No. 18-396-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MATTHEW HERRICK,

Plaintiff-Appellant,

-against-

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

Defendants-Appellees.

On Appeal from an Order of the
United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. THIS COURT SHOULD REMAND BECAUSE OF THE COMPLEXITY OF THE FACTUAL AND LEGAL ISSUES

On appeal, appellees Grindr, LLC, KL Grindr Holdings, Inc., and Grindr Holding Company ("Appellees" or "Grindr") argue complex, disputed facts as if this is review of a Summary Judgment motion.[1] It is not. Grindr chose to move to dismiss under Federal Rule of Civil Procedure 12(b)(6) even though this Court's precedents hold that the Communications Decency Act ("CDA") § 230 limited "immunity" is an affirmative defense generally improper for resolution on a motion to dismiss. (*See* Appellant Opening Br. at 18 (Dkt. 53).)

The District Court erred in the same manner. (*See* id.) It essentially made findings of fact on questions about complex technical matters such as modern

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[1] Throughout its brief, Grindr cites to Mr. Herrick's amended complaint for its own factual assertions. Often, the facts it cites appear nowhere in the record. For example, Grindr writes:

> "The Grindr App ("App") is a digital dating and social networking application designed to provide a 'space safe' for gay, bisexual, trans and queer people to connect. The App requires 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. ([JA-]57 ¶ 21.)"
> (Grindr Br. at p. 2).

However, ¶ 21 of the Amended Complaint reads: "Grindr is an application ("App") for smartphones designed to facilitate the coupling of gay and bisexual men in a given geographic area."

geolocation smartphone application functionality and, without the benefit of fact discovery or expert testimony, reduced all of Appellant Matthew Herrick's claims to the publication of third-party content. The District Court did not articulate any clear standard justifying this reduction. This Court should remand, so the adversarial process can reveal the truth regarding the complex factual and legal questions in this case of first impression at the intersection of computer and products liability law.

This case involves several matters of first impression for this Court: Is a smartphone application ("App") a product or a service? Is real time relational geolocating of users via an App's use of Geographical Positioning System ("GPS") or other location data "neutral assistance" under the CDA? What are the reasonable limits of what constitutes third-party publication under the CDA? What is the standard for distinguishing an alleged Internet Computer Service's conduct from its content and third-party content?

This is not the simple case that Grindr, its Amici, and the District Court portray it as. The complexities rival the sophisticated securities law cases this Court regularly hears, and involve similarly complex and technical issues of law and fact. This Court should not affirm the District Court's decision based on untested arguments or mistaken assumptions about basic computer science, the internet economy, or the function of complex networked software.

II. THIS COURT SHOULD REMAND BECAUSE DISMISSAL IS IMPROPER UNDER *LEADCLICK* AND *RICCI*

This Court has examined the CDA only twice. *FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015). Both these decisions were correct, and both support remand.

A. *LeadClick* Raises Substantial Questions Regarding the Application of the CDA to this Case

In *LeadClick*, a summary judgment appeal, this Court held that appellant-defendant ("LeadClick") did not qualify for CDA § 230 limited immunity. *LeadClick*, 838 F.3d at 162. LeadClick was an internet affiliate-marketing network that helped its merchant clients place internet ads with third-party publishers. The FTC and Connecticut sued LeadClick accusing it of deceptive trade practices. *Id*. at 167-68. LeadClick invoked CDA § 230 limited immunity, arguing it didn't create the "fake news" content for which it was being held liable. *Id.* at 172-73. This Court held LeadClick liable because its conduct facilitated the creation of deceptive content by its affiliates, and thus made LeadClick an "information content provider" ("ICP") as to that content. *Id*. at 175. Thus, it could not invoke CDA § 230 limited immunity because it knowingly participated in the development of the deceptive content at issue. *See id*. at 176.

> [W]e conclude that a defendant acting with knowledge of deception who either directly participates in that deception or has the authority to control the deceptive practice of another, but allows the deception to proceed,

> engages, *through its own actions*, in a deceptive act or practice that causes harm to consumers."
> *Id.* at 170 (emphasis in original).

In *LeadClick*, this Court instructively explores the parameters of CDA § 230 limited immunity.

First, CDA § 230 limited immunity is not absolute, because not everything involving an internet company can be reduced to the publication of third-party content.

Second, a defendant's conduct can take them outside the scope of CDA § 230 limited immunity, particularly where the defendant has knowledge and control over harm being inflicted upon consumers. Grindr is in part an advertising company, similar to LeadClick in that it uses networked ads. (*See, e.g.,* Am. Compl. at ¶ 35, JA-60 ("As [Grindr's] website states . . . 'Our geotargeting lets you find the right audience in your neighborhood or around the world.'".) In 2012, Grindr's Amicus Electronic Frontier Foundation ("EFF") noted that the packaging, lending, and selling of user data is among the "primary purposes" of online dating sites. *See,* Rainey Reitman, "Six Heartbreaking Truths about Online Dating Privacy," EFF (Feb. 10, 2012) available at: https://www.eff.org/deeplinks/2012/02/six-heartbreaking-truths-about-online-dating-privacy (last visited September, 5, 2018). On these facts, Grindr is more like

LeadClick than bulletin board system in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

Third, it establishes that harm by one tortious actor does not bestow CDA § 230 limited immunity on a different tortious actor just because they use the same computer system. Here, just because Mr. Herrick's stalker was committing torts using Grindr's App, it does not follow that Grindr is immune for its own tortious acts, omissions, or content.

Fourth, *LeadClick* raises the question, without deciding it, of whether an internet company is entitled to CDA § 230 limited immunity if it isn't the type of company Congress intended the CDA to protect. *See LeadClick,* 838 F.3d at 175-76. *LeadClick* suggests Grindr may not be entitled to CDA § 230 limited immunity because it is an advertising company that facilitates sexual encounters and sells behavioral data it collects on its users. *See* Azeen Ghorayshi, "Grindr is Letting Other Companies See User HIV Status and Location Data," BuzzFeed (Apr. 2, 2018), available at https://www.buzzfeednews.com/article/azeenghorayshi/grindr-hiv-status-privacy; (Am. Compl. at ¶ 36. JA-60.)

B. Under *LeadClick*, it is Unclear Whether Grindr Meets the Three Prong Test for CDA § 230 Limited Immunity

LeadClick raises a question of whether Grindr meets any of the three prongs of the standard test for CDA § 230 limited immunity. *LeadClick* follows other Circuits in holding that CDA § 230 "shields conduct if the defendant (1) 'is a

provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information.'" *LeadClick*, 838 F.3d at 173 (citations omitted.); (*see also* Appellant Opening Br. at 29-37; Grindr Br. at 15 (Dkt. 107).)

1. Grindr May Not Be a Provider of an Interactive Computer Service at All or with Respect to These Claims

Grindr may not be a provider of an "interactive computer service" ("ICS"). *See LeadClick*, 838 F.3d at 174-76; (Appellant's Opening Br. at 36-7; Grindr Br. at 16-18.). Delving into this question further in *LeadClick* than any court has, this Court expressed doubt that LeadClick was an ICS because:

1. It was questionable whether it was the type of internet company that Congress intended to protect under the CDA. *See LeadClick*, 838 F.3d at 175-76.
2. It was questionable whether it was an internet service provider, website exchange system, online message board, or a search engine. *See id*. at 174.
3. It was questionable whether its services related to its alleged liability. *See id*. at 175-76.

Congress intended CDA § 230 to "promote the continued development of the internet, through 'the availability of educational and informational resources to

our citizens' and to 'offer a forum for a true diversity of political discourse and unique opportunities for cultural development, and myriad avenues for intellectual activity.'" *Id*. at 176 (quoting 47 U.S.C. §§ 230(a)(1-3).) It is an open question whether an App whose primary purpose is data mining its users sexual liaisons for advertising profit falls within the ambit of congressional intent in passing CDA § 230.

This Court also stated in *LeadClick* that it was "doubtful" that LeadClick was an ICS because it did not fall into any of the four categories (internet service providers, website exchange systems, online message boards, and search engines), and because LeadClick cited no cases applying the CDA in similar contexts. *See LeadClick*, 838 F.3d at 174. This Court rejected LeadClick's argument that it was an ICS simply because "it 'enabled computer access by multiple users to a computer server by routing consumers from its affiliates' webpages to . . . websites via the HitPath server.'" *See id*. at 175. Much like the product liability and misrepresentation claims here, in LeadClick the computer access by multiple users to a computer server did not relate to the allegations of deceptive business practices. *See id*. at 175. And it wasn't what Congress intended to protect with the CDA. *See id*. at 176.

The unresolved factual questions regarding Grindr's App's design and functionality, and whether Grindr is properly considered an ICS for these claims,

warrant remand. The District Court barely engaged in the *LeadClick* ICS analysis. (*See* Order at 9, JA-198 ("There is no plausible basis to argue that it is not an interactive computer service.").) It held that, at most, Grindr's role in the creation of any content was "neutral assistance." (*See id*. at 10, JA-199.) The *LeadClick* ICS analysis poses factual questions improper for resolution on a 12(b)(6) motion. (*See* Appellant Opening Br. at 16-23.) This alone justifies remanding.

Moreover, Grindr claims it is an ICS because 'its website gives subscribers access to a common server for purposes of social networking.'" (*See* Grindr Br. at 16.) This may or may not be true, but is largely irrelevant. Mr. Herrick's claims against Grindr only involve its website insofar as Grindr published misrepresentations about its App and its approach to safety. (*See* Am. Compl. at ¶¶ 41-42, JA-62-64.) Those claims involve Grindr's content and not the statements of third parties. Thus, for statements published by Grindr on its own website, or created by Grindr's App, Grindr is an ICP and no CDA limited immunity applies.

Most of Mr. Herrick's claims regard Grindr's smartphone App, and have nothing to do with Grindr's website. (*See* Am. Compl. ¶¶ 21-39,100-216, JA-57-61, 77-93.) Confusing Grindr's App's design and function with its website's is a basic factual error.

2. Blocking Known Stalkers, Rapists, and Molesters Does Not Involve Third-Party Content

Grindr does not meet the second prong of the CDA § 230 limited immunity test, because blocking or removing a user does not constitute the exercise of a traditional editorial function. The District Court held that claims involving Grindr's failure to block Mr. Herrick's stalker were essentially claims about third party content. (*See e.g.* Order at 14-16, JA-203-05.) When the New York Times cancels someone's newspaper subscription, this is not an exercise of a publisher's traditional editorial function. The same is true when Grindr blocks or removes a user. (*see also below* at § II.) No court has ever held that users are content. Users may create or post content, but they are not themselves content.

From the inception of this case when Mr. Herrick filed his emergency order to show cause, he never requested removal of specific third-party content – he didn't even know what or where the content was. The request was always blockage of a user.

Finally, if an internet company has no duty to attempt to block a known stalker, rapist, or molester then stalker can act with impunity when in a jurisdiction that U.S. law can't reach, like China or Russia. Often, the only one capable of stopping stalking are the internet companies.

3. Mr. Herrick's Claims Either Treat Grindr as an Information Content Provider or do not Involve Publication of Third-Party Content

Grindr does not meet the third prong of the CDA § 230 limited immunity test because in all claims, either Grindr is an ICP or the claim has nothing to do with content or publication. CDA § 230 limited immunity does not apply where a defendant publishes its own content, or is so involved in the development of third-party content that it becomes responsible for it. *See LeadClick* 838 F.3d at 176. Additionally, the CDA does not apply to a defendant's conduct. *Id*. at 177.

This does not mean that courts take complaints at face value. Courts review whether a cause of action inherently requires treating the defendant as the publisher or speaker of content provided by another. *Id*. at 175 (citing *Barnes v. Yahoo!*, 570 F.3d 1096, 1102 (9th Cir. 2009).)

On June 5, 2018, the court of appeals of Georgia remanded a CDA § 230 limited immunity dismissal because the claims did not involve third-party content. In *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 80 (Ga. Ct. App. 2018), the court remanded because the lower court erred in granting CDA § 230 limited immunity to Snapchat where the claims related to negligent design. The complaint alleged Snapchat was liable for negligent creation, design, and maintenance of an App's geolocation feature – a speed filter – which encouraged and facilitated dangerous activity, not for any displayed content. *Id.* at 79. Applying the standard three-prong

test, the *Maynard* appellate court held the claims were unrelated to information supplied or published by a third-party, and remanded. *Id.* at 82; *see also Daniel, et. al. v. Armslist, LLC, Inc.,* No. 2017AP344, 2018 WL 1889123 (Wis. Ct. App., Apr. 19, 2018); (Appellant Opening Br. at pp. 27-28.)

A summary of Mr. Herrick's claims shows they too are not inherently based on the publication of third-party content, and likewise should be remanded:

(a) **Defect in Design** – Defects in design, code, manufacture, and assembly make Grindr fundamentally unsafe; (Am. Compl. ¶¶ 100-07, JA-77)

(b) **Defect in Manufacture** – Defects in design, code, engineering, manufacture, production, and assembly because Grindr released a product that failed to incorporate widely used, proven, and common software to flag and detect abusive accounts; (Am. Compl. ¶¶ 108-15, JA-78)

(c) **Defect in Warning** – Grindr designed, coded, engineered, manufactured, produced, assembled, and placed into the stream of commerce an App without warning users that its product could be used to impersonate and abuse, geographically pinpoint, ignores industry safety norms related to abuse; (Am. Compl. ¶¶ 116-20, JA-79)

(d) **Negligent Design** – Grindr neglected its duty to design, code, engineer, manufacture, produce, assemble, and place into the stream of commerce a safe product; (Am. Compl. ¶¶ 121-26, JA-80-81)

(e) **Negligent Failure to Warn** – Grindr negligently placed a dangerous product into the stream of commerce without warnings that it lacked industry standard safety features; (Am. Compl. ¶¶ 127-30, JA-81-82)

(f) **Negligence** – Grindr breached its duty to exercise reasonable care in the design, manufacture, research, coding, development, promotion, and distribution of its App; (Am. Compl. ¶¶ 131-45, JA-82-83)

(g) **Promissory Estoppel** – Plaintiff reasonably relied on Grindr's representations that its product was safe; (Am. Compl. ¶¶ 156-60, JA-86)

(h) **Fraud** – Grindr made material misrepresentations by saying it could and would take action against abuse of its product; (Am. Compl. ¶¶ 161-66, JA-86-87)

(i) **Deceptive Business Practices** – Grindr deceived, misled, and unfairly acted contrary to public policy; (Am. Compl. ¶¶ 167-75, JA-87-88)

(j) **False Advertising** – Grindr concealed material facts in the promotion and marketing of it App; (Am. Compl. ¶¶ 176-87, JA-88-90)

(k) **Intentional Infliction of Emotional Distress** – Grindr's refusal to act when it was uniquely positioned to stop the threat to Mr. Herrick's life was outrageous; (Am. Compl. ¶¶ 188-94, JA-90-91)

(l) **Negligent Infliction of Emotional Distress** – Grindr's negligent failure to act when it was uniquely positioned to stop the threat to Mr. Herrick's life was outrageous; (Am. Compl. ¶¶ 195-205, JA-91-92)

(m) **Negligent Misrepresentation** – Grindr misrepresented itself by saying its App was a safe space for users. (Am. Compl. ¶¶ 206-16, JA-92-94)

C. Dismissal Was Improper Under *Ricci*

Generally, CDA § 230 limited immunity is an affirmative defense. *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015). Grindr cites *Ricci* to support 12(b)(6) dismissal in this case. (Grindr Brief, pp. 16, 27, 29, 31, 35.) But *Ricci* merely holds that when a complaint is obviously defective on its face, dismissal is warranted. *Ricci* is about passive third-party content, and the complaint only pleaded a traditional publication tort: defamation. *Ricci*, 781 F.3d at 26-29.

Ricci, a longtime teamster, claimed he and his family suffered retaliation after refusing to endorse a union president in 2002. *Id*. at 27. Ten years later, he sued the union and the union's website host company, GoDaddy, for defamatory content in a newsletter published on the union's website. It was undisputed that

Ricci's theory of liability against GoDaddy hinged entirely on the publication of content created by the union. *Id*. at 27. GoDaddy was merely a passive and neutral intermediary for the defamatory content. *Id*. The district court granted GoDaddy's 12(b)(6) motion, and this Court affirmed, because it was obvious from the complaint that GoDaddy's liability solely derived from its role as the publisher or speaker of third-party content. *Id.* at 28.

In so doing, this Court cautioned that a 12(b)(6) dismissal was only appropriate because the pleading's defect was indisputable and facially evident. *See id.* at 28 ("Here, the defect is evident. So dismissal was appropriate.").

Ricci is exactly the scenario that CDA § 230 limited immunity was intended for: a defamation tort against a passive intermediary for content published by a third-party. *See Zeran v. American Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). Ricci did not dispute that GoDaddy was an ICS and did not dispute that the defamation claim against GoDaddy was based on third-party content. *See Ricci*, 781 F.3d at 27. Mr. Herrick's case is nowhere near as simple or straightforward as *Ricci*.

III. GRINDR, AMICI, AND THE DISTRICT COURT GET FACTS WRONG

Among the factual complexities that Grindr, Amici, and the District Court get wrong are basic facts about ICC IDs, MAC addresses, VPN blocking, and geofencing. (*See* Order at p. 13, JA-202-03; Appellant Opening Br. at p. 31; Grindr

Br. at pp. 20-22; Amici Br. for Computer & Commc'n Indus. Assoc., et al, at p. 20.) They misconstrue identifying or routing information automatically gathered by the Grindr App as voluntarily published third-party content, and misunderstand technical capabilities for identifying individual devices.

Grindr never publishes that information, nor do users voluntarily submit it to Grindr. The Grindr App automatically collects it, and connects unique device IDs with geolocation information. Security researchers recently discovered that Grindr gave outside parties access to users' HIV status linked to their geolocation information and unique device IDs. *See* Azeen Ghorayshi, "Grindr is Letting Other Companies See User HIV Status and Location Data." BuzzFeed, April 2, 2018, available at https://www.buzzfeednews.com/article/azeenghorayshi/grindr-hiv-status-privacy. Yet Grindr claims it only collects email address, and cannot identify or disable users based on anything else. (*See* Grindr Br. at p. 2 ("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"); *see also* TRO Hearing Transcript (Feb. 22, 2017), JA-151.) The District Court's Order mistakes these unique, non-public identifiers and their role in Grindr's App design and function as an editorial content "polic[ing]" issue. (Order at p. 12, JA-201.)

A. This Court Should Remand for Discovery and Expert Testimony on the Grindr App's Geolocation Feature

There are complex factual and legal issues regarding the Grindr App's patented geolocating functionality ("Geolocating") that justify remand. Grindr's arguments that discussion of its Geolocating are a "red herring" fail. (Grindr Br. at p. 20.)

First, it is doubtful whether the Grindr App's Geolocating is a "passive conduit" that entitles Grindr to CDA § 230 limited immunity. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008). Grindr only cites cases involving simple pull-down menu filters to sort third-party content, none of which involve the algorithmic calculation of relational GPS coordinates. *LeadClick* emphasizes the need to cite cases with similar facts when arguing for CDA § 230 limited immunity if a defendant doesn't fit the rubric of a typical ICS category. (*See above* at § I(A).) Grindr's Geolocating renders it unlike other defendants, except perhaps Snapchat. *See Maynard v. Snapchat, Inc.*, 816 S.E.2d 77 (Ga. Ct. App. 2018).

Second, Grindr's own representations suggest it is an ICP, because the publication of the relative geographical location between users is not the result of any third-party content. (Grindr Br. at p. 20, n. 8 (citing to JA-66).) Grindr produces that content based on GPS coordinates its App harvests from two or more devices. (*Id*.)

Grindr goes on to argue that the District Court "was permitted to consider the functionality of the App" because it was incorporated into the Amended Complaint. (Grindr Opp. at 37.) It cites to an unpublished Southern District of New York opinion. *See Orozco v. Fresh Direct, LLC*, 15-CV-8226 (VEC), 2016 WL 5416510, at *5 (S.D.N.Y. Sept.27, 2016). But *Orozco* is a labor law dispute over alleged unpaid tips to grocery delivery workers. *Id.* It turns on a reasonable person's comprehension of a statement on a website – not anything technical.

Third, Grindr is mistaken about GPS mapping. Grindr argues in its brief that longitude and latitude coordinates transmitted from a smartphone's GPS cannot be used to provide "precise locations such as street addresses . . . ." (*See* Grindr Opp. at pp. 3, 21). But that is precisely what other geolocating products (e.g. Google and Apple Maps) do. *See e.g.* Google Maps Help, "Search locations on Google Maps," at https://support.google.com/maps/answer/3092445/ (last accessed Sept. 6, 2018); Apple Support, "Get help with Maps," at https://support.apple.com/en-us/HT203080/ (last accessed Sept. 6, 2018). Grindr's misunderstanding of smartphone location basics supports remand so their assertions can be tested.

B. When and Whether Grindr's App Accessed Mr. Herrick's Phone is an Unresolved Fact Question

Whether Grindr's App was ever actually removed from Mr. Herrick's phone is a fact question in this case. Grindr's App also displayed Mr. Herrick's accurate geolocation after he ceased using the App. (*See* Amend. Compl. at p. 14, JA-66.)

Strangers using Grindr were finding their way to Mr. Herrick somehow. Grindr's counsel insists that there's no way the App's Geolocating could be used to send the strangers to him, yet Grindr served no pleadings and relies on inapplicable case law about inconsistent statements at trial. (*See* Grindr Br. at pp. 5 & 36 (citing *U.S. v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984) (statements "may" be admissible against the party …."))) This is an open question of fact, requiring remand.

Without knowing whether the Grindr App was removed from Mr. Herrick's phone, it is a reasonable inference that Grindr could obtain Mr. Herrick's GPS coordinates and other information from that device without his consent. On a 12(b)(6) motion, all reasonable inferences are decided in favor of the plaintiff party. *See Doe v. Columbia Univ.*, 831 F.3d 46, 48-49 (2d Cir. 2016).

IV. GRINDR IS POTENTIALLY LIABLE UNDER PRODUCTS LIABILITY LAW

It is a matter of first impression in this Court whether product liability law applies to an App. Grindr cites no case from this Court on this point. Courts in this District and New York State courts have held that software is a product. *See Infectious Disease Sols., P.C. v. Synamed, LLC*, No. 07-CV-5423 DLI MDG, 2012 WL 1106847, at *5 (E.D.N.Y. Mar. 30, 2012) ("A review of New York case law suggests computer software is appropriately categorized as a good under the NY–UCC."); *Commc'ns Groups, Inc. v. Warner Commc'ns, Inc.*, 138 Misc. 2d 80, 82-83 (N.Y. Civ. Ct. 1988) ("Regardless of the software's specific form or use, it

seems clear that computer software, generally, is considered by the courts to be a tangible, and movable item, not merely an intangible idea or thought and therefore qualifies as a 'good' under article 2 of the UCC." (collecting cases)). Other jurisdictions have let product liability claims proceed against internet companies in the face of CDA § 230 limited immunity challenges. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (holding that the CDA did not bar a failure to warn claim); *McDonald v. LG Elecs. USA, Inc.*, 219 F.Supp. 3d 533 (D. MD 2016) (denying CDA limited immunity for negligence and breach of implied warranty); *Daniel, et. al. v. Armslist, LLC, et. al.*, No. 2017AP344, 2018 WL 1889123 (Wis. Ct. App., Apr. 19, 2018). This is another reason to remand for further factual development.

Grindr inaccurately cites to the Restatement (Third) of Torts ("Restatement") in its brief for the proposition that only tangible products, and not software, may be considered products. (*See* Grindr Br. at p. 52.) But the Restatement actually leaves open the question of whether software is a product, stating "[w]hen a court . . . decide[s] whether to extend strict liability to . . . software, it may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law. Under the Code, software that is mass-marketed is considered a good." Restatement (Third) of Torts § 19, cmt. d (1998). This Court should remand for discovery on this fact intensive matter of first impression.

V. GRINDR'S AND ITS AMICI'S POLICY ARGUMENTS ARE DATED

To support a broad reading of the CDA, Grindr and its Amici argue that free speech and innovation are the primary drivers of the internet economy. They argue any other reading of the CDA will damage the internet economy and chill discourse. (*See e.g.* Grindr Br. at p. 15; Amici Br. for Computer & Commc'n Indus. Assoc., *et al*., at p. 2; Amici Br. for EFF and Ctr. for Democracy and Tech. at p. 11.) But their argument is outdated, speculative, and lacks empirical support.

It's 2018, not 1996. Data mining, advertising, and the collection and sale of personal and behavioral data drive the internet economy now. *See e.g.* Dipayan Ghosh and Ben Scott, "#DigitalDeceit: The Technologies Behind Precision Propaganda on the Internet," New America, Public Interest Technology, Harvard Kennedy School (Jan. 2018), available at https://www.newamerica.org/public-interest-technology/policy-papers/digitaldeceit/; Frank Pasquale, "The Black Box Society: The Secret Algorithms That Control Money and Information" (Harvard University Press 2015); Kevin Granville, "Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens" N.Y. Times, (March 19, 2018), available at https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html; *see also* Facebook, Inc., "SEC Form 10K" at 9, (Fiscal Year Ending Dec. 31, 2017) ("***We generate substantially all of our revenue from advertising.***" (bold and italics in original).

The internet economy in 2018 is far removed from the online bulletin boards of the 1990s that are central to Grindr's and its Amici's policy arguments. *See e.g. Zeran v. American Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); (Grindr's Br. at 8-9, 12, 14, 24, 31; Comp. & Comm. Industry *et. al.* Amici Brief at 4-7, 14, 19; Paul Levy Amicus Brief at 2, 4-6; EFF *et al.* Amici Brief at 12, 13, 15, 18-20.) Proponents of a broad reading of the CDA consistently argue it is too expensive to scan content on the internet. But in 2018, scanning user content is cheap, fast, easy, and the primary driver of the internet economy.

VI. MR. HERRICK PROPERLY PLEADED HIS MISREPRESENTATION CLAIMS

At the start of its brief, Grindr states that the "[App] is a digital dating and social networking application *designed* to provide a safe space for gay, bisexual, trans and queer people to connect." (Grindr Br. at p. 2 (emphasis added).) Grindr then proceeds to argue that no reasonable person could have the impression that Grindr made any commitment to their safety. (*See, e.g., id*. at 39-47.) This Court should remand to answer the question of why no reasonable person could believe Grindr has designed a safe App when it says it's designed a safe App.

A. Mr. Herrick Reasonably Relied on Grindr's Statements

Mr. Herrick reasonably relied on Grindr's statements as to its App's safety design, as well as Grindr's commitment to safety. Both Grindr and the District Court read Mr. Herrick's claims as limited to Grindr's terms of service and the text

of Grindr's website's community service page. Both Grindr and the District Court read the Complaint to demand Grindr police and monitor its users' content and essentially reduced every claim to a question of publication of third-party content. (*See e.g.,* Order at p. 20, JA-209; Grindr Br. at pp. 39-42.)

But Mr. Herrick's claims encompass Grindr's marketing as well. (*See, e.g.,* Am. Compl. at ¶¶ 40, 162, 170, 177; JA-62, 86-88; Appellant Opening Br. at p. 47.) And they challenge Grindr's misrepresentations about its App's design and safety, and Grindr's claims they "designed . . . a safe space." (Grindr Br. at 3.) These are representations about conduct and design, not third-party content. It was entirely reasonable for Mr. Herrick to rely on Grindr's statements that they designed and operated a safe space.

B. A Reasonable Person Could Find That Grindr Caused Mr. Herrick's Injuries

Grindr argues their misrepresentations were not the direct and proximate cause of Mr. Herrick's injuries. (Grindr Br. at 39-42.) But proximate cause is generally a fact question for a jury, and inappropriate for determination on a motion to dismiss. *See e.g., In re Sept. 11 Litig.*, 280 F.Supp. 2d 279, 308 (S.D.N.Y. 2003) ("Plaintiffs have the burden to prove proximate cause and, generally, the issue is a question of fact to be resolved by a jury.") (citation omitted). Only where "reasonable people cannot differ" does it become a matter of law for the court. *Id.*

Grindr cites *Bravman v. Baxter Healthcare Corp.*, 984 F.2d 71, 75 (2d Cir. 1993), for the holding that "but for" causation is insufficient in a failure to warn claim. However, *Bravman* was decided on summary judgment, after discovery was complete. The *Bravman* court declined to dismiss the failure to warn claims because they turned on the credibility of a doctor's deposition testimony and held "[i]t is up to the trier of fact to determine whether, and the extent to which, [the doctor]'s testimony on this point is credible." *Id*. Whether Grindr's conduct or its App's design flaws were the direct and proximate cause of Mr. Herrick's injuries is a question for the jury.

C. There is No Waiver Under Fed. R. App. P. 28

Grindr argues that Mr. Herrick waived his misrepresentation related claims because he "fails to address most of the independent bases that the District court articulated" and thus has abandoned these claims. (*See, e.g.,* Grindr Br. at p. 38.) But in his brief, Mr. Herrick raised all the issues he is appealing, and supported them legally and factually in accordance with Federal Rule of Appellate Procedure 28. Grindr cites three inapposite cases for its waiver argument. In all three, less than diligent appellants failed to raise issues in their opening briefs or to raise the factual or legal arguments necessary for their case.

The first case involves an appeal from a default judgment where the appellants failed to raise an issue in their opening brief and only cursorily raised it

in their Reply. *See*, *State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir. 2004) ("[T]he defendants failed to advance any factual support or legal arguments in favor of that proposition."). That is not this case.

The second case is an unpublished opinion by this Court denying an appeal in a criminal case that challenged the denial of a post-trial sufficiency of the evidence ruling by the district court on hearsay grounds. *See United States v. Arline*, 660 F. App'x 35, 40 (2d Cir. 2016). That is not this case.

The third case is an opinion of this Court regarding a *pro se* appeal in a 42 U.S.C. § 1983 case where this Court unremarkably holds that because the appellant failed to raise an issue in his brief, it was abandoned. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995). That is not this case.

If Grindr's interpretation of waiver were the rule, this Court would be inundated with motions to file oversized briefs from lawyers worried they will waive arguments if they fail to challenge the minutiae of every opinion. Moreover, Mr. Herrick's argument that the District Court erred in reducing his claims to ones regarding third-party content encompasses the District Court's alternative arguments because it challenges their foundation. *See e.g. Schwapp v. Town of Avon,* 118 F.3d 106, 112 (2d Cir. 1997) (finding that claims were not abandoned where they “rise[] and fall[]” on a common issue).

VII. IT WAS OUTRAGEOUS FOR GRINDR TO KNOWINGLY FACILITATE THE STALKING OF MR. HERRICK

Immunity is not the standard by which to determine whether conduct is outrageous. The District Court errs when it holds that CDA § 230 limited immunity renders outrageous conduct not outrageous. (*See* Order at p. 18, JA-207 ("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."). Someone who commits murders when they have diplomatic immunity still has committed murder, they just may not be liable for it.

Grindr was on repeated notice the Mr. Herrick's life was in danger, and was in a unique position to easily stop the threat. Unlike Grindr, its competitors are responsive to user safety and design their apps with features to guard against abuse. (*See* Amd. Compl. at ¶ 45, JA-64.) Yet, Grindr maintains, and the District Court agreed, that Mr. Herrick hasn't alleged sufficiently outrageous conduct to support his emotional distress claims. (*See* Grindr Br. at pp. 47-49.) But a reasonable juror could think otherwise upon hearing Mr. Herrick's life was in danger; that he'd reported the abuse dozens of times to the one company uniquely positioned to intervene. This is a fact question for the jury. (*See* Amd. Compl. ¶¶ 52-96, JA-67-76.)

VIII. GRINDR'S ALTERNATIVE GROUNDS FOR DISMISSAL FAIL

A. Grindr was on Notice of its App's Dangers and Defects for Years

Grindr argues that it was unaware of the risks of its product. (Grindr Br. at 53.) This is despite the fact that an entire website exists dedicated to acts of violence committed using Grindr, and one of its own Amici, EFF, reporting in 2012 on the dangers of Grindr's App and Grindr's repeated failure to fix them. (*See* Appellant Opening Br. at 14-15.); Rainey Reitman, "Six Heartbreaking Truths About Online Dating Privacy," EFF (Feb. 10, 2012), available at https://www.eff.org/deeplinks/2012/02/six-heartbreaking-truths-about-online-dating-privacy; *see also* Andy Greenberg, "Gay Dating Apps Promise Privacy but Leak Your Exact Location," Wired (May 20, 2016) available at https://www.wired.com/2016/05/grindr-promises-privacy-still-leaks-exact-location/. Grindr had actual and constructive notice of its App's design flaws and their dangers.

B. The Statute of Limitations Has Not Run on the N.Y. G.B.L. §§ 349-50 Claims

Grindr claims the statute of limitations has run for Mr. Herrick's claims under New York General Business Law §§ 349-50. (Grindr Br. at p. 54.) But the statute of limitations runs from the time the injury accrued, which for Mr. Herrick was in 2017. *See Galdon v. Guardian Life Ins. Co. of America*, 96 N.Y. 2d 201, 210-11 (N.Y. 2001). Moreover, a statute of limitations defense is an affirmative

defense under Fed. R. Civ. P. 8(c), and improper for resolution on a motion to dismiss. This warrants remand.

IX. KL GRINDR HOLDINGS, INC.'S AND GRINDR HOLDING COMPANY'S PERSONAL JURISDICTION CHALLENGES SHOULD BE REMANDED FOR JURISDICTIONAL DISCOVERY

The District Court did not address personal jurisdiction challenges in its order on the motions to dismiss, because it dismissed on other grounds. (*See* Order at p. 7, JA-196 fn. 5). There is no factual record on which to judge personal jurisdiction arguments.

Jurisdictional discovery and a hearing in the District Court on this issue are needed. *See e.g., Texas Int'l Magnetics, Inc. v. BASF Aktiengesellschaft*, 31 F. App'x 738, 739 (2d Cir. 2002). There, a German parent company was held to be sufficiently integrated with an American subsidiary to confer jurisdiction. *Id*. Here, KL Grindr Holdings, Inc. appears sufficiently integrated with its American subsidiary to warrant a hearing. *See id*. at 740. Moreover, during the pendency of this case, ownership of Grindr Holding Company changed. It is now owned by Beijing Kunlun through its subsidiary KL Grindr Holdings, Inc., and, according to published reports, is contemplating an initial public offering on the Shanghai stock exchange. *See* Yingzhi Yang, "Gay dating app Grindr plans to go public after Chinese parent gives go-ahead," South China Morning Post (Aug. 30, 2018) available at: https://www.scmp.com/tech/china-tech/article/2161970/gay-dating-

app-grindr-plans-go-public-after-chinese-parent-gives-go (last accessed Sept. 6, 2018.)

Given the change in ownership, unanswered questions regarding corporate structure, and pending IPO, jurisdictional discovery is necessary.

X. THERE IS NO IMPROPER GROUP PLEADING

Defendants cite scant case law for their argument that Mr. Herrick engaged in group pleading. Fed. R. Civ. P. 8(a) merely requires that claims be short, plain statements of plausible claims that provide notice to defendants. Defendants are well aware of Mr. Herrick's allegations. Because Mr. Herrick has had no opportunity to receive discovery, he cannot evaluate the merits of defendants' group pleading argument. Thus, this Court should remand for further proceedings to determine the merits of defendants' group pleading claim.

CONCLUSION

This Court should remand this important, complex, and novel computer product liability law case for further testing in the crucible of the adversarial process. The District Court's premature dismissal is contrary to this Court's two CDA cases. Those cases raise serious questions about the applicability of CDA § 230 limited immunity to this case. Those questions can only be resolved by further proceedings below. These questions include: whether Grindr's App meets any of the prongs of the standard test for applying the CDA, including whether it is

properly considered and Interactive Computer Service; whether the App is a product or a service; and what the proper scope of liability is for Grindr's own conduct and content.

Mr. Herrick pleaded detailed, plausible claims raising these issues, which cannot simply be reduced to the publication of third-party content. Despite what Grindr and its Amici argue, the internet economy will not collapse if this Court remands for further proceedings. If the District Court's holding is affirmed, then the public will have no recourse when the law cannot reach an internet company who causes harm. The stakes are too high for this Court to allow the District Court's holding to become law without thorough testing of the facts and legal issues that our adversarial system is designed for. This Court should remand.

Dated: September 6, 2018

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CERTIFICATE OF COMPLIANCE

Counsel for Plaintiff-Appellant Matthew Herrick certifies under Federal Rules Of Appellate Procedure 32(a)(7)(B)(ii) that the above brief contains 6,738 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word.

This brief 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 brief has been prepared in a proportionally spaced typeface in 14-point font of Times New Roman.

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CERTIFICATE OF SERVICE

Counsel for Plaintiff-Appellant Matthew Herrick certifies that on September 6, 2018, a copy of the attached Reply Brief was filed with the Clerk through the Court's electronic filing system. In addition, I certify that copies of the above Brief are being sent, via third-party commercial carrier for delivery overnight, to the Clerk.

I certify that all parties required to be served have been served.

DATED: September 6, 2018

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