ORAL ARGUMENT REQUESTED
Nos. 22-1456, 23-1012, 23-1014

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MADISON ROLAND, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

LETGO, INC., *et al.*,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court
for the District of Colorado, No. 1:22-cv-899
Before the Honorable Magistrate Judge Michael E. Hegarty

BRIEF FOR DEFENDANTS-APPELLEES-CROSS-APPELLANTS LETGO, INC. AND OFFERUP INC.

MOHAMED M. AWAN
MONTY COOPER
NEDA SHAHEEN
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Telephone: (202) 624-2500

STEVEN M. HAMILTON
HALL & EVANS, LLC
1001 17th Street, Suite 300
Denver, CO 80202
Telephone: (303) 628-3300

Attorneys for OfferUp Inc.

ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
Telephone: (202) 663-6000

EMILY BARNET
NICHOLAS WERLE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Telephone: (212) 232-8800

Attorneys for Letgo, Inc.

June 30, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 Appellees certify that Letgo, Inc.'s direct parent is OLX B.V. (the Netherlands) and its indirect parents are, in turn, OLX Global B.V. (the Netherlands), MIH e-commerce Holdings B.V. (the Netherlands), and MIH Internet Holdings B.V. (the Netherlands). Prosus N.V. (the Netherlands) and Naspers Ltd. (South Africa) are publicly traded entities that each indirectly owns more than 10% of Letgo, Inc. stock.

Appellees further certify that Prosus N.V. owns 40% of OfferUp Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

There are no prior or related appeals.

INTRODUCTION

This case arises out of tragic events. Kyree Brown lured Joseph and Jossline Roland into a premeditated armed robbery and fatally shot them. Brown was responsible for this heinous act, and he was charged, convicted, and sentenced to two consecutive sentences of life without parole.

Defendants Letgo, Inc. and OfferUp Inc.—past and current owners of an online classified ads platform called Letgo—are not liable for Brown's horrific crime. Defendants' sole connection to these murders is that Brown exploited Letgo's generally available platform to post a deceptive advertisement, purporting to offer a used car, that enticed the Rolands into meeting him. Plaintiffs do not allege that Letgo had anything other than an arms-length relationship with Brown, who was one of tens of millions of users. Yet Plaintiffs argue that Defendants should be held liable for Brown's conduct because Letgo provided all users with features intended to make buying and selling goods safer but allegedly did not do enough to remove wrongdoers from the platform.

Plaintiffs' loss is immense but as the district court correctly held, fundamental legal defects required dismissal of their claims.

First, the district court correctly held that Plaintiffs cannot state any negligence claim because they seek to hold Letgo liable for failing to act, but Letgo had no duty to affirmatively protect the Rolands from Brown's criminal acts. And

duty aside, Brown's premeditated crime—not Letgo's alleged inaction—was the legal and factual cause of the Rolands' murders.

Second, the district court correctly held that Plaintiffs failed to state any claim for fraud, negligent misrepresentation, or violation of the Colorado Consumer Protection Act ("CCPA") because the amended complaint does not plausibly allege any false or misleading statement made by Letgo, let alone with particularity. The district court also correctly dismissed the fraud and negligent misrepresentation claims for failure to plausibly allege reliance and the CCPA claim for failure to plausibly allege that Letgo made any purported misrepresentation knowingly or recklessly and with an intent to mislead the Rolands.

Third, the Court can affirm on the alternative ground that Defendants are immune from suit under Section 230 of the Communications Decency Act. Plaintiffs' claims seek to impose liability on Defendants for content that Brown, not Letgo, created and posted to the platform. Indeed, although Plaintiffs have attempted to frame their claims as turning on Letgo's statements, they admitted below that they would not have a case if Brown had provided only real information. And Plaintiffs have never alleged that Letgo was responsible for developing any of Brown's false or luring content. Section 230 therefore bars their claims.

Brown, not Defendants, is responsible for the Rolands' murder. As the district court rightly concluded, granting leave to amend would not alter the fundamental legal defects in their claims. The district court's dismissal of the amended complaint with prejudice should be affirmed.

JURISDICTIONAL STATEMENT

Appellees agree that this Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. Defendants also filed protective cross-appeals to ensure appellate jurisdiction over the district court's decision denying Defendants immunity under 47 U.S.C. §230.

COUNTERSTATEMENT OF ISSUES

1. Whether the district court correctly dismissed the amended complaint because it fails to adequately plead multiple elements of each state law claim.

2. Whether the district court correctly denied leave to amend because amendment would be futile.

3. Whether dismissal should be affirmed on the alternative ground that Plaintiffs' claims are barred by Section 230 of the Communications Decency Act because they seek to hold Defendants liable for harms arising from content that a third party posted to their platform.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of the amended complaint under Fed. R. Civ. P. 12(b)(6), the district court's ruling that Plaintiff's fraud and negligent misrepresentation claims do not satisfy the heighted pleading standard of Fed. R. Civ. P. 9(b), and the scope of Section 230 immunity. *See United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730, 740 (10th Cir. 2018); *Koch v. Koch Indus., Inc*., 203 F.3d 1202, 1236 (10th Cir. 2000); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 984 (10th Cir. 2000).[1] "[A] district court's denial of leave to amend a complaint," is "generally review[ed] for abuse of discretion" which "includes de novo review of the legal basis for the finding of futility." *St. Mark's Hosp.*, 895 F.3d at 740.

COUNTERSTATEMENT OF THE CASE

A. The Letgo Platform

At the time of the events at issue, Letgo was an online marketplace that allowed users to "buy from, sell to and chat with others locally." Alt.App.12 (¶21). According to the amended complaint, shortly before the events, Defendant Letgo sold the U.S.-facing Letgo business to Defendant OfferUp, which merged it into OfferUp's online marketplace. Alt.App.13 (¶¶24, 26). The amended complaint

[1] Unless otherwise specified, all internal citations, quotation marks, and alterations are omitted, and all emphasis has been added, to all citations.

uses "Letgo" to refer interchangeably to both Defendants and to the platform; this brief does the same.[2]

B. Letgo's Safety Measures

The Letgo platform had certain safety measures. Most relevant here, Letgo provided users with an opportunity to become a "Verified User" with a "Verified User" badge by submitting certain information. Alt.App.13 (¶28). The Letgo website explained that users could earn the 50 points needed to become a Verified User by submitting information such as a profile photo (10 points), a "[v]erified" phone number (15 points), or a "[v]erified" photo identification (40 points). Alt.App.117; *see also* Alt.App.27 (¶27). Users would obtain a "Verified User badge" only if they accumulated 50 or more points. Alt.App.117.[3] Defendants

[2] Nothing regarding the Letgo-OfferUp transaction bears on this appeal, but the amended complaint's description of the transaction is incorrect.

[3] With their motion to dismiss, Defendants filed relevant portions of the Letgo website as it appeared at the time of the alleged events and other documents on which the amended complaint relies. This Court's precedent permitted consideration of the authenticated contents of Letgo's website in adjudicating the motion to dismiss because the amended complaint repeatedly refers to the website, *see, e.g.*, Alt.App.14, 18, 21-22 (¶¶32, 37, 70-71, 73, 91-94, 109), and makes statements on the website central to its claims. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (otherwise "a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied"). Plaintiffs never disputed the authenticity of these documents below. *See generally* Supp.App.6-35, 97; Br.2-8. The district court relied on these materials. *See* Alt.App.153, n.1. And on appeal, Plaintiffs included these documents in their Appendix, *see* Alt.App.65-150, and rely on them in their opening brief, *see, e.g.*, Br.12.

allegedly "encourage[d] users of Letgo to look for 'verification badges' on user profiles." Alt.App.18 (¶¶70-71). If a user submitted some information but not enough to earn a badge (e.g., a "functioning email address"), the user's profile would reflect only that the user had "verified with" that particular category of information (i.e., email). *See* Alt.App.13, 21 (¶¶ 29, 91); Alt.App.79. Letgo also allowed users to leave each other ratings and reviews. *See* Alt.App.114; Alt.App.12-13 (¶23).

Letgo also published Community Guidelines on its website. These Guidelines directed users to "[a]ccurately and fairly represent [themselves] and the items [they]'re buying or selling on letgo," and stated that "[a]ttempts to deceive or defraud users are not tolerated." Alt.App.121; *see also* Alt.App.126-128, 131, 139. They also prohibited selling stolen goods, including "[v]ehicles where you are not the titleholder." Alt.App.121; *see also* Alt.App.127; Alt.App.14 (¶32). And they invited users to "report" "anyone violating these guidelines" to Letgo "using the Report a User or Report a Product feature." Alt.App.120; *see also* Alt.App.127. The website also stated that it used "'machine learning' to identify and block inappropriate content." Alt.App.12-13 (¶23); *see also* Alt.App.109.

The amended complaint alleges in general terms that Defendants "publicly tout[ed] the effectiveness of their security measures and policies of their verification process." Alt.App.18 (¶73). In particular, it alleges—without quoting

any statement made by Letgo—that Letgo "falsely advertise[d] itself as a safe online marketplace for verified sellers," and that these advertisements "induced Letgo users to believe a verification process is undertaken." Alt.App.17 (¶59), 21 (¶91); *see also* Alt.App.18 (¶70) (alleging Defendants indicat[ed]" that users with "'verification badges'" "can be trusted"); Alt.App.18 (¶71) ("Defendants expressly and implicitly represented that their application was safe, especially when dealing with 'verified sellers[.]'"). It also alleges, again without identifying any particular statement, that "Letgo… use[d] the 'verified seller' feature to distinguish itself from its direct competitors such as [c]raiglist." Alt.App.14 (¶37).

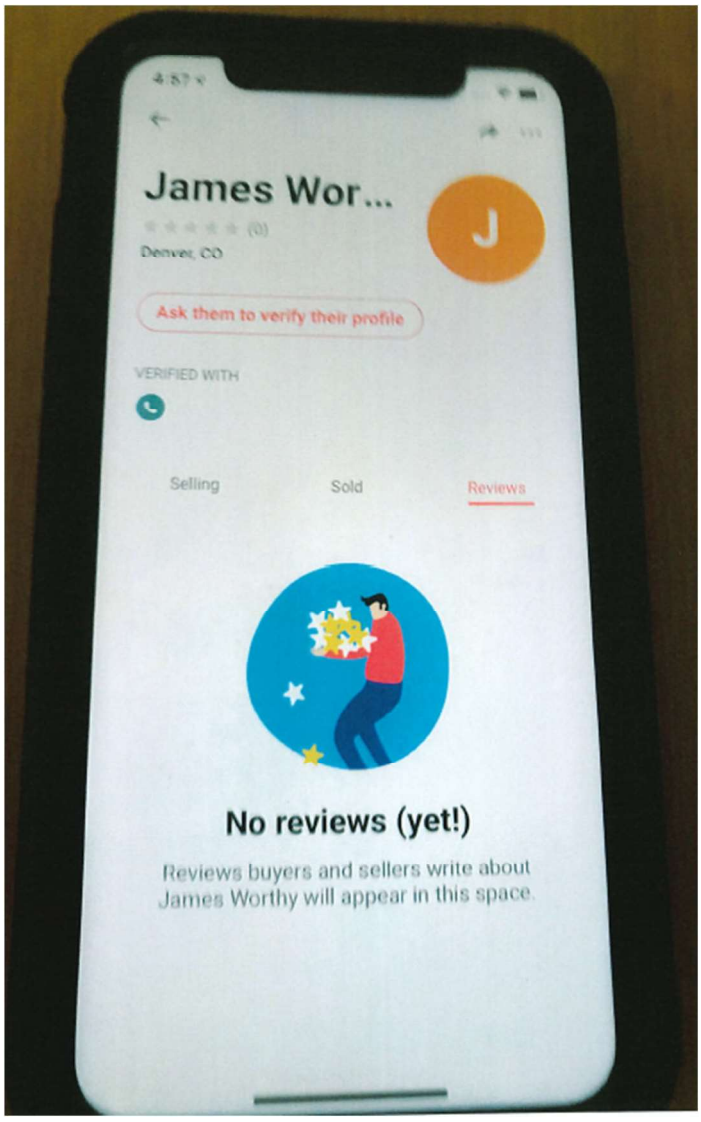
But Letgo did not, and could not, guarantee that engaging in real-world transactions with someone contacted online would be risk-free. Nor did Letgo guarantee that stolen merchandise would never be offered for sale, in violation of its Guidelines. Alt.App.14 (¶32). To the contrary, the site's Terms made clear that Letgo assumed "no obligation to[] monitor (either directly or using software), evaluate, alter or remove Submissions before or after they appear on the Service." Alt.App.132, 140. The site also provided recommendations for how to buy and sell safely. It advised all users that while "[t]he vast majority of letgo's users are trustworthy and online classifieds have been used securely in the U.S. and around the globe for decades," users should "always take the proper precautions, as [they]

should anytime [they] buy or sell online." Alt.App.146. The website thus advised users "[f]or safety," to "meet[] in a public place during the day." Alt.App.145.

C. Brown's Letgo Account And Advertisement

Kyree Brown allegedly created a Letgo account using the pseudonym "James Worthy" and listed a (stolen) 2017 Toyota Rav 4 for sale for $5,000. Alt.App.14 (¶36), 16 (¶56).

The Letgo profile that Brown created appeared as follows:



Alt.App.79.[4] The profile indicated that "James Worthy" is not a Verified User: It displayed no "Verified User" badge, *see* Alt.App.18 (¶70), Alt.App.117, and it advised in red at the top that users considering an interaction with "James Worthy" should "Ask them to verify their profile," Alt.App.79. The profile reflected only information that Brown uploaded to Letgo, including the (false) name, "James Worthy;" a location, "Denver, CO"; and that Brown provided a single item of verified information, a working phone number, as indicated by "verified with ." *Id.* The profile also reflected that "James Worthy" had not uploaded a profile picture, and that the user had received no ratings or reviews. *Id.*

Brown uploaded several images to the ad. Among the images was a screenshot of a third-party website "VINCheck.info." *See* Alt.App.88; *see also* Alt.App.84. This screenshot included the statement "Theft Records Found: None." Alt.App.88. Plaintiffs' counsel conceded below that this statement came from an "image[] that [Brown] uploaded" to the platform, not from Letgo. Supp.App.91:11-92:2.

[4] The district court relied on this screenshot of the "Worthy" profile, *see* Alt.App.153 & n.1, which the amended complaint makes central to its claims, *see, e.g.*, Alt.App. 14-16 (¶¶36, 40, 53-54, 57-58), 19 (¶75).

D. The Tragic Murders Of Joseph And Jossline Roland

Mr. Roland allegedly used Letgo to search for a used vehicle and exchanged messages with "James Worthy" about a car "Worthy" had listed for sale. Alt.App.14 (¶¶35, 38). The Rolands met Brown in the parking lot of a shopping mall after 11 p.m. to purchase the car. Alt.App.14-15 (¶¶36, 39, 40). Brown persuaded the Rolands to follow him to an apartment complex by claiming he had brought the wrong vehicle title. Alt.App.15 (¶40). Once there, Brown approached the Rolands' car with a handgun and demanded they turn over their money. *Id.* (¶41). When Mr. Roland attempted to grab the gun, Brown shot Mrs. Roland and then Mr. Roland, killing them both. *Id.* (¶42). Brown grabbed an envelope containing $3,000 in cash and "fle[d] the scene—leaving the Roland[s] for dead." *Id.* (¶43). After receiving a request for production of records from the Aurora Police Department, Letgo's law enforcement assistance team provided the account's listed contact information, including an email address. Alt.App.72-106. Law enforcement later arrested Brown, and he confessed to murdering the Rolands. Alt.App.17 (¶64). Brown was ultimately convicted of numerous offenses, including two counts of first-degree murder, and sentenced to two consecutive terms of life imprisonment.[5]

[5] *See* Colorado Dist. Att'y Off. 18th Jud. Dist., *Man sentenced to two consecutive life sentences for murdering couple who responded to advertisement for used car*, (Jan. 4, 2023), https://tinyurl.com/bdh2kwdy.

E. Procedural Background

Plaintiffs filed this lawsuit seeking to hold Letgo liable for the Rolands' deaths. Alt.App.4. They asserted claims for negligence, gross negligence, fraud, negligent misrepresentation, violation of the CCPA, wrongful death, and loss of consortium. After Plaintiffs amended their complaint, Defendants moved to dismiss. Alt.App.5-7. Following oral argument, the district court granted Defendants' motion to dismiss and denied Plaintiffs leave to amend. *See* Alt.App.151-166.

At the outset, the court noted "Plaintiffs have not cited a single case" holding "an internet platform potentially liable for violent criminal acts perpetrated by a platform user who lured an innocent consumer into a scheme through means of misrepresentations made by the criminal." Alt.App.163. It concluded it would be "too much of a stretch" "to do so here." *Id.*

The district court held that Plaintiffs "cannot assert" any negligence claim because they do not plausibly allege a duty of care. It explained "this is a case of an alleged failure to act, or 'nonfeasance'" because the "claims involve Defendants' failure to protect the Rolands from Brown's criminal acts." Alt.App.163. Only six special relationships can give rise to a duty in a nonfeasance case and "use of an online platform" is not one of them. Alt.App.164. The district court held that the negligence claims also failed because "[u]nder any

analysis, the predominant and intervening cause was Brown's independent actions," such that "no reasonable jury could conclude Defendants were the 'predominant cause' of the Rolands' deaths." *Id.*

The district court dismissed Plaintiffs' fraud and negligent misrepresentation claims for three reasons. First, "[t]he only possible representation made by Defendants… is that Brown verified his account with an actual phone number," and "[t]hat is true." Alt.App.164. Second, "it would be pure speculation as to what the term 'Verified with [phone number]' meant to the Rolands," such that justifiable reliance was inadequately pled. *Id.* Third, Plaintiffs do not plead the allegedly misleading statements with particularity as Rule 9(b) requires. *Id.*

As to the CCPA claim, the court concluded the amended complaint does "not sufficiently allege that Defendants misrepresented what their verification process entailed," even without applying Rule 9(b). Alt.App.165. And the court held "there is no factual basis for alleging that Letgo *knew* anything in the Brown ad was a lie," or that Letgo "acted recklessly or willfully, intending to induce the Rolands to transact with Brown." *Id.*

The district court dismissed the wrongful death and loss of consortium claims as "derivative," because the amended complaint "alleges no tortious acts for which [Plaintiffs] can recover damages." Alt.App.165.

The district court also considered whether Section 230 bars Plaintiffs' claims. *See* Alt.App.157-163. It explained that Letgo would be immune under Section 230 "if (1) it is a provider of an interactive computer service, (2) alleged liability is based on the defendant having acted as a 'publisher or speaker,' and (3) information is provided by another 'information content provider.'" Alt.App.157 (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009)).

The court found the first two elements satisfied. First, Letgo, as Plaintiffs conceded, is "undoubtedly an interactive computer service." Alt.App.157. Second, the amended complaint seeks to hold Defendants liable as publishers because it is "clear" that "Plaintiffs' claims arise from content Brown provided, including his false name, the working telephone number, and his purported desire to sell a car." Alt.App.158. The court further explained that Plaintiffs' claims "seeking to hold Letgo responsible for failing to adequately verify the content that was in Brown's advertisement" "are expressly precluded" under *Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008), which has "materially" similar facts. Alt.App.157, 158.

Nevertheless, the district court held that Section 230 did not bar Plaintiffs' claims because the 'verified designation,'" which it deemed "the singular item of information relevant here," "factually… appears to be a product of input from both Letgo and its users." Alt.App.160. In concluding that Letgo's "input" rendered it

an information content provider, the district court departed from several cases finding platforms immune in analogous circumstances because the platforms' input was the product of "'neutral tool[s]'" "functioning through voluntary inputs by a user" that did not "'materially contribute to the content's illegality.'" Alt.App.162. The district court concluded that those cases' reliance on "materiality" and "neutral tool" requirements "appear[ed] to be at odds" with *Accusearch*. *Id*.

Finally, the district court denied leave to amend, concluding it saw "no plausible claim even after taking an expansive view of the pleadings," such that "it would be futile to grant Plaintiffs leave to amend." Alt.App.166.

SUMMARY OF ARGUMENT

The district court correctly held that Plaintiffs do not adequately plead any of their state law claims. *First*, Plaintiffs' negligence claims fail for three reasons: (1) because Plaintiffs allege a nonfeasance claim but no special relationship, they do not plausibly allege a duty of care; (2) even if Letgo were allegedly a misfeasant, there still would be no basis to impose a duty of care; and (3) Brown's premeditated armed robbery, not Letgo's alleged inaction, was the factual and legal cause of Plaintiffs' injuries. Dismissal of Plaintiffs' gross negligence claim should also be affirmed because Plaintiffs abandon it on appeal.

Second, the district court correctly dismissed the fraud, negligent misrepresentation, and CCPA claims. Plaintiffs fail to plausibly allege an essential

element of each claim: a false or misleading statement. The statements they allege are not plausibly false or misleading, not pled with sufficient particularity to satisfy Rule 9(b), or both. The fraud and negligence claims also fail because Plaintiffs do not plausibly allege reliance. And the CCPA claim fails for the additional reason that Plaintiffs do not adequately plead that Defendants knowingly or recklessly made any allegedly misleading statement, with an intent to induce the Rolands to transact with Brown.

Third, the district court correctly dismissed Plaintiffs' wrongful death claim because, as Plaintiffs concede, it is derivative of their defective claims. And Plaintiffs abandon their other derivative claim—loss of consortium—by failing to address it in their opening brief.

The district court's denial of leave to amend should also be affirmed. The district court offered Plaintiffs' counsel multiple opportunities to identify additional allegations and Plaintiffs' counsel identified none that could be alleged in good faith.

Finally, the district court's order can also be affirmed on the alternative ground that Section 230 bars all of Plaintiffs' claims. The harmful content in this case is Brown's deceptive profile and advertisement. Letgo's provision of neutral tools—a platform for buying and selling goods and a way for users to verify their profiles—does not make Letgo responsible for what makes that content offensive.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' NEGLIGENCE CLAIMS FOR FAILURE TO ALLEGE ANY DUTY OF CARE OR CAUSATION

The district court correctly dismissed Plaintiffs' negligence claim, which required Plaintiffs to plausibly allege that (1) Letgo owed the Rolands a duty of care, (2) Letgo breached that duty, and (3) the breach caused Plaintiffs' injury. *See Ayala v. United States*, 49 F.3d 607, 611 (10th Cir. 1995) (citing *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992)). *First*, as the district court correctly held, Plaintiffs attempt to hold Letgo liable for allegedly failing to act (i.e., nonfeasance), but, as Plaintiffs concede, they allege no special relationship between Letgo and the Rolands that could create an affirmative duty to act. *Second*, Plaintiffs do not plausibly allege a duty even if Letgo were deemed a misfeasant. *Third*, as the district court held, Plaintiffs fail to plausibly allege causation because Brown's premeditated armed robbery was an intervening cause of Plaintiffs' injuries for which Defendants are not responsible as a matter of law. And because the same elements (and others) are required to state a claim for gross negligence, the district court also correctly dismissed that claim, which, in any event, Plaintiffs have abandoned on appeal.

A. The District Court Correctly Held Plaintiffs Fail To Allege A Duty Of Care Because They Allege Nonfeasance But No Special Relationship

1. Plaintiffs allege Letgo failed to act

The existence and scope of any duty is "a question of law to be determined by the court." *Vigil v. Franklin*, 103 P.3d 322, 325, 328 (Colo. 2004). In determining whether a duty of care exists, Colorado "law distinguishes between acting and failure to act, that is, misfeasance, which is active misconduct that injures 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). That is because, as the U.S. Supreme Court recently reiterated, "our legal system generally does not impose liability for mere omissions, inactions, or nonfeasance; although inaction can be culpable in the face of some independent duty to act, the law does not impose a generalized duty to rescue." *Twitter, Inc. v. Taamneh*, 143 S.Ct. 1206, 1220-1221 (2023) (affirming dismissal of claims against online platforms based on alleged failure to remove harmful content).[6]

[6] For the first time on appeal, Plaintiffs argue their negligence claims seek to impose liability for misfeasance, rather than nonfeasance. Br. 13-15. They did not preserve that argument below. Their opposition to Defendants' motion to dismiss assumed misfeasance but offered no substantive response to Defendants' argument that the amended complaint alleges nonfeasance. *See* Alt.App.49-50; Supp.App.26-29. The Court therefore should deem this argument "forfeited." *In re Rumsey Land Co.*, 944 F.3d 1259, 1271 (10th Cir. 2019).

The district court correctly held that because "Plaintiffs' claims involve Defendants' [alleged] failure to protect the Rolands from Brown's criminal acts, this is a case of a failure to act, or 'nonfeasance.'" Alt.App.163. The Colorado Supreme Court's decision in *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287 (Colo. 2020) is instructive. There, victims of a mass shooting at a local abortion facility asserted a negligence claim against the facility's national parent organization. *Id.* at 294-296. Plaintiffs alleged the national organization "had established a national security team to assist affiliates with security measures" but had allegedly "not regularly inspect[ed]" the local facility; "not develop[ed] and implement[ed] detailed and thorough guidelines and policies concerning safety requirements"; "not communicat[ed] or require[ed] such safety measures"; not required "adequate warnings"; and "not properly instruct[ed]" the local chapter on security in light of known threats. *Id.* at 295. Because "each of those allegations concern[ed] what [the national organization] allegedly did not do to ensure that [the local organization] followed [the national organization's] purported security mandates," the Court "construe[d] the… allegations as assertions of nonfeasance, not misfeasance." *Id.*

The U.S. Supreme Court recently applied these tort principles in affirming dismissal of analogous claims that social media companies were liable for purportedly aiding and abetting an ISIS terrorist attack by allegedly allowing ISIS

to use their sites to recruit, fundraise, and propagandize. *Taamneh*, 143 S.Ct. at 1220-1221. Like Letgo, the *Taamneh* defendants operated platforms on which people could "sign up… and start posting content… without much (if any) advance screening." *Id.* at 1216. As here, the *Taamneh* plaintiffs sought to cast their claims as alleging misfeasance by arguing that generally available features on the platforms (there, recommendation algorithms) had affirmatively helped bad actors (there, terrorists) commit a crime. The Supreme Court rejected this theory:

> Viewed properly, defendants' "recommendation" algorithms are merely part of th[e platforms'] infrastructure…. Once the platform and sorting-tool algorithms were up and running, defendants at most allegedly stood back and watched; they are not alleged to have taken any further action with respect to ISIS. At bottom, then, the claim here rests less on affirmative misconduct and more on an alleged failure to stop ISIS from using these platforms.

Id. at 1226-1227. As the Court explained, "mere creation of [such] platforms… is not culpable," even if "bad actors… are able to use [such] platforms… for illegal—and sometimes terrible—ends." *Id.* at 1226.

As in *Rocky Mountain* and *Taamneh*, Plaintiffs allege that Letgo failed to prevent a crime. Plaintiffs allege that Letgo created a platform used by millions of people and did not intervene to stop Brown from exploiting its generally available features to further his crime. They claim that Defendants failed "to assure that the identity of sellers… were not false," "to ensure all products listed on the application were legitimate and not the result of any illegal activity," "to vet

individuals who attempt to become 'verified sellers' on the application," and "to assure that executing a purchase using the application would not create an unreasonable risk of injury or damage." Alt.App.18 (¶72). Just as in *Rocky Mountain*, these "allegations concern what [Defendants] allegedly did not do to ensure that [sellers] followed [their] purported security mandates." 467 P.3d at 295. It is therefore proper to "construe the[m]… as assertions of nonfeasance, not misfeasance." *Id.*

Plaintiffs are wrong that Letgo's verification tool and alleged safety-related marketing render it a misfeasant. *See* Plaintiffs' Br.13-15 ("Br."). Neither increased the risk that the Rolands would interact with a criminal. Under Colorado law, a defendant is not a misfeasant unless it "'created a new risk of harm to the plaintiff.'" *University of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987). But Plaintiffs do not allege that Letgo's verification tools or alleged advertising created a new risk of armed robbery or murder. Nor could they. Just as the content-neutral "recommendation" algorithms in *Taamneh* applied to ISIS and cooking videos alike, 143 S.Ct. at 1216, Letgo's safety features applied neutrally regardless of whether the user used the platform for its intended use (buying and selling goods) or premeditated crime.

To the extent Plaintiffs argue that Letgo increased the risk of harm by increasing the risk of the Rolands interacting with *Brown*, who happened to be a

criminal, *see* Br.15, that is not the right analysis. Just as a university is not a misfeasant regarding all injuries resulting from students interacting on its campus, *see Whitlock*, 744 P.2d at 57, so too is a platform not a misfeasant regarding all injuries resulting from users interacting on its website. That is why courts have repeatedly treated these types of claims as nonfeasance claims. *See, e.g.*, *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019); *Doe v. SexSearch.com*, 551 F.3d 412, 418 (6th Cir. 2008).

Plaintiffs likewise are wrong that this case resembles *Montoya v. Connolly's Towing, Inc.*, 216 P.3d 98 (Colo. App. 2008). *See* Br.13-14. The misfeasance holding in *Montoya* turned on what is missing here: affirmative conduct by the defendant regarding the specific individual who harmed the plaintiff. In *Montoya*, a tow-truck driver was injured when a wheel fell off the car he was towing from the defendant's storage facility. *See* 216 P.3d at 103. The wheel came loose because the defendant had allowed the car's owner to enter the facility alone, though rules required car owners to be accompanied, and the owner then incompetently changed the car's tires. *See id.* The court found this was misfeasance because the proprietor had affirmatively *exempted* the car owner from generally applicable safety rules. *See id*. at 105 (defendant "created the circumstances that placed [plaintiff] at risk of harm by not uniformly applying its safety rules" after representing that "its customer safety rules applied to all

vehicles"). Here, by contrast, Plaintiffs do not allege that Letgo exempted Brown from its verification process—or even knew anything at all about Brown. *See* Alt.App.14-17 (¶¶36-39, 53-58). Plaintiffs' theory is that Letgo should have created a more rigorous verification process. *See* Alt.App.13 (¶ 29). That alleges nonfeasance.

In short, just as in *Taamneh,* Letgo's "relationship with [Brown]… [was allegedly] the same as [its] relationship with [its] [m]illion[s of] other users: arm's length, passive, and largely indifferent." 143 S.Ct. at 1227. The general features that Brown allegedly exploited are "merely part of th[e platforms'] infrastructure" and once those features "were up and running," Letgo is alleged to have "at most" "stood back and watched" but is "not alleged to have taken any further action with respect to" Brown. *See id.* at 1226-1227. Under Colorado law, this alleges nonfeasance, not misfeasance.

2. Plaintiffs do not allege the special relationship necessary to impose liability for nonfeasance

Plaintiffs concede their allegations are insufficient to establish a duty of care arising from nonfeasance. "[A] duty to control the conduct of a third person to prevent him from causing physical harm to another [exists] only if a special relation exists between the nonfeasant and either the wrongdoer or the victim." *Smit*, 72 P.3d at 372. Only six special relationships are recognized under Colorado

law, *see Rocky Mountain*, 467 P.3d at 295, and Plaintiffs concede none exists here, *see generally* Br.13-16; Supp.App.95.

B. Even If Plaintiffs Had Alleged Misfeasance, Their Allegations Would Still Fail To Establish Any Duty Of Care

Even if the amended complaint had plausibly alleged misfeasance, it still would fall short of alleging a legally enforceable duty. "In determining whether to recognize a duty in a misfeasance case, courts must consider many factors, including [1] the risk involved, [2] the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, [3] the magnitude of the burden of guarding against injury or harm, and [4] the consequences of placing the burden on the actor." *Smit*, 72 P.3d at 373. These factors all weigh against recognizing a duty here.

First, the amended complaint contains no factual allegations demonstrating that the ordinary activity of using a widely available online classified-ads platform carries a significant risk of armed robbery or murder. Alt.App.12-13 (¶ 23). Instead, Plaintiffs attempt to analyze the "risk involved" based entirely on the risks that the Rolands faced under the idiosyncratic facts of this case. Br.15. The first factor, however, turns on the track record of the activity or service more generally. *E.g.*, *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 48-49 (Colo. 1987) (finding a duty to protect patrons from armed robbery where ten armed robberies had occurred at the

particular restaurant over three years, and collecting cases). On that critical question, the amended complaint offers nothing.

Second, as explained further below, the district court correctly held that armed robbery and first-degree murder are not reasonably foreseeable consequences of operating an online classified service. *See infra* pp.27-28. Plaintiffs offer only conclusory assertions that Letgo's "promot[ion of] safety and confidence amongst its users" made "the likelihood of injury to users" foreseeable and "had little social utility." Br.16. But as alleged, Letgo's optional verification system had public safety and economic benefits as compared to the fully anonymous online classified ads platforms offered by other platforms. *See* Alt.App.14 (¶37) (comparing Letgo to craigslist).

Finally, taking the third and fourth factors together, imposing a duty of care on Letgo (and other similar online platforms) would disrupt online commerce and communication because it would impose a tremendous burden. As the Ninth Circuit explained, "[n]o website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content." *Dyroff*, 934 F.3d at 1101. So too here: Imposing a duty to investigate and confirm the authenticity of every user and listing would create enormous costs. And it would perversely disincentivize online marketplaces from adopting any verification system because doing so would expose them to liability for bad actors'

evasion or exploitation of those tools. That is presumably why, as *Taamneh* observed, there appears to be no "case holding such a company liable for merely failing to block… criminals despite knowing that they used the company's services." 143 S.Ct. at 1227 n.14.

Accordingly, even if Plaintiffs had alleged misfeasance (which they have not), their allegations would still fail to establish a duty of care.

C. The District Court Correctly Held Plaintiffs Fail To Allege Causation

The district court also correctly held that Plaintiffs' negligence claim fails because they do not plausibly allege causation. As the court explained, "no reasonable jury could conclude Defendants were the 'predominant cause' of the Rolands' deaths," because "[u]nder any analysis, the predominant and intervening cause was Brown's independent actions." Alt.App.164. If it were otherwise, "ordinary merchants" could be held liable "for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer." *Taamneh*, 143 S.Ct. at 1221. To adequately plead causation, Plaintiffs must allege facts sufficient to establish both "causation in fact" (i.e., "whether, but for the alleged negligence, the harm would not have occurred") and "proximate cause" (i.e., whether the alleged harm was reasonably foreseeable). *Rocky Mountain*, 467 P.3d at 292. The amended complaint adequately alleges neither.

1. The amended complaint does not plausibly allege causation in fact

Causation in fact requires facts sufficient "'to show that the [alleged] negligence was a 'substantial factor' in producing [Plaintiffs'] harm.'" *Rocky Mountain*, 467 P.3d at 292. Alleged negligence does not qualify as "a substantial factor" where "[s]ome other event which is a contributing factor in producing the harm… [had] such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant." *Id.*

As the district court held, the amended complaint fails to establish causation in fact "as a matter of law," Alt.App.164, because Brown's premeditated criminal acts were "the predominant cause of [Plaintiffs'] losses such that no reasonable jury could reach a different conclusion," *Rocky Mountain*, 467 P.3d at 292. At most, the amended complaint alleges that by providing the Letgo platform, Defendants "created a situation" that was "harmless unless acted upon by other forces for which [Defendants were] not responsible"—Brown's armed robbery plot. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1241 (10th Cir. 2009) (applying Colorado law). Brown created the luring content he posted on Letgo. Alt.App.14-15 (¶¶36-38, 56). Brown and the Rolands agreed to meet in person near midnight. *Id.* (¶¶38, 39). Brown brought a gun. Alt.App.15 (¶41). Brown persuaded the Rolands to follow him to a "remote apartment complex" under false pretenses. Alt.App.15, 17 (¶¶40, 61). Once there, Brown tried to rob the Rolands.

And when Mr. Roland resisted, Brown shot them. Alt.App.10, 15 (¶¶3, 41-44). As alleged, Brown's conduct had a substantially—indeed, overwhelmingly—greater impact on Brown's murder of the Rolands than Defendants' alleged negligence. No reasonable jury could conclude otherwise.

2. The amended complaint does not establish proximate cause

The amended complaint likewise fails to allege that any act or omission by Defendants, rather than Brown's crime, proximately caused the Rolands' deaths. "'[P]roximate' causation… depends largely on the question of the foreseeability of harm." *Rocky Mountain*, 467 P.3d at 262. Where "'an intervening cause… breaks the chain of causation from the original negligent act,'" the intervening cause "becomes the proximate cause of the plaintiff's injury, relieving the wrongdoer of liability.'" *Garcia v. Colorado Cab Co.*, 503 P.3d 867, 876 (Colo. App. 2021).

The Colorado Supreme Court has recognized that cases "involv[ing] random and extreme acts of violence committed without warning or foreseeable motive" break the chain of proximate causation. *Rocky Mountain*, 467 P.3d at 294. Here, Brown's crime breaks the chain of causation. It was random and committed without warning. Plaintiffs allege no similar incident involving Letgo or even any comparable platform, let alone so many similar incidents that this risk was reasonably foreseeable. *See id.* (contrasting the shooting at issue, which was "committed without warning," with one "committed at a facility that had long been

the subject of known threats of such violence"); *Taco Bell*, 744 P.2d at 48 (foreseeability "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.").

3. The district court properly resolved causation as a matter of law

Plaintiffs' primary contention on appeal—that the district court should not have resolved causation as a matter of law—is incorrect. Their authorities (all of which apply Oklahoma law) stand only for the general proposition that "'the question is *ordinarily* one of fact for determination by a jury.'" Br.18 (emphasis added) (quoting *Bannister v. Town of Noble*, 812 F.2d 1265, 1267 (10th Cir. 1987)). Ordinarily does not mean never.

Courts applying Colorado law routinely dismiss negligence claims as a matter of law on causation grounds where, as here, a violent criminal's "deliberate, premeditated criminal acts were the predominant cause of plaintiffs' [family members'] death[s]." *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1228 (D. Colo. 2015). For instance, a district court dismissed a claim against a firearms seller connected to the Aurora, Colorado movie theater shooting, holding that making "sales of ammunition and other products to [the mass shooter] can[not] plausibly constitute a substantial factor causing the deaths and injuries in [the] theater shooting." *Id.*; *see also, e.g.*, *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL

4092468, at *3 (D. Colo. June 24, 2016) (same). Similarly, a court dismissed a negligence claim against Columbine High School defendants for allegedly failing to "initiate[] disciplinary proceedings" against the shooters because the shooters' "actions on April 20, 1999 were the predominant, if not sole cause of… injuries." *Castaldo v. Stone*, 192 F.Supp.2d 1124, 1170-1171 (D. Colo. 2001).

This principle is not unique to gun violence: a Colorado court dismissed a negligence claim on summary judgment because the allegedly negligent handling of an insurance claim was not a substantial factor in causing the insured to suffer a fatal motorcycle crash in light of the insured's heavy drinking and impaired physical condition. *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987). The district court here correctly decided causation as a matter of law.

D. This Court Should Affirm Dismissal Of Plaintiffs' Gross Negligence Claim

The district court correctly dismissed Plaintiffs' gross negligence claim for the same reasons it dismissed the simple negligence claim and also because Plaintiffs fail to "plead[] willful or wanton conduct." Alt.App.164. Plaintiffs fail to allege duty or causation—elements of a gross negligence claim, *Ayala v. United States*, 49 F.3d 607, 611 (10th Cir. 1995) (citing *Casebolt*, 829 P.2d at 356)—for the reasons discussed above, *see supra* pp.17-29. Plaintiffs also fail to plausibly allege Defendants acted "recklessly, with conscious disregard for the safety of others." *Hamill v. Cheley Colo. Camps, Inc.*, 262 P.3d 945, 954 (Colo. App.

2011). Dismissal of this claim could alternatively be affirmed on the ground that Plaintiffs have abandoned it by asserting no error in the district court's dismissal. *See GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1213 (10th Cir. 2022).

II. THE DISTRICT COURT CORRECTLY HELD THAT THE AMENDED COMPLAINT FAILS TO PLEAD FRAUD, NEGLIGENT MISREPRESENTATION, AND CCPA CLAIMS

The district court correctly dismissed Plaintiffs' fraud, negligent misrepresentation, and CCPA claims as defective for multiple reasons. *First*, the amended complaint does not plausibly allege that any statement made by Letgo was false or misleading. *Second*, Plaintiffs' fraud and negligent misrepresentation claims lack particularity, as required by Rule 9(b). As the district court recognized, Rule 9(b) also applies to the CCPA claim, and it provides an alternative basis for affirmance. *Third*, Plaintiffs' fraud and negligent misrepresentation claims fail because they do not plausibly allege reliance. *Fourth*, the CCPA claim must be dismissed because the amended complaint does not plausibly allege that Letgo knew that Brown's ad was false or that Letgo acted recklessly or willfully, with an intent to induce the Rolands to transact with Brown.

As Plaintiffs conceded below, their injuries stem from false information provided by Mr. Brown and they would not "have a lawsuit" if "the same act occurred" but "Mr. Brown had given his real name, all real information, phone number, name, address, email address,… and the car wasn't stolen"

Supp.App.83:1-7. Their attempt to avoid that fundamental fact by "highlighting… promises made by Letgo" fails because Letgo did not make any false or misleading promises. Supp.App.83:12-13.

A. The District Court Correctly Held That The Amended Complaint Does Not Plausibly Allege A False Or Misleading Statement, Let Alone With Particularity

Plaintiffs' fraud, negligent misrepresentation, and CCPA claims all require a false or misleading statement. "To establish a prima facie case of fraud, a plaintiff must present evidence that the defendant made a false representation of a material fact." *Brody v. Bock*, 897 P.2d 769, 775-776 (Colo. 1995). Likewise, negligent misrepresentation requires "a misrepresentation of a material fact." *Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011). And a CCPA claim like Plaintiffs' that is based on a misrepresentation, *see* Br.25, requires "a false or misleading statement," *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 147 (Colo. 2003).

Further, as the district court correctly held and Plaintiffs acknowledge (Br.23), Rule 9(b) required them to allege their fraud and negligent misrepresentation claims with particularity. *See* Alt.App.164; *Koch v. Kock Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (fraud); *Pine Tel. Co. v. Alcatel Lucent USA Inc.*, 617 F.App'x 846, 860 & n.8 (10th Cir. 2015) (negligent misrepresentation). As the district court recognized, Rule 9(b) applies to Plaintiffs'

CCPA claim as well because it "alleg[es] fraud." Fed. R. Civ. P. 9(b); *see also* Alt.App.165 (noting but not relying on heightened pleading standard); *HealthONE of Denver, Inc., v. UnitedHealth Grp. Inc.*, 805 F.Supp.2d 1115, 1120 (D. Colo. 2011) (collecting cases). For each asserted statement, Rule 9(b) required the complaint 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*, 203 F.3d at 1236. Plaintiffs acknowledge Rule 9(b)'s purpose is to provide defendants with fair notice. Br.23. This Court has repeatedly explained that a complaint fails to provide fair notice if it does not allege what portion of a statement is false and why. *See Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997).[7]

Plaintiffs fail to plausibly allege any false or misleading statement, let alone with particularity. They rely on three supposed statements (or sets of statements): (1) the label on the "James Worthy" profile stating that the account had been "verified with ," *see* Alt.App.13 (¶29), 79; (2) unspecified advertising regarding verification, which the amended complaint describes as "us[ing] the 'verified seller' feature to distinguish [Letgo] from its direct competitors such as Craigslist" and representing that the platform "was safe for Letgo users," Alt.App.14 (¶37), 21

[7] It is irrelevant that averments concerning a defendant's mental state need not be particularized because that is not at issue in this appeal. *See* Br. 23.

(¶91); and (3) various other statements, including that Letgo "work[ed] closely with local law enforcement to ensure the 'trust and safety of the tens of millions of people who use Letgo," Alt.App.12-13 (¶23). As the district court correctly held, the amended complaint does not plausibly allege that any of these statements was false, and alleged statements in the latter two categories do not satisfy Rule 9(b)'s particularity requirement.

1. The statement "verified with" is not plausibly alleged to be false or misleading

Plaintiffs have never argued that the only statement regarding verification they identify with particularity—the "verified with" tag that appeared on the "James Worthy" profile—is false. For good reason: As alleged, the label merely conveyed the true statement that the person controlling the Worthy profile had submitted an "actual phone number" to Letgo. Alt.App.164; *see* Alt.App.13 (¶29) (label indicates "the method [user] chose"); Alt.App.79 (indicating that "Worthy" chose a phone). As the district court explained, and Plaintiffs do not dispute, "[t]hat is true." Alt.App.164.

Plaintiffs contend the label was false or misleading because it conveyed a *different* statement—that "Worthy" was a Verified User, *see* Br.20, 22—but this is not plausibly alleged. Plaintiffs do not explain (and the amended complaint does not allege, with particularity or otherwise) *how* the "verified with" label could have misled users into thinking that "James Worthy" was a Verified User,

particularly when "consider[ed in] the context in which the statements were made." *Indiana Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1251 n.3 (10th Cir. 2022). Contrary to Plaintiffs' repeated suggestion that the label indicated the profile was that of a "Verified User," *see* Alt.App. 10-11 (¶4), 14 (¶¶36-37), 16 (¶53), 20 (¶83), the label indicated that the profile was verified in only one limited respect, i.e. phone. And there were two clear signs on the profile that "James Worthy" was *not* a "Verified User": the profile lacked a "Verified User badge" and prominent red text (situated immediately above the "verified with " label) advised viewers to "[a]sk them to verify their profile." Alt.App.79.

Moreover, Letgo's website explained the difference between a user submitting certain information (e.g., a phone number) and earning a Verified User badge. The website included a clearly labeled page entitled "How many points do I need to receive a Verified User badge?"[8] That page explained users could accumulate points *towards* a "Verified User" badge, including by submitting a working phone number, but could achieve "Verified User" status only by doing *more* than submitting a working phone number. A user needed to provide enough verified contact information, transaction history, and identification information to

[8] The amended complaint incorporated this article by making Letgo's statements about its "verification process" central to its claims. *See* Alt.App.13, 17-18 (¶¶28-29, 65, 73, 74(c)); *see also supra* p.5 n.3.

accumulate 50 points in order to earn a "Verified User badge." Alt.App.117. Providing a functioning phone number was worth only 15 points. *Id.* Thus, contrary to Plaintiffs' argument, Letgo's website *did* "indicate[] the existence of multiple tiers of verification." Br.22.

2. The other alleged statements regarding verification are not pled with particularity or plausibly alleged to be false or misleading

As the district court correctly held, there are no other "possible" statements that could give rise to a fraud or negligent misrepresentation claim. Alt.App.164. Because it is not plausibly alleged that the "Worthy" profile conveyed he was a Verified User, Letgo's alleged statements about its verified sellers are not material to Plaintiffs' claims. Regardless, Plaintiffs' contention that Letgo misrepresented its verification system more generally also is not plausibly alleged. The amended complaint identifies no statements about verification that are plausibly false, let alone alleged with the particularity Rule 9(b) requires.

First, plaintiffs' suggestion that Letgo misrepresented that a user could become "verified" in the sense that Letgo used the term "Verified User Badge" by providing only an email address is contradicted by the platform's explanation of its verification process and by the "James Worthy" profile's lack of a Verified User badge. *See* Br.22 (contending that "verification is only synonymous with a functioning e-mail address and false username"). As discussed *supra* pp.5-6, 34-

35, Letgo disclosed that a user who had provided only a functioning email address or phone number would earn only 5 points or 15 points, respectively, towards the 50 points required for a Verified User badge.

Second, the amended complaint does not plausibly allege that Letgo misled users into believing that it had "vetted" or run "background check[s]" on *any* users (let alone one whose profile indicated he had verified with only a phone number). Br.22; Alt.App.13 (¶ 29). The amended complaint does not identify any particular statement made by Letgo to this effect or when or where Letgo made such a statement. Nor does it allege the Rolands ever saw any such statement. And Letgo's actual statements about its verification process do not indicate that Letgo ran background checks on users, instead describing how users could "earn" points "by completing… available steps," such as completing their bio, uploading a profile photo, or completing a transaction with another user. Alt.App.117; *see also id.* (describing the steps as "action[s]" users could take).

Third, the amended complaint identifies no particular statement in which Letgo "encouraged Letgo users to trust its 'verified sellers'" or represented that the platform was "safe for Letgo users" because of its verification system. Alt.App.21 (¶91). Nor does it indicate when or where Letgo made such a statement or that the Rolands ever saw any such statement. Letgo's statement that it "offer[s] verified user profiles with ratings and reviews" because it "take[s] the trust and safety of

the tens of millions of people who use letgo pretty seriously," Alt.App.109—which is not specifically alleged in the amended complaint—does not encourage users to categorically trust all of Letgo's users. And in fact, the Letgo website expressly warned users that they should "*always* take the proper precautions, as you should anytime you buy or sell online," including by "meeting in a public place during the day." Alt.App.145-146 (emphasis added).

3. The amended complaint pleads no other actionable misrepresentations

Plaintiffs do not plausibly allege that Letgo made any other false or misleading statements about the platform's safety measures.

Letgo's alleged statement that it "work[ed] closely with local law enforcement to ensure the 'trust and safety of the tens of millions of people who use Letgo,'" Alt.App.12-13 (¶23), is not plausibly false or misleading. Plaintiffs suggest that Letgo's interactions with the Aurora Police Department somehow rendered this statement false or misleading. Br.21. But the statement does not plausibly communicate that Letgo would provide any form of assistance that it did not provide here, or that it could enable the police to catch an evasive perpetrator within a certain amount of time. Nor can Plaintiffs' fraud claim survive a motion to dismiss with the bare assertion that this statement might "mean[] something more" than "complying with a court order," without explaining how the statement is ambiguous in any relevant way. *Id.*

Nor have Plaintiffs adequately pled anything false or misleading in Letgo's statements that it "utilize[d] 'machine learning' to identify and block inappropriate content (such as stolen merchandise)." Alt.App.12-13 (¶23); *see also* Alt.App.127. These statements are not representations that the platform is free of ads for stolen goods. Rather, as alleged, Letgo truthfully represented that it prohibited ads for stolen goods and took steps to identify violating posts.

4. Plaintiffs' counterarguments fail

First, Plaintiffs are wrong to argue that they plausibly allege that Letgo's "verified" tags and statements about working with law enforcement are ambiguous and that they therefore plausibly allege a negligent misrepresentation claim. *See* Br.21. As an initial matter, and as explained above, they do not plausibly allege that either statement is ambiguous, let alone in any relevant way. *See supra* pp.33-38. Contrary to Plaintiffs, the district court did not hold that the "verified with" label on Brown's profile is ambiguous. Alt.App.164; *see* Br.20. Rather, the district court's statement that it would be "pure speculation as to what that term… meant to the Rolands," meant it would be speculative to say in what respect the Rolands relied on the statement.

Regardless, Plaintiffs cannot plausibly allege negligent misrepresentation by alleging a statement that is merely ambiguous. *See* Br.19. Plaintiffs misquote *Level 3 Communications, LLC v. Liebert Corp.,* 535 F.3d 1146, 1156 (10th Cir.

2008) in arguing otherwise. The quoted discussion from *Level 3* concerned a contract claim, in which a defined term was determined to be ambiguous. *See id.* at 1155-1158. Where *Level 3* discusses negligent misrepresentation, it makes clear that the claim requires "g[iving] false information." *Id*. at 1159-1160. Plaintiffs elsewhere concede as much. *See* Br.19 ("A negligent misrepresentation claim 'must focus on what defendant affirmatively represented, not what it failed to disclose.'"). For the reasons already discussed, *see supra* pp.33-38, the amended complaint fails to allege that Letgo "supplied [any] false information," *id*.

Second, Plaintiffs do not plausibly allege a fraudulent concealment claim, which they raise for the first time on appeal. *See* Br.21-22. The requirements to plead fraudulent concealment are demanding: A plaintiff must plead "that the defendant had a duty to disclose material information" and knowingly omitted the information with intent to induce detrimental reliance. *Level 3*, 535 F.3d at 1163-1164 (quoting *Mallon Oil Co. v. Bowen/Edwards Assocs., Inc*., 965 P.2d 105, 111 (Colo. 1998)); *see also id.* at 1160. The amended complaint does not satisfy those demanding requirements. It does not plausibly allege that Letgo had a duty to disclose material information because it does not plausibly allege that Letgo made any "'partial or ambiguous statements of the facts,'" *Poly Trucking, Inc. v. Concentra Health Servs., Inc.*, 93 P.3d 561, 564 (Colo. App. 2004), let alone that Letgo omitted material information knowingly or with intent to induce detrimental

reliance. As discussed *supra* pp.5-6, 34-35, Letgo's website and the Worthy profile made clear that the "verified with  " label conveyed only that the user had submitted a working phone number, not that "James Worthy" was a Verified User.[9]

B. The District Court Correctly Dismissed The Fraud And Negligent Misrepresentation Claims For Failure To Plausibly Allege Reliance

The district court correctly held that the amended complaint does not plausibly allege that the Rolands justifiably relied on any statement the Plaintiffs contend was misleading. That is an independent basis to affirm dismissal of those claims because reliance is an element of both. *See Kopeikin v. Merchants Mortg. & Tr. Corp.*, 679 P.2d 599, 602 (Colo. 1984) (fraudulent concealment); *Allen*, 252 P.3d at 482 (negligent misrepresentation). As the district court explained, "it would be pure speculation as to what the term 'Verified with [phone number]' meant to the Rolands." Alt.App.164. Indeed, Plaintiffs conceded as much at oral argument, acknowledging that they lack an evidentiary basis to allege what statements, if any, the Rolands reasonably relied on when deciding to use Letgo and transact with "James Worthy." *See* Supp.App.82:2-25; *see also* Br.22 (implicitly conceding the same).

[9] Even if Plaintiffs had plausibly alleged that Letgo misrepresented Worthy as a Verified User, they could state a claim only if they *also* plausibly allege that Letgo represented it was always safe for users to interact with a "Verified User." Plaintiffs do not. *See supra* pp.36-37.

C. The District Court Correctly Held The CCPA Claim Fails For The Additional Reason That The Amended Complaint Does Not Plausibly Allege The Required Scienter Or Intent

The district court also correctly held that Plaintiffs' CCPA claim must be dismissed because "there is no factual basis for alleging that Letgo *knew* anything in the Brown ad was a lie, or that it acted recklessly or willfully, intending to induce the Rolands to transact with Brown." Alt.App.165; *see also Rhino Linings*, 62 P.3d at 147 ("A misrepresentation… is actionable when it is made 'either with knowledge of its untruth, or recklessly and willfully made without regard to its consequences, and with an intent to mislead and deceive the plaintiff.'").

First, Plaintiffs concede they do not allege Letgo knew anything in the Brown ad was a lie. *See* Br.25 ("[T]his was never alleged."). Instead, they contend "it is irrelevant to the entire analysis" because they seek to hold Defendants liable for their own conduct. *Id.* But as the district court correctly concluded, Plaintiffs seek to hold Letgo liable for the allegedly misleading nature of the "Worthy" profile. Their CCPA claim alleges the Rolands "would not have communicated with Mr. Brown and/or attempted to buy a vehicle from Mr. Brown" but for the misrepresentations that *they* allege Letgo made, Alt.App.23 (¶113), including the "verified with" label on the "Worthy" profile. Therefore, whether Letgo knew anything in the Brown ad was a lie is central, not irrelevant, to Plaintiffs' CCPA claim.

Second, the amended complaint does not plausibly allege that Letgo acted recklessly or willfully with the intent to induce the Rolands to transact with Brown. Plaintiffs argue that "[t]h[e] lack of verification proves that Defendants had both constructive and actual knowledge" that Letgo "had no meaningful security measures or policies in place to effectively safeguard Letgo buyers from criminal activity." Br.26. But as discussed, the amended complaint does not plausibly allege that Letgo failed to implement the verification system that it advertised with respect to Brown or that Letgo promised users that its verification system could guarantee that all transactions carried out on the platform would be safe. *See supra* pp.33-38. To the contrary, Letgo's website advised users that there was always some risk involved in transacting with individuals met online, including on Letgo. *See supra* pp.7-8. And the "Worthy" profile itself bore a warning label, advising users considering an interaction with "James Worthy" to "Ask them to verify their profile." Alt.App.79.

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' DERIVATIVE CLAIMS FOR LOSS OF CONSORTIUM AND WRONGFUL DEATH

Recovery under the Wrongful Death Act is permitted only when the alleged wrongful act would have "entitled the party injured to maintain an action and recover damages" had death not ensued. *Espinoza v. O'Dell*, 633 P.2d 455, 463 (Colo. 1981). Plaintiffs concede wrongful death actions are derivative. *See* Br.28.

The district court therefore correctly dismissed the wrongful death claim because each of Plaintiffs' other claims is legally defective. *See* Alt.App.165-166.

Plaintiffs have also abandoned the loss of consortium claim by failing to address it in their opening brief. *See* Br.28. Regardless, a loss of consortium claim is also derivative. *See Lee v. Colorado Dep't of Health*, 718 P.2d 221, 232 (Colo. 1986). Moreover, a child cannot bring a loss of consortium claim for the loss of a parent. *See id.*

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEAVE TO AMEND

Leave to amend is properly denied where, as here, the plaintiff failed to cure deficiencies by prior amendments or further amendment would be futile, because "the proposed amended complaint would be subject to dismissal for any reason." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 559-562 (10th Cir. 1997). Plaintiffs concede they had to seek leave to amend because they had already used their one as-of-right amendment. *See* Br.28-29. "[A] request for leave to amend[] must state with particularity the grounds." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1283 (10th Cir. 2021). "To find an abuse of discretion, [this Court] must conclude that this decision was arbitrary, capricious, whimsical, or manifestly unreasonable" in light of an error of law or the additional allegations proffered by counsel. *Id.*

The district court did not abuse its discretion in concluding that Plaintiffs could not "cure the deficiencies in the [amended] complaint['s]" state-law claims. *Bauchman*, 132 F.3d at 559-562. Plaintiffs' briefing below did not suggest they could allege any additional facts that would cure their failure to plausibly allege their claims, instead only vaguely asserting that "additional facts" could "cure any claims dismissed on the grounds of Section 230 immunity." Supp.App.35. And the district court confirmed at oral argument that Plaintiffs lack any new, material allegations to preclude dismissal. The court asked, for example, whether Plaintiffs could plead "that the Rolands actually used this platform because of the[] additional [verification] features," and counsel acknowledged that any allegation concerning reliance would necessarily be based on "assumptions of what they did based on what a reasonable person would do." Supp.App.82:2-25. Counsel also admitted that he was "unaware of whether or not [the Rolands had] followed through with a purchase through the OfferUp[or] Letgo app before." Supp.App.87:8-10. Counsel further conceded that Plaintiffs could not allege that Letgo had ever represented that the advertised vehicle had not been stolen. *See* Supp.App.92.

Moreover, the district court's analysis of the state-law claims indicates particular elements of each claim that Plaintiffs could not sufficiently allege even if given leave to amend. For instance, the court held that Plaintiffs' negligence and

gross negligence claims were defective because "*[u]nder any analysis*, the predominant and intervening cause was Brown's independent actions." Alt.App.164 (emphasis added). And with respect to Plaintiffs' fraud, and negligent misrepresentation claims, the Court concluded that "*it would be pure speculation* as to what the term 'Verified with [phone number]' meant to the Rolands," so justifiable reliance could never be sufficiently alleged. *Id.* (emphasis added). Finally, the Court concluded that Plaintiffs could never sufficiently allege the *mens rea* required to state a CCPA claim, holding that "[i]t is clear from the record that *there is no factual basis for alleging* that Letgo knew anything in the Brown ad was a lie, or that it acted recklessly or willfully, intending to induce the Rolands to transact with Brown." *Id*.

The Court therefore correctly concluded that Plaintiffs have "no plausible claim even after taking an expansive view of the pleadings," and that "it would be futile to grant Plaintiffs leave to amend." Alt.App.166. Even now, on appeal, Plaintiffs fail to proffer a *single* allegation that would cure any claim. *See* Br.28-29. They have therefore failed to justify continuing this litigation. *See Brooks*, 985 F.3d at 1282-1283.

V. THE COURT MAY AFFIRM ON THE ALTERNATE GROUND THAT DEFENDANTS ARE IMMUNE FROM SUIT UNDER SECTION 230

The Court can and should affirm on the grounds set forth above. However, if necessary, Section 230 provides an independent and alternative basis for affirming dismissal of Plaintiffs' claims with prejudice.

Section 230(c)(1) commands 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). Section 230 thus "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party." *Ben Ezra, Weinstein, & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 984-985 (10th Cir. 2000). Because Section 230 prohibits treating a provider of interactive computer services as the "publisher" of third-party content, it forecloses *any* attempts to hold a platform liable for "the exercise of its editorial and self-regulatory functions." *Id.* at 986. That includes claims that a platform was "negligent in promulgating harmful content and in failing to address certain harmful content on its network." *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003).

Section 230 mandates dismissal when (1) the defendant is a "provider… of an interactive computer service"; (2) the claim arises from an alleged harm that resulted from the dissemination of content that was "provided by another

information content provider," and not the defendant; and (3) the claim seeks to hold the defendant liable as a "publisher or speaker" of that content. 47 U.S.C. §230(c)(1); *see FTC v. Accusearch Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009). The district court correctly held that the first and third requirements are satisfied: "Letgo is undoubtedly an interactive computer service," Alt.App.157, and Plaintiffs' claims seek to hold Letgo liable as a publisher and speaker because they "seek[] to hold Letgo responsible for [allegedly] failing to adequately verify the content that was in Brown's advertisement," Alt.App.158. Plaintiffs' brief does not address those conclusions. Therefore, the only dispute is whether Plaintiffs' claims arise from content that was "provided by another information content provider," and not by Letgo. On that issue, the district court erred in concluding that Letgo was the "information content provider" of the harmful content underlying Plaintiffs' claims.

A. Letgo Was Not An Information Content Provider Of Any Harmful Content

Section 230 defines an "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." 47 U.S.C. §230(f)(3). As this Court explained in *Accusearch*, the key "question" in applying this definition is whether the defendant "was '*responsible*, in whole or in part, for the development of the offending content"—*i.e.*, "the

specific content that was the source of the alleged liability." 570 F.3d at 1198. "In this context—responsibility for harm—the word *responsible* ordinarily has a normative connotation." *Id.* Therefore, "to be 'responsible' for the development of offensive content, one must be *more than a neutral conduit for that content*." *Id*. at 1198-1199 (emphasis added). "[A] service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content." *Id.* at 1199. By contrast, "one is not 'responsible' for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content." *Id.*

Here, the "offending content"—that is, the content that caused Plaintiffs' harm—is Brown's misleading profile and luring ad. And it is clear from the face of the amended complaint that Brown alone was responsible for creating and developing everything that was allegedly misleading about that profile and ad. In particular, the amended complaint indicates that the false name ("James Worthy") appearing in the ad and profile and the representation that the named user was offering to sell a used car all originated from—and were created or developed by—Brown himself. *See, e.g.*, Alt.App.16 (¶¶55-56) (Brown "create[d] a fictitious account" and used it to "advertise[] stolen property"); *see also* Supp.App.91:21-92:11 (conceding that Brown uploaded images for the ad). And Plaintiffs conceded that they would not have a lawsuit "if Mr. Brown had given his real

name, all real information,… nothing was false at all, and the car wasn't stolen,… and the same act occurred." Supp.App.83:1-7. Because Plaintiffs' claims turn on user-generated content, they fall in the heartland of the Section 230 "immunity to any cause of action that would make service providers liable for information originating with a third party." *Ben Ezra*, 206 F.3d at 986.

The district court nonetheless erroneously held that Letgo was an "information content provider" of the relevant content by casting Plaintiffs' claims as arising not from Letgo's publication of the profile and ad that Brown created but instead only the "verified with" label that appeared on the profile, which the district court believed had been created, in part, by Letgo. Alt.App.159-163. The district court committed multiple errors in reaching that conclusion.

First, and most fundamentally, the "verified designation" is not the "singular item of information relevant" to the Section 230 analysis. Alt.App.160. The "information content provider" analysis depends on whether the defendant "was responsible for the development of the specific content that was the source of the alleged liability." *Accusearch*, 570 F.3d at 1198. The "verified with" label, alone, is not the source of the alleged liability. Brown's deceptive ad and profile are. And Letgo's alleged role in creating that label on Brown's profile does not render it "responsible" for the offensive content because the label did not materially contribute to what made that content harmful, namely, its

misrepresentation that Brown intended to offer a car for sale. Thus, the Sixth Circuit has held that Section 230 barred a defamation claim against a platform operator who posted a comment on a third party's defamatory statement because the comment, which was not itself defamatory, "did not materially contribute to the defamatory content of the statements." *Jones v. Dirty World Ent. Recordings*, 755 F.3d 398, 416 (6th Cir. 2014). The court explained that "[it] would break the concepts of responsibility and material contribution to hold [the platform operator] responsible for the defamatory content of speech because he later commented on that speech." *Id.* So too here, Letgo cannot be held responsible for the deceptive nature of Brown's profile and ad because it allegedly contributed to the "verified with " label.

Second, in any event, Letgo would be immune under Section 230 even if Letgo's "verified with " label were the "offending content" because it is the product of the kind of neutral tool that courts have uniformly held does not make a platform "responsible" for the user's offensive content. As the district court explained, to obtain the kind of "verified with " label that appeared on the "James Worthy" profile, a user would "provide… a functioning telephone number, whereupon Letgo [would] send[] a communication to that telephone number (an SMS text) to confirm that it really exists." Alt.App.160; *see also* Alt.App.13 (¶29) (user could obtain verify "contact information" by "simply providing" it). The

"verified with" label thus reflected solely user-provided information that had been confirmed via a standard, automated system and then converted into a summary graphic displayed on the user's profile.

Courts have repeatedly rejected arguments that a platform's presentation of information provided by a user, even if it adds graphic items, make the platform operator "responsible" for the "development" of that user-submitted information. That is because in "reduc[ing]" voluntary "inputs from third parties" "into a single, aggregate metric" or graphic icon, a platform does not create its own content or develop user-submitted information, but merely provides a "neutral means by which third parties can post information of their own independent choosing online." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014). In *Marshall's Locksmith Service Inc. v. Google, LLC*, for example, the D.C. Circuit rejected the argument that Google had become an information content provider by virtue of its "translation of [street address] information that c[ame] from… scam-locksmiths' webpages… into map pinpoints." 925 F.3d 1263, 1269 (D.C. Cir. 2019). As the court explained, Google's "decision to present third-party data in a particular format—a map—d[id] not constitute the 'creation' or 'development' of information," even though Google made a "choice of presentation" and processed the address data into another "textual or pictorial form." *Id.* Indeed, the D.C. Circuit found that Section 230 even protected Google's translation of inexact

location information on the scam-locksmiths' websites into map pinpoints, because Google "use[d] a neutral algorithm to make th[e] translation" from third-party content of varying precision to a "website design that portrays all search results… with the maximum precision possible." *Id.* at 1270.

The Ninth Circuit likewise rejected the argument that Yelp! engages in content creation or development by "reduc[ing]" "rating inputs from third parties" to "a single, aggregate metric" via "the star-rating system," which "is best characterized as [a]… neutral tool operating on voluntary inputs." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016). The California Court of Appeal similarly held that Section 230 shielded eBay from liability arising from "information [it] purportedly developed… for its 'safety program,'" including "a color-coded star symbol, a Power Sellers endorsement, and a Feedback Forum," because all three were "comprised of negative or positive information provided by third part[ies]" and "representation[s] of the among of such positive information received." *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 833-834 (2002); *see also, e.g.*, *Smith v. Airbnb, Inc.*, 504 P.3d 646, 653 (Or. Ct. App. 2021) (holding Section 230 immunity applied to Airbnb's "'adding icons' to listings that indicate the presence of hot tubs"). And in *Ripple Labs Inc. v. YouTube LLC*, the court held that YouTube's "award[to a scam channel of] a 'verification badge'… it allegedly reserves for 'authentic' channels" did not strip YouTube of immunity because

"[w]hat made the content illegal" was content the scammers had generated to trick other users and not YouTube's verification badge. 2020 WL 6822891, at *6 (N.D. Cal. Nov. 20, 2020).

The district court wrongly believed that these cases "appear[] to be at odds with *Accusearch, Inc.*" and that they "add[] requirements such as 'materiality' and 'neutral tool' that do not appear in the plain language of the statute." Alt.App.162; Br.10-11. That misreads *Accusearch*. As explained above, *Accusearch* construed the "word *responsible*" in Section 230's definition of "information content provider" to mean that a platform, like Letgo, "must be more than a neutral conduit for th[e] [offensive] content" underlying a plaintiff's claims. 570 F.3d at 1199; *see also id.* at 1198-1199 ("In this context—responsibility for harm—the word *responsible* ordinarily has a normative connotation."). In line with that framework, the defendant in *Accusearch* had "attempt[ed] to portray itself as the provider of neutral tools." *Id.* at 1201. The Court rejected that argument not because neutrality is irrelevant (as the district court here appears to have believed) but because the defendant's actions in that case "were not 'neutral' with respect to generating offensive content; on the contrary, its actions were intended to generate such content." *Id*. At the same time, *Accusearch* recognized that a defendant would "not [be] 'responsible' for the development of offensive content if"—as here—"one's conduct was neutral with respect to the offensiveness of the content."

Id.; *see also id.* at 1199-1200 (explaining that because in *Ben Ezra* AOL's "conduct was neutral with respect to possible errors in the stock quotations," it was not "*responsible* for the offensive content").

Letgo's platform in general and its verification tool in particular are quintessential neutral tools under *Accusearch*. Plaintiffs have never alleged that Letgo solicited or encouraged misleading profiles or luring ads—let alone ads for stolen goods designed to entice buyers into an armed robbery. To the contrary, the amended complaint acknowledges that Letgo implemented safety features and community standards designed to prevent and prohibit users from submitting false information. *See* Alt.App.14 (¶32). The verification tool likewise operated in precisely the same way to automatically confirm a working number regardless of whether it was being used by a legitimate seller or by someone like Brown, who was posting a misleading ad. In other words, much like the algorithms in *Taamneh*, Letgo's verification tool operates on "information and inputs provided by users" but is "agnostic as to the nature of the content." 143 S.Ct. at 1227. Because the verification tool was "neutral with respect to the offensiveness of the content," Letgo is not "responsible." *Accusearch*, 570 F.3d at 1199.

Plaintiffs are wrong to suggest that Letgo could lose Section 230 protection because its platform's operation "add[ed] unwarranted credibility to user accounts with the tag 'verified with.'" Br.11. In most Section 230 cases the platform is

alleged to have lent its imprimatur to harmful content, by, for example, "[p]lacing certain third-party content on a homepage," which "tends to recommend that content to users more than if it were located elsewhere on a website." *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019). A platform's decisions about "what type and format of third-party content they will display," *id.*, always reflect that platform's judgment "about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site," *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1210 (11th Cir. 2022). Courts nonetheless have held that arranging, recommending, and matching "among speakers, content, and viewers of content… is an essential result of publishing" and that "[a]ccepting [the] argument" that this conduct is not protected by Section 230 "would eviscerate section 230(c)(1)." *Force*, 934 F.3d at 66.

Third, the district court erroneously held that Plaintiffs' "theory relies on Defendants having 'created' the information," rather than "developed" the information, as discussed in *Accusearch*. Alt.App.161. As an initial matter, that distinction is irrelevant because either way, the statute requires that defendant be "responsible" for the offending content. 47 U.S.C. § 230(f)(3). Regardless, the district court erred in deeming this a "creation" case. As *Accusearch* explained, a platform operator "creates" content when it "make[s] something new" on its own, without relying on information provided by a user or third party, and a platform

develops content by "mak[ing] [information] actually available or usable" that was "previously only potentially available or useful." 570 F.3d at 1198. Thus, where, as here, a plaintiff alleges the defendant solicited or transformed information supplied by a user or a third party, the key question is whether the defendant "developed" the content, not whether the defendant created it. *See id.* at 1198-1199. Yet the amended complaint does not plausibly allege how Letgo's verification system's display of the "verified with " label made any "latent" information in Brown's phone number "'visible,' 'active,' or 'usable.'" *Id.* at 1198.

In sum, under *Accusearch*, Section 230 bars Plaintiffs' claims because they arise out of Brown's luring profile and ad. Letgo's provision of a neutral tool that Brown used to convey that he had verified his profile with a working phone number does not render it responsible for the deceptive nature of Brown's content.

B. The District Court Correctly Held That Plaintiffs Cannot Evade Section 230 Immunity Through Artful Pleading

Plaintiffs cannot avoid Section 230 immunity by claiming they seek to hold Letgo liable for "advertising its trusted verification process," "represent[ing] that the products posted for sale are not illegally obtained, stolen, or related to any crime," and "advertis[ing] its collaborative effort with law enforcement." Br.11. As the district court correctly recognized, Section 230 prohibits circumventing the immunity through such artful pleading. *See* Alt.App.158; *see also* Supp.App.83:1-

14 (explaining that Plaintiffs are "highlighting" "promises made by Letgo, OfferUp, independent of whatever was uploaded by Mr. Brown," because "Section 230 is very clear in that it doesn't regulate third party content").

Section 230 precludes liability for any claim that "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-1102 (9th Cir. 2009). Applying this principle, courts have repeatedly rejected plaintiffs' efforts to avoid Section 230 immunity by recharacterizing their claims as based on a platform's statements about how it operates rather than its publication of content. For example, in *MySpace*, the Fifth Circuit held that Section 230 barred claims framed as allegations that MySpace failed to implement its prohibition on children under 14 from signing up for the platform because the plaintiffs' "allegations [we]re merely another way of claiming that MySpace was liable for publishing the communications" of a third party. *MySpace*, 528 F.3d at 416. The Third Circuit similarly has held that Section 230 does not permit liability against a platform for allegedly "fail[ing] to live up to its contractual obligations… by refusing to take necessary action" against users who "allegedly transmitted harmful online messages." *Green*, 318 F.3d at 468; *see also id.* at 471. And the California Court of Appeals rejected a plaintiff's attempt to plead around Section 230 by arguing that the platform operator was "'liable because of its *own promises and*

representations'" concerning permissible content, "'not because of anyone else's statements.'" *Cross v. Facebook, Inc.*, 14 Cal.App.5th 190, 206-207 (2017).

As in those cases, Plaintiffs' reference to Letgo's alleged statements about how it handles content on its platform does "not alter the reality that the source of [Plaintiffs'] alleged injuries, the basis for [their] claim[s]," is Letgo's publication of content provided by another: Brown's profile and ad. *Cross*, 14 Cal.App.5th at 202, 207.

CONCLUSION

The district court's order should be affirmed.

ORAL ARGUMENT STATEMENT

Defendants request oral argument in this case because of the need to address the district court's erroneous reading of this Court's Section 230 precedent.

Respectfully submitted,

/s/ Mohamed M. Awan
MOHAMED M. AWAN
MONTY COOPER
NEDA SHAHEEN
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
mawan@crowell.com
mcooper@crowell.com
nshaheen@crowell.com

STEVEN M. HAMILTON
HALL & EVANS, L.L.C.
1001 17th Street, Suite 300
Denver, CO 80202
Tel: (303) 628-3300
Fax: (303) 628-3368
hamiltons@hallevans.com

Attorneys for Defendant-Appellee-Cross-Appellant OfferUp Inc.

/s/ Ari Holtzblatt
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue NW
Washington, DC 20037
Tel: (202) 663-6000
Fax: (202) 663-6363
ari.holtzblatt@wilmerhale.com

EMILY BARNET
NICHOLAS WERLE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel: (212) 232-8800
Fax: (212) 230-8888
emily.barnet@wilmerhale.com
nick.werle@wilmerhale.com

Attorneys for Defendant-Appellee-Cross-Appellant Letgo, Inc.

June 30, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 12,990 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Office Word 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Ari Holtzblatt
ARI HOLTZBLATT

June 30, 2023