free market" of these services "unfettered by Federal or State regulation." (*Id.* § 230, subd. (b)(1)-(2).) Congress equally desired "to encourage the development of technologies which maximize user control over what information is received by individuals, families and schools" using interactive computer services and to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict children's access to objectionable or inappropriate online material." (*Id.* § 230, subd. (b)(3)-(4).) [5]

[5] Congress also expressed a policy "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." As stated in footnote 1, *supra,* none of the Short-Form Complaints at issue on this demurrer allege any actions by Defendants that led to injury of a Plaintiff due to exposure to child sexual abuse material or due to stalking or sexual abuse by an adult.

The California Supreme Court has quoted with approval Ninth Circuit precedent recognizing that "there is an apparent tension between Congress's goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet… . The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is often not a defect but an indication that the legislature was doing its job." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 56 (*Barrett*), quoting *Batzel v. Smith* (9th Cir. 2002) 333 F.3d 1018, 1028 (*Batzel*), reversed on other grounds by subsequent statutory amendment as stated in *Breazeale v. Victim Servs.* (9th Cir. 2017) 878 F.3d 759, 766-767).

***11** As to the preemptive effect of Section 230, the statute states:
(e) Effect on other laws.

…

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(47 U.S.C. § 230, subd. (e)(3).)

Several general principles can be derived from caselaw that has evolved since the enactment of subdivision (c)(1) of Section 230:

- A provider of interactive computer services (hereinafter sometimes referred to as "a provider") cannot be held liable as a publisher or speaker of content provided by a third party. (*Barrett, supra,* 40 Cal.4th at p. 57 ["Congress intended to create a blanket immunity from tort liability for online republication of third party content"]; *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 ["By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers

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liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role"].)

• A provider also cannot be liable for incidental editorial functions because it is still acting as a publisher of third-party content. (*Batzel, supra,* 333 F.3d at 1031 [provider who does no more than select and make minor edits to third-party content cannot be considered a content provider].)

• A provider can be liable for its own speech, subject to First Amendment restrictions. (*Fair Housing Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1169 (*en banc) (Roommates*) [Section 230 did not bar liability where provider "designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children" and thereby allegedly engaged in unlawful discriminatory conduct]; *Liapes v. Facebook, Inc.* (Sept. 21, 2023)_____ Cal.App.5th_____, 2023 WL 20680402 [Facebook acted as a "content developer" and therefore section 230 did not bar a claim against Facebook for unlawful discrimination under California law. Facebook allegedly required users to disclose age and gender and then relied on those "unlawful criteria" to develop an advertising targeting and delivery system making it difficult for individuals with protected characteristics (women and older people) to find or access insurance ads on Facebook].)

• It is important to consider the gravamen of the cause of action brought against the provider. Section 230 bars liability only if the cause of action seeks to impose liability for the provider's *publication* decisions regarding third party content—for example, whether or not to publish and whether or not to depublish. (See, e.g., *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, (*Barnes*) [Although taking down third-party content from its website "is quintessential publisher conduct" by a provider, Section 230 did not bar an action for promissory estoppel based on the provider's failure to remove a posting after it had agreed to do so. "Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication"]; *Hassell, supra,* 5 Cal.5th at pp. 542-543 ["we recognize that not all legal duties owed by Internet intermediaries necessarily treat them as publishers of third party content, even when these obligations are in some way associated with their publication of this material"]; *Bolger v. Amazon.com, LLC* (2020) 53 Cal.App.5th 431, 464-465 (*Bolger*) [Provider was liable in strict product liability as a seller in the chain of distribution for a defective product. That cause of action targeted the provider's role in the distribution of consumer goods, not the third-party content in the product listing published by the provider].)

***12** • Even if third-party content is a "but-for" cause of the harm suffered by a plaintiff, the action is not barred by Section 230 if the cause of action does not seek to hold the provider liable as a publisher. (*Internet Brands, supra,* 824 F.3d at p. 853 [Provider acted as a publisher of third-party content by hosting Jane Doe's user profile on a website, but the provider could be held liable for failure to warn Jane Doe based on its independent knowledge that the website was used to identify rape victims. Section 230 "does not provide a general immunity against all claims derived from third-party content" even if the third-party content was a but-for cause of plaintiff's injuries.]; *HomeAway.com v. City of Santa Monica* (9th Cir. 2018) 918 F.3d 676, 682 (*HomeAway*) [Provider that hosted postings by persons offering Airbnb rentals was required to comply with an ordinance prohibiting short-term home rentals unless licensed as "home-sharing." The court rejected "use of a "but-for' test that would provide immunity under [section 230] solely because a cause of action would not otherwise have accrued but for the third-party content," rather looking to "whether the duty would necessarily require an internet company to monitor third-party content"]; *Lee v. Amazon.com, Inc.* (2022) 76 Cal.App.5th 200, 256 (Lee) [Quoting *HomeAway* and holding that a provider was required to post a warning under

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California's "Proposition 65" where the product offered for sale by a third party on defendant's website exposed consumers to mercury].)

The effect of Section 230 on a cause of action will be discussed below in the context of an enumeration of the elements of the claims that have been pleaded by Plaintiffs in the Master Complaint and in the three Short-Form Complaints for those causes of action that survive this Demurrer.

B. First Amendment

Both the United States Supreme Court and the California Supreme Court have been guided by the importance of protecting free expression and have declined to permit theories of liability based on speech content (except in narrowly defined categories such as obscenity and fighting words). Where liability is imposed on the basis of some other wrongful act, however, a more nuanced approach is required when the liability might have a chilling effect on speech. And, in some instances, the United States Supreme Court has allowed restrictions on speech when the unwilling target of the speech is effectively unable to avoid it.

"The most basic of [the] principles [underlying the First Amendment] is this: '[A]s a general matter, … government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (*Brown v. Entm't Merchs. Ass'n* (2011) 564 U.S. 786, 790-791 (*Brown*), citation and internal quotation marks omitted.) In *Brown,* the United States Supreme Court struck down a California law placing restrictions on sale of violent computer games to minors, holding that the restriction banned speech that was in a category of protected expression and that the regulation did not meet the requirements of strict scrutiny applicable to regulations that censor speech on the basis of content. (*Id.* at p. 799.) Regarding the State's desire to protect children, the Court acknowledged that "a State possesses legitimate power to protect children from harm … but that does not include a free-floating power to restrict the ideas to which children may be exposed." (*Id.* at pp. 794-795, citations omitted.) " 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.' " (*Id.* at p. 795, quoting *Erznoznik v. Jacksonville* (1975) 422 U.S. 205, 213-214 (*Erznoznik*).)

California courts also have been faithful to the First Amendment's protection of expression. In *McCollum v. CBS* (1988) 202 Cal.App.3d 989 (*McCollum*), the Court of Appeal barred an action for wrongful death brought on the ground that the decedent had been incited to commit suicide by the lyrics of a song. The court characterized the action as a "novel attempt to seek postpublication damages for the general public dissemination of recorded music and lyrics … ." (*Id.* at p. 998.) The court held that the plaintiff's claim was barred by the First Amendment because the plaintiff could not show that the generally distributed music was "directed and intended toward the goal of bringing about the imminent suicide of listeners *and* … that it was likely to produce such a result." (*Id.* at pp. 1000-1001, emphasis in original; see also, *Olivia N. v. National Broadcasting Co.* (1981) 126 Cal.App.3d 488 (*Olivia N.*) [television network that broadcast a film in which an act of sexual violence was depicted could not be held liable to plaintiff who suffered a "copycat" assault by a person who had viewed the film].)

***13** In *Bill v. Superior Court* (1982) 137 Cal.App.3d 1002 (*Bill*), the Court of Appeal considered whether the director and producers of a violent film could be held liable for injuries to the plaintiff caused by the actions of a third party who shot the plaintiff outside the movie theater where the film was shown. The plaintiff contended that she did not seek to impose liability based on the content of the film, but rather alleged that the defendants knew or should have known that the violent movie would attract members of the public "who were prone to violence and who carried weapons" and were likely to cause injury to members of the public at or near the showing of the movie. (*Id.* at pp. 1005, 1007.) The court recognized that imposing a duty to warn or imposing liability for the actions of third parties in these circumstances would predictably have "a chilling effect upon the selection of subject matter for movies … ." (*Id.* at p. 1008.) Nevertheless, the court "refrain[ed] from deciding this case on First Amendment grounds alone, for there may well be circumstances in which the state could hold a party responsible for warning, or taking protective action, against the foreseeable reaction of persons to protected speech without violating the First Amendment." (*Id.* at p. 1009.) Instead, the court examined common law principles informing when a defendant will be

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held liable for the wrongful actions of third parties and held that there was no duty to warn. (*Id.* at pp. 1011-1014.) As relevant to the protected nature of the speech, the court concluded that liability could not be imposed for the content of the film itself, and that defendants were not accused of any additional act that increased the risk of harm from the content. "It is not claimed, for example, that petitioners are responsible for any conduct which increased the risk of violence on the part of persons in the vicinity of the theater, in order to obtain some commercial rewards." (*Id.* at p. 1011.)

Courts recognize that when a party commits a wrongful act, the party can be held liable even though the wrongful act involves speech. In *Weirun v. RKO General, Inc.* (1975) 15 Cal.3d 40 (*Weirun*), the California Supreme Court found, in a decision by Justice Stanley Mosk, that a radio broadcast had created an unreasonable risk of harm to its listeners by encouraging their participation in a contest involving a race on city streets to obtain case prizes. (*Id.* at p. 47.) The Supreme Court found the radio station liable to a listener that was killed in a car crash while pursuing the contest prize money. The court rejected the defendant's claim of First Amendment immunity, stating that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." (*Id.* at p. 48.)

Some civil wrongs involve speech in addition to conduct, but a remedy nevertheless is not barred by the First Amendment. "A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134 (*Avis Rent A Car*), citing *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628.) "Since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. …Thus, for example, sexually derogatory fighting words, among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices … ." (*Id.* at p. 135, internal quotation marks, brackets, and ellipses omitted, quoting *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 389 (*R.A.V.*).)

Moreover, when a speaker invades the privacy interests of another "in an essentially intolerable manner," the involuntary hearer may have a right to avoid the speech. (See *Erznoznik, supra,* 422 U.S. at p. 210.) In *Rowan v. U.S. Post Office Dept.* (1970) 397 U.S. 728 (*Rowan*), a unanimous Supreme Court rejected a First Amendment challenge to a federal statute that allowed a postal recipient to "insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.' " (*Id.* at p. 730, quoting 39 U. S. C. § 4009, subd. (a) (1964 ed., Supp. IV).) Despite the fact that the ban on delivery of speech indisputably allowed the postal customer to discriminate on the basis of content, the Court nevertheless allowed the federal government to enforce the postal customer's content preferences. The Supreme Court noted that "[t]he legislative history, including testimony of child psychology specialists and psychiatrists before the House Committee on the Post Office and the Civil Service, reflected concern over the impact of the materials on the development of children. A declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee." (*Id.* at p. 732.) The Court acknowledged that"[t]o make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider." (*Id.* at p. 736.) But the Court tolerated the restriction on the free flow of ideas in order to affirm the right of a recipient to regulate what comes into his home:

> ***14** We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. [Citation.] The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

(*Id.* at p. 738, citations omitted.)

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In *Erznoznik,* the Supreme Court struck down a law forbidding drive-in theaters to show films that displayed nudity when the movie screen could be viewed from a public street or place. The Court found that the law "seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes. In short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' " (*Erznoznik, supra,* 422 U.S. at p. 212, quoting *Redrup v. New York* (1967) 386 U.S. 767, 769 [striking down state attempts to ban "gentlemen's magazines" in a context where the statutes did not "reflect[ ] a specific and limited state concern for juveniles" and display of publications was not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it"].) Nevertheless the Court acknowledged that speech could be limited where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure," quoting Justice John Marshall Harlan's statement in *Cohen v. California* (1971) 403 U.S. 15, 21, that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is … dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." (*Erznoznik, supra,* 422 U.S. at pp. 209-210.)

Finally, First Amendment protections permit reasonable time, place and manner regulations that are not related to the content of the speech, that are narrowly tailored to serve a significant governmental interest and that "leave open ample alternative channels for communication of the information." (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 (*Rock Against Racism*), internal citations and quotation marks omitted.) Thus, the government may "proscribe particular speech on the basis of a noncontent element (*e. g.,* noise) … ." (*R.A.V., supra,* 505 U.S. at p. 386.)

IV. First through Fourth Causes of Action - Product Liability

Plaintiffs allege four causes of action based on the doctrine of product liability: strict liability for design defect (First Cause of Action), strict liability for failure to warn (Second Cause of Action), product liability for negligent design (Third Cause of Action), and negligent failure to warn (Fourth Cause of Action). The parties strenuously debate whether the social media sites created by Defendants can be considered to be "products" for purposes of applying doctrines of product liability. The court determines, as discussed below, that the concept of product liability as a remedy for injuries due to defective products was created in a different era to solve different problems experienced by consumers. The more flexible principles of common law negligence are more appropriate to address what is better characterized as an alleged intentional or negligent course of conduct by Defendants toward Plaintiffs, foreseeably resulting in their injuries.

***15** Plaintiffs allege that Defendants' social media applications are products. Plaintiffs allege that the social media sites are mass marketed and distributed to the public through retail channels and are marketed and advertised for the personal use of the consumer. (Mast. Compl., ¶¶ 828-829.) "The software and architecture of each social media product is the same for every user that logs on or signs up for an account." (Mast. Compl., ¶ 827.) Plaintiffs allege that"[e]ach of the Defendants defectively designed its respective products to addict minors and young adults, who were particularly unable to appreciate the risks posed by the products, and particularly susceptive to harms from those products." (Mast. Compl., ¶ 830.)

In paragraph 838 of the Master Complaint, Plaintiffs enumerate 22 "cost-effective, reasonably feasible alternative designs" that Defendants could have utilized to minimize the harms to minors. These include (by way of example) proposed "[r]obust age verification;" "[e]ffective parental controls … and notifications;" "[o]pt-in restrictions to the length and frequency of sessions" and "self-limiting tools;" blocks during certain times of day or night; "[b]eginning and end to a user's 'Feed;' " redesigning algorithms to limit "addictive engagement" and to limit "strategic timing and clustering of notifications to lure back users;" and "[d]esigning products that did not include the defective features listed in this Complaint while still fulfilling the social networking purposes of a social media product." Plaintiffs do not specifically define the purposes or function that the social media sites are properly designed to serve.

Product liability doctrine is inappropriate for analyzing Defendants' responsibility for Plaintiffs' injuries for three reasons. First, Defendants' platforms are not tangible products and are not analogous to tangible products within the framework of product

liability.[6] Second, the "risk-benefit" analysis at the heart of determining whether liability for a product defect can be imposed is illusive in the context of a social media site because the necessary functionality of the product is not easily defined. Third, the interaction between Defendants and their customers is better conceptualized as a course of conduct implemented by Defendants through computer algorithms.

6 Whether or not something is a product for the purposes of strict product liability is a question of law for the court. (*Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493, 502.)

A. Defendants' Platforms Are Not Analogous to Tangible Products for Purposes of Product Liability Analysis

The Restatement (Third) of Torts: Product Liability defines a "product" as:

> [T]angible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules [for product liability]. … Services, even when provided commercially, are not products.

(Rest.3d Torts, Prod. Liab., § 19, subds. (a)-(b).) Defendants' platforms are not tangible; one cannot reach out and touch them.

Nor are Defendants' platforms analogous to tangible personal property in the context of the purposes behind the creation of product liability. The doctrines of product liability are creations of the common law intended to address the challenges posed by mass manufacture and marketing of products that injure consumers in ways that are not able to be anticipated by the user. (See, e.g., *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63 (*Greenman); Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733 (*Daly).*) Courts that framed the product liability doctrine noted that the industrial economy no longer allowed a relationship between the craftsman of a product and the user that would provide the consumer an opportunity to trust and evaluate the product purchased. (*Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d 453, 467 (conc. op. of Traynor, J.).) In addition, manufacturing processes placed into general circulation products that had predictable, uniform characteristics from the standpoint of the manufacturer (that is, products were not hand-crafted); but from the standpoint of the consumer, the mass-produced products could have unanticipated harmful characteristics. (*Id.* at p. 462; see also Rest.3d Torts: Prod. Liab., § 19, reporter's note, cmt. a [noting caselaw stating that one policy goal of product liability is to spread costs in the case of mass-marketed products].)

***16** Product liability, as a creation of the common law, was designed to overcome two limiting doctrines. The first limiting doctrine was privity. Because consumers frequently did not purchase a product directly from its manufacturer, the absence of privity often barred recovery from the responsible actor. Product liability overcame the limitations of privity and reached back to the source of the injurious product and its defective characteristic. (*Daly, supra,* 20 Cal.3d at p. 732; Rest.3d Torts: Prod. Liab., § 1, cmt (a).) Second, product liability reduced the difficulty of demonstrating negligence. (Rest.2d Torts, § 402A, cmt. b.) Product defects could arise from aspects of product design that the manufacturer had not analyzed or from manufacturing defects of which the manufacturer was unaware. (Rest.2d Torts, § 402A.) As the Restatement (Third) of Torts puts it, "[s]trict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required." (Rest.3d Torts: Prod. Liab., § 1, cmt. (a).) Product liability doctrine intentionally puts aside the question of whether the manufacturer can be understood to bear moral responsibility for the product defect, and instead imposes liability based on (1) the fact that, as between the manufacturer and the consumer, the manufacturer is in the better position to avoid harm than the consumer, and (2) the economic concept that, as between the manufacturer and the consumer, the cost of the harms caused by the product should be borne by the product manufacturer who is in a better position to insure for those risks. (*Greenman, supra,* 59 Cal.2d at p. 63; see also Rest.3d Torts: Prod. Liab., § 2 cmt. (a).)

Services were not made subject to the doctrine of product liability because they ordinarily did not present the same barriers to recovery. (Rest.3d Torts: Prod. Liab., § 19, reporter's note, cmt. (f) ["[c]ourts are unanimous in refusing to categorize commercially-provided services as products for the purposes of strict products liability in tort"].) Services usually involve a direct relationship between the service provider and the customer; privity therefore is not a bar to recovery. Services are also typically shaped to the needs of the customer rather than being delivered through mass production. Therefore, negligence is a more appropriate gauge for whether the seller performed to the standards of reasonable care that society imposes and that reasonable consumers would expect. (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 345.)

The interactions between Defendants and Plaintiffs on Defendants' platforms are different from typical product sales. There is a direct relationship between Defendants and Plaintiffs; therefore, privity is not a bar to recovery. Moreover, Defendants do not sell Plaintiffs a static product. Plaintiffs argue that Defendants' platforms apply a common algorithm to all user interactions. (Mast. Compl., ¶ 827.) The court accepts that allegation as true, but the facts alleged in the Master Complaint do not describe a product that all consumers *experience* in a uniform manner. Rather, the Master Complaint alleges that Defendants' algorithms individually analyze a user's interactions with the platform and, based on those interactions, formulate responses that are intended to and do tailor the user's experience to the individual consumer so as to maximize the amount of time the user spends on Defendants' platforms. (See, e.g., Mast. Compl., ¶¶ 80, 241, 661, 689.) Plaintiffs allege that Defendants knowingly and intentionally seek to maximize advertising revenue by maximizing the time minors spend on Defendants' platforms, and that Defendants knew or should have known that this maximization of use by minors would cause them harm by addicting them to the use of Defendants' platforms. (See, e.g., Mast. Compl., ¶ 80-96.)

There is no moral ambiguity in these allegations. There is no need to turn to an economic analysis of who better can bear the cost of an unanticipated harmful product defect. According to Plaintiffs' allegations, the defects of which they complain are not unanticipated. Stated another way, the ways in which the social media sites are alleged to interact with minors are not "bugs;" they are "features" built into the social media experience by Defendants.

The interactions between Defendants and Plaintiffs by way of the Defendants' platforms are not "analogous to the distribution and use of tangible personal property."[7] They do not present challenges that the common law overcame by creating product liability doctrine. Rather, they present new challenges for the common law.

7 Plaintiffs allege that Defendants themselves have referred to their platforms outside of litigation as "products." (See Mast. Compl., ¶¶ 144-153.) And Plaintiffs have thus suggested that Defendants' social media sites should be considered to be "products" for purposes of product liability analysis because Defendants referred to the social media sites as "products" in a variety of commercial settings. (Pls' Opp., at p. 40, fn. 32.) This argument is not persuasive. The caselaw does not determine whether an alleged instrumentality of harm is or is not a "product" based on the terminology used by the creator of the instrumentality. The definition of "product" in the caselaw and the rationale for subjecting product manufacturers to product liability are *determinative.*

***17** Plaintiffs cite California and federal cases, arguing they support the position that that Defendants' platforms are "products." (Pls' Opp., at pp. 37-43.) None of the cases, properly construed, holds that computer software is a "product" for purposes of product liability law, much less that computer software of every sort should be considered to be a "product." In *Hardin v. PDX, Inc.* (2014) 227 Cal.App.4th 159 (*Hardin*), the plaintiffs sued a software provider for retail pharmacies for negligence and product liability when one of the plaintiffs suffered blindness after taking a drug where the patient warning information omitted a "Black Box" warning by the manufacturer. The defendant's software had been intentionally modified to allow the retail pharmacy to truncate the manufacturer's full list of warnings to a short-form version, and the Black Box warning was omitted through the workings of the software.

The defendant in *Hardin* had advanced a protected speech argument under Section 230. The plaintiffs opposed on the basis that it was the truncating feature of the defendant's software that they were citing as the cause of their harm, not the republication

of portions of the manufacturer's product information. The court held that Section 230 did not bar the plaintiff's claim. (*Hardin,* at pp. 168-69.) The balance of the opinion in *Hardin* followed a statement that defendant's "remaining arguments merit only brief attention." (*Id.* at p. 169.) The court made an inconclusive observation as to the possibility that product liability might apply to these claims:

> [The defendant] also asserts that [the plaintiff] cannot prevail on her products liability theory as a matter of law because [the defendant] distributes drug information, and "'information' is not a 'product' for purposes of product liability claims." But [the plaintiff's] theory is that [the defendant']s software program, not the information it produces, is the defective product. *[The defendant] has not argued, let alone shown, that [the plaintiff] cannot prevail under that theory. Maybe so, but at this early juncture we cannot so conclude.*

(*Id.* at 170, emphasis added.) The challenged truncating feature of the defendant's software appeared to be simple, treated all users in the same way, and did not involve an interactive relationship or course of dealing between the defendant and the plaintiff. In that regard, it was perhaps amenable to treatment under product liability doctrine, although the court in *Hardin* never held as much. Here, the fluid applications of Defendants' algorithms do not present such a simple issue.

Lemmon v. Snap, Inc. (9th Cir. 2021) 995 F.3d 1085 (*Lemmon*), also relied on by Plaintiffs, considered whether Section 230 immunized defendant Snap from liability for the allegedly dangerous conditions created by its Speed Filter, which plaintiff parents alleged was the cause of their two sons' deaths. While the court did characterize Snapchat generally as a "product" with a "defect (the interplay between Snapchat's reward system and the Speed Filter)," the Ninth Circuit panel was not called upon to address whether the doctrine of product liability was applicable to Snap's social media platform. That issue simply was not presented on appeal. *Lemmon* is not a precedent for an issue not decided and not necessary to the decision that was rendered.

Plaintiffs cite *Winter v. G.P. Putnam* (9th Cir. 1991) 938 F.2d 1033 (*Winter*) for the inconclusive statement that "computer software may be a product." (Pls' Opp., at p. 38.) Plaintiffs in *Winter* had purchased a physical book published by defendant and, in reliance on its contents, harvested wild mushrooms and became sick. They sued for product liability and other theories. Dismissal of the suit on summary judgment was affirmed. As to the product liability theory, the appellate court held that although the paper in the physical book may be a product, the information contained therein (the alleged source of liability) was not. (*Id.,* at p. 1034.) The snippet that Plaintiffs chose to cite from this case in their Opposition Brief came after a discussion about why a navigational chart could support a product liability claim but a book about mushrooms could not. The portion quoted by the Plaintiffs says simply: "Computer software that fails to yield the result for which it was designed may be another" circumstance comparable to a defective navigation chart. (*Id.,* at p. 1036.) This is not a holding and is obiter dicta because no computer software was involved in the case.

***18** The final authority cited by Plaintiffs regarding whether software can be considered to be a "product" is *In re MyFord Touch Litigation* (N.D.Cal. 2016) 2016 WL 7734558. Plaintiffs assert it stands for the proposition: "certifying products liability class alleging defect in Ford's 'infotainment' software that caused driver distraction and raised safety concerns." A review of the lengthy procedural history of that case reveals that no such product liability class was certified for California plaintiffs; instead claims for breach of express and implied warranty, Song-Beverly, and Unfair Competition Law violations were. (*In re MyFord Touch Litigation* (N.D.Cal. 2018) 291 F.Supp.3d 936, 943.) The certified product liability claims of Colorado consumers (the only subclass for which this theory was certified) were thereafter dismissed as contrary to Colorado's economic loss rule, meaning those claims were without legal merit. (*Id.,* at pp. 954-956.)

Plaintiffs rely on two California Court of Appeal cases in support of their argument that a product need not be tangible in order for product liability to apply. One case involved defective aeronautical navigation charts (then sold in physical form) and the other involved the delivery of electricity by a public utility to a customer's home. Neither case supports the conclusion that Defendants' platforms are products for purposes of product liability law.

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The case involving mass-produced navigation charts provided to pilots is *Fluor Corp. v. Jeppesen & Co.* (1985) 170 Cal.App.3d 468. The plaintiff aircraft owner sued the chart's publisher for strict liability (plus negligence and breach of warranty) because the chart sold by the defendant at the time of the crash omitted the highest landmass in close proximity to the airport, showing a lesser, alternative promontory instead. The trial court had refused to submit the product liability count to the jury because the trial court believed the challenged product had to be innately dangerous by its composition, e.g., explosive, combustible or flammable material. (*Id.* at p. 475.) The court of appeal reversed, holding that the inaccurate contents of the defendant's mass-produced air navigation charts were properly subjected to product liability exposure: "[A]lthough a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site." (*Id.* at 476.)

Thus, strict products liability applied to the information on the printed navigation charts sold by defendant for the very reason that the information itself was indisputably incomplete and thus inaccurate. Here, by comparison, Plaintiffs necessarily abjure any assertion that the contents of the information provided via Defendants' platforms is inaccurate, because to do so would invite preemptive application of Section 230. Instead, liability is premised on how Defendants' respective algorithms allegedly work to extend customer viewing time and to potentially addict minors to constant usage. This is materially different from how a given pilot would use a mass-produced, printed chart for instrument-landing approach to a given airport when such chart was materially inaccurate. All pilots would suffer from the same defect. [8]

[8] The Restatement (Third) of Torts criticizes the line of cases holding that navigation charts are subject to strict liability principles. "[T]he better view is that false information in such documents constitutes a misrepresentation that the user may properly rely upon." (Rest.3d Torts: Prod. Liab., § 19, cmt. d.)

The California electricity case imposing strict product liability on utility providers is consistent with a specialized line of cases in many jurisdictions which the Restatement Reporters find to be "[t]he weight of authority" that supports the extension of strict liability to electrical utilities. (Rest.3d Torts: Prod. Liab., § 19, reporter's note, cmt. d.) The California case is *Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68 (*Pierce*). The plaintiff suffered a severe shock from a 7,000-volt surge of electricity into her home after she tried to close a propane gas valve. The source of the high voltage was equipment repair by the utility's linemen during a lightning storm. When the case was tried, the utility had evidence that the connection of the household ground wiring to the propane tank was unlawful and that the household wiring had poor insulation. The replacement transformer that malfunctioned had not been known to have any problems, but the crew working on emergency repairs during a storm had not tested it before installation.

***19** The plaintiffs' second cause of action for product liability had alleged defective electrical equipment, not defective electricity. (*Id.* at 78.) The court non-suited the plaintiffs' strict product liability theory at the close of evidence on the theory that the malfunctioning transformer was made by Federal Pacific, not the defendant utility. The jury ruled for the defendant on the remaining claim of negligence.

During trial, the plaintiffs had urged a factual argument that the 7,000-volt surge, i.e., the electricity itself, was the defective product, and the appellate court that held it was adequately disclosed to the defendant, even though the plaintiffs had not formally tried to amend their complaint, such that "Plaintiffs' failure to amend does not bar their pursuit of liability on a theory that electricity is a defective product." (*Id.* at 81.) In reversing on the merits, the court held that it advanced useful social policies to relieve plaintiffs in these circumstance from having to show negligence, that imposing this legal duty would enhance public safety, and, finally, that the utility was in a suitable position to spread the costs among all customers. (*Id.* at p. 83.)

While some of those considerations arguably support Plaintiffs' efforts to treat Defendants' platforms as the equivalent of electricity, [9] if considerations of ease of proof for plaintiffs, imposition of additional legal risk on defendants to induce safer behavior, and the virtues of cost-shifting were the controlling determinates of the availability of strict liability for any and all tort

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claims, then virtually all torts would be treated as product liability claims regardless of whether there was anything conceivably considered a "product" in the calculus. Although Defendants' social media platforms are not tangible, they are not otherwise analogous to electricity within the context of the purposes of product liability doctrine.

9 Notably, product liability applies to utilities only for injurious events which occur after electricity has been sold to a consumer by delivery across the meter which measures the cost owed for the service delivered. (*Pierce, supra,* 166 Cal.App.3d at 84; see also Rest.3d Torts: Prod. Liab., § 19, reporter's note, cmt. d.) Thus, even this application of strict liability to an intangible "product" has its limits.

The common law's ability to adapt basic negligence concepts to new social problems appears better suited to providing legal regulation of this new technology. To treat the multi-faceted ways in which Defendants' platforms interact with their various customers as if they were merely providing some consistent form of service delivery, like the provision of properly regulated electric service to households and businesses, overlooks the factual complexities presented by the pleadings before this court. As noted below, the particularized legal concepts that flow from the application of product liability doctrine to a given "product" do not provide a useful construct for a jury to assess the culpability of these Defendants' conduct in the creation and operation of their interactive social media platforms.

B. The "Risk-Benefit" and "Consumer Expectation" Analyses that Are at the Heart of Determining When a Manufacturer Should Be Liable for a Product Defect Are Not Suitable for Analyzing Liability Under the Facts Alleged

California recognizes two tests for whether a manufacturer is liable for a design defect under principles of product liability. These tests are referred to as the "consumer expectations" test and the "risk-benefit" test. They may be presented to the trier of fact as alternative theories of liability. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 553-554 (*Demara).*) Plaintiffs' First and Second Causes of Action can fairly be read to plead both theories.

***20** Both theories of product liability for design defect focus on the product without reference to the actions or intent of the product manufacturer. The "consumer expectation" test asks the fact-finder to determine whether the product in question "perform[ed] as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way … ." (Judicial Council of California Civil Jury Instructions (2023 ed.) (CACI) 1203; *Demara, supra,* 13 Cal.App.5th at p. 557.) The "risk-benefit" test asks the fact-finder to judge whether "the benefits of the [p]roduce's design outweigh the risks of the design" and in making that determination to consider, *inter alia,* the feasibility, cost and disadvantages of an "alternative design." (CACI 1204; *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431.)

Both of these tests proceed from the premise that a product is a static thing. In order for a factfinder to determine what an "ordinary consumer" would expect when using a product, and in order to discern the benefits of the product's design, the fact-finder must be able to anticipate how the ordinary consumer would use the product, and what benefits a user would be seeking when purchasing the product. Consumers expect a gas-powered lawn mower to cut grass; they likely do not expect it to emit hazardous fumes or to cut their feet or hands. Consumers expect a kitchen blender to chop or puree food; they likely do not expect it to overheat and explode. Consumers who purchase sewing shears value the benefit that they are sharp enough to cut fabric; they likely view this benefit as outweighing the risk that a child could be injured if the shears were left in a place where an unsupervised child could reach it.

Defendants' platforms are not static things; they are programs that facilitate an interactive experience. Moreover, according to the allegations of the Master Complaint, the interactive experience of a user evolves over time as the social media algorithm responds to the user's inputs. The problem with applying the consumer expectation or the risk-benefit test to an algorithm that is designed to produce an interactive experience is that users may have a multiplicity of consumer expectations and may seek very different benefits. A grandmother might expect the social media site to do no more than allow her to see the latest pictures of

her grandchildren. A business might expect a social media site to help it find customers or to help customers find the business. A person might expect to find news stories in which he is interested. A young man might expect to be able to send intimate photographs to his girlfriend that are not retained on the social media site. A child might expect to be able to watch videos of cute puppies. A teen might expect the social media site to facilitate comments on her posted photographs.

In short, there is not one type of anticipated "product" functionality for Defendants' platforms. They are not tangible products with a well-defined, anticipated function. Without the foundational element of a static product from which ordinary consumer expectations or benefits from use of the product can be discerned, there is no reasonable basis for applying the tests for whether a product is defective. Like services, Defendants' platforms involve a direct relationship between the seller and the customer and, at least to some extent, can be shaped by the apparent customer needs or preferences.

The product liability test does not address the allegedly harmful conduct of Defendants, which here is alleged to be intentional manipulation of expected features in order to maximize use time to the benefit of Defendants and to the detriment of minor users. Defendants' platforms may "perform" as some consumers expected and desired when used in a foreseeable way, but the features that are desirable to some nevertheless may cause harm to some minors by virtue of Defendants' unseen actions to maximize use time.

C. Whether or Not Defendants are Liable Should Be Determined by Focusing on Defendants' Conduct

***21** The Master Complaint alleges that Defendants crafted the algorithms that determine a user's interactive experience on a social media site to favor their own interests. It has become a meme of the internet culture that "[i]f you are not paying for it, you're not the customer; you're the product being sold." [10] Plaintiffs are clear that they seek to prove Defendants intended to maximize engagement by users to produce advertising revenue and that Defendants were on notice of foreseeable injury to minors from the features that Defendants intentionally chose in order to affect minors' use of their platforms. (See, e.g., Mast. Compl., ¶ 2.)

10 This quotation has been attributed to Andrew Lewis (aka blue beetle), in a comment on MetaFilter.com on Aug. 26, 2010. (https://www.metafilter.com/95152/Userdriven-discontent* 3256046.)

There is a "functional similarity between negligence theory and strict products liability insofar as duty and breach is concerned … ." (*Milwaukee Electric Tool Corp. v. Superior Court* (1993) 15 Cal.App.4th 547, 559.) The focus in this case is more appropriately on the alleged conduct of Defendants, and on whether common law negligence provides a basis for imposing a duty to avoid the harm for which Plaintiffs seek recovery. As discussed below, the common law has shaped negligence as a nuanced doctrine, not one of unlimited liability. Plaintiffs' allegations are more appropriately conceptualized as contending Defendants engaged in a course of conduct intended to shape the user experience for these Plaintiffs, and that this course of conduct foreseeably caused personal injury to Plaintiffs. Allowing this case to go forward on theories of product liability would be like trying to fit a four-dimensional peg into a three-dimensional hole.

Plaintiffs and Defendants briefed the first four cause of action as a unit. Their primary arguments concerned whether Defendants' social media platforms are "products." Very little attention was given to the failure to warn causes of action (the Second and Fourth Causes of Action) as such. Because Plaintiffs pled failure to warn by invoking product liability principles, those causes of action cannot proceed. Plaintiffs' Fifth Cause of Action based on Negligence does not allege facts concerning any alleged failure to warn. In the briefing on the Demurrer, neither side addressed whether a claim for negligent failure to warn could be pled outside of the product liability context, and the court does not address that issue.

The Demurrer to the First, Second, Third and Fourth Causes of Action is sustained.

V. Fifth Cause of Action - Negligence

A. Plaintiffs'Allegations Supporting a Cause of Action for Negligence

Plaintiffs' Fifth Cause of Action is grounded in common law negligence. Plaintiffs allege that Defendants failed to use reasonable care in designing their social media platforms and that they knew the design and interactive operational features of the applications were likely to cause harm to minor users of the social media sites. Plaintiffs allege that:

> Each Defendant owed Plaintiffs a duty to exercise reasonable care in the development, setup, management, maintenance, operation, marketing, advertising, promotion, supervision, and control of its respective platforms not to create an unreasonable risk of harm from and in the use of its platforms (including an unreasonable risk of addiction, compulsive use, sleep deprivation, anxiety, depression, or other physical or mental injuries); to protect Plaintiffs from unreasonable risk of injury from and in the use of its platforms; and not to invite, encourage, or facilitate youth, such as Plaintiffs, to foreseeably engage in dangerous or risky behavior through, on, or as a reasonably foreseeable result of using its platforms. These duties govern Defendants' own specific actions and are based on direct actions Defendants took in developing their respective Products and features.

***22** (Mast. Compl., ¶ 914.) In addition to maintaining "unreasonably dangerous features and algorithms", Defendants are alleged to have facilitated use of their platforms by youth under the age of 13 by adopting protocols that do not verify the age of users, and "facilitate[ed] unsupervised and/or hidden use of their respective platforms by youth" by allowing "youth users to create multiple and private accounts and by offering features that allow youth users to delete, hide, or mask their usage." (Mast. Compl., ¶ 929(d), (e), (f).)

Plaintiffs allege that Defendants are liable "for injuries occasioned to Plaintiffs by Defendant[s'] want of ordinary care and/or skill in the management of their property. (Mast. Compl., ¶ 916.) "Each Defendant knew or, by the exercise of reasonable care, should have known, that the reasonably foreseeable use of its respective platforms (as developed, set up, managed, maintained, supervised, and operated by that Defendant) was dangerous, harmful, and injurious when used by youth such as Plaintiffs in a reasonably foreseeable manner." (Mast. Compl., ¶ 920.) "Each Defendant could have avoided Plaintiffs' injuries with minimal cost, including, for example, by not including certain features and algorithms in its respective platforms which harmed Plaintiffs." (Mast. Compl., ¶ 924.)

For example, minor Plaintiff M.P. alleges that use of Instagram from 2018 to the present, and use of TikTok from 2019 to the present have caused this Plaintiff to develop addiction/compulsive use, anorexia, depression, and anxiety, as well as long-term physical harms arising as a foreseeable result of the eating disorder. (See J.P. SFC.) In the Master Complaint, Plaintiffs allege that all Defendants-including Meta and ByteDance—breached their duties to the minor users of their platforms by, among other things, using features and algorithms that unreasonably create or increase foreseeable risk of addiction or compulsive use by youths and by structuring and operating their platforms in a manner that "unreasonably creates or increases the foreseeable risk of harm to the physical and mental health and well-being of youth users." (Mast. Compl., ¶ 929.) As to the platforms used by M.P., the Master Complaint alleges that TikTok is designed with "continuous scrolling," a feature of the platform that "makes it hard for users to disengage from the app," (Mast. Compl., ¶ 567) and that minor users cannot disable the "auto-play function" so that a "flow-state" is induced in the minds of the minor users (Mast. Compl., ¶ 590). Plaintiffs allege that "ByteDance uses a series of interrelated design features that exploit known mental processes to induce TikTok's users to use the product more frequently, for more extended periods, and with more intensity (i.e., providing more comments and 'likes')." (Mast. Compl., ¶ 589.) TikTok "also leverages principles of IVR to encourage compulsive usage, in the same fashion as Instagram Reels." (Mast. Compl., ¶ 592.)

B. Plaintiffs Have Adequately Alleged a Basis for Defendants' Duty

"Duty, under the common law, is essentially an expression of policy that the plaintiff's interests are entitled to legal protection against the defendant's conduct." (*Kuciemba v. Victory Woodworks, Inc.* (2023) 14 Cal.5th 993, 1016 (*Kuciemba*), internal citations and quotation marks omitted.) The general framework for defining duty in California is set forth in California Civil Code section 1714. (*Id.*) Civil Code section 1714, subdivision (a), provides that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." "This statute establishes the default rule that each person has a duty 'to exercise, in his or her activities, reasonable care for the safety of others.' " (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 214 (*USA Taekwondo*), internal citations omitted).

***23** "To establish a cause of action for negligence, the plaintiff must show that the defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury." (*Hacala v. Bird Rides, Inc.* (2023) 90 Cal.App.5th 292, 310 (*Hacala*), internal citations and quotation marks omitted.) "While the question whether one owes a duty to another must be decided on a case-by-case basis, *every case* is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. [Citation.] As our [California] Supreme Court has repeatedly emphasized, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where clearly supported by public policy." (*Id.,* internal citations and quotation marks omitted; emphasis in original.)

In *Hacala,* the Court of Appeal held that defendant had a duty to use care when it made its products available for public use and one of those products harmed the plaintiff. The defendant provided electric motorized scooters that could be rented through a "downloadable app." (*Id.* at p. 311.) The app allowed the defendant "to monitor and locate its scooters and to determine if its scooters were properly parked and out of the pedestrian right-of-way." (*Id.,* internal quotation marks and brackets omitted.) The defendant failed to locate and remove scooters that were parked in violation of the requirements set forth in the defendant's city permit, including those parked within 25 feet of a single pedestrian ramp. (*Id.*) The defendant also knew that, because the defendant had failed to place proper lighting on the scooters, the scooters would not be visible to pedestrians at night. (*Id.* at p. 312.) The court found that these allegations were a sufficient basis on which to find that the defendant owed a duty to members of the public like the plaintiff, who tripped on the back wheel of one of the defendant's scooters when walking "just after twilight." (*Id.* at p. 300.)

Here, Plaintiffs seek to hold Defendants liable for the way that Defendants manage their property, that is, for the way in which Defendants designed and operated their platforms for users like Plaintiffs. Plaintiffs allege that they were directly injured by Defendants' conduct in providing Plaintiffs with the use of Defendants' platforms. Because all persons are required to use ordinary care to prevent others from being injured as the result of their conduct, Defendants had a duty not to harm the users of Defendants' platforms through the design and/or operation of those platforms.

Defendants argue that Plaintiffs do not have a "heightened duty of care" because they are not in a "special relationship" with Plaintiffs. Plaintiff's negligence cause of action is based, in part, on allegations that Defendants owed a "heightened duty of care to youth users of their respective platforms because the child brain is not fully developed, meaning young people are more neurologically vulnerable than adults to the addictive and other harmful aspects of Defendants' respective platforms" and have a diminished capacity to make responsible decisions. (Mast. Compl., ¶ 928.) When an actor is in a "special relationship" with another, the actor has an affirmative duty to prevent harm to the other within the scope of the relationship. (6 Witkin, Summary of Cal. Law (11th ed. 2023) Torts, § 961 (Witkin Torts); Rest.3d Torts, Phys. & Emot. Harm, § 40.)

However, separate from the "special relationship" allegations, the Master Complaint also alleges that Defendants are liable based on failure to exercise reasonable care in their own activities thereby creating a risk of harm to Plaintiffs that reasonably could be anticipated. (See Witkin Torts, § 961; Rest.3d Torts, Phys. & Emot. Harm, § 7.) Plaintiffs allege a duty of ordinary

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care arising from the fact that Defendants knew that Plaintiffs were using Defendants' interactive social media applications, that Defendants had a duty to exercise ordinary care to prevent Plaintiffs from being harmed by that use, that Defendants breached that duty by developing and using algorithms and operational features of the platforms that sought to unreasonably maximize the minors' use of the platforms, that it was foreseeable Plaintiffs would be harmed by becoming addicted, and that Plaintiffs were in fact harmed.

***24** As discussed further below, Plaintiffs have adequately stated a claim of negligence based on lack of reasonable care in the Defendants' own conduct from which harm might reasonably be anticipated. Because the cause of action for negligence may proceed on that basis, the court does not reach the issue of whether Defendants also had an affirmative duty to act to protect Plaintiffs based on a special relationship. [11]

11 The court is not now called upon to decide whether in this case it would be appropriate to instruct the jury that "[a]n adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults." (CACI 412.)

C. Public Policy Does Not Require a Limitation on Defendants' General Duty of Ordinary Care - The *Rowland* Factors

The California courts make exceptions to Civil Code section 1714 's general duty of ordinary care "only when foreseeability and policy considerations justify a categorical no-duty rule." (*Cabral v. Ralphs Grocery Co.,* (2011) 51 Cal.4th 764, 772 (*Cabral).*) Those foreseeability and policy considerations are examined through the so-called *Rowland* analysis, based on *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland). (Kuciemba, supra,* 14 Cal.5th at p. 1021.) The multifactor *Rowland* test is not a means of establishing duty, but rather a means to decide whether the scope of the general rule of section 1714 should be limited. (*Id.*) The *Rowland* factors are:

> "[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."

(*Id.,* quoting *Rowland, supra,* 69 Cal.2d at p. 113.) Generally, California authorities divide the *Rowland* factors into two categories, the first addressing foreseeability and related concepts and the second addressing public policy considerations. (*Kuciemba,* at pp. 1021-1022.)

1. Foreseeability Factors

The trilogy of foreseeability factors are foreseeability, certainty, and the connection between the plaintiff and the defendant.

"The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated by section 1714 is whether it was foreseeable." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1145 (*Kesner*).) "[A]s to foreseeability, we have explained that the court's task in determining duty is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed." (*Cabral, supra,* 51 Cal.4th at p. 772, internal citations, quotation marks, and ellipses omitted; emphasis in original.)

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In *Kuciemba* and in *Kesner,* the California Supreme Court looked to whether the defendants in those cases had information that would allow them to anticipate the risks those defendants' conduct allegedly posed to the respective plaintiffs in those cases. In *Kesner,* the Court found that the employer should have been aware from OSHA standards that an employee exposed to asbestos at work could carry asbestos fibers home, causing risk to the plaintiff in that case, who was the wife of an employee. (*Kesner, supra,* 1 Cal.5th at pp. 1146-1148.) In *Kuciemba,* the Court held that government health orders made employers such as the defendant aware "that COVID-19 could be transmitted not only within the workplace but also to individuals [such as the plaintiff] who came into contact with infected employees." (*Kuciemba, supra,* 14 Cal.5th at p. 1023.)

***25** Under the allegations in the Master Complaint, foreseeability weighs heavily in favor of finding that Defendants owe a general duty to the users of Defendants' platforms. The Master Complaint is replete with allegations that Defendants were well aware of the harms that could result to Plaintiffs by their use of Defendants' platforms. For example, Plaintiffs allege:

> Recognizing the power of engaging young users, Defendants deliberately tweaked the design and operation of their apps to exploit the psychology and neurophysiology of kids. Because children's and adolescents' brains are not fully developed, they lack the same emotional maturity, impulse control, and psychological resiliency as adults. As a result, they are uniquely susceptible to addictive features in digital products and highly vulnerable to the consequent harms. Knowing this, Defendants wrote code designed to manipulate dopamine release in children's developing brains and, in doing so, create compulsive use of their apps.

(Mast. Compl., ¶ 12.) Plaintiffs further allege:

> Over a decade of scientific and medical studies demonstrate that dangerous features engineered into Defendants' platforms—particularly when used multiple hours a day—can have a "detrimental effect on the psychological health of their users," including compulsive use, addiction, body dissatisfaction, anxiety, depression, and self-harming behaviors such as eating disorders.

(Mast. Compl., ¶ 102, internal brackets and footnotes omitted.)

In short, Plaintiffs here allege that the effect of Defendants' algorithms and operational features on Plaintiffs' frequency and intensity of use of the social media sites was not only foreseeable, but was in fact intended. And Plaintiffs allege that Defendants were on notice through their own research as well as through independent medical studies that this intended frequency and intensity of use of Defendants' platforms risked adverse health effects for the minor users.

"The second *Rowland* factor, the degree of certainty that the plaintiff suffered injury, has been noted primarily, if not exclusively, when the only claimed injury is an intangible harm such as emotional distress. [Citation.] Courts have occasionally included under this factor concerns about the existence of a remedy." (*Kesner, supra,* 1 Cal.5th at p. 1148, internal citations and quotation marks omitted.)

This factor primarily has influenced decisions about the existence of duty in situations where the wrongful conduct by the defendant was directed toward a person other than the plaintiff or where the plaintiff suffers emotional distress as a bystander. For example, in *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1080, the California Supreme Court applied the *Rowland* factors when a mother sought to recover for emotional distress when her infant was harmed during the process of childbirth. Although the mother suffered emotional distress rather than physical injury, the court noted that the "close bond" between the mother and the baby during labor and delivery made the mother's emotional distress foreseeable. In *Quesada v. Oak Hill Improvement Co.* (1989) 213 Cal.App.3d 596, 608-609, the court held that it was "appropriate to limit the class of potential plaintiffs to close family members in order to avoid expansive liability and to be assured that those claiming damages by way of the negligent handling of a corpse truly suffered serious emotional distress."

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***26** Here, Plaintiffs are the persons who were directly affected by Defendants' conduct; they are not mere bystanders. The nature of the harm suffered is not a reason to deny them recovery. Although Defendants designed social media platforms that interacted with Plaintiffs' minds rather than products that injured Plaintiffs' bodies, the allegations of the Master Complaint (if proved) demonstrate that the adverse effect on Plaintiffs was foreseeable and substantial. Moreover, Plaintiffs also allege they suffered physical harms such as anorexia, long-term physical injury resulting from an eating disorder, self-harm (attempted suicide), inability to sleep, and addictive or compulsive behavior—Plaintiffs do not merely allege that they were emotionally upset. It is sufficiently certain, based on the allegations of the Master Complaint, that Plaintiffs suffered injury.

"The third *Rowland* factor, the closeness of the connection between the defendant's conduct and the injury suffered, … is strongly related to the question of foreseeability itself." (*Kesner, supra,* 1 Cal.5th at p. 1148, internal citations, quotation marks, and brackets omitted.) This factor is relevant when a court is called upon to determine whether the defendant owes "a duty to prevent injury that is the result of third party conduct," and in those circumstances "the touchstone of the analysis is the foreseeability of that intervening conduct." (*Id.*) For example, in *Hacala,* the Court held that a scooter rental company had a duty to a pedestrian who was injured when she tripped on a scooter that a third-party user of the scooter left in a dangerous location. The court stated that "a fair reading of the complaint confirms it alleges sufficient facts, that, if proven, would support a finding that [the scooter rental company's] conduct—specifically, [the company's] 'management of its property' (§ 1714, subd. (a))—*contributed* to the risk of harm that resulted in plaintiffs' injuries." (*Halcala, supra,* 90 Cal.App.5th at p. 311, internal brackets omitted; emphasis in original.)

Defendants argue that "the harms alleged by Plaintiffs are several steps removed from the recommendations or other varied features that Plaintiffs challenge." (Defs' Dem., at p. 71.) But here, as in *Halcala,* Defendants' argument is not supported by the allegations in the Master Complaint. As noted with respect to the first *Rowland* factor, the harms to Plaintiffs are alleged to be caused by the operation of the social media platforms that maximize engagement of minor users through continuous scrolls, IVF notification, and other features. The extent to which the harm suffered by a Plaintiff was contributed to by being pulled into a "flow-state" by continuous scrolling, or by extensive notifications and reminders at all hours of the day and night, or by a compulsion to use the platform in a way that would gain an in-app "reward," or by the inability of a parent to monitor the Plaintiff's use of the social media site due to actions of a Defendant, will be an issue for the jury.

Once it is determined that a Defendant owes a duty of care to a Plaintiff, it is for the jury to determine whether the defendant breached that duty, whether the defendant's breach caused harm to the plaintiff and whether the conduct of some third party also contributed to the harm. (*Cabral, supra,* 51 Cal.4th at p. 769.) At this point in the litigation, the closeness of the connection between Defendants' conduct and Plaintiffs' harm must be determined on the basis of the allegations of the operative pleadings; Plaintiffs have alleged that Defendants' conduct directly harmed Plaintiffs.

2. Policy Factors

"A duty of care will not be held to exist even as to foreseeable injuries … where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 502 (Werdegar, J., dissenting).) As set forth in *Rowland,* the policy factors bearing on this determination are the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

***27** Moral blame attaches to a party's conduct when there are ameliorative steps the party could have taken to avert foreseeable harm and the party failed to take those steps. (*Kuciemba, supra,* 14 Cal.5th at p. 1025.) "Relative inequality between the parties may also bear upon moral blame. 'We have previously assigned moral blame, and we have relied in part on that blame in finding a duty, in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue.' " (*Id.* at p. 1026, citing *Kesner, supra,* 1 Cal.5th at p. 1151.) Defendants offer no argument in their Demurrer as to this *Rowland* factor. Plaintiffs have alleged specific facts which, if true,

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tend to show that Defendants anticipated the very harm allegedly suffered by Plaintiffs and intentionally failed to make changes to ameliorate that potential harm. And there is an obvious inequality between the unsophisticated minors and Defendants who exercised total control over how their platforms functioned.

The *Rowland* factor that considers a policy of preventing future harm ordinarily is served by imposing the costs of negligent conduct on the negligent party. (*Kuciemba, supra,* 14 Cal.5th at p. 1026.) Here, (particularly where the issue is presented in a mass-tort context), if liability is imposed, it is likely to induce a change of conduct by the allegedly negligent party. Defendants offer no argument as to this *Rowland* factor. And, as Plaintiffs point out, protecting minors is an important public policy goal. (See, e.g., *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 407 disapproved of on other grounds by *USA Taekwondo, supra,* 11 Cal.5th 204.)

The third policy factor looks both to the extent of the burden of imposing liability on a defendant and to the consequences to the community of imposing a duty to exercise care with resulting liability for breach. Defendants make two arguments that are relevant to this *Rowland* factor. First, they argue that courts have declined to impose a duty to prevent addiction to online services out of concern that there would be no limiting principle to that liability. Second, they argue that courts have declined to impose duties on disseminators of expressive conduct. (Defs' Dem., at pp. 69-70.)

For their first argument concerning liability for addiction without a limiting principle, Defendants cite the California Supreme Court's *Kesner* decision in a very misleading sentence purporting to quote from that decision. (Defs' Dem., at p. 70.) The actual quotation from that case says only that "courts invoke the concept of duty to limit generally the otherwise potentially infinite liability which would follow from every negligent act." (*Kesner, supra,* 1 Cal.5th at p. 1143, internal citations, quotation marks, brackets, and ellipses omitted.) That case says nothing about addiction.

Defendants also cite a federal case decided under Indiana law holding that a casino had no tort liability for "fail[ing] to evict a gambler who requests his own exclusion" and discussing dram shop liability under Indiana law. (*Merrill v. Trump Ind., Inc.* (7th Cir. 2003) 320 F.3d 729, 732-733.) The case is inapposite for the reason (among others) that there were no allegations that the defendant engaged in manipulative conduct toward the (adult) plaintiff in order to retain the plaintiff's engagement in the services offered by the casino.

In the final case cited by Defendants, parents and their son sued three major television networks, alleging that violent programming watched by the son from age 5 to age 15 had made him a sociopath. Unsurprisingly, the court found that it "lack[ed] the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items containing Violence' in one form or the other," and that suit was barred by the First Amendment. (*Zamora v. Columbia Broadcasting System* (S.D. Fla. 1979) 480 F.Supp. 199, 203.) Again, Plaintiffs here challenge Defendants' manipulation of their engagement with Defendants' platforms, and, as discussed below, the First Amendment does not bar Plaintiffs' negligence claims.

***28** Defendants also cannot support their contention that the California courts have declined to impose duties on disseminators of expressive content. (Defs' Dem., at p. 69.) As discussed above in the section on First Amendment principles, in *Weirun,* the California Supreme Court held that a radio broadcast had created an unreasonable risk of harm to listeners who were encouraged to participate in a race on city streets to obtain cash prizes. The court declined to bar negligence liability solely on the ground that physical injury was induced by speech rather than conduct. (*Weirun, supra,* 15 Cal.3d at p. 48.) Defendants instead cite *McCollum,* but there the Court of Appeal found that the plaintiff had not shown that the music he listened to before committing suicide was directed and intended toward the goal of urging listeners to commit suicide, and that it was likely to produce such a result. (*McCollum, supra,* 202 Cal.App.3d at pp. 1000-1001.) Thus, in addition to holding that suit was barred by the First Amendment, the court found that the plaintiff had not established the elements of negligence (in particular, foreseeability of harm). Similarly, in another case cited by Defendants, *Watters v. TSR, Inc.* (6th Cir. 1990) 904 F.2d 378, 382, the Court of Appeals (referencing other similar cases cited by Defendants) held that "without actual incitement" First Amendment considerations argue against liability for a reader's reaction to a publication.

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As discussed below, the First Amendment does not bar Plaintiffs' negligence claim. Unlike in the cases cited by Defendants, here Plaintiffs seek to hold Defendants liable for their conduct in manipulating Plaintiffs' engagement with social media platforms separate from the content of those platforms. Moreover, the cases cited by Defendants also failed to find a duty based on a lack of foreseeability of harm to a person who chose to watch or read the expressive content. Here, as discussed above, Defendants allegedly knew the likely effect of their conduct on Plaintiffs. To be sure, Plaintiffs seek to limit the conduct of social media sites in crafting mechanisms for interactions with minors. But those limits do not implicate the duties of content publishers who have no intention of inciting harmful behavior in consumers of the content. Neither the extent of the burden of imposing liability on Defendants in this case, nor the consequences to the community of imposing a duty on Defendants to exercise care toward these minor Plaintiffs, suggests that the duty imposed by negligence principles should not apply here.

Finally, as to whether Defendants might be able to insure for the risk involved by recognizing a duty to Plaintiffs, Defendants fail to argue—much less show—that it would be impossible or difficult for Defendants to insure against the risks related to operating their platforms. This *Rowland* factor thus does not weigh in favor of sustaining the Demurrer as to the negligence-based claims.

In summary, the court finds that there is no basis for deviating from general principles of negligence requiring Defendants to exercise due care in the management of their property for the safety of their customers.

D. Plaintiffs Have Adequately Alleged Proximate Causation

Defendants argue that all of the claims alleged by Plaintiffs—including the negligence claims—fail due to Plaintiffs' failure to adequately allege that Defendants' platforms were the proximate cause of Plaintiffs' alleged injuries. Defendants claim it is unclear which Plaintiffs used which features of Defendants' platforms. Defendants state:

> Plaintiffs' allegations are akin to those of a teenager who, having attended multiple high schools, sues each of the schools together, claiming that a variety of issues that can possibly occur in educational settings—from abusive teachers, to inadequate special education services, to unsafe bus drivers, to insufficient protection from bullies, to nutritionally deficient food—are all theoretically capable of causing harm, but declining to specify which high school, let alone which aspect of their school experience at a particular school, actually caused their injuries.

(Defs' Dem., at p. 75.)

"In the usual negligence case, the elements of due care and proximate cause present questions of fact for the jury." (Witkin Torts, § 996.) "Traditionally, the law has asked whether defendant's conduct was the proximate cause of injury. [Citation.] Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 152 (*Modisette*), internal citations, quotation marks, and ellipses omitted.)

***29** "Proximate cause has two aspects. One is cause in fact. An act is a cause in fact if it is a necessary antecedent of an event. This is sometimes referred to as but-for causation. [Citation.] To establish but-for causation, the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of plaintiff's harm." (*Id.* at p. 153, internal citations, quotation marks, and brackets omitted.)

"As with the test for duty in negligence actions, the second aspect of proximate cause focuses on public policy considerations. Because the purported factual causes of an event may be traced back to the dawn of humanity, the law has imposed additional limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection

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between the conduct and the injury, but also with public policy." (*Id.,* internal citations, quotation marks, and brackets omitted.) As for this second aspect of proximate cause, "legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay." (*Id.* at p. 154.) For example, in *Modisette,* the court held that the law was not justified in making Apple, Inc. (Apple) pay for injuries resulting from a third-party driver who crashed into the plaintiffs' vehicle because the third-party driver was using Apple's vide chat application while driving. (*Id.*) The court found that, under the specific facts there, no reasonable person could conclude that Apple was responsible for the car crash. (*Id.* at p. 155.)

Here, as previously discussed, there is a close connection between Defendants' management of their platforms and Plaintiffs' injuries. The Master Complaint is clear in stating that the use of each of Defendants' platforms leads to minors' addiction to those products, which, in turn, leads to mental and physical harms. (See, e.g., Mast. Compl., ¶¶ 80-95.) These design features themselves are alleged to "cause or contribute to (and, with respect to Plaintiffs, have caused and contributed to) [specified] injuries in young people … ." (Mast. Compl., ¶ 96, internal footnotes omitted; see also Mast. Compl., ¶ 102 [alleging that Defendants' platforms "can have a detrimental effect on the psychological health of their users, including compulsive use, addiction, body dissatisfaction, anxiety, depression, and self-harming behaviors such as eating disorders"], internal quotation marks, brackets, and footnotes omitted.) Plaintiffs allege that the design features of each of the platforms at issue here cause these types of harms. (See, e.g., Mast. Compl., ¶¶ 268-337 (Meta); ¶¶ 484-487, 489-490 (Snap); ¶¶ 589-598 (ByteDance); ¶¶ 713-773, 803 (Google).) These allegations are sufficient under California's liberal pleading standard to adequately plead causation.

When the Short-Form Complaints are read in conjunction with the Master Complaint, the three individual Plaintiffs at issue here also have adequately alleged causation in the Short-Form Complaints. Plaintiff M.C. allegedly used the following platforms: Instagram, Snapchat, TikTok, and YouTube. (M.C. SFC, ¶ 4.) Plaintiff M.C. has accordingly brought claims against Meta, Snap, ByteDance, and Google. (M.C. SFC, ¶ 3.) Plaintiff M.P. allegedly used Instagram and TikTok. (J.P. SFC, ¶ 4.) Plaintiff M.P. has accordingly brought claims against Meta and ByteDance. (J.P. SFC, ¶ 3.) Plaintiff L.J.S. allegedly used Facebook and Instagram. (J.S. SFC, ¶ 4.) Plaintiff L.J.S. has accordingly brought claims against Meta. (J.S. SFC, ¶ 3.) The parents of L.J.S. allege that L.J.S was able to secretly use Facebook and Instagram because of Defendants' practices allowing youth users to create accounts without age verification and to create multiple private accounts, that they would not have allowed L.J.S. to use those social media sites, and that L.J.S. developed an addiction to the sites. (J.S. SFC ¶¶ 7-8; Mast. Compl. ¶ 929.) All three of these individual Plaintiffs allege that they suffered specified harm as a result of using Defendants' platforms. (M.C. SFC, ¶ 5; J.P. SFC, ¶ 5; J.S. SFC, ¶ 5.)

***30** To the extent that Defendants can be understood to make the argument that it is unclear from these factual allegations *to what extent* each platform caused the specific harm suffered by one of the individual Plaintiffs, Defendants raise a factual argument that must be addressed at a later stage of the litigation. Here, Plaintiffs have alleged that their use of each of Defendants' platforms causes harm; and each of the three individual Plaintiffs has alleged that his or her use of particular platforms caused his or her individual harm. This coordinated proceeding thus is not analogous to "alternative liability" cases like *Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal.App.4th 1525 (*Setliff*), where the plaintiff was unable to determine *which* product caused the plaintiff harm. Here, for example, Plaintiff M.P. has alleged use of both Instagram and TikTok, and that both Instagram and TikTok caused his or her harm; Plaintiff M.P. has not alleged that he or she is not sure whether he or she used *either* Instagram *or* TikTok. Defendants' reliance on *Setliff,* where the plaintiff was unable to determine which manufacturer had manufactured a product to which he was exposed and by which he was harmed, is thus misplaced.

Moreover, as discussed above, because the Master Complaint can be read to state that Defendants' design features themselves —rather than the actions of third parties using Defendants' platforms—caused Plaintiffs' harms, the Demurrer cannot be sustained based on Defendants' secondary argument that Defendants cannot be made to pay for the actions of third parties using Defendants' platforms.

E. Section 230 Does Not Bar Plaintiffs' Negligence Claim

Section 230 states that "[n]o provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) Through this statute, "Congress intended to create a blanket immunity from tort liability for online republication of third party content." (*Barrett, supra,* 40 Cal.4th 57.)

Plaintiffs do not dispute the fact that Defendants are providers of an interactive computer service within the meaning of Section 230. The question for the court is thus whether the Fifth Cause of Action must be read as seeking to hold Defendants liable as the publishers of third-party information. Put slightly differently, the court must determine "whether the duty that [Plaintiffs allege Defendants] violated derives from [Defendants'] status or conduct as a publisher… ." (Lee, *supra,* 76 Cal.App.5th at p. 256, internal citations and quotation marks omitted.)

As discussed above, under California procedural law, if any allegations are sufficient to support a viable cause of action, the Demurrer to that cause of action must be overruled. Thus, if any facts sufficient to state a claim for negligence support a theory of liability that is not preempted by Section 230, the court must overrule the Demurrer as to the Fifth Cause of Action. If some allegations state a claim that is not barred by Section 230, the court is not required at this stage of the litigation to determine whether or not there are other particular allegations of the Master Complaint and Short-Form Complaints that are barred by Section 230. For the reasons that follow, this court concludes that there are several theories of breach of duty set forth in the Fifth Cause of Action that are not barred by Section 230.

Plaintiffs allege they were injured by features of Defendants' platforms that were designed to, and did in fact, maximize use of the platforms in ways leading to minors' addiction and resulting health consequences. The Ninth Circuit has held that Section 230 does not bar a claim based on features of a social media site that have an adverse effect on users apart from the content of material published on the site.

In *Lemmon, supra,* the plaintiffs were parents of two deceased boys who sued Snap, "alleging that it encouraged their sons to drive at dangerous speeds and thus caused the boys' deaths through its negligent design of its smartphone application Snapchat." (955 F.3d at p. 1087.) At issue was Snap's app called the "Speed Filter." "The app … permits its users to superimpose a filter over the photos or videos that they capture through Snapchat at the moment they take that photo or video. [One of the deceased boys] used one of these filters—the Speed Filter-minutes before the fatal accident on May 28, 2017. The Speed Filter enables Snapchat users to record their real-life speed." (*Id.* at p. 1088, internal quotation marks omitted.) "Many of Snapchat's users suspect, if not actually believe, that Snapchat will reward them for recording a 100-MPH or faster snap using the Speed Filter. According to plaintiffs, this is a game for Snap and many of its users with the goal being to reach 100 MPH, take a photo or video with the Speed Filter, and then share the 100-MPH-Snap on Snapchat." (*Id.* at p. 1089, internal quotation marks and brackets omitted.)

***31** The Ninth Circuit reversed the district court's dismissal of the plaintiffs' action under Section 230, concluding "that, because the [plaintiffs'] claim neither treats Snap as a publisher or speaker nor relies on information provided by another information content provider, Snap does not enjoy immunity from this suit under § 230(c)(1)." (*Id.* at p. 1087, internal quotation marks omitted.) The court noted that the plaintiffs in *Lemmon* alleged a cause of action that "rests on the premise that manufacturers have a duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." (*Id.* at p. 1092.) The court then concluded that the claims were not barred by Section 230:

> The duty underlying such a claim differs markedly from the duties of publishers as defined in [Section 230]. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. [Citation.] Meanwhile, entities acting solely as publishers—*i.e.,* those that "review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it," [citation] —generally have no similar duty. [Citation.]

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> It is thus apparent that the [plaintiffs'] amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker.... [T]he duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. [Citation.] This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. [Citation.] Snap's alleged duty in this case thus "has nothing to do with" its editing, monitoring, or removing of the content that its users generate through Snapchat. [Citation.]

(*Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085, 1092, internal citations and brackets omitted; italics in original.)

As in *Lemmon,* Plaintiffs' claims based on the interactive operational features of Defendants' platforms do not seek to require that Defendants publish or de-publish third-party content that is posted on those platforms. The features themselves allegedly operate to addict and harm minor users of the platforms regardless of the particular third-party content viewed by the minor user. (See, e.g., Mast. Compl., ¶¶ 81, 84.) For example, the Master Complaint alleges that TikTok is designed with "continuous scrolling," a feature of the platform that "makes it hard for users to disengage from the app," (Mast. Compl., ¶ 567) and that minor users cannot disable the "auto-play function" so that a "flow-state" is induced in the minds of the minor users (Mast. Compl., ¶ 590). The Master Complaint also alleges that some Plaintiffs suffer sleep disturbances because "Defendants' products, driven by IVR algorithms, deprive users of sleep by sending push notifications and emails at night, prompting children to re-engage with the apps when they should be sleeping." (Mast. Comp., ¶ 107 [also noting that disturbed sleep increases the risk of major depression and is associated with "future suicidal behavior in adolescents"].)

Also similar to the allegations in *Lemmon,* the Master Complaint alleges harm from "filters" and "rewards" offered by Defendants. Plaintiffs allege, for example, that Defendants encourage minor users to create and post their own content using appearance-altering tools provided by Defendants that promote unhealthy "body image issues." (Mast. Compl., ¶ 94). The Master Complaint alleges that some minors spend hours editing photographs they have taken of themselves using Defendants'tools. (See, e.g., Mast. Compl., ¶ 318.) The Master Complaint also alleges that Defendants use "rewards" to keep users checking the social media sites in ways that contribute to feelings of social pressure and anxiety. (See, e.g., Mast. Compl., ¶ 257 [social pressure not to lose or break a "Snap Streak"].)

***32** Another aspect of Defendants' alleged lack of due care in the operation of their platforms is their facilitation of unsupervised or secret use by allowing minor users to create multiple and private accounts and allowing minor users to mask their usage. (Mast. Compl., ¶ 929(d), (e), (f).) Plaintiffs J.S. and D.S., the parents of minor Plaintiff L.J.S., allege that L.J.S. was able to secretly use Facebook and Instagram, that they would not have allowed use of those sites, and that LJ.S. developed an addiction to those social media sites which led to "a steady decline in his mental health, including sleep deprivation, anxiety, depression, and related mental and physical health harms." (J.S. SFC ¶¶ 7-8.)

Insofar as the Fifth Cause of Action is based on these and similar features allegedly negligently crafted or implemented by Defendants, Plaintiffs' claims are not barred by Section 230 because the alleged wrongdoing does not "treat[ ] [the provider] as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230, subd. (c)(1).) Plaintiffs' contentions based on the allegedly addictive qualities of the interactive features of Defendants' social media sites do not fall within the "blanket immunity from tort liability for online republication of third party content." (*Barrett, supra,* 40 Cal.4th at p. 57.) Defendants are allegedly liable for their own actions, not for the content of third-party postings. (See, e.g., *Barnes, supra,* 570 F.3d 1096 [provider's liability for a promise to remove third-party content was not barred by Section 230]; *Bolger, supra,* 53 Cal.App.5th at pp. 464-465 [provider's liability as a seller in the chain of distribution for a defective product listed on its website was not barred by Section 230].) Where a provider manipulates third party content in a manner that injures a user, Section 230 does not provide immunity. (*Hardin, supra,* 227 Cal.App.4th at p. 171 [no Section 230 immunity where the provider edited product warnings before publishing them and the liability allegedly arose from the omitted portions].)

Courts are to attempt to construe statutes to effectuate the intent of the legislative body. (*People v. Johnson* (2002) 28 Cal.4th 240, 244.) Section 230 states an express congressional policy to "encourage the development of technologies which *maximize user control* over what information is *received* by individuals, families and schools who use the Internet and other interactive computer services … ." (47 U.S.C. § 230, subd. (b)(3), emphasis added.) Congress did not decide to support this congressional policy by enacting into positive law a requirement that a provider act so as to maximize user control. When the immunity granted by subdivision (c) of Section 230 is applied according to its terms, providers are shielded from being held liable for content others have posted on their platforms. Thus, for example, users cannot maximize their control over the content they receive by holding a provider liable if the user receives content he has asked not to see. (Cf., *Barnes, supra,* 570 F.3d 1096.) But the congressional policy of encouraging technologies that maximize user control should caution a court not to stretch the immunity provision of Section 230 beyond its plain meaning in a manner that diminishes users' control over content they receive. So long as providers are not punished for publishing third-party content, it is consistent with the purposes of Section 230 to recognize a common law duty that providers refrain from actions that injure minor users by inducing frequency and length of use of a social media platform to the point where a minor is addicted and can no longer control the information they receive from that platform.

***33** Similarly, Congress made no secret of its intent regarding parental supervision of minors' social media use. By enacting Section 230, Congress expressly sought "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict children's access to objectionable or inappropriate online material." (47 U.S.C. § 230, subd. (b)(4).) While in some instances there may be an "apparent tension between Congress's goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet" (*Barrett, supra,* 40 Cal.4th at p. 56), where a plaintiff seeks to impose liability for a provider's acts that diminish the effectiveness of parental supervision, and where the plaintiff does not challenge any act of the provider in publishing particular content, there is no tension between Congress's goals.

Further, subdivision (e)(3) of Section 230 provides that "[n]othing in this section shall be construed to prevent any State from enforcing State law that is consistent with this section." (47 U.S.C. § 230, subd. (e)(3).) Application of negligence principles in the manner permitted by state common law as described above is consonant with, not inconsistent with, both subdivision (c) of Section 230 and the intent expressed by Congress in enacting Section 230.

Although Defendants argue they cannot be liable for their design features' ability to addict minor users and cause near constant engagement with Defendants' platforms because Defendants create such "engagement" "with user-generated content" (Defs' Dem., at p. 42, internal italics omitted), this argument is best understood as taking issue with the facts as pleaded in the Master Complaint. It may very well be that a jury would find that Plaintiffs were addicted to Defendants' platforms because of the third-party content posted thereon. But the Master Complaint nonetheless can be read to state the contrary—that is, that it was the design of Defendants' platforms themselves that caused minor users to become addicted. To take another example, even though L.J.S. was viewing content of some kind on Facebook and Instagram, if he became addicted and lost sleep due to constant unsupervised use of the social media sites, and if Defendants facilitated L.J.S.'s addictive behavior and unsupervised use of their social media platforms (i.e., acted so as to maximize engagement to the point of addiction and to deter parental supervision), the negligence cause of action does not seek to impose liability for Defendants' publication decisions, but rather for their conduct that was intended to achieve this frequency of use and deter parental supervision. Section 230 does not shield Defendants from liability for the way in which their platforms actually operated.

Moreover, courts have repeatedly "rejected use of a 'but-for' test that would provide immunity under [Section 230] solely because a cause of action would not otherwise have accrued but for the third-party content." (*Lee, supra,* 76 Cal.App.5th at p. 256, internal citations and quotation marks omitted.) "[N]ot all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third party content, even when these obligations are in some way associated with their publication of this material." (*Hassell, supra,* 5 Cal.5th at pp. 542-543.) As the Ninth Circuit found in *Lemmon:*

> Snap "is an internet publishing business. Without publishing user content, it would not exist." *Id.* But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the [plaintiffs'] claim, specifically, seeks to hold Snap

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> responsible in its capacity as a "publisher or speaker." *Id.* The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content.

***34** (*Lemmon, supra,* 995 F.3d at pp. 1092-1093, internal brackets omitted; see also *Internet Brands, supra,* 824 F.3d at p. 853; *HomeAway, supra,* 918 F.3d at p. 682.) Thus, the fact that Plaintiffs' harmful addiction to Defendants' platforms would not have arisen *without* the presence of third-party content does not, without more, bar the Fifth Cause of Action under Section 230.

In arguing that Section 230 bars liability for negligently creating the platform features that Plaintiffs contend cause addiction and resulting harm, Defendants rely on cases that are distinguishable because they concern circumstances where an internet service provider failed to protect a user from harm caused by third-party content. Plaintiffs' allegations on the basis of which this court is sustaining the Demurrer to the negligence claim do not seek to hold Defendants liable for injury caused by third-party content.

In *Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093 (*Dryoff*), for example, the plaintiff's son used a social networking website to connect with a drug dealer and purchase heroin that caused death from fentanyl toxicity. The plaintiff alleged that defendant allowed illegal drug trafficking on the website, steered users to groups dedicated to the sale and use of narcotics, and permitted users to remain active accountholders despite evidence that they openly engaged in drug trafficking. (*Id.*) The Ninth Circuit rejected the plaintiff's argument that the social networking website could be held liable for "features and functions, including algorithms, to analyze user posts on [the site] and recommend[ ] other user groups." (*Id.* at p. 1098.) The court held that "what matters [for purposes of Section 230] is whether the claims 'inherently require[ ] the court to treat the defendant as the 'publisher or speaker' of content provided by another.' " (*Id.,* quoting *Barnes, supra,* 570 F.3d at p. 1102.) The plaintiff in *Dryoff* also was unable to allege that the defendant "materially contributed to the content posted … that led to [the plaintiff's death]." (*Id.* at p. 1099.) Thus, in *Dyroff,* liability was premised on the website's publication and recommendation of third-party content and injury flowing from that content, not from the provider's own actions.

Similarly, in *Doe II v. MySpace, Inc.,* (2009) 175 Cal.App.4th 561 (*MySpace*), the plaintiffs sought to hold the provider liable for injuries from sexual assault by men the minor plaintiffs met through the social networking site. The Court of Appeal held that even though the plaintiffs "seek to hold [the provider] responsible for the communications between the [plaintiffs] and their assailants[,] … [a]t its core, [the plaintiffs] want [the provider] to regulate what appears on its Web site. … [T]hey want [the provider] to ensure that sexual predators do not gain access to (i.e., communicate with) minors on its Web site. That type of activity—to restrict or make available certain material—is expressly covered by section 230." (*Id.* at p. 573.) Again, as in *Dyroff,* it was clear to the appellate court in *MySpace* that the gravamen of the cause of action was for injury caused by content on the social media service. Here, the injuries to Plaintiffs that are the basis for overruling the Demurrer to the Fifth Cause of Action are not alleged to be caused by content on Defendants' website, but rather by features created by Defendants to keep the minor user on the platform and to decrease the potential for parental supervision.

***35** Defendants also argue that *Prager University v. Google LLC* (2022) 85 Cal.App.5th 1022 (*Prager*) rejects the argument that algorithmic features can be a basis for liability that is not barred by Section 230. That case has little relevance here. The plaintiffs in *Prager* sought to hold the defendant provider liable for restricting access to the plaintiff's video content and for limiting third-party advertising based on those videos. (*Id.* at p. 1028.) The plaintiffs alleged that the defendant's algorithms used in determining what content to publish should be considered to be the provider's own speech. The court rejected that argument, finding that the defendant's act of deciding what to allow on its website was indeed a decision to publish third party content and that liability was barred by Section 230. (*Id.* at p. 1034-1035.) Again, here Plaintiffs' contentions concerning features that maximize minors' engagement do not challenge algorithms that decide what content to publish.

Despite the fact that the allegations of the Master Complaint are sufficient to allege a negligence claim based on tools and features of engagement created by Defendants that operate regardless of third-party content, there also are allegations that can be read to seek to hold Defendants liable for publishing third-party content. For example, Plaintiffs allege that "thinspiration"

and "fitspiration" content lowers minors' self-esteem and that content viewed by minors on Defendants' platforms promotes anorexia. (See, e.g., Mast. Compl. ¶¶ 118, 359.)

While the Master Complaint can be read to allege that the amount of time spent on social media can cause disordered eating behaviors (Mast. Compl. ¶ 116), other allegations suggest alternative causes based on content. Nevertheless, the Demurrer to the Fifth Cause of Action must be overruled based on the existence of allegations that Plaintiffs' harms were caused directly by Defendants' negligent failure to properly design and operate their platforms.

At oral argument, Defendants suggested that, contrary to California procedural law, this court can sustain the Demurrer on the ground that some but not all of the allegations can be read to state that Plaintiffs seek to hold Defendants liable in negligence in their role as publishers of third-party content. Defendants have presented no authority—and this court is aware of none—suggesting that the most basic rules of California procedure are somehow preempted by Section 230. The court thus declines to sustain a demurrer to a portion of a cause of action.

F. The First Amendment Does Not Bar Plaintiffs' Negligence Claim

Defendants argue that the First Amendment bars all Plaintiffs' claims, including the Fifth Cause of Action. Defendants claim that they should be viewed as "publishers of material alleged to have harmed those exposed to it." (Defs' Dem., at p. 52.) Defendants argue that they cannot be liable for "disseminating speech," and contend that Plaintiffs seek to hold Defendants liable for disseminating speech. According to Defendants, "Plaintiffs cannot evade the First Amendment by directing attention toward allegedly defective 'features' of Defendants' services." (Defs' Dem., at p. 54.)

"First Amendment rights are accorded a preferred place in our democratic society. [Citation.] First Amendment protection extends to a communication, to its source and to its recipients. [Citation.] Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (*McCollum, supra,* 202 Cal.App.3d at pp. 998-999, internal citations, quotation marks, and brackets omitted.) "First Amendment guaranties of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures or books." (*Id.* at p. 999; see *Brown, supra,* 564 U.S. 786 [striking down a law restricting violent video games as a category of protected expression].)

***36** Defendants cite frequently to *McCollum* in support of their Demurrer, but that case did not deal primarily with the question of whether the relevant bad acts by the defendant constitute speech or expression. In *McCollum,* the act for which the plaintiff sought to hold the defendant liable was publication of a song with lyrics about suicide, which clearly was expressive activity. There, the issue was whether the defendant's speech was directed to inciting or producing imminent lawless action, and thus excepted from the normal protections of the First Amendment. (*McCollum, supra,* 202 Cal.App.3d at p. 1000.) Here, by contrast, the main issue before the court is whether the design features of Defendants' platforms that allegedly harmed Plaintiffs must be viewed as speech protected under the First Amendment.

Defendants would have this court treat Defendants as mere "publishers" of information, and treat Plaintiffs as individuals who were exposed to that information when using Defendants' platforms. Defendants thus seek to analogize the allegations in the Master Complaint to cases where the defendant distributed recorded music or violent movies. (See Defs' Dem., at p. 54, citing *McCollum* and *Olivia N., supra,* 126 Cal.App.3d 488.)

Plaintiffs here were exposed to speech when using Defendants' platforms. But the mere fact that the conduct at issue involves or includes speech does not necessarily shield a defendant from liability. (See *Avis Rent A Car, supra,* 21 Cal.4th at p. 134 [spoken words, alone or in conjunction with conduct, can amount to unlawful employment discrimination].) For example, even where some speech by a defendant is alleged, the First Amendment does not bar a claim for liability based on manufacture and distribution of a defective product. (See *Martinez v. Metabolite Internat, Inc.* (2003) 113 Cal.App.4th 181, 188.) And in *Weirun, supra,* 15 Cal.3d at pp. 47-48, the California Supreme Court allowed a tort claim to be pursued based on a radio broadcast that

created an unreasonable risk of harm by encouraging participation in a race on city streets for cash prizes. Moreover, while conduct that is "sufficiently imbued with elements of communication" is protected by the First Amendment, the Supreme Court of the United States has rejected "the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." (*Edge v. City of Everett* (9th Cir. 2019) 929 F.3d 657, 668, internal citations and quotation marks omitted.)

A case cited by Defendants in support of their arguments regarding Plaintiffs' strict liability claims serves to highlight the difference between, on the one hand, content offered by a defendant's product, and, on the other, the product itself. In *Winter, supra,* 938 F.2d 1033, the Ninth Circuit, concerned with First Amendment protections, held that informational content in a book is not a "product" for the purposes of strict products liability. The court began by stating:

> A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.

(*Id.*) The court determined that the purposes served by products liability law "do not take into consideration the unique characteristics of ideas and expression." (*Id.*)

***37** Because the allegations in the Master Complaint can be read to state that Defendants' liability grows from the way their platforms functioned, the Demurrer cannot be sustained pursuant to the protections of the First Amendment. As Plaintiffs argue in their Opposition, the allegations can be read to state that Plaintiffs' harms were caused by their addiction to Defendants' platforms themselves, not simply to exposure to any particular content visible on those platforms. Therefore, Defendants here cannot be analogized to mere publishers of information. To put it another way, the design features of Defendants' platforms can best be analogized to the physical material of a book containing Shakespeare's sonnets, rather than to the sonnets themselves.

Defendants fail to demonstrate that the design features of Defendants' applications must be understood at the pleadings stage to be protected speech or expression. Indeed, throughout their Demurrer, Defendants make clear their position that Plaintiffs' claims are based on content created by third parties that was merely posted on Defendants' platforms. (See, e.g., Defs' Dem., at p. 49.) As discussed above, a trier of fact might find that Plaintiffs' harms resulted from the content to which they were exposed, but Plaintiffs' allegations to the contrary control at the pleading stage.

Defendants nonetheless argue that "Plaintiffs cannot evade the First Amendment by directing attention toward allegedly defective 'features' of Defendants' services." (Defs' Dem., at p. 54.) According to Defendants, third-party speech disseminated by Defendants is a necessary part of Plaintiffs' claims, and Defendants argue that "without reference to the speech generated or made available through those features, Plaintiffs' alleged harms are inexplicable." (Defs' Dem., at p. 55.) In arguing that the presence of third-party speech on Defendants' platforms renders all of Plaintiffs' claims barred under the First Amendment,

Defendants cite to the following two cases: *Bill, supra,* 137 Cal.App.3d 1002; and *Estate of B.H. v. Netflix, Inc.* (N.D. Cal., Jan. 12, 2022, No. 4:21-CV-06561-YGR) 2022 WL 551701 (*Netflix*). (See Defs' Dem., at p. 54.)

In *Bill, supra,* 137 Cal.App.3d 1002, plaintiff contended that the director and producers of a violent film could be held liable when a third party shot the plaintiff outside the movie theater that showed the film. Although the court expressed concern that such tort liability could have "a chilling effect" on speech (*id.* at p. 1008), the court in fact "refrain[ed] from deciding the case on First Amendment grounds alone" because there could be appropriate circumstances to "hold a party responsible for warning, or taking protective action, against the foreseeable reaction of persons to protected speech without violating the First Amendment" (*id.* at p. 1009). The Plaintiff in *Bill* argued that she was not seeking to impose liability on the basis of the content of the movie. (*Id.* at p. 1007.) But the court effectively found there were no other wrongful actions by the defendant on

which liability could be premised. "It is not claimed, for example, that petitioners are responsible for any conduct [other than distributing the film] which *increased the risk of violence* on the part of persons in the vicinity of the theater, in order to obtain some commercial rewards." (*Id.* at p. 1011, emphasis added.)

The holding in *Bill* cannot be analogized to the allegations of the Master Complaint regarding Defendants' alleged negligence in the design and operation of their platforms. As the court in *Bill* stressed, it was the content of the movie that attracted violent third parties to the movie theater, and it was thus the content of the movie that allegedly led to the plaintiff's harm. In contrast, the allegations of the Master Complaint can be read to state that it is the way in which the platforms function that renders them addictive and thus harmful to minor Plaintiffs, or that certain design features (such as filters) directly led to Plaintiffs' harm. In contrast to the facts in *Bill,* here there is no single type of content viewed by all Plaintiffs; rather, the particular content viewed depends on each user. The allegedly addictive and harmful features of Defendants' platforms are alleged to work *regardless* of the third-party content viewed by the users. (See, e.g., Mast. Compl., ¶ 93.) Moreover, Defendants fail to explain how a requirement that Defendants change the design features of their platforms would have a chilling effect on third-party speech or the distribution of such speech.

***38** Nor does *Netflix* support Defendants' position. *Netflix,* like *Bill,* concerned content, not the design features of a website or application. The plaintiffs in *Netflix* alleged that the defendant, which operated a streaming platform, released a show that dealt with suicide, and that the defendant knew that "certain impressionable youths" would be harmed if they *watched* the show. (See Amended Complaint in *Netflix,* 2021 WL 8821883 (N.D.Cal.).) The plaintiffs alleged that the defendant "used its sophisticated, targeted recommendation systems to push the Show on unsuspecting and vulnerable children, using its cutting-edge technology," but the harm alleged by the plaintiffs was clearly caused by the content of the show. (*Id.* ¶¶ 6, 26.) In dismissing the action on First Amendment grounds, the court thus determined that the plaintiffs' "efforts to oppose the anti-SLAPP motion on the grounds that the complaint [did] not concern the content or dissemination of the show [did] not persuade and [were] inconsistent with the allegations." (*Netflix, supra,* 2022 WL 551701, at *2.)

The reasoning in *Netflix* would apply here to the extent Plaintiffs' claims are based on allegations that Defendants directed them to watch harmful third-party content. But, as repeatedly stated in this order, Plaintiffs' claims can be interpreted as being based on harm arising from the design features of Defendants' platforms. When Plaintiffs' claims are so framed, cases like *Netflix* are inapposite.

Despite Defendants' suggestions to the contrary, this litigation cannot be analogized to *NetChoice, LLC v. Attorney General, Florida* (11th Cir. 2022) 34 F.4th 1196 (*NetChoice*), which dealt directly with the content posted on social-media platforms. In *NetChoice,* the state of Florida sought to control the political content found on social-media platforms. For example, Florida state law would have prevented social-media platforms from willfully deleting or banning a candidate for office from a social-media platform for more than 14 days. (*Id.* at p. 1206.) The Eleventh Circuit determined that "when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site." (*Id.* at p. 1210.) "When a platform selectively removes what it perceives to be incendiary political rhetoric, pornographic content, or public-health misinformation, it conveys a message and thereby engages in 'speech' within the meaning of the First Amendment." (*Id.*) The court in *NetChoice* thus reached the conclusion that "[l]aws that restrict platforms' ability to speak through content moderation therefore trigger First Amendment scrutiny." (*Id.*) Here, the design features of Defendants' platforms are not an instance of "content moderation" as discussed in *NetChoice.*

Defendants are also incorrect in suggesting that First Amendment protections apply here because the addictive features of Defendants' platforms (such as "endless scroll") can be analogized to how a publisher chooses to make a compilation of information. (See Defs' Dem., at p. 55.) It is undisputed that the First Amendment generally protects a publisher from liability where that publisher organized, compiled, and disseminated information that then harmed the plaintiff. (See, e.g., *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 266.) Moreover, a plaintiff cannot properly force a publisher to disseminate certain information. (*Miami Herald Pub. Co. v. Tornillo* (1974) 418 U.S. 241 [political candidate could not sue to require a newspaper

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to publish his reply to the newspaper's editorials].) But Defendants fail to cite to a case in which the plaintiff's claims against a publisher of information were based on harm caused by the way in which the publisher provided third-party content, rather than being based on the content itself. Design features of the platforms (such as endless scroll or filters) cannot readily be analogized to mere editorial decisions made by a publisher. Here, the design features of Defendants' platforms affect how Plaintiffs interact with the platforms regardless of the nature of the third-party content viewed by Plaintiffs.

***39** In addition, the allegations of the Master Complaint are analogous to facts alleged in a line of United States Supreme Court cases that allow a person to avoid speech that invades privacy interests "in an essentially intolerable manner." (*Erznoznik, supra,* 422 U.S. at p. 210.) In *Rowan,* the Supreme Court turned aside a First Amendment challenge to a federal statute that allowed a postal recipient to insulate himself from home delivery of matter he believed to be "sexually provocative." (*Rowan, supra,* 397 U.S. at p. 730.) Although the court acknowledged that the regulation impeded the free flow of ideas and to that extent chilled expression, the court protected minors and the privacy of homes from receiving speech that could not be avoided. "The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." (*Id.* at p. 738.) Similarly, in dicta, the Supreme Court recognized in *Erznoznik* a right to avoid speech when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." (*Erznoznik, supra,* 422 U.S. at p. 209.)

If Plaintiffs' allegations can be proved, minors were subject to endless scrolls of videos and notifications at all hours of the day and night. Having become addicted to Defendants' platforms as a result of these features, the minors were unable to control exposure to the content that was communicated to them in this manner. Holding Defendants responsible in tort for these addictive features does not violate the First Amendment even if less content is delivered as a result. The right of Defendants to send content that the minors could not avoid stops at the boundary of their domain." (*Rowan, supra,* 397 U.S. at p. 738; see also *Rock Against Racism, supra,* 491 U.S. at p. 803 [city's sound-amplification guideline for use of a public bandshell so as to preserve quiet space was narrowly tailored to serve a substantial, content-neutral governmental interest and the guideline left open ample channels of communication].)

As discussed above, Defendants are correct that there are allegations in the Master Complaint that could be read to state that Plaintiffs were also harmed by *content* found on Defendants' platforms. But the Master Complaint can be read to state that Plaintiffs' claims are based on the fact that the design features of the platforms—and not the specific content viewed by Plaintiffs—caused Plaintiffs' harms. The Fifth Cause of Action is not barred by the First Amendment.

VI. Sixth Cause of Action - Negligent Undertaking

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care *increases the risk of such harm,* or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered *because of reliance of the other or the third person upon the undertaking." (Paz v. State of California* (2000) 22 Cal.4th 550, 558 (*Paz*), internal citations, quotation marks, brackets, and footnotes omitted; emphasis added.) "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. [Citation.] However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking." (*Id.* at pp. 558-559, internal citations omitted.)

The Sixth Cause of Action concerns Defendants' alleged decision to provide users with "age verification services." (Mast. Compl., ¶ 940.) Plaintiffs do not contend that Defendants, by creating the age verification services, have undertaken to perform a duty owed by another person to Plaintiffs. (See Pls' Opp., at pp. 58-60.) Plaintiffs must therefore allege *either* that the provision of the age verification services increased the risk of harm to Plaintiffs *or* that the harm was caused by reliance on the age verification services. Because Plaintiffs fail to allege either of these alternative elements of their Sixth Cause of Action, the negligent undertaking claim fails.

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***40** There are no factual allegations stating that the provision of age verification services actually increased any likelihood of harm to Plaintiffs. Here, because the "undertaking" is the provision of age verification services, the increase of risk must be compared with a situation in which *no such services* are provided. But Plaintiffs fail to provide any allegations demonstrating that the risk of harm to Plaintiffs *increased* with the provision of age verification services. Given the allegations in the Master Complaint, the risk of harm to Plaintiffs would have been the same if Defendants had instead failed to provide *any* age verification services for the use of their platforms.

For example, in their Opposition, Plaintiffs cite to paragraph 717 of the Master Complaint in arguing that Google's age verification services increased the risk to Plaintiffs. That paragraph states: "YouTube's defective age verification feature means that Google fails to protect children from other product features discussed below that Google knows to be harmful to kids." (Mast. Compl., ¶ 717.) This paragraph fails to allege any increased risk caused by the provision of age verification services: if there were no age verification services provided by Google, then Plaintiffs would still have been exposed to Google's product features that are harmful to kids. The same conclusion must be reached with respect to ByteDance and Snap. (See Mast. Compl., ¶¶ 434-436, 540-547.)

With respect to Meta, Plaintiffs cite to the following paragraph of the Master Complaint:

> Meta imposes unnecessary barriers to the removal of accounts created by children under 13. Since at least April 2018, Instagram and Facebook both accept reports of accounts created by children under 13. However, before an Instagram or Facebook account is deleted, Meta requires verification that the child is under the age of 13. For example, Instagram's reporting page states:
>
> If you're reporting a child's account that was made with a false date of birth, and the child's age can be reasonably verified as under 13, we'll delete the account. You will not get confirmation that the account has been deleted, but you should no longer be able to view it on Instagram. Keep in mind that complete and detailed reports (example: providing the username of the account you're reporting) help us take appropriate action. If the reported child's age can't reasonably be verified as under 13, then we may not be able to take action on the account.
>
> Facebook's reporting page contains almost identical language. By choosing to implement age verification only before deleting accounts of users suspected to be children, but not when those accounts are first created, Meta makes it more difficult to prove a user is under age 13 than it does for a minor to pretend to be over 13.

(Mast. Compl., ¶ 249, internal footnotes omitted.) Plaintiffs then opine in their Opposition that preteen users *might* continue to be harmed by Meta's products even when their parents try to delete their accounts. (See Pls' Opp., at pp. 59-60.) The problem with this argument, however, is that Plaintiffs fail to point to any factual allegations in the Master Complaint stating that any Plaintiffs suffered harm that they would otherwise not have suffered because Meta required some age verification before a minor's account was deleted. The absence of these allegations comes as no surprise, given the nature of Plaintiffs' claim: Plaintiffs' Sixth Cause of Action is based on the allegation that Meta's age verification services were inadequate *at the point minor users signed up for accounts*—not at the point any parent hypothetically had difficulty in requesting that his or her minor child's account be deleted.

***41** Plaintiffs also argue that ByteDance's and Snap's inadequate age verification features allowed adult users to pose as children, thereby "increasing the dangers to children on these youth-only products." (Pls' Opp., at p. 60.) But again, the decision to provide age verification services for "youth-only products" could not have increased the risk of adults posing as children, given that the failure to provide any age verification services would have made it just as easy for adults to pose as children. And there are no allegations in the Master Complaint suggesting any increased risk.

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Plaintiffs have also failed to allege any facts demonstrating that any harm suffered by minor Plaintiffs was caused by their or their parents' *reliance* on the provision of age verification services. Plaintiffs' only argument on this issue is limited to the following sentence in the Opposition: "Given the potential harms to Plaintiffs, it is reasonable to infer that the parents of Plaintiffs would rely on Defendants to act with ordinary care in providing age verification measures." (Pls' Opp., at p. 60.) But Plaintiffs fail to cite to any allegations in the Master Complaint from which the court could properly infer that any Plaintiff in this coordinated proceeding actually suffered any harm that was caused by his/her parent relying on the provision of age verification services.

VII. Seventh and Eighth Causes of Action - Misrepresentation and Concealment

The Seventh and Eighth Causes of Action are brought solely against Meta for its allegedly fraudulent and negligent misrepresentations and concealment of information regarding its platforms. The Seventh Cause of Action is for fraudulent conduct in *either* making affirmative misrepresentations *or* concealing information. The Seventh Cause of Action is thus based on two different theories of relief. The Eighth Cause of Action sounds in negligence rather than fraud and, like the Seventh Cause of Action, is based on two types of conduct: Meta's affirmative misrepresentations and Meta's alleged negligent concealment of information.

Below, this court addresses both the Seventh and Eighth Causes of Action by first finding that neither cause of action, as alleged, properly states a claim based on a misrepresentation made by Meta. The court then addresses whether Plaintiffs can base a claim in either fraud (Seventh Cause of Action) or negligence (Eighth Cause of Action) based on Meta's "concealment" of information.

A. Plaintiffs Fail to Allege a Claim Based on a Misrepresentation by Meta

"To establish a claim for fraudulent misrepresentation, the plaintiff must prove: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff *reasonably relied on the representation;* (6) the plaintiff was harmed; and, (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. … [Citation.] Each element in a cause of action for fraud must be factually and specifically alleged." (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434, internal citations, quotation marks, and ellipses omitted; emphasis in original.) As for negligent misrepresentation, a plaintiff must prove the following in order to recover: "Misrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage." (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 983, internal citations, quotation marks, and brackets omitted.)

***42** Plaintiffs' misrepresentation claims are based on Meta's representations that its platforms are safe. Plaintiffs cite to the fact that Mark Zuckerberg stated, in a discussion at a university with a United States Senator and in a separate "forum" discussion, that Meta was "focused" on safety, that Meta plans on "try[ing] to build a safe environment" in the future, and that making Meta's platforms potentially safe in the future for minors is "extremely important." (See Pls' Opp., at p. 62, citing Mast. Compl., ¶ 343; see also Mast. Compl., ¶¶ 344 [Zuckerberg stated Meta's intent to make its platforms safe for children].) Elsewhere in the Master Complaint, Plaintiffs allege:

> Meta made numerous partial material representations downplaying any potential harm associated with Instagram and Facebook and reassuring the public, Congress, and parents, including Plaintiffs and Consortium Plaintiffs, that its products, Instagram and Facebook, were safe, including but not limited to:

(a) public statements regarding product development that assured users of the products safety, such as its announcement of a Youth Portal, which it purported helped teens "stay[ ] safe."

(b) statements in congressional hearing asserting that Facebook had adequate safeguards to protect youth online, such as Mark Zuckerberg's statements that "A.I. tools [ ] can proactively police and enforce safety across the community. … I think Facebook is safe. I use it, my family uses it, and all the people I love and care about use it all the time. These controls are not just to make people feel safe; it's actually what people want in the product."

(c) statements in conversations with public officials asserting the products were safe:

i. Zuckerberg (3/25/2011): "So, we're really focused on, on safety, especially children's safety. So we're having folks under the age of 18, um we, we just take a lot of extra precautions for it, to make sure that it's just a safe environment for them um, to use this service that you know, the default for, for people sharing things isn't that they're sharing with everyone but that they're sharing with a smaller community … But I think, I think that's a lot of it. We really try to build a safe environment. Um, and um, that's gonna be the key long term."

ii. Zuckerberg (3/25/2011): "Right, and they, they feel like Facebook is this really secure place and that it's a hundred percent safe, and um, we're always thinking about little and big things like that that we can do to keep it safe for, for the people who use our service."

iii. Zuckerberg (5/25/2011): "I mean, we do not allow people under the age of 13 to sign up and I think if we ever were, we would need to try to figure out a lot of ways to make sure that they were safe, right, because that's just extremely important and that's just not the top of the list in terms of things for us to figure out right now." (d) statements that the core mission and impact of Meta's products on users is to "Giv[e] people the power to build community and bring the world closer together[.]"

(Mast. Compl., ¶ 961, internal footnotes omitted; brackets and ellipses in original.)

Plaintiffs do not plead that any Plaintiff actually relied upon Meta's alleged promises of safety. There is no allegation in the Master Complaint or in the Short-Form Complaints at issue on this Demurrer that any Plaintiff (1) was exposed to any of the above-cited statements, and (2) relied on those statements in either becoming a user of Meta's platforms or allowing his or her child to become a user of Meta's platforms. For example, Plaintiff J.P. alleges in the J.P. SFC that, "[p]rior to M.P. opening an Instagram account, J.P. researched Instagram, including materials and representations Meta published about its Instagram product." (J.P. SFC, Add'l Allegs., ¶ 2.) "Relying on that information, J.P. believed that Instagram was safe and age-appropriate for her child." (J.P. SFC, Add'l Allegs., ¶ 2.) But J.P. fails to allege that he or she was exposed to or otherwise relied upon the statements that are actually included in the Master Complaint. This failure to allege actual exposure and reliance is fatal to J.P.'s misrepresentation claim.

***43** Plaintiffs argue that they need not allege they relied on any of the above-cited statements from the Master Complaint. In support of this argument, Plaintiffs cite *In re Tobacco II Cases* (2009) 46 Cal.4th 298 (*Tobacco II*) and *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235 (*Morgan*), for the proposition that, where "a fraud claim is based upon numerous misrepresentations, such as an advertising campaign that is alleged to be misleading, plaintiffs need not allege the specific advertisements or misrepresentations the individual plaintiffs relied upon; it is sufficient for the plaintiff to provide a representative selection of the advertisements or other statements to indicate the language upon which the implied

misrepresentations are based." (Pls' Opp., at p. 65, internal citations, quotation marks, and brackets omitted.) However, unlike in the cases cited by Plaintiffs, the above-cited statements by Meta "were [not] part of an extensive and long-term advertising campaign." (*Tobacco II, supra,* 46 Cal.4th at p. 328.) Moreover, the cases cited by Plaintiffs make clear that a plaintiff must actually have been exposed to and must have relied upon the defendants' advertising campaigns. (See *id.* at p. 328 [plaintiff alleged he was exposed to the advertising campaign]; see also *Morgan, supra,* 177 Cal.App.4th at p. 1257 [plaintiffs alleged they encountered the defendant's misleading advertisements].) But here, Plaintiffs do not allege that they were exposed to a widespread misleading advertising campaign.

Plaintiffs also argue that they may base their claims on a false statement made to a third party. (Pls' Opp., at pp. 65-66.) Plaintiffs' argument is based on "the principle of indirect deception described in section 533 of the Restatement Second of Torts." (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1548.) But this principle does not free Plaintiffs from the requirement of pleading that the messages relayed to a third party actually came to Plaintiffs' attention. (See, e.g., *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095.) Here, there are no allegations that some third party ever communicated the above-cited statements of Mark Zuckerberg to Plaintiffs.

Accordingly, if the Seventh or Eighth Causes of Action are to survive the instant pleadings challenge, they must be based on fraudulent or negligent *concealment* of information; they cannot survive the Demurrer insofar as they plead alleged misstatements of fact.

B. Plaintiffs Have Properly Alleged Fraudulent Concealment, But Cannot State a Claim for Negligent Concealment

The Eighth Cause of Action pleads negligent misrepresentation and negligent concealment. As explained above, Plaintiffs have failed to allege any actionable misrepresentation, and the Eighth Cause of Action is thus necessarily limited to a cause of action for negligent concealment.

However, California law does not recognize a cause of action for negligent concealment. "Negligent misrepresentation is a species of fraud or deceit specifically requiring a 'positive assertion' [citation] or 'assertion' [citation] of fact. [Citation.] An 'implied' assertion or representation is not enough." (*Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 306, internal citations omitted; see also *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 304.) The court in *Byrum v. Brand* (1990) 219 Cal.App.3d 926, 942 explained this point as follows:

> Witkin has explained that an actual representation is not a required element of a cause of action for breach of fiduciary duty or constructive fraud. However, for a cause of action for negligent misrepresentation, clearly a representation is an essential element. The alleged representation by omission claimed by [the plaintiff] seems to us to be too remote to fit this requirement. While [the defendant] may not have uncovered or investigated certain material facts about the investment— i.e., its timing, cost, scope, or necessity for third-party contribution, as the material facts were defined for the jury—the record does not show he positively asserted any facts about these factors that were not true, nor actively concealed or suppressed any such facts.

Plaintiffs therefore cannot bring a claim for negligent concealment. For that reason, and because Plaintiffs cannot state any claim against Meta based on a misrepresentation, the Demurrer is sustained as to the Eighth Cause of Action. However, this analysis does not apply to a claim based on fraudulent concealment (Seventh Cause of Action).

***44** "A failure to disclose a fact can constitute actionable fraud or deceit in four circumstances: (1) when the defendant is the plaintiff's fiduciary; (2) when the defendant has exclusive knowledge of material facts not known or reasonably accessible to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations that are misleading because some other material fact has not been disclosed." (*Collins v. eMachines, Inc.*

(2011) 202 Cal.App.4th 249, 255 (*Collins).*) "The elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 665-666 (*Roddenberry*), internal citations, quotation marks, and brackets omitted; see also CACI 1901.)

In *Collins,* the court held that failure to tell consumers that a product is defective is an actionable omission for a fraud cause of action. Similarly, in *Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 858, the court held that the manufacturer's failure to disclose facts "showing the product had a history of … failure" could support the plaintiffs' cause of action for fraud. But a duty not to conceal information can also arise outside of the product liability context. For example, in *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 315-318, the court found that a claim could proceed against a provider of medical services for its alleged failure to warn the patient of risks associated with the use of a medical device. And in *Roddenberry,* the duty to disclose a fact arose because the defendant had business dealings with the plaintiff, even though the defendant was not in a fiduciary relationship with the plaintiff. (*Roddenberry, supra,* 44 Cal.App.4th at p. 666.) The principles underlying these decisions were expressed as follows by the Sixth District Court of Appeal:

> Where material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts. … [Citation.] A relationship between the parties is present if there is some sort of *transaction* between the parties. … Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.

(*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1187, internal citations, quotation marks, and brackets omitted; emphasis in original.)

Here, Plaintiffs have adequately alleged facts to survive a pleading challenge to their fraudulent concealment claim. Plaintiffs allege that Meta knew of its platforms' defects, but that Meta nonetheless failed to share this information with its potential customers. Plaintiffs allege that Meta "could have but failed to disclose information it knew concerning the significant risks associated with its products, even though it knew that the public lacked access to this information." (Mast. Compl., ¶ 345.) Plaintiffs allege that Meta has failed to reveal the results of "the internal research it had conducted demonstrating the negative impact Instagram can have on kids' mental health." (Mast. Compl., ¶ 347.) Plaintiffs allege that Meta failed to disclose:

> its detailed research regarding addiction to its products, which the company terms problematic usage; its assessment that "[t]he best external research indicates that Facebook's impact on people's well-being is negative"; its identification of "Problematic Use," loneliness, and social comparison as the three drivers of this negative impact; its finding that up to 25% of people on Facebook experience so-called problematic use; its data showing that "high time spent users do tend to be disproportionately younger users"; its conclusion that so-called problematic use causes profound harms, including loss of productivity, sleep disruption, relationship impacts, and safety risks; its identification of multiple Meta product features that act as triggers for so-called problematic use; its knowledge that teens who feel addicted to a Meta app "know that what they're seeing is bad for their mental health but feel unable to stop themselves"; its studies regarding body image and social comparison; its knowledge that Instagram makes body image issues worse "for one in three teen girls"; its analysis showing that topics eliciting appearance comparison comprise one third of what teen girls see on Instagram; its research concluding that negative social comparison on Instagram gets worse for users over time; its awareness that teens report Instagram as a source of increased anxiety and depression; its finding that Instagram has a "consistent bias in favor

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> of harmful content"; its knowledge that Meta's recommendation algorithms "create an echo chamber" of suicide and self-harm content; its researchers' conclusion that teens "[h]ave an addict's narrative about their use" of Instagram; and its survey finding that "[o]ver one third of teens felt they have only a little control of or no control at all over how Instagram makes them feel"—in addition to the other findings described in this Complaint.

***45** (Mast. Compl., ¶ 350, internal footnotes omitted; brackets in original.)

Plaintiffs allege that the users of Meta's platforms—including Plaintiffs—"could not have discovered such serious safety risks." (Mast. Compl., ¶ 963.) And Plaintiffs allege that Plaintiffs' parents relied on this omission in deciding whether to allow their minor children to use Meta's platforms. "As a direct and proximate result of Meta's material omissions, misrepresentations, and concealment of material information, Plaintiffs and Consortium Plaintiffs were not aware and could not have been aware of the facts that Meta concealed or misstated, and therefore justifiably and reasonably believed that Instagram and Facebook were safe for children to use." (Mast. Compl., ¶ 971; see also J.P. SFC, Add'l Alleg., ¶ 2 [alleging that a Plaintiff's parent relied upon information made available by Meta when deciding whether to allow her child to use Instagram].)

Defendants' reliance on cases like *Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 836 (*Daugherty*) is misplaced, given that, here, Plaintiffs clearly allege that the defects in Meta's platforms were known to cause harm to Plaintiffs. In *Daughtery,* the complaint was "devoid of factual allegations showing any instance of physical injury or any safety concerns posed by the defect." (*Id.*) As Defendants' cited caselaw makes clear, "California federal courts have generally interpreted *Daugherty* as holding that a manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue." (*Wilson v. Hewlett-Packard Co.* (9th Cir. 2012) 668 F.3d 1136, 1141, internal citations, quotation marks, and brackets omitted.) Here, Plaintiffs have alleged that Meta's omission concerned the safety of Meta's platforms.

The fact that the three minor Plaintiffs allege in the Short-Form Complaints that they continue to use Meta's platforms does not mean that Plaintiffs have failed to allege reliance on Meta's omissions. The important fact for the purposes of the Seventh Cause of Action is the initial decision by a minor to become a user of one of Meta's platforms or the initial decision by a parent to first allow a minor child to become a user of one of Meta's platforms. Moreover, despite Defendants' arguments to the contrary, the Master Complaint cannot be read to assert facts leading to the conclusion that the allegedly omitted information could have been properly released by Meta to the public no earlier than 2021. [12] Accordingly, the fact that the three individual Plaintiffs at issue here began using Meta's platforms before 2021 does not defeat the element of reliance.

12 For example, Plaintiffs allege that an internal document regarding "problematic usage" dates from March 9, 2020. (See Mast. Compl., ¶ 498.) This court cannot determine based on the allegations of the Plaintiffs that Meta had no knowledge of "problematic usage" prior to March 9, 2020, when the internal document was allegedly created.

C. Plaintiffs' Claim for Fraudulent Concealment is Not Barred by Section 230 or the First Amendment

***46** The court already has determined that Section 230 does not bar a negligence claim based on a provider's use of features and interactive platform operations that induce minor users' engagement with social media platforms in ways that foreseeably cause addiction. As discussed above, insofar as tort liability turns on these design features, Section 230 immunity for claims based on third-party content is not implicated.

Holding Meta responsible for a failure to warn of the potentially harmful effects of such design features likewise does not fall within the scope of Section 230 immunity. Insofar as Plaintiffs contend that Meta fraudulently concealed from users Meta's research regarding addiction to its products, its data showing that "high time spent users" are disproportionately young, its

awareness that teens report Instagram as a source of increased anxiety and depression, and other research findings of potential harm that do not pertain to harm from specific third-party content, warnings Plaintiffs contend should have been provided do not seek to hold Meta liable for third-party content. Meta is not protected from tort liability for its own failure to warn because these adverse effects that allegedly should have been disclosed result from Meta' own conduct, not from any particular content displayed. Meta could have fulfilled its duty to warn of these potential harms without referencing or deleting any content—the duty springs from its capacity as a creator of features designed to maximize engagement for minors, not from its role as publisher. (See *Lemmon, supra,* 995 F.3d at p. 1092; *Roommates, supra,* 521 F.3d at p. 1164 [Section 230 did not bar liability where provider designed its search and email systems to limit listings to subscribers based on sex and other impermissible categories].)

Some of the warnings contemplated by Plaintiffs do appear to be based on content; for example, a warning about "suicide and self-harm content." (Mast. Compl. ¶ 350.) Liability for failure to warn about specific third-party content could be interpreted as premised on Meta's role as publisher in violation of both Section 230 and the First Amendment. (See, e.g., *L.W. through Doe v. Snap Inc.* (S.D. Cal., June 5, 2023, No. 22CV619-LAB-MDD) 2023 WL 3830365, at *8 [failure to warn claim based on harm caused by third-party content is barred by Section 230]; see also *Netflix, supra,* 2022 WL 551701, at *2 [claim based on failing to warn about the content of a television show is barred by the First Amendment].) However, in *Internet Brands,* the Ninth Circuit held that where a provider has information from "an outside source about how third parties targeted and lured victims" through a website the provider hosted, "[t]he duty to warn imposed by California law would not require [the defendant] to remove any user content or otherwise affect how it publishes or monitors such content," and the claim was not barred by Section 230. (*Internet Brands, supra,* 824 F.3d at p. 851.)

The court does not have to resolve the issue of the scope of Section 230 with respect to a provider's duty to warn based on content on a provider's social media platform. Some of the warnings Plaintiffs contend should have been given concern social media platform design. Duty to warn of harm allegedly flowing from interactive features allegedly known to risk harm to minors is not barred by Section 230 and the Demurrer is overruled on that basis.

***47** Similarly, the First Amendment does not bar a claim of failure to warn of potential injuries from Meta's social media platform design. If a potential user were deterred from consuming content on Meta's platforms due to a warning about possible addiction, the deterrence would not be based on a government sanction of the content on the platforms. Therefore, the First Amendment is not implicated by failure to provide warnings concerning potential harms from features created by Defendants to maximize minors' usage.

Accordingly, the Demurrer to the Seventh Cause of Action is overruled.

VIII. Ninth Cause of Action - Negligence per se

" 'Negligence per se' is an evidentiary doctrine codified at Evidence Code section 669. Under subdivision (a) of this section, the doctrine creates a presumption of negligence if four elements are established: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285.)

Plaintiffs' Ninth Cause of Action for Negligence per se is based on alleged violations of the California Consumer Privacy Act of 2018 (CCPA). (See Cal. Civ. Code §§ 1798.100 *et seq.*) The CCPA gives consumers certain rights over their personal information that is collected by online businesses. Specifically, Plaintiffs base their claim on alleged violations of California Civil Code section 1798.120, subdivision (c), which states:

> … a business shall not sell or share the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of consumers at least 13 years of age and less than 16 years of age, or the

> consumer's parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized the sale or sharing of the consumer's personal information. A business that willfully disregards the consumer's age shall be deemed to have had actual knowledge of the consumer's age.

(Cal. Civ. Code, § 1798.120, subd. (c).) Plaintiffs allege that each Defendant "has collected and shared and/or sold personal information from children younger than age 16 without obtaining prior affirmative authorization from minor users or their parents (for minor users under 13) … ." (Mast. Compl., ¶ 1000.)

Plaintiffs' Ninth Cause of Action cannot proceed. The CCPA itself precludes Plaintiffs from basing a cause of action on a violation of Civil Code section 1798.120. The CCPA provides that "[n]othing in [the CCPA] shall be interpreted to serve as the basis for a private right of action under any other law." (Cal. Civ. Code, § 1798.150, subd. (c).) The only reasonable reading of this language is that section 1798.120 cannot serve as the basis for Plaintiffs' cause of action based on negligence law. The Ninth Cause of Action, which is based on negligence and on the effect of the Evidence Code creating a presumption of negligence, is barred by subdivision (c) of section 1798.150.

Accordingly, the Demurrer must be sustained as to the Ninth Cause of Action.

ORDER:

The Demurrer is sustained as to the First, Second, Third, Fourth, Sixth, Eighth and Ninth Causes of Action. The Demurrer is overruled as to the Fifth and Seventh Causes of Action.

***48** Dated: OCT 13 2023

Carolyn B. Kuhl/Judge

Honorable Carolyn B. Kuhl

Judge of the Superior Court

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ELECTRONICALLY FILED - 2025 May 06 3:34 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006018

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND THE STATE OF SOUTH CAROLINA ex rel. Alan Wilson, in his official capacity as Attorney General of the State of South Carolina, Plaintiff, v. TIKTOK INC., TIKTOK LLC, TIKTOK PTE. LTD., TIKTOK LTD., BYTEDANCE INC., and BYTEDANCE LTD., Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No. 2024-CP-40-06018 **OPINION AND ORDER**

This case is one of nearly two dozen filed by state attorneys general against TikTok Inc. and other related corporate entities alleging violations of state consumer protection laws. The TikTok Defendants (hereafter, "Defendants") filed a Motion to Dismiss the Complaint filed by the State of South Carolina, by and through its Attorney General Alan M. Wilson (hereafter, the "State). For the reasons below, the Court **DENIES** Defendants' Motion to Dismiss.

LEGAL STANDARDS

To prevail on a motion to dismiss for failure to state a cause of action, a defendant must "demonstrate[] the plaintiff has failed 'to state facts sufficient to constitute a cause of action.'" *Williams v. Condon*, 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001) (quoting S.C. R. Civ. P. 12(b)(6)). "The question to be considered is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cowart v. Poore*, 337 S.C. 359, 364, 523 S.E.2d 182, 184–85 (Ct. App. 1999). "When

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considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000).

South Carolina Rule of Civil Procedure 12(b)(2) permits a motion to dismiss for "lack of jurisdiction over the person." In South Carolina, the "case law is settled that 'at the pre-trial stage of proceedings, the plaintiff need only make a prima facie showing" that personal jurisdiction exists, and that "[t]here is no 'other evidence' requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 332, 426 S.E.2d 777, 779 (S.C. 1993).

ANALYSIS

I. Defendants Are Subject to Personal Jurisdiction in South Carolina

Defendants are subject to specific personal jurisdiction in South Carolina. "Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question" in assessing jurisdiction is "whether the exercise of personal jurisdiction would violate due process." *Cockrell v. Hillerich & Bradsby Co*., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "[D]ue process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there." *Id*. at 491–92, 611 S.E.2d at 508. Then, specific personal jurisdiction exists so long as the plaintiff's claims "arise out of *or relate to* the defendant's contacts with the forum" state, regardless of whether a "strict causal relationship" exists. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 362 (2021) (citation omitted).

Here, both parts of the specific personal jurisdiction test are satisfied.

Defendants have created minimum contacts with South Carolina in at least three independent ways. First, Defendants have intentionally cultivated a significant, continuing, and

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immensely profitable line of business in South Carolina by marketing and making its product available here. Second, Defendants enter into a contract with every South Carolinian who signs up for the TikTok app, and those ongoing contracts convey rights and impose obligations on both sides of the contract. Third, Defendants then collect consumer data pursuant to those contracts and uses that data to profit from South Carolina consumers by targeting third-party advertising at them.

These extensive and intentional business contacts with South Carolina are at least as significant as the contacts that the U.S. Supreme Court held established specific personal jurisdiction in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 480 (1985). There, the Court held that one of Burger King's franchisees was subject to personal jurisdiction in Burger King's home state of Florida because he had entered into a contract with Burger King (the franchise agreement) that created an ongoing "relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida." *Id*. at 480. While "an individual's contract with an out-of-state party *alone* can[not] automatically establish sufficient minimum contacts," the Court explained, when the defendant "has created continuing obligations between himself and residents of the forum," then "he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 476, 478 (cleaned up). Similarly, the South Carolina Court of Appeals "has held South Carolina has jurisdiction over a party who entered into a contract that was to be partly performed within the State." *Cribb v. Spatholt*, 382 S.C. 490, 502, 676 S.E.2d 714, 720–21 (Ct. App. 2009).

These holdings control this case. Like the franchisee in *Burger King*, Defendants have "reach[ed] out" into South Carolina, by advertising its application in the State, making it available here, and entering contracts with numerous South Carolinians that "create continuing relationships

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and obligations" with them. 471 U.S. at 473 (citation omitted). Defendants and each of their South Carolina customers knew from the beginning that their "contract . . . was to be partly performed within the State," because in exchange for providing each user ongoing access in South Carolina to the content it hosts, Defendants have received the continuous right to collect their data and use it to target them every day with South Carolina-specific ads. *Cribb*, 382 S.C. at 502, 676 S.E.2d at 720–21. Defendants thus exploit the "continuing relationships and obligations" it has forged with South Carolina consumers *every minute* that they use the application. *Burger King*, 471 U.S. at 473 (citation omitted).

Additionally, Defendants do a substantial volume of business in South Carolina, which independently supports specific personal jurisdiction. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 773–74 (1984). Where a publisher sold an allegedly defamatory book in "approximately 315 bookstores in South Carolina," the Court of Appeals held that the publisher "has directed its activities at the residents of South Carolina, and it must reasonably anticipate being haled into court here in a libel action based on the contents of one of its publications." *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 335–36, 594 S.E.2d 878, 886 (Ct. App. 2004); *see also Cockrell*, 363 S.C. at 493, 611 S.E.2d at 509 (favorably citing *Moosally*). Similarly, the federal circuit courts have held in several cases that personal jurisdiction exists when a company engages in the "deliberate exploitation of the market in the forum state." *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 423 (7th Cir. 2010); *see also NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624–25 (7th Cir. 2022).

Third, Defendants are independently subject to personal jurisdiction here because they craft a South-Carolina-specific product that is targeted at South Carolina residents. Defendants actively target content and advertisements to South Carolina users based on their location. Compl. ¶ 19.

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Where a company not only generally does business in a State but *specifically crafts a unique product* for that State and then sells it there, there can be no question that it has "'purposefully directed' [its] activities at residents of the forum" in a way that satisfies due process. *Burger King*, 471 U.S. at 472 (quoting *Keeton*, 465 U.S. at 774).

These connections to South Carolina supply sufficient minimum contacts for specific personal jurisdiction. That is why the overwhelming weight of authority from other jurisdictions supports states exercising jurisdiction over Defendants. An appellate court in Indiana recently "h[ad] little trouble concluding that Indiana's judiciary has specific personal jurisdiction over TikTok," reasoning that TikTok's "engagement with [its] end-users [in the forum state] is neither passive nor fleeting—TikTok uses the internet, to which its app is connected, to knowingly and repeatedly transmit data to and from each of those . . . end-users each and every hour of each and every day." *Indiana v. TikTok Inc.*, 245 N.E.3d 681, 690 (Ind. Ct. App. 2024); *see also* Pls'. Opp'n to Mot. to Dismiss at 17–18 ("State's Br.") (collecting cases).

This case also relates to Defendants' contacts with the State and so comports with the requirements of due process. *Ford*, 592 U.S. at 362. The State is challenging Defendants' representations about the age-appropriateness of its product—representations that are displayed when South Carolina consumers initially acquire the app. That connection *does* create a strict causal relationship between Defendants' actions and the State's claims, even though precedent instructs that a lesser "relating to" test is what applies. *Id*. Additionally, Defendants' large volume of South Carolina business plausibly "relates to" its alleged misrepresentations in South Carolina and the alleged design of its product to be intentionally addictive. Accordingly, specific personal jurisdiction exists over Defendants in this case.

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Defendants' personal jurisdiction counterarguments are unavailing. It is irrelevant that Defendants may have established the same types of minimum contacts with other states as they have with South Carolina. The Due Process Clause protects defendants by limiting *the types of contacts* that support jurisdiction, not by limiting *the raw number of states where jurisdiction exists*. If Hustler magazine is "a national publication aimed at a nationwide audience," *Keeton*, 465 U.S. at 781, and if Ford "markets, sells, and services its products across the United States," *Ford*, 592 U.S. at 355, the fact that these contacts would support jurisdiction in many states—or even equally *in every state*—is obviously no reason to deny jurisdiction *in any state*. To hold otherwise would effectively eliminate specific personal jurisdiction for nationwide companies, forcing those wronged by such companies to sue only where the *company* is "essentially at home" and subject to general jurisdiction. *Id*. at 358 (quotation marks and citation omitted). That is not the law. Instead, due process prevents unfairness by limiting jurisdiction to those states where the defendant genuinely has minimum contacts and where the case relates to those contacts. That standard is satisfied here, and so it comports with the Constitution's due process guarantee for Defendants to be subject to jurisdiction in South Carolina for this case.

Nor is it true, as Defendants claim, that "the downloading actions of South Carolina residents" are the mere "unilateral activity of [ ]other part[ies]" and "insufficient" under the Due Process Clause to establish jurisdiction. Defs'. Mot. to Dismiss at 9 ("MTD") (quoting *Pitts v. Fink*, 389 S.C. 156, 165, 698 S.E.2d 626, 631 (Ct. App. 2010)). Jurisdiction here is based on *Defendants'* purposeful acts, not a third party's unilateral one. Given that Defendants have taken steps to market its application in South Carolina, make it available here, and profit from South Carolina consumers' use of it by collecting their data and targeting them with ads, the hundreds of thousands of resulting "downloading actions of South Carolina residents" are plainly not

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"unilateral" at all. *Id.* These South Carolina residents did not decide to use Defendants' app out of the blue. And having "structured its sales activity in such a manner as to invite orders from [South Carolina] and developed the capacity to fill them," Defendants "cannot now point to its customers in [South Carolina] and tell us, 'It was all their idea.' " *NBA Props.*, 46 F.4th at 625 (cleaned up).

Defendants also claim that geo-targeting advertisements alone cannot confer personal jurisdiction, but that proposition is both not established as a legal matter, *see Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014), and irrelevant given the numerous *other* contacts also present here. Defendants do more than merely target ads at South Carolina users: they also tailor their experience of the TikTok platform as a whole based on their location data.

Specific personal jurisdiction exists over Defendants in this case.

II. The Court Also Has Jurisdiction Over All Defendants' Corporate Affiliates.

Specific personal jurisdiction exists over *all* of the TikTok corporate defendants in this case based on the State's allegations that the six entities (TikTok Inc., TikTok LLC, TikTok Ltd., TikTok Pte Ltd., ByteDance Ltd., and ByteDance Inc.) are closely intertwined and "are all intimately involved in operating the TikTok Platform." Compl. ¶ 52. Because the Complaint alleges that each of the defendant entities "has actively formulated, participated in, approved, directed, or otherwise controlled the acts or practices" giving rise to the State's claims, *id.* ¶ 37, even where one of the entities was formally acting alone, it was allegedly serving as an agent for the others, making its conduct attributable to them. And "[t]he principle is firmly established that a foreign corporation doing business in this State through an agent is subject to in personam jurisdiction as if the corporation itself was doing business." *Engineered Prods. v. Cleveland Crane & Eng'g*, 262 S.C. 1, 7–8, 201 S.E.2d 921, 924 (1974).

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III. SCUPTA Applies to Defendants' Conduct.

SCUTPA bars "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," S.C. Code. Ann. § 39-5-20(a), and it defines "trade" or "commerce" to include "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." *Id*. § 39-5-10(b). The phrase applies broadly to "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic," *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013) (quoting *Trade or Commerce*, Black's Law Dictionary (9th ed. 2009)).

Here, the State reasonably alleges that "trade" or "commerce" encompasses Defendants' highly profitable distribution of its app, an "intangible" "service[ ] [or] . . . property." S.C. Code. Ann. § 39-5-10(b). In so holding, this Court also endorses the persuasive reasoning of the U.S. District Court for the Northern District of California in an analogous case about the Facebook and Instagram apps. That court held that the "exchange of users' use of Meta's platforms for their personal data" occurs "in the conduct of" Meta's " 'trade or commerce,' regardless of whether Meta's users pay for use of Facebook or Instagram," and that SCUTPA (along with eighteen other similarly worded state laws) thus applied to the alleged unfair or deceptive acts by Meta in that case. *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, Nos. 4:23-cv-05448-YGR, 4:23-cv-05885-YGR, 2024 WL 4532937, at *44 (N.D. Cal. Oct. 15, 2024). The same reasoning applies here.

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IV. Defendants' Alleged Unfair and Deceptive Acts Are Actionable Under SCUPTA.

Defendants claim that the actions the State alleges to have violated SCUPTA are not "unfair or deceptive acts or practices" under that Act, but that is not so. A deceptive act or practice under the statute is "a claim or representation that had the capacity or effect or tendency to deceive," *Clarkson v. Orkin Exterminating Co.*, 761 F.2d 189, 191 (4th Cir. 1985) (quoting *State ex rel. McLeod v. C&L Corp.*, 280 S.C. 519, 525, 313 S.E.2d 334, 338 (Ct. App. 1984)), and an unfair act or practice is one "which is offensive to public policy or which is immoral, unethical, or oppressive," *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted).

The State alleges that Defendants deliberately designed their app to be highly addictive to younger users through particular features that prey upon children's well-known physiological and psychological features, and that Defendants did so despite knowing that these features were likely to cause a variety of significant, negative health effects for children. Compl. ¶¶ 150–59. Taking this allegation as true, the State has plausibly pled that this conduct is offensive to public policy.

Defendants' argument that the bulk of their alleged misrepresentations are not barred because SCUPTA reaches only "misstatements of fact rather than misstatements of opinion," MTD at 18 (quoting *Gilbert v. Mid-S. Mach. Co.*, 267 S.C. 211, 220, 227 S.E.2d 189, 193 (1976)) is unsupported by the law. That limitation does not exist in SCUTPA's text or the caselaw interpreting it.

Defendants also claim that SCUPTA does not apply to mere omissions, but precedent is to the contrary. Where a seller "[i]s aware" of a defect in its product and undertakes efforts "to conceal the severity of the defect," that establishes "circumstances or nature of dealings that give rise to a duty to speak" with at least enough plausibility to get past a motion to dismiss. *Harrell v.*

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BMW of N. Am., LLC, 517 F. Supp. 3d 527, 540 (D.S.C. 2021) (cleaned up). The State's complaint alleges all of these things. *See, e.g.*, Compl. ¶¶ 11, 77–85.

Finally, the State has also adequately alleged that Defendants' statements touting their "Algo Refresh" feature were deceptive, based on the actual effects of that feature. *Id*. ¶¶ 244, 253. The complaint plausibly alleges that Defendants' promise to users of a "fresh start" was illusory, since they may "quickly [be] back in the same rabbit hole again even after using the Refresh feature." *Id*. ¶¶ 249, 258.

V. The Communications Decency Act Does Not Bar the State's Claims.

Section 230 of the Communications Decency Act ("CDA") states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(3). The CDA "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!*, 570 F.3d 1096, 1100–01 (9th Cir. 2009).

Here, the State sufficiently alleges that it is *not* seeking to hold Defendants accountable for the content created by "another information content provider" but instead for their own allegedly unfair and deceptive statements and acts. This is true with regard to the alleged addictiveness of the TikTok platform. Defendants are also not entitled to CDA immunity for their claims related to the age-appropriateness of the content available on its app. Those alleged misrepresentations are Defendants' "own acts," not protected by the CDA. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021) (citation omitted); *see Demetriades v. Yelp, Inc.*, 175 Cal. Rptr. 3d 131, 145 (Cal. Ct. App. 2014) ("Nowhere does plaintiff seek to enjoin or hold Yelp liable for the statements of

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third parties (i.e., reviewers) on its Web site. Rather, plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter.").

At argument, Defendants cited two decisions so recent they could only be cited in the reply brief supporting this motion. The Court has considered these cases, but they do not change the direction of the relevant precedent. Rather, they are merely applications of the CDA consistent with prior caselaw. Both *Doe v. Grindr Inc.*, No. 24-475, 2025 WL 517817 (9th Cir. Feb. 18, 2025), and *M.P. ex rel. Pinckney v. Meta Platforms Inc.*, 127 F.4th 526 (4th Cir. 2025), apply the settled principle that when the harm the plaintiff complains of *comes from third-party content*, the CDA applies. Other cases had previously held the same. *See, e.g.*, *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). Here, however, the harm alleged is plausibly in Defendants' own content that is separate from third-party content, and Defendants' more recent citations do not change that.

Even if Defendants were to be treated as a publisher with regard to the addictiveness count, it would not entitle them to CDA immunity. "[A] website may lose immunity under the CDA by making a material contribution to the creation or development of content." *Kimzey v. Yelp!*, 836 F.3d 1263, 1269 (9th Cir. 2016); *see also Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008). In other words, Defendants lose any CDA protections they might otherwise have "whenever [its] actions cross the line into substantively altering the content at issue in ways that make it unlawful." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 129 (4th Cir. 2022). Here, Defendants are alleged to have done just that. It is not the nature of any third-party content itself that allegedly violates SCUTPA, but rather Defendants' use of that content to feed its addiction-inducing algorithms, beauty filters, and the

other challenged features. Defendants' addictive design features alter the third-party content in a material (and harmful) way, removing any CDA immunity it might otherwise have had.

VI. The First Amendment Does Not Bar the State's Claims.

The First Amendment does not bar any of the State's claims.

First, the foreign defendants are not entitled to First Amendment rights. "[F]oreign organizations operating abroad . . . possess no rights under the First Amendment." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 436 (2020). The U.S. Supreme Court recently applied this rule unanimously to one of the foreign defendants here: "To the extent that ByteDance Ltd.'s asserted expressive activity occurs abroad, that activity is not protected by the First Amendment." *TikTok Inc. v. Garland*, Nos. 24-656, 24-657, 2025 WL 222571, at *4 n.2 (U.S. Jan. 17, 2025).

Second, Defendants' allegedly addictive design features are not speech but *conduct* Defendants undertake, and the First Amendment protects only inherently expressive conduct. *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 65–66 (2006). Defendants' design features, however, do not convey any message or express any viewpoint. Many courts around the country have already held as much, *see* State's Br. at 44 (collecting cases), and this Court agrees.

Third, the First Amendment does not protect knowing misrepresentations in commerce, which is what the State alleges here. "[C]ommercial speech is not protected by the First Amendment unless it concerns lawful activity and is not misleading." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 68, 777 S.E.2d 176, 194 (2015); *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995) ("[T]he government may freely regulate commercial speech that concerns unlawful activity or is misleading."); State's Br. at 46 (collecting cases).

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The First Amendment does not protect Defendants from the State's Complaint.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is **DENIED**.

_____
The Honorable Daniel M. Coble
Chief Administrative Judge

April __, 2025
Columbia, South Carolina

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Richland Common Pleas

Case Caption: State Of South Carolina , plaintiff, et al vs Tiktok Inc , defendant, et al

Case Number: 2024CP4006018

Type: Order/Other

So Ordered

s/ Daniel Coble, 2774

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

STATE OF MONTANA, ex rel. AUSTIN KNUDSEN, ATTORNEY GENERAL, Plaintiff, v. META PLATFORMS, INC., INSTAGRAM, LLC, FACEBOOK HOLDINGS, LLC, FACEBOOK OPERATIONS, LLC, META PAYMENTS INC., META PLATFORMS TECHNOLOGIES, LLC, SICULUS, INC., Defendants.	Cause No.: BDV-2024-797 **DISMISSAL MOTION ORDER**

Before the Court is Meta Platforms, Inc. and its subsidiaries' February 28, 2025, Dismissal Motion. (Doc. 12). The State of Montana (the State) opposes the motion. The motions are fully briefed. Oral argument was not requested by either party.

BACKGROUND

On December 17, 2024, the State filed a Complaint naming several entities as defendants including Meta Platforms, Inc. and its subsidiaries: Instagram, LLC, Facebook Holdings, LLC, Facebook Operations, LLC, META Payments Inc., Meta Platforms Technologies, LLC, and Siculus, Inc. (collectively "Meta"). (Doc. 1, ¶¶ 20-21).

The State's Complaint alleges multiple violations of the Montana Consumer Protection Act, Mont. Code Ann. § 30-14-103. First, Counts I-VII (collectively "App Store Counts") concern alleged deceptive representations to app stores resulting in app stores' deceptive content and age ratings of the Instagram App. The State alleges Meta made deceptive representations as to the frequency and severity of "Alcohol, Tobacco and Drug References" (Count I), "Sexual Content and Nudity" (Count II), "Mature/ Suggestive Themes" (Count III), "Profanity or Crude Humor" (Count IV) shown to Montana consumers. The State further alleges Meta made the deceptive representation that the Instagram App qualifies for a "12+" age rating in the Apple App Store (Count V), the deceptive representation that the Instagram App qualifies for a "T for Teen" age rating in the Google Play Store and Microsoft Store (Count VI), and cumulative deceptive and unfair representations (Count VII). In Count VIII the State alleges that through Instagram's Community Guidelines, "Defendants know that they permit mature content on the platform that they fail to disclose to consumers in the Community Guidelines constituting an unfair practice." (Doc. 1, ¶ 152). In Count IX, the State alleges Meta's public statements have mislead Montana consumers by falsely representing that Instagram moderates content such that mature or prohibited content is not allowed to remain on

Instagram. Finally, in Count X the State alleges Defendants committed unfair and deceptive acts or practices in relation to addictiveness.

The State's Complaint includes the following relevant factual allegations:

Defendants operate social media applications ("Apps"), including Instagram, which has been downloaded and activated by a device located in Montana at least hundreds of thousands of times. Meta's business model is built around using consumer data, including location information, to target advertisements and content to its users. (Doc. 1, ¶ 11-12, 15, 41, 43). Defendants actively serve content to and collect data from all devices and accounts located in Montana. (*Id*., ¶ 10). Meta can attribute millions of dollars in annual revenue to activities in Montana. (*Id*., ¶ 17).

Instagram is downloaded by users from an App Store (*Id*., ¶¶ 46–97). These App Stores assign Apps content-based age ratings. (*Id*., ¶¶ 46–47, 96). Apple has given Instagram an age "12+" rating; Google and Microsoft have given Instagram a "T for Teen" rating. (*Id*., ¶¶ 49, 96). These ratings are determined by the individual App Store operators and are informed by the application owner's representations about the content available on the application. (*Id*., ¶¶ 46–47, 96–97).

When Montana consumers register to use the Instagram app, they enter a contract with Instagram, known as the Terms of Use in which, instead of paying to use Instagram, users allow Meta to show ads that businesses and organizations pay Meta to promote on and off Instagram. (*Id*., ¶ 15). Defendants use data collected from Montana users to serve content to users in Montana. For example, Instagram advises users that it "use[s] location-related information,

such as your current location, where you live, the places you like to go, and the businesses and people you're near" to recommend content. (*Id*., ¶ 11). Instagram also uses the location information of its users to personalize advertisements. For example, based on a user's location, Meta can show the user "ads for businesses nearby." (*Id*., ¶12). The Terms of Use require that Montana users grant Instagram contractual permission to collect location information, "even if Location Services is turned off in your device settings," "includ[ing] . . . IP addresses to estimate your general location."(*Id*., ¶15).

Meta seeks to attract teens to Instagram because they "see them as lifelong customers who set trends and are more likely to be influenced by ads." (*Id*., ¶34). Meta's designs its products to increase customer use including : "(1) audiovisual notifications that interrupt a young user at any time of the day or night, popping up and encouraging an immediate return to the app; (2) an infinite scroll and autoplay feature, meaning the young user will never reach the "end" of the content to be viewed and the content will continue to play automatically; (3) a disappearing content feature known as "stories," requiring a user to view the content of a follower within a certain period of time before it disappears; (4) the quantification and display of "likes" below posts; and (5) an algorithmic content feed targeted to the particular user, including content from accounts the user follows, accounts the user does not follow, and advertisements." (*Id*., ¶38).

Instagram has Community Guidelines that inform users about what content Instagram permits. (*Id*., ¶98). These Community Guidelines state that when content going against these guidelines is found, Meta removes it from Instagram and that Instagram creates an age-appropriate experience for teen users. (*Id*., ¶ 103,104). Drug-related, sexual, and other content not allowed per

the Community Guidelines appears on Instagram to users. (*Id*., ¶100).

Meta argues that this Court lacks personal jurisdiction over it; that the First Amendment bars the State's claims; that 47 U.S.C. § 230 of the Communications Decency Act ("Section 230") bars the State's claims; and that the State has failed to plead an actionable unfair or deceptive practice claim under the Montana Consumer Protection Act.

DISMISSAL STANDARD

A complaint should not be dismissed unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle[] him to relief." *Spencer v. Beck*, 2010 MT 256, ¶ 10, 358 Mont. 295, 245 P.3d 21. For these reasons, dismissal motions are not favored and are rarely granted. *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. Montana district courts are instructed:

> In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true. *Id.*,"[S]hould defendants desire any further degree of specificity, they may obtain the same by use of the appropriate discovery devices such as depositions, interrogatories and requests to admit. This Court does not favor the short circuiting of litigation at the initial pleading stage unless a complaint does not state a cause of action under any set of facts…

*Willson v. Taylo*r, 194 Mont. 123, 128, 634 P.2d 1180 (1981) (citing authority).

Moreover, the only relevant documents when considering a dismissal motion are the complaint and any documents it incorporates by reference. *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6. Notwithstanding, "[i]n deciding a motion to dismiss, the District Court can consider matters of public record as well as the allegations in the complaint."

Stillman v. Fergus Cnty., 220 Mont. 315, 316, 715 P.2d 43 (1986).

In addition, "a complaint must state something more than facts which, at most, would breed only a suspicion that plaintiffs have a right to relief. Liberality does not go so far as to excuse omission of that which is material and necessary in order to entitle relief." *Mysse v. Martens*, 279 Mont. 253, 266, 926 P.2d 765 (1996). "[T]he claim must give notice to the other party of the facts which the pleader expects to prove, and the facts must disclose the presence of all the elements necessary to make out a claim." *Id*.

"A claim is subject to dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Puryer v. HSBC Bank USA, Nat'l Ass'n*, 2018 MT 124, ¶ 12, 391 Mont. 361, 419 P.3d 105.

DISCUSSION

1. Whether Meta is subject to personal jurisdiction in Montana

Meta first argues that the State has failed to meet the burden of establishing that Montana courts can exercise personal jurisdiction over Meta in this case and thus all claims must be dismissed. A court may exercise personal jurisdiction over the parties in a proceeding pursuant to general (all-purpose) or specific (case-linked) personal jurisdiction. *DeLeon v. BNSF Ry. Co.*, 2018 MT 219, ¶ 7, 392 Mont. 446, 426 P.3d 1. It appears the parties agree that Meta is not subject to general personal jurisdiction in Montana. Whether this court can exercise personal jurisdiction over Meta hinges on the scope of specific personal jurisdiction.

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In order to exercise specific personal jurisdiction, two elements must be satisfied: first, the suit itself must arise from the specific circumstances set forth in Montana's long-arm statute, M. R. Civ. P. 4(b)(1), and, if personal jurisdiction exists pursuant to Rule 4(b)(1), courts then determine whether exercising such jurisdiction would comport with traditional notions of fair play and substantial justice embodied in the Due Process Clause of the Fourteenth Amendment. *Groo v. State Eleventh Judicial Dist. Court*, 2023 MT 193, ¶ 24, 413 Mont. 415, 537 P.3d 111.

a. Montana's Long-Arm Statute

Montana's long-arm statute, M. R. Civ. P. Rule 4(b)(1), lists several grounds upon which jurisdiction may exists. The State argues that its claims against Meta arise from conduct qualifying as: "the transaction of any business within Montana" and "entering into a contract for services to be rendered or for materials to be furnished in Montana." Rule 4(b)(1)(A), (E).

"Under M. R. Civ. P. 4(b)(1)(A), a Montana court may 'exert long arm jurisdiction over any person if the claim arises out of that person's transaction of business within the state."' *Grizzly Sec. Armored Express, Inc. v. Armored Group, LLC*, 2011 MT 128, ¶ 23, 360 Mont. 517, 255 P.3d 143. "Jurisdiction comports with M. R. Civ. P. 4(b)(1)(A) if the nonresident business conducts 'substantial'[1] business activity in the state" from which the claim arises. *Grizzly Sec.*, ¶ 23 (quoting *Bunch v. Lancair Int'l, Inc.*, 2009 MT 29, ¶ 18, 349 Mont. 144, 202 P.3d 784). To determine whether action constitutes a business transaction under Rule 4(b)(1)(A), courts look to "the particular facts of the defendant's actions regarding the subject litigation . . . not the entirety of the

[1] There remains an open question about whether business activity needs to be "substantial, as stated in *Grizzly Security Armored Express, Inc. v. Armored Group, LLC, 2011 MT 128, ¶ 23, 360 Mont. 517, 255 P.3d 143*, or "any" business as the text of the Rule states. *Phila. Indem. Ins. Co. v. O'Leary*, 2024 MT 235, ¶ 24, 418 Mont. 306, 317, 557 P.3d 946, 954.

defendant's contacts with the forum[.]" *Phila. Indem. Ins. v. O'Leary*, 2024 MT 235, ¶ 23, 418 Mont. 306, 557 P.3d 946.[2]

The crux of Meta's argument is that its activities within Montana are not sufficiently connected to conduct at issue in the litigation: the alleged intentionally harmful design of Instagram, and the alleged misrepresentations and omissions. Meta heavily relies on the recent decision in *Philadelphia Indemnity Insurance Co v. O'Leary*, 2024 MT 235, 418 Mont. 306, 557 P.3d 946, to support their proposition that the State's Complaint fails to identify the "particular facts" of Meta's purported business transactions that concern "the subject litigation." (Doc. 13 at 5-6; Doc. 16, at 2).

In *Philadelphia*, Gateway Hospitality, Inc, an Ohio corporation, submitted a claim to its insurance provider, Philadelphia Indemnity Insurance Company, requesting defense in the class action lawsuit brought by Montana hotel employees. *Philadelphia*, ¶¶ 1-4. Philadelphia retained the services of California-based Sedgwick LLP attorneys, who advised Philadelphia to deny coverage. *Id.*,¶ 4. Sedgwick sent a letter to Gateway's headquarters in Ohio explaining the denial. *Id*. Gateway sued Philadelphia for failure to provide a defense under their insurance contract, and Philadelphia brought a third-party complaint against the Sedgwick attorneys for legal malpractice. *Id*., ¶ 6.

Although the focus in *Philadelphia* was on "the commission of any act resulting in accrual within Montana of a tort action" under Rule 4(b)(1)(B), the Court also considered the inapplicability of Rule 4(b)(1)(A) and briefly Rule 4(b)(1)(E). The *Philadelphia* Court emphasized that analysis under specific jurisdiction is "limited to the particular facts of the defendant's actions regarding

[2] This inquiry is distinct but overlaps significantly with the second factor considered in the Due Process analysis: whether "the plaintiff's claim arises out of or relates to the defendant's forum-related activities" *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 2019 MT 115, ¶ 12, 395 Mont. 478, 443 P.3d 407 (citations omitted). Due to this overlap, each analysis is incorporated by reference.

the subject litigation (case-linked), not the entirety of the defendant's contacts with the forum (all-purpose)." *Id.*,¶24. To illustrate that analysis in relation to Rule 4(b)(1)(A), it specifically noted that the Sedgwick Defendants did not solicit Philadelphia's business in Montana, did not travel to Montana, did not provide advice, or deliver any other services, did not communicate within Montana, and did not become attorney of record or appear before a Montana court on behalf of Philadelphia. *Id.*,¶ 24. The Court held that "because Philadelphia has not established the Sedgwick Defendants transacted any business within Montana regarding the class action lawsuit involving Gateway… [we] thus conclude that the Sedgwick Defendants are not subject to jurisdiction under Rule 4(b)(1)(A)." *Id.*,¶25 (emphasis added).

Similarly, the *Philadelphia* Court found that jurisdiction did not exist over the Sedgwick Defendants under Rule 4(b)(1)(E) for "entering into a contract for services to be rendered or for materials to be furnished in Montana." *Id.*,¶ 27. The contract, a representation agreement, "failed to establish a contract to perform services *within Montana*" as the "Defendants services are shown here to be only 'about Montana law,' with no delivery of services by the Sedgwick Defendants within Montana." *Id.* (emphasis added). However, this holding does not demand the same result here.

Here, this Court finds that Meta is not directly analogous to the Sedgwick Defendants in *Philadelphia* because the Complaint alleges sufficient facts to establish that the business Meta transacted in Montana relates to the current litigation. Additionally, the contract entered between vast numbers of Montanans and Meta intimately ties Meta to specific performances and services within Montana.

First, Meta's business within Montana is unique as the business is built upon the specific targeting of app users and the marketing of their data, including location data, to advertisers. In essence, the very product which Meta sells is the data derived from Montana users. This "location-related information" is highly personal and user specific as Meta advises users that it "use[s] location-related information, such as your current location, where you live, the places you like to go, and the businesses and people you're near" to recommend content. (Doc. 1 at 5). Meta collects this data from "at least hundreds of thousands of devices and accounts located in Montana." (Doc. 1 at 5). Meta has extensively transacted business within Montana which directly impacts this Litigation. This Court therefore agrees with the State that it has established Meta crafts a Montana specific product that is uniquely targeted at Montana residents. Meta has conducted substantial business activity in Montana and that business activity is at the heart of the State's MCPA claims.

Meta also relies on *Edsall Constr. Co. v. Robinson* pronouncing that "it is well established that a non-resident defendant 'does not subject himself to the jurisdiction of Montana by merely entering into a contract with a resident of Montana.'" 246 Mont. 378, 382, 804 P.2d 1039, 1042 (1991). Meta states that because these contracts do "not have any nexus with [Montana] except for the fact that one party was Montana resident," they are not subject to jurisdiction under Rule 4(b)(1)(E)[3]. (Doc. 13 at 6, citing *Edsall Constr. Co*., 246 Mont at 383).

Contrary to Meta's assertion, the Terms of Use, which are entered into by "hundreds of thousands" of Montanans, calls for the ongoing performance in Montana. (Doc. 1, ¶¶10,15). Far from "merely entering" into a

[3] In 1991, the *Edsall* Court did not discuss Rule 4(b)(1)(E), but rather, analyzed Rule 4(B)(1)(A), which related to "the transaction of any business."

contract, the Terms of Use creates an ongoing relationship with a vast number of Montanans wherein Montanans gain access to the Instagram app and platform, and in consideration for that benefit, they "acknowledge that [Meta] can show [the user] ads that businesses and organizations pay [Meta] to promote on and off the Meta Company Products." This contract also instructs that Meta uses personal data "as information about your activity and interests, to show you ads that are more relevant to" customers and require that Montana users grant Instagram contractual permission to collect location information, "even if Location Services is turned off in your device settings," "includ[ing] . . . IP addresses to estimate your general location."

Further, it is clear that the alleged harms identified by the State arise out of said transactions. The State alleges that Meta was aware their product leads to significant harms to Montana children, including mental health crises, addiction, and extortion scams (Doc. 1 at ¶¶ 38,91,92). The State alleges that these harms are the result of Meta's collection of personalized data of Montana's youth, the subsequent targeting of those users, and their resulting exposure to its harmful and addictive algorithms and app design. In short, the core of Meta's business operations in Montana which targets Montanan children results in harm. Additionally, unlike the Sedgwick Defendants, a contract here exists where Meta and its Montanan users both perform within Montana.

Additionally, the State alleges that Meta has deceptively misrepresented to young users in Montana both the risks of addiction and the extent to which children using the Instagram App are exposed to mature materials. The State argues these misrepresentations lie at the core of Meta's business in Montana. There are sufficient "particular facts" of Meta's purported

business transactions and contracts that arise from “the subject litigation” satisfying Rules 4(b)(1)(A) and (B). The individual claims which the State seeks to bring will be addressed as part of the Due Process analysis. Therefore, the MCPA claims against Meta arise from conduct qualifying as both “the transaction of any business within Montana” and “entering into a contract for services to be rendered or for materials to be furnished in Montana.” Rule 4(b)(1)(A), (E). As the Montana long arm statute is satisfied, this Court turns to the question of Due Process.

b. Due Process

Montana courts follow a three-part inquiry to determine if exercising personal jurisdiction over a defendant comports with due process, courts consider whether: “(1) the nonresident defendant purposefully availed itself of the privilege of conducting activities in Montana, thereby invoking Montana's laws; (2) the plaintiff's claim arises out of or relates to the defendant's forum-related activities; and (3) the exercise of personal jurisdiction is reasonable.” *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 2019 MT 115, ¶ 12, 395 Mont. 478, 443 P.3d 407 (citations omitted). The factors "are not mandatory tests" but rather “simply illustrate the concepts of fundamental fairness which must be considered in each jurisdictional analysis.” *Nasca*, ¶ 32. If the first element of purposeful availment is satisfied, “a presumption of reasonableness arises, which the defendant can overcome only by presenting a compelling case that jurisdiction would be unreasonable.” *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 2019 MT 115, ¶ 12, 395 Mont. 478, 443 P.3d 407 (citations omitted).

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i. *Purposeful Availment.*

A nonresident defendant purposefully avails itself of the benefits and protections of the laws of the forum state when it takes voluntary action designed to have an effect in the forum. *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 86, 796 P.2d 189, 195 (1990). On the other hand, a defendant does not purposefully avail itself when "its only contacts with the forum are random, fortuitous, or attenuated or due to the unilateral activity of a third party." *Id*. In *Groo v. State Eleventh Judicial Dist. Court*, the Montana Supreme Court agreed that the defendant had purposefully availed herself when she identified and targeted a Montana audience and had the specific intent of inflicting economic pain on a Montana business. 2023 MT 193, ¶ 44, 413 Mont. 415, 537 P.3d 111.

The State's Complaint alleges that Meta purposefully directed commercial activities to Montana by: (1) advertising, marketing, and distributing Instagram to Montana consumers and making "at minimum, millions of dollars in revenue to activities in the State of Montana" from selling user data, (2) entering contracts with each of its Montanan users, and (3) encouraging children in Montana to use its products. (Doc. 1, ¶¶ 17, 112, 15,34). Meta actively serves targeted content to hundreds of thousands of devices within Montana, continuously mines Montanan's intimate data, and can attribute "at minimum, millions of dollars in revenue to activities in the State of Montana" (Doc. 1, ¶17). The State also alleges that "Defendants are aware of their presence in Montana and the financial rewards they received from operating within the State of Montana." (Doc. 1, ¶ 17).

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Taking The State's allegations as true, this conduct is sufficiently directly targeted to Montana. Meta's engagement in similar conduct elsewhere is irrelevant to this Court's analysis. Accordingly, this Court concludes that Meta has purposefully availed itself of jurisdiction in Montana courts.

ii. *Claim Arising Out of or Relates to Defendant's Forum-Related Activities.*

Again, Meta's main argument regarding lack of personal jurisdiction is that none of its activities within Montana are adequately connected to the conduct at issue here: the alleged intentionally harmful design of Instagram, and the alleged misrepresentations and omissions. As previously discussed, the State has sufficiently alleged that Meta has engaged in substantial business in Montana and has entered into hundreds of thousands of contracts with Montanans, and that these "suit-related" activities created "a substantial connection with Montana," thus satisfying Montana's long-arm statute. *Philadelphia*, ¶28. This Court therefore turns to the related connection analysis between this activity in the forum state and the State's specific claims in the context of Due Process. A direct line of causation between Meta's activities in Montana and the alleged injuries is not required. *See Ford Motor Co. v. Mont Eighth Jud. Dist. Ct*., 592 U.S. 351, 362 (2021) ("None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."). However, for each claim, the State must demonstrate it "arises out of or relates to the defendant's forum-related activities." *Id*., ¶12.

First, Counts I-VII (collectively "App Store Counts") concern alleged deceptive representations that Meta made to third party App Stores and

the resulting content and age ratings that App Stores have assigned to the Instagram app. The State neither alleges that Meta made these statements in Montana, nor specifically targeted these statements at Montanans. Instead, the State argues that "while Meta's deceptive statements may have been made to Apple or Google in the first instance, the petition alleges that those companies merely served as intermediaries who then convey Meta's self-reported information to customers, including customers located in Montana." (Doc. 14 at 13 citing Doc. 1. ¶¶48-51). The State also alleges that "Defendants' misrepresentations" including those made through the App stores ratings, are "material to the decisions that parents and other consumers make about whether and how to use the Instagram app." (Doc. 1 at ¶ 109).

The Montana Supreme Court and United States Supreme Court have consistently made clear that jurisdiction turns on a defendant's conduct, not actions taken by a third person. Litigation "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Tackett v. Duncan*, 376 Mont. 348, 358, 2014 MT 253, ¶ 32, 334 P.3d 920, 928 quoting *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 1122 (2014) (emphasis in original); *See also*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873, 80 L. Ed. 2d 404 (1984) ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

Since Apple, Google, and Microsoft are all "third persons" which provide the age and content ratings in which Counts I-VII are based, this Court finds there is insufficient connection between the State of Montana and these

App Store Claims. Consequently, Meta's Dismissal Motion as to Counts I-VII is **GRANTED**.

Count VIII alleges that through the Community Guidelines, Meta falsely "represent to Montana consumers" that "certain drug-related and sexual content is not allowed to remain on Instagram" when Meta knows that "content that violates the Community Guidelines remains on Instagram and is widely viewed" (Doc. 1. ¶¶ 151–52). Similarly, Count IX alleges that Meta's public statements have misled consumers by falsely representing to Montana consumers that Instagram moderates content such that mature or prohibited content is not allowed to remain on Instagram. Finally, Count X alleges Meta has committed unfair and deceptive acts or practices in relation to addictiveness. The State neither alleges that Instagram's Community Guidelines or public statements are specific to Montana nor that they were created or spoken in Montana but unlike Counts I-VII, there is no third-party intermediary activity.

Meta argues that these claims of misrepresentations, omissions, and alleged addictive design features do not relate to Meta's contacts with Montana as this conduct did not occur within the state. The State argues that because these claims challenge the representations made by Meta about the age-appropriateness of its product which have induced its Montana users (hundreds of thousands of Montanans, including children[4] who have formed a contractual relationship with Meta) to acquire that product in the first place, a sufficient relation to the Defendants' contacts in Montana is created.

The United States Supreme Court's analysis in *Ford Motor Co. v. Mont Eighth Jud. Dist. Ct.*, 592 U.S. 351 is instructive. In *Ford*, the defendant "extensively promoted, sold, and serviced" vehicles in the forum states, the

[4] Montana alleges that an estimated 72 percent of teens in the United States regularly use Instagram. (Complaint ¶33)

plaintiffs resided in the forum states, the plaintiffs used the allegedly defective vehicles in the forum states, and the plaintiffs suffered injuries in the forum states. *Ford Motor Co.*, 592 U.S. at 366. These facts created an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place." Id., at 370. In discussing how the conduct related to the claims, the Court states:

> "…Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. *Helicopteros*, 466 U. S., at 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (internal quotation marks omitted). That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works."

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) the Supreme Court reiterated that "with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp.* 471 U.S. at 473 (internal citation omitted).

While Meta makes attempts to frame itself as an out-of-state company that just provides a service nationwide, it has done substantially more than simply make its product accessible to the world on the internet. *See, Will Co. v. Ka Yeung Lee*, 47 F.4th 917, 924-26 (9th Cir. 2022) (personal jurisdiction over Defendants which did "something more" than mere passive operation of the

website when their advertising structure demonstrated that they profited from viewers in the United States' market and they had the intent to cultivate an audience in the United States). Meta does not just host content and advertisements nor does Meta hold contracts with a mere hundred or so customers within Montana. Instead, the State has alleged that Meta has marketed their product to Montanans, entered into contracts that create continuous obligations with hundreds of thousands of Montanans, collected individualized and highly personal data from each of Meta's Montanan customers, adapted content based upon that data, targeted advertising specifically to Montanans, and sold Montanan's personal data to national and local Montanan businesses with the goal of better targeting Montanan users. (Doc. 1, ¶¶10, 11,15, 17, 36, 38). The alleged misrepresentations Meta has made about the safety and content of Instagram are also intimately related to its forum contacts because the Complaint alleges that those statements are material to the decisions of parents and other users when deciding whether and how to use (or allow their children to use) this app. (Doc. 1, ¶ 114).

Meta makes money selling ads based on its ability to target potential customers through extracting user's data and thus has an incentive to increase the number of users on its app and the amount of time those users spend on the app leading Meta to "design their products to encourage addictive and compulsive use" (Doc. 1, ¶38). The State alleges that Meta has a particular interest in attracting teen users because "they see them as lifelong customers who set trends and are more likely to be influenced by ads." (Doc. 1 at 34).

These facts indicate that Meta has systematically served a market in Montana for the Instagram application which the State alleges has hurt

Montana's youth. Assuming such facts can be proved, they show a form of direct targeting of Montanans by Meta that are far from random, fortuitus, or attenuated. *Simmons Oil Corp.*, 244 Mont. at 86. Entering into this wide-scale business practice gives rise to targeted, predictable effects in Montana. This prong is satisfied.

iii. *Reasonable*.

Even if there are sufficient contacts within the state to satisfy due process, a court must also confirm that asserting jurisdiction comports with "fair play and substantial justice." *Burger King* at 476. Courts look to several factors to determine whether the exercise of personal jurisdiction is reasonable:

> (1) The extent of the defendant's purposeful interjection into Montana;
> (2) The burden on the defendant of defending in Montana;
> (3) The extent of conflict with the sovereignty of the defendant's state;
> (4) Montana's interest in adjudicating the dispute;
> (5) The most efficient resolution of the controversy;
> (6) The importance of Montana to the plaintiff's interest in convenient and effective relief; and
> (7) The existence of an alternative forum.

Nasca v. Hull, 323 Mont. 484, 495, 2004 MT 306, ¶ 32, 100 P.3d 997, 1005.

The Montana Supreme Court has reiterated that "the above factors are not mandatory tests, each of which the plaintiff must pass in order for the court to assume jurisdiction. Rather, the factors simply illustrate the concepts of fundamental fairness, which must be considered in each jurisdictional analysis." *Id*., at ¶ 33 citing *Simmons*, 244 Mont. at 88. Finding that Meta has purposely availed themselves to the forum and that Claims VII-X arose from Meta's forum-related activities, a "presumption of reasonableness" has arisen which Meta can

only overcome by "presenting a compelling case that jurisdiction would be unreasonable." *Ford Motor Co.*, ¶ 12 (citations omitted).

Meta has not presented any argument, let alone "a compelling case" that jurisdiction would be unreasonable should the State prove its claims. *Buckles v. Cont'l Res., Inc.*, 2020 MT 107, ¶ 27, 400 Mont. 18, 30, 462 P.3d 223, 232 (citing *Ford Motor Co.*, ¶ 12). Meta has extensively and purposefully interjected itself into Montana through, as discussed above, advertising in the state, entering into contracts with Montanan users, extracting personalized and location specific data from hundreds of thousands of users' devices, and profiting off those users' data. Meta makes no argument that it faces any burden defending this suit in Montana. Although Meta is headquartered in California, it is a large corporation capable of defending itself anywhere. Preventing the State of Montana, however, from bringing these types of consumer protection claims would potentially impede the Montana State Legislature's ability to protect Montanans from the substantial harms alleged in this lawsuit. The State also has an interest in obtaining convenient and effective relief within Montana judiciary.

For these reasons, the Court finds that Meta purposefully directed its activities to Montana residents in the State of Montana to the degree that exercise of jurisdiction in Montana is reasonable relative to Counts VIII, IX and X.

2. Are the State's remaining claims adequately pled under MCPA?

The MCPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]" Mont. Code Ann. § 30-14-103 (2023). An unfair trade practice is one that is "contrary to established public policy and which is either immoral, unethical, oppressive,

unscrupulous, or substantially injurious to consumers." *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 19, 390 Mont. 12, 407 P.3d 692 (emphasis in original) (citation and quotation omitted). A deceptive act is one "that is likely to mislead consumers." *Rubin v. MasterCard Int'l, LLC*, 342 F. Supp. 2d 217, 220 (S.D.N.Y. 2004).

a. Community Guidelines Count VIII

Count VIII hinges on the State's assertion that "[t]hrough the Community Guidelines, Defendants represent and have represented that certain drug-related and sexual content is not allowed on Instagram, when such content *is* allowed. Defendants know that they permit mature content on the platform that they fail to disclose to consumers in the Community Guidelines." (Doc. 1, ¶152) (emphasis in original). Meta argues that the State has failed to plead the Community Guidelines Claim because "it has not alleged that any Montanan has read those guidelines or pleaded any actionable misrepresentation with particularity." (Doc. 13 at 25), *See, Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1047 (N.D. Cal. 2020). This argument is unavailing because the Complaint does allege that Meta's misrepresentations—including their "assurances in the Community Guidelines"—are "material to the decisions that parents and other consumers make about whether and how to use the Instagram app," and that parents "read information about apps before allowing their teens to download them." (Doc. 1, ¶ 109).

Meta further argues that, if Montanans did read the Guidelines, the content of the guidelines itself discloses that users will see some amount of violating content on Instagram even as Meta works to remove it. The State cites the section of the Community Guidelines which states: "If you see something that

you think may violate our guidelines, please help us by using our built-in reporting option." (Doc. 1, at ¶ 98; Doc. 13 at 26). The State alleges that the Community Guidelines "mislead users into believing this content is not available on Instagram," (Doc. 1, ¶ 100). Specifically, the State relies on the following Community Guideline sections:

> "We know that there are times when people might want to share nude images that are artistic or creative in nature, but for a variety of reasons, we don't allow nudity on Instagram. This includes photos, videos, and some digitally-created content that show sexual intercourse, genitals, and close-ups of fully-nude buttocks. It also includes some photos of female nipples, but photos in the context of breastfeeding, birth giving and after-birth moments, health-related situations (for example, post-mastectomy, breast cancer awareness or gender confirmation surgery) or an act of protest are allowed. Nudity in photos of paintings and sculptures is OK, too."
> "We also remove content that attempts to trade, co-ordinate the trade of, donate, gift, or ask for non-medical drugs, as well as content that either admits to personal use (unless in the recovery context) or coordinates or promotes the use of non-medical drugs."

(Doc. 1. at ¶ 99).

The State then directs the Court to several allegations included in its Complaint which it contends demonstrate Meta does allow such content. (Doc. 1, ¶¶ 58–68, 72–78). The State alleges these statements "mislead users into believing this content is not available on Instagram." (*Id*., ¶ 100). A plain reading of these sections does not, however, support such a conclusion. These guidelines lay out what is and is not permitted and request users' help in identifying posts that violate those guidelines. These guidelines cannot be interpreted as a guarantee no violating content exists. Even construing these allegations in the State's favor, it has not pled any actionable misrepresentation with particularity

in relation to Count VIII. *Flathead Props.*, 2024 MT at ¶ 9.

Accordingly, Meta's dismissal motion as to Count VIII is **GRANTED.**

b. Public Statements Claim IX

Meta makes similar arguments in relation to Montana's Public Statements Claim. Meta also points out there is no allegation that it was engaged in "trade or commerce" when it made these statements. Mont. Code Ann. § 30-14-103 (2023). Meta additionally argues that statements made to Congress or to the press are not the sort of commercial activity the MCPA regulates. Mont. Code Ann. § 30-14-102(1) (2023); *Brookins v. Mote*, 2012 MT 283, ¶ 54, 367 Mont. 193, 292 P.3d 347 (holding "that only those acts or practices in the conduct of the entrepreneurial, commercial, or business aspects of running a hospital are actionable under Montana's CPA.")

The State has not responded to these arguments. Thus, it has forfeited the issue, and this claim is therefore dismissed. *McLaughlin v. Hart*, 213 Mont. 216, 220, 690 P.2d 431, 434 (1984) (dismissing complaint because no response was made by plaintiffs supporting the complaint). Accordingly, Meta's dismissal motion as to Count IX is **GRANTED.**

c. Addiction Claim X

Meta argues that the Addiction Claim (Count X), is not supported by sufficient factual allegations under either an "unfair" or "deceptive" theory. First, Meta argues that the State failed to "identify a 'clear and well-established' policy Meta violated—a policy that is 'declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution." (Doc.13 at 28, quoting *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1229 (11th Cir. 2018)).

This Court, however, agrees with the State that there is a well-established public policy within Montana to "protect the welfare of the children" of Montana. *In re M.A.L.*, 2006 MT 299, ¶ 26, 334 Mont. 436, 148 P.3d 606; *see also*, *In re J.B.*, 2015 MT 342, ¶ 24, 381 Mont. 525, 362 P.3d 859 (regarding the Legislature's directive to protect the interests of children).

Second, Meta argues that the State has failed to allege "that Instagram's 'design' is 'either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Rohrer v. Knudson*, 2009 MT 35, ¶ 28, 349 Mont. 197, 203 P.3d 759; (Doc. 13 at 29). Meta additionally argues "the alleged failure to disclose that Instagram is 'addictive' does not satisfy basic pleading requirements" because "[t]he sole basis of the State's deceptiveness claim regarding addiction is a vague allegation that Meta represented to consumers that Instagram 'is safe and appropriate for minors' and omitted that it was 'addictive.'" (Doc. 13 at 30, citing Doc. 1, ¶¶ 163–6).

The State alleges that Meta's design of their product is "known to be addictive and harmful to teens; they were made that way by design." (Doc. 1, at 38). It then describes several features that encourage addictive and compulsive use and several protections that Meta has declined to provide or implement (Doc. 1, ¶¶ 38, 39). Construing The State's Complaint in the most favorable light and taking these "allegations of fact" "as true," this Court finds the State has adequately plead the Addiction Claim. See, *Willson v. Taylor*, 194 Mont. 128.

3. Whether Section 230 bars the State's Addiction Claim

Meta request that the State's addiction claim be barred by Section 230. Generally, "preemption under the Communications Decency Act is an affirmative defense, but it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint." *Klayman v. Zuckerberg*, 410 U.S. App. D.C. 187, 190, 753 F.3d 1354, 1357 (2014); *See also, Jones v.*

Bock, 549 U.S. 199, 215 (2007); *Jones v. Horne*, 634 F.3d 588, 600, 394 U.S. App. D.C. 261 (D.C. Cir. 2011); *Teatotaller LLC v. Facebook, Inc.*, 242 A.3d 814, 819 (N.H. 2020). Section 230 provides:

> The 1996 Communications Decency Act (the "CDA") states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 USC § 230(c)(1). The CDA also provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

Id.,§ 230(e)(3).

To determine whether § 230(c)(1) applies here—and thus immunizes Meta from the State's claim—courts apply the three-prong test set forth in *Barnes v. Yahoo!, Inc*., 570 F.3d 1096 (9th Cir. 2009). CDA immunity is only enjoyed if Meta is "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021), citing *Barnes*, 570 F.3d at 1100-01. Therefore, social media companies are protected from liability when a plaintiff seeks to treat it under a state law cause of action as a speaker or as a publisher of content posted on its platform by a third party**.** *See Barnes*, 570 F.3d at 1100-01.

As in several other cases cited by the State, this Court similarly finds that Meta does not meet the second prong requiring Meta to be a publisher or a speaker. For example, the 9th Circuit recognized a California state law claim of "negligent failure to warn" despite the defendant website's claim of Section 230 immunity. *Doe v. Internet Brands, Inc*., 824 F.3d 846, 849 (9th Cir. 016).The

Doe Court stated that the plaintiff did not seek to hold the defendant liable as a "publisher or speaker" of content because her claim was based on the defendant's failure to warn her about information it obtained from an outside source about how third parties targeted and lured victims through a website. *Id.*,851. Accordingly, Section 230 did not bar her claim. *Id.*, 853. This was further echoed in *Lemmon v. Snap, Inc*., where the 9th Circuit held that the CDA did not immunize the defendant, a social media entity, from liability in a negligent design lawsuit brought by parents of two boys who died a high-speed car accident, because it was apparent that the parents' amended complaint did not seek to hold the defendant liable for its conduct as a publisher or speaker pursuant to 47 U.S.C.S. § 230(c)(1). 995 F.3d 1085, 1094 (9th Cir. 2021) ("even if Snap is acting as a publisher in releasing Snapchat and its various features to the public, the Parents' claim still rests on nothing more than Snap's 'own acts.'").

While Meta does distribute third-party content, the State's claim is based on Meta's actions, namely: "creating and marketing an app that is intentionally addictive" and "telling the public both explicitly and implicitly that their app is safe and appropriate for users under age 17, even though its app is actually addictive to these minors." (Doc. 1 at 161.) Therefore, from the "face of the complaint" Section 230 does not bar this suit. *See Klayman v. Zuckerberg*, 410 U.S. App. D.C. 187, 190, 753 F.3d 1354, 1357 (2014). Construing the State's Complaint in a light most favorable to it and as true, the Court declines to dismiss Count X based upon § 230.

4. Whether the First Amendment bars the State's Addiction Claim

Meta argues the First Amendment bars the State's claims. The State argues that Instagram's addictive design is conduct, not speech and even if

Count X imposed an incidental burden on speech, those claims would be at most content neutral. The First Amendment protects publishers' discretion to disseminate third-party speech and categorically protects publishers from liability for injuries arising out of that speech. *See Miami Hearld Pub'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

Meta relies heavily on *Moody*, to argue the State cannot "penalize Meta" for "its 'continuous display' of third-party content, which is just another expressive decision." (Principal at 14). Meta states that the "First Amendment also bars the portion of Count X of the Complaint alleging that Meta has violated the MCPA by 'intentionally design[ing] [Instagram] to be addictive.' Compl. ¶ 167." (Doc. 13, at 16). The State argues that the *Moody* passages relied on by Meta are dicta and even if it were not, "*Moody's* dicta explicitly does not apply to the type of features challenged in this case." (Doc. 14, at 23). The State also directs this Court to consider the Courts across the county that have contended with Meta's line of reasoning and rejected it. (Doc. 14, at 24).

The *Moody* Court considered whether Florida's and Texas's content-moderation laws are facially unconstitutional. It vacated both lower court decisions "for reasons separate from the First Amendment merits…". *Moody*, 603 U.S. at 717. The State also points out that *Moody's* dicta is not so clearly transferred to the case at hand because the question of whether non-expressive algorithm is a form of speech was not before the *Moody* Court. In footnote 5, the court stated "We therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards."

The State's remaining claim seeks to hold Meta accountable for the

algorithms and features designed by Meta which the State alleges are "intentionally addictive" and for not informing the public that it is addictive. This falls outside of the *Moody* dicta. Further, this claim rests on conduct and does not depend on the substance of the distributed third-party content. Therefore, this Court finds that the First Amendment does not bar Count X.

CONCLUSION

For the forgoing reasons, Meta's dismissal motion is **DENIED** as to Count X and **GRANTED** as to Counts I-IX.

ORDER

For the reasons stated above, **IT IS HEREBY ORDERED, ADJUGED and DECREED:**

1. Meta's dismissal motion is **GRANTED IN PART** and **DENIED IN PART** as set forth in this Order;

2. Meta's dismissal motion as to Count X is **DENIED**;

3. Meta's dismissal motion as to Counts I-IX is **GRANTED**; and

4. Meta shall have **21 days** from the date of this Order to submit their Answer to Montana's surviving and remaining claim.

ELECTRONICALLY SIGNED AND DATED BELOW.

Michael McMahon

cc: Brent Mead, via e-filing
Anna K Schneider, via e-filing
William W. Mercer, via e-filing
John D. Sullivan, via e-filing
Mark W. Mosier, via e-filing
Nathan Shafroth, via e-filing

MFM/tt/BDV-2024-813 State et al. v. Meta et al. – Order Dismissal Motions.doc

Electronically Signed By:
Hon. Judge Michael McMahon
Mon, Jul 07 2025 09:12:37 AM

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IV

STATE OF TENNESSEE ex rel. JONATHAN SKRMETTI, ATTORNEY GENERAL and REPORTER,	)	
Plaintiff,	)	**JURY DEMAND**
v.	)	**No. 23-1364-IV**
META PLATFORMS, INC. and INSTAGRAM, LLC,	)	
Defendants.	)	

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ORDER ON MOTION TO DISMISS AMENDED COMPLAINT

On October 24, 2023, State of Tennessee, *ex rel.* Jonathan Skrmetti, Attorney General and Reporter ("State"), filed this Civil Enforcement Action against Defendants Meta Platforms, Inc. and Instagram, LLC (collectively, "Meta" or "Defendants"). The State amended its Complaint on July 16, 2024 ("Amended Complaint"). The Amended Complaint contains two claims: 1) unfairness under the Tennessee Consumer Protection Act; and 2) deception under the Tennessee Consumer Protection Act.[1] Both claims are based on the State's theory that the social media platform Instagram is unfairly and deceptively addictive and harmful, particularly to young people.

On August 30, 2024, Defendants filed a motion to dismiss the Amended Complaint pursuant to Rule 12.02(2) and 12.02(6) of the Tennessee Rules of Civil Procedure. Defendants assert that the Amended Complaint does not contain allegations sufficient to establish personal jurisdiction over either defendant; that Section 230 of the Communications Decency Act prohibits the State from imposing liability on Defendants; that the First Amendment to the United States Constitution prohibits the State from

[1] The State's lawsuit is part of a multi-state civil law enforcement effort involving several other states.

imposing civil liabilities on Defendants for their role in disseminating user content; and the Amended Complaint fails to state a claim for relief under the Tennessee Consumer Protection Act. The State opposed the motion. The motion to dismiss came before the Court for hearing on Friday, October 11, 2024.

I. Factual Allegations

Both Meta and Instagram are Delaware corporations with principal places of business in Menlo Park, California. Instagram is a subsidiary of Meta. Meta owns, operates and controls several social technology services, including multiple social media platforms. Through its mobile application and website, Instagram offers consumers the opportunity to connect with friends, follow accounts, and explore various interests. On Instagram, consumers interact with different surfaces, which include the main Feed and Stories that display content posted by accounts the consumer follows. The Explore surface suggests new content to consumers; the Reels surface focuses on short-form videos; and the Direct Messaging surface allows consumers to send messages to one another. Instagram presents a customized display to each consumer based on the interests and preferences they express on Instagram, along with other data in Meta's possession.

To fully access Instagram, consumers must create an account. As part of the account creation process, consumers enter a contract with Meta. By entering that contract, consumers agree to comply with Instagram's Terms of Use ("Terms"). The Terms state, *inter alia*, that Instagram is a Meta product. Thus, the Terms constitute an agreement between the consumer and Meta. Consumers do not pay money to use Instagram. Instead, in exchange for the right to use Instagram, consumers agree to terms that power Meta's advertising business.

Meta's business model has made Meta one of the largest and most profitable advertising companies in the world. Meta reported earning $116.6 billion in revenue in 2022, with $23.2 billion in net income. Meta capitalizes on its ability to offer highly targeted, data-informed advertising opportunities, including opportunities based on consumers' location. Consumers are served targeted advertisements during their sessions on Instagram, and consumers see advertisements several times per minute. The advertisements Meta displays on Instagram are interwoven into most, if not all, of Instagram's surfaces. Viewing advertisements is a core part of the Instagram experience. Given this business model, Meta is motivated to maximize the time consumers spend on Instagram. The more time a consumer spends on Meta's platforms, the more advertising opportunities Meta can sell, and the more data Meta collects about the consumer. The increase in consumer time spent therefore significantly increases the profits Meta can make from the consumer.

Consumers under eighteen ("Young Users") are Meta's prized demographic and increasing Young Users' time spent on its platforms is one of Meta's goals. Meta pursues Young Users because Meta's advertising customers value that audience, as Young Users are more likely influenced by advertisements, may become lifelong customers, and set trends society emulates. Instagram is Meta's most popular application with the Young Users' demographic.

Instagram is popular among young Tennesseans. According to Meta's internal metrics, from July 2020 to June 2021, over 475,000 Tennessee teens used Instagram monthly and over 350,000 Tennessee teens used Instagram daily. Between October 2022 and April 2023, over 500,000 young adults in Tennessee used Instagram daily and over 800,000 young adults in Tennessee used Instagram monthly. Meta's internal metrics

show that Nashville and Memphis had the 21st and 22nd most teen Instagram users among U.S. cities in 2019. According to the same metrics, Nashville had 67,728 daily active teen users; 80,410 weekly active teen users; and 88,221 monthly active teen users. Memphis had 66,735 daily active teen users; 83,319 weekly active teen users; and 94,434 monthly active teen users.

Meta closely tracks Instagram's performance in Tennessee, including following metrics for Instagram usage in Tennessee, the amount of time Tennessee teens spend on Instagram per day, the percentage of Tennessee teens on Instagram, the ratio of Tennessee teen daily versus monthly active users, Tennessee teen monthly active user story participation rates, the amount of feed media daily active Tennessee teens consume per day on Instagram, the amount of stories that daily active Tennessee teens consume per day on Instagram, the percentage of Facebook Android monthly active users on Instagram, and the reduction in active users over a two month period. As of 2020, Meta determined that Instagram had fully saturated the market for Tennesseans under 35 years of age. That same year, Meta found that it had fully entered the teenage market in Tennessee.

In 2019, Meta conducted interviews with young consumers in Memphis to study that population's experience on Instagram. Meta started the Teen Ecosystem Understand project in 2020 to study Young Users in order to deliver insights that would allow Meta to make Instagram increasingly irresistible to Young Users. The Teen Ecosystem Understand and Consumer Market Research projects were two of many Meta initiatives to study Young Users and capture more of their time and attention.

The State argues that Instagram is not reasonably avoidable for many Young Users because it is highly addictive and designed to exploit Young Users' biologically

limited capacity for self-control. The State alleges that Instagram harms Young Users by, *inter alia*, negatively impacting their metal well-being and impairing their healthy development. Despite having overwhelming evidence showing that Instagram is addictive, the State asserts that Meta made decisions that facilitated Young Users' addiction to Instagram.

The State further alleges that Meta misled the public, including Tennesseans, about the addictive nature of the Instagram platform and the risks Instagram presents to its consumers, particularly Young Users, in three general ways. First, the State asserts that Meta knew that Instagram was harmful for consumers, and particularly Young Users, but it did not share that information with the public. Secondly, the State asserts that Meta created the façade that Instagram is a safe platform where harmful content is rarely encountered. Thirdly, the State asserts that Meta misled the public through misrepresentations about its commitment to well-being related products and features.

By allegedly designing and deploying Instagram in a manner that overwhelmed consumers' free and informed choice regarding how much time to spend on the Instagram platform and by allegedly deceiving consumers through statements, conduct, silence and action that Instagram is a safer platform than it is in reality, the State alleges Meta violated the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-104(a)&(b).

II. Procedural History

The State filed the original Complaint in this action on October 24, 2023. Meta moved to dismiss the Complaint, which, by Order entered March 13, 2024, the Court denied. On April 12, 2024, Meta moved to certify the March 13, 2024 Order for interlocutory appeal under Tenn. R. App. P. 9, which the Court granted. By Order

entered June 3, 2024, the Court provided its statement of reasons for certifying all three questions presented for interlocutory appeal. On June 13, 2024, Meta filed its Rule 9 application with the Tennessee Court of Appeals. On June 14, 2024, the State moved to amend the Complaint. On June 24, 2024, the State responded to Meta's Rule 9 application in the Court of Appeals. On July 10, 2024, the Court of Appeals denied Meta's Rule 9 application.

The Amended Complaint adds allegations concerning Tennessee contacts based on internal Meta documents the State obtained in discovery. *See* Am. Comp., ¶¶ 83 (internal metrics on Instagram users in Nashville and Memphis); 91-94 (interview with Meta's Head of Global Safety on Tennessee Radio Network); 95-99 (in-person parent creator event hosted in Nashville); 100-03 (Meta's sponsorship of a National Charter Schools Conference in Nashville, an anti-bullying event, and a town hall); 104-07 (Meta's closely monitoring Instagram's reputation in Tennessee after The Covenant School shooting and a Tennessee teen's death by suicide). Further, considering recent amendments to the TCPA, the Amended Complaint requests additional relief. *See* Am. Compl, p. 77, ¶ d.

III. Standards

A defendant may challenge the Court's exercise of personal jurisdiction through a motion to dismiss pursuant to Rule 12.02(2) of the Tennessee Rules of Civil Procedure. Although not required to do so, the defendant may support his or her motion with affidavits or other materials. *See Baskin v. Pierce & Allred Constr., Inc.*, 676 S.W.3d 554, 566 (Tenn. 2023)(citing *Crouch Ry. Consulting, LLC v. LS Energy Fabrication, LLC*, 610 S.W.3d 460, 470 (Tenn. 2020)). If the defendant does so, then the plaintiff must also submit affidavits or other materials to carry its burden. *See id.* "[T]he

submission of matters outside the pleadings does not convert the Rule 12.02(2) motion to dismiss into a motion for summary judgment." *Id.*

"When a defendant challenges the state's exercise of personal jurisdiction in this manner, the plaintiff bears the burden of establishing a prima facie case for personal jurisdiction over the defendant." *Id.* (citing *Crouch Ry. Consulting, LLC*, 610 S.W.3d at 470). This Court's decision regarding the exercise of personal jurisdiction over the defendant is a question of law. *See id.*

> When evaluating whether the plaintiff has established a prima facie case for personal jurisdiction, the trial court must accept the plaintiff's factual allegations as true and resolve all factual disputes in the plaintiff's favor. [*Crouch*, 610 S.W.3d at 470]; [*State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 739 (Tenn. 2013)]. However, the court may disregard "allegations that are controverted by more reliable evidence and plainly lack credibility, conclusory allegations, or farfetched inferences." *Crouch*, 610 S.W.3d at 470 (citing [*First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 382 (Tenn. 2015)]. Ultimately, the court must determine whether the factual allegations in the plaintiff's complaint and any supporting materials establish, with reasonable particularity, sufficient contacts between the defendant and Tennessee. *First Cmty. Bank*, 489 S.W.3d at 383.

Id.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the Complaint, admitting the truth of all relevant and material factual averments contained in the Complaint. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). "[A] motion filed under Rule 12.02(6) tests 'the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence.'" *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). In deciding a motion to dismiss, courts are required to construe the Complaint liberally, treating all factual allegations as true and considering all reasonable inferences in the plaintiff's favor. *See Webb*, 346 S.W.3d at 427; *Tigg v. Perelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007). However,

"courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Webb*, 364 S.W.3d at 426 (quoting *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997)). Unless it appears from the pleadings and the applicable law that the plaintiff can prove no set of facts that would entitle the plaintiff to relief on his/her claim, a motion to dismiss for failure to state a claim should be denied. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999).

IV. Discussion

Defendants assert that their motion to dismiss should be granted for four core reasons: 1) The State fails to allege sufficient facts to support personal jurisdiction; 2) the State's claims would impose liability on Meta by treating it as a publisher of third-party content on Instagram, which is barred by Section 230 of the Communications Decency Act; 3) the State seeks to hold Meta liable for the allegedly harmful consequences of user speech that Meta organizes and disseminates on Instagram, which is barred by the First Amendment; and 4) the Amended Complaint fails to state a claim under the TCPA.

Personal Jurisdiction

The authority of courts to exercise personal jurisdiction over non-resident defendants is restricted by the Due Process Clause of the Fourteenth Amendment. *See Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 646 (Tenn. 2009). When a question regarding personal jurisdiction arises, courts are required to ascertain whether it is "fair and substantially just to both parties to have the case tried in the state where the plaintiff has chosen to bring the action." *Id.* "The plaintiff bears the ultimate burden of

demonstrating that the trial court may properly exercise personal jurisdiction over a defendant." *Id.* at 643.

Tennessee's long-arm statute permits the courts of this state to exercise jurisdiction upon "any basis not inconsistent with the constitution of this state or of the United States." Tenn. Code Ann. § 20-2-214(a)(6); *Wall Transp., LLC v. Damiron Corp.*, No. M2014-00487-COA-R3-CV, 2014 WL 7263778, at *3 (Tenn. Ct. App. Dec. 19, 2014). In order for a non-resident defendant to be subject to personal jurisdiction in Tennessee, the defendant must have "certain minimum contacts . . . such that the maintenance of a suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)(quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Those minimum contacts with the forum state may create two types of personal jurisdiction: 1) general personal jurisdiction, which requires a defendant to have continuous and systematic contact with the forum state; or 2) specific personal jurisdiction, which focuses only on "deliberate" and "significant" contacts in the forum state from which the claims at issue arise. *Miller v. AXA Winterthur Ins. Co.*, 694 F.3d 675, 678-79 (6th Cir. 2012).

For general personal jurisdiction to attach, a non-resident defendant's contacts with Tennessee must be so continuous and systematic as to render them essentially at home in Tennessee, and they must comply with traditional notions of fair play and substantial justice. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). A corporation's state of organization and principal place of business are paradigm bases for general jurisdiction. *See First Cmty. Bank N.A.*, 489 S.W.3d at 385. Merely "doing business" in the forum state is not sufficient to subject a non-resident defendant to jurisdiction there. *See id.* at 386.

Specific jurisdiction exists when a defendant has minimum contacts with the forum state and the cause of action arises out of those contacts. *See NV Sumatra Tobacco Trading Co.*, 403 S.W.3d at 744. "[C]ertain 'single or occasional acts' in the forum state may be sufficient to render a non-resident corporation subject to personal jurisdiction 'with respect to those acts, though not with respect to matters unrelated to the forum.'" *Id.* at 385 (quoting *Goodyear*, 564 U.S. at 923). Determining whether a forum state may exercise specific jurisdiction over a non-resident defendant requires a two-part analysis: 1) whether the defendant's activities in the state that give rise to the cause of action constitute sufficient minimum contacts with the forum state, and, if so, 2) whether the exercise of jurisdiction over the non-resident defendant is fair. *See id.* at 388.

"It is well established that, in order for a nonresident defendant's contacts with the forum state to be sufficient to give rise to personal jurisdiction there, those contacts must arise out of the defendant's own purposeful, deliberate actions directed toward the forum state." *Id.* at 389 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

> This "purposeful availment" requirement ensures that a defendant will not be [hailed] into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King, 471 U.S. at 475-76.

A defendant's connections with the forum state must not only be intentional, but also substantial enough to give rise to jurisdiction. *See Walden v. Fiore*, 571 U.S. 277,

284-85 (2014). This requires the Court to consider "the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts." *Sumatra*, 403 S.W.3d at 759-60. Furthermore, in performing the minimum contacts analysis, courts must look to "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 571 U.S. at 285. A defendant's contacts with the plaintiff "cannot be the only link between the defendant and the forum." *Id.*

The State is not asserting that Meta is subject to general personal jurisdiction in Tennessee. The State's TCPA claims arise from its allegations that 1) Meta engineered dangerous product features into Instagram; and 2) Meta materially misrepresented Instagram's safety to the public. Broadly speaking, the State argues that this Court has specific jurisdiction over Meta because Meta chose to 1) make Instagram available in Tennessee; 2) enter contracts with hundreds of thousands of Tennesseans; 3) analyze Instagram's performance in Tennessee across several highly-granular metrics; 4) promote its brand in Tennessee; 5) study Tennessee consumers; and 6) deliver Tennessee-specific advertisements to Tennesseans. The Court now turns to the due process analysis to determine whether Meta has such minimum contacts with Tennessee to warrant the exercise of specific jurisdiction over it.

To establish the necessary minimum contacts, Meta must either purposefully direct its activities toward Tennessee or purposefully avail itself of the privileges of conducting activities in Tennessee; the claim must arise out of or relate to Meta's Tennessee-related activities; and the exercise of jurisdiction must be reasonable. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1208 (9th Cir. 2020)(citation omitted); *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). "If any of the

three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995).

"'[P]urposeful availment' is something akin to a deliberate undertaking to do or cause an act or thing to be done in [Tennessee] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [Tennessee], something more than a passive availment of [Tennessee] opportunities." *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891 (6th Cir. 2002)(quoting *Khalaf v. Bankers & Shippers Ins. Co.*, 273 N.W.2d 811, 819 (Mich. 1978)). The State argues that Meta delivers Tennessee consumers a highly interactive and customized online experience in Tennessee. Through its consumers' assent to Instagram's Terms, Meta collects data from its consumers, including locational data, such as a consumer's GPS, Bluetooth signals, nearby Wi-Fi access points, beacons, and cell towers. Meta then uses that data to deliver its consumers a customized experience on Instagram.

Meta capitalizes on its ability to offer highly targeted, data-informed advertising opportunities, including opportunities based on consumers' locations. Consumers are served targeted advertisements during their sessions on Instagram, and consumers see advertisements several times per minute. Viewing advertisements is a core part of the Instagram experience. The more time a consumer spends on Meta's platforms, the more advertising opportunities Meta can sell, and the more data Meta collects about the consumer. Thus, the time a consumer time spends on Instagram significantly affects the profits Meta can make from the consumer.

A court may "hold [a defendant] answerable . . . for the contents of a website whose economic value turns, in significant measure, on its appeal to [forum residents]."

Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1230 (9th Cir. 2011); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 (1984). All manner of Tennessee entities - from Graceland to Dollywood, the Nashville Zoo to the Tennessee Aquarium, the Memphis Grizzlies to the Tennessee Titans, the *Knoxville News Sentinel* to *The Tennessean* - advertise on Instagram to reach a Tennessee audience and expand their business in Tennessee. Meta profits through its sale of Tennessee-targeted advertising opportunities.

The fact that these advertisements, among others, target Tennesseans indicates that Meta knows, either actually or constructively, about its Tennessee consumer base, and Meta exploits that base for commercial gain by selling the ability for advertisers to show their Tennessee-based advertisements to Tennessee consumers on Instagram. Hundreds of thousands of young adults consume Instagram in Tennessee. *See* Am. Compl., ¶ 82. This is a substantial viewer base. *See id.*, ¶ 110. A platform targets a forum if it "'continuously and deliberately exploit[s]' the forum's market for commercial gain, by operating 'a website whose economic value turns, in significant measure, on its appeal to [forum residents].'" *AMA Multimedia, LLC*, 970 F.3d at 1220 (Gould, J. dissenting)(quoting *Mavrix Photo, Inc.*, 647 F.3d at 1230).

Specific jurisdiction is insufficient to support personal jurisdiction for all claims but will support jurisdiction for a claim "sufficiently related to the defendant's activities in the state." *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 426 (7th Cir. 2010). Whether a claim is sufficiently related to a forum turns on "whether the relationship between the plaintiff's claim and the defendant's contacts with the state made it fair to call the defendant into court there." *Id.* at 427. Here, the Amended Complaint alleges that Meta used irresistible design features to capture an ever-increasing amount of Young Users' time and data, for the benefit of Meta's business. *See* Am. Compl., ¶ 5. Thus,

viewing advertisements is a core part of the Instagram experience, and the more time a consumer spends on Instagram, the more advertising opportunities Meta can sell and the more data Meta collects about the consumer.

Under Meta's business model, consumers agree to Instagram's Terms, which explain that Meta shows consumers ads that businesses and organizations pay Meta to promote. Advertisers tell Meta their business goal and the kind of audience they want to see their ads. Meta then uses consumers' personal data to create categories and charges advertisers to show ads to that category. In this way, Meta also custom tailors a consumer's ad experience on Instagram. Meta is motivated to maximize the time users spend on Instagram, because the more time a user spends on Instagram, the more advertising opportunities Meta can sell and the more profits Meta makes from the consumer in the form of advertising dollars.

Because advertisers wish to reach Young Users, Young Users are the prized demographic. Many of Meta's advertisers are willing to pay Meta for the opportunity to reach Young Users in a specific geographical market, such as Tennessee. As such, Meta is motivated to increase Young Users' time spent on Instagram. The State alleges that Meta designs Instagram to make it addictive to Young Users in order to ensure they will spend more time on Instagram, thereby economically benefitting Meta. Young Users' consumption of Instagram allegedly harms Young Users by negatively impacting their mental well-being and impairing their healthy development. These allegations demonstrate the nexus between the State's claims and Meta's Tennessee-related contacts.

Additionally, the State alleges that Meta used its research to develop sophisticated tools that hook consumers to Instagram and that Meta allegedly deceived consumers about the results of its research in various ways. The Amended Complaint alleges that

Meta conducted some of that research in Memphis, Tennessee. Additionally, the Amended Complaint alleges that Meta engaged *The Tennessean*'s editorial board to provide a positive, forward-looking message related to Meta's impact in Tennessee and hosted or participated in events in Tennessee to communicate that Instagram is safe for Young Users. This Tennessee-specific conduct relates to the State's claims that Meta offers a harmful product in Tennessee and misleads Tennesseans about its product's safety. As such, this litigation relates to Meta's Tennessee-related conduct.

Before concluding the analysis, the Court must determine whether an exercise of specific jurisdiction over Meta would offend traditional notions of "fair play and substantial justice." *Burger King*, 471 U.S. at 476. This requires to Court to analyze the "burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in efficiently resolving controversies, and the shared interest of the states in furthering fundamental substantive social policies." *uBID, Inc.*, 623 F.3d at 432. This case involves alleged violations of the TCPA. As such, most of these factors counsel in favor of allowing this Court to exercise specific personal jurisdiction over Meta. Furthermore, the burden on Meta of defending a lawsuit in Tennessee is minimal. Meta reports earnings in the billions and has a broad enough reach to operate its services on a global scale. The relationship between Meta, the State, and this litigation is close enough not to offend due process.

For the foregoing reasons, the Court determines that it has specific personal jurisdiction over Meta on the claims brought by the State related to Meta's Tennessee-related conduct. The motion to dismiss is respectfully denied on this ground.

Communications Decency Act

Meta seeks to dismiss the Amended Complaint pursuant to Section 230 of the Communications Decency Act, which directs that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). "Section 230 of the Communications Decency Act . . . , titled 'Protection for private blocking and screening of offensive material,' was passed by Congress in 1996." *Soc. Media Cases*, Nos. JCCP 5225, 22STCV21355, 2003 WL 6847378, at *9 (Cal Super. Ct. Oct. 13, 2023).

Through Section 230, "Congress intended to create a blanket immunity from tort liability for online republication of third party content." *Id.* at *30 (citation omitted). "Section 230(c)(1) shields defendants who operate certain internet services from liability based on content created by a third party and published, displayed, or issued through the use of the defendant's services." *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 155 (E.D.N.Y. 2017). By enacting Section 230, "Congress sought to prevent state and federal laws from interfering with the free exchange of information over the internet." *Daniel v. Armslist, LLC*, 386 Wis. 2d 449, 464 (2019); 47 U.S.C. § 230(e)(3). Section 230 is to be construed broadly. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016).

The necessary components of an immunity claim under Section 230(c)(1) are: 1) the defendant is a provider or user of an interactive computer service; 2) the claim is based on information provided by another information content provider; and 3) the claim treats the defendant as the publisher or speaker of third-party content that forms the basis of the claim. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009), *as amended* (Sept. 28, 2009); *Cohen*, 252 F. Supp. 3d at 155-56 (citing *FTC v. LeadClick*

Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016)). "Where a defendant establishes these requirements based on the face of a complaint, a motion to dismiss may be granted." *Cohen*, 252 F. Supp. 3d at 156.

Here, the first element is satisfied, because both Meta and Instagram are providers of an interactive computer service, as that term is defined by the Communications Decency Act. *See* 47 U.S.C. § 230(f)(2); *Doe v. MySpace*, 528 F.3d 413, 420-22 (5th Cir. 2008)(social networking site is an interactive computer service under Section 230). As such, whether Section 230 provides immunity to Meta and Instagram under the facts alleged here turns on the second and third elements. "Practically speaking, the second and third factor tend to overlap in significant ways." *In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, 625 F. Supp. 3d 971, 978 (N.D. Cal. 2022). The second prong focuses on whether the State's claims stem from Meta's "status or conduct as a publisher or speaker." *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 826 (N.D. Cal. 2023)(quoting *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021)(quoting *Barnes*, 570 F.3d at 1107)). "A claim meets this prong where the claim is based on 'behavior that is *identical to* publishing or speaking.'" *Id.* (quoting *Barnes*, 570 F.3d at 1107)(emphasis in original).

> Critically, Section 230 does not create immunity simply because publication of third-party content is relevant to or a but-for cause of the plaintiff's harm. The issue is whether the defendant's alleged duty to the plaintiff could "have been satisfied without changes to the content posted by the website's users and without conducting a detailed investigation."

Id. (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016)).

Publishing constitutes "deciding whether to publish or to withdraw from publication third-party content." *Lemmon*, 995 F.3d at 1092. It also includes "editorial

decisions and functions ancillary to the decision to make content available." *In re Soc. Media*, 702 F. Supp. 3d at 827.

> Thus, publishing has been found to involve reviewing and editing, such as reviewing material submitted for publication, perhaps editing it for style or technical fluency, and deciding whether to exclude material. In general, it is any conduct rooted in the common sense and common definition of what a publisher does.

Id. (internal quotations and citations omitted).

Section 230 also protects tools that filter, pick, choose, digest, and organize content. *See* 47 U.S.C.(f)(4)(A)-(C). Algorithms used to recommend content to users are protected by Section 230, because "tools meant to facilitate the communication and content of others" constitute publishing. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019).

> Given the complexity with which online platforms function, it is not always clear whether a platform is merely acting as an interactive services provider and publisher of another's content, or if the platform's involvement or intervention in the posting or presentation of that content crosses the line into what courts generally refer to as "development."

Id. (quoting *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016)). If a platform provides "'neutral tools' for the creation or dissemination of content[,]" then Section 230 immunity applies. *In re Soc. Media*, 702 F. Supp. 3d at 828 (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008)). However, if the platform "materially alters the content," then "the tool is not neutral, and Section 230 does not bar liability." *Id.* (quoting *Roommates.Com*, 521 F.3d at 1174-75).

The State alleges that Instagram is not reasonably avoidable for many Young Users because Meta designed it to be highly addictive and to exploit Young Users' biologically limited capacity for self-control through an array of Instagram features such as notifications, ephemerality, auto-play and infinite scroll. Meta notifies Young Users

when another user follows them, likes their content, comments on their content, tags them, mentions them, sends them a message, or goes live. *See* Am. Compl., ¶ 147. Ephemeral content is only available on a temporary basis and not on a schedule convenient for the consumer. *See id.*, ¶ 154. The Stories feature displays user-created images, videos, and narratives for a maximum twenty-four hours before the content disappears. *See id.*, ¶ 155. Live gives users the ability to livestream videos during a specific session, after which the video is typically no longer available. *See id.*, ¶ 156.

Instagram partially displays additional content at the bottom of the user's screen, which allegedly makes it difficult for Young Users to disengage, because there is no natural end point to the display of new information. *See id.*, ¶¶ 165-66. Similar to infinite scroll, Stories show automatically and continuously play content, encouraging Young Users to remain on Instagram. *See id.*, ¶ 170. Videos on Reels automatically and perpetually play as the consumer swipes the screen up to the next video. Additional aspects of Reels, including the placement of the like, comment, save, and share buttons on top of the video allegedly reduce or prevent interruption and keep the consumer constantly viewing videos. *See id.*, ¶ 173.

The State alleges that Young Users' compulsive use of Instagram causes lack of sleep and related health outcomes, diminished in-person socialization skills, difficulty maintaining attention, increased hyperactivity, self-control challenges, increased depression and anxiety, and interruption of various brain development processes. *See* Am. Compl., ¶¶ 205-07, 210.

The Superior Court of California in *Social Media Cases* was presented with litigation against five companies operating social media platforms including Facebook, Instagram, YouTube, TikTok, and Snapchat. The plaintiffs alleged that, as children or

minor teenagers, they became addicted to the social media platforms as a result of the platforms' allegedly manipulative features that sought to maximize the time they spent on the sites and thereby maximize the platforms' advertising revenue. *See Soc. Media Cases*, 2023 WL 6847378, at *1. The plaintiffs alleged that, "as a result of their addiction, they suffered depression and anxiety, engaged in self-harm, became suicidal, and developed eating disorders." *Id.*

> For example, the Master Complaint alleges that TikTok is designed with "continuous scrolling," a feature of the platform that "makes it hard for users to disengage from the app," (Mast. Compl., ¶ 567) and that minor users cannot disable the "auto-play function" so that a "flow-state" is induced in the minds of the minor users (Mast. Compl., ¶ 590). The Master Complaint also alleges that some Plaintiffs suffer sleep disturbances because "Defendants' products, driven by IVR algorithms, deprive users of sleep by sending push notifications and emails at night, prompting children to re-engage with the apps when they should be sleeping." (Mast. Comp., ¶ 107 [also noting that disturbed sleep increases the risk of major depression and is associated with "future suicidal behavior in adolescents"].)

Id. at *31. "[T]he Master Complaint alleges harm from 'filters' and 'rewards' offered by Defendants. Plaintiffs allege, for example, that Defendants encourage minor users to create and post their own content using appearance-altering tools provided by Defendants that promote unhealthy 'body image issues.'" *Id.*

The court in *Social Media Cases* determined that the plaintiffs' claims were not barred by Section 230, "because the alleged wrongdoing does not 'treat[ ] [the provider] as the publisher or speaker of any information provided by another information content provider.'" *Id.* at *32 (quoting 47 U.S.C. § 230(c)(1)). Rather, the court determined the plaintiffs' allegations were "based on the allegedly addictive qualities of the interactive features of Defendants' social media sites[,]" which did not fall within the blanket

immunity of Section 230, because "Defendants are allegedly liable for their own actions, not for the content of third-party postings." *Id.*

"Section 230 does not bar a claim based on features of a social media site that have an adverse effect on users apart from the content of material published on the site." *Id.* at *30. "So long as providers are not punished for publishing third-party content, it is consistent with the purposes of Section 230 to recognize a common law duty that providers refrain from actions that injure minor users by inducing frequency and length of use of a social media platform to the point where a minor is addicted and can no longer control the information they receive from that platform." *Id.* at *32. "The duty to design a reasonably safe product is fully independent of [the platform's] role in monitoring or publishing third-party content." *Id.* at *33 (quoting *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092-93 (9th Cir. 2021)).

Social Media Cases is instructive here. The State's claims based on the interactive operational features of Instagram[2] do not seek to require that Meta publish or de-publish any third-party content posted on Instagram. Rather, the features themselves allegedly operate to addict and harm Young Users, regardless of the particular third-party content viewed by the Young Users. Although the Amended Complaint contains allegations that could be read as seeking to hold Defendants liable for publishing third-party content, it also contains allegations that the harms to consumers complained of are caused by Meta's design and operation of Instagram. Viewing the Amended Complaint in the light most favorable to the State, the State's Amended Complaint sufficiently alleges that it was Meta's design of Instagram itself that caused Young Users to become

[2] The State's allegations concerning Instagram features that maximize Young Users' engagement do not challenge algorithms that decide what content to publish.

addicted and to suffer harm as a result.[3] Because it appears from the factual allegations and the applicable law that the State could prove a set of facts that would entitle it to relief on its claims, the motion to dismiss Count 1 of the Amended Complaint premised on Section 230 is respectfully denied. *See Snyder*, 986 S.W.2d at 554.

For its deception claim, the State alleges that, by misrepresenting Instagram's safety, the incidence of harmful experiences on Instagram, and the efficacy of Instagram's well-being related platform features, Defendants engaged in deceptive practices prohibited by the TCPA. The State further alleges that Defendants failed to disclose the harms associated with Instagram in general and with certain Instagram features, which Defendants knew had a harmful effect on consumers' mental health and well-being. By allegedly downplaying the risks of Instagram use, Defendants purportedly led reasonable consumers to believe that Instagram is a safer platform than it really is.

Some of the State's deception claim could be construed as being based on specific third-party content (i.e., cyberbullying, harassment, self-harm, negative appearance and social comparison-provoking content, unwanted advances). These allegations could be interpreted as being premised on Meta's role as a publisher, which would be prohibited under Section 230. The Amended Complaint could also be construed as being based on conduct other than the publishing of third-party content, such as failing to disclose or misrepresenting platform features allegedly known to risk harm to Young Users. Under the latter interpretation, liability is alleged to arise "from [Defendants'] knowledge, based on public studies or internal research, of the ways that their products harm" their

[3] It could very well be that a jury finds that Young Users became addicted to Instagram because of the third-party content posted thereon. However, this Court's task, when presented with a motion to dismiss, is to test the legal sufficiency of the Amended Complaint, not the strength of the State's proof. *See Webb*, 346 S.W.3d at 426.

consumers. *In re Soc. Media*, 702 F.Supp.3d at 834. As such, Section 230 immunity would not apply "because these adverse effects that allegedly should have been disclosed result from Meta's own conduct, not from any particular content displayed." *Soc. Media Cases*, 2023 WL 6847378, at *46.

Viewing the Amended Complaint in the light most favorable to the State, it appears from the factual allegations and the applicable law that the State could prove a set of facts that would entitle it to relief on its claims. *See Snyder*, 986 S.W.2d at 554. Accordingly, the motion to dismiss Count 2 of the Amended Complaint premised on Section 230 is respectfully denied.

First Amendment

"The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). "[A]s a general matter, . . . government has no power to restrict expression [of speech] because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011)(citation omitted). "[A] State possesses legitimate power to protect children from harm . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed." *Id.* at 794-95 (citations omitted). "'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Id.* at 795 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975)).

Under the First Amendment, the acts of dissemination, disclosing and publishing information are considered speech. *See In re Soc. Media*, 702 F. Supp. 3d at 835 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Bartnicki v. Vopper*, 532 U.S. 514,

527 (2001)); *Newspaper Printing Corp. v. Galbreath*, 580 S.W.2d 777, 779 (Tenn. 1979)(First Amendment provides the freedom to publish constitutionally protected speech "as the publisher sees fit."). "It is undisputed that the First Amendment generally protects a publisher from liability where that publisher organized, compiled, and disseminated information that then harmed the plaintiff." *Soc. Media Cases*, 2023 WL 6847378, at *38. However, "the mere fact that the conduct at issue involves or includes speech does not necessarily shield a defendant from liability." *Id.* at *36.

While the Amended Complaint could be read to allege that consumers were harmed by third-party content found on Instagram, it is undisputed that there is no single type of content viewed by all consumers. Rather, the particular content viewed is custom tailored to each consumer. As such, the allegedly addictive and harmful features of Instagram are alleged to work regardless of the third-party content viewed. To this end, the Amended Complaint can be read to allege that it is the design and the way Instagram functions that makes it addictive and thus harmful to consumers, especially Young Users, or that certain design features (such as filters) directly harms Young Users, especially young women, not the content itself.

Under this interpretation, Defendants cannot be analogized to mere publishers of information. *See id.* at *38 ("Design features of the platforms (such as endless scroll or filters) cannot readily be analogized to mere editorial decisions made by a publisher."). Moreover, the Court "must make sure" it "carefully parse[s] . . . how the regulated activities actually function before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit." *Moody v.*

NetChoice, LLC, 144 S. Ct. 2383, 2411-12 (2024)(Jackson, J., concurring).[4] Thus, further factual development is necessary before Meta's First Amendment challenge can be fully and fairly addressed.

Viewing the Amended Complaint in the light most favorable to the State, it appears from the factual allegations and the applicable law that the State could prove a set of facts that would entitle it to relief on its claims. Accordingly, the motion to dismiss Count 1 of the Amended Complaint premised on the First Amendment is respectfully denied.

"Liability for failure to warn about specific third-party content could be interpreted as premised on Meta's role as publisher in violation of both Section 230 and the First Amendment." *Soc. Media Cases*, 2023 WL 6847378, at *46. However,

> [i]f a potential user were deterred from consuming content on Meta's platforms due to a warning about possible addiction, the deterrence would not be based on a government sanction of the content on the platforms. Therefore, the First Amendment is not implicated by failure to provide warnings concerning potential harms from features created by Defendants to maximize minors' usage.

Id., at *47. "Similarly, the First Amendment does not bar a claim of failure to warn of potential injuries from Meta's social media platform design." *Id.*

Some of the State's deception claim allegations could be construed as being based on specific third-party content (i.e., cyberbullying, harassment, self-harm, negative appearance and social comparison-provoking content, unwanted advances). These allegations could be interpreted as being premised on Meta's role as a publisher, which would be prohibited under the First Amendment. However, the Amended Complaint

[4] *Moody* concerns a facial First Amendment challenge to Florida and Texas laws that regulate certain social media content moderation decisions, such as removing or deprioritizing posts or accounts based on their viewpoint. *Moody* does not control this enforcement action, as it concerns Meta's allegedly unfair design choices and misrepresentations to consumers, not governmental restriction on content and viewpoint.

could also be construed as being based on conduct other than the publishing of third-party content, such as failing to disclose or misrepresenting platform features allegedly known to risk harm to Young Users. Under the latter interpretation, liability is alleged to arise from Defendants' knowledge of the ways their products allegedly harm consumers, especially Young Users.[5]

The First Amendment does not protect Defendants from liability for their own failure to warn, as the adverse effects that allegedly should have been disclosed result from Defendants' own conduct, not from any particular third-party content displayed. Stated differently, Meta's potential liability springs from its capacity as a creator of features designed to maximize engagement for Young Users, not from its role as publisher. Taking the allegations in the Amended Complaint in the light most favorable to the State, it appears from the Amended Complaint's factual allegations and the applicable law that the State could prove a set of facts that would entitle it to relief on its deception claims.

Defendants assert that, to the extent the State identifies any misrepresentations made by Meta, as opposed to any omissions or failure to disclose, those statements are protected by the First Amendment. More specifically, Defendants assert that, to the

[5] In *NetChoice v. Bonta*, 113 F.4th 1101 (9th Cir. 2024), a trade association of online businesses sued the State of California for declaratory and injunctive relief, seeking to invalidate statutes requiring "covered businesses to identify and disclose to the government potential risks that minors might be exposed to potentially harmful content [online] and [to] develop a timed plan to mitigate or eliminate the identified risks before publication." *Id.* at 1117. The district court granted a preliminary injunction, holding that the challenged statutes likely violated the First Amendment. *See id.* at 1101. In affirming the district court's preliminary injunction, the 9th Circuit concluded that Plaintiff was likely to succeed in showing that the statutes facially violate the First Amendment because "the risk that businesses must measure and disclose to the government is the risk that children will be exposed to disfavored speech online." *Id.* at 1121. As stated above, the allegations in Amended Complaint can be construed as being based on conduct other than the publishing of third-party content, such as failing to disclose or misrepresenting platform features allegedly known to risk harm to Young Users. "If commercial speech is misleading . . . , it is not entitled to [First Amendment] protection." *Id.* at 1119. Furthermore, a statute "that compels businesses to measure and disclose to the government certain types of risks potentially created by their services might not create a problem." *Id.* at 1120-21.

extent the State's deception claim is based on statements made to Congress in response to questioning,[6] it is barred by the First Amendment under the *Noerr-Pennington* doctrine. *See* Am. Compl., ¶¶ 358-61, 381-83, 386-90, 394-400. The State asserts that its TCPA claims do not challenge Meta's efforts to petition the government; rather, Meta's congressional testimony is one example of a broader effort by Meta to develop trust among Tennesseans that Instagram is a safe place for Young Users. *See* Pl.'s Resp., p. 13.

> The *Noerr-Pennington* doctrine acknowledges that the right to petition the government is a freedom that is protected by the Bill of Rights. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Under the *Noerr-Pennington* doctrine, civil actions are barred where the activity challenged under federal statute or state law consists of "petitioning legislatures, administrative bodies, and the courts," even if the defendant's actions had an "anticompetitive or otherwise injurious purpose or effect." *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1316-17 (E.D.N.Y. 1996); *see United Mine Worker of Am. v. Pennington*, 381 U.S. 657 (1965). *Noerr-Pennington* has also been applied to bar liability in state common law tort claims, including negligence and products liability claims, for statements made in the course of petitioning the government. *See Hamilton*, 935 F. Supp. at 1317.

Tuosto v. Phillip Morris USA Inc., No. 05 Civ. 9384(PKL), 2007 WL 2398507, at *5 (S.D.N.Y. Aug. 21, 2007).

> There are two exceptions to the protective reach of the *Noerr-Pennington* doctrine: the "mere sham" exception and the "unethical" exception. *See id.* Statements made in the course of petitioning Congress are considered a "mere sham" when the actor making the statements does not have a true interest in the outcome of the effort to influence government because the effort "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144; *see, e.g., Oregon Natural Res. Council v. Mohla*, 944 F.2d 531, 535 (9th Cir. 1991). The "unethical" exception denies *Noerr-Pennington* protection to statements made while petitioning the government "where the political activity involved illegal, corrupt or unethical means." *Hamilton*, 935 F. Supp. at 1317.

[6] The alleged statements were made in response to questions from Congress in part to persuade Congress of the public benefits of Meta's services and concerned potential efforts by Congress to pass legislation.

Id. "Notwithstanding the 'unethical' and 'mere sham' exceptions, *Noerr-Pennington* protection has been extended to all advocacy intended to influence government action, including to allegedly false statements." *Id.* (citations omitted).

The question of whether there should be absolute immunity for conduct including intentional misrepresentations or fraud should be analyzed under the sham exception. *See In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 614 (N.D. Cal. 2020); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). "Whether or not an otherwise non-actionable statement falls within the sham exception is generally a question of fact not appropriate for resolution on a motion to dismiss." *Id.* Additionally, while the *Noerr-Pennington* doctrine provides immunity from liability for simply petitioning government, the doctrine does not foreclose use of communications to government as evidence of, *inter alia*, knowledge, intent, or state of mind. *See In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 181 F. Supp. 3d 278, 306 (E.D. Pa. 2016).

Regarding the State's claim that Meta created the false impression that Instagram is a safe platform where users were unlikely to experience significant harm and where users' mental health is protected, *see* Am. Compl., ¶ 24, Defendants assert that Meta's statements regarding safety or the prioritization of safety are statements of opinion entitled to First Amendment protection. "[S]tatements of opinion are protected by the First Amendment unless they 'imply a false assertion of fact.' Even seemingly factual statements 'are protected by the First Amendment if they cannot reasonably be

interpreted as stating actual facts about their target.'" *Berry v. Schmitt*, 688 F.3d 290, 303 (6th Cir. 2012)(quoting *Standing Comm. v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995)).

> "[A] company has a duty to disclose hard information but not soft information unless other criteria are met." *Weiner v. Tivity Health, Inc.*, 365 F. Supp. 3d 900, 913 (M.D. Tenn. 2019)(quoting *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 572 (6th Cir. 2008)). "Hard information is typically historical information or other factual information that is objectively verifiable. Such information is to be contrasted with 'soft' information, which includes predications and matters of opinion." *Id.* (quoting *Zaluski*, 527 F.3d at 572). With regard to soft information, "a defendant may choose silence or speech based on the then-known factual basis, but it cannot choose half-truths." *Id.* (quoting *In re Ford* [*Motor Co. Sec. Litig.*], 381 F.3d [563,] 569 [(6th Cir. 2004)]; *see also City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 675 (6th Cir. 2005)("the protections for soft information end where speech begins.")(internal citation omitted). "Thus, once a company has chosen to speak on an issue – even an issue it had no independent obligation to address – it cannot omit material facts related to that issue so as to make its disclosure misleading." *Weiner*, 365 F. Supp. 3d at 913 (citation and internal quotations omitted).

St. Clair Cnty. Emps. Ret. Sys. v. Acadia Healthcare Co., Inc., No. 3:18-cv-00988, 2023 WL 195370, at *4 (M.D. Tenn. Jan. 20, 2021).

The question of whether alleged misrepresentations or omissions are material is a mixed question of law and fact that courts generally reserve for the trier of fact. *See id.* at *6; *Helwig v. Vencor, Inc.*, 251 F.3d 540, 563 (6th Cir. 2001). "The courts are also more inclined to send close cases to the jury when the representation at issue relates directly to . . . safety." *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 100 (Tenn. Ct. App. 1996). For these and the foregoing reasons, the motion to dismiss Count 2 of the Amended Complaint on the grounds of First Amendment protection is respectfully denied.

TCPA

The TCPA is to be interpreted and construed "in accordance with interpretations of 15 U.S.C.A. § 45(a)(1) by the Federal Trade Commission and the federal courts." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005)(citing Tenn. Code Ann. § 47-18-115). One purpose of the TCPA "is to provide additional, supplementary state law remedies to consumers victimized by unfair or deceptive business acts or practices that were committed in Tennessee in whole or in part." *Id.*; Tenn. Code Ann. §§ 47-18-102(2). "[T]he TCPA is explicitly remedial, and Tennessee courts are therefore required to construe it liberally to protect consumers in Tennessee and elsewhere." *Id.*

The TCPA specifically enumerates 62 unfair or deceptive acts or practices that are prohibited and deemed unlawful under the statute. *See* Tenn. Code Ann. § 47-18-104(b). A deceptive act or practice is "one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact." *Tucker*, 180 S.W.3d at 116. An unfair act is "an act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." *Id.* at 116-17. While these standards are legal matters for a court to determine, "whether a specific representation in a particular case is 'unfair' or 'deceptive' is a question of fact." *Id.* at 116.

Defendants argue that the State's TCPA claims fail because 1) the Amended Complaint does not allege that any unfair or deceptive acts or practices occurred in Davidson County; 2) the TCPA exempts entities that engage in the dissemination of information; 3) the Amended Complaint does not allege any acts or practices affecting the conduct of any trade or commerce; and 4) the alleged deceptions or

misrepresentations identified are not statements of fact and/or the Amended Complaint does not allege their materiality.

The Attorney General may bring a TCPA action or proceeding in any court of competent jurisdiction "in the county where the alleged unfair or deceptive act or practice took place, is taking place, or is about to take place, or in the county in which such person resides, has such person's principal place of business, conducts, transacts, or has transacted business[.]" Tenn. Code Ann. § 47-18-108(a)(4); Tenn. Code Ann. § 47-18-114. The Amended Complaint alleges that Davidson is a county in which alleged violations took place and where Defendants have conducted or transacted business. *See* Am. Compl., ¶¶ 35, 85-90, 95-99, 101-02, 113. Taking the allegations in the Amended Complaint in the light most favorable to the State, these allegations are sufficient to survive the motion to dismiss.

The TCPA does not apply to

> [a] publisher, broadcaster, or other person principally engaged in the preparation or dissemination of information or the reproduction of printed or pictorial matter, who has prepared or disseminated such information or matter on behalf of others without notification from the attorney general that the information or matter violates or is being used as a means to violate this part[.]

Tenn. Code Ann. § 47-18-111(a)(2).

Defendants argue that Meta is principally engaged in the dissemination of information as described in this section; thus, it is exempt from the TCPA. This exemption applies in cases where a plaintiff seeks to hold a defendant liable for publishing third-party content and disseminating that information on behalf of others. As discussed more thoroughly above, the State's Amended Complaint can be interpreted as

seeking to hold Meta liable for its own misconduct, not for the third-party content Meta disseminates on others' behalf.

The TCPA is limited to unfair or deceptive acts or practices that affect the conduct of any trade or commerce. *See* Tenn. Code Ann. § 47-18-104(a). "'Trade,' 'commerce,' or 'consumer transaction' means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated." Tenn. Code Ann. § 47-18-103(24). Thus, the TCPA guards against unfair or deceptive acts or practices that affect the advertising or distribution of services and other things of value wherever situated. Unfair or deceptive acts or practices affecting the conduct of any trade or commerce include "engaging in any . . . act or practice which is deceptive to the consumer or to any other person[.]" Tenn. Code Ann. § 47-18-104(b)(27). An exchange of money or transfer of valuable consideration is not a requirement written into the TCPA.

The Amended Complaint alleges that Meta engages in trade and commerce by offering advertisements and providing Instagram in Tennessee. *See* Am. Compl., ¶ 415. Meta allegedly employs unfair and deceptive tactics, such as designing and featuring Instagram in a manner that induces compulsive use, to fuel its collection of data from consumers, which it allegedly monetizes by selling targeted advertising. Allegedly, Meta intentionally exploits the developmental nature of Young Users' brains, causing them to spend more time on Instagram and creating an obstacle to their free choice. *See id.*, ¶ 420. Defendants also allegedly deprive consumers of free and informed choice regarding Instagram by withholding important information about and misrepresenting the degree to which Instagram induces compulsive use, the negative impact Instagram has on mental

health, the efficacy of Instagram's well-being features, and the frequency of harmful experiences on Instagram. *See id.*, ¶¶ 422, 429-31. These allegations meet the definition of unfair or deceptive acts or practices affecting the conduct of any trade or commerce under the TCPA.

Defendants argue that the Amended Complaint fails to allege deceptive practices or misrepresentations. Defendants contend that many of the identified statements are not statements of fact and, thus, cannot serve as the basis of a TCPA claim. The TCPA does not define "unfair" or "deceptive." Thus "the standards to be used in determining whether a representation is 'unfair' or 'deceptive' under the TCPA are legal matters to be decided by the courts." *Tucker*, 180 S.W.3d at 116. "However, whether a specific representation in a particular case is 'unfair' or 'deceptive' is a question of fact." *Id.* "Misrepresentations that would not be actionable as common-law fraud may nevertheless be actionable under the provisions of the . . . TCPA." *Id.* at 115. "The TCPA applies to any act or practice that is unfair or deceptive to consumers." *Id.* (citing Tenn. Code Ann. §§ 47-18-104(a), -104(b)(27)).

> Although Tennessee courts have not had many opportunities to construe the terms "unfair" and "deceptive" under the TCPA, the Federal Trade Commission and the federal courts have developed a substantial and finely honed body of law construing these terms in the context of the FTC Act. The General Assembly has instructed us to look to the federal understanding of these terms in interpreting them in the TCPA. Tenn. Code Ann. § 47-18-115. Accordingly, we may look to the federal law defining these key terms to determine how they should be applied in this case.
>
> The concept of deceptiveness is a broader, more flexible standard of actionable merchant misconduct than the traditional remedy of common-law fraud. A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact. Thus, for the purposes of the TCPA and other little FTC acts, the essence of deception is misleading consumers by a merchant's statements, silence, or actions. JONATHAN SHELDON &

> CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.3.1, at 118-19 (5th ed. 2001) [hereinafter UNFAIR AND DECEPTIVE ACTS AND PRACTICES].
>
> The concept of unfairness is even broader than the concept of deceptiveness, and it applies to various abusive business practices that are not necessarily deceptive. UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.3.3.1, at 156. In the 1994 legislation reauthorizing the Federal Trade Commission, Congress undertook to codify the Commission's policy statement on unfairness by stating that an act or practice should not be deemed unfair "unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C.A. § 45(n).
>
> To be considered "substantial," consumer injury must be more than trivial or speculative. *Tungate v. MacLean-Stevens Studios, Inc.*, 714 A.2d 792, 797 (Me. 1998); *Legg v. Castruccio*, 100 Md. App. 748, 642 A.2d 906, 917 (1994). Substantial injury usually involves monetary injury or unwarranted health and safety risks. UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.3.2.2, at 154. Consumer injury will be considered substantial if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988).
>
> Even if an act or practice causes or is likely to cause substantial injury, it will not be considered unfair unless the injury is not reasonably avoidable by consumers themselves. Consumers cannot reasonably avoid injury when a merchant's sales practices unreasonably create or take advantage of an obstacle to the free exercise of consumer decision-making. Practices that unreasonably interfere with consumer decision-making include (1) withholding important information from consumers, (2) overt coercion, or (3) exercising undue influence over a highly susceptible class of consumers. UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.3.2.3, at 155.

Tucker, 180 S.W.3d at 116-17.

Company statements of opinion or puffery are "evaluated in context to determine if they convey more than just a generalized optimism." *Grae v. Corr. Corp. of Am.*, No. 3:16-CV-2267, 2017 WL 6442145, at *14 (M.D. Tenn. Dec. 18, 2017). "[V]ague statements not subject to verification by proof are generally deemed non-actionable

puffery. But 'opinion or puffery . . . in particular contexts when it is both factual and material . . . may be actionable.'" *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 674 (6th Cir. 2005)(quoting *Longman v. Food Lion, Inc.*, 197 F.3d 675, 683 (4th Cir. 1999))(emphasis omitted); *see also Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989)("What might be innocuous 'puffery' or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact when used to emphasize and induce reliance upon such a representation.").

Whether an alleged misrepresentation or omission is material is a mixed question of law and fact. *See St. Clair Cnty. Emps. Ret. Sys.*, 2021 WL 195370, at *6. "A claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.'" *Kraft, Inc v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)(quoting *Matter of Cliffdale Assocs.*, 103 F.T.C. 110, 1984 WL 565319, at *37 (FTC Mar. 23, 1984)). "A presumption of materiality is applied 'with three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned.'" *State ex rel. Slatery v. HRC Med. Ctrs., Inc.*, 603 S.W.3d 1, 24 (Tenn. Ct. App. 2019)(quoting *Kraft*, 970 F.2d at 322-23).

"Successfully pleading an actionable material misrepresentation or omission requires a plaintiff to allege facts demonstrating two things: (1) that a defendant made a statement or omission that was false or misleading; and (2) that this statement or omission concerned a material fact." *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 470 (6th Cir. 2014). "[C]ontext must inform determinations of materiality." *St. Clair Cnty. Emps. Ret. Sys.*, 2021 WL 195370, at *6; *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d at 478

("[A]s we have said and the Supreme Court has made clear, context matters when analyzing materiality."). Given these principles and viewing the Amended Complaint in the light most favorable to the State, the Court declines to dismiss the Amended Complaint at this early stage, as a reasonable juror might conclude that Defendants' statements or omissions were actionable material misrepresentations.

Defendants assert that the State's allegations regarding the Bad Experiences and Encounters Framework ("BEEF") do not establish that the challenged statements regarding the Community Standard Enforcement Reports ("CSERs") are false or misleading. Defendants assert that the CSERs measure the prevalence of community-standards-violating content (i.e., the percentage of views that were of content violating Meta's community standards) whereas BEEF reports the percentage of users who self-report having seen content that falls into certain inherently subjective categories. Stated differently, BEEF does not address the same metrics as the CSERs; thus, Defendants contend BEEF does not contradict the CSERs.

The Amended Complaint alleges that the CSERs create the impression that Instagram is a safe platform on which harmful content is rarely encountered. *See* Am. Compl., ¶ 307-08. The Amended Complaint claims that Meta uses misleading terminology in the CSERs, which tout the prevalence of community-standards-violating conduct, rather than the higher prevalence of harmful content. *See id.*, ¶¶ 310-11. The Amended Complaint alleges that Meta exploits that confusion to inflate the CSERs' significance to consumers. *See id.*, ¶¶ 313-16; 318-19. The Amended Complaint further alleges that Meta's internal surveys, such as BEEF, make it clear that harmful content is much more prevalent on Instagram than the CSERs suggest. The Amended Complaint alleges that a former Meta executive testified under oath that Meta intentionally uses the

CSERs to create a misleading picture of the harmfulness of Meta's platforms. *See id.*, ¶¶ 333-39.

At this stage in the proceedings, the Court must take the State's factual allegations as true and consider all reasonable inferences in its favor. *See Webb*, 346 S.W.3d at 427. Whether the BEEF survey undermines the CSERs is a factual question for resolution at a later stage in the proceedings. *See FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 631 (D.N.J. 2014) *aff'd*, 799 F.3d 236 (3d Cir. 2015)("[T]he impression that a reasonable consumer would have had after reading the privacy policy seems to involve fact issues that the Court cannot resolve at this juncture."); *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008)("The meaning of an advertisement, the claims or net impressions communicated to reasonable consumers, is fundamentally a question of fact.").

As it appears from the factual allegations and the applicable law that the State could prove a set of facts that would entitle it to relief on its TCPA claims, the motion to dismiss the Amended Complaint on the grounds of failure to state a claim is respectfully denied.

V. Conclusion

Defendants have sufficient minimum contacts with Tennessee for this Court to exercise specific personal jurisdiction over them. At this stage of the proceedings, the Court must view the Amended Complaint in the light most favorable to the State. Because the allegations in the Amended Complaint can be construed as being based on conduct other than the publishing of third-party content, Section 230 immunity and First Amendment protections do not bar the Amended Complaint. Additionally, it appears

from the factual allegations and the applicable law that the State could prove a set of facts that would entitle it to relief on its TCPA claims.

> [I]t must be remembered that we are addressing the standard in assessing the sufficiency of a single document filed at the very beginning of a case – the complaint. Our motion-to-dismiss jurisprudence reflects the principle that this stage of the proceedings is particularly ill-suited for an evaluation of the likelihood of success on the merits or of the weight of the facts pleaded, or as a docket-clearing mechanism.

Webb, 346 S.W.3d at 437. "The prima facie case . . . is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

For these and the foregoing reasons, the Court respectfully denies the motion to dismiss filed by Meta Platforms, Inc. and Instagram, LLC.

IT IS SO ORDERED.

RUSSELL T. PERKINS, CHANCELLOR

cc: Matthew D. Janssen, Esq.
Brian T. Phelps, Esq.
Christopher A. Dunbar, Esq.
Keaton Murphy, Esq.
Robert E. Cooper, Esq.
Jessalyn H. Zeigler, Esq.
Courtney A. Hunter, Esq.
Gregory L. Halperin, Esq.
Christian J. Pistilli, Esq.

MAILED 10/17/24

The Order of the Court is stated below:
Dated: July 25, 2024 09:49:07 AM
/s/ KENT HOLMBERG
District Court Judge

SEAN D. REYES

UTAH ATTORNEY GENERAL

Douglas Crapo (14620)

Peishen Zhou (18596)

Assistant Attorneys General

160 East 300 South, 5th Floor

Salt Lake City, Utah 84114

Tel: (801) 366-0310

crapo@agutah.gov

peishenzhou@agutah.gov

Attorneys for Plaintiff Utah Division of Consumer Protection

THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

UTAH DIVISION OF CONSUMER PROTECTION, *Plaintiff*,	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS** Case No.: 230908060

v. **META PLATFORMS, INC.**, and **INSTAGRAM, LLC**, *Defendants.*	Honorable Kent Holmberg **Tier III**

On June 11, 2024, the Court conducted a hearing on Defendant Meta Platforms, Inc., and Instagram, LLC's (collectively "Meta" or "Defendants") Motion to Dismiss. Plaintiff Utah Division of Consumer Protection (the "Division"), a subdivision of the Utah Department of Commerce, was present and represented by counsel, as were Defendants. Consistent with the oral ruling announced at the hearing, which is fully incorporated into this written Order, the Court hereby DENIES Meta's Motion to Dismiss in full.

BACKGROUND

On October 24, 2023, the Division filed a two-count Complaint against Meta, alleging violations of the Utah Consumer Sales Practices Act ("UCSPA"). Count I alleges that the Defendants engaged in unconscionable acts and practices exploiting children's neurological vulnerabilities by designing and continually refining addictive features on their social media platforms, Facebook and Instagram, to hook children into spending more time on those platforms. Count II alleges that the Defendants engaged in deceptive acts and practices by making material misrepresentations and omissions about the safety of their platforms, including the use of addictive design features.

The Complaint alleges that Meta operates social media platforms including Facebook and Instagram (the "social media platforms" or "platforms"). Compl. ¶¶ 16–18. The Complaint alleges that the foundation of Meta's business model with respect to these platforms is targeted advertising. *Id.* ¶¶ 35–38.

The Division further alleges Meta thus strives to maximize the time users spend on the platforms and the amount of data Meta can gather from users so that it can sell more advertisements. *Id.* According to the Complaint, teenagers are among the most valuable advertising demographics, and brands look to advertise where teenagers are engaging online. *Id.* ¶ 40. The Complaint further alleges that Meta has aggressively sought to attract teenagers to its platforms. *Id.* ¶¶ 41–47. According to the Complaint, one-third of the children in Utah are daily active users of Facebook, and over half of Utah children between the ages of ten and nineteen use Instagram at least monthly. *Id.* ¶¶ 48, 51. The Division alleges that Meta makes more money

when users spend more time on its products, creating an incentive to increase the time that Utah users spend on its platforms. *Id.* ¶¶ 35–38.

The Complaint goes on to allege that Meta has responded to this incentive by adding features that addict and consume the attention of Utah's children to the detriment of their wellbeing. *Id.* ¶ 53–113. This is the very heart of the claims in the Division's Complaint. The Division alleges that Meta has implemented a variety of addictive design features designed to trick children into spending as much time as possible on the platforms and that these features do cause harm to children. *Id.* The Division alleges excessive and compulsive use of the platforms leads to depression, anxiety, body dysmorphia, eating disorders, self-harm, suicidal ideation and poor sleep patterns. *Id.* ¶¶ 92–113, 119, 126–27, 155, 171, 205–10. The Complaint alleges that despite knowledge of these and other harms, Meta has repeatedly represented the safety of its platforms and knowingly concealed the dangers. *Id.* ¶¶ 134–228.

The Division also alleges that Meta purposely directs commercial activities to Utah by maintaining data centers in the state, providing social networking services to Utah users, encouraging those users to view, like, and comment on posts exhibited on Meta's platforms, and selling advertising to companies which target Utah users. *Id.* ¶¶ 24–32. According to the Division, Meta has a business relationship with nearly 70 percent of Utahns through use of its algorithms and targeted alerts. *Id.* ¶¶ 4–5, 28.

The Complaint further alleges that Meta used features like personalized content, recommendation algorithms, distracting notifications, infinite scroll, reels, ephemeral content, and auto-play. *Id.* ¶¶ 237–39.

The Defendants filed a joint Motion to Dismiss the Complaint in its entirety on December 22, 2023. The Motion argued that (1) the State of Utah does not have personal jurisdiction over Meta; (2) the Division's claims would impose liability on the Defendants for publication of third-party content, which is barred by Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230; (3) the Division's claims would implicate Meta's right to freedom of speech under the First Amendment to the U.S. Constitution; (4) the Complaint fails to state a claim under the UCSPA because it provides immunity to entities that are engaged in the dissemination of information or the reproduction of printed or pictorial matter, Utah Code Section 13-11-22(1)(b), which the Defendants claim applies to them as a matter of law; (5) the Complaint cannot or does not allege that the Defendants undertook any conduct in connection with a consumer transaction as required by the UCSPA; and (6) the Complaint fails to allege facts establishing the elements of a claim for a deceptive or an unconscionable practice under the UCSPA.

LEGAL STANDARD

In addressing a motion to dismiss under Rule 12(b), a District Court must accept the factual allegations in the Complaint as true and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). In other words, assuming all the facts in the Complaint are true, and any reasonable inferences added on top of those facts, the Defendants must show that, as a matter of law, the Division cannot make its claim. Dismissal is justified only when the allegations of a complaint clearly demonstrate that the plaintiff does not have a claim. In ruling on a motion to dismiss, a District Court makes no findings as to the ultimate strength of either a plaintiff's claims or a defendant's defenses, but instead accepts the

facts in the Complaint as true. At the pleading stage, the Court is not making any decisions about how valid the Division's claims or the Defendants' defenses are. Both sides make their arguments, and all the Court considers is what is in the Complaint.

CONCLUSIONS OF LAW

A. The Division Has Adequately Alleged Specific Personal Jurisdiction over Meta.

First, on the issue of personal jurisdiction, the Division did not argue general jurisdiction, so only specific personal jurisdiction was at issue. Specific jurisdiction exists if (1) the Defendants purposefully availed themselves of the protection of Utah's laws, including by directing activities at the forum; (2) the claim arises out of or relates to these forum-based contacts; and (3) the exercise of personal jurisdiction is fair and reasonable. *Synergetics v. Marathon Ranching Co.*, 701 P.2d 1106, 1110 (Utah 1985).

First, has the Division established the purposeful direction prong of the test for specific personal jurisdiction by showing that the Defendants purposely availed themselves of the privilege of conducting activities within the State of Utah? The Division alleges that Meta purposefully directs commercial activities to Utah by maintaining data centers in the State, providing social networking services to Utah users, encouraging those users to view, like, and comment on posts exhibited on Meta's platform, and selling advertising to companies which target Utah users. Compl. ¶¶ 24–32.

It is true that the mere operation of a commercial website accessible to users nationally and internationally does not amount to purposeful direction, *e.g.*, *Admar Int'l v. Eastrock, LLC*, 18 F.4th 783, 785 (5th Cir. 2021), but the Defendants are doing much more than merely operating a commercial website. In this case, the Complaint alleges that the Defendants have intentionally directed their activity or operation at Utah rather than just having the activity or

operation accessible there. A party purposely avails itself of the benefits of conducting business in a state by deliberately engaging in significant activities within the state or by creating continuing obligations between themselves and residents of that state.

The Division has made a *prima facie* showing that the Defendants purposely availed themselves of the benefit of conducting business in Utah. According to the Division, Meta has a business relationship with nearly 70 percent of Utahns through the use of its algorithms and targeted alerts. Compl. ¶¶ 4–5, 28. The Complaint alleges that Meta deliberately and significantly engages with its Utah customers in a way that encourages their continuous use of the platforms to the benefit of the Defendants and their advertisers. The nature of the Defendants' contacts, which includes targeting Utahns with advertisements all in an effort to allegedly maximize profits from Utah customers, satisfies the purposeful availment requirement. The Complaint sufficiently alleges that Defendants purposely avail themselves of Utah law by serving content to, collecting data from, and targeting advertisements to Utah users—creating a Utah-specific experience inside the Defendants' social media apps.

Second, in evaluating personal jurisdiction the Court must examine whether the Defendants' contacts are sufficiently related to the claims in this case so that it can be said that the claim arises out of these contacts. The heart and soul of the Complaint alleges facts that draw a direct line between the Defendants' activities in this state and the alleged causes of action.

To name a few of the allegations in the Complaint, Meta operates social media platforms including Facebook and Instagram. Compl. ¶¶ 16–18. The foundation of their alleged business model with respect to these platforms is targeted advertising. *Id.* ¶¶ 35–38. The Division further alleges Meta thus strives to maximize the time users spend on the platforms and the amount of

data Meta can gather from users so that it can sell more advertisements. *Id.* The Complaint alleges that teenagers are among the most valuable advertising demographics, and brands look to advertise where teenagers are engaging online. *Id.* ¶ 40. Consequently, according to the Complaint, Meta has aggressively sought to attract teenagers to its platforms. *Id.* ¶¶ 41–47. Continuing on with the allegations in the Complaint, one-third of the children in Utah are daily active users of Facebook. *Id.* ¶¶ 48, 51. Over half of Utah children between the ages of ten and nineteen use Instagram at least monthly. *Id.* The Division goes on to allege that Meta makes more money when users spend more time on its products, creating an incentive to increase the time that Utah users spend on their platforms. *Id.* ¶¶ 35–38.

The Defendants argue that they do not specifically target Utah, and that may turn out to be a true fact; however, the allegations in the Complaint and the evidence that has been submitted to the Court supports the *prima facie* case that would establish personal jurisdiction.

The Complaint goes on to allege that Meta has responded to this incentive by adding features that addict and consume the attention of Utah's children to the detriment of their wellbeing. *Id.* ¶ 53–113. This is the very heart of the claims in the Division's complaint. The Division alleges that Meta has implemented a variety of addictive design features designed to trick children into spending as much time as possible on the platforms, and these features do cause harm to children. *Id.* It alleges excessive and compulsive use of the platforms leading to depression, anxiety, body dysmorphia, eating disorders, self-harm, suicidal ideation, and poor sleep patterns. *Id.* ¶¶ 92–113, 119, 126–27, 155, 171, 205–10. The Complaint alleges that despite knowledge of these and other harms, Meta has repeatedly represented the safety of its platform and knowingly concealed the dangers. *Id.* ¶¶ 134–228.

Under the Complaint's allegations, the Defendants do target Utah. While they target other areas of the country as well, Defendants certainly target Utah and Utah youth both with targeted algorithms and by selling advertising targeted to Utah youth. The Defendants have a significant business presence in Utah, as alleged in the Complaint, to obtain Utah youth as customers, and harvest their data, which Defendants then sell and use to deliver advertisements directed at Utah youth.

The Defendants' arguments that they are not subject to the Court's jurisdiction lack any credibility. Utah has a strong interest in providing a forum to adjudicate its consumer protection laws, and it is entirely reasonable for the Defendants to expect that they would be haled into Utah court especially considering the extent to which the Defendants benefit from their business operations and customer base in Utah. So the Court concludes, with respect to personal jurisdiction, that based on the allegations of the Complaint (1) the Division has sufficiently distinguished *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 264 (2017); (2) the Defendants purposefully availed themselves of the protection of Utah's laws, including by directing activities at the forum; (3) the Division's claims arise out of or relate to these forum-based contacts; and (4) the exercise of personal jurisdiction is fair and reasonable.

B. As Alleged, the Division's Claims Are Not Foreclosed by Section 230 of the CDA.

Defendants next argued that they are immune from suit under Section 230 of the Communications Decency Act, 47 U.S.C. § 230. The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and provides immunity from state law causes

of action that would hold them liable for information originating with a third-party. *Id.* The Defendants argued that they were doing nothing other than acting as a funnel or a pass-through entity for third-party content.

However, the allegations in the Complaint, if true, could entitle the Division to relief on its claims without implicating Section 230. Looking at the Complaint in a light most favorable to the Division, the Division's claims do not seek to treat Meta as a publisher or speaker. Although Meta does disseminate third-party content, the Division's claims rest on the Defendants' own acts: their use of features and practices to target children into spending excessive amounts of time on their platforms and their misrepresentations about the safety of those platforms. The Complaint alleges that Meta used features like personalized content, serving algorithms, destructive notifications, infinite scroll, reels, ephemeral content, and auto-play. *Id.* ¶¶ 237–39. The use of these features is alleged to have amounted to a violation of Utah law. *Id.*

The Division also alleges that none of these features constitute traditional publishing activity, which generally involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content. The Complaint alleges that the methods of promotion in contrast to content moderation decisions are not publication. For example, the Division alleges that Meta's creation and use of content serving algorithms is not publishing, and the Court cannot conclude as a matter of law that that is an incorrect statement.

What is alleged goes well beyond typical publishing activities of reviewing, editing, and determining what content to publish or withdraw from a typical website or interactive computer service. As Judge Katzmann in the Second Circuit explained, "it strains the English language to say that in targeting and recommending [third-party content] to users—and thereby forging

connections, developing new social networks—Facebook is acting as 'the *publisher* of information provided by another information content provider.'" *Force v. Facebook, Inc.*, 934 F.3d 53, 76–77 (2d Cir. 2019) (Katzmann, C. J., concurring in part and dissenting in part) (quoting 47 U.S.C. § 230(c)(1)).

As to Count I: the content-serving algorithms and the use of notifications and alerts are not merely an act of publishing third-party content. As alleged, the notifications and alerts are Meta's own content. The use of infinite scroll and other features are likewise not only the publication of third-party content. Material contribution is also alleged sufficiently in the Complaint to put the Defendants on notice that the material contribution exception to Section 230 may be involved here if, as a factual matter, the content has been altered in a material way.

Count II of the Complaint alleges that Meta made material misrepresentations and omissions about the platforms' safety, which also does not seek to treat Meta as the publisher of third-party content.

The Court can envision situations where Defendants may be exactly right and that the algorithms, disruptive notification, or infinite scroll, *et cetera*, may be nothing more than publishing activity, but the Complaint alleges that they are not focused on publishing activity. In a motion for summary judgment where the facts are in front of the Court, these features might qualify for Section 230 immunity. But at this stage, the Court must treat the allegations of a Complaint as true and the Division is alleging that these features, including algorithms, disruptive notifications, and more, amount to a violation of Utah law. At least as alleged, Section 230 does not foreclose the Division's claims at this stage. Meta may renew its Section 230 arguments at summary judgment or at trial.

C. The First Amendment Does Not Bar the Division's Claims.

Defendants also argued that Count I violates their rights under the First Amendment. The Court agrees with the Division that the Complaint's allegations are content neutral. The Complaint is not focused on the substance of any third-party content, but instead is focused on the actions of the Defendants with respect to the addictive design features and with respect to their own misrepresentations. Count I does not seek to curtail any speech either of Meta or any third parties. The Court agrees that the Division adequately pled that the addictive design features for which the Division seeks to hold Meta liable are not even speech. They convey no message. They express no viewpoint. They use variable reward structures to feed content to each individual user. These are actions.

D. The Division Has Adequately Pled UCSPA Violations.

The Court finds that the Division has pled a cause of action under the UCSPA. First, Meta does not fall under the publisher and broadcaster exemption, Utah Code Section 13-11-22(1)(b). Similar to the CDA immunity argument, the Division's allegations do not seek to treat Meta as a publisher or a broadcaster or a printer of any third-party content. The Division is seeking to hold Meta liable for its use of the addictive design features and its own material misrepresentations and omissions.

Second, the Complaint also alleges a sale and/or a transfer sufficient to support a consumer transaction under the UCSPA, Utah Code Section 13-11-3(2)(a). The Division alleges facts that could support a conclusion the transaction involves a sale or transfer, including that Meta does not provide its products for free, that its business model allows it to turn attention into money, and that when users spend time on Meta's social media platforms, Meta harvests their

personal data (including interests, religion, beliefs, and what they like to watch or buy). The Complaint alleges that Utah consumers' personal data has value to the Defendants as Meta has built an entire business model on enticing users to give up their personal data and their time as consideration for their services on the Defendants' platforms. The Court does not read anything into the Legislature's passage of the Social Media Regulation Act that somehow alters or sends a message concerning the UCSPA.

Third, concerning the arguments surrounding Count I, the Division's unconscionability count: claims of unconscionability under the UCSPA require a gross disparity in terms that are so one sided as to oppress or unfairly surprise an innocent party. The Division alleges that Meta developed and continually refined addictive design features and that it knowingly exploited certain neurological vulnerabilities in children. It goes on to detail these addictive design features, including dopamine-manipulating personalization algorithms, audio-visual and haptic alerts sent at all times of day or night, and various content presentation formats designed to discourage children's attempts to self-regulate and to disengage from the platforms. Giving all reasonable inferences to the pleading party, manipulating children in these ways in order to maximize time spent on the platforms and thus advertising revenue generated could certainly be found to be unconscionable. Meta argues that users are not unfairly surprised or oppressed because they choose to use the service and are aware of the addictive design features, but the Complaint specifically alleges that Meta actively misrepresents and attempts to conceal that it manipulates children and exploits their neurological vulnerabilities with the addictive design features. So, as pled and giving all inferences to the Division, the Complaint does state a claim for unconscionability.

Regarding Count II, Meta argues that the Complaint's allegations fail to meet the heightened pleading standard for fraud, requiring that a party alleging deceptive conduct, "must state with particularity the circumstances constituting [the deceptive conduct]." Utah R. Civ. P. 9(c). The Court agrees that the rule on heightened pleading does apply, although not with respect to intent. That can be alleged generally. Much of the remainder of Defendants' arguments on this point are substantive attacks on what the evidence is or how it should be viewed, but at this stage, the Court must accept the allegations in the Complaint. After reviewing the Complaint, particularly Paragraphs 134 through 228, the Court finds that the Division has satisfied the heightened pleading standard for deceptive conduct allegations.

The Court is also convinced that restitution is a remedy under the UCSPA, and therefore, the Court would not dismiss that remedy at this stage.

CONCLUSION

For these reasons, Defendants' Motion to Dismiss is DENIED in full.

END OF ORDER

OFFICIAL SIGNATURE APPEARS AT TOP OF FIRST PAGE

Approved as to form:

/s/ Douglas Crapo
Douglas Crapo, Assistant Attorney General, Utah Attorney General's Office

For Plaintiff Utah Division of Consumer Protection

/s/ Megan Rodgers
Megan Rodgers, Covington & Burling LLP

For Defendants Meta Platforms, Inc., and Instagram, LLC

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing **PROPOSED ORDER DENYING DEFENDANTS' MOTION TO DISMISS** to be delivered by the Court's electronic filing system, which electronically transmitted notice of the filing to all counsel this July 18, 2024.

/s/ Douglas Crapo

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

UTAH DIVISION OF CONSUMER PROTECTION, Plaintiff, vs. TIKTOK INC. Defendant.	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS** Case No. 230907634 Honorable Richard Daynes Tier III

On September 10, 2024, the Court held a hearing on Defendant TikTok, Inc.'s ("TikTok") Motion to Dismiss the Complaint. This Court took the matter under advisement, and now issues its written opinion. For the reasons set forth below, the Court DENIES TikTok's Motion to Dismiss in full.

BACKGROUND

On October 10, 2023, the Division of Consumer Protection of the State of Utah (the "Division") filed a three-count Complaint against TikTok Inc. alleging violations of the Utah Consumer Protection Act ("UCSPA"). Count One alleges "Unconscionable Acts or Practices Concerning Underage Consumers, Violation of Utah Consumer Sales Practices Act, Utah Code § 13-11-5." Count Two alleges "Deceptive Acts or Practices, Violation of Utah Consumer Sales

Practices Act, Utah Code § 13-11-4," basically stating that TikTok has deceptively misrepresented the actions it has taken to keep the application safe for children and persons of all ages. Count Three alleges, "Deceptive Acts or Practices, Violation of Utah Consumer Sales Practices Act, Utah Code § 13-11-4," principally stating that TikTok represents itself to be a company located, controlled and headquartered in the United States when it continues to be controlled by its China-based parent company, ByteDance.

On December 20, 2023, TikTok filed a motion to dismiss the Complaint, citing lack of both general and specific personal jurisdiction; that section 230 of the Communications Decency Act ("CDA") protects TikTok from liability; that application of UCSPA as alleged in the Complaint violates the First Amendment to the U.S. Constitution; that the UCSPA is impermissibly vague; and that the Complaint fails to state a claim of unconscionability. TikTok also asserts the challenged statements are not made in connection with a consumer transaction and do not constitute acts or practices.

MOTION TO DISMISS STANDARD OF REVIEW

In Utah, pursuant to Utah Rules of Civil Procedure 12(b)(6), a Motion to Dismiss may be granted when there is a "failure to state a claim upon which relief can be granted," meaning the Court must assess whether the plaintiff's complaint, when viewed in the light most favorable to the plaintiff, contains sufficient factual allegations to state a viable legal claim under applicable law. Essentially, the court may only dismiss a case if the complaint demonstrates a complete lack of a legal basis for the claim, even if the facts alleged are accepted as true. *See St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). "A dismissal is a severe measure and should be granted . . . only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Am. W. Bank Members, L.C. v. State*, 2014 UT

49, ¶ 13, 342 P.3d 224. The Court must construe the complaint as pled under both Rules 8 and 12 of the Utah Rules of Civil Procedure liberally in favor of the plaintiff, meaning any doubts about the sufficiency of the claim will be resolved in favor of allowing the case to proceed. *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995) ("[W]e accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff."); *Gill v. Timm*, 720 P.2d 1352, 1353 (Utah 1986) ("Rule 8(a) is to be liberally construed when determining the sufficiency of a plaintiff's complaint."). Mack v. Utah State Dep't of Com., Div. of Sec., 2009 UT 47, ¶ 17, 221 P.3d 194, 200, (referring to the Utah Rules of Civil Procedure; *see also*, Utah R. Civ. P. 1, (stating, The Rules of Civil Procedure "shall be liberally construed and applied to achieve the just, speedy and inexpensive determination of every action.")

I. THE COURT HAS SPECIFIC PERSONAL JURISDICTION OVER TIKTOK.

A. General Personal Jurisdiction

The Division has not argued for **general personal jurisdiction** as to this matter and so this Court has generally only reviewed the case for specific personal jurisdiction. Nevertheless, TikTok is not incorporated in the State of Utah and Utah is not the home forum state for TikTok. Hence, there is no general personal jurisdiction over TikTok. However, as set forth below, the Court does find specific personal jurisdiction.

B. Specific Personal Jurisdiction

"[T]he evaluation of specific jurisdiction in Utah mandates a three-part inquiry: '(1) the defendant's acts or contacts must implicate Utah under the Utah long-arm statute; (2) a 'nexus' must exist between the plaintiff's claims and the defendant's acts or contacts; and (3) application of the Utah long-arm statute must satisfy the requirements of federal due

process.' " *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir.1999) citing *Arguello v. Industrial Woodworking Mach. Co.*, 838 P.2d 1120, 1122 (Utah 1992), quoting *National Petroleum Mkt'g, Inc. v. Phoenix Fuel Co.*, 902 F.Supp. 1459, 1465 (D.Utah 1995)(citation omitted).

1. Utah's Long Arm Statute:

To have specific personal jurisdiction, Utah's long-arm statute must apply and allow its courts to reach out-of-state defendants. Additionally, the submission of jurisdiction must still comply with the Due Process Clause of the U.S. Constitution. Utah's long arm statute states:

> 78B-3-205. Acts submitting person to jurisdiction.
>
> Notwithstanding Section 16-10a-1501, any person or personal representative of the person, whether or not a citizen or resident of this state, who, in person or through an agent, does any of the following enumerated acts is subject to the jurisdiction of the courts of this state as to any claim arising out of or related to:
>
> (1) the transaction of any business within this state;
>
> (2) contracting to supply services or goods in this state;
>
> (3) the causing of any injury within this state whether tortious or by breach of warranty... .

In this case, as alleged in the Complaint by the Division, all three of these elements set forth within Utah's long arm statute have been met. "[T]ransaction of business" is defined by Utah's long arm statute as "activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah." Utah Code Ann. § 78-27-23. TikTok intentionally transacts business within the state of Utah. TikTok sells advertising which is directed at Utah residents. TikTok enters agreements with the users of its app and provides individualized targeted content to each Utah customer. The Complaint

alleges injury to thousands of residents of Utah, and specifically children targeted by TikTok to continuously engage in using its application.

Utah's long arm statute applies in this circumstance to the extent that Due Process under the U.S. Constitution would allow. According to Utah Code § 78-27-22, Utah's long arm statute is intended "to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." Due process should therefore be the next consideration in reviewing the jurisdictional element.

2. Due Process Evaluation:

To meet the requirements of due process, a court may assert specific jurisdiction if the following conditions are met: i) Purposeful Activities: The defendant has deliberately engaged in activities targeting the forum state or has otherwise established connections there. ii) Nexus: A nexus exists between the purposeful activities and the defendant's Utah contacts, iii) Reasonableness: Exercising personal jurisdiction over the defendant is reasonable and fair under the circumstances. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-478 (1985). A lack of physical presence cannot defeat personal jurisdiction. *Id.* at 476.

i. Purposeful Activities and ii Nexus:

In this case the Court finds that, as alleged in the Complaint, TikTok has purposefully conducted activity within the State of Utah and those activities relate to the claims set forth by the Division in its Complaint and response to the Motion to Dismiss. As alleged in the Complaint, the Division's claims "relate to" TikTok's profitable multi-billion-dollar business because TikTok designs its app to carefully cultivate user attention, allowing TikTok to

collect personal user data—including from Utahns—which in turn enables TikTok to offer more targeted and profitable advertisements. [Complaint] ¶¶ 3, 15–16.

TikTok makes its money selling ads— and TikTok makes more money when more users spend more time on its app, creating an incentive to increase the time that Utah users spend on its app. *Id.* TikTok has responded to that incentive by adding features that addict and consume the attention of Utah's children to the detriment of their well-being. *Id.* ¶¶ 2–4.

TikTok's alleged misrepresentations about the safety of and origin of its app are also intimately related to its forum contacts because the Complaint alleges that those statements targeted Utah children and their parents to maximize their use of TikTok's app and to keep them coming back. These claims go to the central claims in the Division's Complaint and are sufficient to find purposeful activity in Utah and a nexus. *See Inconnu Lodge v. Commbine.com LLC*, 214 F. Supp. 2d 1204, 1208–09 (D. Utah 2002) (finding that a domain name purchased by an out-of-state resident in order to extort money from Utah resident demonstrated defendants' efforts to "direct" their activity towards Utah).

The allegations, as argued and set forth in the Complaint, are sufficient to satisfy this requirement. The Court agrees with the Division that the Division's claims arise out of or relate to TikTok's contacts with Utah. *See Hood v. Am. Auto Care*, LLC, 21 F.4th 1216, 1222 (10th Cir. 2021); see also, *Burger King, Inc.* at 472.

3. **Fairness and Reasonableness:**

Even if there are sufficient contacts within the state, to satisfy due process a court must also confirm that asserting jurisdiction comports with "fair play and substantial justice." *Burger King Corp.*, at 476 (citation omitted). This involves considering several factors to

decide if it is suitable to proceed in the forum state. The factors to review include, first, whether it is an unreasonable burden on the Defendant to litigate in Utah. Second, the interest of the state in having the case heard in the forum-state. Third, the interest of the plaintiff in having the case heard in the forum-state. And finally, the court must also consider judicial efficiency and the interests of the interstate system.

1) It is not an unreasonable burden to have TikTok litigate in Utah. TikTok has failed to show that litigating in Utah would place it at a "severe disadvantage." *Burger King*, 471 U.S. at 478 (citation omitted). TikTok does not face any special burden in defending in Utah. By its own self-descriptions, it conducts a worldwide business and offers services throughout the United States. It has substantial yearly revenues, conducts significant business in Utah, and has signed up hundreds of thousands of Utah residents as its consumers. There is no reason to think that California, the state of TikTok's listed incorporation, has any special interest in litigating this matter there. The victims and many witnesses would be located in Utah and Utah law is the applicable law to be applied. It is not unfair to cause TikTok to defend itself in the jurisdiction of Utah where the central issues of the case involve the protection of hundreds of thousands of TikTok consumers which TikTok has cultivated in Utah.

Further, a denial of jurisdiction on due process grounds is only appropriate where litigation in the forum is so gravely difficult that it puts the defendant at a severe disadvantage. The Court does not find that circumstance to be present here based on the evidence presented. *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990). As a sophisticated technology company, TikTok is surely aware that many litigation burdens are eliminated entirely by modern technology. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444

U.S. 286, 293 (1980) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." (citation omitted)); *Pro Axess, Inc. v. Orlux Distrib., Inc.*, 428 F.3d 1270, 1280 (10th Cir. 2005).

Another factor to consider is the forum state's Interest and the plaintiff's interest in litigating the claim. *See Sher* at 1365. The Court finds that it is in the state of Utah's interest in resolving this dispute. The Complaint itself arises from claims of injury towards Utah residents in enforcing Utah's Consumer Sales Practices Act. The alleged victims of the defendant's conduct apparently includes hundreds of thousands of Utah citizens. Those citizens are alleged to use the TikTok application within the state of Utah. Thus, the case has been brought by the Division and it is in the Division's interest specifically to enforce Utah laws and to protect and seek recourse for Utah residents from the alleged unlawful activities of TikTok directed individually to each of those residents.

Finally, the court must also consider judicial efficiency and the interests of the interstate system. This involves assessing how efficiently the legal matter can be resolved and ensuring that the choice of forum does not unnecessarily complicate the legal proceedings. By examining these factors, the court ensures that asserting jurisdiction aligns with principles of fair play and substantial justice, which are core to due process under the Constitution. There is nothing here that would delay or cause issues with the interstate system of justice. While TikTok has alleged that forcing it into Utah's judicial system to litigate these claims could subject it to every jurisdiction in the U.S., the fact that TikTok has similar substantive contacts with virtually every jurisdiction does not sway this Court to

believe that judicial efficiency or the interests of interstate should free TikTok from specific personal jurisdiction.

According to the Complaint, TikTok has purposefully directed its activities toward Utah and established contacts with the forum state. TikTok knowingly and deliberately has entered into hundreds of thousands of contracts with its Utah users. Compl. ¶ 15. Thus, the Division has established the minimum contacts of TikTok required by the due process clause of the Fourteenth Amendment. *First Mortgage Corp. v. State Street Bank and Trust Co.*, 173 F. Supp.2d 1167, 1175 (D. Utah 2001) quoting *Harnischfeger*, 883 F.Supp. at 617-18. "[P]ersonal jurisdiction is established when 'a defendant clearly does business over the Internet,' such as entering into contracts which require the "knowing and repeated transmission of computer files over the Internet." *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F.Supp.2d at1324 (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1123-24 (W.D.Pa.1997)). The Court therefore finds that the claims alleged in the Complaint sufficiently arise from TikTok's interactions with Utah, thereby justifying specific personal jurisdiction over the defendant. Additionally, exercising personal jurisdiction in Utah is considered reasonable and fair to TikTok. Therefore, the motion to dismiss for lack of personal jurisdiction is denied. Exercise of specific jurisdiction is appropriate in this context. The contacts are substantial and related to the suit sufficient to establish personal jurisdiction over defendant TikTok.

II. The Division's Claim Under the UCSPA Does Not Fail to State a Claim.

TikTok has argued that the UCSPA does not apply in this case because there was no money exchanged and therefore this cannot be deemed a "consumer" transaction. For the

reasons listed below, the Court finds the conduct as alleged does meet the definition of a "consumer transaction." This issue is therefore without merit.

The UCSPA defines a "consumer transaction" stating:

> (2) (a) "Consumer transaction" means a sale, lease, assignment, award by chance, **or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible** (except securities and insurance) **to, or apparently to, a person for:**
>
> **(i) primarily personal, family, or household purposes; or**
>
> (ii) purposes that relate to a business opportunity that requires:
>
> (A) expenditure of money or property by the person described in Subsection (2)(a); and
>
> (B) the person described in Subsection (2)(a) to perform personal services on a continuing basis and in which the person described in Subsection (2)(a) has not been previously engaged.

Utah Code § 13-11-3(2)(a).

TikTok argues that since its use of the application is provided for free, this is not a "consumer transaction." TikTok cites the Court to the definition as found in the MERRIAM-WEBSTER DICTIONARY (11th ed. 2020), arguing plain meaning. However, this definition does not comport with the legal definition as defined in the UCSPA. TikTok also cites to cases referring to the Indiana statute which has similar language to the UCSPA. Ind. Code Ann. § 24-5-0.5-2(1). Nevertheless, the UCSPA and Indiana's consumer protection statutes are not identical and the Utah Legislature has included the word "transfer" in the definition of a "consumer transaction," while Indiana's legislature did not. In reviewing this another court has found that, "in enacting the UCSPA the Utah Legislature eschewed the language of the model

act's definition of 'consumer transaction' in favor of a **broader** definition." *Iadanza v. Mather*, 820 F. Supp. 1371, 1380 (D. Utah 1993)(emphasis added).

The Utah Legislature has defined a "consumer transaction" to include a "written or oral **transfer** or disposition of goods, services or other property, both tangible and intangible." Such "transfer" requires no "expenditure of money" if those goods, services, or other property are provided for "primarily personal, family, or household purposes." *See* Utah Code § 13-11-3(2)(a).

Notwithstanding the legal definition as found in the UCSPA, a consumer transaction generally includes the transfer of any form of value in a transactional relationship. This is consistent with the Division's proffered definition of the term "Sale" under Webster's Third New International Dictionary 2003 (3d ed. 2002) which includes "a contract transferring . . . ownership of property from one person or corporate body to another for a price (as a sum of money **or any other consideration.**" (emphasis added). Further, the Utah Legislature has indicated that this Act should be "construed liberally..." Utah Code § 13-11-2. This Court is not convinced after a review of the definition under the UCSPA that the Utah Legislature intended to exclude transactions that did not include the exchange of money or involved an actual sale based on the language used to define a "consumer transaction."

During oral argument on the Motion to Dismiss, a great amount of emphasis was placed on the wording, of "or <u>other</u> written or oral transfer..." *Id.* TikTok has argued that the use of the word "or other" was intended therefore to refer back to the language "sale, lease, assignment, award by chance..." indicating therefore it must be for an exchange of money. The Court disagrees with this reading of the statute especially where the very next subparagraph refers specifically to "the expenditure of money." Under Utah Code § 13-11-3(2)**(a)(ii)**, the Utah

Legislature defined the term "consumer transaction" to include the "expenditure of money" when referring to the second alternative definition of a "consumer transaction." It defines this subsection as referring to "purposes that relate to a business opportunity that requires... **expenditure of money or property** by the person described in Subsection (2)(a)" *Id.* Had the Utah Legislature intended (2)(a)(i) to also include "expenditure of money," an "exchange of money" or some other specific exchange, to be apply equally under 13-11-3(2)(a)(i), they would have included that in the definition. The Legislature did not include this requirement, and the absence of this language indicates it was meant to be more broadly construed.

As alleged in the Complaint, TikTok makes millions of dollars in value from its consumers through its advertising revenue. See Compl. ¶ 16. TikTok therefore receives great value directly from its hundreds of thousands of Utah users in the form of personal data, information regarding their individual interests, and their time as they are engaged in the use of the TikTok application. The time, data, and information provided by the Utah consumers are documented and collected by TikTok which then uses that value to sell advertising space to marketers. See Compl. ¶ 15.

III. The Division's Claims Are Not Foreclosed by Section 230 of the CDA

TikTok has argued that they are immune from suit under Section 230 of the Communications Decency Act, 47 U.S.C. § 230 passed in 1996 ("CDA"). The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and provides "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). Together, these provisions mean that a

company like TikTok is protected from liability when a plaintiff "seeks to treat [it], under a state law cause of action, as a publisher or speaker" of content posted on its app by a third party. *Id.*

TikTok contends under Section 230 that this Complaint targets TikTok in its role in publishing third-party content. However, when the Complaint is viewed in a light most favorable to the Division, the claims do not fail. The claims of the Division are not attempting to hold TikTok accountable as a publisher of user-generated content, but rather seeking recourse for the harmful algorithms that are causing injury to the application's users. It is therefore content neutral and not governed by Section 230 of the CDA. "It is not enough that third-party content is involved," and courts have "rejected use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content." *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676, 682 (9th Cir. 2019); *see also Henderson v. Source for Pub. Data*, L.P., 53 F.4th 110, 122–23 (4th Cir. 2022).

Although TikTok distributes third-party content, the Division's claims are based on the Defendant's own actions employing features and practices that target children, resulting in excessive usage of their platforms, and making misleading statements about the safety of those platforms. The Complaint taken on its face alleges that TikTok used features under "a dopamine-inducing algorithm that spoon-feeds users a steady diet of highly personalized short-form videos, making it difficult for children to unplug, which TikTok amplifies with a series of manipulative features designed to keep users on the app." Compl. ¶ 27. These and other features give children the illusion of control, hide any effective tools to limit time spent on the app, and further amplify and incentivize compulsive, repeated use, which is especially unhealthy for kids whose brains are not yet fully formed." Compl. ¶37. The use of these features is alleged to have amounted to a violation of Utah law.

Similar to the Court's finding in *Utah Division of Consumer Protection v. Meta Platforms, Inc. and Instagram, LLC*, Case No. 230908060 (Order Denying Defendant's Motion To Dismiss, July 25, 2024), Judge Holmberg found in that case involving Meta and Instagram that it is possible this analysis could change if it becomes clearer that after further discovery in the case, that it is actually the content and not the algorithm that is at issue, then this issue may be addressed again in a motion for summary judgment or at trial. Judge Holmberg stated:

> The Court can envision situations where Defendant may be exactly right and that the algorithms, disruptive notification, or infinite scroll, et cetera, may be nothing more than publishing activity, but the Complaint alleges that they are not focused on publishing activity. In a motion for summary judgment where the facts are in front of the Court, these features might qualify for Section 230 immunity. But at this stage, the Court must treat the allegations of a Complaint as true and the Division is alleging that these features, including algorithms, disruptive notifications, and more, amount to a violation of Utah law. At least as alleged, Section 230 does not foreclose the Division's claims at this stage. TikTok may renew its Section 230 arguments at summary judgment or at trial.

Similarly here, there may be specific facts presented by TikTok that could change the analysis on whether this is a content-based rather than algorithm based harm. If these facts become clear, the defendant could present the issue once more in a motion for summary judgment or at trial, but at this stage, the Court must treat the Division's Complaint in a light most favorable to the plaintiff and as true, and therefore the motion to dismiss on this basis is denied.

B. Count One is not barred by the First Amendment and the Free Speech Clause of the Utah Constitution.

The defendant also asserts that Count One infringes on TikTok's First Amendment rights. However, Count One does not seek to curtail any speech but rather to curtail the addictive features challenged. Count One does not seek to prevent or convey any message or viewpoint. The allegations in the Complaint are content-neutral. This means that the Complaint does not

target or criticize the specifics or nature of any third-party content available on the platform. Instead, it focuses on the actions taken by the Defendant regarding the addictive design features of the platform and their own misleading statements about its safety. Essentially, the issue isn't about the type of content shared on TikTok, but rather about TikTok's practices and representations that impact how the platform is used.

The Court therefore agrees with the Division in its memorandum that TikTok's use of these features is conduct, not speech, and "First Amendment doctrine permits regulating the conduct of an entity that hosts speech." *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 455 (5th Cir. 2022), *cert. granted in part sub nom. Netchoice, LLC v. Paxton*, 216 L. Ed. 2d 1313 (U.S. 2023).

C. The UCSPA provision at issue in Count One is not impermissibly vague and is not in violation of the Due Process Clause and the First Amendment.

While TikTok asserts that that the UCSPA's prohibition on "unconscionable act[s] or practice[s]" is unconstitutionally vague, this Court disagrees. See Mot. at 16 (citing Utah Code § 13-11-5). TikTok relies on a Colorado case, *Trail Ridge Ford, Inc. v. Colo. Dealer Licensing Bd.*, 543 P.2d 1245 (Colo. 1975). This Court finds the *Trail Ridge Ford, Inc.* case distinguishable and while it may be difficult for the Division to eventually establish these causes of action with the facts as alleged, this does not make it unconstitutionally vague. Other state courts have held that a ban on unconscionable consumers acts or practices is not unconstitutionally vague. *See State ex rel. Bryant v. R & A Inv. Co.*, 985 S.W.2d 299, 302 (Ark. 1999) (consumer protection statute's bar on "unconscionable" acts or practices not too vague). *See, e.g., Trade Comm'n v. Skaggs Drug Ctrs., Inc.*, 446 P.2d 958, 965 (Utah 1968) ("[W]e disagree with the trial court decision that the terms 'unfairly diverting trade from a competitor' and 'injuring a competitor' are vague and

ambiguous. The terms may present difficulties in application, but such difficulty is not sufficient to hold the Act unconstitutional.").

The Court therefore agrees that unlike the licensing statute in Trail Ridge, the bar on unconscionable practices in the UCSPA, a general consumer protection statute, is appropriate because the legislature "could not be expected to envision every conceivable violation" of the statute. *Bryant*, 985 S.W.2d at 302; see also Scott, 430 N.E.2d at 1018 ("[E]ffective regulation requires that the concept be flexible, defined on a case-by-case basis, in view of the futility of attempting to anticipate and enumerate all the unfair methods and practices that fertile minds might devise." (quotations, citations, and alterations omitted)). The Court therefore finds that the provision is not unconstitutionally vague.

D. The Division's claim of unconscionability does not fail to state a claim under the UCSPA on the merits.

TikTok next argues that Count One has failed to sufficiently allege an unconscionability claim and has not alleged any conduct that would rise to the level of "extreme unfairness" required for a claim of unconscionability. TikTok argues that unconscionability requires an absence of meaningful choice, gross inequality in bargaining power, oppression, unfair surprise, or overall imbalance. Mot. at 18.

In response, the Division has alleged in its memorandum that in the Complaint it states that TikTok has exploited children's neurological limitations using addictive design features to hook them into spending unhealthy amounts of time on the app. Compl. ¶¶ 5, 27. In reviewing the Complaint there is sufficient detail regarding these addictive features, which include personalized algorithms designed to manipulate dopamine releases in children's brains, use of an infinite scroll feature that makes it difficult for children to disengage, and push notifications sent

at all times of day and night. Id. ¶¶ 28–44. The allegations of manipulating children in these ways to maximize time spent on the app (and thus advertising revenue generated) meet the definition of unconscionable.

While TikTok argues that the motion to dismiss should be granted because there should be an "absence of meaningful choice" or "gross inequality in bargaining power." At this time there are sufficient facts pled by the Division to allow this count to proceed.

"[D]ismissal is a severe measure and should be granted . . . only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Am. W. Bank Members*, 2014 UT 49, ¶ 13, 342 P.3d 224 (citation omitted). Under the UCSPA, "[i]f it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination." Utah Code § 13-11-5(2). Based on the reasons as set forth above the Court declines to dismiss the UCSPA claim on the pleadings for failure to allege unconscionability.

IV. The Division Does Not Fail to State a Claim in Count Two that TicTok Deceived Users about Its Safety and Content Moderation Practices.

After a review of the Complaint and the briefs filed in this matter the Court agrees with the Division and finds that Count Two does state a claim under the UCSPA and there are sufficient facts pled to sustain this count alleging deceptive conduct. To allege deceptive conduct, "a party must state with particularity the circumstances constituting [the deceptive conduct]." Utah R. Civ. P. 9(c); *see also Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982). Rule 9(c) must be read consistently with "the fundamental purpose of our liberalized pleading rules [which] is to afford parties 'the privilege of presenting whatever legitimate contentions they

have pertaining to their dispute,' . . . subject only to the requirement that their adversary have 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Williams*, 656 P.2d at 971 (citations omitted).

Rule 9(c) should be applied "with great liberality in sustaining the sufficiency of allegations stating a cause of action." *Id.* Thus, a complaint is sufficient if it "describe[s] the nature or substance of the acts or words complained of." *Id.*

Here, the Division's Complaint satisfies this requirement. The Complaint alleges numerous areas of deception, including as an example that TikTok represents that it proactively removes harmful content that violates its guidelines but further explains how these representations are deceptive because TikTok's approach is reactive, not proactive, and is completely ineffectual. Id. ¶¶ 68–111. Furthermore, these alleged misrepresentations are not just vague statements, but rather the Division identifies numerous examples of verifiable factual misrepresentations. For these reasons, the Court finds that the Division does state a claim in Count Two that TicTok deceived its users about its safety and content moderation practices and the motion to dismiss this allegation is denied.

V. The Division Does Not Fail to State a Claim in Count Three that TikTok Deceived Users About the "Geographical Origin or Location" of Its Business.

Count Three, alleges that TikTok misrepresents itself as an independent U.S. company. While this may also be difficult to prove factually, based on the Complaint, this does state a claim under the UCSPA and should not be dismissed. The Division alleges that TikTok portrays itself as independent of its Chinese parent company, ByteDance, that "TikTok's CEO has claimed that he is responsible for all business operations and strategic decisions for TikTok," that TikTok states that it is a "myth" that "[d]ecisions about TikTok are made in Beijing," and that

TikTok encourages its employees and spokespeople to downplay its association with ByteDance and China. Compl. ¶¶ 139–42. The Division alleges those representations are deceptive because TikTok remains heavily controlled by, and cannot operate independently from, ByteDance.

TikTok argues that the Division's claims do not fall within the purview of UCSPA section 13-11-4(2)(w), which makes "misrepresent[ing] the geographical origin or location of the supplier's business" a deceptive practice. TikTok argues that "geographical origin" and "location" as used in the statute "simply mean the defendant's actual location." Mot. at 26–27. But the Court agrees with the Division that TikTok's argument improperly reads the word "origin" out of the statute. *See Turner v. Staker & Parson Cos.*, 2012 UT 30, ¶ 12, 284 P.3d 600. Thus, even if TikTok's "location" is in California, Compl. ¶ 10, the "origin" of its business—the locus of control—is alleged to be in China. As to TikTok's allegation that these facts may not be proven to be true or false, this is not the appropriate stage of the case to raise issues of fact and the Court accepts all facts as set forth in the Complaint as true and liberally construes this in the favor of the Plaintiff. As to whether this would be material to a reasonable customer, this is also an inappropriate time to raise this as an issue of fact and this should be allowed to move forward and give the Division a chance to establish those facts as alleged. The Division having alleged sufficient facts and allegations to support Count Three, the motion to dismiss this count is denied.

Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss is hereby DENIED in full. The case will proceed to trial for a full examination of the material facts and legal issues presented.

It is so ordered.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 230907634 by the method and on the date specified.

MANUAL EMAIL: ISIUWA MABATAH MABATAHJ@BALLARDSPAHR.COM

MANUAL EMAIL: KEVIN HEINER KHEINER@WSGR.COM

MANUAL EMAIL: CONSTANDINOS HIMONAS DHIMONAS@WSGR.COM

MANUAL EMAIL: ALEXANDER H SOUTHWELL asouthwell@gibsondunn.com

MANUAL EMAIL: WINSTON YAW WEN CHAN wchan@gibsondunn.com

MANUAL EMAIL: BLAINE H EVANSON bevanson@gibsondunn.com

MANUAL EMAIL: PEISHEN ZHOU PEISHENZHOU@AGUTAH.GOV

MANUAL EMAIL: DOUGLAS CRAPO CRAPO@AGUTAH.GOV

MANUAL EMAIL: EMILY PENKOWSKI PEREZ epenkowski@edelson.com

MANUAL EMAIL: JIMMY ROCK jrock@edelson.com

MANUAL EMAIL: THEO BENJAMIN tbenjamin@edelson.com

MANUAL EMAIL: SHANTEL CHAPPLE KNOWLTON schappleknowlton@edelson.com

MANUAL EMAIL: CARINA WELLS SSHEPHERD@AGUTAH.GOV

MANUAL EMAIL: ROGER PERLSTADT rperlstadt@edelson.com

MANUAL EMAIL: JOHN FEENEY COYLE jfeeneycoyle@edelson.com

MANUAL EMAIL: TAYLOR MOSOLF TMOSOLF@AGUTAH.GOV

Date: 11/12/2024

/s/ CHARLENE MARTIN

Signature

Vermont Superior Court
Filed 07/29/24
Chittenden Unit

VERMONT SUPERIOR COURT
Chittenden Unit
175 Main Street, PO Box 187
Burlington VT 05402
802-863-3467
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 23-CV-4453

State of Vermont v. Meta Platforms, Inc. and Instagram, LLC

RULING ON MOTION TO DISMISS

Title: Motion to Dismiss (Motion: 3)
Filer: Kendall Alison Hoechst
Filed Date: January 19, 2024

The State brings this case against Meta (formerly Facebook) and its subsidiary Instagram, LLC, alleging violations of the Vermont Consumer Protection Act, 9 V.S.A. § 2451 et seq. The complaint alleges, inter alia, that Meta intentionally seeks to addict Instagram users under 18 ("Young Users") in a way that Meta knows is harmful to the users' physical and mental health, and misrepresents both its intentions and the harm it is knowingly causing. The State seeks injunctive relief, civil penalties, disgorgement of profits, investigative costs, and attorney's fees.

Meta and Instagram (jointly "Meta") argue that the case must be dismissed because (1) the State lacks personal jurisdiction over the company, (2) the claims are barred by the federal Communications Decency Act, (3) the claims are barred by the First Amendment, and (4) the allegations fail to state a valid claim under the Vermont Consumer Protection Act. The court heard oral argument on the motion to dismiss on July 3.

Summary of Relevant Allegations

The State alleges many facts in its 378-paragraph complaint. A few are summarized here for purposes of the discussion below. The court makes no finding as to their accuracy at the pleading stage.

Defendant Meta Platforms, Inc. is a social media company that derives 98% of its total revenue from advertising. Meta owns, operates, and controls Defendant Instagram, LLC, one of the most widely used social media platforms globally and in Vermont. Instagram's mobile application and website lets consumers—including Vermont consumers—create profiles from which they can post pictures and videos with captions, follow other Instagram users' profiles and posts, "like" and "comment" on other users' posts, "share" content that other users have posted, and communicate with other users privately through direct messaging. Meta collects data from Instagram users to algorithmically curate and personalize each user's experience, including the content displayed and recommendations on which other accounts to follow. It is estimated that 22 million teens—including approximately 62% of teens ages 13–17—log onto Instagram in the U.S. each day.

Meta profits by leveraging user data to sell advertising. Thus, its business model incentivizes it to maximize the amount of time that young users spend on Instagram, and that has been a priority for Meta throughout its corporate history. The State alleges that, despite Meta's knowledge of the harms to teens under eighteen ("Young Users") caused by excessive and compulsive Instagram use, Meta designed Instagram to be addictive to them through specific features and algorithms. Moreover, the State alleges that Meta has misled consumers about Instagram's design, concealed its internal

findings about the degree to which Instagram intentionally causes Young Users to use the platform compulsively and excessively, and misled consumers about the degree to which it exposes Young Users to harmful content and experiences. The State contends that Meta's conduct constitutes unfair and deceptive acts and practices under the Vermont Consumer Protection Act.

With respect to Vermont in particular, the complaint alleges that as of June 2021, over 40,000 Vermont teens used Instagram each month and almost 30,000 used it daily; at times more teens in Vermont used Instagram, per capita, than in any other state; Meta has focused research on Vermont teens and on Vermont as one of four targeted states; Meta has "sold advertising to both national businesses and Vermont businesses targeting Vermont markets;" Meta has "sought to refine Instagram in order to increase the engagement of Vermont teens, in particular;" has entered into at least tens of thousands of contracts with Vermonters including Young Users; and has used personal data from those users to target advertising to them from, inter alia, Vermont businesses. Complaint ¶¶ 15, 75, 76, 79-81, 84, 85.

Discussion

The question on a motion such as this is whether "it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Skaskiw v. Vermont Agency of Agric., 2014 VT 133, ¶ 6, 198 Vt. 187 (citation omitted). A court must "assume as true all facts as pleaded in the complaint, accept as true all reasonable inferences that may be derived from the plaintiff's pleadings, and assume as false all contravening assertions in the defendant's pleadings." Id. The question is "whether the bare allegations of the complaint are sufficient to state a claim." Id. "[T]he threshold a

plaintiff must cross in order to meet our notice-pleading standard is exceedingly low." Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575 (quotation and citations omitted). Such motions "are disfavored and should be rarely granted." Id.

Personal Jurisdiction

Personal jurisdiction addresses whether a party can be sued in a particular state. It has two categories: "general" jurisdiction and "specific" jurisdiction. The former generally exists when the state is the defendant's home or primary place of business. As Meta is based in California, the parties agree that the issue here is specific jurisdiction.

A nonresident defendant is subject to specific jurisdiction when a defendant has "purposefully directed . . . activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." Fox v. Fox, 2014 VT 100, ¶ 27, 197 Vt. 466 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). It must be foreseeable "that the defendant's conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there." Id. ¶ 29 (quoting Burger King, 471 U.S. at 474). "A corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State may be sued in that state when those products subsequently injure consumers; a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story, and parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the other state's jurisdiction in connection with the consequences of their activities." Id. ¶ 28 (quotations omitted). "'Once it has been decided that a defendant purposefully

established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.'" State v. Atl. Richfield Co., 2016 VT 22, ¶ 27, 201 Vt. 342 (quoting Burger King, 471 U.S. at 476).

The impact upon Vermonters is not sufficient to support jurisdiction: the question turns on Meta's actions. "The contacts must be the defendant's own choice and not random, isolated, or fortuitous," and they "must show that the defendant deliberately reached out beyond its home—by, for example, exploi[ting] a market in the forum State or entering a contractual relationship centered there." Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021) (citation and quotations omitted) (brackets in original).

The law regarding specific jurisdiction developed long before the internet, interactive websites, and apps existed. How the doctrine applies to the on-line world is an evolving area of law. *See, e.g.*, Douglas Co., Inc. v. My Brittany's LLC, No. 19-CV-1234-SM, 2020 WL 2768973, at *6 (D.N.H. May 28, 2020) ("This area of the law is both evolving and decidedly unsettled."); McCleese v. WM. A. Natorp Co., No. 5:19-CV-34, 2019 WL 13396473, at *4 (D. Vt. Oct. 24, 2019)("The Supreme Court has not yet directly addressed how traditional personal jurisdiction doctrine is affected by the internet."); Dist. of Columbia v. Facebook, Inc., No. 2018 CA 8715 B, 2019 WL 7212642, at *8 (D.C. Super. May 31, 2019) ("The relationship between a defendant's online activity and its susceptibility to suit in a foreign jurisdiction remains ill-defined, and the United States Supreme Court has yet to offer guidance in this particular area."). It is clear that merely having a passive website that is accessible to all does not create jurisdiction in every

state. TheHuffingtonPost.com, Inc., 21 F.4th at 320 ("Grannies with cooking blogs do not, and should not, expect lawsuits from Maui to Maine."). Vermont residents' mere use of an app that is accessible to all cannot create jurisdiction here. The question is how much more is needed to subject an internet-based entity to jurisdiction in a particular state. Has Meta itself done enough to invite jurisdiction in Vermont?

The State relies initially upon a sliding scale test created over twenty years ago in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). That case essentially held that the more interactive the activity, the greater the likelihood of personal jurisdiction. However, more recent cases have pointed out that such an analysis is out of pace with the changes in internet-based businesses over recent decades, and would sweep huge numbers of companies into its reach. *See, e.g.*, My Brittany's LLC, 2020 WL 2768973, at *6. Nor was Zippo ever a controlling test.

Both sides point to multiple, more recent cases supporting their positions. Meta, for example, cites Fidrych v. Marriott Int'l, Inc., 952 F. 3d 124, 143 (4th Cir. 2020). There, the court found that because Marriott's reservation website was "accessible to all but targeted at no one in particular" it did not support personal jurisdiction in South Carolina. Meta also cites cases holding that merely posting ads for local businesses, or having local residents buy products through such ads, is not a basis for jurisdiction. Johnson v. TheHuffingtonPost.Com, 21 F.4th 314, 320 (5th Cir. 2021); Doshier v. Twitter, 417 F. Supp. 3d 1171, 1177-78 (E.D. Ark. 2019). The State cites, for example, an Arkansas case that found allegations that "Meta's features and targeted activities toward young Arkansans have significantly injured them by causing various harms and psychological injuries as well as addiction to the platform" were sufficient to support

personal jurisdiction. Arkansas ex. Rel Griffin v. Meta Platforms, Inc., No. 57CV-23-47 (Ark. 18th Cir. Ct. June 13, 2024). It also points to District of Columbia v. Facebook, Inc., *supra,* at 10, which found that "Facebook's distribution of District of Columbia users' personal data for profit . . . qualifies as systematic and continuous 'transactions' between Facebook and its consumers in the District of Columbia." The case law creates no clear test for when a company's on-line presence is sufficient to create jurisdiction in a particular state. The crux of the question is whether the complaint adequately alleges that Meta's own actions have such a connection to Vermont that the company "should [have] reasonably anticipate[d] being haled into court" here. Fox, 2014 VT 100, ¶ 29 (quotation omitted).

The State argues that Meta's acts were specifically directed towards Young Users in Vermont. Specifically, the State alleges that Meta has entered into contracts with many thousands of Vermonters (Complaint ¶¶ 50-52, 85), uses the data it collects from these thousands of Vermont users to sell advertising to Vermont businesses, including at least five specifically named in the complaint (id. ¶¶ 84–85 & nn. 38–39), and has specifically tracked and studied Young Users in Vermont as part of its attempt to increase their addiction to Instagram (id. ¶¶ 74–77, 79–81, 85, 89–111). The State also alleges that Meta has designed Instagram to target Young Users and to increase the amount of time they spend on the app (id. ¶¶ 119–20), and that it has misled the public about the addictiveness of the app and the mental health impacts of such addiction (id. ¶¶ 258–61). These last allegations, however, apply to Young Users everywhere, not just in Vermont.

The court concludes that the allegations here are sufficient to establish a prima facie case for jurisdiction. Meta has done more than merely make its product available to the world at large on the internet. Unlike, for example, the Marriott case, Meta does not merely have a dropdown menu listing every state. Nor does it merely host ads for Vermont businesses. Nor is this a case of a company contracting with or selling a product to only a handful of customers in the state. Instead, as noted above, the State alleges that Meta has entered into contracts with tens of thousands of Vermonters, collected personal data from them to target advertising to them, adapted the content it provided them based upon that data, and sold the data about Vermonters to Vermont businesses to target Vermont users. Furthermore, the State alleges that Meta has specifically tracked and studied Young Users in Vermont as part of its attempt to increase their addiction to Instagram. Assuming such facts can be proved, they show direct targeting of Vermonters by Meta. This is not merely fortuitous, attenuated, or random contact.[1]

Meta argues that none of its contacts with Vermont are causally connected to the conduct at issue here: the alleged intentionally harmful design of Instagram, and the alleged misrepresentations and omissions. However, the State need not show a direct line of causation between Meta's acts of reaching into Vermont and the alleged injuries. "None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." Ford Motor Co., 592 U.S. at 362. There must only be a connection between the two. The States's allegations are that the

[1] Meta also argues that there is no evidence that its actions in Vermont are different from its actions in every other jurisdiction. Reply at 5 ("The State does not allege any of this conduct was unique to Vermont."). Whether this matters is a question the court need not answer today: at this stage of the case the court has no evidence on which to determine the accuracy of such a claim.

harm to Young Users in Vermont is the result of Meta's research about and targeting of those users, and their resulting exposure to its harmfully designed algorithms. This is sufficient to establish a connection.

The court must next consider whether it is nonetheless unfair to require Meta to defend itself here. *See* Atl. Richfield, 2016 VT 22, ¶ 27. The relevant factors include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Burger King, 471 U.S. at 477. "[W]here a defendant who purposefully has directed [its] activities at forum residents seeks to defeat jurisdiction, [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Id.

All that Meta points to in this regard is that there is already a multi-district suit in California, and there are no allegations in the complaint that witnesses or documents are here. No actual burden is cited, and given the allegations that it is a $116 billion company, *see* Compl. ¶ 72, the court cannot imagine that hiring Vermont lawyers and coming to Vermont for trial will be more than a drop in Meta's waters. Meta argues that Instagram is "available globally and thus the State's allegations could be made as to any state in the country." Motion at 8. That may be, but there is no rule that a company cannot be subject to suit in multiple jurisdictions. The court finds sufficient allegations to support personal jurisdiction.

The Communications Decency Act

Meta next argues that Section 230 of the federal Communications Decency Act bars the claims here. 47 U.S.C. § 230(c)(1). That provision states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." For example, Meta is not considered the publisher of a social media influencer's posts. Meta thus argues that it is insulated from liability for any harm caused to Young Users by what is shown to them on Instagram.

"Section 230 bars liability only if the cause of action seeks to impose liability for the provider's *publication* decisions regarding third party content—for example, whether or not to publish and whether or not to depublish." Social Media Cases, No. 22STCV21355, 2023 WL 6847378, at *11 (Cal. Super. Ct. Oct. 13, 2023). Thus, Meta may well be insulated from liability for injuries resulting from bullying or sexually inappropriate posts by Instagram users, but the State at oral argument made clear that it asserts no claims on those grounds. The question is whether it is insulated from liability for the claims that its own design independently harms Young Users. The State alleges that the intentional *addictiveness* itself harms Young Users' mental health, separate and apart from the *content* of what they see. Compl. ¶ 187-200. Likewise, the State alleges that Meta failed to warn users (and parents) of the harm that their product can cause merely from overuse, separate and apart from the content. Id. ¶¶ 312-315. Unsurprisingly, both sides cite cases supporting their arguments.

The cases cited by Meta in its initial motion are not persuasive. Those cases involve claims that the *substance* of third-party content posted on the platform harmed

the plaintiffs. *See*, *e.g.*, Force v. Facebook, Inc., 934 F.3d 53, 65 (2d Cir. 2019) (plaintiffs sought to hold Facebook liable for giving Hamas a forum with which to communicate, for bringing Hamas's message to interested parties, and for failing to delete content from Hamas members' Facebook pages); Klayman v. Zuckerberg, 753 F.3d 1354, 1355–56 (D.C. Cir. 2014) (plaintiff sued Facebook for failing to promptly remove pages from its platform); Johnson v. Arden, 614 F.3d 785, 787, 791 (8th Cir. 2010) (involving claims that "allegedly defamatory statements posted on an internet discussion board" by third parties harmed plaintiffs); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102–03 (9th Cir. 2009), as amended (Sept. 28, 2009) (alleging that internet service provider should have removed certain content from its website); Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097–98 (9th Cir. 2019) (alleging that website operator—through its algorithms and recommendations—was liable for plaintiff's son's heroin death resulting from drugs he obtained from interacting with third party drug dealer on website); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 257 (4th Cir. 2009) (alleging that consumer affairs website was liable for allegedly defamatory statements posted on website by third parties). Section 230 plainly barred the claims in all of those cases. In its subsequent filings, Meta cites several other cases holding that algorithms that determine what content to show, or when, or how much, constitute publishing. However, with one exception, those cases also addressed injuries caused by the third-party content, not by the internet companies' own designs. The exception is In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 4:22-MD-03047-YGR, 2023 WL 7524912 (N.D. Cal. Nov. 14, 2023). In that case, the claims were very similar to those here: that the algorithms and other features created by the defendants caused children harmful addiction to the media and resulting mental heath problems.

The problem with such an analysis is that it ignores the language of the statute, which bars treating a company such as Meta as "the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). In other words, Meta cannot be held liable for the things said by someone else on Instagram. That is not what is alleged here. The State is not seeking to hold Meta liable for any content provided by another entity. Instead, it seeks to hold the company liable for intentionally leading Young Users to spend too much time on-line. Whether they are watching porn or puppies, the claim is that they are harmed by the time spent, not by what they are seeing. The State's claims do not turn on content, and thus are not barred by Section 230. *Accord*, Lemmon v. Snap, Inc., 995 F. 3d 1085, 1092-94 (9th Cir. 2021) (no immunity under Section 230 because negligence claim for harmful design "does not seek to hold Snap liable for its conduct as a publisher or speaker"); Tennessee v. Meta Platforms, Inc., No. 23-1364-IV at 20-21 (Tenn. Chancery Ct., March 13, 2024) (Section 230 does not apply to claims that Meta misrepresented features they knew were harmful to Young Users); Social Media Cases, 2023 WL 6847378, at *31-32 (Where "[t]he features themselves allegedly operate to addict and harm minor users of the platforms regardless of the particular third-party content viewed by the minor user," Section 230 does not apply).

The State's deception claim (Compl. ¶¶ 258–61) is also not barred by Section 230 for the same reason—it does not depend on third party content or traditional editorial functions. The State alleges that Meta has failed to disclose to consumers its own internal research and findings about Instagram's harms to youth, including "compulsive and excessive platform use." Compl. ¶ 259. The alleged failure to warn is not

"inextricably linked to [Meta's] alleged failure to edit, monitor, or remove [] offensive content." Herrick v. Grindr LLC, 765 F. App'x 586, 591 (2d Cir. 2019); *see also* Doe v. Internet Brands, Inc., 824 F.3d 846, 851 (9th Cir. 2016) ("A . . . warning that [defendant] generated would involve only content that [defendant] itself produced. Therefore, an alleged tort based on a duty that would require such a self-produced warning falls outside of section 230(c)(1)."); In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., 2023 WL 7524912, at *16 ("The duty arises not from their publication of conduct, but from their knowledge, based on public studies or internal research, of the ways that their products harm children. Plaintiffs allege through these claims that defendants could meet this duty without making any changes to how they publish content, by providing warnings for any and all of the alleged defects."); Social Media Cases, 2023 WL 6847378, at *46 ("Meta could have fulfilled its duty to warn of these potential harms without referencing or deleting any content—the duty springs from its capacity as a creator of features designed to maximize engagement for minors, not from its role as publisher.").

The First Amendment

The next argument is that Meta's exercise of editorial control over what is posted on Instagram is protected under the First Amendment. Motion at 22. Again, however, this fails to distinguish between Meta's role as an editor of content and its alleged role as a manipulator of Young Users' ability to stop using the product. The First Amendment does not apply to the latter. "[A] restriction on nonspeech or non-expressive conduct does not implicate the First Amendment and receives only rational basis scrutiny." Ruling on Mot. to Dismiss, State v. Clearview AI Inc., No. 226-3-20

Cncv, slip copy at 10–11 (Vt. Super. Ct. Sept. 10, 2020) (Ex. A to Pl.'s Opp'n) (citing Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986); Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)); *see also* Elane Photography, LLC v. Willock, 284 P.3d 428, 439 (N.M. App. Ct. 2012) ("the First Amendment does not apply when a law regulates conduct rather than expression"). Meta pointed at oral argument to the Supreme Court's recent ruling in Moody v. NetChoice, LLC, __U.S. __, 144 S. Ct. 2383 (2024), which involved the application of the First Amendment to social media companies. Meta points to the comment there that "expressive activity includes presenting a curated compilation of speech originally created by others." Id. at 2400. As Meta acknowledged, that was merely dicta, but this court nonetheless takes no issue with the point. It does not change the result here. Unlike Moody, where the issue was government restrictions on content, as discussed above it is not the substance of the speech that is at issue here.

There is a separate claim here that Meta's alleged lies in testimony before Congress constitute actionable misrepresentations under the Consumer Protection Act. Meta argues that these are protected by the First Amendment right to petition the government. Meta cites several cases for the proposition that even false testimony to Congress is so protected. The first case cited does not so hold. It discusses venal motives, "sham" petitions (attempts to hurt a competitor), and conspiracies with the government, but not falsehoods. Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075 (5th Cir. 1988). The others all address the question of antitrust suits and "sham" petitions. Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288 (8th Cir. 1978); Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir. 1999); Kottle v. Nw. Kidney Centers, 146 F.3d 1056 (9th Cir. 1998). None address

whether a consumer protection claim may be brought based upon false testimony before a government body. Moreover, it is a crime to knowingly lie under oath to Congress. 18 U.S.C. §§ 1001, 1621; U.S. v. Norris, 300 U.S. 564 (1937); United States v. Lattimore, 215 F.2d 847, 867–68 (D.C. Cir. 1954) ("Congress, the courts, and administrative bodies must not be misled, in their official action, by false testimony.") (Edgerton, J., concurring). The court is thus unpersuaded by Meta's claim that such lying is protected speech, and cannot say that "it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." Skaskiw, 2014 VT 133, ¶ 6. Dismissal on this basis is therefore inappropriate.

The Consumer Protection Act

Meta's next argument is that the Vermont Consumer Protection Act does not apply here for various reasons. First, it argues that because Instagram is free, there is no seller, buyer, or commerce at issue.

Instagram is certainly engaging in commerce when it provides Instagram to Vermonters: "To be considered 'in commerce,' the transaction must take place in the context of [an] ongoing business in which the defendant holds himself out to the public." Foti Fuels, Inc. v. Kurrle Corp., 2013 VT 111, ¶ 21, 195 Vt. 524 (quotations and citation omitted). That is exactly what Meta does. Users of Instagram allegedly sign a contract agreeing to give Instagram access to personal information for advertising purposes in exchange for using the site. That sufficiently pleads a contractual business relationship between Instagram and each user. As Meta itself notes, the definition of consumer includes a person who "contracts" for goods or services. 9 V.S.A. § 2451a(1).

Meta's argument that there must be money changing hands is unsupported. Although the statute is not a model of clarity, it has different requirements for cases brought by individuals and those brought by the State. The State may bring actions when it has reason to believe that a defendant "is using or is about to use any method, act, or practice" that is an unfair or deceptive act in commerce. 9 V.S.A. §§ 2458, 2453. There is no requirement of a specific purchase and sale in such cases. In fact, such cases can be brought before any act has even taken place. Id. § 2458 (action may be filed when Attorney General believes an unfair act "is about to" occur). Moreover, "proper defendant[s] includ[e] not only a seller or solicitor, but also an 'other violator,' a broad term . . ." Elkins v. Microsoft Corp., 174 Vt. 328, 331 (2002) (allowing claim against product manufacturer despite there being no direct transaction between the consumer and the manufacturer). The State has sufficiently alleged acts covered by the statute.

Nor is the court persuaded by Meta's next argument: that the complaint fails to allege any actionable omissions or misrepresentations. Motion at 28-32. Meta argues that representations as to the safety of the site are mere statements of opinion, not fact, and cannot be the basis of a misrepresentation claim. *See* Webb v. Leclair, 2007 VT 65, ¶ 22, 182 Vt. 559; Heath v. Palmer, 2006 VT 125, ¶ 14, 181 Vt. 545; Winey v. William E. Dailey, Inc., 161 Vt. 129, 133 (1993). A general statement that "Instagram is safe" might well be opinion. However, the complaint has specific allegations that, for example, Meta falsely denied that it designed Instagram to get users to spend more time on the site, and falsely denied that it had any research to show the site is addictive. Complaint ¶¶ 306-312. Those are factual statements that can be proved or disproved, not opinion or puffery.

Next, Meta asserts that there are insufficient details as to what misrepresentations were made, when, and to whom. The complaint, however, identifies specific Congressional testimony, quarterly reports to the public, press releases, and intentional omissions of internal research and findings of harms posed by specific Instagram features. Id. ¶¶ 266-285; 292-302, 306-310, 328-336.

Meta also argues that there are no allegations to support a finding of materiality as to any misrepresentation or omissions. Specifically, Meta notes that the complaint does not say that any user would have chosen not to use Instagram had she known of all the falsehoods or omitted information. Motion at 33. To the contrary, the complaint alleges both that (1) "[i]f Meta publicly disclosed the known risks and harms of Instagram to youth, many consumers—including young users and their parents and guardians—would likely reject the product," and (2) the misrepresentations and omissions "were likely to have affected, and are likely to be affecting, consumers' decisions to use Instagram." Id. ¶¶ 28, 371. While general, these are sufficient allegations to survive a motion to dismiss.

Finally, Meta argues that the complaint lacks any allegations of unfair conduct, defined for purposes of the Consumer Protection Act as "'likely to cause substantial injury to consumers.'" *See* Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158, 168 (2d Cir. 2016) (quoting 15 U.S.C. § 45(n)); 9 V.S.A. § 2453(b); Christie v. Dalmig, 136 Vt. 597, 601 ("9 V.S.A. s 2453(b) mandates that the courts of this state be guided by the construction of similar terms contained in the Federal Trade Commission Act."). The parties dispute whether this is a required element of the State's case, but the court concludes that it is nonetheless adequately pled. The complaint alleges that Instagram

has purposely been designed to affect Young Users, despite Meta knowing that such addiction causes a litany of physical and mental health problems for such users, including anxiety, depression, lack of sleep, suicidal thoughts and behaviors, and changes in brain structure. It is hard to see how such results, if proved, could *not* be considered substantial injury. The fact that most consumer protection cases involve financial injury does not preclude a finding of substantial injury based upon physical and mental harm. As another court has noted in interpreting the Federal Trade Commission Act, "although Congress has noted that consumer injury often involves monetary harm, and that mere '[e]motional impact and other more subjective types of harm' are ordinarily insufficient, these generalizations do not limit Section 5(n)'s reach only to tangible harms." Fed. Trade Comm'n v. Kochava Inc., 671 F. Supp. 3d 1161, 1174 (D. Idaho 2023) (quoting S. Rep. No. 103-130, at 13, 1993 WL 322671 (1993)); *see also* F.T.C. v. Accusearch, Inc., No. 06-CV-105-D, 2007 WL 4356786, at *8 (D. Wyo. Sept. 28, 2007), aff'd, 570 F.3d 1187 (10th Cir. 2009) ("while the substantial injury requirement may not *ordinarily* be met from emotional impact harm that is 'trivial or merely speculative,' the evidence presented to the Court regarding the sale of consumer phone records in particular demonstrates a host of emotional harms that are substantial and real and cannot fairly be classified as either trivial or speculative.").

Order

The motion to dismiss is denied. Meta shall file its answer within 14 days, and the parties shall file a stipulated discovery schedule within 30 days thereafter.

Electronically signed on July 28, 2024 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge

The Order of the Court is stated below:
Dated: October 18, 2024 08:41:33 AM /s/ John A. Pearce Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

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INSTAGRAM, LLC and META PLATFORMS, INC., Petitioners, v. UTAH DIVISION OF CONSUMER PROTECTION, Respondent.	ORDER Case No. 20240875-SC

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This matter is before the Court upon a petition for permission to appeal from an interlocutory order filed August 15, 2024, and the response filed on September 18, 2024.

Pursuant to Utah Rule of Appellate Procedure 5, the petition for permission to appeal from an interlocutory order is denied.

End of Order - Signature at the Top of the First Page

IN THE SUPREME COURT OF THE STATE OF NEVADA

META PLATFORMS, INC. F/K/A FACEBOOK, INC., Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party in Interest.	No. 89920
META PLATFORMS, INC. F/K/A FACEBOOK, INC., Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party in Interest.	No. 89921
META PLATFORMS, INC. F/K/A FACEBOOK, INC. AND INSTAGRAM, LLC, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT	No. 89922

FILED

JAN 27 2025

ELIZABETH A. ...
CLERK OF SUPREME ...
BY ... DEPUTY CLERK

SUPREME COURT
OF
NEVADA

(O) 1947A

25-03898

JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

ORDER DENYING PETITIONS

These are three related original petitions for a writ of prohibition and mandamus. These original writ petition proceedings involve the same parties and counsel and arise from related district court cases.

The decision to entertain a petition for extraordinary writ relief lies within the discretion of this court. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991) (recognizing that writ relief is an extraordinary remedy and that this court has sole discretion in determining whether to entertain a writ petition). A writ of mandamus is available only to compel the performance of a legally required act or to cure an arbitrary and capricious exercise of discretion. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the district court's jurisdiction. NRS 34.320; *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

Petitioners bear the burden to show that extraordinary relief is warranted, and such relief is proper only when there is no plain, speedy, and adequate remedy at law. NRS 34.170; *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224, 228, 88 P.3d 840, 841, 844 (2004). An appeal is generally an adequate remedy precluding writ relief. *Pan*, 120 Nev. at 224, 88 P.3d at 841. Even when an appeal is not immediately available because the

challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal generally precludes writ relief. *Id.* at 225, 88 P.3d at 841.

Having reviewed the petition and supporting documents, we are not persuaded that our extraordinary intervention is warranted. As an initial matter, while petitioner argues that mandamus relief would be appropriate to avoid potentially significant reoccurring issues of law, it does not make a compelling argument as to why an appeal from a later final judgment would not be an adequate remedy. *Id.* at 224, 88 P.3d at 841. As a general rule, "judicial economy and sound judicial administration militate against the utilization of mandamus petitions to review orders denying motions to dismiss and motions for summary judgment." *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983), *as modified by State v. Eighth Jud. Dist. Ct.*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002); *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (noting that "[n]ormally this court will not entertain a writ petition challenging the denial of a motion to dismiss"). Although the rule is not absolute, *see Int'l Game Tech.*, 122 Nev. at 142-43, 127 P.3d at 1096, petitioner has not established the district court manifestly abused its discretion.

Further although "[a] writ of prohibition is the appropriate remedy for improper exercise of personal jurisdiction by a district court," *Ind. Ins. Co. v. Eighth Jud. Dist. Ct.*, 112 Nev. 949, 951, 920 P.2d 514, 516 (1996), petitioner's request for prohibitive relief appears to be based on a factual dispute as to whether personal jurisdiction existed, and "those disputes must be resolved in favor of the plaintiff' if a prima facia showing of jurisdiction was made below, *Levinson v. Second Jud. Dist. Ct.*, 103 Nev.

404, 407, 742 P.2d 1024, 1026 (1987). Petitioner does not demonstrate that extraordinary writ relief is warranted. *Pan*, 120 Nev. at 224, 88 P.3d at 841.[1] Accordingly, we

ORDER the petitions DENIED.

_____, C. J.
Herndon

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Joanna Kishner, District Judge
Womble Bond Dickinson (US) LLP/Las Vegas
Peterson Baker, PLLC
Kemp Jones, LLP
Eighth District Court Clerk

[1]As an additional ground for denial, the district court's orders challenged by these original writ petition proceedings granted real party in interest leave to amend its complaints. While petitioner argues that the amended complaints do not substantively alter the legal issues presented in the petitions, and that therefore amendment "neither renders the legal issue abstract nor prevents [this court] from granting effectual relief to the prevailing party," *Orbitz Worldwide, LLC v. Eighth Jud. Dist. Ct.*, 139 Nev., Adv. Op. 40, 535 P.3d 1173, 1178 n.5 (2023), it is not clear that the district court's legal conclusions challenged by these petitions would not be affected by a subsequent district court decision. This is especially true seeing as petitioner appears to have filed new motions to dismiss in the district court that are currently still pending.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2025-0022, State of New Hampshire v. Meta Platforms, Inc. & a., the court on February 18, 2025, issued the following order:

Notice of appeal is declined. See Rule 7(1)(B).

Under Supreme Court Rule 7(1)(B), the supreme court may decline to accept a notice of discretionary appeal from the superior or circuit court. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who considered this matter believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

The declination is without prejudice to the filing of a future appeal in compliance with the rules of this court that raises the issues contained in this appeal.

Declined.

MacDonald, C.J., and Bassett, Donovan, and Countway, JJ., concurred.

Timothy A. Gudas,
Clerk

Distribution:
Merrimack County Superior Court, 217-2023-CV-00594
Honorable John C. Kissinger, Jr.
Michael A. Delaney, Esq.
Gregory L. Halperin, Esq.
Mark W. Mosier, Esq.
Christopher J. Walsh, Esq.
Theo Benjamin, Esq.
Brandon F. Chase, Esq.
Brandon H. Garod, Esq.
Attorney General
Shantel Chapple Knowlton, Esq.
Emily Penkowski Perez, Esq.
Roger Perlstadt, Esq.
Jimmy R. Rock, Esq.
Kevin P. Scura, Esq.
Mary Frances Stewart, Esq.
File

FILED
07/10/2024
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE EX REL. JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER v. META PLATFORMS INC. ET AL.

Chancery Court for Davidson County
No. 23-1364-IV

No. M2024-00877-COA-R9-CV

ORDER

The Tennessee Rule of Appellate Procedure 9 application for permission to appeal filed by Meta Platforms, Inc. and Instagram, LLC has been considered by the Court and is hereby denied. The costs are taxed to Meta Platforms, Inc. and Instagram, LLC, for which execution may issue.

PER CURIAM

Vermont Supreme Court
Filed: December 23, 2024

VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 24-AP-295

ENTRY ORDER

DECEMBER TERM, 2024

State of Vermont v. Meta Platforms, Inc. et al.*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit, Civil Division
	}	
	}	CASE NO. 23-CV-04453

In the above-entitled cause, the Clerk will enter:

Defendants filed a motion in the civil division under Vermont Rule of Appellate Procedure 5(b)(1) requesting permission to appeal an interlocutory order denying their motion to dismiss. They sought review of the court's rulings regarding: (1) personal jurisdiction; (2) application of Section 230 of the federal Communications Decency Act (CDA), 47 U.S.C. § 230, to the State's claims; and (3) application of the First Amendment to the U.S. Constitution and Article 13 of the Vermont Constitution to the State's claims.

The trial court "must permit an appeal from an interlocutory order or ruling" if it finds that "(A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (B) an immediate appeal may materially advance the termination of the litigation." V.R.A.P. 5(b)(1). Here, the court granted permission to appeal its ruling on personal jurisdiction, concluding that the requirements of Rule 5(b)(1)(A) and (B) were satisfied. However, it denied defendants' requests to appeal its rulings on their CDA and constitutional arguments, finding that an immediate appeal would not materially advance the termination of the litigation. Defendants then filed a motion in this Court requesting permission to appeal these two interlocutory rulings pursuant to Rule 5(b)(7)(A).

We conclude that the requirements of Rule 5(b)(1)(A) and (B) are satisfied as to the civil division's interlocutory ruling on personal jurisdiction, and therefore accept the appeal of this issue. See V.R.A.P. 5(b)(6)(B). However, defendants have not shown that the civil division abused its discretion in denying their request for immediate appeal of its interlocutory rulings under the CDA and the U.S. and Vermont Constitutions. State v. Haynes, 2019 VT 44, ¶ 33, 210 Vt. 417 ("[T]he trial court has discretion in granting or denying interlocutory appeal, and this Court reviews for an abuse of that discretion."). Defendants did not demonstrate that immediate appeal of these rulings would materially advance the termination of the litigation as required under Rule 5(b)(1)(B). Because a failure to satisfy any one of the Rule 5(b)(1) criteria precludes interlocutory appeal, defendants' motion for permission is denied. In re Pyramid Co. of Burlington, 141 Vt. 294, 302 (1982).

Within fourteen days of entry of this order, defendants shall pay any required entry fee, file with this Court an appellants' docketing statement, and order transcripts from an approved transcription service or file a statement indicating that no transcripts are necessary for the appeal. See V.R.A.P. 3(e), 5(b)(6)(B), 10(b). Defendants' failure to comply with this order may result in dismissal of the appeal without further notice.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Nancy J. Waples, Associate Justice

KeyCite Yellow Flag
Disagreed With by Ganim v. Smith and Wesson Corp., Conn., October 9, 2001

KeyCite Overruling Risk
Overruling Risk Iannacchino v. Ford Motor Co., Mass., June 13, 2008

12 Mass.L.Rptr. 225
Superior Court of Massachusetts.

CITY OF BOSTON & another, [1]
v.
SMITH & WESSON CORP. & others. [2]

No. 199902590.
|
July 13, 2000.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

HINKLE.

***1** This is an action by the City of Boston and the Boston Public Health Commission against various firearms manufacturers, distributors, sellers and promoters, including firearms industry trade associations. [3] In a detailed six-count complaint, [4] Plaintiffs seek to recover damages allegedly sustained through conduct of Defendants. [5] Briefly stated, Plaintiffs allege that Defendants, through a strategy of willful blindness, exploit and rely upon for profit an illegal, secondary firearms market of juveniles, criminals and other unauthorized gun users in Boston. Plaintiffs allegedly bear immense costs arising from this market. Plaintiffs also allege that Defendants design guns without readily available safety devices and fail to warn of certain dangers.

The matter is before the court on the motion of the manufacturing defendants to dismiss the First Amended Complaint under Mass.R.Civ.P. 12(b)(6) for failure to state a claim. After a hearing, for the reasons discussed below, the motion to dismiss is *ALLOWED* in part and *DENIED* in part. [6]

BACKGROUND

The factual allegations contained in the First Amended Complaint, [7] as relevant to each of the theories of liability, are summarized as follows. [8] For clarity, additional factual allegations are set forth in the discussion section where pertinent.

Plaintiffs allege that Boston faces a high level of violent crime [9] involving guns manufactured by Defendants. [10] Easy movement of firearms from the legal marketplace to unauthorized and illegal users, [11] through an illegal, secondary firearms market, fuels the gun violence. [12]

Plaintiffs also allege that the flow of firearms into the illegal market and into the hands of unauthorized users in Boston has occurred in ways Defendants knew or should have known. Plaintiffs claim that Defendants could have taken action to control and prevent the illegal diversion. The methods of illegal diversion include, according to Plaintiffs: (1) straw purchases, which occurred under circumstances which indicated or should have indicated to the dealer that a straw purchase was being made; (2) multiple sales (where a purchaser buys more than one gun, at one time or over a short period, from a licensed dealer with the intent of conveying the gun to another person not qualified to purchase guns), occurring under circumstances which indicated or should have indicated to the seller that the gun was destined for the unlawful market; (3) sales to "kitchen table" dealers (federally licensed dealers who do not sell from a retail store) by Defendants, even though Defendants knew or should have known that many of those dealers fail to perform background checks or otherwise illegally divert guns to the illegal market; (4) theft of guns from firearm dealers who failed to provide adequate security for their premises, where Defendants failed to ensure that persons distributing their products have implemented adequate security measures; (5) obliteration of serial numbers from guns, where Defendants, though aware of this problem, took no initiative to make their serial numbers tamper-proof; (6) movement of firearms from states with weak gun control laws to areas (such as Boston) with stronger laws and (7) sales at gun shows, where background checks are usually not required. These guns are often used in more than one crime.

***2** Plaintiffs allege that Defendants' distribution system is reckless and has caused firearms to come into the hands of unauthorized persons, causing Plaintiffs direct harm. [13] Plaintiffs claim that Defendants knew that their guns were distributed into the illegal, secondary market and knew that

this market supplied a substantial percentage of firearms used to inflict harm upon Plaintiffs.[14] According to Plaintiffs, Defendants could have helped to prevent firearms they manufacture, market, distribute and sell from flowing into the illegal market and into the hands of unauthorized persons.[15]

Plaintiffs also claim that Defendants' guns are unsafely designed in that Defendants fail to incorporate features which would inhibit unlawful access, transfer or theft by criminals, juveniles and other unauthorized users. The defective design results in thousands of unintentional deaths and non-fatal injuries per year, according to Plaintiffs.[16] Plaintiffs claim that failure to incorporate "personalized" gun technology (to prevent unauthorized or prohibited persons from obtaining access to and using guns) results in homicides and other crimes, some of which occur in Boston.

Plaintiffs claim that Defendants are in the best position to conduct research to correct the design of their guns. Plaintiffs allege that Defendants have been aware of the need for design features which would inhibit straw purchases, reuse of stolen weapons and accidental discharges by unauthorized users, but that Defendants have failed to research, develop and implement feasible, available technology.

According to Plaintiffs, it has been reasonably foreseeable that Defendants' guns would come into the hands of unauthorized users.[17] Plaintiffs claim that Defendants have been aware or should have been aware that, when unauthorized users gain access to Defendants' guns, shootings may result. Unintentional shootings, suicides and crimes committed by juveniles and other unauthorized users could be prevented if Defendants implemented safer gun designs, Plaintiffs allege. Such designs, according to Plaintiffs, include built-in locking systems, magazine-disconnect safeties and chamber-loaded indicators. Plaintiffs claim that Defendants knew that by failing to implement such safety designs, it was reasonably foreseeable that stolen guns could be employed by unauthorized or prohibited users in violent criminal acts. Plaintiffs claim that they have been repeatedly victimized by Defendants' "unreasonably dangerous products."[18]

According to Plaintiffs, when Defendants manufactured, distributed, promoted, and/or sold these guns, they knew or should have known of the unreasonable dangers of the guns; Defendants knew of and had available to them safety devices or other measures which would decrease the dangers; Defendants are in the best position to correct the unreasonably dangerous design of their products, but have failed to remedy the deficiency and Defendants purposefully and intentionally engaged in their activities knowing that their products could be made to prevent firing by unauthorized users and knowing that Plaintiffs would be injured and forced to bear substantial expenses. Plaintiffs further allege that Defendants have acted in concert with each other in their failure to develop and implement safety features and implement proper warnings.

***3** Plaintiffs claim that, to increase profits, Defendants have knowingly, purposefully, intentionally or negligently misled, deceived and confused Boston and its citizens regarding the safety of firearms. Defendants did this, Plaintiffs allege, by claiming falsely and deceptively through advertising that firearm ownership enhances security and that firearms are safe. Plaintiffs say that when Defendants made these claims, Defendants knew or should have known that studies and statistics show that presence of firearms in the home increases the risk of harm and that firearms without locking devices are unsafe.[19] Plaintiffs claim that, in Boston, numerous deaths and injuries have occurred when firearms were foreseeably used in unintentional shootings, suicides by teenagers, domestic disputes and other acts of violence.

Plaintiffs allege that Defendants' conduct undermines the Commonwealth's public policy regarding handguns. Plaintiffs further allege that Defendants' conduct has caused Plaintiffs harm, including substantial financial costs for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants; increased spending on law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability, and unemployment benefits, higher prison costs and youth intervention programs and lower tax revenues and lower property values.

DISCUSSION

The standard for evaluating the sufficiency of a complaint under Mass.R.Civ.P. 12(b)(6) is undisputed. The court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them in the plaintiff's favor. *Eyal v.. Helen Broad Corp.*, 411 Mass. 426, 429 (1991). Plaintiffs "need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim." *Bell v. Mazza,* 394 Mass. 176, 184 (1985). A "complaint should not be dismissed for failure to state a claim unless it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader v. Citron,* 372 Mass. 96, 98 (1977) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). "[A] complaint is not subject to dismissal if it would support relief on any theory of law," *Whitinsville Plaza, Inc. v. Kotseas,* 378 Mass. 85, 89 (1979) (citations omitted; emphasis in original), "even though the particular relief [which the plaintiff] has demanded and the theory on which he seems to rely may not be appropriate." *Nader,* 372 Mass. at 104 (citations omitted). In addition, "[a] complaint should not be dismissed simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins,* 15 Mass.App.Ct. 934, 934 (1983).

In this case, Defendants argue that the complaint should be dismissed because the claims are substantively deficient and the claims are barred by reason of six defenses, namely (1) Boston's harm is too remote to confer standing or establish proximate cause; (2) a municipality cannot obtain relief for the expenditure of funds to provide municipal services; (3) the economic loss rule bars recovery; (4) Plaintiffs improperly aggregate claims; (5) the Home Rule Amendment and the Firearms Act bar recovery and (6) the relief requested amounts to improper regulation of interstate commerce. Each issue will be addressed in turn.

I. The "Remoteness" Issue

***4** Defendants argue that Plaintiffs' claims are entirely derived from harm or threatened harm to others and, therefore, Plaintiffs cannot establish standing or show that Defendants' alleged actions proximately caused the harm claimed. [20]

Proof of a causal relationship between a defendant's action and a plaintiff's injury is essential in every tort "because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history," the concept of proximate causation was developed to limit the liability of a wrongdoer to only those harms with a reasonable connection to the wrongdoer's actions. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.,* 191 F.3d 229, 235 (2d Cir.1999), cert. denied, 120 S.Ct. 799 (2000) (hereafter "*Laborers Local* "). "[T]he notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 268 (1992) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41, at 264 (5th ed.1984)). [21]

One way in which the concept of proximate cause operates is through the remoteness doctrine, which is sometimes called the direct injury test. *Holmes,* 503 U.S. at 268. This doctrine states that there must be "some direct relation between the injury asserted and the injurious conduct alleged." [22] *Id.* Thus, in general, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69 (citing 1 J. Sutherland, Law of Damages 55-56 (1882)).

This doctrine has been applied in Massachusetts. [23] In the "classic" [24] case of *Anthony v. Slaid,* 11 Met. (52 Mass.) 290, 291 (1846), the plaintiff, for a fixed annual compensation, contracted to support the poor of a Massachusetts town. After incurring increased expense in caring for a pauper who was the victim of an assault and battery, the plaintiff sued the party responsible for the attack. [25] The Supreme Judicial Court held that the injury to the plaintiff, which derived entirely from the pauper's injuries, was too remote and indirect because the relation between the plaintiff and the pauper was based on a "special contract" rather than as a "natural and legal relation." *Id.*

The Supreme Judicial Court took occasion to explain *Anthony* in *Chelsea Moving & Trucking Co. v. Ross Towboat Co.,* 280 Mass. 282 (1932). In that case, the injured victim's employer sought to recover from the tortfeasor for the employer's loss, which resulted from the victim-employee's decreased work ability, which in turn had resulted from the tortfeasor's negligence. Holding that the injury to the employer was too remote, the Court emphasized that the relationship between the original victim and the plaintiff was based on contract. *Id.* at 287. In contrast, where the plaintiff's loss is the effect of a natural and legal relationship, such as a parent-child relationship, that loss is not too remote. *Id.* at 284; *Balian v. Ogassin,* 277 Mass. 525, 531 (1931) (father's damages-medical expenses incurred in treatment of injured son-not too remote that father could not recover from tortfeasor); *Dennis v. Clark,* 2 Cush. (56 Mass.) 347, 354-55 (1848) (same).

***5** Similarly, the Supreme Judicial Court held, the relationship between a master and an apprentice was so important and so like a parent-child relationship that the master could recover for injuries to the apprentice, whose services the master lost. *Chelsea Moving & Trucking Co.,* 280 Mass. at 284-85 (citing *Ames v. Union Ry. Co .,* 117

Mass. 541 (1875)). The reason for this distinction, the Court said, was that the injury to an employer "is not the natural and probable consequence of the ordinary tort." *Id.* at 287. Thus, the employer's injury was too remote because it was not foreseeable to the tortfeasor, who did not know of the contract. Had the tortfeasor known of the contract, a different result may have obtained:

> It is not alleged that there was any knowledge on the part of the defendant of the contract between [the employee] and the plaintiff or that the negligence of the defendant had any relation to such knowledge. There is no allegation of malice on the part of the defendant toward the plaintiff or toward anybody. There was no negligent interference with a contract. There is no allegation of deliberate design by the defendant to accomplish a definite end regardless of consequences to others. If elements of that nature were present a quite different question would be presented.

Id. at 286. See also *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 309 (1927) (tortfeasor not liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong").

From these cases, it is apparent that a plaintiff cannot recover from a defendant when the plaintiff's loss arises from harm the defendant caused to the injured party, absent some special relationship between the plaintiff and the injured party or, perhaps, an ordinary contract relationship of which the defendant knew.[26] There is no proximate cause under those circumstances because the plaintiff's harm is too "remote."

The cases the parties cite show that a plaintiff's harm arises from harm to a third party when it is "purely contingent on" or "wholly derivative of" harm to the third party.[27] *Laborers Local,* 191 F.3d at 236 & 237. *Holmes* itself was a case of "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts."[28] *Holmes,* 503 U.S. at 268, 269-70.

In this case, the principal portion of the complaint alleging harm states:

> Defendants' conduct has caused [Plaintiffs] to incur public costs to respond to both intentional and accidental gunshot injuries. The harm to [Plaintiffs] includes substantial financial costs necessary for prevention, amelioration and abatement of the ongoing public nuisance caused by [D]efendants. Moreover, [Plaintiffs] ha[ve] suffered economic injury as a result of increased spending on, among other things, law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs. Boston has further been damaged by lower tax revenues and lower property values.

***6** Compl. at par. 76.[29]

This alleged harm is in large part not "wholly derivative of" or "purely contingent on" harm to third parties. Unlike the harm alleged in the cases discussed above, which would not have existed without harm to a third party, harm to Plaintiffs may exist even if no third party is harmed. For example, Plaintiffs allege that Defendants' conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile (who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants' conduct. Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services). Similarly, diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on

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individuals. [30] Plaintiff's' harm is in essence the type of harm typically suffered by municipalities due to public nuisances. Cf. *White v. Smith & Wesson,* 97 F.Sup.2d (ND.Ohio 2000), 2000 WL 664176 at *6. Indeed, much of the harm alleged is of a type that can only be suffered by these plaintiffs.

To be sure, Plaintiffs do allege injuries that arise from harm to others. Plaintiffs allege, for example, increased costs for emergency medical services, funerals, pensions, disability and unemployment benefits and lost productivity of citizens and employees harmed by guns. In addition, some of the injuries not necessarily derivative of harm to others may be exacerbated if individuals themselves are harmed. Two points need be made on this.

First, the remoteness doctrine, as it appears to exist in Massachusetts, contains an exception in cases of a special relationship between the plaintiff and the injured third party, such as a parent-child relationship or a close master-apprentice relationship *Chelsea Moving & Trucking Co.,* 280 Mass. at 284-85. An additional exception may arise where the plaintiff and the injured third party, while not in a special relationship, have a relationship of which the defendant knew, or in cases where the defendant acted with malice or with a "deliberate design ... to accomplish a definite end regardless of consequences to others." *Id.* at 286. As governmental bodies, Plaintiffs may have the type of special relationship that puts this case within the first exception to *Anthony* (if such an exception exists), and the complaint's allegations are sufficient to place the case within the second *Anthony* exception (if this exception exists).

The uncertainty about the state of the law expressed in the above paragraph raises the second point. It is settled law that a complaint should not be dismissed "simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins,* 15 Mass.App.Ct. 934, 934 (1983). A motion to dismiss is not an appropriate vehicle for "resolv[ing] undecided points of substantive law[.]" *M. Aschheim Co. v. Turkanis,* 17 Mass.App.Ct. 968, 968 (1983).

***7** Nearly all the cases to which the parties refer which apply the remoteness doctrine are non-Massachusetts cases. [31] While the *Anthony* case appears to be the ultimate source of the remoteness doctrine, the contours of that doctrine are ill-defined in Massachusetts. Even if Plaintiffs' allegations present an extreme theory of liability, a motion to dismiss is not the proper vehicle to challenge the theory. [32] See *New Eng. Insulation Co. v. Gen. Dynamics Corp.,* 26 Mass.App.Ct. 28, 30 (1988). [33]

In sum, Plaintiffs' allegations are not, as a matter of law, barred by "remoteness."

II. The Free Public Services Issue

Defendants argue that the complaint should be dismissed because a municipality may not recover costs of providing public services. The principal Massachusetts case on which Defendants rely is *Town of Freetown v. New Bedford Wholesale Tire, Inc.,* 384 Mass. 60 (1981). The court does not read *Freetown* as broadly as do Defendants. [34]

In *Freetown,* the plaintiff town alleged that the defendants negligently dumped 750,000 used tires on town land. A fire broke out, and the town's fire department "incurred greater expense than usual and necessary" in extinguishing the fire. *Id.* at 61. The town sought to recover for the defendant's alleged negligence or misrepresentation. The Supreme Judicial Court held that the town could not recover because the costs of controlling that type of fire were to be borne by the town. The Court noted that the establishment and maintenance of a fire department is for the benefit of the public. Implicit in the Court's decision is the determination that the costs of this public benefit are to be carried by the public as a whole, absent a contrary statute.

In this respect, *Freetown* is consistent with the other cases to which Defendants refer In *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.,* 719 F.2d 322, 323 (9th Cir.1983), the plaintiff city incurred great public expense after the defendant's train, containing liquefied petroleum gas, derailed. The Ninth Circuit (predicting Arizona law on an issue of First impression) held that the city could not recover its costs.

> [T]he cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the

> tortfeasor does not expect a demand for reimbursement.

Id. (citation omitted). The court noted that while sometimes "new tort doctrines are required to cure an unjust allocation of risks and costs," such is not the situation "where a fair and sensible system for spreading the costs of an accident is already in place." *Id.* In addition, the court said, the state legislature had chosen to allocate to the government the costs in question, and the court doubted that judicial intervention was needed to call the attention of the state legislature to "the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill." *Id.* at 324.

***8** Similarly, in *Township of Cherry Hill v. Conti Constr. Co.,* 218 N.J.Super. 348, 349, 527 A.2d 921 (N.J.Super.Ct.App.Div.1987), where the plaintiff town sought to recover expenses (largely police overtime) incurred when the defendant ruptured a natural gas main, recovery was barred. "Government has traditionally assumed the ultimate cost of providing basic emergency services that protect the community." *Id.* "[T]he policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences." *Id.* (quoting *Krauth v. Israel Geller & Buckingham Homes, Inc.,* 31 N.J. 270, 274, 157 A.2d 129 (1960) (applying firefighter's rule, which shifts to taxpayers' financial responsibility for firefighter's or police officer's injury)). See also *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1078, 1080 (D.C.Cir.1984) (District must bear costs arising from crash of airplane); *County of Lassen v. State,* 4 Cal.App.4th 1151, 1154, 1156, 6 Cal.Rptr.2d 359 (Cal.Ct.App.1992) (county must bear costs of defending inmate suit).

What each of these cases has in common is that the acts causing the damage were of the sort the municipality reasonably could expect might occur, and each of the results was a discrete emergency. Fires, fuel spills and ruptured gas mains are all frequent happenings which, while every effort is made to prevent them, can be expected to occur. Train derailments and airplane crashes are more unusual, but not so rare that a municipality can never expect to have to respond to such an emergency. The cases thus stand for the principle that such contingencies are part of the normal and expected costs of municipal existence, and absent legislation providing otherwise are costs to be allocated to the municipality's residents through taxes. In addition, in those cases there is no evidence that the specific defendants had engaged in a repeated course of conduct causing recurring costs to the municipality.

This case is different. Plaintiffs allege wrongful acts which are neither discrete nor of the sort a municipality can reasonably expect. Plaintiffs allege that Defendants maintained and exploited an illegal firearms market, knowing that the market would and did cause Plaintiffs harm. Defendants' argument based on *Freetown* thus fails because that case and other cases applying the same doctrine do not extend the rule as far as Defendants contend. Accord *City of Flagstaff,* 719 F.2d at 324 ("Recovery has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate").

III. The Economic Loss Rule

Defendants argue that Plaintiffs' claims are barred by the economic loss rule, which prohibits recovery in negligence for purely economic loss. *Clark v. Rowe,* 428 Mass. 339, 342 [1998]. The rule provides that

> ***9** ... when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the plaintiff's person or property, the plaintiff may not recover for purely economic losses. *Garweth Corp. v. Boston Edison Co.,* 415 Mass. 303, 305 (1993).

Priority Finishing Corp. v. LAL Constr. Co., 40 Mass.App.Ct. 719, 719 n. 2 (1996).

Analytically, the economic loss rule occupies an uncertain legal position. Marking the boundary between tort and contract law, the rule may be seen as functionally part of the causation analysis and a limit on boundless recovery. See John M. Palmeri & Monty L. Barnett, The Continuing Vitality of the Economic Loss Rule, 31 Land & Water L.Rev. 757, 758-59 (1996). As such, it may be understood as part of the foreseeability element of proximate cause. *Id.* at 761-62. It may also be understood as going to whether

there existed a duty to another person or class of persons. *Id.* at 765. A defendant's fault appears to have some role in the economic loss rule. *Id.* at 761-62. [35] Additionally, as discussed below, the rule serves to separate tort and contract claims by encouraging parties to allocate risk contractually. In Massachusetts, the economic loss rule has been applied in cases where actions by a defendant interfered with a plaintiff's contract [36] and in products strict liability cases. [37]

Both types of cases, of course, lie at the boundary of tort and contract law. The reason for the rule in products liability cases is that when a product causes only economic loss, [38] a commercial user of the product is best left to his contractual remedies. *Bay State Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.,* 404 Mass. 103, 109-10 (1989). In the typical products liability case where the economic loss rule is applied, a product that the defendant manufactures proves defective, and the purchaser bears costs to repair the product, and usually suffers from loss of business as well. See, e.g., *id.* at 104. The economic loss rule is justified because a "commercial user can protect himself by seeking express contractual assurances concerning the product (and thereby perhaps paying more for the product) or by obtaining insurance against losses." *Id.* at 109-10. In contrast, a person physically injured by the product "had neither the bargaining power nor the opportunity to bargain" to protect himself. *Id.* at 110. See also Restatement (Third) of Torts: Products Liability § 21(1997).

In my view, the economic loss rule does not compel dismissal of this case for several reasons.

First, Plaintiffs' allegations here differ from those in cases where the economic loss rule was applied. Insofar as the complaint states allegations under products liability law, this case is dissimilar to the typical products suit discussed above. The reasons supporting application of the economic loss rule to strict products liability actions, essentially risk-allocation principles, do not apply to the allegations in this case with the same force as in the usual products liability action. See *Clark,* 428 Mass. at 342 (Refusing to apply the economic loss rule to legal malpractice, the Court stated, "When the economic loss rule has been applied, the parties usually were in a position to bargain freely concerning the allocation of risk, and, more importantly, there was no fiduciary relationship"). To the extent the complaint states allegations analogous to the other line of cases applying the rule (interference with a contract or economic opportunity), Plaintiffs allege that it was foreseeable that they would suffer harm. Also, Plaintiffs have an interest in the safety and welfare of the residents of Boston. Accord *Priority Finishing Corp.,* 40 Mass.App.Ct. at 721 (noting that bailee of damaged property not barred by economic loss rule from recovering for financial harm because "the plaintiff's pecuniary losses are derived from physical harm to property for which the plaintiff has a right to recover").

***10** Secondly, while the allegations of harm in this case include economic harm, they are not limited to that type of harm. See, e.g., Compl. at par. 76 (Plaintiffs incurred "public costs"); at par 83 (Plaintiffs incurred "enormous costs in support of the public welfare"); at pars. 107 & 120 (loss of productivity of individuals harmed).

Finally, as noted, the uniqueness of the allegations of this case counsels against dismissal at the pleading stage. [39]

IV. The Aggregation Issue

Defendants next argue that the complaint must be dismissed because it improperly aggregates claims that individually could not survive the pleading stage, that are too "amorphous" and that are "factually diverse independent claims." As to the argument that the complaint improperly combines separate claims that are individually deficient, I defer discussion to the substantive claims (see pages 30 to 41).

Defendants' second argument is that the complaint is vague because Plaintiffs have brought suit "on the basis of some amorphous injury to unspecified citizens linked in only general terms to some amorphous wrong by a group of defendants." I disagree. In my view, the complaint meets basic notice pleading requirements.

Defendants' third argument is that this action is an effort to aggregate factually and legally diverse individual claims as a strategic effort to bypass the difficulty of proving causation or the existence of a tort, and to overcome affirmative defenses. Defendants misconstrue Plaintiffs' allegations. As noted in the discussion of "remoteness," Plaintiffs do not seek to aggregate multiple claims of individuals and recover on their behalf. Rather, Plaintiffs, two government bodies who have advanced various theories of liability, claim that Defendants' conduct caused harm to them. The harm alleged, including costs for preventative measures, youth intervention programs, increased security at schools and other public buildings and emergency rescue services, is not the same as harm to individuals.

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V. Home Rule Amendment and Preemption

In their analysis of the Home Rule Amendment to the Massachusetts Constitution, Defendants advance two distinct arguments. First, they argue that Plaintiffs lack authority to bring this action under the Home Rule Amendment, Mass. Const. Art. Amend. 2, § 6 ("HRA"). Secondly, they claim that this action is preempted by the Massachusetts Firearms Act, G.L. c. 140, §§ 121 et seq.

Turning first to the Home Rule Amendment, the Legislature provides municipalities with the express statutory right to sue and be sued. G.L. c. 40, § 2.[40] It is well established that cities and towns have authority to initiate suits to recover damages under tort and contract theories.[41] See, e.g., *Town of Middleborough v. Middleborough Gas & Elec. Dep't,* 422 Mass. 583, 585 (1996).

Defendants' Home Rule[42] argument is premised on a misinterpretation of Plaintiffs' claims. According to Defendants, Plaintiffs claim "statutory authority to regulate through litigation." Plaintiffs, however, do not seek to regulate but rather assert common law and statutorily based claims. The terms "ordinance" and "by-law" found in the Home Rule Amendment are not so broad as to encompass civil actions like this case. That the courts of the Commonwealth have recognized the existence of tort and contract actions by municipalities, before and after ratification of the Home Rule Amendment, belies such an expansive interpretation.[43]

***11** In their reply brief, Defendants seek to distinguish between a city acting in "corporate capacity" and one acting in its "government capacity." Thus, Defendants argue, the language in G.L. c. 40, § 2 (allowing a town-and, through § 1, a city-to sue "in its corporate capacity," does not allow a city to sue in its "governmental capacity."[44] This argument simply repeats the contention that Plaintiffs are seeking to regulate by lawsuit.

Defendants next argue that this action is preempted by the Massachusetts Firearms Act, G.L.c 140, § 121 et seq., and by state regulations regarding firearms, 940 Code Mass. Regs. §§ 16.00 et seq. (regulations promulgated under G.L. c. 93A). In support of this argument, Defendants recite the standard for determining whether a local ordinance or by-law is inconsistent with and thus preempted by a state statute. See *Boston Gas Co. v. City of Newton,* 425 Mass 697, 699 (1997).[45] They argue that the Firearms Act is so comprehensive that the court should infer a legislative intent to preempt the field.[46]

Defendants' argument fails because this is a tort and contract case, not a suit about a local by-law or ordinance. The issue before the court is not whether the statute and regulations preempt an ordinance or by-law, but whether the statute abrogates this state's common law of tort and contract and the relevant portions of the Uniform Commercial Code relating to warranties. "[A]n existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication." *Eyssi v. Lawrence,* 416 Mass. 194, 199-200 (1993) (quoting *Ferriter v. Daniel O'C'onnell's Sons,* 381 Mass. 507, 521 (1980)). See also *General Elec. Co. v. Department of Envtl. Protection,* 429 Mass. 798, 804-05 (1999). "Moreover, '[a] statute is not to be interpreted as effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed.' " *Eyssi,* 416 Mass. at 200 (quoting *Riley v. Davison Constr. Co.,* 381 Mass. 432, 438 (1980) (alteration by *Riley* Court)); *Hopkins v. Medeiros,* 48 Mass.App.Ct. 600, 610 (2000). Defendants cite no authority, and the court has found none, stating that the Firearms Act or the regulations clearly express an intent to abrogate the common law, or that they do so by necessary implication.[47]

VI. The Commerce Clause Issue

Defendants next argue that this suit is barred by the Commerce Clause.[48] U.S. Const. Art I, § 8.[49] The affirmative grant to Congress of authority to regulate interstate commerce encompasses a "dormant" limitation on the authority of states to enact legislation affecting interstate commerce. *Healy v. Beer Inst.,* 491 U.S. 324, 326 n 1 (1989). In this respect, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *id.* at 336 (quoting *Edgar v. MITE Corp.,* 457 U.S. 624, 642-43 (1982)), and bars "a statute that directly controls commerce occurring wholly outside the boundaries of a State regardless of whether the statute's extraterritorial reach was intended by the legislature," *id.* (quoting *Brown-Forman, Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986)). "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also ..., how the challenged statute may interact with the

legitimate regulatory regimes of other States ...” *Id.* [50] The applicability of the Commerce Clause to causes of action under state tort and contract law is unsettled.

***12** The standard for analysis under the Commerce Clause has its focus on positive law-statutes or regulations. See *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 87 (1987) (“The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce). [51] With one exception, none of the cases Defendants cite as conducting a Commerce Clause analysis involve application of a remedy by a court after finding defendants liable under state tort and contract law. See, e.g., *Healy,* 491 U.S. at 326 (Connecticut statute); *Brown-Forman Distillers Corp.,* 476 U.S. at 584 (New York statute), *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 679 (1981) (Iowa statute); *Hughes v. Oklahoma,* 441 U.S. 322, 323 (1979) (Oklahoma statute); *Hunt v. Washington State Apple Adver. Comm'n.* 432 U.S. 333, 354 (1977) (Washington statute); *Dean Foods Co. v. Brancel,* 187 F.3d 609, 620 (7th Cir.1999) (Wisconsin regulations); *Knoll Pharm. Co. v. Sherman,* 57 F.Sup.2d 615, 623 (ND.Ill.1999) (Illinois statute).

Nonetheless, the Supreme Court did state, in *BMW of N. America, Inc. v. Gore,* 517 U.S. 559, 572 (1996), that Commerce Clause principles apply in some civil suits, although the Court recognized that state civil suits may proceed even though the result may be to effect a change in out-of-state practices. [52] , [53] In *BMW of N. America,* the plaintiff alleged that failure to disclose that the new automobile he purchased in Alabama had been damaged and repainted constituted fraud under Alabama law. The repainting occurred in Georgia, and the nondisclosure was due to a nationwide BMW policy not to advise car dealers of repairs to new cars if the repair cost was no more than 3 percent of the suggested retail price. After trial, the jury awarded the plaintiff compensatory damages and $4 million in punitive damages. The plaintiff argued that the large punitive damage award was necessary to change BMW's policy nationwide.

The Supreme Court held that “a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States” *Id.* at 572 (footnote omitted). Economic penalties (in the form of legislatively authorized fines or judicially imposed punitive damages) “must be supported by the State's interest in protecting its own consumers and its own economy.” *Id.* Thus, Alabama could not “punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents,” and could not “impose sanctions on BMW in order to deter conduct that is lawful [54] in other jurisdictions.” *Id.* at 573. Applying notions of fairness, [55] the Court concluded that the punitive damages award was grossly excessive.

Thus, the Supreme Court never held that the plaintiff's suit in the *BMW* case was barred by the Commerce Clause. In fact, the Court appeared to take for granted that the suit was proper, as would legislation have been obtaining the same result:

> ***13** No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation ... The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.
>
> That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement.

Id. at 568-70 (footnotes omitted). What the Supreme Court held to be improper was, in part, seeking to change BMW's conduct in other states. *Id.* at 572. See also *id.* at 572 n. 18 (“The record discloses no basis for [the plaintiff's] contention that BMW could not comply with Alabama's law without changing its nationwide policy”).

Here, Plaintiffs allege violations of longstanding state law and seek remedies specific to these violations. Plaintiffs seek compensatory, not punitive, damages, which the Supreme Court never questioned in *BMW of N America.* [56] Certainly, some of the expansive injunctive relief Plaintiffs seek (e.g., to enjoin “manufacturing, distributing, or offering for sale firearms without appropriate safety devices and warnings, including devices designed to prevent unauthorized use”) can be read to seek directly to impact out-of-state conduct. However, as I have previously emphasized, all I now decide is a motion to dismiss for failure to state a claim. The scope and constitutionality of any remedy, should Plaintiffs succeed at trial, is appropriately left to the judge who will have the benefit of a full factual record. [57] The court then will also be

able to determine whether the intent of any of the proposed remedies is to deter or punish for out-of-state conduct, or whether the intent is to protect residents of Boston. See *BMW of N. America,* 517 U.S. at 572-73. [58]

The contention that the allegations of the complaint violate the Commerce Clause is also weakened by the existence of the Firearms Act, G.L. c. 140, §§ 121 et seq., and the Attorney General's regulations, 940 Code Mass.Regs. §§ 1600 et seq. Defendants have not attempted to argue why maintaining this action violates the Commerce Clause while the Firearms Act and the regulations do not.

VII. The Substantive Claims

Finally, Defendants argue that each of the six counts in the complaint is legally deficient.

Public Nuisance

A public nuisance is an "unreasonable interference with a right common to the general public." [59] Restatement (Second) of Torts § 821B(1) (1979) (quoted in *Leary v. Boston,* 20 Mass.App.Ct. 605, 609 (1985)).

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> > ***14** (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> >
> > (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> >
> > (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.
>
> Restatement (Second) of Torts § 821B(2). A public nuisance differs from a private nuisance: "It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property" W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90, at 643 (5th ed, 1984). Thus, in its broadest statement, the concept of a public nuisance "seems unconnected to place or property." *Leary,* 20 Mass.App.Ct. at 609.

Liability for a public nuisance may arise even though a person complies in good faith with laws and regulations. *Hub Theaters, Inc. v. Massachusetts Port Auth.,* 370 Mass. 153, 156 (1976); *Strachan v. Beacon Oil Co.,* 251 Mass. 479, 488 (1925).

Liability extends to all who join or participate in the creation or maintenance of a public nuisance. *Attorney Gen. V. Baldwin,* 361 Mass. 199, 208 n. 3 (1972).

Defendants argue that Plaintiffs' claim fails because it does not arise from activities on or related to property. However, as noted, a public nuisance is not necessarily one related to property. Defendants also argue that the claim fails because Plaintiffs cannot allege that the manufacturers owned or had control of the land or instrumentality that caused the harm, citing *Belanger v. Commonwealth,* 41 Mass.App.Ct. 668, 670 n. 3 (1996). *Belanger,* however, addressed private nuisance, which is, as noted, distinct from public nuisance. [60] Defendants also cite *Commonwealth v. Mead,* 153 Mass. 284, 286 (1891). In *Mead,* a criminal case, the nuisance alleged was the keeping of a tenement used for the sale of intoxicating liquors. As such, *Mead* was a case where the nuisance was one connected with property, but the case does not hold that the connection is required. See *id.* at 286. [61] Plaintiffs allege that Defendants created and supplied an illegal, secondary market in firearms. The "instrumentality" which Plaintiffs allege Defendants controlled is the creation and supply of this secondary market. [62]

Review of the complaint shows that Plaintiffs allege Defendants intentionally and negligently created and maintained an illegal, secondary firearms market. They further allege that this market unreasonably interfered with public rights by (1) significantly interfering with the public safety, health, or peace, (2) producing permanent or long-lasting harm and (3) undermining Massachusetts firearms law, making enforcement of those laws difficult or impossible. Compl. Pars. 79 & 81. [63] Thus, the complaint alleges sufficient facts to state a claim for public nuisance. [64] To be sure, the legal theory is unique in the Commonwealth but, as previously noted, that is not reason to dismiss at this stage of the proceedings.

Negligent Distribution and Marketing

***15** Defendants argue that Plaintiffs' claim for negligent distribution and marketing fails because, as a matter of law, Defendants did not owe Plaintiffs a duty to protect from the criminal acts of third parties.[65] Here, too, Defendants misconstrue the complaint. Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs.[66]

To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty; the defendant breached that duty and that this breach actually and proximately caused injury *Davis v. Westwood Group,* 420 Mass. 739, 742-43 (1995). The existence of a duty is a question of law. *Id.* at 743; *Bergendahl v. Massachusetts Elec. Co.,* 45 Mass.App.Ct. 715, 722-23 (1998), rev, denied, 428 Mass 1111, cert. denied, 120 S.Ct. 326 (1999). "In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and to appropriate social policy. A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm." *Yakubowicz v. Paramount Pictures Corp .,* 404 Mass. 624, 629 (1989) (citation omitted).

Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged-the creation of the illegal, secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm.[67] Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs.[68] Thus, the court need not decide whether Defendants owed a duty greater than the basic duty.[69] , [70]

Breach of Warranty-Defective Design

The complaint alleges that Defendants breached the implied warranties of merchantability and of fitness for a particular purpose, by way of defective design, by failing to incorporate certain devices.

In Massachusetts, a warranty that goods are merchantable is implied in every sale of goods.[71] G.L.c 106, § 2-314. Defendants assert two reasons why this count should be dismissed. They argue (1) knowing and deliberate misuse is a complete bar to recovery and (2) Plaintiffs are not in privity with Defendants.[72]

***16** Under the doctrine of unreasonable use, "a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty." *Colter v. Barber Greene Co.,* 403 Mass. 50, 60 (1988) Apart from this affirmative defense, as an element of their claim Plaintiffs must prove that at the time of their injuries Defendants' products were being used "in a manner that the defendant seller, manufacturer, or distributor reasonably could have foreseen." *Allen v. Chance Mfg. Co.,* 398 Mass. 32, 34 & n. 1 (1986). See *Correia v. Firestone Tire & Rubber Co.,* 388 Mass. 342, 357 (1983). As to the latter, Plaintiffs have put forth sufficient allegations to survive this motion to dismiss. See Compl. at pars. 93 & 95.[73] As to the former, the affirmative defense, Defendants carry the burden of proof, and they have not shown that, on the facts alleged, Plaintiffs cannot prove any set of facts which would entitle them to relief.[74] See *Nader,* 372 Mass. at 98.

As to Defendants' privity argument, G.L.c 106, § 2-318 provides in relevant part:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably

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> have expected to use, consume *or be affected by the goods*.

(Emphasis added.)

On its face, then, the relevant statute does not require privity between Plaintiffs and Defendants in this case, as Plaintiffs allege that Defendants could reasonably have expected (or actually knew) that Plaintiffs would be harmed by their goods. See *Jacobs v. Yamaha Motor Corp., USA.,* 420 Mass. 323, 328 (1995) (explicit language of G.L.c 106, § 2-318, invalidates claim that privity is required for plaintiff to sue motorcycle manufacturer). The decision in *Sebago, Inc.,* 18 F.Sup.2d at 99, is not to the contrary. *Sebago, Inc.,* predicting Massachusetts law, read *Jacobs* as being limited to "consumer goods," and ruled that privity is required when a contract-based warranty claim arises from a commercial transaction. *Id.* In this case, Defendants do not argue that the firearms were purchased through commercial transactions. See also *Thayer v. Pittsburgh Corning Corp.,* 45 Mass.App.Ct. 435, 440, rev. denied 428 Mass. 1109 (1998) (no privity required for worker injured by asbestos to sue asbestos manufacturer).

Breach of Warranty-Failure to Warn

Plaintiffs also allege that Defendants breached the implied warranties of merchantability and fitness for a particular purpose by failing to provide adequate warnings or instructions. Defendants argue that this count must be dismissed because Plaintiff's lack privity and because the dangers posed by firearms are "open and obvious." The court has already addressed the privity argument in the context of the count alleging defective design.

***17** A product's manufacturer has a duty to warn foreseeable users of latent dangers in the product's normal and intended use. *Vassallo v. Baxter Healthcare Corp.,* 428 Mass. 1, 23(1998); *Carey v. Lynn Ladder & Scaffolding Co.,* 427 Mass. 1003, 1003 (1998); *Bavuso v. Caterpillar Indus., Inc.,* 408 Mass. 694, 699 (1990). There is no duty to warn, however, where the danger is obvious or where the plaintiff appreciated the danger substantially to the same extent as a warning would have provided. *Carey,* 427 Mass. at 1004.

In this case, Plaintiffs allege that Defendants failed adequately to warn or instruct, e.g., as to risks that children could obtain access to the firearms, that a gun's chamber may contain a round of ammunition, as to proper storage of guns to prevent suicide, accidents, or theft, that guns can be fired with the ammunition magazine removed and without pulling the trigger, that the guns may not contain safety devices, that a gun in the home dramatically increases rather than decreases risk of injury to household members, that training is needed to handle guns safely and that improperly stored guns could be stolen. Compl. at par. 103. This failure to warn, Plaintiffs allege, was the proximate cause of Plaintiffs' injuries. *Id.* at par. l06. [75]

Defendants reference no case where on a motion to dismiss for failure to state a claim it was decided that, as a matter of law, the danger was obvious or that it was appreciated to the same extent as if a warning had been supplied. See *Carey,* 427 Mass. at 1003 (summary judgment); *Bavuso,* 408 Mass. at 694 (jury trial); *Bell v. Wysong & Miles Co.,* 26 Mass.App.Ct. 1011, 1012 (1988) (jury trial); *Killeen v. Harmon Grain Prods. Inc.,* 11 Mass.App.Ct. 20-21 (1980) (directed verdict for defendant); *Wasylow,* 975 F.Sup. at 378 (summary judgment); *Bolduc v. Colt's Mfg. Co.,* 968 F.Sup. 16, 17 (D.Mass.1997) (summary judgment). [76]

Defendants do not argue that they have no duty to warn of any of the dangers presented by firearms. The court does not have before it any evidence of the warnings that were provided, from which the court could determine whether, as a matter of law, adequate warnings were provided. Defendants are, in essence, asking this court to take judicial notice that the dangers posed by firearms discussed in paragraph 103 of the complaint are so obvious (or were actually appreciated) such that warnings or instructions were not required. This is contrary to Plaintiffs' allegations, and the court declines to do so.

Negligence

In this count of their complaint, Plaintiffs allege that Defendants negligently designed, marketed, distributed and sold their products. Compl. at par. 111. Inasmuch as this states a claim for negligent distribution and marketing, it is duplicative of Count II and is dismissed. However, this count states a claim not previously stated, for negligent design.

"A manufacturer is under a duty to design its product with reasonable care to eliminate avoidable dangers. The manufacturer must anticipate the environment in which the product will be used and design against reasonably

foreseeable risks attending the product's use in that setting. The duty is placed on the manufacturer because it stands in a superior position to recognize and cure defects in its product's design." *Simmons v. Monarch Mach. Tool Co.,* 413 Mass. 205, 211(1992) (citations omitted).

***18** In this case, Plaintiffs have alleged that Defendants were negligent in their design of firearms by failing to include adequate safety devices and failing to include adequate warnings. Such a claim is distinct from the breach of warranty counts. *Uloth v. City Tank Corp.,* 376 Mass. 874, 875 (1978). See J.R. Nolan & L.J. Sartorio, Tort Law § 307 (2d ed. 1989 & 2000 Supp.). Because Defendants have only argued for dismissal of this count on grounds that it is duplicative, the court need not test the sufficiency of the allegations further.

In sum, the court dismisses Count V to the extent it alleges negligent distribution and marketing, but denies Defendants' motion as to the claim for negligent design.

Unjust Enrichment

In the final count of the complaint, Plaintiffs allege that Defendants have been unjustly enriched because they have "reaped substantial profits and gains" from their conduct, causing Plaintiffs' harm.

A claim that a party has been unjustly enriched seeks the equitable remedy of restitution. *Keller v. O'Brien,* 425 Mass. 774, 778 & n. 8. (1997). Restitution is appropriate when the circumstances of receipt or retention of a benefit "are such that, as between the two persons, it is unjust for [one] to retain it." *Keller,* 425 Mass. at 778 (quoting *National Shawmut Bank v Fidelity Mut. Life Ins. Co.,* 318 Mass. 142, 146 (1945)). "A person confers a benefit upon another if he in any way adds to the other's security or advantage." 9 Mass. Jurisprudence § 2:5 (1993) (citing Restatement of Restitution § 1, cmt b).

Here, Plaintiffs allege that they have conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants' conduct ("externalities"). See *White,* 97 F.Sup.2d at 2000 WL 664176, at *10. Plaintiffs further allege that Defendants undertook the alleged wrongful conduct for the purpose of increasing their profits. Thus, Plaintiffs state a claim for unjust enrichment.

CONCLUSION

The parties in this case have pressed upon the court public policy considerations which they believe the court should consider. Defendants, in urging the court to look behind the allegations in the complaint, which they describe as "politicized rhetoric and conclusory allegations," emphasize that they are not the ones "truly responsible" for the harm. Plaintiffs put forth examples of the devastating effects of gun violence. It is not this court's function, on a motion under Rule 12(b)(6), to decide whether public policy requires that the complaint proceed or that it be dismissed. Rather the court's inquiry is limited to deciding whether the complaint fails to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, Defendants' motion to dismiss is *ALLOWED* as to Count V to the extent that count alleges negligent distribution and marketing. Defendants' motion to dismiss is *DENIED* as to Count V to the extent it alleges negligent design. As to all other counts, the motion to dismiss is *DENIED.*

All Citations

Not Reported in N.E.2d, 12 Mass.L.Rptr. 225, 2000 WL 1473568

Footnotes

1 Boston Public Health Commission.

2 Beretta USA Corp., BL Jennings Inc., Browning Arms Co., Inc., Bryco Arms Corp., Charter Arms Corp., Colt's Manufacturing Co., Inc., Davis Industries Inc., Firearms Import & Export Corp., Glock Inc., Harrington &

Richardson Corp., Heritage Manufacturing, Inc., Hi-Point Firearms Corp., International Armaments Corp. dba Interarms, Inc., Kel-Tec CNC Industries, Inc., Import Sport, Inc. dba SGS Importers International, Inc., Lorcin Engineering Co., Inc., Marlin Firearms Co., OF Mossberg & Sons, Inc., Navegar, Inc. dba Intratec USA Corp., Phoenix Arms Inc., U.S. Repeating Arms Co., Inc., Remington Arms Corp., Savage Arms Inc., Sigarms, Inc., Sturm, Ruger & Co., Inc., Sundance Industries Corp., Taurus International Manufacturing, Inc., American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., Sporting Arms & Ammunition Manufacturers Institute, Inc., Does 1-250. Does 1-50 are unknown business entities that manufacture firearms distributed, marketed, sold, and/or possessed within Boston. Does 51-100 are unknown business entities that are retailers of firearms found in Boston. Does 101-225 are unknown business entities that distribute and/or market firearms found within Boston. Does 226-250 are unknown business entities that are industry trade associations composed of firearms manufacturers, distributors, and retailers.

3 This action is one of a number of similar suits brought throughout the United States. See Note, Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry, 113 Hav.L.Rev. 1521 (2000).

4 The six counts are: public nuisance (Count I); negligent distribution and marketing (Count II); breach of warranty through a design defect (Count III); breach of warranty through failure to warn (Count IV); negligence (Count V) and unjust enrichment (Count VI).

5 Defendants Beretta, Colt's and Phoenix Arms have filed a third-party complaint against China North Industries Corp./Norinco and Denel (Pty) Ltd.

6 Defendants removed this action to federal court. That court remanded the case. See *City of Boston v. Smith & Wesson Corp.,* 66 F.Sup.2d 246 (D.Mass.1999).

7 All references in this decision to the complaint are to the First Amended Complaint.

8 In this decision I place no reliance on the settlement agreement between Smith & Wesson and certain public entities, which was submitted to the court after the hearing on this motion.

9 Plaintiffs allege that these crimes from 1996 through 1998 include 30 homicides, 131 aggravated assaults, 37 armed robberies and 29 suicides.

10 Plaintiffs allege that over 1,400 guns were involved in the crimes cited in note 9. They also allege that from July 1, 1996 through July 31, 1998, 1,470 guns were seized by the Boston Police Department and that from January 1, 1993 through November 30, 1998, the firearms recovered were made by the individual defendants in the following numbers: Beretta USA (102), Browning Arms (35), Bryco Anus (138), Charter Arms (29), Colt's Mfg. (138), Davis Industries (100), Firearms Import & Export (48), Glock (89), Harrington & Richardson (100), Hi-Point (27), Interarms (6), Lorcin (121), Marlin (51), Mossberg (73), Navegar (27), Phoenix (90), Remington (39), Savage (45), Smith & Wesson (369), Sturm & Ruger (167), Sundance (15) and Taurus (56). Plaintiffs allege additionally that thousands of guns used in crime in Boston remain unrecovered.

11 While Plaintiffs frame many of their allegations in terms of acquisition and use of guns by juveniles and criminals, Plaintiffs refer to “all other classes prohibited from acquiring or possessing guns, such as illegal aliens, fugitives, drug addicts, persons committed to mental institutions, and persons under domestic violence restraining orders.” Pls.' Mem. at 5 n. 4 (citing 18 U.S.C. § 922; G.L. c. 140, § 129B).

12 Plaintiffs allege that surveys indicate that juveniles and convicted criminals can easily obtain firearms. Plaintiffs do not allege that the surveys were of Boston respondents. This survey evidence is, according to Plaintiffs, continued by a study by the Federal Bureau of Alcohol, Tobacco and Firearms (“ATF”), which found that in Boston over a one year period (Plaintiffs do not state which year) 11 percent of guns traced

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to crime were seized from juveniles, while the figure for the previous year was 14 percent. The ATF also found (presumably based on national data) that more guns traced to crime are seized from persons in the age group of 18, 19, and 20 years than any other three-year age group. Also presumably based on national data, the ATF found that over 45 percent of seized weapons were possessed illegally by felons. Finally, as additional evidence of an ease of movement of firearms into an illegal market, Plaintiffs allege that there is a short time interval between retail sale and criminal use of a significant percentage of firearms. Between 40 and 44 percent of guns traced to crime seized in Boston had been sold at retail less than three years earlier, which Plaintiffs allege to be evidence of trafficking.

13 Plaintiffs allege 15 incidents of examples of Defendants' misconduct.

14 According to Plaintiffs, traces by the ATF of guns involved in crimes (where the ATF contacts the manufacturer, who provides the name of the distributor) provides Defendants with actual notice that the distribution system supplies guns to an unlawful market. The ATF data further indicates that a very high percentage of guns traced to crime have been “funneled through” a small set of federally licensed dealers. Plaintiffs cite statements allegedly made by Robert Hass, former Senior Vice President of Marketing and Sales for Smith & Wesson, and Robert Lockett, 1993 (firearms) Dealer of the Year, to the effect that the gun industry knows that their guns seep into an illegal market but takes no action to prevent this.

15 To restrict or impede the unlawful flow of firearms into Boston, Defendants could have (Plaintiffs allege) taken the following “reasonably available” steps:

(1) adequately investigate or screen distributors and dealers through which Defendants distribute and sell firearms;

(2) adequately monitor, supervise, regulate, and standardize distributors' and dealers' methods of distributing and selling firearms;

(3) conduct research (or heed existing research) to better monitor and control the flow of firearms to the illegal, secondary market, and implement preventative strategies;

(4) “establish a tighter and more direct distribution system in which Defendants remain in control of the distribution of their lethal products”;

(5) adequately train and encourage distributors and dealers to act lawfully and responsibly to ensure compliance with law:

(6) direct distributors and dealers to refuse to sell firearms when the distributor or dealer knows or should know that the firearm likely will not be used for lawful purposes;

(7) require distributors and dealers not to sell more than one handgun per month to any person not holding a federal firearms license, and to track sales to enforce this restriction:

(8) require distributors and dealers to sell only to retailers who stock guns for sale from retail stores, and not to sell guns over the Internet, at gun shows, or to “kitchen table” dealers;

(9) require distributors and dealers to certify compliance with all firearms laws and to provide documentation of sales employees' and sales agents' eligibility to sell guns;

(10) require distributors and dealers to carry a specified minimum amount of liability insurance coverage at all times;

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(11) refrain (and require distributors and dealers to refrain) from rewarding sales persons or purchasers based on sale or purchase volume;

(12) require distributors and dealers to meet reasonable and specified security requirements to prevent theft;

(13) require distributors and dealers to maintain computerized inventory tracking programs containing information concerning the acquisition and disposition of every gun, and enforce this requirement;

(14) require distributors and dealers to maintain records of trace requests initiated by law enforcement agencies, and to report those requests to the firearm manufacturer;

(15) track and analyze trace requests from law enforcement agencies to determine where and when in the distribution chain the gun may have been diverted to crime, and take preventative measures to reduce diversions; and

(16) institute effective training, monitoring, and sanctions to enforce these requirements (including disciplining or terminating distributors and dealers Defendants know or should know distribute firearms to the illegal market or in an illegal or unsafe manner).

16 Plaintiffs allege that 23 percent of unintentional shooting deaths nationwide per year occur because the gun user is unaware that the gun is still loaded with ammunition. Plaintiffs allege that this is one reason that the firearm death rate for children aged 14 and under is 12 times higher in the United States than the combined rate in 25 other industrialized countries. According to Plaintiffs, about 35 percent of all unintended shooting deaths occur where the user of the gun is between ages 13 and 16, during which adolescents are attracted to accessible guns and discount the risks of handling a firearm. Plaintiffs claim that the risk that a potentially suicidal adolescent will kill himself doubles if a gun is kept in the home; a person aged 10 to 19 years commits suicide with a gun every six hours; guns are used in 65 percent of male teenager suicides and 47 percent of female teenager suicides, and firearm-related suicides account for about 81 percent of the increase in the rate of suicide among 15 to 19 year-olds from 1980 to 1992. In each allegation summarized in this footnote, Plaintiffs allege that some of the events described occurred in Boston.

17 Plaintiffs allege that there are guns in about half the homes in the United States.

18 Plaintiffs allege that each year a number of children in Boston are injured or killed because Defendants' firearms are sold without the means to prevent their use by unauthorized users, without adequate warnings and without adequate instruction regarding the importance of proper firearm storage.

19 According to Plaintiffs, the referenced studies indicate that one out of three handguns is kept loaded and unlocked in the home; guns kept in the home for self-protection are 22 times more likely to kill or injure someone known by the owners than an intruder; a gun is used for protection in fewer than two percent of home invasion crimes when someone is home and for every time a gun in the home was used in a legally justifiable shooting, there were four unintentional shootings. seven criminal assaults or homicides and 11 attempted or completed suicides. Compl. at par. 72.

20 Defendants discuss “remoteness” as if it were a free-standing doctrine. The case law, however, considers remoteness as an element of either standing or proximate cause. Defendants do not separate their standing and proximate cause arguments. For purposes of clarity, the court addresses Defendants' arguments in terms of proximate causation, but the analysis is equally applicable to standing principles.

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21 The Second Circuit Court of Appeals described the notion of proximate cause as “an elusive concept.” *Laborers Local,* 191 F.3d at 235. The United States Supreme Court noted that “the principle of proximate cause is hardly a rigorous analytic tool.” *Blue Shield of Va. v. McCready,* 457 U.S. 465, 477 n. 13 (1982).

22 The Second Circuit stated in *Laborers Local* that, in addition to time remoteness doctrine, other elements of proximate cause are the requirements of proof that the defendant's acts were a substantial cause of the injury and that the plaintiff's injury was reasonably foreseeable. 191 F.3d at 235-36. Defendants' argument in this case rests solely on the remoteness inquiry.

23 The parties have referred the court to no Massachusetts case articulating this doctrine as clearly as the cases previously discussed in the text. *Anthony v. Slaid,* 11 Met. (52 Mass.) 290 (1846), appears (insofar as the cases the parties discuss) to be the source of the doctrine. This court assumes, for purposes of this motion, that the doctrine is still recognized in Massachusetts.

24 The case was characterized as “classic” in *Seafarers Welfare Plan v. Philip Morris,* 27 F.Sup.2d 623, 628 (D.Md.1998).

25 The party responsible was the attacker's husband. Anthony, II Met. (52 Mass.) at 290.

26 See *Associated Gen. Contractors of Cal., Inc. v. California Store Council of Carpenters,* 459 U.S. 519, 532 n. 25 (1983) (quoting 1 J. Sutherland, Law of Damages 55-56 (1882)) (“[w]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, *if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account ...”*) (emphasis added & deleted).

27 The Second Circuit held:

> [Plaintiffs'] damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products ... Being purely contingent on harm to third parties, these injuries are indirect.

Laborers Local, 191 F.3d at 239.

28 As Defendants note, numerous other cases bar recovery where the harm the plaintiffs allege is wholly derivative of harm to third persons. A large number of these cases involve suits by health benefit funds against tobacco manufacturers and their public relations, lobbying and research firms. In these cases, the harm to the funds (increased expenses) was found to be too remote, as it derived entirely from harm to third persons (the smokers). See, e.g ., *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.,* 199 F.3d 788, 788-99 (5th Cir.2000); *International Bhd of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.,* 196 F.3d 818, 827 (7th Cir.1999); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc .,* 185 F.3d 957, 963-64 (9th Cir.1999), *cert. denied,* 120 S.Ct. 789 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.,* 171 F.3d 912, 932-33 (3d Cir.1999), cert. denied, 120 S.Ct. 844 (2000); *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.,* 62 F.Sup.2d 236, 246 (D.Mass.1999); *Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc.,* 42 F.Sup.2d 943, 948 (D.Ariz.1999); *Seafarers Welfare Plan v. Philip Morris,* 27 F.Sup.2d 623, 630 D.Md.1998). *Coyne v. American Tobacco Co.,* 183 F.3d 488, 494-95 (6th Cir.1999), is slightly different and imports the remoteness doctrine into the context of standing of taxpayers to sue. A number of these cases also suggest that the health benefit funds sustained no injury (not even a remote injury), as the costs were ultimately passed on to others with the funds being mere “financial intermediaries.” *International Bhd. of Teamsters,* 196 F.3d at 823-25. See also *Seafarers Welfare Plan,* 27 F.Sup.2d at 627-28. Not all courts follow these cases. See *Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.,* 83 F.Sup.2d 70, 86 (D.D.C.1999). Even within the circuits that decided the above-cited cases, lower courts have found factual distinctions that

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allow similar claims to proceed beyond the motion to dismiss stage. See *National Asbestos Workers Medical Fund v. Philip Morris, Inc.,* 74 F.Sup.2d 221, 225-28 (E.D.N.Y.1999).

29 Additionally, and apart from the generalized allegations found throughout the complaint that Plaintiffs have suffered harm, Plaintiffs allege the following:

> As for Count I (public nuisance): Defendants "have caused damage to the public health, the public safety and general welfare of the Boston residents, and have thereby wrongfully caused the plaintiffs to incur enormous costs in support of the public health, safety and welfare. The presence of illegitimately possessed and used firearms in Boston proximately results in significant costs to plaintiffs to enforce the law, arm its police force and to treat the victims of firearms." Compl. at pars. 83 & 84.
>
> As for Count II (negligent distribution and marketing): Defendants' conduct has caused Plaintiffs "to expend substantially more resources than [they] otherwise would in the form of police services, fire services, emergency medical services, pension benefits, disability benefits, workers' compensation benefits, health care, expenses to provide additional security measures in public schools and other public facilities." *Id.* at par. 88.
>
> As for Count III (breach of warranty by defective design): "the plaintiffs have paid and will continue to pay increased sums of money for police services, law enforcement, fire and rescue services, indigent health care, emergency medical services and other emergency services, pension benefits, disability benefits, workers' compensation benefits, health care, prison costs, increased security and other services in the public schools and other necessary facilities and services due to the threat of or actual use of the defendants' firearms ... Furthermore, ... Boston has suffered from diminished tax revenues and property values." *Id.* at pars. 97 & 98.
>
> As for Count IV (breach of warranty by failure to warn): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98, see *id.* at pars. 106 & 108, and allege that "Boston has suffered from the lost productivity of certain citizens and employees harmed as a result of the use of defendants' products and suffered a direct loss of revenue from lost tax revenues due to diminished property values in areas of Boston where defendants' products are used." *Id.* at par. 107.
>
> As for Count V (negligence): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98. See *id.* at pars. 115 & 116.
>
> As for Count VI (unjust enrichment): Plaintiffs repeat, in substance, the allegations of par. 97, see *id.* at par. 119, and allege that they have been harmed by "the loss of substantial tax revenues as a result of diminished property values, loss of businesses and lost productivity of those individuals harmed by guns, due to the presence and use of guns throughout Boston." *Id* . at par. 120.

30 In their reply brief, Defendants misconstrue the remoteness doctrine as that doctrine was applied in *Anthony* and in the other cases discussed in Defendants' original memorandum. In the reply brief, Defendants state that "if firearms never were misused by such third parties to inflict direct injury on other third parties, [Plaintiffs] would have no cause to incur any of the claimed expenses." Defs.' Reply Mem. at 4. The remoteness doctrine is concerned with harm that is solely derived from injury to another rather than harm that is caused by persons other than the defendant. Plaintiffs allege that it was Defendants' misconduct that caused Plaintiffs' harm. Defendants' briefs do not raise the argument that their liability is barred by the intervening criminal (or tortious) acts of third persons.

31 The most recent Massachusetts case cited was decided in 1934. See *Ross v. Wright,* 286 Mass. 269, 273 (1934).

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32 In their memorandum, Defendants seek to persuade the court that, should the complaint stand, a veritable Pandora's box would be opened, because cities would be allowed to sue automobile manufacturers on the theory that vehicles are made so as to be able to violate speed laws and sue liquor manufacturers on the theory that Scotch bottles are capable of being opened and the contents consumed by underage drinkers. These examples misconstrue Plaintiffs' allegations. Plaintiffs allege that Defendants' misconduct (i.e., allegedly fueling and exploiting an illegal firearms market and allegedly manufacturing defective and unreasonably dangerous products) caused Plaintiffs to suffer the harm discussed in the text. An apt analogy, to use Defendants' illustration, would be allegations that the alcohol industry exploited and relied upon an illegal, secondary market of underage drinkers and sold defective products, causing harm. In other words, it is not the mere manufacture and sale of a lawful product of which Plaintiffs complain, but rather the tortious manufacture and sale.

33 Defendants also argue that “practical and equitable considerations” reinforce their position. Defs.' Mem. at II. It is true that, in the context of the proximate cause analysis under the federal Racketeer Inf1uenced and Corrupt Organizations (RICO) Act, the Supreme Court identified three relevant factors: (1) the difficulty of ascertaining the amount of damages attributable to the misconduct rather than to some other source; (2) the difficulty of apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to prevent multiple recoveries and (3) whether suits by directly injured victims would vindicate the general interest in deterring injurious conduct. *Holmes,* 503 U.S. at 269-70. The difficulty in ascertaining damages in this case is best assessed when the case has gone beyond the pleading stage. For purposes of the pending motion, the complaint contains sufficient allegations of harm to survive. While Defendants characterize their connection to the alleged wrongdoing as being shippers of products that made their way, “by a series of legal and illegal acts beyond the manufactures' control,” to persons who misused them, Defs.' Mem. at 13, Plaintiffs allege that Defendants could have exercised control over the distribution of their product. E.g., Compl. at pars. 59-60.

34 In their original memorandum, Defendants state that the rule articulated in the *Freetown* case “is a corollary of the ‘fireman's rule.’ ‘% Def's.’ Mem. at 15 n. 2. Subsequently, the Appeals Court stated that “the firefighter's rule has no continuing vitality in Massachusetts.” *Hopkins v. Medeiros,* 48 Mass.App.Ct. 600, 608-09 (2000). In their supplemental memorandum, Defendants argue that the fact that the Commonwealth no longer follows the firefighter's rule “has no effect on the continued vitality of the municipal cost recovery doctrine, as applied by the Supreme Judicial Council [sic] in *Freetown.*” Defs.' Supp.Mem. (dated June 1, 2000), at final (unnumbered) page of argument section. The court does not rule on the relationship between the firefighter's rule and the *Freetown* doctrine.

35 The authors state:

> Two generalizations underlie the numerous exceptions [to the economic loss rule]. First, the common rationale for allowing recovery of purely economic losses is formability. Second, the degree to which a defendant knew or should have known the extent of the consequences of negligent conduct, including economic loss, plays a dispositive role in a court's holding, more knowledge means more culpability.
>
> One differentiating factor between those cases allowing recovery and those denying recovery is foreseeability; that is, recovery hinges on whether a defendant could foresee that time negligent conduct would cause harm to a specific person, known class of persons, or foreseeable persons under the circumstances.

Palmueri & Barret, *supra,* at 761-62, 765 (footnotes omitted).

36 See *FMR Corp. v. Boston Edison Co.,* 415 Mass. 393, 395 (1993) (plaintiffs claimed defendants' negligent conduct caused plaintiffs to sustain damages from loss of income and increased costs of doing business);

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Garweth Corp., 415 Mass. at 305 (plaintiff claimed defendant's conduct caused plaintiff to sustain monetary losses in connection with contract); *Stop & Shop Cos. v. Fisher,* 387 Mass. 889, 893 (1983) (plaintiff claimed that defendant's negligence in striking bridge caused economic injury to plaintiffs). See also Restatement (Second) of Torts § 766C (1979).

37 See *Marcil v. John Deere Indus. Equip. Co.,* 9 Mass.App.Ct. 625, 630-31 (1980) (plaintiff claimed manufacturing defect in construction equipment caused plaintiff business losses). See also Restatement (Third) of Torts: Products Liability § 21 (1997).

38 "Economnic loss" in time products liability setting is "the cost of repairs and lost profits." *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.,* 404 Mass. 103, 107 (1989). The Appeals Court defined "economic loss" as including "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property ..." *Marcil,* 9 Mass.App.Ct. at 630 n. 3 (quoting *Alfred N. Koplin & Co. v. Chrysler Corp.,* 49 Ill.App.3d 194, 199 (1977)).

39 Defendants' argument that the economic loss rule requires dismissal of the claims for public nuisance and unjust enrichment is without merit, as the rule does not appear to apply to such claims. See *Garweth Corp.,* 415 Mass. at 306.

40 General Laws c. 40, § 2 provides:

> A town may in its corporate capacity sue and be sued by its name, and may appoint necessary agents therefor.

This reference only to "town" is complemented by G.L. c. 40, § 1, which makes clear that § 2 applies to cities as well. Section 1 states:

> Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in time acts relating thereto. Except as expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.

41 Of course, the Boston Public Health Commission is the second plaintiff. However, Defendants make no separate argument as to the commission's authority to be a plaintiff, and they treat both plaintiffs the same. In the complaint, Plaintiffs rely on G.L. c. 111, § 122 (and Append. 2-4 & 2-5), for the commission's authority to sue.

42 Article 89 of the Amendments to the Constitution of the Commonwealth was ratified in 1966, and is commonly known as the Home Rule Amendment. This replaced the existing Article 2. At present, Article 2 of the Amendments, section 6, reads in full:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

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> General Laws c. 43B, § 13 (part of the Home Rule Procedures Act), largely tracks the language of the Home Rule Amendment. Section 13 has as its subject ordinances or by-laws, and "legislative or executive actions."

43 In a footnote in their reply brief, Defendants argue that while G.L. c. 40, § 2 empowers municipalities to sue and be sued in their own names, the scope of that empowerment derives from some other authority, such as the Home Rule Amendment. This argument has no merit. As noted, cities and towns have long had the authority to initiate tort and contract actions. The court does not believe that c. 40, § 2 requires that there exist specific statutory or constitutional authorization as to every asserted tort or contract cause of action before a city or town may initiate a suit. Defendants cite no authority to support that position.

44 The sole Massachusetts authority on which Defendants rely to support this distinction is *Higginson v. Treasurer & Sch. House Comm'rs of Boston,* 212 Mass. 583 (1912). *Higginson* held that the legislature had authority to designate city parkland as the site for a school building. The Court stated that there existed two characters of city and towns, a governmental capacity and a capacity similar to a private corporation. *Id.* at 585. Defendants make this distinction, apparently, to suggest that G.L. c. 40, § 2 only allows municipalities to sue in their "corporate capacity" (i.e., acting in the nature of a private corporation), and not in their "governmental capacity." Regardless which capacity Plaintiffs are suing in, the cases discussed plainly allow contract and tort suits to be brought by municipalities. Defendants cite no Massachusetts case barring suit and relying on the distinction made in *Higginson* . In *Slama v. Attorney Gen.,* 384 Mass. 620, 623-24 (1981), the Court made a different distinction and suggested that "corporate capacity" meant a municipality acting as a distinct entity, and "representative capacity" meant a municipality acting as a representative of its citizens, the actual rightholders, for whom it would be difficult or impossible to assert claims.

45 To determine whether an ordinance or by-law is inconsistent with state law, the Court asks (1) whether there was an express legislative intent to forbid local activity on the same subject, (2) whether the local regulation would frustrate the purpose of a statute so as to warrant an inference that the Legislature intended to preempt the subject or (3) whether legislation on the subject is so comprehensive that legislative intent to preempt can be inferred, as any local enactment would frustrate the statute's purpose. *Boston Gas Co.,* 425 Mass. at 699.

46 Defendants make no separate argument in relation to the regulations in 940 Code Mass.Regs. §§ 16.00 et seq.

47 I do not intend anything in this decision to affirm the propriety of the injunctive relief Plaintiffs seek. Any such comment would be highly premature.

48 Defendants frame their argument in terms of the Commerce Clause. In one paragraph of their memorandum, Defendants discuss Due Process principles, in connection with *BMW of N. America, Inc. v. Gore,* 517 U.S. 559 (1996). Because the thrust of this portion of their memorandum clearly focuses on a Commerce Clause argument, the court declines to read this paragraph of defendants' memorandum as raising a Due Process argument any broader than the doctrine discussed in *BMW of N. America.*

49 Clause 3 of Art. I, § 8, grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

50 The United States Supreme Court has summarized its two-tiered approach as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and

> regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.
>
> *Healy,* 491 U.S. at 337 n. 14 (quoting *Brown-Forman Distillers Corp.,* 476 U.S. at 579) (citations omitted).

51 See also *Dennis v. Higgins,* 498 U.S. 439, 447 (1991) (Commerce Clause is limitation on "the power of the States to enact laws imposing substantial burdens on [interstate] commerce") (quoting *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87 (1984); alteration added).

52 The Court stated: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. America,* 517 U.S. at 572 n. 17. The Court cited *New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964) (relating to defamation and First Amendment), and *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959) (relating to displacement of state jurisdiction under National Labor Relations Act).

53 The Court's statements in this regard may properly be characterized as dicta, since the Court assumed that the ultimate damage award of $2 million (after remittitur by the Alabama Supreme Court) was based only on conduct occurring in Alabama and held that even this award was grossly excessive. *BMW of N. America,* 517 U.S. at 574. Thus, the Commerce Clause discussion was not necessary to the Court's analysis. See *id.* at 604 (Scalia, J., dissenting); *id.* at 607 (Ginsburg, J., dissenting).

54 The Supreme Court did not consider whether a State may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America,* 517 U.S. at 573 n. 20.

55 While the Supreme Court discussed notions of fairness enshrined in "constitutional jurisprudence," the Court appeared to rely on Due Process. *BMW of N. America,* 517 U.S. at 574 n. 22.

56 See *BMW of N. America,* 517 U.S. at 576 ("But this observation [that infliction of economic injury may warrant a substantial penalty] does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages").

57 Defendants point out that the alleged diversions into an illegal firearms market can occur anywhere in the country and thus an injunction could have the effect of forcing Defendants to change its practices nationwide. Again, an argument as to the scope of injunctive relief, should such an argument be necessary and should injunctive relief be deemed appropriate, is best addressed at a later stage of litigation. Also, as noted, the Supreme Court has left open the question whether a state may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America,* 517 U.S. at 573 n. 20.

58 Defendants state that, according to the complaint, most of the sales of firearms to distributors took place outside Massachusetts. This appears to speak to a personal jurisdiction argument, and Plaintiffs appear to have interpreted it as such. Nevertheless, Defendants in their reply brief emphatically deny that they dispute personal jurisdiction. Defs.' Reply Mem. at 32.

59 See also *Planned Parenthood League of Mass., Inc. v. Bell,* 424 Mass. 573, 578 n. 4, cert. denied, 522 U.S. 819 (1997) ("A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury") (quoting *Connerty v. Metropolitan Dist. Comm'n,* 398 Mass. 140, 148 (1986)) (emphasis added); Restatement (Second) of Torts § 821B, cmt. h ("a public nuisance does not necessarily involve interference with use and enjoyment of land ... When the particular harm consists of interference with the use and enjoyment of land, the public nuisance may also be a private nuisance ...").

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60 "A private nuisance is actionable when a property owner creates, permits, or maintains a condition ... that causes a substantial and unreasonable interference with the use and enjoyment of the property of another." *Belanger,* 41 Mass.App.Ct. at 670 n. 3 (quoting *Asia v. Fitchburg,* 24 Mass.App.Ct. 13, 17 (1987)).

61 Along similar lines is *Massachusetts v. Pace,* 616 F.Sup. 815, 821 (D.Mass.1985), which Defendants also cite. In that case, the federal court held that the defendants did not participate to a substantial extent in the release of chemicals into the ground when the defendants only transported the chemicals to a chemical waste reclamation facility, which did release the chemicals into the ground. Thus, the nuisance in *Pace* was also of the type connected to property.

62 In their reply brief, Defendants argue that, in order to exercise control to abate the nuisance, they would have to "identify[ ] all criminals and disarm[ ] them-something neither defendants, nor [Boston] with all its statutory and law enforcement resources can do." This argument misses the point of Plaintiffs' allegations. To exercise control to abate the alleged nuisance, Defendants would have to cease maintaining the illegal, secondary market.

63 Plaintiffs have also alleged that they sustained special or peculiar harm.

64 In a footnote to their original memorandum, Defendants observe that Plaintiffs have not pled that Boston's Corporation Counsel has initiated this action. Defendants conclude this makes Boston not a proper party. Defs.' Mem. at 21 n. 5. Under Chapters of the City of Boston Code, the city's law department is placed under the charge of the Corporation Counsel. The ordinance states in pertinent part that the Corporation Counsel "shall, subject to the direction of the Mayor, institute any suit or proceeding in behalf of the City which line shall deem the interest of the City requires; shall by himself or by his assistants in the Law Department appear as Counsel in all suits, actions, or prosecutions which may involve the rights or interests of the City[.]" City of Boston Code, Ordinances, c. 5, § 5-8.1 (1985 & 1999 update). Defendants cite no cases or rule of civil procedure, and present no argument as to why the quoted language from the city ordinance requires that the city plead that it has satisfied the ordinance, and why failure to do so requires dismissal. Plaintiffs do not address this issue in their opposition memorandum, and Defendants do not raise it in their reply memorandum or their sur-reply memorandum. See Mass.R.Civ.P. 9(a). Defendants thus have not pressed this issue.

65 Defendants' argument is framed in terms of the first element of a negligence action, the existence of a duty of care. However, the penultimate paragraph of this portion of their memorandum speaks of misuse of a firearm as being a bar to recovery. Defs.' Mem. at 34. This confronts the proximate causation analysis, which is an issue distinct from whether there exists a duty of care. To the extent Defendants argue that liability is barred by the intervening acts of third persons, such an argument fails in Massachusetts if the third person's acts could have been foreseen, which is what Plaintiffs allege. See *Poskus v. Lombardo's of Randolf, Inc.,* 423 Mass. 637, 639-40 (1996); *Jesionek v. Massachusetts Port Auth.,* 376 Mass. 101, 105 (1978); *Gidwani v. Wasserman,* 373 Mass. 162, 166-67 (1977).

66 Plaintiffs allege that Defendants are jointly and severally liable. Compl. at par. 87. Defendants make no argument against joint and several liability.

67 The complaint alleges alternatively that Defendants were negligent in failing to inhibit the formation of the secondary market. Failing to prevent an event from happening, if one knows it will occur absent intervention and one desires it to occur, may be the functional equivalent of an affirmative act. However, the court need not decide this issue, as a complaint should not be dismissed "if it would support relief on any theory of law." *Whitinsville Plaza,* 378 Mass. at 89 (citations omitted; emphasis is in original).

68 Foreseeability is sometimes considered an element of the ascertainment of the existence of a duty of care. *Whittaker v. Saraceno,* 418 Mass. 196, 198-99 & n. 3 (1994).

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69 The legislature and the Attorney General have, as noted, established statutory and regulatory rules to prevent the harm Plaintiffs allege. This may be evidence of "existing social values and customs, as well as [ ] appropriate social policy," Davis, 420 Mass. at 743, from which a different duty can be inferred. The court does not reach this issue. Cf. *Tobin v. Norwood Country Club, Inc.,* 422 Mass. 126, 133 (1996) ("Determinations of public policy, especially when a statute 'undoubtedly' identifies such a policy, are highly relevant to [the initial inquiry, whether the defendant owed a duty of care]"); *Michnik Zilbernman v. Gordon's Liquor, Inc.,* 390 Mass. 6, 11 (1983) ("Once a vendor places liquor in the hands of a minor, it may set in motion the very harm which the Legislature has attempted to prevent").

70 Plaintiffs also allege that Defendants were negligent in marketing their products by failing to educate consumers regarding the risks of firearms, representing that purchase of a firearm will enhance household security, representing that firearms are safe and representing that families could safely store firearms unlocked and accessible to minors or mentally impaired persons, causing additional harm to Plaintiffs. Compl. at par. 89. Defendants make no argument relative to these allegations, and the court does not address them.

71 Defendants do not argue that the implied warranty of fitness for a particular purpose does not apply. G.L. c. 106, § 2-3-15.

72 As these are the only grounds for dismissal of this count urged by Defendants, the court confines its discussion to these two issues. In their reply brief, Defendants for the first time appear to raise the argument that the guns were not "defective." See Defs.' Reply Mem. at 27. The argument, in its entirety, is as follows: "When a product is deliberately functioned [sic] to accomplish a known and intended result, the product is not defective and liability is not extended to the manufacturer." Defendants reference a footnote in their original memorandum. That footnote argues that misuse of a firearm constitutes a superseding cause, negating a finding of proximate causation. Defs.' Mem. at 27 n. 9. Thus, Defendants present no argument as to why the firearms were, as a matter of law, not "defective" under warranty law. The court notes that the complaint contains sufficient allegations that Defendants' products were defective. See, e.g., Compl. at par. 94. *See Commonwealth v. Johnson Insulation,* 425 Mass. 650, 660-61 (1997) (discussion of breach of implied warranty of merchantability).

73 While these paragraphs of the complaint allege that Defendants reasonably could have expected that Plaintiffs would have been injured by Defendants' defectively designed guns (and thus speaks to the foreseeability of harm rather than foreseeability of use), the facts alleged in the complaint, if proven, would show that Defendants reasonably could have foreseen the use to which their products were put. See, e.g., Compl. at pars. 53-55 (alleging, in substance, that Defendants reasonably should have known that their guns were being used by the secondary, illegal market to inflict harm by gun violence).

74 The court acknowledges that the breach of warranty by defective design claim seeks to apply warranty law in a way unlike past cases. The typical breach of warranty case involves allegations that the defendant's product, used in a reasonably foreseeable way, harmed the plaintiff-user. In such a situation, the defendants may assert the affirmative defense that the plaintiff acted unreasonably toward a product he knew to be defective and dangerous. Here, however, Plaintiffs were not the users, a difference which raises novel questions of law regarding the affirmative defense of unreasonable use. These questions are better addressed in the context of a factual record. Cf. *Bolduc v. Colt's Mfg. Co.* 968 F.Sup. 16, 18 (D.Mass.1997) (deciding, at summary judgment, that plaintiff's decedent's deliberate misuse of firearm barred recovery on negligent design claim).

75 Paragraph 106 of the complaint mentions by name only the implied warranty of merchantability. It does, however, reference G.L. c 106, § 2-315, the implied warranty for fitness for a particular purpose.

76 *Mavilia v. Stoeger Indus.,* 574 F.Sup. 107, 111 (D.Mass.1983), was a case involving a handgun decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). That case does not appear to have involved allegations of

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failure adequately to warn. Applying what it perceived to be Massachusetts law as it then existed, the federal district court decided that the .38 caliber Llama automatic pistol was not inherently defective and declined to certify the issue to the Supreme Judicial Court. *Id.* & n. 5. The allegations in *Mavilia* were different from Plaintiffs' allegations in this case.

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Superior Court of Massachusetts,
Suffolk County, Business Litigation Session.

COMMONWEALTH
v.
EXXON MOBIL CORPORATION

1984CV03333BLS1
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June 22, 2021

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

Karen F. Green, Associate Justice of the Superior Court

***1** The Commonwealth of Massachusetts, by its Attorney General, brings this action against Exxon Mobil Corporation ("Exxon") for violations of G.L.c. 93A. The Commonwealth claims that Exxon has "systematically and intentionally ... misled Massachusetts investors and consumers about climate change"; more specifically, that Exxon "has been dishonest with investors about the material climate-driven risks to its business and with consumers about how its fossil fuel products cause climate change ..." Amended Complaint, ¶1.

The Commonwealth filed its original complaint, alleging four violations of c. 93A, in this court on October 24, 2019. On November 29, 2019, Exxon removed the case to the United States District Court for the District of Massachusetts. The Commonwealth moved to remand on December 26, 2019, and on March 17, 2020, the District Court remanded the case to this court. On June 5, 2020, the Commonwealth filed an Amended Complaint, alleging three violations of c. 93A. Specifically, the Commonwealth claims that Exxon has: (1) misrepresented and failed to disclose material facts regarding systemic climate change risks to Massachusetts investors (Count I); (2) deceived Massachusetts consumers by misrepresenting the purported environmental benefit of using its Synergy™ and Mobil 1™ products and failed to disclose the risks of climate change caused by its fossil fuel product (Count II); and (3) deceived Massachusetts consumers by promoting false and misleading "greenwashing" campaigns (Count III). [1] The Commonwealth requests injunctive relief, $5,000 for each violation of c. 93A, and an award of costs and attorneys fees.

The matter is now before me on Exxon's Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Mass.R.Civ.P. 12(b)(2) and 12(b)(6), respectively. For the reasons that follow, Exxon's motion is *DENIED*.

BACKGROUND

The Comonwealth's Amended Complaint, which is 202 pages and contains 770 paragraphs, cites to and quotes from numerous Exxon documents. I provide only a general overview of the Commonwealth's allegations here. I discuss other pertinent facts and allegations in the respective sections of the Discussion.

Since at least the late 1970s, Exxon has known that its fossil fuel products cause climate change. Exxon also knew the dangerous effects of global warming, resulting from increasing use of fossil fuels, on the global ecosystem. In the past, Exxon has described the impacts of climate change and global warming as akin to other "existential threats to human survival, such as 'a nuclear holocaust or world famine' " and "globally catastrophic." Amended Complaint, ¶¶86, 90, 96. Exxon knew that, once measurable, climate change effects "might not be reversible," and that "[m]itigation of the 'greenhouse effect' would require major reductions in fossil fuel." *Id.* at ¶107. Exxon understood the risk climate change poses to its business.

***2** Despite knowing this information, Exxon has deceived Massachusetts investors in its marketing of securities by misrepresenting and failing to disclose the risk posed by climate change to Exxon's business. For example, Exxon knows the "physical risks" from climate change, such as sea level rise, extreme weather, drought, and excessive heat, would harm fossil fuel demand because of efforts to reduce greenhouse gas emissions and market shifts to cleaner energy. These climate risks threaten the value of Exxon's business prospects and the value of Exxon securities held by Massachusetts investors. Instead of disclosing this information, Exxon has told Massachusetts investors that Exxon faces few if any financial risks from climate change, and little risk that its fossil fuel assets will be stranded, i.e., "rendered economically incapable of being developed because of governmental limits on emissions and other

measures that increase the cost of developing fossil fuel reserves and shift demand away from fossil fuels." Amended Complaint, ¶19.

Exxon has also deceived Massachusetts consumers by misrepresenting and failing to disclose that normal use of its fossil fuel products, like gasoline and motor oil, causes climate change. For example, Exxon deceptively markets Synergy™ as a product that improves, rather than harms, the environment. Finally, Exxon deceptively advertises itself as a company that protects the environment even though it knows continued reliance on its fossil fuels will harm the environment.

DISCUSSION

I. Personal Jurisdiction [2]

Exxon first argues that this court lacks personal jurisdiction over it because Exxon is an out-of-state resident and the Commonwealth's claims challenge Exxon's statements and activities outside Massachusetts.

"For a nonresident to be subject to the authority of a Massachusetts court, the exercise of jurisdiction must satisfy both the Massachusetts's long-arm statute, G.L.c. 223A, § 3, and the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution." *Exxon Mobil Corp. v. Attorney Gen.,* 479 Mass. 312, 314 (2018), citing *SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324, 325 (2017). Exxon is a New Jersey corporation with a principal place of business in Texas. The Supreme Judicial Court ("SJC") has determined that Exxon is not subject to general jurisdiction in Massachusetts. See *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. at 314 (concluding that total of Exxon's activities in Massachusetts does not approach volume required for assertion of general jurisdiction); see also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (court may assert general jurisdiction over corporation when its affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State). Thus, the question is whether Exxon's contacts with Massachusetts are sufficient to confer specific jurisdiction under Massachusetts's long-arm statute, G.L.c. 223A, § 3.

"Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities, such as when the litigation itself is founded directly on those activities." *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 142 F.3d 26, 34 (1st Cir. 1998); see G.L.c. 223A, § 3 (granting jurisdiction over claims "arising from" certain enumerated grounds occurring within Massachusetts). It is confined to adjudication of "issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919 (quotations and citation omitted). "Or put just a bit differently, 'there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." ' " *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S.Ct. 1017, 1025 (2021), quoting *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582, 137 S.Ct. 1773, 1780 (2017). Thus, the question is whether a nexus exists between Exxon's in-state activities and the Commonwealth's legal claims. See *Exxon Mobil Corp.*, 479 Mass. at 315.

***3** The Commonwealth's claims are based on G.L.c. 93A, "a statute of broad impact" that prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693-94 (1975); G.L.c. 93A, § 2(a). The Commonwealth alleges that Exxon has misled Massachusetts consumers and investors about the impact of fossil fuels on both the Earth's climate and the company's value, in violation of c. 93A. See *Exxon Mobil Corp.*, 479 Mass. at 316. In its Amended Complaint, the Commonwealth claims that Exxon has made "significant factual misstatements" and failed "to make disclosures to investors and consumers that would have been material to decisions by Massachusetts investors to purchase, sell, retain, and price ExxonMobil securities and by Massachusetts consumers to purchase ExxonMobil fossil fuel products that cause climate change." Amended Complaint, ¶2. See also *Exxon Mobil Corp.*, 479 Mass. at 316 (Commonwealth claims that "[d]espite [Exxon's] sophisticated internal knowledge" about impact of fossil fuels on both Earth's climate and value of the company, "Exxon failed to disclose what it knew to either the consumers who purchased its fossil fuel products or investors who purchased its securities").

A. Burden of Proof and Standard of Review

The Commonwealth "has the burden of establishing the facts upon which the question of personal jurisdiction over [Exxon] is to be determined." *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 151 (1978). The Commonwealth "must eventually establish jurisdiction by a preponderance of the evidence at an evidentiary hearing or at trial." *Cepeda v. Kass*, 62 Mass.App.Ct. 732, 738 (2004). When a defendant challenges the assertion of personal jurisdiction over it, the court, in its discretion, may either (1) consider the motion under the *prima facie* standard and defer a final determination on the issue until the time of trial, when the plaintiff must establish jurisdiction by a preponderance of the evidence, or (2) hold an evidentiary hearing under the preponderance of evidence standard. See *von Schönau-Riedweg v. Rothschild Bank AG*, 95 Mass.App.Ct. 471, 483 (2019); *Cepeda*, 62 Mass.App.Ct. at 739-40; see also Mass.R.Civ.P. 12(d) (motion pursuant to 12(b)(2) "shall be heard and determined before trial ... unless the court orders that the hearing and determination thereof be deferred until the trial").

Courts typically resolve such motions by applying the prima facie standard. *Cepeda*, 62 Mass.App.Ct. at 737 (most common approach allows court to determine rule 12(b)(2) motion solely on affidavits and other written evidence without conducting an evidentiary hearing). The plaintiff "must make a prima facie showing of evidence that, if credited, would be sufficient to support findings of all facts essential to personal jurisdiction." *Fern v. Immergut*, 55 Mass.App.Ct. 577, 579 (2002). In evaluating whether a prima facie showing has been made, the court acts as a data collector, not as a fact finder, and the plaintiff's burden is one of production, not persuasion. *Cepeda*, 62 Mass.App.Ct. at 737-38. The court takes "specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Massachusetts School of Law at Andover, Inc.*, 142 F.3d at 34; see *Cepeda*, 62 Mass.App.Ct. at 739 (that facts may be controverted by defendant does not overcome *prima facie* showing). The court then "add[s] to the mix facts put forward by defendants; to the extent they are uncontradicted." *Massachusetts School of Law at Andover, Inc.*, 142 F.3d at 34. Where a court denies a motion pursuant to Mass.R.Civ.P. 12(b)(2), without holding an evidentiary hearing, it "reserves the jurisdictional issue, unless waived by the defendant, for final determination at the trial, pursuant to a preponderance of the evidence standard." *Cepeda*, 62 Mass.App.Ct. at 737.

This court will apply the *prima facie* standard in ruling on Exxon's motion and thereby reserves the jurisdictional issue for final determination at trial based on a preponderance of the evidence. See *id.*

B. Long-Arm Statute

***4** The Massachusetts long-arm statute, G.L.c. 223A, § 3, "sets out a list of specific instances in which a Massachusetts court may acquire personal jurisdiction over a nonresident defendant." *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767 (1994). The Commonwealth asserts specific jurisdiction under section (a), which extends "personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's ... transacting any business" in Massachusetts. [3]

The Commonwealth's allegations in this case may be categorized as (1) allegations that Exxon misled Massachusetts investors in connection with their decisions to buy, hold, and sell Exxon securities (Count I); and (2) allegations that Exxon misled Massachusetts consumers in connection with their decisions to purchase Exxon products (Count II and III). Although no Massachusetts state court has specifically adopted a claim-specific analysis under G.L.c. 223A, I will consider the investor claim and the consumer claims separately under c. 223A(a). See *Figawi, Inc. v. Horan*, 16 F.Sup.2d 74, 79 (D. Mass. 1998) (referencing claim-specific nature of "specific" in personam jurisdiction under § 3(a)). [4]

***5** "For jurisdiction to exist under § 3(a), the facts must satisfy two requirements—the defendant must have transacted business in Massachusetts, and the plaintiff's claim must have arisen from the transaction of business by the defendant." *Tatro*, 416 Mass. at 767. The court construes these dual requirements "broadly." *Id.* at 771. The transacting business requirement "embraces any purposeful acts performed in Massachusetts whether personal, private, or commercial." *Johnson v. Witkowski*, 30 Mass.App.Ct. 697, 713 (1991). The "arising from" requirement creates a "but for" test. See *Tatro*, 416 Mass. at 770-71. Exxon apparently does not dispute that it transacts business in Massachusetts; instead, it argues that the Commonwealth's

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claims do not "arise from" Exxon's transaction of business in Massachusetts. [5]

1. Count I

The Commonwealth claims that Exxon deceived investors about the long-term health of Exxon by failing to disclose the full extent of risks associated with climate change and climate regulation. Exxon contends that the court lacks jurisdiction over the investor deception claim because it does not arise from Exxon's contacts with the forum. More specifically, Exxon argues that any statements the Commonwealth alleges Exxon made regarding the impact of climate risks on future demand for oil and natural gas and Exxon's processes for assessing those risks were not made in Massachusetts. I disagree.

The Commonwealth alleges that Exxon "offers its securities, including its common stock and debt instruments, directly to Massachusetts investors" and "investment managers," that "collectively[ ] hold millions of shares of [Exxon] common stock worth billions of dollars." Amended Complaint, ¶¶270, 273; see *id.* at ¶¶271, 274-79, 281-83, 289. [6] The Commonwealth further alleges:

> Notwithstanding the additional anticipated costs it expects to incur as a result of increased efforts to reduce greenhouse gas emissions, [Exxon] insists that its businesses will continue to meet growing demand for fossil fuel energy around the world and its reserves are not at risk of becoming stranded. Over the last decade, [Exxon] assured its Massachusetts ... investors[, including State Street Corporation, Wellington Management Group, Fidelity Investments, and Boston Trust Walden Company and their affiliates,] that it has accounted for such risks by building into its business planning what is known as a 'proxy cost' of carbon, which accounts for the likelihood of increasing costs from policies that will tax or regulate greenhouse gas emissions from [Exxon's] operations and fossil fuel products.
>
> ...
>
> This story of careful risk management was highly misleading, as [Exxon's] actual internal practices were, in fact, inconsistent with its representations to investors and did not actually influence [Exxon's] business decisions.

Amended Complaint, ¶¶20, 358. The Commonwealth also references direct communications between Exxon and Massachusetts investors regarding the impact of climate change and climate change regulation on Exxon's business and Exxon's management of climate risk, including its proxy cost of carbon. *Id.* at ¶¶446-69. These included a 2015 meeting with Wellington Management at which Exxon's CEO "relayed ... that Massachusetts Institute of Technology scientists with whom Exxon[ ] works ha[d] advised [Exxon] that 'the jury is still out,' on climate change"; a 2016 meeting with Fidelity Investments at which Exxon's CEO "expressed his skepticism about the viability of renewable energy and his confidence in Exxon[ ]'s business model in the context of proposals to increase the use of renewables"; and various other meetings in Boston in 2017 and 2018 between representatives of Exxon and of Massachusetts institutional investors. *Id.* at ¶¶452, 455, 459-67.

***6** In notes from its March 17, 2017 meeting with Exxon, State Street writes that Exxon stated that, "the price of carbon is used as a modeling tool and [Exxon] has used this since 2007 and it considered the proxy cost of carbon before COP21 [the United Nations climate change conference] so the [Paris] climate agreement did not impact their strategy because they had already accounted for a global event like that." Exhibit 8 to Affidavit of I. Andrew Goldberg. Further, when asked about "stranded assets," Exxon replied that it "has 13 years of proven reserves but there are opportunities for future development and the resource development planning process is robust and there is a process in place to look at future returns that considers geopolitical risk, regulations, environmental impact assessments, etc." *Id.*

These are examples of statements that the Commonwealth alleges were deceptive because Exxon failed to disclose known risks to its business presented by climate change. Indeed, a few months later, in October 2017, a representative from Wellington Management pointed this out. The Wellington representative stated in notes from an Exxon meeting, in which several investors participated:

> Despite the strong message from shareholders asking for [Exxon] to address climate risks in its long-term planning, the company continues to avoid the real issue. Instead, [Exxon] responded by focusing on

> the algae biofuel research results they announced in June. [Exxon] has put a lot of money into advertising this research, which I believe is an effort to improve its image on environmental issues rather than an effort to truly address risks posed by climate change to their business.

Id. at Exhibit 9.

Thus, the Commonwealth has shown that its claim regarding investor deception arises from Exxon's contacts with Massachusetts. The Commonwealth has sufficiently alleged that Massachusetts investors would not have purchased or retained Exxon's stocks but for its misrepresentations and omissions concerning the risk of climate change to its business.

2. Counts II and III

The SJC already has determined that Exxon's "franchise network of more than 300 retail service stations under the Exxon and Mobil brands that sell gasoline and other fossil fuel products to Massachusetts consumers," represents Exxon's "purposeful and successful solicitation of business from residents of the Commonwealth," such that it satisfies the "transacting any business" prong of § 3(a). Exxon Mobil Corp., 479 Mass. at 317-18. If the Commonwealth's consumer deception claims arise from this franchise network of Exxon and Mobil-branded fuel stations, the court can assert personal jurisdiction over Exxon. Again, the SJC has concluded that "[t]hrough its control over franchisee advertising, Exxon communicates directly with Massachusetts consumers about its fossil fuel products ..." Exxon Mobil Corp., 479 Mass. at 320. [7] Exxon argues that because the advertisements at these franchises "do not contain the purported misrepresentations that give rise to the consumer deception claim," Reply Memorandum at page 6, they cannot support personal jurisdiction over Exxon. I am not persuaded.

***7** A person may violate G.L.c. 93A through false or misleading advertising. See *id.* "[A]dvertising need not be totally false in order to be deemed deceptive in the context of G.L.c. 93A ... The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394-95 (2004); *Underwood v. Risman*, 414 Mass. 96, 99-100 (1993) (duty exists under c. 93A to disclose material facts known to a party at time of transaction); 940 Code Mass. Regs. § 3.05(1) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect").

The Commonwealth claims that Exxon "deceives Massachusetts consumers by failing to disclose in advertisements and promotional materials directed at them ... the extreme safety risk associated with the use of [Exxon's] dangerous fossil fuel products, which are causing potentially 'catastrophic' climate change ..." Amended Complaint, ¶¶578, 579. It further alleges that Exxon's "misleading representations and omissions to consumers are material because disclosure of information that [Exxon] knows regarding the dangerous climate effects of using [Exxon's] fossil fuel products would influence the purchasing behavior of Massachusetts consumers." *Id.* at ¶36.

In response to Exxon's motion to dismiss for lack of personal jurisdiction, the Commonwealth submitted the affidavit of I. Andrew Goldberg, which contains photographs of signs posted at Exxon and Mobil-branded fuel stations in Massachusetts. These signs state that Exxon's Synergy™ "Supreme" gas "provides 2x cleaner engine for better gas mileage," but do not state that the gas causes climate change. It is Exxon's failure to disclose this allegedly material information to Massachusetts consumers that forms the basis of Count II of the Commonwealth's complaint. The Commonwealth claims that Exxon's failure to include allegedly material information in its in-state advertising created an over-all misleading impression in violation of c. 93A. See *Aspinall*, 442 Mass. at 394-95 (criticized advertising may create an over-all misleading impression through failure to disclose material information). [8]

Thus, the Commonwealth's claims regarding consumer deception arise from Exxon's advertisements through its Massachusetts franchisees. More specifically, the alleged injury to Massachusetts consumers, that is, their purchase in Massachusetts of "dangerous" fossil fuel products, would not have occurred "but for" Exxon's failure to disclose additional and allegedly relevant information about those products at its franchise stations.

C. Due Process

The court must also determine whether the exercise of personal jurisdiction over Exxon comports with the requirements of due process. The "touchstone" of this inquiry is "whether the defendant purposefully established 'minimum contacts' in the forum state." *Tatro*, 416 Mass. at 772, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). "The governing principle [of due process] is the fairness of subjecting a defendant to suit in a distant forum." *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 7 (1979). A plaintiff seeking to assert personal jurisdiction over a defendant must establish that: (1) the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws; (2) the claim arises out of or relates to the defendant's contacts with the forum state; and (3) the assertion of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. *Bulldog Investors Gen. P'ship v. Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations and quotations omitted).

***8** The court's exercise of personal jurisdiction over Exxon comports with the requirements of due process. First, the SJC already has held that Exxon has purposefully availed itself of the privilege of conducting business activities in Massachusetts. See *Exxon Mobil Corp.*, 479 Mass. at 321-23.

Further, as discussed above, the claims asserted by the Commonwealth arise out of Exxon's contacts with Massachusetts. See *Tatro*, 416 Mass. at 772, citing *Burger King Corp.*, 471 U.S. at 472 ("The plaintiff's claim must arise out of, or relate to, the defendant's forum contacts"); see also *Ford Motor Co.*, 141 S.Ct. at 1026, 1028 (quotations and citation omitted) (language "or relate to" "contemplates that some relationships will support jurisdiction without a causal showing"; because Ford "had systematically served a market in [States where plaintiffs brought suit] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States," there was "strong relationship among the defendant, the forum, and the litigation—the essential foundation of specific jurisdiction").

Finally, the exercise of personal jurisdiction over Exxon does not offend "traditional notions of fair play and substantial justice." See *Exxon Mobil Corp.*, 479 Mass. at 323, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Commonwealth has a strong interest in enforcing its consumer protection law, including against allegedly false and misleading statements, in Massachusetts. Meanwhile, Exxon delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in all states, including Massachusetts. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297298 (1980) (forum State does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over corporation that delivers its products into stream of commerce with expectation that they will be purchased by consumers in forum State). Exxon also interacts with investors in Massachusetts with the expectation that they will purchase and retain its securities. Although having to litigate this case in Massachusetts may result in some inconvenience to Exxon, any such inconvenience is outweighed by the Commonwealth's interest in enforcing its laws in a Massachusetts forum. See *Bulldog Investors Gen. P'ship*, 457 Mass. at 218 (Commonwealth's interest in adjudicating violations of Massachusetts securities laws in Massachusetts forum outweighed any inconvenience to out-of-state defendant resulting from having to litigate there).

Because the court's exercise of jurisdiction over Exxon satisfies both the Massachusetts long-arm statute, G.L.c. 223A, § 3, and the due process clause of the Fourteenth Amendment to the United States Constitution, Exxon's motion to dismiss for lack of personal jurisdiction is denied.

II. Failure to State a Claim

In deciding the motion to dismiss, the court accepts as true the factual allegations of the complaint and the reasonable inferences that can be drawn from those facts in the plaintiff's favor. *Foster v. Commissioner of Correction (No. 2)*, 484 Mass. 1059, 1059 (2020), citing *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 625 n.7 (2008). The court considers whether the allegations, if true, plausibly suggest an entitlement to any relief against the defendant. *Foster*, 484 Mass. at 1060, citing *Iannacchino*, 451 Mass. at 635-36.

***9** Chapter 93A prohibits "unfair methods of competition"[9] and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Slaney*, 366 Mass. at 693-94; G.L.c. 93A, § 2(a). "A successful G.L.c. 93A action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation ... or that the defendant intended to deceive the plaintiff ... or even knowledge on the part of the

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defendant that the representation was false." *Aspinall*, 442 Mass. at 394 (internal citations omitted). An act or practice is deceptive if it "has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Id.* at 396; see *Leardi v. Brown*, 394 Mass. 151, 156 (1985) (act or practice is deceptive if it possesses "a tendency to deceive"). One can also violate c. 93A "by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase." *Greenery Rehabilitation Group, Inc. v. Antaramian*, 36 Mass.App.Ct. 73, 78 (1994). In determining whether an act or practice is deceptive, the court considers the effect that the act or practice might reasonably be expected to have upon the general public. *Leardi*, 394 Mass. at 156. [10]

A. Count I

In this count, the Commonwealth claims that Exxon violated c. 93A by misrepresenting and failing to disclose the financial risks to Exxon posed by climate change to Exxon's business in its marketing of its securities to Massachusetts investors. The Commonwealth alleges that Exxon's "supposed climate risk disclosures [to investors] assert that [Exxon] has accounted for and is responsibly managing climate change risks and that, in any event, they pose no meaningful threat to the Company's business model, its assets, or the value of its securities." Amended Complaint, ¶471. According to the Commonwealth, this is because Exxon claims that "fossil fuel demand is fated to grow in the coming decades, clean energy alternatives are not and will not in the near future be competitive with fossil fuels, and the world's governments are unlikely to constrain fossil fuel use to limit global warming to the levels those governments have agreed is necessary to avert the most harmful potential consequences of climate change." *Id.* Further, "[t]hese communications are deceptive because they deny or ignore the numerous systemic risks that climate change presents to the global economy, the world's financial markets, the fossil fuel industry, and ultimately [Exxon's] own business ... despite [Exxon's] longstanding scientific understanding of the potentially 'catastrophic' nature of these risks." Amended Complaint, ¶472.

For example, the Commonwealth alleges that Exxon has "repeatedly said that it was accounting for climate change risks through the use of a high and rising 'proxy cost' of carbon that would capture the future impact of greenhouse gas regulations" on Exxon's business, yet Exxon "did not use proxy costs as represented ..." Amended Complaint, ¶358, 364. Instead, Exxon's "use of a proxy cost of carbon was not, in fact, a serious corporate effort to characterize and manage climate change risks. Internally, [Exxon] did not apply proxy costs consistently or uniformly; its internal corporate guidance for planning, budgeting, and reserves calculations did not match its publicly-disclosed proxy costs. For some projects, [Exxon] did not apply a proxy cost at all." Amended Complaint, ¶384. All the while, however, Exxon "reassured investors that the coming regulatory costs of climate change posed no risk of asset stranding and indeed no meaningful risk at all to" Exxon. Amended Complaint, ¶384.

***10** Exxon contends that this court should dismiss Count I because it fails plausibly to allege that reasonable investors would be misled by Exxon's statements about the risks of climate change. First, Exxon claims that its statements are not actionable as a matter of law because they are "forward looking" statements of opinion and "only statement of facts are actionable." *NPS, LLC v. Ambac Assur. Corp.*, 706 F.Sup.2d 162, 171 (D. Mass. 2010); *von Schönau-Riedweg*, 95 Mass.App.Ct. at 497 (statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment). Statements of opinion and belief, however, may be actionable if the "opinion is inconsistent with facts known" at the time the statement is made. *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 57 n.24 (2004). Further, a "statement that, in form, is one of opinion, in some circumstances may reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion." *Briggs v. Carol Cars, Inc.*, 407 Mass. 391, 396 (1990) (uninformed person purchased used vehicle from used vehicle dealer whose representations that vehicle was in good condition reasonably implied that it was safe and operable and that vehicle's oil requirements would be far less than they turned out to be); see also *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass.App.Ct. 573, 575 (1995) ("[A] statement that in form is one of opinion may constitute a statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it").

The Commonwealth has specifically alleged that Exxon made statements to investors that climate change risks pose no meaningful threat to Exxon's business model, its assets, or the value of its securities despite Exxon's "longstanding scientific understanding of the potentially 'catastrophic' nature of

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these risks." Amended Complaint, ¶472. This is enough to survive a motion to dismiss. See *Marram*, 442 Mass. at 62 (whether statements by defendant "are unactionable 'mere puffery' " cannot be resolved on pleadings); *McEneaney*, 38 Mass.App.Ct. at 575 (distinction between statement of fact and statement of opinion is "often a difficult one to draw"); see also *In re Smith & Wesson Holding Corp.*, 604 F.Sup.2d 332, 343 (D. Mass. 2009) (information offered by defendants to rebut plaintiffs' claims of falsity "may be pertinent to an assessment of a future motion for summary judgment, but it cannot support dismissal prior to discovery").

Second, Exxon contends that Count I is implausible because "Chapter 93A does not require a company to disclose 'information [that is] readily available to consumers,' " and "Exxon has issued numerous climate risk disclosures." This argument fails for at least two reasons. First, Exxon's reliance on *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 81-82 (1st Cir. 2020) is misplaced. See *id.* (affirming dismissal of c. 93A claim based on "pure omission" theory; that defendants repeatedly made information about prevalence of worst forms of child labor in their supply chains publicly available through their websites and other media mitigated concern that their omission at point of sale was unethical under c. 93A, regardless of whether plaintiffs were aware of website disclosures). Second, the Commonwealth is not alleging a failure to disclose information readily available to the public; it is alleging that Exxon's public disclosures regarding the risks to its business presented by climate change were deceptively misleading in light of information Exxon knew, but omitted.

Next, Exxon contends that the Commonwealth has not plausibly alleged that its failure affirmatively to warn investors of systemic climate risks was "knowing[ ] and willful" as required by c. 93A. See *Underwood*, 414 Mass. at 100 (duty exists under c. 93A to disclose material facts known to party "at the time of a transaction"; there is no liability for failing to disclose what that party does not know); *Mayer v. Cohen-Miles, Ins. Agency, Inc.*, 48 Mass.App.Ct. 435, 443 (2000) (c. 93A proscribes material, knowing, and willful nondisclosures that are "likely to mislead consumers acting reasonably under the circumstances"). To the contrary, the Commonwealth has specifically alleged that Exxon knew and purposely concealed such information. These allegations that Exxon deliberately misrepresented and omitted information about the risks of climate change on its company state a viable claim that Exxon engaged in deceptive conduct in violation of G.L.c. 93A. [11]

***11** Exxon also contends that this court should dismiss Count I because it was not engaged in "trade or commerce" at the time it made the statements challenged therein. More specifically, Exxon claims that it did not sell securities directly to Massachusetts investors and, therefore, its purportedly deceptive statements were not made in connection with an offer to sell, or sale of, securities.

Chapter 93A defines "trade and commerce" to include "the advertising, the offering for sale, ... the sale, ... or distribution of ... any security." G.L.c. 93A, § 1. It shall include "any trade or commerce directly or indirectly affecting the people of this commonwealth." *Id.* (emphasis added). "By enacting this broad standard for coverage under c. 93A, the Legislature provided protection not only for specific individuals involved in a transaction, but also for the public as a whole." *Manning v. Zuckerman*, 388 Mass. 8, 14 (1983). Chapter 93A seeks to deter unfair or deceptive acts or practices between particular individuals, and "to reduce the general danger to the public arising from the potential for such unscrupulous behavior in the marketplace." *Id.*; see also *Ciardi v. F. Hoffmann La Roche, Ltd.*, 436 Mass. 53, 66-67 (2002) (c. 93A's language evinces clear statement of legislative policy to protect Massachusetts consumers through authorization of indirect purchaser actions). [12] At this stage, the Commonwealth's allegations are sufficient to state a claim that Exxon was engaged in trade or commerce when it made the allegedly deceptive statements to Massachusetts investors.

B. Count II

In Count II, the Commonwealth alleges that Exxon has misled Massachusetts consumers by advertising that consumer use of certain Exxon products, such as Synergy™ gas and Mobil 1™ motor oil, will reduce greenhouse gas emissions. Amended Complaint, ¶538. Further, these advertisements are deceptive because Exxon does not disclose that the "development, refining, and consumer use of [Exxon] fossil fuel products emit large volumes of greenhouse gases, which are causing global average temperatures to rise and destabilizing the global climate system." Amended Complaint, ¶538. Further, these allegedly false and misleading misrepresentations are material because they directly influence a consumer's decision to purchase Exxon's products. Amended Complaint, ¶537.

Exxon argues that the court should dismiss this claim because (1) the Commonwealth does not allege that any statements made by Exxon about Synergy™ and Mobil 1™ were false; (2) Exxon's representations about Synergy™ and Mobil 1™ were not misleading half-truths because a reasonable consumer would not have been misled by them; and (3) Exxon cannot be liable for failing affirmatively to disclose the risks of climate change because a "pure omission" is not a basis for liability under c. 93A. I disagree.

First, "advertising need not be totally false in order to be deemed deceptive in the context of G.L.c. 93A." *Aspinall*, 442 Mass. at 394. [13] Advertising may consist of a half-truth, "or even may be true as a literal matter, but still create an overall misleading impression through failure to disclose material information." *Id.* at 395; *Greenery Rehabilitation Group, Inc.*, 36 Mass.App.Ct. at 78 ("One can violate § 2 of G.L.c. 93A ... by failing to disclose to a buyer a fact that might have influenced the buyer to refrain from the purchase"). Thus, contrary to Exxon's argument, the Commonwealth does not have to allege that Exxon's representations about the benefits of Synergy™ and Mobil 1™ were false to "plausibly allege" that the representations were misleading. [14]

***12** Next, Exxon argues that no reasonable consumer would be misled by Exxon's advertisements because its statements necessarily imply that their products produce some CO2 emissions and because a reasonable consumer would be aware of the connection between fossil fuels and climate change. "[A]n advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Aspinall*, 442 Mass. at 396. Whether statements made by Exxon would have misled a reasonable consumer or how Exxon's statements would be understood by a reasonable consumer are questions ill-suited for resolution on a motion to dismiss. For example, the court cannot conclude at this stage that no reasonable consumer would be misled by Exxon's promotion of its Synergy™ fuel on its website:

> Environmental Performance
>
> Conscientious practices. Rigorous standards.
>
> Continually Improving Environmental Performance While Pursuing Reliable and Affordable Energy
>
> Ten years ago, we introduced Protect Tomorrow. Today —a set of expectations that serves as the foundation for our environmental performance. Guided by a scientific understanding of the environmental impacts and related risks of our operations, these rigorous standards and good practices have become an integral part of our day-to-day operations in every country in which we do business including those with minimal regulations in place ...
>
> The following are the three major areas in which we've concentrated our efforts to reduce environmental impacts ...
>
> Improve Efficiency in Consumer Use of Fuels
>
> We're continually innovating to develop products that enable customers to reduce their energy use and CO2 emissions. For example, we have: ...
>
> Engineered Fuel Technology Synergy fuels to help improve fuel economy and reduce CO2 emissions.

Amended Complaint, ¶¶587, 588.

Finally, this claim does not involve a "pure omission" as Exxon contends. A pure omission occurs when a seller "merely stay[s] silent about a subject in circumstances that do not give any particular meaning to [the] silence." *Tomasella*, 962 F.3d at 73 (quotations and citation omitted). Declaring pure omissions to be deceptive would inevitably "expand[ ] that concept virtually beyond limits," considering the vast universe of "erroneous preconceptions" that individual consumers may have about any given product as well as "[t]he number of facts that may be material to [them]." *Id.* at 75 (quotations and citation omitted). Instead, the Commonwealth's claim is based on Exxon advertising that consumer use of its products will reduce greenhouse gas emissions when "consumer use of fossil fuel products (even products that may yield relatively more efficient engine performance) increase greenhouse gas emissions." Amended Complaint, ¶582 (emphasis in original). According to the Commonwealth, Exxon is not "merely staying silent" about the subject, but is actually (mis)representing that its products "reduce greenhouse gas emissions." This is not a prior consumer misconception, see *Tomasella*, 962 F.3d at 73; it is a misconception allegedly created by Exxon.

In addition, the Commonwealth does not claim that Exxon had an affirmative duty to warn consumers about climate risks

associated with use of its products; it claims that Exxon had a duty to fully disclose those risks once it created the impression that using its products resulted in environmental benefits. See Amended Complaint, ¶582. Compare *Tomasella*, 962 F.3d at 67 (First Circuit affirmed dismissal of plaintiff's c. 93A claims and concluded that by not disclosing on packaging of their chocolate products that there are known child labor abuses in their cocoa supply chains, defendants "stay[ed] silent on the subject in a way that [did] not constitute a half-truth or create any misleading impressions about the upstream labor conditions in the cocoa supply chain").

***13** The Commonwealth's allegations about Exxon's deceptive advertising state a viable claim that Exxon engaged in unfair and deceptive practices in violation of G.L.c. 93A.

C. Count III

Finally, the Commonwealth charges Exxon with "greenwashing," which it defines as "advertising and promotional materials designed to convey a false impression that a company is more environmentally responsible than it really is, and so to induce consumers to purchase its products." Amended Complaint, ¶540. Exxon's "deceptive 'greenwashing' campaigns ... target Massachusetts consumers with false and misleading messages about [Exxon's] leadership in solving the problem of climate change, support of action to reduce greenhouse gas emissions, and focus on developing clean energy to 'protect tomorrow today,' and to protect future generations." Amended Complaint, ¶762. Exxon "promotes its products by falsely depicting [itself] as a leader in addressing climate change ... without disclosing (i) [Exxon's] ramp up of fossil fuel production in the face of a growing climate emergency; (ii) the minimal investment [Exxon] is actually making in clean energy compared to its investment in business-as-usual fossil fuel production; and (iii) [Exxon's] efforts to undermine measures that would improve consumer fuel economy." *Id.* at ¶541. These misrepresentations and omissions mislead consumers by "obscuring the extreme effects of climate change caused by the production and normal use of [Exxon's] fossil fuel products." *Id.* at ¶763. Further, Exxon "saturat[es] its brand with deceptive 'green' images that portray ExxonMobil as a good environmental steward ..." *Id.* at ¶633. For example, the Commonwealth alleges that Exxon describes its "Protect Tomorrow. Today." campaign, as "defin[ing] our approach to the environment ... The environment we work in includes clean air, water, and ecosystems, which people, plants, and animals depend upon." Amended Complaint, ¶643.

Exxon contends that the court should dismiss this claim because the statements the Commonwealth alleges are deceptive do not violate c. 93A because they are "truthful at best and mere puffery at worst." von *Schönau-Riedweg*, 95 Mass.App.Ct. at 497; see also *Hansmann v. Nationstar Mortg., LLC*, 2014 Mass. App. Unpub. LEXIS 797 *3 (2014), citing *Kwaak v. Pfizer, Inc.*, 71 Mass.App.Ct. 293, 300-01 (2008) ("permissible puffery" statements are distinct from actionable conduct under c. 93A). The determination, however, of whether statements are actionable misrepresentations or inactionable puffery is not appropriate at a motion to dismiss stage. See *Marram*, 442 Mass. at 62; *NPS, LLC*, 706 F.Sup.2d at 172 ("Courts vary in their conclusions of just where the line between [civilly actionable] misrepresentation and [inactionable] puffery lies, and often the determination is highly fact-specific").

Further, as discussed earlier, the Commonwealth does not have to allege that any statement was false nor is it appropriate to resolve at the motion to dismiss stage what a reasonable consumer would think about Exxon's representations. Finally, Exxon argues that it did not make the challenged "greenwashing" statements in connection with the sale or offer to sell any "services" or "property." G.L.c. 93A, § 1. The Commonwealth alleges, however, that Exxon's "greenwashing" campaign is designed to "induce consumers to purchase its products." Amended Complaint, ¶540. The Commonwealth has thus sufficiently alleged that Exxon engaged in deceptive practices with respect to the "greenwashing" claim.

III. First Amendment

***14** Exxon contends that the complaint must be dismissed because the Commonwealth seeks to use c. 93A to compel speech in violation of the First Amendment. Commercial speech is protected by the First Amendment if it concerns lawful activity and is not misleading. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980); see also *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 US 600, 612 (2003) (First Amendment does not protect fraud). Here, the Commonwealth alleges that Exxon made misleading statements to consumers and investors in violation of G.L.c. 93A. This court is not in

a position, at least at this stage, to determine whether any particular statement is protected by the First Amendment.

For the reasons stated and other reasons articulated in the Commonwealth's Opposition, it is hereby ORDERED that the Defendant's Motion to Dismiss is *DENIED.*

ORDER

All Citations

Not Reported in N.E. Rptr., 2021 WL 3493456

Footnotes

1 In its original complaint, the Commonwealth also claimed that Exxon's allegedly materially false and misleading statements to Massachusetts investors regarding its use of a proxy cost of carbon violated c. 93A.

2 When a defense of lack of personal jurisdiction is raised, the court should resolve that issue before dealing with other questions, such as a Rule 12(b)(6) motion, that goes to the case's merits. See *Attorney Gen. v. Industrial Nat'l Bank of Rhode Island*, 380 Mass. 533, 534 (1980).

3 The Commonwealth also contends that Exxon is subject to personal jurisdiction under G.L.c. 223, § 3(c), which authorizes personal jurisdiction over a non-resident who causes "tortious injury" by an "act or omission in this Commonwealth," and § 3(d) which authorizes personal jurisdiction over a non-resident who causes "tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth." Because I conclude that § 3(a) grants personal jurisdiction over Exxon, I need not decide whether § 3(c) and (d) do as well. Nevertheless, there is some indication in the case law that § 3(d) may not be relied upon to establish specific jurisdiction. See *Fletcher Fixed Income Alpha Fund, Ltd. v. Grant Thornton LLP*, 89 Mass.App.Ct. 718, 725 (2016), citing *Connecticut Nat. Bank v. Hoover Treated Wood Prods., Inc.*, 37 Mass.App.Ct. 231, 233 n.6 (1994) (§ 3[d] "is predicated on general jurisdiction," i.e., defendant having engaged in continuous and systematic activity in forum, unrelated to suit); *Fern*, 55 Mass.App.Ct. at 581 n.9 (referring to claim under § 3[d] as one for general jurisdiction); *Ericson v. Conagra Foods, Inc.*, 2020 U.S. Dist. LEXIS 219813 *9 (D. Mass. 2020), and cases cited ("Section 3(d) is the Massachusetts long-arm statute's general personal jurisdiction provision and is applicable only if the defendant is subject to general personal jurisdiction in Massachusetts").

4 The First Circuit "divides [the due process] minimum contacts analysis into three inquires: purposeful availment, relatedness, and reasonableness." *Astro-Med, Inc. v. Nihon Kohden America, Inc.*, 591 F.3d 1, 9 (1st Cir. 2009). In evaluating relatedness under the due process analysis, "questions of specific jurisdiction are always tied to the particular claims asserted." *Phillips Exeter Academy v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999). "To satisfy the relatedness prong, [the plaintiff] must show a nexus between its claims and [the defendant's] forum-based activities." *A Corp. v. All Am. Plumbing, Inc.*, 812 F.3d 54, 59 (1st Cir. 2016).

5 Exxon also makes this argument in connection with the second due process prong, that is, the requirement that the claim "arise out of or relate to the defendant's contacts with the forum." *Bulldog Investors Gen. P'ship v. Secretary of the Commonwealth*, 457 Mass. 210, 217 (2010) (citations and quotations omitted). The court, however, must consider the requirements of the long-arm statute first. See *SCVNGR, INC.*, 478 Mass. at 329-30 (2017) (requirements of G.L.c. 223A, § 3 "may not be circumvented by restricting the jurisdictional inquiry to due process considerations").

6 As an example, the Commonwealth claims that: "As of December 31, 2019, State Street [Corporation and its affiliates] was the third-largest institutional investor in [Exxon] common stock, holding 202, 281, 808 shares with a total value of approximately $14.1 billion." Amended Complaint, ¶275.

7 Exxon argues that the SJC's analysis does not control here because, according to the SJC, "the [Civil Investigative Demand] context requires that we broaden our analysis to consider the relationship between Exxon's Massachusetts activities and the 'central areas of inquiry covered by the [Attorney General's] investigation, regardless of whether that investigation has yet to indicate [any] ... wrongdoing.' " *Exxon Mobil Corp.*, 479 Mass. at 315. Notwithstanding the SJC's use of the word "broad," the question before this court is whether the Commonwealth's claims arise from Exxon's transaction of business in Massachusetts. To the extent that the Commonwealth alleges that Exxon is deceiving its customers through its franchisees, the SJC's analysis controls.

8 Exxon also argues that the Commonwealth's "greenwashing" claim does not arise from its forum contacts. But part of Exxon's "greenwashing" claim involves the selling of Exxon's products at its Exxon and Mobil-branded fuel stations in Massachusetts, including Mobil 1™, which is "literally colored green by" Exxon. See Commonwealth's Opposition, page 6; Amended Complaint, ¶611.

9 The Commonwealth has not alleged any unfair methods of competition.

10 The First Circuit has recently reiterated that a deceptive act or practice consists of three elements: "(1) there must be a representation, practice, or omission likely to mislead consumers; (2) the consumers must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is likely to affect consumers' conduct or decision with regard to a product." *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 72 (1st Cir. 2020) (quotations and citation omitted).

11 Exxon also argues that its statements about its use of a proxy cost of carbon would not materially mislead reasonable investors. The Commonwealth's allegations about proxy costs once supported a separate claim for violation of c. 93A, but are now included in Count I. The court will therefore not specifically address Exxon's arguments that its disclosures about proxy costs were neither false nor misleading or that no reasonable investor would have considered the information material except to note that, like most of Exxon's arguments, they are not ones that are appropriately decided at the motion to dismiss stage.

12 I do not find persuasive the single sentence in a twenty-six-year-old, factually distinguishable District Court case on which Exxon relies in support of its argument. See *Salkind v. Wang*, 1995 U.S. Dist. LEXIS 4327 *31 (D. Mass. 1995) (company's public dissemination of statements reflecting confidence in company's future —"simply do not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets").

13 See also 940 Code Mass. Regs. § 3.05(1) ("No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect"); 940 Code Mass. Regs. § 3.16(2) (providing that an act or practice is a violation of § 2, if "[a]ny person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction"); 940 Code Mass. Regs. § 6.01 (material representation is claim "which has the tendency or capacity to influence the decision of reasonable buyers or reasonable prospective buyers whether to purchase the product"); 940 Code Mass. Regs. § 6.04(1) (misleading representation is material representation which seller knows or should know "is false or misleading or has the tendency or capacity to be misleading"). These regulations are

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authorized by G.L.c. 93A, § 2(c), have the force of law, and "set standards the violations of which ... constitute violations of c. 93A." *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 769-73 (1980).

14 The case cited by Exxon, *Ortiz v. Examworks, Inc.*, 470 Mass. 784, 794 (2015), did not involve advertisements.

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36 Mass.L.Rptr. 56
Superior Court of Massachusetts,
Suffolk County..

COMMONWEALTH of Massachusetts
v.
PURDUE PHARMA, L.P. et al. [1]

1884CV01808BLS2
|
September 17, 2019

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT PURDUE'S MOTION TO DISMISS

Janet L. Sanders, Justice of the Superior Court

***1** The Commonwealth commenced this action against Purdue Pharma, L.P. and Purdue Pharma, Inc. (collectively, Purdue) seeking redress for harms that it claims were caused by Purdue's deceptive marketing and sale of its opioid products in Massachusetts. The First Amended Complaint (the Complaint) also names as defendants current and former Purdue directors, CEOs, and a vice president of sales. All defendants have moved to dismiss the claims against them pursuant to Mass.R.Civ.P. 12(b)(6). This Memorandum concerns only the Motion to Dismiss by Purdue. [2] For the following reasons, this Court concludes that it must be *DENIED*.

BACKGROUND

The Complaint is notable both in its length (274 pages) and its level of detail, including its citation to and quotations from Purdue's own internal communications. This Court only briefly summarizes those allegations, which are taken as true for purposes of this Motion.

Purdue manufactures prescription opioid medications used for the treatment of chronic pain. The Complaint largely focuses on Purdue's OxyContin, which is a tablet patients take orally, and which is sold in different dosing strengths. Butrans and Hysingla are Purdue's other opioid products. [3] Purdue's opioid formulations include "extended release" or "long acting" doses because they release the active ingredient into a person's system over time. Other opioids on the market are "immediate release" formulations. Opioids, including Purdue's products, carry several risks to the user, including physical dependence, addiction, and related withdrawal symptoms. Opioids can also cause respiratory depression, which is life-threatening.

Purdue released OxyContin in 1996. In the years thereafter, opioid-related deaths rose across the nation and in Massachusetts in particular. In 2007, after multiple state and federal investigations, a predecessor corporation and three executives pleaded guilty to illegal misbranding. An agreed statement of facts submitted in connection with that plea stated that Purdue supervisors and employees intentionally deceived doctors about OxyContin's addictive properties in the previous six years. Also in 2007, Purdue reached a consent judgment with several states, including Massachusetts (the 2007 Judgment). The 2007 Judgment prohibited Purdue from making "any written or oral claim that is false, misleading, or deceptive" in the promotion or marketing of OxyContin. It also required Purdue to establish and follow an abuse and diversion detection program to identify high-prescribing doctors who show signs of inappropriate prescribing, to stop promoting drugs to them, and to report them to authorities.

In the years following the 2007 Judgment, Purdue, despite its promises, did not substantively alter its deceptive and illegal marketing practices. Rather, it continued to downplay its opioids' propensities for addiction and abuse in its messaging to doctors so as to persuade them to prescribe the opioids at greater frequency, at ever-higher (and more expensive) doses, and for longer treatment durations. Purdue also influenced prescribing to inappropriate patient populations. For example, it promoted opioids for use by geriatric osteoarthritis patients, even though opioids were more dangerous for elderly individuals and studies had not shown opioids to be a more effective treatment for them. According to the Complaint, Purdue knew that its marketing tactics caused more patients to become addicted and substantially increased the likelihood that they would overdose and die. Despite this knowledge, Purdue continued to minimize the dangers associated with the use of its drugs and to make false representations regarding their safety. It did so in order to maximize its profits.

***2** The Complaint goes into extensive detail about Purdue's marketing tactics. For example, Purdue deployed its sales staff to make frequent in-person visits to doctors' offices in Massachusetts, targeting doctors who were already suspected of overprescribing. It dispensed money, meals, or other gifts to prescribers, and paid doctors to act as

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spokespersons for its opioids. Purdue funded programs at Tufts University and Massachusetts General Hospital in order to influence physicians associated with those institutions. Its sales representatives dispensed savings cards, knowing that their use would encourage patients to stay on opioids longer.

The Complaint alleges that, because of Purdue's unfair and deceptive conduct, the Commonwealth has sustained substantial damage. In particular, the Commonwealth asserts that Purdue's actions significantly contributed to the opioid epidemic in Massachusetts, which has been the cause of thousands of deaths and non-fatal overdoses. Included within the thousands who have died are 671 people who filled prescriptions for Purdue opioids. Those that have survived their addictions have imposed a heavy burden on the Commonwealth: many cannot work, and they require lengthy and expensive care and treatment, for both themselves and their dependents. The Commonwealth is seeking damages from the defendants to offset the costs of the opioid epidemic, which has been declared a public health emergency in Massachusetts.

DISCUSSION

The standard that this Court applies to the instant motion is well established. Although the complaint must contain more than "labels and conclusions," *Iannacchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008), the ultimately inquiry is whether the plaintiff has alleged facts that are "adequately detailed so as to plausibly suggest an entitlement to relief." *Greenleaf Arms Realty Trust, LLC v. New Boston Fund, Inc.,* 81 Mass.App.Ct. 282, 288 (2012) (reversing lower court's allowance of Rule 12(b)(6) motion). In ruling on the motion, the Court accepts the factual allegations as true and draws all reasonable inferences in the plaintiff's favor. *Sisson v. Lhowe,* 460 Mass. 705, 707 (2011). Its review is also confined to the four corners of the complaint, with consideration of other materials appropriate only where the complaint attaches them or where they are of the type of which this Court can take judicial notice. *Schaer v. Brandeis Univ.,* 432 Mass. 474, 477 (2000).

Many of Purdue's arguments in support of its Motion disregard this standard. A good portion of Purdue's memoranda and a large part of its oral argument dispute the factual basis for the Commonwealth's allegations. For example, it argues that addiction is complex and multifaceted, and that the Commonwealth has itself contributed to the problem. It argues that OxyContin makes up only a small fraction of the opioids prescribed nationally and that Purdue is being unfairly scapegoated for a problem not of its making. Such arguments are better made to the fact finder at trial. They cannot be resolved under Rule 12(b)(6). Purdue also asks this Court to take into account matters beyond the four corners of the Complaint that it says contradict the Complaint's allegations, citing to findings by the Massachusetts Department of Public Health, for example. This too ignores the standard this Court applies at this early stage of the case. The Court therefore declines to address these arguments, and turns instead to the legal arguments Purdue offers in support of the Motion.

The Complaint asserts two causes of action: violations of G.L.c. 93A (Count I) and public nuisance (Count II). In support of its Motion, Purdue argues that the Complaint fails to state a claim because its allegations conflict with federal law—namely, FDA approval of the opioids at issue. In a related vein, it contends that the challenged conduct is exempt from Chapter 93A because it is a "permitted practice." As to the nuisance claim, Purdue asserts that it fails as a matter of law because there is no allegation that Purdue has infringed on any "public right." More generally, Purdue contends that it cannot be legally liable for harms flowing from prescriptions written by doctors because the "learned intermediary" doctrine breaks the chain of causation between its conduct and the harms alleged. Similar arguments have been raised and rejected in litigation against Purdue proceeding in other states. See, e.g., *Alaska v. Purdue Pharma, L.P.,* 2018 WL 4468439 (Alaska Super.Ct. 2018); *State of Arkansas v. Purdue Pharma, L.P.*, No. 60CV-18-2018 (Ark.Cir.Ct. Apr. 5, 2019); *Minnesota v. Purdue Pharma, L.P.,* No. 27-CV-18-10788 (Minn.Dist.Ct. Jan. 4, 2019); *New Hampshire v. Purdue Pharma, Inc.,* 2018 WL 4566129 (N.H.Super.Ct. 2018); *Ohio v. Purdue Pharma, L.P.,* 2018 WL 4080052 (Ohio C.P. 2018); *Oklahoma v. Purdue Pharma, L.P.,* 2017 WL 10152334 (Okl.Dist.Ct. 2017); *Tennessee v. Purdue Pharma L.P.,* No. 1-173-18 (Tenn.Cir.Ct. Feb. 22, 2019); *Vermont v. Purdue Pharma L.P.*, No. 757-9-18 (Ver.Super.Ct. March 19, 2019). In line with these other states, this Court concludes that Purdue's arguments do not support dismissal and offers the following by way of explanation.

1. Conflict with Federal Law

***3** Purdue argues that the Commonwealth's claims conflict with FDA decisions approving the sale of the opioids at issue

in this litigation and the labeling that accompanied them. In particular, Purdue maintains that, because the representations and conduct that the Commonwealth claims to be deceptive conform to determinations the FDA made in the exercise of its regulatory authority, then it necessarily follows that those statements are not actionable as a matter of law. Although Purdue does not use the term "preemption," that appears to be the doctrine upon which it is relying. Neither the law nor the facts as alleged in the Complaint support Purdue's position, however.

"In all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the court starts] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (alterations removed; internal quotations and citations omitted). *Wyeth v. Levine,* 555 U.S. 555, 565 (2009). Conflict preemption (which Purdue appears to assert) is a type of implied preemption that "occurs where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotations and citations omitted). *Reckis v. Johnson & Johnson,* 471 Mass. 272, 283 (2015). A party's contention that state law claims are preempted because it is impossible it to comply both with state and federal law has been described as a "demanding defense." *Wyeth,* 555 U.S. at 573. Purdue falls well short of demonstrating what the case law requires for this type of preemption to apply. In particular, there is nothing about this lawsuit which seeks to impose restraints on Purdue that would put it at odds with the FDA, or which would make it impossible for Purdue to comply both with federal and state regulations.

This becomes particularly apparent upon a fair reading of the Complaint itself. It does not challenge the contents of the relevant opioid labels, nor does it seek to remove Purdue's opioids from the marketplace. Instead, the Complaint contains numerous allegations that Purdue's marketing activities were *inconsistent* with label warnings. For example, despite prominent warnings in the label concerning the risk of abuse and addiction, Purdue put out publications which sought to minimize those risks in a false and deceptive manner.[4] Its sales force also actively and forcefully marketed opioids for elderly arthritis patients, even though the FDA approved label clearly warned against use in that population.[5]

The Commonwealth points out that courts in other states have rejected similar arguments made by Purdue. See, e.g., *Delaware v. Purdue Pharma, L.P.,* 2019 WL 446382 (Del.Super. 2019); *Grewal, Attorney General of New Jersey v. Purdue Pharma, L.P.,* 2018 WL 4829660 (N.J.Super.Ct. 2018), and state decisions cited at page 5, *supra.* Those courts reasoned that there was no conflict between the state and federal law, given the allegations leveled against Purdue that it promoted use of opioids far beyond that which was consistent with the FDA-approved labeling. Purdue makes no effort to explain why the reasoning of these other courts is flawed except to direct this Court to a single decision handed down by a North Dakota court which concluded that federal law did preempt that state's claims against Purdue. See *North Dakota v. Purdue Pharma L.P.*, Case No. 08-2018-CV-01300 (May 10, 2019), attached to Purdue's Reply Brief as Exhibit A. This holding appears to be an outlier and is of questionable value, however, particularly given a decision handed down by the United States Supreme Court that same day which clarified the showing a drug manufacturer must make on a claim of "impossibility preemption." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S.Ct. 1668 (May 20, 2019).

2. Permitted Practice Under c. 93A

***4** Purdue argues that even if federal law does not preempt the state law claims, it cannot be held liable on a c. 93A claim because the conduct that the Commonwealth challenges is actually permitted by federal law and, as such, is a "permitted practice" exempt from c. 93A liability. In support, it relies on G.L.c. 93A, § 3, which expressly exempts from the reach of the statute "transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States." Purdue argues that, because the FDA approved high-dose opioids, the conduct at issue here falls within that § 3 exemption. This Court disagrees, for much the same reasons that it concludes there is no federal preemption.

Section 3 precludes the assertion of a 93A claim "when a regulator authorized to review the defendant's actions has determined that those actions, in particular, were not unfair or deceptive." *O'Hara v. Diageo-Guinness, USA, Inc.,* 306 F.Sup.3d 441, 454 (D.Mass. 2018), and cases cited therein. A defendant who seeks protection from c. 93A liability under this section bears a "heavy" burden of proving that the exemption applies. *Aspinall v. Philip Morris, Inc.*, 453

Mass. 431, 434 (2009). In particular, the defendant "must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction." *Bierig v. Everett Sq. Plaza Assocs.,* 34 Mass.App.Ct. 354, 367 n.14 (1993). Rather, the defendant must demonstrate that the regulatory scheme "affirmatively *permits* the practice which is alleged to be unfair or deceptive." *Id.* (italics in original).

The Complaint in the instant case does not describe conduct that has been affirmatively approved by the FDA. Instead, it describes marketing practices that minimized addiction risks, promoted misuse of the drugs, and targeted inappropriate patient populations—conduct which no state or federal regulatory authority has condoned. Citing a September 10, 2013, letter from the FDA in response to a citizen's petition, Purdue argues that the FDA rejected proposed labeling restrictions on the dose and duration for opioid use. It does not follow, however, that this action authorized Purdue to make the false claims the Complaint alleges that it did regarding addiction and abuse. In any event, the exemption enunciated in § 3 is an affirmative defense that is rarely decided on a Rule 12(b)(6) motion. Compare *Fleming v. Nat'l Union Fire Ins. Co.,* 445 Mass. 381, 389-91 (2005).

3. Public Nuisance

Purdue attacks Count II of the Complaint both on factual and legal grounds. As already, explained, factual disputes cannot be resolved on a motion to dismiss. As to the legal basis, Purdue contends that the Complaint fails to state a claim for public nuisance because it does not allege an interference with a public right. Rather, the Commonwealth's nuisance claim is (according to Purdue), "exactly the sort of poorly disguised, repackaged products liability claim courts have rejected." Purdue cites decisions by courts in Delaware and Connecticut dismissing similar public nuisance claims against it. See *Delaware,* 2019 WL 446382 at *12-*13; *New Haven v. Purdue Pharma, L.P.,* 67 Conn. L. Rptr. 644, 2019 WL 423990 (January 8, 2019). Applying Massachusetts law, this Court reaches a different conclusion.

A public nuisance, as opposed to a private nuisance, is one that "interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court,* 448 Mass. 15, 34 (2006), quoting *Connerty v. Metropolitan Dist. Comm'n,* 398 Mass. 140, 148 (1986), and citing Restatement (Second) of Torts § 821B (1979) ("A public nuisance is an unreasonable interference with a right common to the general public"). "In determining whether there has been an unreasonable interference with a public right, a court may consider, *inter alia*, '[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.' " *Sullivan,* 448 Mass. at 15, quoting Restatement (Second) of Torts § 821B. Applying these legal principles, this Court concludes that the Complaint's allegations are sufficient to support a claim that Purdue's conduct has interfered with public health and safety.

***5** This Court also disagrees with Purdue that this is simply a repackaged product liability claim that cannot as a matter of law be brought as a public nuisance claim. In fact, Massachusetts courts have allowed public nuisance claims concerning dangerous products. See, e.g., *Evans v. Lorillard Tobacco Co.,* 2007 WL 796175 at *18-*19 (Mass.Super.Ct. 2007) [22 Mass. L. Rptr. 91] (denying motion to dismiss public nuisance action against cigarette manufacturer); *Boston v. Smith & Wesson Corp.,* 2000 WL 1473568 at *14 (Mass.Super. 2000) [12 Mass. L. Rptr. 225] (denying motion to dismiss public nuisance action against gun manufacturer). In support of its position that the claims here fall outside the traditional scope of public nuisance law, Purdue relies on *Jupin v. Kask*, 447 Mass. 141 (2006). In that case, however, the SJC concluded only that the storage of a lawfully obtained unloaded weapon in one's home could not support a claim for public nuisance. The allegations in the Complaint against Purdue are far different.

4. Causation

Purdue argues that the Complaint does not contain sufficient factual allegations to show causation. In opposing the Motion, the Commonwealth points out (quite correctly) that questions of causation generally should not be decided on a motion to dismiss, given their fact-intensive nature. The Commonwealth also contends that, at least with respect to the c. 93A claim, it need not prove that any consumer actually was harmed. See *Commonwealth v. Equifax, Inc.,* 35 Mass. L. Rptr. 106, 2018 WL 3013918 at *5 (Mass.Super. 2018) (the Attorney General, unlike a private litigant, need only prove that the unfair and deceptive acts took place in trade or commerce, not that they caused any quantifiable economic injury). That is because, in actions by the Attorney General under c. 93A, the court may impose civil penalties and require the defendant to pay the costs of abatement in lieu of damages.

See G.L.c. 93A, § 4. For purposes of this Motion, however, this Court assumes that some causation between the conduct at issue and some quantifiable harm must be established. The Court concludes that the Complaint contains sufficient allegations to meet the standard applicable to a 12(b)(6) motion.

In order to show causation, the Commonwealth must plead and prove both "cause in fact" and proximate cause. Cause in fact means injury or harm that would not have occurred but for the defendant's conduct. Proximate cause is an injury to a plaintiff that was a "foreseeable result" of the defendant's actions. *Kent v. Commonwealth,* 437 Mass. 312, 320 (2002). Purdue contends that this case raises several causation issues. Many of these arguments are fact-based, which this Court sees no need to discuss, given the standard applicable to a Rule 12(b)(6) motion. There is one legal issue that does merit some comment, however. Purdue argues that, because doctors prescribed the drugs alleged to have caused the harm here, they are an intervening cause that shields Purdue from liability. This argument appears to rely in large part on the learned intermediary doctrine.

The learned intermediary doctrine is based on the proposition that a drug manufacturer's duty to warn may be discharged if the manufacturer provides the physician with an adequate warning about any risks associated with its prescription drug. *Niedner v. Ortho-McNiel Pharm., Inc.*, 90 Mass.App.Ct. 306, 309 (2016). If an adequate warning is provided, then the chain of causation between the defendant drug maker and the consumer plaintiff is broken, since the physician is presumed to make an independent and educated prescribing decision. *Liu v. Boehringer Ingelheim Pharm., Inc.,* 230 F.Sup.3d 3, 9 (D.Mass. 2017). That causation chain is not broken, however, where the prescribing decision is affected by deceptive and misleading conduct on the part of the drug manufacturer. See, e.g., *In re Neurontin Mktg. & Sales Practices Litig.,* 712 F.3d 21, 39 (1st Cir. 2013) (physician held not to be an independent intervening cause in case involving fraudulent marketing of prescription drug). In other words, because of the defendant's wrongful conduct, the physician is no longer acting independently and the learned intermediary doctrine is not applicable. That is precisely what the Complaint alleges here: by actively undermining the warnings on its products through its deceptive conduct, Purdue is alleged to have caused physicians to write prescriptions they otherwise would not have written. That is sufficient.

5. Miscellaneous Arguments

***6** Purdue's remaining arguments require little discussion. It asserts that the 2007 Judgment estops the Commonwealth from bringing the present action because its terms require Purdue to market its products consistently with approved uses and labeling, which it has done. This is not what the Complaint alleges, however: it accuses Purdue of engaging in marketing practices that were inconsistent with the relevant approved product labels, and, thus, in violation of the 2007 judgment. Purdue next argues that the statute of limitations bars any claim that relies on allegations predating 2012.[6] The statute of limitations begins to run, however, only when the plaintiff knew or should have known of the defendant's harmful conduct. *Koe v. Mercer,* 450 Mass. 97, 101 (2007); see also *Szymanski v. Boston Mut. Life Ins. Co.,* 56 Mass.App.Ct. 367, 370 (2002) (discovery rule applies to G.L.c. 93A actions). That is ordinarily a question of fact. *Doe v. Creighton,* 439 Mass. 281, 283-84 (2003). The Complaint contains sufficient factual allegations with regard to the pre-2012 conduct to raise at least a factual issue. Finally, Purdue argues that certain of the damages the Commonwealth seeks are unavailable, and, for that reason, those portions of the Complaint must be dismissed. A motion to dismiss, however, tests the plaintiff's entitlement to *any* relief under the causes of action pleaded, not the scope of that relief following a determination of liability. Mass.R.Civ.P. 12(b)(6); *Iannacchino,* 451 Mass. at 635-36. Purdue may pursue these arguments at later stages of litigation, where appropriate.

All Citations

Not Reported in N.E. Rptr., 36 Mass.L.Rptr. 56, 2019 WL 5495866

Footnotes

1 Purdue Pharma, Inc., Richard Sackler, Theresa Sackler, Kathe Sackler, Jonathan Sackler, Mortimer D.A. Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, Judith Lewent, Craig Landau, John Stewart, Mark Timney, and Russell J. Gasdia.

2 The Court expects to issue decisions on the motions made by the individual defendants within the next few weeks.

3 Butrans releases opioids into the body from a skin patch; the Complaint does not describe Hysingla's dosing route.

4 One Purdue publication cited in the Complaint stated: "addiction is rare in patients who become physiologically dependent on opioids while using them for pain control." Another stated that only "a small minority of people may not be reliable or trustworthy" and therefore not suitable for opioids. A third stated that addiction "is not caused by drugs."

5 The OxyContin label provides: "Life-threatening respiratory depression is more likely to occur in elderly ... patients because they may have altered pharmacokinetics or altered clearance compared to younger, healthier patients ... Monitor such patients closely, particularly when initiating and titrating OXYCONTIN and when OXYCONTIN is given concomitantly with other drugs that depress respiration ... Alternatively, consider the use of non-opioid analgesics in these patients."

6 The Complaint was filed on June 12, 2018. Claims under G.L.c. 93A have a four-year statute of limitations, G.L.c. 260, § 5A. Moreover, the parties entered into a consent agreement to toll the statute of limitations during the period from August 2, 2016, through May 18, 2018.

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United States District Court, S.D. Texas, Houston Division.

John DOE, THROUGH NEXT
FRIEND Jane ROE, Plaintiff,
v.
SNAP, INC., Bonnie Guess-Mazock, and
Conroe Independent School District, Defendants.

Civil Action No. H-22-00590
|
Signed 07/07/2022

MEMORANDUM AND OPINION

Lee H. Rosenthal, Chief United States District Judge

***1** John Doe alleges that when he was a 15-year-old sophomore at Oak Ridge High School, in Conroe, Texas, his science teacher, a woman in her thirties, engaged him in a sexual relationship. This teacher, Bonnie Guess-Mazock, allegedly lured Doe into the relationship by using the social-media platform, Snapchat, to send Doe inappropriate messages and photographs, and then by encouraging him to take prescription and over-the-counter drugs during sex. The sexual assaults continued repeatedly over several months. They were discovered when Doe overdosed on the prescription drugs Guess-Mazock provided him. After a long hospital stay, Doe recovered, at least from the drug overdose. Doe's legal guardian sues Guess-Mazock, the Conroe Independent School District, and Snap, Inc., the company that owns and maintains Snapchat. All defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Docket Entries Nos. 11, 10, 24).

Based on the motions, the responses, the replies, and the applicable case law, the court grants in part and dismisses in part Guess-Mazock's motion to dismiss, (Docket Entry No. 24); grants the school district's motion to dismiss, (Docket Entry No. 11); and grants Snap, Inc.'s motion to dismiss, (Docket Entry No. 20). Doe's claims against the school district and Doe's intentional-infliction-of-emotional-distress claim against Guess-Mazock are dismissed without prejudice and with leave to amend. Doe may amend his complaint against the school district by **August 22, 2022.** Doe's claims against Guess-Mazock are abated until 90 days after Doe serves Guess-Mazock with notice as required under the Texas Education Code § 22.0513. Doe's claims against Snap, Inc. are dismissed with prejudice.

The reasons are set out below.

I. Background

The summary of the factual background is based on the allegations in Doe's complaint, which the court accepts as true in considering this motion to dismiss. The allegations describe a troubled adolescent who survived a difficult childhood. Doe's father abandoned him as a child, and his mother was murdered. Doe has been raised by Jane Roe, his guardian, who brings this lawsuit on his behalf. (Docket Entry No. 1, at 2).

In October 2021, during his sophomore year at Oak Ridge High School, Doe's science teacher, Guess-Mazock, a woman in her thirties, "preyed" on the fifteen-year-old Doe, knowing that he was young and otherwise vulnerable. Guess-Mazock asked Doe to "stay with her in the classroom after the rest of the classroom was dismissed" and "met with Doe alone with the door to the classroom closed." (*Id.*, at 3). "At this closed-door meeting, [Guess-Mazock] began to groom Doe for a sexual relationship and, in furtherance of that goal, asked Doe for his Snapchat username." (*Id.*). "Guess-Mazock then began to seduce Doe via Snapchat by sending seductive photos of herself appended with solicitous messages." (*Id.*).

Throughout the fall and winter of 2021, Guess-Mazock and Doe "had repeated sexual contact ... at different locations," including Guess-Mazock's car and Doe's home. (*Id.*, at 3–4). Guess-Mazock also purchased, or gave money to Doe to purchase, prescription and over-the-counter drugs, "and encouraged Doe to abuse those substances prior to their having sex." (*Id.*, at 4). On January 12, 2022, Doe overdosed on prescription drugs that Guess-Mazock gave Doe or paid him to get. Doe survived after a long hospital stay. (*Id.*, at 13).

***2** Doe's legal guardian filed this civil action, asserting claims under federal law against the Conroe Independent School District, and asserting claims under federal and state law against Guess-Mazock. As to the school district, Doe first alleges that it violated § 1983 by failing to adequately train its teachers and staff to identify illegal and inappropriate student-teacher relationships. (*Id.*, at 7). Doe alleges that even though "the illicit relationship between Guess-Mazock and Doe ... was an open secret that students frequently discussed," school staff and administrators were not trained "to recognize and report inappropriate sexual relationships

between students and teachers." (*Id.*, at 4–5). Second, Doe alleges that the school district failed to properly screen teachers and other employees, even though the district "had at least five instances of sexual assault of a student by employees in the last 20 years." (*Id.*, at 8). Doe alleges that "[u]pon information and belief, an adequate background check would have revealed Guess-Mazock's pedophilic tendencies." (*Id.*, at 9). Third, Doe alleges that the school district failed to adequately supervise Guess-Mazock, who not only assaulted Doe, but also "attempted to seduce other students." Doe alleges that the school district should not have allowed "opposite-sex, student-teacher private meetings on school grounds," and that by "explicitly permitting" these meetings, "the School District promulgated a[ ] policy and procedure that demonstrates a conscience indifference to the Fourteenth Amendment rights of students of the District and Doe in particular." (*Id.*, at 10).

As to Guess-Mazock, Doe alleges that she violated Doe's due process rights under the Fourteenth Amendment "to be free of illegal sexual advances by his teacher at school." (*Id.*, at 6). Doe alleges that Guess-Mazock assaulted, battered, and raped him, because "Doe had not reached the age of consent at the time of Guess-Mazock's seduction." (*Id.*, at 6–7).

Finally, Doe asserts three state-law negligence claims against Snap, Inc., the owner of Snapchat. Doe alleges that Snap is liable for "negligent undertaking" because it "claims to have undertaken to protect its young users" by "report[ing] all instances of child sexual exploitation to authorities," a duty that it breached "by failing to exercise reasonable care in performing its data-mining services and failing to intervene when [Guess-Mazock] started sending sexually explicit messages and images to [Doe]." (*Id.*, at 11). Doe also alleges that Snapchat is "negligently designed" because the application "allow[s] for the widespread practice of using false birth dates," so that "users younger than 13 years old are using the application." Doe alleges that "[b]y creating an environment where adults can interact with underage users with assurances that there will be no long-lasting evidence of those interactions, Snap has fostered an environment that draws in sexual predators and allows them to act with impunity." And Doe alleges a claim of gross negligence, stating that when "viewed objectively ... Snap presented an extreme risk of grievous harm in marketing an application to minors that, by design, allows pedophiles to prey on them with apparent impunity." (*Id.*, at 12).

II. The Standard for a Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6), a federal court dismisses a complaint if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *see also* Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). In reviewing a Rule 12(b)(6) motion, the court "accept[s] all well-pleaded facts as true and view[s] all facts in the light most favorable to the plaintiff." *Thompson v. City of Waco*, 764 F.3d 500, 502 (5th Cir. 2014). "A court reviewing a motion to dismiss under Rule 12(b)(6) may consider '(1) the facts set forth in the complaint, (2) the documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201.' " *DZ Jewelry, LLC v. Certain Underwriters of Lloyds London*, No. H-20-3606, 2021 WL 1232778 (S.D. Tex. Mar. 21, 2021) (quoting *Inclusive Cmtys. Proj., Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019)).

To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017) (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557). "A complaint 'does not need detailed factual allegations,' but the facts alleged 'must be enough to raise a right to relief above the speculative level.' " *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555).

III. Analysis

***3** The motions to dismiss the federal and state law claims by each of the three defendants, the Conroe Independent School District, Guess-Mazock, and Snap, Inc., are addressed in turn.

A. The Conroe Independent School District

Doe asserts a § 1983 claim against the Conroe Independent School District. Doe alleges that "Anthony Livecchi, while acting under the color of state law as principal of Oak Ridge High School, and the Conroe Independent School District deprived Doe of [his Due Process] rights." (Docket Entry No. 1, at 7). Doe does not name Livecchi as a defendant in this lawsuit. Doe alleges that the school district violated § 1983 by failing to properly train its teachers and staff to identify warning signs indicating inappropriate student-

teacher relationships; that the school district was "deliberately indifferent ... in failing to adequately train Defendant Guess-Mazock"; that the school district failed to properly screen employees before "placing them into the classroom with vulnerable students"; and that the school district failed to "adequately supervise" its teachers by "ha[ving] a policy that allow[ed] teachers and students of the opposite sex to hold closed door meetings private in classrooms and other rooms within the high school."

The school district argues that Doe's complaint must be dismissed because Doe has not alleged that an official policymaker "approved, adopted, or ratified any actions Doe claims caused him injuries." (Docket Entry No. 11, at 9). The school district also argues that Doe has not alleged that an official policymaker's actions or inactions amounted to deliberate indifference of Doe's constitutional rights. (*Id.*, at 13).

The court agrees with both arguments. Liability cannot be imposed on school districts under a theory of vicarious liability or *respondeat superior*. *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). A plaintiff must plausibly allege that a policy or custom attributable to the school district was the "moving force" behind the deprivation of the plaintiff's constitutional rights. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). That policy or custom must have been tolerated or approved by a person or entity with final policymaking authority for the school district. *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 753–54 (5th Cir. 1993). In Texas, the school district's Board of Trustees is the sole entity with final policymaking authority for the school district. *See Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting TEX. EDUC. CODE ANN. § 11.151(b)).

To survive a motion to dismiss, Doe must plausibly allege that Conroe Independent School District's Board of Trustees adopted an unconstitutional policy or otherwise knew about and acquiesced "in a permanent and deeply embedded abusive and unconstitutional practice." *Penny v. New Caney Indep. Sch. Dist.*, No. H-12-3007, 2013 WL 2295428, at *4 (S.D. Tex. May 23, 2013) (citing *Piotrowski*, 237 F.3d at 578–79). "Isolated violations of law by [the school district's] employees cannot constitute a custom or policy by [the district's] Board of Trustees." *Id.*

Doe's complaint does not once mention the Board of Trustees. The complaint alleges that "[t]he School" had "inadequate" training policies, and that "the School was deliberately indifferent to Doe's constitutional rights." (Docket Entry No. 1, at 7–8). These allegations are insufficient to allege that the Board of Trustees adopted an unconstitutional policy or acquiesced to an unconstitutional custom.

***4** Doe has also not alleged that an official policymaker's actions or inactions amounted to deliberate indifferent of his constitutional rights. "When a plaintiff bases [his] claim on a failure to implement or enforce a policy or custom, the facts alleged must support an inference of deliberate indifference to the plaintiff's constitutional rights." *Gonzalez*, 996 F.2d at 753–54, 755– 56. Doe appears to base at least three of his claims against the school district on the district's failure —not the Board's—to implement policies or customs that would have protected him from harm by Guess-Mazock. Doe alleges that the school district did not enact adequate training policies to teach teachers and staff "warning signs that indicate inappropriate student-teacher relationships"; that the school district did not enact social media policies prohibiting teachers from communicating with students; and that the school district "fail[ed] to adequately supervise its teachers," because the school "allows teachers and students of the opposite sex to hold closed door meetings privately in classrooms and other rooms within the high school."

To plead that an official policymaker acted with deliberate indifference, Doe would need to plead facts showing that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [school district could] reasonably be said to have been deliberately indifferent to the need." *Gonzalez*, 996 F.2d at 757 (citation omitted). Doe has not alleged a pattern of sexual assault by teachers, or inappropriate contact between teachers and students through social media, that has "occurred for so long or so frequently," that the need for more or different training is obvious. *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir. 2009). Doe alleges that the school district had "at least five instances of sexual assault of a student by employees in the last 20 years." This allegation does not suggest a pattern of sexual assault so obvious that the school board acted with deliberate indifference to Doe's constitutional rights by failing to enact different training or social media policies. Five instances over twenty years suggests, at most, isolated instances of condemnable conduct, but not a pattern of behavior among teachers requiring different training protocols.

"To act with deliberate indifference," the school board "must also know of and disregard an excessive risk to the victim's health or safety." *McLendon v. City of Columbia*, 305 F.3d 314, 326 n.8 (5th Cir. 2002) (internal quotations omitted). The allegation that Guess-Mazock preyed on Doe in a classroom with the door closed does not plausibly allege that the Board knew or should have known, from one instance of abusive conduct, that allowing teachers to communicate with opposite-sex students in closed-door rooms would pose an excessive risk to students' safety. It is not "so obvious" that a teacher who is alone with a student of the opposite gender will sexually assault that student, so as to require the enactment of an open-door policy.

Doe also alleges that the school district "has a persistent and widespread practice of failing to properly screen their potential employees prior to hiring them and placing them into the classroom with vulnerable students." (Docket Entry No. 1, at 8). But even assuming that this adequately alleges a policy or practice, Doe has not alleged facts that could support "a direct causal link between the alleged policy and the claimed constitutional injury." *Penny*, 2013 WL 2295428, at * 4 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998)). Doe alleges, in conclusory fashion, that "an adequate background check would have revealed Guess-Mazock's pedophilic tendencies." (Docket Entry No. 1, at 9). Doe does not explain what a background check might have revealed or how the background check "would have revealed Guess-Mazock's pedophilic tendencies." Doe does not allege, for example, that Guess-Mazock had a criminal record or a record from prior employment that would have raised any red flags about Guess-Mazock, which might lend support to his allegations.

***5** Doe has not alleged that the Board of Trustees enacted or failed to enact policies or customs with deliberate indifference to Doe's constitutional rights. The school district's motion to dismiss is granted, without prejudice and with leave to amend by no later than August 22, 2022.

B. Bonnie Guess-Mazock

Doe asserts a federal claim under 42 U.S.C. § 1983 and state-law claims of assault, battery, statutory rape, and intentional infliction of emotional distress against Guess-Mazock. In her motion to dismiss, Guess-Mazock does not deny that she sexually assaulted, battered, and raped Doe. Instead, she argues that because she did not assault Doe on school property or during school events, the § 1983 claim must be dismissed because she did not commit the assaults under color of state law.

Guess-Mazock argues that Doe's state-law claims must be dismissed because Doe did not comply with certain procedural prerequisites to filing the state-law claim against her as a school district employee, and because she has "professional immunity" under Texas state law. (Docket Entry No. 24, at 9 (citation omitted), 11). The Texas law she relies on provides that:

> A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

TEX. EDUC. CODE ANN. § 22.0511(a).

Guess-Mazock argues that she is immune from Doe's state-law claims because she "is a professional employee under the statute," and "her actions [were] within the scope of her duties." (Docket Entry No. 24, at 11). Guess-Mazock argues, however, that she is also immune from Doe's federal-law claim because she was *not* acting "under the color of state law." (*Id.*, at 9).

Doe asserts that Guess-Mazock's arguments for dismissing the claims are irreconcilable. Doe argues that if Guess-Mazock acted under the scope of her employment in sexually assaulting Doe, then she necessarily acted under color of state law, regardless of whether the assaults occurred on school property or during a school event. "Under color of state law," however, "does not necessarily equate to 'scope of employment.' " *McLaren v. Imperial Cas. and Indem. Co.*, 767 F. Supp. 1364, 1371 n.4 (N.D. Tex. 1991) (citing *Brown v. Miller*, 631 F.2d 408, 411 (5th Cir. 1980)); *cf. Robinett v. City of Indianapolis*, 894 F.3d 876, 881 (7th Cir. 2018) ("[The plaintiff] argues that there is no effective difference between [under color of state law] and scope of

employment. That is incorrect. While the two concepts are 'closely related,' they are 'not identical.' " (citation omitted)). While it is Doe's burden to plead that Guess-Mazock acted under the color of state law, "[i]mmunity under § 22.0511 is an affirmative defense," and so Guess-Mazock bears the burden of establishing that she acted within the scope of her employment. *Moreno v. Northside Indep. Sch. Dist.*, No. SA-11-CA-0746-XR, 2012 WL 13029076, at *9 (W.D. Tex. Jan. 23, 2012).

This case demonstrates, at least on the pleadings, that it is plausible that Guess-Mazock acted "under the color of state law" for the purpose of Doe's § 1983 claim, but did not act "under the scope of employment" for the purpose of Doe's state-law tort claim, so that both survive dismissal. The reasons are explained below.

1. 42 U.S.C. § 1983

***6** Doe has plausibly alleged a claim under § 1983. To state a claim under § 1983, Doe must allege that he was deprived of a constitutional right "by a person acting under color of state law." [1] *West v. Atkins*, 487 U.S. 42, 48 (1988); *James v. Tex. Collin Cnty.*, 535 F.3d 365, 373 (5th Cir. 2008). Doe alleges that Guess-Mazock violated his Due Process right to bodily integrity. Guess-Mazock does not contest that Doe, a minor who is legally incapable of consent to sex, has a constitutionally protected right to be free from sexual abuse by his teacher. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (*en banc*) ("We hold ... that schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violates that right.").

"Although the law is clear that physical sexual abuse of a student by a school teacher can give rise to § 1983 liability, a separate and essential element of such a claim is that the abuse occur under color of state law." *Becerra v. Asher*, 105 F.3d 1042, 1045 (5th Cir. 1997). Guess-Mazock argues that Doe's § 1983 claim should be dismissed, because he has not alleged that she was acting under color of law when the sexual abuse occurred, as no alleged assault occurred on school premises or at school functions. This argument is unpersuasive based on Doe's allegations and Fifth Circuit precedent.

Becerra v. Asher is instructive. Asher, a music teacher in the Houston Independent School District, sexually molested an eleven-year-old student, identified as Juan Doe. *Id.* at 1044. Juan's mother sued Asher, the school district, and three school administrators, alleging a federal-law claim under § 1983 and state-law claims. The Fifth Circuit, sitting en banc, held that the mother failed to state a claim under § 1983 against Asher, because the "physical sexual abuse of Juan did not occur under color of state law." *Id.* at 1047.

In that case, Asher "first befriended and show[ed] a special interest in Juan at school," but the assaults did not start until after Juan "withdrew from the school where [the teacher] taught." *Id.* at 1047. Juan and Asher separately "continued a friendship," "includ[ing] home music lessons, trips to the zoo and theme parks, and church activities," after Juan had left school. *Id.* at 1044, 1047. Asher then twice assaulted Juan in Juan's home. *Id.*

The Fifth Circuit held that "[a]s egregious and cruel as Asher's acts were," "Asher's physical sexual abuse of Juan did not occur under color of state law." *Id.* at 1047. The court noted that "[t]he assaults occurred at Juan's home," and that "Asher first molested Juan more than five months after Juan withdrew from the school where Asher taught. Asher's contacts with Juan thereafter were in no way part of his duties as a state employee, were not school-sponsored, and were not reported to any school official." *Id.* The court emphasized that "Asher was not Juan's teacher 'before, during, and after' the sexual abuse, nor was this wrongful conduct 'on and off school grounds.' " *Id.* (quoting *Doe v. Taylor*, 15 F.3d 443, 452 n.4 (5th Cir. 1994)).

Juan had "offered expert affidavits to the effect that the seduction of Juan began at school, and the later sexual abuse would not have occurred if Asher had not first won Juan's trust and affection while serving as his teacher." *Id.* But, the Fifth Circuit stated, "the constitutional violation [under the Due Process Clause] did not extend to the development of trust and affection." *Id.* "On this evidence," the court concluded, "there was no 'real nexus ... between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher.' " *Id.* (citation omitted).

***7** The *Becerra* court reached its conclusion by distinguishing an earlier Fifth Circuit decision, *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994), and by comparing the case to a Tenth Circuit decision, *D.T. by M.T. v. Indep. Sch. Dist. No. 16 of Pawnee Cnty., Okl.*, 894 F.2d 1176 (10th Cir. 1990). These cases help define the parameters

of a § 1983 claim when a student alleges that he or she was sexually assaulted by a teacher.

In *Doe v. Taylor*, a female student was sexually molested by her high school teacher. 15 F.3d at 445. The Fifth Circuit held that the teacher's actions *were* taken under color of state law. *Id.* at 452 n.4. The court wrote:

> In this case, ... [the teacher] took full advantage of his position as Doe's teacher and coach to seduce her. He required Doe to do little or no work in the classroom and still gave her A's. He also spoke to one of Doe's other teachers about raising her grade in that class. [The teacher] was also Doe's basketball coach and he exploited that position as well. The first physical contact [the teacher] had with Doe was after a basketball game in November 1986 when he grabbed her and kissed her. [The teacher's] physical contact with Doe escalated thereafter. During the next several months [the teacher] took Doe from his classroom to an adjoining lab room where he kissed and petted her. During that same period of time [the teacher] also met Doe in the school's fieldhouse where similar activity took place.

Id.

The court concluded that because "a 'real nexus' exist[ed] between the activity out of which the [Constitutional] violation occur[red] and the teacher's duties and obligations as the teacher," the teacher's conduct was "taken under color of state law." *Id.*

The Tenth Circuit reached the opposite conclusion in a case involving allegations of sexual assault of a student by a teacher. In *D.T. by M.T.*, a teacher molested a student over summer vacation, at the teacher's home, following a fundraising activity for a basketball camp that was not affiliated with the school. 894 F.2d at 1177. "It [was] uncontested in [the] case" that the teacher "was on summer 'vacation' " and "had no duties or obligations owing to or functions to perform for the School District." *Id.* at 1186. "His contract required only that he teach fifth grade and coach boys' basketball ... commencing late August and continuing to the end of May of each year." *Id.* The school principal had "made it plain [to the teacher] that any and all activities associated with [the] summer basketball camps were not school related." *Id.* As a result, the court concluded, the "events were the product of a private individual acting in his private capacity." *Id.* (citation omitted). The student had failed to state a claim under § 1983.

This case is between *Doe v. Taylor* and *D.T.* and *Becerra.* Unlike the plaintiff in *Doe v. Taylor*, the Doe in this case does not allege that a sexual assault occurred on the school campus or at school functions, or that Doe received any favoritism on grades in the classroom. Unlike the plaintiffs in *D.T.* and *Becerra*, Doe was a student of the teacher who allegedly committed the assault. Doe has alleged that Guess-Mazock used her authority as Doe's assigned teacher to have Doe stay with her in the classroom after the rest of the class was dismissed. Doe alleges that Guess-Mazock "began to seduce Doe via Snapchat by sending seductive photos of herself appended with solicitous messages." Although Doe does not allege whether these messages were sent while Guess-Mazock and Doe were on or off school property, it is plausible that messages were sent during school hours. Doe similarly does not allege that Guess-Mazock and Doe had sex on school property, but does allege that "[s]ex occurred at different locations," and provides only a few examples. Doe alleges that Guess-Mazock "exhibited explicit interest in him beyond what was appropriate for a teacher-student relationship," so that "it was an open secret" among students on campus, suggesting that there plausibly was illicit contact on campus.

***8** When a teacher sends inappropriate messages to a student in her class, it is more than plausible to believe that that student would fear repercussion if he did not answer those messages, or attempted to cut off ties, compared to if "a total stranger [had] been contacting [him]." *Chivers v. Cent. Noble Cmty. Sch.*, 423 F. Supp. 2d 835, 854 (N.D. Ind. 2006). Guess-Mazock's "official interactions with [Doe] and [her] sexual pursuit [of Doe] constituted an 'indivisible, ongoing relationship' even though a significant amount of the sexual misconduct [allegedly] occurred after hours and off school grounds[.]" *Id.* at 854 (quoting *Doe v. Taylor*, 15 F.3d at 461 (Higginbotham, *J.*, concurring)). There was a sufficiently alleged nexus between Guess-Mazock's position of trust and authority as Doe's teacher, and Guess-Mazock's violation

of Doe's bodily integrity to state a claim. Guess-Mazock's motion to dismiss Doe's § 1983 claim is denied.

2. State-Law Claims

Doe also asserts four state-law claims against Guess-Mazock of assault, battery, statutory rape, and intentional infliction of emotional distress. (Docket Entry No. 1, at 7). Guess-Mazock moves to dismiss these claims on both immunity and procedural grounds. Guess-Mazock argues that she is immune from suit under the Texas Education Code, because

> [a] professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

TEX. EDUC. CODE ANN. § 22.0511(a). Guess-Mazock argues that Doe's alleged tort claims were "incident to or within the scope of [her] duties."

Guess-Mazock also argues that dismissal is required on procedural grounds because, under Texas law, "before a person may sue a professional employee of a school district, such as a teacher, the claimant must first give written notice to the employee of the claim, reasonably describing the incident from which the claim rose.... [Doe] makes no such allegation that he provided notice to Guess-Mazock." (Docket Entry No. 24, at 11) (citing TEX. EDUC. CODE ANN. § 22.0513(a)). Guess-Mazock also argues that Doe "made an irrevocable election of remedies when he filed suit on these claims and named [the school district] as a co-defendant," because Texas law "immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit" if the plaintiff also sues the "governmental unit regarding the same subject matter." (*Id.*, at 12 (citing TEX. CIV. PRAC. & REM. CODE § 101.106)).

Finally, Guess-Mazock argues that Doe has failed to plausibly allege a claim of intentional infliction of emotional distress. Guess-Mazock does not challenge Doe's claims of assault, battery, and rape. The court addresses Guess-Mazock's immunity claim, before turning to her other arguments.

i. Immunity Under the Texas Education Code

"Whether [a teacher] is acting within the scope of [her] employment depends upon whether the general act from which [the] injury arose was in furtherance of the employer's business and the accomplishment of the object for which the employee was employed." *Gonzalez v. Johnson*, No. 04-20-00516-CV, 2021 WL 4976562, at *2 (Tex. App. Oct. 27, 2021) (quoting *Chesshir v. Sharp*, 19 S.W.3d 502, 505 (Tex. App. 2000)). The burden is on Guess-Mazock to establish that she was (1) "a professional employee of a school district"; (2) that the "challenged conduct was within or incident to the scope of [her] duties"; (3) that her "duties involved the exercise of discretion or judgment"; and (4) that her "acts did not cause the plaintiff injury as a result of the use of excessive force in disciplining the plaintiff or negligence in disciplining the plaintiff." *Doe v. S & S Consol. I.S.D.*, 149 F. Supp. 2d 274, 297 (E.D. Tex. 2001). The following cases demonstrate that Guess-Mazock was not acting within the scope of her employment when she purchased drugs for Doe and sexually assaulted him.

***9** In *Ashley G. v. Copperas Cove Indep. Sch. Dist.*, Case No. 19-cv-420, 2020 WL 7240392 (W.D. Tex. Dec. 9, 2020), parents of a fourteen-year-old son with autism sued three school administrators after the administrators allegedly assaulted their son. The assault occurred when M.G., the student, was called to the assistant principal's office after he was accused of stealing a snack from another student. *Id.* at *1. M.G. denied the allegation and tried to leave the office. "Upon being told to sit down repeatedly by [the assistant principal] while she blocked the door, M.G. pushed [the principal] out of the way and into a wall." *Id.* at *2. "At this point, the first of two restraints on M.G. was initiated." *Id.* Another assistant principal, Robert Turner, wrapped his arms around M.G. and "attempted to place M.G. in a standing restraint." *Id.* Later, after M.G. started to kick Turner, Turner "guided M.G. to the ground by placing one knee on the ground while in the hug containment." *Id.*

The parents brought a common-law assault claim against the assistant principals. The court held, however, that the

assault claims were barred "by the statutory immunity under Tex. Educ. Code § 22.0511," because "[i]t [was] within the scope of educators, especially principals and counselors, to address discipline and behavioral incidents of students," and "[t]he restraint performed was an act of discretion under their duties." *Id.*

In *Anderson v. Bessman*, 365 S.W.3d 119 (Tex. App. 2011), a group of faculty members of the University of Texas Medical Branch at Galveston sued the provost and several department chairs for wrongly firing them, asserting various tort claims. *Id.* at 121. The faculty members alleged that the administrators violated school procedures and "terminated faculty positions based on financial incentives and personal animosities, and had acted in bad faith in recommending their termination." *Id.* at 123. The school administrators moved to dismiss the lawsuit, alleging that their decisions to terminate the faculty was well within their discretion.

The court agreed that the school administrators were immune from suit because they were acting in the scope of employment when they fired the faculty members, even if the firing was alleged to be based on their own financial incentives and personal animosities. The alleged conduct underlying the tort claims—the school administrators firing faculty members—fell within the administrators' job duties, and was therefore within the scope of their employment.

Finally, in *Jackson v. Texas Southern University*, 31 F. Supp. 3d 884 (S.D. Tex. 2014), a Texas Southern University faculty member, Dr. Jackson, sued another faculty member, Dr. Adobo, for assault.[2] Dr. Jackson alleged that he was proctoring an exam with Dr. Adobo when Dr. Adobo physically assaulted him without provocation. Dr. Adobo argued that because the assault was within the scope of his employment, he was immune from suit. The court agreed. The court "f[ound] from the facts alleged ... that Dr. Adobo was acting in the scope of his employment in proctoring an exam as lawfully assigned by [Texas Southern University], substantially within the authorized time and space limits of the university's scheduling, even if he was motivated in part by personal animosity toward Dr. Jackson." *Id.* at 888.

These cases suggest that an employee is acting in the scope of his or her employment if he or she commits a tort while completing a job duty. In *Ashley G.*, the assistant principals allegedly assaulted a student while they were disciplining him. In *Anderson*, school administrators allegedly committed various torts when they fired faculty members. In *Jackson*, a faculty member allegedly assaulted another faculty member while he was proctoring an exam.

***10** The question is whether Doe has alleged that Guess-Mazock was performing her duties as a teacher when she allegedly assaulted, battered, and raped Doe. The court cannot conclude, based on the allegations, that Doe's injuries occurred "within" or "incident to" Guess-Mazock's duties as a teacher. There is no allegation that, for example, Guess-Mazock was communicating with Doe about school assignments when Guess-Mazock assaulted Doe. There is no allegation that Guess-Mazock was teaching Doe at the time of the assault. There is no allegation that Guess-Mazock was working to advance the school's interests when Guess-Mazock sexually assaulted Doe off-campus.

"Because this is a 12(b)(6) motion, the [c]ourt cannot go beyond the pleadings in deciding" whether Guess-Mazock was acting within the scope of her employment, "[a]nd, as noted, immunity under § 21.0511 is an affirmative defense." *Moreno*, 2012 WL 13029076, at *10. "Dismissal under Rule 12(b)(6) based on affirmative defense is appropriate only if the application of the defense is apparent on the face of the complaint." *Id.* Doe's allegations thread a thin needle. The court finds that Doe has sufficiently alleged a nexus between Guess-Mazock's authority as a teacher and her sexual assault of Doe to plausibly support that Guess-Mazock was acting under color of state law for purposes of Doe's § 1983 claim. But the court also finds that Doe has also not alleged facts showing that the tort occurred incident to the scope of Guess-Mazock's duties as a teacher, as required for her to be entitled to immunity on Doe's state-law claims. Further discovery may reveal that one, or both, of these conclusions is inaccurate. But dismissal of Doe's state-tort claims on immunity grounds is improper under Rule 12(b)(6).

ii. Election-of-Remedies

In addition to her immunity argument, Guess-Mazock argues that Doe's state-law claims must be dismissed under the Texas Tort Claims Act because Doe "made an irrevocable election of remedies when he filed suit on these claims and named [the school district] as a co-defendant." Guess-Mazock argues that the Texas Tort Claims Act "immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit" if the plaintiff also sues the "governmental unit regarding the same subject matter."

The Texas Tort Claims Act's election-of-remedies requirement is irrelevant to this dispute, because the Texas Tort Claims Act does not apply to Doe's claims. The Act provides that "[a] government unit in the state is liable for:

(1) Property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. AND REM. CODE § 101.021.

Doe has not complained of personal injury proximately caused by the condition or use of tangible, personal, or real property, or the operation or use of a motor-vehicle. The Tort Claims Act's election-of-remedies does not apply to Doe's claims. *See Dallas Cnty. Mental Health v. Bossley*, 968 S.W.2d 339, 343 (1998).

iii. Intentional Infliction of Emotional Distress

Guess-Mazock also argues that Doe has not alleged the necessary elements of an intentional infliction of emotional distress claim. Guess-Mazock does not raise any similar argument about Doe's assault, battery, or rape claims. Guess-Mazock argues that Doe has not plausible alleged an intentional infliction of emotional distress claim because he has not "pled any facts that establish any degree of severity of his alleged emotional distress suffered as a result of Guess-Mazock's actions," because Doe "acknowledg[es] that his childhood and homelife were 'turbulent and chaotic.' " (Docket Entry No. 24, at 13). Guess-Mazock appears to suggest that Doe could not suffer from severe emotional distress from her conduct, because he already experienced emotional distress at home. While the court finds that this particular argument is meritless, the court agrees that Doe's claim for infliction of emotional distress must be dismissed.

***11** The Texas Supreme Court has stated that a claim for intentional infliction of emotional distress is "first and foremost, a 'gap-filler' tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004) (citing *Standard Fruit and Vegetable Co. v. Johnson*, 985 S.W.2d 68 (Tex. 1998)).[3] "Where the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available." *Id.* (citing cases). Additionally, "when the substance of the complaint is covered by another tort, 'a plaintiff cannot maintain an intentional infliction claim regardless of whether he or she succeeds on, or even makes, [an alternate] claim.' " *Miller v. Target Corp.*, 854 F. App'x 567, 569 (5th Cir. 2021) (quoting *Hoffman-La Roche, Inc.*, 144 S.W.3d at 448).

Doe alleges that Guess-Mazock intentionally "subject[ed] Doe to sexual assault and abuse" which "constitute[d] ... intentional infliction of emotional distress." (Docket Entry No. 1, at 7). As alleged, Doe's intentional-infliction claim is not based on conduct separate from the conduct giving rise to his assault or statutory rape claims. *See Hoffman-La Roche*, 144 S.W.3d at 450 (denying the plaintiff's intentional-infliction claim because it was not "independent of her sexual harassment claim"); *Draker v. Schreiber*, 271 S.W.3d 318, 323 (Tex. App. 2008) ("[T]o maintain a claim for intentional infliction of emotional distress, [the plaintiff] was required to allege facts independent of her defamation claim."). Doe's intentional-infliction claim is dismissed, without prejudice, so that Doe may, if he can, amend his claim to allege facts sufficient to support an independent claim for intentional infliction of emotional distress.

iv. Required Notice Under the Texas Education Code

Finally, Guess-Mazock argues that the court should dismiss Doe's state-law claim on procedural grounds because Doe did not provide her with required notice of his claims under § 22.0513 of the Texas Education Code. At the court's June 28, 2022, hearing, and in his motion to dismiss response, Doe conceded that he did not provide Guess-Mazock with adequate notice. The remedy is not dismissal, but abatement. *See Gray v. Fort Worth Indep. Sch. Dist.*, Case No. 4:09-cv-00225-Y (N.D. Tex. June 4, 2009) (Docket Entry No. 10)

("[S]ection 22.0513 requires such a notice, but provides that a court shall abate the suit if notice was not provided."). The Texas Education Code provides that "[n]ot later than the 90th day before the date a person files a suit against a professional employee of a school district, the person must give written notice to the employee of the claim, reasonably describing the incident from which the claim arose." TEX. EDUC. CODE § 22.0513. The Code also provides that if "[a] professional employee of a school district against whom a suit is pending ... does not receive written notice," that employee "may file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the suit is pending." *Id.* The court, in turn, "shall abate the suit if the court, after a hearing, finds that the person is entitled to an abatement because notice was not provided as required by this section," and that abatement will "continue[ ] until the 90th day after the date that written notice is given to the professional employee of a school district." *Id.* § 22.0513(c), (3).

***12** It is unclear whether Guess-Mazock is entitled to this notice, because she was no longer a school district employee when Doe filed suit. No "Texas state or federal case [has] analyz[ed] whether a Plaintiff must give pre-suit notice to a former employee under TEX. EDUC. CODE § 22.0513." (Docket Entry No. 41, at 1). Guess-Mazock argues that "the answer is clear" that notice is still required, because "the analysis is whether the challenged acts were by a professional employee, and not whether a defendant in a lawsuit is currently employed." (*Id.*). She argues that as long as she committed the alleged acts while she was still a teacher in the Conroe School District, she is entitled to the protections, including procedural protections, afforded by the Texas Education Code.

The conservative approach is to give Guess-Mazock the notice and abatement she seeks, despite the resulting delay, and despite the facts that Guess-Mazock has already received the complaint, hired counsel, and timely filed a motion to dismiss. Still, the court, out of an abundance of caution, finds that abatement is required. Doe and Guess-Mazock must file a joint letter informing the court when Doe has provided Guess-Mazock with notice required under § 22.0513. Doe may move to reopen the case 90 days after he has provided Guess-Mazock written notice of his claims, and file an amended complaint at that time. *See* TEX. EDUC. CODE § 22.0513(d). Because of the abatement, the court vacates its previous scheduling order deadlines only as they apply to Guess-Mazock. (Docket Entry No. 40). The deadlines remain in place as to the claims against the school district, except that Doe may have until August 22, 2022, to amend his complaint against the school district.

C. Snap, Inc.

Finally, Doe asserts three claims against Snap, Inc. First, Doe asserts a claim of "negligent undertaking." (Docket Entry No. 1, at 10). Doe alleges that "Snapchat represents that it reports all instances of child sexual exploitation to authorities," and as a result has undertaken a "duty ... to protect its young users." (*Id.*). Doe alleges that Snap has represented "to advertisers that it undertakes to monitor content to prohibit bullying and explicit content," and has created a host of anti-abuse measures designed to monitor the content shared on its platform, including "dedicated Safety and Support teams" and an "Abuse Engineering Team." (*Id.*, at 11). Doe alleges that Snap breached its duty "to exercise reasonable care in performing its data-mining services and failing to intervene when an adult started sending sexually explicit messages and images to a minor." (*Id.*). Doe alleges that Snap should be able to "extract[ ] sufficient data from the user to accurately determine, and target, a user's age," to identify when "minor users ... send and receive messages from adults on their Snapchat application." (*Id.* at 11–12).

Second, Doe asserts that Snap "negligently designed" Snapchat "by allow[ing] users as young as 13 years old to create accounts" using false birthdates, "[b]y creating an environment where adults can interact with underage users with assurances that there will be no long-lasting evidence of those interactions," and by creating a platform that deletes messages and images shortly after they are sent. Doe alleges that that Snap owes a duty to "use ordinary care in designing, maintaining, and distributing its products and services," and that through these alleged design flaws, has "fostered an environment that draws in sexual predators and allows them to act with impunity." (*Id.*, at 12).

Finally, Doe asserts a claim of "gross negligence," alleging that Snap was "conscious[ly] indifferen[t] to ... the use of its product to foster the exploitation of a minor by an adult" by "marketing an application to minors that, by design, allows pedophiles to prey on them with apparent impunity." (*Id.*, at 12–13).

***13** Snap argues that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, bars Doe's three negligence claims, because "Section 230 immunizes interactive computer service providers like Snap from liability for its

users' content and any alleged failure to adequately monitor such content." (Docket Entry No. 20, at 9). Snap also alleges that "even setting aside the dispositive issue of Section 230 immunity," Doe "fails to plausibly allege any claim against Snap," because Doe "does not, and cannot, allege that Snap was a proximate cause of [Doe's] harm—i.e., that 'but for' the use of Snapchat, Mazock would not have abused him." (*Id.*).

The court agrees that Doe's claims against Snap are barred by the Communications Decency Act. Section 230 of the Communications Decency Act "provide[s] broad immunity ... to Web-based service providers for all claims stemming from their publication of information created by third parties." *Doe v. Myspace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *see* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). "No cause of action may be brought and no liability may be imposed under any State or local law," 47 U.S.C. § 230(e)(3), if the cause of action would "make internet service providers liable for information originating with a third-party user of the service," *Diez v. Google, Inc.*, 831 F. App'x 723, 724 (5th Cir. 2020).

Neither party disputes that Snap is an "interactive computer service" provider protected by Section 230. The Communications Decency Act defines "interactive computer service" broadly to include "any information, service, system, or access software provider that provides or enables computer access by multiple users to a computer server ...." 47 U.S.C. § 230(f)(2). Multiple courts have held that Snap is an "interactive computer service" provider, because "[t]he Snapchat application permits its users to share photos and videos through Snap's servers and the internet. Snapchat thus necessarily 'enables computer access by multiple users to a computer server,' and Snap, as the creator, owner, and operator of Snapchat, is therefore a 'provider' of an interactive computer service." *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021); *see also Grossman v. Rockaway Tp.*, No. MRS-L-1173-18, 2019 WL 2649153, at *14 (N.J. Super. Ct. June 10, 2019); *Palmer v. Savoy*, No. 20-CVS-94, 2021 WL 3559047, at *5 (N.C. Super. July 18, 2021).

The disputed issue is whether Doe's claims attempt to hold Snap liable for "[the] publication of information created by third parties." *Myspace, Inc.*, 528 F.3d at 418. If so, Doe's claims are barred by Section 230. *See In re Facebook, Inc.*, 625 S.W.3d 80, 83 (Tex. 2021) ("[T]he uniform view of federal courts interpreting [Section 230] requires dismissal of claims alleging that interactive websites ... should do more to protect their users from the malicious or objectionable activity of other users.").

The Fifth Circuit considered allegations similar to Doe's in *Doe v. Myspace, Inc.*, 528 F.3d 413 (5th Cir. 2008). In that case, a parent alleged that Myspace had failed to take sufficient steps to prevent her 13-year-old daughter from lying about her age to create a personal profile on Myspace, which resulted in her being contacted and ultimately assaulted by a sexual predator. The Fifth Circuit held that the plaintiff's claim was barred by Section 230, because the claim sought "to hold Myspace liable for its failure to implement measures that would have prevented [the child] from communicating with [a sexual predator]." *Id.* at 420. These allegations, the court explained, were "merely another way of claiming that Myspace was liable for publishing the communications." *Id.*

***14** The Third Circuit considered similar allegations in *Green v. Am. Online, Inc. (AOL)*, 318 F.3d 465 (3d Cir. 2003), and held that AOL was immune from the plaintiff's claims under Section 230. In that case, the plaintiff sued AOL after he received a computer virus from a third-party and received derogatory comments from users in an online "chat room." *Id.* at 469. The plaintiff alleged that AOL had negligently failed "to properly police its network for content transmitted by its users." *Id.* at 470. The Third Circuit held that Section 230 barred the plaintiff's claims because the plaintiff "attempt[ed] to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Id.* at 471.

The Ninth Circuit, however, recently held that Snap was not entitled to immunity on a negligent design allegation. In *Lemmon v. Snap*, 995 F.3d 1085 (9th Cir. 2021), parents of two boys sued Snap after their sons were killed in a car crash. The crash occurred because the boys were driving at high speeds while attempting to take a picturing using a Snapchat filter that shows users the speed at which they are traveling. The parents alleged that Snap negligently designed Snapchat by creating "[t]he Speed Filter," among other alleged design flaws. *Id.* at 1091–92. Snap moved to dismiss on immunity grounds under Section 230. The Ninth Circuit denied the motion, alleging that the parents' complaint did "not seek to hold Snap liable for its conduct as a publisher or speaker," but instead "treat[ed] Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect." Put differently, the parents' claim was not about the

publication of content, it was about Snap's alleged negligence "as a product designer." *Id.* at 1092.

Doe's negligent undertaking, negligent design, and gross negligence claims all seek to hold Snap liable for messages and photos sent by Guess-Mazock. Doe's allegations are similar to those *Myspace* and *AOL*, and distinguishable from those in *Lemmon*. Doe's negligent undertaking claim alleges that Snapchat has failed to monitor content and messages sent between parties on its platform. Doe's gross negligence claim alleges that Snap is indifferent to sexual predators' use of the platform to message minors "with apparent impunity." Each of these claims seek to "fault[ ] [Snap] for information provided by [a] third part[y]"—messages and photos sent by Guess-Mazock to Doe. *Lemmon*, 995 F.3d at 1093. Section 230 provides Snap with immunity from these claims.

Doe's negligent design claim is similar barred by the Communications Decency Act. Doe alleges that Snapchat is negligently designed because the application fails to prevent underage users from creating accounts using false birthdays, and because Snapchat allows messages to automatically delete after a short period of time. Doe alleges that these designs cause harm because they allow adults to inappropriately message children. While Doe's negligent design claim "may be couched as [a] complaint[ ] about" Snapchat's "design and operation ... rather than ... its role as a publisher of third-party content," Snapchat's "alleged lack of safety features is only relevant to [Doe's] injuries to the extent that such features would have averted wrongful communication via [Snap's] platforms by third parties." *In re Facebook, Inc.*, 625 S.W.3d at 93–94 (internal quotation marks and citations omitted). The crux of Doe's negligent design claim, like his negligent undertaking and gross negligent claims, is that Snapchat designed its product with features that allegedly created the opportunity for Guess-Mazock to send illicit messages to Doe. Doe's negligent design claim similarly aims to hold Snap liable for communications exchanged between Doe and Guess-Mazock. This claim is also barred by Section 230.

***15** Doe concedes that "[i]f this Court follows the prevailing precedent" on Section 230 immunity, then "the court must dismiss this case." (Docket Entry No. 30, at 17–18). The court agrees. Because Snap is immune from Doe's claims, and because amendment would be futile, Snap's motion to dismiss is granted, with prejudice. [4]

IV. Conclusion

Guess-Mazock's motion to dismiss, Docket Entry No. 24, is granted in part and denied in part; the school district's motion to dismiss, Docket Entry No. 11, is granted; and Snap's motion to dismiss, Docket Entry No. 20, is granted. Doe's claims against the school district and Doe's intentional infliction of emotional distress claim against Guess-Mazock are dismissed without prejudice, and with leave to amend. Doe's claims against Snap, Inc., are dismissed with prejudice, because amendment would be futile given Snap, Inc.'s broad immunity under Section 230.

This case will proceed on two tracks. Doe may amend his complaint against the school district by **August 22, 2022.** The court's scheduling order, Docket Entry No. 40, remains in place for resolving Doe's claims against the school district. The court abates Doe's claims against Guess-Mazock until 90 days after Doe gives Guess-Mazock written notice of his claim, as required under the Texas Education Code. Doe and Guess-Mazock must file a joint letter indicating that Doe has provided Guess-Mazock with this required notice. Doe may file an amended complaint as to Guess-Mazock after the abatement period ends. The court will set a new scheduling order for resolving Doe's claims against Guess-Mazock after Doe files his amended complaint.

All Citations

Not Reported in Fed. Supp., 2022 WL 2528615

Footnotes

1 As a public official, Guess-Mazock can be sued in her official or her personal capacity. *See Hafer v. Melo*, 502 U.S. 21 (1991). Doe alleges that he has sued Guess-Mazock in her personal capacity.

2 The issue in *Anderson* and *Jackson* was whether the school administrators were immune under the Texas Tort Claims Act, which similarly provides that a government employee is immune if the lawsuit is "based on conduct within the general scope of that employee's employment," among other criteria. Tex. Civ. Prac & Rem. Code Ann. § 101.106(f).

3 The case on which Doe relies to argue that he has properly asserted an intentional infliction of emotional distress claim, *Doe v. Beaumont I.S.D.*, 8 F. Supp. 2d 596 (E.D. Tex. 1998), predates *Standard Fruit*—the Texas Supreme Court case which held that a plaintiff must allege facts independent of another tort claim to support an intentional infliction of emotional distress claim.

4 Because the court finds that Doe's claims against Snap are barred by the Communications Decency Act, the court does not address Snap's arguments that Doe has failed to plausibly allege that Snap owed, and breached, a duty to Doe, or that Snap's conduct proximately caused Doe's harm.

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KeyCite Yellow Flag
Distinguished by Tavassoli v. Altria Group, Inc., D.Ariz., September 17, 2007

KeyCite Overruling Risk
Overruling Risk Iannacchino v. Ford Motor Co., Mass., June 13, 2008

22 Mass.L.Rptr. 91
Superior Court of Massachusetts,
Suffolk County.

Willie EVANS, as Executor [1]
v.
LORILLARD TOBACCO CO. & others. [2]

Civil Action No. 04–2840A.
|
Feb. 7, 2007.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

PAUL E. TROY, Justice.

1** The plaintiff, Willie Evans ("Plaintiff") commenced this action alleging that defendants Lorillard Tobacco Co. ("Lorillard"), Garber Bros., Inc. ("Garber"), George Melhado & Co. ("Melhado"), and Franklin Wholesalers, Inc. ("Franklin"), (collectively, "Defendants") caused the death of his mother, Marie R. Evans ("Evans"), through their design, marketing, distribution, and sale of Newport brand cigarettes. The action is before this court on the Defendants' motions to dismiss [3] the Plaintiff's complaint. For the following reasons, the Defendants' motions are ***DENIED in part and ***ALLOWED*** in part.

BACKGROUND

For purposes of a motion to dismiss under Rule 12(b)(6), the court must accept as true all of the factual allegations in the Plaintiff's complaint.

Newport cigarettes contain menthol which works "to facilitate the initiation of smoking and the development of a smoking habit in children." Complaint, ¶ 20. Lorillard is the designer, manufacturer, distributor, and seller of Newport cigarettes. During the time Evans purchased and smoked Newport cigarettes, defendants Garber, Melhado, and Franklin distributed Newport cigarettes in the areas where Evans lived and worked.

Growing in the Orchard Park housing project in Roxbury, Massachusetts, Evans attended Newport cigarette giveaway events in her neighborhood starting in approximately 1957 when she was about nine years old. At these giveaway events, Lorillard representatives gave her free samples of Newport cigarettes despite her age. When she was a young teenager, Evans began smoking the Newport cigarettes she received at the giveaway events not only because they were free, but also because she was influenced by Lorillard's marketing of Newport cigarettes. Lorillard advertised Newport cigarettes in *Jet* and *Ebony,* African–American magazines to which Evans had access. The advertisements showed attractive African–American men and women smoking Newport cigarettes and described the cigarettes as "fresher than any other menthol cigarette." *Id.* ¶ 18. Lorillard also used "various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' 'impact,' 'strength,' 'rich aroma,' and 'pleasure.' " *Id.* ¶ 23. Evans was addicted to Newport cigarettes for over forty years, smoking at least one and a half packs a day to as many as four packs a day.

Lorillard promised [4] the public that it would lead the effort to discover and disclose the truth about smoking and health, recognizing that such research and disclosures "were necessary for the protection of smokers of Lorillard-brand cigarettes, including ... Evans." *Id.* ¶ 52. Through industry research spanning decades, Lorillard has learned that the nicotine in cigarettes is addictive, and the Newport cigarettes cause such diseases as lung cancer and contain carcinogenic elements that increase the dangers of smoking. Rather than fulfill its promise to disclose this information to smokers such as Evans, however, Lorillard has concealed and suppressed the true facts about the health hazards of smoking Newport cigarettes, denied that nicotine is addictive, and, until recently, claimed that nicotine is important to cigarettes for taste.

***2** Therefore, Lorillard's knowledge of the material facts about smoking, health, and addiction was vastly superior to the knowledge of Evans and other members of the general public who purchased, used, and consumed Lorillard's cigarettes. Public access to these facts known by Lorillard has been exclusively within its control." *Id.* ¶ 43. Moreover, Lorillard has controlled the nicotine content in Newport cigarettes in order to create and sustain addiction in smokers

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such as Evans. In fact, in April 1994, Lorillard's then President and Chief Executive Officer, Andrew H. Tisch ("Tisch") testified under oath before the Congressional Subcommittee on Health and the Environment that nicotine is not addictive.

At the time Evans began smoking Newport cigarettes, Evans did not know that cigarette smoking causes illnesses such as cancer, she did not know that the nicotine in Newport cigarettes is addictive, and she did not know that Lorillard added menthol to Newport cigarettes in order to encourage the development of smoking habits in children. Evans had a heart attack in 1984 when she was approximately thirty-eight years old, at which time she learned that smoking causes diseases and that the addition of menthol made Newport cigarettes more dangerous to her health than cigarettes without the addition of menthol.

Evans made several futile attempts to quit smoking after her 1984 heart attack. By the time she was diagnosed with small call lung cancer in December 2001, the cancer had already spread to her brain, liver, and adrenal glands, and her doctor told her she had three to six months to live. Evans underwent four chemotherapy treatments that rendered her bedridden and unable to eat. Evans died on June 20, 2002.

As executor of Evans estate, the Plaintiff filed a complaint against the Defendants alleging fraud and misrepresentation (Count I, against Lorillard); voluntary undertaking of a duty (Count II, against Lorillard); breach of warranty (Count III, against the Defendants); public nuisance (Count IV, against Lorillard); battery (Count V, against Lorillard); violations of G.L. c. 93A, § 9 (Count VI, against the Defendants); negligence (Count VII, against the Defendants); and wrongful death (Count VIII, against the Defendants).

DISCUSSION

In deciding a motion brought pursuant to Rule 12(b)(6), the court must accept as true the complaint's well-pleaded factual allegations and any reasonable inferences in the plaintiff's favor that may be drawn from those allegations. *Fairneny v. Savogran Co.,* 422 Mass. 469, 470 (1996). A " 'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Nader v. Citron,* 372 Mass. 96, 98 (1977), quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). The court must give the complaint a generous reading and the plaintiff the benefit of the doubt. *New England Insulation Co. v. General Dynamics Corp.,* 26 Mass.App.Ct. 28, 29 (1988); *Kipp v. Kuelcer,* 7 Mass.App.Ct. 206, 210 (1979). A "rule 12(b)(6) motion is ordinarily not the proper vehicle for testing the factual sufficiency of a plaintiff's claims[;]" rather, a motion for summary judgment is more appropriate. *Reardon v. Commissioner of Corr.,* 20 Mass.App.Ct. 946, 947 (1985); *Wrightson v. Spaulding,* 20 Mass.App.Ct. 70, 72 (1985).

***3** The Defendants have moved to dismiss the Plaintiff's claims against them for failure to state a claim upon which relief can be granted because the Plaintiff cannot satisfy the essential elements of the claims and because, as to conduct that the Plaintiff alleges occurred after June 30, 1969, certain claims are preempted by the Federal Cigarette Labeling and Advertisement Act.

I. *Federal Cigarette Labeling and Advertisement Act*

The Defendants allege that insofar as the Plaintiff's complaint concerns the Defendants' alleged conduct occurring after June 30, 1969, it is preempted by the Federal Cigarette Labeling and Advertisement Act ("FCLAA"), set forth at 15 U.S.C. §§ 1331–1341. With the FCLAA, Congress "crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001). Section 1334 of title 15 of the United States Code, titled "Preemption," "unequivocally precludes the requirement of any additional statements on cigarette packages provided in [15 U.S.C.] § 1333." *Id.* at 542, citing 15 U.S.C. § 1334(a).[5] The preemption provision further provides that "[n]o *requirement or prohibition* based on smoking and health shall be imposed under *State law* with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (emphases added); see *Lorillard Tobacco Co.,* 533 U.S. at 542 ("Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted."). The statute expressly states that the effective date of 15 U.S.C. § 1334 is July 1, 1969.

The Supreme Court in *Cipollone v. Liggett Group, Inc.* addressed the issue of whether this preemption provision "encompassed state common-law claims." 505 U.S. 504, 516 (1992).[6] Acknowledging the presumption against preemption, the Court held that common-law damages actions impose "requirements and prohibitions" because such actions "are premised on the existence of a legal duty," and that

"the phrase 'state law' ... include[s] common law as well as statutes and regulations." *Id.* at 522. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are *not* pre-empted[,]" however, *id.* at 517 (emphasis added); therefore, the Court had to consider individually each of the plaintiff's "common-law claims to determine whether it [was] in fact preempted." *Id.* at 523.

"The central inquiry in each case is straightforward: ... whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health ... imposed under State law with respect to ... advertising or promotion, giving that clause a fair but narrow reading." *Id.* at 523–524 (second and third ellipses in original) (footnote omitted). Thus, "[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at 525; see *Philip Morris Inc. v. Harshbarger,* 122 F.3d 58, 76–77 (1st Cir.1997) ("This observation indicates that the relevant inquiry focuses not upon any relation between advertising and the *motivation* behind a state law, but upon the law itself and any connection it might have with advertising activities." (emphasis in original)). This court will apply this analysis to those claims in the Plaintiff's complaint that the Defendants argue must be preempted. [7] It is undisputed that the FCLAA does not preempt any allegation concerning the Defendants' conduct occurring prior to June 30, 1969. As discussed with respect to the claims below, the FCLAA also does not preempt any other aspect of the Plaintiff's complaint. [8]

A. *Count I—Fraud and Misrepresentation*

***4** In Count I, the Plaintiff alleges that Lorillard willfully and recklessly failed to disclose to Evans the health hazards and addictive nature of smoking Newport cigarettes and that Lorillard "waged an aggressive campaign of disinformation about the health consequences of cigarette smoking." Complaint, ¶ 2. Among this disinformation, the Plaintiff points to Lorillard's advertisements in which it marketed Newport cigarettes as " 'fresher than any other menthol cigarette[,]' " *id.* ¶ 18, and Lorillard's use of "various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' impact,' strength,' 'rich aroma,' and 'pleasure.' " *Id.* ¶ 23.

In *Cipollone,* the Court considered the plaintiff's two fraudulent misrepresentation theories. 505 U.S. at 527–529. The first theory was essentially a failure to warn theory in which the plaintiff alleged that the defendants, "through their advertising, neutralized the effect of federally mandated warning labels ...." *id.* at 527, "and that they had possessed, but had 'ignored and failed to act upon' medical and scientific data indicating that 'cigarettes were hazardous to the health of consumers[.]' " *Id.* at 510 (first and second alteration added) (ellipses in original). [9] The FCLAA did preempt this claim because it was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527.

Unlike in *Cipollone,* the Plaintiff's misrepresentation claim does not specifically make an allegation concerning Lorillard's conduct with respect to the federally required warning labels, although it does concern advertising and promotion. See *Johnson v. Brown & Williamson Tobacco Corp.,* 122 F.Supp.2d 194, 201 (D.Mass.2000) ("*Johnson I* ") (noting that "any communication by a cigarette manufacturer with the public constitutes 'advertising and promotion' under the [FCLAA]"). Despite the absence of language concerning warning labels, Lorillard argues that, by claiming that Lorillard failed to disclose to consumers the alleged health hazards associated with smoking, the Plaintiff is alleging that Lorillard has a legal duty to make such a disclosure. With this allegation, Lorillard further asserts, the Plaintiff is claiming that Lorillard's advertising should have included additional or more clearly stated warnings. Lorillard's attempt to turn this fraud and misrepresentation claim into a failure to warn claim fails.

As noted, the Plaintiff makes no mention of Lorillard's warnings. Rather, the Plaintiff alleges that Lorillard knew of certain facts and intentionally misrepresented and failed to disclose those facts to the public, including Evans, both directly and through its trade association, and that it "expressly [told] the public to place special trust and confidence in Lorillard's promise to discover and disclose all material facts about smoking, health and addiction." Complaint, ¶ 45; see *Johnson I,* 122 F.Supp.2d at 201. These allegations are distinguishable from the plaintiff's failure to warn claim in *Cipollone* which the FCLAA preempted. See 505 U .S. at 524, 528.

***5** The plaintiff's second fraudulent misrepresentation theory in *Cipollone* alleged "intentional fraud and

misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact.' " *Id.* at 528 (alterations in original). The Plaintiff's Count I is more like this second theory in *Cipollone* in that the Plaintiff alleges that Lorillard's use of "various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' impact, 'strength,' 'rich aroma,' and 'pleasure[,]' " Complaint, ¶ 23, and the description of Newport cigarettes as being "fresher than any other menthol cigarettes" constituted misrepresentation. *Id.* ¶ 23. The *Cipollone* Court held that the FCLAA did not preempt this theory "insofar as those claims rel[ied] on a state-law duty to disclose such facts through channels of communication *other than advertising or promotion.*" 505 U.S. at 528 (emphasis added).

The Plaintiff alleges that Lorillard made its comments regarding the freshness of Newport cigarettes in print advertisements. The Plaintiff's complaint does not specify the context in which Lorillard allegedly used euphemisms to conceal the true effect of nicotine. As noted above, however, "any communication by a cigarette manufacturer with the public constitutes 'advertising and promotion' under the" FCLAA. *Johnson I,* 122 F.Supp.2d at 201. Therefore, this court presumes that they constitute advertising and promotion. See *id.*

To the extent that these misrepresentation claims did "arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements)[,]" *Cipollone,* 505 U.S. at 528, the FCLAA still does not preempt them because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528–529. "[T]he phrase [in 15 U.S.C. § 1334(b)] 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." *Id.* at 529. The Court reasoned that, with the FCLAA, Congress did not intend "to insulate cigarette manufacturers from longstanding rules governing fraud .... [or] to proscribe the regulation of deceptive advertising." *Id.* Therefore, here, the FCLAA does not preempt the Plaintiff's allegations that Lorillard engaged in fraudulent misrepresentations in the context of its advertising and promotion. [10]

The FCLAA does not preempt Count I.

B. *Count II—Voluntary Undertaking of a Duty*

In Count II, the Plaintiff claims that Lorillard promised the public, including Evans, that it would research tobacco use and human health and that it would impart the results of that research to the public completely and accurately. In *Cipollone,* the plaintiff did not allege a "voluntary undertaking" claim; he did, however, allege breach of express warranty. *Id.* at 525. The Court's analysis of this claim is analogous to Count II. See *id.* at 525–526.

***6** When considering the plaintiff's breach of an express warranty claim in *Cipollone,* the Court held that liability for such a breach "derives from, and is measured by, the terms of that warranty. Accordingly, the 'requirement [s]' imposed by an express warranty claim are not 'imposed under state law,' but rather imposed *by the warrantor.*" *Id.* at 525 (alternation and emphasis in original). The Court concluded that "a common-law remedy for a contractual commitment *voluntarily undertaken* should not be regarded as a 'requirement ... *imposed under State law* ' within the meaning of" 15 U.S.C. § 1334(b). *Id.* at 526 (ellipses and second emphasis in original). Here, Count II is predicated on Lorillard's promise to research the effects of cigarette smoking on health and to impart those results to the public. State law did not impose this promise on Lorillard; Lorillard made this promise voluntarily. See *id.* The FCLAA therefore does not preempt Count II.

C. *Count III—Breach of Warranty*

In Count III, the Plaintiff alleges that the Defendants breached their warranty that the Newport cigarettes that they designed, manufactured, marketed, distributed, and sold were merchantable and fit for the ordinary purposes for which they were intended because they were carcinogenic, addictive, and contained dangerous levels of such substances as tar and nicotine. [11] See G.L. c. 106, § 2–314. As noted, the plaintiff's complaint in *Cipollone* alleged a claim of breach of *express* warranty. "While the general duty not to breach warranties arises under state law, the particular 'requirement ... based on smoking and health ... with respect to the advertising or promotion [of] cigarettes' in an express warranty claim arises from the *manufacturer's* statements in its advertisements." *Cipollone,* 505 U.S. at 526 (ellipses and alteration in original) (emphasis added).

Although the Plaintiff's claim is breach of an *implied* warranty rather than an express warranty, see Complaint, ¶ 59, the rationale against preemption is the same. The implied warranty of merchantability is arguably state-imposed given

the provision in G.L. c. 106, § 2–314 that "a warranty that the goods shall be merchantable is implied in a contract for their sale.... Goods to be merchantable must at least be such as ... are fit for the ordinary purposes for which such goods are used...." G.L. c. 106, § 2–314(1), (2)(c). Any implied warranty "based on smoking and health ... with respect to the advertising and promotion of cigarettes[,]" however, 15 U.S.C. § 1334(b), "arises from [the Defendants'] statements [implied or otherwise] in [their] advertisements." *Cipollone,* 505 U.S. at 526. Therefore, the *Defendants* created the implied warranty that the Plaintiff alleges they breached, and their liability will "derive[ ] from, and [be] measured by, the terms of that warranty." *Cipollone,* 505 U.S. at 525.

***7** Moreover, Count III essentially alleges that the Defendants breached the implied warranty of merchantability because Newport cigarettes were defectively designed. See *Johnson I,* 122 F.Supp.2d at 202. The FCLAA "does not preempt 'state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes.' " *Id.* at 201–202, quoting *Cipollone,* 505 U.S. at 523. Consequently, insofar as the Plaintiff alleges breach of the implied warranty of merchantability by defective design, the FCLAA does not preempt Count III.

D. *Count V—Battery*

In Count V, the Plaintiff alleges that Lorillard committed a battery by distributing Newport cigarettes to Evans when she was a child through free giveaways and by intentionally concealing the hazardous and addictive effects of smoking Newport cigarettes so that she was unable to appreciate the danger. Although, arguably, the giveaways Lorillard conducted constitute promotional conduct within the scope of 15 U.S.C. § 1334(b), they presumably fall outside the effective date of the FCLAA, June 30, 1969, given that they continued "for several years" after 1957. Complaint, ¶ 16. The FCLAA does not preempt this pre–1969 conduct.

Even assuming that the conduct that the Plaintiff complains of in Count V occurred after June 30, 1969, and concerns advertising or promotion, [12] however, the FCLAA still does not preempt the claims. In conducting preemption analysis under 15 U.S.C. § 1334(b), "[t]he appropriate inquiry is not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising and promotion." *Cipollone,* 505 U.S. at 525. The Plaintiff's Count V, read narrowly, appears to be predicated on a common-law prohibition of distributing cigarettes without disclosing to consumers the hazardous effects of smoking.

Cipollone, however, does not require such a narrow reading of Count V. In the context of the plaintiff's fraudulent misrepresentation claim, the Court held that, in enacting the FCLAA, Congress did not intend "to insulate cigarette manufacturers from longstanding rules governing fraud .... [or] to proscribe the regulation of deceptive advertising." *Id.* at 529. The Court reasoned that failure to analyze the plaintiff's fraud claim at this level of generality "would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the 'police regulations' of the States." *Id.* at 529 n.27; see *id.* at 529 n.26 (noting that FCLAA does not affect such "police regulations" as " 'the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings ...' " (quoting S.Rep. No. 91–566, at 12 (1969)).

The Court distinguished the plaintiff's fraud claim from its failure to warn claim and construed the latter claim narrowly, holding that to construe it generally "would render the 1969 amendments [to the FCLAA] meaningless and would pay too little respect to Congress' substantial reworking of the [FCLAA]." *Id.* Moreover, "[u]nlike state-law obligations concerning the warnings necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Id.* at 529. Therefore, a claim of battery is more like a claim of fraud in that it relies on the uniform standard of an offensive, non-consented-to touching rather than obligations concerning the required warnings. See *id.*

***8** Accordingly, to the extent that Count V concerns conduct occurring after June 30, 1969, the FCLAA does not preempt Count V.

E. *Count VI—Violations of G.L. c. 93A, § 9*

In Count VI, the Plaintiff alleges that the Defendants violated G .L. c. 93A, § 9, by Lorillard's misrepresentations of material facts with respect to the addictive and hazardous nature of Newport cigarettes, by Lorillard's failure to disclose facts to Evans which might have influenced her not to purchase Newport cigarettes, and by the Defendants' breach of the implied warranty of merchantability through their manufacture, distribution, and sale of Newport cigarettes in a defective condition that was unreasonably dangerous to

consumers, including Evans. The Defendants argue that the FCLAA preempts Count VI because it is a claim that the Defendants concealed information concerning the hazardous and addictive nature of Newport cigarettes. Such a claim, the Defendants assert, is the "converse" of a state law requiring such disclosure.

As with Count I, fraud and misrepresentation, this count is "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Cipollone,* 505 U.S. at 528–529. Additionally, as with Count III, because the alleged implied warranty was not state-imposed but was created by the Defendants, and to the extent it alleges a design defect, it is not within the scope of the FCLAA. Consequently, the FCLAA does not preempt Count VI.

F. *Count VII—Negligence*

In Count VII, the Plaintiff alleges that the Defendants owed Evans a duty to exercise reasonable care but that they breached that duty by failing to exercise reasonable care in their manufacture, marketing, distribution, and sale of Newport cigarettes, in Lorillard's distributing Newport cigarettes to children, including Evans, at giveaways, and by Lorillard's marketing Newport cigarettes to children, including Evans.[13] The Defendants argue that with this claim, the Plaintiff alleges that the Defendants undermined the awareness of the public, including Evans, through their advertising and through their concealment of information. Just as with Counts I and VI, however, this claim is "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* Therefore, the FCLAA does not preempt Count VII.

II. ***Judicial Notice***[14]

The Defendants argue that the hazardous and addictive natures of cigarette smoking is common knowledge, therefore any reliance by Evans on the Defendants' representations, false or otherwise, was unreasonable as a matter of law. Based on this theory, the Defendants seek to dismiss Counts I, III, V, VI, VII, and VIII.[15] A court may take judicial notice of facts or law "only when they are indisputably true. Matters of common knowledge or observation within the community may be judicially noticed because they so qualify." *Nantucket v. Beinecke,* 379 Mass. 345, 352 (1979). " 'Facts which ordinarily are not known without the aid of expert testimony or other proof cannot be said to be matters of common knowledge.' " *Commonwealth v. Hartman,* 404 Mass. 306, 313 n.9 (1989), quoting *Mady v. Holy Trinity Roman Catholic Polish Church,* 223 Mass. 23, 26 (1916). Additionally, "[j]udicial notice is not to be extended to personal observations of the judge or juror ." *Nantucket,* 379 Mass. at 352.

***9** The Defendants rely on *Wolf v. Philip Morris, Inc.,* Civil No. 99–1260B (Norfolk Super. Ct. June 21, 2001) (Lauriat, J.), and *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.,* 62 F.Supp.2d 236 (D.Mass.1999), for their argument that given that the risks of smoking have been common knowledge for decades, the Plaintiff cannot allege that Evans' reliance on Lorillard's alleged misrepresentations was reasonable. In *Massachusetts Laborers' Health & Welfare Fund,* the plaintiff's complaint acknowledged that, "starting in the 1950s and continuing to the present, the results of research linking smoking to cancer, emphysema, and other health problems have been well publicized." 62 F.Supp.2d at 242. In response to this "research already available to the public that indicated smoking was dangerous[,]" *id.,* the defendants "engaged in a conspiracy to conceal the harmful effects of smoking on health." *Id.* at 239. Therefore, it was "a fundamental premise of the plaintiff's claims that smoking is hazardous to health and that the defendants were trying to obscure that truth. *It follows that those who warned of the health risks of smoking must have been speaking the truth.*" *Id* . at 243 (emphasis added).

In that case, the plaintiff's complaint also indicated that the plaintiff was "confronted with inconsistent or contradictory representations...." *Id.* at 242. In such a situation, the plaintiff could not "reasonably rely on one side of the controversy without attempting to resolve the inconsistency or contradiction." *Id.* at 242–243. The plaintiff's complaint offered "no basis for concluding that it was *reasonable* for the plaintiff to rely on the defendants' information as opposed to the contradictory information from other sources also in the public domain." *Id.* at 243 (emphasis in original). The absence of this allegation of reasonableness in the complaint caused the court to dismiss the plaintiff's claims of fraud, misrepresentation, and deceptive trade practices rather than take judicial notice of the hazards of smoking. *Id.*

Although the Plaintiff in this case has alleged that the Defendants have known about the hazards and addictiveness of cigarette smoking, he has not contended that Evans knew of this information, or that it was in the public domain. See Complaint, ¶ 43 (alleging public access to material facts about

smoking, health, and addiction were "exclusively within [Lorillard's] control"). *Massachusetts Laborers' Health & Welfare Fund* therefore does not support the Defendants' request that this court take judicial notice.

This court is also not persuaded by *Wolf* to take judicial notice that the hazardous and addictive natures of cigarette smoking has been common knowledge at least since 1957. Like in *Massachusetts Laborers' Health & Welfare,* the plaintiff's complaint in *Wolf* "acknowledge[d] widespread reporting of the hazards of cigarette smoking beginning in the late 1950's." Civil No. 99–1260B, at 15. Unlike in *Massachusetts Laborers' Health & Welfare,* however, the court decided to take "judicial notice of the fact that the smoking of cigarettes poses serious health risks, including the risk of addiction, and that such risks have been generally known and recognized by the public as far back as the late 1930's...." *Id.* at 8. The court did not base this decision solely on the allegation in the plaintiff's complaint regarding the widespread reporting of the hazards of smoking. See *id.* at 15. Rather, the court also relied on "[well-]reasoned decisions ... [that] conclude[d], as a matter of law, that the dangers of smoking have long been common knowledge." *Id.* at 7, citing *Cipollone,* 505 U.S. at 513, *Allgood v. R.J. Reynolds Tobacco Co.,* 80 F.3d 168, 172 (5th Cir.1996), *Roysdon v. R.J. Reynolds Tobacco Co.,* 849 F.2d 230, 236 (6th Cir.1988), *Insolia v. Philip Morris, Inc.,* 53 F.Supp.2d 1032, 1037, 1040–1041 (W.D.Wis.1999), [16] *Paugh v. R.J. Reynolds Tobacco Co.,* 834 F.Supp. 228, 231 (N.D.Ohio 1993), *Ploch v. City of St. Louis,* 138 S.W.2d 1020, 1023 (Mo.1940), *State v. Olson,* 144 N.W. 661, 667 (N.D.1913).

***10** In *Johnson I,* similar to *Wolf,* the court held that it was "firmly convinced that the risks of smoking were quite clear to the population at large before 1969, ... [and that] the widespread publicity surrounding the 1964 report by the Surgeon General's advisory committee concerning the health risks of smoking was sufficient to charge all reasonable consumers with general knowledge of such health risks at least as of 1964." *Johnson I,* 122 F.Supp.2d at 204 (internal citations omitted), citing *Guilbeault v. R.J. Reynolds Tobacco Co.,* 84 F.Supp.2d 263, 273 (D. R.I.2000). The court took judicial notice in response to the plaintiff's allegation in his complaint that " '[a]t all times relevant to this matter, the ordinary consumer ... did not, in the exercise of ordinary diligence, know of the likelihood or the severity of the risks from using tobacco products....' " *Id.* (alteration and ellipses in original). The court concluded that the plaintiff's "claim that nearly all Americans were unaware of the health risks associated with smoking prior to 1969[was] simply without foundation ." *Id.*

This court does not accept, based on this court's (Lauriat, J.) holding in *Wolf* or the District Court's holding in *Johnson I,* that the health hazards and addictiveness of cigarette smoking have been common knowledge to Evans since a certain date. First, Evans began smoking Newport cigarettes sometime after 1957. This date is prior to the 1964 report of the Surgeon General's advisory committee stating that cigarette smoking is a health hazard, *Cipollone,* 505 U.S. at 513, and prior to the enactment of the 1965 version of the FCLAA mandating warnings on cigarette packages. *Id.* at 514. Second, the Plaintiff alleges that "[s]oon after ... Evans began smoking Newport cigarettes, she became addicted to smoking and struggled unsuccessfully to overcome a lifelong addiction to Newport cigarettes." Complaint, ¶ 21. Thus, by the time that these two events—the advisory committee's report and the requirement of warning labels on cigarette packages—occurred, Evans was already addicted. See, e.g., *Inzerilla v. The Am. Tobacco Co.,* Civil No. 11754/96, 2000 WL 34016364, *6 (N.Y.Sup.Ct. Oct. 27, 2000) (Berke, J.) (rejecting defendant's argument that "decedent knew or should have known of the carcinogenic risk of smoking from at least" the time when labels were required on cigarette packages "because it overlooks the element of addiction .... [meaning that] decedent allegedly learned of the carcinogenic properties of cigarettes at a time when addiction allegedly prevented her from acting upon that knowledge").

Moreover, even if this court were persuaded "to charge *all reasonable consumers* with general knowledge of such health risks" as of a certain date, see *Johnson I,* 122 F.Supp.2d at 204 (emphasis added), Evans was a child at the time she received Newport cigarettes at the giveaways and "a young teenager" when she began to smoke. See Complaint, ¶ 17. This court is not willing to hold that Evans is the "reasonable consumer" given the age at which she began to smoke, and given the explicit allegations in the Plaintiff's complaint that when Evans began smoking "and for years thereafter," Evans was unaware of the hazardous and addictive nature of cigarette smoking. *Id.* ¶ 19; see *id.* ¶¶ 27–28 (contending that Evans was influenced and confused by Lorillard's "campaign of misinformation" intended "to mislead the public about the health risks of smoking and to create controversy in the minds of smokers about the link between smoking and human disease"); see also *Fairneny,* 422 Mass. at 470 (requiring court to accept facts in complaint as true for purposes of motion to dismiss); *New England Insulation*

Co., 26 Mass.App.Ct. at 29 (holding that, on motion to dismiss, court must give complaint generous reading and give plaintiff benefit of doubt). Consequently, at this point in the litigation, this court will not take judicial notice of the fact that the hazards and addictiveness of cigarette smoking have been common knowledge to Evans, at least since she began smoking. [17]

III. ***The Plaintiff's Claims***

11** The Defendants also contend that the Plaintiff's complaint against them must be dismissed for failure to state a claim upon which relief can be granted because the Plaintiff cannot satisfy the essential elements of the claims. For the following reasons, the Defendants' motions to dismiss on these grounds are ***ALLOWED in part and ***DENIED*** in part.

A. *Count I—Fraud and Misrepresentation*

To state a claim for fraud and misrepresentation, the Plaintiff must establish " 'that [Lorillard] made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the [P]laintiff to act thereon, and that the [P]laintiff relied upon the representation as true and acted upon it to his damage.' " *Danca v. Taunton Savs. Bank,* 385 Mass. 1, 8 (1982), quoting *Barrett Assocs. v. Aronson,* 346 Mass. 150, 152 (1963); *Stolzoff v. Waste Sys. Int'l,* 58 Mass.App.Ct. 747, 759 (2003). Failing to disclose a material fact is also actionable as a misrepresentation. See *Danca,* 385 Mass. at 8. Lorillard argues that the Plaintiff has not satisfied the particularity requirements of Mass. Rule Civ. P. 9(b), and that the Plaintiff has not stated a claim for relief because he cannot establish that Evans relied upon the alleged representation as true. See *Equipment & Sys. for Indus ., Inc. v. Northmeadows Constr. Co., Inc.,* 59 Mass.App.Ct. 931, 932 (2003) (holding that although " 'plaintiffs need only surmount a minimal hurdle to survive a motion to dismiss for failure to state a claim[,]'.... [R]ule 9(b) heightens the pleading requirements placed on plaintiffs who allege fraud and deceit").

As an initial matter, the Plaintiff alleged that Lorillard promised the public, including Evans, to discover and disclose "the truth about cigarettes" in order to induce the public to trust Lorillard. *Id.* ¶ 45. "A statement on which liability for fraud may be based must be one of fact; it may not be one of ... matters promissory in nature." *Stolzoff,* 58 Mass.App.Ct. at 759. Lorillard's promise is therefore not actionable as a misrepresentation, and Lorillard's motion to dismiss Count I is ***ALLOWED*** as to this allegation.

1. *Mass. R. Civ. P. 9(b)*

Rule 9(b) of the Massachusetts Rules of Civil Procedure provides that, "[i]n all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity." In contrast, claims of "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Mass. R. Civ. P. 9(b). The allegations of fraud must be particular enough so "[t]here can be no question that the defendants were warned adequately concerning the particular statements which constituted the alleged fraud so that they could prepare their defense." *Friedman v. Jablonski,* 371 Mass. 482, 488–489 (1976). The Plaintiff must "allege who made the statements, their falsity[,] .... to whom the statements were made, the period during which they were made, that they were made to induce [Evans'] reliance, and that [Evans] did rely to [her] harm." *Id.* at 488.

***12** " '[A]lthough a bare statement that defendant's "fraudulent conduct harmed" plaintiff ..., standing alone, is insufficient, [r]ule 9(b) must be read with the [r]ule 8(a) mandate that the pleading contain a short and plain statement of the claim.' " *Lazzaro v. Holladay,* 15 Mass.App.Ct. 108, 110–111 (1983) (ellipses and second and third alterations in original), quoting James W. Smith & Hiller B. Zobel, Rules Practice, § 9.2 (1974). " 'Rule 9(b) does not require the claimant to set out in detail all of the facts upon which he bases his claim, nor does it require him to plead detailed evidentiary matter.' " *Id.,* quoting Smith & Zobel, supra. At the same time, however, "an oblique remark in the complaint suggest[ing]" the representation at issue was fraudulent does not satisfy Rule 9(b). *Charbonnier v. Amico,* 367 Mass. 146, 152 (1975).

The Plaintiff has alleged that at least since Evans first began smoking Newport cigarettes, Lorillard knowingly concealed information from the public, including Evans, in order to mislead and confuse the public about the hazardous nature of smoking Newport cigarettes. Complaint, ¶ 26. Although a failure to disclose can constitute a misrepresentation, the Plaintiff's allegation that Lorillard failed to make these disclosures "at the time [Evans] began smoking and for many years thereafter[,]" *id.,* is too vague to satisfy Rule 9(b)' s particularity requirement because it does not provide Lorillard with adequate warning concerning the omissions that constitute the alleged fraud so that it can prepare its defense. *Friedman,* 371 Mass. at 488. Lorillard's motion to dismiss Count I is therefore ***ALLOWED*** as to this allegation

that Lorillard failed to make material disclosures to Evans during the time she was a Newport cigarette smoker.

The Plaintiff further alleges that, "[a]t all times relevant to this Complaint, Lorillard knowingly made material misrepresentations and/or omissions to the public, including ... Evans about the link between smoking and various human diseases, and, in particular, misrepresented that nicotine is addictive." Complaint, ¶ 22. "Rather than acknowledging what it has known for years—namely, that the primarily, if not sole, function of nicotine is to provide a pharmacological effect on the smoker that leads to addiction—Lorillard has instead used various misleading euphemisms to conceal the true role of nicotine, such as 'satisfaction,' 'impact,' 'strength,' 'rich aroma,' and 'pleasure.' " *Id.* ¶ 23. Moreover, "very recently, top Lorillard executives have claimed falsely that nicotine is important in cigarettes for taste." *Id.* These allegations, too, do not satisfy Mass. R. Civ. P. 9(b)' s particularity requirement. The phrase "[a]t all times relevant to this complaint," *id.* ¶ 22, is too vague as that time period spans from 1957, when Evans first began attending Lorillard's free giveaways, to 2002, when Evans died. The phrase "very recently" similarly fails to provide the requisite particularity. See *id.* ¶ 23. [18] Additionally, the Plaintiff's list of "euphemisms" that Lorillard allegedly used to mislead the public also fail to satisfy Mass. R. Civ. P. 9(b) because, again, the Plaintiff does not indicate "the period during which they were made...." *Friedman,* 371 Mass. at 488. Lorillard's motion to dismiss these allegations is therefore ***ALLOWED.***

***13** The Plaintiff has also alleged that Lorillard ran print advertisements of attractive people smoking Newport cigarettes along with the phrase " 'fresher than any other menthol cigarette.' " Complaint, ¶ 18. The Plaintiff further alleged that the combination of the advertisement and the statement therein left Evans "confused about the health risks of smoking and unconvinced that smoking caused human disease until her heart attack in 1984." *Id.* ¶ 28. [19] Therefore, as a result of Lorillard's misinformation and failure to disclose the hazardous nature of smoking Newport cigarettes, Evans smoked Newport cigarettes for forty years. Evans died of lung cancer in 2002. According to the allegations in the Plaintiff's complaint, these print advertisements ran "when [Evans] was a teenager." *Id.* ¶ 18.

Evans was a teenager between the years 1961 and 1967. [20] This allegation is particular enough for Lorillard to prepare a defense as it specifies the statement, the locations of the statement, and the time range during which the advertisements containing that statement appeared in the magazines. See *Friedman,* 371 Mass. at 488–489. Accordingly, Lorillard's motion to dismiss Count I as to this allegation is ***DENIED*** because the allegation satisfies the particularity requirement of Mass. R. Civ. P. 9(b).

Finally, the Plaintiff alleges that in 1994 Tisch testified before Congress that nicotine is not addictive. This allegation similarly satisfies Mass. R. Civ. P. 9(b) as it sets forth who made the false statement intended to mislead the public, including Evans, and when the statement was made. Lorillard's motion to dismiss Count I is therefore ***DENIED*** as to this allegation.

2. *Reasonable Reliance*

As noted above, one of the required elements of a claim for fraud and misrepresentation is that the plaintiff "reasonably relied" on the defendant's misrepresentations. See *Robertson v. Gaston Snow & Ely Bartlett,* 404 Mass. 515, 523 (1989). Given this court's conclusions, above, this argument is only relevant with respect to Evans' reliance on Tisch's 1994 comments before Congress, Complaint, ¶ 3, and Evans' reliance on Lorillard's magazine advertisements showing attractive African–American men and women smoking Newport cigarettes and the phrase "fresher than any other menthol cigarette .' " *Id.* ¶ 18. "The question whether a party's reliance on a promise by another is reasonable is often a question of fact, but in an appropriate case can present an issue of law. This is especially so when the parties involved are of relatively equal knowledge and sophistication." *Cataldo Ambulance Serv., Inc. v. Chelsea,* 426 Mass. 383, 387 (1998); see *Moran v. Gala,* 66 Mass.App.Ct. 135, 141 (2006).

The Plaintiff explicitly alleged in his complaint that "Lorillard's knowledge of the material facts about smoking, health and addiction was vastly superior to the knowledge of ... Evans and other members of the general public who purchased, used and consumed Lorillard's cigarettes. Public access to these facts known by Lorillard has been exclusively within its control." Complaint, ¶ 43. [21] For purposes of a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), this court takes this allegation as true. *Fairneny,* 422 Mass. at 470. Therefore, as it is not "beyond doubt that the [P]laintiff can prove ... [a] set of facts in support of his claim which would entitle him to relief[,]' " Lorillard's motion to dismiss Count I for failure to state a claim of reasonable reliance is ***DENIED.*** *Nader,* 372 Mass. at 98, quoting *Conley,* 355 U.S. at 45–46.

B. *Count II—Voluntary Undertaking of a Duty*

***14** In Count II, the Plaintiff claims that Lorillard voluntarily undertook the duty of researching tobacco use and human health and of accurately and fully disclosing the results of its research to the smokers of Lorillard-brand cigarettes, including Evans. By failing to exercise reasonable care in performing that duty, the Plaintiff further alleges, Evans suffered physical harm beyond that which she would have experienced if Lorillard had not voluntarily undertaken this duty. Lorillard seeks to dismiss this claim because the Plaintiff cannot establish the essential elements of the claim.

" 'If a person voluntarily assumes a duty or undertakes to render services to another that should have been seen necessary for her protection, that person may be liable for harm caused because of the negligent performance of his undertaking.' " *Davis v. Westwood Group,* 420 Mass. 739, 746 (1995), quoting *Thorson v. Mandell,* 402 Mass. 744, 748 (1988). The mere fact that Lorillard voluntarily undertook the service of researching tobacco use and human health "is not sufficient to impose a duty. It must also be shown that either (a) the failure to exercise due care increased the risk of harm, or (b) the harm is suffered because of [Evans'] reliance on the undertaking." *Mullins v. Pine Manor Coll.,* 389 Mass. 47, 53–54 (1983); see Restatement (Second) of Torts § 323 (1965).[22] Where the voluntary undertaking is gratuitous, however, the only duty owed is "the duty to refrain from gross negligence." *Kolofsky v. Heath,* 370 Mass. 856, 856 (1976), citing *Wheatley v. Peirce,* 354 Mass. 573, 576 (1968).

> " 'Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care.... It is a heedless and palpable violation of legal duty respecting the rights of others.... Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure.' "
> *Christopher v. Father's Huddle Café, Inc.,* 57 Mass.App.Ct. 217, 230–231 (2003), quoting *Altman v. Aronson,* 231 Mass. 588, 591–592 (1919).

There is no need to determine whether the Plaintiff has stated a claim of gross negligence. The duties that Lorillard allegedly undertook were

> "to accept an interest in the public's health as a basic and paramount responsibility; to cooperate closely with those who safeguard the public health; to aid and assist the research effort into all aspects of tobacco use and human health; to continue to research and otherwise undertake all possible efforts to learn all the facts and to discover the truth about smoking and health; and finally, to disclose to the American public ... complete and accurate information about the effects of cigarette smoking on human health."

***15** Complaint, ¶ 51. The Plaintiff's complaint further asserts that Lorillard undertook this duty "to render such services [to research and disclose] recognizing that they were necessary for the protection of smokers of Lorillard-brand cigarettes, including ... Evans." Complaint, ¶ 52. Taking the allegations set forth in the complaint as true, *Fairneny,* 422 Mass. at 470, the duty Lorillard voluntarily undertook was not gratuitous but for the protection of smokers of Newport cigarettes, including Evans. See *Davis,* 420 Mass. at 746.

The Plaintiff has set forth sufficient facts in his complaint to state a claim that Lorillard failed to disclose the results of its research and that, as a result of this failure to disclose, Evans did not understand that cigarettes were hazardous and addictive and that the menthol in Newport cigarettes made them more hazardous than non-mentholated cigarettes. Therefore, Lorillard's motion to dismiss Count II is ***DENIED.***[23]

C. *Count III—Breach of Warranty*

In Count III, the Plaintiff alleges that the Defendants breached their implied warranty of merchantability. Pursuant to G.L. c. 106, § 2–314, "a warranty that the goods shall be merchantable is implied in a contract for the sale if the seller is a merchant with respect to goods of that kind." G.L. c. 106, § 2–314(1). For goods to be "merchantable" within the meaning of the statute, they must be "fit for the ordinary purposes for which such goods are used...." *Id.* § 2–314(2)(c).

Massachusetts equates "a breach of the implied warranty of merchantability that goods be 'fit for the ordinary purposes for which such goods are used,' G.L. c. 106, § 2–314(2)(c), with the sale of an 'unreasonably dangerous' product" as set forth in Restatement (Second) of Torts § 402A(1). [24] *Commonwealth v. Johnson Insulation,* 425 Mass. 650, 660 (1997) (internal citations in original); see *Haglund v. Philip Morris Inc.,* 446 Mass. 741, 746 (2006) ("Warranty liability is ... 'congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965).'"). "A product may be unreasonably dangerous because of a defect in design.... Alternatively, a product may be considered to be unreasonably dangerous because of the absence of an adequate warning, sufficient to alert those who may be sensitive to the product and to allow users to balance the risk of harm against the product's social utility." *Johnson Insulation,* 425 Mass. at 661; see *Haglund,* 446 Mass. at 747 ("Warranty liability may be premised either on the failure to warn ... or ... on defective design.").

The Plaintiff alleges that the Defendants breached the implied warranty of merchantability both by a design defect and an inadequate warning. First, the Plaintiff asserts that Newport cigarettes were defective and unreasonably dangerous to consumers such as Evans as a result of the dangerous levels of tar, nicotine, and other substances they contained. Had the Defendants adopted a reasonable alternative design, the Plaintiff further alleges, they could have avoided or, at the least, reduced the foreseeable risks the Newport cigarettes posed. Second, the Plaintiff contends that the Defendants breached this warranty by failing to give consumers an adequate warning, prior to June 30, 1969, of the health hazards and addictive properties of Newport cigarettes. The Defendants argue that, given the fact that the risks of smoking have been well-known since the time Evans began smoking, there is no duty to warn.

1. *Design Defect*

***16** The "essence" of a design defect theory "is that all products of a particular type are defective when they leave the manufacturer." *Smith v. Ariens Co.,* 375 Mass. 620, 626 (1978). Warranty liability as a result of a design defect therefore "focuses on the product's features, not the seller's conduct." *Haglund,* 446 Mass. at 747. Thus, "[t]o show that a defect is attributable to a manufacturer in a design defect action, therefore, the plaintiff must show that the defect existed at the time the product left the manufacturer." *Smith,* 375 Mass. at 626; see *Back v. Wickes Corp.,* 375 Mass. 633, 642 (1978) (stating that factors to be considered in evaluating adequacy of product's design include " 'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design' "). Liability results if the " 'conscious design choices fail to anticipate the reasonably foreseeable risks of 'ordinary' use." *Haglund,* 446 Mass. at 747–748, quoting *Back,* 375 Mass. at 642. The Defendants argue that the Plaintiff cannot state a design defect claim because the Plaintiff cannot establish that the Newport cigarettes Evans smoked were unreasonably dangerous, that there was a unique defect in the Newport cigarettes Evans smoked, and that there is a technically feasible alternative design.

Under the heading "Sale of Defective and Unreasonably Dangerous Products" in the complaint, the Plaintiff expressly states that the Newport cigarettes that the Defendants sold or distributed contained "disease-causing ingredients and nicotine in addictive amounts...." Complaint, ¶ 35. Moreover, the Plaintiff alleges that "Newport cigarettes are an inherently, abnormally and unreasonably dangerous product.... Defendants knew or should have known of the dangers inherent in the use of Newport cigarettes, and that ... Evans would be harmed by the foreseeable and intended use of these cigarettes." *Id.* ¶ 37. Newport cigarettes were unreasonably dangerous "because such cigarettes were carcinogenic, addictive, and contained dangerous levels of tar, nicotine and other substances." *Id.* ¶ 60.

In *Kyte v. Philip Morris Inc.,* the plaintiff's claim that defendant breached the implied warranty of merchantability was "not based on the proposition that all cigarettes are inherently defective, but rather on a claim that, because of their defective design, ... [the defendant's] cigarettes were inherently carcinogenic and addictive." 408 Mass. 162, 171 (1990). The fact that the plaintiff's complaint failed to "spell out what the design defect was that made [the defendant's] ... cigarettes carcinogenic and addictive" was not fatal to the plaintiff's claim, and the court denied the defendant's motion for summary judgment. *Id.;* see also *Johnson I,* 122 F.Supp.2d at 205 ("Although the overall 'thrust' of [plaintiff's] negligent design claim may be characterized as alleging that cigarettes as a whole are dangerous, it clearly pleads that [defendant's] tobacco was 'bad'.... [Thus, plaintiff] has ... sufficiently pled design defects specific to [defendant's] cigarettes as opposed to cigarettes in general."). [25] Here, too, the Plaintiff's claim

of breach of implied warranty of merchantability does not rely solely on the defects inherent in all cigarettes; rather, the Plaintiff claims that the dangerous levels of tar, nicotine, and other substances in Newport cigarettes constitute a design defect. This allegation is more detailed and "spell[ed] out" than the plaintiff's claim in *Kyte* on which the court declined to grant the defendant's motion for summary judgment. See 408 Mass. at 171; see also *Johnson I,* 122 F.Supp.2d at 205 (relying on *Kyte's* reasoning).

17** Additionally, "a plaintiff alleging negligent design must show the existence of a safer alternative design that can be implemented without undue cost." *Johnson I,* 122 F.Supp.2d at 206, citing *Colter v. Barber–Greene Co.,* 403 Mass. 50, 57 (1988). Although the plaintiff in *Johnson I* did not "specify any such alternative designs," the plaintiff "implie[d] that there was a safer alternative design available to [the defendant]" by listing in his complaint the several design defects in the defendant's cigarettes. *Id.* Similarly, the Plaintiff in this case has not specifically alleged safer alternative designs the Defendants could have implemented, but he implies that a safer alternative "presumably would have reduced tar and other carcinogens...." *Id.;* see *Fairneny,* 422 Mass. at 470 (holding that, on motion to dismiss, court must accept ast true complaint's well-pleaded factual allegations and any reasonable inferences in plaintiff's favor that may be drawn therefrom"). Accordingly, the Defendants' motions to dismiss Count III are ***DENIED insofar as Count III alleges that Newport cigarettes are defectively designed because of the high levels of tar, nicotine, and other substances that render them carcinogenic and addictive.

The Plaintiff's complaint also alleges that Lorillard "added menthol to its Newport cigarettes to facilitate the initiation of smoking and the development of a smoking habit in children[,]" and that Evans was "unaware until after her heart attack in 1984, that the addition of menthol made Newport cigarettes more dangerous to her health than non-mentholated cigarettes." Complaint, ¶ 20. The court in *Johnson v. Brown & Williamson Tobacco Corp.* ("*Johnson II* ") held that the plaintiff's argument that the defect was the presence of menthol failed "because the addition of menthol is the purpose and intention of menthol cigarettes, not a defect. [The defendant's] cigarettes are advertised as containing menthol and consumers buy them with full knowledge of that fact." 345 F.Supp.2d 16, 21 (D.Mass.2004); see Restatement (Second) of Torts § 402A, cmt. g.[26] The Defendants urge this court to adopt this holding and dismiss the Plaintiff's allegation.

This court declines to follow the First Circuit's holding in *Johnson II.* 345 F.Supp.2d at 21. That court rendered its decision after discovery, and with the benefit of a full summary judgment record that included expert opinions. See *id.* But see *Johnson I,* 122 F.Supp.2d at 205 (denying defendant's motion to dismiss plaintiff's design defect claim). Moreover, as discussed above, this court has declined to take judicial notice as to the hazardousness and addictiveness of cigarettes. Thus, at this point in the litigation, before there has been discovery and the retention of expert testimony, this court denies the Defendants' motions to foreclose the Plaintiff from proceeding on this claim. The Defendants' motions to dismiss Count III are therefore ***DENIED.***

2. *Failure to Warn*

***18** Section 2(c) of the Restatement (Third) of Torts: Products Liability § 2(c) (1998)

> "reaffirms the principle expressed in Restatement (Second) of Torts, ... at § 402A comment j, by stating that a product 'is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings ... and the omission of the instructions or warnings renders the product not unreasonably safe.' "

Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 21 (1998) (second ellipses in original). The Plaintiff limits his failure to warn claim to the period prior to June 30, 1969, see 15 U.S.C. 1334(b), alleging that the Defendants "failed to give users and consumers of Newport cigarettes ... an adequate warning of the health hazards and addictive properties of Newport cigarettes, all of which were known or should have been known to Defendants." Complaint, ¶ 61. The Plaintiff has stated a claim for relief in Count III as to this issue, therefore the Defendants' motions to dismiss Count III insofar as it alleges a breach of warranty as a result of a failure to warn prior to June 30, 1969, are ***DENIED.***

D. *Count IV—Public Nuisance*

In Count IV, the Plaintiff alleges that the Newport cigarette giveaways that Lorillard conducted around the area where Evans grew up constituted a significant interference with the public health and safety in violation of G.L. c. 270, § 6, and were therefore a public nuisance. Lorillard seeks to dismiss this claim arguing that the Plaintiff has no private

right of action under G.L. c. 270, § 6, and that the Plaintiff has not established that Lorillard interfered with a legally recognizable public right.

" 'A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing common injury.' " *Town of Hull v. Massachusetts Port Auth.,* 441 Mass. 508, 517 (2004), quoting *Connerty v. Metropolitan Dist. Comm'n,* 398 Mass. 140, 148 (1986), abrogated on other grounds by *Jean W. v. Commonwealth,* 414 Mass. 496 (1993). "To maintain a public nuisance action, a plaintiff must show that the public nuisance has caused some special injury of a direct and substantial character *other than that which the general public shares.*" *Connerty,* 398 Mass. at 148 (emphasis added), citing *Stop & Shop Cos. v. Fisher,* 387 Mass. 889, 894, 899 (1983). If the plaintiff does allege particularized harm, the plaintiff himself can "recover for injuries caused by a public nuisance...." *Id.* "Without such a particularized injury, however, the remedy for public nuisance must be sought by public authorities." *Id.*

The Plaintiff has demonstrated that Lorillard's conduct interfered with a public right, specifically G.L. c. 270, § 6, [27] which prohibits the distribution of cigarettes to any person under the age of eighteen. In *Planned Parenthood League of Mass. v. Bell,* the court held that the plaintiff "sufficiently state[d] a case in public nuisance" because it alleged that the defendant had interfered with the rights of its patients to obtain an abortion, a right " 'recognized as a substantive right under both the Federal and State Constitutions.' " 424 Mass. 573, 578 (1997), quoting *Planned Parenthood League of Mass., Inc. v. Operation Rescue,* 406 Mass. 701, 707 (1990). At this point in the litigation, the Plaintiff has therefore satisfied this burden.

***19** The Plaintiff has also sufficiently alleged particularized harm. In *Connerty,* the court found that the plaintiff "alleged facts sufficient to indicate he ... suffered harm more particularized than the harm suffered by the community at large." *Id.* Specifically, as a licensed clam digger, he "suffered harm to his livelihood ... [as] he was deprived of income by the [defendant's] pollution of the waters...." *Id.* at 148–149. In contrast, "the ordinary citizen was merely deprived of a cleaner harbor for a period of time." *Id.* at 149. Here, the Plaintiff has also alleged facts sufficient to state a claim that Evans suffered particularized harm. While the harm to the public was the distribution of Newport cigarettes to minors, Evans developed injuries to her health and eventually died of cancer. Thus, the Plaintiff has satisfied this burden as well.

Consequently, Lorillard's motion to dismiss Count IV is ***DENIED.***

E. *Count V—Battery*

In Count V, the Plaintiff claims that Lorillard's conduct constitutes a battery. Lorillard seeks to dismiss this count, arguing that Massachusetts law does not permit a battery claim based on lack of consent, and that the Count V lacks the specificity required for a claim based upon an allegation of concealment. " 'An actor is subject to another for battery if [a] he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and [b] a harmful contact with the person of the other directly or indirectly results....' " *Waters v. Blackshear,* 412 Mass. 589, 590 (1992) (alterations in original), quoting Restatement (Second) of Torts § 13 (1965). Thus, to state a claim for civil battery, the Plaintiff must allege that Lorillard's intentional act resulted in either direct or indirect contact with Evans that was either harmful or offensive.

Contact is harmful " 'regardless of consent. But an offensive ... [contact] is so only because of lack of consent.' " *Commonwealth v. Cohen,* 55 Mass.App.Ct. 358, 359 (2002), quoting *Commonwealth v. Burke,* 390 Mass. 480, 483 (1983) ("[I]t is the nonconsensual imposition upon one's person that makes a touching offensive and it is the offensiveness that makes the touching a battery."); see also *Commonwealth v. Parker,* 25 Mass.App.Ct. 727, 731 n.8 (1988) ("Physically harmful touching is a battery, and consent is immaterial. However, a nonharmful touching is a battery only if there is no consent."). The contact at issue in this case is Evans' smoking Newport cigarettes. Given her health problems arising from her addiction to Newport cigarettes, the contact was physically harmful. Evans' consent is therefore irrelevant.

Harmful or offensive contact is " 'intended if the act is done for the purpose of accomplishing the result or with knowledge that to a substantial certainty such a result will ensue....' " *Waters,* 412 Mass. at 590, quoting Harper F. James, Jr., & O.S. Gray, Torts § 3.3, at 272–273 (2d ed.1986). The Plaintiff has alleged that Lorillard added menthol to cigarettes in order to develop smoking habits in children. Complaint, ¶ 20. Lorillard therefore knew that adding menthol to cigarettes made the cigarettes more addictive.

***20** The "contact" that results from the act " 'may be direct, as by striking another, or it may be indirect, as by setting

in motion some force or instrumentality with the intent to cause injury.' " *Cohen,* 55 Mass.App.Ct. at 359, quoting *Commonwealth v. Dixon,* 34 Mass.App.Ct. 653, 654 (1993). Lorillard's act that resulted in Evans' sustaining physical harm was its addition of menthol to Newport cigarettes. By adding menthol to Newport cigarettes, Lorillard set in motion an instrumentality—Newport cigarettes, containing an ingredient that allegedly rendered them more addictive than non-mentholated cigarettes—with the intent to cause injury.

The Superior Court case, *Burke v. Chatbar, Inc.,* Civil No. 03–00423, 2004 WL 3218001 (Barnstable Super. Ct. Nov. 18, 2004) (Connon, J.), is instructive as to this claim. In *Burke,* the plaintiff sued the defendant employer and two co-workers for, in part, battery as a result of one of the defendant co-worker's actions. *Id.* at *1. Specifically, the plaintiff alleged that the defendant committed a battery by intentionally serving the plaintiff a sandwich containing a fried dish towel. *Id.* As a result of ingesting this "sandwich," the plaintiff went to the hospital where he was treated for nausea. *Id.* The court found that these facts were sufficient to deny the defendant's motion for summary judgment on that claim. *Id.* at *6. *Burke* serves as persuasive authority for the argument that a plaintiff has alleged a battery where the plaintiff has ingested something the defendant has given her when the defendant knows the item is physically harmful and the plaintiff does not know that the item is physically harmful.

The Plaintiff has accordingly stated a cause of action of civil battery, and Lorillard's motion to dismiss Count V is ***DENIED.***

F. *Count VI—Violations of G.L. c. 93A, § 9*

In Count VI, the Plaintiff alleges that the Defendants violated G .L. c. 93A, § 9, by Lorillard's misrepresentations of material facts with respect to the addictive and hazardous nature of Newport cigarettes, by Lorillard's failure to disclose facts to Evans which might have influenced her not to purchase Newport cigarettes, and by the Defendants' breach of the implied warranty of merchantability through their manufacture, distribution, and sale of Newport cigarettes in a defective condition that was unreasonably dangerous to consumers, including Evans. The Defendants first argue that this claim must be dismissed for the same reasons it argued that Counts I and III must be dismissed. While this court agrees that Count VI is based on conduct alleged in Counts I and III, this court found that both of those counts are viable. Therefore, the Defendants' motions to dismiss Count VI on those grounds are ***DENIED.***

The Defendants also argue that Count VI must be dismissed to the extent it alleges conduct that occurred prior to the effective date of G.L. c. 93A. "The effective date of G.L. c. 93A, § 2, inserted by St.1967, c. 813, § 1 (approved December 26, 1967), is March 26, 1968; and the effective date of G.L. c. 93A, § 9, inserted by St.1969, c. 960 (approved August 13, 1969), is November 13, 1969." *Lewis v. Ariens Co.,* 434 Mass. 643, 645 n.3 (2001). Therefore, the Defendants argue, any conduct that the Plaintiff alleges occurred prior to November 13, 1969, is not actionable under G.L. c. 93A.

***21** " '[A]ll statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations[.]' " *Goodwin Bros. Leasing, Inc. v. Nousis,* 373 Mass. 169, 173 (1977) (first alteration in original) quoting *Hanscom v. Malden & Melrose Gas Light Co.,* 220 Mass. 1, 3 (1914). Thus, " '[w]here it appears that the Legislature intended an act to be retroactive, this intent should be given effect in so far as the Massachusetts and Federal Constitutions permit.' " *Pielech v. Massassoit Greyhound, Inc.,* 441 Mass. 188, 192 (2004), quoting *St. Germaine v. Pendergast,* 416 Mass. 698, 702 (1993). "Where, however, the statute regulates practice, procedure or evidence, as distinguished from substantive rights, it will commonly be applied to actions already pending." *Id.,* citing *American Locomotive Co. v. Hamblen,* 217 Mass. 513, 515 (1914). It is undisputed that G.L. c. 93A concerns substantive rather than procedural rights and that the Legislature did not intend G.L. c. 93A to be retroactive.

As "the legislative intent is unequivocally clear ..., [G.L. c. 93A] ... operates prospectively, not retroactively." *Sentry Fed. Sav. Bank v. Co–Operative Central Bank,* 406 Mass. 412, 414 (1990). Accordingly, the Defendants' motions to dismiss Count VI are ***ALLOWED*** to the extent that Count VI concerns conduct that occurred prior to November 13, 1969. [28]

G. *Count VII—Negligence*

In Count VII, the Plaintiff alleges that the Defendants owed Evans a duty to exercise reasonable care but that they breached that duty by failing to warn and to make complete and accurate representations to the public, including

Evans, of the addictive and hazardous nature of Newport cigarettes, and by failing to exercise reasonable care in their manufacture, marketing, distribution, and sale of Newport cigarettes; in Lorillard's distributing Newport cigarettes to children, including Evans, at giveaways; and in Lorillard's marketing Newport cigarettes to children, including Evans. The Defendants argue that, insofar as Count VII is a claim for negligent design defect and negligent failure to warn, it should be dismissed for the same reasons as Count III; insofar as Count VII is a claim for negligent misrepresentation, the Plaintiff cannot establish Evans' reasonable reliance; insofar as Count VII is a claim for negligent entrustment, the Plaintiff cannot establish that Evans was ignorant of the dangers of smoking, and the Plaintiff has no private right of action under G.L. c. 270, § 6; and, insofar as Count VII is a claim for negligent marketing, it fails for the same reasons as Count V and negligent entrustment as it is duplicative of those claims.

1. *Negligent Failure to Warn and Negligent Design Defect*

***22** "[N]egligent failure to warn and failure to warn under breach of warranty are to be judged by the same standard: the reasonableness of the defendant's actions in the circumstances." *Hoffman v. Houghton Chem. Corp.,* 434 Mass. 624, 637 (2001). Moreover, "[it] is possible ... to bring a defective design claim predicated on a theory of negligence." *Haglund,* 446 Mass. at 747 n.9, citing *Uloth v. City Tank Corp.,* 376 Mass. 874 (1978). Furthermore, " '[a] defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true.' " *Id.,* quoting *Colter,* 403 Mass. at 61. Thus, "[a] defendant cannot be found to have been negligent without having breached the warranty of merchantability." *Id.,* quoting *Colter,* 403 Mass. at 61.

Above, in its conclusion concerning Count III, the Plaintiff's breach of warranty claim, this court held that the Plaintiff can proceed on his design defect claim and on his failure to warn claim. Accordingly, insofar as Count VII duplicates the allegations in Count III, the Defendants' motions to dismiss Count VII are ***DENIED.***

2. *Negligent Misrepresentation*

"A claim for negligent misrepresentation is ordinarily one for a jury, unless the undisputed facts are so clear as to permit only one conclusion." *Nota Constr. Corp. v. Keyes Assoc., Inc.,* 45 Mass.App.Ct. 15, 20 (1998); see Restatement (Second) of Torts § 552(1), cmt. e (1977). "Negligent misrepresentation differs from an action for fraud because 'liability for misrepresentation does not require a showing that the defendant even knew that the statements made were false or that the defendant actually intended to deceive the plaintiff.' " *Marram v. Kobrick Offshore Fund, Ltd.,* 442 Mass. 43, 59 n.25 (2004), quoting *Kitner v. CTW Transp ., Inc.,* 53 Mass.App.Ct. 741, 749 (2002); see *Nota Constr. Co.,* 45 Mass.App.Ct. at 20 (listing reasonable reliance among elements of negligent misrepresentation). The Plaintiff has limited this claim of negligent misrepresentation to Lorillard only, see Complaint, ¶ 84(c), therefore the Defendants' motions to dismiss Count VII are ***ALLOWED*** insofar as it alleges that defendants Garber, Melhado, and Franklin made negligent misrepresentations.

In Count VII, the Plaintiff has alleged that "Lorillard failed to exercise reasonable care in making representations and providing complete and accurate information to the public, including ... Evans, about smoking, health and addiction...." *Id.* As discussed above, the Plaintiff has also alternatively alleged that Lorillard knew that its representations to the public, including Evans, regarding the harmfulness and addictiveness of cigarettes were false and that it intended to deceive its customers. See Mass. R. Civ. P. 8(e)(2) (permitting party to "set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses"). [29] In the absence of any indication to the contrary, this court presumes that the Plaintiff's claim of negligent misrepresentation refers to the same alleged statements on which the Plaintiff's Count I relies. See Complaint, ¶ 82 ("Plaintiff restates and incorporates herein [Count VII] the foregoing paragraphs 1–80 of his Complaint."). Consequently, for the same reasons set forth above with respect to the Plaintiff's Count I allegations, Lorillard's motion to dismiss Count VII is ***ALLOWED*** in part and ***DENIED*** in part.

3. *Negligent Entrustment*

***23** "[I]n particular circumstances, a supplier may be liable for harm caused after the supplier has knowingly placed property in the hands of an incompetent person." *Kyte,* 408 Mass. at 169. A manufacturer, however, cannot be held "liable in negligence simply because some third party unlawfully placed that product in the hands of a minor and, as a result, the minor or some other person was harmed." *Id.* In his opposition to the Defendants' motions to dismiss, the Plaintiff explains that the challenged action that gives rise to this

claim of negligent entrustment is Lorillard's giveaways of Newport cigarettes to minors, including Evans; the Plaintiff's complaint does not allege that the other Defendants had any involvement in these giveaways. Therefore, insofar as Count VII alleges negligent entrustment against defendants Garber, Melhado, and Franklin, those defendants' motions to dismiss Count VII are ***ALLOWED.***

The Plaintiff alleges, therefore, that it is Lorillard itself that "knowingly placed property in the hands of an incompetent person." *Id.* The court in *Kyte* likens the placing of cigarettes in the hands of a minor to the sale of alcoholic beverages to a minor. *Id.,* citing *Michnik–Zilberman v. Gordon's Liquor, Inc.,* 390 Mass. 6, 10–11 (1983). In *Michnik–Zilberman,* the plaintiff alleged that the defendant liquor store sold liquor to a seventeen-year-old customer who, while driving after imbibing the liquor, struck and killed the plaintiff's husband. 390 Mass. at 7–8. "It is the rule of this Commonwealth that negligence on the part of a seller or supplier of alcoholic beverages may be shown by a sale or the furnishing of those beverages to a minor, as well as to an inebriated person, as each is proscribed by statute." *Id.* at 10, citing G.L. c. 138, §§ 34, 69. It is the sale of the alcoholic beverages to a minor that is the "evidence of negligence even if the minor is not intoxicated at the time of the transaction. It is the sale or furnishing alcohol itself which is critical." *Id.* (footnote omitted).

As noted above, "[w]hoever sells a cigarette, chewing tobacco, snuff or any tobacco in any of its forms to any person under the age of eighteen or, not being his parent of guardian, *gives* a cigarette, chewing tobacco, snuff or tobacco in any of its forms to any person under the age of eighteen" is in violation of G.L. c. 270, § 6, and subject to a fine. G.L. c. 270, § 6 (emphasis added). A free giveaway of cigarettes to persons under the age of eighteen therefore violates G.L. c. 270, § 6. See *id.* The court in *Kyte* held that the plaintiffs failed "to produce record support ... as to whether ... [defendant cigarette manufacturer] supplied cigarettes to minors through Store 24. [The defendant] produced record support for the proposition that it did not." *Kyte,* 408 Mass. at 170. For that reason, the court held that, as a matter of law, the plaintiffs could not prove their claim of negligent entrustment. *Id.* The court was therefore willing to recognize a cause of action of negligent entrustment based on the sale of cigarettes to minors.

24** Here, conversely, the Plaintiff has set forth facts in his complaint alleging that Lorillard gave Newport cigarettes to minors. Thus, insofar as Count VII alleges that Lorillard's free giveaways of Newport cigarettes constitutes negligent entrustment, the Defendants' motions to dismiss are ***DENIED.

4. *Negligent Marketing*

As with negligent entrustment, the Plaintiff limits this claim to Lorillard alone, specifically to Lorillard's marketing Newport cigarettes to target minors at the giveaways. The Plaintiff does not allege that defendants Garber, Melhado, and Franklin engaged in marketing, negligent or otherwise. Therefore, insofar as the Plaintiff claims Garber, Melhado, and Franklin are liable for negligent marketing, those three defendants' motions to dismiss Count VII are ***ALLOWED.***

In *Kyte,* as the plaintiffs did not argue that the defendant cigarette manufacturer was liable under a theory of negligent marketing, the court did "not consider how far, if at all, marketing that intentionally or negligently induced an incompetent to use a product could be the basis of a manufacturer's liability." *Id.* The court cited to *Killeen v. Harmon Grain Prods., Inc.,* 11 Mass.App.Ct. 20, 28 (1980), for the proposition "that a manufacturer's liability [for negligent marketing] might be based on the marketing of a product in a manner calculated to induce direct purchases by children whose use would involve an unreasonable risk of injury." *Kyte,* 408 Mass. at 170 & n.8.

In *Killeen,* the court noted that, "[p]resumably, the [defendant] manufacturer [did] not know of a sale to any particular customer[,] .... [and] [t]here was no evidence that [the products] ... were advertised, to children or otherwise." 11 Mass.App.Ct. at 28. Conversely, here, the Plaintiff has alleged that Lorillard marketed Newport cigarettes "in a manner calculated to induce direct purchases by children" by failing "to exercise reasonable care in marketing Newport cigarettes, including at Newport giveaways, by intentionally and/or negligently inducing minors, including ... Evans, to smoke samples of Newport cigarettes." Complaint, ¶ 84(e). Moreover,

> "[a] ... basis for a finding of negligence against a manufacturer would involve the manufacturer's marketing its product, through advertising, packaging, or distribution, in a manner calculated to induce direct

> purchases by children or others whose use of the product would involve an unreasonable risk of injury. Without such a basis a finding of liability would imply that the manufacturer is subject to a legal duty to guard, by warnings or otherwise, against his products' falling into the hands of children, *a duty which might reasonably be required with respect to a product that is particularly attractive to children and inherently hazardous* ... but which ... is not required with respect to such everyday objects as pins, needles, scissors, knives, toothpicks, or objects made of glass."

***25** *Killeen,* 11 Mass.App.Ct. at 28 (emphasis added).

Consequently, the Plaintiff has set forth a claim for negligent marketing of Newport cigarettes, and the Defendants' motions to dismiss Count VII on this basis are ***DENIED.***

H. *Count VIII—Wrongful Death*

Finally, in Count VIII, the Plaintiff contends that the Defendants' wrongful conduct caused Evans' death. The wrongful conduct the Plaintiff alleges includes the manufacture, distribution, and selling of Newport cigarettes with carcinogenic and other harmful substances and with an addictive amount of nicotine when reasonable alternative designs were feasible; the manufacture, distribution, and selling of a product in an unreasonably dangerous condition; the failure to warn Evans, prior to 1969, of the hazardous and addictive nature of smoking Newport cigarettes; Lorillard's distribution of Newport cigarettes through giveaways at which children, including Evans, received free samples; and Lorillard's intentional, willful, and/or reckless failure to disclose to Evans that Newport cigarettes were carcinogenic, addictive, and hazardous to human health and contained harmful substances. The Defendants allege that Count VIII is dependant on the viability of the Plaintiff's other claims, therefore this claim must be dismissed as well.

"General Laws c. 229, § 2, governs actions for recovery of damages arising from wrongful death." *Marco v. Green,* 415 Mass. 732, 735 (1993). Section 2 "establishes procedures for the recovery of damages the substantive right to which is anchored in the common law." *Id.,* citing *Gaudette v. Webb,* 362 Mass. 60, 71 (1972); see *Hallett v. Town of Wrentham,* 398 Mass. 550, 555 (1986) ("The wrongful death statute provides for a single action brought by the decedent's executor or administrator. The executor or administrator presents all claims by the designated beneficiaries for damages flowing from the wrongful death."). A party is liable under G.L. c. 229, § 2, if he "by his negligence causes the death of a person, or ... by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or ... is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death...." G.L. c. 229, § 2.

As noted, the Plaintiff alleges that the Defendants are liable for the wrongful death of Evans based on their negligence and their breach of warranty. These allegations concern the same issues set forth in the Plaintiff's claims of negligence (Count VII) and breach of the implied warranty of merchantability (Count III). Insofar as Count VIII arises out of the same conduct complained of in Counts III and VII, the Defendants' motions to dismiss Count VIII are ***DENIED.***

The Plaintiff also alleges that the Defendants are liable for the wrongful death of Evans based on their willful, wanton, and/or reckless conduct. " 'Wilful, wanton, or reckless' conduct is '*intentional* conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another.' " *Manning v. Nobile,* 411 Mass. 382, 387 (1991) (footnote omitted) (emphasis added), quoting *Commonwealth v. Catalina,* 407 Mass. 779, 789 (1990). The Plaintiff has alleged that, "[a]t all relevant times, [D]efendants knew or should have known that smoking Newport cigarettes is hazardous to human health, causes human diseases and his addictive.... Defendants knew or should have known of the dangers inherent in the use of Newport cigarettes, and that ... Evans would be harmed by the foreseeable and intended use of these cigarettes." Complaint, ¶¶ 36–37. Further, the Plaintiff has alleged that the Defendants willfully and knowingly violated G.L. c. 93A through their conduct. Accordingly, insofar as Count VIII alleges that the Defendants are liable for the wrongful death of Evans in violation of G.L. c. 229, § 2, as a result of their willful, wanton, and/or reckless conduct, the Defendants' motions to dismiss are ***DENIED.***

ORDER

26** For the foregoing reasons, the Defendants' motions to dismiss the Plaintiff's complaint are ***DENIED in full as to Counts II, III, IV, V, and VIII; the Defendants' motions to dismiss the Plaintiff's complaint are ***ALLOWED*** in part and ***DENIED*** in part as to Counts I, VI, and VII.

All Citations

Not Reported in N.E.2d, 22 Mass.L.Rptr. 91, 2007 WL 796175, 62 UCC Rep.Serv.2d 661

Footnotes

1 Of the Estate of Marie R. Evans

2 Garber Bros., Inc., George Melhado & Co., and Franklin Wholesalers, Inc.

3 Lorillard filed an extensive motion to dismiss; Franklin filed a separate motion to dismiss and also joined in the other Defendants' motions to dismiss; and Garber and Melhado filed a joint motion to dismiss indicating that they joined in Franklin's and Lorillard's motions to dismiss.

4 Lorillard made this promise through its trade association, the Tobacco Industry Research Committee.

5 The only statement relating to smoking and health that is "required on any cigarette package" is "the statement required by section 1333 of this title...." 15 U.S.C. § 1334(a). Section 1333 of title 15 of the United States Code requires that cigarette packages bear one of the following labels:

> "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide."

Id. § 1333(a)(1), (2), (3).

6 Although no Massachusetts state court has analyzed *Cipollone* in the context of an action against tobacco manufacturers, the Supreme Judicial Court analogized to the *Cipollone* Court's examination of the FCLAA in its own discussion of the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act in *Hochberg v. Zoecon Corp.,* 421 Mass. 456, 459–461 (1995).

7 Lorillard makes this argument specifically as to Counts I, II, V, VI, and VII; Franklin, which also joins in the other Defendants' motions to dismiss, makes this argument as to Count III specifically.

8 For purposes of the following analysis only, this court assumes that the Plaintiff's allegations are otherwise valid and state a claim for relief.

9 The plaintiff's separate failure to warn claim, to which the Court likened this fraudulent misrepresentation theory, alleged that the defendants 'failed to provide 'adequate warnings of the health consequences of

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cigarette smoking.' " *Id.* at 524. The Court held that the FCLAA did preempt the failure to warn claim to the extent that it "require[d] a showing that [defendants'] post–1969 advertising or promotions should have included additional, or more clearly stated, warnings...." *Id.*

10 Even if the alleged misrepresentations do not constitute advertising and promotion, the FCLAA does not preempt them. See *Cipollone,* 505 U.S. at 528–529.

11 In Count III, the Plaintiff also alleges that the Defendants breached this warranty prior to 1969 by failing to warn of the health hazards and addictive nature of Newport cigarettes. Given that the effective date of the FCLAA was June 30, 1969, there is no need to conduct a preemption analysis of these claims that occurred before that date.

12 To the extent that Count V concerns conduct that does not concern advertising or promotion, there is no preemption as 15 U.S.C. § 1334(b) is not triggered.

13 In Count VII, the Plaintiff also alleges that the Defendants breached their duty in their failure to warn and to make complete and accurate representations to the public, including Evans, of the addictive and hazardous nature of Newport cigarettes. The Plaintiff, however, expressly contends that this failure to warn occurred prior to 1969, thereby precluding the FCLAA from preempting this claim.

14 Just as with its FCLAA analysis, above, for purposes of this analysis only, this court presumes that the Plaintiff's claims are valid and state a claim upon which relief can be granted.

15 The Plaintiff's complaint is premised on the notion that Lorillard's addition of menthol in its Newport cigarettes rendered those cigarettes more hazardous to Evans' health and more addictive than non-mentholated cigarettes. See Complaint, ¶ 20. In particular, the Plaintiff also alleges that Lorillard marketed Newport cigarettes as " 'fresher than any other menthol cigarette[,]" Complaint, ¶ 18, that Lorillard "added menthol to its Newport cigarettes to facilitate the initiation of smoking and the development of a smoking habit in children[,] .... [and that] the addition of menthol made Newport cigarettes more dangerous to her health than non-mentholated cigarettes." *Id.* ¶ 20. Therefore, although the Defendants have not made this argument, an additional inquiry is whether this court should take judicial notice of the hazards and addictiveness of smoking *mentholated* cigarettes in particular, and not simply smoking cigarettes in general as the Defendants have asserted.

In *Johnson I,* in which the court considered the defendant's motion to dismiss, the plaintiff alleged that the decedent died as a direct result of smoking Kool brand cigarettes. 122 F.Supp.2d at 198. In a separate decision, the court later considered the defendant's summary judgment motion and noted that, in support of his "argument that Kool cigarettes have been defectively designed, [the plaintiff] offer[ed] the deposition testimony and affidavit of a [doctor] .... [who] allege[d] that the menthol in Kool brand cigarettes (and presumptively all menthol cigarettes) acts as an anesthetic and cough suppressant causing smoke to be held longer in the lungs. That results, he explain[ed], in the smoker receiving more nicotine." *Johnson v. Brown & Williamson Tobacco Corp.,* 345 F.Supp.2d 16, 19 (D.Mass.2004) ("*Johnson II* ").

This court is not prepared to take judicial notice of the fact that mentholated cigarettes are more hazardous and addictive than non-mentholated cigarettes at this point in the litigation. There is no allegation that this fact is common knowledge, especially given the court's holding in *Johnson II,* 345 F.Supp.2d at 19, that suggests that this fact cannot be known without the aid of expert testimony. See *Hartman,* 404 Mass. at 313 n.9 (precluding judicial notice where facts cannot be known without expert testimony or other proof). Accordingly, at this point in the litigation, this court will not take judicial notice of the fact that mentholated cigarettes are more hazardous and addictive than non-mentholated cigarettes.

16 Affirmed in part and reversed, on other grounds, in part by 216 F.3d 596 (7th Cir.2000).

17 Additionally, the Supreme Judicial Court recently reiterated that it has "previously taken judicial notice of a report by the Surgeon General of the United States released in May, 2004, that 'presents persuasive evidence that smoking [cigarettes] harms nearly every organ of the human body, causes many diseases and reduces the health of smokers in general.' " *Haglund v. Philip Morris, Inc.,* 446 Mass. 741, 750 (2006) (alteration in original), quoting *Aspinall v. Philip Morris Co.,* 442 Mass. 381, 388 n.16 (2004); see *American Lithuanian Naturalization Club, Athol, Mass., Inc. v. Board of Health of Athol,* 446 Mass. 310, 317–318 (2006) (relying on judicial notice taken in *Aspinall* for conclusions regarding "substantial health dangers caused by tobacco smoke to smokers and nonsmokers alike"). Evans died in 2002, thus this court's taking judicial notice of the 2004 Surgeon General report would be of no effect.

18 To the extent that this sentence refers to Tisch's 1994 comment before Congress, it survives Lorillard's motion to dismiss because, as discussed further below, the Plaintiff's allegation of fraud and misrepresentation based on Tisch's statement satisfies Mass. R. Civ. P. 9(b)/

19 For purposes of this Rule 9(b) discussion only, this court will assume that these facts constitute reasonable reliance. This element is discussed further, below, in the context of Lorillard's challenge of that element.

20 According to the Plaintiff's complaint, Evans died on June 20, 2002, at the age of fifty-four. Therefore, Evans was likely born in 1948 and was a teenager, age thirteen through age nineteen, from 1961 to 1967.

21 The Plaintiff contends that at the time Tisch allegedly made his statement before Congress, he was Lorillard's President and Chief Financial Officer. The court infers from this allegation that Tisch made this statement within the scope of his employment. See *Fairneny,* 422 Mass. at 470 (accepting as true all reasonable inferences arising from plaintiff's complaint).

22 Proposed Final Draft 1 of Restatement (Third) of Torts: Liability for Physical Harm § 42 (2005) provides

> "An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:
>
> (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or
>
> (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking."

Massachusetts has not expressly adopted this provision.

23 In a footnote, Lorillard argues that, because the Plaintiff bases Count II on statements "made in the course of the public dialogue on smoking and health, it fails for the independent reason that it is barred by the First Amendment." Lorillard Motion to Dismiss, at 35 n.10. This public dialogue "centered on 'evaluations and judgments' of scientific evidence." *Id.,* citing United States Department of Health, Education, and Welfare, United States Surgeon General's Advisory Committee, *Smoking and Health,* Forward (1964). At this stage of the litigation, this argument fails. Even if Lorillard's having undertaken this duty in the context of this "public dialogue" triggers First Amendment protection, this court is not prepared to take judicial notice of the fact that this "public dialogue" existed.

24 Restatement (Second) of Torts § 402A(1) provides,

> "One who sells any product in a defective condition unreasonably dangerous to the user of consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

25 These holdings requiring that the plaintiff make more than a general allegation that all cigarettes are inherently defective are consistent with Restatement (Second) of Torts § 402A, cmt. i, which provides, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.

26 Comment g states that a product is defective where it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) of Torts § 402A, cmt. g.

27 Section 6 of G.L. c. 270 provides,

> "Whoever sells a cigarette, chewing tobacco, snuff or any tobacco in any of its forms to any person under the age of eighteen or, not being his parent or guardian, gives a cigarette, chewing tobacco, snuff or tobacco in any of its forms to any person under the age of eighteen shall be punished by a fine of not less than one hundred dollars for the first offense, not less than two hundred dollars for a second offense and not less than three hundred dollars for any third or subsequent offense."

Contrary to Lorillard's argument, Count IV does not assert a private right of action under G.L. c. 270, § 6. The Plaintiff included that statute in his complaint in order to specify the public right with which Lorillard's conduct interfered.

28 The Plaintiff relies on *Commonwealth v. DeCotis,* 366 Mass. 234 (1974), for the argument that the determination as to whether G.L. c. 93A should be applied prospectively "must be made on a case-by-case basis and that retroactive application of Chapter 93A is appropriate when the conduct of which the plaintiff complains was already unlawful prior to the statute's enactment." Plaintiff's Consolidated Opposition to Defendants' Motions to Dismiss the Complaint, at 50 n.21. This court disagrees with the Plaintiff's reading of *DeCotis.*

In *DeCotis,* the court held that the defendants were not required to make payments to those individuals whose injuries occurred prior to the effective date of G.L. c. 93A, and that the defendants were entitled to a modification of the final decree to that effect. *DeCotis,* 366 Mass. at 244 n.8. The defendants, however, were only entitled to a modification as to those individuals who were injured prior to the effective date of G.L. c. 93A and who "did not have a right (*apart from G.L. c. 93A*) to" payment by the defendants. *Id.* (emphasis added). The individuals who were not entitled to payment from the defendants were therefore those whose injuries occurred prior to the effective date of G.L. c. 93A *and* whose only right to payment arose from G .L. c. 93A. *Id.* In order to ascertain which individuals were not entitled to payments, "a determination as to each such [individual's] rights [would] be required before the motion to modify [could] be acted on." *Id.*

29 This court acknowledges that it is logical that a claim for negligent misrepresentation must be dismissed where the defendant's misrepresentation was not negligent but was rather knowing and intentionally made

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to induce reliance. In Count VII, however, the Plaintiff has alleged that "Lorillard failed to exercise reasonable care [,]" Complaint, ¶ 84(c), and Mass. R. Civ. P. 8(e)(2) permits the Plaintiff to make alternative claims.

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2022 WL 877107
United States District Court, N.D. Texas, Dallas Division.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
MATCH GROUP, INC., Defendant.

Civil Action No. 3:19-CV-2281-K
|
Signed 03/24/2022

Attorneys and Law Firms

Reid Abram Tepfer, M. Hasan Aijaz, Matthew James Wilshire, Sarah Zuckerman, Pro Hac Vice, Zachary Alexander Keller, Federal Trade Commission, Dallas, TX, for Plaintiff.

Angela C. Zambrano, Sidley Austin LLP, Dallas, TX, Anna Tutundjian, Pro Hac Vice, Chad S. Hummel, Pro Hac Vice, Sidley Austin LLP, Los Angeles, CA, for Defendant.

MEMORANDUM OPINION AND ORDER

ED KINKEADE, UNITED STATES DISTRICT JUDGE

***1** Before the Court are: (1) Defendant Match Group, Inc.'s Motion to Dismiss ("Motion to Dismiss") (Doc. No. 20); (2) Plaintiff Federal Trade Commission's Motion to Exclude Matters Outside the Pleadings Pursuant to Fed. R. Civ. P. 12(d) ("Motion to Exclude") (Doc. No. 26); and (3) Plaintiff Federal Trade Commission's Motion for Leave to File Sur-Reply ("Motion for Leave") (Doc. No. 32). The Court has carefully considered each of the motions, the responses, the replies, the supporting appendices, the applicable law, and the relevant portions of the record.

For the reasons set forth in Section II, the Court **GRANTS in part and DENIES in part** Match Group, Inc.'s Motion to Dismiss. For the reasons set forth in Sections III and IV, the Court **DENIES** Plaintiff Federal Trade Commission's Motion to Exclude and Motion for Leave, respectively.

I. Factual and Procedural Background

Defendant Match Group, Inc. ("Match") is "the dominant online dating service provider in the United States" and it owns, operates, and controls Match.com. Compl. (Doc. No. 1) at 3, ¶¶10-11. Match "primarily generates revenue on Match.com by selling subscriptions to consumers in 25 countries, including the United States." *Id.* Consumers of online dating services, such as Match.com, are given access to the service's database of other users to find a romantic partner. *Id.* at 4, ¶13. Consumers create profiles containing certain information about themselves, and it is these profiles which other users are able to view. *Id.* at ¶14. Consumers are able to communicate with one another through various means; on Match.com this includes "likes", "winks" (until May 2018), and personalized "emails". *Id.* at ¶13; 6, ¶20. The types of communications a consumer can send and also read depend upon whether they are a subscriber or not. *Id.* at ¶¶20-21.

Plaintiff Federal Trade Commission (the "FTC") alleges that online dating services such as those Match owns, operates, and controls, are "often misused to facilitate fraud or to promote dubious or unlawful products or services to consumers." *Id.* at ¶15. This includes romance scams such as gifting or loaning the culprit money, stealing the consumer's personal information, and obtaining through extortion compromising videos or pictures of the consumer. *Id.* at ¶15; 5, ¶19. These schemes have allegedly resulted in substantial injury to consumers of online dating services. *Id.* at ¶16. The FTC alleges that, between 2015 and 2017, consumers reported to the FTC and the Federal Bureau of Investigation losses totaling an estimated $884 million. *Id.*

Match.com offers subscriptions in 1-, 3-, 6-, or 12-month packages, and all packages automatically renew. *Id.* at 5, ¶17. Consumers can also create a free "nonsubscriber" profile which gives them limited access to services. *Id.* Consumers using Match.com's services are not able to identify whether another user is a subscriber or nonsubscriber. *Id.* at ¶18. The FTC alleges that, from 2013 to mid-2018, nonsubscribers were unaware that "as many as 25-30 percent of Match.com members who registered each day were using Match.com to perpetrate scams." *Id.* at ¶19. The FTC alleges that Match knew, or suspected, certain users were engaging in fraud. *Id.* at 10, ¶36. Knowing that, Match allegedly used communications from these fraudulent accounts to induce nonsubscribers to purchase a subscription, touting the communications as romantic interest from a legitimate user, which then exposed these consumers to a "risk of falling victim to a romantic scam or other form of fraud" when accessing these fraudulent communications. *Id.* at 6-7, ¶¶22-26; 10, ¶34-37.

***2** The FTC also alleges that, until mid-2019, Match marketed a deceptive "match GUARANTEE" to users purchasing a six-month Match.com subscription service. *Id.*

at 11, ¶38. The "match GUARANTEE" promised these subscribers a free six-month subscription if they did not "meet someone special" during the paid six-month subscription. *Id.* at ¶39. Match "did not disclose that the guarantee is subject to any additional terms or conditions" even though several requirements set forth in "a lengthy 'Program Rules' section" must be satisfied in order to receive the guarantee. *Id.* at ¶¶40-43. The FTC alleges that few subscribers actually received a free six-month subscription because Match did not clearly state the requirements of the "match GUARANTEE" or the required process by which to claim it. *Id.* at 15-17, ¶¶46, 48, 51-52.

The FTC also alleges that Match has a confusing and complicated subscription cancellation process. Match.com subscriptions have a "negative option renewal", meaning the subscription automatically renews and the subscriber is charged unless he affirmatively cancels the subscription. *Id.* at 17, ¶¶53-54. The cancellation process allegedly has "several steps", including two pages of "survey questions", consumers must complete before reaching the actual confirmation cancellation page. *Id.* at ¶¶55-56. The FTC alleges this practice has resulted in Match billing "thousands of consumers" for subscription auto-renewals "after they believed they effectively canceled their Match.com subscriptions." *Id.* at 19, ¶58. The FTC also alleges Match has deceptive billing practices, in particular those related to Match.com billing disputes and access to paid-for subscription services or accounts. *Id.* at ¶¶61-63.

The FTC initiated action against Match directly in federal court. In filing this suit, the FTC alleges, generally, that Match violated 15 U.S.C. § 45(a) by: (1) misleading users that "dating communications" were sent from legitimate user accounts when Match knew the account was fraudulent or flagged for review as set up by a third-party for illegitimate purposes; (2) exposing legitimate customers to fraud because Match failed to investigate these fake accounts before sending notification of those communications; (3) offering a "money back guarantee" that was deceptive; and (4) unfairly denying customers access to paid-for accounts in relation to billing disputes. The FTC also alleges that Match violated the Restore Online Shoppers' Confidence Act ("ROSCA") in (5) failing to provide a simple way for customers to cancel recurring charges. In its Complaint, the FTC seeks injunctive relief, disgorgement, restitution, monetary civil penalties, costs, and any other relief to which it is entitled. Match filed the instant Motion to Dismiss in response to the Complaint. The FTC then filed its Motion to Exclude and Motion for Leave to file Sur-reply.

Before the Court ruled on those motions, Match filed a motion to stay the case pending the Supreme Court's resolution of a key issue before the Court in this case—whether the Federal Trade Commission Act (the "Act") permits the FTC to seek equitable monetary relief directly in federal court. *See generally* Mot. to Stay (Doc. No. 51). This Court granted the stay. *See* Order Staying Case (Doc. No. 54). The Supreme Court issued its decision in *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, — U.S. —, 141 S. Ct. 1341 (2021), on April 22, 2021. The Supreme Court held that Section 13(b) of the Act explicitly authorizes the FTC to seek injunctive relief in federal court, including, "in proper cases", a "permanent injunction", but this authorization does not extend to equitable monetary relief. *Id.* at 1344. The Act, as its currently written, does not authorize the FTC to obtain, or the courts to award, equitable monetary relief, including disgorgement and restitution. *Id.* at 1352.

***3** The Court turns now to the pending motions.

II. Match's Motion to Dismiss Under Rule 12(b)(6)

A. Applicable Law

1. Rule 12(b)(6) Standard

In considering a Rule 12(b)(6) motion, a court must determine whether the plaintiff has sufficiently stated a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6). A well-pleaded complaint must allege facts upon which the claims are based and not merely recite the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The facts must be sufficiently alleged such that the "claim has facial plausibility" and is not merely "possible". *Aschcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff pleads a claim with facial plausibility when the "factual content ... allows the court to draw the reasonable inference that the defendant is liable." *Id.* In other words, the alleged facts must nudge the plaintiff's claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Court "accept[s] all well-pleaded facts as true and view[s] those facts in the light most favorable to the plaintiff." *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007) (per curiam). The Court does not, however, "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron*

Corp., 484 F.3d 776, 780 (5th Cir. 2007) (quoting *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)).

The Court must generally determine a motion to dismiss for failure to state a claim based solely on the pleadings, including any attachments thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The Fifth Circuit also allows the district court to consider documents attached to the motion to dismiss when those documents "are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim." *Id.* at 498–99 (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)).

"Although dismissal under Rule 12(b)(6) is ordinarily determined by whether the facts alleged in the complaint, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings." *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986); *see also EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 470 (5th Cir. 2006) ("Although dismissal under rule 12(b)(6) may be appropriate on a successful affirmative defense, that defense must appear on the face of the complaint.").

2. Section 13(b) of the Federal Trade Commission Act

Section 45(a) of the Act prohibits "[u]nfair methods of competition ... and unfair or deceptive acts or practices in or affecting commerce[.]" 15 U.S.C. § 45(a)(1). This section also empowers the FTC to take action against such prohibited conduct. *Id.* § 45(a)(2). The FTC is authorized to enforce the Act through the FTC's own administrative proceedings and in court actions. *AMG Cap.*, 141 S. Ct. at 1346-47. Relevant to this case, the Act permits the FTC "in proper cases" to file an action directly in court seeking a permanent injunction. 15 U.S.C. § 53(b) (the "Section 13(b)"). When the FTC reasonably believes:

> ***4** (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC], and (2) that the enjoining thereof pending the issuance of a complaint by the [FTC] and until such complaint is dismissed by the [FTC] or set aside by the court on review, or until the order of the [FTC] made thereon has become final, would be in the interest of the public—
>
> The [FTC] by any of its attorneys designated by it for such purpose may bring suit in a district court of the United State to enjoin any such act or practice.... *Provided further*, That in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction.

Id.

3. Section 4 of the Restore Online Shoppers' Confidence Act

Recognizing the importance of consumer confidence to online commerce, Congress enacted the Restore Online Shoppers' Confidence Act ("ROSCA") in response to finding "that the aggressive sales tactics many companies use against their online customers have undermined consumer confidence in the Internet and thereby harmed the American economy." 15 U.S.C § 8401. Section 4 of ROSCA makes it unlawful to charge a consumer for goods or services sold online using a "negative option feature" unless the seller: (1) provides clear and conspicuous disclosure of all material terms of the transaction before obtaining the consumer's billing information; (2) obtains the consumer's express informed consent before charging the consumer; and (3) provides a simple method for the consumer to stop recurring charges. *Id.* § 8403. "Negative option feature" is defined as, "in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w).

B. Analysis

In its Motion to Dismiss, Match argues all five of the FTC's claims must be dismissed. Match first contends the Court must dismiss Counts I-IV because the FTC cannot bring them in federal court under Section 13(b) which is premised on the FTC's reasonable belief Match "is violating, or is about to violate" the law. Match asserts the FTC admits in its Complaint that the complained-of conduct has ceased and fails to allege specific facts that Match "is imminently resuming" the unlawful conduct. Next, Match contends equitable monetary relief is not authorized under Section 13(b) because that provision authorizes only injunctive relief. Third, Match submits it is entitled to immunity for Counts 1 and II under the Communications Decency Act ("CDA") which provides web-based service providers, like Match, immunity from liability for publishing third-party generated content. Finally, Match asserts the ROSCA claim fails as a matter of law because the FTC alleges only that

Match's online method for cancelling a subscription is not simple. Because the FTC fails to allege Match's other five cancellation methods are also not simple, the Court must dismiss the ROSCA claim.

The FTC responds first that it does plausibly allege a claim against Match under Section 13(b) based on the "likelihood to recur" standard used by the Fifth Circuit, which the Court must apply rather than the Third Circuit standard Match submits. Next, the FTC contends it is entitled to seek equitable monetary relief under Fifth Circuit precedent and this Court should not apply the conflicting Seventh Circuit law on which Match relies. On the third point, the FTC argues the CDA does not bar Counts I and II because the FTC seeks to hold Match liable only for Match's own conduct and the resulting harm, not that of any third-party, and for its actions taken in "bad faith". Finally, the FTC asserts it properly pled the ROSCA claim because it alleges conduct sufficient to find Match liable for a ROSCA violation. The FTC also contends that Match's argument and evidence regarding other available cancellation methods are not relevant at this stage. In its reply, Match maintains its arguments the FTC has not sufficiently pled any of its five claims and each must be dismissed.

***5** The Court has taken the well-pleaded facts as true and has viewed those in the light most favorable to the FTC as the plaintiff. The Court **denies** the Motion to Dismiss as to Counts I-IV on Match's argument that the FTC fails to allege plausible facts that Match "is violating" or "is about to violate" the law as required under Section 13(b). *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 723 (5th Cir. 1982); *see FTC v. Neora LLC*, 552 F. Supp. 3d 628, *6 (N.D. Tex. 2021)(Lynn, CJ.) ("Regarding the FTC's pleading burden, to plead that a defendant 'is violating, or is about to violate' under § 13(b), the FTC need only allege practices 'giving rise to a "fair inference of a reasonable expectation of continued violations" absent restrain.' ") (quoting *Sw. Sunsites*, 665 F.2d at 723); *see also Neora*, 552 F. Supp. 3d at *7 ("Accordingly, simply because the Complaint contains allegations of past violations does not mean that the FTC has not sufficiently alleged that similar violations are likely to reoccur. Instead, allegations of past violations must be assessed in [the] context of the FTC's other allegations, including the *Cornerstone Wealth* factors[.]"); *cf. United States v. Cornerstone Wealth Corp., Inc.*, 549 F. Supp. 2d 811, 816-17 (N.D. Tex. 2008)(Fitzwater, CJ.) (listing non-exclusive factors the court should consider in whether to issue a § 13(b) permanent injunction based on past violations of the law).

The Court also **denies** the Motion to Dismiss as to Count V of the FTC's Complaint based on Match's alleged violation of ROSCA. The Court looks only to the allegations contained in the Complaint; argument or evidence of other cancellation methods Match might offer but which are not alleged in the Complaint are not properly considered by the Court on the Motion to Dismiss. The FTC sufficiently pled Count V with facial plausibility as the "factual content ... allows the court to draw the reasonable inference that the defendant is liable." *Iqbal*, 556 U.S. at 678; *see also* 15 U.S.C. § 8403.

The Court turns now to the claims on which the Motion to Dismiss is **granted**.

1. Equitable Monetary Relief

In its Motion to Dismiss, Match asks the Court to find the FTC is not entitled to equitable monetary relief under § 13(b). The FTC argues in its Response such relief is permitted under Fifth Circuit caselaw and asks the Court deny Match's Motion to Dismiss this relief. Before the Court issued a ruling on the Motion to Dismiss, the Supreme Court granted certiorari to consider this exact issue and held that Section 13(b) does not authorize the FTC to seek, or a federal court to award, equitable monetary relief in an action filed directly in court. *AMG Capital*, 141 S. Ct. at 1344, 1352.

After issuance of the Supreme Court's decision, the parties filed a Joint Report with the Court explaining each party's position of the effect on this case. *See generally* Joint Report (Doc. No. 62). In that Joint Report, the FTC concedes the Supreme Court's *AMG Capital* decision "precludes this Court from awarding equitable monetary relief under Section 13(b)" which the FTC seeks in relation to Counts I-IV. Joint Report at 3. In light of the Supreme Court's holding in *AMG Capital*, the Court **grants** the Motion to Dismiss the FTC's claim for equitable monetary relief under Section 13(b) for Counts I-IV—the FTC has no authority to seek, and this Court is not empowered to award, any equitable monetary relief. The Court, therefore, **dismisses with prejudice** the FTC's claim for monetary relief.

2. Counts I and II—Immunity under Section 230 of the Communications Decency Act

A defendant is entitled to immunity under the Communications Decency Act (the "CDA") where: (1) the

defendant is "a provider or user of an interactive computer service"; (2) the plaintiff's claims treat the defendant as a "publisher" of the allegedly damaging information; and (3) that information was "provided by another information content provider". 47 U.S.C. § 230(c)(1). The CDA further provides that no liability attaches for any voluntary action taken in good faith by an interactive computer service provider "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.* § 230(c)(2).

***6** In its Motion to Dismiss, Match contends it is entitled to immunity under § 230. Case law in the Fifth Circuit is well-established that dismissal under Rule 12(b)(6) may be appropriate where an affirmative defense appears clearly on the face of the complaint. *Clark*, 794 F.2d at 970 ("[A] claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings."); *EPCO*, 467 F.3d at 470 ("Although dismissal under rule 12(b)(6) may be appropriate on a successful affirmative defense, that defense must appear on the face of the complaint."). Courts in the Fifth Circuit have determined the affirmative defense at issue here, § 230 immunity, is an appropriate basis for dismissal under Rule 12(b)(6). *See, e.g.*, *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017) (court found defendant was entitled to § 230 immunity and dismissed plaintiff's claims with prejudice under Rule 12(b)(6)); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014) (court found eBay was entitled to § 230 immunity and dismissed plaintiff's claims with prejudice under Rule 12(b)(6)); *Wells v. YouTube, LLC*, Civ. Action No. 3:20-CV-2849-BH, 2021 WL 2652966 (N.D. Tex. May 17, 2021), *adopting rec.*, 2021 WL 2652514 (June 28, 2021)(Scholer, J.) (court dismissed *pro se* plaintiff's claims with prejudice under Rule 12(b)(6) as barred by § 230 immunity); *Inge v. Walker*, Civ. Action No. 3:16-CV-0042-B, 2017 WL 4838981 (N.D. Tex. Oct. 26, 2017)(Boyle, J.) (on Rule 12(b)(6) motion, court dismissed with prejudice defamation claim against one defendant because defendant was immune under § 230 from any liability); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 8440858 (E.D. Tex. Jan. 18, 2006), *adopting rec.*, 2006 WL 3813758 (Dec. 27, 2006) (court dismissed plaintiffs' claims against defendant with prejudice on Rule 12(b)(6) motion having found requirements for § 230 immunity appeared on face of complaint); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, Civ. Action No. 3:02-CV-2727-G, 2004 WL 833595 (Apr. 19, 2004)(Fish, CJ.) (court considered § 230 immunity on defendants' Rule 12(b)(6) motion but found defendants did not meet requirements for immunity on face of complaint); *cf. Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) ("*MySpace II*") (affirming district court's dismissal of plaintiff's claims, having construed defendant's Rule 12(b)(6) motion as Rule 12(c) motion, because defendant was entitled to § 230 immunity).

For the following reasons, the Court agrees with Match and finds Match is entitled to § 230 immunity for both Count I and Count II as that affirmative defense appears clearly on the face of the FTC's Complaint.

a. Count I—"Misrepresentation Regarding Users of Defendant's Service"

Match argues § 230 bars Count I because the FTC seeks to hold Match liable for content provided by third-parties and for acting as the publisher of third-party information. 47 U.S.C. § 230(c)(1). Match also contends it is immune from any liability arising from its efforts to conduct fraud review as asserted in Count I.

1) Immunity Under Section 230(c)(1)

a) Provider of Interactive Computer Service

For § 230(c) to apply, Match must be a provider of an "interactive computer service". An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet...." *Id.* § 230(f)(2). Based on the briefing, it appears undisputed that Match is an "interactive computer service" provider for purposes of the CDA. Moreover, it is apparent from the Complaint that Match is an "interactive computer service" provider under the CDA. Compl. at 3, ¶10; 4, ¶12; *see also Beckman v. Match.com*, No. 2:13-CV-97JCM-NJK, 2013 WL 2355512, at *3-4 (D. Nev. May 29, 2013) (finding Match to be an "interactive computer service" provider), *rev'd on other grounds*, 668 F. App'x 759 (9th Cir. 2016).

b) Information from Another Information Content Provider

An interactive computer service provider has immunity under the CDA as long as it is not also the provider for the content in question. *GW Equity LLC v. Xcentric Ventures LLC*, Civ. Action No. 3:07-CV-0976-O, 2009 WL 62173, at *3 (N.D. Tex. Jan. 9, 2009)(O'Connor, J.) (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)); *see also Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (affirming "Congress's grant of 'broad immunity' [under § 230] to internet service providers 'for all claims stemming from their publication of information created by third parties,' which we and other circuits have consistently given wide scope."). The CDA defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

***7** In its Complaint, the FTC affirmatively alleges the advertisements Match sent were automatically generated when a communication was sent by one user to another. *See, e.g.*, Compl. at 6, ¶21; 7, ¶24; 9, ¶33. In support of Count I, the FTC alleges Match, "in numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of its online dating service, ... represented, directly or indirectly, expressly or by implication, that communications received by consumers using Match.com are from people interested in establishing a dating relationship with those consumers." Compl. at 20-21, ¶68. But, "[i]n truth and in fact, in numerous instances," these communications allegedly "are not from people interested in establishing a dating relationship with those consumers but are instead from fake accounts created by fraudsters to deceive consumers." *Id.* at ¶69; *see id.* at 4, ¶¶15-16 (alleging user profiles are set up by "perpetrators" to carry out "romance scams"). Match allegedly "used these fraudulent communications to induce consumers to subscribe to Match.com" to view them and also to communicate with sender, a supposedly legitimate user. *Id.* at 6, ¶23; 8, ¶27. Instead of genuine romantic interest, new subscribers sometimes either found a profile that was unavailable (with no indication it was fraudulent) or accessed a fraudulent communication. *Id.* at ¶28. In its advertisements, Match allegedly did not disclose that the communication or user account was flagged or identified as fraudulent. *Id.* at ¶29. The FTC alleges "hundreds of thousands of consumers" purchased a Match.com subscription "after receiving a fraudulent communication." *Id.* at 9, ¶32.

"[T]he immunity analysis turns on who was responsible for the specific harmful material at issue, not on whether the service provider was responsible for the general features and mechanisms of the service or content (such as advertisements) that might also have appeared on the service." *Bates*, 2006 WL 8440858, at *10. For Match to be the provider of the content at issue, the FTC must plausibly allege that Match "itself *authored or created* the content." *La'Tiejira*, 272 F. Supp. 3d at 994. No matter how artfully pled, it is clear from the Complaint that the underlying communication created by a third-party, a Match.com user, is truly "the specific harmful material at issue," not the automatically generated advertisement sent by Match.

The FTC alleges the advertisements themselves are deceptive because they incorrectly lead a consumer to believe a fraudulent communication was sent by a legitimate user seeking a romantic relationship and this misrepresentation induces the consumer to purchase a subscription. *See*, Compl. at 7, ¶24; 8, ¶26. The FTC does not allege that *every* advertisement was deceptive or that only fraudulent communications triggered an advertisement representing a user's romantic interest or including a subscription discount. In fact, the Complaint affirmatively (and repeatedly) asserts that these advertisements were *automatically* generated when a communication was sent from one user (without reference to legitimacy of the account) to another user. *See, e.g.*, Compl. at 6, ¶21; 7, ¶24; 9, ¶33 (emphasis added). By the FTC's own allegations, the advertisement could be deceptive only in the instance that a fraudulent or flagged account sent the communication and not every advertisement was triggered solely by those communications.

Without those fraudulent communications, there could be no harm to these consumers. *cf. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19-20 (1st Cir. 2016) (allegations treated defendant Backpage as publisher or speaker of third-party content where "there would be no harm to [plaintiffs] but for the content of the postings."). But the FTC does not allege Match "created or developed" the fraudulent or flagged communication that triggered the automatic advertisement. *see La'Tiejira*, 272 F. Supp. 3d at 994. Nor could the FTC make such allegations based on its other allegations that these fake accounts are created by "persons seeking to perpetrate scams." *See, e.g.*, Compl. at 6, ¶22. It is the fraudulent or flagged communication that caused an advertisement

to be deceptive based on these allegations and Match is not alleged to have had any hand in the creation of that content. *see Carafano*, 339 F.3d at 1124-25 (affirming that defendant Matchmaker.com could not be liable for fraudulent profile created by third party because it was that user, not Matchmaker.com, who supplied the information); *cf. Dryoff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (defendant did not "create or develop the posts that lead to Greer's death", it merely published the third-party content that injured Greer, and its recommendations and notifications are just tools, "not content in and of themselves.").

***8** Website features such as recommendations and email notifications are "the type of content-neutral tools" that are used "to facilitate the communication and content of others.... [and] are not content in and of themselves." *See, e.g.*, *id.* at 1096-98. Again, the FTC affirmatively alleges the advertisements Match sent were generated automatically when one user sent a communication to another user. Compl. at 6, ¶23; 7, ¶24-25; 9, ¶33. The Court is not persuaded by the FTC's attempt to distinguish *Dryoff* in arguing that these advertisements are not "content-neutral tools". Just as in *Dryoff*, these automatically generated advertisements, as alleged by the FTC, are a tool used by Match to assist users in communicating with each other. *See id.* That the advertisements allegedly include a message "touting" the communication was sent by a user having romantic interest and also a discount offer to "induce" a nonsubscriber to purchase a subscription package does not alter the analysis. The FTC "cannot plead around Section 230 immunity by framing these website features as content." *Dryoff*, 934 F.3d at 1098. These automatically generated advertisements are not themselves content.

The FTC argues that the advertisements "deliberately withheld" the third-party content apparently inferring that because Match did not include or copy the communication into the advertisement, it is content created solely by Match which takes the advertisement outside the scope of § 230(c)(1) immunity. Although creative, this argument is not persuasive. It is without merit and legal support. *Cf. id.* (holding that Ultimate Software acted as a publisher through its recommendations of user groups and notifications of communications sent by users). The FTC cannot get around its own allegations which undoubtedly place third-party content at the core of Count I; without the communication from a fraudulent or flagged account, there can be no harm to any consumer. *cf. Backpage.com*, 817 F.3d at 19-20 (allegations treat Backpage as publisher or speaker of third-party content where "there would be no harm to [plaintiffs] but for the content of the postings.").

As alleged in the Complaint, these advertisements are not content in and of themselves. Match used the advertisement to "help[ ] facilitate this user-to-user communication, but it did not materially contribute ... to the alleged unlawfulness of the content." *Dryoff*, 934 F.3d at 1099.

c) Publisher of Information from Another Information Content Provider

An interactive computer service provider is entitled to § 230 immunity if the plaintiff seeks to hold it liable as a publisher or speaker of information created by another information content provider, in other words a third-party. § 230(c)(1). Screening, blocking, monitoring, or editing allegedly harmful third-party content falls within "a 'publisher's traditional editorial functions,' " and a defendant is entitled to § 230 immunity for claims grounded in allegations of such conduct. *Bates*, 2006 WL 8440858, at *12 (quoting *Zeran v, Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)); *accord MySpace II*, 528 F.3d at 420; *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under Section 230."). The Fifth Circuit continues to affirm "Congress's grant of 'broad immunity' [under § 230] to internet service providers 'for all claims stemming from their publication of information created by third parties,' which we and other circuits have consistently given wide scope." *Google*, 822 F.3d at 220; *see MySpace II*, 528 F.3d at 418 ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of [third-party] user-generated content.") (collecting cases); *Diez v. Google, Inc.*, 831 F. App'x 723, 724-25 (5th Cir. 2020).

In Count I, the FTC seeks to hold Match liable for its advertisements that allegedly misrepresent the communication sent from a user "interested in establishing a dating relationship" with the consumer, but, "in numerous instances," it was sent from an account set up by someone with nefarious motives. Compl. at 20-21, ¶¶68-69. Despite the FTC's creative arguments to the contrary, the allegations ultimately rest on Match's efforts, or conversely failures, to screen these fraudulent accounts and their communications, particularly with respect to automatically

generated advertisements sent to nonsubscribers. and Match's failure to disclose or warn of a fraudulent or flagged account to consumers. *cf. Herrick*, 306 F. Supp. 3d at 590-91.

***9** "It would be impossible for service providers to screen each of their millions of postings for possible problems." *Zeran*, 129 F.3d at 331. The Court has already concluded the content at issue is created by third-parties, not Match. In truth, liability for Count I is predicated on alleged actions that Match took as a publisher performing traditional editorial functions, such as editing, screening, and removing content. *See id.*; *Dryoff*, 934 F.3d at 1098 ("By recommending user groups and sending email notifications, [defendant] ... was acting as a publisher of other's content."); *see also MySpace II*, 528 F.3d at 420 (claim based on MySpace's alleged failure to implement measures to prevent minor user from communicating with adult user who sexually assaulted her was simply "another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content.").

In its Response, the FTC cites *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006) in support of its argument that § 230 does not apply to these "deceptive" advertisements. Resp. at 27 fn. 19. The FTC submits that the *Anthony* court "held that where an online dating service's 'manner of presenting the profiles—not the underlying profiles themselves—constitute fraud, the CDA does not apply." *Id.* (quoting *Anthony*, 421 F. Supp. 2d at 1263). That court's actual determination is not as broad as the FTC implies. The plaintiff in *Anthony* alleged defendant "Yahoo! sent 'profiles of actual, legitimate former subscribers whose subscriptions had expired and who were no longer members of the service, to current members of the service.' " *Anthony*, 421 F. Supp. 2d at 1263. The plaintiff specifically "allege[d] that Yahoo! *creates* false profiles, not merely fails to delete them[ ]" and that Yahoo! sent "users false profiles for the purpose of luring them into renewing their subscriptions." *Id.* at 1262 (emphasis added). Based on those allegations, Yahoo! was not " 'the publisher or speaker' of the profiles" even though they were created by third parties because the plaintiff alleged Yahoo! manufactured false profiles and also misrepresented profiles that it knew to be false or no longer active. *Id.* at 1262-63.

Although the FTC attempts to characterize Match's conduct as akin to Yahoo! in *Anthony*, the FTC's allegations are in no way similar. The FTC does not allege Match created or manufactured fraudulent accounts. *But see, e.g.*, Compl. at 5, ¶19; 6, ¶22. Furthermore, the FTC simply does not allege Match deliberately generated advertisements upon communications sent *only* from fraudulent or flagged user accounts for the purpose of selling advertisements. Here, the FTC challenges *automatically generated* advertisements sent by Match which, by the FTC's own allegations, were triggered by any communication sent from one Match.com user to another. *See, e.g.*, Compl. at 6. The FTC does not allege that *every* advertisement was deceptive or that *every* communication which triggered an advertisement was deceptive. *But see, e.g.*, Compl. at 6 (alleges communications are sent from an illegitimate user "in many instances" and, between 2013 and 2016, more than half of certain communications were identified as fraudulent.). The FTC also does not allege the advertisement's representation of romantic interest was included only when a flagged or fraudulent account was involved. In fact, the Complaint affirmatively (and repeatedly) asserts that these advertisements were *automatically* generated when a communication was sent from one third-party user (without reference to legitimacy of the account) to another user. *See, e.g.*, Compl. at 6, ¶21; 7, ¶24; 9, ¶33 (emphasis added). As alleged by the FTC, the advertisement could be deceptive only in the instance that a fraudulent or flagged account sent the communication and not every advertisement was triggered solely by those communications.

***10** The FTC also argues the advertisement "deliberately withheld" the third-party content. The FTC appears to infer that because Match did not include or copy the communication into the advertisement, it is then truly content created solely by Match which takes the advertisement outside the scope of § 230(c)(1). This argument is without merit and legal support. *cf. Dryoff*, 934 F.3d at 1098 (holding that Ultimate Software acted as a publisher through its recommendations of user groups and notifications of communications sent by users). As alleged in the Complaint, third-party content is most certainly at the heart of Count I because without it, there could be no harm to any consumer. *see Backpage.com*, 817 F.3d at 19-20 (allegations treat Backpage as publisher or speaker of third-party content where "there would be no harm to [plaintiffs] but for the content of the postings.").

d) Conclusion

As alleged in the Complaint, the true basis for the FTC's claim is third-party content. *see La'Tiejira*, 272 F. Supp. 3d at 994; *Bates*, 2006 WL 8440858, at *11 ("In sum, because the [first amended complaint] affirmatively asserts that someone other than Defendant created and developed the particular unlawful and injurious photographs at issue in this case, those photographs as a matter of law constitute 'information provided by another information content provider.' "); *GW Equity LLC*, 2009 WL 62173, at *3 (an interactive computer service provider has immunity under the CDA as long as it is not also the provider for the content in question). The automatically generated advertisements, as alleged by the FTC, are not content created by Match such that it is the information content provider. The FTC does not plausibly allege Match materially contributed to the communications (or the user accounts sending them) which triggered the advertisements. At the end of the day, the FTC is seeking to hold Match liable for acting as a publisher of third-party content. *see Google*, 822 F.3d at 220 (affirming "Congress's grant of 'broad immunity' [under § 230] to internet service providers 'for all claims stemming from their publication of information created by third parties,' which we and other circuits have consistently given wide scope."); *MySpace II*, 528 F.3d at 418; *see also Dryoff*, 934 F.3d at 1098 (Section 230 immunity applies if the claims "inherently require[ ] the court to treat the defendant as the 'publisher or speaker' of content provided by another.") (quotations omitted). It is apparent from the face of the FTC's Complaint that Match is entitled to immunity under § 230 (c)(1) for Count I.

2) Immunity Under Section 230(c)(2)

Section 230(c)(2) provides, in relevant part, that no interactive computer service provider may be liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene ... or otherwise objectionable[.]" § 230(c)(2). Because immunity under § 230 (c)(1) applies, the Court need not reach the question of whether § 230 (c)(2) also bars Count I. However, if the Court were to consider whether § 230(c)(2) immunity applies, Match is immune to the extent the FTC seeks to impose liability on March for actions related to its fraud review process. *Id.*; *see also Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007) ("*MySpace I*"), *aff'd, MySpace II*, 528 F.3d 413 ("[T]he CDA also immunizes [interactive computer] services from liability based on efforts to self-regulate material.").

b. Count II—Exposing Consumers to Risk of Fraud

In Count II, the FTC alleges Match "exposed consumers to the risk of fraud by providing recent subscribers access to communications that [Match] knew were likely to have been sent by persons engaging in fraud." Compl. at 21, ¶71. The FTC alleges that Match's "actions cause or are likely to cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition." *Id.* at ¶72. In support of this claim, the FTC alleges that Match "screens users that send communications through Match.com to identify users that are likely to be perpetrating romance scams or other frauds." *Id.* at 9, ¶33. The FTC alleges that, from 2013 through mid-2018, Match exposed nonsubscribers to a fraud risk through its automatically emailed advertisements of "communications from fraud-flagged users" allowing them access to fraudulent or flagged communications upon subscribing "while withholding [fraud-flagged communications] from subscribers until [Match] had completed its fraud review." *Id.* at 10, ¶34. The FTC alleges "[w]ithout this practice, the vast majority of these fraud-flagged Match.com users would never have been able to contact their intended recipients." *Id.* at ¶35. Because of this "practice", the FTC alleges Match "delivered millions of advertisements to consumers touting communications that [Match] knew to be sent by users likely engaging in fraud and that those consumers would not have received had they already been subscribers to Match.com." *Id.* at ¶37. The FTC alleges that consumers who subscribed to Match.com in order to view these communications "were placed at risk of falling victim to a romance scam or other form of fraud." *Id.*

***11** An interactive service provider has immunity under the (c)(2) exemption for voluntary actions taken in good faith to block or screen offensive material. § 230(c)(2). Section 230(c)(2) "reflects Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all." *MySpace I*, 474 F. Supp. 2d at 850. It is apparent from the Complaint that the FTC seeks to hold Match liable for exposing nonsubscribers to potential fraud because they received notification of communications from fraud-flagged accounts before Match completed its fraud review process; in other words, the FTC challenges the fraud review process Match conducted for its subscribers as compared to

nonsubscribers. Match is clearly entitled to immunity on this claim under § 230(c)(2). *See id.* ("[T]he CDA also immunizes such services from liability based on efforts to self-regulate material."); *cf. Herrick*, 306 F. Supp. 3d. at 590 ("Herrick's claim that Grindr is liable because it failed to incorporate adequate protections against impersonating or fake accounts is just another way of asserting that Grindr is liable because it fails to police and remove impersonating [or fake] content.").

The FTC tries to argue around the § 230(c)(2) exemption in asserting that liability arises from Match's "own bad faith conduct" which is "precisely the opposite of the 'good faith' the CDA protects." Resp. at 29. The FTC also argues that Match designed "its platform to funnel fraud-flagged communications towards its nonpaying members to generate subscriptions." *Id.* By its allegations in its Complaint, the FTC takes aim at the fraud review process Match performed with respect to communications sent to subscribers but that Match did not likewise perform or complete for those sent to nonsubscribers. *See, e.g.*, Compl. at 10, ¶¶34-37. The FTC alleges Match withheld fraud-flagged communications from subscribers until a fraud review was completed, whereas Match's automatically generated advertisements notified nonsubscribers of the communication before the fraud review was done. *See, e.g.*, Compl. at 10, ¶34. The FTC raises allegations of bad faith and a system "to funnel potentially fraudulent messages to Match.com users" for the first time in its Response. Resp. at 31. Nowhere in the Complaint does the FTC allege Match "developed a system" or "designed its platform to systematically peddle false advertisements." *Id.* at 29 & 31. The FTC cannot amend its Complaint in the Response to the Motion to Dismiss. *see Cody v. Allstate Fire & Cas. Ins. Co.*, Civ. Action No. 3:19-CV-1935-K, 2021 WL 389768, at *7 (N.D. Tex. Feb. 3, 2021)(Kinkeade, J.) (citing *Skidmore Energy, Inc. v. KPMG LLP*, Civ. Action No. 3:03-CV-2138-B, 2004 WL 3019097, at *5 (N.D. Tex. Dec. 28, 2004)), *aff'd*, 19 F.4th 712 (5th Cir. 2021); *see Diamond Beach Owners Assoc. v. Stuart Dean Co., Inc.*, Civ. Action No. 3:18-CV-0173, 2018 WL 7291722, at *4 (S.D. Tex. Dec. 21, 2018) ("[I]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time."). Also, allowing the FTC leave to amend its allegations on this point would be futile because Match is nevertheless entitled to immunity on Count II based on § 230(c)(1) as discussed *infra*. Moreover, as discussed at length in the analysis on Count I, the FTC has alleged the advertisements were automatically generated by a communication sent from one user to another, not just those sent from fraud-flagged user accounts. The FTC has pled its best case on this claim. *see Wells*, 2021 WL 2652966, at *6.

Even so, the FTC's argument that Match acted in "bad faith" is merely semantics. Based on its own allegations, the FTC challenges Match's conduct related to its internal efforts to review user accounts for being fake. The FTC seeks to impose liability on Match for failing to conduct or complete its "fraud review" process before sending nonsubscribers advertisements of fraud-flagged communications thereby allowing them access to those communications. "It would be impossible for service providers to screen each of their millions of postings for possible problems." *Zeran*, 129 F.3d at 331. Congress chose to provide immunity for multiple reasons, including to avoid the "chilling effect" of service providers choosing to "severely restrict the number and types of messages" and "to encourage service providers to self-regulate the distribution of offensive material over their service." *Id.*; *see MySpace I*, 474 F. Supp. 2d at 850 ("[S]ection [230(c)(2)] reflects Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all."). Match is entitled to immunity for liability stemming from its actions (or inaction) in reviewing user accounts sending communications. *see Herrick*, 306 F. Supp. 3d. at 590 ("Herrick's claim that Grindr is liable because it failed to incorporate adequate protections against impersonating or fake accounts is just another way of asserting that Grindr is liable because it fails to police and remove impersonating [or fake] content."). Count II is barred by § 230(c)(2).

***12** Even if the Court agreed with the FTC that immunity under § 230(c)(2) does not apply, which it does not, Match would still be entitled to immunity for this claim under § 230(c)(1). In Count II, the FTC seeks to impose liability on Match for allegedly "expos[ing] consumers to the risk of fraud" in providing access to communications from third-party user accounts that were potentially fake. *See* Compl. at 21, ¶71. Such conduct goes to the heart of Match's "role as a publisher of online third-party-generated content." *MySpace II*, 528 F.3d at 420; *see also Bates*, 2006 WL 8440858, at *10 ("The case law confirms that the immunity analysis turns on who was responsible for the specific harmful material at issue, not on whether the service provider was responsible for the general features and mechanisms of the service or other content (*such as advertisements*) that might have also appeared on the service.") (emphasis added). The Court's detailed analysis on § 230(c)(1) immunity for Count I,

supra, applies equally here. Accordingly, Match is entitled to immunity on Count I under § 230(c)(1).

c. Conclusion

"Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of [third-party] user-generated content." *MySpace II*, 528 F.3d at 418. No matter how artfully pleaded, the FTC is attempting to impose liability on Match for content created and developed by third-party users of Match.com in both Counts I and II. Based on the allegations in the Complaint, Match is acting as a publisher of third-party generated content and is entitled to immunity under § 230(c)(1) on both Counts I and II. *see GW Equity*, 2009 WL 62173, at *3 (an interactive computer service provider has immunity under the CDA as long as it is not also the provider for the content in question). Furthermore, Match is entitled to immunity under § 230(c)(2) on both Counts I and II for any actions related to its fraud review process of user accounts. *MySpace I*, 474 F. Supp. 2d at 850 ("[T]he CDA also immunizes [interactive computer] services from liability based on efforts to self-regulate material."); *see Herrick*, 306 F. Supp. 3d. at 590 (defendant is entitled to immunity under § 230(c)(2) for claims arising from alleged failure to protect plaintiff against fake accounts because it goes to efforts to police and remove fake content).

It is apparent from the face of the Complaint that Match is entitled to § 230(c) immunity on both Counts I and II. Therefore, the Court **grants** the Motion to Dismiss and Counts I and II are **dismissed with prejudice**. *see La'Tiejira*, 272 F. Supp. 3d at 981.

3. Leave to Amend

In a single sentence of its conclusory paragraph, the FTC ask the Court to "provide the FTC leave to amend any deficiencies the Court may find." It is well established that a party seeking to amend a pleading under Rule 15(a) need not always file a formal motion but the party must "give the court some notice of the nature of his or her proposed amendments" and support the request for leave to amend with "*some* specificity" which is required. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). A plaintiff that simply "tack[s] on a general curative amendment request" in response to a motion to dismiss does not provide a sufficient basis for why the court should grant leave. *Goldstein v. MCI WorldCom*, 340 F.3d 238, 254 (5th Cir. 2003). "[A] bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which the amendment is sought, *cf.* FED. R. CIV. P. 7(b)—does not constitute a motion within the contemplation of Rule 15(a)." *U.S. ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 387 (5th Cir. 2003) (quotation omitted).

The Fifth Circuit has "not provided strict guidelines as to what constitutes a sufficient request for leave to amend," but that court has stated that "it is clear that *some* specificity is required." *see Thomas*, 832 F.3d at 590. A district court does not abuse its discretion in denying a plaintiff leave to amend where, as here, the plaintiff: (1) did not amend its complaint as a matter of right, (2) submitted a general curative request to amend its complaint in its response to the motion to dismiss, (3) did not submit a proposed amended complaint to the court, and (4) failed to provide "some specificity" to the court and defendant of the substance of its proposed amendment. *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 315 (5th Cir. 2002). For those same reasons, the Court denies the FTC's curative request to amend its Complaint. *See id.*; *see also Goldstein*, 340 F.3d at 254-55 (affirming denial of motion for leave to amend where plaintiffs stated only that "Should this Court find that the Complaint is insufficient in any way, however, plaintiffs respectfully request leave to amend.").

III. The FTC's Motion to Exclude

***13** The FTC filed a Motion to Exclude (Doc. No. 26) arguing that Match improperly included matters outside the pleadings with its Motion to Dismiss. The FTC submits five categories of improper representations: (1) "Match claims the wrong entity was sued"; (2) "Match claims to have 'permanently ceased' its unlawful conduct"; (3) "Match claims to offer alternative simple cancellation methods"; (4) "Match's claims about the FTC investigation"; and (5) "Match's generic praising of its own business and business practices". Mot. to Exclude at 3-8. In its response, Match agrees the Court should not rely on matters outside of the pleadings in deciding the Motion to Dismiss, and the FTC's Motion to Exclude should be denied because none of these matters must be considered by the Court in deciding the Motion to Dismiss. Resp. (Doc. No. 31) at 1.

The Court agrees with Match and **denies** this Motion to Exclude. Match does not ask the Court to take judicial notice of any matter, including within those five categories defined by the FTC. Furthermore, the Court did not take into

consideration any of these "matters" identified by the FTC in deciding the Motion to Dismiss. *see Collins*, 224 F.3d at 498 (court determines a motion to dismiss for failure to state a claim based solely on the pleadings, including any attachments thereto). For these reasons, the Court **DENIES** the Motion to Exclude.

IV. The FTC's Motion for Leave to File Sur-Reply

The FTC seeks leave to file a sur-reply to Match's Motion to Dismiss. *See* (Doc. No. 32). In this motion, the FTC contends that a sur-reply is necessary to: (1) address "a significant Fifth Circuit opinion" which raises "three issues critical to the Court's decision in this case"; and (2) Match raised a new argument in its reply "regarding the pleading standard for Section 13(b)". Mot. for Leave at 1. Match responds that the FTC is simply trying to get the "last word" on Match's Motion to Dismiss because there is no new relevant legal authority and Match did not raise a new argument in its reply. Resp. (Doc. No. 35) at 1.

Sur-replies are highly disfavored and permitted only in very limited circumstances. *Campoamor v. Cengage Learning, Inc.*, 3:09-CV-0921-M, 2010 WL 11618843, at *1 (N.D. Tex. June 10, 2010)(Lynn, J.); s*ee also* L.R. 7.1 (motion practice limited to response filed by nonmovant and reply filed by movant). A sur-reply may be permitted in the district court's discretion where the movant asserts new legal theories or evidence in its reply. *Williams v. Aviall Servs. Inc.*, 76 F. App'x 534, 535 (5th Cir. 2003); *Zurich Am. Ins. Co. v. Centex Corp.*, 373 F. Supp. 3d 692, 695 (N.D. Tex. 2016)(Godbey, J); *cf. Domain Vault LLC v. Rightside Grp., Ltd.*, 3:17-CV-0789-B, 2017 WL 4298133, at *1 (Sept. 28, 2017)(Boyle, J.) (sur-reply standard applies to motions other than just summary judgment). However, leave to file a sur-reply is not justified if the proposed sur-reply is simply a restatement of the arguments made in the party's response. *see Williams*, 76 F. App'x at 535. Moreover, arguments in a reply are not "newly asserted" if they were raised in the motion or are within the scope of the arguments contained in the response. *Campoamor*, 2010 WL 11618843, at *1; *accord Austin v. Kroger Tex. L.P.*, 3:11-CV-1169-B, 2016 WL 1322248, at *2 (Apr. 5, 2016)(Boyle, J.); *cf. Murray v. TXU Corp.*, 3:03-CV-0888-P, 2005 WL 1313412, at *4 (May 27, 2005)(Solis, J.) ("Assuming no new arguments were raised, the Court finds it nonsensical to believe a party must limit its research to previous briefings.").

The Court has carefully considered the Motion for Leave with the attached proposed sur-reply, the response, and the reply. The Court is not persuaded by either of the FTC's proffered reasons that a sur-reply is warranted. Rather, the Court agrees with Match and concludes that the proposed sur-reply is nothing more than the FTC's attempt to get the "last word." *see Murray*, 2005 WL 1313412, at *4 ("Plaintiff simply wants an opportunity to continue the argument."). The Court **denies** the FTC's Motion for Leave

V. Conclusion

***14** The Court **grants** Defendant Match Group, Inc.'s Motion to Dismiss as to the claim for equitable monetary relief in Counts I-IV. The Court also **grants** Defendant Match Group, Inc.'s Motion to Dismiss Counts I and II because Match is entitled to immunity under 47 U.S.C. § 230 of the Communications Decency Act, thus those claims are barred and **dismissed with prejudice**. Defendant Match Group, Inc.'s Motion to Dismiss is **denied** in all other respects. The Court **denies** Plaintiff Federal Trade Commission's Motion to Exclude. The Court also **denies** Plaintiff Federal Trade Commission's Motion for Leave to File a Sur-reply.

The Court hereby **lifts the stay** in this case.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 877107, 2022-1 Trade Cases P 82,047

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2012 WL 13418361
Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

Sarah JONES, Plaintiff-Appellee,
v.
DIRTY WORLD ENTERTAINMENT RECORDINGS LLC, dba Thedirt.com; Dirty World Entertainment, LLC, dba Thedirty.com, Defendants, Hooman Karamian, aka Nik Richie, aka Corbin Grimes; Dirty World, LLC, dba Thedirty.com, Defendants-Appellants.

No. 12-5133
|
FILED May 9, 2012

Attorneys and Law Firms

Eric C. Deters, Law Office, Independence, KY, Geoffrey Parker Damon, Law Office, Cincinnati, OH, Charles T. Lester, Jr., Law Office, Fort Thomas, KY, for Plaintiff-Appellee.

Alexander C. Ward, Huddleston Bolen, Ashland, KY, David S. Gingras, Law Office, Phoenix, AZ, Alexis B. Mattingly, Huddleston Bolen, Huntington, WV, for Defendant-Appellant Dirty World, LLC.

Before: KENNEDY, SILER, and SUTTON, Circuit Judges.

ORDER

***1** The defendants in this defamation and invasion-of-privacy case claim they are immune from suit pursuant 47 U.S.C. § 230(c), a part of the Communications Decency Act of 1996 ("CDA"). They appeal the district court's denial of their motion for summary judgment on grounds of immunity. The plaintiff moves to dismiss the appeal for lack of appellate jurisdiction. The defendants oppose the motion.

This court has jurisdiction in appeals from final orders and decisions of the district court. 28 U.S.C. § 1291. A decision is final if it disposes of all claims and parties on the merits and leaves nothing for the district court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). An order denying summary judgment does not dispose of all claims in the action and thus is not final for purposes of appeal under § 1291. The defendants, however, maintain that an order denying § 230 immunity is immediately appealable pursuant to the collateral order doctrine. Under the collateral order doctrine established by *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), "an order is appealable under Section 1291 if the order (1) conclusively determines a disputed issue; (2) resolves an issue separate from the merits of the action that is too important to be denied review; and (3) will be effectively unreviewable on appeal from a final judgment." *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444 F.3d 462, 472 (6th Cir. 2006).

Assuming that the CDA does, in fact, offer providers of an interactive computer service immunity from suit, it is still necessary to determine if an immunity claim under the CDA is sufficiently important to warrant an immediate appeal. *See Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866 (1994). "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction of it[.]' " *Id.* at 867 (citations omitted). Only some orders denying an asserted right to avoid the burdens of trial qualify for immediate review. "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will v. Hallock*, 546 U.S. 345, 353 (2006) (citation omitted).

Although the defendants have invoked their alleged right not to stand trial under the CDA, they have failed to demonstrate how a substantial public interest will be imperiled by delaying their appeal until after the district court enters a final order. *See Kelly v. Great Seneca Fin. Corp.*, 447 F.3d 944, 948 (6th Cir. 2006). "The Supreme Court did not say that denials of all forms of absolute immunity, regardless of the function that the invoking litigant served, were immediately appealable." *Id.* We are not persuaded that the purpose or function of the CDA will be imperiled by delaying an appeal in this particular case.

***2** The motion to dismiss is **GRANTED**.

All Citations

Not Reported in Fed. Rptr., 2012 WL 13418361

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2014 WL 949830
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

MOVING AND STORAGE, INC., d/b/a Neighbors Moving and Storage, Mbm Moving Systems, Llc, Colonial Van Lines, Inc., Father & Son Moving And Storage, American Van Lines, Inc., and Nationwide Relocation Services, Inc., Plaintiffs,
v.
Martin PANAYOTOV, Stoil Andreev, Xpress Movers, LLC, Advanced Interactive, LLC, and World Media Group, LLC, Defendants.

Civil Action No. 12–12262–GAO.
|
Signed March 12, 2014.

Attorneys and Law Firms

Lorri Lomnitzer, The Lomnitzer Law Firm, P.A., Boca Raton, FL, Scott McConchie, Sherin and Lodgen LLP, Boston, MA, for Plaintiffs.

George C. Rockas, Kara G. Thorvaldsen, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Boston, MA, for Defendants.

OPINION AND ORDER

O'TOOLE, District Judge.

***1** This case arises out of the defendants' operation of the moving company review website MyMovingReviews.com. The individual defendants, Martin Panayotov and Stoi l A ndreev, are officers or owners of the corporate defendants, Xpress Movers, LLC, Advanced Interactive, LLC, and World Media Group, LLC. The plaintiffs, all corporations providing moving services, allege that the defendants deleted positive customer reviews of the plaintiffs and deleted negative customer reviews of Xpress Movers in order to gain market share, all the while maintaining that the website was neutral in its operation. The plaintiffs assert various tort and statutory claims arising from the alleged conduct, and they also claim that the defendants committed copyright and trademark infringement by using content and logo designs taken from the plaintiffs' websites onMyMovingReviews.com without permission.

Defendant Panayotov moves to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing primarily that he is immune from suit under the Communications Decency Act ("CDA"), 47 U.S.C. § 230. The remaining defendants have also moved to dismiss, incorporating by reference Mr. Panayotov's motion and memorandum in support.

I. Legal Standard

In evaluating a motion to dismiss, the Court must take "all the factual allegations in the complaint as true." *Maldonado v. Fontanes,* 568 F.3d 263, 266 (1st Ci r.2009) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). However, "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Court need not "accept as a true a legal conclusion couched as a factual allegation." *Id.* (quoting *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). The Court may "begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 664.

II. Discussion

A. Communications Decency Act

Defendant Panayotov contends that Counts I through IV [1] of the Amended Complaint are barred by the Communications Decency Act ("CDA"). Section 230(c)(1) of the CDA states, in relevant part:

> (1) Treatment of publisher or speaker No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. Under the CDA, a defendant:
>
> > is immunized from a state law claim if: (1) [the defendant] is a "provider or user of an interactive computer service"; (2) the claim is based on "information provided by another information content

provider"; and (3) the claim would treat [the defendant] "as the publisher or speaker" of that information.

***2** *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir.2007).

There is no dispute that the defendants provide an "interactive computer service" via the MyMovingReviews.com website. *See id.* at 419 ("[W]eb site operators ... are providers of interactive computer services within the meaning of Section 230.").

As to the second element, the plaintiffs contend that their claims are not based on information provided by *"another* information content provider," which in this case would be reviews by third-party customers. I agree. The plaintiffs' claims do not arise from the content of the reviews, whether they be disparaging, laudatory, or neither, but instead, the defendants' alleged ill-intentioned deletion of positive reviews of the plaintiffs' moving companies and deletion of negative reviews of their own company, coupled with various representations—that the website offers "accurate" data, that it is "serious about reviews quality," and that readers "see the most accurate and up to date rating information to base your decision on." The manner in which the information is presented, or withheld, is the conduct at issue, as well as the allegedly misleading ratings which result from such alleged manipulations. Such conduct provides substantial basis to find that the defendants were developers of the alleged misinformation.[2] Cf. *id.* at 420 (holding that website operator was not responsible for the creation or development of the alleged misinformation where the plaintiffs alleged only that the defendant "may have made it marginally easier for others to develop and disseminate misinformation").

Likewise, the plaintiffs do not seek to treat the defendants as the publisher or speaker of the third-party reviews. Rather, the plaintiffs treat the third-party customers as the publishers or speakers and bring "causes of action based not on [the defendants'] publishing conduct but on [their] representations regarding such conduct, [which] would not be immunized under [the CDA]." *Levitt v. Yelp! Inc.*, 2011 WL 5079526, at *9 (N.D.Cal.2011).

As the three elements giving rise to immunity under Section 230(c)(1) have not been satisfied, the defendants are not immune from suit under that subsection of the CDA.

With regards to Mr. Panayotov's contention that the website merely filtered out inaccurate or otherwise suspect material, including reviews not submitted by real customers, the applicable provision of the CDA is Section 230(c)(2), which states:

(2) Civil liability

(A) No provider or user of an interactive computer service shall be held liable on account of—any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2). This subsection requires a showing of good faith. As the plaintiffs have sufficiently alleged bad faith, the issue cannot be appropriately decided at this stage. It is better resolved on a developed factual record.

***3** For these reasons, the CDA does not mandate dismissal of any of the claims at this time.

B. False Advertising and Unfair Competition; Chapter 93A (Counts I, II, III)

The plaintiffs bring claims for false advertising and unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), and state common law, as well as a claim for violation of M.G.L. Chapter 93A. These claims arise from the allegations that the defendants made various misrepresentations on the website MyMovingReviews.com, including the allegedly false claim that it was accredited by the Better Business Bureau and the alleged misrepresentations about the accuracy and reliability of the customer reviews. Taking all factual allegations in the Amended Complaint as true, I conclude that these claims are adequately pled.

C. Tortious Interference (Count IV)

To prevail on a claim for tortious interference with business relationships under Massachusetts l aw, a plaintiff must prove the following:

(1) a business relationship or contemplated contract of economic benefit;

(2) the defendant's knowledge of such relationship;

(3) the defendant's interference with the relationship through improper motive or means; and,

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(4) the plaintiff's loss of advantage as a direct result of the defendant's conduct.

Singh v. Blue Cross/Blue Shield of Mass., Inc., 308 F.3d 25, 47 (1st Ci r.2002) (citations omitted). The plaintiffs here allege that their "customers and prospective customers are misled into believing that Plaintiffs' services are poorly rated and reviewed on Defendants' website, through Defendants' conduct of removing negative reviews concerning Plaintiffs and posting fictitious negative reviews," and also "misled into believing that Defendants' services are positively rated and reviewed due to Defendants' conduct in removing negative reviews posted on MyMovingReviews.com, and that Defendants' business [is] accredited by the BBB." (Am. Compl. at ¶¶ 81, 82.)

The plaintiffs have failed to allege with specificity any "business relationship or contemplated contract of economic benefit." They rely on *Guest–Tek Interactive Entm't, Inc. v. Pullen,* 731 F.Supp.2d 80, 87 (D.Mass.2010), for the proposition that it is sufficient to allege generally that business relations with prospective customers have been affected. But the holding in *Guest–Tek* is not so expansive. The court there noted that it was appropriate to draw the reasonable inference that the party being sued had knowledge of the potential business relationships in light of other circumstances and factual allegations, e.g., the nature of the business and the defendant's alleged use of the plaintiff's contact list. *Id.* at 87–88.

No such circumstances exist here, especially in this type of business where the class of potential customers is not at all defined but could include any individual who may need moving services in the future. As noted in a similar case in this district,

> ***4** The plaintiff's definition of "advantageous relations" for these purposes is too expansive. It appears that the plaintiff's theory is that the existence of a potential market for a company's product is sufficient to create a prospective advantageous relationship with each potential customer in that market. Massachusetts does not interpret this tort to reach so far. The plaintiff has not identified any case in which a court applying Massachusetts law has allowed a claim for intentional interference with advantageous business relations where the business relationship said to have been interfered with was as inchoate as alleged here.

Kati n v. Nat'l Real Estate Info. Servs., Inc., 2009 WL 929554, at * 9 (D.Mass. Mar.31, 2009) (quoting *Laser Lasbs, Inc. v. ETL Testing Labs., Inc.,* 29 F.Supp.2d 21, 23–24 (D.Mass.1998)). The tortious interference claim is therefore dismissed.

D. Trademark Infringement (Count V)

Plaintiffs Moving and Storage (d/b/a Neighbors Moving and Storage) and American Van Lines allege that the defendants infringed their trademarks "Neighbors Moving & Storage" and "American Van Lines" by using these marks without permission on their website and in metatags.

"To establish trademark infringement under the Lanham Act, a plaintiff must prove that: (1) it owns and uses the disputed marks; (2) the defendant(s) used similar or identical marks without permission; and (3) that unauthorized use likely confused consumers, harming the plaintiff." *Shelby v. Factory Five Racing, Inc.,* 684 F.Supp.2d 205, 215 (D.Mass.2010) (citing *Venture Tape Corp. v. McGills Glass Warehouse,* 540 F.3d 56, 60 (1st Cir.2008)). The First Circuit has "interpreted 'likely confusion' to mean 'more than the theoretical possibility of confusion.' " *Boston Duck Tours, LP v. Super Duck Tours, L L C,* 531 F.3d 1, 12 (1st Cir.2008) (quoting *Int'l Ass'n of Machinists and Aerospace Workers, AFL–CIO v. Winship Green Nursing Ctr.,* 103 F.3d 196, 200 (1st Cir.1996)). "I n other words, the allegedly infringing conduct must create a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care." *Id.* (internal quotation marks and citation omitted).

The plaintiffs' allegations fail to support any inference that confusion by consumers is likely. The defendants' website, MyMovingReviews.com, is very clearly a review website, and it is implausible that any reasonably prudent purchaser exercising ordinary care would be confused by the use of the plaintiffs' marks. The plaintiffs rely on the "initial interest confusion" doctrine, which "refers to a type of pre-sale

confusion that has not been fully explored or addressed by the First Circuit." *Hearts on Fire Co., LLC v. Blue Nile, Inc.,* 603 F.Supp.2d 274, 283 (D.Mass.2009). The plaintiffs assert that the defendants' use of metatags to divert consumers who search for the plaintiffs' companies online to the defendants' website amounts to trademark infringement under this doctrine. However, even if this doctrine were recognized in this Circuit, which it has not been, "[m]ere diversion, without any hint of confusion, is not enough." *Id.* at 286.

***5** The plaintiffs claim that they specifically made allegations of consumer confusion at ¶¶ 4, 26, 32, 33 [3], and 99 of the Amended Complaint. However, these are merely legal conclusions couched as factual allegations, and even if they were taken as true, they only support the inference that consumers are misled into believing allegedly inaccurate ratings, not that consumers were confused in the relevant sense, i.e., that they were confused about the source of the service or about endorsement or affiliation. *See Swarovski Aktiengesellschaft v. Bldg. No. 19, Inc.,* 704 F.3d 44, 49 (1st Cir.2013). This claim is dismissed.

E. Copyright Infringement (Count V I)

Plaintiff Father & Son Moving and Storage asserts that the defendants took copyrighted content from Father & Son's website (www.fandsmoving.com) without permission and published it on their own website, in violation of Father & Son's rights under the U.S. Copyright Act. Father & Son alleges that it "holds a copyright in the language and literary work used on its website" and that "the following language ... appears on the Defendants' Site":

> Father & Son means QUALITY LOW COST MOVING! We are a family-owned business, dedicated to providing professional and personal service. Father & Son specialized in local, statewide, long distance moving, Office relocation, truck rentals, small moves, self services movers, and more. All moves are performed by our quality trained professionals, who handle your moving needs from start to finish. Address: 12435 E 42nd Avenue Unit 50 Denver, CO 80239 Phone: (303) 322–6562.

(Am. Compl. at ¶¶ 104, 106 (dkt. no. 37).)

"Registration of a copyright is a precondition to filing a copyright infringement claim." *Latin A m. Music Co. I nc. v. Media Power Grp., I nc.,* 705 F.3d 34, 42 (1 st Ci r.2013) (citing 17 U.S.C. § 411)). Here, Father & Son alleges that the Copyright Office received its registration application on May 21, 2013, three days before the filing of the Amended Complaint. Further, according to a Notice (dkt. no. 70) filed by the plaintiffs on February 20, 2014, the Copyright Office issued a certificate of registration, attached to the Notice as Exhibit A, effective May 21, 2013, but the plaintiffs did not receive the certificate until several months thereafter. Under these circumstances, the registration requirement has been satisfied, and the claim will not be dismissed for the reason asserted by the defendants.

III. *Conclusion*

For the foregoing reasons, defendant Panayotov's Motion to Dismiss (dkt. no. 41) is GRANTED in part and DENIED in part. Counts IV and V of the Amended Complaint are DISMISSED. The other counts remain.

It is SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 949830

Footnotes

1 For false advertising and unfair competition, violation of M.G.L. Chapter 93A, and tortious interference.

2 The Amended Complaint also alleges that the defendants posted "fictitious negative reviews" concerning the plaintiffs' companies. (Am. Compl. at ¶ 81.) Any claims based on such content would be based on information provided by the defendants and therefore would not fall under CDA immunity.

3 Here, the plaintiffs allege that the "unnecessary posting of Plaintiffs' trademarks have confused consumers about the nature of Plaintiff's [sic] services." But as the First Circuit noted in *Swarovski Aktiengesellschaft v. Bldg. No. 19, Inc.*, 704 F.3d 44, 52 (1st Cir.2013), "a trademark holder has no right to police 'unnecessary' use of its mark. Whether necessary or not, a defendant's use of a mark must be *confusing* in the relevant statutory sense for a plaintiff to raise a viable infringement claim."

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KeyCite Blue-Striped Flag
Appeal Filed by NetChoice, LLC v. Bonta, 9th Cir., April 14, 2025

770 F.Supp.3d 1164
United States District Court, N.D. California, San Jose Division.

NETCHOICE, LLC, doing business as NetChoice, Plaintiff,
v.
Rob BONTA, Attorney General of the State of California, Defendant.

Case No. 22-cv-08861-BLF
|
Signed March 13, 2025

Synopsis

Background: Trade association of online businesses sued California Attorney General for declaratory and injunctive relief, seeking to invalidate the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, as facially violating the free-speech protections of the First Amendment and the California Constitution, as facially violating the Fourth Amendment, as facially void for vagueness under the First Amendment and the Due Process Clauses of the United States and California Constitutions, as facially violating the dormant Commerce Clause, and as facially preempted by the federal Children's Online Privacy Protection Act (COPPA) and Communications Decency Act (CDA). The United States District Court for the Northern District of California, Beth Labson Freeman, J., 692 F. Supp. 3d 924, granted association's preliminary-injunction motion, holding that challenged provisions likely violated the First Amendment and were not severable. On Attorney General's appeal, the Court of Appeals, 113 F.4th 1101, affirmed in part, vacated in part, and remanded. On remand, trade association amended its complaint to assert both facial and as-applied challenges and to assert a new First Amendment theory, and association again moved for a preliminary injunction.

Holdings: The District Court, Beth Labson Freeman, J., held that:

[1] association was likely to show that CAADCA, which was content-based in every application, could not survive strict scrutiny, and thus was facially invalid under the First Amendment;

[2] association was likely to show that provision requiring content providers to enforce "published terms, policies, and community standards" was facially invalid, on its own, under the First Amendment;

[3] association was not likely to show that provisions related to the use of a child's personal information were facially invalid, on their own, under the First Amendment;

[4] association was not likely to show that provision barring a content provider's use of "dark patterns" or otherwise acting against children's interests was facially invalid, on its own, under the First Amendment;

[5] association was likely to show that provision requiring content providers to enforce "published terms, policies, and community standards" was facially invalid and impermissibly vague, on its own, under the First Amendment;

[6] association was likely to show that provisions related to use of a child's personal information were impermissibly vague under the First Amendment;

[7] association was likely to show that provision barring a content provider's use of "dark patterns" or otherwise acting against children's interests was impermissibly vague under the First Amendment;

[8] association was not likely to show that provision requiring content providers to estimate the age of a child user was impermissibly vague under the First Amendment;

[9] association did not show that it was likely to prevail on its as-applied First Amendment challenge;

[10] provisions related to the creation of a Data Protection Impact Assessment (DPIA) with respect to features likely to be accessed by children were functionally severable, but not volitionally severable, from other provisions under California law;

[11] association did not show that it was likely to prevail on its Commerce Clause, COPPA, and CDA arguments; and

[12] in addition to showing a likelihood of success on the merits of its First Amendment facial challenge, association showed that it would suffer irreparable harm absent an injunction, that the balance of hardships favored association, and that an injunction was in the public interest.

Motion granted.

Procedural Posture(s): Motion for Preliminary Injunction.

West Headnotes (73)

[1] **Civil Rights** Preliminary Injunction

In cases arising under the First Amendment, showing a likelihood of success on the merits generally results in a finding that the remaining preliminary-injunction factors are satisfied as well. U.S. Const. Amend. 1.

[2] **Civil Rights** Preliminary Injunction

For preliminary-injunction purposes, where a plaintiff has a colorable claim that a law violates the First Amendment, they have demonstrated that they likely will suffer irreparable harm if the law takes effect. U.S. Const. Amend. 1.

[3] **Civil Rights** Preliminary Injunction

For preliminary-injunction purposes, a finding that a plaintiff has raised serious First Amendment questions compels a finding that the balance of hardships tips sharply in their favor. U.S. Const. Amend. 1.

[4] **Civil Rights** Preliminary Injunction

For preliminary-injunction purposes, there is a significant public interest in upholding First Amendment principles, and it is always in the public interest to prevent the violation of a party's constitutional rights. U.S. Const. Amend. 1.

[5] **Constitutional Law** Viewpoint or idea discrimination

Constitutional Law Content-Based Regulations or Restrictions

Under the First Amendment's Free Speech Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S. Const. Amend. 1.

[6] **Constitutional Law** Content-Based Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

Under the First Amendment's Free Speech Clause, content-based restrictions on speech are presumptively unconstitutional and may be justified only if the government proves that they survive strict scrutiny, that is, that they are narrowly tailored to serve compelling state interests. U.S. Const. Amend. 1.

[7] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

Under the First Amendment's Free Speech Clause, content-neutral laws are subject to intermediate scrutiny; to survive intermediate scrutiny, a restriction on speech or expression must be narrowly tailored to serve a significant governmental interest. U.S. Const. Amend. 1.

[8] **Constitutional Law** Facial invalidity

In general, a plaintiff cannot succeed on a facial challenge to a law's constitutionality unless the plaintiff establishes that no set of circumstances exists under which the law would be valid, or the plaintiff shows that the law lacks a plainly legitimate sweep.

[9] **Constitutional Law** Facial challenges

When a plaintiff asserts a facial challenge to a law as violating the First Amendment, the question is whether a substantial number of the

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law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. U.S. Const. Amend. 1.

[10] **Constitutional Law** Facial challenges

A First Amendment facial challenge to a state law has two parts: the first step is to assess the state law's scope by asking what activities, by what actors, are prohibited or otherwise regulated by the laws; the second step is to decide which of the law's applications violate the First Amendment, and to measure them against the rest. U.S. Const. Amend. 1.

[11] **Constitutional Law** Facial challenges; facial invalidity

A party bringing a First Amendment facial challenge to a law has the burden to show the full scope of the law's coverage, to identify which of the law's applications are constitutionally permissible and which are not, and, ultimately, to show that the law prohibits a substantial amount of protected speech relative to its plainly legitimate sweep. U.S. Const. Amend. 1.

[12] **Constitutional Law** Facial challenges; facial invalidity

A court considering a First Amendment facial challenge may assume without deciding that the challenged statute reaches some protected speech. U.S. Const. Amend. 1.

[13] **Antitrust and Trade Regulation** Validity

Constitutional Law Service providers

Infants Child protection in general

For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, in suit against California Attorney General, CAADCA regulated protected speech, where CAADCA regulated businesses that provided "an online service, product, or feature likely to be accessed by children," many of the regulated online services, products, and features —including video games, video-streaming services, social media, and educational content — involved expressive content, and those types of products and services traditionally enjoyed First Amendment protections. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a).

[14] **Constitutional Law** Content-Neutral Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

The crucial first step in evaluating a First Amendment challenge to a law regulating expression is determining whether the law, on its face, is content-neutral or content-based; a law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. U.S. Const. Amend. 1.

1 Case that cites this headnote

[15] **Constitutional Law** Content-Based Regulations or Restrictions

For purposes of a challenge under the First Amendment's Free Speech Clause, a law is content-based on its face if it applies to particular speech because of the topic discussed or the idea or message expressed. U.S. Const. Amend. 1.

[16] **Constitutional Law** Content-Based Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

For purposes of a challenge under the First Amendment's Free Speech Clause, a law that is facially content-neutral nonetheless will be considered a content-based regulation of speech if the law cannot be justified without reference to the content of the regulated speech; such laws, like those that are content-based on their

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face, must also satisfy strict scrutiny. U.S. Const. Amend. 1.

[17] **Constitutional Law** 🔑 Service providers

For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, in suit against California Attorney General, CAADCA's coverage definition, under which CAADCA regulated businesses providing "an online service, product, or feature likely to be accessed by children," made the law content-based in every application and subject to strict scrutiny; applying CAADCA's criteria to determine if a particular business's online offerings were likely to be accessed by children unavoidably required an evaluation of content. U.S. Const. Amend. 1; Cal. Civ. Code §§ 1798.99.30(b)(4), 1798.99.31(a), 1798.99.31(b).

[18] **Constitutional Law** 🔑 Content-Based Regulations or Restrictions

For purposes of the First Amendment's Free Speech Clause, a law that focuses only on the content of the speech and the direct impact that speech has on its listeners is the essence of content-based regulation. U.S. Const. Amend. 1.

[19] **Constitutional Law** 🔑 Protection of **Infants** 🔑 Interest, role, and authority of government in general

No doubt a state possesses legitimate power to protect children from harm, but, under the First Amendment's Free Speech Clause, that power does not include a free-floating power to restrict the ideas to which children may be exposed. U.S. Const. Amend. 1.

[20] **Constitutional Law** 🔑 Protection of

Under the First Amendment's Free Speech Clause, speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. U.S. Const. Amend. 1.

[21] **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

For purposes of a challenge under the First Amendment's Free Speech Clause, if a statute's gateway coverage definition is content-based, the statute as a whole is subject to strict scrutiny because the coverage definition applies in all applications of the statute. U.S. Const. Amend. 1.

[22] **Constitutional Law** 🔑 Freedom of speech, expression, and press

Constitutional Law 🔑 Strict or exacting scrutiny; compelling interest test

Under the First Amendment's Free Speech Clause, a plaintiff's showing that a statute is content-based shifts the burden to the state to show that the statute is narrowly tailored to promote a compelling government interest. U.S. Const. Amend. 1.

[23] **Constitutional Law** 🔑 Strict or exacting scrutiny; compelling interest test

When a plaintiff challenges a content-based statute under the First Amendment's Free Speech Clause, even where strict scrutiny applies, the plaintiff must show that the applications of the statute that fail strict scrutiny are substantial in comparison to any applications of the statute that do not. U.S. Const. Amend. 1.

[24] **Constitutional Law** 🔑 Facial challenges; facial invalidity

A facial challenge to a statute under the First Amendment's Free Speech Clause does not have

to be analyzed on a provision-by-provision basis. U.S. Const. Amend. 1.

[25] **Civil Rights** Weight and Sufficiency of Evidence

Assuming, for purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—in suit against California Attorney General, that California had a compelling interest in protecting the privacy and well-being of children, California failed to meet its burden to show that being online harmed children in a way that could be alleviated by CAADCA, which was content-based and subject to strict scrutiny, where the parties had submitted conflicting evidence on the causal relationship between social media and other online media on the one hand and mental-health impacts on the other. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.28 et seq.

[26] **Antitrust and Trade Regulation** Validity
Constitutional Law Service providers
Infants Child protection in general

Assuming, for purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—in suit against California Attorney General, that CAADCA advanced California's compelling interest in protecting children's privacy and well-being, California failed to show that CAADCA, which was content-based and subject to strict scrutiny, was narrowly tailored to serve that interest, where CAADCA applied to all online content likely to be accessed by minors and imposed significant burdens on content providers, and California did not try to explain why a less-restrictive statute could not serve its goals. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.28 et seq.

[27] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

For purposes of applying strict scrutiny to a content-based statute challenged under the First Amendment's Free Speech Clause, a law is not narrowly tailored when the state's interest could be served by vigorous enforcement of existing, less-restrictive regulations. U.S. Const. Amend. 1.

[28] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was likely to show in suit against California Attorney General that challenged provisions of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—could not survive strict scrutiny under the First Amendment, where CAADCA was content-based in every application, California had not tried to satisfy strict scrutiny, California did not show that CAADCA alleviated harm to children from being online, California did not show that CAADCA was narrowly tailored to advance its interest in children's privacy and well-being, and CAADCA had no constitutionally permissible application. U.S. Const. Amend. 1; Cal. Civ. Code §§ 1798.99.30(b)(4), 1798.99.31(a), 1798.99.31(b).

More cases on this issue

[29] **Constitutional Law** Facial challenges; facial invalidity

A plaintiff may assert a facial challenge under the First Amendment's Free Speech Clause to a specific application of a statutory provision. U.S. Const. Amend. 1.

[30] **Constitutional Law** Service providers

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For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, in suit against California Attorney General, provision in CAADCA requiring content providers to enforce their "published terms, policies, and community standards," including policies "concerning children," was facially content-based and was subject to strict scrutiny, because the provision would burden a provider's right to exercise its editorial judgment whether to permit or prohibit any given content in any given instance. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(9).

[31] **Antitrust and Trade Regulation** Validity
Constitutional Law Service providers
Infants Child protection in general

Assuming, for purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—in suit against California Attorney General, that provision in CAADCA requiring content providers to enforce their "published terms, policies, and community standards," including policies "concerning children," advanced a compelling interest in protecting children while they were online, California did not show that the provision, which was content-based and subject to strict scrutiny, addressed a concrete harm or was narrowly tailored to serve that interest. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(9).

[32] **Antitrust and Trade Regulation** Validity
Constitutional Law Service providers
Infants Child protection in general

For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—in suit against California Attorney General, provision in CAADCA requiring content providers to enforce their "published terms, policies, and community standards," including policies "concerning children," a provision that was content-based and subject to strict scrutiny, had no legitimate sweep, where the provision would raise the same First Amendment issues in every application and would burden a covered business's editorial judgment in every instance. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(9).

[33] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was likely to show in suit against California Attorney General that provision of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—requiring content providers to enforce "published terms, policies, and community standards," including policies "concerning children," could not survive strict scrutiny under the First Amendment as it related to content policies and community standards, where California failed to show that the provision addressed a concrete harm or was narrowly tailored to serve the interest in protecting children, and provision had no legitimate sweep. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(9).

More cases on this issue

[34] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was not likely to show in suit against California Attorney General that certain provisions of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting

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children's privacy and influencing the design of online products to recognize children's needs—related to the use of a child's personal information were invalid under the First Amendment, where association did not explain how the sweep of the provision, as narrowed under association's theory of provision's unconstitutionality, compared to provision's unconstitutional applications, and association's amorphous definitions did not show that every application was unconstitutional. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(b)(1)-(4).

More cases on this issue

[35] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was not likely to show in suit against California Attorney General that provision of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—barring a content provider's use of "dark patterns" or otherwise acting against children's interests was invalid under the First Amendment as applied to "use of recommendation algorithms, continuous scroll, autoplay, and other design features that organize content," where association had not identified an application of provision with sufficient particularity to allow consideration of a First Amendment facial challenge. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(b)(7).

More cases on this issue

[36] **Constitutional Law** Service providers

For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, in suit against California Attorney General, provision requiring content providers to estimate the age of a child user "with a reasonable level of certainty appropriate to the risks" to that user for the purpose of determining what content was age-appropriate was content-based and subject to strict scrutiny; provision imposed limits on what content a provider could publish and a user could view and, if a provider did not estimate age, all content would have to be sanitized for suitability to the youngest children. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(5).

[37] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was likely to show in suit against California Attorney General that provision of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—requiring content providers to estimate the age of a child user "with a reasonable level of certainty appropriate to the risks" to that user could not survive strict scrutiny under the First Amendment, where every covered provider would have to choose between intruding into user privacy or publishing only child-appropriate content, the choice was not narrowly tailored to advance children's well-being, and provision had no legitimate sweep. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(5).

More cases on this issue

[38] **Constitutional Law** Narrow tailoring

Under the First Amendment's Free Speech Clause, a statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another is unacceptable if less-restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. U.S. Const. Amend. 1.

[39] **Constitutional Law** Vagueness

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Constitutional Law Certainty and definiteness; vagueness

A statute can be impermissibly vague, in violation of the First Amendment's Free Speech Clause or the Fourteenth Amendment's Due Process Clause, for either of two independent reasons: first, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, and second, if it authorizes or even encourages arbitrary and discriminatory enforcement. U.S. Const. Amends. 1, 14.

[40] **Constitutional Law** Vagueness

Although perfect clarity is not required even when a law regulates protected speech, vagueness concerns are more acute when a law implicates First Amendment rights, and, therefore, vagueness scrutiny under the First Amendment is more stringent than under the Fourteenth Amendment's Due Process Clause. U.S. Const. Amends. 1, 14.

[41] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was likely to show in suit against California Attorney General that provision of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—requiring content providers to enforce "published terms, policies, and community standards," including policies "concerning children," was impermissibly vague under the First Amendment, where provision gave California virtually unfettered discretion to enforce as law a variety of subjective content policies that might be viewed differently by California than by the policies' creators. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(9).

More cases on this issue

[42] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was likely to show in suit against California Attorney General that certain provisions of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—related to the use of a child's personal information were impermissibly vague under the First Amendment, where provisions used terms such as "best interests of children" and "materially detrimental" to a child's health or well-being, and those terms were so vague that they did not provide covered content providers with notice of what conduct was proscribed and what conduct was permitted. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(b)(1)-(4).

More cases on this issue

[43] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was likely to show in suit against California Attorney General that provision of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—barring a content provider's use of "dark patterns" or otherwise taking action that it knows or has reason to know "is materially detrimental to the child's physical health, mental health, or well-being" was impermissibly vague under the First Amendment, where it was hard to say when a provider would have reason to know the effects of a feature on children generally, and key terms such as "detrimental" had no established meaning. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(b)(7).

More cases on this issue

[44] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, was not likely to show in suit against California

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Attorney General that provision of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—requiring content providers to estimate the age of a child user "with a reasonable level of certainty appropriate to the risks" to that user was impermissibly vague under the First Amendment, even though provision was not entirely precise as to the degree of certainty with which ages had to be estimated, where the thrust of the requirement—that a business was required to estimate the age of child users—was clear. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.31(a)(5).

More cases on this issue

[45] **Constitutional Law** Vagueness

Constitutional Law Certainty and definiteness; vagueness

A vagueness challenge under the First Amendment's Free Speech Clause or the Fourteenth Amendment's Due Process Clause will fail when it is clear what the challenged law as a whole prohibits. U.S. Const. Amends. 1, 14.

[46] **Civil Rights** Preliminary Injunction

Trade association of online businesses, for purposes of its preliminary-injunction motion, did not show in suit against California Attorney General that association was likely to prevail on its argument that the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—violated the First Amendment as applied, where association had devoted a single sentence of its motion to its as-applied claims and had failed to address any of the factors that must be shown in a pre-enforcement challenge to a statute. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.28 et seq.

More cases on this issue

[47] **Constitutional Law** Freedom of Speech, Expression, and Press

An as-applied challenge contends that a law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others.

[48] **Federal Courts** Threat of enforcement

Where a plaintiff seeks to challenge a statute prior to enforcement, for the dispute to be constitutionally ripe, there must be a genuine threat of imminent prosecution; to determine whether a plaintiff has established such a threat, a court considers: (1) whether the plaintiff has articulated a concrete plan to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute.

[49] **Federal Courts** Ripeness; Prematurity

The mere existence of a statute that a plaintiff seeks to challenge is insufficient to create a constitutionally ripe controversy.

[50] **Statutes** Effect of Partial Invalidity; Severability

Where a portion of a law has been found to be unconstitutional, invalidation of the entire law may be avoided if the unconstitutional portion may be severed from the remainder.

[51] **Federal Courts** State constitutions, statutes, regulations, and ordinances

Severability of portions of a state statute that have been found unconstitutional is governed by state law.

[52] **Statutes** Effect of Partial Invalidity; Severability

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Under California law, an invalid statutory provision may be severed, and the remainder of the statute enforced, if the invalid provision is grammatically, functionally, and volitionally separable; all three criteria must be met for the invalid provision to be severed.

[53] **Statutes** Effect of Partial Invalidity; Severability

Under California law an invalid portion of a statute passes the test for volitional severability if it can be said with confidence that the enacting body's attention was sufficiently focused upon the parts to be validated so that it would have separately considered and adopted them in the absence of the invalid portions.

[54] **Statutes** Effect of Partial Invalidity; Severability

Under California law, the invalid portion of a statutory provision is volitionally separable if it was not of critical importance to the measure's enactment.

[55] **Statutes** Effect of Partial Invalidity; Severability

Under California law, the issue, when assessing the volitional separability of an invalid portion of a statute, is not whether a legislative body would have preferred the whole to the part, as it surely would have; instead, the issue is whether a legislative body, knowing that only part of its enactment would be valid, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid.

[56] **Statutes** Effect of severability clause

Under California law, in determining whether the invalid portions of a statute can be severed, courts look first to any severability clause; the presence of such a clause establishes a presumption in favor of severance, but the absence of such a clause is not conclusive.

[57] **Statutes** Effect of Partial Invalidity; Severability

Under California law, when determining in the absence of a severability clause whether the invalid portions of a statute can be severed, courts look to the statute's text, the intended function of the particular statutory scheme and the effect severance has on that intended function, any express policy statement or declaration of purpose, and legislative materials, including a senate floor analysis and the floor statement of the sponsoring legislator.

[58] **Statutes** Effect of Partial Invalidity; Severability

Under California law, although the absence of a severability clause does not raise a presumption against the severability of valid from invalid portions of a statute, it does suggest an intent to have all components operate together or not at all.

[59] **Statutes** Sponsors or authors

Under California law, floor statements of the sponsoring legislator may be considered when interpreting a statute.

[60] **Statutes** Trade or business

For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, in suit against California Attorney General, provisions that were subject to being preliminarily enjoined—those related to the creation by covered businesses of a Data Protection Impact Assessment (DPIA) with respect to features likely to be accessed by children—were not volitionally severable from the rest of the statute under California law; court could not say with confidence that the legislature

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would have separately considered and adopted the non-enjoined portions of CAADCA in the absence of the DPIA provisions. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.28 et seq.

More cases on this issue

[61] **Statutes** Effect of Partial Invalidity; Severability

Under California law, an invalid provision of a statute is functionally severable if it is not necessary to the law's operation and purpose; the remainder after separation of the invalid part must be complete in itself and capable of independent application.

[62] **Statutes** Trade or business

For purposes of facial First Amendment challenge by trade association of online businesses to the California Age-Appropriate Design Code Act (CAADCA), a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs, in suit against California Attorney General, provisions that were subject to being preliminarily enjoined—those related to the creation by covered businesses of a Data Protection Impact Assessment (DPIA) with respect to features likely to be accessed by children—were functionally severable from the rest of the statute under California law; the invalidity of the DPIA provisions did not prevent the independent application of CAADCA's remaining provisions. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.28 et seq.

More cases on this issue

[63] **Injunction** Other particular businesses or occupations

Trade association of online businesses, for purposes of its preliminary-injunction motion, did not show in suit against California Attorney General that association was likely to prevail on its facial challenge asserting that certain provisions of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—were preempted by the Communications Decency Act (CDA), since determining whether the CDA provided immunity against enforcement of CAADCA would depend on the circumstances of a particular case. Communications Act of 1934 § 230, 47 U.S.C.A. § 230; Cal. Civ. Code §§ 1798.99.31(a)(9), 1798.99.31(b)(1), (3)-(4), 1798.99.31(b)(7).

More cases on this issue

[64] **Injunction** Other particular businesses or occupations

Trade association of online businesses, for purposes of its preliminary-injunction motion, did not show in suit against California Attorney General that association was likely to prevail on its facial challenge asserting that certain provisions of the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—were preempted by the Children's Online Privacy Protection Act (COPPA), where it was not clear that the challenged CAADCA provisions contradicted COPPA or would stand as an obstacle to COPPA's enforcement, answering the preemption question would require a careful and nuanced analysis, and the parties had devoted only a few paragraphs of their briefing to the issue. 15 U.S.C.A. § 6502(d); Cal. Civ. Code § 1798.99.28 et seq.

More cases on this issue

[65] **Federal Preemption** Telecommunications

A state law is not inconsistent with the Children's Online Privacy Protection Act (COPPA) for purposes of that statute's preemption clause unless the state law contains requirements that contradict those of COPPA or stand as obstacles to federal objectives embodied in COPPA. 15 U.S.C.A. § 6502(d).

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[66] **Federal Preemption** Telecommunications

A state law that supplements or requires the same thing as the Children's Online Privacy Protection Act (COPPA) is not inconsistent with COPPA for purposes of that statute's preemption clause. 15 U.S.C.A. § 6502(d).

[67] **Injunction** Other particular businesses or occupations

Trade association of online businesses, for purposes of its preliminary-injunction motion, did not show in suit against California Attorney General that association was likely to prevail on its facial challenge asserting that the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—was facially invalid under the dormant Commerce Clause, where the briefing on the issue, comprising approximately one page per party, and the record regarding potential extraterritorial applications of CAADCA were insufficient for the careful analysis that would be required to decide the challenge. U.S. Const. art. 1, § 8, cl. 3; Cal. Civ. Code § 1798.99.28 et seq.

More cases on this issue

[68] **Commerce** Regulation and conduct in general; particular businesses

The dormant Commerce Clause prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. U.S. Const. art. 1, § 8, cl. 3.

[69] **Commerce** Regulation and conduct in general; particular businesses

When a state law completely bans—or even just directly affects—commercial transactions that take place entirely outside of the state's borders, it plainly contravenes the dormant Commerce Clause; this is so even if the regulated commerce has effects within the state. U.S. Const. art. 1, § 8, cl. 3.

[70] **Civil Rights** Preliminary Injunction

In addition to showing a likelihood of success on the merits of its First Amendment facial challenge to the California Age-Appropriate Design Code Act (CAADCA), trade association of online businesses showed, as required for a preliminary injunction barring CAADCA's enforcement, that it would suffer irreparable harm, that the balance of the hardships tipped in association's favor, and that an injunction was in the public interest, where association had a colorable First Amendment claim that raised serious questions. U.S. Const. Amend. 1; Cal. Civ. Code § 1798.99.28 et seq.

More cases on this issue

[71] **Injunction** Grounds in general; multiple factors

Injunction Administrative Agencies and Proceedings in General

When a plaintiff makes a sufficient showing on all four preliminary-injunction factors, issuance of a preliminary injunction is warranted, even if issuance of the injunction will involve intrusion into an agency's administration of state law.

[72] **Injunction** Discretion of court

Injunction Amount

When granting a preliminary injunction or a temporary restraining order (TRO), a district court has discretion to dispense with the filing of a bond altogether, or to require only nominal bond. Fed. R. Civ. P. 65(c).

[73] **Civil Rights** Preliminary Injunction

Trade association of online businesses would not be required to post a bond in connection with their successful preliminary-injunction motion in suit against California Attorney General asserting a facial challenge under the

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First Amendment's Free Speech Clause to the California Age-Appropriate Design Code Act (CAADCA)—a statute aimed at protecting children's privacy and influencing the design of online products to recognize children's needs—where court had issued a prior preliminary injunction without a bond and without objection from California, and the parties had not addressed the issue of bond in their briefing. U.S. Const. Amend. 1; Fed. R. Civ. P. 65(c).

More cases on this issue

West Codenotes

Validity Called into Doubt
Cal. Civ. Code §§ 1798.99.28, 1798.99.29, 1798.99.30, 1798.99.31, 1798.99.32, 1798.99.33, 1798.99.35, 1798.99.40

Attorneys and Law Firms

***1176** Adam Stanley Sieff, Davis Wright Tremaine LLP, Los Angeles, CA, Ambika Kumar, Pro Hac Vice, Bianca G. Chamusco, Pro Hac Vice, Davis Wright Tremaine LLP, Seattle, WA, David Morris Gossett, Pro Hac Vice, Meenakshi Krishnan, Pro Hac Vice, Davis Wright Tremaine LLP, Washington, DC, Robert Corn-Revere, Pro Hac Vice, Foundation for Individual Rights and Expression, Washington, DC, for Plaintiff.

Kristin A. Liska, California Department of Justice - Attorney General's Office, San Francisco, CA, Nicole Juliet Kau, Office of the California Attorney General Department of Justice, Los Angeles, CA, for Defendant.

Megan Leef Brown, Pro Hac Vice, Boyd Garriott, Pro Hac Vice, Wiley Rein LLP, Washington, DC, Kathleen Scott, Pro Hac Vice, Washington, DC, Robert Edward Dunn, Eimer Stahl LLP, Campbell, CA, for Amicus Chamber of Commerce of the United States of America.

Lindsay C. Harrison, Jenner & Block LLP, Washington, DC, for Amicus Eric Goldman.

Christopher Patrick Eby, Pro Hac Vice, King & Spalding, Atlanta, GA, Mark W. Brennan, Pro Hac Vice, James Ryan Thompson, Pro Hac Vice, Hogan Lovells U.S. LLP, Washington, DC, Tamra Moore, King & Spalding, Washington, DC, Thomas Veitch, Pro Hac Vice, Washington, DC, Trenton Herbert Norris, Hogan Lovells U.S. LLP, San Francisco, CA, for Amici Chamber of Progress, LGBT Tech Institute.

Christopher Patrick Eby, Pro Hac Vice, King & Spalding, Atlanta, GA, Tamra Moore, King & Spalding, Washington, DC, for Amicus IP Justice.

Lauren Gallo White, Wilson Sonsini Goodrich and Rosati, PC, San Francisco, CA, for Amicus Computer & Communications Industry Association.

Alan Jay Butler, Electronic Privacy Information Center, Washington, DC, for Amici Electronic Privacy Information Center, Reset Tech.

Laura Marquez-Garrett, Social Media Victims Law Center, Seattle, WA, for Amici Fairplay, The Public Health Advocacy Institute, Childrens Advocacy Institute, Center for Humane Technology, Spark and Stitch, Accountable Tech, Center for Digital Democracy, Design It For U.S., North Carolina Young Peoples Alliance, Encode Justice, Civics Unplugged, Archewell Foundation, 5 Rights Foundation, Ek, Ultraviolet.

Jason Seth Harrow, Gerstein Harrow LLP, Los Angeles, CA, Laura Marquez-Garrett, Social Media Victims Law Center, Seattle, WA, Ariel F. Johnson, Pro Hac Vice, Shaker Heights, OH, for Amicus Common Sense Media.

Dana R. Green, Pro Hac Vice, Legal Department, New York, NY, Samantha Chariz Hamilton, Pro Hac Vice, Asian Americans Advancing Justice - Atlanta, Norcross, GA, for Amici The New York Times Company, Student Press Law Center.

Ian David Adams, Bethesda, MD, for Amicus International Center for Law & Economics.

Trenton Herbert Norris, Hogan Lovells U.S. LLP, San Francisco, CA, for Amici The Information Technology and Innovation Foundation, The Woodhull Freedom Foundation.

ORDER GRANTING PLAINTIFF'S SECOND MOTION FOR PRELIMINARY INJUNCTION

[Re: ECF 101]

BETH LABSON FREEMAN, United States District Judge

**1 *1177 Committed to protecting children from harmful online products and services, the California State Legislature enacted the California Age-Appropriate Design Code Act ("CAADCA" or "Act"), Cal. Civ. Code §§ 1798.99.28 *et seq.*, for the stated purpose of protecting the "privacy, safety, and well-being" of children when they are online, *1178 *id.* § 1798.99.29. The Act was intended to take effect on July 1, 2024. *See id.* § 1798.99.30(d). Before that date, this suit was filed by Plaintiff NetChoice, LLC ("NetChoice"), a trade association comprised of internet companies such as Amazon, Google, Meta, and Netflix, challenging the CAADCA on constitutional and federal preemption grounds. *See* Compl., ECF 1. NetChoice also filed a motion for a preliminary injunction to enjoin enforcement of the CAADCA. *See* Pl.'s Mot. for Prelim. Inj., ECF 29. This Court granted the motion based on its determination that NetChoice was likely to succeed on its facial challenge to the Act under the First Amendment. *See NetChoice, LLC v. Bonta* ("*NetChoice I*"), 692 F. Supp. 3d 924 (N.D. Cal. 2023), *aff'd in part, vacated in part*, 113 F.4th 1101 (9th Cir. 2024). The State appealed.

While the appeal was pending, the Supreme Court decided *Moody v. NetChoice, LLC*, 603 U.S. 707, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024), which clarified the standard for analyzing a facial challenge to a statute under the First Amendment. Applying *Moody*, the United States Court of Appeals for the Ninth Circuit concluded that this Court's preliminary injunction order did not conduct the analysis required for a First Amendment facial challenge. *See NetChoice, LLC v. Bonta ("NetChoice II")*, 113 F.4th 1101, 1108 (9th Cir. 2024). The Ninth Circuit nonetheless affirmed the preliminary injunction as to one aspect of the CAADCA, the requirement that each covered business create a Data Protection Impact Assessment ("DPIA") identifying, for each offered online service, product, or feature likely to be accessed by children, any risk of material detriment to children arising from the business's data management practices. *See id.* at 1108-09. The Ninth Circuit also affirmed the injunction as to provisions of the CAADCA that are not grammatically severable from the DPIA requirement. *See id.* at 1108. The preliminary injunction was vacated in all other respects, and the case was remanded for further proceedings. *See id.*

On remand, NetChoice filed a first amended complaint ("FAC"), and a second motion for a preliminary injunction. *See* FAC, ECF 100; Pl.'s Second Mot. for Prelim. Inj., ECF 101. The motion is opposed by the State. *See* Def.'s Opp'n., ECF 112. The Court has considered the motion, the State's opposition, NetChoice's reply, the parties' supplemental briefs, the briefs filed by five sets of *amici curiae*, and the record evidence. The Court heard oral argument on January 23, 2025, and the State agreed to defer enforcement of the non-enjoined portions of the CAADCA until April 5, 2025, to allow the Court time to issue a reasoned decision.

NetChoice's second motion for a preliminary injunction is GRANTED for the reasons discussed below.

I. BACKGROUND

**2 In recent years, "[s]ocial-media platforms, as well as other websites, have gone from unheard-of to inescapable." *Moody*, 603 U.S. at 716, 144 S.Ct. 2383. "They structure how we relate to family and friends, as well as to businesses, civic organizations, and governments." *Id.* "The questions of whether, when, and how to regulate online entities, and in particular the social-media giants, are understandably on the front-burner of many legislatures and agencies." *Id.*

In general, government actors are better positioned than courts to address public policy issues relating to online platforms. *See Moody*, 603 U.S. at 716, 144 S.Ct. 2383. However, "courts still have a necessary role in protecting those entities' rights of speech, as courts have historically protected traditional media's rights." *Id.* *1179 The tension between legislative interests in regulating online entities and those entities' First Amendment rights has generated lawsuits throughout the United States, many – like this one – brought by NetChoice. *See, e.g., Moody*, 603 U.S. 707, 144 S.Ct. 2383; *NetChoice v. Bonta*, No. 5:24-CV-07885-EJD, 761 F.Supp.3d 1202 (N.D. Cal. Dec. 31, 2024); *NetChoice, LLC v. Reyes*, 748 F.Supp.3d 1105 (D. Utah 2024); *Computer & Commc'ns Indus. Ass'n v. Paxton*,[1] 747 F. Supp. 3d 1011 (W.D. Tex. 2024); *NetChoice, LLC v. Fitch*, 738 F. Supp. 3d 753 (S.D. Miss. 2024); *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539 (S.D. Ohio 2024).

The CAADCA was enacted for the purpose of regulating "business[es] that provide[ ] an online service, product, or feature likely to be accessed by children" ("coverage definition"). Cal. Civ. Code §§ 1798.99.31(a), (b). "Children" are "consumers who are under 18 years of age." *Id.* § 1798.99.30(b)(1). The Act covers online businesses that meet certain criteria, including earning more than $25 million in gross annual revenue or sharing at least 100,000 consumers' information annually. *See id.* § 1798.140(d).[2] NetChoice alleges that the Act would apply to the vast majority of

companies operating online, including major news outlets (New York Times, Wall Street Journal, ABC, CBS, Fox News, etc.), sports leagues, magazines, podcasts, social media services, online video games, and online self-help and suicide prevention services treating adults and children. *See* FAC ¶ 26. As used in the coverage definition, "online service, product, or feature" does not include telecommunications services, delivery or use of a physical product, or healthcare services. *See* Cal. Civ. Code §§ 1798.99.30(b)(5), 1798.99.40. The Act does not apply to government agencies or nonprofits. *See id.* § 1798.140(d).

The CAADCA imposes numerous affirmative requirements and prohibitions on covered businesses (collectively, "Regulatory Provisions"). *See* Cal. Civ. Code §§ 1798.99.31(a), (b). The Act's affirmative requirements are set forth in California Civil Code § 1798.99.31(a), while its prohibitions are set forth in California Civil Code § 1798.99.31(b).

DPIA Requirement and Notice and Cure Provision

The cornerstone of the Act's affirmative requirements "is the provision requiring online businesses to create a Data Protection Impact Assessment (DPIA) report identifying, for each offered online service, product, or feature likely to be accessed by children, any risk of 'material detriment to children that arise from the data management practices of the business.' " *NetChoice II*, 113 F.4th at 1109 (quoting Cal. Civ. Code §§ 1798.99.31(a)(1)). Related provisions require covered businesses to create a plan to mitigate or eliminate the risks identified in the DPIA, *see* Cal. Civ. Code § 1798.99.31(a)(2), and to provide a list of all completed DPIAs (or the DPIAs themselves) to the California Attorney General upon request, *see id.* §§ 1798.99.31(a)(3)-(4).

****3** A covered business that is in substantial compliance with the DPIA requirement is entitled to written notice and a 90-day cure period before civil penalties may be assessed for violation of the Act. *See* Cal. Civ. Code § 1798.99.35(c). The CAADCA ***1180** provides for civil penalties of up to $2,500 per child for each negligent violation and up to $7,500 per child for each intentional violation. *See* Cal. Civ. Code § 1798.99.35(a). Such penalties may be assessed and recovered in a civil action brought by the California Attorney General. *See id.*

The DPIA requirement is currently enjoined, as are other provisions of the CAADCA that the Ninth Circuit found to be not grammatically severable from the DPIA requirement, including the notice and cure provision. *See NetChoice, LLC v. Bonta*, 113 F.4th at 1108. The enjoined provisions are California Civil Code §§ 1798.99.31(a)(1)-(4), (c), 1798.99.33, and 1798.99.35(c) (collectively, "DPIA provisions"). *See id.*

Other Affirmative Requirements

In addition to complying with the DPIA requirement and related provisions, covered businesses must take the following actions enumerated in California Civil Code §§ 1798.99.31(a)(5)-(10):

> (5) Estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers.
>
> (6) Configure all default privacy settings provided to children by the online service, product, or feature to settings that offer a high level of privacy, unless the business can demonstrate a compelling reason that a different setting is in the best interests of children.
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> (7) Provide any privacy information, terms of service, policies, and community standards concisely, prominently, and using clear language suited to the age of children likely to access that online service, product, or feature.
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> (8) If the online service, product, or feature allows the child's parent, guardian, or any other consumer to monitor the child's online activity or track the child's location, provide an obvious signal to the child when the child is being monitored or tracked.
>
> (9) Enforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children.
>
> (10) Provide prominent, accessible, and responsive tools to help children, or if applicable their parents or guardians, exercise their privacy rights and report concerns.

Cal. Civ. Code §§ 1798.99.31(a)(5)-(10).

Prohibitions

Covered businesses are prohibited from taking the following actions enumerated in California Civil Code §§ 1798.99.31(b)(1)-(8):

(1) Use the personal information of any child in a way that the business knows, or has reason to know, is materially detrimental to the physical health, mental health, or well-being of a child.

(2) Profile a child by default unless both of the following criteria are met:

(A) The business can demonstrate it has appropriate safeguards in place to protect children.

(B) Either of the following is true:

(i) Profiling is necessary to provide the online service, product, or feature requested and only with respect to the aspects of the online service, product, or feature with which the child is actively and knowingly engaged.

(ii) The business can demonstrate a compelling reason that profiling is in the best interests of children.

***1181** (3) Collect, sell, share, or retain any personal information that is not necessary to provide an online service, product, or feature ... unless the business can demonstrate a compelling reason that [doing so] is in the best interests of children likely to access the online service, product, or feature.

****4** (4) If the end user is a child, use personal information for any reason other than a reason for which that personal information was collected, unless the business can demonstrate a compelling reason that use of the personal information is in the best interests of children.

(5) Collect, sell, or share any precise geolocation information of children by default unless the collection of that precise geolocation information is strictly necessary for the business to provide the service, product, or feature requested....

(6) Collect any precise geolocation information of a child without providing an obvious sign to the child for the duration of that collection that precise geolocation information is being collected.

(7) Use dark patterns to lead or encourage children to provide personal information beyond what is reasonably expected to provide that online service, product, or feature to forego privacy protections, or to take any action that the business knows, or has reason to know, is materially detrimental to the child's physical health, mental health, or well-being.

(8) Use any personal information collected to estimate age or age range for any other purpose or retain that personal information longer than necessary to estimate age. Age assurance shall be proportionate to the risks and data practice of an online service, product, or feature.

Cal. Civ. Code §§ 1798.99.31(b)(1)-(8).

Taking these provisions directly from a law enacted in the United Kingdom, the California Legislature left it to the courts to pass the CAADCA through the filter of our First Amendment. *See* 2022 Cal. Stat. ch. 320 (A.B. 2273), §§ (1)(d)-(e).

NetChoice's Complaint and First Motion for Preliminary Injunction

Before the CAADCA's original effective date of July 1, 2024, NetChoice filed this suit alleging six claims – four facial challenges to the Act on constitutional grounds and two challenges to the Act on federal preemption grounds. *See* Compl. ¶¶ 76-122. NetChoice also filed a motion for a preliminary injunction to enjoin the Act's enforcement. *See* Pl.'s Mot. for Prelim. Inj. This Court granted the motion for a preliminary injunction on September 18, 2023, concluding that that NetChoice had shown it was likely to succeed on its facial challenge to the CAADCA under the First Amendment. *See NetChoice I*, 629 F. Supp. 3d at 961. The Court did not reach NetChoice's additional constitutional challenges to the Act or its challenges based on federal preemption. *See id.* at 962-63.

The Ninth Circuit affirmed the preliminary injunction only as to the DPIA provisions. *See NetChoice II*, 113 F.4th at 1108. The Ninth Circuit found that the DPIA requirement triggers review under the First Amendment because it "compels speech by requiring covered businesses to opine on potential harm to children," and because "it deputizes covered businesses into serving as censors for the State." *See id.* at 1117-18. The Ninth Circuit found a facial challenge to the DPIA requirement appropriate, because "[i]n every application of the DPIA report requirement to a covered business, the DPIA report requirement raises the same First Amendment issues." *Id.* at 1123. When determining what level of scrutiny applies to the DPIA requirement, the Ninth Circuit held ***1182** that "[s]trict scrutiny is warranted because the DPIA report requirement (1) compels speech

with a particular message about controversial issues; and (2) deputizes private actors into censoring speech based on its content." *Id.* at 1118 (internal quotation marks and citations omitted). The Ninth Circuit concluded that the DPIA requirement is likely to fail strict scrutiny, because (among other reasons) "a disclosure regime that requires the forced creation and disclosure of highly subjective opinions about content-related harms to children is unnecessary for fostering a proactive environment in which companies, the State, and the general public work to protect children's safety online." *Id.* at 1122.

****5** The Ninth Circuit vacated the preliminary injunction in all other respects. *See NetChoice II*, 113 F.4th at 1108. Stating that most of the CAADCA's other provisions "by their plain language, do not necessarily impact protected speech in all or even most applications," the Ninth Circuit determined that the record needed further development before a First Amendment facial challenge could be evaluated under the standard clarified in *Moody*. *Id.* at 1122-23. The Ninth Circuit found that this Court's order "not only failed to properly consider the facial nature of NetChoice's First Amendment challenges to other provisions of the CAADCA, *id.* §§ 1798.99.31(a)(5)-(7), (9), (b)(1)-(4), (7), but also erroneously overstated the likelihood that NetChoice would ultimately succeed in showing that the unconstitutional portions of the CAADCA are not severable from its valid remainder." *Id.* at 1108. The case was remanded to this Court for further proceedings consistent with the Ninth Circuit's opinion. *See id.*

NetChoice's FAC and Second Motion for Preliminary Injunction

On remand, NetChoice filed the operative FAC, asserting the same six claims pled in the original complaint. *See* FAC ¶¶ 77-126. However, whereas the original complaint raised only facial challenges to the CAADCA, each of the claims of the FAC is asserted both facially and as applied to NetChoice's members. *See id.*

The FAC asserts claims for: (1) violation of the First and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 2(a) of the California Constitution (facial and as applied); (2) violation of the Fourth Amendment to the U.S. Constitution (facial and as applied); (3) void for vagueness under the First Amendment and Due Process Clause of the U.S. Constitution, and Article I, Section 7(a) of the California Constitution (facial and as applied); (4) violation of the dormant Commerce Clause of the U.S. Constitution (facial and as applied); (5) preemption under the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501 *et seq.* (facial and as applied); and (6) preemption under Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230") (facial and as applied).

NetChoice adds a new First Amendment theory challenging the Regulatory Provisions, Cal. Civ. Code §§ 1798.99.31(a), (b), on the basis that the Act's coverage definition is content-based and fails strict scrutiny, thus infecting all of the Regulatory Provisions and rendering them unconstitutional in every application. *See* FAC ¶ 25, Prayer ¶ 2.

NetChoice also filed a second motion for a preliminary injunction, which is the subject of this order.

II. LEGAL STANDARD

"The Supreme Court has explained that plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm absent preliminary ***1183** relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest." *Where Do We Go Berkeley v. California Dep't of Transportation*, 32 F.4th 852, 859 (9th Cir. 2022) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The Ninth Circuit employs a sliding scale approach to the four *Winter* factors, under which a strong showing on the balance of hardships may compensate for a lesser showing of likelihood of success. *See Where Do We Go Berkeley*, 32 F.4th at 859.

[1] [2] [3] [4] In cases arising under the First Amendment, showing a likelihood of success on the merits generally results in a finding that the remaining *Winter* factors are satisfied as well. *See Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757-58 (9th Cir. 2019). Where the plaintiffs "have a colorable First Amendment claim, they have demonstrated that they likely will suffer irreparable harm if the [law] takes effect." *Id.* at 758. Next, a finding that the plaintiffs have raised serious First Amendment questions compels a finding that the balance of hardships tips sharply in their favor. *See id.* Finally, there is a "significant public interest in upholding First Amendment principles," and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (internal quotation marks and citations omitted).

III. DISCUSSION

**6 The parties devote the bulk of their arguments to the first *Winter* factor, likelihood of success on the merits. As NetChoice points out in its reply, the State effectively concedes the other three *Winter* factors. *See* Pl.'s Reply at 17, ECF 121; Def.'s Opp'n. at 7.

NetChoice contends that it is likely to succeed on the merits of its First Amendment claims; that it is entitled to injunctive relief on the ground that the previously enjoined DPIA provisions are not severable from the remainder of the CAADCA; and that it is likely to succeed on the merits of its claims that the CAADCA is preempted by Section 230 and COPPA and is invalid under the dormant Commerce Clause. The State disputes those contentions. The Court addresses them in turn.

A. First Amendment Claims (Claims 1 and 3)

In Claim 1 of the FAC, NetChoice asserts that the CAADCA violates the expressive rights of NetChoice and its members under the First Amendment, and in Claim 3, NetChoice asserts that the CAADCA is void for vagueness under the First Amendment.[3] NetChoice argues that it is likely to succeed on the merits of those claims for four reasons. First, NetChoice contends that the CAADCA as a whole, through its coverage definition, is content-based on its face and fails strict scrutiny. Because the coverage definition necessarily applies in every application of the Act, NetChoice asserts that it is likely to succeed on its First Amendment facial challenge to the Act as a whole. Second, NetChoice contends that seven Regulatory Provisions are facially invalid, specifically those addressing: content policy enforcement, Cal. Civ. Code § 1798.99.31(a)(9); information use restrictions, *id.* §§ 1798.99.31(b)(1)-(4); dark patterns, *1184 *id.* § 1798.99.31(b)(7); and age estimation, *id.* § 1798.99.31(a)(5) (collectively, the "Individual Provisions"). Third, NetChoice asserts that the Individual Provisions are impermissibly vague in violation of the First Amendment. Fourth, NetChoice asserts that "[f]or the same reasons the challenged provisions are facially invalid, they are also invalid as applied to NetChoice's members." Pl.'s Second Mot. for Prelim. Inj. at 23. The State argues that NetChoice's arguments are without merit and that NetChoice cannot demonstrate it is likely to succeed on the merits of its First Amendment claims.

The Court begins by discussing First Amendment principles generally, as well as the standard for First Amendment facial challenges clarified in *Moody*. The Court then takes up NetChoice's four asserted bases for likely success on the merits of its First Amendment claims.

1. General Principles

[5] [6] [7] "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.' " *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) (quoting U.S. Const., Amdt. 1). "Under that Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quotation marks and citation omitted). Content-based restrictions on speech are presumptively unconstitutional and may be justified only if the government proves that they survive strict scrutiny, that is, that they are narrowly tailored to serve compelling state interests. *See id.* at 163, 171, 135 S.Ct. 2218. Content-neutral laws are subject to intermediate scrutiny. *See City of Austin, Texas v. Reagan Nat'l Advert. of Austin*, LLC, 596 U.S. 61, 67, 142 S.Ct. 1464, 212 L.Ed.2d 418 (2022). "[T]o survive intermediate scrutiny, a restriction on speech or expression must be narrowly tailored to serve a significant governmental interest." *Id.* at 76, 142 S.Ct. 1464.

2. Standard for Evaluating First Amendment Facial Challenges

**7 [8] [9] In general, "a plaintiff cannot succeed on a facial challenge unless he establishes that no set of circumstances exists under which the law would be valid, or he shows that the law lacks a plainly legitimate sweep." *Moody*, 603 U.S. at 723, 144 S.Ct. 2383 (internal quotation marks, citation, and brackets omitted). "In First Amendment cases, however, [the Supreme Court] has lowered that very high bar," substituting "a less demanding though still rigorous standard." *Id.* "The question is whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (internal quotation marks, citation, and brackets omitted).

[10] "[A] First Amendment facial challenge has two parts[.]" *NetChoice II*, 113 F.4th at 1115. "The first step in the proper facial analysis is to assess the state laws' scope." *Moody*, 603 U.S. at 724, 144 S.Ct. 2383. "What activities, by what actors, do the laws prohibit or otherwise regulate?" *Id.* The second

step "is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest." *Id.* at 725, 144 S.Ct. 2383.

[11] The party bringing the First Amendment facial challenge has the burden to show the full scope of the law's coverage; to identify which of the law's applications are constitutionally permissible and which are not; and, ultimately, to show that the law "prohibits a substantial amount of protected speech relative to its ***1185** plainly legitimate sweep." *Moody*, 603 U.S. at 744, 144 S.Ct. 2383 (internal quotation marks and citation omitted).

3. Facial Challenge to CAADCA based on Coverage Definition

NetChoice contends that the CAADCA's coverage definition, limiting the Act's application to "business[es] that provide[ ] an online service, product, or feature likely to be accessed by children," is facially content-based, triggering strict scrutiny of the Act as a whole. Because this gateway coverage definition controls whether the Act applies in the first instance, and is facially content-based, NetChoice argues that the State must show that the burdens imposed by the Act's Regulatory Provisions are the least restrictive means to achieve a compelling state interest. NetChoice asserts that the State cannot make that showing, and that as a result NetChoice is likely to succeed in demonstrating that the Act as a whole is facially invalid.

In opposition, the State argues that the coverage definition is content-neutral. The State also argues that NetChoice's facial challenge to the Act as a whole does not comport with the Ninth Circuit's opinion in this case or with the Supreme Court's opinion in *Moody*, because in the State's view both of those opinions require evaluation of a First Amendment facial challenge to a statute on a provision by provision basis.

NetChoice did not raise this argument, that the gateway coverage definition is content-based, in its first motion for a preliminary injunction. Consequently, neither this Court nor the Ninth Circuit had occasion to consider whether the coverage definition causes the CAADCA's Regulatory Provisions to be subject to strict scrutiny in every application. This Court takes up that analysis here.

a. CAADCA Regulates Protected Speech

[12] NetChoice must demonstrate as an initial matter that the CAADCA, through its coverage definition, regulates protected speech and thereby implicates the First Amendment. *See NetChoice II*, 113 F.4th at 1116-17 (determining as an initial matter whether "the DPIA report requirement regulates the speech of covered businesses and thus triggers review under the First Amendment."). A court considering a First Amendment facial challenge "may assume without deciding that the statute 'reaches some protected speech.' " *Arizona Attorneys for Crim. Just. v. Mayes*, 127 F.4th 105, 110 (9th Cir. 2025) (quoting *United States v. Hansen*, 599 U.S. 762, 784, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023)). The Court need not rely on an assumption in this case, however, because NetChoice has demonstrated that the Act regulates protected speech through its coverage definition.

****8** **[13]** As noted, the CAADCA regulates "business[es] that provide[ ] an online service, product, or feature likely to be accessed by children." Cal. Civ. Code §§ 1798.99.31(a), (b). NetChoice argues that the vast majority (if not all) of such online services, products, and features will involve expressive content, pointing to examples including articles and original videos regarding the entertainment industry published by IMDB, *see* Ciarella Decl. ¶¶ 2, 10, ECF 29-22; recommendations for and information about books offered by Goodreads, *see* Roin Decl. ¶¶ 2, 18, ECF 29-25; articles, user comments, and podcasts about technology and policy published by Techdirt.com, *see* Masnick Decl. ¶¶ 2, 8, ECF 29-29, Masnick Suppl. Decl. ¶ 6, ECF 101-5; and content on social media platforms, *see* Paolucci Decl. ¶¶ 2, 11, ECF 29-28, Paolucci Suppl. Dec. ¶ 5, ECF 101-6. In addition to its own evidence, ***1186** NetChoice directs the Court to the declaration of the State's expert, Jenny Radesky, M.D., who discusses children's online access to video games, video streaming services, social media, and educational content. *See* Radesky Decl. ¶ 25-29, ECF 51-5. Those types of products and services traditionally have enjoyed First Amendment protections. *See Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1176 (9th Cir. 2015) (recognizing that video games are entitled to protection under the First Amendment because they communicate ideas and social messages like protected books, plays, and movies).

In opposition, the State does not dispute that the Act's coverage definition implicates protected speech. Nor does the

State identify any non-speech application of the CAADCA. Instead, the State contends that the coverage definition is content-neutral, and designed only to identify businesses that target children so that those businesses may be regulated. The Court addresses the latter contention below in the context of its discussion regarding the appropriate level of scrutiny.

b. The CAADCA is Content-Based on its Face

[14] **[15]** **[16]** Having concluded that the CAADCA regulates protected speech, the Court must determine what level of scrutiny applies. The "crucial first step" in evaluating a First Amendment challenge to a law regulating expression is "determining whether the law is content neutral on its face." *Reed*, 576 U.S. at 165, 135 S.Ct. 2218. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained' in the regulated speech." *Id.* (quotation marks and citation omitted). A law is content-based on its face if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163, 135 S.Ct. 2218. A law that is facially content-neutral nonetheless will be considered a content-based regulation of speech if the law "cannot be justified without reference to the content of the regulated speech[.]" *Id.* at 164, 135 S.Ct. 2218. "Those laws, like those that are content based on their face, must also satisfy strict scrutiny." *Id.*

In *Reed*, the Supreme Court addressed a First Amendment challenge to a town's code regulating display of outdoor signs. *See Reed*, 576 U.S. at 159, 135 S.Ct. 2218. The code treated signs differently based on their message. *See id.* For example, signs bearing ideological messages were given more favorable treatment than signs concerning a political candidate, which were themselves given more favorable treatment than signs announcing an assembly of individuals. *See id.* at 169, 135 S.Ct. 2218. The Supreme Court found the disparate treatment to be "a paradigmatic example of content-based discrimination." *Id.* Rejecting the town's argument that the code was content-neutral because it did not endorse or discriminate against any particular ideas within each category of sign, the Supreme Court held that "a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169, 135 S.Ct. 2218.

[17] Applying *Reed* to the present case, this Court finds that the CAADCA's coverage definition makes the Act content-based in every application. *See* Cal. Civ. Code §§ 1798.99.31(a), (b). Businesses that provide online services, products, or features "likely to be accessed by children" are subject to heightened regulation, while other businesses are not. "Likely to be accessed by children," means it is reasonable to expect, based on the following indicators, that the online service, product, or feature would be accessed by children:

> ****9** ***1187** (A) The online service, product, or feature is directed to children as defined by the Children's Online Privacy Protection Act (15 U.S.C. Sec. 6501 *et seq.*).
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> (B) The online service, product, or feature is determined, based on competent and reliable evidence regarding audience composition, to be routinely accessed by a significant number of children.
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> (C) An online service, product, or feature with advertisements marketed to children.
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> (D) An online service, product, or feature that is substantially similar or the same as an online service, product, or feature subject to subparagraph (B).
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> (E) An online service, product, or feature that has design elements that are known to be of interest to children, including, but not limited to, games, cartoons, music, and celebrities who appeal to children.
>
> (F) A significant amount of the audience of the online service, product, or feature is determined, based on internal company research, to be children.

Cal. Civ. Code § 1798.99.30(b)(4). Application of these criteria to determine whether a particular business's online offerings are likely to be accessed by children unavoidably requires an evaluation of content.

The State argues that the Act's coverage definition is content-neutral even though its application requires examination of the content published by a particular business, relying mainly on *City of Austin*. *City of Austin* involved a city code that distinguished between on-premises and off-premises signs and imposed additional regulations on the latter. *See City of Austin*, 596 U.S. at 66, 142 S.Ct. 1464. The code defined an off-premises sign to be one "advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs

persons to any location not on that site." *Id.* The Supreme Court acknowledged that application of the code required an examination of the particular sign's content, but found that such examination was required "only in service of drawing neutral, location-based lines." *Id.* at 69, 142 S.Ct. 1464. Under those circumstances, the Supreme Court concluded that the code was content-neutral, observing that "[t]his Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 72, 142 S.Ct. 1464.

Seizing on that language, the State argues "[t]hat determining whether a business's users are children may involve looking at the content of a product, service, or feature does not make the Act content based." Def.'s Opp'n at 12, ECF 112. The State's argument ignores the differences between the present case and *City of Austin.* The code addressed in *City of Austin* did "not single out any topic or subject matter," because a sign's substantive message itself was irrelevant to the code's application. *City of Austin*, 596 U.S. at 71, 142 S.Ct. 1464. A sign was treated differently under the code based solely on whether it was located on the same premises as the thing being discussed, and the sign message mattered "only to the extent that it inform[ed] the sign's relative location." *Id.* In contrast, the CAADCA does single out particular subject matter, specifically, online content that is likely to be accessed by children. A business will be treated differently under the CAADCA if it provides online services, products, or features with design elements that are known to be of interest to children, such as games, cartoons, music, or other content that appeals to children, or the business knows that a significant portion of its audience is children. Thus, the present case is ***1188** not like *City of Austin*, in which evaluation of speech was necessary only to determine whether the sign was an on-premises sign or an off-premises sign.

****10** The State cites the Ninth Circuit's recent decision in *Project Veritas v. Schmidt*, 125 F.4th 929 (9th Cir. 2025), in support of its position that the necessity to examine online content to apply the CAADCA does not make it content-based. *Project Veritas* involved a nonprofit media organization's challenge to an Oregon law prohibiting the recording of oral conversations without the knowledge of all participants. *See id.* at 937. The plaintiff frequently recorded individuals without their knowledge when engaged in undercover journalism; in the plaintiff's experience, an announcement that a conversation is being recorded may cause individuals to refuse to talk or to distort their story. *See id.* The plaintiff challenged the Oregon law under the First Amendment, both facially and as-applied. *See id.* at 939.

The Ninth Circuit determined that the Oregon statute regulates speech protected by the First Amendment. *See Project Veritas*, 125 F.4th at 942. In deciding whether the statute is content-based or content-neutral, the Ninth Circuit summarized the holdings of *Reed* and *City of Austin* as follows: "a regulation of speech is facially content based ... if it targets speech based on its communicative content – that is, if it applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 950 (internal quotation marks, citations, and brackets omitted). Applying those standards, the Ninth Circuit found that the Oregon statute is facially neutral, as it merely limits the circumstances under which a conversation may be recorded, but does not draw distinctions based on the speaker's message. *See id.* at 950-51. Here, the CAADCA does draw distinctions based on the speaker's message, namely, whether it is content likely to be accessed by children, in which case the content is regulated to protect children's "best interests." Given that critical difference between the two statutes, this Court finds the State's arguments based on *Project Veritas* to be unpersuasive.

The Court likewise finds the State's reliance on *Porter v. Martinez*, 68 F.4th 429 (9th Cir. 2023), to be misplaced. In *Porter*, the plaintiff brought a First Amendment challenge to a state law prohibiting the honking of a vehicle's horn except when reasonably necessary to warn of a safety hazard. *See id.* at 434. Even accepting the plaintiff's "questionable assertion that honking to give a warning is a form of expression," the Ninth Circuit found that the law did not distinguish "between honks intended to convey warnings and honks intended to convey other messages." *Id.* at 441. The Ninth Circuit rejected the plaintiff's argument that the law was content-based on its face "because an officer must examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* The Ninth Circuit held that an officer did not need to examine the "content" of a honk to determine whether the law had been violated; the officer only needed to "observe the traffic circumstances and determine if a safety risk is present." *Id.* at 442. The facts of *Porter* are so different from those of the present case that the Court finds it to have little relevance.

[18] The State suggests that the CAADCA is not content-based if its sole purpose is to regulate businesses that serve children. *See* Def.'s Opp'n at 12. As NetChoice points

out, however, the Act does not regulate all businesses that provide services to children, only those that provide online *content* to children. Businesses that provide online content featuring ***1189** "advertisements marketed to children," "games," "cartoons," "music," or "celebrities who appeal to children" fall within the Act's coverage definition. Cal. Civ. Code § 1798.99.30(b)(4). Businesses that provide other types of online services to children fall outside the Act's coverage definition. *See* Cal. Civ. Code §§ 1798.99.30(b)(5), 1798.99.40. The cornerstone of the Act, the DPIA requirement, directs businesses to determine whether children are exposed "to harmful, or potentially harmful, *content* on the online product, service, or feature." *See* Cal. Civ. Code § 1798.99.3(a)(1)(B)(i) (emphasis added). The Supreme Court has held that where "[t]he overriding justification for the regulation is concern for the effect of the subject matter on young viewers," the law "is not justified without reference to the content of the regulated speech." *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (internal quotation marks and citation omitted). A law that "focuses only on the content of the speech and the direct impact that speech has on its listeners," is "the essence of content-based regulation." *Id.* (internal quotation marks and citation omitted). The Court therefore finds entirely unpersuasive the State's suggestion that the Act is not content-based.

****11** NetChoice points to three recent cases in which statutes were held to be content-based on their face, and thus subject to strict scrutiny, because of their coverage definitions. *See Reyes*, 748 F.Supp.3d at 1123; *Fitch*, 738 F. Supp. 3d at 771; *Yost*, 716 F. Supp. 3d at 558. In *Reyes*, the district court held that because "the Central Coverage Definition facially distinguishes between 'social' speech and other forms of speech, it is substantially likely the Definition is content based[.]" *Reyes*, 748 F.Supp.3d at 1123. The *Reyes* court went on to conclude that, "Accepting that the entire Act, through the Central Coverage Definition, is facially content based, strict scrutiny applies." *Id.* In *Fitch*, the district court found that a statute was content-based, and thus subject to strict scrutiny, because the coverage definition distinguished between digital service provider ("DSPs") of "social interaction" (covered) and DSPs of "news, sports, commerce, [or] online video games" (not covered). *Fitch*, 738 F. Supp. 3d at 771.

Yost addressed a statute with a coverage definition that limited the statute's application to websites "targeted at children, or reasonably anticipated to be accessed by children." *Yost*, 716 F. Supp. 3d at 554. The *Yost* court found the distinction between websites on the basis of whether they target children was not sufficient, standing alone, to make the statute content-based. *See id.* at 556. The *Yost* court reasoned that "[t]here is no indication that the State disfavors the sort of content designed to appeal to children – cartoons and the like." *Id.* However, the *Yost* court determined that the statute's exclusion from the coverage definition of two categories of websites – product review websites and "widely recognized" media outlets – were "easy to categorize as content based." *Id.* at 557-58. By crafting the coverage definition to exclude product review websites and widely recognized media outlets, the State was "favoring engagement with certain topics, to the exclusion of others," which was "plainly a content-based exception deserving of strict scrutiny." *Id.* at 558. Thus, while the *Yost* court declined to find the statute's coverage definition to be content-based solely because it was limited to websites targeting children, the *Yost* court ultimately did find the coverage definition to be content-based because of its exclusions of certain categories of websites. *See id.* Based on that content-based coverage definition, the *Yost* court went on to apply strict scrutiny to the statute as a whole. *See id.*

***1190** After the hearing in the present case, NetChoice filed a statement of recent decision advising the Court of another decision finding a statute to be content-based on its face because of its coverage definition. *See Students Engaged in Advancing Texas v. Paxton* ("*SEAT*"), No. 1:24-CV-945-RP, 765 F.Supp.3d 575 (W.D. Tex. Feb. 7, 2025). *SEAT* involved a statute that distinguished between DSPs based on whether they allowed users to interact with each other socially. A DSP that did so but "primarily function[ed] to provide" access to news or commerce was unregulated, while an identical DSP that "primarily function[ed] to provide" updates on what a user's friends and family were doing was regulated. *Id.* at 594. Relying on *Fitch* and *Yost*, the *SEAT* court concluded that strict scrutiny applied "because the law regulate[d] DSPs based on the content of their speech and the identity of the speaker." *Id.* Addressing the same statute in a companion case, the *SEAT* court found in *Computer & Commc'ns Indus. Ass'n* that the content-based coverage definition required strict scrutiny of all substantive provisions. *See Computer & Commc'ns Indus. Ass'n*, 747 F. Supp. 3d at 1034-35.

In *Reyes, Fitch, Yost, SEAT*, and *Computer & Commc'ns Indus. Ass'n*, the district courts found the statutes they addressed to be content-based on their face in light of distinctions drawn by their coverage definitions. The State argues that *Reyes, Fitch*, and *Yost* are distinguishable from the

present case, because they addressed statutes that specifically regulated social media companies, and the courts' decisions were largely based on differential treatment between "social" speech and other speech. The State argues that the CAADCA does not distinguish between social speech and other speech, but rather applies to all types of companies that produce all kinds of content likely to be accessed by children. Nothing in *Reyes, Fitch*, and *Yost* suggests that their holdings are limited to statutes governing social media companies. The Court reads those decisions to stand for the proposition that where a statute's gateway coverage definition divides the universe into covered and uncovered business based on the type of content they publish, those statutes are content-based and subject to strict scrutiny.

****12** For example, in *Reyes*, the district court concluded that the statute at issue was content-based because "the Act's Central Coverage Definition divide[d] the universe of internet platforms into social media services, defined as websites or applications that 'allow users to interact socially with each other,' and other internet platforms, such as platforms for 'news, sports, commerce, [and] online video games.' " *Reyes*, 748 F.Supp.3d at 1122. In the present case, the coverage definition divides the universe of businesses into those that publish content likely to be accessed by children and those that publish content not likely to be accessed by children. The fact that the dividing line is drawn differently does not render the CAADCA content-neutral. To the extent the *Yost* court found that drawing a line based on the likelihood that content will be accessed by children was not content-based, this Court respectfully disagrees.

[19] **[20]** The State argues that the CAADCA is not intended to regulate any particular expressive content, but rather is intended to protect children from harm. *See* Def.'s Opp'n at 12. In essence, the State argues that it may burden speech directed to, or likely to be accessed by, children because its intentions are good. *See id.* (asserting that in order to remediate harms to children, "regulate[ ] businesses that serve children, irrespective of ***1191** what sort of content they host."). However, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165, 135 S.Ct. 2218. "No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794, 131 S.Ct. 2729 (citations omitted). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *See id.* at 794, 131 S.Ct. 2729 (internal quotation marks and citation omitted). Accordingly, the State's intentions in enacting the CAADCA cannot insulate the Act from the requirements of the First Amendment.

[21] In summary, this Court finds that the CAADCA's coverage definition is content-based. The Court also finds persuasive the reasoning of *Reyes, Fitch, and Yost* that if a statute's gateway coverage definition is content-based, the statute as a whole is subject to strict scrutiny because the coverage definition applies in all applications of the statute. *See Reyes*, 748 F.Supp.3d at 1123 ("Accepting that the entire Act, through the Central Coverage Definition, is facially content based, strict scrutiny applies."); *Fitch*, 738 F. Supp. 3d at 771 (finding that the statute's coverage definition "makes the Act content-based, and therefore subject to strict scrutiny"); *Yost*, 716 F. Supp. 3d at 558 ("Having concluded that NetChoice is likely to succeed on its argument that the Act is a content-based regulation, this Court considers whether the Act is likely to fail strict scrutiny.").

c. Strict Scrutiny Applies to the Regulatory Provisions as a Whole

The parties disagree as to how strict scrutiny is to be applied. NetChoice argues that once it has established that the CAADCA is content-based, the burden shifts to the State to show that the Act's Regulatory Provisions, collectively, are narrowly tailored to achieve a compelling state interest. The State contends that the standard articulated by the Supreme Court in *Moody*, 603 U.S. at 724-25, 144 S.Ct. 2383, and applied by the Ninth Circuit in this case, *NetChoice II*, 113 F.4th at 1108, requires NetChoice to show that the CAADCA is unconstitutional on a provision by provision basis.

Reyes, Fitch, and *Yost* took the approach urged by NetChoice here. In those cases, the district courts applied strict scrutiny to the statutes as a whole, and found that the defendants had not shown the statutes were narrowly tailored to serve a compelling state interest. *See Reyes*, 748 F.Supp.3d at 1124-27; *Fitch*, 738 F. Supp. 3d at 772-76; *Yost*, 716 F. Supp. 3d at 558-60. *Yost* was decided before *Moody*, and *Fitch* was decided the same day, so neither court addressed the impact of *Moody* on the application of strict scrutiny to a statute.

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13 *Reyes* was decided after *Moody*, and the *Reyes* court received supplemental briefing on the effect of *Moody*. *See Reyes*, 748 F.Supp.3d 1105 at 1117 n.71, 1121 n.92. "With respect to the scope-framing Central Coverage Definition," the *Reyes* court found the inquiries mandated by *Moody* to be "easily answered," as there was no dispute about who and what the statute regulated. *Id.* After determining that the state failed to show the statute passed strict scrutiny, the *Reyes* court determined that the plaintiff, NetChoice, had shown it was ***1192 likely to succeed in showing that the statute had "no constitutionally permissible application." *Id.* at 1121.

SEAT took a different approach, applying strict scrutiny to each challenged statutory provision individually. *See SEAT*, 765 F.Supp.3d at 595-96. The *SEAT* court opined that "[e]ven if HB 18 is a content-based regulation, it does not follow as a matter of course that the law is facially invalid." *Id.* The same district court had concluded in a related case that "[p]er *Moody*, the Court must instead go through each provision and examine its respective permissibility under the First Amendment." *Computer & Commc'ns Indus. Ass'n*, 747 F. Supp. 3d at 1034-35. Accordingly, in *SEAT* the district court held that "HB 18's threshold coverage definition is a content-based regulation, such that strict scrutiny applies to all regulations in HB 18." *SEAT*, 765 F.Supp.3d at 592.

[22] **[23]** This Court finds that applying strict scrutiny to the Regulatory Provisions as a whole, and applying *Moody* in that context, is the better approach. Under well-established precedent, a plaintiff's showing that a statute is content-based shifts the burden to the State to show that the statute is narrowly tailored to promote a compelling Government interest. *See, e.g., Reed*, 576 U.S. at 155, 135 S.Ct. 2218 (applying strict scrutiny to sign ordinance based on determination that it was content-based); *United States v. Playboy Ent.*, 529 U.S. at 813, 120 S.Ct. 1878 (applying strict scrutiny to content-based statute governing cable operators). *Moody* did not disturb that precedent; it clarified that the standard for analyzing a First Amendment facial challenge requires the court to assess the law's scope and compare its unconstitutional applications to its constitutional ones. *See Moody*, 603 U.S. at 724-25, 144 S.Ct. 2383. Thus, even where strict scrutiny applies, the plaintiff must show that the applications of the statute that fail strict scrutiny are substantial in comparison to any applications of the statute that do not. *See id.* at 718, 144 S.Ct. 2383 ("the question ... is whether a law's unconstitutional applications are substantial compared to its constitutional ones").

[24] *Moody* does not require that a First Amendment facial challenge must be analyzed on a provision by provision basis. In most cases, as in *Moody*, consideration of the full range of activities covered by a statute may well require analysis of each statutory provision. *See Moody*, 603 U.S. at 724-25, 144 S.Ct. 2383. However, *Moody* did not involve, and does not speak to, a First Amendment facial challenge to a statute's coverage definition that extends to every application of the statute's substantive provisions. The Act's coverage definition draws a line between businesses that provide an online service, product, or feature likely to be accessed by children (covered under the Act) and businesses that do not. NetChoice has shown that the vast majority (if not all) of such online services, products, and features will involve expressive content. Thus, even assuming the full sweep of the Act's Regulatory Provisions, collectively, may apply to some online services, products, and features that do not implicate protected speech, any such applications of the Regulatory Provisions necessarily will be substantially outweighed by the applications of the Regulatory Provisions that do implicate protected speech. And the Supreme Court has made clear that imposing regulations on protected speech solely because the speech is directed at children is impermissible unless the regulations pass strict scrutiny. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (addressing California statute imposing restrictions and labeling ***1193** requirements on the sale or rental of violent video games to minors). All of the Act's Regulatory Provisions, not just those that directly regulate expression, impose burdens on covered businesses based on the expressive content they provide. For that reason, the State's argument that certain of the Regulatory Provisions do not themselves regulate speech misses the mark with respect to NetChoice's challenge to the Regulatory Provisions as a whole based on the gateway content definition.

**14 NetChoice's prior First Amendment challenge to the CAADCA addressed only certain of the Act's Regulatory Provisions; it was not framed as a challenge based on the gateway coverage definition. Thus, the Ninth Circuit was not presented with, and did not address, a challenge to the Regulatory Provisions as a whole, as is raised in the present motion. *See NetChoice II*, 113 F.4th at 1108. Considering that challenge for the first time here, this Court finds it appropriate to apply strict scrutiny to the Regulatory Provisions as a whole, and to perform the analysis required by *Moody* in that context.

d. The Act's Regulatory Provisions Likely Fail Strict Scrutiny

Because strict scrutiny applies to the Regulatory Provisions as a whole, those provisions of the Act "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163, 135 S.Ct. 2218.

The State does not even attempt to satisfy strict scrutiny. Instead, the State argues that strict scrutiny does not apply. *See* Def.'s Opp'n at 11. Consequently, the State has failed to meet its burden to prove that the Regulatory Provisions, collectively, serve a compelling state interest and are narrowly tailored. For the sake of completeness, the Court nonetheless touches on the issues of compelling state interest and narrow tailoring.

[25] The State asserts that it has a substantial interest in "protecting the privacy and well-being of children." *See* Def.'s Opp'n at 24. In its order granting NetChoice's first motion for a preliminary injunction, this Court found that the State had submitted evidence sufficient to establish a substantial state interest in protecting the well-being of minors. *See NetChoice I*, 692 F. Supp. 3d at 948. The Court will assume for purposes of discussion that the State would have asserted its interest in protecting the privacy and well-being of minors as a compelling state interest had it addressed strict scrutiny. "The Supreme Court has recognized that 'there is a compelling interest in protecting the physical and psychological well-being of minors.' " *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961-62 (9th Cir. 2009), *aff'd sub nom. Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (quoting *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)). The Court therefore accepts for purposes of the present analysis that the State has a compelling interest in protecting the privacy and well-being of children.

The demonstration of a compelling interest is not sufficient to satisfy strict scrutiny, however. The State must show that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Video Software Dealers Ass'n*, 556 F.3d at 961-62 *Id.* (internal quotation marks, citation, and brackets omitted). The State's expert, Dr. Radesky, opines that children suffer many types of harm as result of being online. *See* Radesky Suppl. Decl. ¶¶ 22-27, 30, 43. According ***1194** to Dr. Radesky, those harms include sleep disruption, bullying, harassment, interference with attention and learning, sexual exploitation, and invasion of privacy. *See id.* Dr. Radesky claims that research has shown a causal link between nighttime media use by teens and poor sleep. *See id.* ¶ 52. The State argues that the CAADCA will address these harms.

NetChoice challenges Dr. Radesky's opinions and the State's argument based thereon, submitting declarations from its own expert, psychology professor Christopher Ferguson. *See* Ferguson Decl., ECF 101-4; Ferguson Suppl. Decl., ECF 121-1. Professor Ferguson states his view that there is no evidence establishing a cause-and-effect relationship between social media and other online media on the one hand and mental health impacts on the other. *See* Ferguson Suppl. Decl. ¶¶ 22-25. Given the conflicting evidence submitted by the parties, the Court concludes that the State has not carried its burden to prove that being online harms children in a way that can be alleviated by the CAADCA. This conclusion is consistent with the Court's first preliminary injunction order, in which the Court found that the State had not shown that the CAADCA advanced the State's interest in the privacy and well-being of children. *See NetChoice I*, 692 F. Supp. 3d at 948-59.

****15** **[26]** Even if the Court were to accept that the Act advances a compelling State interest in protecting the privacy and well-being of children, the State has not shown that the CAADCA is narrowly tailored to serve that interest. The Act applies to *all* online content likely to be accessed by consumers under the age of 18, and imposes significant burdens on the providers of that content. For example, California Civil Code § 1798.99.31(a)(5) requires each covered business to "[e]stimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers." Moreover, the legislative findings interpret the age estimation requirement as advising covered businesses to "take into account the unique needs of different age ranges, including the following developmental stages." 2022 Cal. Stat. ch. 320 (A.B. 2273), § 1(a)(5) (listing five separate age ranges). Record evidence describes the difficulties of age estimation, and the threats to users' privacy inherent in age estimation. *See* Paolucci Suppl. Decl. ¶ 6; Masnick Suppl. Decl. ¶ 7; Rumenap Decl. ¶¶ 7-10, ECF 29-30. If a business chooses not to take on the burden of age estimation, it must

apply the privacy and data protections designed for children to all content accessed by children or adults. The State has not even attempted to explain why its interest in protecting children could not be served by a less restrictive statute. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Ent.*, 529 U.S. at 813, 120 S.Ct. 1878.

In effect, the CAADCA controls access to features distinctive to the medium of online communication, and appears to suppress those features to the extent they offer "detrimental material" to children, 2022 Cal. Stat. ch. 320 (A.B. 2273), § 1(a)(8), but to protect the same features to the extent they deliver content in "the best interests of children," Cal. Civ. Code § 1798.99.29. A regulation that focuses on "[t]he emotive impact of speech on its audience" is content-based, *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), and therefore must be drawn as narrowly as possible. The State has not shown that the CAADCA is narrowly drawn here.

***1195** **[27]** NetChoice also faults the State for failing to protect children by enforcing existing laws, including COPPA, instead of enacting a new regime that burdens expression. The State's declarants assert that other laws are not adequately enforced. *See* Radesky Decl. ¶¶ 31-39; Radesky Suppl. Decl. ¶ 42; Egelman Decl. ¶¶ 37-40. Those assertions cut both ways, however. A law is not narrowly tailored when the State's interest could be served by vigorous enforcement of existing, less restrictive regulations. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 800, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *see also NetChoice II*, 113 F.4th at 1121 (finding that DPIA requirement was not narrowly tailored in part because the State could have relied on existing criminal laws prohibiting related unlawful conduct).

[28] Based on the State's failure to even attempt to satisfy strict scrutiny, and the evidence and authorities discussed above, the Court concludes that the Regulatory Provisions, collectively, are likely to fail strict scrutiny. That is not the end of the Court's inquiry, however. Applying the two-step *Moody* framework, the Court must consider "the full range of activities" regulated by the Act, and then must decide whether the unconstitutional applications of the Act substantially outweigh the constitutional ones. *Moody*, 603 U.S. at 724-25, 144 S.Ct. 2383. Here, the application of strict scrutiny is grounded in the content-based definition of a covered business, which applies in *all* applications of the Act. Accordingly, as in *Reyes*, the Act has "no constitutionally permissible application." *Reyes*, 748 F.Supp.3d at 1121; *see also NetChoice II*, 113 F.4th at 1116 (finding Moody satisfied where "the DPIA report requirement, in every application to a covered business, raises the same First Amendment issues").

Consequently, the Court concludes that NetChoice has demonstrated a likelihood of success on the merits of its First Amendment facial challenge to the CAADCA's Regulatory Provisions, Cal. Civ. Code §§ 1798.99.31(a), (b).

The Court ordinarily would not go on to address NetChoice's other First Amendment challenges, and in particular its challenges to Individual Provisions of the CAADCA. However, as noted above, at least one district court has construed *Moody* to require facial challenges to be analyzed provision by provision. *See SEAT*, 765 F.Supp.3d at 594-95. In light of the State's insistence that NetChoice's facial challenge to the Regulatory Provisions as a whole is improper, and the lack of clarity in the case law regarding the proper application of *Moody* when the plaintiff brings a facial challenge to the statute's gateway coverage definition, the Court will address NetChoice's challenges to Individual Provisions of the CAADCA.

4. Facial Challenge to Individual Provisions of CAADCA

****16** NetChoice independently asserts facial challenges to each of seven Individual Provisions of the CAADCA, "either in its entirety or as to certain applications." Pl.'s Second Mot. for Prelim. Inj. at 14. NetChoice divides its arguments regarding the Individual Provisions into four categories:

(a) specific applications of California Civil Code § 1798.99.31(a)(9), requiring a covered business to "[e]nforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children";

(b) specific applications of California Civil Code §§ 1798.99.31(b)(1)-(4), restricting how and for what purpose a covered business may use the personal information of children;

***1196** (c) specific applications of California Civil Code § 1798.99.31(b)(7), prohibiting covered businesses from using dark patterns "to lead or encourage children to provide personal information beyond what is reasonably expected,"

or to "take any action" the business has reason to know "is materially detrimental" to children's health or well-being; and

(d) all applications of California Civil Code § 1798.99.31(a)(5), requiring covered businesses to "[e]stimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers."

The State contends that under *Moody*, NetChoice cannot challenge only specific applications of the Individual Provisions. In the State's view, NetChoice must show that the asserted unconstitutional applications of an Individual Provision substantially outweigh the constitutional applications of the entire Individual Provision. The State also asserts that even if NetChoice may challenge specific applications of Individual Provisions, NetChoice has not defined a discrete, clear application of any Individual Provision that properly could be enjoined by the Court.

In *Doe v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010), the Supreme Court considered a First Amendment facial challenge to the State of Washington's Public Records Act ("PRA"), but only as the PRA applied to referendum petitions. The plaintiffs, who had signed and/or sponsored a petition to challenge by referendum a state law extending certain benefits to same-sex couples, sought to prevent private parties from obtaining copies of the petition under the PRA. *See id.* at 191, 130 S.Ct. 2811. The plaintiffs asserted that certain private parties intended to post the referendum petition online in searchable form, thus subjecting the plaintiffs to harassment and intimidation. *See id.* at 199, 130 S.Ct. 2811. In seeking to prevent that outcome, the plaintiffs claimed that the PRA was "unconstitutional as applied to referendum petitions." *Id.* at 193, 130 S.Ct. 2811.

The Supreme Court acknowledged that the challenge had characteristics of both a traditional as-applied challenge and a facial challenge. *See Doe*, 561 U.S. at 194, 130 S.Ct. 2811. The claim was as-applied in the sense that it was not directed to the PRA in all its applications, but it was facial in the sense that it went beyond the plaintiffs' particular case by challenging the PRA's application to all referendum petitions, not just the referendum signed by the plaintiffs. *See id.* Ultimately, the Supreme Court treated the challenge as a facial one, observing that the "plaintiffs' claim and the relief that would follow – an injunction barring the secretary of state from making referendum petitions available to the public, – reach[ed] beyond the particular circumstances of these plaintiffs." *Id.* (internal quotation marks and citation omitted).

****17** In considering the plaintiffs' facial challenge, the Supreme Court found that "[t]he compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment." *Doe*, 561 U.S. at 194, 130 S.Ct. 2811. The Supreme Court went on to consider whether the PRA, as limited to referendum petitions, survived what it termed "exacting scrutiny." *Id.* at 196, 130 S.Ct. 2811. "That standard requires a substantial relation between the disclosure requirement and a sufficiently important' governmental interest." *Id.* (internal quotation marks and citations omitted). The Supreme Court found that "[t]he State's interest in preserving the integrity of the electoral process is undoubtedly important," ***1197** encompassing efforts to identify invalid signatures caused by mistake or fraud, and to promoting transparency in the electoral process. *Id.* at 197-98, 130 S.Ct. 2811. The Supreme Court compared the State's interest against any burdens to First Amendment rights that would be imposed by disclosure of referendum petitions generally. *See id.* at 200-01, 130 S.Ct. 2811. Observing that the plaintiffs had failed to show that disclosure of "typical referendum petitions concern[ing] tax policy, revenue, budget, or other state law issues" would result in the type of harm the plaintiffs feared in their particular circumstances, the Supreme Court found that "only modest burdens attend the disclosure of a typical petition." *Id.* Consequently, the Supreme Court "conclude[d] that disclosure under the PRA would not violate the First Amendment with respect to referendum petitions in general[.]"

[29] Although it ruled against the *Doe* plaintiffs at the end of the day, the Supreme Court did consider their First Amendment facial challenge to a specific application of the PRA (referendum petitions) to be properly before it. NetChoice argues that under the reasoning of *Doe*, it may raise First Amendment facial challenges not only to entire provisions of the CAADCA, but to specific applications of some provisions. This Court agrees that based on *Doe*, a plaintiff may assert a First Amendment facial challenge to a specific application of a statutory provision.

The State argues that such a challenge is foreclosed by the Ninth Circuit's decision in *Arizona Attorneys*, 127 F.4th 105, which issued on the same day as the hearing on NetChoice's second motion for a preliminary injunction. The

Court requested supplemental briefing from the parties as to any potential impact *Arizona Attorneys* may have on this case. NetChoice argues that *Arizona Attorneys* is factually distinguishable from the present case and therefore does not apply here.

Arizona Attorneys addressed a state statute that, among other things, prohibited criminal defense attorneys from initiating direct contact with crime victims, requiring the defense team to initiate any contact with victims through the prosecutor's office. *See Arizona Attorneys*, 127 F.4th at 107. The plaintiffs challenged that prohibition, referred to as the "Victim Contact Limit," as facially invalid under the First Amendment. *See id.* The Victim Contact Limit covered any communication during a criminal case, and its primary application was to requests for interviews with crime victims. *See id.* at 110. The plaintiffs did not challenge the primary application of the Victim Contact Limit, but instead restricted their challenge to defense team contacts with victims to share information about the crime, the case, and the legal system generally. *See id.* at 111. However, the plaintiffs sought to invalidate the Victim Contact Limit entirely, in all its applications, based on their challenge to the non-primary applications of the Victim Contact Limit. *See id.* at 107. Analyzing the plaintiffs' facial challenge under *Moody*, the Ninth Circuit determined that the plaintiffs' challenge was directed "to the edges of the Victim Contact Limit," such that even if the challenged applications were assumed to be unconstitutional, they did not substantially outweigh the unchallenged primary applications of the Victim Contact Limit. *See id.* at 111-12.

NetChoice argues that because *Arizona Attorneys* involved a facial challenge to the entire Victim Contact Limit, it sheds no light on the proper analysis of a facial challenge to only specific applications of a statutory provision. This Court agrees. Accordingly, the Court does not find persuasive the State's assertion that ***1198** *Arizona Attorneys* precludes NetChoice's proposed facial challenges to specific applications of the Individual Provisions under *Doe*. The Court addresses NetChoice's facial challenges to the Individual Provisions below.

****18** This Court is mindful of the fact that the Ninth Circuit vacated the first preliminary injunction with respect to the Individual Provisions that NetChoice challenges again here. *See NetChoice II*, 113 F.4th at 1122-23. The Ninth Circuit stated that those Individual Provisions, "by their plain language, do not necessarily impact protected speech in all or even most applications." *Id.* at 1122 (citing Cal. Civ. Code §§ 1798.99.31(a)(5)-(6), (9), (b)(1)-(4), (7)). The Ninth Circuit indicated that "the record needs further development to allow the district court to determine the full range of activities" those provisions cover. *Id.* at 1123. In order to succeed on its second motion for preliminary injunction, NetChoice at a minimum must address the concerns raised by the Ninth Circuit.

a. Policy Enforcement Requirement – Specific Applications Cal. Civ. Code § 1798.99.31(a)(9)

California Civil Code § 1798.99.31(a)(9) requires each covered business to "Enforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children." In the FAC's Prayer, NetChoice asks the Court to "[d]eclare that Section 1798.99.31(a)(9) violates the First and Fourteenth Amendments to the United States Constitution on its face *to the extent* that section applies to covered services' *content policies and community standards*[.]" FAC Prayer ¶ 5 (emphasis added).[4] Under the holding of *Doe*, NetChoice may assert a First Amendment facial challenge to these specific applications of § 1798.99.31(a)(9).

[30] The State argues that NetChoice has identified an "amorphous" range of applications in its challenges to the Individual Provisions, which are not sufficiently specific to be analyzed as facial challenges. Def.'s Opp'n at 1. While the Court finds that argument persuasive as to NetChoice's challenges to specific applications of other provisions, it is not well-taken here. The meaning of "content policies" and "community standards" is readily understood. Requiring a business to enforce its own published content policies and community standards to the satisfaction of the State would burden the business's right to exercise its editorial judgment whether to permit or prohibit any given content in any given instance. The Supreme Court has held that exercise of such editorial judgment is protected by the First Amendment, because "[a]n entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity." *Moody*, 603 U.S. at 731, 144 S.Ct. 2383 (internal quotation marks, citation, and brackets omitted). Consequently, even if the Court had not determined that all Regulatory Provisions are subject to strict scrutiny because of the content-based coverage definition, the Court would find § 1798.99.31(a)(9) subject to strict scrutiny on the ground that the provision itself is facially content-based to the extent applied to covered businesses' content policies and community standards.

[31] Applying strict scrutiny, the Court must determine whether the State has satisfied its burden to show that § 1798.99.31(a)(9) is "narrowly tailored to serve compelling state interests" to the ***1199** extent it applies to a business's enforcement of its published content policies and community standards. *Reed*, 576 U.S. at 155, 135 S.Ct. 2218. The State does not articulate any compelling interest in the portion of its brief addressing NetChoice's facial challenge to § 1798.99.31(a)(9). And assuming that it has a compelling interest in protecting children when they are online, the State has not identified a concrete harm this provision seeks to address or shown how the requirement at issue is narrowly tailored to serve that interest.

****19** The State argues that the First Amendment does not preclude it from requiring private parties to honor their promises, and that the provision requiring businesses to comply with their own content policies "simply requires that they adhere to the contract made with users, a private agreement between private parties." Def.'s Opp'n at 14. The State cites two cases, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991), and *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), neither of which held that an internet business's published content policy is a contract. In fact, neither *Cohen* nor *Belgau* involved content policies at all. *See id. Cohen* involved a confidential source's claim that a newspaper breached a confidentiality agreement, while *Belgau* involved a contractual relationship between a union and its employees. *See Cohen*, 501 U.S. at 665, 111 S.Ct. 2513; *Belgau*, 975 F.3d at 950. Consequently, to the extent the State argues that content policies may be enforced as contracts, the State has failed to offer any legal support for its position.

[32] Based on the foregoing, the Court finds that § 1798.99.31(a)(9) likely fails strict scrutiny. That is not the end of the Court's inquiry, however. Applying the two-step *Moody* framework, the Court must consider "the full range of activities" regulated by § 1798.99.31(a)(9), as limited to "content policies and community standards" pursuant to *Doe*, and then must decide whether the unconstitutional applications of that provision substantially outweigh the constitutional ones. *Moody*, 603 U.S. at 724-25, 144 S.Ct. 2383. With respect to the range of activities, the provision will raise the same First Amendment issues in every application to a covered business, as it will require every business to enforce its content policies to the satisfaction of the State, and will burden the business's editorial judgment in every instance. Because all applications are unconstitutional, the provision has no legitimate sweep.

[33] Accordingly, the Court concludes that NetChoice is likely to prevail on its claim of facial invalidity with respect to California Civil Code § 1798.99.31(a)(9), as limited to content policies and community standards.

b. Information Use Restrictions – Specific Applications Cal. Civ. Code §§ 1798.99.31(b)(1)-(4)

California Civil Code §§ 1798.99.31(b)(1)-(4) collectively restrict how and for what purpose a covered business may use the personal information of children. In the FAC's Prayer, NetChoice asks the Court to "[d]eclare that Sections 1798.99.31(b)(1)-(2), (b)(4) violate the First and Fourteenth Amendments to the United States Constitution on their face *to the extent* those sections apply to covered services' *use of personal information to publish content or to make information available.*" FAC Prayer ¶ 6 (emphasis added). NetChoice also asks the Court to "[d]eclare that Section 1798.99.31(b)(3) violates the First and Fourteenth Amendments to the United States Constitution on its face *to the extent* that section applies to covered services' *retention, sale, and sharing of personal* ***1200** *information to publish content or to make information available.*" FAC Prayer ¶ 7 (emphasis added).

The Court finds the State's argument that NetChoice has identified an "amorphous" range of applications to be well-taken with respect to §§ 1798.99.31(b)(1)-(4). Def.'s Opp'n at 1. In *Doe*, the Supreme Court found it appropriate to consider a facial challenge to a particular application of a state public records act, specifically, application of the act to referendum petitions. *See Doe*, 561 U.S. at 194, 130 S.Ct. 2811. There was no ambiguity regarding the scope of the challenged application. *See id.* This Court determined that *Doe* may be applied to permit a challenge to a particular application of California Civil Code § 1798.99.31(a)(9), specifically, application of the provision to content policies and community standards. The Court made that determination based on its conclusion that there is no ambiguity regarding the scope of the challenged application.

****20** That is not the case with respect to NetChoice's proposed challenge to specific applications of California Civil Code §§ 1798.99.31(b)(1)-(4). The State argues persuasively that NetChoice's use of the term "content" does not

explain "*what* content – user-generated content, business-created content, editorial discretion content, webpage layout content?" Def.'s Opp'n at 16. NetChoice points to the declaration of the State's expert, which discusses the ways in which data profiling can lead to children receiving detrimental material online. *See* Radesky Decl. ¶¶ 65, 78, 89. NetChoice also directs the Court to its own declarants' statements regarding ways that online businesses use information to target personalized compilations of expression to different audiences. *See, e.g.*, Roin Decl. ¶¶ 2-6, 10-13; Cairella Decl. ¶¶ 8, 20; Masnick Suppl. Decl. ¶ 9; Paolucci Suppl. Decl. ¶ 9. These examples do not render NetChoice's identification of the challenged applications of the subject provisions any more definite. If the Court were to issue an injunction incorporating the language used by NetChoice to define the challenged applications of §§ 1798.99.31(b)(1)-(4), it likely would be unenforceable because it would be entirely unclear what businesses and what conduct would be encompassed.

Although the Court identified a number of likely unconstitutional applications of § 1798.99.31(b)(1)-(4) in its prior preliminary injunction order, *see NetChoice I*, 692 F. Supp. 3d at 955-57, the Ninth Circuit directed this Court to consider the fully *Moody* analysis, including identification of the full range of activities covered by the provision. *See NetChoice II*, 113 F.4th at 1123.

[34] Looking to NetChoice to present this analysis, the Court finds that NetChoice's simple narrowing of the scope of its claim under *Doe* to only "use of personal information to publish content or make other information available" does not answer the critical question of what is the full sweep of the narrowed application of the provision as compared to the unconstitutional applications. The Court is not persuaded that every application is unconstitutional given the amorphous definitions offered by NetChoice such as "restrict[ions] [on] how services decide what speech to publish. Pl.'s Reply at 9.

Accordingly, the Court finds that NetChoice has not shown that it is likely to prevail on its claim of facial invalidity with respect to California Civil Code §§ 1798.99.31(b)(1)-(4), as limited to specific applications.

c. Dark Patterns Restriction – Specific Applications Cal. Civ. Code § 1798.99.31(b)(7)

California Civil Code § 1798.99.31(b)(7) prohibits covered businesses from using ***1201** dark patterns "to lead or encourage children to provide personal information beyond what is reasonably expected," or to "take any action" the business has reason to know "is materially detrimental" to children's health or well-being. In the FAC's Prayer, NetChoice asks the Court to "[d]eclare that Section 1798.99.31(b)(7) violates the First and Fourteenth Amendments to the United States Constitution on its face *to the extent* that section applies to covered services' *use of recommendation algorithms, continuous scroll, autoplay, and other design features that organize content*[.]" FAC Prayer ¶ 8 (emphasis added).

[35] The State argues that this challenge to § 1798.99.31(b)(7) suffers from the same defect as the challenge to §§ 1798.99.31(b)(1)-(4), discussed above, in that it seeks to challenge an insufficiently definite range of applications. The Court agrees. The State argues persuasively that it is unclear what design features are used by covered businesses or how those design features involve protected editorial judgment or other expressive activity. It is equally unclear what are the "other design features that organize content." The Court finds that NetChoice has not identified a specific application of § 1798.99.31(b)(7) with sufficient particularity to allow the Court to consider a First Amendment facial challenge under *Doe*.

Accordingly, the Court finds that NetChoice has not shown that it is likely to prevail on its claim of facial invalidity with respect to California Civil Code § 1798.99.31(b)(7), as limited to specific applications.

d. Age Estimation Requirement – All Applications Cal. Civ. Code § 1798.99.31(a)(5)

****21** California Civil Code § 1798.99.31(a)(5) requires each covered business to "Estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers." In the FAC's Prayer, NetChoice asks the Court to "[d]eclare that Section 1798.99.31(a)(5) violates the First and Fourteenth Amendments to the United States Constitution on its face[.]" FAC Prayer ¶ 4. NetChoice does not challenge specific applications of this provision, but asserts that the provision is facially invalid in all applications. NetChoice argues that the age estimation requirement would prevent covered businesses from providing expressive content protected by the First

Amendment to both children and adults, and likewise would prevent children and adults from accessing expressive content protected by the First Amendment.

[36] The State contends that estimating a user's age is conduct, not expressive activity. But this provision does not merely require covered a business to estimate age. The business must estimate a user's age "with a reasonable level of certainty appropriate to the risks" to that user. The legislature contemplated that businesses would consider "the unique needs of different age ranges, including the following developmental stages: 0 to 5 years of age or 'preliterate and early literacy'; 6 to 9 years of age or 'core primary school years'; 10 to 12 years of age or 'transition years'; 13 to 15 years of age or 'early teens'; and 16 to 17 years of age or 'approaching adulthood.' " 2022 Cal. Stat. ch. 320 (A.B. 2273), § 1(a)(5). By requiring a business to estimate age for the purpose of determining what content is appropriate for that age, the CAADCA imposes limits on the content a covered business may publish and the content each user may view. In the alternative, all content must be sanitized to comport with the highest risk level, presumably, the youngest children. Imposing ***1202** restrictions of that nature with respect to content published to, and accessed by, both children and adults would trigger strict scrutiny of this provision even if the Court had not already determined that strict scrutiny applies to all Regulatory Provisions based on the gateway coverage definition.

[37] Applying strict scrutiny, the Court must determine whether the State has satisfied its burden to show that § 1798.99.31(a)(5) is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 155, 135 S.Ct. 2218. The State has not addressed the requirements of strict scrutiny with respect to this provision, instead arguing that the age estimation requirement would meet the standard for intermediate scrutiny. *See* Def.'s Opp'n at 24. The State asserts that it has a substantial interest in "protecting the privacy and well-being of children." *Id.* The Court will treat that as an assertion of a compelling state interest in the privacy and well-being of children for purposes of the present analysis.

The State contends that the age estimation requirement furthers its interest in the privacy and well-being of children, because a business that estimates a user's age will know which of the Act's substantive protections must be applied. For example, once a business has estimated that a user is under the age of 18, the business must "[c]onfigure all default privacy settings ... to settings that offer a high level of privacy," unless "a different setting is in the best interests of children." Cal. Civ. Code § 1798.99.31(a)(6). The business also is prohibited from using the personal information of children in certain ways. *Id.* §§ 1798.99.31(b)(1)-(6), (8).

The State's argument is grounded in an assumption that greater data privacy for children means greater security and well-being. As NetChoice points out, however, the State ignores that the age estimation requirement will require businesses to collect private information that users may not wish to share. *See* Paolucci Suppl. Decl. ¶ 6; Masnick Suppl. Decl. ¶ 7; Rumenap Decl. ¶¶ 7-10, ECF 29-30. One of NetChoice's declarants, Stacie Rumenap of the nonprofit organization Stop Child Predators, opines that the practical effect of the CAADCA's age estimation requirement is that businesses will gather and create "a trove of sensitive data" regarding children. Rumenap Decl. ¶ 7. Ms. Rumenap considers it "an inevitability, given the realities of data security, that one or more of these data sets will be breached, exposing the personal information of children to bad actors." *Id.*

****22** The State presents the declaration of Serge Egelman, Ph.D., who discusses a report on age estimation prepared by a French agency. *See* Egelman Decl. ¶¶ 64-65, ECF 112-2. Dr. Egelman states that the report describes France's practice of using third parties for age estimation, as well as a prototype system for performing age estimation through access to restricted websites without sharing other personally identifiable data. *Id.* Dr. Egelman's report does not explain how using third parties for age estimation would address the intrusive aspects of that process described by Ms. Rumenap, nor does Dr. Egelman's report suggest that the prototype system described in the French report is widely available to covered businesses in the United States. *See id.* On this record, the Court finds that the State has not met its burden to show that age estimation furthers its interest in the privacy and well-being of children.

[38] If a business chooses not to estimate the age of its users, it must apply the privacy and data protections afforded to children to all consumers. However, the Supreme Court has made clear that under ***1203** the First Amendment, a state "could not reduce the adult population ... to reading only what is fit for children." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 252, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (internal quotation marks and citation omitted). "A statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one

another ... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft v. ACLU*, 542 U.S. 656, 665, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (internal quotation marks and citation omitted). While the State asserts that there are no less restrictive alternatives, it fails to carry its burden on that point because its statement is not supported by any evidence. *See* Def.'s Opp'n at 25.

Based on the foregoing, the Court finds that § 1798.99.31(a)(5) likely fails strict scrutiny. At the first step of the *Moody* analysis, the Court finds that the provision will impose the same barriers to speech on all covered businesses and their audiences. Every covered business will be forced to choose between intruding into user privacy, thereby chilling publication of and access to protected speech, or publishing only child-appropriate content, thereby restricting access to protected speech for users of all ages. The State has not demonstrate that this choice is narrowly tailored to advance the well-being of children. At the second step of Moody, the Court finds that because all applications of § 1798.99.31(a)(5) will impose barriers to protected speech, the provision has no legitimate sweep.

Accordingly, the Court concludes that NetChoice is likely to prevail on its claim of facial invalidity with respect to California Civil Code § 1798.99.31(a)(5).

5. Vagueness Challenge

In Claim 3 of the FAC, NetChoice asserts that the Individual Provisions are unconstitutionally vague under the First Amendment.[5] Specifically, NetChoice raises vagueness challenges to the policy enforcement requirement, Cal. Civ. Code § 1798.99.31(a)(9); the information use restrictions, Cal. Civ. Code §§ 1798.99.31(b)(1)-(4); the dark patterns restriction, Cal. Civ. Code § 1798.99.31(b)(7); and the age estimation requirement, Cal. Civ. Code § 1798.99.31(a)(5). The State disputes NetChoice's characterization of the Individual Provisions as vague.

[39] **[40]** "A statute can be impermissibly vague for either of two independent reasons." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Id.* "Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Id.* "Although perfect clarity is not required even when a law regulates protected speech, vagueness concerns are more acute when a law implicates First Amendment rights, and, therefore, vagueness scrutiny is more stringent." *Butcher v. Knudsen*, 38 F.4th 1163, 1168 (9th Cir. 2022) (internal quotation marks and citation omitted). "Consistent with these principles, courts have not hesitated to reject on vagueness grounds laws regulating speech protected by the First ***1204** Amendment." *Id.* at 1169 (collecting cases).

a. Policy Enforcement, Cal. Civ. Code § 1798.99.31(a)(9)

****23** **[41]** NetChoice's first vagueness challenge is asserted against California Civil Code § 1798.99.31(a)(9), which requires each covered businesses to "Enforce published terms, policies, and community standards established by the business, including, but not limited to, privacy policies and those concerning children." The State argues that businesses should understand their own policies well enough to enforce them, and that under those circumstances the policy enforcement provision is not vague.

NetChoice does not contend that businesses will not understand the directive to enforce their own content policies. However, NetChoice contends that the provision will authorize and invite arbitrary and discriminatory enforcement because the State will have wide discretion to interpret businesses' policies differently from the businesses themselves. NetChoice submits examples of covered businesses' content policies to illustrate its point. Reddit's Content Policy states that Reddit "is a place for creating community and belonging, not for attacking marginalized or vulnerable groups of people" and so users who "promote hate based on identity of vulnerability will be banned." Kumar Decl. Ex. 3., ECF 29-4. The New York Times' content policy requires use of "respectful language" and tells uses to "[d]ebate, but don't attack." Kumar Decl. Ex. 5, ECF 29-6. NetChoice suggests that a State regulator might understand an "attack" on a "marginalized" person differently than Reddit, or might understand the phrase "respectful language" differently than the New York Times. Certainly we all understand that language a parent might find to be disrespectful will not comport with the view of the child who uses that language. The Court agrees with NetChoice that the provision at issue, which gives the State legal authority to decide whether a covered business is complying with its own content policies, grants the State nearly unfettered discretion.

The Court finds that NetChoice is likely to succeed on its vagueness challenge to the Act's policy enforcement provision, California Civil Code § 1798.99.31(a)(9). That provision would grant the State virtually unfettered discretion to enforce as law a variety of subjective content policies that might be viewed differently by the State than by the policies' creators.

b. Information Use Restrictions, Cal. Civ. Code §§ 1798.99.31(b)(1)-(4)

[42] California Civil Code §§ 1798.99.31(b)(1)-(4) collectively restrict how and for what purpose a covered business may use the personal information of children. NetChoice asserts that several terms in those provisions are open-ended and subjective, rendering the provisions impermissibly vague. The terms identified by NetChoice are: "material detriment," "best interests," and "physical health, mental health, or well-being." The challenged provisions are set forth in relevant part below, with the terms identified by NetChoice in italics:

Pursuant to California Civil Code §§ 1798.99.31(b)(1)-(4), covered businesses may not:

> (1) Use the personal information of any child in a way that the business knows, or has reason to know, is *materially detrimental* to the *physical health, mental health, or well-being* of a child.
>
> (2) Profile a child by default unless both of the following criteria are met:
>
> ***1205** (A) The business can demonstrate it has appropriate safeguards in place to protect children.
>
> (B) Either of the following is true:
>
> (i) Profiling is necessary to provide the online service, product, or feature requested and only with respect to the aspects of the online service, product, or feature with which the child is actively and knowingly engaged.
>
> ****24** (ii) The business can demonstrate a compelling reason that profiling is in the *best interests* of children.
>
> (3) Collect, sell, share, or retain any personal information that is not necessary to provide an online service, product, or feature ... unless the business can demonstrate a compelling reason that [doing so] is in the *best interests* of children likely to access the online service, product, or feature.
>
> (4) If the end user is a child, use personal information for any reason other than a reason for which that personal information was collected, unless the business can demonstrate a compelling reason that use of the personal information is in the *best interests* of children.

Cal. Civ. Code §§ 1798.99.31(b)(1)-(4) (italics added).

Reasonable minds may differ on what is "detrimental" to a child's "physical health, mental health, or well-being," as those terms are used in California Civil Code § 1798.99.31(b)(1). NetChoice queries whether the qualifying effects on children might include sleep loss? Distraction? Hurt feelings? *See* Pl.'s Second Mot. for Prelim. Inj. at 14. The challenged terms have no established meaning and the CAADCA provides no guidance. Consequently, § 1798.99.31(b)(1) runs afoul of the constitutional requirement that "a statute must clearly delineate the conduct it proscribes." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). The State does not offer a proposed definition or means for determining how to decide what is "detrimental" to a child's "physical health, mental health, or well-being." Instead, the State argues that the provision is clear on its face. That argument lacks merit for the reasons discussed above. The State also argues that NetChoice has failed to submit evidence showing it would ever have to construe the challenged terms. The Court is at a loss to understand the State's argument, as a covered business must understand what is "detrimental" to a child's "physical health, mental health, or well-being," in order to have fair notice of what conduct is prohibited by § 1798.99.31(b)(1).

California Civil Code §§ 1798.99.31(b)(2), (3), and (4) prohibit a covered business from taking certain acts unless the business can establish that those acts are in the "best interests" of children. The phrase "best interests" is not defined in the Act, and NetChoice argues that it has no established meaning in this context. The State argues that "best interests" of a child is a legal term of art that is well-established in family law. The State cites several cases demonstrating that family courts consider the "best interests" of the child when addressing custody arrangements, guardianship decisions, and delinquency proceedings. *See In re Jonathan C.M.*, 91 Cal. App. 5th 1039, 1046, 308 Cal.Rptr.3d 724 (2023) (the "best interests" of the child must be considered in juvenile proceedings); *In re Marriage of Vargas & Ross*, 17 Cal. App. 5th 1235, 1243, 226 Cal.Rptr.3d 442 (2017) (phrase "best

interest of the child" was not ambiguous as used in child custody statute); *Petition of Daniels*, 177 Cal. App. 2d 376, 377, 2 Cal.Rptr. 243 (1960) (identifying "the best interest of the child" as paramount ***1206** consideration for deciding contest between nonparents for guardianship).

****25** The undersigned is quite familiar with the family law and juvenile proceedings referenced by the State, which indeed turn on the best interest of the child. Those are specialized proceedings, however, in which finite custodial or dependency options must be considered by the court as to a particular child, on a particular factual record. A state court's application of the "best interest" standard in those specialized proceedings provides no useful guidance as to how a covered business should understand what the "best interests" of children generally means as used in the CAADCA. Without an understanding of that phrase's meaning, covered businesses will not have notice of what conduct is proscribed and what conduct is permitted, as required to satisfy the constitution. *See Foti*, 146 F.3d at 638.

The Court finds that NetChoice has demonstrated a likelihood of success on its vagueness challenge to California Civil Code §§ 1798.99.31(b)(1)-(4).

c. Dark Patterns Restriction, Cal. Civ. Code § 1798.99.31(b)(7)

[43] Under California Civil Code § 1798.99.31(b)(7), covered businesses may not:

> Use dark patterns to lead or encourage children to provide personal information beyond what is reasonably expected to provide that online service, product, or feature to forego privacy protections, or *to take any action* that the business knows, or *has reason to know*, is *materially detrimental* to the child's *physical health, mental health, or well-being.*

Cal. Civ. Code § 1798.99.31(b)(7) (italics added). NetChoice contends that this provision is impermissibly vague because it does not advise businesses what conduct is prohibited, in part because the italicized terms have not established meaning.

The State contends that § 1798.99.31(b)(7) is not vague, pointing out that "dark pattern" is defined under California law. " 'Dark pattern' means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice, as further defined by regulation." Cal. Civ. Code § 1798.140(l). The State contends that "[t]wo of the three relevant prohibited uses – to disclose more personal information or to forego privacy protections – are clear in their limits." Def.'s Opp'n at 23. The State argues that the remaining prohibited use of dark patterns, taking action that the business knows or has reason to know is materially detrimental to the child, can be understood by a person of ordinary intelligence.

In its reply, NetChoice acknowledges the statutory definition of dark patterns, and clarifies that it does not challenge the prohibitions on using dark patterns to lead or encourage children to provide personal information or to forego privacy protections. *See* Pl.'s Reply at 15. However, NetChoice argues that § 1798.99.31(b)(7) gives no guidance on how and when a business will have "reason to know" that a particular user interface covered by the restriction on dark patterns – for example, an autoplay feature or push notification – will be "materially detrimental" to the child's "physical health, mental health, or well-being."

The State argues that the phrase "reason to know" is not vague, relying on *United States v. Jae Gab Kim*, 449 F.3d 933 (9th Cir. 2006). *Kim* addressed a criminal defendant's vagueness challenge to a statute that, in relevant part, imposes penalties on "[a]ny person who knowingly or intentionally ... possesses or distributes a listed chemical knowing, or having reasonable ***1207** cause to believe, that the listed chemical will be used to manufacture a controlled substance...." *Id.* at 937 (quoting 21 U.S.C. § 841(c)(2)). The Ninth Circuit found that the statute is not vague, because "[w]hether a defendant is guilty of having 'reasonable cause to believe' that [the listed chemical] will be used to produce illicit drugs turns on the facts actually known by the defendant in a particular case." *Id.* at 942 (internal quotation marks and citation omitted). The Ninth Circuit explained that "[r]easonable cause to believe" is ... often proven largely through circumstantial evidence and inferences, but *what* must be proven is not vague." *Id.* at 943.

****26** The rationale set forth in *Kim* does not apply in the present case, where the "what" that must be proven *is* vague. While it may be easy to say that an individual has reason to know that a particular chemical will be used to produce

illegal drugs based on the facts of a particular case, it is far more difficult to say that businesses have reason to know what effect a feature like autoplay or push notification will have on children generally. Moreover, as discussed above with respect to the Act's information use restrictions, reasonable minds may differ on what is "detrimental" to a child's "physical health, mental health, or well-being." Those terms have no established meaning and the CAADCA provides no guidance. The State does not offer a proposed definition or means for determining how to decide what is "detrimental" to a child's "physical health, mental health, or well-being." Accordingly, the Court finds that § 1798.99.31(b)(7) does not "clearly delineate the conduct it proscribes" as required under the constitution. *Foti*, 146 F.3d at 638.

The Court finds that NetChoice has demonstrated a likelihood of success on its vagueness challenge to the dark pattern restriction, Cal. Civ. Code § 1798.99.31(b)(7).

d. Age Estimation, Cal. Civ. Code § 1798.99.31(a)(5)

[44] California Civil Code § 1798.99.31(a)(5) requires each covered business to "Estimate the age of child users with a reasonable level of certainty appropriate to the risks that arise from the data management practices of the business or apply the privacy and data protections afforded to children to all consumers." NetChoice does not challenge the requirement that a business estimate the age of child users. NetChoice's issue is with the requirement that such estimation be done "with a reasonable level of certainty appropriate to the risks" that arise from the business's practices.

The State contends that § 1798.99.31(a)(5) is not vague because it gives businesses an alternative to performing age estimation, that is, applying the privacy and data protections afforded to children to all consumers. That argument is unpersuasive. If the age estimation requirement were impermissibly vague, the fact that a business has an alternative to performing age estimation would not render the age estimation requirement itself less vague. And, as discussed above, limiting all users to material appropriate to a 7-year-old is hardly a valid alternative.

[45] However, the Court finds that the thrust of the age estimation requirement – that a business must estimate the age of child users – is clear. A vagueness challenge will fail when "it is clear what the ordinance as a whole prohibits." *Hill*, 530 U.S. at 733, 120 S.Ct. 2480 (internal quotation marks, citations, and brackets omitted). The Court agrees that the provision is less than precise with respect to the degree of certainty with which age estimation must be performed. But NetChoice ***1208** has not cited, and the Court has not discovered, any authority suggesting that ambiguity in the degree of precision with which a task must be performed renders a statute vague when it is clear *what* task must be performed.

The Court concludes that NetChoice has not shown a likelihood of success on its vagueness challenge to California Civil Code § 1798.99.31(a)(5).

6. As-Applied Challenge

[46] After the case was remanded to this Court by the Ninth Circuit, NetChoice amended its pleading to add as-applied challenges to its claims, which previously had asserted only facial challenges. *See* FAC ¶¶ 77-126. NetChoice devotes a single sentence of its motion to its as-applied claims, asserting, "For the same reasons the challenged provisions are facially invalid, they are also invalid as applied to NetChoice's members." Pl.'s Second Mot. for Prelim. Inj. The State did not respond to that argument. In its reply, NetChoice asserts that it is entitled to relief on its as-applied claims, citing case authority for the proposition that a party who fails to oppose an argument concedes it. *See Cody v. Ring LLC*, 718 F. Supp. 3d 993, 1003 n.4 (N.D. Cal. 2024).

****27** **[47]** **[48]** **[49]** "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Project Veritas*, 125 F.4th at 939-40. "Where a plaintiff seeks to challenge a statute prior to enforcement, there must be a genuine threat of imminent prosecution." *Id.* at 941 (internal quotation marks and citation omitted). "To determine whether a plaintiff has established such a threat, we consider: [1] whether the plaintiffs have articulated a concrete plan to violate the law in question, [2] whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute." *Id.* (internal quotation marks and citation omitted). "[T]he mere existence of a statute is insufficient to create a ripe controversy[.]" *Id.* (internal quotation marks and citation omitted).

NetChoice does not address any of these factors. Accordingly, it is not entitled to a preliminary injunction based on its as-applied challenge, regardless of the State's failure to respond.

B. Severability (Prayer for Relief)

In the FAC's Prayer for Relief, NetChoice asks the Court to declare that the Individual Provisions, Cal. Civ. Code §§ 1798.99.31(a)(5), (9), (b)(1)-(4), (7), are facially invalid because they are not severable from the enjoined DPIA provisions. *See* FAC Prayer ¶ 9. NetChoice also asks the Court to declare any remaining provisions of the Act invalid to the extent the Court finds those provisions inseverable from the enjoined portions. *See* id.

[50] **[51]** **[52]** Where a portion of a law has been found to be unconstitutional, invalidation of the entire law may be avoided if the unconstitutional portion may be severed from the remainder. *See Acosta v. City of Costa Mesa*, 718 F.3d 800, 817 (9th Cir. 2013). Severability of a state statute is governed by state law. *See Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 574 (9th Cir. 2014). Under California law, an invalid statutory provision may be severed, and the remainder of the statute enforced, if the invalid provision is "grammatically, functionally, and volitionally separable." *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 271, 135 Cal.Rptr.3d 683, 267 P.3d 580 (2011). All three criteria must be met for the invalid provision to be severed. *See* ***1209** *McMahan v. City & Cnty. of San Francisco*, 127 Cal. App. 4th 1368, 1374, 26 Cal.Rptr.3d 509 (2005).

NetChoice contends that the CAADCA cannot be saved by severing the enjoined DPIA provisions. The enjoined provisions include the DPIA requirement as well as the 90-day notice and cure provision, which the parties also refer to as the "safe harbor." *See NetChoice, LLC v. Bonta*, 113 F.4th at 1108 (identifying enjoined provisions). NetChoice argues that the DPIA provisions are neither volitionally severable nor functionally severable from the remainder of the CAADCA.

While this Court's order granting NetChoice's first motion for a preliminary injunction addressed functional severability, as did the Ninth Circuit's opinion, neither this Court nor the Ninth Circuit considered the issue of volitional severability. *See NetChoice II*, 113 F.4th at 1125; *NetChoice I*, 692 F. Supp. 3d at 960-61. NetChoice raises the argument that the DPIA provisions are not volitionally severable from the remainder of the CAADCA for the first time in the present motion.

1. Volitional Severability

NetChoice argues that the DPIA provisions are not volitionally severable from the rest of the Act for two reasons. First, NetChoice contends that the plain text counsels against severance. Second, NetChoice asserts that the legislative history of the Act shows that the legislature would not have passed the Act without the DPIA provisions, and in particular the 90-day notice and cure provision. The State asserts that the DPIA provisions are volitionally severable.

[53] **[54]** An invalid portion of a statute "passes the test for volitional severability if it can be said with confidence that the enacting body's attention was sufficiently focused upon the parts to be validated so that it would have separately considered and adopted them in the absence of the invalid portions." *Acosta*, 718 F.3d at 817-18 (internal quotation marks, citation, and brackets omitted). A statutory provision "is volitionally separable if it was not of critical importance to the measure's enactment." *Jevne v. Superior Ct.*, 35 Cal. 4th 935, 961, 28 Cal.Rptr.3d 685, 111 P.3d 954 (2005) (internal quotation marks and citation omitted).

****28** **[55]** "The issue, when assessing volitional separability, is not whether a legislative body would have preferred the whole to the part; surely it would have[.]" *Matosantos*, 53 Cal. 4th at 273, 135 Cal.Rptr.3d 683, 267 P.3d 580. "Instead, the issue is whether a legislative body, knowing that only part of its enactment would be valid, would have preferred that part to nothing, or would instead have declined to enact the valid without the invalid." *Id.*

[56] **[57]** "In determining whether the invalid portions of a statute can be severed, we look first to any severability clause." *Matosantos*, 53 Cal. 4th at 270, 135 Cal.Rptr.3d 683, 267 P.3d 580. "The presence of such a clause establishes a presumption in favor of severance." *Id.* However, "the absence of such a clause is not conclusive." *Cnty. of Sonoma v. Superior Ct.*, 173 Cal. App. 4th 322, 352, 93 Cal.Rptr.3d 39 (2009). In the absence of a severability clause, "courts look to the statute's text, the intended function of the particular statutory scheme and the effect severance has on that intended function, any express policy statement or declaration of purpose, and legislative materials[.]" *Fowler Packing Co., Inc. v. Lanier*, 674 F. Supp. 3d 851, 877-78 (E.D. Cal. 2023) (internal quotation marks and citations omitted). Among the legislative materials considered by California courts are a Senate floor analysis, *see People v. Cornett*, 53 Cal. 4th

1261, 1267, 139 Cal.Rptr.3d 837, 274 P.3d 456 (2012), and the ***1210** floor statement of the sponsoring legislator, *see Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 926, 12 Cal.Rptr.3d 262, 88 P.3d 1 (2004); *In re Marriage of Siller*, 187 Cal. App. 3d 36, 46, 231 Cal.Rptr. 757 (1986).

[58] NetChoice argues that the plain text of the statute supports a finding that the DPIA provisions are not severable, noting that the Act does not contain a severability clause. "Although the absence of a severability clause does not raise a presumption against severability, it does suggest an intent to have all components operate together or not at all." *Matter of Reyes*, 910 F.2d 611, 613 (9th Cir. 1990) (internal quotation marks and citation omitted). NetChoice also points to legislative findings directing regulators to look to the United Kingdom for guidance. *See* 2022 Cal. Stat. ch. 320 (A.B. 2273), §§ (1)(d)-(e). Guidance from the Information Commissioner's Office in the U.K. focuses on compliance rather than monetary penalties. *See* Gossett Decl. Exs. 1-4, ECF 101-7. If the CAADCA is permitted to take effect without the DPIA provisions, covered businesses that violate the Act will not be given an opportunity to come into compliance before they are subject to stiff monetary penalties. The CAADCA provides for civil penalties of up to $2,500 per child for each negligent violation and up to $7,500 per child for each intentional violation. *See* Cal. Civ. Code § 1798.99.35(a). That result, NetChoice argues, was not contemplated or intended.

NetChoice argues that the Act's legislative history shows that the CAADCA would not have passed without the DPIA safe harbor granting businesses the right to notice and a 90-day cure period before imposition of civil penalties. Assembly Bill 2273 went through five iterations before it ultimately passed and was codified as the CAADCA. *See* Pl.'s Request for Judicial Notice, ECF 129. [6] The first two versions of the bill, dated February 16, 2022 and April 26, 2022, are not at issue. The third version, dated June 30, 2022 ("Version 3"), was the last version without the notice and cure provision. *See id.* Ex. 3, A.B. 2273, 2021-2022 Leg., Reg. Sess. (Cal. June 30, 2022). The Senate Appropriations Committee referred Version 3 to the suspense file.

****29** The bill was amended again on August 11, 2022 ("Version 4") to make substantial changes, including the addition of a notice and cure provision with a 45-day cure period. *See* Pl.'s Request for Judicial Notice Ex. 4, A.B. 2273, 2021-2022 Leg., Reg. Sess. (Cal. August 11, 2022). On August 22, 2022, the full Senate read the bill a third time and amended Version 4 to become the fifth and final version ("Version 5"). *See id.* Ex. 5, A.B. 2273, 2021-2022 Leg., Reg. Sess. (Cal. August 22, 2022). Version 5 increased the notice and cure period to 90 days and did not include any other significant amendments. *See id.* NetChoice argues that the fact that the legislature actually considered, but did not adopt, the bill without the 90-day notice and cure period is strong evidence that the legislature would not have adopted with bill without that provision.

The Court notes that the DPIA regime as a whole, not just the safe harbor provision, is prominently highlighted in the Legislative Counsel's Digest in the August 11, 2022 and August 22, 2022 versions of the bill. *See* Pl.'s Request for Judicial Notice Exs. 4, 5.

[59] NetChoice presents evidence that floor statements by the bill's co-author also ***1211** support a finding that the DPIA provisions are not volitionally severable. Assemblymember Wicks highlighted the notice and cure provision when presenting the final version of the bill for a vote, explaining that the amendment ensures that businesses in substantial compliance with the Act have an opportunity to remedy violations prior to being subject to civil penalties. *See* Transcript, Assembly Floor Analysis, AB 2273 (Aug. 11, 2022), Gossett Decl. Ex. 9. Floor statements of the sponsoring legislator may be considered when interpreting a statute. *See Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 926, 12 Cal.Rptr.3d 262, 88 P.3d 1 (2004); *In re Marriage of Siller*, 187 Cal. App. 3d 36, 46, 231 Cal.Rptr. 757 (1986).

[60] The Court finds persuasive NetChoice's showing regarding the importance of the DPIA provisions, and in particular the notice and cure provision, to the passage of the CAADCA. The State argues that the Act makes clear the depth of the legislature's concerns for the privacy and safety of child users. *See* Cal. Civ. Code § 1798.99.29 (stating purpose of protecting the privacy and well-being of children when they are online). In the State's view, the legislature would have enacted the remaining portions of the Act even had it known the notice and cure provision would not be included. The State's position is not supported by the record, which reflects that the legislature had the opportunity to pass the Act without the notice and cure provision but declined to do so. The legislature was presented with multiple versions of the bill omitting the notice and cure provision, and even a version including a shorter 45-day notice and cure period. The Act

was not passed, however, until the 90-day safe harbor was included. Under those circumstances, the Court cannot "say with confidence" that the legislature would have separately considered and adopted the non-enjoined portions of the Act in the absence of the DPIA provisions. *Acosta*, 718 F.3d at 817. On this record, the Court simply cannot find that the DPIA provisions, including the safe harbor provision, were "not of critical importance to the measure's enactment." *Jevne v. Superior Ct.*, 35 Cal. 4th at 961, 28 Cal.Rptr.3d 685, 111 P.3d 954.

Accordingly, the Court finds that the enjoined DPIA provisions are not volitionally severable from the remainder of the statute.

2. Functional Severability

NetChoice also argues that the DPIA provisions are not functionally severable from the remaining provisions of the CAADCA. The State contends that the DPIA provisions are functionally severable.

[61] An invalid provision is functionally severable if it is not necessary to the law's operation and purpose. *Acosta*, 718 F.3d at 820. "[T]he remainder after separation of the invalid part must be complete in itself and capable of independent application." *Abbott Lab'ys. v. Franchise Tax. Bd.*, 175 Cal. App. 4th 1346, 1358, 96 Cal.Rptr.3d 864 (2009) (internal quotation marks and citation omitted).

****30** NetChoice argues that the enjoined DPIA provisions are not functionally severable because they are critical to what NetChoice characterizes as "a compliance-based regime enforced primarily through internal compliance bureaucracies, not strict liability." Pl.'s Second Mot. for Prelim. Inj. at 25. NetChoice cites extensively to interview statements made by Assemblymember Wicks, the Act's co-author, indicating that the purpose of the Act is to bring covered businesses into compliance with its regulations, not to impose penalties on them. NetChoice argues that stripping ***1212** out the DPIA provisions would change the Act's function and focus.

The State responds by pointing out that under California law, "the statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation." *Quintano v. Mercury Cas. Co.*, 11 Cal. 4th 1049, 1062, 48 Cal.Rptr.2d 1, 906 P.2d 1057 (1995). As noted above, statements made on the floor may be considered, as they are presented to the legislature as a whole. *See Dowhal*, 32 Cal. 4th at 926, 12 Cal.Rptr.3d 262, 88 P.3d 1. However, the Court gives little weight to the statements of Assemblymember Wicks in an interview.

[62] Considering the plain text of the CAADCA, it appears that the enjoined DPIA provisions are distinct from other provisions of the Act, such that the invalidity of the DPIA provisions does not prevent the independent application of the Act's remaining provisions. For example, a covered business still can comply with the Act's affirmative requirements that it "[e]stimate the age of child users ...," Cal. Civ. Code § 1798.99.31(a)(5); "[c]onfigure all default privacy settings provided to children by the online service, product, or feature to settings that offer a high level of privacy ...," *id.* § 1798.99.31(a)(6); "[p]rovide any privacy information, terms of service, policies, and community standards ...," *id.* § 1798.99.31(a)(7); "provide an obvious signal to the child when the child is being monitored or tracked," *id.* § 1798.99.31(a)(8); "[e]nforce published terms, policies, and community standards ...," *id.* § 1798.99.31(a)(9); and "[p]rovide prominent, accessible, and responsive tools to help children ... exercise their privacy rights and report concerns," *id.* § 1798.99.31(a)(10). A covered business likewise still can comply with the Act's prohibitions set forth in *id.* § 1798.99.31(b)(1)-(8).

The Court concludes that the DPIA provisions are functionally severable from the remainder of the statute.

C. Section 230, COPPA, and Dormant Commerce Clause (Claims 4-6)

NetChoice argues that it is likely to succeed on its claims that the CAADCA is preempted by Section 230 (Claim 6); is preempted by COPPA (Claim 5); and is facially invalid under the dormant Commerce Clause (Claim 4). The State contends that NetChoice is not likely to succeed on those claims.

1. Section 230 Preemption (Claim 6)

[63] In Claim 6, NetChoice asserts that certain provisions of the CAADCA are preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. Specifically, NetChoice asserts that Section 230 preempts the Act's policy

enforcement requirement, Cal. Civ. Code § 1798.99.31(a)(9); several of the information use restrictions, Cal. Civ. Code §§ 1798.99.31(b)(1), (3)-(4); and the dark patterns restriction, Cal. Civ. Code § 1798.99.31(b)(7). The State argues that Section 230 does not preempt any provisions of the CAADCA.

"Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties[.]" *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (footnotes omitted). "The operative section of the law, § 230(c) ... is divided into two working parts." *Est. of Bride by & through Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1175 (9th Cir. 2024). "The first broadly states that no service ***1213** provider 'shall be treated as the publisher or speaker of any information provided by another information content provider,' or, more colloquially, by a third-party user of the service." *Id.* (quoting § 230(c)(1)). "The second part protects actions taken by a service provider to moderate and restrict material it 'considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.' " *Id.* (quoting § 230(c)(2)). "Section 230 expressly preempts any state laws with which it may conflict." *Id.* (quoting § 230(e)(3)).

****31** The Ninth Circuit has emphasized "that § 230(c)(1) does not declare a general immunity from liability deriving from third-party content." *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 740 (9th Cir. 2024) (internal quotation marks, citation, and brackets omitted). Immunity applies only if the website operator "is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content." *Roommates*, 521 F.3d at 1162 (quoting § 230(f)(3)). "A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content." *Id.* "But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider." *Id.* "Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content." *Id.* at 1162-63.

Any assertion of Section 230 immunity against enforcement of the CAADCA therefore will depend on the circumstances of the case. One business's publication of content may implicate Section 230 while another business's publication of the same content may not, depending on each business's role (or lack thereof) in creating the published content. Indeed, the Ninth Circuit has recognized that Section 230 immunity "is a difficult and complex issue that requires case-specific, and indeed claim-specific, analysis." *Calise*, 103 F.4th at 739. Consequently, while it may be appropriate for a covered business to raise Section 230 in response to the State's attempted enforcement of the CAADCA in a particular case, NetChoice has not shown that it is likely to succeed on its facial challenge to the CAADCA as preempted by Section 230.

2. COPPA Preemption (Claim 5)

[64] **[65]** **[66]** In Claim 5, NetChoice asserts that the CAADCA is preempted by COPPA, which contains a preemption clause providing, "No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce in connection with an activity or action described in this chapter that is inconsistent with the treatment of those activities or actions under this section." 15 U.S.C.A. § 6502(d) (emphasis added). A state law is not "inconsistent" with COPPA for preemption purposes unless the state law contains requirements that contradict those of COPPA or "stand as obstacles to federal objectives" embodied in COPPA. *Jones v. Google LLC*, 73 F.4th 636, 642 (9th Cir. 2023). A state law that supplements or requires the same thing as COPPA is not inconsistent with COPPA. *See id.*

NetChoice claims that the CAADCA is inconsistent with COPPA because the CAADCA's regulations reach more broadly to businesses providing services "likely to be accessed by children," and because the CAADCA does not grant parents the power to decide what their children an access online, as does COPPA. The State argues that the cited provisions of the ***1214** CAADCA do not contradict, and indeed supplement, COPPA.

It is not clear that the cited provisions of the CAADCA contradict those of COPPA, or would stand as an obstacle to enforcement of COPPA. A determination that there is preemption would require a careful and nuanced analysis, which is not consistent with the few paragraphs the parties have devoted to the issue. The Court finds that NetChoice has not shown it is likely to succeed on its claim of COPPA preemption.

3. Dormant Commerce Clause (Claim 4)

[67] **[68]** **[69]** Finally, in Claim 4 of the FAC, NetChoice asserts that the CAADCA violates the dormant Commerce Clause. "[T]he Commerce Clause prohibits the enforcement of state laws driven by economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023). "When a state law ... completely bans – or even just directly affects – commercial transactions that take place entirely outside of the state's borders, it plainly contravenes the dormant Commerce Clause." *Nat'l Shooting Sports Found. v. Bonta*, 718 F. Supp. 3d 1244, 1256 (S.D. Cal. 2024) (internal quotation marks and citation omitted). "This is so even if the regulated commerce has effects within the State of California. *Id.* (internal quotation marks and citation omitted).

****32** NetChoice argues that, because the CAADCA applies to "residents of California," and such residents may be out of the state, the Act runs afoul of the dormant Commerce Clause. In response, the State contends that NetChoice applies the dormant Commerce Clause too broadly, and that in any event the CAADCA has no impact on transactions occurring wholly outside of the state. The briefing on these issues, comprising approximately one page per party, and the record regarding potential extraterritorial applications of the Act, are insufficient for the careful analysis that would be required before the Court could find the Act facially invalid under the dormant Commerce Clause. The Court therefore concludes that NetChoice has not shown it is likely to succeed on the merits of this claim.

D. Conclusion Re NetChoice's Entitlement to a Preliminary Injunction

The Court finds that NetChoice has shown a likelihood of success on its First Amendment claim (Claim 1), as NetChoice has established that the CAADCA likely is invalid on its face. NetChoice also has shown that the previously enjoined DPIA provisions are not volitionally severable from the remainder of the Act. Consequently, NetChoice has satisfied the first of the four *Winter* factors, as required to obtain a preliminary injunction barring enforcement of the CAADCA. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (listing factors).

In addition, NetChoice has shown a likelihood of success on its First Amendment claim (Claim 1) and its First Amendment Vagueness claim (Claim 3) as to the Act's Individual Provisions, as NetChoice has established that: the policy enforcement provision, Cal. Civ. Code § 1798.99.31(a)(9), likely is both facially invalid with respect to content policies and community standards, and impermissibly vague; the use restrictions, *id.* §§ 1798.99.31(b)(1)-(4), likely are impermissibly vague; the dark patterns restriction, *id.* § 1798.99.31(b)(7), likely is impermissibly vague; and the age estimation requirement, *id.* § 1798.99.31(a)(5), likely is facially invalid.

***1215** **[70]** The remaining *Winter* factors – the likelihood of irreparable harm, the balance of equities, and the public interest – are not contested, and the Court has no difficulty finding that they are satisfied here. Because NetChoice has a colorable First Amendment claim, it likely will suffer irreparable harm if the CAADCA takes effect. *See Am. Beverage Ass'n*, 916 F.3d at 758. The fact that NetChoice has raised serious First Amendment questions necessarily means that the balance of hardships tips sharply in NetChoice's favor. *See id.* And courts have consistently recognized the significant public interest in upholding First Amendment principles. *See id.*

[71] When a plaintiff makes a sufficient showing on all four *Winter* factors, issuance of a preliminary injunction is warranted, even if issuance of the injunction will involve intrusion into an agency's administration of state law. *See Baird v. Bonta*, 81 F.4th 1036, 1041 (9th Cir. 2023). Accordingly, NetChoice's motion for a preliminary injunction will be GRANTED.

E. Security

[72] Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The Ninth Circuit has "recognized that Rule 65(c) invests the district court with discretion as to the amount of security required, if any." *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks and citation omitted) (italics in original). Thus, the district court has discretion to dispense with the filing of a bond altogether, or to require only a nominal bond. *See id.*

****33** **[73]** The parties have not addressed the issue of bond in their briefing. The Court issued the first preliminary injunction without a bond and without objection from the State. The Court again finds it appropriate to issue a preliminary injunction without requiring security.

IV. ORDER

(1) Plaintiff NetChoice's motion for preliminary injunction is GRANTED as follows:

(a) Rob Bonta, Attorney General of the State of California, and anyone acting in concert with his office are ENJOINED from enforcing the California Age-Appropriate Design Code Act;

(b) This preliminary injunction shall issue without the requirement of a security bond; and

(c) This preliminary injunction shall take effect immediately and shall remain in effect until otherwise ordered by the Court.

(2) This order terminates ECF 101.

All Citations

770 F.Supp.3d 1164, 2025 WL 807961

Footnotes

1 NetChoice, LLC was the second named plaintiff in this suit.

2 The definitions section of the California Consumer Privacy Act, Cal. Civ. Code § 1798.140, is incorporated into the CAADCA unless otherwise specified, *id.* § 1798.99.30(a).

3 Claim 1 also is brought under Article I, Section 2(a) of the California Constitution, and Claim 3 also is brought under the Due Process Clause of the United States Constitution and under Article I, Section 7(a) of the California Constitution. Those additional aspects of Claims 1 and 3 are not bases for NetChoice's second motion for preliminary injunction, however, and so are not discussed here.

4 At the hearing, NetChoice advised the Court that the scope of its challenge to each section was set forth in its Prayer for Relief.

5 As noted previously, Claim 3 also is brought under the Due Process Clause of the United States Constitution and under Article I, Section 7(a) of the California Constitution. Because those aspects of the claim are not addressed in NetChoice's second motion for preliminary injunction, they are not discussed here

6 NetChoice's request for judicial notice of AB 2273's legislative history is granted. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice.").

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United States District Court, W.D.
Arkansas, Fayetteville Division.

NETCHOICE, LLC, Plaintiff
v.
Tim GRIFFIN, in his Official Capacity as Attorney General of Arkansas, Defendant

CASE NO. 5:23-CV-5105
|
Signed March 31, 2025

Attorneys and Law Firms

Katherine Church Campbell, Marshall S. Ney, Friday, Eldredge & Clark, LLP, Rogers, AR, Erin E. Murphy, James Xi, Joseph DeMott, Paul D. Clement, Clement & Murphy, PLLC, Alexandria, VA, for Plaintiff.

John O. Payne, Jordan Broyles, Justin Brascher, Noah Watson, Laura Purvis, Office of Arkansas Attorney General, Little Rock, AR, for Defendant.

Holly Elizabeth Dickson, ACLU of Arkansas, Inc., Little Rock, AR, for Amici American Civil Liberties Union, Americans Civil Liberties Union of Arkansas, Electronic Frontier Foundation.

MEMORANDUM OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT JUDGE

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I. INTRODUCTION

This case presents a constitutional challenge to Arkansas Act 689 of 2023, the "Social Media Safety Act" ("Act 689"). Act 689 requires certain social media platforms to verify the age of all account holders who reside in Arkansas in order to prevent minors from opening accounts without parental consent. This age verification must be performed by a third-party vendor using the account-seeker's government identification or biometric information. Act 689 was set to go into effect September 1, 2023, but was preliminarily enjoined by this Court (Doc. 44). Plaintiff NetChoice, LLC, an Internet trade association, now moves for summary judgment on its First Amendment and vagueness claims. For the reasons that follow, NetChoice's Amended Motion for Summary Judgment (Doc. 66) is **GRANTED**.

II. BACKGROUND

A. The Social Media Safety Act: Objectives and Requirements

As described by the State, "Arkansas passed the Social Media Safety Act (Act 689) to protect children from the widespread dangers of social media" and "prevent[ ] online sexual predators from exploiting children in online spaces" by requiring "reasonable age verification." (Doc. 72, p. 1).

Act 689 is described in detail in the Court's preliminary injunction order (Doc. 44). [1] The broad strokes are as follows. Under Act 689, "[a] social media company shall not permit an Arkansas user who is a minor to be an account holder on the social media company's social media platform unless the minor has the express consent of a parent or legal guardian." Ark. Code Ann. § 4-88-1402(a). To enforce this prohibition, social media companies "shall use a third-party vendor to perform reasonable age verification before allowing access to the social media company's social media platform." *Id.* § 1402(c)(1). "Reasonable age verification methods" include providing the account holder's digital ID or other government-issued ID to the third-party vendor, or "[a]ny commercially reasonable age verification method" a third-party vendor might use. *Id.* § 1402(c)(2). Other age verification methods currently on the market utilize biometric data to perform face or voice analysis. (Doc. 45, pp. 17:12–20). Once their age is verified, an adult can access a social media platform. A minor, however, cannot access a social media platform unless and until the social media company confirms that the minor has express parental consent. *Id.* § 1402(b)(2). Act 689 does not say how a social media company should identify an account-seeking minor's parents or verify a parent's consent.

2** Act 689 defines both "social media company" and "social media platform," and neither definition follows common parlance. Under Act 689, a "social media company" is defined in terms of what *account holders* may do on the company's platform. A "social media company" is one that permits its account holders to: (1) create a public profile "for the ***primary purpose of interacting socially with other profiles and accounts"; (2) upload or post content; (3) view content of other account holders; and (4) interact with other account holders "through request and acceptance." *Id.* at § 1401(7)(A) (emphasis added). The definition of "social media company" has multiple exclusions: companies that offer "career development opportunities"; exclusively gaming-related content; or exclusively "subscription content in which users follow or subscribe unilaterally." *Id.* at § 1401(7)(B). That last exclusion comes with an exception: "A social media company that allows a user to generate short video clips of dancing, voice-overs, or other acts of entertainment in which the primary purpose is not educational or informative does not meet the exclusion ...." *Id.* § 1401(7)(B)(i)(b). And finally, companies that offer "cloud storage services, enterprise cybersecurity services, educational devices, or enterprise collaboration tools for kindergarten through grade twelve (K-12) schools" and derive "less than twenty-five percent (25%)" of their revenue "from operating a social media platform" are excluded. *Id.* § 1401(7)(B)(iii). This exemption shields Google (a subsidiary of Alphabet, Inc.) from compliance, so neither Google Hangouts nor Google's video-sharing platform, YouTube, are required to verify the ages of their account holders under the Act.

Act 689 defines "social media platform" as a "public or semipublic internet-based service or application" of which the "***substantial function*** ... is to allow users to interact socially with each other within the service or application." *Id.* § 1401(8)(A)(ii)(a) (emphasis added). The "social media platform" definition also comes with multiple exclusions: platforms for which "the predominant or exclusive function is" email or direct messaging; e-commerce including classified ads for the sale of goods (but not personal services); business-to-business interaction; shared document collaboration; data visualization; tech support; "[a]cademic or scholarly research"; use by educational entities; or hosting content that is created, posted, or selected by the provider rather than the user or account holder. *Id.* § 1401(8)(B). Act 689 also exempts platforms controlled by businesses that generate less than $100 million annually. *Id.* § 1401(8)(C). As a result, platforms like Parler, Gab, and Truth Social are not required to verify the ages of their account holders.

B. Social Media Use Among Minors

Social media is used broadly by adults and near-universally by teens. In 2021, about 70% of Americans reported that they have used social media. *Social Media Use in 2021*, Pew Rsch. Ctr. (Apr. 7, 2021). [2] And as of 2023, up to 95% of people aged 13–17 reported using any social media platform. U.S. Surgeon General, Social Media and Youth Mental Health 4 (2023). [3] "There is broad agreement among the scientific community that social media has the potential to both benefit and harm children and adolescents." *Id.* at 5.

"[A]dolescents who spent more than 3 hours per day on social media faced double the risk of experiencing poor mental health outcomes including symptoms of depression and anxiety." *Id.* at 6. And "[a]s of 2021, 8th and 10th graders spen[t] an average of 3.5 hours per day on social media." *Id.* at 7. Social media users may encounter disturbing suicide-and self-harm-related content online. *Id.* at 8. "Social comparison driven by social media is [also] associated with body dissatisfaction, disordered eating, and depressive symptoms." *Id.* And social media users can become victims of cyberbullying, which has "a consistent relationship [with] depression among children and adolescents." *Id.* at 9.

In addition to the risks posed by other minors on social media, these platforms can also be used by adults to sexually exploit minors. The State relies on an FBI report that found:

> Financial sextortion schemes occur in online environments where young people feel most comfortable—using common social media sites, gaming sites, or video chat applications that feel familiar and safe. On these platforms, online predators often use fake female accounts and target minor males between 14 to 17 years old, but the FBI has interviewed victims as young as 10 years old.

***3** FBI Nat'l Press Off., *FBI and Partners Issue National Public Safety Alert on Financial Sextortion Schemes* (Dec. 19, 2022) [hereinafter *Financial Sextortion*]. [4]

C. Types of Speech Available on NetChoice Members' Platforms

It is undisputed that adults and minors use NetChoice members' online services to engage in constitutionally protected speech. (Doc. 68, ¶¶ 4, 6, 14, 21, 30, 34, 37; Doc. 73, ¶¶ 2, 4, 6, 11, 12, 14, 15). Social media companies and platforms "allow[ ] users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). "[U]sers employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.' " *Id.* at 105 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). "On [NetChoice member Meta's platform,] Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos." *Id.* at 104. On NetChoice member X, "users can petition their elected representatives and otherwise engage with them in a direct manner." *Id.* at 104–05.

With all that said, the State reminds the Court that social media users "also engage in non-expressive activity not protected by the First Amendment, including criminal conduct and that which is harmful to minors." (Doc. 73, ¶¶ 2, 4, 11, 14). The Court would note that "harmful to minors" is not a category of unprotected speech. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (" 'From 1791 to the present,' ... the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' " (second alteration in original) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992))). It is, however, true that despite these entities' efforts to self-regulate, social media users of any age may still encounter some speech online that is not entitled to constitutional protection, including real threats, child pornography, obscenity, defamation, fighting words, or speech integral to criminal conduct. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). In addition, minors may encounter speech online that is constitutionally protected as to adults, but not as to minors, and some of that speech may be harmful to them.

D. Existing Parental Controls

Of course, parents may rightly decide to regulate their child's use of social media—including restricting the amount of time they spend on it, the content they may access, or even those they chat with. And many tools exist to help parents with this endeavor.

The first step to acquiring a social media account is an internet-capable device. Parents decide what, if any, internet-capable devices to give their child. Most manufacturers offer device-level parental controls for parents who chose to give their child internet-capable devices. For example, iPhones and iPads empower parents to limit the amount of time their children can spend on the device, choose which applications (e.g., YouTube, Facebook, Snapchat, or

Instagram) their children can use, set age-related content restrictions for those applications, filter online content, and control privacy settings. *See* Apple, *Use Parental Controls on Your Child's iPhone, iPad, and iPod Touch* (Doc. 66, pp. 52–59). [5] Google and Microsoft also offer parental controls for their devices. *See* Google, Safety Center, Parental Controls (Doc. 66, pp. 80–85); [6] Microsoft, *Getting Started with Microsoft Family Safety* (Doc. 66, pp. 86–90). [7] In addition, numerous third-party applications allow parents to control and monitor their children's use of Internet-connected devices and online services. *See* Ben Moore & Kim Key, *The Best Parental Control Apps for Your Phone*, PCMag (Mar. 29, 2022) (Doc. 66, pp. 99–115). [8]

***4** The next step is connecting that internet-capable device to the internet. Devices may access the internet through a wireless plan on a particular device, i.e., cell-phone data, or by connecting to a wireless or wired network, e.g., home WiFi. At both these connection points, parental controls are available. Cell carriers and broadband providers have tools that allow parents to block certain applications and websites from their children's devices, ensure that their children are texting and chatting with trusted contacts only, and restrict their children's access to screen time during certain hours of the day. *See, e.g.*, AT&T, *Learn About the AT&T Secure Family App* (Doc. 66, pp. 60–64); [9] T-Mobile, *Family Controls and Privacy* (Doc. 66, pp. 135–43); [10] Comcast Xfinity, *Set Up Parental Controls for the Internet*, (Doc. 66, pp. 65–70). [11]

Wireless routers themselves offer parental controls, too. *See* Molly Price & Ry Crist, *How to Set Up and Use Your Wi-Fi Router's Parental Controls*, CNET (Feb. 11, 2021) (Doc. 66, pp. 126–34). [12] Parents can use these controls to block certain websites or online services that they deem inappropriate, set individualized content filters for their children, and monitor the websites their children visit and the services they use. *Id.* Parents can also use router settings to turn off their home internet at particular times of day or pause internet access for a particular device or user. *Id.*

Finally, there are the internet browsers and the websites or mobile applications through which children create social media accounts and access social media content. Many browsers offer parents tools to control which websites their children can access. *See, e.g.*, Mozilla, *Block and Unblock Websites with Parental Controls on Firefox* (Doc. 66, pp. 116–18). [13] Microsoft offers "Kids Mode," which allows children to access only a pre-approved list of websites. *See* Microsoft, *Learn More About Kids Mode in Microsoft Edge* (Doc. 66, pp. 91–98). [14] Google has a similar feature. It provides parents with "activity reports," allowing them to see what apps and websites their children access most frequently. *See* Google, Safety Center, Parental Controls (Doc. 66, pp. 80–85). [15]

Some social media platforms also offer parental controls within the platform itself. For example, Facebook and Instagram have "supervision tools" through which parents can set time limits, view privacy and content settings, and monitor what accounts their child is connected with. *See* Declaration of Antigone Davis ¶ 28, (Doc. 66, pp. 11–32) [hereinafter Davis Decl.]. Snapchat also offers a "family center" through which parents can see who their child is communicating with in the app. *See* Declaration of David Boyle, ¶ 7, (Doc. 17-3) [hereinafter Boyle Decl.]. [16]

***5** To be sure, parents may or may not use these tools. The State's expert explains that even though these filtering controls can be "applied in the home, on the router or on laptops, tablets, and smartphones through family cellular plans," research indicates "that many parents are unaware of this technology" or "do not know how to use it, or discover their children also know how to use it or have circumvented it some other way." (Doc. 34-1, ¶ 85). Furthermore, he attests, "Children can be very persuasive, and parents might release the controls to allow them to play a game designed for 18+ within a social media platform, unaware the game or platform may be a portal to pornographic or other unsuitable content and dangerous functionality." *Id.*

E. Existing Social Media Protections for Minors

Some NetChoice members have also developed policies and practices designed to protect minor users that operate on their platforms even without parental intervention. Facebook, Instagram, Pinterest, and Snapchat require users in the United States to be at least 13 years old before they can create an account—though account holders are asked only to self-report their ages. *See* Davis Decl. ¶ 17; Pinterest, *All About Pinterest* (Doc. 66, pp. 152–56); [17] Boyle Decl. ¶ 5. While none of Plaintiff's members currently use the age verification methods required by Act 689, Meta employs human content reviewers who are trained to flag, among other things, Facebook and Instagram users who appear to be under 13;

if a flagged user cannot prove they meet minimum age requirements, their account is taken down. *See* Davis Decl. ¶ 27. Members also use different default settings based on age: Snapchat defaults all minors to private settings, while Facebook, Instagram, and Pinterest do so for minors under 16. *See* Boyle Decl. ¶ 6; Davis Decl. ¶ 17; Pinterest, *Teen Safety Options* (Doc. 66, pp. 167–72). [18]

NetChoice members also attempt to curate the content that users post and see on their platforms. *See, e.g.*, Declaration of Justyn Harriman ¶ 9 (Doc. 66, pp. 33–46) [hereinafter Harriman Decl.]. Members attempt to restrict the uploading of violent and sexual content, bullying, and harassment. *See* Declaration of Carl Szabo ¶ 7 (Doc. 66, pp.4–10) [hereinafter Szabo Decl.]; Davis Decl. ¶¶ 36–37, 39; Boyle Decl. ¶ 6. Some NetChoice members, like Meta, also use age-verification technology to try to keep minors from seeing certain content visible to adults, or to keep younger teens from seeing content visible to older teens. *See* Szabo Decl. ¶ 7; Davis Decl. ¶ 32. NetChoice members implement these policies through algorithms, automated editing tools, and human review. *See* Davis Decl. ¶¶ 36, 27, 39–40. If a platform decides that certain content violates its policies, it may remove the content, restrict it, or add a warning label or disclaimer. *See* Davis Decl. ¶ 39. Nextdoor even gives "Kindness Reminders" before a user publishes a post containing potentially offensive language. *See* Harriman Decl. ¶ 7.b. Repeat violators of a platform's policies may find themselves suspended or banned from the platform. *See* Davis Decl. ¶ 40.

NetChoice members also utilize tools directed at the particular issue of child sexual exploitation. Meta and Nextdoor use both automated and human review to take down harmful content, including child sexual abuse material. *See* Davis Decl. ¶¶ 36–37; Doc. 72-2, p. 21:1–17 (Knapp Depo.). Snapchat purports to protect its minor users by only recommending minors as friend connections to people already in their contacts or with whom they have mutual friends. *See* Boyle Decl. ¶ 6. Instagram warns minor users when a "suspicious" adult tries to interact with them and gives them an option to end the conversation and block, report, and/or restrict the adult; adults are flagged as suspicious if they are sending a large number of friend or message requests to people under age 18 or if they have recently been blocked by people under age 18. *See* Davis Decl. ¶ 30. Snapchat similarly provides "in-conversation warnings" if minors connect with someone with whom they do not share mutual friends. *See* Doc. 72-3, pp. 35:20–36:13 (Boyle Depo.).

III. LEGAL STANDARD

***6** A party moving for summary judgment must establish the absence of a genuine dispute of material fact and its entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Nat'l Bank of Commerce of El Dorado v. Dow Chem. Co.*, 165 F.3d 602, 606 (8th Cir. 1999). "As a general rule, summary judgment is proper 'only after the nonmovant has had adequate time for discovery.' " *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. 2014) (citations omitted). Federal Rule of Civil Procedure 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). "The party seeking additional discovery must show: '(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are essential to resist the summary judgment motion.' " *Marlow v. City of Clarendon*, 78 F.4th 410, 416 (8th Cir. 2023) (quoting *Toben*, 751 F.3d at 895).

To secure a permanent injunction, a party's claim must actually succeed on the merits. Once a successful merits claim is established, the Court "then considers the following factors in deciding whether to grant a permanent injunction: (1) the threat of irreparable harm to the moving party; (2) the balance of harms with any injury an injunction might inflict on other parties; and (3) the public interest." *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 229 (8th Cir. 2008). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

IV. DISCUSSION

A. Standing

Arkansas asserts that "NetChoice does not have standing to bring First Amendment claims on behalf of third parties without first making any claims on behalf of itself." (Doc. 72, p. 2). The State does not otherwise address NetChoice's standing or attempt to rebut the Court's prior standing determination. The factual and legal bases for NetChoice's suit have not changed. Therefore, for the reasons explained in the Court's preliminary injunction order, the Court finds that NetChoice has associational standing to assert claims based on the harms to be suffered by its member and third-party standing to assert the rights of its members' users.

B. Need for Further Discovery

The State argues that, under the Supreme Court's recent decision in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), the Court should find that more discovery is needed to resolve a facial challenge so summary judgment is not appropriate at this juncture. The State does not specify what additional factual information it seeks.

In *Moody*, the Supreme Court addressed a facial First Amendment challenge to two state laws that "limit[ed] [social media] platforms' capacity to engage in content moderation," thereby infringing, on the plaintiff's account, the platforms' protected editorial discretion. *Id.* at 717. The Court vacated the lower courts' rulings because "neither Court of Appeals properly considered the facial nature of NetChoice's challenge." *Id.* at 718. In ruling on a facial challenge under the First Amendment, the Supreme Court said, a court must decide "whether a law's unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other." *Id.* at 718. Because "[t]he parties ha[d] not briefed the critical issues" and the record was "underdeveloped," the court vacated and remanded for the lower courts "to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones." *Id.* at 726.

***7** Here, NetChoice's challenge is based on the First Amendment rights of users, not platforms. It is unclear how additional factual development would help illuminate the scope of users' First Amendment interest in accessing regulated platforms. The laws' scope is largely not in dispute. While the parties disagree about some of the platforms that are subject to the Act's requirement, there is no dispute that users engage in protected speech on all the platforms that are arguably within the Act's proscription. Moreover, as the Court determines below, the Act imposes a platform-wide burden on users' right to engage in that speech, and the Court struggles to see how this would differ between the platforms regulated.

Notably, *Moody* went to the Supreme Court in a preliminary injunction posture. This case comes before the Court, now, at summary judgment. The State relies entirely on *Moody* and does not attempt to address the requirements for a court to postpone ruling on a motion for summary judgment under Federal Rule of Civil Procedure 56(d). [19] Turning to those requirements, the State has not "set forth in affidavit form the specific facts they hope to elicit from further discovery," "that the facts sought exist," or "that these sought-after facts are essential to resist the summary judgment motion." *Marlow*, 78 F.4th at 416. "If a party fails to carry its burden, 'postponement of a ruling on a motion for summary judgment is unjustified.' " *Id.* (quoting *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 911 (8th Cir. 1999)).

NetChoice bears the burden of showing that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law, and the State can argue that NetChoice has not met that burden on the existing record, as it has in its Response. But the Court cannot "simply refrain" from ruling on Plaintiff's motion and "instead allow this to proceed to full discovery" when the State has not made out the required showing under Rule 56(d).

C. Merits Claims

1. Burdens on First Amendment Rights: Platform Users' Rights

a. Level of Scrutiny

NetChoice contends that Act 689's age-verification requirement targets speech based on content, speaker, and viewpoint and is therefore subject to strict scrutiny. The

State disagrees and argues that Act 689's age-verification requirement "only regulates non-expressive conduct," namely, minors "entering a social media establishment alone," and so is not subject to First Amendment scrutiny at all. (Doc. 72, pp. 65–67). The State further argues that even if the Act regulates some speech, the effect is merely incidental.

Laws regulating speech or conduct unprotected by the First Amendment are subject to rational basis review. *Ginsberg v. New York*, 390 U.S. 629, 641 (1968). On the other hand, laws that restrict protected speech or expression are subject to heightened scrutiny. Courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

***8** The State focuses on the direct effect of the regulation on the social media platforms—ignoring NetChoice's assertion of users' rights—to argue that a platform's decision to allow minors on its platform is not "expressive." The Court need not decide whether a social media platform's decision to distribute speech to minors and by minors is itself expressive because the Act ultimately impacts users' speech by "deputiz[ing] covered businesses into serving as censors for the State." *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1118 (9th Cir. 2024).

The First Amendment protects both the right to speak and the "right to receive information and ideas, regardless of their social worth." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The protections of the First Amendment extended to social media: "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham v. North Carolina*, 582 U.S. 98, 108 (2017). And the State concedes that social media users use these platforms "to engage in a broad array of expressive activity, protected by the First Amendment, on a wide range of topics." (Doc. 68, ¶ 4; Doc. 73, ¶ 2).

Act 689 forecloses access to social media for those minors whose parents do not consent to the minor's use of social media. It also burdens social media access for all Arkansans —both adults and minors whose parents would allow them to use social media. Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and "discourage[s] users from accessing [the regulated] sites." *Reno*, 521 U.S. at 856. Age-verification schemes like those contemplated by Act 689 "are not only an additional hassle," but "they also require that website visitors forgo the anonymity otherwise available on the internet." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003); *see also ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to "relinquish their anonymity to access protected speech").

Other courts examining similar regulations have found that "[r]equiring Internet users to provide ... personally identifiable information to access a Web site would significantly deter many users from entering the site[ ] because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007); *see also PSINET, Inc. v. Chapman*, 167 F. Supp. 2d 878, 889 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004) ("Fear that cyber-criminals may access their [identifying information] ... may chill the willingness of some adults to participate in the 'marketplace of ideas' which adult Web site operators provide."). Record evidence also reflects this concern. *See* Harriman Decl. ¶¶ 28–29. The State has made no attempt to address this concern and, as in its preliminary injunction order, the Court agrees that the age-verification requirement will deter adults from speaking or receiving protected speech on social media.

Because the Act burdens users' speech, the Act is subject to intermediate scrutiny at a minimum. However, NetChoice also argues that the Act discriminates based on content, speaker, and viewpoint. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.*

***9** NetChoice argues that the law is content based because whether a particular "social media company" or "social media platform" is subject to the Act turns on content that users post on that platform. Under Act 689, a "social media company"

is regulated if users use its online forum "for the primary purpose of interacting socially with other profiles." Ark. Code. Ann. § 4-88-1401(7)(A). Companies that "exclusively offer" "content for the purpose of interacting [sic] gaming, entertainment, or associated entertainment," "provide[ ] career development opportunities," or subscription content so long as that content is not "short video clips of dancing, voice-overs, or other acts of entertainment in which the primary purpose is not educational or informative," are, however, exempt. *Id.* § 1401(7)(B). Similarly, a "social media platform" is regulated if "a substantial function" of the platform is "to allow users to interact socially." *Id.* § 1401(8)(A). Here, too, platforms may be exempt from regulation if they predominantly feature certain types of content including "news, sports, entertainment," "academic or scholarly research," and "educational" programming. *Id.* § 1401(8)(B).

The State argues that Act 689 is not content based because it is not directed at "the message that is being expressed," but instead at "the place where a message is expressed." (Doc. 72, p. 9 (emphasis omitted)). This is a distinction without a difference. Under the Act, "whether any particular [company or platform] falls within the ban is determined by the content of the [posts] resting inside that [company or platform]. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.' " *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993). A website operating in Arkansas, an enforcement official, a court, or a jury applying the Act, cannot determine whether the website is regulated without looking to the content posted on that website. And the State itself cannot seem to resist this conclusion either. In its Response, it says: "The Act regulates my [sic] subject matter, which is not a viewpoint." (Doc. 72, p. 12).

"[I]t is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.' " *Reed*, 576 U.S. at 169 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 537 (1980)). "Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.*

NetChoice also argues that the Act is a speaker-based restriction. "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000). Courts are "deeply skeptical of laws that 'distinguis[h] among different speakers, allowing speech by some but not others.' " *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 777–78 (2018) (citations omitted) (alteration in original) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)). This is because "[s]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.' " *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)).

Act 689 exempts platforms that distribute "licensed media" that is not licensed from users, "news, sports, entertainment or other content that is preselected by the provider and not user generated," and digital news websites with social features "if the news content is posted only by the provider of the digital news website." Ark. Code. Ann. § 4-88-1401(8)(B). NetChoice argues that "the Act explicitly favors the speech of whoever provides the online service" over the speech of users of online services. (Doc. 67, p. 21). The Court agrees. This privileges institutional content creators—movie and TV studios, mainstream media outlets, and traditional journalists—over the Soundcloud artist, the TikTok chef, and the citizen journalist.

***10** Because the Act draws both content-based and speaker-based distinctions, the State bears the burden of demonstrating that it survives strict scrutiny. And Arkansas has not done so.

b. Act 689 Is Not Narrowly Tailored to Serve a Compelling State Interest

As described above, Act 689 is a content-based restriction on both adults' and minors' access to constitutionally protected speech. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. "The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Ent. Grp.*, 529 U.S. at 812.

As in the Court's preliminary injunction order, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), remains instructive. There, a California law prohibited the sale or

rental of violent video games to minors. *Id.* at 802. The law "straddle[d] the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children." *Id.* at 805. The *Brown* Court recognized these goals as legitimate; however, because the law affected Californians' First Amendment rights, the Court cautioned that the state's objectives "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Id.* "As a means of protecting children from portrayals of violence, the legislation [was] seriously underinclusive, not only because it exclude[d] portrayals other than video games, but also because it permit[ted] a parental ... veto." *Id.* If the material was indeed "dangerous [and] mindaltering," the Court explained, it did not make sense to "leave [it] in the hands of children so long as one parent ... says it's OK." *Id.* at 802. And "as a means of assisting concerned parents," the Court held that the regulation was "seriously overinclusive because it abridge[d] the First Amendment rights of young people whose parents ... think violent video games are a harmless pastime." *Id.* at 805. Put simply, the legislation was not narrowly tailored.

In the end, the *Brown* Court rejected the argument "that the state has the power to prevent children from hearing or saying anything without their parents' prior consent," for "[s]uch laws do not enforce parental authority over children's speech and religion; they impose governmental authority, subject only to a parental veto." *Id.* at 795 n.3. "This is not the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires." *Id.* at 804. The Court also expressed "doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority." *Id.* at 802. "Accepting that position would largely vitiate the rule that 'only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].' " *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975)).

***11** The Court does not doubt the reality, well supported by the record, that unfettered social media access can and does harm minors. And the State "has a compelling interest in protecting minor children." *Mitchell v. Dakota Cnty. Soc. Servs.*, 959 F.3d 887, 897 (8th Cir. 2020). The State does not, however, have "a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.' " *Brown*, 564 U.S. at 794–95 (quoting *Erznoznik*, 422 U.S. at 213–14).

The State regulation here, like the one in *Brown*, is not narrowly tailored to address the harms that the State has a compelling interest in preventing. The State maintains that Act 689 is not underinclusive because it "targets the types of social media that are most likely to lead to predators contacting minors while leaving others unregulated." (Doc. 72, p. 20). The State's evidence undermines this contention.

With respect to incidence of online exploitation, the State cites the National Center for Missing and Exploited Children's (NCMEC) 2022 CyberTipline Report. *See* Doc. 72, p. 15 (citing *2022 CyberTipline Reports by Electronic Service Providers (ESP)* 1, National Center for Missing & Exploited Children (2023)[20]). This report lists dozens of electronic service providers, including all of the platforms regulated by the Act, and notes the number of suspected incidents of child sexual exploitation that each platform self-reported over the past year. *Id.* As the Court noted in its preliminary injunction order, *see* Doc. 44, pp. 44–45, Act 689 regulates Facebook and Instagram, the platforms with the two highest numbers of reports.[21] But, the Act *exempts* Google, WhatsApp, Omegle, and Snapchat—the sites with the third, fourth, fifth, and sixth highest numbers of reports. Nextdoor is at the very bottom of NCMEC's list, with only one report of suspected child sexual exploitation in 2022, yet the State continues to justify Nextdoor's inclusion based on the purported risk to minors. *See* Doc. 72, p. 21.

The State likewise continues to cite the FBI's public safety alert on financial sextortion. *See* Doc. 72, p. 16 (citing *Financial Sextortion*). The alert notes "gaming sites or video chat applications that feel familiar and safe [to minors]" are common places where adult predators engage in financial "sextortion" of minors. *Id.* Act 689 also exempts these platforms from age verification.

The State acknowledges that "private conversations and interactions ... lead to much of the mental-health harm towards and predation on minors." (Doc. 72, p. 20). Yet private-message focused platforms like Snapchat, Kik, and Omegle are unregulated. Mr. Tony Allen, the State's expert, noted this issue as well. When testifying during the preliminary injunction hearing, he stated that he did not "want to be unkind to the people who drafted [Act 689]," but at least some exempt platforms are ones that adult sexual predators

commonly use to communicate with children, including Kik, Google Hangouts, and interactive gaming websites and platforms. (Doc. 45, pp. 67:17–70:19).

***12** The State attempts to justify this exclusion using Snapchat as the prototype. For self-identified minors, Snapchat does not "promote connecting with people that you wouldn't know in real life already." (Doc. 72-3, p. 11:5–6 (Boyle Depo.)). Thus, minors are only discoverable by other Snapchat users with whom they share mutual friends or contacts. *Id.* at 14:8–14. Public content on Snapchat is also limited, and instead Snapchat is primarily used for the "private conversations and interactions" that the State purports to be concerned with.

The State invites the Court to contrast Snapchat with Nextdoor, pointing out that Nextdoor lacks "an extensive process confirming the user actually is who they say they are." (Doc. 72, p. 21). Notably, there is no evidence that Snapchat has such a process. "To make matters worse," the State says, "inappropriate and/or sexual messages between users would only be flagged [on Nextdoor] if one of the users involved self-reports the conduct." *Id.* But Snapchat uses roughly the same system. Boyle Decl. ¶ 6. Indeed, Snapchat's entire structure seems designed for the undetected exchange of sexually explicit materials because pictures and videos automatically delete after being opened. *Id.* ¶ 4.

The Act also exempts YouTube, "the most popular online activity" and "most widely used" platform among children. *See Children and Parents: Media Use and Attitudes Report 2022* at 2, 23, Ofcom (Mar. 30, 2022) (cited in Declaration of Tony Allen ¶ 85 (Doc. 34-1)).[22] And it exempts platforms that generate less than $100 million annually. So a large platform that may have a lower percentage of "harmful" content and robust tools for taking that content down must verify the ages of its users, while a small platform that may have relatively more "harmful" content and no tools for taking that content down need not. This "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown*, 564 U.S. at 802.

For the platforms regulated by Act 689, the only constraint on minors is a one-time parental veto. Once a child receives a parent's blanket consent, the Act does nothing to protect users who have now been reliably identified as minors. The State points to "excessive data collection, which [social media platforms] use to deliver harmful content and troves of paid advertising." *See* Doc. 72, p. 17. But the Act does not bar data collection from identified minors and instead seems to provide platforms with more accurate age data to feed to algorithms and advertisers because of the age-verification requirement. The Act also does not require regulated entities to screen the content that is shown to known minors by, for example, requiring platforms to hide obscene content. Thus, once a minor has parental permission to make an account, they can find, or even be recommended, harmful content.

The State's briefing also indicates that time spent on social media is highly correlated with the risk of adverse mental health effects. (Doc. 72, p. 14). But the Act does not require regulated entities to offer or inform parents about time restriction settings for minors' accounts. And still, the State has failed to present any evidence that a parent's involvement in account creation signals an intent to be involved in the child's online experiences thereafter. *See* Doc. 44, p. 46–47. If the legislature's goal in passing Act 689 was to protect minors from materials or interactions that could harm them online, there is no evidence that the Act will be effective in achieving that goal.

***13** "The [Arkansas] Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent ... says it's OK." *Brown*, 564 U.S. at 802. "That is not how one addresses a serious social problem." *Id.* "Because a 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,' [Act 689] fails strict scrutiny." *Reed*, 576 U.S. at 172 (citation omitted) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).

The Court also concludes that Act 689 is seriously overinclusive. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808–810 (1984)). Rather than targeting content that is harmful to minors, Act 689 simply impedes access to content writ large.

Arkansas's imposition of an age-verification requirement for account creation is maximally burdensome. It erects barriers to accessing entire social media platforms rather than placing those barriers around the content or functions that raise concern. It not only hinders adults' ability to speak and receive protected speech online, it excludes minors whose parents do not consent (or cannot prove their consent) from

"the vast democratic forums of the Internet." *Reno*, 521 U.S. at 868.

Minors, who cannot vote for the lawmakers that represent them, can use social media to make their voices heard on issues that affect them, like school shootings and school choice. The State does not have "the power to prevent children from hearing or saying anything without their parents' prior consent." *Brown*, 564 U.S. at 795 n.3. "Such laws do not enforce parental authority over children's speech ...; they impose *governmental* authority, subject only to a parental veto." *Id.*

In *Packingham*, the Court observed that it was possible for a state to "enact specific, narrowly tailored laws" targeted to "conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor"; but it would be unconstitutional for a state to unduly burden adult access to social media. 582 U.S. at 106–07. There, the state of North Carolina had made it a crime for a registered sex offender to access social media sites where minors were permitted. If a statute barring registered sex offenders from using social media is not narrowly tailored, the Court does not see how a statute barring minors from social media fares any better.

Age-verification requirements are also more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies. "Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source." *Ashcroft v. ACLU*, 542 U.S. 656, 657 (2004). And "[u]nder a filtering regime, adults ... may gain access to speech they have a right to see without having to identify themselves[.]" *Id.* Similarly, the State could always "act to encourage the use of filters ... by parents" to protect minors. *Id.*; *see also Playboy Ent. Grp.*, 529 U.S. at 809–10, 815 (finding that voluntary, "targeted blocking" of certain content by viewers "is less restrictive than banning" the same content).

***14** Act 689 is also overinclusive as to the State's interest in "giv[ing] parents more control over what social-media platforms their children are using." (Doc. 72, p. 18). "Not all of the children who are forbidden to [make social media accounts] on their own have parents who care whether they [use social media]." *Brown*, 564 U.S. at 804. As in *Brown*, the State has presented no evidence that the Act "meet[s] a substantial need of parents who wish to restrict their children's access to [social media] but cannot do so." *Id.* at 803. The State attempts to distinguish *Brown* by pointing out that, unlike the video game industry's uniform rating system, "regulated social media companies have no system writ large that self-polices their services." (Doc. 72, p. 19). However, NetChoice points to myriad avenues for parents to control their children's social media use. *See infra* section II.D. The fact that these tools do not operate "writ large" proves nothing. Most minors cannot access social media without a parent-funded device and internet connection, and "parents who care about the matter" have many tools at their disposal to restrict and monitor their children's internet use. *Brown*, 564 U.S. at 803. "Filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest." *Id.*

To the extent that parents are not aware of these tools, notice to parents of their availability is a much less restrictive means of promoting the State's interest, and the State has offered no evidence to prove this alternative ineffective. *Playboy Ent. Grp.*, 529 U.S. at 823. "While some of the legislation's effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want." *Brown*, 564 U.S. at 804. "This is not the narrow tailoring to 'assisting parents' that restriction of First Amendment rights requires." *Id.*

The State describes its age-verification requirement as "simple." (Doc. 72, p. 1). Well spotted. But "[t]he First Amendment does not permit the State to sacrifice speech for efficiency." *Becerra*, 585 U.S. at 775 (quoting *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988)). The Court finds that Act 689 is a content-based restriction on speech that is not narrowly tailored to serve a compelling government interest. Act 689 therefore violates the First Amendment.

The State argues that NetChoice's First Amendment claim nonetheless fails on the merits because "the record is far too underdeveloped for the Court" "to determine 'which of the law['s] applications violate the First Amendment.' " (Doc. 72, p. 24 (quoting *Moody*, 603 U.S. at 725)). However, because the Court has found that Act 689 is a content-based restriction, the State bears the burden of showing the Act meets strict scrutiny. The State failed to do so, and a content-based restriction, insufficiently tailored to target a compelling government interest, is presumptively unconstitutional in

all applications. The State has pointed to no applications of the Act that could be considered "plainly legitimate" and the Court is aware of none. By barring access to all content on regulated platforms, including that which is neither unprotected nor harmful, based on the content and speakers represented on those platforms, the Act is unconstitutional in all conceivable applications.

2. Void for Vagueness: NetChoice Members' Claim

NetChoice also moves for summary judgment on its claim that Act 689 violates the due process rights of its members because pivotal terms are unconstitutionally vague. NetChoice argues that the Act is unconstitutionally vague because it is unclear which of its members are subject to the Act's requirements. The State responds that the Act is not unconstitutionally vague "because *some* of [NetChoice's] members' conduct is clearly proscribed" and " 'primary purpose' is not vague." (Doc. 72, pp. 22–23 (emphasis added)).

As the Supreme Court explained in *Grayned v. City of Rockford*:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

***15** 408 U.S. 104, 108 (1972) (footnotes omitted).

A regulation "violates the first essential of due process of law" by failing to provide adequate notice of prohibited conduct. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted). A court should find a regulation unconstitutional if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.*

"The degree of vagueness that the Constitution tolerates —as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). "[E]conomic regulation is subject to a less strict vagueness test" as are "enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498–99. "Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499.

Here, Act 689 must meet "a more stringent vagueness test" because it both contains criminal penalties, Ark. Code. Ann. § 4-88-1403(b)(1), and interferes with the right of free speech, *see infra* section IV.C.1. "When speech is involved, rigorous adherence to th[e]se requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). Indefinite statutes "abut[ting] upon sensitive areas of basic First Amendment freedoms" may force the entities regulated "to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). "Free speech may not be so inhibited." *Id.*

"It is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (striking down city ordinance imposing misdemeanor penalty on movie theaters for showing films "unsuitable for minors" as impermissibly vague); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (invalidating state law banning motion picture distributors from distributing "sacrilegious"

movies due to vague standards); *Winters v. New York*, 333 U.S. 507, 518–19 (1948) (finding unconstitutionally vague a state law regulating the distribution of certain commercial publications).

Act 689 is unconstitutionally vague because it fails to adequately define which entities are subject to its requirements, risking chilling effects and inviting arbitrary enforcement. A "social media company" is defined as "an online forum that a company makes available for an account holder" to "[c]reate a public profile, establish an account, or register as a user for the *primary purpose* of interacting socially with other profiles and accounts," "[u]pload or create posts or content," "[v]iew posts or content of other account holders," and "[i]nteract with other account holders or users, including without limitation establishing mutual connections through request and acceptance." Ark. Code. Ann. § 1401(7)(A) (emphasis added). Act 689 does not define "primary purpose"—a term critical to determining which entities fall within its scope.

***16** Worse, Act 689 is ambiguous as to *whose* "primary purpose" is being considered—the user in creating the account or the company in making the forum available. "[A] regulation is not vague because it may at times be difficult to prove an incriminating fact *but rather because it is unclear as to what fact must be proved.*" *Fox*, 567 U.S. at 253 (emphasis added) (citing *United States v. Williams*, 553 U.S. 285, 306 (2008)). Even if the Court agreed that "primary purpose" is an acceptable "qualitative standard," *see Johnson v. United States*, 576 U.S. 591, 604 (2015), the Act does not identify whose primary purpose "courts, juries, and regulators" should look to in conducting their "standard factual inquiry." (Doc. 72, p. 23). Companies must choose between risking unpredictable and arbitrary enforcement (backed by civil penalties, attorneys' fees, and criminal sanctions) and implementing the Act's costly age-verification requirements, at a minimum chilling their users' constitutionally protected speech and at a maximum putting themselves out of business in the process. *See* Harriman Decl. ¶ 34 (attesting that "Arkansas may be an unviable market" if Nextdoor is forced to implement third-party age verification). Such ambiguity renders a law unconstitutional. Left to deal with the uncertainty, platforms may choose to "restrict[ ] their conduct to that which is unquestionably safe," possibly by ending operation in the state altogether.

Other provisions of Act 689 are similarly vague. The Act defines the phrase "social media platform" as an "internet-based service or application ... [o]n which a *substantial function* of the service or application is to connect users in order to allow users to interact socially with each other within the service or application"; but the Act excludes services in which "the *predominant or exclusive function* is" "[d]irect messaging consisting of messages, photos, or videos" that are "[o]nly visible to the sender and the recipient or recipients" and "[a]re not posted publicly." Ark. Code Ann. § 1401(8)(A)–(B) (emphasis added). Again, the statute does not define "substantial function" or "predominant ... function," leaving companies to guess whether their online services are covered. Many services allow users to send direct, private messages consisting of texts, photos, or videos, but also offer other features that allow users to create content that anyone can view. Act 689 does not explain how platforms are to determine which function is "predominant," leaving those services to guess whether they are regulated.

The State argues that Act 689's definitions are clear "because any person of ordinary intelligence can tell that [Act 689] regulates Meta, Twitter [now X], and TikTok." (Doc. 72, p. 22). The Court is less concerned with the straightforward applications of the Act and more concerned with the NetChoice members who are not certain whether they are regulated, namely Snapchat, Nextdoor, and Pinterest.

The State asserts that Snapchat is exempt, Nextdoor is not, and no mention of Pinterest is made at all. (Doc. 72, pp. 20–21). Snapchat, the State says, is exempted from the Act because it's "different from a traditional social media platform." (Doc. 72, p. 20) (quoting Doc. 72-3, p. 10:18–21 (Boyle Depo.)). The features the State points to—no public commenting, connections recommended based on contacts in one's phonebook, curated but user-generated public content—are not related to any particular exemption. Snapchat features both public "stories" and private messaging. *See* Boyle Decl. ¶ 4. A "substantial function" of Snapchat is social interaction. Snapchat believes it is unregulated because its "predominant purpose is as a direct messaging service" but nonetheless fears being dragged into litigation if it does not comply with the age-verification requirement. *Id.* at ¶ 8.

NetChoice also points to uncertainty with respect to Nextdoor and Pinterest. The State does not explain why Nextdoor falls within the Act's purview. Nextdoor users may passively "receive updates from nearby neighbors, businesses, and public services," or they may interact socially by connecting with other users, joining groups, or exchanging direct messages. *See* Harriman Decl. ¶ 4; Doc. 72-2, p. 14:14–

15:9 (Knapp Depo.). Pinterest describes itself as "a visual discovery engine for finding ideas like recipes, home and style inspiration, and more." *All About Pinterest* (Doc. 66, p. 153). But Pinterest, too, has some social features: users can follow other users, comment on Pins, and send messages. *Id.* pp. 153–56. It is unclear to the Court whether the "the primary 'end to be attained' of a profile" on either of these platforms is social interaction as opposed to say, finding a reliable plumber or planning a wedding. (Doc. 72, p. 23 (quoting *Purpose*, Merriam-Webster Dictionary [23])).

***17** Snapchat provides the prime example of the arbitrary decisionmaking the Act invites. As the Court noted in its preliminary injunction order, the State's attorney asserts that Snapchat is exempted from the Act's requirements, while both a co-sponsor of the Act as well as the State's own expert witness contend that Snapchat is regulated. *See* Doc. 44, pp. 33–34. The State is correct that courts, not experts, are tasked with interpreting statutes. However, due process requires that the legislature, not the Court, provide "explicit standards for those who apply the law" so that "arbitrary and discriminatory enforcement" may be avoided. *Grayned*, 408 U.S. at 108. Here, three people possessing, the Court assumes, at least ordinary intelligence—and ostensibly all on the enforcement side—cannot agree whether the Act covers Snapchat. Snapchat is right to be worried about the risk of litigation.

Arkansas "cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David" while leaving Arkansans to bear constitutional deprivation in the meantime. *Percoco v. United States*, 598 U.S. 319, 337 (2023) (Gorsuch, J., concurring in the judgment). That is precisely what the State has asked this Court to do; Act 689 is unconstitutionally vague.

D. Irreparable Harm

Because Act 689 abridges the First Amendment rights of Arkansans who use social media and contains terms too vague to be reasonably understood, NetChoice members and their users will suffer irreparable harm if the Act goes into effect. Because it is unclear which NetChoice members are subject to regulation, some members would be forced to choose between risking enforcement penalties—civil and criminal—and implementing age-verification requirements that burden their users' First Amendment rights. Other members, those that are clearly regulated, would be pressed into service as the private censors of the State. No legal remedy exists to compensate Arkansans for the loss of their First Amendment rights. *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990). "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

E. Balance of the Equities and the Public Interest

When the government opposes the issuance of an injunction, the final two factors—the balance of the equities and the public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of the equities and public interest decidedly favor NetChoice: "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012). Act 689 is a content-based restriction on speech, and it is not targeted to address the harms the State has identified. Arkansas takes a hatchet to adults' and minors' protected speech alike though the Constitution demands it use a scalpel.

V. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Amended Motion for Summary Judgment (Doc. 66) is **GRANTED**. Act 689 of 2023, the "Social Media Safety Act," is **PERMANENTLY ENJOINED**.

IT IS SO ORDERED on this 31st day of March, 2025.

All Citations

Slip Copy, 2025 WL 978607

Footnotes

1 Act 689 has since been recodified at subchapter 14, rather than subchapter 11, of Chapter 88 of the Arkansas Code. In the Court's preliminary injunction order when reading a cite to, e.g., § 1102, the reader should now look to § 1402.

2 https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ [https://perma.cc/76X7-VFFQ].

3 https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf [https://perma.cc/3HU9-S6ZA].

4 https://www.fbi.gov/news/press-releases/fbi-and-partners-issue-national-public-safety-alert-on-financial-sextortion-schemes [https://perma.cc/K5MN-W7SU].

5 https://support.apple.com/en-us/HT201304 [https://perma.cc/9PLJ-7CR4].

6 https://safety.google/families/parental-supervision/ [https://perma.cc/WGU8-KKVS].

7 https://support.microsoft.com/en-us/account-billing/getting-Started-with-microsoft-family-safety-b6280c9d-38d7-82ff-0e4f-a6cb7e659344 [https://perma.cc/F47N-PTSL].

8 https://www.pcmag.com/picks/the-best-parental-control-apps-for-your-phone [https://perma.cc/ZK7Z-N5AQ].

9 https://www.att.com/support/article/wireless/KM1271913 [https://perma.cc/2NBP-PNDG].

10 https://www.t-mobile.com/privacy-center/education/family-controls [https://perma.cc/DJJ3-Q9S5].

11 https://www.xfinity.com/support/articles/set-up-parental-controls-with-comcast-networking [https://perma.cc/7V5R-BLHC].

12 https://archive.ph/wip/uGaN2.

13 https://support.mozilla.org/en-US/kb/block-and-unblock-websites-parental-controls-firef [https://perma.cc/2Q6Z-B4P6].

14 https://support.microsoft.com/en-us/microsoft-edge/learn-more-about-kids-mode-in-microsoft-edge-4bf0273c-1cbd-47a9-a8f3-895bc1f95bdd [https://perma.cc/96PS-SP65].

15 https://safety.google/families/parental-supervision/ [https://perma.cc/96ZQ-Y4TJ].

16 NetChoice repeatedly cites “Boyle Declaration” which supposedly appears in the record as Exhibit C to NetChoice's summary judgment motion. First, NetChoice filed its motion and all exhibits as a single nearly 200-page document. Second, while NetChoice initially cites to the Boyle Declaration as “Exhibit C,” the “Exhibit C” contained in the single 200-page summary judgment motion is, in fact, the Declaration of Justyn Harriman. The Declaration of David Boyle does, however, appear in the record at Doc. 17-3.

17 https://help.pinterest.com/en/guide/all-about-pinterest [https://perma.cc/S6YD-HY6R].

18 https://help.pinterest.com/en/article/teen-safety-options [https://perma.cc/NJL4-S9Y4].

19 In fact, the need for more time to conduct discovery has already been litigated here. The parties were originally permitted to commence discovery as of October 11, 2023. (Doc. 46, ¶ 6). On October 23, 2023, Arkansas requested six months of discovery. (Doc. 47, ¶ 6(a)). On November 30, 2023, Arkansas moved

under Rule 56(d) to delay consideration of NetChoice's Motion for Summary Judgment. (Doc. 58). After fulsome briefing, the Court defined the boundries of continued limited discovery and granted Arkansas an extension of the discovery deadline to June 7, 2024. (Doc. 64). Even though *Moody* potentially changes the posture of the analysis, Arkansas makes no effort to explain why or how it remains prejudiced, despite its discovery opportunities to date.

20 https://www.missingkids.org/content/dam/missingkids/pdfs/2022-reports-by-esp.pdf [https://perma.cc/E9UH-ALR9].

21 One shortcoming of this data is that it reports the number of total incidents but does not report the number of incidents in relation to the number of users. Naturally, platforms with more users may have more suspected incidents of sexual exploitation, but it is possible that smaller platforms present greater risk on a per-user basis.

22 https://www.ofcom.org.uk/__data/assets/pdf_file/0024/234609/childrens-media-use-and-attitudes-report-2022.pdf [https://perma.cc/PA87-5PAD].

23 https://www.merriam-webster.com/dictionary/purpose [https://perma.cc/K98B-A8YS].

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KeyCite Blue-Striped Flag
Appeal Filed by NetChoice, LLC v. David Yost, 6th Cir., May 13, 2025

778 F.Supp.3d 923
United States District Court, S.D. Ohio, Eastern Division.

NETCHOICE, LLC, Plaintiff,
v.
Dave YOST, in his official capacity
as Ohio Attorney General, Defendant.

Case No. 2:24-cv-00047
|
Signed April 16, 2025

Synopsis

Background: Trade association of internet companies brought action against the Ohio Attorney General, raising constitutional challenge under First Amendment's Free Speech Clause to Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services. Both sides moved for summary judgment.

Holdings: The District Court, Algenon L. Marbley, Chief Judge, held that:

[1] trade association had associational standing;

[2] trade association had third-party standing to assert minors' rights;

[3] statute was content-based regulation of speech;

[4] statute failed strict scrutiny test;

[5] statute was unconstitutionally vague in violation of due process;

[6] irreparable harm requirement for permanent injunction was met; and

[7] balance of hardships and public interest favored granting permanent injunction.

Trade association's motion granted; Attorney General's motion denied.

Procedural Posture(s): Motion for Summary Judgment; Motion for Permanent Injunction.

West Headnotes (60)

[1] **Summary Judgment** Determination

A court deciding a summary judgment motion is not obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim; rather, it need only consider those portions of the record specifically called to its attention by the parties. Fed. R. Civ. P. 56(a).

[2] **Summary Judgment** Cross-motions

Standards for summary judgment do not change when both parties seek to resolve the case through the vehicle of cross-motions for summary judgment. Fed. R. Civ. P. 56(a).

[3] **Injunction** Grounds in general; multiple factors

Party seeking permanent injunction must satisfy four-factor test, under which it must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

[4] **Federal Courts** Injunction

Injunction Discretionary Nature of Remedy

Decision to grant or to deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.

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[5] **Civil Rights** Injunction

A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law. U.S. Const. Amend. 1.

[6] **Constitutional Law** Advisory Opinions

Federal Civil Procedure In general; injury or interest

Federal Courts Case or Controversy Requirement

Because Article III limits federal judicial jurisdiction to cases and controversies, federal courts are without authority to render advisory opinions or to decide questions that cannot affect the rights of litigants in the case before them; standing is a doctrine that reflects and enforces those limitations. U.S. Const. art. 3, § 2, cl. 1.

[7] **Federal Civil Procedure** In general; injury or interest

In essence, the question of standing is whether the litigant is entitled to have court decide the merits of the dispute or of particular issues; this inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. U.S. Const. art. 3, § 2, cl. 1.

[8] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

Federal Courts Injury, harm, causation, and redress

The constitutional minimum of standing flows from Article III's case-or-controversy requirement and has three elements; first, a plaintiff must show that he or she has suffered or imminently will suffer a concrete injury, second, a plaintiff must show that the injury is fairly traceable to the challenged conduct of the defendant, and third, a plaintiff must show that a favorable federal court decision is likely to redress that injury. U.S. Const. art. 3, § 2, cl. 1.

[9] **Federal Civil Procedure** Rights of third parties or public

The federal judiciary adheres to a set of prudential principles that bear on the question of standing and generally prohibit third parties from asserting the rights of others or from asserting generalized grievances.

[10] **Federal Civil Procedure** In general; injury or interest

Even when a case falls within the constitutional boundaries of the case or controversy requirement, a plaintiff may still lack standing under prudential principles by which the judiciary seeks to limit access to the federal courts to those litigants best suited to assert a particular claim. U.S. Const. art. 3, § 2, cl. 1.

[11] **Injunction** Persons entitled to apply; standing

Summary Judgment Burden of Proof

Unlike the preliminary injunction stage, when standing is challenged at summary judgment, mere allegations of injury are insufficient; rather, the moving party must establish that there exists no genuine issue of material fact as to justiciability on the merits.

[12] **Federal Civil Procedure** In general; injury or interest

Plaintiff bears the burden of establishing standing, and must show that it has standing for each type of relief sought.

[13] **Summary Judgment** Burden of Proof

A plaintiff in response to a summary judgment motion, cannot rely on mere allegations with

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respect to each standing element, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.

[14] **Associations** Suits on Behalf of Members; Associational or Representational Standing

To establish associational standing, an organization must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

[15] **Constitutional Law** Freedom of Speech, Expression, and Press

Trade association of internet companies satisfied requirements for associational standing in action challenging constitutionality, based on right to freedom of speech under the First Amendment, Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services; association's members had individual standing to sue since they were direct object of the Act and faced compliance costs and civil liability for violations of its provisions, injury was directly traceable to defendant, the Ohio Attorney General, whom the Act vested with enforcement authority, injury would be redressed by injunction blocking enforcement, lawsuit was germane to association's purpose, and nature of suit was unlikely to require fact-intensive inquiry of each member. U.S. Const. Amend. 1; Ohio Rev. Code Ann. §§ 1349.09(B)(1), 1349.09(H), 1349.09(I).

More cases on this issue

[16] **Federal Civil Procedure** Rights of third parties or public

Rule that a party generally may assert only his or her own rights and cannot raise the claims of third parties who are not before the court serves two judicial purposes; it fosters judicial restraint freeing the court from unnecessary pronouncement on constitutional issues that may affect rights of those not before it, and it assures the court that the issues before it will be concrete and sharply presented.

[17] **Federal Civil Procedure** Rights of third parties or public

As exception to general rule against third-party standing, a litigant may assert the rights of a third party not before the court if there are substantial obstacles to the third party asserting its own rights and the litigant will effectively represent the interests of the party.

[18] **Constitutional Law** First Amendment in General

As exception to general rule against third-party standing, a litigant may challenge a statute on the ground that it is overly broad and thus violates the First Amendment rights of third parties not before the court, even if the law is constitutional as applied to the litigants. U.S. Const. Amend. 1.

[19] **Federal Civil Procedure** Rights of third parties or public

To have third-party standing, a plaintiff must establish that their relationship with the third party whose rights they wish to assert is sufficiently close such that the plaintiffs are fully, or very nearly, as effective a proponent of the right as the third party would be.

[20] **Federal Civil Procedure** Rights of third parties or public

The close-relationship standard for third-party standing is generally satisfied if the third parties' rights are inextricably bound up with the activity the litigants wish to pursue.

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[21] **Federal Civil Procedure** Rights of third parties or public

The relationship prong of third-party standing inquiry does not ask whether plaintiff's interests and third party's interests are closely aligned; the relationship between the third party and plaintiff only counts insofar as it is linked to the right asserted.

[22] **Federal Civil Procedure** Rights of third parties or public

Relevant relationship inquiry for purposes of third-party standing is whether the plaintiff and the third party have the sort of relationship of special consequence such that the plaintiff will be as vigorous as the third party in asserting the third party's rights.

[23] **Constitutional Law** Freedom of Speech, Expression, and Press

Trade association of internet companies had third-party standing to assert rights of Ohio minors in First Amendment free speech challenge of Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services; to extent that minors' constitutional rights were violated, they were denied a forum in which to assert their own rights, and statute allegedly impacted minors' First Amendment right to speech by foreclosing their access to social media platforms absent parental consent. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

More cases on this issue

[24] **Constitutional Law** Scope of inquiry in general

Courts usually handle constitutional claims case by case, not en masse.

[25] **Constitutional Law** Facial challenges; facial invalidity

In First Amendment cases challenging statutes on free speech facial grounds, the question is whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. U.S. Const. Amend. 1.

[26] **Constitutional Law** Facial challenges

A First Amendment facial challenge to a statute has two parts: first, the courts must assess the state laws' scope, and second, the courts must decide which of the laws' applications violate the First Amendment, and measure them against the rest. U.S. Const. Amend. 1.

[27] **Constitutional Law** Website content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services raised same First Amendment issues in every application to a covered business, as required to trigger strict scrutiny analysis in constitutional challenge brought by trade association of internet companies; all websites that provided socially interactive features outlined in the statute and considered to be targeting minors or likely to be accessed by minors were under same statutory obligation to block access to unemancipated Ohio minors absent parental consent, whether it was association's members or other covered websites. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

1 Case that cites this headnote

[28] **Constitutional Law** Property and Events

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. U.S. Const. Amend. 1.

[29] **Constitutional Law** Freedom of Speech, Expression, and Press

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Because the freedom of speech is the indispensable condition of nearly every other form of freedom, the First Amendment bars the government from dictating what people see or read or speak or hear, and protects the right to distribute, the right to receive, the right to read, and freedom of thought. U.S. Const. Amend. 1.

[30] **Constitutional Law** Freedom of Speech, Expression, and Press

The First Amendment right to the freedom of speech protects against not just regulations that directly suppress speech but also those that target activities useful for speaking. U.S. Const. Amend. 1.

[31] **Constitutional Law** Commercial Speech in General

That an entity seeks financial benefit from its speech does not vitiate its First Amendment rights. U.S. Const. Amend. 1.

[32] **Constitutional Law** Website content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services regulated protected speech, and was thus not subject to deferential rational basis standard of review, in constitutional challenge brought by trade association of internet companies; statute was directed at certain content and aimed at particular speakers, as it was aimed at websites that targeted children, or were reasonably anticipated to do so, and offered socially interactive features, and for those websites, minors had to secure parental consent or they would be denied access to websites and all of the speech on them. U.S. Const. Amend. 1; Ohio Rev. Code Ann. §§ 1349.09(A), 1349.09(B), 1349.09(E).

[33] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

Constitutional Law Strict or exacting scrutiny; compelling interest test

Courts apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content, but only an intermediate level of scrutiny when regulations are unrelated to the content of speech. U.S. Const. Amend. 1.

[34] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

"Strict scrutiny," in First Amendment free speech challenges, requires the government to show that the law at issue is narrowly tailored to serve compelling state interests. U.S. Const. Amend. 1.

[35] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

"Intermediate scrutiny" validates a content-neutral law under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. U.S. Const. Amend. 1.

[36] **Constitutional Law** Content-Based Regulations or Restrictions

When considering whether a regulation is content based, as would require strict scrutiny on First Amendment challenge, the principal inquiry is whether the government has regulated the speech based on its communicative content. U.S. Const. Amend. 1.

1 Case that cites this headnote

[37] **Constitutional Law** Content-Based Regulations or Restrictions

When a law applies to particular speech because of the topic discussed or the idea or message expressed, it is content based on its face. U.S. Const. Amend. 1.

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[38] **Constitutional Law** Content-Based Regulations or Restrictions

Under the First Amendment, a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a function or purpose proxy that achieves the same result. U.S. Const. Amend. 1.

[39] **Constitutional Law** Content-Based Regulations or Restrictions

A law need not discriminate based on viewpoint to be content based. U.S. Const. Amend. 1.

[40] **Constitutional Law** Content-Neutral Regulations or Restrictions

Constitutional Law Content-Based Regulations or Restrictions

Speaker-based restrictions of speech are not automatically content based or content neutral. U.S. Const. Amend. 1.

1 Case that cites this headnote

[41] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

Constitutional Law Content-Based Regulations or Restrictions

Speaker-based restrictions on speech are suspect under First Amendment only because they are often proxy or pretext for regulation of content, but if they distinguish between speakers based only on manner in which speakers transmit their messages to viewers, and not upon messages that they carry, they are subject to only intermediate scrutiny. U.S. Const. Amend. 1.

[42] **Constitutional Law** Website content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services was content based and thus, strict scrutiny applied to First Amendment free speech challenge brought by trade association of internet companies; statute targeted some websites based on their social interaction features that compiled and curated third-party speech into expressive product of their own, such that the features that the statute singled out were inextricable from content produced by those features, and its exclusions were based on content of websites, such as reporting news and current events and reviewing products. U.S. Const. Amend. 1; Ohio Rev. Code Ann. §§ 1349.09(A)(1), 1349.09(B), 1349.09(N)(1), 1349.09(O)(1)-(2).

[43] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

Law that is content based on its face is subject to strict scrutiny on a First Amendment free speech challenge regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. U.S. Const. Amend. 1.

[44] **Constitutional Law** Children and Minors

Generally, First Amendment free speech protections are no less applicable when government seeks to control the flow of information to minors; for that reason, only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. U.S. Const. Amend. 1.

[45] **Constitutional Law** Protection of

While states possess legitimate power to protect children from harm, under First Amendment's Free Speech Clause that does not include a free-floating power to restrict the ideas to which children may be exposed. U.S. Const. Amend. 1.

[46] **Constitutional Law** Strict or heightened scrutiny; compelling interest

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Strict scrutiny is the most demanding test known to constitutional law; it requires the government to show that the law furthers a compelling governmental interest and is narrowly tailored to that end.

[47] **Constitutional Law** Strict or exacting scrutiny; compelling interest test

For a speech regulation to survive strict scrutiny under the First Amendment, the state must specifically identify an actual problem in need of solving and show that the curtailment of free speech must be actually necessary to the solution. U.S. Const. Amend. 1.

[48] **Constitutional Law** Website content

Telecommunications Programming and content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services was not narrowly tailored to state's compelling interest in protecting minors against oppressive contracts and thus could not survive strict scrutiny on First Amendment free speech challenge brought by trade association of internet companies; statute regulated access to and dissemination of speech when it could instead seek to regulate the arguably unconscionable terms of service that platforms required, and the statute was underinclusive with respect to the claimed interest, as a minor could still agree to contract with a news website without parental consent, but not with a social media website. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

[49] **Constitutional Law** Website content

Telecommunications Programming and content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services was not narrowly tailored to state's stated interest in protecting minors from harms associated with social interaction on covered platforms, including mental health issues and sexual predation and thus could not survive strict scrutiny on First Amendment free speech challenge brought by trade association of internet companies; record did not show that the thousands of covered websites caused harm to minors sufficient to suppress minors' access to protected speech, and even if protecting children from such harms was a compelling interest, the statute was underinclusive because children could still access the harmful material as long as one parent consented. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

[50] **Constitutional Law** Website content

Telecommunications Programming and content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services was not narrowly tailored to state's compelling interest in advancing parents' ability to make decisions about their children's care and upbringing and thus could not survive strict scrutiny on First Amendment free speech challenge brought by trade association of internet companies; parental-control options existed and state did not show that minors were so capable of evading them that they were an insufficient alternative to infringement on protected speech, and statute was overinclusive, as some parents may not have cared if their children accessed the covered websites. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

[51] **Constitutional Law** Certainty and definiteness; vagueness

Laws run afoul of the Due Process Clause of the Fourteenth Amendment if they fail to give fair notice of conduct that is forbidden or required. U.S. Const. Amend. 14.

[52] **Constitutional Law** Certainty and definiteness; vagueness

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Constitutional Law Speech, press, assembly, and petition

Under due process principles, precision is essential to ensure that laws cannot be enforced in an arbitrary or discriminatory way; the need for clarity is particularly acute when laws restrict speech. U.S. Const. Amends. 1, 14.

[53] **Constitutional Law** Telecommunications

Telecommunications Programming and content

Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services was unconstitutionally vague in violation of due process; statute used expansive language that would leave many operators unsure whether it applied to their website and the provided 11-factor list for determining if a website was covered did not provide clarity, as all the listed considerations were undefined, and the exceptions for "established" and "widely recognized" media outlets whose "primary purpose" was to "report news and current events" provided no guardrails or signposts for determining which media outlets were established and widely recognized. U.S. Const. Amends. 1, 14; Ohio Rev. Code Ann. §§ 1349.09(B), 1349.09(C), 1349.09(O)(2).

[54] **Injunction** Grounds in general; multiple factors

In determining whether to enter a permanent injunction, district court considers a modified iteration of the factors it utilizes in assessing preliminary injunctions: (1) success on the merits; (2) whether the plaintiff will suffer irreparable injury absent an injunction; (3) whether, balancing the hardships, there is harm to the defendant; and (4) whether the public interest favors granting the injunction.

[55] **Civil Rights** Injunction

Internet company trade association's members and their users would suffer multiple forms of irreparable harm, thus weighing in favor of granting permanent injunction against enforcement of Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services; statute allegedly violated members' and users' First Amendment rights, and members would face compliance costs for violations and there was no cause of action through which they could seek to recover those costs. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

More cases on this issue

[56] **Civil Rights** Injunction

As a matter of law, when constitutional rights are threatened or impaired, irreparable injury element for permanent injunction is presumed.

[57] **Civil Rights** Injunction

Balance of hardships and public interest favored granting internet company trade association's request for permanent injunction against enforcement of Ohio statute requiring certain online platforms to obtain parental consent before an unemancipated minor under age 16 could use their services; permanent injunction would ensure that minors could continue to access and engage in protected speech in vast array of websites regulated by the statute, and those websites would be able to continue disseminating speech to the public without statute's burdens, while the state had no interest in enforcing laws that were unconstitutional. U.S. Const. Amend. 1; Ohio Rev. Code Ann. § 1349.09.

More cases on this issue

[58] **Injunction** Injunctions against government entities in general

The last two permanent injunction factors in the balancing test, harm to defendant and public interest, merge when the government is a party.

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[59] **Civil Rights** Injunction

It is always in the public interest to prevent the violation of a party's constitutional rights, for purposes of balancing test for permanent injunctions.

[60] **Civil Rights** Injunction

Where a First Amendment injury is both threatened and occurring and a plaintiff has prevailed on the merits, permanent injunctive relief is the appropriate remedy. U.S. Const. Amend. 1.

West Codenotes

Held Unconstitutional
Ohio Rev. Code Ann. § 1349.09

Attorneys and Law Firms

Matthew Huntley Rice, Sperling Kenny Nachwalter, LLC, Chicago, IL, Alexis Swartz, Pro Hac Vice, Joshua P. Morrow, Pro Hac Vice, Lehotsky Keller Cohn LLP, Austin, TX, Jared Bryans Magnuson, Pro Hac Vice, Lehotsky Keller Cohn LLP, Atlanta, GA, Jeremy Evan Maltz, Pro Hac Vice, Scott Allen Keller, Pro Hac Vice, Steven P. Lehotsky, Pro Hac Vice, Lehotsky Keller Cohn LLP, Washington, DC, for Plaintiff.

Julie M. Pfeiffer, Elizabeth Hanning Smith, James Parker Reising, Stephen P. Tabatowski, Office of the Attorney General, Columbus, OH, Phillip Thomas Kelly, Gallagher Sharp LLP, Columbus, OH, for Defendant.

OPINION AND ORDER

ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE

****1** ***931** This matter comes before this Court on Defendant Ohio Attorney General David Yost's Motion for Summary Judgment (ECF No. 42) and Plaintiff NetChoice, LLC's ("NetChoice") Motion for Summary Judgment (ECF No. 43). For the reasons set forth below, this Court **DENIES** Defendant's Motion (ECF No. 42) and **GRANTS** Plaintiff's Motion (ECF No. 43).

INTRODUCTION

This action raises a constitutional challenge to Ohio's Parental Notification by Social Media Operators Act (the "Act"), a state law that requires certain online platforms to obtain verifiable parental consent before any unemancipated minor below the age of sixteen agrees to the platform's terms of service to access or utilize the service. Ohio Rev. Code § 1349.09(B)(1). The Act was signed into law in July 2023 and slated to take effect on January 15, 2024, before it was restrained and enjoined by this Court. (*See* ECF No. 33).

This Court lauds the State's effort through the Act to protect the children of this state. This Court finds, however, that the Act as drafted fails to pass constitutional muster and is constitutionally infirm. And in this constitutional democracy, it cannot be gainsaid that even the government's most noble entreaties to protect its citizenry must abide in the contours of the U.S. Constitution, in this case the First Amendment. As Justice Scalia profoundly reasoned in *Brown v. Entertainment Merchants Association*, (*see* in-depth analysis *infra* Section III.B.1), which found unconstitutional under the First Amendment a California statute imposing restrictions on the sale or rental to minors of "violent video games":

> [M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them .... No doubt a State possesses legitimate power to protect children from harm ... but that does not include a free-floating power to restrict the ideas to which children may be exposed. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a

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> legislative body thinks unsuitable for them ....

Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 794–95, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (internal quotation marks and citations omitted).

This case resides at the intersection of two unquestionable rights: the rights of children to "a significant measure of" freedom of speech and expression under the First Amendment, *see id.*, and the rights of parents to direct the upbringing of their children free from unnecessary governmental intrusion, *see Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (finding that the "primary role of parents in the upbringing of their children is now established beyond debate"); *Farrington v. Tokushige*, 273 U.S. 284, 298, 47 S.Ct. 406, 71 L.Ed. 646 (1927) (noting that the parental "right to direct the education of his own child without unreasonable restrictions"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (emphasizing parents' right "to direct the upbringing and education of children under their control"); *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 590 (6th Cir. 2008) (noting that "parents have a liberty interest in the ***932** care, custody, and control of their children") (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)).

****2** Much like the law at issue in *Brown*, the Act here "straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children." 564 U.S. at 805, 131 S.Ct. 2729. And while "[b]oth ends are legitimate," when these goals affect First Amendment rights, the state must pursue them "by means that are neither seriously underinclusive nor seriously overinclusive." *Id.* As Justice Scalia's majority opinion in *Brown* makes clear, even if "the state has the power to enforce parental prohibitions"—for example, enforcing a parent's decision to forbid their child to attend an event—"it does not follow that the state has the power to prevent children from hearing or saying anything *without their parents' prior consent*." *Id.* at 795 n.3, 131 S.Ct. 2729. "Such laws," Justice Scalia emphasized, "do not enforce *parental* authority over children's speech ... they impose *governmental* authority, subject only to a parental veto." *Id.* [1]

Minors' access to information is essential to their growth into productive members of our democratic public sphere. As Judge Posner observed when he cautioned of "the danger of allowing government to control the access of children to information and opinion":

> Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise.

Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.)

I. BACKGROUND

A. NetChoice and the Internet Landscape

NetChoice is a trade association of Internet companies. Its members include: Google, which owns and operates YouTube; Meta, which owns and operates Facebook and Instagram; X (formerly Twitter); Nextdoor; Pinterest; and Dreamwidth. (ECF No. 2-2 ¶¶ 2, 7). These members' websites and platforms both "publish," "disseminate," "create," and "distribute" speech. (ECF No. 1 ¶ 18; ECF No. 2-1 ¶ 6). Adults and teens alike flock to NetChoice members' websites and generate billions of "posts" every day. (ECF No. 2-1 ¶ 6).

There are a number of good things to be said about social media platforms. Dreamwidth, for example, allows users to share their writing, artwork, and innermost thoughts. (ECF No. 1 ¶ 19). Facebook gives users a space to debate religion and politics or share vacation photos. Instagram lets people post and view friends' photos, showcase art, follow political commentary, and discover or start small businesses. ***933** (*Id.*). YouTube endeavors to show people the world in all its facets, from travel documentaries to step-by-step cooking instructions. (*Id.*). On Nextdoor, users can connect with neighbors, share local news, and borrow tools. (*Id.*). Pinterest houses recipes, style ideas, home designs for users to collect, explore, and compare. (*Id.*). And, on X, users can petition their elected representatives and directly engage with them. (*Id.*). The ability to form and to maintain social connections on these online platforms can have positive

effects on children and adolescents, especially those who routinely feel marginalized or excluded. (*See* ECF No. 42-2, U.S. Dep't of Health and Human Serv., Office of the Surgeon General, *Social Media and Youth Mental Health* (2023) [hereinafter Surgeon General Advisory]). In addition to enabling peer connection and social support, social media can also promote positive and identity-affirming content and encourage behaviors that proactively address mental health care. (*Id.*).

****3** But as the Ohio Attorney General correctly illustrates, these benefits come with a cost. (*See* ECF Nos. 42-1–6). Extensive social media use also has been linked to higher rates of depression, anxiety, and loneliness among young people. Research from the University of Oxford identifies adolescents as particularly vulnerable, with social media use linked to decreased life satisfaction. (ECF No. 42-3, Amy Orben et al., *Windows of developmental sensitivity to social media*, 13 Nature Communications 1649 (2022), https://ora.ox.ac.uk/objects/uuid:d4ce6392-53ef-41d1-a970-67f64b4e1c78). As the evidence in the record suggests, these platforms do not appear to be incorporating user-agnostic judgments when promoting content. "Push notifications, autoplay, infinite scroll, quantifying and displaying popularity (i.e., 'likes'), and algorithms that leverage user data to serve content recommendations are some examples of these features that maximize engagement." (*Id.*). One study led by the Harvard T.H. Chan School of Public Health confirms that "[s]ocial media platforms are highly incentivized to keep youth online"; and that children's and adolescents' online experiences are "heavily monetized through advertising revenue on platforms' websites and mobile applications," which draw upon "highly personalized computational advertising to match users' specific demographics and usage patterns with advertisers' financial interests." (ECF No. 42-1, Amanda Raffoul *et al.*, *Social media platforms generate billions of dollars in revenue from U.S. youth: Findings from a simulated revenue model*, 18 J. Pub. Lib. Sci. 1 (2023), https://doi.org/10.1371/journal.pone.0295337). In 2022, six platforms including Facebook, Instagram, X, and YouTube collectively derived nearly $11 billion in advertising revenue from U.S.-based users younger than 18 years old. (*Id.*).

B. Ohio's Parental Notification Act

Against this backdrop, lawmakers across the nation have sought to regulate online entities and cabin their deleterious effects, particularly on the youth. The task is an admittedly daunting one: Legislatures must craft laws broad enough to accommodate the pace with which digital platforms evolve, but not so broad that they cripple innovation or trample free speech. The resulting legislation can therefore be imperfect, but that does not prevent legislatures from trying.

Enter "Ohio's Parental Notification by Social Media Operators Act," Ohio Rev. Code § 1349.09 [hereinafter "the Act"]. Slated to take effect on January 15, 2024, the Act requires unemancipated children under the age of sixteen to obtain "verifiable" parental consent before agreeing to terms and conditions on social media platforms that fit certain criteria.

***934** *1. Covered Operators*

Specifically, the Act regulates "operator[s]" of "online web site[s], service[s], or product[s]" that: (1) have users in Ohio; (2) "target[ ] children," or are "reasonably anticipated to be accessed by children"; and that (3) allow users to do all of the following:

> (a) Interact socially with other users within the confines of the online web site, service, or product;
>
> (b) Construct a public or semipublic profile for the purpose of signing into and using the online web site, service, or product;
>
> (c) Populate a list of other users with whom an individual shares or has the ability to share a social connection within the online web site, service, or product;
>
> (d) Create or post content viewable by others, including on message boards, chat rooms, video channels, direct or private messages or chats, and a landing page or main feed that presents the user with content generated by other users.

Ohio Rev. Code § 1349.09(A)(1).

In order to determine whether a platform "targets children, or is reasonably anticipated to be accessed by children," the Attorney General or a court "may" consider eleven factors: (1) subject matter; (2) language; (3) design elements; (4) visual content; (5) use of animated characters or child-oriented activities and incentives; (6) music or other audio content; (7) age of models; (8) presence of child celebrities or celebrities who appeal to children; (9) advertisements; (10)

empirical evidence regarding audience composition; and (11) evidence regarding the intended audience. Ohio Rev. Code § 1349.09(C).

Two types of operators are exempted from the reach of the statute. The Act's requirements do not apply to platforms that "limit[ ]" "interaction between users" to:

(1) Reviewing products offered for sale by electronic commerce or commenting on reviews posted by other users;

(2) Comments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events.

**4 *Id.* § 1349.09(O). The Act likewise exempts websites "where the predominant or exclusive function is": (1) "[c]loud storage or cloud computing services"; and (2) "[b]roadband internet access services." *Id.* § 1349.09(N)(1)(a)-(b).

2. Requirements

All non-exempt operators that meet the specifications of Ohio Rev. Code § 1349.09(A)(1) must adhere to three requirements. ***First,*** the operator must "[o]btain verifiable consent for any contract with a child, including terms of service, to register, sign up, or otherwise create a unique username to access or utilize the online web site, service, or product, from the child's parent or legal guardian." Ohio Rev. Code § 1349.09(B)(1). An operator can obtain this "verifiable consent" through "any of the following methods":

(a) Requiring a parent or legal guardian to sign and return to the operator a form consenting to the contract by postal mail, facsimile, or electronic mail;

(b) Requiring a parent or legal guardian, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;

*935 (c) Requiring a parent or legal guardian to call a toll-free telephone number implemented by the operator and staffed by trained personnel;

(d) Requiring a parent or legal guardian to connect to trained personnel by videoconference;

(e) Verifying a parent's or legal guardian's identity by checking a form of government-issued identification against databases of such information, and promptly deleting the parent's or legal guardian's identification from the operator's records after such verification is complete.

Id. Unless parental consent is obtained, children under the age of sixteen "shall" be denied access to the "use of the online web site, service, or product." *Id.* § 1349.09(E).

Second, the Covered Operator must "[p]resent to the child's parent or legal guardian a list of the features offered by an operator's online web site, service, or product related to censoring or moderating content, including any features that can be disabled for a particular profile." *Id.* § 1349.09(B)(2). ***Third***, the Covered Operator must "[p]rovide to the child's parent or guardian a web site link at which the parent or legal guardian may access and review the list of features [related to censoring or moderating content, including any features that can be disabled for a particular profile] at another time." *Id.* § 1349.09(B)(3).

3. Enforcement and Penalties

The Act authorizes the Ohio Attorney General to investigate any noncompliance and "to bring a civil action ... for appropriate relief including a temporary restraining order, preliminary or permanent injunction, and civil penalties." *Id.* §§ 1349.09(G), (H). A court that finds that an operator has violated the terms of the Act "shall impose a civil penalty" under the following scheme: (1) up to $1000 per day for the first 60 days of noncompliance; (2) up to an additional $5000 per day for days 61-90; and (3) up to an additional $10,000 per day for days 91 and beyond. *See id.* § 1349.09(I). Where an operator is "in substantial compliance," the attorney general must provide the operator with written notice of the suspected violations, and a 90-day opportunity to cure, in which the operator must provide the attorney general with "written documentation that the violation has been cured and that the operator has taken measures sufficient to prevent future violations." *Id.* § 1349.09(M).

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C. Procedural History

****5** On January 5, 2024, NetChoice sued the State of Ohio (the "State"), through Ohio Attorney General Dave Yost in his official capacity, for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, challenging the Act as unconstitutional under the First and Fourteenth Amendments. After a January 8, 2024 hearing on Plaintiff's motion for a temporary restraining order ("TRO"), this Court granted the TRO and enjoined Defendant "from enforcing the Act against Plaintiff or its member organizations." (ECF No. 27). On February 12, 2024, this Court granted a preliminary injunction on the same grounds. (ECF No. 33 ("PI Order")).

A month later, the parties agreed that "this case is ready to proceed to a final merits determination"; that "[t]here is not a jury demand;" that they "do not believe that settlement is likely"; and that they will not rely on expert testimony. (ECF No. 37 at 2–3). The parties also "agreed to forego discovery in this case," explaining that "the parties will rely primarily on the record established through the preliminary injunction briefing," and "stipulate that the evidence the parties have submitted with their respective briefing thus far is admissible." (*Id.*).

***936** On May 3, 2025, the parties filed cross-motions for summary judgment (ECF Nos. 42, 43); opposed one another's motions (ECF Nos. 44, 45); and filed their respective replies (ECF Nos. 47, 48). This Court held oral argument on the parties' motions on March 13, 2025.

D. Effect of Intervening *Moody* Decision

As set forth in its Complaint, NetChoice alleges that Ohio's Parental Notification by Social Media Operators Act violates the First Amendment rights of its covered members as well as those members' current and prospective users, including Ohio minors. NetChoice raises both: (1) a traditional facial challenge under the First Amendment; and (2) alternatively, a First Amendment overbreadth facial challenge. Under a traditional facial challenge, "*no* set of circumstances exists under which [the Act] would be valid." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 141 S. Ct. 2373, 2387, 210 L.Ed.2d 716 (2021) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Under a First Amendment overbreadth facial challenge, "a substantial number of [the Act's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (cleaned up). NetChoice also alleges that the Act's central coverage provision is unconstitutionally vague in violation of the First Amendment and Due Process Clause of the Fourteenth Amendment.

One week after the parties' summary judgment briefing concluded, the Supreme Court decided *Moody v. NetChoice, LLC*, 603 U.S. 707, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024), a case that considered whether Florida's and Texas's content-moderation laws are facially unconstitutional. There, the Supreme Court emphasized that although First Amendment facial challenges are subject to "a less demanding though still rigorous standard," they remain difficult to mount successfully. *Id.* at 723, 144 S.Ct. 2383.[2] A proper First Amendment facial challenge, the Court reiterated, proceeds in two steps. The "first step" is to determine every hypothetical application of the challenged law. *Id.* at 724, 144 S.Ct. 2383. The second step is "to decide which of the law['s] applications violate the First Amendment, and to measure them against the rest." *Id.* at 725, 144 S.Ct. 2383. Plaintiffs can satisfy their burden of showing the law is facially unconstitutional "only if the law's unconstitutional applications substantially outweigh its constitutional ones." *Id.* at 724, 144 S.Ct. 2383. Given this fact-intensive inquiry, the Court remanded the cases because "the record is underdeveloped." *Id.* at 726, 144 S.Ct. 2383.[3] On remand, the Fifth Circuit tossed ***937** the suit back to the district court, explaining that "these are fact-intensive questions that must be answered by the district court in the first instance after thorough discovery." *NetChoice, L.L.C. v. Paxton*, 121 F.4th 494, 499 (5th Cir. 2024). The Eleventh Circuit likewise remanded the case "in full to the district court for further proceedings consistent with the Supreme Court's opinion." *See* Order, ECF No. 178-2, *NetChoice, LLC v. Attorney General,* No. 21-12355 (11th Cir. Aug. 16, 2024).

****6** In light of *Moody*, this Court asked the parties at oral argument whether discovery should be re-opened or summary judgment briefing should be supplemented. The State opined that the record is insufficient but that the burden of proof rests with NetChoice. NetChoice, on the other hand, maintained that the record is sufficient under *Moody*.

II. STANDARD OF REVIEW

[1] **[2]** Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

of law." Fed. R. Civ. P. 56(a). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When ruling on a motion for summary judgment, a court reviews the evidence in the light most favorable to the non-moving party, mindful that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ...." *Id.* at 255, 106 S.Ct. 2505. A court, however, is not "obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 805 F. Supp. 2d 396, 402–03 (S.D. Ohio 2011) (quoting *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990)). Rather, it need only consider "those portions of the record specifically called to its attention by the parties." *Id.* at 403. The standards for summary judgment "do not change when, as here, 'both parties seek to resolve [the] case through the vehicle of cross-motions for summary judgment.' " *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 387 (6th Cir. 2016) (quoting *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)).

[3] **[4]** **[5]** When a motion for summary judgment also seeks a permanent injunction, the party seeking a permanent injunction must satisfy a four-factor test. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). The plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Id.* The decision to grant or to deny permanent injunctive relief is "an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *Id.* In a case arising ***938** under the First Amendment, "a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Am. C.L. Union of Kentucky v. McCreary Cnty., Ky.*, 607 F.3d 439, 445 (6th Cir. 2010) (internal quotation marks and citation omitted).

III. LAW & ANALYSIS

NetChoice argues that it is entitled to a permanent injunction and summary judgment on its First Amendment facial challenges on behalf of both NetChoice's covered members and those members' current and prospective users. NetChoice also invokes the void-for-vagueness doctrine under the First and Fourteenth Amendments, arguing that the central coverage provision, the Act's exceptions, and other key terms are unconstitutionally vague.

****7** The State, on the other hand, seeks summary judgment that NetChoice lacks standing to assert the free-speech rights of Ohio children, and that the Act is constitutional. Specifically, the State maintains that: (1) that the Act regulates contracts, not speech and, thus, rational basis review is appropriate; (2) that the Act, "at worst," only "incidentally" implicates speech and is therefore subject to intermediate scrutiny; (3) that the Act, in any event, satisfies any level of scrutiny given Ohio's important and compelling interest in protecting minors and parental decision-making rights. The State also argues that the Act is not unconstitutionally vague.

A. Plaintiff's Standing to Challenge the Act

[6] **[7]** Because Article III limits federal judicial jurisdiction to cases and controversies, *see* U.S. Const. art. III, § 2, federal courts are without authority "to render advisory opinions [or] 'to decide questions that cannot affect the rights of litigants in the case before them,' " *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (citation omitted). Standing is one doctrine that reflects and enforces those limitations. *See Davis v. FEC*, 554 U.S. 724, 732–33, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). As the Supreme Court explained: "In essence, the question of standing is whether the litigant is entitled to have court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Id.* at 498, 95 S.Ct. 2197.

[8] The "constitutional minimum of standing" flows from Article III's case-or-controversy requirement and has three elements. *Kowalski v. Tesmer*, 543 U.S. 125, 128–29, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). First, a plaintiff must show that he or she has

suffered or imminently will suffer a concrete injury. *Memphis A. Philip Randolph Inst. v. Hargett,* 2 F.4th 548, 555 (6th Cir. 2021). Second, a plaintiff must show that the injury is fairly traceable to the challenged conduct of the defendant. *Id.* Third, a plaintiff must show that a favorable federal court decision is likely to redress that injury. *Id.*

[9] **[10]** The federal judiciary also adheres to a set of "prudential" principles that bear on the question of standing and generally prohibit third parties from asserting the rights of others or from asserting generalized grievances. *See Warth*, 422 U.S. 490, 95 S.Ct. 2197; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); ***939** *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). So, even when a case falls within the constitutional boundaries of the "case or controversy" requirement, a plaintiff may still lack standing under these prudential principles "by which the judiciary seeks to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone*, 441 U.S. at 99–100, 99 S.Ct. 1601. As this Court recognized in its PI Order, there are exceptions to this general prohibition against third-party standing. *See Powers v. Ohio*, 499 U.S. 400, 410–411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). An organization, for example, has "associational standing" to sue on behalf of its members when its members would otherwise have standing to sue in their own right; the interests at stake are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See Hargett*, 2 F.4th at 555 (quoting *Friends of the Earth*, 528 U.S. at 181, 120 S.Ct. 693). Additionally, "[w]here plaintiffs challenge a statute or ordinance for vagueness or overbreadth, the Supreme Court has concluded that they have standing to assert the rights of third parties whose protected speech may have been impermissibly curtailed by the challenged prohibition, even though as applied to the plaintiffs themselves, the ordinances only curtailed unprotected expression." *Brandywine, Inc. v. City of Richmond, Kentucky*, 359 F.3d 830, 835 (6th Cir. 2004) (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 59 n.17, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)); *see Ison v. Madison Loc. Sch. Bd.*, 395 F. Supp. 3d 923, 931–32 (S.D. Ohio 2019).

****8** The State challenges NetChoice's standing to assert the free-speech rights of Ohio children. (*See* ECF No. 42 at 14–15; ECF No. 44 at 4). It suggests that NetChoice fails to satisfy Article III requirements, i.e., the constitutional requirements. Thus, the State argues, prudential principles —like the overbreadth exception to the general prohibition against third-party standing—are inapplicable here. (*See* ECF No. 42 at 14). NetChoice takes the position that the State "no longer disputes that NetChoice has organizational or associational standing to challenge the Act." (ECF No. 45 at 12 & n.3 ("Defendant makes one reference to 'associational' standing and states that '[o]verbreadth ... is not an exception to Article III standing requirements,' .... [b]ut Defendant does not argue that NetChoice lacks Article III standing.")).

[11] **[12]** **[13]** Unlike the preliminary injunction stage, when standing is challenged at summary judgment, "mere allegations of injury are insufficient." *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 329, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999). Rather, NetChoice "must establish that there exists no genuine issue of material fact as to justiciability or the merits." *Id.* (citing *Lujan v. National Wildlife Federation,* 497 U.S. 871, 884, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)). Plaintiff bears the burden of establishing standing, *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016) (citing *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130), and "must 'show that [it] has standing for each type of relief sought,' " *id.* (cleaned up) (quoting *Summers v. Earth Island Inst.,* 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). Because this burden progresses "with the manner and degree of evidence required at the successive stages of the litigation," a plaintiff " 'in response to a summary judgment motion,' ... cannot rely on 'mere allegations' with respect to each standing element, 'but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true.' " *Id.* (quoting *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130).

***940** Although the State focuses on NetChoice's standing to bring claims on behalf of Ohio minors, NetChoice itself must still meet the "constitutional minimum" requirements regardless of any third-party rights it seeks to assert. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) ("To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact."); *Birmingham v. Nessel*, No. 21-1297, 2021 WL 5712150, at *2–3 (6th Cir. Dec. 2, 2021) (prudential standing doctrines, such as the prohibition on third-party standing "do[ ] not affect constitutional standing"); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019) ("Even where a litigant challenges a law or regulation as overbroad, that litigant must still 'show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action.'

" (quoting *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972))); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 350 (6th Cir. 2007) ("Even though Prime Media advances an overbreadth challenge, it is thus still required to show an injury in fact ...."). Because Defendant challenges NetChoice's standing, this Court begins its analysis there.

1. Constitutional Standing

[14] Under Article III, a plaintiff must establish that it has suffered an "injury in fact" that is "fairly traceable to the challenged action of the defendant" and is capable of being "redressed" by the court. *Lujan,* 504 U.S. at 560–61, 112 S.Ct. 2130; *see also Morrison v. Bd. of Educ. of Boyd Cty.,* 521 F.3d 602, 608 (6th Cir. 2008). While these requirements generally prevent a litigant from bringing a claim based on injuries experienced by others, associational standing permits an association or organization to sue based on injuries to its members. *See United Food and Commercial Workers v. Brown Group,* 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). To establish associational standing, NetChoice must show that: "(1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *See Hargett*, 2 F.4th at 555 (quoting *Friends of the Earth*, 528 U.S. at 181, 120 S.Ct. 693).

****9** **[15]** NetChoice satisfies these requirements. First, it has shown that its members have individual standing to sue because they are subject to the Act and will face injury in the form of compliance costs and civil liability if they violate its operative provisions. *See* Ohio Rev. Code § 1349.09(B) (outlining parental consent methods); ECF Nos. 2-1 ¶ 14; 2-2 ¶ 13 (discussing compliance costs); Ohio Rev. Code § 1349.09(I) (imposing civil penalties); *see also Kentucky v. Yellen*, 54 F.4th 325, 342–43 (6th Cir. 2022) ("[C]ompliance costs are a recognized harm for purposes of Article III."); *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.' "); *Am. Booksellers*, 484 U.S. at 392, 108 S.Ct. 636 (plaintiffs suffered an injury in fact that satisfied constitutional standing requirements where the challenged law was "aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution"). In *Lujan,* the Supreme Court explained:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial ***941** stage) in order to establish standing depends considerably ***upon whether the plaintiff is himself an object of the action*** (or forgone action) at issue. ***If he is, there is ordinarily little question that the action or inaction has caused him injury***, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.

504 U.S. at 561–562, 112 S.Ct. 2130 (emphasis in original). Because several of NetChoice's members are the direct "object" of the Act, "there is little question" that they satisfy the injury requirement. *Id.*

Second, the injury is directly traceable to Defendant, whom the Act vests with enforcement authority. *See* Ohio Rev. Code § 1349.09(H) ("If it appears that an operator of an online web site, service, or product failed to comply with this section, the attorney general has the exclusive authority to bring a civil action in a court of common pleas, or other appropriate court, for appropriate relief including a temporary restraining order, preliminary or permanent injunction, and civil penalties."). And third, the injury would be redressed by an injunction blocking that authority. *See Mikel v. Quin*, 58 F.4th 252, 258 (6th Cir. 2023) ("Injunctions redress ... 'imminent future' injuries .... Injuries are ... 'imminent' when they are certain or

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perhaps substantially likely to occur in the future." (internal quotation marks and citations omitted)), *cert. denied sub nom. Mikel v. Nichols*, —— U.S. ——, 143 S. Ct. 2660, 216 L.Ed.2d 1238 (2023).

NetChoice has also shown that this lawsuit is germane to its purpose "to make the Internet safe for free enterprise and free expression," and the nature of the lawsuit is "unlikely to require fact-intensive inquiry of each member." (*See* ECF No. 33 at 8–9 (citing ECF No. 2-1 ¶ 3)). In its PI Order, this Court concluded, based on the affidavits and evidence presented, that NetChoice has constitutional associational standing to bring claims on behalf of its members. (PI Order, ECF No. 33 at 6–8). Defendant offers no reason for this Court to depart from that ruling.

2. Prudential Considerations and Third-Party Standing

[16] The only standing issue Defendant contests at summary judgment is whether NetChoice can raise the First Amendment interests of its members' minor users. A party generally may assert only his or her own rights and cannot raise the claims of third parties who are not before the court. *See Warth*, 422 U.S. at 499, 95 S.Ct. 2197. This rule serves at least two judicial purposes. It fosters judicial restraint freeing the court from "unnecessary pronouncement on constitutional issues" that may affect the rights of those not before it, and it "assures the court that the issues before it will be concrete and sharply presented." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (quoting *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)). The underlying assumption is "that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004).

****10** There are, however, exceptions to this rule. *See Powers*, 499 U.S. at 410–411, 111 S.Ct. 1364. First, the Supreme Court has ***942** permitted third-party standing in circumstances where "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Compare Singleton v. Wulff*, 428 U.S. 106, 115, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion) (finding it "generally [ ] appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision," given the closeness of doctors' relationship to patients and the "decision is one in which the physician is intimately involved"), *with Kowalski*, 543 U.S. at 126, 125 S.Ct. 564 (attorneys "do not have 'close relationship with their alleged [hypothetical] clients' " to challenge state law that made appointment of counsel discretionary for defendants who plead guilty or *nolo contendre*).

[17] Second, a litigant may assert the rights of a third party not before the court if there are substantial obstacles to the third party asserting its own rights and the litigant will effectively represent the interests of the party. *See e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 446, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (distributor of contraceptives to unmarried persons has standing to assert rights of unmarried persons "because unmarried persons denied access to contraceptives ... are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights"); *Barrows v. Jackson*, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953) (woman who was sued for selling her real property to an African American, in violation of a restrictive covenant applicable to her property, could defend the action by arguing that the covenant violated the equal protection rights of others where "the action of the state court ... might result in a denial of constitutional rights and ... it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court").

[18] Finally, a litigant may challenge a statute on the ground that it is overly broad and thus violates the First Amendment rights of third parties not before the court, even if the law is constitutional as applied to the litigants. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633–35, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."). The reason for this "special rule in First Amendment cases," the Supreme Court explained, "is apparent": "An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380–81, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *see also Baird*, 405 U.S. at 446 n.5, 92 S.Ct. 1029 ("[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert

precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.").

NetChoice argues that "[b]ecause minors' speech rights are so closely tied to covered websites' rights to disseminate speech, NetChoice's members are particularly 'well positioned to raise' users' First Amendment 'concerns.' " (*See* ECF No. 43 at 27 (quoting *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155, at *12 (W.D. Ark. Aug. 31, 2023)).) In support, NetChoice cites ***943** *Brown v. Entertainment Merchants Association,* 564 U.S. 786, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), a case that sustained a First Amendment challenge to California's restrictions on minors' access to violent video games. (*See* ECF No. 43 at 26–27). Because *Brown* plaintiffs were the "Video Software Dealers Association [ ] and the Entertainment Software Association [ ]," which are "associations of companies in the video game industry," *Video Software Dealers Ass'n v. Schwarzenegger*, 2007 WL 2261546, at *1 (N.D. Cal. Aug. 6, 2007), NetChoice contends that there can be "no question" that "trade associations could challenge a law regulating the industry they represent and raising the rights of affected minors." (ECF No. 43 at 27).

****11** Standing, however, was never challenged in *Brown* so that case is not a precedent for standing. *See Grendell v. Ohio Supreme Ct.*, 252 F.3d 828, 837 (6th Cir. 2001) ("As the Supreme Court has previously noted, 'when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine,* 415 U.S. 528, 535 n.5, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). This is especially true as it relates to the issue of standing, 'perhaps the most important of [the jurisdictional] doctrines.' *FW/PBS v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).").

Plaintiff next relies on *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), to argue that "if purveyors of alcohol can raise the rights of 18-21-year-olds to purchase alcohol, surely NetChoice members can raise the rights of users to receive and express protected speech." (ECF No. 45 at 13 (citing 429 U.S. at 194, 97 S.Ct. 451)). In *Craig v. Boren*, the Supreme Court allowed an alcohol vendor to challenge the constitutionality of gender-based differentials in state liquor laws by asserting the equal-protection rights of her male customers. 429 U.S. 190, 97 S.Ct. 451. The Court's analysis began, however, by noting that "prudential objectives[ ] thought to be enhanced by restrictions on third-party standing[ ] cannot be furthered here," because "the lower court already has entertained the relevant constitutional challenge" and a decision "to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *See id.* at 193, 97 S.Ct. 451 (noting that "limitations on a litigant's assertion of *jus tertii* [third party standing] ... stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative"). In other words, the Court found that efficiency cautioned against sending the case back on standing grounds because the constitutional question had already been teed up and decided by the lower courts. *See id.* (noting that "despite having had the opportunity to do so," the state "never raised before the District Court any objection to [vendor's] reliance upon the claimed unequal treatment of 18-20-year-old males as the premise of her equal protection challenge to Oklahoma's 3.2% beer law" and "at oral argument [ ] acknowledged that [it] always 'presumed' that the vendor, subject to sanctions and loss of license for violation of the statute, was a proper party in interest to object to the enforcement of the sex-based regulatory provision"). Proceeding to the merits, the Court concluded that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting ***944** their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.* at 195, 97 S.Ct. 451.

[19] **[20]** *Craig v. Boren* is arguably distinguishable on those procedural grounds, namely that unlike the state in that case, Ohio here has challenged Plaintiff's standing from the outset. But Defendant maintains that the case also stands for the proposition that "third-party standing exceptions ... generally scrutinize the relationship between the litigant and the third party and whether their interests align." (*See* ECF No. 42 at 15). True, a plaintiff must establish that their relationship with the third party whose rights they wish to assert is sufficiently close such that the plaintiffs are "fully, or very nearly, as effective a proponent of the right" as the third party would be. *Singleton*, 428 U.S. at 115, 96 S.Ct. 2868. The close-relationship standard is generally satisfied if the third parties' rights are "inextricably bound up with the activity the litigant[s] wish[ ] to pursue." *Id.* at 114, 96 S.Ct. 2868.

****12** Defendant contends that NetChoice members "burden children and parents with one-sided contractual terms of

questionable enforceability ... to generate billions of dollars collecting and selling the userdata of American kids" and "employ user interfaces that are specifically designed to maximize user engagement (and profits) while exacerbating the risks of mental health illnesses and sexual abuse." (ECF No. 42 at 15–16). These findings, according to Defendant, should cut against any conclusion that the "relationship" between NetChoice members' social media platforms and their minor users is sufficiently "close," or that their interests are adequately aligned, to justify third party standing. Stated differently, the Attorney General insists that Plaintiff cannot establish a close relationship with its minor users due to a conflict of interest.

The research Defendant submits is certainly compelling. It "underscore[s] the financial incentive for platforms to oppose government efforts to protect youth," and the strong incentive they have to "keep youth online." (*See* ECF No. 42-1 at 2–3; *see also id.* at 3 ("Social media platforms are suspected to derive hefty profits from youth users who may be vulnerable to negative mental health outcomes, including depression, anxiety, and eating disorders. Platforms, however, are not required to make these data publicly available, which may limit the abilities of researchers and policymakers to adequately investigate and regulate platform practices.")).

[21] But the "relationship" prong of the third-party standing inquiry does not ask whether NetChoice members are interested in protecting the general interests of the minors, be they health or privacy interests; the relationship between the third party and Plaintiff "only counts insofar as it is linked to the *right asserted*"—here, the right of minors to access social media platforms without obtaining parental consent. *See Amato v. Wilentz*, 952 F.2d 742, 752 (3d Cir. 1991) (emphasis added). It is for this reason that the Supreme Court has generally permitted vendors or sellers "to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market." *See e.g., Craig v. Boren,* 429 U.S. at 195, 97 S.Ct. 451; *see also U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720–21, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (lawyer has third party standing to challenge a fee restriction by raising client's due process rights); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623–24, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) (law firm has third-party standing to challenge a drug forfeiture ***945** statute on behalf of Sixth Amendment rights of an existing client where forfeited assets were needed to pay attorney's fees); *Barrows*, 346 U.S. at 254–58, 73 S.Ct. 1031 (white sellers of land have standing to assert constitutional rights of potential black purchasers in defending a suit to enforce a racially restrictive land covenant).

Additionally, while a professional or transactional relationship may be sufficient, it is not necessary. In *Baird*, for example, the Supreme Court held that a man convicted under state law "for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students" and for giving a young woman a contraceptive foam at the close of his address could "assert the rights of unmarried persons denied access to contraceptives." 405 U.S. at 440-43, 92 S.Ct. 1029. The state argued that the claimant and young woman had no professional or doctor-patient relationship to support standing. *Id.* Rejecting that argument, the Court explained that the relationship between the litigant "and those whose rights he seeks to assert is not simply that between a [contraceptive] distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." *Id.* at 445, 92 S.Ct. 1029. [4]

****13** **[22]** In *Triplett*, 494 U.S. 715, 110 S.Ct. 1428, the Court permitted an attorney to challenge a restriction on attorney's fees by asserting the due process rights of the client and, in so doing, clarified the key aspects of the third-party relationship prong:

> When ... enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third party standing has been held to exist.

494 U.S. at 720, 110 S.Ct. 1428. What this line of cases makes clear is that the relevant "relationship" inquiry for purposes of third-party standing is whether the plaintiff and the third party have the sort of relationship "of special consequence" such that the plaintiff will be as vigorous as the third party in asserting the third party's rights. *See Caplin & Drysdale*, 491 U.S. at 623 n.3, 109 S.Ct. 2646. Paradoxically, it is precisely NetChoice members' financial incentive to keep minors on their platforms that suggests that they are "fully, or

very nearly, as effective a proponent" of the minors' rights to access the platforms. *See Singleton*, 428 U.S. at 115, 96 S.Ct. 2868; *see also Amato*, 952 F.2d at 752 (noting that where "the vendor's monetary interests are greater, it has more incentive to sue, and its advocacy will be at least as vigorous as the vendee's").

[23] Aside from the relationship factor, this Court finds that the other two prudential standing factors—the impact of the litigation on minors' interests and the ability of third-party minors to advance their own rights—weigh in favor of conferring third-party standing. *Powers*, 499 U.S. at 413–16, 111 S.Ct. 1364. In *Baird,* the Supreme Court observed that "more important than the nature of the relationship ***946** between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests." 405 U.S. at 445, 92 S.Ct. 1029. Observing that enforcement of the statute would deny persons who "are not themselves subject to prosecution" access to contraceptives, the Court concluded that, "to that extent," those persons "are denied a forum in which to assert their own rights," making the case for third-party standing even "stronger." *Id.* at 446, 92 S.Ct. 1029.

Minors themselves are not the subject of the Act so, like the third party in *Baird,* to the extent their constitutional rights are violated, they are "denied a forum in which to assert their own rights." *See* 405 U.S. at 446, 92 S.Ct. 1029; *see also id.* at 446 n.6, 92 S.Ct. 1029 (noting that in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), "a custodian, in violation of state law, furnished a child with magazines to distribute on the streets," and "[t]he Court there implicitly held that the custodian had standing to assert alleged freedom of religion and equal protection rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself").

Second, the statute, if it goes into effect, allegedly impacts Ohio minors' First Amendment right to speech by foreclosing their access to social media platforms absent parental consent. *See Baird*, 405 U.S. at 446 n.5, 92 S.Ct. 1029 ("[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech."); *Munson,* 467 U.S. at 957, 104 S.Ct. 2839 ("Although [failure to show an obstacle] might defeat a party's standing outside the First Amendment context, this Court has not found the argument dispositive in determining whether standing exists to challenge a statute that allegedly chills free speech."); *Am. Booksellers,* 484 U.S. at 392–93, 108 S.Ct. 636 (no inquiry into obstacle in summarily upholding booksellers' standing to raise book buyers' First Amendment rights in facial challenge to statute).

****14** Based on the longstanding precedent described above and cited in this Court's PI order, as well as the record evidence, this Court concludes that there is no genuine issue of fact that NetChoice has standing to assert its members' rights and the rights of Ohio minors in this constitutional challenge.

B. Plaintiff's Constitutional Claims

[24] **[25]** **[26]** Turning to the merits, this Court now considers the constitutionality of the Act. "[C]ourts usually handle constitutional claims case by case, not en masse." *Moody*, 603 U.S. at 723, 144 S.Ct. 2383. In First Amendment cases, the Supreme Court has "lowered th[e] very high bar" of a "traditional" facial challenge, which would require a showing "that no set of circumstances exists under which the [law] would be valid." *See id.* (internal quotation marks and citation omitted). The question is whether "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (internal quotation marks and citation omitted). As explained earlier, a First Amendment facial challenge has two parts: first, the courts must "assess the state laws' " scope; and second, the courts must "decide which of the laws' " applications violate the First Amendment, and ... measure them against the rest." *Id.* at 708, 144 S.Ct. 2383. The Supreme Court recently admonished that courts cannot treat facial challenges "more like as-applied claims than like facial ones." *Id.* at 704, 100 S.Ct. 826.

***947** NetChoice mounts a "traditional" First Amendment facial challenge to the Act's constitutionality, or, in the alternative, a First Amendment overbreadth challenge. In other words, NetChoice argues that the Act is unconstitutional under all circumstances, or even if it is constitutional in some circumstances, it is unconstitutional in such a great number of circumstances that it should be struck down. (ECF No. 43 at 24–25). NetChoice makes two central arguments to support its position: (1) the Act triggers strict scrutiny by requiring minors to secure parental consent before accessing protected speech; and (2) the Act triggers strict scrutiny and violates the First Amendment because certain provisions, Ohio Rev. Code

§§ 1349.09(A), (B), and (O), are content and speaker based. NetChoice also contends that the Act is unconstitutionally vague under the First and Fourteenth Amendment because NetChoice members do not have fair notice as to whether they must comply with the Act's dictates, and if so, how.

The State, on the other hand, maintains that the Act is constitutional and is not unconstitutionally vague. It argues that the Act regulates ordinary commercial transactions, contracts specifically, and is therefore subject to rational basis review. In the alternative, the State argues that the Act is subject to intermediate scrutiny because it is content-neutral "and, at worst, only incidentally implicates speech." (ECF No. 42 at 23). In any event, the Act, according to the State, passes any level of scrutiny because it "advances Ohio's important and compelling governmental interests in protecting the health and safety of minors by requiring parental consent before a covered operator can contract with them." (*Id.* at 35).

[27] Beginning with the Act's scope, this Court concludes that, in every application to a covered website, the Act raises the same First Amendment issues. Specifically, whether it is a NetChoice member product—YouTube; Facebook and Instagram; X; Nextdoor; Pinterest; or Dreamwidth—or other covered websites that provide the "socially interactive" features outlined in the Act and considered to be "target[ing]" minors or likely to be accessed by minors—like Goodreads, Soundcloud, Substack, Yelp, or LinkedIn—they are all are under the same statutory obligation to block access to unemancipated Ohio minors absent parental consent. Thus, unlike the provisions at issue in *Moody*, the regulation here "raises the same First Amendment issues" "in every application to a covered business." *See NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1116 (9th Cir. 2024).

1. First Amendment: Restrictions on Protected Speech

a. The Act Regulates Protected Speech

****15** **[28]** **[29]** The First Amendment, applicable to the States through the Fourteenth, prohibits laws "abridging the freedom of speech." U.S. Const., amend. I; *see also Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). A fundamental principle of the First Amendment is that "all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 582 U.S. 98, 104, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017). While in the past, these places took the form of a street or a park, social media platforms today have become the "essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire." *Id.* Because freedom of speech is "the indispensable condition[ ] of nearly every other form of freedom," *Palko v. Connecticut,* 302 U.S. 319, 327, 58 S.Ct. 149, 82 L.Ed. 288 (1937), the First Amendment "bars the government from dictating ***948** what we see or read or speak or hear," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), and protects "the right to distribute, the right to receive, the right to read and freedom of thought," *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Despite the "challenges of applying the Constitution to ever-advancing technology," *Brown*, 564 U.S. at 790, 131 S.Ct. 2729, the Act's First Amendment implications come into focus when social media operators are thought of as publishers of opinion work—a newspaper limited to "Letters to the Editor," or a publisher of a series of essays by different authors. (PI Order, ECF No. 33 at 12); *see Moody*, 603 U.S. at 716, 144 S.Ct. 2383 (likening social media platforms to "[t]raditional publishers and editors"). The analogy is an imperfect one—social media operators are arguably less involved in the curation of their websites' content than these traditional examples. (PI Order, ECF No. 33 at 12). But the comparison helps clarify that the Act regulates speech in two consequential ways: (1) it regulates operators' ability to publish and distribute speech *to minors* and speech *by minors*; and (2) it regulates minors' ability both to *produce speech* and to *receive speech.* (*Id.*). And as this Court noted in its PI Order, this Court is unaware of a "contract exception" to the First Amendment. (*Id.*).

These principles control here. The Act impedes minors' ability to engage in and access speech by requiring covered websites to obtain parental consent before allowing any unemancipated child under the age of sixteen to register or create an account on their website. That means minors' ability to contribute or access "a wide array of protected First Amendment activity on any number of diverse topics," *Packingham*, 582 U.S. at 98, 137 S.Ct. 1730, will be contingent on securing parental consent—an impermissible curtailment of their First Amendment rights. *See Am. Amusement Mach. Ass'n*, 244 F.3d at 578 (Posner, J.) (finding parental consent requirements for violent video games unconstitutional, noting that "even parents who think violent video games harmful or even edifying ... may rather

prevent their children from playing these games than incur the time and other costs of [providing parental consent]" and "conditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights").

The State insists that the Act does not regulate speech, but the ability of minors to contract, which the Attorney General argues falls comfortably within the State's authority to regulate non-expressive, economic conduct. (*See* ECF No. 42 at 17). Pointing to *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), the Attorney General contends that "[r]estrictions on economic activity are distinct from regulations on protected expression," (*id.* at 17), and that the Act governs economic activity because it "explicitly applies only where minors are required to enter into a contract with covered operators," (*id.* at 18). When that contract is created, he continues, "an exchange occurs: a minor is given access to a particular platform, and the operator of that platform often gains an opportunity to advertise to the minor, collect the minor's data, and engage in a wide array of other activities intended to benefit the operator financially." (*Id.* at 18).

****16** **[30]** **[31]** But "the First Amendment right to the 'freedom of speech' protects against not just regulations that directly suppress speech but also those that target activities useful for speaking." *Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868, 882 (6th Cir. 2024). Like many of NetChoice's member organizations, a publisher stands to profit from engagement with ***949** consumers. (*See* PI Order, ECF No. 33 at 12). That an entity seeks financial benefit from its speech, however, does not vitiate its First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *see also Bonta*, 113 F.4th at 1120 ("The mere fact that a business may earn revenue from its services is 'insufficient by itself' to render its opinions about those services 'commercial.' " (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983))). While the State is correct that regulations restricting commercial or non-expressive conduct are subject to a different standard of review than regulations restricting protected expression, *Sorrell* is unhelpful because the Court there rejected a similar argument by Vermont "that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation." *Sorrell*, 564 U.S. at 566, 131 S.Ct. 2653.

The Vermont law at issue in *Sorrell* restricted the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors, with exceptions that allowed entities engaging in "educational communications" to purchase the information, but barred disclosure when the recipients would use the information for marketing. *Id.* at 557, 131 S.Ct. 2653. Additionally, "Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs," but the law prevented pharmaceutical manufacturers from using the information for their own marketing purposes. *Id.* at 564, 131 S.Ct. 2653. Thus, the statute "disfavor[ed] marketing, i.e., speech with a particular content, as well as particular speakers, i.e., [entities] engaged in marketing on behalf of pharmaceutical manufacturers." *Id.* at 552, 131 S.Ct. 2653; *id.* at 564, 131 S.Ct. 2653 ("The law on its face burdens disfavored speech by disfavored speakers."). As the Court summarized:

> Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

Id. at 557, 131 S.Ct. 2653.

[32] Like the law considered in *Sorrell*, the Act here "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id.* at 567, 131 S.Ct. 2653. Particularly, if a website "targets children" or is "reasonably anticipated to target children," and offers socially interactive features—like the ability to interact with other users; construct a public or semipublic profile; populate a list of other users with whom an individual "shares or has the ability to share a social connection"; create or post visible content "including on message boards, chat rooms, video channels, direct or private messages or chats, and

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a landing page or main feed that presents the user with content generated by other users," *see* Ohio Rev. Code § 1349.09(A)—then that website faces a dichotomy: (1) either minors secure parental consent and gain "access to" and "use of" all the speech on covered websites; or (2) minors do not secure parental consent and are denied "access to" and "use of" the covered websites. *Id.* §§ 1349.09(B), (E). These provisions do not strike at the commercial aspect of the relationship between covered websites and their users, they tackle the social speech aspect of it. (PI Order, ECF No. 33). As this Court noted in its PI ***950** Order, "a law prohibiting minors from contracting to access to a plethora of protected speech can[not] be reduced to a regulation of commercial conduct." (PI Order, ECF No. 33 at 13). Because the Act implicates protected speech, at least to some degree, it is not subject to the deferential rational basis standard of review. (*Id.*).

b. The Law is Content Based

****17** **[33]** **[34]** **[35]** Having concluded that the Act does indeed implicate the First Amendment, this Court next considers whether it should be subject to strict scrutiny or only to intermediate scrutiny. Courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," but only "an intermediate level of scrutiny" when "regulations are unrelated to the content of speech." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).[5] NetChoice argues that several provisions of the law discriminate based on content, whereas Defendant argues that the Act is content-neutral and that any effect it has on speech is incidental.

[36] **[37]** **[38]** **[39]** When considering whether a regulation is content based, the principal inquiry is whether the government has regulated the speech based on its communicative content. *Id.* at 643, 114 S.Ct. 2445. When a law "applies to particular speech because of the topic discussed or the idea or message expressed," it is content based on its face. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69, 142 S.Ct. 1464, 212 L.Ed.2d 418 (2022) (cleaned up). And "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* at 74, 142 S.Ct. 1464 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015)). Nor can a facially content-based law escape strict scrutiny so long as it has a "benign motive." *Reed*, 576 U.S. at 165–66, 135 S.Ct. 2218. It is worth noting that "[g]overnment discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.' " *Id.* at 168–69, 135 S.Ct. 2218 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). But a law need not discriminate based on viewpoint to be content based. *See id.* at 169, 135 S.Ct. 2218 ("[I]t is well established that 'the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.' " (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980))).

[40] **[41]** Other regulations are better described as speaker based. The Supreme Court is "deeply skeptical of laws that distinguish among different speakers," *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 138 S.Ct. 2361, 2378, 201 L.Ed.2d 835 (2018), but speaker-based restrictions "are not automatically content based or content neutral," ***951** *Schickel v. Dilger*, 925 F.3d 858, 876 (6th Cir. 2019). Speaker based restrictions are suspect only because they are often a proxy or pretext for regulation of content. *Id.* But if they distinguish between speakers "based only on the manner in which speakers transmit their messages to viewers, and not upon the messages that they carry," they are subject only to intermediate scrutiny. *Turner Broad. Sys.*, 512 U.S. at 645, 114 S.Ct. 2445.

NetChoice argues that the Act is facially content based because it targets some websites while exempting others. Specifically, the Act only purports to govern websites that are targeted at children, or reasonably anticipated to be accessed by children. Ohio Rev. Code § 1349.09(B).[6] The Act also excludes from coverage websites where interaction between users is "incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events." *Id.* § 1349.09(O).[7] Similar is an exemption for websites where interaction is limited to reviews for "products for sale," but the Act does not exempt reviews of, for example, services or art. *Id.* All of these, NetChoice argues, are content-based restrictions. NetChoice contends that even if these are just speaker-based restrictions, they cannot be justified without reference to

content, and are therefore, content-based distinctions subject to strict scrutiny. *Schickel*, 925 F.3d at 876 & n.2.

****18** The State, on the other hand, maintains that the Act is "agnostic to content." (ECF No. 42 at 24 (quoting *City of Austin*, 596 U.S. at 69, 142 S.Ct. 1464)). According to the State, the Act's parental consent requirement is based on "extrinsic qualities ***952** unrelated to any 'substantive message' " that the covered websites "might convey." (*Id.*). The State also contends that the Act's exceptions, O.R.C. 1349.09(O)(1)-(2), are not content-based because they apply "based on *how* or *where* user interaction occurs on a website —in public or private—and not on *what* message is being conveyed." (*Id.* at 25).

Turning first to the language that defines the broad category of operators to which the Act applies—websites that "target[ ] children" or are "reasonably anticipated to be accessed by children"—NetChoice argues that these are transparently content-based restrictions because whether a website "targets children" is inextricably connected to its content. (ECF No. 29 at 12). The State argues, on the other hand, that this language is simply an example of tailoring, designed to prevent overbreadth by exempting websites that are unlikely to be accessed by children. (ECF No. 28 at 27-28).

As this Court noted at the PI juncture, since this language identifies a certain topic, it is tempting to apply strict scrutiny reflexively, particularly given that facially content-based regulations cannot be rehabilitated by an apparent benign purpose. *Reed*, 576 U.S. at 165–66, 135 S.Ct. 2218. In *Reed*, the Supreme Court invalidated a regulation that treated, for example, "Temporary Directional Signs" differently from "Ideological Signs." *Id.* at 164, 135 S.Ct. 2218. The Supreme Court reasoned that the sign code was facially content based because it discriminated based on communicative content and was, therefore, subject to strict scrutiny. *Id.* at 159, 164, 135 S.Ct. 2218. But relevant here is the Supreme Court's "rejection of the view that *any* examination of speech or expression inherently triggers" strict scrutiny. *City of Austin*, 596 U.S. at 69, 142 S.Ct. 1464. That is, a law may still be content neutral, even if it requires reading the speech at issue to determine if the speech or speaker is covered. *Id.* In *City of Austin*, a sign was treated differently under the code based solely on whether it was located on the same premises as the topic being discussed, and the sign message mattered "only to the extent that it inform[ed] the sign's relative location." *Id.* at 71, 142 S.Ct. 1464. Evaluation of speech was necessary there only to determine whether the sign was an on-premises sign or an off-premises sign. *Id.* The sign's location relative to its content determined the regulation to which it was subject, but the topic was otherwise not considered. *Id.* The majority concluded that Austin's sign regulation was content-neutral because it did not "single out any topic or subject matter for differential treatment." *See id.*; *see also NetChoice, LLC v. Bonta*, —— F.Supp.3d ——, ——, 2025 WL 807961, at *9 (N.D. Cal. Mar. 13, 2025) (distinguishing regulation at issue in *City of Austin* from state law regulating social media platforms that "single[s] out particular subject matter, specifically, online content that is likely to be accessed by children").

It is challenging to reconcile *City of Austin* with *Reed*. Indeed, Justice Thomas, who wrote *Reed*, dissented in *City of Austin*, saying the majority's attempt to distinguish Austin's sign code from the one in *Reed* was unworkable. *Id.* at 91, 142 S.Ct. 1464. (Thomas, J., dissenting). In Justice Thomas's view, if the message matters at all when applying a regulation, the law is content based. *Id.* at 92, 142 S.Ct. 1464.

****19** The Act here certainly requires consideration of the content on an operator's platform to determine if it "targets children" or is "reasonably anticipated to be accessed by children." The Act's eleven-factor list attempts to make clear that content is the essential consideration with respect to whether an operator is covered.[8] ***953** Ohio Rev. Code § 1349.09(C)(1)-(11).[9] But Justice Thomas's more rigid approach only garnered three votes in *City of Austin*. The majority's opinion instead requires this Court to inquire whether the Act "single[s] out any topic or subject matter for differential treatment." *City of Austin*, 596 U.S. at 71, 142 S.Ct. 1464. The "targets children" or "reasonably anticipated to be accessed by children" language tailors the Act's applicability to only the platforms that have a chance of attracting the children the Act seeks to protect. Sites that are not reasonably likely to be accessed by children need not conform with the Act's dictates.

[42] In any event, as this Court has concluded, the coverage provision's distinction on the basis of [websites'] functionalities"—i.e., their means of disseminating speech and facilitating users' speech— are "content-based." (PI Order, ECF No. 33 at 21). In particular, the Act regulates websites that allow users to: (a) interact socially with other users; (b) construct a public or semipublic profile; (c) populate a list of other users with whom an individual "shares or has the ability to share a social connection"; (d) create or post visible content "including on message boards, chat

rooms, video channels, direct or private messages or chats, and a landing page or main feed that presents the user with content generated by other users." Ohio Rev. Code § 1349.09(A)(1). Similarly, the Act excludes websites that have any number of other "predominant or exclusive function[s]." *Id.* § 1349.09(N)(1).

As this Court has concluded, covered websites' choices about whether and how to disseminate user-generated expression "convey a message about the type of community the platform seeks to foster." (PI Order, ECF No. 33 at 21). In other words, the Act's references to "function" are a proxy for "differential treatment" of specific types of speech. *See City of Austin*, 596 U.S. at 71–74, 142 S.Ct. 1464. Among the messages the Act regulates are the ideas that: (1) user-generated content is not less valuable than speech authored by the websites themselves; and (2) social interactions and connections (as compared to other types of interactions, such as business interactions) have unique value for online communities. Thus, the "features that the Act singles out are inextricable from the content produced by those features." (PI Order, ECF No. 33 at 21). And by disseminating speech these ways (and according to their own editorial policies), many covered websites "engage[ ] in compiling and curating others' speech into an expressive product of [their] own." *Moody*, 603 U.S. at 709–10, 144 S.Ct. 2383; *see also id.* at 729–30, 144 S.Ct. 2383 ("A private party's collection of third-party content into a single speech product (the operators' 'repertoire' of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.").

****20** ***954** The exceptions to the Act for product review websites and "widely recognized" media outlets are also content based. Specifically, the Act excludes websites where "interaction between users is limited to": (1) "[c]omments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events"; and (2) "[r]eviewing products offered for sale by electronic commerce or commenting on reviews posted by other users." Ohio Rev. Code § 1349.09(O)(1)-(2). Both of these exclusions are "based on" the "content" of the "websites": "report[ing] news and current events" and "reviewing" certain "products." *Id.* Presumably, the public nature of comments—as opposed to private chats—reduces the predation risk to minors that Defendant argues covered operators pose. Even assuming, however, that requiring parental approval before a minor can engage in private user interaction is one of the Act's goals—and a constitutionally sound one—the exceptions as written still distinguish between the subset of websites without private chat features based on their content. For example, a product review website is excepted, but a book or film review website is presumably not. The State is therefore favoring engagement with certain topics, to the exclusion of others. That is plainly a content-based exception deserving of strict scrutiny. (PI Order, ECF No. 33 at 22); *see Planet Aid v. City of St. Johns*, 782 F.3d 318, 327 (6th Cir. 2015) ("[W]hen a regulation 'regulates speech on the basis of its subject matter,' it is not content-neutral." (citation omitted)).

[43] The State nonetheless argues that the Act is aimed at the "unique risks" that covered operators' platforms pose to minors "based on shared features and functions unrelated to speech." (ECF No. 48 at 3). But "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165, 135 S.Ct. 2218.

c. The Act Violates Ohioan Minors' Rights

[44] **[45]** NetChoice also argues that the Act merits strict scrutiny because it infringes on minors' rights both to access and to produce First Amendment protected speech. Generally, First Amendment protections "are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 511–14, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Brown*, 564 U.S. at 794, 131 S.Ct. 2729. For that reason, "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik,* 422 U.S. at 212–213, 95 S.Ct. 2268 (citation omitted). While the State "possesses legitimate power to protect children from harm," that "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794, 131 S.Ct. 2729 (citations omitted). Indeed, governments lack "the power to prevent children from hearing or saying anything *without their parents' prior consent.*" *Id.* at 795 n.3, 131 S.Ct. 2729. "No doubt" Defendant "would concede this point if the question were whether to forbid children to read without the presence of an adult the *Odyssey* ...; or *The Divine Comedy* ...; or *War and Peace.*" *Am. Amusement Mach. Ass'n*, 244 F.3d at 577.

Particularly relevant here is the Supreme Court's analysis in *Brown*, which invalidated a California regulation prohibiting the sale of violent video games to minors. 564 U.S. 786, 131 S.Ct. 2729. The ***955** Act *sub judice* mirrors the requirements considered in *Brown*. And like content-based regulations, laws that require parental consent for children to access constitutionally protected, non-obscene content are subject to strict scrutiny.

d. The Act fails Strict Scrutiny

[46] **[47]** Having concluded that the Act is a content-based regulation, this Court considers whether the Act fails strict scrutiny. Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). It requires the government to show that the law "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. In other words, to survive strict scrutiny, the State must "specifically identify an actual problem in need of solving" and show that "the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799, 131 S.Ct. 2729.

Attorney General Yost toggles between several different interests in his motion and opposition to NetChoice's motion. Defendant argues both that it seeks to regulate the ability of operators to contract with minors, not to limit minors' access to expressive content, but in the same breath asserts that the State's compelling interest is in protecting minors from harms associated with covered operators' platforms, including mental health issues, data privacy issues, and sexual predation. (ECF No. 42 at 35–37). Defendant also argues that the State has a compelling interest in protecting and advancing parents' ability to make decisions about their children's care and upbringing. (*Id.* at 36). This Court will address each of these purported interests in turn.

****21** **[48]** With respect to minors' ability to contract with operators, Defendant cites the risk to minors of "involuntary releases of personally identifiable and other personal information and data." (ECF No. 42 at 16–17). Attorney General Yost also points out that courts have enforced these extensive "click-wrap" terms against minors. (*Id.*) As this Court previously held, however, the Act is not narrowly tailored to protect minors against oppressive contracts. The Act regulates access to and dissemination of speech when it could instead seek to regulate the —arguably unconscionable—terms of service that these platforms require. The Act is also underinclusive with respect to this interest. For example, as NetChoice explains, a child can still agree to a contract with the *New York Times* without their parent's consent, but not with Facebook.

[49] Next, Defendant argues that scientific research supports the notion that engagement with operators' platforms can have damaging mental health effects, and subject minors to sexual predation. (ECF No. 42 at 35–36). The research reports submitted by the State outline the potential risk of harm to children and teens from both: (1) exposure to harmful content; and (2) excessive use perpetuated by the features discussed above like "infinite scrolling." (*Id.* at 29–31). To satisfy its burden, the State must come forward with "a compelling basis for believing" that these harms are "actually caused by" the socially interactive nature of these websites, "and not pretexts for regulation on grounds not authorized by the First Amendment." *Am. Amusement Mach. Ass'n*, 244 F.3d at 576. The record Defendant has assembled here, however, is much like the deficient record in *Brown*, where "nearly all of the research" showing any harmful effects "is based on correlation, not evidence of causation." 564 U.S. at 800, 131 S.Ct. 2729 (cleaned up; citation omitted). [10] The record also does not show that ***956** the full range of "thousands" of websites covered by the Act *cause* harms to minors sufficient to suppress those minors' access to protected speech.

But even if protecting children against these harms is a compelling interest, which it very well may be, *see Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (explaining that "there is a compelling interest in protecting the physical and psychological well-being of minors"), the Act is not narrowly tailored to those ends. As this Court previously concluded, "[f]oreclosing minors under sixteen from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, is a breathtakingly blunt instrument for reducing social media's harm to children." (PI Order, ECF No. 33 at 25). The State's approach is an untargeted one, as parents must only give one-time approval for the creation of an account, and parents and platforms are otherwise not required to protect against any of the specific dangers that social media might pose. As the Supreme Court observed in *Brown*, legislation preventing minors from buying violent video games was "seriously underinclusive" because the "Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent ... says it's OK.... That is not

how one addresses a serious social problem." 564 U.S. at 802, 131 S.Ct. 2729.

22 **[50] Finally, with respect to the rights of parents, Attorney General Yost fails to distinguish the State's purported interest from an analogous—and rejected—state interest in *Brown*. When the State of California tried a similar argument, that the legislation prohibiting minors from purchasing violent video games was "justified in aid of parental authority," the Supreme Court noted that it doubted "punishing third parties for conveying protected speech to children *just in case* their parents disapprove of that speech is a proper governmental means of aiding parental authority." *Brown*, 564 U.S. at 802, 131 S.Ct. 2729. More conclusively, however, the Court detailed a series of preexisting protections to help parents—just as there are here—such that "filling the remaining modest gap in concerned parents' control can hardly be a compelling state interest." *Id.* at 803, 131 S.Ct. 2729. And the legislation was also overinclusive, in that it enforced a governmental speech restriction, subject to parental veto, as opposed to protecting only the interests of genuinely concerned parents. *Id.* at 804, 131 S.Ct. 2729. That is, some parents simply may not care. *Id.* The same is true here.

Indeed, Defendant concedes that "parents have certain parental-control options for overseeing how their minor children ***957** use the internet," but contends that "these options are simply not preventative enough and ignore the reality of the pervasiveness ... of technology." (ECF No. 42 at 39). The fact that parents may be unaware of these tools, however, is not a proper justification. *See Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) ("It is cardinal with us that the custody, case, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (quoting *Prince*, 321 U.S. at 166, 64 S.Ct. 438)). As another district court observed, "parents control whether their minor children have access to Internet-connected devices in the first place, and Defendant[ ] ha[s] not shown minors are so capable of evading parental controls that they are an insufficient alternative to the State infringing on protected speech." *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1127 (D. Utah 2024) (cleaned up).

This Court, although sympathetic to what the Ohio legislature sought to do, finds that the evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech. In other words, the Act is either underinclusive or overinclusive, or both, for all the purported government interests at stake. Ohio's response to a societal worry that children might be harmed if they are allowed to access adult-only sections cannot be to ban children from the library altogether absent a permission slip. As Justice Holmes put it, the Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75–76, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). This is not to suggest that the State is wholly without power to enact legislation that seeks to minimize social media harms. Protecting children's well-being is a laudable, perhaps even achievable, goal. But Ohio's imperative is to achieve this goal through legislation that is constitutional.

2. Due Process: Void for Vagueness

[51] **[52]** Laws run afoul of the Due Process Clause of the Fourteenth Amendment if they fail to "give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). In addition to affording regulated parties notice, precision is also essential to ensure that laws cannot be enforced in an arbitrary or discriminatory way. *Id.* The need for clarity is particularly acute when laws restrict speech. *See id.* Having concluded above that the Act does in fact regulate speech, this Court rejects Attorney General Yost's invitation to apply a relaxed vagueness standard.

[53] NetChoice identifies several aspects of the Act that this Court finds troublingly vague. Specifically, the Act purports to apply to operators that "target[ ] children" or are "reasonably anticipated to be accessed by children." Ohio Rev. Code § 1349.09(B). On its face, this expansive language would leave many operators unsure as to whether it applies to their website. The legislature's apparent attempt at clarity is also unilluminating. The Act provides an eleven-factor list that the Attorney General or a court may use to determine if a website is indeed covered, which includes malleable and broad-ranging considerations like "[d]esign elements" and "[l]anguage." Ohio Rev. Code § 1349.09(C). All the listed considerations are undefined.

**23 The Act also contains an eyebrow-raising exception for "established" and "widely recognized" media outlets whose "primary purpose" is to "report news and current events," the speaker and content-based flavor of which are discussed further below. Ohio Rev. Code § 1349.09(O)(2).

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But the Act also provides no guardrails or signposts for determining which media outlets ***958** are "established" and "widely recognized." Such capacious and subjective language practically invites arbitrary application of the law.

Attorney General Yost does not focus his argument on these examples, but instead highlights aspects of the Act that are more precisely defined. For example, he points to the Act's "carve-outs," (ECF No. 42 at 44), and a few of the eleven factors that are less vague: "[e]mpirical evidence regarding audience composition" and "[p]resence of child celebrities or celebrities who appeals to children." (*Id.* at 46 (quoting § 1349.09(C))). Defendant Yost also points to the Children Online Privacy Protection Act of 1998 ("COPPA"), a federal regulation that uses some of the same factors to explain which websites or online services are "directed to children," and therefore, covered by COPPA. (*Id.* at 46–47). But he points to no case where a court has concluded that COPPA's language is not vague, nor can this Court find one.

These more specific factors and the existence of the COPPA scheme do not cure vagueness in the eleven-factor list. But even if they did, they do not address the broad-ranging language in the exceptions. None of these phrases or the definitions in COPPA rehabilitates, for example, amorphous descriptors like "established" or "widely recognized."

C. Permanent Injunction

[54] In determining whether to enter a permanent injunction, this Court considers a modified iteration of the factors it utilizes in assessing preliminary injunctions: (1) success on the merits; (2) whether the plaintiff will suffer irreparable injury absent an injunction; (3) whether, balancing the hardships, there is harm to the defendant; and (4) whether the public interest favors granting the injunction. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."); *Am. C.L. Union of Kentucky*, 607 F.3d at 445.

[55] **[56]** As discussed above, NetChoice prevails on the merits. And this Court has already determined that NetChoice satisfies the remaining factors for injunctive relief. (PI Order, ECF No. 33 at 27–28). Specifically, NetChoice members and their users will suffer multiple forms of irreparable harm. As a matter of law, "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (cleaned up). Most pertinent here, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (internal quotation marks and citation omitted). The Act violates covered members' and their users' First Amendment rights for all the reasons discussed above. Covered members' unrecoverable compliance costs also constitute sufficient irreparable injury. *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 765, 141 S.Ct. 2485, 210 L.Ed.2d 856 (2021) (citing compliance costs "with no guarantee of eventual recovery"). This Court previously observed that the "engineering and compliance procedures" for some covered members are "extremely burdensome," and "there is no cause of action through which [NetChoice members] could seek to recover those compliance costs." (PI Order, ECF No. 33 at 28).

****24** **[57]** **[58]** **[59]** The last two factors in the balancing test merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). It ***959** "is always in the public interest to prevent the violation of a party's constitutional rights." *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (internal quotation marks and citation omitted). Here, a permanent injunction would ensure that minors could continue to access and engage in protected speech on the vast array of websites regulated by the Act. And those websites would be able to continue disseminating speech to the public without the Act's burdens. On the other side of the ledger, "the State has no interest in enforcing laws that are unconstitutional." (PI Order, ECF No. 33 at 29) (quoting *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 591 F. Supp. 3d 205, 215 (W.D. Ky. 2022)); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (similar).

[60] In short, where a First Amendment injury is both "threatened" and "occurring" and a plaintiff has prevailed on the merits, permanent injunctive relief is the appropriate remedy. *See Elrod v. Burns*, 427 U.S. 347, 373–74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accordingly, this Court grants Plaintiff's motion for a permanent injunction.

IV. CONCLUSION

Having considered the parties' cross-motions for summary judgment, the declarations and exhibits in the record, and the arguments of counsel, and for the reasons set forth above, it is hereby **ORDERED** that Defendant's motion for summary judgment (ECF No. 42) is **DENIED**; and Plaintiff's motion for summary judgment and permanent injunction (ECF No. 43) is **GRANTED**. It is **FURTHER ORDERED** that Defendant David Yost, in his official capacity as Attorney General for the State of Ohio, and his respective officers, employees, representatives, and agents are **ENJOINED** from enforcing the Parental Notification by Social Media Operators Act, Ohio Rev. Code § 1349.09, Am. Sub. H.B. No. 33 §§ 803.380, 1349.09, 135th Gen. Assemb., Reg. Sess. (Ohio 2023). It is **FURTHER ORDERED** that this Opinion and Order shall constitute a final judgment in this case, and the Clerk of Court is **DIRECTED** to close the case administratively.

IT IS SO ORDERED.

All Citations

778 F.Supp.3d 923, 2025 WL 1137485

Footnotes

1 Indeed, other courts have enjoined state statutes similar to the one at issue here. *See e.g.*, *NetChoice, LLC v. Griffin*, No. 5:23-CV-5105, 2025 WL 978607 (W.D. Ark. Mar. 31, 2025) (permanently enjoining age-verification and parental-consent law); *NetChoice, LLC v. Bonta*, —— F.Supp.3d ——, 2025 WL 807961 (N.D. Cal. Mar. 13, 2025) (preliminarily enjoining regulation with age-estimation requirements); *Comput. & Commc'n Indus. Ass'n v. Paxton*, 747 F. Supp. 3d 1011 (W.D. Tex. 2024) (preliminarily enjoining law requiring platforms to identify minors and monitor and filter out certain content from minor users' accounts); *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105 (D. Utah 2024) (preliminarily enjoining age-assurance and parental-consent law); *NetChoice, LLC v. Fitch*, 738 F. Supp. 3d 753 (S.D. Miss. 2024) (preliminarily enjoining age-verification and parental-consent law).

2 There are a "host of good reasons" for the Court's judicial skepticism. *Id.* For example, facial challenges "rest on speculation," *id.* (quotation omitted), "short circuit the democratic process," *id.* (quotation omitted), and is "at odds with Article III," *see id.* at 752, 144 S.Ct. 2383 (Thomas, J., concurring). Because of the significant risks associated with facial challenges, the Supreme Court reiterated that challengers bear a heavy burden. *See id.* at 723, 144 S.Ct. 2383 (majority opinion); *id.* at 745, 144 S.Ct. 2383 (Barrett, J., concurring) ("[T]hese cases illustrate the dangers of bringing a facial challenge .... In fact, dealing with a broad swath of varied platforms and functions in a facial challenge strikes me as a daunting, if not impossible, task."); *id.* at 748, 144 S.Ct. 2383 (Jackson, J., concurring in part and concurring in the judgment) ("[A]s all Members of the Court acknowledge, plaintiffs bringing a facial challenge must clear a high bar."); *id.* at 750, 144 S.Ct. 2383 (Alito, J., concurring in the judgment) ("Facial challenges also strain the limits of the federal courts' constitutional authority to decide only actual 'Cases' and 'Controversies,' " so "parties mounting facial attacks [must] satisfy demanding requirements.").

3 *See also id.* at 747, 144 S.Ct. 2383 (Barrett, J., concurring) (noting the record failed to "thoroughly expose[ ] the relevant facts about particular social-media platforms and functions"); *id.* at 749, 144 S.Ct. 2383 (Jackson, J., concurring in part and concurring in the judgment) (noting plaintiffs failed to show "how the regulated activities actually function"); *id.* at 750, 144 S.Ct. 2383 (Thomas, J., concurring in the judgment) (noting plaintiffs "failed to provide many of the basic facts necessary to evaluate their challenges to H.B. 20"); *id.* at 766, 144 S.Ct. 2383 (Alito, J., concurring in the judgment) (noting the "incompleteness of this record").

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4 The Supreme Court also noted that its *Baird* ruling was consistent with its earlier ruling in *Barrows*—the case that held that "a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the covenant violated the equal protection rights of prospective non-Caucasian purchasers"—noting that the relationship there "between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself." *Baird*, 405 U.S. at 445, 92 S.Ct. 1029.

5 "Strict scrutiny" requires the government to show that the law at issue is "narrowly tailored to serve compelling state interests." *KenAmerican Res., Inc. v. United States Sec'y of Lab.*, 33 F.4th 884, 893 (6th Cir. 2022) (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218). On the other hand, "intermediate scrutiny" validates a law "under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Id.* (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–27, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010)).

6 "(B) The operator of an online web site, service, or product that targets children, or is reasonably anticipated to be accessed by children, shall do all of the following:

(1) Obtain verifiable consent for any contract with a child, including terms of service, to register, sign up, or otherwise create a unique username to access or utilize the online web site, service, or product, from the child's parent or legal guardian using any of the following methods:

(a) Requiring a parent or legal guardian to sign and return to the operator a form consenting to the contract by postal mail, facsimile, or electronic mail;

(b) Requiring a parent or legal guardian, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;

(c) Requiring a parent or legal guardian to call a toll-free telephone number implemented by the operator and staffed by trained personnel;

(d) Requiring a parent or legal guardian to connect to trained personnel by videoconference;

(e) Verifying a parent's or legal guardian's identity by checking a form of government-issued identification against databases of such information, and promptly deleting the parent's or legal guardian's identification from the operator's records after such verification is complete.

(2) Present to the child's parent or legal guardian a list of the features offered by an operator's online web site, service, or product related to censoring or moderating content, including any features that can be disabled for a particular profile.

(3) Provide to the child's parent or guardian a web site link at which the parent or legal guardian may access and review the list of features described in division (B)(2) of this section at another time."

7 "(O) This section does not apply to an online web site, service, or product respecting which interaction between users is limited to the following:

(1) Reviewing products offered for sale by electronic commerce or commenting on reviews posted by other users;

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(2) Comments incidental to content posted by an established and widely recognized media outlet, the primary purpose of which is to report news and current events."

8 "Attempts to" because the Act remains vague with respect to which operators it regulates, as discussed further below.

9 "In determining whether an operator's online web site, service, or product targets children, or is reasonably anticipated to be accessed by children, the attorney general or a court may consider the following factors:

(1) Subject matter;

(2) Language;

(3) Design elements;

(4) Visual content;

(5) Use of animated characters or child-oriented activities and incentives;

(6) Music or other audio content;

(7) Age of models;

(8) Presence of child celebrities or celebrities who appeal to children;

(9) Advertisements;

(10) Empirical evidence regarding audience composition; and

(11) Evidence regarding the intended audience."

10 *See e.g.,* ECF No. 42-2 at 5 ("More research is needed to fully understand the impact of social media[.]"), *id.* at 11 ("more research is necessary to understand whether one causes the other"), *id.* at 12 ("Most prior research to date *has been correlational*, focused on young adults or adults, and generated a range of results." (emphasis added)); *id.* (identifying "Known Evidence Gaps"); ECF No. 42-3 at 3 ("Meta-analyses have identified small or negligible negative links between social media use and well-being, while experimental evidence is mixed. Longitudinal observational studies that have investigated the predictive relationships between social media use and well-being have found that they are either reciprocal, only present in a certain direction or sex or not present at all."), *id.* at 6 ("The study has multiple limitations that need to be considered. First, to interpret the parameters from our analyses as estimates of causal effects one would need to adopt [five] assumptions[.] ... Only if these assumptions are met can this observational study be said to capture the causal effects between social media and life satisfaction. Second, the data are self-report and therefore only allow inferences about the impact of self-estimated time on social media, rather than objectively measured social media use.").

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
JUDICIAL DISTRICT OF WATERBURY.
COMPLEX LITIGATION DOCKET.

V.V., et al.
v.
META PLATFORMS, INC., et al.

DOC. NO.: X06-UWY-CV-23-5032685-S
|
FEBRUARY 16, 2024

MEMORANDUM OF DECISION RE MOTION TO STRIKE #143

Bellis, J.

***1** In this matter, the plaintiffs, V.V. and E.Q., individually and as next friends to the minor C.O., have brought suit against Snap, Inc., Snapchat, LLC (collectively, the defendants),[1] Reginald Sharp, and Eddie Rodriguez.[2] As alleged in the plaintiffs' complaint, the plaintiffs V.V. and E.Q. are the parents and guardians of C.O. At the time of the commencement of this lawsuit, C.O. was a fifteen-year-old girl. The defendants own and operate the Snapchat social media platform, which is distributed and widely available to users in the state of Connecticut. Originally developed in 2011, Snapchat allows individuals to form groups and share posts known as "Snaps" that disappear after being viewed by the recipients. This feature was developed, in part, to make users feel more comfortable sharing nude photographs. The application also allows for text and video chat conversations. By 2015, Snapchat had over 75 million monthly active users and was the most popular social media application with American teenagers. Indeed, since its creation, Snapchat's leadership team has specifically designed new product features to increase its popularity among the teenage demographic. In particular, the self-destructing content portion of Snapchat is popular with teenagers because it makes it more difficult for parents to monitor their social media activity. At the same time, however, this attribute of the Snapchat application makes it easier for sexual predators to communicate with minors. Over the years, the defendants have received multiple reports of child abuse and bullying occurring through the Snapchat application, but the defendants have not altered their extremely lucrative business model. By 2021, Snapchat had collected $4.12 billion in revenue and had 347 million daily active users worldwide.

Specifically, the plaintiffs allege that Snapchat utilizes a user recommendation technology called Quick Add that selects and sends recommendations to the user regarding people with whom they should connect. These algorithms function by taking user data such as age, gender, on and off-platform activities, usage history, habits, and interactions to formulate these recommendations. According to the plaintiffs, these technologies function in a manner that "reward" users who have historically targeted young women by increasing the number of suggested connections from the same age and gender demographic. Snapchat further has implemented product designs that allow a user's followers to enable the sharing of their location and identify friends of friends who are physically near them. Moreover, Snapchat utilizes technologies such as push notifications, Snap Streak, and photo decoration functions in order to facilitate young people to become addicted to the application and maximize the number of viewing sessions. Despite knowing that Snapchat is addictive, especially with respect to developing adolescent brains, the defendants have actively concealed this fact from governments around the world. Additionally, although the Snapchat application is free to use, the defendants, unbeknownst to the users, are still making money through advertisers that are targeted to specific demographics.

***2** When she was twelve years old, C.O. opened her first Snapchat account without her parents' knowledge or consent. Even though Snapchat's terms of service purport to prohibit an individual from having multiple personal accounts, the defendants have chosen not to use available technologies to enforce these terms. C.O. eventually opened multiple Snapchat accounts, so that when her parents eventually realized she was using these products, she was able to hide her continued usage. The defendants assist minors and other predatory users in creating multiple accounts because they do not verify the individuals' phone numbers, e-mail addresses, or inconsistent birthdates. Shortly after opening her Snapchat accounts, C.O. began having trouble sleeping, and eventually experienced anxiety, depression, and moodiness. Snapchat further inundated C.O. with harmful social media content that encouraged disordered eating and self-harm. C.O. was also subjected to highly sexualized content. Furthermore,

other children began to bully C.O. through Snapchat's direct messaging feature. Thereafter, C.O. began to experience personality changes and her grades at school began slipping. Despite all of these negative consequences from using Snapchat, C.O. could not stop utilizing the application because she was addicted to it. After she opened her own account, C.O. began receiving unsolicited pictures of male genitalia. C.O. reported these incidents to Snapchat and stated that she did not want these strangers to harass her further. Despite these complaints, the defendants did nothing to block these individuals from sending her inappropriate photographs.

On July 15, 2019, when C.O. was only twelve[3] years old, Snapchat directed her to the defendant Sharp. This individual was a registered sex offender using the profile name JASONMORGAN5660. Sharp quickly began messaging C.O. sexually inappropriate comments and he offered her money in exchange for C.O. sending him sexually explicit photographs. After C.O. acquiesced to Sharp's requests, he threatened to post the photographs to Snapchat unless she had sex with him. On July 23, 2019, Sharp coerced C.O. into sneaking out of her home in the middle of the night in order to meet him. At that time, Sharp raped C.O. The following day, C.O.'s mother immediately knew something was wrong, and the incident was reported to the police, who were quickly able to discover Sharp was the individual behind the fake profile. Despite Sharp's subsequent arrest and incarceration, and Snapchat's knowledge of same, Sharp's Snapchat account was still active as of December 10, 2022.

Subsequently, in October, 2021, C.O. connected her with the defendant Rodriguez, a former police officer and sex offender. Rodriguez used Snapchat to obtain C.O.'s phone number and address, and he began sending her sexually explicit messages and photographs. One morning in October, 2021, Rodriguez convinced C.O. to meet him in-person, and Rodriguez offered to give C.O. a ride to school. When C.O. entered Rodriguez's car, he sexually assaulted her. Like Sharp, Rodriguez is also currently incarcerated. Following these incidents, C.O. has been hospitalized and in counseling. She suffers from anxiety and depression and has had thoughts of self-harm and suicide.

In their complaint, the plaintiffs allege the following causes of action against the defendants: (1) count one—strict product liability (design defect); (2) count two—strict product liability (failure to warn); (3) count three—negligence; (4) count four—violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110g et seq.; (5) count five—unjust enrichment; (6) count six—invasion of privacy; (7) count seven—negligence (arising out of the Quick Add feature); (8) count eight—assault and battery (as to Sharp) and (9) count nine—assault and battery (as to Rodriguez).[4]

On September 14, 2023, the defendants filed a motion to strike all counts of the plaintiffs' complaint on a plethora of different grounds along with a memorandum of law in support of their motion. The plaintiffs filed a memorandum of law in opposition to the motion to strike on October 26, 2023. On November 16, 2023, the plaintiffs filed their reply memorandum.[5] The court heard oral argument on the motion to strike and the opposition thereto on January 8, 2024.

***3** "The purpose of a motion to strike is to contest ... the legal sufficiency of the allegations of any complaint ... to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "The role of the trial court in ruling on a motion to strike is to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Coe* v. *Board of Education*, 301 Conn. 112, 117, 19 A.3d 640(2011). "If any facts provable under the express and implied allegations in the plaintiff's complaint support a cause of action ... the complaint is not vulnerable to a motion to strike." *Bouchard* v. *People's Bank*, 219 Conn. 465, 471, 594 A.2d 1 (1991). Nevertheless, "[a] motion to strike admits all *facts* well pleaded; it does not admit *legal conclusions or the truth or accuracy of opinions* stated in the pleadings." (Emphasis in original; internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital,* 308 Conn. 338, 349, 63 A.3d 940 (2013).

First, the defendants move to strike all of the counts asserted against them on the ground of improper joinder. According to the defendants, the plaintiffs' complaint impermissibly combines the assault and battery causes of action brought as to Sharp and Rodriguez with claims against them that are different and factually distinct. Specifically, the defendants contend that: (1) the plaintiffs' claims do not affect all of the parties to this action; (2) the causes of action alleged against them and Sharp/Rodriguez do not arise out of the

same transaction or occurrence; and (3) the claims against the two groups cannot be conveniently heard together. In response, the plaintiffs argue that each of the defendants are properly joined. The plaintiffs contend that the present action falls squarely within the statutory requirements for joinder. Furthermore, the plaintiffs assert that this case involves identical claims of injury and damage as between all the defendants. Therefore, the plaintiffs believe that each of the parties are affected because they will inevitably blame each other for C.O.'s injuries at trial. Finally, the plaintiffs contend that equitable considerations favor trying this matter in one case because there will be substantial overlap in the evidence that will be presented against the various defendants.

Our Supreme Court has determined that "in this state ... joinder of claims and of remedies is permissive rather than mandatory." (Internal quotation marks omitted.) *Beaudoin* v. *Town Oil Co., Inc.*, 207 Conn. 575, 584, 542 A.2d 1124 (1988). Indeed, the provision of the rules of practice governing joinder "by its terms spells out when certain separate causes of action may be joined in one complaint. It does not purport to mandate when they must be so joined." *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 26, 730 A.2d 1128 (1999). Nevertheless, "[t]he public has an interest in the prevention of unnecessary litigation, both because of the burden it places on the [s]tate and the resulting crowding of the dockets of the courts. This procedure of trying cases together, which has long been the established practice in this state, assists in expediting business without doing anyone an injustice." (Internal quotation marks omitted.) *DiBella* v. *Greenwich*, Superior Court, judicial district of Stamford-Norwalk, Complex Litigation Docket, Docket No. X08-CV-09-5012500-S (May 22, 2012, *Brazzel-Massaro, J.*). Under our rules of practice, "[t]he exclusive remedy for misjoinder of parties is by motion to strike." (Internal quotation marks omitted.) *Costello* v. *Goldstein & Peck, P.C.*, 187 Conn. App. 486, 497, 203 A.3d 611, cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019). See also Practice Book § 11-3. [6] Therefore, a motion to strike is the correct procedure mechanism to determine if defendants are properly joined.

***4** General Statutes § 52-97 provides in relevant part: "In any civil action the plaintiff may include in his complaint both legal and equitable rights and causes of action ... but, if several causes of action are united in the same complaint, they shall all be brought to recover ... (2) for injuries, with or without force, to person and property, or either, including a conversion of property to the defendant's use .... or (7) upon claims, whether in contract or tort or both, arising out of the same transaction or transactions connected with the same subject of action. *The several causes of action so united shall all belong to one of these classes, and*, except in an action for the foreclosure of a mortgage or lien, *shall affect all the parties to the action*, and not require different places of trial, and shall be separately stated; and, *in any case in which several causes of action are joined in the same complaint*, or as matter of counterclaim or set-off in the answer, *if it appears to the court that they cannot all be conveniently heard together, the court may order a separate trial of any such cause of action or may direct that any one or more of them be expunged from the complaint or answer.*" [7] (Emphasis added.) See also Practice Book § 10-21 (setting forth substantially similar language.)

There is a dearth of appellate authority interpreting the scope § 52–97 and its Practice Book equivalent. Nevertheless, according the statutory text, "a plaintiff is permitted to bring several causes of action in a single complaint if: (I) the causes of action belong to one of the classes described in General Statutes § 52–97 and Practice Book § 10–21; (ii) the causes of action affect all the parties to the action; and (iii) if the causes of action are joined, the court deems it convenient to hear the causes of action together." *Ocasio* v. *Buchanan*, Superior Court, judicial district of Hartford, Docket No. CV-15-6059597-S (January 13, 2016, *Dubay, J.*) (61 Conn. L. Rptr. 624, 626).

The plaintiffs rely on §§ 52-97 (2) and (7) in support of their position that the claims against the corporate and individual defendants are properly joined. By its plain language, the plaintiffs appear to satisfy § 52-97 (2) in that they allege injury "to person." See, e.g., *Persaud* v. *Harris*, Superior Court, judicial district of Hartford, Docket No. CV-18-6092289-S (September 6, 2018, *Noble, J.*) (67 Conn. L. Rptr. 31, 32) (stating that "both claims qualify as a cause of action for injury to person thus falling within the ambit of § 52-97 (2) ...."). The court also concludes that the language of § 52-97 (7) is applicable here because the plaintiffs allege causes of action sounding in contract or tort that arise out of the same transaction. For the purposes of the law governing joinder, our courts have determined that "[a] transaction is something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other ...." (Internal quotation marks omitted.) *Collazo* v. *Hamilton Street Enterprises, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-16-6060339-S (December 27, 2016, *Wilson, J.*) (63 Conn. L. Rptr. 613, 614), quoting, *Craft Refrigerating Machine Co.*

v. *Quinnipiac Brewing Co.*, 63 Conn. 551, 560, 29 A. 76 (1893). In the present case, the plaintiffs allege that C.O. was injured when Sharp and Rodriguez contacted her by using the social media application owned and operated by the defendants. Sharp and Rodriguez then subsequently sexually assaulted C.O. If construed in a manner most favorable to the pleader, the court determines that all these alleged acts occurred as part of the same transaction.

***5** With respect to the second prong of the joinder test, "[t]here is a split of opinion among judges of the [S]uperior [C]ourt regarding the interpretation of the phrase 'shall affect all the parties to the action,' employed in both § 52-97 and Practice Book § 10-21. Some courts adopt a strict interpretation of the phrase, holding that there must be a 'commonality' between all parties such that the existence of different defendants, as is the case here, defeats joinder. Other courts construe the phrase more liberally and only require joined parties to have an interest in the outcome of each claim." (Internal quotation marks omitted.) *Gabel* v. *Guay*, Superior Court, judicial district of New Haven, Docket No. CV-21-6111322-S (January 14, 2022, *Abrams, J.*). One group of cases, relying primarily on a quote from 1 Stephenson's Connecticut Civil Procedure (3rd Ed., 1997) § 47 (c), has determined that "[i]n addition to the requirement that all claims must fall within a single one of the categories listed, the rule of joinder of actions requires that all plaintiffs and all defendants must be common to all the claims and that all counts be triable at the same place under the rules as to venue." (Internal quotation marks omitted.) *Ciamciolo* v. *Musumano*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5008286-S (August 12, 2008, *Alvord, J.*). Nevertheless, "[o]ther courts have concluded that 'shall affect all the parties' does not require that all parties must be common to all the causes of action, but rather that 'affect' only requires joined parties to have an interest in the outcome of each claim.... This is because each party to [the] action is affected by each claim in the fundamental sense that, there being injuries of the same nature (with other injuries) to both plaintiffs ... the extent of negligence of each party claimed to have contributed to the plaintiff's injuries is determined by the trier of fact." (Citations omitted; internal quotation marks omitted.) *Rivera* v. *Schwager*, Superior Court, judicial district of New Britain, Docket No. CV-166033541-S (February 6, 2017, *Wiese, J.*) (63 Conn. L. Rptr. 395, 397).

When determining which side of this split of authority the court agrees with, the court is guided by the persuasive historical analysis found in *Vrenezi* v. *Louzada*, Superior Court, judicial district of Danbury, Docket No. CV-20-6036141-S (December 9, 2020, *Kowalski, J.*). In *Vrenezi*, the court stated that "the broad interpretation of the statute is consistent with the maxim that statutes that abrogate the common law must be constructed strictly and not enlarged beyond the scope of the text.... At common law, 101 causes of action properly pleadable under the same writ could be joined as separate counts in one action, whether or not they had any other relationship or similarity.... The common law tradition of little restriction on joinder was replaced by the Practice Act of 1879, which today is codified in General Statutes § 52-97 and Practice Book § 10-21.... The statute limited the use of joinder to instances when the specific requirements of the statute are met. So when interpreting the statute, it must be interpreted it in a way that does not further enlarge the abrogation of common law joinder. If the phrase 'shall affect all parties' is construed narrowly with the requirement that the parties be common to all claims, it would enlarge the statute's encroachment against the common law rule because it would further limit the use of joinder. Contrastingly, a broad interpretation that requires only that the parties have an interest in the outcome of the claims would not enlarge the statute's encroachment against the common law because this interpretation is more favorable to allowing joinder." (Citations omitted; internal quotation marks omitted.) Id., quoting 1 E. Stephenson, Connecticut Civil Procedure (3d Ed. 1997), § 47 (a), p. 145 and § 47 (b), p. 146. This interpretation also more closely tracks the plain meaning of the applicable statutory and Practice Book provisions. "The use of 'shall affect' rather than a more specific phrase, such as 'shall include' or 'shall be parties to' suggests such a broader meaning. Therefore, the better view is that 'affect' merely requires joined parties to have an interest in the outcome of each claim." (Internal quotation marks omitted.) *Tigre* v. *Espinal-Baez*, Superior Court, judicial district of Waterbury, Docket No. CV-22-6065344-S (October 14, 2022, *D'Andrea, J.*).

The court's decision in *Mills* v. *Rita H. Carver Revocable Trust*, Superior Court, judicial district of New London, Docket No. CV-12-6015038-S (February 19, 2013, *Devine, J.*) (55 Conn. L. Rptr. 605) is illustrative of the broad interpretation of the "shall affect all the parties to the action" language. *Mills* involved a plaintiff who brought suit against one group of defendants for a slip and fall and another group of defendants for a car accident that occurred on different dates. The various defendants filed motions to strike claiming improper joinder. When concluding that the plaintiff's action satisfied the "shall affect all the parties to the

action" requirement, the *Mills* court stated that "the plaintiff alleges that the collision exacerbated injuries to the cervical and lumbar areas of her spine, which were originally caused by the slip and fall, and further that both incidents resulted in head, neck, back, and lower extremity injuries and shock to her nervous system. This is the type of case where medical testimony will be necessary to determine which injuries were caused by which incidents. In addition, each defendant will try to claim that the other incident was the primary cause of the worst injuries." Id., 607.

***6** The *Mills* court relied, in part, on *Card* v. *State*, 57 Conn. App. 134, 747 A.2d 32 (2000) to support its interpretation of General Statutes § 52-97 and Practice Book § 10-21. In *Card*, the Appellate Court implicitly approved the consolidation of multiple cases for the purpose of trial because "[t]he trier of fact's responsibility in cases involving injuries sustained in successive accidents is to apportion the damages among the parties whose negligence caused the plaintiff's injuries." Id., 145. "Although joinder was not the issue on appeal, *Card* is helpful [in considering a motion to strike for misjoinder] in that it resulted in approval of a single [jury] hearing the claims against multiple defendants notwithstanding the unique circumstances creating liability on each of their parts." (Internal quotation marks omitted.) *Swaney* v. *Estrella*, Superior Court, judicial district of New London, Docket No. CV-15-6023670-S (October 27, 2015, *Cole-Chu, J.*) (61 Conn. L. Rptr. 175, 176). *Card*, therefore, provides further support for the conclusion that the more lenient interpretation of the second joinder element is the correct one.

When applying this standard to the present case, it becomes apparent that both sets of defendants will have an interest in the outcome of each claim. In this matter, the plaintiffs allege that C.O. suffered injuries arising out of the individual defendants' alleged misuse of the Snapchat social media platform. At trial, there will no doubt be testimony from medical experts regarding C.O.'s injures, and the fact finder will have to determine which damages are properly attributable to which set of defendants. Moreover, as correctly noted by the plaintiffs in their memorandum of law in opposition, "[w]hile apportionment of liability under [General Statutes §] 52-102b may not strictly apply, there is little doubt that as a practical matter of trial tactics, defendants will seek to foist ultimate blame for C.O.'s injuries on each other."[8] Accordingly, the court determines that this matter satisfies the second prong of the requirements for joinder.

The court will now turn to the third element of the legal test for joinder, i.e., whether it would be convenient to hear the various legal claims together. "In line with this provision, courts often determine whether to allow joinder based on a variety of equitable considerations, such as whether judicial economy would be served by joining or consolidating the causes of action." (Internal quotation marks omitted.) *Moulter* v. *Pina*, Superior Court, judicial district of New Haven, Docket No. CV-19-6094952-S (December 13, 2019, *Wilson, J.*). "Other courts have referenced the general policy in favor of joinder stated by the Supreme Court in the early case of *Evergreen Cemetery* [*Assn.*] v. *Beecher*, 53 Conn. 551, 552, 5 A. 353 (1886), wherein the Supreme Court stated that allowing joinder is 'in harmony with our practice in analogous proceedings ... [if] it promotes speedy, complete, and inexpensive justice, without placing any obstruction in the way of any defendant in protecting his rights.' " (Internal quotation marks omitted.) Id. "Still other cases have extrapolated from the holding of *Card* v. *State*, [supra,] 57 Conn. App. [144] ... in which three automobile accidents were consolidated for trial so that damages could be fairly apportioned. There, the Appellate Court stated that '[i]n the rare case where damages cannot be apportioned between two or more accidents, the plaintiff who can prove causation should not be left without a remedy. One judicial response to situations in which a jury is unable to make even a rough apportionment of damages is to apportion damages equally among the various accidents.' " (Internal quotation marks omitted.) Id.

***7** Once again, the court's discussion in *Vrenezi* v. *Louzada*, supra, Superior Court, Docket No. CV-20-6036141-S, is helpful here. In *Vrenezi*, the court stated that "trying the claims before separate juries could result in inconsistent verdicts that drastically undercompensate the plaintiff, or even overcompensate the plaintiff. Overcompensation could result if each jury blames the defendant before it for the majority of the injuries. Contrastingly, the joinder of the two claims maximizes the likelihood of complete and consistent verdicts. The jury will be able to consider the actions of both defendants, evaluate all the injuries, and determine the extent of liability for each defendant according to the evidence. Splitting the case before separate juries would be inefficient because it would force the plaintiff to proffer much of the same evidence, including expert medical testimony, twice. This would impose an additional expense upon the plaintiff, and an added burden for courts to have hear the same evidence before two different juries .... Having two jury trials would require the court to assemble two venire panels, and have

two juries sit for two trials where duplicative evidence is presented. Conducting two trials instead of one would also delay the start of evidence in another case that is ready for trial .... [Therefore,] the remaining equitable considerations overwhelmingly favor the joinder of the claims by the plaintiff against the defendants." Id. The court agrees with this analysis of the relevant equitable factors, and it determines that the same result is mandated here with respect to the third prong of the joinder test.

Accordingly, the court denies the motion to strike on the ground of improper joinder.

Next, the defendants move to strike each of the counts asserted against them on the ground that all the claims are barred by the federal Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230 et seq. According to the defendants, the CDA immunizes interactive computer service providers from liability for causes of action that treat them as the publisher of third-party user content. The defendants assert that all the plaintiffs' claims arise out of allegations that they acted as the publisher or speaker of content provided by someone else. As the defendants' alleged conduct fits within the ambit of the protections afforded by the CDA and that immunity has been construed broadly by the courts, the defendants argue that the plaintiffs' claims are legally insufficient. In opposition, the plaintiffs assert that the defendants' arguments are misplaced because they have not engaged in a proper preemption analysis. As argued by the plaintiffs, federal preemption of state law is generally disfavored, and there is no irreconcilable conflict between the CDA and Connecticut law. The plaintiffs assert that the CDA is not a comprehensive grant of immunity for third-party content, and as result, the CDA does not mandate a "but-for" test that would provide immunity. Rather, the appropriate focus is whether the defendant at issue was acting as a publisher or speaker. According to the plaintiffs, none of their claims seek to treat the defendants as publishers or speakers, and therefore, CDA immunity does not apply here. The plaintiffs assert that this fact is especially true with respect to their claims sounding in product liability. Finally, the plaintiffs argue that the authorities relied upon by the defendants are unpersuasive and distinguishable.

As explained by the Appellate Court, "Congress enacted the CDA as Title V of the Telecommunications Act of 1996 ... primarily to protect minors from exposure to obscene and indecent material on the Internet." (Citation omitted; internal quotation marks omitted.) *Vazquez* v. *Buhl*, 150 Conn. App. 117, 123, 90 A.3d 331 (2014). "At the same time, however, Congress was also concerned with ensuring the continued development of the Internet. See 47 U.S.C. § 230 (b). Section 230 ... was enacted based on a congressional concern that treating providers of computer services the same way as traditional publishers would impede the development of the Internet. Accordingly, Congress, [w]hether wisely or not ... made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others." (Internal quotation marks omitted.) Id.

The text of the CDA provides in relevant part that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230 (c) (1). The term "interactive computer service" is defined to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230 (f) (2). "Information content provider" is statutorily defined to mean "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230 (f) (3). Importantly, the CDA provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230 (e) (3). At the same time, under the CDA: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230 (e) (3). "Taken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties.... Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them.... State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." (Citations omitted.) *Nemet Chevrolet, Ltd.* v. *Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

***8** "In applying the statute, courts have broken [it] down into three component parts, finding that [i]t shields conduct if the defendant (1) is a provider or user of an interactive

computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." (Internal quotation marks omitted.) *Desilet* v. *East Hartford Police Officers Assn.*, Superior Court, judicial district of Hartford, Docket No. CV-21-6146962-S (December 27, 2022, *Rosen, J.*), citing *Poole* v. *Tumblr, Inc.*, 404 F. Supp. 3d 637, 641 (D. Conn. 2019). "There is general consensus among the [federal] circuits that the CDA should be construed broadly in favor of immunity ...." (Internal quotation marks omitted.) *Brodie* v. *Green Spot Foods, LLC*, 503 F. Supp. 3d 1, 11 (S.D.N.Y. 2020). Accordingly, the court may appropriately determine whether a defendant is entitled to immunity under the CDA within the context of a motion to strike. *Vazquez* v. *Buhl*, supra, 150 Conn. App. 128.

The parties do not dispute that the defendants, as the operator of a social media application, qualify as a "provider ... of an interactive computer service." See, e.g., *Thomas* v. *Twitter Corporate Office*, United States District Court, Docket No. 22 Civ. 5341 (KPF) (S.D.N.Y. December 6, 2023) ("[c]ourts have repeatedly concluded that ... social media sites qualify as 'interactive computer services' "); *Jackson* v. *Airbnb, Inc.*, United States District Court, Docket No. CV 22-3084 DSF (JCx) (C.D. Cal. November 2, 2022) (stating that "Snap is clearly 'a provider of an interactive computer service.' "). Nor do the plaintiffs explicitly argue in their written submissions that the harmful content at issue was not provided to Snapchat by a third-party users acting as an "information content provider." [9] See, e.g., *L.W.* v. *Snap, Inc.*, United States District Court, Docket No. 22CV619-LAB-MDD (S.D. Cal. June 5, 2023) (wherein the court determined that CDA immunity applied when "the harm animating [p]laintiffs' claims is directly related to the posting of third-party content on [Snapchat]").

The more difficult question, however, is whether the plaintiffs' claims would require the defendants to be considered the publisher or speaker of the speech at issue. "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, 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—are barred." (Internal quotation marks omitted.) *Doe One* v. *Oliver*, 46 Conn. Supp. 406, 410, 755 A.2d 1000 (2000), aff'd, 68 Conn. App. 902, 792 A.2d 911, cert. denied, 260 Conn. 911, 796 A.2d 556 (2002). "[W]hat matters is not the name of the cause of action ... what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes* v. *Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). Indeed, § "230 (c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party [c]ommunications." *Cohen* v. *Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017), aff'd in relevant part sub nom., 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761, 206 L. Ed. 2d 936 (2020).

***9** According to the plaintiffs, they are not attempting to hold the defendants liable for the publication of material from third parties. [10] Rather, the plaintiffs assert that "claims that [the] [d]efendants violated their duties as publishers are distinct from [the] [p]laintiffs' allegations in this case that [the] [d]efendants breached their duty as manufacturers to design a reasonably safe product." As framed in the parties' briefs, the plaintiffs allege the following categories of product defects: (1) user recommendation technologies (specifically, design features that facilitated connecting adult sexual predators with vulnerable minors); (2) lack of identify and age verification; (3) recommendation algorithms that are designed to make children addicted; (4) "other design features" such as push notifications and (5) failure to warn users and/or parents of the addictive design defects in Snapchat.

It appears that the precise questions raised in this motion to strike have yet to be squarely adjudicated by any Connecticut state court. Nevertheless, similar issues have been addressed by the Second Circuit Court of Appeals. In *Force* v. *Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761, 206 L. Ed. 2d 936 (2020), the plaintiffs, legal representatives of victims of terrorist attacks perpetrated by Hamas in Israel, brought suit against Facebook and alleged "that Hamas used Facebook to post content that encouraged terrorist attacks in Israel during the time period of the attacks in this case." Id., 59. According to the plaintiffs in *Force*, "Facebook ha[d] allegedly failed to remove the 'openly maintained' pages and associated content of certain Hamas leaders, spokesmen, and other members.... It [was] also alleged that Facebook's algorithms directed such

content to the personalized newsfeeds of the individuals who harmed the plaintiffs." (Citation omitted.) Id. In an opinion authored by Judge Droney, the Second Circuit Court of Appeals determined that Facebook was shielded from liability under the protections of the CDA. The court stated that it "disagree[d] with plaintiffs' contention that Facebook's use of algorithms renders it a non-publisher. First, we find no basis in the ordinary meaning of 'publisher,' the other text of Section 230, or decisions interpreting Section 230, for concluding that an interactive computer service is not the 'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests." Id., 66. "Like the decision to place third-party content on a homepage, for example, Facebook's algorithms might cause more such 'matches' than other editorial decisions. But that is not a basis to exclude the use of algorithms from the scope of what it means to be a 'publisher' under Section 230 (c) (1)." Id., 67. According to the *Force* court, the "alleged conduct by Facebook falls within the heartland of what it means to be the 'publisher' of information under Section 230 (c) (1)." Id., 65. The court reached this determination because "[a]ll of [Facebook's] decisions, like the decision to host third-party content in the first place, result in 'connections' or 'matches' of information and individuals, which would have not occurred but for the internet services' particular editorial choices regarding the display of third-party content." Id., 67.

***10** The court finds this discussion in *Force* to be persuasive,[11] and concludes that the fact that an interactive computer service allegedly created user recommendation technologies and algorithms that operate to connect users together does not change the computer service's status as a publisher.[12] See, e.g., *L.W.* v. *Snap, Inc.*, supra, Docket No. 22CV619-LAB-MDD (wherein the court specifically held that Snapchat's "Quick Add" feature "more closely implicate[s] a publication function than a design or development function."). Nor do allegations of an application's lack of identify and age verification remove the "publisher" designation. See, e.g., *Mother Doe* v. *Grindr, LLC*, United States District Court, No. 5:23-CV-193-JA-PRL (M.D. Fla. October 26, 2023) (appeal filed) (stating that a claim raising "failure to implement basic safety measures to protect minors ... treat[s] [d]efendants as a publisher of information ... [because it] is 'inextricably linked' to [d]efendants' publication of [the individual who sexually assaulted the minor's] messages to [the victim]"). Similarly, allegations of failure to warn of an application's potential danger do not remove the "publisher" status. See, e.g., *Herrick* v. *Grindr, LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018), aff'd, 765 Fed. Appx. 586 (2d Cir.), cert. denied, 140 S. Ct. 221, 205 L. Ed. 2d 135 (2019) (stating that "[t]o the extent [the plaintiff] has identified a defect in Grindr's design or manufacture or a failure to warn, it is inextricably related to Grindr's role in editing or removing offensive content—precisely the role for which Section 230 provides immunity").

In an attempt to avoid this result, the plaintiffs cite to a number of different cases. Almost all of them are distinguishable from the present matter. For example, in *Lemmon* v. *Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), the parents of children who died in a high-speed automobile accident brought suit after their decedents used a Snapchat filter to determine how fast they were going. The plaintiff parents alleged that Snapchat's filter encouraged the decedents to drive at over 100 miles per hour, and thus it incentivized them to drive at too fast of a speed. The Ninth Circuit Court of Appeals determined that "[i]t is ... apparent that the [p]arents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated springs from its distinct capacity as a product designer.... This is further evidenced by the fact that Snap could have satisfied its alleged obligation —to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate.... Snap's alleged duty in this case thus has nothing to do with its editing, monitoring, or removing of the content that its users generate through Snapchat." (Citations omitted; internal quotation marks omitted.) Id., 1092. The result in *Lemmon* makes sense, of course, because the plaintiffs there did not attempt to hold the defendant liable for publication of third-party content. Rather, the case rested solely on an alleged defect in the Snapchat application that did not involve statements made by third parties when using Snapchat.[13] Another factually similar case cited by the plaintiffs is *Maynard* v. *Snapchat, Inc.*, 870 S.E. 2d 739 (Ga. 2022). *Maynard*, however, does not even analyze the potential relevancy of the CDA. That case, therefore, is also not helpful for the plaintiffs.

***11** A different group of cases relied on by the plaintiffs is also inapposite. In both *Bolger* v. *Amazon.com, LLC*, 53 Cal. App. 5th 431, 267 Cal. Rptr. 3d 601 (2020) and *Erie Ins. Co.* v. *Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019), the plaintiffs sued an online marketplace for selling them

an allegedly defective product. The *Bolger* and *Erie* courts rejected the applicability of CDA immunity because the "products liability claims ... are not based on the publication of another's speech. The underpinning of [the plaintiff's] claims is its contention that Amazon was the seller of the [product] and therefore was liable as the seller of a defective product. There is no claim made based on the content of speech published by Amazon — such as a claim that Amazon had liability as the publisher of a misrepresentation of the product or of defamatory content." (Emphasis omitted.) Id., 139-40. Unlike *Bolger* and *Erie*, there is no allegation here that C.O. actually purchased any product from the defendants. Therefore, *Bolger* and *Erie* are not persuasive precedent in support of the plaintiffs' arguments.

Accordingly, the court determines that the allegations of this case fall squarely within the ambit of the immunity afforded to "an interactive computer service" that acts as a "publisher or speaker" of information provided by another "information content provider." 47 U.S.C. § 230 (c) (1). The plaintiffs clearly allege that the defendants failed to regulate content provided by third parties such as Sharp and Rodriguez when they were using the defendants' service. Therefore, as recently held by a federal district court judge when analyzing similar claims against the dating application Grindr, "as [the plaintiffs'] claims in essence seek to impose liability on Grindr for failing to regulate third-party content, they require that the [c]ourt treat Grindr as a publisher or speaker." *Doe* v. *Grindr, Inc.*, United States District Court, Docket No. 2:23-CV-02093-ODW (PDx) (C.D. Cal. December 28, 2023) (appeal filed) (dismissing plaintiff's claims sounding in defective product design, defective product manufacturing, defective product warning, negligence and negligent misrepresentation). As each of the plaintiffs' causes of action arise out of this same factual background, the court is compelled to conclude that all of the plaintiffs' claims are legally insufficient. [14] Moreover, as the plain language of the CDA "preempts any state law that is inconsistent with its protections," the court must strike all of the counts of the plaintiffs' complaint. [15] *Baiqiao Tang* v. *Wengui Guo*, United States District Court, Docket No. 17 Civ. 9031 (JFK) (S.D.N.Y. November 2, 2020).

As previously noted by the First Circuit Court of Appeals when ruling on a case that raised similar issues: "This is a hard case—hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that [the court] ... deny relief to plaintiffs whose circumstances evoke outrage. The result [the court] must reach is rooted in positive law. Congress addressed the right to publish the speech of others in the Information Age when it enacted the [CDA] ...." *Jane Doe No. 1* v. *Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir. 2016), cert. denied, 580 U.S. 1083, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017). It is the court's function to apply the law in its current form. As stated by our Appellate Court when previously ruling on a case involving the CDA, matters such as this one "can make faithful interpretation of statutes difficult. Without further legislative action, however, there is little [this court can] do in [its] limited role but join with other courts and commentators in expressing [its] concern with the statute's broad scope." *Vacquez* v. *Buhl*, supra, 150 Conn. App. 133 n.8.

***12** For the foregoing reasons, the court grants the defendants' motion to strike in its entirety.

All Citations

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Footnotes

1 As Snap, Inc. and Snapchat, LLC are the parties to the motion to strike that is currently before the court, they will collectively be known as "the defendants." Sharp and Rodriguez will be referred to by their surnames.

2 When originally commenced, Meta Platforms, Inc. was also named as a defendant in this case. The plaintiffs withdrew their claims against Meta Platforms, Inc. on December 28, 2023. Accordingly, the court need not consider any of the plaintiffs' allegations against this former defendant.

3 At various points, the complaint alleges that C.O. was both twelve and thirteen years old at the time of this incident. This decision will assume that C.O. was twelve years old at the time of the 2019 sexual assault

because the plaintiffs also allege that C.O. was fourteen in 2021 and fifteen when this lawsuit was commenced in January, 2023.

4 It appears that counts one through seven are brought against Snap, Inc. and Snapchat, LLC, whereas counts eight and nine state claims against Sharp and Rodriguez, respectively.

5 Following the reply memorandum, the parties have also filed multiple pleadings that contain both copies of unreported cases and substantive argument. As indicated during the January 8, 2024 oral argument, the court will only consider the cases that counsel have attached and not the arguments set forth in those documents.

6 Practice Book § 11-3 provides: "The exclusive remedy for misjoinder of parties is by motion to strike. As set forth in Section 10-39, the exclusive remedy for nonjoinder of parties is by motion to strike."

7 The plaintiffs in this matter only rely on General Statutes §§ 52-97 (2) and (7). The other subsections of § 52-97 clearly do not apply to the facts alleged in this case.

8 Under Connecticut law, apportionment of damages between the defendants and Sharp/Rodriguez will be legally impermissible because "the apportionment principles of [General Statutes] § 52–572h do not apply where the purported apportionment complaint rests 'on any basis other than negligence,' and that these other bases include, without limitation, 'intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute ....' " *Allard* v. *Liberty Oil Equipment Co., Inc.*, 253 Conn. 787, 801, 756 A.2d 237 (2000). Simply put, as a general rule, "[t]he liability of intentional tortfeasors may not be apportioned between parties liable for negligence." *Maza* v. *Montes-Vazquez*, Superior Court, judicial district of Waterbury, Docket No. CV-17-6033664-S (June 26, 2023, *Massicotte, J.*). Although apportionment (in the strict legal sense) may be prohibited between the two groups of defendants in this case by the governing statutory and case law, the fact still remains, as a practical matter, that each set of defendants will be affected by the disposition of the claims asserted against the other.

9 The plaintiffs' counsel did make clear at oral argument that he is not "conceding" this element. Nevertheless, it is apparent that the harms alleged in this case arise out of communications that originated from third parties.

10 On page forty-nine of their complaint, the plaintiffs allege that they "Expressly Disclaim Any and All Claims Seeking to Hold Defendants Liable as the Publisher or Speaker of Any Content Provided, Posted, or Created by Third Parties." Despite this attempt to plead around any potential CDA immunity, the court will read the allegations of the complaint as a whole to determine if the plaintiffs are actually alleging that the defendants were acting as a "publisher or speaker." In any event, such an allegation is a legal conclusion, and it is the court's role to analyze the legal soundness of the allegations of a complaint, construed in a manner most favorable to the pleader, and not necessarily accept the plaintiffs' characterization of their own allegations.

11 Although technically not binding on this court, "[i]t is well established that when Connecticut courts interpret federal statutes, [t]he decisions of the Second Circuit Court of Appeals carry particularly persuasive weight ...." (Internal quotation marks omitted.) *Modzelewski's Towing & Recovery, Inc.* v. *Commissioner of Motor Vehicles*, 322 Conn. 20, 32, 139 A.3d 594 (2016), cert. denied, 580 U.S. 1216, 137 S. Ct. 1396, 197 L. Ed. 2d 554 (2017). Accordingly, this court relies on the precedent of cases from the Second Circuit Court of Appeals when they are applicable.

12 Notably, at oral argument, the plaintiffs' counsel essentially admitted that the court would have to rule in favor of the defendants, at least with respect to the Quick Add feature, if it followed the reasoning of the *Force* case.

13 One of the cases cited by the plaintiffs is *A.M.* v. *Omegle.com, LLC*, 614 F. Supp. 3d 814 (D. Or. 2022). In *A.M.*, the minor plaintiff brought a product liability claim against an online chat room that randomly paired her with a much older man who proceeded to sexually abuse her online. The *A.M.* court denied the defendant's

Fed R. Civ. P. 12 (b) (6) motion to dismiss and stated that the "[p]laintiff does not seek to treat [the defendant] as a publisher of information under Section 230 of the CDA under *Lemmon*." Id., 820. The court acknowledges that this case does support the arguments advanced by the plaintiffs in this matter. Nevertheless, in the court's view, if *A.M.* would have been decided in accordance with Second Circuit precedent, the result may have been different. Similarly, in the California trial-level decision recently submitted by the plaintiffs, *Neville* v. *Snap, Inc.*, California Superior Court, Los Angeles County, Docket No. 22STCV3500 (January 2, 2024), the court acknowledged the existence of *Force* v. *Facebook, Inc.*, supra, 934 F.3d 53, but it chose not to follow that case. Indeed, the *Neville* court quoted the *Force* concurring and dissenting opinion at length instead of the majority opinion. Therefore, *Neville* is of little persuasive value to this court.

14 Notably, the plaintiffs make no written argument that certain of their causes of action may not be covered by CDA immunity. Rather, in the section of their memorandum of law that discusses the applicability of the CDA, there is no attempt by the plaintiffs to differentiate between their various claims. Moreover, as the court has concluded that it must strike all of the plaintiffs' causes of action, it need not examine the myriad of other arguments raised by the defendants in support of striking each of the individual counts.

15 The court need not engage in the extensive preemption analysis urged by the plaintiffs because "when a federal law contains an express preemption clause, [the court] focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent .... [A court] do[es] not invoke any presumption against pre-emption when a statute contains an express-preemption clause." (Citations omitted; internal quotation marks omitted.) *Buono* v. *Tyco Fire Products, LP*, 78 F.4th 490, 495 (2d Cir. 2023). According to its plain text, the CDA clearly preempts state law claims are that inconsistent with its protections.

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