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Filed	Document Description	Page	Docket Text
03/30/2023	Main Document	2	[10987786] Appellant/Petitioner's brief filed by Rosa Bilbrey, Gina Harris, Sammi Heckerman and Madison Roland in 22−1456. Served on 03/30/2023 by email, US mail. Oral argument requested? Yes. Word/page count: 8,255. This pleading complies with all required privacy and virus certifications: Yes. [22−1456, 23−1012, 23−1014] −−[Edited 03/30/2023 by SDS to replace pdf and modify text] NTM
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CASE NO. 22-1456

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MADISON ROLAND et al., Plaintiff(s) — Appellant(s), v. LETGO, INC. et al. Defendant(s) — Appellee(s).	Appeal Case No. 22-1456, 23-1012 & 23-1014 (D.C. Case No. 1:22-cv-00899-MEH) (D. Colo.)

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Michael E. Hegarty
D.C. No. 1:22-CV-00899-MEH

APPELLANT'S OPENING BRIEF

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Oral Argument Is Requested.

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PRIOR OR RELATED APPEALS

Defendant-Appellee Letgo, Inc. filed a Notice of Protective Cross Appeal on January 10, 2023, (23-1012). Defendant-Appellee OfferUp, Inc. filed a Notice of Protective Cross Appeal on January 11, 2023, (23-1014).

JURISDICTIONAL STATEMENT

The district court properly exercised federal diversity jurisdiction over this case pursuant to 28 U.S.C. §1332. The amount in controversy exceeds $75,000; and there is complete diversity between Madison Roland et al., all citizens of Colorado, and Letgo and OfferUp, both incorporated in Delaware. Letgo's principal place of business is New York, New York and OfferUp's principal place of business is Bellevue, Washington.

This appeal is timely pursuant to Rule4(a)(1) of the Federal Rules of Appellate Procedure. The Notice of Appeal was filed within 30 days of the district court's decision. *See* Notice of Appeal, Alt. App. at 167, attached hereto in Addendum A.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the December 5, 2022, decision is a final order or judgment that disposes of all parties' claims. *See* Order, Alt. App. at 151, attached hereto in Addendum B.

STATEMENT OF THE ISSUES

1. Whether the court erred in granting Defendants' motion to dismiss in its entirety after finding them to be "Information Content Providers" and not entitled to immunity under Section 230 of the Communications Decency Act.
2. Whether the court erred in granting Defendant's motion to dismiss without leave to amend the Amended Complaint as it is liberally granted.

[1] Pursuant to Local Rule 28.1, citations to the Appendix shall be Alt. App. at xx.

STATEMENT OF THE CASE

Plaintiffs commenced this action on April 14, 2022, against Letgo and OfferUp, by filing a complaint stating seven claims of relief: (1) negligence; (2) gross negligence; (3) fraud; (4) negligent misrepresentation; (5) deceptive and unfair trade practices violation of C.R.S. § 6-1-101 *et seq*. (6) loss of consortium; and (7) wrongful death. (Alt. App. at 17-25.) Letgo and Offerup moved to dismiss all seven claims on June 17, 2022. (Alt. App. at 5.) On October 31, 2022, the district court held oral arguments. (Alt. App. at 7.) On December 5, 2022, the district court granted Letgo and OfferUp's motion to dismiss, ruling that although Letgo and OfferUp are not entitled to immunity under the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230, that no reasonable jury could conclude Defendants were the predominant cause of the Roland's' deaths without leave to amend. (Alt App. at 163-166.) Plaintiffs timely appealed. (Alt. App. at 8.)

STATEMENT OF THE FACTS

A. History of Letgo and OfferUp

Letgo is a company that provides a website and mobile application that allows users to "buy from, sell to and chat with others locally." (Alt. App. at 12.) Letgo initially targeted the United States market and competed against online marketplace leaders such as eBay and Craigslist. (*Id*.) However, the way Letgo started to distinguish itself from its competitors was by advertising its "verified user" feature. (Alt. App. at 13.) The purpose of this feature is to reassure its consumers that the buyers and sellers with its "verified user" tag are reputable and to be trusted. (*Id*.) The Letgo website even explicitly states that it

works closely with local law enforcement to ensure the "trust and safety of the tens of millions of people who use Letgo." (*Id*.)

OfferUp is a mobile-drive "consumer to consumer" marketplace with an emphasis on in-person transactions. (*Id*.) OfferUp separates itself from its competitors, by its mobile-friendly apps and user profiles with ratings (*Id*.) On or about August 31, 2020 (near the time of the events at issue), OfferUp acquired Letgo. (*Id.)*

B. Letgo and OfferUp's Lack of Verification

However, all that is required to become "verified" is a functioning e-mail address and an unverified name—the same exact information required from its "unverified" competitors such as Craigslist. (*Id.*) Once a Letgo user account is created with this unverifiable information, a Letgo user's account profile is then viewable, accessible and most importantly, relied upon, by any other Letgo user. (*Id.*) Additionally, based on its own advertising and marketing, Letgo misrepresents to the public that the selling of stolen merchandise is allegedly prohibited with the help of its "anti-fraud technology" and that Letgo works in conjunction with law enforcement to remove these stolen items. (*Id.*)

C. Mr. and Mrs. Roland's Reliance upon Letgo's "Verified User" Feature

In August 2020, Joseph Roland ("Mr. Roland"), the decedent and father of five minor children, initiated the process of searching for a used vehicle for his eldest daughter, Madison Roland, to drive. (*Id*.) During his search, Mr. Roland utilized the Letgo app and its "verified" seller feature. (*Id*.) On or around August 14, 2020, Mr. Roland discovered the posting of a "2017 Toyota Rav 4 LE AWD" for $5,000.00 by "James Worthy"—one of Lego's "verified" sellers. (*Id*.) As law enforcement later discovered, "James Worthy"

was just a pseudonym for 18-year-old Kyree Brown with a criminal history ("Mr. Brown"). (*Id*.) Mr. Roland detrimentally relied upon Letgo's "verified seller" tag and representations that the vehicle was not stolen property before legitimately pursuing the sale of the now known to be stolen vehicle. (Alt. App. at 14, 16, 18.)

Again, Letgo's entire business model is based upon the "verified seller" feature to distinguish itself from its competition. (Alt. App. at 13.) As such, Mr. Roland justifiably relied upon Letgo's misrepresentations concerning the verification process and quality of goods before initiating contact with the actual seller, Mr. Brown. (Alt. App. at 14.)

D. The Murders of Mr. and Mrs. Roland

As recommended by Letgo, Mr. Roland and Mr. Brown only exchanged messages via the Letgo chat feature. (*Id*.) By trusting the verification process represented by Letgo, Mr. Roland ultimately decided to meet Mr. Brown on the evening of August 14, 2020, and complete the purchase. (*Id*.) Mr. Roland and Mr. Brown agreed to meet at a PETCO parking lot by the Southlands Mall, a public shopping area with good lighting in the District of Colorado. (*Id*.) That evening, at approximately 11 p.m., Mr. Roland and his wife Jossline Roland ("The Roland's") left their residence, for what would end up being the last time. (*Id*.) Mrs. Roland accompanied her husband so she could drive the 2017 Toyota Rav 4 back to their residence following the purchase. (*Id*.)

Upon arrival, Mr. Brown notified the Roland's that he "accidentally" brought the wrong vehicle title to the PETCO shopping center. (Alt. App. at 15.) To rectify the matter, Mr. Brown suggested to the Roland's to follow him back to his fictitious residence in the 11000 block of East Cornell Circle to obtain the correct title—also located in the District

of Colorado. (*Id*.) Unsuspecting of any danger since James Worthy was a Letgo "verified" seller and selling legitimate goods (according to Letgo's promises), the Roland's obliged and followed Mr. Brown back to his "residence." (Alt. App. at 14, 16, 18.) As both vehicles arrived at the fictitious residence, Mr. Brown stepped out of the Toyota Rav 4 he successfully advertised through Letgo. (Alt. App. at 15.) Mr. Brown then approached the Roland's vehicle with a 9mm handgun and killed both Mr. and Mrs. Roland inside their vehicle as he stole an envelope containing $3,000.00 in cash that the Roland's intended to use to complete the purchase of the vehicle. (*Id*.)

At approximately 11:30 p.m. on August 14, 2020, nearby residents heard between five or six gunshots and immediately called 911 to report the incident. (*Id*.) Upon arrival, law enforcement discovered the Roland's unresponsive inside their vehicle and immediately transported them to the nearest hospital, where they were both declared dead slightly after midnight on August 15, 2020—leaving behind five minor children. (*Id*.)

E. Letgo and OfferUp's Failure to Verify its Users and Goods Caused the Roland Murders

Upon arrival, the Aurora Police Department ("APD") secured the scene and quickly obtained surveillance footage from a nearby residence. (Alt. App. at 16.) The video showed Mr. Brown exiting the Letgo advertised 2017 Toyota Rav 4 and approaching the Roland's vehicle before he discharged his 9mm handgun five times (all five rounds were audible in the obtained surveillance footage). (*Id*.) Following the search of the crime scene, APD made contact with the Roland residence and legally obtained and gained access to Mr. Roland's iPhone to review the communications between Mr. Roland and Mr. Brown

exclusively via the Letgo app. (*Id*.) Upon review of Mr. Roland's iPhone, APD accessed the Letgo app and located the posting of a 2017 Toyota Rav 4 for sale by a "James Worthy" that Mr. Roland had recently viewed. (*Id*.) Although Mr. Roland's phone showed that the "James Worthy" account had been "verified" with Letgo's "VERIFIED WITH" tag, officers were unable to locate any actual information to trace the person behind the "James Worthy" account. (*Id*.) Despite law enforcement actively pursuing the double homicide, Letgo's actual lack of verification not only caused the deaths of the Roland's, but also caused further delay in the uncovering "James Worthy's" identity. (Alt. App. at 11, 16.)

Not only did this delay (directly caused by Letgo and its lack of verification) impact the investigation of the Roland murders, but it also provided Mr. Brown with enough time to tamper/destroy evidence (i.e., the vehicle). (Alt. App. at 16.) While APD was searching for "James Worthy's" identity, Mr. Brown had sufficient time to set the 2017 Toyota Rav 4 on fire, delete his fictitious "James Worthy" account, and create an entirely new fictitious account with the same 2017 Toyota Rav 4 that he had just destroyed. (*Id*.)

On August 19, 2020 (five days after the Roland's were murdered), Mr. Brown deleted his "James Worthy" account and immediately created another "verified" account under a new pseudonym, "Jessica Harlan." (*Id*.) This newly "verified," and fictitious "Jessica Harlan" account attempted to resell the same and now destroyed 2017 Toyota Rav 4 to other Letgo users while the investigation was still taking place! (*Id*.) Going against all its advertising and marketing, Letgo's failure to implement an actual verification process meant that Letgo could not assist in the murder investigation because Letgo had no real information to provide law enforcement. (Alt. App. at 16, 18.) Letgo feverishly advertises

its prohibition on the sale of stolen merchandise, yet Mr. Brown successfully advertised stolen property not once, but twice with the help of Letgo. (*Id*.)

On August 20, 2020, APD executed a search warrant for all Letgo account information regarding the "James Worthy" and "Jessica Harlan" accounts. (Alt. App. at 16.) This exercise proved to be futile. (*Id*.) The criminal affidavit from APD stated that the account holder for both accounts had no contact information other than an e-mail address. (*Id.*) In other words, a "verified" seller just needs a functioning e-mail address and a fictitious username—nothing else. (*Id*.) This is in complete contradiction of Letgo's entire business model—providing the illusion that these alleged "verified" accounts can and should be trusted above their online "marketplace" competition. (*Id.*)

Letgo's practices, or lack thereof, single-handedly delayed law enforcement and forced APD into filing an emergency order with Verizon Wireless just to obtain basic information on a criminal who just carried out a double homicide with the help of Letgo. (Alt. App. at 17, 18.) On August 27, 2020 (12 days after the Roland's murders), Verizon Wireless confirmed location data of the phone used at the Southlands Mall at the time of the murders and led to the successful arrest of Mr. Brown. (Alt. App. at 17.) Once law enforcement captured Mr. Brown on August 27, 2020, Mr. Brown quickly confessed to both Roland murders and was found in possession of the stolen $3,000. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court inappropriately granted Defendants' motion to dismiss for Plaintiffs' failure to state a claim. In its ruling, the court found Defendants Letgo/OfferUp ("Letgo") responsible for portions of the offending "verified" representations on its

platform and therefore not entitled to the protections of CDA immunity. Despite this ruling, the district court then inexplicably dismissed all seven of Plaintiffs' claims for failure to state a claim without leave to amend. (Alt. App. at 162-63, 166.)

STANDARD OF REVIEW

This case presents two separate issues. First, whether the district court erred in granting Defendants' motion to dismiss after finding them to be "Information Content Providers" and therefore not entitled to immunity under Section 230 of the Communications Decency Act. This Court reviews dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all well-pled factual allegations as true and construing them in the light most favorable to the plaintiff. *Porter v. Ford Motor Co.,* 917 F.3d 1246, 1248 (10th Cir. 2019). Second, whether the district court erred in declining to grant Plaintiffs leave to amend their Complaint as it is liberally granted. This Court reviews this decision for an abuse of discretion. *Warnick v. Cooley*, 895 F.3d 746, 754 (10th Cir. 2018).

ARGUMENT

I. The District Court Erred in Granting Defendants' Motion to Dismiss After Ruling them to be "Information Content Providers" and not Protected by Section 230 Immunity under the Communications Decency Act

A. The District Court Properly Ruled that Defendants are not Protected by Section 230 Immunity

In its decision, the district court ruled that Letgo—as contributors to the development of its "verification" representations on its app—is not entitled to the protections of Section 230 immunity. In other words, Letgo was responsible for its own conduct and speech.

Section 230 bars any cause of action that attempts to hold a provider of interactive computer services liable for any claim arising from the publication of content created by a third party. However, under Section 230(c), this grant of immunity only applies to "all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1105 (9th Cir. 2009). However, "information content providers," such as Letgo, are not protected for their active role in the development and creation of content and not for just being a third-party publisher or speaker. *F.T.C. v. Accusearch*, 570 F.3d 1187, 1197 (10th Cir. 2009).

a. Letgo and OfferUp are "Information Content Providers"

Section 230(f)(3) defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." "[Information content provider] is a broad definition, covering even those who are responsible for the development of content only 'in part.'" *Accusearch*, 570 F.3d at 1197 (citing *Uni. Comm. Systems, v. Lycos, Inc.,* 478 F.3d 413 (1st Cir. 2007). "An interactive computer service that is also an 'information content provider' of certain content is not immune from liability arising from publication of that content." *Id*. In contrast, a service provider is strictly a publisher when it only involves, "reviewing editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes,* 570 F.3d at 1102.

However, one is not mutually exclusive from the other. "A website operator can be both a [third-party publisher] and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that

content. But as to the content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider." *Fair Housing v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2009).

For example, in *Accusearch*, the Tenth Circuit denied Defendants Section 230 immunity. 570 F.3d 1187. In its ruling, the *Accusearch* court relied upon the reasoning from *Roommates.com* by stating that "a service provider is 'responsible' for the development of offensive content...if it in some way specifically encourages development of what is offensive about the content." *Id.* at 1199. In *Accusearch*, the court held that Abika.com played an active role in the selling of personal information (by advertising, delivering and processing payments) rather than acting as a passive intermediary, and therefore considered Akiba.com "responsible for the development of offensive content" even though the personal information came from third-party vendors. *Id.* Defendants in *Accusearch*, like Letgo, attempted to "portray itself as the provider of neutral tools, stressing that it merely provided 'a forum in which people advertise and request.'" *Id.* at 1201. Defendants even attempted to argue that a customer could know that a third-party researcher was involved in a transaction by reading boilerplate language contained on the website and in email correspondence. *Id.* at 1191. The court disagreed. The court held that Defendants' actions were "not 'neutral' with respect to generating offensive content; on the contrary, its actions were intended to generate such content." *Id.* at 1201. Therefore, Defendants were not entitled to immunity under the Section 230.

In its decision, the district court likened Letgo's active and direct involvement in the development of its verification representations to that of the defendants in *Accusearch*.

(Alt. App. at 162.) Like *Accusearch*, Letgo takes a very active and prominent role in the development of its content and the sale of stolen goods on its platform. (Alt. App. at 13.) Rather than acting as a passive intermediary, Letgo is responsible for the development and creation of their own content by profusely advertising its trusted verification process and adding unwarranted credibility to user accounts with the tag "VERIFIED WITH." (Alt. App. at 14.) Letgo creates these verification tags (i.e., content), not its third-party user. (*Id.*) Although this alone is sufficient to satisfy the *Accusearch* standard to become an "information content provider," Letgo goes even further and makes representations that the products posted for sale are not illegally obtained, stolen, or related to any crime and advertises its collaborative effort with law enforcement. (*Id*.) In reality, Letgo just responded to a search warrant after-the-fact. (*Id*.)

Unfortunately, this partnership-like approach by Letgo creates the illusion that these supposed "verified" accounts can and should be trusted above their online "marketplace" competition (when all that is required is a functioning e-mail address and username). (Alt. App. at 13, 17.) Letgo knowingly provides this illegitimate "seal of approval" with the intention of giving credibility to these vendors and dupe customers to enter into a transaction via the Letgo app with the intention of turning a profit. (Alt. App. at 22.) Despite this high level of involvement, Letgo attempts to downplay its actions as if they are not the same aggressive tactics that turned them into a billion-dollar enterprise. (Alt. App. at 43.) Sadly, these deceptive tactics continue to lure customers (like Mr. Roland) into a false sense of security and away from its competitors daily. (Alt. App. at 12, 14.)

Despite their direct involvement in the verification process, Letgo, like the Defendants in *Accusearch*, attempts to shield itself with Section 230 protections by portraying themselves as just another passive intermediary. (Alt. App. at 43.) The district court disagreed. (Alt. App. at 162-63.)

Letgo's actions are entirely different and far more involved than simply placing an icon next to a user's profile (as the Defendants tried to argue in their 12(b)(6) motion). (Alt. App. at 47.) Letgo then tried to argue that the users themselves create its own verification—both illogical and contradictory to their entire business model. (*Id*.) Furthermore, Mr. Brown did not transcribe "not stolen" in his posting or affirm the products legitimacy. (*Id.*) Letgo affirmed the products authenticity. (Alt. App. at 14.) Lastly, Defendants tried to argue that their convoluted and misleading verification system can all be decoded in its "articles" section hidden on its website. (Alt. App. at 47, 117-18.) However, these same arguments did not hold weight in *Accusearch* because of the Defendants' prominent role in the sale of the information.

Just like the Defendants in *Accusearch*, Letgo is an "information content provider" and should not be entitled to Section 230 immunity. Letgo's "VERIFIED WITH" tags and verification of goods are entirely independent from the information supplied by Mr. Brown.

B. Plaintiffs Sufficiently Plead Each Cause of Action

Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of* Denver, 567 F.3d 1169, 1178 (10th Cir. 2009). So, when considering whether a plaintiff's claim should be dismissed under Rule 12(b)(6),

the court must accept all well-pleaded factual allegations as true and view them in the light most favorable to the plaintiff as the nonmoving party. *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). All that is required is "a short and plaint statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P.8(a)(2). The complaint must, though, contain "enough facts to state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 555 (2007). In other words, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id*. at 556.

a. Negligence

According to Colorado law, the elements of a negligence claim are: (1) the defendant owed duty to the plaintiff; (2) the defendant breached that duty; and (3) the breach proximately caused the plaintiff's injury. *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo.1992). The threshold question in any negligence action is therefore "whether the defendant owed a legal duty to protect the plaintiff against injury." *Ayala v. U.S.* 49 F.3d 607, 611 (10th Cir. 1995). However, it must also be determined whether or not the duty is based upon nonfeasance or misfeasance. *Montoya v. Connolly's Towing, Inc.*, 216 P.3d 98, 105 (Colo.App.2008).

i. Misfeasance

Letgo created the circumstances that placed the Roland's at risk of harm by developing the offending "verified" representations, and therefore, Letgo owed the Roland's a duty of care based upon misfeasance.

In determining whether a defendant owes a specific duty to a particular plaintiff, "the law distinguishes between acting and failure to act, that is, misfeasance, which is active misconduct that injuries others, and nonfeasance, which is a failure to take positive steps to protect others from harm." *Smit v. Anderson*, 72 P.3d 369, 372 (Colo.App.2002). "The reason for this distinction is that a misfeasant creates a risk of harm; while the nonfeasant, although not creating a risk of harm, merely fails to benefit the injured party by interfering in his or her affairs." *Id*. Letgo is the former, a misfeasant, by creating the risk of harm for the Rolands through their endangering verification representations.

In *Montoya*, Connolly Towing permitted a Mustang that caused injury to the plaintiff to be stored on its lot and represented to the public that its customer safety rules applied to all vehicles stored therein. 216 P.3d 98, 105 (Colo.App.2008). Therefore, the court in *Montoya* concluded that Connolly created the circumstances that placed the plaintiff at risk of harm by not applying its safety rules to all its vehicles and by not disclosing to the plaintiff that is customer safety rules did not apply to the Mustang. *Id*. Accordingly, the court concluded that any duty of care imposed on Conolly is based on misfeasance, not nonfeasance. *Id*. Once a duty of care is based on misfeasance, the court need not consider whether a special relationship exited between the parties. *Id*.

Both the Defendants in their motion to dismiss and the district court in its order mischaracterize Letgo's failures as "nonfeasance" or failure to protect the Roland's from Brown's criminal acts. (Alt. App. at 50, 163.) Here, Letgo's relentless promotion and reassurances of its safety practices created the circumstances that exposed the Roland's to a high risk of danger and their ultimate deaths. (Alt. App. at 18.) Letgo represented to the

Roland's and the public in general that they work closely with law enforcement when they do not. (*Id.*) In fact, it is quite the opposite. (Alt. App. at 13.) Letgo, by their own admission, works closely with their buyers and sellers, like Mr. Brown, by giving them unwarranted credibility with verification tags (without any actual verification) to obtain consumer trust. (Alt. App. at 13, 18.) Again, the fact that district court found Letgo responsible for developing its "verification" representations makes their dismissal of all claims without leave to amend even more incompressible.

ii. Duty of Care

Once a determination is made between nonfeasance and misfeasance, the court must then decide whether the law imposes a duty on a defendant, relevant factors include: (1) the risk involved; (2) the foreseeability of harm to others and likelihood of injury as weighed against the social utility of the actor's conduct; (3) the magnitude of the burden of guarding against the injury of harm; and (4) the consequences of placing the burden on the actor. *Montoya*, 216 P.3d. at 104. A court may also consider any other relevant factors based on the competing individual and societal interests implicated by the facts of the case. *Id.* The question is "one of fairness under contemporary standards, that is, whether reasonable persons would recognize and agree that a duty of care exists." *Id*. at 104-105.

Here, under the first prong of the duty analysis, we consider the risk involved. Letgo did not actually verify its users or work closely with law enforcement—creating a risk that users such as the Roland's who relied upon these features and assurances could be injured or killed. In fact, Letgo could not even assist in the subsequent murder investigation, allowing 12 days to pass before Mr. Brown's apprehension. (Alt. App. at 17.)

Under the second prong of the duty analysis, the issue of foreseeability and social utility are considered. The purpose of the verification tags and promotion of law enforcement involvement existed to promote safety and confidence amongst its users and the likelihood of injury to users, such as the Roland's, who rely upon the safety features was foreseeable. (*Id.*) Letgo's failure to apply its safety features had little social utility other than to attract more consumers to buy and sell without taking any actual steps to prevent harm. Thus, the foreseeability of harm to others and likelihood of injury here outweighed the social utility of defendant's conduct.

Under the third prong, the magnitude of the burden of guarding against injury or harm is addressed. Letgo easily could have either: (1) implemented an actual verification process that required more than just an active e-mail address such as uploading a government issued identification card; or (2) just not claimed to have a verification process. Such action would have substantially reduced the risk of harm to the Roland's with little or no adverse impact on Letgo. Alternatively, if requiring identification is too great, Letgo could have simply just not advertised that it verifies its users or works closely with law enforcement. Under the fourth prong, it is not unreasonable to place this burden upon Letgo as they are the sole advertisers of their own verification process.

Based upon this four-prong test, Letgo placed the Roland's at risk for harm and therefore assumed a duty of care under the four-prong analysis.

iii. Breach of Duty

Although the question of whether a particular defendant owed a legal duty to a particular plaintiff is a question of law, "the question of whether the defendant breached

that duty by its actions or by its failure to act is a question of fact, and therefore a question to be decided by the jury." *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo.1981). Only when the evidence is so clear that reasonable minds could not differ as to whether the defendant failed to exercise reasonable care and thereby breached its duty to the plaintiff may the court take that question from the jury..." *Ferguson v. Gardner,* 191 Colo. 527, 530 (1976).

In *Taco Bell Inc*., the court held that it was proper to submit to the jury the issue of whether Taco Bell breached its duty of failing to provide armed security guards in a high-crime area because the record showed that reasonable persons could reach more than one conclusion with respect to whether Taco bell breached its duty by failing to provide one or more armed security guards. 744 P.2d 43, 51 (Colo. 1987).

Therefore, the issue of whether Letgo breached its duty to exercise reasonable care in the marketing, advertising, promoting, sale, and/or distribution of their app and without actually implementing a verification process (or working closely with law enforcement) is to be determined by a jury and not the court. Reasonable persons could reach more than one conclusion with respect to whether Letgo breached its duty.

iv. **Causation and Damages**

Just like breach of duty, as a general rule, the question of proximate cause in a negligence case is one of fact for the jury. *Bannister v. Town of Noble, Okl.* 812 F.2d 1265, 1267 (10th Cir. 1987). "The proximate cause of an injury is a question of fact and only becomes a question of law where the evidence together with all inferences which may be properly deduced therefrom is insufficient to show a causal connection between the alleged

wrong and the injury." *Gates v. United States,* 707 F.2d 1141, 1145 (10th Cir.1983) (quoting *Smith v. Davis,* 430 P.2d 799, 800 (Okla.1967)); *see also Sturdevant v. Kent,* 322 P.2d 408, 409–10 (Okla.1958) (if the facts regarding proximate cause are such that all reasonable men must draw the same conclusion, the question is one for the court).

Second, "[n]ot every intervening cause will insulate the original negligent actor from liability." *Thompson v. Pres. Hosp., Inc.,* 652 P.2d 260, 264 (Okla. 1982). When there is a question as to whether an intervening act is the proximate cause of an injury to the exclusion of a prior wrongful act alleged to have merely created a condition, the question is ordinarily one of fact for determination by a jury." Bannister, 812 F.2d at 1267.

Here, the district court made its own fact-finding determination and took the question of causation away from the jury. In its decision, the district court stated, "Plaintiffs' claims also fail at the causation element...I find that no reasonable jury could conclude Defendants were the "predominant cause" of the Roland's' deaths." The district court based its ruling on "the predominant and intervening cause was Brown's independent actions." (Alt. App. at 164.) However, this type of rationale is in complete contradiction to case law. Just because Mr. Brown's actions served as an intervening act does not immediately exclude the prior wrongful acts by Letgo that created the condition in which the Roland's were murdered.

Letgo has created a billion-dollar enterprise from their relentless promotion and reassurances of its safety practices to not just the Roland's, but the public in general. (Alt. App. at 12, 18.) Based upon these reassurances (i.e., verified sellers, working closely with law enforcement, etc.), Mr. Roland opted to use the Letgo app over their competitor

Craigslist. (Alt. App. at 18.) When law enforcement eventually unlocked Mr. Roland's phone during the murder investigation, it was revealed that Mr. Roland not only relied upon "James Worthy" having a "verified" account, but that Mr. Roland cautiously did not exchange his personal number with Mr. Brown (as encouraged by Letgo) and only communicated through the Letgo app to ensure his safety when he agreed to meet Mr. Brown in a public location. (Alt. App. at 16.) In other words, Letgo's safety reassurances created a condition in which Mr. Roland relied upon their promoted safety features before meeting Mr. Brown in person—making them both responsible parties. The jury, not the court, determines whether Mr. Brown's actions insulated the original negligent actor, Letgo, from liability.

b. Negligent Misrepresentation

A negligent misrepresentation claim "must focus on what [defendant] affirmatively represented, not what it failed to disclose." *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.,* 251 P.3d 9, 31 (Colo. App. 2010). To establish a claim of negligent misrepresentation, "the complaining party must demonstrate that the defendant supplied false information in a business transaction and failed to exercise reasonable care or competence in obtaining or communicating the information upon which other parties justifiably relied. The misrepresentation must be of a material part or present fact." *Zimmerman v. Dan Kamphusen Co.*, 971 P.2d 236, 240 (Colo. App. 1998) (citing *Mehaffy, Rider Windholz & Wilson v. Central Bank*, 892 P.2d 230 (Colo. 1995). Whether or not a party breached its duty of care in communicating information is precisely what the tort of negligent

misrepresentation seeks to address. *Level 3 Communications, LLC v. Liebert Corp.,* 535 F.3d 1146, 1163 (10th Cir. 2008).

Determining whether a misrepresentation is ambiguous is a question of law. *Id*. at 1155. However, it is not enough that the parties disagree about the meaning., but rather ambiguity only exists if it is "fairly susceptible" to more than one interpretation. *Id*. Extrinsic evidence may be conditionally admitted to determine if a term was ambiguous. *Id.* at 1155. However, once the determination is made that a term is considered ambiguous, the issue must then be decided by a jury, not a court. *Id*. at 1156.

In *Level 3*, both parties entered into an agreement where all products sold from Liebert Corp. to Level 3 Communications were to be new. *Id. at 1149.* However, during a power outage, the plaintiffs demanded Level 3 Communications supply them with an alternative solution. *Id.* In response, defendants located another set of batteries that happened to be two-years old (not new products) and sold them to plaintiffs. *Id.* The issue then became whether these alternative batteries should be considered "products" per the terms of the agreement. *Id.* The court held that the discussion regarding the batteries "illustrates, the issue is ambiguous and must be decided by the jury." *Id*.

The discussion regarding verification is no different. In its decision, the district court stated that it would be pure speculation as to what the term "verified" meant to the Roland's. (Alt. App. at 164.) The district court then attempts to limit the discussion to "verified with [phone number]." *Id.* However, "verification" is just one of the several ambiguous terms misrepresented by Letgo. Plaintiffs never limited their claims of negligent misrepresentation to only "verified with [phone number]."

Plaintiffs argue that Letgo purposely leaves their "verified" tags and their claims of working closely with local law enforcement to ensure the "trust and safety of the tens of millions of people who use Letgo" as extremely ambiguous in order to con consumers into trusting their platform. However, in accordance with case law, the exact meaning of these ambiguous terms should also be left to a jury and not a court. (Alt. App. at 154.) For example, a jury should determine if "working closely with law enforcement" means something more than just complying with a court order when forced. (Alt. App. at 17.)

c. Fraud

To establish a claim for fraudulent concealment or non-disclosure, the plaintiff must show that the defendant had a duty to disclose the information. *Bair v. Pub. Serv. Emp. Credit Union*, 709 P.2d 961, 962 (Colo.App.1985). The duty to disclose a particular fact is a question of law. *Van Winkle v. Trans. Title Ins. Co.,* 697 P.2d 784, 786 (Colo.App.1984).

First, Letgo's verification process (or lack thereof) is inarguably material information to its buyers and sellers as Letgo's entire brand is based upon the trust and safety of its "verification" process. (Alt. App. at 12-14.) Second, a duty to disclose these material facts exists when "in equity or good conscience [they] should be disclosed." *Poly Trucking, Inc. v. Concentra Health Servs., Inc.,* 93 P.3d 561, 564 (Colo. App. 2004) (citing *Mallon Oil,* 965 P.2d at 111). To make this determination, Colorado courts look to the Restatement for guidance. § 551(2)(b) of the Restatement states, "One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated[] matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being

misleading." As explained in the comments, a statement may be misleading when "made so ambiguously that it may have two interpretations, one of which is false." *Id.* cmt. g. "When such a statement has been made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient." *Id.*

Therefore, Letgo in good conscience had a duty to ensure its users were not being misled by the ambiguous meaning of "verified." The district court even implied that more than one meaning exists as it stated in its decision that it'd be mere speculation as to how Mr. Roland understood the meaning of "verified." (Alt. App. at 164.) A reasonable person, such as Mr. Roland, could have reasonably (and incorrectly) assumed that "verified" meant that Letgo actually vetted its users and legitimately attempted to verify their identities. In other words, consumers easily could have mistaken that only one-level of verification exists because nothing on Letgo's homepage indicates the existence of multiple tiers of verification or that verification is only synonymous with a functioning e-mail address and false username. (Alt. App. at 12, 21.) Letgo spends millions of dollars to advertise its trusted verification process to entice users to engage in regular business transactions and therefore had a duty to disclose their practically non-existent process or at least state that their process is no different than its direct competitor Craigslist. (Alt. App. at 12-13.)

Letgo also had a duty to inform its customers that working closely with law enforcement was highly exaggerated and nothing more than complying with court orders when forced. (Alt. App. at 16-17.) Therefore, in accordance with case law, Letgo in good conscience had a duty to disclose this material information.

i. Rule 9(b)

Claims of negligent misrepresentation and fraud must also satisfy the requirements of Federal Rule of Civil Procedure 9(b). However, in its decision, the district court held that the Amended Complaint did not satisfy the heightened pleading requirements of Rule 9(b) and denied Plaintiffs an opportunity to amend the Complaint and cure any defects.

The purpose of heightened pleadings under Rule 9(b) is to put [a defendant] on notice, so that it may prepare its case." *HealthOne of Denver, Inc., v. UnitedHealthGrp. Inc.,* 805 F.Supp.2d 1115, 1121 (D. Colo. 2011). Under Rule 9(b), all that is required in a complaint is to "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Koch v. Koch Industries, Inc.,* 203 F.3d 1202, 1236 (10th Cir. 2000). However, Rule 9(b) does not require the pleading to contain "detailed evidentiary matter, nor does it require any particularity in connection with an averment of intent, knowledge, or condition of mind. It only requires identification of the circumstances constituting fraud." *Trussell v. Underwriter, Ltd.*, 228 F.Supp. 757, 774-75 (D. Colo. 1964). In other words, Rule 9(b) is only intended to "afford the defendants a fair notice of the plaintiff's claims and factual ground upon which they are based." *S.E.C. v. Nacchio*, 438 F.Supp.2d 1266, 1277 (D. Colo. 2006). Moreover, a court must remember that Rule 9(b) is read in conjunction with the principles of Rule 8 "which calls for pleadings to be 'simple, concise, and direct...and to be construed as to do substantial justice.'" *Schwartz v. Celestial Seasonings, Inc.,* 124 F.3d 1246, 1252 (10th Cir. 1997) (quoting Fed.R.Civ.P. 8(e), (f)).

Here, Defendants have been provided with more than sufficient notice of the "time, place, contents of the false representation, the identity of the party making the false statements and consequences thereof." On August 14, 2020, in the District of Colorado, Mr. and Mrs. Roland detrimentally relied upon Letgo's fraudulent statements that Letgo works closely with law enforcement and that its users were verified. (Alt. App. at 17.) On August 14, 2020, Mr. Roland's opted to utilize the Letgo app over its competitors to communicate with another Letgo user ("James Worthy") who Letgo claimed to be verified (as displayed on Mr. Roland's phone). (Alt. App. at 12-17.) These statements of verification were statements only made by Letgo, not Mr. Brown. As a result of Letgo's fraudulent statements, Mr. Roland then coordinated with "James Worthy" through the Letgo app to meet in a public location where him and his wife were ultimately killed by Mr. Brown. (*Id.*)Even though Plaintiffs met the heightened Rule 9(b) standard, the district court incorrectly dismissed all claims without leave to amend. (Alt. App. at 166.)

d. Colorado Consumer Protection Act (CCPA)

Like the previously addressed claims, the district court incorrectly dismissed Plaintiff's CCPA claim for deceptive trade practices without leave to amend. (*Id.*)

However, the purpose of CCPA is to "regulate commercial activities and practices, which because of their nature, may prove injurious, offensive, or dangerous to the public." *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003). More specifically, the CCPA works to deter and punish businesses for consumer fraud. *Id*. The CCPA should also be liberally construed to serve its broad purpose and scope. *Hall v. Walter*, 969 Pd.2d 224, 230 (Colo.1998). Whether there is a duty to disclose

a fact under the CCPA is a matter of law. *Poly Trucking, Inc. v. Concentra Health Servs., Inc.,* 93 P.3d 561, 564 (Colo. App. 2004).

For a plaintiff to recover on a CCPA claim, the plaintiff must prove by a preponderance of the evidence: "(1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury." *Id.* at 235.

Regarding the first element, § 6-1-105(1)(e) of the CCPA provides a non-exhaustive list of deceptive trade practices that are actionable, including, "knowingly or recklessly mak[ing] a false representation as to the characteristics...[of] services." § 6-1-105(e). The Tenth Circuit held that "false representation" within the context of the CCPA must either "induce a party to act, refrain from acting, or have the capacity or tendency to attract customers." *Rhino Linings,* 62 P.3d at 147. Therefore, a plaintiff may satisfy the deceptive trade practices requirement of § 6-1-105(1)(e) by "either a misrepresentation or that the false representation had the capacity or tendency to deceive, even if it did not." *Id*. at 148.

In its decision, the district court states that there is "no factual basis for alleging that Letgo *knew* anything in the Brown ad was a lie." (Alt. App. at 167.) First, this was never alleged. Second, it is irrelevant to the entire analysis because Plaintiffs are not attempting to hold Defendants derivatively liable for any statements made or actions taken by Mr. Brown. Plaintiffs are arguing that Defendants should be held liable for their own conduct.

The facts alleged in the Amended Complaint more than prove that Letgo acted recklessly or willfully with the intention to induce the Roland's to transact with Mr. Brown. Alt. App. at 12-17.) Letgo conducted an intense and expensive marketing campaign to promote the use of the Letgo's marketplace application based entirely around its "verified seller" feature that separates them from their online "marketplace" competitors. (Alt. App. at 20.) Craigslist and eBay, Letgo's competitors, make no such promises. (Alt. App. at 13.) However, just like its competitors, all Letgo requires for a new account is an unverified name and an active email address—nothing else. (*Id.*) This lack of verification proves that Defendants had both constructive and actual knowledge that their application had no meaningful security measures or policies in place to effectively safeguard Letgo buyers from criminal activity. (*Id.*)

A reasonable jury could determine that that these false representations had the tendency (all that is required under CCPA) to lead Mr. Roland into believing he was communicating with an actual "verified" seller and that the vehicle he wanted to purchase was not reported as stolen property. These are not unreasonable assumptions from Mr. Roland. Furthermore, the district court agreed that these representations of verification by Letgo were entirely independent from any of the statements made by Mr. Brown and therefore not protected by Section 230 immunity. (Alt. App. at 166.)

The second element is satisfied as the Roland's utilized the Letgo app for its intended purpose of trying to purchase a listed vehicle from a "verified seller." (Alt. App. at 14.) "In order for a plaintiff to prove [the third element] that a challenged trade practice has a significant impact on the public as actual or potential consumers of the defendant's

goods, services, or property, the plaintiff must establish that the wrong is not private in nature." *Peterson v. USAA Life Ins. Co.*, 353 F.Supp.3d 1099, 1113 (D. Colo. 2018). Courts have held that statements or claims on a defendant's website were sufficient to have a significant impact on the public at-large. *Matthys v. Narconon Fresh Start*, 104 F.Supp.3d 1191, 1207 (D. Colo. 2015). In *Matthys,* the defendants stated on their website that their treatment facility had "a 76% success rate" and that "[Plaintiff] would receive counseling related to substance abuse at [the facility]" were sufficient to demonstrate a significant public impact under the CCPA. *Id.*

On its website, Defendants knowingly made false representations as to the safety and security of the Letgo app and its alleged "verified sellers" to gain more credibility than their online competitors (Alt. App. at 22.) In addition to the "verification tag," Letgo explains that it continues to work closely with local law enforcement to ensure the "trust and safety of the tens of millions of people who use Letgo" even though this means nothing more than complying with an issued court order. (Alt. App. at 16-17.)

Elements four and five are satisfied as the Roland's were brutally murdered as a result of Mr. Roland reliance upon Letgo's false "verified" seller features as evidenced by Mr. Roland's iPhone in a subsequent criminal investigation. (Alt. App. at 13, 16.) The investigation showed that Mr. Roland not only relied upon "James Worthy" having a "verified" account, but that Mr. Roland cautiously did not exchange his personal number with Mr. Brown and only communicated through the Letgo app to ensure his safety when he agreed to meet in a public location. (Alt. App. at 16.) Even if the district court did not

err in dismissing Plaintiffs' CCPA claim, the district court erred in denying Plaintiffs leave to amend to cure any deficiencies.

e. Wrongful Death

In Colorado, a wrongful death action is "derivative and allows recovery of only the monetary losses sustained by certain relatives of decedent." *DeCicco v. Trinidad Area Health Ass'n*, 573 P.2d 559, 562 (Colo. App. 1997). The Roland's died on August 15, 2020, and orphaned five minor children as a direct and proximate result of Defendants' "offending 'verification' representations." (Alt. App. at 11, 24, 162-63.) As a result of Defendants' tortious conduct, Defendants are liable for Plaintiffs' injuries under the Colorado Wrongful Death Act as integral participants in the wrongful conduct.

II. The District Court Erred in Granting Defendants' Motion to Dismiss without Leave to Amend the Complaint as it is Liberally Granted.

Even if the district court did not err in granting Defendants' motion to dismiss, the district court erred in denying Plaintiffs leave to amend. In its decision, the district court found Letgo responsible for portions of the offending "verified" representations on its platform and therefore found the Defendants not entitled to the protections of Section 230 immunity. (Alt. App. at 162-63.) Despite these rulings, the district court inexplicably denied Plaintiffs leave to amend to cure any deficiencies. (Alt. App. at 166.)

Although leave to amend is within the discretion of the district court and reviewed for abuse of discretion, courts are supposed to grant "freely...when justice so requires." Fed. R. Civ. P. 15(a)(2). The purpose of Rule 15(a) is "to provide litigants 'the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.'"

Minter v. Prime Equip. Co., 451 F.3d 1196, 1204 (10th Cir. 2006). Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, none are present. There was never a showing of any undue delay, undue prejudice to the opposing party, bad faith or dilatory motive or even a prior opportunity to cure any deficiencies by amendments previously allowed. (Alt. App. at 166.) Yet, the district court still refused leave to amend because "it would be futile" and provide no other reason. (*Id.*) Therefore, the district court abused its discretion in denying Plaintiffs leave to amend the complaint and cure any deficiencies after a finding of responsibility by the Defendants for the offending content.

CONCLUSION

The district court erred in dismissing all of Plaintiffs' claims without leave to amend. For the foregoing reasons, this Court should reverse the district court's decision and remand this matter with the instructions on foreseeability being sufficiently pled in the Amended Complaint. To the extent this Court does not provide such instructions, to order the district court to grant Plaintiffs leave to amend as it is liberally granted.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Plaintiffs-Appellants request oral argument in this case based on the national importance of the issues involved and the need for consistent decisions among the districts in this Circuit regarding Section 230.

Respectfully submitted this 30th day of March 2023

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CERTIFICATE OF COMPLIANCE
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) because this brief contains 8,255 words and is 30 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 using Microsoft Word 2023 in 13-point Times New Roman.

Submitted this 30th day of March 2023,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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I hereby certify that:

X All other parties to this litigation are either: (1) represented by attorneys; or (2) have consented to electronic service in this case; or

x On March 30, 2023, I sent a copy of this Motion for Extension of Time In Which to File Appellant's Opening Brief
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