No. 19-

IN THE

Supreme Court of the United States

MATTHEW HERRICK,

Petitioner,

v.

GRINDR LLC, KL GRINDR HOLDINGS INC., GRINDR HOLDING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the Communications Decency Act § 230(c)(1), which protects interactive computer services from liability for traditional publication torts when they publish third party content, prevent well pleaded causes of action for non-publication torts – such as product liability, negligence, fraud, and failure to warn – as a matter of law?

(2) Whether, as the majority of the Federal Appellate Circuit Courts holds, invocation of the Communications Decency Act § 230(c)(1) is an affirmative defense and therefore inappropriate for resolution at the motion to dismiss stage?

PARTIES TO PROCEEDING

Petitioner is Matthew Herrick. Respondents are Grindr, LLC, KL Grindr Holdings, Inc., and Grindr Holding Company.

RELATED CASES

- *Matthew Herrick v. Grindr, LLC, et. al.*, No. 1:17-cv-00932, U.S. District Court for the Southern District of New York. Order entered on January 25, 2018.

- *Matthew Herrick v. Grindr, LLC, et. al.*, No. 18-396, U.S. Court of Appeals for the Second Circuit. Judgment entered May 9, 2019.

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On January 25, 2018 the Honorable Judge Valerie E. Caproni of the Southern District of New York issued an Opinion and Order dismissing Matthew Herrick's claims against Grindr, LLC, KL Grindr Holdings, Inc., and Grindr Holding Company (collectively "Grindr") under Federal Rule of Civil Procedure 12(b)(6).[1]

On March 27, 2019, the Second Circuit issued a Summary Order affirming Judge Caproni's decision.[2] On May 9, 2019, the Second Circuit denied Herrick's motion for reconsideration *en banc*.[3]

JURISDICTION

The Southern District of New York had jurisdiction under 28 U.S.C. §§ 1331 and 1332. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1) following the Second Circuit's denial of a motion for reconsideration *en banc* on May 9, 2019.

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Communications Decency Act ("CDA"), 42 U.S.C. § 230(c)(1), provides in relevant part:

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1. *Matthew Herrick v. Grindr, LLC, et. al.* 306 F. Supp.3d 579 (S.D.N.Y. 2018), Appendix B, 1a -13a.

2. *Matthew Herrick v. Grindr, LLC, et. al*, 765 Fed. App. 586 (2d Cir. 2019), App. A, 14a – 52a.

3. Dkt. 166, App. C, 53a-54a.

> 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.

CDA § 230(f)(2) defines "interactive computer service" as

> 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.

CDA § 230(f)(3) 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.

STATEMENT OF THE CASE

Starting in October 2016, Petitioner Matthew Herrick began receiving uninvited visitors to his home and job. They said they were there for sex dates arranged through the gay dating app, Grindr. The unsolicited visitors showed Herrick a Grindr user profile with Herrick's own picture that he hadn't created. Over the next five months, the Grindr App directed over 1100 men to Herrick with pinpoint GPS precision facilitated by its patented Geolocation targeting system.[4] At one point six different men came to Herrick's work within a six-minute span. As many as 16 arrived in a single day. Grindr not only directed the men to Herrick's exact location, it displayed the distance in feet between the unwelcome visitors and Herrick.[5] This happened without Herrick's consent, and despite the fact that he was not an active Grindr user.

Many of the visitors were under the false impression that Herrick had rape and sado-masochistic fantasies and were made to believe his protests would be part of the act. Others thought he had free drugs. Some arrived ready to assault him after being provoked with racist and homophobic comments they believed were sent by him. Others became violent when Herrick told them he hadn't solicited sex from them.

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4. "Grindr" is used interchangeably in this Petition to refer to both the Respondents and the Grindr App. The context makes clear which meaning is being referenced. Where it isn't clear, we use the phrase "Grindr App" to distinguish the App from the Respondents.

5. Because this case was dismissed under Federal Rule of Civil Procedure 12(b)(6), there's been no fact discovery revealing how this was possible.

The onslaught of visitors was relentless. They would ring his buzzer at all hours, wait for him when he walked his dog, follow him into the bathroom during his brunch shifts, accost him at the gym, and lurk in the stairwell in his apartment building.

How Grindr could geo-target Herrick's location without Herrick's consent or knowledge is an unresolved factual question because the District Court dismissed the case before fact discovery. It's possible that Grindr was leaking Herrick's GPS coordinates because it was still tracking him even though he wasn't actively using the App. Grindr has known for years that its App leaks geolocation data.[6] Or Herrick's stalker may have exploited a defect in Grindr's code, or used widely available and known Geo-Spoofing software to interact with the App to target Herrick. The answers to these questions lie with Grindr, but the lower courts' rulings denied Herrick access to this information.

One thing is certain. Grindr was on repeated notice of the dangers, but took no steps to mitigate the harms with readily available software or industry standard safety measures.

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6. Fed. R. App. P. 28(j) Letter to Second Circuit Court of Appeals, *Herrick v. Grindr, et al.*, No. 18-396-CV, Dkt. No. 140, (Sept. 17, 2018) (citing Nicole Nguyen, "There's A Simple Fix, But Grindr Is Still Exposing The Location Of Its Users," *BuzzFeed* (Sept. 14, 2018), available at https://www.buzzfeednews.com/article/nicolenguyen/grindr-location-data-exposed ("The gay dating app Grindr is still exposing the precise location of its more than 3.6 million active users although it has long been aware of the issue.").)

Indeed, the United States government recognizes the dangers of Grindr. Recently the government ordered Grindr to be sold back to a United States company, because of national security concerns, after it was sold to a Chinese entity.[7]

Suing Grindr was Herrick's last resort. Herrick had already made fourteen police reports and obtained a family court order of protection against his stalker. But neither the police nor the courts could stop his stalker. It would take months before Herrick's stalker was arrested, well after Herrick sued Grindr.

Herrick and his friends filed roughly fifty reports with Grindr asking for help. It would have been simple to do. When Herrick's stalker targeted Herrick using Grindr's competitors, Grindr's competitors, Jack'd and Scruff, stopped the stalking as soon as they were put on notice. The only response Herrick received to his pleas for help from Grindr were auto-replies and silence.

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7. See "China's Kunlun Tech Agrees to U.S. Demand to sell Grindr Gay Dating App", by Echo Wang, Reuters, published May 13, 2019, accessible at "https://www.reuters.com/article/us-grindr-m-a-beijingkunlun/chinas-kunlun-tech-agrees-to-u-s-demand-to-sell-grindr-gay-dating-app-idUSKCN1SJ28N"; and "U.S. Orders Chinese Firm to Sell Dating App Grindr Over Blackmail Risk", by Georgia Wells and Kate O'Keeffe, published March 27, 2019, The Wall Street Journal, accessible at https://www.wsj.com/articles/u-s-orders-chinese-company-to-sell-grindr-app-11553717942, ("U.S. national-security experts said Chinese government knowledge of an individual's usage of Grindr could be used in certain cases to blackmail U.S. officials and others with security clearances, such as defense contractors, and force them to provide information or other support to China.")

It took filing an emergency order to show cause in New York State Supreme Court to finally get Grindr's attention. And even then, Grindr removed the case to the Southern District of New York and argued it had no responsibility to help Herrick because it enjoyed near absolute immunity under the 1996 Communications Decency Act ("CDA") § 230(c)(1). Grindr's refusal to help Herrick is a direct byproduct of an overbroad reading of a statute that incentivizes inaction.

Passed in the antediluvian era of the internet, before GPS tracking smartphones, Google, or Facebook, CDA § 230(c)(1) was meant to protect the fledgling internet economy from crippling damage awards from traditional publication torts such as defamation. The law was never intended to provide blanket immunity for internet companies, yet many courts across the country using outdated, 20th century paradigms, have judicially legislated the CDA into providing just such blanket immunity.

They do so primarily three ways: 1) by classifying every internet company defendant as an "interactive computer service;" 2) by regarding the subject matter of all suits as involving a third-party "information content provider;" and 3) by dismissing the cases on Federal Rule of Civil Procedure 12(b)(6) motions thereby inhibiting plaintiffs from gathering basic evidence. This is problematic because cases involving internet companies usually involve information asymmetry and complex questions of computer functionality.

William Blackstone famously commented it's not the common law that usually goes wrong, but statutes

that act in derogation of the common law.[8] Whereas the "common law [is] nothing but custom, arising from the universal agreement of the whole community" and thus embodies the whole experience of that community, statutes generally aren't informed by the experience of that whole community.[9] And thus statutes in derogation of the common law often lead to unintended consequences the drafters never foresaw. And when, as has happened with CDA § 230(c)(1), the courts interpret a statute far beyond its text and intent, harmful unintended consequences abound.

Courts are slowly beginning to recognize the harms arising from their boundless interpretations of CDA § 230(c)(1). And as the facts of this case demonstrate, the time has come for this Court to provide guidance to the courts below by holding that CDA § 230(c)(1) is limited to publication torts, isn't a grant of blanket immunity, and that the invocation of CDA § 230(c)(1) is an affirmative defense inappropriate for dismissal under Federal Rule of Civil Procedure 12(b)(6).

Grindr & Herrick

Around May 2011, Herrick downloaded Grindr and used it to date local men in New York City for several years.[10] In June 2015, Herrick, then a thirty-year-old New

8. 1 William Blackstone, "Commentaries on the Laws of England" 13 (Oxford ed. 2016.)

9. *Id.* at 306.

10. (Am. Compl. at ¶ 46 (S.D.N.Y. Dkt. No. 34); Second Circuit Joint Appendix ("JA"), at 64 (Second Circuit Dkt. No. 43.)

Yorker, began dating JC, a man he met through Grindr.[11] Around November 2015, Herrick stopped actively using Grindr.[12]

In October 2016, Herrick ended the relationship. JC then commenced a campaign of non-stop vengeance against Herrick, including relentlessly impersonating Herrick on Grindr.[13] Exploiting Grindr's design deficiencies and apparent inability to exclude abusive users, JC weaponized Grindr. Grindr then directed over 1,100 strangers to Herrick's home and workplace with the algorithmic GPS precision modern smartphones permit.[14] These men were seeking sex, including sadomasochistic sex and sex involving violent rape fantasies.[15] Grindr algorithmically selected and directed all these individuals to Herrick via its patented geolocation and sorting functions.[16] Despite these known dangers, and Grindr's public declarations of its commitment to users' safety, Grindr lacked easily implemented design features to screen and block known abusive and dangerous users violating the company's terms of service.[17]

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11. (Am. Compl. ¶ 14, 48, JA-56, 65.)

12. (Am. Compl. ¶ 48, JA-65.)

13. (Am. Compl. ¶ 49, JA-65.)

14. (*Id.*)

15. (Am. Compl. ¶¶ 49-51, 67, JA-65, 70.)

16. (Am. Compl. ¶¶ 52-53, JA-67.)

17. (Am. Compl. ¶¶ 43-44, 49, 52-53, 67, 83-89, JA-64, 65, 70, 73-74.)

The impersonating profiles contained images of Herrick. The profiles contained accurate descriptions of Herrick, gave his location as Harlem, and falsely portrayed him as an HIV-positive individual seeking violent unprotected sex.[18] As many as sixteen individuals per day showed up to Herrick's home and restaurant workplace expecting sex.[19]

Between November 2016 and January 2017, Herrick reported Grindr's targeting of him and his stalking approximately fifty times to Grindr.[20] From January 27, 2017 through March 2017, he and/or his representatives made fifty more reports, including in the form of cease and desist legal letters and, as discussed below, in a court order.[21]

Herrick was not safe at home or at work.[22] In the span of one week in January 2017, two men refused to leave Herrick's home and loitered outside for thirty minutes.[23] One day, six different men came to Herrick's work in the span of six minutes.[24] The next day, a man followed Herrick into the bathroom at work.[25] The police were

18. (Am. Compl. ¶¶ 32, 50, JA-59, 65.)

19. (Am. Compl. ¶ 54, JA-67.)

20. (Am. Compl. ¶ 68, JA-70.)

21. (Am. Compl. ¶ 69, JA-70.)

22. (Am. Compl. ¶ 63, JA-69.)

23. (Am. Compl. ¶ 55, JA-67.)

24. (Am. Compl. ¶ 56, JA-67.)

25. (Am. Compl. ¶ 57, JA-68.)

called a few days later when a man became so angry about being turned away that he attacked Herrick's roommate.[26] One visitor returned after Herrick sent him away, saying Herrick had direct messaged asking him to come back.[27]

Herrick tried everything to stop the unwelcome visitors.[28] Herrick filed fourteen police reports against his stalker.[29] When that did not stop the stalker, Herrick successfully petitioned New York State Family Court for an Order of Protection against his stalker.[30] But his stalker, like many in the face of a court order, was undeterred. Instead, he sent even more strangers to Herrick for sex.[31] Grindr was the only one that could help, was on repeated notice, and was uniquely and exclusively qualified to do so. Yet, Grindr did nothing.[32]

With no other options, Herrick sued Grindr in New York State Supreme Court with the goal of injunctive relief ordering Grindr to stop its targeting of him.

The Proceedings in the Southern District of New York

On January 27, 2017, Herrick filed a Summons and Complaint in New York State Supreme Court, New York

26. (Am. Compl. ¶ 59, JA-68.)

27. (Am. Compl. ¶ 62, JA-68-69.)

28. (Am. Compl. ¶¶ 68-70, 73, 81, JA-70, 71, 72.)

29. (Am. Compl. ¶ 73, JA-71.)

30. (*Id.*)

31. (Am. Compl. ¶¶ 55-60, JA-67-68.)

32. (Am. Compl. ¶¶ 71, 82, JA-71, 73.)

County, in the matter of *Matthew Herrick v. Grindr, LLC*, Index No. 150903/17 by Order to Show Cause, seeking a preliminary injunction and temporary restraining order ("TRO"). Justice Kathryn Freed granted the ex parte TRO, ordering Grindr to "immediately disable all impersonating profiles created under [Herrick]'s name or with identifying information relating to [Herrick], [Herrick]'s photograph, address, phone number, email account or place of work, including but not limited to all impersonating accounts under the control of [his stalker]."[33]

On February 8, 2017, Grindr filed a Notice of Removal under 28 U.S.C. § 1441, *et seq.* removing the matter to the Southern District of New York.[34]

On February 15, 2017, Herrick applied for an extension on the TRO which expired as a matter of law because of the removal.[35] On February 17, 2017, Grindr opposed that application.[36] On February 22, 2017, the District Court held a hearing on the TRO extension.[37]

At the hearing, Grindr's counsel argued there was nothing they could do – or were obligated to do. Grindr admitted their knowledge of Herrick's targeting but said it didn't matter.[38] They said their client had no responsibility to Herrick – or anyone else – because the CDA immunized

33. (JA-41-42.)

34. (Dist. Dkt. 1.)

35. (Dist. Dkt. 11.)

36. (Dist. Dkt. 13.)

37. (Dist. Dkt. 20.)

38. *See* Transcript of Oral Argument before Judge Caproni, (JA 150) (February 22, 2017):

them from all liability associated with the use of their product.

Grindr made this argument despite readily available, widely used software and methods such as VPN blocking, photo-hashing, and industry standard user verification that could have protected Herrick and stopped the stream of strangers. Although Grindr's business model depends on sophisticated techniques to scan, sort, and analyze user data to sell to advertisers (including HIV status), and its patented geolocation technology to match and direct users to one another, Grindr claimed it lacked the rudimentary technical capability to identify and block accounts.

On February 24, 2017, the District Court denied Herrick's application to extend the TRO.[39]

On April 12, 2017, Herrick filed his Amended Complaint adding new claims, including product liability claims and adding Grindr's holding companies – KL Grindr Holdings, Inc. and Grindr Holding Company – as defendants.[40] The Amended Complaint pleaded the following causes of action:

"The Court: You are saying that [Grindr] only [has] the ability to [comply with the TRO] based on the email address associated with that account so you can just jump to a different e-mail account and continue bad behavior?

Mr. Waxman: That's right, your Honor."

39. (Dist. Dkt. 21, JA-43-52.)

40. (JA-53-95.)

(1) Product Liability for Defective Design of Grindr[41]

(2) Product Liability for Defect in Manufacture of Grindr by failing to incorporate widely used, proven, and common safety software[42]

(3) Product Liability for Defect in Warning because Grindr knew, but failed to warn, that Grindr has been and can be used as a stalking weapon[43]

(4) Negligent Design because Grindr knew, or should have known, that Grindr created an unreasonable risk of injury to Herrick and its users[44]

(5) Negligent Failure to Warn or to Provide Adequate Instruction because Grindr placed Grindr into the stream of commerce without warning that it facilitated stalking[45]

(6) Negligence for Grindr's failure to meet its duty and the industry's standard of care in relation to product safety and incident response[46]

(7) Copyright Infringement[47]

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41. (Am. Compl. at ¶¶ 100-07, JA-77.)

42. (Am. Compl. at ¶¶ 108-15, JA-78.)

43. (Am. Compl. at ¶¶ 116-20, JA-79.)

44. (Am. Compl. at ¶¶ 121-26, JA-80-81.)

45. (Am. Compl. at ¶¶ 127-30, JA-81-82.)

46. (Am. Compl. at ¶¶ 131-45, JA-82-83.)

47. Petitioner has dropped his copyright claim.

(8) Promissory Estoppel because Herrick relied on Grindr's Terms of Service ("ToS"), privacy representations, and Grindr's assurances that it could and would respond to reports of abuse[48]

(9) Fraud because Grindr knew the misrepresentations about its commitment to safety in the ToS, which Herrick reasonably relied upon, were false[49]

(10) Deceptive Business Practices under N.Y. Gen. Bus. Law § 349 because Grindr made false and misleading statements about its commitment to privacy and safety to attract customers[50]

(11) False Advertising in violation of N.Y. Gen. Bus. Law. §§ 350 & 350-a because Grindr falsely advertised the nature, efficacy, and safety of Grindr[51]

(12) Intentional Infliction of Emotional Distress because Grindr repeatedly ignored Herrick's desperate pleas for help in the face of the weaponization of Grindr against him by a dangerous and criminal stalker[52]

(13) Negligent Infliction of Emotional Distress because Grindr breached its duty of care by ignoring

48. (Am. Compl. at ¶¶ 156-60, JA-86.)

49. (Am. Compl. at ¶¶ 161-66, JA-86-87.)

50. (Am. Compl. at ¶¶ 167-75, JA-87-88.)

51. (Am. Compl. at ¶¶ 176-87, JA-88-90.)

52. (Am. Compl. at ¶¶ 188-91, JA-90-91.)

Herrick's repeated requests for help after a dangerous and criminal stalker weaponized Grindr against him[53] and

(14) Negligent Misrepresentation because Herrick relied on Grindr's safety representations that Grindr did not intend to enforce.[54]

On April 21, 2017, Grindr, LLC filed a motion to dismiss the Amended Complaint.[55]

On May 24, 2017, KL Grindr Holdings, Inc. and Grindr Holding Company filed motions to dismiss the Amended Complaint.[56]

On June 14, 2017, Herrick filed a memorandum of law opposing the motions.[57] The parties' requests for oral argument were denied.

On January 25, 2018, the District Court issued an order granting Defendants' motions to dismiss with prejudice on all claims except Herrick's copyright infringement claim, under Rule 12(b)(6).[58] On February 14, 2018, the court issued a subsequent order dismissing the copyright claim with prejudice.[59]

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53. (Am. Compl. at ¶¶ 191-205, JA-91-92.)

54. (Am. Compl. at ¶¶ 206-13, JA-92-94.)

55. (Dist. Dkt. 41, JA-96-97.)

56. (Dist. Dkt. 47 & 50, JA-181-82, 185-86.)

57. (Dist. Dkt. 54.)

58. (Dist. Dkt. 63, JA-190-218.)

59. (Dist. Dkt. 66.)

The Proceedings in the Second Circuit Court of Appeals

On February 9, 2018 Herrick filed a Notice of Appeal. On January 7, 2019 oral arguments were held. Given the importance of the case, seven Amici Curiae briefs were filed by the following organizations and individuals around the country

For Herrick:

1) Sanctuary for Families, Cyber Sexual Abuse Task Force, Day One, Domestic Violence Legal Empowerment and Appeals Project, Her Justice, Legal Momentum, My Sister's Place, New York Legal Assistance Group, and Safe Horizon

2) Electronic Privacy Information Center (EPIC)

3) Break the Cycle, National Association of Women Lawyers, National Network to End Domestic Violence, Laura's House, Legal Aid Society of Orange County, and Public Law Center

4) Consumer Watchdog

For Grindr:

1) Computer and Communications Industry Association, Match Group, Inc., and Indeed, Inc.

2) Paul Alan Levy

3) Electronic Frontier Foundation and Center for Democracy and Technology

On March 27, 2019, the United States Court of Appeals for the Second Circuit issued a "Summary Order" affirming the district court's decision to dismiss the complaint.[60]

On April 11, 2019, Herrick filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*.[61] On May 9, 2019, that petition was denied.[62]

REASONS FOR GRANTING THE PETITION

This Court has never ruled on the proper scope of the Communications Decency Act § 230(c)(1). As this case demonstrates, in 2019 this is a matter of life and death for victims of stalking targeted by computer technologies with functionalities unimagined when Congress passed CDA § 230(c)(1) in 1996. Congress passed CDA § 230(c)(1) to protect interactive computer services from liability for traditional publication torts arising from passive third-party content posted on bulletin boards and websites. GPS-tracking Smartphones, Google, and Facebook did not exist when Congress passed CDA § 230(c)(1). Yet since its passage, the lower courts have judicially legislated the

60. *Matthew Herrick v. Grindr, LLC, et. al*, 765 Fed. Appx. 586 (2d Cir. 2019), Appendix A, 13a.

61. Dkt. 161.

62. Dkt. 166, Appendix C, 53a-54a.

scope of CDA § 230(c)(1) far beyond its text and intent into a near absolute immunity for internet companies.[63] This is part of the reason the question of CDA § 230(c)(1)'s scope is a crucial component of our society's current debate about the responsibility that internet companies have to our society for the harm their technologies propagate.

Unfortunately, this debate is muddied by the fact that the federal and state court decisions in this country lack clarity and are often contradictory as to CDA § 230(c)(1)'s proper scope. This lack of conceptual clarity has led many courts to create an almost absolute immunity for internet companies for their tortious conduct even though CDA § 230(c)(1) is limited by its text and congressional intent to publication torts. Courts do this, as the lower courts did in this case, by making everything an internet company does simply a question of the publication of third-party content while simultaneously failing to state a clear and coherent standard for differentiating between the publication of third-party content and tortious conduct by the internet company. Because there is no clear standard both the Federal Circuits and the state courts have taken divergent positions on the CDA's scope.

The particular fact intensive nature of the CDA § 230(c)(1) eligibility inquiry, due to the complexity of modern computer functionality, is another reason this Court should grant certiorari in order to make clear that the invocation of CDA § 230(c)(1) is an affirmative defense.

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63. Danielle Keats Citron and Benjamin Wittes, "The Problem Isn't Just Backpage: Revising Section 230 Immunity" 2 GEO. L. TECH. REV. 453, 460 (2018) ("[T]he broad construction of CDA's immunity provision adopted by the courts has produced an immunity from liability far more sweeping than anything the law's words, context, and history support.")

I. The Court Should Grant Certiorari to Fix the Inconsistent Standards Among the Federal Circuit Courts of Appeals as to the Scope of CDA § 230(c)(1)

Courts apply conflicting ad hoc approaches to the scope of the CDA § 230(c)(1). For instance, the Ninth Circuit Court of Appeals has allowed a failure to warn claim similar to Herrick's to proceed whereas the Second Circuit in this case did not.[64] As the Seventh Circuit has noted, CDA § 230(c)(1) only limits liability related to the publication of third-party content by interactive computer services and isn't a blanket grant of immunity for internet companies. Yet, courts continue to apply the CDA in blanket fashion.[65]

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64. Although this petition is from an unpublished summary order, this Court has granted certiorari in cases involving summary orders and should do so here. *See*, *e.g., Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (stating "[w]e note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case.")

65. *See, City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (Easterbrook, C.J.) ("[CDA § 230(c)(1)] limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker'. Section 230(c) is irrelevant."); *see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) ("[t]he CDA does not provide a general immunity against all claims derived from third-party content."); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) ("Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?"); *Fair Hous. Council of San Fernando Valley v. Roommates.Com,*

The Federal Circuits generally apply CDA § 230(c)(1) broadly when the complaint involves traditional publication activity. For instance, the Third Circuit barred a plaintiff's claims because he was "attempt[ing] to hold AOL liable for decisions relating to monitoring, screening, and deletion of content from its network – actions quintessentially related to a publisher's role."[66] The First Circuit struck down sex trafficking claims against a classified advertisement website because the claims centered on the site's regulation of third-party conduct causing plaintiffs' injuries.[67] And the Fifth Circuit prevented negligence claims alleging that an online social network took insufficient precautions to stop a young teen from lying about her age resulting in a sexual assault.[68] But none of those cases involved complex factual questions related to the interaction of patented geolocation technology used to repeatedly target a stalking victim where, as here, the internet company was on repeated notice of the harm the weaponization of their App was causing and willfully ignored that harm nonetheless. The lower courts in this case have articulated no coherent rationale as to how the fact pattern in this case fits into the traditional rubric of traditional publishing.

Other courts are more restrictive when it comes to the CDA's scope. The Tenth Circuit has refused "to immunize

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LLC, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) ("[T]he internet . . . has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress ….")

66. *Green v. Am. Online* (AOL), 318 F.3d 465, 471 (3d Cir. 2003)

67. *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016)

68. *Doe v. MySpace, Inc.,* 528 F.3d 413 (5th Cir. 2008)

a party's conduct outside the realm of the Internet just because it relates to the publishing of information on the Internet."[69] The Third Circuit holds that when the defendant does more than just publish or "speak" information provided by a third party, CDA immunity does not extend to claims revolving around its other functions.[70] But because there is no clear standard for the lower courts to apply as to CDA § 230(c)(1) the topography that emerges from the current state of the case law is one of ad hoc decision making based on the factual vagaries of the case rather than consistent and principled analysis following clearly articulated guidelines.

This is particularly apparent among the conflicting opinions in the lower courts as to whether the protections of CDA § 230(c)(1) apply to product liability claims. The Ninth Circuit, contrary to the holding in Herrick's case, holds that an online platform is not entitled to immunity for a failure to warn product liability claim.[71] In contrast, in *Obersdorf v. Amazon*, the Third Circuit recently decided that CDA § 230(c)(1) does apply to a product liability failure to warn claim.[72] The fact that the current functionality of computer technology, functionality unimagined when

69. *See Fed. Trade Comm'n v Accusearch Inc.,* 570 F.3d 1187, 1206 (10th Cir. 2009) (Tymkovich, J., concurring).

70. *See Obersdorf v. Amazon,* No. 18-1041, 2019 WL 2849153, at *12 (3d Cir. July 3, 2019).

71. *See, Doe v. Internet Brands, Inc.*, 824 F.3d 846, 854 (9th Cir. 2016) ("In short, this case presents the novel issue of whether the CDA bars Jane Doe's failure to warn claim under California law. We conclude that it does not.")

72. *See Obersdorf v. Amazon,* No. 18-1041, 2019 WL 2849153 (3d Cir. July 3, 2019).

the CDA was passed in 1996, is resulting in an increase of product liability claims against internet companies gives urgency to the need to determine the scope of CDA § 230(c)(1).[73]

The incoherent and inconsistent standards in the lower courts as to the scope of CDA § 230(c)(1) is in part a result of the difficult, fact intensive nature of any CDA § 230(c)(1) inquiry. This is why the majority of federal circuit courts recognize that it is generally improper to dismiss a complaint on CDA § 230(c)(1) grounds, as happened in this case. Unfortunately, this rule is more honored in its breach, and this Court should make it clear to the lower courts that dismissal on the basis of CDA § 230(c)(1) should be reserved only for instances, unlike Herrick's, where the applicability of CDA § 230(c)(1) is apparent from the face of the complaint.

II. The Court Should Grant Certiorari to Clarify that CDA § 230(c)(1) is an Affirmative Defense

Given the fact intensive nature of whether CDA § 230(c)(1) applies to a case, federal circuit courts recognize that it is generally improper to dismiss a complaint before fact discovery.[74] Courts recognize the

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73. *See, e.g., McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016); *Maynard v. Snapchat, Inc.,* 346 Ga. App. 131, 816 S.E.2d 77 (2018); *Daniel, et. al. v. Armslist, LLC ,et al.*, No. 2017AP344, 2018 WL 1889123 (Wis. Ct. App., Apr. 19, 2018), *review granted*, 2018 WI 93, 383 Wis. 2d 627, 918 N.W.2d 642, and *rev'd,* 2019 WI 47, 386 Wis. 2d 449, 926 N.W.2d 710.

74. *See Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (holding that CDA limited immunity is an affirmative defense and

danger in prematurely granting a motion to dismiss based on the CDA.[75]

There are numerous factual questions in this case for which the answers could point not to third party content, but to conduct or to Grindr's own content. For instance, how was Grindr able to precisely geo-locate and transmit the distance between Herrick and someone using Grindr, if Herrick wasn't using the App? How do the lower courts know that Grindr's code isn't defective or negligent because it doesn't incorporate standard safety features common in the industry? If Grindr was repeatedly on notice of the criminal use of its App, why isn't this actionable tortious conduct as opposed to simply a question of the publication of third-party content? How, precisely, did Grindr's functionality, a functionality far beyond anything that fits within a traditional publishing rubric, work in this particular instance? By dismissing Herrick's well pleaded complaint before discovery and the adversarial process could answer these questions, the lower courts engaged in speculation without any factual

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that "[a]ffirmative defenses do not justify dismissal under Rule 12(b)(6); litigants need not try to plead around defenses.")

75. *See, e.g., CYBERsitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012) ("Because Defendant's entitlement to immunity under the CDA depends on whether Defendant 'developed' or materially contributed to the content of these advertisements, it is too early at this juncture to determine whether CDA immunity applies."); *cf. Wang v. OCZ Tech. Group Inc.*, 276 F.R.D. 618, 632 (N.D. Cal. 2011) ("Whether OCZ falls within the CDA's definition of 'interactive computer service,' and whether the third-party content allegedly displayed . . . was reproduced by OCZ in a manner potentially subjecting it to liability, raise factual questions unfit for disposition pursuant to a motion to strike.")

basis. This Court should grant certiorari to clarify to the lower courts that factual speculation as to the merits of a well pleaded complaint is not grounds for dismissal on CDA § 230(c)(1) grounds.

CONCLUSION

The Court should grant certiorari to limit the scope of CDA § 230(c)(1) to what Congress intended - the publication of third-party content by interactive computer services. Since its inception, courts in this country have judicially legislated the scope of CDA § 230(c)(1) far beyond the text and intent of the statute into an almost absolute immunity for interactive computer services. As recent cases in both the federal and state courts attest, this broad reading of the CDA is not only contrary to the text and intent of the statute but dangerous in that it provides victims of stalking no recourse when an interactive computer service is the sole entity that can stop the threat to a victim's life.

It's 2019, not 1996, and the days where internet activity was limited to the passive publication or retrieval of information from internet bulletin boards are long gone. This Court should grant certiorari to clarify this to the lower courts, and reign in the harm caused to our society by the judicially legislated grant of near absolute immunity for internet companies under CDA § 230(c)(1).

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MARCH 27, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

18-396

At a stated term of the United States court of Appeals for the Second Circuit, held at Thurgood Marshall United States courthouse, 40 Foley Square, in the City of New York, on the 27th day of March, two thousand nineteen.

PRESENT: DENNIS JACOBS,
REENA RAGGI,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

MATTHEW HERRICK,

Plaintiff-Appellant,

v.

GRINDR LLC, KL GRINDR HOLDINGS INC.,
GRINDR HOLDING COMPANY,

Defendants-Appellees.

March 27, 2019, Decided

Appendix A

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court entered on February 14, 2018 is **AFFIRMED**.

Matthew Herrick appeals from a judgment of the United States District Court for the Southern District of New York (Caproni, J.) dismissing his claims against Grindr LLC, KL Grindr Holdings, Inc., and Grindr Holding Company (collectively, "Grindr"). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Grindr is a web-based "hook-up" application ("app") that matches users based on their interests and location. Herrick was the victim of a campaign of harassment by his ex-boyfriend, who created Grindr profiles to impersonate Herrick and communicate with other users in his name, directing the other users to Herrick's home and workplace. Herrick alleges that Grindr is defectively designed and manufactured because it lacks safety features to prevent impersonating profiles and other dangerous conduct, and that Grindr wrongfully failed to remove the impersonating profiles created by his ex-boyfriend.

Herrick filed suit against Grindr in New York state court in January 2017, asserting causes of action for negligence, deceptive business practices and false advertising, intentional and negligent infliction of emotional distress, failure to warn, and negligent

misrepresentation. On the same day the complaint was filed, the state court entered an *ex parte* temporary restraining order ("TRO") requiring Grindr to disable all accounts impersonating Herrick. In February 2017, Grindr removed the case to the Southern District of New York. The district court subsequently denied Herrick's motion to extend the state court's TRO, concluding that each of his claims was either barred by Section 230 of the Communications Decency Act of 1996 (the "CDA"), 47 U.S.C. § 230, or failed on the merits.

Herrick filed an amended complaint in March 2017, adding causes of action for products liability, negligent design, promissory estoppel, fraud, and copyright infringement.[1] Grindr moved to dismiss on the grounds that all the claims other than copyright infringement are barred by CDA § 230, and that the misrepresentation-based claims fail on the merits. KL Grindr Holdings, Inc. ("KL Grindr") and Grindr Holding Company ("Grindr Holding") additionally moved to dismiss for lack of personal jurisdiction.

On January 25, 2018, the district court granted the motions to dismiss. Herrick argues on appeal that the district court erred in dismissing the majority of his claims as barred by the CDA; that he sufficiently pleaded the claims that were dismissed on the merits; and that the district court abused its discretion in denying leave to amend the complaint.

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1. Herrick does not appeal the dismissal of the copyright infringement claim.

We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *ACLU v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015). We review the district court's denial of leave to amend for abuse of discretion. *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 28 (2d Cir. 2016).

1. Under CDA § 230(c), "[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). "In applying the statute, courts have broken it down into three component parts, finding that it shields conduct if the defendant [A] is a provider or user of an interactive computer service, [B] the claim is based on information provided by another information content provider and [C] the claim would treat the defendant as the publisher or speaker of that information." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (internal quotation marks and alterations omitted). "The majority of federal circuits have interpreted [§ 230(c)] 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." *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (internal quotation marks omitted).

A. Grindr is a provider of an interactive computer service.

Herrick suggests that the Grindr app is not an interactive computer service ("ICS"). The CDA defines

an ICS as "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). This definition "has been construed broadly to effectuate the statute's speech-protective purpose." *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015).

As the district court observed, courts have repeatedly concluded that the definition of an ICS includes "social networking sites like Facebook.com, and online matching services like Roommates.com and Matchmaker.com," which, like Grindr, provide subscribers with access to a common server. App. 198 (collecting cases). Indeed, the Amended Complaint expressly states that Grindr is an ICS, and Herrick conceded as much at a TRO hearing in the district court. Accordingly, we see no error in the district court's conclusion that Grindr is an ICS.

B. Herrick's claims are based on information provided by another information content provider.

Herrick argues that his claims are not based on information provided by another information content provider. He argues that while the information in a user's Grindr profile may be "content," his claims arise from Grindr's management of its users, not user content.

Herrick's products liability claims arise from the impersonating content that Herrick's ex-boyfriend incorporated into profiles he created and direct messages

with other users. Although Herrick argues that his claims "do[] not arise from any form of speech," Appellant's Br. at 33, his ex-boyfriend's online speech is precisely the basis of his claims that Grindr is defective and dangerous. Those claims are based on information provided by another information content provider and therefore satisfy the second element of § 230 immunity. *See Ricci*, 781 F.3d at 27-28.

The claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress relate, in part, to the app's geolocation function. These claims are likewise based on information provided by another information content provider. Herrick contends Grindr created its own content by way of the app's "automated geolocation of users," but that argument is undermined by his admission that the geolocation function is "based on real-time streaming of [a user's] mobile phone's longitude and latitude." Appellant's Br. at 32. It is uncontested that Herrick was no longer a user of the app at the time the harassment began; accordingly, any location information was necessarily provided by Herrick's ex-boyfriend.

C. Herrick's claims treat Grindr as the publisher or speaker of the offensive content.

As we have observed, "[a]t its core, § 230 bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content.'" *LeadClick Media, LLC*, 838 F.3d at 174 (quoting

Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014)). Therefore, allegations based on an ICS's "refus[al] to remove" offensive content authored by another are barred by § 230. *Ricci*, 781 F.3d at 28.

Herrick argues that his claims are premised on Grindr's design and operation of the app rather than on its role as a publisher of third-party content. However, as the district court observed, Grindr's alleged lack of safety features "is only relevant to Herrick's injury to the extent that such features would make it more difficult for his former boyfriend to post impersonating profiles or make it easier for Grindr to remove them." App. 202. It follows that the manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and are barred by § 230. *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) (claims based on the "structure and operation" of a defendant ICS were barred by § 230 because the lack of safety features reflects "choices about what content can appear on the website and in what form," which are "editorial choices that fall within the purview of traditional publisher functions"); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (the defendant's "decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting").

Herrick argues that the failure to warn claim is not barred by § 230, relying on *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016). But in *Internet Brands*, there

was no allegation that the defendant's website transmitted potentially harmful content; the defendant was therefore not an "intermediary" shielded from liability under § 230. *Id.* at 852. Herrick's failure to warn claim is inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content provided by his ex-boyfriend; accordingly, it is barred by § 230. *See LeadClick Media, LLC*, 838 F.3d at 174.

In any event, insofar as Herrick faults Grindr for failing to generate its own warning that its software could be used to impersonate and harass others, the claim fails for lack of causation. *See Estrada v. Berkel, Inc.*, 14 A.D.3d 529, 530, 789 N.Y.S.2d 172 (2d Dep't 2005) (observing that causation is element of failure to warn claim). Since, as the Amended Complaint admits, Herrick deactivated his Grindr account in 2015 (over one year before any impersonation or harassment), any purported failure to warn Herrick when he first downloaded Grindr in 2011 is unrelated to his ex-boyfriend's subsequent use of the app. In sum, there is no basis to infer from the Amended Complaint that Grindr's failure to warn caused Herrick's injury. The district court therefore did not err in dismissing the failure to warn claim.

To the extent that the claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress are premised on Grindr's allegedly inadequate response to Herrick's complaints, they are barred because they seek to hold Grindr liable for its exercise of a publisher's traditional editorial functions. *LeadClick Media, LLC*, 838 F.3d at 174. To the extent that

they are premised on Grindr's matching and geolocation features, they are likewise barred, because under § 230 an ICS "will not be held responsible unless it assisted in the development of what made the content unlawful" and cannot be held liable for providing "neutral assistance" in the form of tools and functionality available equally to bad actors and the app's intended users. *See id.* at 174, 176 (citing *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (in banc)).

* * *

For the foregoing reasons, Herrick's products liability claims and claims for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress are barred by CDA § 230, and dismissal on that ground was appropriate because "the statute's barrier to suit is evident from the face of the complaint." *Ricci*, 781 F.3d at 28.

2. Herrick argues that the district court erred in ruling that his claims for fraud, negligent misrepresentation, promissory estoppel, deceptive business practices, and false advertising fail to state a claim on the merits.

A. Fraud

"Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of

inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001) (citing *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996)).

The district court determined that there was no material misrepresentation by Grindr because the allegedly misleading statements identified in the Amended Complaint--Grindr's Terms of Service and its "community values page"--do not represent that Grindr will remove illicit content or take action against users who provide such content, and the Terms of Service specifically disclaim any obligation or responsibility to monitor user content. On appeal, Herrick contends that the district court erred by considering language from Grindr's Terms of Service that was not incorporated into the Amended Complaint and reaffirms his contention that the community values page "fraudulently conveys that Grindr has the capacity to help." Appellant's Br. at 41 (emphasis omitted).

Even if we were to assume that there were material misrepresentations in Grindr's Terms of Service and community values page and that Herrick reasonably relied upon them when he created a Grindr account in 2011, his claim would nevertheless fail for lack of causation. As the district court observed, Herrick deactivated his Grindr account in 2015 when he met his (now) ex-boyfriend, before any harassment began. Herrick therefore could have suffered the exact same harassment if he had never seen the Terms of Service or created a Grindr account; so his injury is not a "direct and proximate result of his

reliance on [the alleged] misrepresentations," *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 296 (2d Cir. 1986), and the district court therefore did not err in dismissing the fraud claim.

B. Negligent Misrepresentation

Herrick's negligent misrepresentation claim was dismissed on the same grounds as his fraud claim, and on the additional ground that the Amended Complaint fails to allege a "special relationship" sufficient to sustain a claimed negligent misrepresentation. *See Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 114 (2d Cir. 2012). Since (for reasons adduced above) the Amended Complaint fails to plausibly allege that Grindr's alleged misrepresentations are a proximate cause of Herrick's injury, the district court did not err in dismissing the negligent misrepresentation claim. *See Laub v. Faessel*, 297 A.D.2d 28, 30, 745 N.Y.S.2d 534 (1st Dep't 2002).

C. Promissory Estoppel

The district court determined that Herrick's promissory estoppel claim must be dismissed because it fails to allege a sufficiently unambiguous promise and fails to plausibly allege reasonable reliance. Herrick takes issue with these rulings, but even if we assume that the Amended Complaint plausibly alleges a promise and reasonable reliance, Herrick has failed to explain how his injury was "sustained . . . by reason of his reliance" on the alleged promise. *See Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787, 793 (2d Cir. 1986). His promissory estoppel claim (like the claims for

fraud and negligent misrepresentation) was appropriately dismissed for failure to plausibly allege causation.

D. Deceptive Business Practices and False Advertising

The district court determined that the claims for deceptive business practices and false advertising under New York General Business Law ("GBL") §§ 349 and 350 fail because the Amended Complaint does not plausibly allege that a reasonable consumer would be misled by Grindr's statements, and with respect to the false advertising claim, for the additional reason that it fails to allege reasonable reliance. On appeal, Herrick cites allegations regarding Grindr's "promotional statements made on its website and its [Terms of Service] assuring potential users it would moderate abusive content and act to prevent harassment of its users." Appellant's Br. at 47.

As the district court observed, Grindr's Terms of Service specify, *inter alia*, that "Grindr assumes no responsibility for actively monitoring User Content for inappropriate content," and that "Grindr does not endorse and has no control over the content of User Content submitted by other Users." App. 210 (internal quotation marks omitted). Those disclaimers were properly considered by the district court in its ruling on the motion to dismiss. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002) ("[T]he complaint is deemed to include . . . any statements or documents incorporated in it by reference," and "[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." (internal quotation marks omitted)). In

view of the disclaimers in the Terms of Service, Herrick has failed to plausibly allege that a reasonable consumer would be misled by Grindr's statements, and the district court therefore did not err in dismissing the claims under GBL §§ 349 and 350. *See Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000).

3. The district court denied leave to amend the complaint for a second time on the ground that Herrick failed to attach a proposed amended complaint to his request for leave. In view of the fatal deficiencies in Herrick's claims described above, we see no abuse of discretion in the district court's denial of leave to amend. *See Credit Chequers Info. Servs., Inc. v. CBA, Inc.*, 205 F.3d 1322 (2d Cir. 2000) (summary order) (denying motion to amend where "appellant has given no indication of what amendment is proposed that would state a valid claim for relief," and therefore "failed to meet its burden of setting forth with particularity the grounds for supporting its motion").

We have considered Herrick's remaining arguments and conclude they are without merit.[2] The judgment of the district court is therefore **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
CLERK

/s/_____

2. Because the complaint must be dismissed in its entirety on the grounds of CDA immunity and failure to state claims, we need not address Grindr Holding's and KL Grindr's personal jurisdiction arguments.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 25, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17-CV-932 (VEC)

MATTHEW HERRICK,

Plaintiff,

-against-

GRINDR, LLC; KL GRINDR HOLDINGS, INC.; AND GRINDR HOLDING COMPANY,

Defendants.

January 25, 2018, Decided
January 25, 2018, Filed

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge:

Grindr, LLC ("Grindr") is a web-based dating application ("app") for gay and bi-sexual men. Plaintiff Matthew Herrick ("Herrick") is a former Grindr user and the victim of a campaign of malicious catfishing:[1] since

1. A "catfish" is "a person who sets up a false personal profile on a social networking site for fraudulent or deceptive purposes."

October 2016, Herrick's former boyfriend has used Grindr to impersonate Herrick by posting fake profiles to Grindr, which describe Herrick as being interested in fetishistic sex, bondage, role playing, and rape fantasies and which encourage potential suitors to go to Herrick's home or workplace for sex. Allegedly hundreds of interested Grindr users have responded to the false profiles and many of them have physically sought out Herrick. This lawsuit is, however, against Grindr, not Herrick's former boyfriend. Herrick alleges 14 causes of action, the gist of which is that Grindr is a defectively designed and manufactured product because it lacks built-in safety features; that Grindr misled Herrick into believing it could interdict impersonating profiles or other unpermitted content; and that Grindr has wrongfully refused to search for and remove the impersonating profiles. Grindr and its two corporate parents, KL Grindr Holdings, Inc. ("KL Grindr") and Grindr Holding Company ("Grindr Holding" and together with Grindr and KL Grindr, the "Defendants"), have moved to dismiss on the grounds that Section 230 of the Communications Decency Act of 1996 (the "CDA"), 47 U.S.C. § 230, immunizes Grindr from liability for content created by other users. The Court agrees. The CDA bars Herrick's products liability claims and his claims that Grindr must do more to remove impersonating profiles. Each of these claims depends on holding Grindr responsible for the content created by one of its users. Herrick's misrepresentationrelated claims fail on their merits because Herrick has not alleged a misleading or false statement by Grindr or that Grindr's alleged misstatements are the cause of his injury.

Catfish, Merriam-Webster's Collegiate Dictionary (11th ed. 2018).

Appendix B

BACKGROUND

Herrick joined Grindr in approximately May 2011. Am. Compl. (Dkt. 34) ¶ 46. Grindr works by matching users based on their interests and location. Am. Compl. ¶¶ 22-24, 31. In order to set up a Grindr profile, a user must enter his email address, accept Grindr's terms of service, and create a profile, including a "display name, profile photo, and 'about me' section." Am. Compl. ¶ 32. Users can customize their profile by selecting from a list of drop-down menus, including, *inter alia*, their age, height, weight, body type, and preferred sexual position. Am. Compl. ¶ 32.

The app's user-interface presents each user with a scroll of thumbnails of compatible profiles. Am. Compl. ¶ 31. Matches are generated by Grindr's algorithmic sorting and filtering software and are based on sexual preferences — as captured by the user's profile — and location. Am. Compl. ¶¶ 31, 53. Grindr accesses a user's location by accessing the latitude and longitude of his mobile device. Am. Compl. ¶ 24. Once two users match, the app allows them to send direct messages. Am. Compl. ¶ 31. Users can also generate and share a map of their location, based on the geolocational data collected by the app. Am. Compl. ¶ 24.

Herrick "matched" with his former boyfriend in June 2015 and deactivated his Grindr account after the relationship became exclusive in November 2015. Am. Compl. ¶ 48. At some unspecified time, the two parted ways, apparently on bad terms. Beginning in October

2016, Herrick's former boyfriend began impersonating Herrick on Grindr. Am. Compl. ¶ 49. The impersonating profiles suggest that Herrick is interested in "serious kink and many fantasy scenes," hardcore and unprotected group sex, and "hosting" — that is looking for partners to meet him at his location. Am. Compl. ¶ 50. Herrick alleges that "approximately 1100" users responded to the impersonating profiles from October 2016 through the end of March 2017. Am. Compl. ¶ 49; *see also* Am. Compl. ¶¶ 54-62 (describing interactions with numerous men responding to the impersonating profiles at Herrick's home and work). Grindr's direct messaging feature was used to facilitate the scheme. Users were transmitted maps of Herrick's location, Am. Compl. ¶ 52, and some of the men were told to expect that Herrick would resist their approach, which they were told was part of a rape-fantasy or role play, Am. Compl. ¶ 62. Herrick also alleges that Grindr's geolocation functionality directed some of these users to his home and work (even though the app is no longer installed on his phone).[2] Am. Compl. ¶ 52. Herrick and others have reported the impersonating accounts to Grindr approximately 100 times, but Grindr has not responded, other than to send an automated, form response. Am. Compl. ¶ 71.

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2. This allegation contradicts Herrick's explanation of the scheme at oral argument in respect of his motion for a temporary restraining order. At that hearing, counsel agreed that Grindr does not have Herrick's location, because the app is not installed on his phone, and that users responding to the fake profiles learn of Herrick's location through direct messages from Herrick's former boyfriend (masquerading as Herrick). *See* Declaration of Jacquelyn Schell ("Schell Declr") (Dkt. 43) Ex. B ("TRO Hr'g Tr.") at 8:1-5.

Appendix B

The Amended Complaint alleges that the design of the Grindr app has enabled this campaign of harassment. More specifically, Herrick alleges that Grindr does not incorporate certain safety features that could prevent impersonating profiles.[3] Herrick alleges that Grindr does not use "proven and common image recognition or duplicate-detection software," which could be used to search for profiles using Herrick's picture. Am. Compl. ¶ 79; *see also* Am. Compl. ¶ 84 (Grindr does not use "PhotoDNA technology" to identify unauthorized photographs). Grindr does not run keyword searches on direct messages sent through the app. Am. Compl. ¶¶ 80, 83. Grindr does not have the ability to search for IP addresses, MAC addresses, and ICC numbers or block the use of spoofing, proxies, and virtual private networks (VPNs), all of which might prevent new impersonating accounts. Am. Compl. ¶ 82. And Grindr could use a technique called "geofencing" to determine when an impersonating account is associated either with Herrick's address or the address of his former boyfriend. Am. Compl. ¶ 85.[4]

According to Herrick, Grindr is on notice of the potential for the app to be misused and nonetheless failed to warn users (including Herrick) of this risk:

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3. According to the Amended Complaint, similar apps are able to remove offensive content within 24 hours and can more effectively block users from creating new accounts. Am. Compl. ¶ 45.

4. According to the Amended Complaint, Grindr has told Herrick that it can block profiles or Grindr users only if Herrick reports them individually. Am. Compl. ¶ 87.

"Grindr neither warned users of this location exposure vulnerability, nor that Grindr could be used to direct scores of potentially dangerous individuals to their workplace and home." Am. Compl. ¶ 38. Herrick alleges, instead, that Grindr's advertising and terms of service led him to believe that Grindr had effective controls in place to prevent harassment. "At all relevant times, Grindr represented to users in its advertising and community values page that it protects users from 'behaviors that endanger them.'" Am. Compl. ¶ 40; *see also* Am. Compl. ¶ 41 (Grindr's website states that "[i]n order for everyone to have the best time possible, we have a system of digital and human screening tools to protect our users from actions and behaviors that endanger them and go against what we're about."). Grindr's terms of service (the "Terms of Service") also require users to agree that they will not engage in a list of prohibited behaviors, including: using Grindr to "'stalk,' harass[,] abuse, defame, threaten or defraud other Users"; "impersonat[ing] any person or entity"; or posting "material which a reasonable person could deem to be objectionable . . ., offensive, obscene, indecent, pornographic, harassing, threatening, . . ., intentionally misleading, false, or otherwise inappropriate." Am. Compl. ¶ 42. The Terms of Service warn that Grindr may delete submissions, ban accounts, or terminate access to the app for violations of these policies. Am. Compl. ¶ 42.

Herrick filed suit in state court on January 27, 2017. Not. of Removal (Dkt. 1) ¶ 3. The original complaint included causes of action for negligence, deceptive business practices and false advertising, intentional and

negligent infliction of emotional distress, failure to warn, and negligent misrepresentation. *See generally* Not. of Removal Ex. A. Although the state court entered an *ex parte* temporary restraining order against Grindr on January 27, 2017, Am. Compl. ¶ 75, Grindr removed the case to this Court on February 8, 2017. *See* Not. of Removal.

The Court denied Herrick's motion for an extension of the state court's temporary restraining order on February 22, 2017. *Herrick v. Grindr, LLC*, No. 17-CV-932 (VEC), 2017 U.S. Dist. LEXIS 26651, 2017 WL 744605 (S.D.N.Y. Feb. 24, 2017) ("*TRO Op.*"). The Court concluded that each of the claims in the original complaint was either barred by Section 230 of the Communications Decency Act or failed on its merits. To the extent Grindr has a role in creating the impersonating profiles, the Court found that it is through "neutral assistance" — functions which are available to all users and not tortious in their own right — rather than in creating the content that has caused Herrick's injury. 2017 U.S. Dist. LEXIS 26651, [WL] at *4. Because Herrick's claims are premised on Grindr's failure to monitor and remove content it did not create, the Court found that Herrick's claims were likely to be barred by the CDA. *Id.* Moreover, the Court concluded that Herrick's claims for deceptive practices, false advertising, and misrepresentation were unlikely to succeed because the causal nexus between Grindr's representations to Herrick in 2011 and the harassment Herrick suffered in 2016 and 2017 is too attenuated to state a claim. 2017 U.S. Dist. LEXIS 26651, [WL] at *5.

Appendix B

Herrick filed an amended complaint on March 31, 2017, doubling down on his theory that Grindr is responsible for the impersonating profiles. The Amended Complaint alleges that Grindr is responsible for the impersonating profiles because it designed an app that is easily manipulated and misused and because it has not taken adequate steps to stop the impersonating profiles. In addition to the claims raised in the original complaint, the Amended Complaint alleges causes of action for products liability (causes of action I, II, and III), and negligent design (cause of action IV). Herrick has also expanded on his theory that Grindr's advertising and terms of service are misleading, pleading new claims for promissory estoppel and fraud (causes of action VIII and IX). Finally, Herrick has added a claim for copyright infringement, based on the use of his photograph in many of the impersonating profiles (cause of action VII).

Defendants have moved to dismiss. Grindr argues that all of Herrick's claims (with the exception of his copyright claim) are barred by the CDA because Herrick's former boyfriend created the impersonating profiles; not Grindr. Grindr argues that the CDA also bars any claim based on its failure to more effectively search for and to remove the impersonating profiles, or to block the former boyfriend from creating new ones, because these claims treat Grindr as responsible for the false content itself. Herrick's misrepresentation-based claims fail, according to Grindr, because he has not identified any statement by Grindr in which it committed to remove impersonating content, and because Grindr's statements in 2011 are too attenuated from Herrick's injury in 2016 and 2017. KL

Grindr and Grindr Holdings have joined in the motion to dismiss and also move to dismiss on personal jurisdiction grounds because the Amended Complaint does not allege any suit-related contacts with this forum by either entity. *See* Dkts. 47, 49, and 50.

DISCUSSION

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In reviewing a Rule 12(b)(6) motion to dismiss, courts "accept[] all factual allegations as true and draw[] all reasonable inferences in favor of the plaintiff." *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013) (quoting *Litwin v. Blackstone Grp., LP*, 634 F.3d 706, 715 (2d Cir. 2011)). Nonetheless, in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 544). "Plausibility" is not certainty. *Iqbal* does not require the complaint to allege "facts which can have no conceivable other explanation, no matter how improbable that explanation may be." *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 360 (2d Cir. 2013). But "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and "[courts] 'are not bound to accept as true a legal

conclusion couched as a factual allegation,'" *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014) (quoting *Twombly*, 550 U.S. at 555) (other internal quotations marks and citations omitted).[5]

1. Products Liability and Negligent Design and Failure to Warn

Grindr argues that Section 230 of the CDA bars Herrick's products liability and negligent design and failure to warn claims. Herrick alleges in these claims that Grindr's "server-side software," Am. Compl. ¶ 112,

5. Because each of Herrick's claims fails for the reasons given below, the Court does not address personal jurisdiction over KL Grindr and Grindr Holdings. *See Sullivan v. Barclays PLC*, No. 13-CV-2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *11 (S.D.N.Y. Feb. 21, 2017) ("In cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, we may address first the facial challenge to the underlying cause of action and, if we dismiss the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants." (quoting *Chevron Corp. v. Naranjo*, 667 F.3d 232, 247 n.17 (2d Cir. 2012))). The Court notes, however, that the Amended Complaint contains no factual allegations whatsoever against either KL Grindr or Grindr Holdings and Herrick appears to acknowledge that he has engaged in group pleading. *See* Opp'n (Dkt. 54) at 49 (The amended complaint "clearly identifies the defined term 'Defendant' as collectively owning, maintaining, and controlling the weaponized product. It is apparent from the assertion that all three entities are responsible for the ownership, maintenance and control of the product that Plaintiff's allegations apply fully to each Defendant.").

is defectively and negligently designed and manufactured because it does not incorporate "widely used, proven and common software to flag and detect abusive accounts," which "resulted in Grindr selecting and directing an incessant stream [of] men demanding sex from [Herrick]," Am. Compl. ¶ 109. Herrick's failure to warn claim — also pleaded as products liability and negligence — is based on Grindr's failure to warn that the app can be used as a tool for harassment and that Grindr has limited ability to stop abuse. Am. Compl. ¶¶ 117, 129. The Court agrees with Grindr. To the extent Herrick 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.

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." 47 U.S.C. § 230(c)(1). There are three elements to a claim of immunity under Section 230(c). The defendant must show that: "(1) [it] 'is a provider . . . 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.'" *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)) (additional citations omitted). The term "publisher" is borrowed from defamation law (though Section 230 does not apply to defamation claims exclusively). *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

Although Herrick contends that Grindr is not an "interactive computer service" (or an "ICS"), the Court finds that there is no plausible basis to argue that it is not. An "interactive computer service" is defined as "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). Courts applying this definition have had no trouble concluding that social networking sites like Facebook.com, and online matching services like Roommates.com and Matchmaker.com, are "interactive computer services." *See Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156-57 (E.D.N.Y. 2017); *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Like those services, Grindr provides its subscribers with access to a common server. *See Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 323 (D.N.J. 2015) (Grindr is an ICS because "its website gives subscribers access to a common server for purposes of social networking."). Herrick has not identified any legally significant distinction between a social networking platform accessed through a website, such as Facebook, and a social-networking platform accessed through a smart phone app, such as Grindr. In either case, the platform connects users to a central server and to each other.[6]

6. Herrick's allegation that it is Grindr's "server-side" software that is defective is in tension with his argument that Grindr is not an ICS. Moreover, Herrick's counsel conceded that Grindr is an ICS at oral argument on Herrick's motion to renew the TRO. *See* TRO Hr'g Tr. at 25:14-18.

Appendix B

The second element of immunity under Section 230(c) is satisfied because Herrick's design and manufacturing defect, negligent design, and failure to warn claims are all based on content provided by another user — Herrick's former boyfriend. An ICS is not the creator of offensive content unless it contributes to the "development of what [makes] the content unlawful." *LeadClick Media, LLC*, 838 F.3d at 174 (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009)). An ICS may not be held liable for so-called "neutral assistance," *id.* at 176, or tools and functionality that are available equally to bad actors and the app's intended users, *Roommates.Com, LLC*, 521 F.3d at 1169. To the extent Grindr contributes to the impersonating profiles, it is through such "neutral assistance." Categorization features, such as Grindr's drop-down menu for "preferred sexual position," constitute quintessential "neutral assistance." *See Carafano*, 339 F.3d at 1124 ("[T]he fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a "developer" of the "underlying misinformation."); *Roommates.com*, 521 F.3d at 1169 ("A dating website that requires users to enter their sex, race, religion and marital status through drop-down menus, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality."). These features are available equally to all users and are not intrinsically offensive or unlawful. Grindr's algorithmic filtering, aggregation, and display functions are similar. *See Dyroff v. Ultimate Software Grp., Inc.*, No. 17-CV-5359-LB, 2017 U.S. Dist. LEXIS 194524, 2017 WL

5665670, at *10 (N.D. Cal. Nov. 26, 2017) (explaining that it is "the users' voluntary inputs that create the content . . . not [defendant's] proprietary algorithms," and relying on *Carafano* and *Roommates.com*); *Roommates.com, LLC*, 521 F.3d at 1169, 1172 (explaining that allowing users to sort dating profiles based on user inputs does not constitute content "development" for purposes of the CDA); *see also O'Kroley v. Fastcase Inc.*, No. 3-13-0780, 2014 U.S. Dist. LEXIS 86343, 2014 WL 2881526, at *1-2 (M.D. Tenn. June 25, 2014) (finding that providing search returns based on automated algorithms and user inputs does not constitute creating content). They apply equally to legitimate and improper inputs, and they constitute "neutral assistance."

Relying on *Roommates.com*, Herrick argues that Grindr contributes to what makes the impersonating profiles offensive. *See* Opp'n at 20-21. The Court has previously rejected this argument. *See TRO Op.*, 2017 U.S. Dist. LEXIS 26651, 2017 WL 744605, at *4. In *Roommates.com*, the Ninth Circuit concluded that a website connecting potential roommates was potentially liable for violations of the Fair Housing Act. 521 F.3d at 1166-67. The website in question required users to respond to questions regarding protected personal characteristics and then used the answers to those improper questions to determine which users learned about what available housing. "[T]he act of hiding certain listings [was] itself unlawful under the Fair Housing Act," *id.* at 1169, as were the underlying questions themselves, *id.* at 1164-65; *see also id.* at 1167 ("Roommate's search engine . . . differs materially from generic search engines such as Google, Yahoo! and MSN Live Search, in that Roommate designed

its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process."). There is nothing similarly illegal about Grindr's drop-down menus, its geolocational function, or its sorting, aggregation, and display functions. *See Saponaro*, 93 F. Supp. 3d at 324 (rejecting analogy between Grindr and the offensive questions and filtering at issue in *Roommates.com*); *see also Dyroff*, 2017 U.S. Dist. LEXIS 194524, 2017 WL 5665670 at *11 (explaining that algorithmic sorting and filtering tools are "neutral assistance" and rejecting an analogy to the "substantial and affirmative conduct . . . promoting the use of such tools for unlawful purposes" in *Roommates.com* (quoting *Roommates.com*, 521 F.3d at 1174 n.37)).

The third element of immunity under Section 230(c) is satisfied because the Amended Complaint seeks to hold Grindr liable as the "publisher" or "speaker" of the impersonating profiles. "Publication" describes the choice by an author to include information, the communication or transmission of information, and the failure to remove information communicated by another party. As the Ninth Circuit has explained, it includes "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). Courts have interpreted "publication" capaciously to reach claims that, although pleaded to avoid the CDA, "implicitly require recourse to that content [posted by a third party] to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party [content]." *Cohen*, 252 F. Supp. 3d at 156. "To put it another way, courts 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.'" *Id.* (quoting *Leadclick Media, LLC*, 838 F.3d at 175) (additional citations omitted); *see also Roommates.com, LLC*, 521 F.3d at 1170-71 (explaining that "publishing" includes "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online"); *see also Backpage.com, LLC*, 817 F.3d at 19-20 (explaining that plaintiffs' claims were unlikely to succeed because "there would be no harm to [the plaintiffs] but for the content of the postings").

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 content. The Fifth Circuit rejected a similar theory in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). In *Doe*, a minor was sexually assaulted by an adult she met through the MySpace platform. The child's guardians sued, alleging that MySpace had inadequate features in place to prevent communications between children and adults. 528 F.3d at 416. The Fifth Circuit rejected Doe's theory. It explained that a claim based on MySpace's failure to implement additional safety features was "merely another way of claiming that MySpace was liable for publishing the communications" themselves. *Id.* at 420; *see also Gibson v. Craigslist, Inc.*, No. 08-CV-7735 (RMB), 2009 U.S. Dist. LEXIS 53246, 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009) (rejecting claim that the defendant failed to "monitor, police, maintain and properly supervise the goods and services sold on its . . . website," partially relying on *MySpace, Inc.*). As in *Doe*, Herrick's claims depend on a connection between the safety features

Grindr allegedly is missing and Grindr's failure to remove the impersonating profiles. The existence *vel non* of safety features is meaningless in a vacuum, and their existence is only relevant to Herrick's injury to the extent that such features would make it more difficult for his former boyfriend to post impersonating profiles or make it easier for Grindr to remove them.

That Herrick has based his claim on the design of Grindr's "server-side software" does not change the result. To the contrary, it brings his theory closer to the facts in *Backpage.com*. In *Backpage.com*, victims of sex trafficking alleged that the "structure and operation" of the Backpage.com website facilitated use of the site as a bazaar for illegal sex services. 817 F.3d at 21. Among other things, Backpage.com did not verify phone numbers or limit posts after use of forbidden terms, and the website permitted "e-mail anonymiziation, forwarding and auto-reply" — all features that made it particularly well-suited to illicit use. *Id.* The First Circuit explained that these features, and the lack of safety features, reflected "choices about what content can appear on the website and in what form" and therefore were the sort of "editorial choices that fall within the purview of traditional publisher functions." *Id.; see also Universal Comm'cn Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) ("[Plaintiff] is ultimately alleging that the construct and operation of [Defendant's] web sites contributed to the proliferation of misinformation; [Defendant's] decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting."). The Court finds the First Circuit's

reasoning persuasive and applicable to Herrick's design and manufacturing defect and negligent design claims. Like the claims in *Backpage.com*, Herrick's claims are based on features or missing safety features, such as Grindr's geolocational tools and Grindr's inability to block profiles based on ICC numbers and MAC address or to search for profiles by photograph. As in *Backpage.com*, these features (or the lack of additional capabilities) are only relevant to Herrick's injury because they bear on Grindr's ability to search for and remove content posted to the app — exactly the sort of "editorial choices" that are a function of being a publisher.

Herrick's failure to warn claims (causes of action III and V) also require treating Grindr as the "publisher" of the impersonating profiles.[7] A duty to warn claim "implicitly require[s]" recourse to the impersonating profiles themselves and the traditional function of a publisher to supervise content. *See Cohen*, 252 F. Supp. 3d at 156. The warning proposed by Herrick is only necessary because Grindr (as publisher) does not police or remove objectionable content. Although it is indirect, liability under such a theory nevertheless depends on Grindr's decision to publish the impersonating profiles without reviewing them first. Alternatively, the Court is persuaded that requiring Grindr to post a warning at the outset or along with each profile is no different than

7. Although Plaintiff asserts two claims, New York law does not distinguish between negligent failure to warn and failure to warn under a products liability theory. There is only one cause of action for failure to warn. *See In re N.Y. City Asbestos Litig.*, 27 N.Y.3d 765, 787, 37 N.Y.S.3d 723, 59 N.E.3d 458 (2016).

requiring Grindr to edit the third-party content itself. *See McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 538-39 (D. Md. 2016) (rejecting on CDA grounds an "independent duty to speak alongside content posted by third parties"). The fact that the proposed warning would potentially operate at a general level, rather than be appended to specific posts, is not significant. The CDA applies at both the individual and systemic or architectural level. *See Lycos, Inc.*, 478 F.3d at 422.

Herrick argues that there is an exception to Section 230(c) — or at least "heightened accountability"—when an ICS is on notice that its service is being used to commit a crime or sexual violence. Opp'n at 21. Herrick's argument relies entirely upon *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), and therefore a description of the facts of that case is in order. The ICS in *Internet Brands* provided a networking website for models and aspiring models. *Id.* at 848. After viewing Doe's profile on the website, two individuals contacted her, ostensibly for a modeling shoot. *Id.* at 849. The modeling shoot was fake, and the two men raped Doe and recorded the act for sale as pornography. *Id.* at 849. Doe sued the networking website. She alleged that it knew that the two men had previously used the site to scout for victims but failed to warn users of the risk. *Id.* at 849. The Ninth Circuit held that the CDA did not provide immunity against plaintiff's negligent failure to warn claim. In reaching that conclusion, the Court noted that the two men did not post any content to the website, the defendant did not learn of the scheme through its oversight of the website, and the defendant's monitoring of postings on its site was not at issue. *Id.* at 851.

Internet Brands is best read as holding that the CDA does not immunize an ICS from a failure to warn claim when the alleged duty to warn arises from something other than usergenerated content. The bad actors in *Internet Brands* did not post any content to the website, and they contacted Doe offline. To the extent any web content was involved, it was Doe's own profile, which she did not allege to be tortious. *Id.* at 851; *see also id.* at 852 ("[T]here [was] [] no allegation that [the defendant] transmitted any potentially harmful messages between [] Doe and the [two men]."). Finally, knowledge of the misuse of the site arose not from any content on the site but from an outside source. *Id.* at 849.

By contrast, the proposed warning in this case would be about user-generated content itself — the impersonating profiles or the risk that Grindr could be used to post impersonating or false profiles. Unlike in *Internet Brands*, Herrick's failure-to-warn claim depends on a close connection between the proposed warning and user-generated content. Additionally, Herrick's proposed warning is about Grindr's publishing functions. He proposes that Grindr should warn users that the app can be used to impersonate or harass individuals, that the "features on the interface to report abusive accounts are merely decorative" and that Grindr "shun[s] the basic technology widely used in their industry to prevent or stop known abuse."[8] Am. Compl. ¶ 117. Because Herrick's

8. As the Court has explained, *supra*, a warning about third-party content is a form of editing, just as much as a disclaimer printed at the top of a page of classified ads in a newspaper would be. To the extent *Internet Brands* can be read to hold that,

proposed warning is about user-generated content and goes to Grindr's publishing functions, *Internet Brands* does not apply.[9]

2. Negligence, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress

The CDA also bars Herrick's claims for negligence (cause of action VI),[10] intentional infliction of emotional

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notwithstanding the CDA, an ICS could be required to publish a warning about the potential for misuse of content posted to its site, this Court respectfully disagrees.

9. The Court does not address Grindr's argument that it is not a "product" for purposes of products liability. It appears to be common ground between the parties that strict products liability may apply to standardized and mass-downloaded software but does not apply to information or "expressive" content. *See* Opp'n at 14; Reply Br. (Dkt. 58) at 8 (assuming that standardized software is a product); *see also Simulados Software, Ltd. v. Photon Infotech Private Ltd.*, 40 F. Supp. 3d 1191, 1200-01 (N.D. Cal. 2014); *Rottner v. AVG Tech. USA, Inc.*, 943 F. Supp. 2d 222, 230 (D. Mass. 2013); *cf. Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 324-25 (S.D.N.Y. 2006) (applying the same distinction to the "intangible" information contained in a book and the book's "tangible" form). As the Court has explained, Herrick's real complaint is with the impersonating profiles, which are expressive content that was not created by Grindr. To the extent Herrick takes issue with Grindr's software architecture and features, the CDA applies and the Court need not address whether those aspects of the software are "products" for purposes of strict products liability.

10. This negligence claim is distinct from Herrick's negligence claims for defective design and failure to warn.

distress ("IIED") (cause of action XII), and negligent infliction of emotional distress ("NIED") (cause of action XIII). These claims are based on Grindr's role in matching users, through its filtering and aggregation algorithm, and its allegedly inadequate response to Herrick's complaints. *See* Am. Compl. ¶¶ 136, 138 ("Grindr negligently failed to investigate and respond to [Herrick's] reports of abuse, impersonation, and stalking."), 189 (Grindr improperly "handled" Herrick's "pleas for it to control its product and disable the accounts used to destroy his life"), 192 (Grindr "directly caused" Herrick's injury by "select[ing] and direct[ing] hundreds and hundreds of visitors to Plaintiff."), 198 (Grindr ignored "numerous complaints and requests for [it] to control its product and disable the [impersonating] accounts being used to destroy [Herrick's] life."). To the extent these claims are premised on Grindr's "neutral assistance" and software architecture, they fail for the reasons already given. *See supra* at 9-10, 13; *Backpage.com*, 817 F.3d at 21. To the extent these claims are based on Grindr's alleged obligation to police and remove content, they are also barred by the CDA. As the Court has explained previously, allegations premised on an ICS's failure to "block, screen, or otherwise prevent the dissemination of a third party's content," seek to hold the defendant liable in its capacity as a "publisher." *TRO Op.*, 2017 U.S. Dist. LEXIS 26651, 2017 WL 744605, at *4 (quoting *Gibson*, 2009 U.S. Dist. LEXIS 53246, 2009 WL 1704355, at *4); *Barnes*, 570 F.3d at 1102. There is no basis to treat Grindr differently simply because it operates a smart phone app rather than a website. *See Saponaro*, 93 F. Supp. 3d at 323) (rejecting claims based on Grindr's failure to search for and remove underage users).

Even if the CDA did not bar these claims, Herrick has not alleged plausibly the necessary elements of intentional infliction of emotional distress. New York follows the Restatement (Second) of Torts's approach to intentional infliction of emotional distress.[11] *See Coraggio v. Time Inc. Magazine Co.*, No. 94-CV-5429 (MBM), 1995 U.S. Dist. LEXIS 5399, 1995 WL 242047, at *6 (S.D.N.Y. April 26, 1995). In order to state a claim, a plaintiff must allege "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another." *Fischer v. Maloney*, 43 N.Y.2d 553, 557, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978) (quoting Restatement (Second) of Torts § 46 (Am. Law Inst. 1965)). "The element of outrageous conduct has been described as 'rigorous, and

11. The Terms of Service include a choice of law provision selecting for California law. *See* Schell Declr. Ex. A § 21.2. That provision applies to "Covered Dispute Matters," which is defined to include "any dispute that has arisen or may arise between us relating in any way to Your use of or access to [Grindr], . . . , or otherwise relating to Grindr in any way." Schell Declr. Ex. A. § 21.1. Nonetheless, both parties cite and apply New York law and the Court will do the same. *See Star Ins. Co. v. A&J Constr. of N.Y., Inc.*, No. 15-CV-8789 (CS), 2017 U.S. Dist. LEXIS 211081, 2017 WL 6568061, at *4 (S.D.N.Y. Dec. 22, 2017) ("[E]ven when the parties include a choice-of-law clause in their contract, their conduct during litigation may indicate assent to the application of another state's law." (quoting *Cargill, Inc. v. Charles Kowsky Res., Inc.*, 949 F.2d 51, 55 (2d Cir. 1991))). The Court notes, however, that the elements of certain of Herrick's causes of action differ meaningfully under California law, and it is at least curious that neither party saw fit to raise this issue. The Terms of Service also include an arbitration provision that is potentially applicable to Herrick's claims. *See* Schell Declr. Ex. A § 21.3.

difficult to satisfy,'" *Taggart v. Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 388, 394 (2d Dep't 2015) (quoting W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 12 at 61 (5th ed. 1984)), and Herrick has not met this high bar. While the creation of the impersonating profiles may be sufficiently extreme and outrageous, Grindr did not create the profiles. *See supra* at 9-11. "Ordinarily, the failure to respond appropriately to complaints of harassment, on its own, will not be sufficiently egregious — 'outrageous' — to amount to intentional infliction of emotional distress under New York law." *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 161 (2d Cir. 2014); *see also Taggart*, 14 N.Y.S.3d at 394 (landlord's failure to prevent a tenant from burglarizing other tenants is not sufficiently extreme and outrageous). For example, in *Turley*, the defendant, in addition to ignoring ongoing harassment, actively impeded investigations into the harassment and appeared to encourage it further. 774 F.3d at 161. Grindr's role in the impersonating profiles is not equivalent. Grindr's involvement is limited to "neutral assistance" — which it provides to all users — and its failure to affirmatively intervene and stop the impersonating profiles. Additionally, Grindr's conduct was not lacking in any reasonable justification. *See Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir. 1985) ("The conduct must also be intentionally directed at the plaintiff and lack any reasonable justification."). Even assuming Section 230 did not apply, Grindr had a good faith and reasonable basis to believe (correctly, it turns out) that it was under no obligation to search for and remove the impersonating profiles. The Court finds that Herrick has not plausibly alleged sufficiently outrageous and extreme

behavior by Grindr to constitute intentional infliction of emotional distress.[12]

3. Fraud, Negligent Misrepresentation, Promissory Estoppel, and Deceptive Practices

Next are Herrick's misrepresentation claims. Although Herrick alleges separate claims for promissory estoppel, fraud, negligent misrepresentation, deceptive practices, and false advertising, these claims share a common theory that Grindr misled Herrick (as a user) into believing it had a system in place to monitor for impermissible content and the tools to remove such content. Grindr moves to dismiss on the grounds that the CDA bars these claims and that Herrick has not alleged the essential elements of any of these causes of action. The Court need not decide whether the CDA applies to claims based on Grindr's own statements because each of these claims is inadequately pleaded.[13]

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12. "Extreme and outrageous" conduct is not a necessary element of a claim for negligent infliction of emotional distress. *See Abdel-Karim v. EgyptAir Airlines*, 116 F. Supp. 3d 389, 411 (S.D.N.Y. 2015). Rather, negligent infliction of emotional distress requires a showing of a duty owed to the plaintiff, negligence resulting directly in emotional harm, and a showing the claim possesses "some guarantee of genuineness." *Id.* (quoting *Taggart*, 14 N.Y.S.3d at 396). The duty owed must be specific to the plaintiff. *Id.* The Court need not address whether these elements are satisfied because the duty Herrick seeks to impose is barred by the CDA. *See supra* at 16-17.

13. The parties do not address application of the CDA to these causes of action specifically. In *Barnes*, the Ninth Circuit

Appendix B

Fraud

Fraud has five elements. A plaintiff must allege: "(1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001). Unlike Herrick's other causes of action, fraud claims must be pleaded with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. To plead the circumstances constituting fraud with particularity, the complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)).

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concluded that Section 230(c) did not bar a promissory estoppel claim based on the defendant's own statements. *See Barnes*, 570 F.3d at 1108-09. To the extent liability is premised on Grindr's own statements, Herrick's misrepresentation claims are directed at Grindr's own content, at least in part. Additionally, these claims do not clearly implicate Grindr's actions as a publisher of user-generated content. The duty allegedly violated is the duty to speak candidly to one's customers — not to edit and remove content. On the other hand, the statements at issue describe Grindr's conduct and policies as a publisher and the ultimate injury in this case remains associated with user-generated content. The statements are false, according to Herrick, because Grindr does not police and remove content. The Court need not resolve this issue because the claims fail on their merits.

Appendix B

The Amended Complaint identifies two sets of potentially misleading statements. "At all relevant times," Grindr's community values page has stated that it has a "system of digital and human screening tools to protect our users from actions and behaviors that endanger them and go against what we're about." Am. Compl. ¶¶ 40, 41. The Amended Complaint also quotes from the Terms of Service, which warn users that their content may be deleted and their accounts may be disabled if they violate Grindr's guidelines or the Terms of Service. Am. Compl. ¶ 42. The Court understands Herrick's theory to be that these statements are false because they are implicit representations that Grindr "will take a hard line against anyone who uses Grindr's products in abusive ways," when, in fact, Grindr makes "little to no effort to screen and monitor the activities of its members or to ban abusive accounts." Am. Compl. ¶¶ 43-44; *see also* Opp'n at 31 (the Terms of Service "work to provide users with . . . material representations that Grindr is safe. . . . In fact, Grindr, . . . , has no way of enforcing these provisions . . . .").

The Terms of Service and community values page do not say what Herrick alleges they say. The community values page represents that Grindr has tools to protect users from dangerous "actions and behaviors." It does not represent or imply that Grindr will take a "hard line" against users who post illicit content. The Terms of Service are similar. They reserve Grindr's right to remove illicit content, but they do not represent that Grindr will do so. Put differently, Grindr does not warrant that it *will* remove illicit content; instead, it merely represents that it *may* do so. *See* Am. Compl. ¶ 42; *cf. Caraccioli v. Facebook,*

Inc., 167 F. Supp. 3d 1056, 1064 (N.D. Cal. 2016) (rejecting a similar argument that Facebook's terms of service amount to a representation that it will monitor third party content and explaining that the relevant terms of service are intended to impose an obligation on the user, not Facebook). The other provisions of the Terms of Service identified in the Amended Complaint are agreements by users (not Grindr) to refrain from posting impermissible content. Almost all of these statements begins with the prefatory clause "You will NOT." Am. Compl. ¶ 42; *see e.g. id.* ("You will NOT impersonate any person or entity . . . ."). Other provisions of the Terms of Service are also directly at odds with Herrick's theory. Section 10.4, for example, states that "Grindr has the right, but does not have any obligation, to monitor [user] content for any purpose." Terms of Service § 10.4. Section 12.4 provides that "Grindr assumes no responsibility for actively monitoring User Content for inappropriate content." Terms of Service § 12.4; *see also id.* ("Grindr does not endorse and has no control over the content of User Content submitted by other Users."). Given those disclaimers, it is not plausible that a reasonable person could conclude from the Terms of Service and community values page that Grindr has made any representation regarding its commitment to remove improper content.

For similar reasons, the Court finds that Herrick has not plausibly alleged reasonable reliance on Grindr's alleged misstatements. Reliance is unreasonable as a matter of law where the alleged inference or misrepresentation is contradicted directly by another statement by the defendant. *See Dovitz v. Rare Medium*

Grp., Inc., No. 01-CV-10196 (LLS), 2003 U.S. Dist. LEXIS 3469, 2003 WL 1057426, at *3 (S.D.N.Y. Mar. 10, 2003) (citing *Bonacci v. Lone Star Int'l Energy, Inc.*, No. 98-CV-0634 (HB), 1999 U.S. Dist. LEXIS 1564, 1999 WL 76942, at *2 (S.D.N.Y. Feb. 16, 1999)). A closely related principle is that reliance on an inference drawn from one document is unreasonable when it contradicts a more specific representation in another document. *See Sable v. Southmark/Envicon Capital Corp.*, 819 F. Supp. 324, 334 (S.D.N.Y. 1993). Sections 10.4 and 12.4 of the Terms of Service state explicitly that Grindr is not committing to monitor or remove content posted by users. *See* Terms of Service §§ 10.4 ("Grindr has the right, but does not have any obligation, to monitor [user] content for any purpose."), 12.4 ("Grindr assumes no responsibility for actively monitoring User Content for inappropriate content. . . . Grindr does not endorse and has no control over the content of User Content submitted by other Users."). In light of these clear warnings, it was unreasonable for Herrick to rely on the Terms of Service to conclude that Grindr would take a "hard line" against illicit content. *See* Am. Compl. ¶¶ 43-44. This is particularly true because the disclaimers are far more specific than the statements in the Terms of Service upon which Herrick relies, and they address specifically Grindr's disavowal of any responsibility to monitor and block content. Terms of Service §§ 10.4, 12.4. The community values page is also too general to be reasonably relied upon. *See Ashland Inc. v. Morgan Stanley & Co., Inc.*, 700 F. Supp. 2d 453, 471 (S.D.N.Y. 2010) (reliance on vague and indefinite assurances is unreasonable). The community values page does not specify what it means to have a "system of digital

and human screening tools in place," or what "actions and behaviors" the system protects against. It simply cannot be read to represent that Grindr's tools are effective at blocking "improper" content.

The Amended Complaint also fails to allege that Herrick's injuries were proximately caused by Grindr's alleged misstatements. A misstatement is a proximate cause of an injury if the "injury 'is the natural and probable consequence of the [] misrepresentation or . . . the defrauder ought reasonably to have foreseen that the injury was a probable consequence of his fraud.'" *King Cty., Wash. v. IKB Deutsche Industriebank AG*, 916 F. Supp. 2d 442, 447 (S.D.N.Y. 2013) (quoting *Suez Equity Inv'r, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 104-05 (2d Cir. 2001)) (additional citations omitted). "Many considerations enter into the proximate cause inquiry including the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Glidepath Holding B.V. v. Spherion Corp.*, 590 F. Supp. 2d 435, 457-58 (S.D.N.Y. 2007) (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994)) (additional citations omitted and internal quotation marks).

Herrick's injury has only an attenuated connection to his use of the Grindr app and agreement to the Terms of Service. According to Herrick he joined Grindr in 2011 in reliance on the Terms of Service and community values page; some four years later, in 2015, he met his former boyfriend and de-activated his Grindr account; one year later, in 2016, and after they broke up, his

former boyfriend began using Grindr to terrorize him. Am. Compl. ¶¶ 48-49. Thus, although Herrick alleges that Grindr's misstatements caused him to join Grindr, he has not been a Grindr user at any point since 2015, including during the events giving rise to this lawsuit. As the facts of this case illustrate, one does not need to be a Grindr user to be impersonated on Grindr; what happened to Herrick could, unfortunately, have happened to him even if he never saw the Terms of Service and never used Grindr. At best (for Herrick), his decision to join Grindr in 2011 in reliance on the Terms of Service is a "but-for" cause of his injuries — had he not joined Grindr, Herrick would never have met his former boyfriend — but the Terms of Service and community values page have no other connection to the harassment directed at Herrick in 2016 and 2017.

Herrick has essentially conceded this point. His brief addresses proximate causation relative to his negligence claims, i.e. his claim that Grindr's features contribute to the impersonating profiles but addresses proximate causation relative to his misrepresentation claims only in passing. *Compare* Opp'n at 25-26 (arguing that Herrick's injury is a proximate result of Grindr's negligent design of the app), *with* Opp'n at 36 (arguing that causation is adequately alleged as to Herrick's deceptive practices claim by reference to sections of the opposition that do not discuss proximate causation). Assuming Herrick intended his negligence arguments to apply to his misrepresentation claims, his analogy is unavailing. There is a critical difference between Grindr's design of the app and decision not to monitor and remove user-generated content in 2016 and 2017 (which bears directly on Herrick's

injury, but is protected by the CDA) and Grindr's long ago, alleged misstatements relative to Herrick's decision to use the Grindr app in the first place.

In sum, the Court finds that Herrick has not plausibly alleged a misstatement, reasonable reliance on that misstatement, or that Grindr's misstatements are a proximate cause of his injury.

Promissory Estoppel

Herrick's promissory estoppel claim fails because he has not alleged a sufficiently unambiguous promise by Grindr. There are three elements of a claim for promissory estoppel: "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *Kortright Capital Partners LP v. Investcorp Inv. Advisers Ltd.*, 257 F. Supp. 3d 348, 360-61 (S.D.N.Y. 2017) (quoting *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 929 N.Y.S.2d 571, 577 (1st Dep't 2011)). Promissory estoppel is "a narrow doctrine which generally only applies where there is no written contract, or where the parties' written contract is unenforceable for some reason." *Paxi, LLC v. Shiseido Ams. Corp.*, 636 F. Supp. 2d 275, 287 (S.D.N.Y. 2009) (quoting *DDCLAB Ltd. v. E.I. DuPont De Nemours and Co.*, No. 03-CV-3654 (GBD), 2005 U.S. Dist. LEXIS 2721, 2005 WL 425495, at *6 (S.D.N.Y. Feb. 18, 2005)).

Herrick contends that the community values page and Terms of Service constitute a promise to monitor

and remove content. *See* Am. Compl. ¶ 157 ("Plaintiff and Grindr entered a [sic] clear and unambiguous promise when Plaintiff signed up to use the software products."). For the same reasons that Grindr's statements are not false or misleading, they also do not constitute a "clear and unambiguous promise" to search for and remove offensive content. *Cf. Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) (rejecting argument that AOL's terms of service amounted to a promise to police offensive content). Herrick's reliance on Grindr's statements was also unreasonable in light of the clear disclaimer in the Terms of Service of any obligation to police user content. *See supra* at 21-22; Terms of Service §§ 10.4, 12.4; *see also Prestige Foods, Inc. v. Whale Sec. Co., L.P.*, 243 A.D.2d 281, 663 N.Y.S.2d 14, 15 (1st Dep't 1997) (Promissory estoppel claim was "properly dismissed as 'flatly contradicted' by the letter agreements in issue . . . .").

Negligent Misrepresentation

"To allege a claim for negligent misrepresentation a plaintiff must assert '(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment.'" *Eidelman v. Sun Prods. Corp.*, No. 16-CV-3914 (NSR), 2017 U.S. Dist. LEXIS 156420, 2017 WL 4277187, at *4 (S.D.N.Y. Sept. 25, 2017) (quoting *Anschutz Corp. v.*

Merrill Lynch & Co., 690 F.3d 98, 114 (2d Cir. 2012)). Proximate causation is an element of a claim for negligent misrepresentation. *See Laub v. Faessel*, 297 A.D.2d 28, 745 N.Y.S.2d 534, 536 (1st Dep't 2002). For the reasons already given, Herrick has not adequately alleged a false or misleading statement, that his reliance was reasonable in the face of Grindr's more specific disclaimers of a duty to monitor user content, or that Grindr's alleged misrepresentations were a proximate cause of his injury.

The Amended Complaint also fails to allege a sufficient "special relationship." There are three factors relevant to whether a special relationship exists: whether the defendants "held or appeared to hold unique or special expertise," whether there is a special relationship of "trust or confidence," and whether there are allegations that the "speaker was aware of the use to which the information would be put and supplied it for that purpose." *Izquierdo v. Mondelez Int'l Inc.*, No. 16-CV-4697 (CM), 2016 U.S. Dist. LEXIS 149795, 2016 WL 6459832, at *8 (S.D.N.Y. Oct. 26, 2016). Herrick does not claim a special relationship of trust or confidence and the relationship between the parties was typical of an arm's length transaction. *See Beckman v. Match.com, LLC*, No. 13-CV-97 JCM, 2017 U.S. Dist. LEXIS 35562, 2017 WL 1304288, at *3-4 (D. Nev. Mar. 10, 2017) (applying Nevada law and holding there is no special relationship between Match.com and its users); *see also Henneberry v. Sumitomo Corp. of Am.*, 532 F. Supp. 2d 523, 539 (S.D.N.Y. 2007) ("Courts have routinely held that an arms-length commercial transaction, without more, does not give rise to a special duty to speak with care."). Where New York courts have found a representation of special expertise, they have done so based on detailed

statements or professional expertise. *See e.g., Eidelman*, 2017 U.S. Dist. LEXIS 156420, 2017 WL 4277187, at *5 (representations that dermatologists recommended a product and that it was "clinically proven" suggest special expertise); *Fallman v. Hotel Insider Ltd.*, No. 14-CV-10140 (SAS), 2016 U.S. Dist. LEXIS 5895, 2016 WL 316378, at *9 (S.D.N.Y. Jan. 15, 2016) ("This standard has been applied to professionals such as lawyers and doctors, and technical experts such as engineers."). The fact that Grindr has knowledge of its own internal monitoring practices is not enough to establish special expertise. *See KCG Am. LLC v. Brazilmed, LLC*, No. 15-CV-4600 (AT), 2016 U.S. Dist. LEXIS 30497, 2016 WL 900396, at *7 (S.D.N.Y. Feb. 26, 2016) ("Allegations that a party has 'superior knowledge about the particulars of his own business practices is insufficient to sustain' a negligent misrepresentation claim." (quoting *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 928 N.Y.S.2d 229, 235-36 (1st Dep't 2011))). Additionally, there are no factual allegations in the Amended Complaint to suggest Grindr was aware that Herrick intended to rely on the community values page or the Terms of Service. The disclaimers in the Terms of Service suggest the opposite; that any representation of an ability to police and monitor content should not be relied upon. *See* Terms of Service §§ 10.4, 12.4. In short, the Court finds that Herrick has not sufficiently alleged a "special relationship."

Deceptive Practices and False Advertising

Herrick's deceptive business practices and false advertising claims fail because he has not plausibly alleged that a reasonable consumer would be misled by

Grindr's statements. *See Merck Eprova AG v. BrookStone Pharms., LLC*, 920 F. Supp. 2d 404, 425 (S.D.N.Y. 2013) (to allege a deceptive business practice under Section 349 of New York's General Business Law, a plaintiff must allege: "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." (quoting *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000))). Herrick's false advertising claim fails for the additional reason that he has not alleged reasonable reliance. *See Leider v. Ralfe*, 387 F. Supp. 2d 283, 292 (S.D.N.Y. 2005) (elements of false advertising under General Business Law Section 350 are the same as under Section 349, but plaintiff must also allege reliance).[14]

4. Copyright Infringement

Last is Herrick's claim for copyright infringement. The Amended Complaint alleges that some of the impersonating profiles use photos of Herrick for which he has filed copyright registration applications. Am. Compl. ¶¶ 147, 150. This claim is inadequately pleaded. In order

14. The New York Court of Appeals has not decided whether proximate cause is an element of a deceptive practices claim under General Business Law § 349 or a false advertising claim under General Business Law § 350. *See Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 3 N.Y.3d 200, 207, 818 N.E.2d 1140, 785 N.Y.S.2d 399 (2004). Because Herrick's deceptive practices and false advertising claims fail for other reasons, the Court need not address whether he has adequately alleged causation for purposes of Section 349.

to plead copyright infringement a plaintiff must allege "1) which specific original works are the subject of the copyright claim, 2) that plaintiff owns the copyrights in those works, 3) that the copyrights have been registered in accordance with the statute, and 4) by what acts during what time the defendant infringed the copyright." *Zuma Press, Inc. v. Getty Images (US), Inc.*, No. 16-CV-6110 (AKH), 2017 U.S. Dist. LEXIS 101286, 2017 WL 2829517, at *2 (S.D.N.Y. June 29, 2017) (quoting *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 (S.D.N.Y. 1992)). Herrick has filed four applications for registration of copyrights, but he concedes that the Copyright Office has not acted upon his applications. *See* Opp'n at 42 (arguing that "[a]llowing Plaintiff's claims to proceed pending registration will best serve the principles of copyright law"). There is an "'overwhelming' consensus in the Southern District of New York that under the registration approach, a pending 'application for copyright registration cannot sustain a claim for infringement prior to its approval or rejection by the Copyright Office.'" *Zuma Press, Inc.*, 2017 U.S. Dist. LEXIS 101286, 2017 WL 2829517, at *4 (quoting *Christians of Cal., Inc. v. Clive Christian N.Y., LLP*, No. 13-CV-0275 (KBF)(JCF), 2014 U.S. Dist. LEXIS 77067, 2014 WL 2465273, at *4 n.1 (S.D.N.Y. May 30, 2014)). Under the circumstances, the proper course is to dismiss Herrick's complaint without prejudice so that he can amend and allege that the Copyright Office has either granted or denied his applications. *See LLM Bar Exam, LLC v. Barbri, Inc.*, No. 16-CV-3770 (KPF), 271 F. Supp. 3d 547, 2017 U.S. Dist. LEXIS 156411, 2017 WL 4280952, at *31 (S.D.N.Y. Sept. 25, 2017) ("[c]ourts within this Circuit have consistently held that failing to meet a

statutory precondition to suit precludes adjudication on the merits and warrants dismissal without prejudice."[15] (quoting *Senisi v. John Wiley & Sons, Inc.*, No. 13-CV-3314 (LTS), 2016 U.S. Dist. LEXIS 33338, 2016 WL 1045560, at *3 (S.D.N.Y. Mar. 15, 2016))).

5. Leave to Amend

This is Herrick's second attempt to state a claim against Grindr, and he has not attached a proposed second amended complaint. Under the circumstances, Herrick's bare request for leave to amend is inadequate. *See Gazzola v. Cty. of Nassau*, No. 16-CV-0909 (ADS), 2016 U.S. Dist. LEXIS 142566, 2016 WL 6068138, at *9 (E.D.N.Y. Oct. 13, 2016) ("Courts have held that a 'bare request to amend a pleading' contained in a brief, which does not also attach the proposed amended pleading, is improper under [Rule] 15."); *see also Copeland ex. rel. NBTY, Inc. v. Rudolph*, 160 F. App'x 56, 59 (2d Cir. 2005) (conclusory requests for leave to amend are insufficient under Rule 15). Accordingly, with the exception of Herrick's copyright claim, the Court DENIES leave to amend.

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15. Herrick has not responded to Grindr's other arguments that his copyright claim fails because he has not alleged a theory of infringement against Grindr or when and how Grindr infringed his copyrights. *See* Reply Br. (Dkt. 58) at 15 (noting Herrick's failure to respond). Websites and social networking sites are not liable *per se* for infringing content posted by their users. *See BWP Media USA Inc. v. Hollywood Fan Sites, LLC*, 69 F. Supp. 3d 342, 354 (S.D.N.Y. 2014) ("The fact that Defendants own the sites, standing alone, does not create copyright liability for the actions of third parties."). Herrick is forewarned that any amendment to his copyright claims must address these deficiencies.

Appendix B

CONCLUSION

With the exception of Herrick's seventh cause of action for copyright infringement, the Defendants' motions to dismiss pursuant to Rule 12(b)(6) are GRANTED WITH PREJUDICE. The Defendants' motions to dismiss Herrick's claim for copyright infringement are GRANTED WITHOUT PREJUDICE. To the extent Herrick wishes to file an amended complaint, curing the deficiencies in his copyright claim, he must file a motion for leave to amend by **January 31, 2018**.

The Clerk of the Court is directed to close the open motions at docket entries 41, 47, and 60.

SO ORDERED.

Date: January 25, 2018
New York, New York

/s/ Valerie Caproni
VALERIE CAPRONI
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of May, two thousand nineteen.

ORDER
Docket No: 18-396

MATTHEW HERRICK,

Plaintiff-Appellant,

v.

GRINDR LLC, KL GRINDR HOLDINGS INC., GRINDR HOLDING COMPANY,

Defendants-Appellees.

Appellant, Matthew Herrick, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe