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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ESTATE OF CARSON BRIDE, by and through his appointed administrator KRISTIN BRIDE; A. K., by and through her legal guardian Jane Doe 1; A. C., by and through her legal guardian Jane Doe 2; A. O., by and through her legal guardian Jane Does 3; TYLER CLEMENTI FOUNDATION, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants*, v. YOLO TECHNOLOGIES, INC., *Defendant-Appellee*.	No. 23-55134 D.C. No. 2:21-cv-06680-FWS-MRW OPINION

Appeal from the United States District Court
for the Central District of California
Fred W. Slaughter, District Judge, Presiding

Argued and Submitted April 11, 2024
Pasadena, California

Filed August 22, 2024

Before: Eugene E. Siler,* Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Siler

SUMMARY**

Communications Decency Act

The panel reversed the district court's dismissal of plaintiffs' misrepresentation claims and affirmed the district court's dismissal of plaintiffs' products liability claims in their diversity class action alleging that YOLO Technologies violated multiple state tort and product liability laws by developing an anonymous messaging app which promised to unmask bullying and abusive users, but YOLO never actually did so.

The district court held that § 230 of the Communications Decency Act—which protects apps and websites which receive content posted by third-party users from liability for any content posted on their services—immunized YOLO from liability on plaintiffs' claims and dismissed the complaint.

Reversing the district court's dismissal of plaintiffs' misrepresentation claims, the panel held that the claims

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

survived because plaintiffs seek to hold YOLO accountable for its promise to unmask or ban users who violated the terms of service, and not for a failure to take certain moderation actions.

Affirming the district court's dismissal of plaintiffs' products liability claims, the panel held that § 230 precludes liability because plaintiffs' product liability theories attempt to hold YOLO liable as a publisher of third-party content.

COUNSEL

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Megan Iorio and Tom McBrien, Electronic Privacy Information Center, Washington, D.C., for Amici Curiae Electronic Privacy Information Center and Fairplay.

OPINION

SILER, Circuit Judge:

Appellee YOLO Technologies developed an extension for use on the Snapchat application ("app") which allowed users to ask public questions and send and receive anonymous responses. YOLO informed all users that it would reveal the identities of, and ban, anyone who engaged

in bullying or harassing behavior. Appellants, three living minor children and the estate of a fourth, all suffered extreme harassment and bullying through YOLO resulting in acute emotional distress, and in the case of Carson Bride, death by suicide. They brought this diversity class action alleging that YOLO violated multiple state tort and product liability laws by developing an anonymous messaging app which promised to unmask, and thereby prevent, bullying and abusive users, but YOLO never actually did so.

The district court held that § 230 of the Communications Decency Act immunized YOLO from these claims and dismissed the complaint. We affirm and reverse in part, holding that § 230 bars Plaintiffs' products liability claims but not their misrepresentation claims.

I.

A.

YOLO Technologies developed their app as an extension upon the already-popular Snapchat app. Marketed mainly toward teenagers in mobile app stores, YOLO achieved tremendous popularity, reaching the top of the download charts within a week of its launch. It eventually reached ten million active users.

Anonymity was YOLO's key feature. Users would install the app and use it to post public questions and polls for their followers. Other users, also using YOLO, could respond to the questions or polls anonymously, unless they chose to "swipe up" and voluntarily disclose their identity as part of their answer. Without such voluntary revelation, the recipient would not know the responder's account nickname, user information, or any other identifying data.

Anonymous messaging applications, even ones marketed specifically to teens, are not new inventions. Plaintiffs contend that "it [has] long been understood that anonymous online communications pose a significant danger to minors, including by increasing the risk of bullying and other antinormative behavior." In fact, prior applications with anonymous communication features had caused "teenagers [to] take[] their own lives after being cyberbullied."

As a hedge against these potential problems, YOLO added two "statements" to its application: a notification to new users promising that they would be "banned for any inappropriate usage," and another promising to unmask the identity of any user who "sen[t] harassing messages" to others. But, Plaintiffs argue, with a staff of no more than ten people, there was no way YOLO could monitor the traffic of ten million active daily users to make good on its promise, and it in fact never did. Many user reviews of the YOLO app on Apple's app store reflected frustration with harassing and bullying behavior.

B.

Plaintiffs A.K., A.C., A.O., and Carson Bride all downloaded the YOLO extension and used it on the Snapchat app. All four were inundated with harassing, obscene, and bullying messages including "physical threats, obscene sexual messages and propositions, and other humiliating comments." Users messaged A.C. suggesting that she kill herself, just as her brother had done. A.O. was sent a sexual message, and her friend was told she was a "whore" and "boy-obsessed." A.K. received death threats, was falsely accused of drug use, mocked for donating her hair to a cancer charity, and exhorted to "go kill [her]self,"

which she seriously considered. She suffered for years thereafter. Carson Bride was subjected to constant humiliating messages, many sexually explicit and highly disturbing. Despite his efforts, Carson was unable to unmask the users who were sending these messages and discover their identities. On June 23, 2020, Carson hanged himself at his home.

A.K. attempted to utilize YOLO's promised unmasking feature but received no response. Carson searched the internet diligently for ways to unmask the individuals sending him harassing messages, with no success. Carson's parents continued his efforts after his death, first using YOLO's "Contact Us" form on its Customer Support page approximately two weeks after his death. There was no answer. Approximately three months later, his mother Kristin Bride sent another message, this time to YOLO's law enforcement email, detailing what happened to Carson and the messages he received in the days before his death. The email message bounced back as undeliverable because the email address was invalid. She sent the same to the customer service email and received an automated response promising an answer that never came. Approximately three months later, Kristin reached out to a professional friend who contacted YOLO's CEO on LinkedIn, a professional networking site, with no success. She also reached out again to YOLO's law enforcement email, with the same result as before.

Kristin Bride filed suit against YOLO and other defendants no longer part of the action. The first amended complaint alleged twelve causes of action including product liability based on design defects and failure to warn, negligence, fraudulent and negligent misrepresentation, unjust enrichment, and violations of Oregon, New York,

Colorado, Pennsylvania, Minnesota, and California tort law. Plaintiffs' counsel agreed at a hearing that the state law claims were all based in "misrepresentation, intentional and negligent." Forty-eight hours after Plaintiffs filed this suit, Snap suspended YOLO's access to its application and later announced a complete ban on anonymous messaging apps in its app store.

C.

Plaintiffs' theories essentially fall into two categories: products liability and misrepresentation. Counsel admitted that the state law claims all fell under misrepresentation, and YOLO splits them between products liability and misrepresentation.

The products liability claims allege that YOLO's app is inherently dangerous because of its anonymous nature and that it was negligent for YOLO to ignore the history of teen suicides stemming from cyberbullying on anonymous apps. Plaintiffs based their products liability claim solely on the anonymity of YOLO's app at the district court and through initial briefing at this court.[1]

Plaintiffs' misrepresentation claims are based on their allegation that YOLO alerted all new users that bullying and harassing behavior would result in the offending user being banned and unmasked, but YOLO never followed through

[1] In their reply brief, Plaintiffs advance a new theory that several of YOLO's features taken together created liability. YOLO moved to strike this argument because it was raised for the first time in the reply brief. We agree and will grant the motion. Our grant of this motion, however, does not affect any possible motions in the district court to amend the complaint on remand.

on this threat despite A.K.'s requests and Kristin Bride's emails.

The district court granted YOLO's motion to dismiss, finding that the entire complaint sought to hold YOLO responsible for the content of messages posted on its app by users and not for any separate duty or obligation to the Plaintiffs. The court relied heavily on *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019), which involved a lawsuit against a completely anonymous website through which the plaintiff's deceased son purchased fentanyl-laced drugs. The district court found this matter essentially on all fours with *Dyroff* and dismissed the suit.

II.

We review de novo the district court's decision to grant YOLO's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). Questions of statutory interpretation are reviewed de novo as well. *Collins v. Gee W. Seattle LLC*, 631 F.3d 1001, 1004 (9th Cir. 2011). And we take all factual allegations in the complaint as true and "construe the pleadings in the light most favorable to the nonmoving party." *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)).

A.

The Internet was still in its infancy when Congress passed the Communications Decency Act ("CDA") in 1996. 47 U.S.C. § 230; *Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003). Even at its young age, legislators recognized its tremendous latent potential. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). However, because of the

unprecedented reach and speed of the new forum, that potential would be significantly limited if courts imposed traditional publisher liability on internet platforms. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851–52 (9th Cir. 2016). Traditional publisher liability held that if a publisher took upon itself the task of moderating or editing the content that appeared within its pages, it became responsible for anything tortious written there. *Id.* at 852. A New York state court perfectly illustrated this danger when it found that an online message board became a publisher responsible for the offensive content of any messages "because it deleted some offensive posts but not others." *Id.* In light of the sheer volume of internet traffic, this presented providers with a "grim choice": voluntarily filter some content and risk overlooking problems and thereby incurring tort liability, or take a hands-off approach and let the trolls run wild. *Id.*

To address this problem, Congress enacted § 230 of the CDA. This section allows services "to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages they didn't edit or delete." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) [hereinafter *Roommates*]. Congress included a policy statement within § 230 concluding that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). To that end, the law sought to encourage the development and use of technologies that would allow users to filter and control the content seen by themselves or their children. *Id.* § 230(b)(3)–(4).

The operative section of the law, § 230(c), titled "Protection for 'Good Samaritan' blocking and screening of

offensive material," is divided into two working parts. *Id.* § 230(c). The first broadly states that no service provider "shall be treated as the publisher or speaker of any information provided by another information content provider," or, more colloquially, by a third-party user of the service. *Id.* § 230(c)(1). The second part protects actions taken by a service provider to moderate and restrict material it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2). Section 230 expressly preempts any state laws with which it may conflict. *Id.* § 230(e)(3).

In short, § 230 protects apps and websites which receive content posted by third-party users (i.e., Facebook, Instagram, Snapchat, LinkedIn, etc.) from liability for any of the content posted on their services, even if they take it upon themselves to establish a moderation or filtering system, however imperfect it proves to be. This immunity persists unless the service is itself "'responsible, in whole or in part, for the creation or development of' the offending content." *Roommates*, 521 F.3d at 1162 (quoting 47 U.S.C. § 230(f)(3)).

This robust immunity applies to "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Barnes*, 570 F.3d at 1100–01 (footnote omitted). The parties agree that YOLO is an interactive computer service under § 230, and therefore satisfies the first prong. *See* 47 U.S.C. § 230(f)(2). YOLO is clearly the developer of the YOLO app, which allows users to communicate anonymously, send polls and questions, and send and receive anonymous responses.

The second *Barnes* prong considers whether the cause of action alleged in the complaint seeks to plead around the CDA's strictures and treat the defendant as a "publisher or speaker" of third-party content. *See* 47 U.S.C. § 230(c)(1). "[W]hat matters is not the name of the cause of action . . . [but] whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101–02 (listing successful cases against services that failed to qualify for § 230 immunity). The act of "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* at 1102.

It is imperative to consider that "neither [subsection 230(c)] nor any other declares a general immunity from liability deriving from third-party content." *Id.* at 1100. Indeed, that could not be true; for most applications of § 230 in our internet age involve social media companies, which nearly all provide some form of platform for users to communicate with each other. In cases such as these, "[p]ublishing activity is a but-for cause of just about everything [defendants are] involved in. [They are] internet publishing business[es]." *Internet Brands*, 824 F.3d at 853; *see also Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 742 (9th Cir. 2024) ("Putting these cases together, it is not enough that a claim, including its underlying facts, stems from third-party content for § 230 immunity to apply."). The proper analysis requires a close examination of the duty underlying each cause of action to decide if it "derives from the defendant's status or conduct as a publisher or speaker." *Barnes*, 570 F.3d at 1107. Therefore, services can still be liable under traditional tort theories if those theories do not require the services to exercise some kind of publication or editorial function. *Id.* at 1102.

B.

In short, we must engage in a "careful exegesis of the statutory language" to determine if these claims attempt to treat YOLO as the "publisher or speaker" of the allegedly tortious messages. *Id.* at 1100. This exacting analysis helps us avoid "exceed[ing] the scope of the immunity provided by Congress."[2] *Internet Brands*, 824 F.3d at 853 (quoting *Roommates*, 521 F.3d at 1164 n.15). After all, § 230 immunity is extraordinarily powerful, granting complete immunity where it applies and, in the process, preempting even the will of the people as expressed in their state legislatures. *See* 47 U.S.C. § 230(e)(3) (preempting state law). Our analysis, therefore, "ask[s] whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1102. But if it does not, then the suit may proceed as against the claim of immunity based on § 230(c)(1).

Our opinion in *Calise v. Meta Platforms*, published earlier this year, clarified the required duty analysis that originated in *Barnes v. Yahoo*, *Lemmon v. Snap, Inc.*, and *HomeAway.com, Inc. v. City of Santa Monica*. *Calise*, 103 F.4th at 742 ("Our cases instead require us to look to the legal 'duty.' 'Duty' is 'that which one is bound to do, and for which somebody else has a corresponding right.'" (quoting *Duty*, Black's Law Dictionary (11th ed. 2019))). We now conduct a two-step analysis. *Id.* First, we examine the "right from which the duty springs." *Id.* (quotations omitted). Does it stem from the platform's status as a

[2] In light of this, we have explicitly disclaimed the use of a "but-for" test because it would vastly expand § 230 immunity beyond Congress' original intent. *See Internet Brands*, 824 F.3d at 853.

publisher (in which case it is barred by § 230)? Or does it spring from some other obligation, such as a promise or contract (which, under *Barnes*, is distinct from publication and not barred by § 230)? Second, we ask what "this duty requir[es] the defendant to do." *Id*. If it *requires* that YOLO moderate content to fulfill its duty, then § 230 immunity attaches.[3] *See id.*; *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019).

Barnes perfectly illustrates the duty distinction reemphasized in *Calise*. In that case, Barnes's estranged boyfriend posted nude images of her on a fake profile on Yahoo's website, and she reached out to Yahoo to get them removed. *Barnes*, 570 F.3d at 1098–99. Yahoo's Director of Communications promised Barnes over the phone that she would personally facilitate the removal of the offending fake profile. *Id.* at 1099. Nothing happened and Barnes sued, alleging negligent undertaking and promissory estoppel. *Id.* Skeptical of Barnes's negligent undertaking claim, we held that it was simply a defamation claim recast as negligence and asked,

> [W]hat is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo's website.

[3] We emphasize, however, that this does not mean immunity attaches anytime YOLO *could* respond to a legal duty by removing content. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019). Instead, we look at what the purported legal duty *requires*—"specifically, whether the duty would necessarily require an internet company to monitor third-party content." *Id.* For immunity to attach at this second step, moderation must be more than one option in YOLO's menu of possible responses; it must be the only option.

> But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.

Id. at 1103; *see* 47 U.S.C. § 230(c)(1). We determined that Barnes's negligent undertaking claim faulted Yahoo for failure to remove content, and "such conduct is publishing conduct . . . that can be boiled down to" editorial behavior. *Id*. at 1103 (emphasis and quotations omitted) (quoting *Roommates*, 521 F.3d at 1170–71). Such claims are explicitly foreclosed by § 230(c)(1).

Barnes's promissory estoppel claim, however, fared better. Because this claim "is a subset of a theory of recovery based on a breach of contract," it was not ultimately grounded in Yahoo's failure to remove content, but in their failure to honor a "private bargain[]." *Id.* at 1106 (quotations omitted). While yes, that was a promise to moderate content, the underlying obligation upon which Barnes relied was not an obligation to remove a profile, but the promise itself. *Id.* at 1107–09. As we noted, Barnes did "not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who [had] breached." *Id.* at 1107. Section 230 only "precludes liability when the duty the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker." *Id*. We justified the distinction because of where the individual claims derive liability: negligent undertaking is grounded in "behavior that is identical to publishing or speaking," whereas "[p]romising is different because it is not synonymous with the performance of the action promised." *Id.* "[W]hereas one

cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it at the same time." *Id.* Therefore, contractual liability stood where negligence fell.

The question of whether § 230 immunity applies is not simply a matter of examining the record to see if "a claim, including its underlying facts, stems from third-party content." *Calise*, 103 F.4th at 742. Nor is there a bright-line rule allowing contract claims and prohibiting tort claims that do not require moderating content, for that would be inconsistent with those cases where we have allowed tort claims to proceed, *see Internet Brands*, 824 F.3d 846 (negligent failure to warn claim survived § 230 immunity); *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) (authorizing a products liability claim based in negligent design), and contradict our prior position that the name of a cause of action is irrelevant to immunity, *Barnes*, 570 F.3d at 1102 ("[W]hat matters is not the name of the cause of action . . . what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another."). Instead, we must engage in a careful inquiry into the fundamental duty invoked by the plaintiff and determine if it "derives from the defendant's status or conduct as a 'publisher or speaker.'" *Id.*

C.

We now conduct that inquiry here. The parties divide the claims into two categories—misrepresentation and products liability—and we will continue that distinction in our analysis.

1.

Turning first to Plaintiffs' misrepresentation claims, we find that *Barnes* controls. YOLO's representation to its users that it would unmask and ban abusive users is sufficiently analogous to Yahoo's promise to remove an offensive profile. Plaintiffs seek to hold YOLO accountable for a promise or representation, and not for failure to take certain moderation actions. Specifically, Plaintiffs allege that YOLO represented to anyone who downloaded its app that it would not tolerate "objectionable content or abusive users" and would reveal the identities of anyone violating these terms. They further allege that all Plaintiffs relied on this statement when they elected to use YOLO's app, but that YOLO never took any action, even when directly requested to by A.K. In fact, considering YOLO's staff size compared to its user body, it is doubtful that YOLO ever intended to act on its own representation.

While it is certainly an open question whether YOLO has any defenses to enforcement of its promise, at this stage we cannot say that § 230 categorically prohibits Plaintiffs from making the argument. YOLO may argue that it did not intend to induce reliance on the promise by the Plaintiffs, or that the statements were not promises made to Plaintiffs but instead warnings to others. But we treat "the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the conduct at hand," a duty which we will enforce. *Barnes*, 570 F.3d at 1107.

The district court oversimplified the proper analysis for § 230 immunity and essentially dismissed the claims because malicious third-party postings were involved or must be edited by YOLO. In its own words, "Plaintiffs'

claims that [YOLO] . . . misrepresented their applications' safety would not be cognizable" without the harmful behavior of third-party users, and therefore immunity applies. The proper analysis is to examine closely the duty underlying each cause of action and decide if it "derives from the defendant's status or conduct as a publisher or speaker." *Id.* If it does, then § 230(c)(1) immunizes the defendant from liability on that claim.

In summary, *Barnes* is on all fours with Plaintiffs' misrepresentation claims here. YOLO repeatedly informed users that it would unmask and ban users who violated the terms of service. Yet it never did so, and may have never intended to. Plaintiffs seek to enforce that promise—made multiple times to them and upon which they relied—to unmask their tormentors. While yes, online content is involved in these facts, and content moderation is one possible solution for YOLO to fulfill its promise, the underlying duty being invoked by the Plaintiffs, according to *Calise*, is the promise itself. *See Barnes*, 570 F.3d at 1106–09. Therefore, the misrepresentation claims survive.

2.

Next, we address the product liability claims. In general, these claims assert that YOLO's app is inherently dangerous because of its anonymous nature, and that previous high-profile suicides and the history of cyberbullying should have put YOLO on notice that its product was unduly dangerous to teenagers. We hold that § 230 precludes liability on these claims.

Plaintiffs first allege product liability claims for design defect, and negligence. The defective design claim alleges that YOLO "developed, designed, manufactured, marketed, sold, and distributed to at least hundreds of thousands of

minors" a product that was unreasonably dangerous because of its anonymity. They claim that the bare fact of YOLO's anonymity made it uniquely dangerous to minors and that YOLO should have known this because prior anonymous applications had a deleterious effect on minor users. The negligence claim is similar, claiming that YOLO failed to "protect users from an unreasonable risk of harm arising out of the use of their app[]." Failure to mitigate this "foreseeable risk of harm," Plaintiffs claim, makes YOLO liable.

Plaintiffs also allege products liability claims under a failure to warn theory. The alleged risks are the same as those for defective design and negligence, but the claims are centered more on YOLO's alleged failure to disclose these risks to users when they downloaded the YOLO app. Plaintiffs therefore ask for compensatory damages, pecuniary loss, and loss of society, companionship, and services to Carson Bride's parents, and punitive damages "based on [YOLO's] willful and wanton failure to warn of the known dangers" of its product.

At root, all Plaintiffs' product liability theories attempt to hold YOLO responsible for users' speech or YOLO's decision to publish it. For example, the negligent design claim faults YOLO for creating an app with an "unreasonable risk of harm." What is that harm but the harassing and bullying posts of others? Similarly, the failure to warn claim faults YOLO for not mitigating, in some way, the harmful effects of the harassing and bullying content. This is essentially faulting YOLO for not moderating content in some way, whether through deletion, change, or suppression.

Our decision in *Lemmon v. Snap, Inc.* does not help Plaintiffs. In that case, parents of two teens killed while speeding sued the company that owns Snapchat. *Lemmon*, 995 F.3d at 1087. They alleged that the boys had been speeding because of a feature on the Snapchat app that allowed users to overlay their current speed onto photos and videos. *Id.* at 1088–89. It was widely believed that Snapchat would reward users with in-app rewards of some kind if they attained a speed over 100 mph. *Id.* at 1089. The boys operated the filter moments before their deaths. *Id.* at 1088. The parents brought negligent design claims alleging that Snapchat, despite numerous news articles, an online petition about the inherent problems with the filter, "at least three accidents," and "at least one other lawsuit," continued to offer a feature that "incentiviz[ed] young drivers to drive at dangerous speeds." *Id.* at 1089. The district court dismissed the complaint on § 230 grounds. *Id.* at 1090. On appeal, we held that the negligent design claims were not an attempt "to treat a defendant as a 'publisher or speaker' of third-party content." *Id.* at 1091. Instead, the parents sought to hold Snap liable for creating (1) Snapchat, (2) the speed filter, and (3) an incentive structure that enticed users to drive at unsafe speeds. *Id.* In clarifying that the parents' product liability claim was not "a creative attempt to plead around the CDA," we explained that claim did "not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends." *Id.* at 1094. As a result, the claim did not depend on third-party content. *Id.*

Here, Plaintiffs allege that anonymity itself creates an unreasonable risk of harm. But we refuse to endorse a theory that would classify anonymity as a per se inherently unreasonable risk to sustain a theory of product liability. First, unlike in *Lemmon*, where the dangerous activity the

alleged defective design incentivized was the dangerous behavior of speeding, here, the activity encouraged is the sharing of messages between users. *See id.* Second, anonymity is not only a cornerstone of much internet speech, but it is also easily achieved. After all, verification of a user's information through government-issued ID is rare on the internet. Thus we cannot say that this feature was uniquely or unreasonably dangerous.

Similarly, *Internet Brands* provides no cover for Plaintiffs' failure to warn theory. In that case, we upheld liability against a professional networking site for models under a failure to warn theory. *Internet Brands*, 824 F.3d at 848. Plaintiff created a profile on the website Model Mayhem, owned by Internet Brands, advertising her services as a model. *Id.* Meanwhile, the site's owners were aware that a pair of men had been using the site to set up fake auditions, lure women to "auditions" in Florida, and then rape them. *Id.* at 848–49. Yet the owners did not warn plaintiff, and she fell victim to the scheme. *Id.* at 848. We reasoned that plaintiff sought to hold defendant liable under a traditional tort theory—the duty to warn—which had no bearing on Model Mayhem's decision to publish any information on its site. *Id.* at 851. After all, plaintiff had posted her own profile on the website, and did not allege that the rapists had posted anything on the website. *Id.* Therefore, § 230 was no protection.

In short, the defendant in *Internet Brands* failed to warn of a known conspiracy operating independent of the site's publishing function. *Id.* But here, there was no conspiracy to harm that could be defined with any specificity. It was merely a general possibility of harm resulting from use of the YOLO app, and which largely exists anywhere on the

internet. We cannot hold YOLO responsible for the unfortunate realities of human nature.

Finally, we clarify the extent to which *Dyroff v. Ultimate Software Group* is applicable, but not dispositive, here. In that case, a grieving mother sued an anonymous website that allowed users to post whatever they wanted, anonymously, and receive anonymous replies. *Dyroff*, 934 F.3d at 1094–95. Her son purchased drugs using the site and died because the drugs he purchased were laced with fentanyl. *Id.* at 1095. As we explained, "[s]ome of the site's functions, including user anonymity and grouping, facilitated illegal drug sales." *Id.* at 1095. The mother sued, alleging that the site had allowed users to engage in illegal activity, that the website's recommendation algorithm had promoted and enabled these communications, and that defendant failed to moderate the website's content to eliminate these problems. *Id.* We concluded that § 230(c) granted defendant immunity from these claims. *Id.* at 1096. First, we noted that § 230 "provides that website operators are immune from liability for third-party information . . . unless the website operator 'is responsible, in whole or in part, for the creation or development of [the] information.'" *Id.* (brackets in original) (quoting 47 U.S.C. § 230(c)(1), (f)(3)). We then looked at whether the claims "inherently require[] the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1098 (brackets in original) (quoting *Barnes*, 570 F.3d at 1102). Because the automated processes contained in the site's algorithm were not themselves content but merely "tools meant to facilitate the communication and content of others," we found the second *Barnes* prong satisfied. *Id.* Finally, the third *Barnes* prong was satisfied because the content was clearly developed by others, not the defendant. *Id.* at 1098. Unlike in *Roommates*,

where the defendant played a role in developing the illegal content by requiring users to answer particular questions, the defendant in *Dyroff* merely provided a "blank text box" that users could utilize however they wanted. *Id.* at 1099.

In our view, Plaintiffs' product liability theories similarly attempt to hold YOLO liable as a publisher of third-party content, based in part on the design feature of anonymity. To be sure, our opinion in *Dyroff* did not rely on anonymity for its § 230 analysis. *See id.* at 1096–99. But our analysis of Plaintiffs' product liability claims is otherwise consistent with *Dyroff*'s reasoning: here, the communications between users were direct, rather than suggested by an algorithm, and YOLO similarly provided users with a blank text box. These facts fall within *Dyroff*'s ambit. As we have recognized, "No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content." *Id.* at 1101. Though the claims asserted in *Dyroff* were different than the claims asserted here, our conclusion is consistent with *Dyroff*'s reasoning.

In summary, Plaintiffs' product liability claims attempt to hold YOLO responsible as the speaker or publisher of harassing and bullying speech. Those product liability claims that fault YOLO for not moderating content are foreclosed, *see supra* at 18; otherwise, nothing about YOLO's app was so inherently dangerous that we can justify these claims, and unlike *Lemmon*, YOLO did not turn a blind eye to the popular belief that there existed in-app features that could only be accessible through bad behavior. *Lemmon*, 995 F.3d at 1089–90 (describing how users thought that exceeding 100 mph while using the Snapchat app would produce a reward). And to the degree that the online environment encouraged and enabled such behavior,

that is not unique to YOLO. It is a problem which besets the entire internet. Thus, § 230 immunizes YOLO from liability on these claims.

D.

In holding that the Plaintiffs' misrepresentation claims may proceed, we adhere to long-established circuit precedent. We must strike a delicate balance by giving effect to the intent of Congress as expressed in the statute while not expanding the statute beyond the legislature's expressed intent in the face of quickly advancing technology. Today's decision does not expand liability for internet companies or make all violations of their own terms of service into actionable claims. To the degree that such liability exists, it already existed under *Barnes* and *Calise*, and nothing we do here extends that legal exposure to new arenas. Section 230 prohibits holding companies responsible for moderating or failing to moderate content. It does not immunize them from breaking their promises. Even if those promises regard content moderation, the promise itself is actionable separate from the moderation action, and that has been true at least since *Barnes*. In our caution to ensure § 230 is given its fullest effect, we must resist the corollary urge to extend immunity beyond the parameters established by Congress and thereby create a free-wheeling immunity for tech companies that is not enjoyed by other players in the economy.

III.

We therefore REVERSE the district court's grant of YOLO's motion to dismiss the misrepresentation claims but AFFIRM in all other respects. YOLO's motion to strike is GRANTED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES – GENERAL

Case No.: 2:21-cv-06680-FWS-MRW Date: January 10, 2023
Title: Kristin Bride, *et al.* v. Snap Inc., *et al.*

Present: **HONORABLE FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE**

Melissa H. Kunig	N/A
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

PROCEEDINGS: ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS [118][127]

Before the court are Defendants Yolo Technologies, Inc. ("Yolo") and LightSpace Inc.'s ("LightSpace") (collectively, "Defendants") Motions to Dismiss Plaintiffs the Estate of Carson Bride by and through his appointed administrator, Kristin Bride, A.C., A.O., A.K.,[1] and the Tyler Clementi Foundation's ("Plaintiffs") First Amended Complaint ("FAC"). (Dkts. 118, 127.) The matter is fully briefed.[2] (Dkts. 135, 138-39.) Based on the state of the record, as applied to the applicable law, the court **GRANTS** the Motion and **DISMISSES WITH PREJUDICE** the FAC.

[1] A.C., A.O., and A.K., are represented by and through their legal guardians, Jane Does 2, 3, and 1, respectively.

[2] The court, in its discretion, **GRANTS** Plaintiffs' Motion to Exceed the Page Limit in Opposition to Defendant's Motion to Dismiss by five (5) pages. (Dkt. 137.) While Yolo opposes, (Dkt. 140), the court finds any resulting prejudice minimal and that it is in the interest of judicial economy to permit the brief as filed. Future requests of this nature must be set for hearing in advance of the motion to which they relate.

I. Relevant Background

The FAC alleges[3] that Yolo and LightSpace designed, developed, and operate the YOLO and LMK applications, respectively, which have "Teen" content ratings on the Google Play store, and permit teenaged and minor users to share anonymous messages. (Dkt. 113 ¶¶ 60, 74-76.) LMK is an "anonymous Question and Answer and polling app" that allows its users to "create and customize[] stickers and backgrounds while sharing polls with their friends on Snapchat." (*Id.* ¶¶ 28, 73.) Similarly, YOLO "is an app designed to allow its users to send messages to each other anonymously" who can "chat, exchange questions and answers, and send polling requests to one another on a completely anonymous basis." (*Id.* ¶ 26.) Senders of messages on YOLO and LMK remain anonymous. (*Id.* ¶¶ 3, 56, 73.) Plaintiffs allege studies show the "depersonalized" context of anonymous apps increases the risk of "aberrant" behavior like bullying and harassment. (*Id.* ¶¶ 35-37.)

Plaintiffs allege they received harassing messages in response to their benign posts on Defendants' applications and did not receive comparable messages on other platforms in which user identities were revealed. (*Id.* ¶¶ 97-99, 102-104.) Plaintiffs allege that YOLO had pop-up notifications that stated individuals' identities would be revealed if they harassed other users and LightSpace similarly stated it would take reports of bullying it received seriously and potentially send those reports to law enforcement. (*Id.* ¶¶ 65, 71, 81, 105-118.) Plaintiffs reference several specific explicit messages they received on these platforms and also aver more generally that they received harassing messages on both applications. (*Id.* ¶¶ 90-103, 128-131, 136-140, 145-147.) Plaintiffs allege that YOLO in particular did not respond to reports of harassment and that a decedent of one of the Plaintiffs unsuccessfully attempted to search online for ways to "reveal" the identities of individuals who had previously sent him harassing messages on YOLO the night before his death. (*See id.* ¶¶ 71, 94.)

[3] For the purposes of the Motions to Dismiss, the court accepts all allegations of material fact as true and construes the pleadings in the light most favorable to Plaintiffs. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

In this lawsuit, Plaintiffs bring state law causes of action against Defendants for: (1) strict product liability based on a design defect; (2) strict product liability based on a failure to warn; (3) negligence; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) unjust enrichment; (7) violation of the Oregon Unlawful Trade Practices Act; (7) violation of the New York General Business Law § 349; (8) violation of the New York General Business Law § 350; (9) violation of the Colorado Consumer Protection Act; (10) violation of the Pennsylvania Unfair Trade Practices Law; (11) violation of the Minnesota False Statement in Advertising Act; and (12) violation of California Business and Professions Code §§ 17200 & 17500. (*See id.* ¶¶ 20-30, 178-322.) Plaintiffs seek to bring a class action. (*See id.* ¶¶ 159-177.)

Plaintiffs initially filed the Complaint in this action on May 10, 2021, against Defendants and former Defendant Snap, Inc., in the Northern District of California. (Dkt. 1.) The case was transferred to the Central District of California on August 18, 2021. (Dkts. 49-50, 53.) The three Defendants initially filed Motions to Dismiss and Stay Discovery in September 2021, (*see* Dkts. 71-77, 79); after numerous stipulations to extend the hearing on those motions pending settlement discussions, (*see* Dkts. 82, 86, 88, 90, 94, 96, 98, 102, 105), the parties stipulated to Snap, Inc.'s dismissal with prejudice from this action on June 17, 2022, (Dkt. 111). Plaintiff filed the First Amended Complaint on June 27, 2022. (Dkt. 113.) After several more stipulations to extend the deadlines in this case, (Dkts. 112, 116, 121, 123), the court entered an order on September 29, 2022, granting Defendants' motion to stay discovery pending resolution of potentially dispositive motions to dismiss, (Dkt. 126). LightSpace initially moved to dismiss the FAC on August 18, 2022, (Dkt. 118), and Yolo similarly moved on October 6, 2022, (Dkt. 127). The court heard oral argument on these matters on January 5, 2023. (Dkt. 141.)

II. Legal Standard

A. Motion to Dismiss Pursuant to Rule 12(b)(6)

Rule 12(b)(6) permits a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by

reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). To withstand a motion to dismiss brought under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a plaintiff must provide "more than labels and conclusions" and "a formulaic recitation of the elements of a cause of action" such that the factual allegations "raise a right to relief above the speculative level." *Id.* at 555 (citations and internal quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (reiterating that "recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). "A Rule 12(b)(6) dismissal 'can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

"Establishing the plausibility of a complaint's allegations is a two-step process that is 'context-specific' and 'requires the reviewing court to draw on its judicial experience and common sense.'" *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995-96 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 679). "First, to be entitled to the presumption of truth, allegations in a complaint . . . must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Id.* at 996 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). "Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.* (quoting *Starr*, 652 F.3d at 1216); *see also Iqbal*, 556 U.S. at 681.

Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. 544, 556 (2007)). On one hand, "[g]enerally, when a plaintiff alleges facts consistent with both the plaintiff's and the defendant's explanation, and both explanations are plausible, the plaintiff survives a motion to dismiss under Rule 12(b)(6)." *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 47 (9th Cir. 2022) (citing *Starr*, 652 F.3d at 1216). But, on the other, "'[w]here a complaint pleads facts that are merely

consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" *Eclectic Props. E., LLC*, 751 F.3d at 996 (quoting *Iqbal*, 556 at U.S. 678). Ultimately, a claim is facially plausible where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 at 556); *accord Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

In *Sprewell v. Golden State Warriors*, the Ninth Circuit described legal standards for motions to dismiss made pursuant to Rule 12(b)(6):

> Review is limited to the contents of the complaint. *See Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See id.* The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. *See Mullis v. United States Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir.1987). Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

266 F.3d 979, 988 (9th Cir. 2001).

III. Discussion

A. Section 230 of the Communications Decency Act

Defendants first argue that they are immune from suit under Section 230 of the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230. Section 230 of the CDA "protects certain internet-based actors from certain kinds of lawsuits." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). The statute provides, in relevant part, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Additionally, it states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). "The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (citations and internal quotation marks omitted).

CDA immunity under Section 230(c)(1) "applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (quoting 47 U.S.C. § 230(f)(3)). The "prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009)).

Under the Ninth Circuit's three-prong test, "[i]mmunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.'" *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting *Barnes*, 570 F.3d at 1100-01). "When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." *Id.* (citation omitted).

In considering the first prong of the *Barnes* test, courts "interpret the term 'interactive computer service' expansively." *Id.* (citation omitted). Here, Plaintiffs do not meaningfully challenge Defendants' status as providers of "interactive computer service[s]" within the meaning of Section 230. (*See* Dkt. 135 at 5-30.) Under the statute, "[t]he term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or

services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). Courts have noted providers of interactive computer services include entities that create, own, and operate applications that enable users to share messages over its internet-based servers, like Defendants. *See, e.g.*, *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021) (holding creator, owner, and operator of application that "permits its users to share photos and videos through [its] servers and the internet" necessarily "enables computer access by multiple users to a computer server," and thus qualifies as a "provider of an interactive computer service") (citations and internal quotation marks omitted). Accordingly, the court finds the first prong of the *Barnes* test is met.

Under the second prong, "what matters is whether the claims 'inherently require[] the court to treat the defendant as the "publisher or speaker" of content provided by another.'" *Dyroff*, 934 F.3d at 1098 (alteration in original) (quoting *Barnes*, 570 F.3d at 1102). Plaintiffs argue their claims do not treat Defendants as publishers or speakers because their claims allege Defendants' products could be made safer without altering third-party content and that the designs of Defendants' applications encourage the alleged harmful conduct. (Dkt. 135 at 6-12.) Further, Plaintiffs argue the anonymity of Defendants' users "itself creates harm that makes any content seem harmful." (Dkt. 135 at 11-12.) Defendants contend that, regardless of how Plaintiffs' claims are styled, Plaintiffs' legal theories seek to hold Defendants liable for publishing the content of third parties. (Dkts. 118 at 9-10; 127 at 14-15.)

Ultimately, although Plaintiffs frame user anonymity as a defective design feature of Defendants' applications, Plaintiffs fundamentally seek to hold Defendants liable based on content published by anonymous third parties on their applications. Accordingly, the court finds Plaintiff's theories of liability treat Defendants as a "publisher" within the meaning of Section 230. *See Dyroff*, 934 F.3d at 1098 (acknowledging defendant implemented "features and functions" to "analyze" and "recommend" user grounds but holding plaintiffs "cannot plead around Section 230 immunity by framing these website features as content" because plaintiffs' claims sought to treat defendant as a "publisher" of third-party information); *id.* at 1095 (noting that "[s]ome of [defendant's] [web]site's functions, including user anonymity and grouping, facilitated illegal drug sales"); *Kimzey*, 836 F.3d 1266 (holding district court properly dismissed complaint that sought to "circumvent the CDA's protections" by "plead[ing] around the CDA to

advance the same basic argument that the statute plainly bars: that [defendant] published user-generated speech that was harmful to [plaintiff]") (citation omitted); *Gonzalez v. Google LLC*, 2 F.4th 871, 891 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 80 (2022) ("This element is satisfied when 'the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker."'") (quoting *Barnes*, 570 F.3d at 1102); *see also Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (noting "[t]he courts' generally broad construction of Section 230(c)(1) in favor of immunity has resulted in a capacious conception of what it means to treat a website operator as the publisher of information provided by a third party") (cleaned up). While Plaintiffs urge that preventing users from posting anonymously is unrelated to the content users of Defendants' applications generate, these "decisions about the structure and operation of a website are content-based decisions" under Section 230. *See Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016) (noting courts have held such content-based decisions include "the option to anonymize email addresses, [and the] acceptance of anonymous payments") (citing *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016)); *see also Lewis v. Google LLC*, 461 F. Supp. 3d 938, 954 (N.D. Cal. 2020).

The court similarly finds that *Dyroff* is not materially distinguishable on the basis that the users of the application at issue in *Dryoff* remained pseudonymous while posting users of Defendants' applications remain anonymous. The Ninth Circuit in *Dyroff* drew no such distinction. Rather, the Circuit stated that "[t]oday, online privacy is a ubiquitous public concern for both users and technology companies." 934 F.3d at 1100. The Ninth Circuit in *Dryoff* spoke in terms of "anonymity," not pseudonymity. *See id.* at 1095, 1100. Even if it had not, the court does not find it plausible to distinguish from *Dyroff* given the Ninth Circuit ultimately concluded that the defendant was "entitled to immunity under the plain terms of Section 230 and our case law as a publisher of third-party content" because the plaintiff could not "and [did] not plead that [the defendant] required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts." *Id.* at 1099. The court finds this ultimate conclusion applies to this case with equal force.

Plaintiffs principally seek to combat the application of Section 230 immunity by bringing this case within the ambit of *Lemmon*, in which the plaintiffs brought claims against Snap, Inc.,

a former Defendant in this case and creator of an application similar to Defendants'. In *Lemmon*, the plaintiffs alleged Snapchat's "Speed Filter," an "interactive system" that "encouraged its users to pursue certain unknown achievements and rewards" and "worked in tandem to entice young Snapchat users to drive at speeds exceeding 100 MPH," had nothing to do with "its editing, monitoring, or removing of the content that its users generate through Snapchat." 995 F.3d at 1091-92. Finding the case presented "a clear example of a claim that simply does not rest on third-party content," *id.* at 1093, the Ninth Circuit held that "the duty [Snap] allegedly violated 'spr[a]ng[] from' its distinct capacity as a product designer,'" *id.* at 1092. The Ninth Circuit in *Lemmon* also reasoned that "Snap could have satisfied its 'alleged obligation'—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate." *Id.* (citing *Internet Brands*, 824 F.3d at 851).

Though Plaintiffs seek to characterize anonymity as a feature or design independent of the content posted on Defendants' applications, the theories underlying Plaintiffs' claims essentially reduce to holding Defendants liable for publishing content created by third parties that is allegedly harmful because the speakers are anonymous. Imposing such a duty would "necessarily require [Defendants] to monitor third-party content," *cf. HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019), e.g., in the form of requiring Defendants to ensure that each user's post on their applications is traceable to a specifically identifiable person. Accordingly, the court finds *Lemmon* is distinguishable, and the second prong of Section 230 immunity is satisfied.

Under the third prong, "§ 230(c)(1) cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties" but permits liability against internet companies when "they create or develop their own internet content" or are "responsible in part, for the creation or the development of the offending content on the internet." *Lemmon*, 995 F.3d at 1093 (cleaned up). Here, Plaintiffs argue their claims do not treat Defendants as publishers of information, but rather seek to impose liability on the basis that their applications could have been designed more safely without altering third-party content; namely, by removing complete anonymity. (Dkt. 135 at 5-10.) Plaintiffs also argue that Defendants contributed to the behavior that harmed Plaintiffs by designing applications in which posting

users remain anonymous, thereby promoting bullying on their platforms. (*Id.* at 10-12.) Defendants argue that their users, not Defendants, are the persons responsible for the creation or development of the harmful content at issue. (Dkts. 118 at 8-9; 127 at 14.)

The thrust of Plaintiffs' allegations concern posts by users of Defendants' applications. Accordingly, Defendants are not "information content provider[s] because [they] did not create or develop information" but rather "published information created or developed by third parties." *Dyroff*, 934 F.3d at 1098. Defendants did not create or develop the harassing and explicit messages that led to the harm suffered by Plaintiffs; the sending users did. *See id.* While Plaintiffs assert their false advertising claims differ from their other claims in this respect, (*see* Dkt. 135 at 14-15), those claims are still predicated on content developed by those third parties. Had those third-party users refrained from posting harmful content, Plaintiffs' claims that Defendants falsely advertised and misrepresented their applications' safety would not be cognizable. Accordingly, the nature of Plaintiffs' legal claim does not alter the court's conclusion, whether based on negligence or false advertising. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009) (noting the Ninth Circuit has held that "CDA § 230 provide[s] immunity from state unfair competition and false advertising actions") (citing *CCBill*, 488 F.3d at 1108, 1118-19)).

In sum, "[t]he accusation here is fundamentally that [Defendants] should have monitored and curbed third-party content." *See Jackson v. Airbnb, Inc.*, 2022 WL 16753197, at *2 (C.D. Cal. Nov. 4, 2022) (finding Section 230 immunized defendant notwithstanding *Lemmon* where plaintiffs' claims were "predicated on holding [defendant] liable for third party content posted on its platform"); *cf. In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, 2022 WL 4009918, at *4-18 (N.D. Cal. Sept. 2, 2022) (summarizing historical development of Ninth Circuit case law regarding Section 230 and distinguishing between "mere message boards" and "creators of content themselves"). Because these claims fall squarely within Section 230's broad grant of immunity, the court finds Section 230(c)'s immunity provision applies to Defendants.

B. Applying Section 230 to Plaintiffs' Claims

As stated above, the FAC brings twelve causes of action under state law against Defendants; namely: (1) strict product liability based on a design defect; (2) strict product liability based on a failure to warn; (3) negligence; (4) fraudulent misrepresentation; (5) negligent misrepresentation; (6) unjust enrichment; (7) violation of the Oregon Unlawful Trade Practices Act; (7) violation of the New York General Business Law § 349; (8) violation of the New York General Business Law § 350; (9) violation of the Colorado Consumer Protection Act; (10) violation of the Pennsylvania Unfair Trade Practices Law; (11) violation of the Minnesota False Statement in Advertising Act; and (12) violation of California Business and Professions Code §§ 17200 & 17500. For the reasons set forth below, the court finds that each of these causes of action is predicated on the theory that Defendants violated various state laws by failing to adequately regulate end-users' abusive messaging, and is therefore barred by Section 230.

Plaintiffs argue CDA immunity does not attach to Plaintiffs' failure to warn claims under *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). (Dkt. 135 at 12-13.) Defendants argue *Internet Brands* is distinguishable, and that the CDA bars Plaintiffs' failure to warn claims regardless on the basis that Plaintiffs seek to hold Defendants liable as a publisher of third-party content. (Dkts. 118 at 10-14; 127 at 19-20.)

The Ninth Circuit in *Internet Brands* noted that the plaintiff sought to hold the defendant "liable for failing to warn her about information it obtained from an outside source about how third parties targeted and lured victims through [the website on which the defendant hosted the plaintiff's user profile]," and thus reasoned that "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content." 824 F.3d at 851. The Ninth Circuit continued that the "alleged tort based on a duty that would require such a self-produced warning falls outside of section 230(c)(1)" because the "plaintiff's negligent failure to warn claim [did] not seek to hold Internet Brands liable as the publisher or speaker of any information provided by another information content provider." *Id.* (citation and internal quotation marks omitted). As discussed above, the court finds that Plaintiffs' theory would require the editing of third-party

content, thus treating Defendants as a publisher of content. Accordingly, *Internet Brands* is inapposite on this issue.[4] *See Roommates*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."); *Dyroff*, 934 F.3d at 1100 (holding the "allegation that user anonymity equals promoting drug transactions [was] not plausible" in view of defendant's "anonymity features along with its public statements expressing concern for internet privacy and detailing the burden of law enforcement information requests" and affirming district court's "dismiss[al] [of] all claims related to this supposed theory of liability" under Section 230).

With respect to Plaintiffs' remaining claims based on negligence and various state law statutes prohibiting false advertising and misrepresentations,[5] Plaintiffs argue Section 230 immunity does not protect Defendants from their own alleged misrepresentations and false statements on which Plaintiffs' various remaining claims are based. (Dkt. 135 at 14-15.) Defendants argue that, because Plaintiffs' claims are directed at Defendants' content moderation policies, the remainder of Plaintiffs' claims are barred under the CDA. (Dkts. 118 at 15-18; 127 at 20-22.) The court agrees with Defendants and finds Plaintiffs' argument unpersuasive for the same reason as Plaintiffs' failure to warn claims: because they are all predicated on allegations concerning activity immunized by Section 230. *See Roommates*, 521

[4] Additionally, the *Internet Brands* court "express[ed] no opinion on the viability of the failure to warn allegations on the merits." 824 F.3d at 854. Later Ninth Circuit precedent suggests Defendants—whose applications' anonymous posting feature is not plausibly alleged to relate to content created or selectively promoted by Defendants—may not owe such a duty under California law, even if those claims are not barred by the CDA. *See Dyroff*, 934 F.3d at 1101 ("No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content.") (citing *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359-60 (D.C. Cir. 2014)).

[5] As discussed at oral argument, it is materially undisputed in substance, for the purposes of Section 230 immunity, that Plaintiffs' remaining state law claims are predicated on Plaintiffs' allegations that Defendants committed false advertising or actionable misrepresentations, or are otherwise coextensive with Plaintiffs' negligence or product liability claims.

F.3d at 1170-71; *Dyroff*, 934 F.3d at 1100; *Zango*, 568 F.3d at 1177 (false advertising); *Barnes*, 570 F.3d at 1102-03 (holding negligence claim under state law that "derive[d] from [defendant's] role as a publisher" was subject to CDA immunity); *Doe through Next Friend Roe v. Snap, Inc.*, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) (finding state law claim based on negligence was barred by Section 230 where it was "couched as a complaint about [defendant's] design and operation rather than its role as a publisher of third-party content," because defendant's "alleged lack of safety features [was] only relevant to [plaintiff's] injuries to the extent that such features would have averted wrongful communication via [defendant's] platforms by third parties") (cleaned up).[6]

Because Section 230 immunizes Defendants from Plaintiffs' claims in their entirety, the FAC is subject to dismissal.[7] "While it is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, that presumption can be overcome where there has been a clear showing that amendment would be futile." *Barke v. Banks*, 25 F.4th 714, 721 (9th Cir. 2022) (cleaned up). Stated differently, although Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be "freely" given, "that liberality does not apply when amendment would be futile." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016); *see also AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) ("[A] district court need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile.") (citations omitted). "[C]ourts have treated § 230(c) immunity as quite robust," *see, e.g.*, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003), and the doctrine

[6] To the extent the Fourth Circuit's decision in *Henderson v. The Source of Public Data*, 53 F.4th 110, 122 (4th Cir. 2022), in which the Fourth Circuit Court of Appeal reinterpreted its prior conception of "publication" under § 230(c)(1) in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)), is implicated here, the court finds it unpersuasive in light of broader view adopted by the Ninth Circuit, *see, e.g.*, *Roommates*, 521 F.3d at 1170-71; *see also Monsarrat v. Newman* 28 F.4th 314, 320 (1st Cir. 2022).

[7] In light of this finding that Defendants are immunized against Plaintiffs' claims under Section 230 of the CDA, the court does not reach the remainder of the parties' arguments.

bars any claims brought against a covered interactive computer service provider that "inherently require[] the court to treat the defendant as the 'publisher or speaker' of content provided by another," *Dyroff*, 934 F.3d at 1098 (alteration in original) (quoting *Barnes*, 570 F.3d at 1102). Because the court finds the core theory underlying Plaintiffs' claims seeks to treat Defendants as a "publisher or speaker" of the posts of third parties utilizing their applications, the court finds amendment to be futile. *See Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (affirming district court's dismissal with prejudice because granting plaintiff "leave to amend its complaint would be futile" where plaintiff's claim was "barred by the CDA" under Section 230).

Ultimately, based on the state of the record, as applied to the applicable law, the court concludes that Defendants are immunized under Section 230 of the CDA and that permitting further amendment would be futile. Accordingly, the court **DISMISSES WITH PREJUDICE** the FAC.

IV. Disposition

For the reasons set forth above, the court **GRANTS** Defendants' Motions to Dismiss and **DISMISSES WITH PREJUDICE** the FAC.

IT IS SO ORDERED.

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE ESTATE OF CARSON BRIDE, by and through his appointed administrator KRISTIN BRIDE; et al., Plaintiffs-Appellants, v. YOLO TECHNOLOGIES, INC., Defendant-Appellee.	No. 23-55134 D.C. No. 2:21-cv-06680-FWS-MRW Central District of California, Los Angeles ORDER

Before: SILER,* BEA, and IKUTA, Circuit Judges.

Judges Siler, Bea, and Ikuta voted to deny appellee's petition for panel rehearing.

The petition for rehearing, Dkt. No. 67, is DENIED.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.