18-0396-cv

United States Court of Appeals

for the

Second Circuit

MATTHEW HERRICK,

Plaintiff-Appellant,

– v. –

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES GRINDR LLC AND KL GRINDR HOLDINGS, INC.

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CORPORATE DISCLOSURE STATEMENT[1]

Pursuant to Fed. R. App. P. Rules 26.1 and 28(a)(1) Appellee Grindr LLC ("Grindr") states that it is a private, non-governmental party, that it has no parent company and that no publicly-held corporation owns 10% or more of Grindr's stock.

Pursuant to Fed. R. App. P. Rules 26.1 and 28(a)(1) Appellee KL Grindr Holdings, Inc. ("KL Grindr") states that Beijing Kunlun Technology Company Limited is publicly traded on the Hong Kong Stock Exchange and, through intermediaries, owns 10% or more of KL Grindr's stock. No other publicly-traded corporations own 10% or more of KL Grindr's stock.

[1] This Brief is submitted on behalf of Grindr LLC and KL Grindr Holdings, Inc.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the District Court properly found that Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230 ("Section 230"), barred Plaintiff-Appellant Matthew Herrick's ("Appellant") claims for defect in design, defect in manufacture, defect in warning, negligent design, failure to warn, negligence, intentional infliction of emotional distress and negligent infliction of emotional distress?

(2) Whether the District Court properly found that Appellant failed to plead plausible claims for fraud, promissory estoppel, negligent misrepresentation and deceptive practices and false advertising under New York General Business Law?

STANDARD OF REVIEW

The Court of Appeals reviews de novo a district court's decision to grant motions to dismiss under Federal Rule of Civil Procedure Rule 12(b)(6). *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018).

STATEMENT OF THE CASE

Appellant is going through contortions to hold an interactive computer service provider liable for content solely generated by a rogue user.

The Grindr App

The Grindr App ("App") is a digital dating and social networking application designed to provide a "safe space" for gay, bisexual, trans and queer people to connect. The App requires that users submit only an email address to create a profile, and otherwise provides users with complete flexibility as to the information that they provide to Grindr or share with other users, because users often need to be discreet to avoid harassment, discrimination, legal repercussions, or physical violence for their sexual orientation. (A57, ¶ 21.)

On the App, users can create profiles, which may include photographs, personal information, dating preferences, or links to social media accounts at their sole direction. Users may also view other users' profiles, listed by geographic proximity and, if interested, exchange messages with other users. (A57, A59, ¶¶ 27, 31.) The App, like many other smartphone apps for dating, shopping, restaurant reviews, etc., asks each user to allow access to his smartphone's geolocation (longitude and latitude). (A57, ¶¶ 23-24.) From this information, the App automatically displays a scrolling list of profiles based on geographic proximity to other App users. (A57-A59, ¶¶ 23-24, 28, 31-33.) If the user allows,

the App shows the distance between two users (*e.g.*, a number of feet or miles away). It does not provide precise locations such as street addresses, apartment numbers, or even direction from the user, nor could it based on the longitude and latitude received from smartphones.

Users may view other profiles, "favorite" profiles of interest, or "block" unwanted profiles. (A59-A60, ¶ 31.) The App also allows users to sort profiles by "tribe" so that, for example, a user who prefers athletic men would see only profiles of users who self-identified as "Jocks." (A59-A60, ¶ 32.) Grindr does not assign users a tribe or other category or suggest introductions or "matches." If users wish to interact, they can send direct messages to other users ("chat"), including pictures, text messages, or an image of their location (shown by a "dropped pin"). (A59, ¶ 31.) No information is sent from one user to another unless a user chooses to open the App in a given location, provide profile information, and then send chat messages or location information to another user. (A60, ¶ 34.)

Appellant's Allegations

Appellant first used the App in May 2011. (A64, ¶ 46.) Appellant disabled his account in November 2015, after he met Oscar Juan Carlos Gutierrez ("JC")

through the App and the two began a relationship.[2] (A65, ¶ 48.) Since disabling his account in 2015, Appellant has not used the App. (*Id.*; A135, lines 10-11.) Appellant alleges that long after he disabled the App and after he and JC broke up, JC began a campaign of harassment against him, creating Grindr profiles that impersonated Appellant, which JC used to chat with other Grindr users and invite them to Appellant's home and workplace to engage in sexual encounters, often with the promise of violence or aggression. (A54-A55, A65-A67, ¶¶ 5, 9, 49-54.)

Appellant alleged fourteen causes of action: defective design, defective manufacture, defect in warning, negligent design, negligent failure to warn or to provide adequate instruction, negligence, copyright infringement, promissory estoppel, fraud, violation of N.Y. Gen. Bus. Law § 349 (deceptive practices) and §§ 350 and 350-a (false advertising), intentional infliction of emotional distress, negligent infliction of emotional distress and negligent misrepresentation. Appellant's claims are all based on the same factual allegations, that: (1) the App is a defectively designed and manufactured product because it lacks built-in safety features to block or remove JC's impersonating profiles, messages, or photographs; (2) Grindr misled Appellant into believing it could interdict impersonating profiles

[2] The amicus brief of Electronic Privacy Information Center ("EPIC") falsely claims that Appellant left the App because of abuse, citing to the paragraph of the Amended Complaint in which Appellant admits he left the App because he began a relationship with JC. (*See* Doc. 72 p. 21.)

or other harassing content; and (3) Grindr has wrongfully refused to search for and remove impersonating profiles.

The App does not direct users to one another and did not direct anyone to Appellant's home or workplace. Rather, as Appellant repeatedly acknowledges, JC created the impersonating information and messages directing individuals to Appellant's locations:

- "Starting in October, 2016 [Appellant]'s then-recent ex-boyfriend began using Grindr to impersonate [Appellant]." (A65, ¶ 49; *id.* at ¶¶ 50-51.)
- "direct messages were used to transmit maps of [Appellant]'s locations and to arrange the sex dates." (A67, ¶ 52.)
- "Direct messages from Grindr users ... repeatedly use the same words and phrases." (A54, ¶ 6 (referencing the scheme "brought by a Grindr user"), A72, ¶ 80.)
- "The impersonating accounts have repeatedly used the same photographs of [Appellant]." (A72, ¶ 79.)
- "JC is creating fake accounts and all the other users who are using Grindr are privy to that geolocation information." (A138, lines 17-19.)
- "JC puts in the address in Grindr." (A139, line 16.)
- "JC began impersonating [Appellant] on Grindr to chat with other users..." (A19, ¶ 30.)[3]

[3] Superseded pleadings constitute the admissions of a party-opponent and are admissible in the case in which they were originally filed. *U.S. v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) ("A party thus cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories.") Additionally, in his

- "The most pernicious and relentless of JC's tactics to destroy [Appellant] was through creating Grindr profiles impersonating [Appellant] and making endless appointments for sexual encounters between [Appellant] and strangers." (A19, ¶ 32; *see also* A19-A20, ¶¶ 31, 33-34.)

- "All visits were arranged by JC impersonating [Appellant] on the [App]." (A21, ¶ 36.)

- "Starting in October 2016, after [Appellant] ended the relationship, JC commenced a campaign of non-stop vengeance against [Appellant], including impersonating [Appellant] on Grindr." (Appellant's Brief ("App. Br.") p. 11.)

- "**JC** weaponized the [App] **and directed over 1,100 strangers to [Appellant]'s home and workplace**." (App. Br. p. 11) (emphasis added).

- "His stalker ex-boyfriend … impersonat[ed] him on the [App]." (App. Br. p. 7.)

- "The impersonating profiles… used his pictures, his name, his age, his height, and his weight. The profiles said he had rape fantasies, was HIV-positive but sought unprotected sex, and had drugs to share." (App. Br. pp. 7-8.)

- "The impersonating profiles contained images of [Appellant]. The profiles' dropdown menus contained accurate descriptions of [Appellant], gave his location as Harlem, falsely portrayed him as an HIV-positive individual seeking violent unprotected sex." (App. Br. pp. 11-12.)

Appellant requested a restraining order to prevent JC—the bad actor—from directing Grindr users to Appellant's home and workplace. Appellant did not seek to stop *any* conduct by Grindr, but rather, asked the District Court to compel

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supporting papers (incorporated by reference and part of the judicial record) and at the hearing on the application to extend the temporary restraining order ("TRO") (A139, line 16), Appellant admitted that JC, not Grindr, directed users to his home and workplace.

Grindr to "disable ... impersonating accounts under the control of [JC] and/or associated with [him]" and "prohibit[] Grindr from allowing" such profiles. (*See* A42.)

Procedural History

On January 27, 2017, Appellant commenced this action against Grindr in the Supreme Court of the State of New York, New York County. (A9-A40.) Upon Appellant's application, Justice Kathryn Freed entered an Ex Parte Order to Show Cause and TRO. (A41-A42.)

On February 8, 2017, Grindr timely removed the action to the District Court, on the basis of diversity jurisdiction. (ECF No. 1.)

On February 22, 2017, the District Court held a hearing on Appellant's application to extend the TRO. (A44.) At that hearing, Appellees' counsel informed the District Court that Grindr rigorously worked to try to stop the alleged impersonation by conducting daily searches for accounts that might have been created by JC. (A149-A153.) By conducting searches based on email addresses, phone numbers, and street addresses, Grindr was able to identify and delete numerous accounts. (*Id.*) (A149-A153.)

By order dated and filed February 24, 2017, the District Court denied extension of the TRO. (A43-A52.)

On March 31, 2017, Appellant filed his Amended Complaint, adding KL Grindr and Grindr Holding Company ("Grindr Holding") as defendants.[4] (A53-A95.) On April 21, 2017, Grindr moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) on the grounds that all of the claims were barred by Section 230 and, in any event, were improperly pleaded. (A96-A97.) KL Grindr additionally sought dismissal on the grounds that: (i) it could not be liable based solely on its status as a member of Grindr; (ii) the court lacked personal jurisdiction over it; and (iii) Appellant impermissibly engaged in group pleading. (A181-A182.)

By Decision and Order dated and filed January 25, 2018 ("Order"), the District Court properly dismissed Appellant's Amended Complaint with prejudice.[5] (A190-A218.)

SUMMARY OF THE ARGUMENT

In 1997, the Fourth Circuit held that the plain language of Section 230 "creates a federal immunity to any cause of action that would make service

[4] At the time, KL Grindr and Grindr Holding were Grindr's two corporate members. For no articulated reason, the Amended Complaint attempts to extend Appellant's claims against Grindr to these members. Appellant simply groups the three separate entities—along with the App—into a single defined term. (*See* A53, ¶ 1.)

[5] The District Court, finding that each of Appellant's claims was subject to dismissal pursuant to Rule 12(b)(6), did not address KL Grindr's other bases for dismissal of the Amended Complaint.

providers liable for information originating with a third-party user of the service." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Since then, the Court of Appeals for every Circuit—including this one—as well as all of the district courts within this Circuit that have analyzed Section 230, have similarly concluded that Section 230 immunity is robust and extends to all manner of third-party content and claims. Following this abundant precedent, the District Court properly dismissed all of Appellant's claims which attempted to hold Appellees liable for third-party content created by JC, Appellant's ex-boyfriend.

This Court and every other Circuit apply a three-part test to determine if a party is entitled to immunity under Section 230: (1) the defendant is a provider or user of an interactive computer service ("ICS"); (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.

The District Court had no trouble finding that Grindr is an ICS because it provides subscribers with access to a common server.

The court similarly had no trouble finding that all of Appellant's claims, other than those based on purported misrepresentations, are based on third-party

content since they are based on information JC provided on the App to direct potential suitors to Appellant's home or workplace.[6]

Noting that courts have interpreted "publication" capaciously, the District Court found that Appellant's claims of insufficient safety features or failure to adequately police and remove JC's content were ultimately attempts to hold Grindr liable as the publisher or speaker of the impersonating profiles. Courts, including this one, have consistently held that claims that an ICS failed to take down third-party content, monitor or police its platform, or employ adequate safety features are merely another way of claiming that the ICS is liable for publishing the third-party content.

The District Court also properly found that Appellant's claims based on purported misrepresentations were inadequately pleaded. Appellant completely ignores many of the independent grounds enumerated by the District Court for dismissing these claims, including that the Terms of Service on which he relies are

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[6] The District Court properly dismissed Appellant's Amended Complaint without leave to amend because, among many other reasons, Appellant's central allegations undermine his own claims. For instance, one of Appellant's principal arguments regarding why Section 230 does not bar his claims is that the App was defective because it "facilitated … criminal stalking" through the operation of its "defining technological feature," which is the "geolocational function." (App. Br. pp. 10, 12.) Yet, it is apparent from the face of the Amended Complaint that this technology had nothing to do with Appellant's alleged injury because JC did not have access to Appellant's mobile device—a necessary prerequisite for the geolocational function to operate. As a result, the alleged defect that purports to substantiate Appellant's entire narrative is absent, rendering his claims meritless.

directly at odds with his theory that he was misled, that he has not plausibly alleged reasonable reliance, and that he has not adequately alleged that any misrepresentations were a proximate cause of his injury. He thus abandons any challenge to these findings.

Because the District Court properly found that the Amended Complaint should be dismissed under Rule 12(b)(6), this Court should affirm the Order.

ARGUMENT

POINT I

CONGRESS INTENDED SECTION 230 TO BE INTERPRETED BROADLY TO ACCOMPLISH ITS PURPOSE

Due to concern about the future of free speech online and responding directly to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995), Congress enacted an amendment to the CDA which would become known as Section 230. Section 230 ensured that "provider[s] of interactive computer service" would not be treated as publishers of third-party content.

Congress's objective in enacting Section 230 is clear from the statute's text which provides that "It is the policy of the United States--

- [T]o promote the continued development of the Internet and other interactive computer services and other interactive media;
- [T]o preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal of State regulation."

47 U.S.C. § 230(b)(1)-(2). *See also F.T.C. v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (noting this objective and citing *Zeran*, 129 F.3d at 330 ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium")).

Congress expressly set forth its findings which led to the enactment of Section 230 in the statute itself:

- The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens;
- These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops;
- The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity;
- The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation;
- Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a)(1)-(5).

Based on these objectives and findings, in enacting the CDA, Congress created broad federal immunity for claims against online service providers such as Grindr based on content created by users: "No provider or user of an interactive

computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

As the Court stated in *Zeran*, 129 F.3d at 331 (citation omitted):

> Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

See also Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18-19 (1st Cir. 2016) ("This preference for broad construction recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content would have an obvious chilling effect in light of the difficulty of screening posts for potential issues."), *cert. denied*, 137 S. Ct. 622 (2017).

Appellant's proposed construction of Section 230 disregards congressional intent and sound policy. If the Court adopted Appellant's construction, interactive computer service providers would be exposed to limitless liability based on the conduct of individuals and forces outside of their control. Rather than foster

continued development of interactive computer services and a healthy market and online ecosystem, Appellant's proposed construction of Section 230 would prompt a mass exodus from this space, thereby cutting off speech, commerce, and other socially beneficial activity. This Court's Section 230 precedent, as embraced by the District Court, strikes the right balance between the competing interests that the statute was designed to address.

POINT II

THE DISTRICT COURT CORRECTLY DETERMINED THAT APPELLANT'S CLAIMS WERE BARRED BY THE CDA

The Second Circuit applies a three-part test to determine if a party is entitled to 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.'" *LeadClick*, 838 F.3d at 173 (quoting *Backpage.com*, 817 F.3d at 19).

The District Court properly applied this three-part test to find that Appellees were entitled to immunity under Section 230 with respect to Appellant's product liability, failure to warn, negligence and intentional and negligent infliction of emotional distress claims.

A. The District Court Correctly Held that Grindr Is an ICS

The District Court found that Grindr is an ICS and that there was "no plausible basis to argue that it is not." (A198.) 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). The District Court noted that courts applying this definition have had no trouble concluding that social media networking sites, such as Facebook, and online matching services, like Roommates.com and Matchmaker.com, are ICSs, citing to *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156-57 (E.D.N.Y. 2017), *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162, n.6 (9th Cir. 2008), and *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

The District Court correctly held that Grindr, like those services, is an ICS because it provides subscribers with access to a common server. (A198); *see also 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."); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27-28 (2d Cir. 2015) (noting that the statute defines "interactive computer service" expansively and holding that GoDaddy, a web host, qualifies as an ICS); *Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("web site

operators … are providers of interactive computer services" because "[a] web site … enables computer access by multiple users to a computer server, namely, the server that hosts the web site"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420-22 (5th Cir. 2008); *Backpage.com,* 817 F.3d at 18-19; *see also Franklin v. X Gear 101, LLC,* No. 17-cv- 6452-GBD-GWG, 2018 WL 3528731, at *19 (S.D.N.Y. Jul. 23, 2018) (finding that Instagram, "a photo sharing computer and/or mobile phone application" where users post photos on their profile that others follow, was an ICS to which CDA immunity applied).

Appellant does not dispute that Grindr provides an internet-based service for multiple users to communicate and access information created by other users. In the Amended Complaint, Appellant actually pleaded that Grindr was an ICS.[7] Nevertheless, without any citation, Appellant argues that whether a defendant is an ICS is a technical and fact-intensive definition since (i) Grindr may be a product and not a service; (ii) the App does not function the same as websites in other CDA immunity cases; and (iii) Grindr allegedly does not provide educational or informational resources, discourse or intellectual activity and thus is not the type of forum upon which Congress intended to confer ICS status.

[7] Appellant alleged that Grindr was an ICS (A76, ¶ 98), but now disingenuously claims that that allegation was a typographic error. (App. Br. p. 37.)

First, the product versus service argument is illusory. The touchstone is whether defendant provides subscribers with access to a common server, which Grindr clearly does. Second, Grindr is a social-networking platform no different from Facebook or other matching services like Roommates.com and Matchmaker.com. Appellant fails to explain how Grindr functions any differently from any other website that has been found to be an ICS. Indeed, the District Court found that Appellant failed to identify "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." (A198.)

Third, Appellant provides no support for his argument that a website or app that fails to provide educational or informational resources, discourse or intellectual activity cannot qualify as an ICS. This argument disregards all of the cases cited above which held that social-networking platforms and matching services were ICSs.

B. The District Court Correctly Held Appellant's Claims Were Based on Content Provided by Another "Information Content Provider"

The District Court also properly found that the second Section 230(c) immunity element was satisfied "because [Appellant's] design and manufacturing

defect, negligent design, and failure to warn claims are all based on content provided by another user—[Appellant's] former boyfriend." (A198.)

Appellant appears to advance two arguments to avoid this truth: (i) "Grindr engages in tortious conduct and content creation through its function and design - particularly through its patented geolocation feature which independently determines the longitude and latitude of a user, generates a map, and guides users to their targets in real time" (App. Br. p. 19.); and (ii) because Section 230 immunity applies only to traditional publishing torts such as defamation, only published information, publicly displayed, constitutes content for purposes of the second element of immunity. (App. Br. p. 8.) Both arguments lack merit.

The District Court correctly concluded that Appellant's product liability, failure to warn, negligence and intentional and negligent infliction of emotional distress claims are all based on content provided by Appellant's former boyfriend, JC. Appellant repeatedly admits in his Original Complaint, Amended Complaint and Appellate Brief that JC created the impersonating profiles which included Appellant's pictures, name, personal characteristics, his location, a false portrayal of him as HIV-positive, and, through direct messaging, transmitted Appellant's locations and arranged sex dates. (A65-A66, ¶¶ 49-52, A72, ¶ 80; A19-A21, ¶¶ 31-34, 36; App. Br. pp. 7, 11-12.)

The District Court correctly determined that content created by JC allegedly sent suitors to Appellant's home and workplace, not Grindr's geolocation function. (A192, n.2 and A198.) Appellant's focus on Grindr's geolocation function is a "red herring." As an initial matter, the App's geolocation function only sorts users by proximity and, if the user allows, displays his relative distance (*e.g.*, "104 feet away"). (*See* A12-A13, ¶ 10; A66 (screen shot).) The App does not, as Appellant implausibly alleges, "direct" users to one another, nor does it display a user's street address, "apartment building," "unit door" number," "window," or workplace—all information Appellant alleges the unwanted visitors had. (A68-A69, ¶¶ 59-64.) The App does not and could not have this information as it relies solely on the longitude and latitude from the App user's device to determine location. (A57, ¶ 24.) The only way users could have this specific information is through content provided by JC, such as direct messages, which Appellant admits JC provided. (A67, A72, ¶¶ 52, 80; A21, ¶ 35; A139, lines 1-5.)[8]

[8] To the extent Appellant argues that Grindr "creates" content by providing a feature that allows users to create and share a map showing their location, Grindr does not create this information—it merely displays the location a user provides by allowing access to his location. (*See* A66.) This "neutral assistance," used by numerous apps to allow users to easily provide directions, is not what makes JC's actions on the App tortious. Even assuming JC could provide a dropped pin representing Appellant's location, the content at issue—the "dropped pin"—would be created exclusively by JC, not Grindr.

Moreover, Appellant was no longer a Grindr user at the time of JC's impersonation, so Grindr did not have access to Appellant's longitude and latitude. (A65, ¶ 48; A135, lines 10-11 ("Our client...is not using the app."); App. Br. p. 11 ("Around November 2015, [Appellant] stopped using his Grindr account.")). In order for the App to have Appellant's longitude and latitude, JC would need to be standing next to Appellant when using the App, and, even in this fantastical circumstance, the App still would not have Appellant's location.

While Appellant contends the App's functionality allowed JC to impersonate Appellant, an ICS does not become an information content provider by "merely taking action that is necessary to the display of allegedly illegal content." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 410-11 (6th Cir. 2014). An ICS only loses its immunity if it assists in the "development of what [makes] the content unlawful." *LeadClick*, 838 F.3d at 174 (quoting *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009)).

The District Court correctly determined that an "ICS may not be held liable for so-called 'neutral assistance,' or tools and functionality that are available equally to bad actors and the app's intended users," and that Grindr's categorization features, such as its drop-down menu for preferred sexual position, "algorithmic filtering, aggregation, and display functions," constitute quintessential neutral assistance. (A199.)

Courts have consistently ruled that sorting and filtering functions, which organize information based on user or third-party input, are "neutral tools" that do not create new content or destroy CDA immunity. *See, e.g.*, *Saponaro*, 93 F. Supp. 3d at 323 (dismissing claims that Grindr's drop-down menus and profile questions constituted creation of new content); *Carafano*, 339 F.3d at 1125 (dismissing claims against dating website based on its "sorting" of users; noting that an ICS "receives full immunity regardless of the specific editing or selection process"); *Roommates.com*, 521 F.3d at 1172 ("Of course, any classification of information, like the sorting of dating profiles by the type of relationship sought in *Carafano*, could be construed as 'develop[ment]' under an unduly broad reading of the term. But, once again, such a broad reading would sap section 230 of all meaning."); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007).

Appellant argues that Section 230 immunity applies only to traditional publishing torts such as defamation and that only publicly displayed information constitutes content for purposes of the second element of immunity, but that theory is contrary to all of the case law interpreting Section 230. Section 230 "creates a federal immunity to *any cause of action* that would make service providers liable for information originating with a third-party user of the service." *Zeran*, 129 F.3d at 330 (emphasis added). "[T]he language of the statute does not limit its application to defamation cases. Indeed many causes of action might be premised

on the publication or speaking of what one might call 'information content.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). "Thus, what matters is not the name of the cause of action defamation versus negligence versus intentional infliction of emotional distress—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." *Id.* at 1101-02. Consistent with its text and purpose, "[t]here has been near-universal agreement that section 230 should not be construed grudgingly." *Backpage.com*, 817 F.3d at 18-19. "The broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party.…The ultimate question...does not depend on the form of the asserted cause of action; rather, it depends on whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." *Id.* at 19. "[C]lose cases … must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites." *Jones*, 755 F.3d at 408 (citation omitted).

Consistent with the broad construction accorded to Section 230, courts have applied it to a wide variety of causes of action that have nothing to do with traditional publishing torts such as defamation. *See, e.g.*, *Barnes*, 570 F.3d at

1101-02 (dismissing claims based on allegations that Yahoo! failed to adequately police or stop plaintiff's ex-boyfriend from creating profiles impersonating her); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) (rejecting argument that MySpace negligently failed to take adequate safety measures to prevent users from preying on minors), *aff'd*, 528 F.3d 413 (5th Cir. 2008); *Carafano*, 339 F.3d at 1125 (affirming dismissal of claims against dating website based on third party's posting of profiles impersonating actress and providing home address and phone number); *Backpage.com*, 817 F.3d at 18-19 (affirming dismissal of claims against online classified ad forum, based on publication of advertisements from third parties offering sex with underage victims); *Zeran*, 129 F.3d at 335 (affirming dismissal of claims based on failure to remove false postings impersonating plaintiff and directing buyers to plaintiff to place orders for offensive t-shirts bearing slogans relating to the 1995 Oklahoma City bombing).

The cases cited by Appellant do not support his position that Section 230 liability applies only to publication torts like defamation. In *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), plaintiff did not claim damages resulting from any posting that defendant failed to remove. Indeed, there was no allegation that the bad actors transmitted any harmful messages over the website. "Jane Doe's failure to warn claim has nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user generated content." *Id.* at 852.

The court did make any distinction between publication or non-publication tort claims based on content on a website.

In *Roommates.com*, 521 F.3d at 1174, the Ninth Circuit found that the website, which connected potential roommates, was not entitled to CDA immunity because: (i) it actually created content that violated the Fair Housing Act by requiring users to respond to questions regarding protected personal characteristics and (ii) the company then used the improperly solicited answers to determine which users learned about available housing. Like the court in *Internet Brands*, the Ninth Circuit did not address any distinction between publication torts like defamation and non-publication torts.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), the court found Craigslist was immune from liability under Section 230 for hosting users' discriminatory housing postings because "[n]othing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination." *Id.* at 671. The court rejected the claim that Craigslist caused discriminatory postings by hosting an interactive web forum and rejected the argument that Fair Housing Act claims were an exception to Section 230. Once again, the decision does not remotely stand for Appellant's proposition that Section 230 immunity applies only to publication torts like defamation.

In the final case on which Appellant relies, *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016), a buyer sued Amazon for negligent failure to warn, negligence, and breach of implied warranty for injuries resulting from an exploding cellphone battery sold by a third-party seller on Amazon. The court concluded Section 230 would not provide immunity to the extent a plaintiff established that an ICS played a direct role in tortious conduct, but it held that Section 230 *did* bar plaintiff's negligent failure to warn claim because plaintiff "seeks to impose upon Amazon either (1) a duty to edit and filter content posted by third parties on Amazon's website or (2) a duty to speak alongside content posted by third parties." 219 F. Supp. 3d at 538. Thus, rather than concluding that Section 230 does not provide immunity for non-publication torts, the court dismissed the non-publication failure to warn claim under Section 230.

C. The District Court Correctly Held that Appellant's Claims Seek to Hold Grindr Liable as the Publisher of Third-Party Content

The District Court also properly determined that the third element of Section 230(c) immunity was met because Appellant sought to hold Grindr liable as the "publisher" or "speaker" of the impersonating profiles. In *LeadClick*, this Court cited the Ninth Circuit's discussion in *Barnes*, *supra*, for determining when a plaintiff's theory would treat a defendant as a publisher or speaker of third-party content. *Barnes* established that "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.'" 570 F.3d at 1102. In *Roommates.com*, the Ninth Circuit explained that "publishing" includes "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." 521 F.3d at 1170-71.

Appellant claims the App is defective and dangerous in design because it does not incorporate certain software, such as VPN blocking, photo hashing, and geofencing, to protect its users from foreseeable dangerous uses of its products, such as JC's stalking. Thus, Appellant argues, his claims are unaffected by Section 230 because they are not asserted against Grindr in its capacity as a publisher or speaker of third party content; rather, they spring from Grindr's non-speech related conduct of designing, operating, and maintaining a defective product. (App. Br. pp. 28, 31–33.) Appellant's attempt to repackage his allegations to evade the strictures of Section 230 is unavailing, and the District Court properly found this is but another way of asking the court to hold Grindr liable for failure to police and remove impersonating content. (A201.)

Appellant's theory of liability has been rejected by multiple courts on CDA grounds, including this Court. *See Ricci*, 781 F.3d at 28 (ruling that CDA shielded GoDaddy, a web hosting service, from claims based on refusal to take down allegedly defamatory content); *Gibson v. Craigslist, Inc.*, No. 08 CIV. 7734 (RMB), 2009 WL 1704355, at *3 (S.D.N.Y. June 15, 2009) (declining to impose

liability on Craigslist for failure to "monitor, police, maintain and properly supervise the goods and services sold on its . . . website"); *MySpace*, 528 F.3d at 420 (rejecting claim that MySpace had inadequate features to prevent communications between children and adults, advanced by guardians of minor sexually assaulted by an adult met through MySpace, as "merely another way of claiming that [MySpace] was liable for publishing the communications" themselves); *Backpage.com*, 817 F.3d at 21 (finding that Backpage.com's failure to verify phone numbers, allowing "e-mail anonymization, forwarding [and] auto-reply", 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."); *Universal Commc'ns*, 478 F.3d at 422 ("[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 District Court also properly determined that Appellant's failure to warn claims similarly required treating Grindr as the "publisher" of impersonating profiles created by JC, finding that "[t]he warning proposed by [Appellant] is only

necessary because Grindr (as publisher) does not police or remove objectionable content."[9] (A203.)

In asking this Court to reverse the Order, Appellant and certain amici suggest that Grindr is not entitled to Section 230's protections because it was aware of the offensive profiles and did nothing in response to Appellant's complaints. No case stands for this proposition. The CDA prohibits "failure to police" claims even if the ICS has knowledge of and declines to remove illegal content. *Ricci*, 781 F.3d at 28 ("refusal to remove" allegations do not withstand the CDA); *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588, 590 (9th Cir. 2017) ("Contrary to [plaintiff's] argument, Facebook did not become the 'information content provider' under § 230(c)(1) merely by virtue of reviewing the contents of the suspect account and deciding not to remove it."); *Cohen*, 252 F. Supp. 3d at 156 ("In keeping with this expansive view of the publisher's role, judicial decisions in the area consistently stress that decisions as to whether existing content should be removed from a website fall within the editorial prerogative.").

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[9] Appellant oddly contends that the content of the ICC numbers and MAC addresses of potential stalkers are not published in the traditional sense and Grindr's alleged possession of this information does not constitute the publication of third-party content. These numbers and addresses are not the unlawful content of which Appellant is complaining, *i.e.*, the impersonating profiles and messages directing potential suitors to his home or workplace. Thus, it is irrelevant whether Grindr can be said to have published this information.

In any event, the contention that Grindr did nothing is completely false. Grindr took extensive steps to stop the alleged impersonation by conducting daily searches for accounts that JC might have been created and deleting numerous accounts.[10] (A149-A153.)

POINT III

ALL OF THE CIRCUIT COURTS HAVE INTERPRETED THE CDA TO BAR APPELLANT'S CLAIMS

In seeking reversal of the Order, Appellant asks this Court to depart from decisions of every circuit court and all of the precedent in this Circuit, which have recognized that Section 230 immunity is broad, as Congress intended, and is meant to immunize ICSs from liability for content originating with a third-party user. *See, e.g.*, *Jones*, 755 F.3d at 406-07 ("close cases … must be resolved in favor of immunity") (quoting *Roommates.com*, 521 F.3d at 1174); *Carafano*, 339 F.3d at 1125; *Almeida v. Amazon.com*, 456 F.3d 1316, 1321 (11th Cir. 2006); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *MySpace*, 528 F.3d at 418; *Chi. Lawyers' Comm.*, 519 F.3d at 671; *Universal Commc'ns*, 478 F.3d at 418-19; *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra*,

[10] EPIC contends in its amicus brief that unlike other dating sites which provide a link to report offensive conduct, Grindr does not provide a mechanism for users to file complaints or flag abusive behavior. (Doc. 72 pp. 9-10.) This is false. The App contains block and reporting features. Indeed, EPIC concedes that Grindr permits users to block or report another user. (*Id.*)

Weinstein, & Co., Inc. v. AOL, 206 F.3d 980, 984-85 (10th Cir. 2000); *Zeran*, 129 F.3d at 328.

In *LeadClick*, this Court acknowledged that circuits "have recognized that Section 230 immunity is broad." 838 F.3d at 173. In *Ricci*, 781 F.3d at 28, this Court also recognized that the CDA's wording has been construed broadly to effectuate the statute's "speech-protective purpose."[11]

The district courts in this Circuit also have consistently interpreted Section 230 to apply broadly, creating immunity for any cause of action that would make service providers liable for third-party content. *See Cohen*, 252 F. Supp. 3d at 155 (interpreting Section 230 as barring plaintiff's claims based on third party's use of Facebook to post offensive content that incited violence); *Gibson*, 2009 WL 1704355, at *1; *Manchanda v. Google*, No. 16-CV-3350 (JPO), 2016 WL 6806250

[11] Appellant relies on *Daniel v. Armslist, LLC*, 382 Wis. 2d 241 (Wis. App. Ct. 2018) to establish that Section 230 should be interpreted more narrowly. This Wisconsin appellate court decision is an outlier that has no precedential value and on August 15, 2018 the Wisconsin Supreme Court accepted this case for review. The *Armslist* court relied on defendant's design and operation of website features to hold that Section 230 did not apply. Courts have consistently rejected similar efforts by plaintiffs to work around Section 230 by suing for the defendant-website's design and operation. *See, e.g., MySpace*, 528 F.3d at 420; *Backpage.com*, 817 F.3d at 21; *Universal Commc'ns*, 478 F.3d at 422. While the *Armslist* court purports to engage in a "plain language" analysis, it ignored: (i) Congress' findings recited in Section 230(a) and (b), which counsel for a broader reading of the statute; (ii) over 20 years of case law; and (iii) Congress' post-section 230 amendments, which confirm that Congress intended Section 230 to be read broadly.

(S.D.N.Y. Nov. 16, 2016); *Murawski*, 514 F. Supp. 2d 577. This Circuit has recognized the consistent holdings of district courts within its Circuit as persuasive authority. *Cohen v. Senkowski*, 290 F.3d 485, 490 (2d Cir. 2002).

Unable to dispute that the case law from the eleven Circuit Courts and the courts within this Circuit requires dismissal of each of Appellant's claims based on JC's content, Appellant and the amici are left arguing that each of these courts misinterpreted Congress' intent in enacting Section 230. This argument ignores Congress' findings and objectives recited in Section 230(a) and (b), including the objective, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *LeadClick*, 838 F.3d at 173.

In urging passage of Section 230, Representative Goodlatte (one of its key sponsors) described a "very serious problem" for the companies that were offering online communications tools:

> There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.

141 Cong. Rec. 22,046 (1995) (Statement of Rep. Goodlatte).

The argument that all of the courts have misinterpreted Congressional intent also ignores the fact that Congress is aware of the broad interpretation accorded to Section 230 and has not acted to alter this interpretation. In 2002, a Committee of the House of Representatives noted:

> [Internet Service Providers] have successfully defended many lawsuits using section 230(c). **The courts have correctly interpreted section 230(c)**, which was aimed at protecting against liability for such claims as negligence (*See, e.g., Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)).

H.R. Rep. No. 107-449, at 13 (2002) (emphasis added).

Indeed, since Section 230 was enacted, the CDA has been amended twice, once in 1998, in connection with the addition of Section 231, which criminalized commercial distribution on the internet of material deemed harmful to minors, and again this year, when Congress enacted the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"). In enacting FOSTA, the House opined that: "The CDA provides **broad immunity** for interactive computer services." H.R. Rep. No. 115-572, at 3 (2018) (emphasis added). If Congress believed that courts were incorrectly applying Section 230, it could have amended the statute to correct that misinterpretation. Congress's declination to do so is thus instructive on the issue and weighs in favor of finding that courts have correctly interpreted Section 230 to provide broad immunity for an ICS. *Merrill Lynch, Pierce, Fenner*

& Smith, Inc. v. Curran, 456 U.S. 353, 381-82 (1982) (Congress's comprehensive amendment of a statute, without amending that portion of the statute under which "federal courts routinely and consistently had recognized an implied private cause of action … is itself evidence that Congress affirmatively intended to preserve that remedy."); *see also U.S. v. Gallant*, 570 F. Supp. 303, n.15 (S.D.N.Y. 1983) ("Congressional inaction, though not decisive evidence of Congressional intent, is strongest where, as here, a consistent line of cases is established and Congress fails to change the courts' interpretation while it changes provisions in related statutes.").

POINT IV

APPLICATION OF THE CDA IS APPROPRIATE ON A MOTION TO DISMISS

The District Court properly ruled that CDA immunity could be determined at the motion to dismiss stage and that discovery was unnecessary to evaluate the applicability of the CDA to Appellant's claims. Cases from the Second Circuit as well as from across the country have properly dismissed claims based on Rule 12(b)(6) where, as here, CDA immunity was apparent on the face of the complaint. *E.g., Gibson*, 2009 WL 1704355, at *1; *Green*, 318 F.3d at 470; *Barnes*, 570 F.3d at 1105-06; *Kimzey v. Yelp! Inc*, 836 F.3d 1263, 1266, 1268 (9th Cir. 2016).

Indeed, this Court has explicitly stated: "Although [p]reemption under the Communications Decency Act is an affirmative defense, ... it can still support a

motion to dismiss if the statute's barrier to suit is evident from the face of the complaint." *Ricci*, 781 F.3d at 28 (citation and internal quotation marks omitted); *see also Cohen*, 252 F. Supp. 3d at 155. Appellant acknowledges this rule (App. Br. p. 18.) and cites to *Ricci* and *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), both of which affirmed lower court orders granting defendants' motions to dismiss under the CDA.[12]

This Court should affirm the District Court's dismissal because CDA immunity is apparent on the face of the Amended Complaint. In any event, although Appellant asserts that dismissal was premature because he did not have an opportunity to engage in discovery, he does not identify any issues or facts bearing on Grindr's ability to assert a defense under Section 230 that need to (or can) be developed during discovery. Appellant's argument therefore fails.

POINT V

THE DISTRICT COURT DID NOT IMPROPERLY CONSIDER MATTERS OUTSIDE OF THE COMPLAINT OR DECIDE ISSUES OF FACT

Appellant argues that the District Court improperly relied on the following two admissions made by Appellant's counsel during oral argument on Appellant's application to extend the TRO: (1) "Grindr does not have [Appellant's] location because the app is not installed on his phone, and that users responding to the fake

[12] *Doe v. GTE*, 347 F.3d 655 (7th Cir. 2003), cited by Appellant, is inapposite. The court did not reach the issue of whether Section 230 applied.

profiles learn of [Appellant's] location through direct messages from [Appellant's] former boyfriend (masquerading as [Appellant]),” and (2) Grindr is an ICS. (App. Br. p. 22.) These admissions of counsel are binding on Appellant. *McKeon*, 738 F.2d at 30 (“[s]tatements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney”) (internal citations omitted).

Moreover, Appellant repeatedly acknowledges in his Original Complaint, Amended Complaint and Appellate Brief that JC was responsible for impersonating Appellant and directing potential suitors to Appellant's home and workplace. (A67, A72, ¶¶ 52, 80; A19-A20, ¶¶ 31-34, 36; App. Br. pp. 11-12.) Similarly, Appellant pleaded that he was no longer a user of the Grindr App (A65, ¶ 48), so Grindr did not have access to his location.

Appellant's allegation that the App, without assistance from JC, “selected and directed” individuals to Appellant's home and workplace is not only contradicted by all of these admissions, but so fanciful that it has no plausibility. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“only a complaint that states a plausible claim for relief survives a motion to dismiss”); *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (Determining whether a complaint satisfies this plausibility standard is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).

Even if Appellant had not repeatedly acknowledged that JC was directing suitors to Appellant's home and workplace, the District Court was permitted to consider the functionality of the App, itself, which is incorporated into the Amended Complaint by reference and central to Appellant's allegations.[13] *See Orozco v. Fresh Direct, LLC*, No. 15-CV-8226 (VEC), 2016 WL 5416510, at *5 (S.D.N.Y. Sept. 27, 2016) ("...the website is not only incorporated by reference in the Complaint but is at the center of Plaintiffs' allegations, so the Court may consider the website in its totality as it existed during the relevant time period in resolving Defendants' motion to dismiss.").

Contrary to Appellant's protestation, the District Court made no factual findings. Based on the pleadings, it was plain that Grindr is an ICS and that Appellant seeks to hold Grindr liable for JC's content.

POINT VI

THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S MISREPRESENTATION-RELATED CLAIMS AS INADEQUATELY PLEADED

The District Court found that Appellant's fraud, promissory estoppel, negligent misrepresentation, and deceptive practices and false advertising claims

[13] The claim that Grindr's geolocation function directs one user to another user without any communication between the two is clearly wrong. The App cannot provide specific addresses; it relies solely on longitude and latitude to determine location. (A57, ¶ 24.)

were subject to dismissal because they were inadequately pleaded. Appellant fails to address most of the independent bases that the District Court articulated for dismissal of these claims, and, as a result, he has abandoned any challenges to the District Court's findings, allowing this Court to affirm on that basis alone. *State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 171-72 (2d Cir. 2004) ("Because the defendants have failed to advance any factual or legal arguments with respect to the district court's and magistrate judge's determinations regarding the absence of proximate causation, we conclude that they have, in effect, abandoned any challenge to those findings. As a consequence, they are unable on appeal to demonstrate that they have satisfied the proximate cause element…"); *U.S. v. Arline*, 660 F. App'x 35, 40 (2d Cir. 2016) (affirming district court's order and finding appellant waived any challenge to alternative finding by failing to challenge it); *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995).

A. The District Court Correctly Held that Appellant Inadequately Pleaded Fraud

To state a fraud claim under New York law, 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) (citation

omitted). Under Rule 9(b), a plaintiff must allege "with particularity" the circumstances constituting the fraud. Fed. R. Civ. P. 9(b); *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 197 (2d Cir. 2013). Additionally, under Rule 9(b), Plaintiff must allege "facts that give rise to a strong inference of fraudulent intent," established by alleging facts either showing "that defendants had both motive and opportunity to commit fraud" or "constitut[ing] strong circumstantial evidence of conscious misbehavior or recklessness." *In re Agape Litig.*, 773 F. Supp. 2d 298, 308 (E.D.N.Y. 2011) (citations omitted).

The Amended Complaint identified two potentially misleading statements: (1) "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," (2) Terms of Service warn users that their content may be deleted and their accounts may be disabled if they violate Grindr's guidelines or Terms of Service. (A62, ¶¶ 40-42.) Appellant contends that these statements misled him into believing that the App was "safe"—which he insists means free from dangerous users and protected by all available, top-of-the-line monitoring software.

The District Court properly determined Appellant could not plausibly assert reasonable reliance because neither the community values page, nor the Terms of Service represent or imply that Grindr will take a "hard line" against users who

post illicit content or "that Grindr's tools are effective at blocking 'improper' content." (A210-A211.) Instead, the District Court found that Grindr's Terms of Service state that Grindr does not have any obligation to monitor content and assumes no responsibility for actively monitoring user content. (A110, *see* § 10.4 and A112, § 12.4.) The Terms of Service explicitly warn:

- GRINDR IS NOT RESPONSIBLE FOR YOUR USE OF THE GRINDR SERVICES OR FOR THE ACTIONS OF OTHER USERS WITH WHOM YOU MAY EXCHANGE INFORMATION. **GRINDR DOES NOT CONDUCT CRIMINAL BACKGROUND SCREENINGS ON ITS USERS.** (A102, § 1.3.)

- Grindr does not control the content of User Accounts and profiles. Grindr has the right, but does not have any obligation, to monitor such content for any purpose. (A110, § 10.4.)

- You understand that when using the Grindr Services, You will be exposed to User Contents from a variety of sources, and that Grindr is not responsible for the … safety... of or relating to such User Content. You further understand and acknowledge that You may be exposed to User Content that is inaccurate, offensive, indecent or objectionable. (A112, § 12.3.)

- Grindr assumes no responsibility whatsoever in connection with or arising from User Content. Grindr assumes no responsibility for actively monitoring User Content for inappropriate content. (*Id.*, § 12.4.)

While the Terms of Service reserve Grindr's right to remove illicit content, they do not represent that Grindr will do so.

Accordingly, the District Court found "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." (A210.) It was thus unreasonable for Appellant to rely on the Terms of Service to conclude that Grindr would take a "hard line" against illicit content because the Terms of Service and the community values page specifically state that Grindr is not committing to monitor or remove user content. (A210-A211.)

Moreover, the District Court properly determined that Appellant's reliance on the Terms of Service and community values page was not a proximate cause of his alleged injuries—"although Herrick alleges that Grindr's misstatements caused him to join Grindr, he had not been a Grindr user at any point since 2015," including during the events giving rise to this lawsuit. (A212.) The District Court found, 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." (A212.)

"Under New York law, [a defendant] must show that he was injured as a direct and proximate result of his reliance on [the alleged] misrepresentations." *Lehman v. Dow Jones & Co., Inc.*, 783 F.2d 285, 296 (2d Cir. 1986). Appellant's injury was allegedly caused by JC's use of Grindr to create accounts impersonating Appellant, not Appellant's own use. The only relationship between Appellant's use of Grindr and his injury was that Appellant met JC by using Grindr. However, Appellant did not allege any misrepresentations related to introducing him to JC.

Instead, Appellant alleged misrepresentations concerning Grindr's ability to stop harmful uses of the App by others. Thus, Appellant's reliance on Grindr's terms did not cause him to suffer from JC's impersonations.

Appellant simply reiterates his inadequate attempt to plead fraud by arguing on appeal that: Grindr made misrepresentations in its Terms of Service, he relied on those misrepresentations when becoming a Grindr user, Grindr knew it had no technology to stop harmful uses of its product, and he suffered "serious pain and mental distress." (App. Br. p. 40.) Appellant fails to address the District Court's findings that the Terms of Service and community values page do not state what Appellant alleges, that Appellant's reliance was not reasonable given the express disclaimers in the Terms of Service, and that Appellant's injuries were not proximately caused by his reliance on the Terms of Service and the community values page.[14] As a result, Appellant abandons any challenge to those findings. *State St. Bank*, 374 F.3d at 171-72.

B. The District Court Correctly Held Appellant Inadequately Pleaded Promissory Estoppel

To state a claim of promissory estoppel, Appellant must allege: "(1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance on that

[14] The District Court found that Appellant had essentially conceded the point of proximate causation as his brief only addressed proximate causation relative to his negligence claims. (A212.) Appellant also fails to address this finding.

promise; and (3) injury to the relying party as a result of the reliance." *Underdog Trucking, LLC, Reggie Anders v. Verizon Servs. Corp.*, No. 09 Civ. 8918(DLC), 2010 WL 2900048, at *6 (S.D.N.Y. July 20, 2010).

While Appellant contends that the community values page and Terms of Service constitute a promise to monitor and remove content, the District Court properly found that they did not. (A213.) Appellant does not address this finding. Appellant also does not address the District Court's finding that his reliance on Grindr's statements was unreasonable in light of the clear disclaimer in the Terms of Service of any obligation to police user content. (A214.) As a result, Appellant abandons any challenge to the District Court's findings with respect to his promissory estoppel claim. *State St. Bank*, 374 F.3d at 171-72.

C. The District Court Correctly Held Appellant Inadequately Pleaded Negligent Misrepresentation

To state a claim of negligent misrepresentation, Appellant must allege: "(1) carelessness in imparting words; (2) upon which others were expected to rely; (3) upon which they did justifiably rely; (4) to their detriment; and (5) the author must express the words directly, with knowledge they will be acted upon, to one whom the author is bound by some relation or duty of care." *Fromer v. Yogel*, 50 F. Supp. 2d 227, 242 (S.D.N.Y. 1999). Additionally, the tort of negligent misrepresentation requires a "special relationship." *Gardianos v. Calpine Corp.*, 16 A.D.3d 456, 456 (2d Dep't 2005).

The District Court correctly found Appellant failed to plead that Grindr made a false or misleading statement, that Appellant's 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. (A214.) Appellant ignores the District Court's findings with respect to lack of a misleading statement, reasonable reliance and proximate causation, choosing only to argue that he adequately pleaded a "special relationship." As a result, Appellant has abandoned his challenge to these findings. *State St. Bank*, 374 F.3d at 171-72.

The District Court correctly held that Appellant failed to allege "a special relationship of trust or confidence and the relationship between the parties was typical of an arm's length transaction." (A215.) In response, Appellant merely argues that Grindr had superior and exclusive knowledge about its Terms of Service and its abilities to monitor and respond to abusive or problematic accounts. However, this is insufficient.[15] *See Atkins Nutritionals, Inc. v. Ernst & Young*,

[15] The cases on which Appellant relies are inapposite. In *Kimmell v. Schaefer*, 89 N.Y.2d 257 (1996), the court found that "there must be some identifiable source of a special duty of care" in order to impose tort liability in a commercial transaction. 89 N.Y.2d at 263-64. There, defendant, the chief financial officer and chairman of a company, had expertise to evaluate the economics of the transaction at issue and experience with the sale of projects to investors, such that he had a duty to speak to prospective investors. In *Century Pacific, Inc. v. Hilton Hotels Corp.*, No. 03 Civ. 8258(SAS), 2004 WL 868211, *8 (S.D.N.Y. Apr. 21, 2004), the court found that defendants made numerous false statements with the specific intent of earning plaintiffs' trust and relationship. Here, the same cannot be argued. Grindr's Terms of Service disclaim any duty to police accounts. In *LBBW*

LLP., 301 A.D.2d 547, 548 (1st Dep't 2003) (arms-length business relationship does not give rise to a special relationship); *Andres v. LeRoy Adventures, Inc.*, 201 A.D.2d 262, 262 (1st Dep't 1994) (same); *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 529 (2d Dep't 2001) (special relationship requires "close degree of trust" between parties). Appellant does not cite to a single case in which a court held that a plaintiff and a website or app had a special relationship.

Appellant also does not respond to the District Court's finding that Grindr's knowledge of its own internal monitoring practices is insufficient to establish special expertise. Moreover, Appellant's argument that Grindr purportedly attracted users by representing it had the power and tools to monitor accounts for unlawful behavior has no merit in light of the fact that: (i) the disclaimers say the opposite and (ii) Appellant was not a Grindr user at the time of the alleged impersonating profiles.

D. Appellant Ignores the District Court's Grounds for Dismissing His Deceptive Practices and False Advertising Claims

To state claims under N.Y. G.B.L. §§ 349, 350, or 350-a, Appellant 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

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Luxemburg S.A. v. Wells Fargo Sec. LLC, 10 F. Supp. 3d 504, 527 (S.D.N.Y. 2014), the court discussed one of the elements necessary to establish constructive fraud, not negligent misrepresentation.

as a result of the deceptive act.'" *Merck Eprova AG v. Brookstone Pharm., LLC*, 920 F. Supp. 2d 404, 425 (S.D.N.Y. 2013) (quoting *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000)); A50 (quoting same). "A claim of false advertising under Section 350 must meet all of the same elements as a claim under Section 349, and the plaintiff must further demonstrate proof of actual reliance." *Merck Eprova*, 920 F. Supp. 2d at 425 (citation omitted).

The District Court properly found that Appellant did not plausibly allege a reasonable consumer would be misled by Grindr's statements, and that Appellant had not shown why his reliance would be reasonable in light of the clear disclaimers in Grindr's Terms of Service. (A216.) Appellant does not address any of these findings, and, as a result, he abandons his challenge to the District Court's findings. *State St. Bank*, 374 F.3d at 171-72.

Appellant argues that he sufficiently pleaded these claims because he alleged that: Grindr "conducted a business or furnished a service," Grindr made promotional statements on its website and its Terms of Service assuring potential users it would moderate abusive content and act to prevent harassment of its users, and Grindr's failure to moderate and supervise its users to prevent harassment and abusive acts caused him to suffer repeated harassment, threats and danger at his home and workplace. (App. Br. p. 47.) These conclusory arguments, contradicted

by the language in the Terms of Service, do not address any of the District Court's findings with respect to the inadequacy of Appellant's pleadings.

POINT VII

THE DISTRICT COURT PROPERLY HELD THAT THERE WERE ALTERNATIVE GROUNDS TO DISMISS APPELLANT'S NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

The District Court correctly held that, in addition to being barred by the CDA, Appellant's negligent and intentional infliction of emotional distress claims were inadequately pleaded. (A206-A207.)

To state a claim for intentional infliction of emotional distress, a plaintiff must allege facts demonstrating (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. *Rakofsky v. Washington Post*, No. 105573/11, 2013 WL 1975654, at *15 (Sup. Ct. N.Y. Cnty. Apr. 29, 2013); *see also Wolkstein v. Morgenstern*, 275 A.D.2d 635, 637 (1st Dep't 2000). Whether conduct is "extreme and outrageous"—that is, whether an act or omission "so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society"—is a matter of law for the court to decide.[16] *Beyer*, 2014 WL 3057492, at *4 (rejecting

[16] Appellant argues, without citation, that whether Grindr's conduct was outrageous and extreme was an issue of fact for the jury to decide. Appellant's position is contradicted by New York case law. *Beyer v. Parents for Megan's Law*,

claim because of CDA immunity); *Wolkstein*, 275 A.D.2d at 637.

Here, the District Court properly found Appellant did not meet the high bar of pleading outrageous contract. (A207.) As the District Court determined, Grindr did not create the impersonating profiles on which Appellant bases his claims (A207) and "'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.'" (*Id.* (quoting *Turley v. ISG Lackawanna*, 774 F.3d 140, 161 (2d Cir. 2014)).[17] Additionally, the District Court determined Grindr's conduct was not lacking in any reasonable justification since "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 impersonating profiles." (A207) (*citing Martin v. Citibank, N.A.*, 762 F.2d 212, 202 (2d Cir. 1985) ("The

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No. 13–15544, 2014 WL 3057492, at *4 (Sup. Ct. Suffolk Cnty. May 19, 2014); *Wolkstein*, 275 A.D.2d at 637.

[17] Appellant relies on *Turley* to save his intentional infliction of emotional distress claim, but the facts in that case differ drastically from the facts here. In *Turley*, plaintiff claimed that defendant failed to respond to a workplace harassment complaint; defendant was a personal witness to "ongoing and severe indignity, humiliation, and torment" for three years and blocked others' efforts to investigate the reports of harassment; and, at times, defendant even encouraged the harassment. The District Court identified this glaring distinction, noting "in *Turley*, the defendant in addition to ignoring ongoing harassment, actively impeded investigations into the harassment and appeared to encourage it further." (A207.)

conduct must also be intentionally directed at plaintiff and lack any reasonable justification.").

To state a claim for negligent infliction of emotional distress, a plaintiff must allege "breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety," as well as "the same showing of outrageousness" as required for the intentional tort. *Santana v. Leith*, 117 A.D.3d 711, 712 (2d Dep't 2014) (citation omitted). The District Court properly found that the duty Appellant seeks to impose on Grindr, a purported duty to ban abusive users and remove offensive content, is barred by the CDA. (A207, n.12.)

POINT VIII

THE DISTRICT COURT PROPERLY DENIED LEAVE TO AMEND

The District Court properly determined Appellant was not entitled to leave to amend his Amended Complaint. In the conclusion of his brief in opposition to Grindr's motion to dismiss, and without filing a cross-motion, Appellant simply asked that if the District Court decided to grant any of Appellees' motions to dismiss, then Appellant requested leave to amend the complaint for a second time. (ECF No. 54, at 50.) The District Court properly determined that this bare request for leave was inadequate. (A217.)

In *U.S. ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16 (2d Cir. 2016), relied on by Appellant, this Court found that the district court did not abuse its discretion in denying plaintiff's request to file another amended complaint, where plaintiff failed to "proffer or describe a proposed new pleading to cure the deficiencies." 824 F.3d at 28-29. Here, Appellant admits he did not attach a proposed amended complaint to his request for leave or even explain how a new pleading would cure the Amended Complaint's deficiencies.[18] (App. Br. p. 50.) Thus, the District Court properly exercised its discretion to deny Appellant's bare request for leave to amend. (A217 (citing *Gazzola v. Cnty. of Nassau*, No. 16-CV-0909 (ADS), 2016 WL 6068138, at *9 (E.D.N.Y. Oct. 13, 2006) ("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*

[18] Break the Cycle's amicus brief nonsensically argues that Appellant could add a failure to warn claim because Appellant provided Grindr with notice of impersonating accounts created by JC. (Doc. 70 p. 26.) If Appellant informed Grindr about the impersonating accounts, Grindr would not be warning Appellant of something of which he was unaware. Moreover, none of the cases relied on by Break the Cycle stand for the proposition that a plaintiff can assert a failure to warn claim against an internet service provider based on user-generated content. For example, in *Internet Brands*, 824 F.3d at 849-852, the bad actors did not post any content on the website and contacted the plaintiff offline.

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).[19]

Appellant's reliance on *State Teachers Retirement Board v. Flour Corp.*, 654 F.2d 843 (2d Cir. 1981) for the proposition that leave to amend should not be denied on the ground that it would cause undue delay is misplaced. The District Court did not base its determination on whether Appellant's amendment would cause delay. Additionally, unlike Appellant, the plaintiff in *State Teachers Retirement Board* apprised the court of the facts underlying its proposed amended pleading when it requested leave to amend. 654 F.2d at 844-45.

POINT IX

ALTERNATIVE GROUNDS EXISTED TO DISMISS ALL OF APPELLANT'S CLAIMS

Should this Court find that Appellant's claims are not subject to dismissal for the reasons set forth in the Order, this Court should still affirm based on the following additional grounds raised by Appellees below.

A. Appellant Cannot Assert Products Liability Claims

1. *The App Is Not a "Product" Within the Meaning of the Law*

The law of products liability does not apply to the App—an ICS used to

[19] Appellant also ignores that, despite his failure to attach a proposed amended complaint to his request for leave to amend, the District Court permitted him leave to amend his copyright claim. (A218.) However, Appellant did not amend his copyright claim.

exchange information—because is not a tangible product and because it provides a service. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991) ("Products liability law is geared to the tangible world."); *see also Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1278 (D. Col. 2002); *see* Restatement (Third) of Torts: Prod. Liab. § 19 ("A product is tangible personal property distributed commercially for use or consumption."). Courts have held that an ICS is not a product for purposes of products liability law. *See, e.g., James v. Meow Media, Inc.*, 300 F.3d 683, 700-701 (6th Cir. 2002) (plaintiff "has failed to demonstrate a prior requirement, that the video games, movies, and internet sites are 'products' for purposes of strict liability").

The App is not a product, but rather provides a "service" in allowing users to communicate with one another. *See* Rest. (Third) of Torts: Prod. Liab. § 19 ("Services, even when provided commercially, are not products.").

2. *Appellant Has Not Alleged a Flaw or Defect in the App*

For the design and manufacturing based claims, Appellant must allege a defect in the App that was "a substantial factor in bringing about the injury or damage" and show that, "at the time of the occurrence, the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable." *Amatulli by Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 532 (N.Y. 1991). Appellant did not identify any defective condition in the

App itself; to the contrary, he alleged that it functioned as intended, but that JC "weaponized" the App to harass Appellant. (A69-A70, A79, ¶¶ 66, 117.) As the District Court found, the problem is not with the App; "[t]he problem, of course, is that the product is only dangerous in combination with the sort of false content JC has created." *Herrick v. Grindr, LLC*, No. 17-CV-932 (VEC), 2017 WL 744605, at *4, n.7 (S.D.N.Y. Feb. 24, 2017).

3. *Appellant Has Not Alleged a Foreseeable Risk or Duty to Warn*

Appellant has not alleged a "degree of danger" that a reasonable person would not be aware of and that necessitates a given warning, as required to state a strict liability claim under New York law. *See Landrine v. Mego Corp.*, 95 A.D.2d 759 (1st Dep't 1983) ("No duty to warn exists where the intended or foreseeable use of the product is not hazardous."); *Lancaster Silo & Block Co. v. N. Propane Gas Co.*, 75 A.D.2d 55, 65 (4th Dep't 1980). The absence of a duty to warn can be decided by a court as a matter of law. *Id.* at 65.

The App is not an inherently dangerous product. Its function is to allow users to communicate with one another, with a degree of anonymity, in order to protect against outside parties who might discriminate against or harm users merely because of their sexual preference. To the extent there is a risk of encountering someone through the App who may turn out to be a bad actor, that risk is not unique to or created by the App.

4. *The Insufficient "But For" Causation Is Fatal to the Failure to Warn Claim*

In his failure to warn claims, Appellant alleged that if the App contained certain warnings, he would never have downloaded the App, would not have met JC, and would not be subject to JC's harassment years later. (A79, ¶ 117.) This "but for" causation is insufficient as products liability claims require proximate causation. *Bravman v. Baxter Healthcare Corp.*, 984 F.2d 71, 75 (2d Cir. 1993).

B. Appellant's N.Y. G.B.L. Claims Are Time-Barred

Claims under G.B.L. §§ 349, 350 and 350-a are subject to a three-year statute of limitations. CPLR § 214(2); *Marshall v. Hyundai Motor Am.*, 51 F. Supp. 3d 451, 461 (S.D.N.Y. 2014). Where, as here, Appellant claims misrepresentations or falsehoods "about the nature of the product itself, rather than a benefit from purchasing the product separate from the product's inherent function," the claim accrues with the purchase or use of the product. *Id.* at 461; *People ex rel. Spitzer v. Katz*, No. 405062/06, 2007 WL 1814652, at *1 (Sup. Ct. N.Y. Cnty. June 4, 2007) ("The limitations period for claims brought under GBL § 349 is three years from the time of the deceptive act or behavior.").

Appellant's claims would have accrued in May 2011 when he allegedly relied upon statements as to the "nature" of Grindr's services and downloaded the product. *See Marshall*, 51 F. Supp. 3d. at 455. Thus, both claims are time barred.

C. Appellant Cannot Hold KL Grindr Liable Based on Its Status as a Member of Grindr

All of the claims against KL Grindr are based solely on KL Grindr's status as a member of Grindr and are therefore barred by California limited liability company law. As Grindr is a California LLC, California law governs whether KL Grindr may be liable for acts alleged against Grindr. *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995).

California law provides that a member of an LLC cannot be held liable for the "debts, obligations, or other liabilities of" the LLC "whether arising in contract, tort, or otherwise" solely by reason of the member acting as a member or manager acting as a manager for the LLC. Cal. Corp. Code § 17703.04; *Celebrity Chefs Tour, LLC v. Macy's, Inc.*, No. 13-CV-2714 (JLS)(KSC), 2014 WL 1660724, at *5 (S.D. Cal. Apr. 25, 2014).

Appellant did not allege any acts by KL Grindr, distinct from the acts of the LLC, that would give rise to liability. The only specific allegation about KL Grindr is that KL Grindr and the other Appellees "own, maintain and control" the App. (A53, ¶ 1.) This conclusory allegation is far less specific than the allegations of alter ego found to be insufficiently pleaded by the courts. *See Celebrity Chefs*, 2014 WL 1660724, at *5; *Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank*, 552 F. App'x 13, 15 (2d Cir. 2014).

D. The Court Lacks Personal Jurisdiction over KL Grindr[20]

In order to assert a valid exercise of jurisdiction over KL Grindr, Appellant must articulate some factual basis stating at least a *prima facie* claim of personal jurisdiction. *See Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185 (2d Cir. 1998). The Amended Complaint is devoid of any factual basis for jurisdiction over KL Grindr.

Absent exceptional circumstances, general jurisdiction is appropriate in New York only if a company is incorporated in or has its principal place of business in New York. *Beach v. Citigroup Alt. Invs. LLC*, No. 12 CIV. 7717 PKC, 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014). General jurisdiction may also exist where a defendant's "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *Verragio, Ltd. v. Malakan Diamond Co.*, No. 16 Civ. 4634 (CM), 2016 WL 6561384, at *2 (S.D.N.Y. Oct. 20, 2016).

KL Grindr is a Delaware corporation with its principal place of business in China. (A183, ¶ 3.) It has no employees, offices, real estate, or other physical presence in New York. (A183, ¶ 6.) It does not regularly transact business in or

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[20] Although the District Court did not address the issue of personal jurisdiction, it noted that the Amended Complaint contained no factual allegations against KL Grindr or Grindr Holding, and that Appellant appeared to acknowledge he engaged in group pleading. (A196.)

have any other "continuous and systematic" connections with New York. *Id.*

Appellant also did not allege any basis for specific jurisdiction under New York's long-arm statute or even articulate a subsection or legal theory under which he contends jurisdiction would be appropriate. (A56, ¶ 19.) Appellant has not alleged that KL Grindr transacted any business or committed any tortious act in New York. *See* N.Y. C.P.L.R. § 302; *Barricade Books, Inc. v. Langberg*, No. 95 CIV. 8906 (NRB), 2000 WL 1863764, at *3 (S.D.N.Y. Dec. 19, 2000).

E. Appellant's Attempt at Group Pleading Does Not Satisfy Rule 8(a)

Finally, Appellant's claims fail because he has not alleged any specific act by any specific Defendant, instead attempting to lump the Defendants together as one, in violation of Rule 8(a). *See* Fed. R. Civ. P. 8(a); *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001).

CONCLUSION

Appellees Grindr and KL Grindr respectfully request that this Court affirm the District Court's Order.

Dated: August 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of 14,000 words of Local Rule 32.1(a)(4) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 13,692 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: August 23, 2018

/s/ Daniel P. Waxman
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