No. 18-396

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

BRIEF FOR PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and, on the Plaintiff-Appellant's copyright claim, under 28 U.S.C. § 1332. This Court has jurisdiction under 28 U.S.C. § 1291. On January 25, 2018, an Order granting Appellees' Motion to Dismiss with prejudice (the "Order") was entered for all but one (copyright infringement) of Appellant's claims in the Southern District of New York. On February 9, 2018, Appellant filed a timely notice of appeal, and seeks remand to the District Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in dismissing Plaintiff-Appellant Matthew Herrick's Amended Complaint because Communications Decency Act Section 230 ("CDA § 230") limited immunity is an affirmative defense, generally improper for decision on a motion to dismiss?

2. Did the District Court err in dismissing the Amended Complaint by looking beyond the four corners of the Amended Complaint, and making findings on disputed issues of fact without converting the motion to dismiss into a motion for summary judgment?

3. Did the District Court apply an overly expansive interpretation of CDA § 230 limited immunity?

4. Did Mr. Herrick sufficiently plead the claims not dismissed under CDA § 230?

5. Did The District Court abuse its discretion by dismissing the Amended Complaint with prejudice?

STATEMENT OF THE CASE

I. CASE HISTORY

This is an appeal from the January 25, 2018 dismissal with prejudice by Judge Valerie E. Caproni of the United States District Court for the Southern District of New York of Plaintiff-Appellant's First Amended Complaint (the "Amended Complaint") against Defendants-Appellees Grindr, LLC, KL Grindr Holdings, Inc., and Grindr Holding Company (collectively "Grindr") alleging the following claims, all under New York State law:

(1) Product Liability for Defective Design of the Grindr App (Am. Compl. at ¶¶ 100-07, Joint Appendix ("JA") 77);

(2) Product Liability for Defect in Manufacture of the Grindr App by failing to incorporate widely used, proven, and common safety software (Am. Compl. at ¶¶ 108-15, JA-78);

(3) Product Liability for Defect in Warning because Grindr knew, but failed to warn, that its Grindr App has been and can be used as a stalking weapon (Am. Compl. at ¶¶ 116-20, JA-79);

(4) Negligent Design because Grindr knew, or should have known, that the Grindr App created an unreasonable risk of injury to Mr. Herrick and its users (Am. Compl. at ¶¶ 121-26, JA-80-81);

(5) Negligent Failure to Warn or to Provide Adequate Instruction because Grindr placed the Grindr App into the stream of commerce without warning that it facilitated stalking (Am. Compl. at ¶¶ 127-30, JA-81-82);

(6) Negligence for Grindr's failure to meet its duty and the industry's standard of care in relation to product safety and incident response (Am. Compl. at ¶¶ 131-45, JA-82-83);

(7) Copyright Infringement[1] (Am. Compl. at ¶¶ 146-55, JA-84-85);

(8) Promissory Estoppel because Mr. Herrick relied on Grindr's Terms of Service ("ToS"), privacy representations, and Grindr's assurances that it could and would respond to reports of abuse (Am. Compl. at ¶¶ 156-60, JA-86);

(9) Fraud because Grindr knew the misrepresentations about it commitment to safety in the ToS, which Mr. Herrick reasonably relied upon, were false (Am. Compl. at ¶¶ 161-66, JA-86-87);

(10) Deceptive Business Practices under N.Y. Gen. Bus. Law § 349 because Grindr's made false and misleading statements about its commitment to privacy and safety to attract customers (Am. Compl. at ¶¶ 167-75, JA-87-88);

[1] Plaintiff-Appellant is not appealing dismissal of the copyright infringement claim.

(11) False Advertising in violation of N.Y. Gen. Bus. Law. §§ 350 & 350-a because Grindr falsely advertised the nature, efficacy, and safety of the Grindr App (Am. Compl. at ¶¶ 176-87, JA-88-90);

(12) Intentional Infliction of Emotional Distress because Grindr repeatedly ignored Mr. Herrick's desperate pleas for help in the face of the weaponization of the Grindr App against him by a dangerous and criminal stalker (Am. Compl. at ¶¶ 188-91, JA-90-91);

(13) Negligent Infliction of Emotional Distress because Grindr breached its duty of care by ignoring Mr. Herrick's repeated requests for help after a dangerous and criminal stalker weaponized the Grindr App against him (Am. Compl. at ¶¶ 191-205, JA-91-92); and

(14) Negligent Misrepresentation because Mr. Herrick relied on Grindr's safety representations that Grindr did not intend to enforce. (Am. Compl. at ¶¶ 206-13, JA-92-94)

On January 27, 2017, Mr. Herrick filed a Summons and Complaint in New York State Supreme Court, New York County in the matter of *Matthew Herrick v. Grindr, LLC*, Index No. 150903/17 by Order to Show Cause, seeking a preliminary injunction and temporary restraining order ("TRO"). Justice Kathryn Freed granted the ex parte TRO, ordering Grindr to "immediately disable all impersonating profiles created under [Mr. Herrick]'s name or with identifying information relating to [Mr.

Herrick, Mr. Herrick]'s photograph, address, phone number, email account or place of work, including but not limited to all impersonating accounts under the control of [his stalker]." (JA-41-42).

On February 8, 2017, Grindr filed a Notice of Removal exercising its rights under the provisions of 28 U.S.C. § 1441, *et seq.* to remove the matter to the Southern District of New York. (Dist. Dkt. 1.)

On February 15, 2017, Mr. Herrick applied for an extension on the TRO's expiration. (Dist. Dkt. 11.) On February 17, 2017, Grindr opposed that application. (Dist. Dkt. 13.) On February 22, 2017, the District Court held a hearing on the TRO extension. (Dist. Dkt. 20.)

On February 24, 2017, the District Court denied Mr. Herrick's application to extend the TRO. (Dist. Dkt. 21, JA-43-52.)

On April 12, 2017, Mr. Herrick filed his Amended Complaint adding new claims, including product liability claims and adding Grindr's holding companies – KL Grindr Holdings, Inc. and Grindr Holding Company – as defendants. (JA-53-95.)

On April 21, 2017, Grindr, LLC filed a motion to dismiss the Amended Complaint. (Dist. Dkt. 41, JA-96-97.) On May 24, 2017, KL Grindr Holdings, Inc. and Grindr Holding Company filed motions to dismiss the Amended Complaint. (Dist. Dkt. 47 & 50, JA-181-82, 185-86) On June 14, 2017, Mr. Herrick filed a

memorandum of law opposing the motions. (Dist. Dkt. 54.) The parties' requests for oral argument were not granted by the District Court.

On January 25, 2018, the District Court issued an order granting Defendants' motions to dismiss with prejudice on all claims except Mr. Herrick's copyright infringement claim, pursuant to Rule 12(b)(6). (Dist. Dkt. 63, JA-190-218.) On February 14, 2018, Judge Caproni issued a subsequent order dismissing the copyright claim with prejudice. (Dist. Dkt. 66.)

INTRODUCTION

Grindr knew.

It was October of 2016 when the first stranger rang Matthew Herrick's Harlem apartment buzzer. The man said he'd come for sex. Matthew was startled and confused. He hadn't invited anyone over.

Over the next five months, roughly 1,100 strangers did the same thing. Sometimes as many as sixteen men came in one day to Matthew's apartment and to the restaurant where he waited tables. They all came for sex. Some got angry when turned away. Others would not leave and instead banged on his door, screamed profanities and threats at him in the middle of his brunch shift, or followed him when he walked his dog. They loitered in the stairwell of his apartment building. They followed him into the bathroom at work. They all thought he had asked for it. They were wrong. He hadn't asked for any of it. He was scared. He was confused. And he feared for his life.

The strangers told Matthew they met him on the Grindr App, a popular gay dating application. They told him he had agreed to the sex. Matthew's surprise, they thought, was all part of his plan. But Matthew didn't plan any of this. His stalker ex-boyfriend did, by impersonating him on the Grindr App.

Matthew saw the impersonating profiles. They 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. And Grindr's geolocation feature directed everyone wanting to indulge those fantasies to Matthew's home and workplace.

Matthew sought help. He went to the police fourteen times. He got an Order of Protection from New York State Family Court against his stalker. Throughout, he asked Grindr for help. He asked roughly fifty times. Each time, Grindr ignored him.

With no other options, Matthew filed suit and obtained a Temporary Restraining Order against Grindr in New York State Supreme Court ordering Grindr to stop the impersonating accounts. But the strangers kept coming, and Grindr did nothing.

Grindr removed the case to the Southern District of New York. In court, Grindr's lawyers argued there was nothing they could do – or were obligated to do. Grindr knew. They admitted their knowledge, but said it didn't matter. They said their client had no responsibility to Matthew – or anyone else – because the Communications Decency Act ("CDA") Section 230 immunizes them from all liability associated with the use of their product. They claimed this even though this 1996 law was only meant to provide a limited exception to certain computer services for traditional publishing torts like defamation, and was never intended as a blanket grant of immunity.

Grindr, a business using advanced geolocation technology to direct users to one another in real time for offline sexual encounters, said it did not need to take any precautions to protect people from stalkers. Despite readily available, widely used software and methods such as VPN blocking, photo-hashing, and industry standard user verification methods that could have protected Matthew and stopped the stream of strangers. Although Grindr's business model depends on sophisticated methods to scan, sort, and analyze user data to sell to advertisers (including HIV status), Grindr claims it lacks the technical capability to block accounts.

Almost a year later, the District Court agreed with Grindr, dismissing Matthew's complaint and finding Grindr has no duty to stop people from using its product as a weapon. The District Court framed all of Matthew's claims as involving the publication of third-party content and therefore held the claims were blocked by the CDA § 230's limited exception to liability for publication torts. The District Court did so without the benefit of any fact discovery or expert testimony. Without examining a line of the Grindr App's code, and without the benefit of evidence on Grindr's structure, methods, or function, the District Court held, as a matter of law, that Matthew's Amended Complaint did not plausibly allege facts that entitled him to relief.

The District Court's broad interpretation is not supported by the legislative history or the plain language of CDA § 230. CDA § 230 only creates limited exceptions to tort liability, which apply only when an interactive computer service ("ICS") acts as a traditional publisher of third-party content. It does not protect tortious or criminal conduct. It was premature for the District Court to decide complex factual questions as to whether Grindr was engaged in conduct, versus merely publishing third-party content, and whether Grindr itself was creating content, as though such questions were simple matters of law.

Grindr knowingly facilitated the criminal stalking of Matthew. Grindr was on repeated notice, subjected to a New York court's restraining order, and still did nothing. It had a duty to use the same readily available software, methods, and standard of care used by its competitors to protect the public, yet it did nothing but hide behind an overbroad interpretation of CDA § 230.

Grindr knew. And because it knowingly facilitated criminal and tortious conduct, this Court should remand to the District Court to allow the adversarial process to expose the truth.

FACTS

I. MATTHEW HERRICK USES AND THEN ABANDONS GRINDR

Around May 2011, Plaintiff-Appellant Matthew Herrick downloaded the Grindr App and proceeded to use it to date local men for several years. (Am.

Compl. at ¶ 46, JA-64.) Upon downloading the Grindr App, Mr. Herrick, as required of all users, agreed to Grindr's Terms of Service. (Am. Compl. ¶ 47, JA-64.) In June 2015, Mr. Herrick, then a thirty-year-old New Yorker, began dating JC, a man he met through the Grindr App. (Am. Compl. ¶ 14, 48, JA-56, 65.) Around November 2015, Mr. Herrick stopped using his Grindr account. (Am. Compl. ¶ 48, JA-65.)

Starting in October 2016, after Mr. Herrick ended the relationship, JC commenced a campaign of non-stop vengeance against Mr. Herrick, including impersonating Mr. Herrick on Grindr. (Am. Compl. ¶ 49, JA-65.) Exploiting the Grindr App's lack of basic consumer safety features, JC weaponized the Grindr App and directed over 1,100 strangers to Mr. Herrick's home and workplace. (*Id*.) These men were seeking sex, including sadomasochistic sex and sex involving violent rape fantasies. (Am. Compl. ¶¶ 49-51, 67, JA-65, 70.) All these individuals were selected and directed to Mr. Herrick by the Grindr App and its geolocation and sorting functions. (Am. Compl. ¶¶ 52-53, JA-67.) The stalking was facilitated by the Grindr App's lack of easily implemented safety features to screen and block abusive and dangerous users. (Am. Compl. ¶¶ 43-44, 49, 52-53, 67, 83-89, JA-64, 65, 70, 73-74.)

The impersonating profiles contained images of Mr. Herrick. The profiles' dropdown menus contained accurate descriptions of Mr. Herrick, gave his location

as Harlem, falsely portrayed him as an HIV-positive individual seeking violent unprotected sex. (Am. Compl. ¶¶ 32, 50, JA-59, 65.) As many as sixteen individuals per day showed up to Mr. Herrick's home and workplace expecting sex. (Am. Compl. ¶ 54, JA-67.)

From November 2016 through January 2017, Mr. Herrick reported the impersonation and stalking approximately fifty times to Grindr. (Am. Compl. ¶ 68, JA-70.) From January 27, 2017 through March 2017, he or his representatives made fifty more reports. (Am. Compl. ¶ 69, JA-70.)

Mr. Herrick was not safe at home or at work. (Am. Compl. ¶ 63, JA-69.) In the span of one week alone in January 2017, two men refused to leave and loitered outside Mr. Herrick home for thirty minutes. (Am. Compl. ¶ 55, JA-67.) One day, six different men came to Mr. Herrick's work in the span of four-minutes. (Am. Compl. ¶ 56, JA-67.) The next day, a man followed Mr. Herrick into the bathroom at work. (Am. Compl. ¶ 57, JA-68.) The police were called a few days later when a man became so angry about being turned away that he attacked Mr. Herrick's roommate. (Am. Compl. ¶ 59, JA-68.) One visitor returned after Mr. Herrick sent him away, saying Mr. Herrick had direct messaged asking him to come back. (Am. Compl. ¶ 62, JA-68-69.)

Mr. Herrick tried everything to get the impersonation to stop. (Am. Compl. ¶¶ 68-70, 73, 81, JA-70, 71, 72.) He first focused on efforts to stop the stalker.

(Am. Compl. ¶ 73, JA-71.) In total, Mr. Herrick filed fourteen police reports against the stalker. (*Id.*) When that did not stop the stalker, Mr. Herrick successfully petitioned New York State Family Court for an Order of Protection. (*Id*.) But the stalker was not deterred. Instead, he sent even more strangers to Mr. Herrick for sex. (Am. Compl. ¶¶ 55-60, JA-67-68.) Grindr was the only one that could help. Grindr did nothing. (Am. Compl. ¶¶ 71, 82, JA-71, 73).

II. GRINDR'S APP

Launched in 2009, Grindr is purportedly the world's largest and most popular hook-up application for gay and bisexual men. (Am. Compl. ¶ 29, JA-58.) The Grindr App, available for download onto mobile devices through the Apple App Store and Google Play, has approximately ten million users in 192 countries. (Am. Compl. ¶¶ 28, 29, JA-58.) Over a quarter of those users are in the United States. (Am. Compl. ¶ 29, JA-58.) To create an account, a user enters an email address (with no verification), date of birth (not verified), and password, and accepts the terms of service. (Am. Compl. ¶¶ 32, JA-59-60.) Then, a user is immediately provided a list of potential "matches" selected and produced by Grindr—ranked in distance from closest to furthest. (*Id*.) Additionally, users may enter supplemental profile information, such as age, height, body weight, sexual activity preferences, ethnicity, HIV status, and last tested date. (*Id*.)

Grindr's defining technological feature is its geolocation function. (Am. Compl. ¶ 23, JA-57.) Geolocation is the tracking of the real-world geographic location of an object, such as a mobile phone or computer. (Am. Compl. ¶ 22, JA-57.) The Grindr App retrieves the latitude and longitude of a user's mobile phone without any affirmative action from users. (Am. Compl. ¶¶ 22-24, JA-57.)

A. Grindr's Safety Record

Grindr has a lax history of protecting its users' safety and privacy (Am. Compl. ¶ 37, JA-60-61.) In 2014, a design flaw was discovered that allowed third-parties to precisely geographically pinpoint individual users. (Am. Compl. ¶ 37, JA-60-61.) Two years later, without having remedied the defect, it was widely reported that this privacy breach was possible even when a user disabled the Grindr App's "show distance" (i.e. distance from another user) feature. (*Id.*)

Serial killer Stephen Port used the Grindr App to drug, rape, film, and murder men he met through the app. (Am. Compl. ¶ 39, JA-61.) In 2012, a thirteen-year-old minor misrepresented his age on Grindr and was sexually assaulted by two adult males. (*Id.*) An entire website exists just to rank the violent crimes committed through the Grindr App. (*Id.*)

Grindr's website assures users it is committed to being a "safe space." (Am. Compl. ¶¶ 40-41, JA-62.) Grindr's website says "[w]e strive to create a safe space

where all are welcome to be who they are and express themselves without fear of judgment." (Am. Compl. ¶ 41, JA-62.)

Additionally, Grindr's privacy policy affirmatively assumes a duty to "protect[] users from 'behaviors that endanger them.'" (Am. Compl. ¶¶ 40, 41 & n.5, JA-62) ("[W]e have a system of digital and human screening tools to protect our users from actions and behaviors that endanger them and go against what we're about".) Users are required to agree not to violate the Terms and Conditions of Service ("ToS") upon creating a Grindr account. (Am. Compl. ¶ 32, JA-59).

B. Industry Standards

Unlike Grindr, other dating apps are responsive to user complaints and take measures to swiftly act if a user is being injured by their products. (Am. Compl. ¶ 45, JA-64.) Competitor same-sex male dating app companies "Scruff" and "Jack'd" employ staff who respond to complaints – within 24 hours they can locate and remove offending profiles and ban IP addresses and specific devices from creating new profiles. (*Id*.) Scruff notifies complainants when a problem is resolved. (*Id.*) Grindr, though, fails to apply readily available, industry standard software to ban abusive accounts, such as VPN blacklisting, IP blocking, or basic duplication detection techniques. (Am. Compl. ¶ 79, JA-72.) Furthermore, it fails to properly staff and supervise a customer service department to address the known consumer safety problems of its dangerous and defective product. (Am. Compl.

¶¶ 37, 39, 86, JA-60-61, 74.) Grindr does not use easily available methods, such as photo-hashing or word searches, to identify accounts created by repeat abusers. (Am. Compl. ¶¶ 44, 82-86, JA-64, 73-74.)

Each time Mr. Herrick turned to Grindr for help before filing this lawsuit, the only response he got was an automated message: "Thank you for your report." (Am. Compl. ¶ 71, JA-71.)

ARGUMENT

I. THIS COURT SHOULD REMAND FOR DISCOVERY BECAUSE THE DISTRICT COURT IMPROPERLY MADE FINDINGS ON DISPUTED ISSUES OF FACT

In dismissing Mr. Herrick's Amended Complaint, the District Court went outside the face of the Amended Complaint and treated complex questions of disputed fact as simple questions of law. The Second Circuit recognizes that the limited immunity available under CDA § 230 for the publication of third-party content ("CDA limited immunity") is an affirmative defense for which the burden of proof lies with the defendant. Thus, CDA limited immunity is generally an improper issue for resolution at the motion to dismiss stage unless the affirmative defense is clear from the face of the complaint. That is not the case here.

Without the benefit of the benefit of fact discovery, depositions, or expert testimony, the District Court here made findings as a matter of law on complex factual disputes. Nowhere in the District Court's Order granting Grindr's Motion to

Dismiss (the "Order") does the Court address the issue of CDA limited immunity as an affirmative defense. Instead, the District Court embarked on fact finding improper for a motion to dismiss under Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6).

Moreover, the District Court looked outside the four corners of Mr. Herrick's Amended Complaint, and the information integral to it, without converting Defendants' Motion to Dismiss into a Summary Judgment motion under F.R.C.P. 56. This was error, as this Court strictly enforces the rule that a motion to dismiss must be converted into a summary judgment motion if a lower court looks outside the four corners of a complaint. The rule is so strict that a motion to dismiss must be converted to one for summary judgment on the "mere possibility" that a court looked for information outside the complaint.

Thus, this Court should remand for fact discovery, expert testimony, and further adversarial proceedings because it is premature to rule on Mr. Herrick's Amended Complaint as a matter of law. The facts in his well pleaded complaint establish his right to relief as a matter of law, and the District Court erred in granting Grindr's Motion to Dismiss rather than converting it to one for summary judgment.

A. The District Court Erred in Granting the Motion to Dismiss Based on an Affirmative Defense

Mr. Herrick alleged plausible facts supporting torts involving Grindr's conduct and creation of content that, if proven, would entitle him to relief. CDA limited immunity is an affirmative defense, generally improper for resolution at the motion to dismiss stage. Such a resolution is only proper if the defense is plain from the face of the complaint. *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) ("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.") (quoting *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014).); *see also Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (holding that CDA limited immunity is an affirmative defense and that "[a]ffirmative defenses do not justify dismissal under Rule 12(b)(6); litigants need not try to plead around defenses.") Dismissal was improper here because it is not clear from the face of the Amended Complaint that Mr. Herrick should be deprived from the relief sought therein.

The Amended Complaint plausibly alleges that Grindr created a defectively designed product; that Grindr knew of the dangerous uses of the Grindr App; and that Grindr failed in its duties to warn and protect the public from the Grindr App's dangers and defects. The Amended Complaint adequately alleges that: (1) the Grindr App is defective and dangerous in design because it does not incorporate

commonly used software, such as VPN blocking, photo hashing, and geofencing, to protect its users from foreseeable dangerous uses of its product such as JC's stalking of Mr. Herrick (Am. Compl. ¶¶ 45, 82-91, JA-64, 73-75); (2) that Grindr disregarded its duties to Mr. Herrick and the public because it fully knew and was repeatedly put on notice about the criminal and tortious uses of its product (Am. Compl. at ¶¶ 68-71, 75-76, 81, JA-70-71, 72); (3) that 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 (Am. Compl. at ¶¶ 22-26, 35, 37, 52. JA-57, 60-61, 67.); and (4) that Grindr is liable in tort for its knowing failure to warn and the negligent misrepresentations it has made about its commitment to its users' safety, to their users' detriment. (Am. Compl. ¶¶ 38-45, 35. JA-61-64, 60.) These allegations are particular, concrete, and rise above mere speculation.

Courts have allowed similar tort claims to proceed past the motion to dismiss stage. They do so because they recognize the limited and fact-specific nature of immunity under CDA § 230. This limited immunity only applies to liability for traditional publication torts by interactive computer services publishing third-party content. *See, e.g., FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) ("[The] grant of immunity only applies if the interactive service

provider is not also an 'information content provider' of the content which gives rise to the underlying claim."); *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010), ("[S]ubsection (c)(1) does not create an 'immunity' of any kind. It limits who may be called the publisher of information that appears online" (citations omitted).)

Both the CDA's text and the case law are clear that CDA limited immunity does not apply to non-publication torts. *See, Doe v. Internet Brands, Inc.*, 824 F.3d 846, 854 (9th Cir. 2016) ("In short, this case presents the novel issue of whether the CDA bars Jane Doe's failure to warn claim under California law. We conclude that it does not."); *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) ("[T]he internet . . . has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress …."); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) ("Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?"); *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 537 (D. Md. 2016) ("[T]o the extent that a plaintiff may prove that an interactive computer service played a *direct* role in tortious conduct—through its

involvement in the sale or distribution of the defective product—Section 230 does not immunize defendants from all products liability claims." (emphasis in original).) Mr. Herrick pleaded facts that entitled him to relief and it was improper and premature for the District Court to dismiss his complaint under F.R.C.P. 12(b)(6) based on an affirmative defense, without Mr. Herrick having the benefit of discovery, expert testimony, and further adversarial proceedings.

Courts recognize the danger in granting a motion to dismiss based on CDA limited immunity. *See CYBERsitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012) ("Because Defendant's entitlement to immunity under the CDA depends on whether Defendant 'developed' or materially contributed to the content of these advertisements, it is too early at this juncture to determine whether CDA immunity applies."); *cf. Wang v. OCZ Tech. Group Inc.*, 276 F.R.D. 618, 632 (N.D. Cal. 2011) ("Whether OCZ falls within the CDA's definition of 'interactive computer service,' and whether the third-party content allegedly displayed . . . was reproduced by OCZ in a manner potentially subjecting it to liability, raise factual questions unfit for disposition pursuant to a motion to strike.") Mr. Herrick's well pleaded Amended Complaint plausibly alleges facts related to Grindr's tortious conduct and creation of content. Dismissal was not warranted.

B. The Order Granting the Motion to Dismiss Should be Reversed Because the District Court Considered Matters Outside the Amended Complaint

In its Order, the District Court references and relies on the transcript of oral arguments taken at a TRO Hearing preceding the Amended Complaint. (*See* Order at 3 n.2, 9 n.5, JA-192, 198.) An Amended Complaint supersedes prior factual pleadings. *See, e.g., Int'l Controls Corp. v. Vesco,* 556 F.2d 665, 668-69 (2d Cir. 1977) ("It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect."); Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1476 (3d ed.) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies".)

The Amended Complaint's factual allegations specifically contradict facts alleged during the emergency TRO hearing on which the District Court seems to have relied. (*Compare* 3 n.2, 9 n.5, JA-192, 198 *with* Am. Compl. JA-53-94.) Specifically, contrary to the factual allegations seemingly relied on by the District Court, the Amended Complaint does not allege that the stalker directed individuals to Mr. Herrick via the Grindr App's direct messaging function. Rather, the Amended Complaint alleges that Grindr's App, particularly its geolocating function, "selected and directed" individuals to Mr. Herrick's home and place of employment, and that Grindr was on notice of this. (*See* Am. Compl. ¶¶ 23, 58, 61, 63, 67, 78, 80, 87, 192, 203, JA-57, 68, 69, 70, 72, 74, 91, 92.) By wrongly relying

on these outside facts, and without the benefit of any discovery or expert testimony on the functionality or code underlying Grindr's geolocation function and other operations, the District Court improperly dismissed the Amended Complaint.

The District Court considered information outside the four corners of the Amended Complaint which fell beyond content integral to it. Yet, the District Court never converted Grindr's Motion to Dismiss into a Summary Judgment Motion. This Court mandates that the "conversion requirement is 'strictly enforced' whenever a district court considers extra-pleading material in ruling on a motion to dismiss." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002) (citing *Friedl v. City of New York*, 210 F.3d 79, 83–84 (2d Cir. 2000)) This strict standard requires reversal even on the mere "*possibility* that [the court] relied on matters outside the pleading in granting a defendant's Rule 12(b) motion." *Friedl*, 210 F.3d at 83–84 (2d Cir. 2000) (emphasis added, citations omitted) The District Court's Order, as well as Grindr's Motion to Dismiss, considered material outside the Amended Complaint and thus this Court should remand.

C. The District Court Improperly Treated Disputed Questions of Complex Fact as Simple Questions of Law

The District Court repeatedly turned to cases with dissimilar fact patterns to make findings on disputed factual issues. For instance, the Order cites *Saponaro v. Grindr, LLC,* 93 F. Supp. 3d 319 (D.N.J. 2015). (*See* Order at pp. 9, 11, 17, JA-198, 200, 206.)

But *Saponaro* involved the case of a thirteen-year-old who used the Grindr App to solicit sex with the plaintiff, who was then charged with sexual assault for the ensuing encounter. *Saponaro*, 93 F. Supp. 3d at 321-22. The plaintiff in *Saponaro* then sued Grindr for negligence for failing to enforce its age restriction and "causing" him to have sex with a thirteen-year-old. *Id. Saponaro* is an absurd lawsuit involving a single instance of a plaintiff seeking to blame Grindr for the fact that the plaintiff had sex with a thirteen-year-old boy. It does not involve Grindr's geolocation function repeatedly selecting and directing people towards the plaintiff. It does not involve the plaintiff putting Grindr on notice at least fifty times of the criminal and tortious use of Grindr's dangerous and defective product. It does not involve a situation where Grindr did nothing in response to these complaints and pleas for assistance. Nor does *Saponaro* contain any discussion or technical analysis of Grindr's geolocation function or the function of its software in general. It is a simple case involving a simple passive posting of third-party content. The District Court's reliance on *Saponaro* is misplaced.

II. GRINDR DOES NOT QUALIFY FOR CDA LIMITED IMMUNITY

This is a case about Grindr's knowing tortious conduct and content creation, and its misrepresentations to the public about the safety of the Grindr App. The causes of action do not turn on Grindr's publication of third-party content. Mr. Herrick is suing Grindr for, among other things, product liability claims arising

from Grindr's own conduct and content creation. (Am. Compl. ¶¶ 13, 100-216, JA-55-56, 77-98.)

CDA limited immunity for the publication of third-party content by ICSes was never intended as a form of blanket immunity. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) ("Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.") The facts as alleged in the Amended Complaint establish that Grindr engaged in knowing and negligent tortious conduct and content creation. Therefore, Grindr cannot avail itself of CDA limited immunity.

A. CDA Limited Immunity Was Meant to Protect Free Speech and Innovation on the Internet, Not Dangerous Criminal and Tortious Behavior

CDA limited immunity became law in 1996. *See* 47 U.S.C. § 230(c)(1). Congress passed CDA limited immunity in reaction to two conflicting court cases involving defamation claims over third-party postings on electronic bulletin boards. *See, generally,* Ali Grace Zieglowsky, Note, *Immoral Immunity: Using a Totality of Circumstances Approach to Narrow the Scope Section 230 of the Communications Decency Act*, 61 Hasting L.J. 1307, 1308-11 (2010).

The first case held that the electronic bulletin board Compuserve was not liable for defamation for unknowingly publishing a post by a newsletter company

that defamed a competitor's newsletter. *See Cubby, Inc. v. Compuserve, Inc.* 776 F. Supp. 135, 141 (S.D.N.Y 1991). The second case held the electronic bulletin board Prodigy liable for an anonymous user's defamatory post accusing a securities firm of a white-collar crime. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 323710, at *4 (N.Y. Sup. Ct. May 24, 1995). The world wide web and the internet were in their infancy at this point, and lawmakers feared that if online companies like Prodigy and CompuServe were liable for publication torts based on third-party content it would stifle discourse and innovation.

At the same time, lawmakers were concerned about the dangers posed by the internet, particularly to children. *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) ("When it was introduced, the primary purpose of the CDA was to protect children from sexually explicit internet content. Section 230 … had a different objective: '[T]o preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.'") (citation omitted).); Sen. Rep. No. 1944, at 1953 (Feb. 1, 1995) ("The [Communications] Decency Act will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies.") (Sen. Exon) (citing Sandy Rover, "Molesting Children by Computer" Wash. Post, Aug. 2, 1994); H.R. Rep. No. 8460, 8469 (Aug. 4, 1995)

Over the next twenty years, however, courts interpreting the CDA's limited immunity transformed it into a near blanket immunity for interactive computer services far beyond the context of publication torts involving third party content, and far beyond congressional intent. *See, e.g., Daniel, et al. v. Armslist, LLC ,et al.*, No. 2017AP344, 2018 WL 1889123, at *10 (Wis. Ct. App. Apr. 19, 2018) ("*Armslist*") (criticizing the District Court's Order in this case) ("We believe that the cases cited by [defendant] are effectively reading into the Act language that is not present, to the effect that the Act provides general immunity for all activities that consist of designing or operating a website that includes content from others."); Zieglowsky, *Immoral Immunity* 61 Hasting L.J. at 1314-15 (2010). At the same time that courts were expanding CDA limited immunity to decrease liability for ICSes, they were increasing the dangers faced by individual members of the public.

Indeed, the courts stretched CDA limited immunity to the point that it facilitated a thriving market in child sex trafficking. Congress was forced to take action. *See Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, PL 115-164, 132 Stat 1253 (April 11, 2018), codified at 47 U.S.C. § 230(e)(5). But even discounting broad judicial interpretations of CDA limited immunity untethered from the text of the statute, the Amended Complaint pleads facts that place Grindr outside the three necessary elements for limited immunity to apply.

The words in a statute must be given their "ordinary or natural meaning." *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014). If the plain meaning of the words cannot be discerned, then legislative intent may be turned to as an interpretive tool. *Id.* But the plain text of CDA § 230(c)(1) is easy to understand. It simply speaks of exempting interactive computer services acting as publishers from liability for the publication of third party content. It says nothing about the operations or design of internet companies and their Apps. And the courts should stop reading words into the statute at the expense of victims of online harassment and stalkers. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009); ("It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language.") The plain language of CDA § 230 does not extend to Grindr's operation and design:

> If the goal of Congress were to establish the sort of broad immunity urged by [Defendant], that is, immunity for all actions of websites that could be characterized as publishing activities or editorial functions, Congress could have used any number of formulations to that end. Instead, Congress limited immunity to a single circumstance: when a theory of liability treats the website creator or operator "as the publisher or speaker of any information provided by another information content provider." Nothing in this language speaks more generally to website design and operation. *Daniel, et. al. v. Armslist, LLC, et. al.* No. 2017AP344, 2018 WL 1889123, at *9 (Wis. Ct. App. Apr. 19, 2018).

To the extent that Grindr's conduct in operating and designing its Application relates to the publication of content, it is content created by Grindr's

geolocation software and the like. *See id.* The District Court's Order articulates no clear standard that proves otherwise.

B. Under the Facts Alleged in the Amended Complaint Grindr Does Not Meet Any of the Three Requisite Elements Necessary for CDA Limited Immunity

The plain text of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This Court follows the majority of courts in holding that there are three elements necessary for CDA limited immunity. 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 Media, LLC,* 838 F. 3d at 173 (2d Cir. 2016) (citations omitted). The three elements are addressed in reverse order.

1. Grindr is Not a Publisher or Speaker of Third-Party Content, as Alleged in the Amended Complaint

The Amended Complaint makes plausible claims predicating liability on Grindr's own conduct and content. The District Court bootstrapped almost all of Mr. Herrick's causes of action into ones where Grindr is unequivocally a speaker of third-party content. And it did so using unarticulated standards that fail to distinguish conduct from content. But anyone familiar with the First Amendment

doctrine of "speech integral to criminal conduct" knows that distinguishing between conduct and content should be approached with caution, and not abandon. *See, e.g.,* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277 (2005).

Not every action of an ICS provider transforms it into a publisher or speaker. The definition of a publisher for CDA limited immunity is a narrow one; it is limited to the role of a traditional publisher publishing third party content, and nothing more. *See, e.g., StubHub!, Inc.*, 624 F.3d at 366 (Easterbrook, C.J.) ("[CDA § 230(c)] limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker'. Section 230(c) is irrelevant.") CDA limited immunity does not apply when allegations target conduct that goes beyond "a publisher's traditional editorial functions– such as deciding whether to publish, withdraw, postpone or alter content.'" *See LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (citations omitted). Of course, in order to determine if an ICS is engaged in publishing content, one must first have a clear and articulable standard defining what is and what is not content.

But the District Court articulates none. Instead, it presumes almost everything is the publication of third-party content. For instance, the District Court maintains that Mr. Herrick's product liability claims are simply safety claims involving editorial choices:

> Herrick's claims are based on features or missing safety features, such as Grindr's geolocational tools and Grindr's inability to block profiles based in ICC numbers and MAC address . . . these features are . . . only relevant . . . because they bear on Grindr's ability to search for and remove content posted to the app exactly the sort of 'editorial choices' that are a function of being a publisher. (Order at 13-14, JA-202-03.)

But with this statement the District Court is speculating without the benefit of fact discovery or expert testimony. The point of these non-content functions is not to prevent the publication of or edit third party content. The point is to prevent known stalkers and abusers, identified by their unique ICC numbers and MAC Addresses, from using Grindr's geolocation function for criminal and tortious stalking. Obtaining ICC numbers, MAC addresses, utilizing VPN blocking and geofencing are all safety processes involving the function of computer code. The content of the ICC numbers, MAC addresses, and the like are not published in any traditional sense in order for those safety processes to function. This does not constitute the publication of third-party content, as the only party obtaining and utilizing that information would be Grindr itself. These factual issues present complex questions of code functionality and communication between the Grindr

App and Grindr's server-side software. They are not the simple fact patterns derived from common law publication torts involving static third-party content.

The Amended Complaint's allegations involving industry-standard safety practices are claims about Grindr's conduct and Grindr's failure to uphold the applicable duty of care, and about content creation by Grindr not akin to that of a traditional publisher. It is a dynamic process to prevent unsafe or dangerous behavior by individuals using Grindr's product, not editing third-party content. By categorizing it as the latter, the District Court is speculating without discovery or expert testimony.

A test of whether a theory of liability treats someone as a publisher of third-party content for CDA limited immunity is to ask "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).) A clear articulable standard would differentiate conduct from content. Even under the "publisher or speaker" test, it strains credulity to say that automated geolocation of users based on real-time streaming of their mobile phone's longitude and latitude constitutes "a publisher's traditional editorial function." (*See* Order at 13-14, JA-202-03.)

Just as the New York Times cannot escape liability by appealing to the First Amendment if it publishes a newspaper with poison ink, Grindr cannot evade product liability for creating a defective and dangerous application by claiming it is only a publisher of third-party content. Grindr's duty under product liability law does not arise from any form of speech; it arises from Grindr's duty as a business not to put dangerous products into the stream of commerce without sufficient safety measures or warning. This duty is measured by the applicable standard of care derived from societal and industry norms, and does not implicate third-party content.

This is why courts have recognized that CDA limited immunity does not apply to product liability claims. *See, e.g. McDonald,* 219 F. Supp. 3d at 537 (D. Md. 2016) ("[T]o the extent that a plaintiff may prove that an [ICS] played a direct role in tortious conduct—through its involvement in the sale or distribution of the defective product—Section 230 does not immunize defendants from all products liability claims.") Grindr's conduct in designing, operating, and marketing its product in the stream of commerce, and the content Grindr produces while so doing, are at issue here. For this reason, Grindr cannot evade liability at this stage by taking refuge under CDA limited immunity.

2. Grindr's Business Operations and Product Design are its Own Creation

Mr. Herrick's claims of design and manufacturing defect, negligent design, and failure to warn are not based on the publication of third-party content. They are based on Grindr's conduct, and content produced by Grindr. Mr. Herrick's claims are based on the foreseeable harms from Grindr's dangerously designed product, and the absence of policies, systems, or procedures to address the harms associated with operating a business which facilitates sexual encounters between strangers via automated geolocation and algorithmic matchmaking.

The Grindr App enables in-person sexual encounters using software in conjunction with real-time geolocation that monitors the longitude and latitude of user devices and transmits that information. Yet Grindr lacks a system to block access to their product by individuals who violate the ToS. After Mr. Herrick submitted the first report to Grindr, it was on notice that the Grindr App was causing harm and yet had nothing in place to stop that harm. Rather, when confronted with multiple reports that a stalker had weaponized the Grindr App, Grindr's only response was to ignore the reports until being sued.

C. Mr. Herrick's Claims are Not Based on Third-Party Content Because They Involve Either Grindr's Own Content or the Display of Information That is Not Content

The information in a user's or subscriber's published profile may constitute content, either on Grindr's App or the New York Times. But users of an ICS are

not “content” any more than subscribers to the New York Times are its content. The New York Times’ management of its subscriber database is not the act a traditional publisher exercising an editorial role. The management of users and subscribers is business conduct, not editorial. The District Court here repeatedly conflated the two, essentially arguing that most of Mr. Herrick's claims amount to requests to remove "offensive content." (Order at p. 2, JA-191) ("The CDA bars Herrick's products liability claims and his claims that Grindr must do more to remove impersonating profiles. Each of these claims depends on holding Grindr responsible for the content created by one of its users.")

Because CDA limited immunity only applies to traditional publishing of third-party content, it follows that only published information, publicly displayed, constitutes “content” for CDA limited immunity purposes. For this reason, cases involving CDA limited immunity generally concern published content that someone saw and reacted to negatively. These cases tend to involve simple content, such as allegedly defamatory or discriminatory comments, posts, images, or information, all of which fit easily into the rubric of a traditional publisher exercising its editorial role. *See, e.g., FTC v Accusearch Inc.,* 570 F.3d 1187 (10th Cir. 2009) (involving the sale of telephone records); *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (involving real estate ads on a website and a discriminatory questionnaire) ("The

CDA does not grant immunity for inducing third parties to express illegal preferences."); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (involving online sex ads). While published content is central to these claims, it is only ancillary to this case.

Based on available information, content publication was only a small part of the underlying function of Grindr's App, and without discovery and expert analysis of that function and the computer code therein, there is no basis to conclusively determine whether the Grindr App's function constitutes content created by Grindr or third-party content.

D. Fact Discovery is Required to Determine if Grindr Meets This Court's Narrowly Construed Definition of an Interactive Computer Service

Without fact discovery it is impossible to definitively conclude that Grindr meets this Court's definition of an ICS. "The term [ICS] means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). This is a technical and fact-intensive definition. However, the District Court dismissed Mr. Herrick's argument that Grindr is not an ICS without engaging in the technical and fact-intensive inquiry required, and without the benefit of any discovery or

testimony needed to make that factual determination.[2] This Court recently encouraged just this sort of inquiry as to the question of whether a party was an ICS in *Leadclick*, 838 F.3d at 175–76 (2d Cir. 2016) (questioning whether an internet affiliate-marketing network was an ICS on policy grounds because "the 'service' purportedly provided—access to the HitPath server—is not the type of service that Congress intended to protect in granting immunity.")

Grindr may not be an ICS for a number of reasons. First, there is a factual dispute as to whether Grindr provides a product or a service. Second, the Grindr App functions nothing like the websites, online bulletin boards, or search engines that form the subject of many CDA limited immunity cases. Third, Grindr is not the type of forum upon which Congress intended to confer ICS status, as it does not provide educational or informational resources, discourse, or intellectual activity. Instead, Grindr algorithmically sorts users and directs them towards offline sexual encounters. *See LeadClick Media, LLC*, 838 F.3d at 175–76. Since the District Court dismissed these claims before any fact discovery, these questions have not been definitively answered.

[2] In what appears to be a typo that has gone unnoticed by the parties and the District Court, until now, the Amended Complaint inadvertently refers to Grindr as an "Interactive Computer Service." (Am. Compl. ¶ 98, JA-76.) If this case is remanded Plaintiff will seek leave to amend to correct this typo.

III. MR. HERRICK'S CLAIMS WERE SUFFICIENTLY PLED

The District Court improperly dismissed all fourteen claims in the Amended Complaint. Mr. Herrick appeals the District Court's finding in thirteen of those.[3] Of the thirteen, The District Court dismissed seven solely on grounds of Grindr having CDA limited immunity: Defect in Design, Defect in Manufacture, Defect in Warning, Negligent Design, and Failure to Warn, Negligence, and Negligent Infliction of Emotional Distress. (Order at 7-16, JA-196-205.)

Four were dismissed because the court found deficiencies in Mr. Herrick's pleadings: Negligent Misrepresentation, Promissory Estoppel, N.Y. Gen. Bus. Law § 349 (the "Deceptive Business Practices Act"), and N.Y. Gen. Bus. Law § 350-35-a ("False Advertising"). (Order at 19, JA-208.) The remaining two, Fraud and Intentional Infliction of Emotional Distress, were dismissed both because of CDA §230 limited immunity and because the District Court found the pleadings deficient. (Order at 19 and 17, JA-208, 206.)

The CDA limited immunity issue is discussed above. (*See above,* § I and II.) And the District Court erred in holding that Mr. Herrick's claims are not sufficiently pled.

[3] Mr. Herrick does not challenge the District Court's dismissal of his Copyright Infringement claim. (Am. Compl. at ¶¶ 146-155. JA-84-85.)

A. Under This Court's Standard, the Amended Complaint Sufficiently Pled Fraud

Mr. Herrick pleaded fraud with sufficient particularity. (Am. Compl. ¶¶ 161-166, JA-86-87.) Fraud has five elements: "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).

F.R.C.P. 9(b) requires added particularity in fraud pleadings. "1) specify the statements that plaintiff contends were fraudulent, 2) identify the speaker, 3) state where and when the statements were made and 4) explain why the statements were fraudulent." *United States ex rel. Ladas v. Exelis, Inc.,* 824 F.3d 16, 25 (2d Cir. 2016) (citation omitted). The purpose of Rule 9(b) is "threefold – it is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." *Id*.

This Court rejects an overly rigid interpretation of Rule 9(b) when a party seeks dismissal under Rule 12(b), because it recognizes that certain facts are "peculiarly within the opposing party's knowledge." *United States ex rel. Chorches v. Amer. Med. Response*, 865 F.3d 71, 82 (2d Cir. 2017) (citation omitted). This Court encourages allowances in pleading when the plaintiff faces

the extreme outcome of pre-discovery 12(b) dismissal with prejudice. *See id.* Moreover, Rule 9(b) does not "elevate the standard of certainty that a pleading must attain beyond the ordinary level of plausibility." *Id.* at 88.

Mr. Herrick's allegations are sufficiently particular and robust to allay any fear of undermining the purpose of Rule 9(b). The Amended Complaint amply pleads all elements of fraud with sufficient particularity as follows. First, it claims Grindr misrepresented itself in the ToS on its website and omitted material facts about its alleged inability to stop users from weaponizing their product to stalk, impersonate, and harass. (Amd. Compl. ¶162, 44, JA-86, 64.) Second, by entering into an agreement to use its product and relying on Grindr's claims about user safety, Mr. Herrick demonstrated his reliance on Grindr's representations. (Amd. Compl. ¶¶47, 81, JA-64, 72.) Third, the Amended Complaint identifies the speaker of the content as Grindr (Amd. Compl. ¶41-42, JA-62-64) and alleges Grindr knew it had no technology to stop harmful uses of its product. (Amd. Compl. ¶¶82, 87, JA-73, 74.) Next, it describes Matthew's "serious pain and mental distress." (Amd. Compl. ¶¶ 92, 94-96, JA-75.) Above and beyond F.R.C.P. 9(b)'s requirements, the Amended Complaint, quotes particular terms in the ToS that are fraudulent and provides the website addresses and the dates that material was last seen. (Amd. Compl. ¶42(a) – (i), JA-61-63.)

The District Court's analysis of the fraud claims is neither procedurally nor logically sound. First, it quotes language from the ToS not incorporated in the Amended Complaint, §§10.2 and 12.4, in which the District Court asserts Grindr's ToS is internally contradictory and should never have been relied upon by Mr. Herrick. (Order at 21, JA-210.)

Importantly, Amended Complaint alleges that Grindr's "community values page represents that Grindr has tools to protect users from dangerous 'actions and behaviors.'" (Am. Compl. at 20, JA-209.) This, along with Grindr's representations that it *may* help fraudulently conveys that Grindr has the *capacity* to help.

B. The Amended Complaint Sufficiently Pled Negligent Misrepresentation

The District Court erred in dismissing Mr. Herrick's claims for negligent misrepresentation by holding that Mr. Herrick failed to adequately allege a "special relationship." (Order at 25-26, JA-215-16.)

Mr. Herrick sufficiently alleges that he had a special relationship with Grindr because (1) Grindr had superior and exclusive knowledge about its ToS and its abilities to monitor and respond to abusive or otherwise problematic accounts; (2) Grindr made misleading disclosures and representations in its ToS and its community values page about its abilities to monitor problematic accounts; and (3)

Mr. Herrick reasonably relied on these statements to his detriment. (Am. Compl. ¶¶ 206-216, JA-92-94.)

Mr. Herrick's Amended Complaint alleges that Grindr repeatedly represented that it could ban abusive accounts in its ToS. (Am. Compl. ¶¶ 42(a) – (i), JA-62-64. It asserts that users, in order to use Grindr, must accept Grindr's ToS (Am. Compl. ¶ 32, JA-59.) The Amended Complaint further alleges that Grindr advertised, on its website, that it had a "system of digital and human screening tools to protect [its] users from actions and behaviors that endanger them and go against what [it's] about." (Am. Compl. ¶ 41, JA-62.) It pleads that, although Grindr makes representations that it has tools to protect its users from dangerous actions and behaviors, and that it can suspend and ban problematic accounts, Grindr refuses, fails, or is incapable of doing so. (Am. Compl. ¶ 43, JA-64.) It states Grindr makes little to no effort to actually monitor the activities of its users or ban abusive accounts, even when given repeated notice of accounts and the dangerous weaponization of its product. (Am. Compl. ¶¶ 44, 81, JA-64, 73.)

Accepting these allegations as true, the District Court should have found that Mr. Herrick satisfied each of the factors necessary to establish negligent misrepresentation. *See Kimmell v. Schaefer*, 652 N.Y.S.2d 715 (N.Y. 1996). Under *Kimmell*, "a duty to speak with care exists when 'the relationship of the parties ... [is] such that *in morals and good conscience the one has the right to rely upon the*

other for information." *Id*. at 719 (emphasis added, citations omitted). This duty exists for those who "possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Id*.

Whether the relationship is such that reliance on a negligent misrepresentation is justified "generally raises an issue of fact." *Id*. Thus, "a fact finder should consider [1] whether the person making the representation held or appeared to hold a unique or special expertise; [2] whether a special relationship of trust or confidence existed between the parties; and [3] whether the speaker was aware of the use to which the information would be put and supplied it for that purpose." *Id*.

The District Court erred in treating the above factors as if they were elements of the claims, rather than factors to be considered by the fact finder. *See Century Pac., Inc. v. Hilton Hotels Corp.*, 03-Civ-8258, 2004 WL 868211, at *8 (S.D.N.Y. Apr. 21, 2004) ("[D]etermination of whether a special relationship exists is highly fact-specific and generally not susceptible to resolution at the pleading stage.") (internal quotation marks omitted); *see also LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC,* 10 F. Supp. 3d 504, 524 (S.D.N.Y. 2014) (holding that the existence of a confidential relationship is "ultimately a 'question of fact, dependent upon the circumstances in each case.'")

The Amended Complaint sufficiently pled a negligent misrepresentation claim by meeting the requirements set forth in *Kimmel*. It clearly alleged that Grindr held, or certainly appeared to hold a unique or special expertise as to its own monitoring abilities; and that it was aware of the use to which this information would be put: to induce users to join Grindr with the illusion of a "safe space." (Am. Compl. ¶¶ 41, 171, JA-62, 88.) *See LBBW Luxemburg*, 10 F.Supp.3d at 526 ("Strong allegations on the first and third factors [demonstrating negligent misrepresentation] can overcome weak pleading of the second, somewhat circular factor.")

In its effort to attract users, Grindr assuaged potential users' concerns about the misuse of accounts by repeatedly representing it had the power and tools to monitor accounts for unlawful or problematic behavior. (*See* Am. Compl. ¶¶ 206-16, JA-92-94.) Finally, the New York State Supreme Court ratified the special relationship between Mr. Herrick and Grindr with its January 27, 2017 TRO ordering Grindr to "immediately disable all impersonating profiles under Plaintiff's name or with identifying information related to Plaintiff, Plaintiff's photograph, address, phone number, email account or place of work, including but not limited to all impersonating accounts under the control [of Plaintiff's stalker]" (Am. Compl. ¶ 75, JA-71.)

In light of the representations made by Grindr, Mr. Herrick could not have known of the extraordinary dangers he could and did face due to Grindr's refusal to monitor its accounts. *See J & R Elecs. Inc. v. Bus. & Decision N. Am., Inc.,* 12 Civ. 7497 (PKC), 2013 WL 5203134, at *7 (S.D.N.Y. Sept. 16, 2013) ("Where a plaintiff has the capacity to conduct due diligence, the defendant is not imparting exclusive information, and plaintiff exhibits familiarity with the hazards inherent to the transaction, a relationship sufficiently special to justify reliance is unlikely to arise.") (citation omitted.)

The Amended Complaint adequately alleged that Grindr was on notice of the use to which the misleading information would be put. *See Kimmel*, 652 N.Y.S.2d at 719. Grindr made misleading representations about its commitment to users' safety and "Grindr's false and misleading statements [regarding its monitoring tools] were made with the goal of attracting more consumers to the product, to give those consumers a false sense of safety, and to induce users to rely on and trust Grindr into believing Grindr would intervene if the App was put to ill use." (Am. Compl. ¶¶ 40-41, 44, 81, 171, JA-62, 64, 72, 88.)

C. Under This Court's Standard, the Amended Complaint Sufficiently Pled Promissory Estoppel

The Amended Complaint sufficiently pled promissory estoppel. In New York, promissory estoppel has three elements: "'a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made;

and injury sustained by the party asserting the estoppel by reason of his reliance.'" *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.,* 804 F.2d 787, 793 (2d Cir. 1986) (quoting Restatement (Second) of Contracts § 90 (1981); *see also Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.*, 383 F. Supp. 2d 428, 448 (S.D.N.Y. 2003).

The Amended Complaint lays out the promises and representations made by Grindr in their promotional materials, ToS, and other publicly available documents. (Am. Compl. ¶¶ 156-160, JA-86.)

The District Court erred in dismissing the promissory estoppel claim and this Court should reverse.

D. The Amended Complaint Sufficiently Pled Deceptive Business Practices and False Advertising Claims

The Amended Complaint properly pled a deceptive business practices claim under New York General Business Law ("NY GBL") § 349 and False Advertising under NY GBL § 350 and § 350-a. "To successfully assert a claim under either section, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.'" *Orlander v. Staples, Inc.*, 802 F.3d 289, 300 (2d Cir. 2015) (quoting *Koch v. Acker, Merrall & Condit Co.,* 18 N.Y.3d 940, 944 (N.Y. 2012)).

Mr. Herrick alleges Grindr "conducted a business or furnished a service" in New York, which satisfies the first element of a claim under NY GBL § 349. (Am. Compl. ¶¶ 167-75, JA-87-88.) Mr. Herrick alleged a litany of deceptive practices and false advertisements by Grindr, including promotional statements made on its website and its ToS assuring potential users it would moderate abusive content and act to prevent harassment of its users. (Am. Compl. ¶¶ 167-187, 41, JA-87-90, 62.) This satisfies the second element of claims under NY GBL §§ 349 and 350. Plaintiff alleged concrete, cognizable injury from the above deceptive practices and false advertisements: specifically that these deceptive acts, including Grindr's failure to moderate and supervise its users to prevent harassment and abusive acts, caused Mr. Herrick to suffer repeated harassment, threats, and danger at home and at his workplace.

E. The Amended Complaint Sufficiently Pled Intentional Inflection of Emotional Distress

Grindr is liable for the extreme and outrageous harm they and their product caused Mr. Herrick. Mr. Herrick plausibly pled all elements. Grindr's persistent refusal to do anything about accounts they knew were being used to direct hundreds of men towards him was intolerable conduct. (Am. Comp. ¶¶ 188-94, JA-90-91.) He alleges this was intentional based on Grindr's repeated disregard of his requests for intervention. (Am. Compl. ¶ 190, JA-90.) Finally, Mr. Herrick

experienced emotional distress as a result of Grindr's actions. (Am. Compl. ¶ 191, JA-90.)

The Order cites *Turley v. ISG Lackawanna, Inc,* for the proposition that "ordinarily, the failure to respond appropriately to complaints of harassment, on its own, will not be sufficiently egregious – 'outrageous' – to amount to intentional infliction of emotional distress under New York law." *Turley v. ISG Lackawanna, Inc.,* 774 F.3d 140, 161 (2d Cir. 2014); *see* Order at p. 17, JA-207.) But, in *Turley*, as here, the repeated number of complaints, ongoing harassment, and the defendant's failure to act supported an IIED claim. 774 F.3d at 161. This Court went on to state that, "under New York law, an IIED claim does not turn on a distinction between action and omission... the ultimate question [regarding IIED liability] remains whether the conduct *proven at trial*, in light of all the circumstances, was 'utterly intolerable in a civilized community.'" *Id*. (emphasis added.)

It was outrageous and extreme for Grindr, the lone entity with control of its product, to do nothing in this situation. This is an issue of fact for a jury to decide.

F. The Amended Complaint Sufficiently Pled Negligence and Negligent Infliction of Emotional Distress

For the reasons above, Grindr is not immune from liability for its negligence or its negligent infliction of emotional distress ("NIED"), which entail neither

"information provided by another content provider" nor treatment of Grindr "as the publisher of that information."

The negligence claims relate to Grindr's role: in (1) "designing, manufacturing, researching, coding, development, promoting and distribution of its apps and other software into the stream of commerce, including a duty to assure the product would not cause users and the public to suffer unreasonable dangerous effect," (2) "fail[ing] to investigate and respond to Plaintiff's reports of abuse, impersonation and stalking," (3) "fail[ing] to comply with its own written policies to protect users and ban abusive accounts," (4) "fail[ing] to enact or enforce policies, procedures or systems for banning abusive or harassing users" (5) "fail[ing] to properly supervise its employees to ensure they acted upon and investigated reports of abuse," and (6) "fail[ing] to screen users to stop abusers from using the service to target and victimize others" (Am. Compl. ¶¶131-145, JA-82-83.)

The NIED claim in the Amended Complaint sufficiently establishes Grindr's breach of its duty of care and its causal role in Mr. Herrick's injury.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO AMEND

Under F.R.C.P. 15(a)(2), courts consistently "freely give leave to amend when justice so requires." F.R.C.P. 15(a)(2). To further that principle, district courts are entrusted with broad discretion in determining whether to grant leave to

amend a complaint. *See U.S. ex rel Ladas v. Exelis, Inc.,* 824 F.3rd 16, 28 (2d Cir. 2016). Courts apply this discretion in favor of the party seeking leave to amend. *Foman v. Davis*, which sets forth the seminal standard in this regard, holds that, "in absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility, etc. – the leave sought should, as the rules require, be 'freely given.'" 371 U.S. 178, 182 (1962).

The District Court found Mr. Herrick's request for leave to amend inadequate merely for failing to attach the proposed amended complaint to the request for leave. At worst, this minor omission would result in nominal delay, not substantive harm. "Mere delay… absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.,* 654 F.2d 843, 856 (2d Cir. 1981) (citation omitted)

The District Court's refusal to grant Mr. Herrick leave to amend is a significant departure from existing precedent. In the rare instances where leave to amend has been denied, the reasons for doing so are extreme.

Mr. Herrick properly requested leave to amend in his reply to the 12(b)(6) motion. Thus far, Mr. Herrick has only amended his complaint once and this was

with the consent of both parties. His amendments were substantive in basis. An amended complaint would not cause undue delay. The request was not made in bad faith or to delay. Denying leave to amend with prejudice is a severe and punitive outcome.

CONCLUSION

Grindr knowingly facilitated the criminal and tortious stalking of Matthew Herrick. Mr. Herrick asked Grindr for help dozens of times and Grindr ignored him. When all else failed, Mr. Herrick filed suit. Grindr invoked CDA § 230 to claim it was immune from any legal responsibility for its dangerous product. The expansive interpretation of CDA § 230 in the District Court's Order runs contrary to the text of the statute, congressional intent, and the relevant case law. This is a dangerous and flawed interpretation which absolves tech companies from their responsibility to the public.

The District Court dismissed Mr. Herrick's Amended Complaint and denied leave to amend, despite material disputes of fact and without converting the 12(b)(6) motion into one for summary judgment. This Court should reverse and remand the District Court's decision.

Dated: May 24, 2018

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CERTIFICATE OF COMPLIANCE

Counsel for Plaintiff-Appellant Matthew Herrick certifies under Federal Rules Of Appellate Procedure 32(a)(7)(C) that the above brief contains 11,432 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), 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 May 24, 2018, a copy of the attached Brief was filed with the Clerk through the Court's electronic filing system. In addition, I certify that copies of the above Brief and the Joint Appendix 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: May 24, 2018

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