COOLEY LLP
KYLE C. WONG (224021)
(kwong@cooley.com)
REECE TREVOR (316685)
(rtrevor@cooley.com)
3 Embarcadero Center, 20th Floor
San Francisco, California 94111-4004
Telephone: +1 415 693 2000
Facsimile: +1 415 693 2222

TIANA DEMAS (*pro hac vice*)
(tdemas@cooley.com)
MARIAH A. YOUNG (*pro hac vice)*
(mayoung@cooley.com)
110 N. Wacker Drive, Suite 4200
Chicago, Illinois 60606
Telephone: +1 312 881-6500
Facsimile: +1 312 881-6598

Attorneys for Defendants
GOOGLE LLC and YOUTUBE, LLC

Additional counsel on signature page.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

BOGARD, MCGRATH, JANE DOE, BECCA SCHMILL FOUNDATION, *Individually and on behalf of all others similarly situated*,

Plaintiffs,

v.

TIKTOK, INC., BYTEDANCE, INC., GOOGLE LLC, YOUTUBE, LLC,

Defendants.

Case No. 5:24-cv-03131-VKD

DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Hearing Date: July 22, 2025
Time: 10:00 a.m.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE that on July 22, 2025 at 10:00 a.m., Defendants Google LLC and YouTube LLC ("Google Defendants") and TikTok Inc. and ByteDance Inc. ("TikTok Defendants") will move to dismiss the First Amended Complaint (ECF No. 110, the "FAC") in its entirety. The issues to be decided are whether the FAC should be dismissed because: (1) Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), bars the claims; (2) the First Amendment bars the claims; (3) Plaintiffs otherwise fail to state any claim upon which relief can be granted; and (4) the Becca Schmill Foundation ("Foundation") lacks Article III standing. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities, the pleadings and papers on file in this matter, and upon such matters as may be presented before or at the time of the hearing on this Motion.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This is Plaintiffs' second attempt at pleading theories of products liability, negligence, fraud, and consumer protection that seek to hold Defendants liable for their alleged failure to remove third-party content from their platforms—conduct that is plainly immunized by Section 230 of the Communications Decency Act ("Section 230") and protected by the First Amendment. The FAC repeats claims and theories identical to those that the Court has already rejected. The Court should once again dismiss.[1]

On February 24, 2025, the Court issued a well-reasoned order granting Defendants' joint motion to dismiss, identifying several independently dispositive reasons why Plaintiffs' allegations failed to adequately state any claim: (1) Plaintiffs failed to plead viable products liability, negligence, misrepresentation, and state consumer protection claims; (2) Section 230 barred the common law claims; and (3) the Becca Schmill Foundation lacked Article III standing. ECF No.

[1] "Plaintiffs" in this action collectively refers to Joann Bogard, Annie McGrath, Jane Doe, and the Foundation. "Defendants" collectively refers to the Google Defendants and the TikTok Defendants. Alphabet Inc. and XXVI Holdings Inc were previously named defendants who were dismissed with prejudice.

108 ("Order"). The few minor revisions to the FAC do not address those deficiencies.

The FAC's immaterial amendments include:

- Allegations that Defendants' content review tools "[were] not capable of conducting a review of the user reports and the videos that were reported," whereas Plaintiffs previously claimed the tools were "flawed";
- Allegations made on information and belief that when a user specifically sought out videos to report, the user could receive "recommendations" for similar videos;
- Allegations that Defendants' content reporting tools are difficult to use and confusing, despite Plaintiffs' admissions that they frequently used these tools to report third-party videos;
- Allegations that Defendants obtained revenue from targeted ads; and
- Allegations about the Foundation's "core activities."

At bottom, the FAC rests on the same underlying theory that this Court has already rejected as barred by Section 230. As this Court previously held, Defendants cannot be held liable for their content moderation decisions, including their alleged failure to remove third-party videos that Plaintiffs reported as potentially violating Defendants' Community Guidelines. Plaintiffs' failure to change the theory of their case or add any curative allegations requires the Court to, once again, dismiss the FAC in its entirety. Indeed, this failed second bite at the apple makes clear that Plaintiffs' theory of liability suffers from systemic issues, regardless of how they frame it. The Court should therefore dismiss without leave to amend.

II. BACKGROUND

Plaintiffs are four individuals and a foundation, FAC ¶¶ 42–45, who allege various common law and state law statutory claims arising from content "reporting tools that Defendants created, designed, and marketed to members of the public." *Id.* ¶¶ 11, 32. Plaintiffs allegedly used each Defendant's content-reporting function to flag "dangerous" third-party videos for moderation. *Id.* ¶¶ 8, 9. Each version of the pleadings has asserted the same eight causes of action,[2] and the FAC,

[2] The eight claims are: (1) strict products liability for design defect; (2) negligence; (3) fraudulent misrepresentation; (4) negligent misrepresentation; (5) violation of the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5 *et seq.*; (6) violation of the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18 *et seq.*; (7) violation of the Oregon Unlawful Trade Practices Act, Or. Rev. Stat. § 646.605 *et seq.*; and (8) violation of California's Unfair Competition and False Advertising Laws, Cal. Bus. & Prof. Code §§ 17200 & 17500, respectively. For efficiency, claims (3) and (4) are sometimes jointly referred to as Plaintiffs' misrepresentation claims.

like its predecessor, seeks to hold Defendants liable for failing to remove all videos Plaintiffs reported. *Compare, e.g.*, ECF No. 1 ¶ 75 (alleging liability based on "YouTube and TikTok's repeated arbitrary determinations, failure to enforce their guidelines, and ultimate invalidation of [Plaintiff's] voluntary efforts to report harmful content") *with* FAC ¶ 85 (same).

A. The Court's Prior Dismissal Order.

Section 230. The Court held that Section 230 barred Plaintiffs' common law (i.e., strict products liability, negligence, and misrepresentation) claims because they sought "to treat Defendants as [ ] publisher[s] or speaker[s] of information provided by others." Order at 30. Regarding the strict products liability claim, Plaintiffs theorized that Defendants had designed a "defective" reporting tool "because objectionable content persists on their platforms even after it is reported." *Id.* at 31. The "duty" Plaintiffs sought to impose was therefore one "to remove reported videos"—"precisely the circumstances in which Section 230 applies." *Id.* Section 230 similarly barred the negligence claim to the extent it was based on Defendants' roles "as manufacturers or providers of a product, and a corresponding obligation to remove content." *Id.* Plaintiffs' "duty to protect" negligence theory suffered from similar flaws, as the alleged duty also would have required Defendants to remove "*all* prohibited content," or else face liability. *Id.* 31–32 (emphasis added). As for the misrepresentation claims, "fulfilment of the duty . . . would necessarily require Defendants to change how they moderate content posted by third parties—i.e. to remove all reported videos," which Section 230 barred. *Id*. at 32.[3]

Common Law Tort Claims – Merits. In dismissing the strict products liability claim, the Court rejected the notion that Defendants' reporting tools were "products" subject to products liability law. *Id*. at 11–14. The Court noted that "Plaintiffs do not challenge Defendants' reporting tools *per se*," and the argument that the tools were "ineffective" was "an objection to Defendants' decisions . . . to remove or not remove certain videos," not "to the functionality of the reporting tool itself." *Id*. at 12. The alleged defect therefore reflected Plaintiffs' disagreement with "ideas, content, and free expression, upon which products liability claims cannot be based." *Id.* at 13. The

[3] The Court did not decide if Section 230 barred the state statutory claims, although it recognized that these claims "rely on the same alleged misrepresentations." *Id.* at 21.

Court also found that Plaintiffs had failed to allege an actionable harm. *Id.* at 14.

The Court dismissed the negligence claim for failure to plead duty and rejected the notion that "offering a means to report videos" somehow created a "special relationship" between Defendants and Plaintiffs. *Id.* at 15. The Court noted there were no facts suggesting that Defendants had undertaken "an obligation to remove immediately any video" that users believe violate Defendants' policies or guidelines. *Id.* at 15.

The Court dismissed the misrepresentation claims for failure to plead the necessary elements, including with the particularity required by Rule 9(b). As the Court noted, most challenged statements "simply describe what content is allowed on the platforms," making it "difficult to imagine how such statements . . . could be considered 'false' . . . . " *Id.* at 19. Other challenged statements were about Defendants' "subjective determination[s]" about whether third-party content violated their guidelines and so were "not [ ] susceptible of being 'true' or 'false." *Id.* at 20. Plaintiffs also failed to plead justifiable reliance or damages. *Id.* at 20–21.[4]

State Statutory Claims – Merits. The Court dismissed Plaintiffs' Indiana, Oregon, Wisconsin, and California state statutory claims because they relied on the same alleged statements as the misrepresentation claims and suffered from the same deficiencies. *Id.* at 21, 23, 25, 26. The Court also held that Plaintiffs failed to plead the requisite damages or injury. [5]

Article III Standing. The Court held that the Foundation did not adequately allege Article III standing because it failed to identify a cognizable theory for how Defendants' actions directly harmed the Foundation's "*already-existing* core activities." *Id.* at 9. The Court specifically rejected the Foundation's theory that Defendants' actions led it to devote resources to a study of social media harms. The Court observed that such research was already part of the Foundation's activities and therefore the associated costs could not be attributed to Defendants. *Id.*

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[4] Because Plaintiffs had generally failed to state cognizable tort claims as to the elements of duty, breach, and harm, the Court declined to address whether Plaintiffs had sufficiently pleaded proximate causation. Order at 29.

[5] *See id.* at 21 (insufficient allegations of physical impact or harm under Indiana law); 23–24 (insufficient allegations of pecuniary loss tied to Defendants' allegedly defective content reporting systems under Wisconsin law); 25–26 (insufficient allegations of economic harm under Oregon law); 26–28 (insufficiently abstract theory of economic injury arising out of the potential monetization of personal data under California law).

B. Plaintiffs' Amendments.

On March 24, 2025, Plaintiffs filed the FAC, which re-alleges the same claims as the original complaint and is brought by the same named Plaintiffs. Although the FAC contains minor changes—such as substituting "reporting tools" for "reporting features" the substantive allegations remain fundamentally the same, as summarized below.[6]

Changed "Meaningful Review" to "Incapable of Conducting a Review." The FAC, like the original complaint, still alleges that Defendants "fail[ed] to meaningfully respond to reports of harmful contents," FAC ¶¶ 28, 167, 197–98, 233. The FAC now alleges that Defendants' content review tools were "not capable of conducting a review of the user reports and the videos." *Id.* ¶¶ 9, 11, 20, 121, 136. Plaintiffs elsewhere concede they reported multiple third-party videos to Defendants using these "tools," received verification that their reports had been submitted, and Defendants removed some, but not all, of the reported content. *Id.* ¶¶ 21, 63, 68, 82, 93.

Algorithms. The FAC alleges "upon information and belief" that Defendants' content reporting processes "may . . . amplify" the reported content because searching for, watching, and re-watching the videos "would potentially" subject "the user . . . to more recommendations similar to the harmful content" due to Defendants' algorithm(s). *Id.* ¶ 17. However, Plaintiffs continue to allege that they affirmatively sought out specific videos or types of content to report, and locating these videos was central to their advocacy. *Id.* ¶¶ 7–9. Plaintiffs do not allege that reporting videos impacted their virality for *other users*—only that "the user" who reported a given video may receive "recommendations" for similar videos. *Id.* at ¶ 17.

Ease of Use of Reporting Tools. Plaintiffs now allege that although they successfully reported multiple third-party videos to Defendants and received responses to their reports, Defendants' content reporting processes are "confusing" and "do[] not provide a means for the user to track the status of the harms report." *Id.* at ¶¶ 67, 73. Plaintiffs elsewhere concede they could (and did) "track the status of" their reports. *Id.* at ¶ 125.

Advertising Revenue. The state statutory claims contain a new paragraph alleging that

[6] A redline comparing the FAC to the original complaint is attached as Exhibit A to the concurrently-filed Declaration of Tiana Demas ("Demas Decl.").

Defendants "gained profit such as advertising packages specifically targeting children and minor users." *Id.* at ¶¶ 215, 223, 247. Plaintiffs do not purport to bring claims on behalf of children or minors.

The Foundation. The FAC alleges that the Foundation's "core activities include legislative advocacy that includes provisions that require online media social media platforms to implement proper harm reporting tools," and that the Foundation "educations [sic] the public on model social media behavior which includes making reports of harmful contents." *Id*. at ¶ 45.

III. LEGAL STANDARD

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citations omitted). Moreover, the Court is not required to "'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" *Prager Univ. v. Google LLC* ("*Prager I*"), No. 17-cv-06064-LHK, 2018 WL 1471939, at *3 (N.D. Cal. Mar. 26, 2018) (quoting *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (*per curiam*)). Nor does the Court need to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Under Rule 9(b), allegations of fraud or mistake must be pled "with particularity." Fed R. Civ. P. 9(b). "A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir. 1993) (citations and quotations omitted). This includes pleading "the who, what, when, where, and how of the misconduct charged." *Whiteside v. Kimberly*

Clark Corp., 108 F.4th 771, 785 (9th Cir. 2024) (citation and quotations omitted).

Denying leave to amend and dismissing claims with prejudice is an appropriate remedy where Plaintiffs cannot "identif[y] any additional allegations that would cure their pleading deficiencies if they were afforded yet another opportunity to amend." *Hogan v. Amazon.com, Inc.*, 2025 WL 869202, at *2 (9th Cir. Mar. 20, 2025); *see also Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011) (affirming dismissal without leave to amend where "none of the new allegations cure[d] . . . deficiencies").

IV. PLAINTIFFS' CLAIMS ARE BARRED BY SECTION 230.

Each claim in the FAC faults Defendants for failing to remove third-party content that supposedly violated their guidelines, and each is therefore barred by Section 230. The Court previously held that Section 230 barred Plaintiffs' common law claims because each claim sought to treat Defendants as publishers or speakers of information provided by others. Order at 30–32. The FAC's minor amendments do not change that conclusion. The state statutory claims are premised on the same seven statements as the common law misrepresentation claims. FAC ¶¶ 215, 223, 233, 243. Consequently, the statutory claims are barred by Section 230 because they similarly seek to impose a duty "to moderate third-party content—or else face liability." *Calise v. Meta Platforms, Inc.*, 103 F.4th 742 (9th Cir. 2024). The Court should dismiss the FAC with prejudice because none of its amendments cured the original complaint's defects, and none could.

A. Section 230 Bars the Strict Products Liability Claim (Count I).

The strict products liability claim still seeks to hold Defendants liable for failing to remove the third-party videos Plaintiffs reported and is therefore barred by Section 230.[7] As the Court previously noted, "Plaintiffs' theory of liability is that Defendants designed a reporting tool that is defective because objectionable content persists on their platforms even after it is reported; in other words, the breach of duty alleged is Defendants' failure to remove reported videos." Order at 31. The theory remains the same. *See, e.g.*, FAC ¶ 21 ("less than 5 [percent] of [the videos Plaintiffs

[7] There is no question that the reported videos are third-party content, and Plaintiffs do not allege that Defendants created or developed the videos at issue. *See* FAC ¶¶ 6, 8–9, 14–15, 17, 19, 27–28, 30, 39, 45, 63, 67, 73–75, 81, 85, 87, 102, 113, 132, 134, 136, 141, 145, 164, 182, 195, 224, 233.

reported] were deemed violative of the Community Guidelines. This leaves only one possibility: the review process of the reporting tool is defective."); ¶ 28 ("By sending automated messages to users who report harmful content and taking the position that the reported material is 'not against community guidelines,' Defendants harmed users in a distinct way."); ¶ 139 ("Researchers reported 20 of the videos, but none of them were removed.").

Although the FAC now claims that Defendants' reporting systems were "not *capable* of conducting a review of the harmful content," *Id.* ¶ 164, the essence of the strict liability claim remains the same: that "Defendants' fail[ed] to remove reported videos." Order at 31. The content reporting processes obviously functioned, as Plaintiffs submitted reports and received responses.[8] FAC ¶¶ 21, 82, 93, 136. Instead, Plaintiffs point to "utterly *inconsistent* results of the review," which allegedly "indicates that the reporting tool is *incapable* of assessing the harmful content against its own Guidelines." *Id.* at ¶ 136 (emphasis added). In other words, the alleged "defect" is "not moderating content in some way, whether through deletion, change, or suppression." *Est. of Bride v. Yolo*, 112 F.4th 1168, 1180 (9th Cir. 2024) (affirming dismissal of products liability claims under Section 230).[9] Any theory of liability arising out of that conduct is barred by Section 230. Order at 31; *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("[T]he very essence of publishing is making the decision whether to print or retract a given piece of content.").

The FAC also adds allegations about Defendants' "algorithms"—namely, that by engaging with certain videos, a "user may be subject to more recommendations similar to the harmful content." FAC ¶ 17. Those allegations do not impact the Section 230 analysis. The Ninth Circuit has consistently held that an online platform's use of neutral algorithms to recommend content to

[8] As such, the Court need not accept these contradicted allegations as true. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (courts are not "required to accept as true allegations . . . that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"); *see also Lee v. Fin. Recovery Servs.*, No. 5:24-cv-00861, 2024 WL 5439275, *2-3 (C.D. Cal. Nov. 14, 2024) (dismissing claim where "amended complaint's allegations are difficult to reconcile with those in the original complaint")

[9] To the extent Plaintiffs suggest that using automated processes for content moderation is not protected by Section 230, they are wrong. *See Ryan v. X Corp.*, No. 24-cv-03553, 2024 WL 5058526, at *8 (N.D. Cal. Dec. 9, 2024) ("[N]o authority suggests that [a social media platform's] use of a generative AI model to do content regulation deprives it of section 230 immunity. . . . No court has held otherwise.")

users is protected by Section 230 immunity. *See, e.g.*, *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (affirming dismissal of all claims and holding that website's alleged use of "features and functions, including algorithms" to "recommend" third-party content to others was immunized by Section 230); *Gonzalez v. Google LLC,* 2 F.4th 871, 894 (9th Cir. 2021), *vacated on other grounds,* 598 U.S. 617, 622 (2023) (applying section 230 immunity to algorithm that "select[ed] the particular content provided to a user based on that user's inputs"). According to Plaintiffs, Defendants' "algorithms" and the resulting recommendations are driven by user input. FAC ¶ 141. They are thus materially indistinguishable from those found to be protected by Section 230, which squarely bars the products liability claim.

B. Section 230 Bars the Negligence Claim (Count II).

Insofar as the negligence claim is premised on Defendants' alleged duties as manufacturers or providers of products,[10] obligating them to remove content, it is barred for the same reasons as the products liability claim. *See* Order at 31. The FAC's "failure to protect" theory is essentially unchanged, and it continues to improperly seek to impose a duty on Defendants to "protect users from an unreasonable risk of harm arising out of the use of their apps." FAC ¶ 176. The alleged "harm" underlying Plaintiffs' negligence claim is therefore the failure to remove videos Plaintiffs reported. *Id.* at ¶ 179 (asserting that "Defendants' reporting procedures rendered completely *arbitrary* results . . ."). The Court already determined that this precise harm is barred by Section 230. Order at 32; *see also Bride*, 112 F.4th at 1175–76 ("In short, § 230 protects apps and websites which receive content posted by third-party users . . . from liability for any of the content posted on their services, even if they take it upon themselves to establish a moderation or filtering system, *however imperfect it proves to be*.").

C. Section 230 Bars the Common Law Misrepresentation Claims (Counts III-IV).

The common law misrepresentation claims also seek to hold Defendants liable for failing to remove third-party content, and they are therefore barred by Section 230. The Court previously held that Plaintiffs' misrepresentation claims—based on the same seven alleged statements

[10] Defendants are not manufacturers or providers of products for purposes of products liability law. *See infra* at Section V.A.1.

repeated in the FAC—were barred by Section 230 because the "duty" these claims seek to impose would "require Defendants to change how they moderate content posted by third parties—i.e. to remove all reported videos." Order at 32. As the Court previously recognized, "many of the statements simply describe what content is allowed on the platforms," while others concerned Defendants' "subjective determination" of "whether a video violates a policy or guideline." *Id.* at 19, 20 (citations omitted). As such, none of the challenged statements is a "promise[] *unrelated to a defendant's role as a publisher or speaker of third-party content*." *Doe v. Grindr*, 128 F.4th 1148, 1154 (9th Cir. 2025) (emphasis added). Indeed, Plaintiffs assert that Defendants' descriptions of their content reporting features are false *only* when Plaintiffs disagree with the outcomes of their reports, *i.e.*, the content is not removed. FAC ¶¶ 192, 198, 199, 207. Plaintiffs add no new allegations that change the conclusion that the only way to comply with the duty Plaintiffs seek to impose is to remove the third-party content or else face liability. *Calise*, 103 F.4th at 742. Section 230 forecloses such claims. *Id.*

D. Section 230 Bars the State Statutory Claims (Counts V-VIII).

The Court previously noted that the "state statutory claims rely on the same alleged misrepresentations . . . [as] the common law misrepresentation claims." Order at 32-33. This is equally true of the statutory claims as alleged in the FAC, and Section 230 bars those claims for the same reasons as the common law misrepresentation claims. *See supra* Section IV.C. Each statutory claim alleges that Defendants made "misrepresentations," FAC ¶ 215 (IDCSA, Ind. Code § 24-5-0.5 *et seq.*), ¶ 222 (WDTPA, Wis. Stat. § 100.18 *et seq.*), ¶ 233 (OUTPA, ORS § 646.605 *et seq.*), or "false and material statements" (UCL and FAL, Cal. Bus. & Prof. Code §§ 17200 *et seq.* & 17500 *et seq.*). And each state statute imposes a duty not to commit "deceptive" acts or practices (IDCSA, WDPA, OUTPA), a "fraudulent business act or practice" (UCL), or "unfair, deceptive, untrue or misleading advertising" (FAL). As Plaintiffs frame it, Defendants explicitly and implicitly represented that they would review reported content in accordance with their guidelines. FAC ¶¶ 214, 222, 233, 243. But, as with Plaintiffs' misguided misrepresentation claims, the only way Defendants could fulfill the duty Plaintiffs seek to impose would be to remove third-party content. There are no well-pleaded allegations that Defendants did not review the reported videos

at all—in fact, Plaintiffs allege the opposite. *See, e.g., Id.* ¶¶ 14–15 (alleging that Defendants' automated reporting tools are defective because they "mistakenly block contents related to . . . breast-feeding advocates, failing to distinguish these from sexually explicit content"); ¶ 21 (alleging that "less than 5%" of the videos Plaintiffs reported "were deemed violative of the Community Guidelines").[11] Instead, Plaintiffs take issue with the *results* of that review—i.e., Defendants' decisions not to remove certain third-party content. That is quintessential publishing conduct protected by Section 230. As the Ninth Circuit held when affirming dismissal of a UCL claim in *Calise*, "the predicate duty [under the state unfair competition law] is to not engage in unfair competition by advertising illegal conduct," which "not only touches on quintessential publishing conduct, but [] is also indeed the very conduct that § 230(c)(1) addresses." *Calise*, 103 F.4th at 732, 744 (internal citations omitted). Section 230 bars the state statutory claims.

V. PLAINTIFFS FAIL TO STATE ANY CLAIM AGAINST DEFENDANTS.

Separate and apart from Section 230, each claim in the FAC fails on its merits. The same independent, dispositive deficiencies that this Court identified in its Order are fatal to Plaintiffs' amended pleading and justify dismissal without leave to amend.

A. Plaintiffs' Products Liability Claim Fails to Allege Any Cognizable Defect or Injury (Count I).

1. Defendants' Decision-Making on Content Is Not a Cognizable Products Liability Defect.

This Court made it clear that products liability claims premised on Defendants' *decisions* "to remove or not remove certain videos" are not viable because they raise no "objection to the functionality of the reporting tool itself." Order at 12. To plead a viable products liability claim, Plaintiffs must identify an alleged design defect that is not premised on Defendants "hav[ing] to change the content posted on their platforms." *Id* at 13. They have not done so.

As this Court previously explained, a products liability claim "may only proceed if the allegedly defective item qualifies as a 'product,' a 'question of law' to be resolved by the trial

[11] The FAC's new allegation that YouTube "knew it could not" review "reported contents against its Community Guidelines" lacks factual support and is contradicted by other allegations. *Compare* FAC ¶ 222 *with id.* ¶¶ 14-15, 21, 136, 179; *Lee*, 2024 WL 5439275, *2–3 (dismissing claim where "amended complaint's allegations are difficult to reconcile with those in the original complaint").

court." *Id.* at 11 (citing *Brooks v. Eugene Burger Mgmt. Corp.*, 215 Cal. App. 3d 1611, 1626 (1989)) (cleaned up). Products liability law is generally limited to "'tangible personal property distributed commercially for use or consumption.'" *Johnson v. United States Steel Corp.*, 240 Cal. App. 4th 22, 31 (2015) (citing Restatement (Third) of Torts: Prods. Liab. § 19 (1998)). Courts have rejected invitations to extend products liability law to encompass the intangible risks of ideas and expression. *See, e.g.*, *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) ("[W]e decline to expand products liability law to embrace the ideas and expression in a book.").[12]

Plaintiffs cannot salvage their products liability claims with new allegations that TikTok's and YouTube's "automated reporting tool[s]" were defective because they were "not capable of conducting a review of the harmful content against the Defendants' Community Guidelines." FAC ¶ 164. By "not capable of conducting a review" Plaintiffs plainly mean that they reported videos, and Defendants did not remove those videos. In Plaintiffs' view, if a video they reported was not removed, that must evidence a product *defect*, rather than an editorial decision. *Id.* at ¶ 9. But this "defect" is identical to the one this Court already rejected: "that the Defendants' reporting systems are defective because Plaintiffs' reports do not produce the outcomes that Plaintiffs believe they should—i.e. removal of the reported videos." Order at 13. Plaintiffs do not allege they were unable to make reports or that the reporting tools never removed content. Instead, Plaintiffs again fault Defendants for their editorial *decisions*. *See, e.g.*, FAC ¶¶ 66–67 (alleging defects with YouTube's reporting tool based on popup confirming that videos would be removed if found to be in violation of Community Guidelines); ¶ 98 (taking issue with "TikTok's executives" failure to "explain why the automated reporting tool did not reach the conclusion that the video violated the community guidelines"); ¶ 99 (listing videos that were not removed after they were reported). Because Plaintiffs target the content-moderation decisions arising from their use of Defendants' reporting

[12] For purposes of this motion to dismiss, Defendants continue to assume California law applies, a point that Plaintiffs did not contest. *See* Order at 10–11. Defendants maintain that products liability law only applies to "tangible" products, though Judge Gonzalez Rogers has taken a different approach. *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 848-49 (N.D. Cal. 2023). That reasoning, however, was based on a single decision from a court applying Florida law. In any case, Judge Gonzalez Rogers acknowledged that allegations reflecting a disagreement about "ideas, content, and free expression" are allegations "upon which products liability claims cannot be based." *Id.* at 849.

tools—and not a defect inherent in the tools themselves—their claims should again be dismissed.

Plaintiffs also allege in passing that Defendants use "defective algorithms" in making content available to users. *Id.* ¶ 17. Not only is this defect pled in conclusory terms without any connection to Plaintiffs' alleged harms, but it is also wholly premised on Defendants' decision-making about what content to host and recommend to users. Accordingly, it is also not a cognizable products liability defect.

Because Plaintiffs again fail to allege a design defect claim separate from Defendants' content moderation, Plaintiffs' products liability claims must be dismissed again, this time with prejudice.

2. Plaintiffs' Allegations Related to the Accessibility and Usability of Defendants' Reporting Tools Are Also Not Cognizable.

Plaintiffs fare no better with their new allegations that Defendants' reporting tools are defective because YouTube's reporting forms are "unreasonabl[y] difficult[]" to use and TikTok's reporting tool is "hidden within a three dotted button in the corner of the video or within the 'share button.'" FAC ¶¶ 67, 73. These conclusory allegations—no more than a single paragraph as to each of YouTube and TikTok—are insufficient as a matter of law. *See Iqbal*, 556 U.S. at 678 ("mere conclusory statements[] do not suffice"); *accord In re Gilead Scis. Sec. Litig.*, 536 F.3d at 1055.

More importantly, Plaintiffs do not allege that they were unable to make reports due to these purported defects. They claim just the opposite. Plaintiff Bogard alleges that she "*continuously* found and reported" videos on TikTok. FAC¶ 71 (emphasis added). Similarly, she says she reported "numerous" videos to YouTube. *Id.* 63. The other Plaintiffs similarly claim to have submitted multiple reports. *Id.* ¶ 82 (Plaintiff McGrath reported "several" videos to YouTube); ¶¶ 90, 92, 99 (Plaintiff Doe, her son M.F., and a third-party acquaintance all used TikTok's reporting tool); ¶ 109 (alleging the Foundation "made reports" to both TikTok and YouTube). Nor do Plaintiffs allege, much less plausibly, that the location of any reporting tools is connected to their claimed harms. In other words, Plaintiffs have not pled any injury-in-fact arising from these newly-alleged defects. *See Browning v. Am. Honda Motor Co., Inc.*, 2022 WL 824106, at *5 (N.D. Cal. 2022) (no Article III standing where plaintiffs did not plead that they themselves experienced

product defect in vehicle).

Whether Plaintiffs failed to plead a facially plausible defect or failed to allege any injury in fact arising from this defect—the result is the same. Plaintiffs' products liability claims must be dismissed.

3. Plaintiffs' Products Liability Claims Also Fail Because They Allege No Actionable Harm.

Plaintiffs' products liability claims should also be dismissed because they fail to allege any injury "tethered to a product defect." Order at 14. This Court previously found that Plaintiffs "d[id] not allege any harm caused by Defendants' purportedly defective reporting tools," because Plaintiffs' injuries were tied to Defendants' content removal decisions, not any defect in Defendants' reporting tools. *Id.* This remains true.

Plaintiffs allege they were harmed because they had to "watch the traumatic scenes of childrens'[*sic*] suffering over and over" and they suffered "severe mental harm, leading to emotional distress, pain, and suffering as well as a futile waste of time." FAC ¶¶ 167, 170. Neither of these purported harms results from a defect in Defendants' reporting tools. Indeed, paragraph 170 is substantively identical to what Plaintiffs previously alleged in their initial Complaint. *See* Ex. A at 50. These alleged injuries still stem from Plaintiffs' reactions to Defendants' decisions about what content to remove (or not remove). As a result, Plaintiffs have not pled an actionable harm, and their products liability claims should be dismissed once again.

B. Plaintiffs' Negligence Claim Fails Because Plaintiffs Still Fail to Adequately Plead the Existence of a Duty (Count II).

Duty is a required element of a negligence claim. *See Dyroff*, 2017 WL 5665670, at *12. This Court previously found that Plaintiffs failed to allege either a circumstance in which Defendants assumed a duty of care or that Defendants owed a special duty of care to Plaintiffs. Order at 15–16. Plaintiffs' amended allegations on duty are even more cursory and conclusory than those in their initial pleading, and they provide no reason for this Court to reach a different conclusion.

In the FAC, Plaintiffs allege that Defendants have a "duty to develop a reporting tool that is reasonably safe" and that Defendants have a "special duty to respond to Plaintiffs' reports,

because [Defendants] ostensibly designed, maintained, offered, and held out their reporting processes as a way to address user reports of harmful content." FAC ¶¶ 37, 39. Neither of these assertions, which are merely legal conclusions disguised as factual allegations, addresses the pleading defects that this Court previously identified. Plaintiffs still "plead no facts suggesting that Defendants have undertaken an obligation to remove immediately any video Plaintiffs or other users report," Order at 15; —they allege only that Defendants offered "a way to address user reports." FAC ¶ 39. And Plaintiffs' claims still "fail to plausibly allege that Defendants assumed a special duty of care" to Plaintiffs who "are adults who assert claims on their own behalf, not on behalf of children." *Id*. at 16.

C. Plaintiffs' Misrepresentation Claims Must be Dismissed (Counts III and IV).

The Court should again dismiss all fraud and misrepresentation claims, including the state statutory claims ("Fraud Claims"),[13] for failure to state a claim or satisfy Rule 9(b), which requires Plaintiffs to identify "the who, what, when, where, and how of the misconduct," including "*what* is false or misleading … and why." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). The Fraud Claims, as lightly amended, boil down to a theory that Defendants misrepresented their content-reporting processes in their respective policies. FAC ¶¶ 19, 34, 121–22, 134–36, 191, 207, 214, 222, 233, 244. But Plaintiffs still fail to allege any facts—much less with the particularity required by Rule 9(b)—from which it could be determined that the statements in these policies

[13] Plaintiffs' fraudulent misrepresentation claim (Count III), the IDCSA claim (Count V), the WDPTA claim (Count VI), the OUTPA claim (Count VII), and the UCL/FAL claim (Count VIII) all "sound in fraud." *See Gilmore v. Wells Fargo Bank N.A.*, 75 F. Supp. 3d 1255, 1271 (N.D. Cal. 2014) (applying Rule 9(b) to fraudulent misrepresentation claim); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009) (applying Rule 9(b) to state consumer fraud statutory claims); *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014) (same); *Lynch v. DeMotte State Bank*, 2022 WL 4300455, at *4 (N.D. Ind. Sept. 19, 2022) ("[a]n incurable deceptive act [under the IDCSA] requires a showing of fraud and, thus, must be pled with particularity"); *Martell v. Gen. Motors LLC*, 492 F. Supp. 3d 1131, 1145 (D. Or. 2020) (applying Rule 9(b) to assess the sufficiency of plaintiff's OUTPA claim); *Great Pac. Sec. v. Barclays Cap., Inc.*, 743 F. App'x 780, 783 (9th Cir. 2018) (ruling alleged UCL and FAL claims "are subject to Rule 9(b)'s particularity standard"). Similarly, Plaintiffs' negligent misrepresentation claim (Count IV) rests entirely on the allegation that Defendants "made false representations," FAC ¶ 206, and also is subject to Rule 9(b), *see, e.g.*, *Gilmore*, 75 F. Supp. 3d at 1270 ("The Court agrees with the line of cases that hold that negligent misrepresentation is a species of fraud, and, hence, must be plead in accordance with Rule 9(b)."). However, Plaintiffs' allegations as to the Fraud Claims are inadequate even under the more forgiving Rule 8(a) pleading standard. *See* Order at 17 n.6 (determining Plaintiffs' original complaint inadequately pled the Fraud Claims under both under the more forgiving Rule 8(a) and more stringent Rule 9(b) standards).

were false when made. *Das v. WMC Mortg. Corp.*, 831 F. Supp. 2d 1147, 1166 (N.D. Cal. 2011) (dismissing "vague and conclusory" negligent misrepresentation claims that lacked "any information as to the who, what, when, where, and how of the misconduct charged") (citation omitted); *In re Uber Passenger Sexual Assault Litig.*, 745 F. Supp. 3d 869, 900-01 (N.D. Cal. 2024) (dismissing fraud, misrepresentation, and UCL claims for failure to plead what representations Plaintiffs saw and relied on).

The FAC continues to allege that: (1) Defendants' Community Guidelines describe the type of third-party content that they do not allow; (2) Defendants state they will remove reported content that *they determine* violates their guidelines; (3) Plaintiffs reported videos that *they believed* violated Defendants' Community Guidelines; (4) Plaintiffs received responses to their reports; and (5) Plaintiffs disagree with Defendants' content moderation decisions. *See* FAC ¶¶ 82-84, 92-93, 97, 191-92, 199. These amount to the same basic set of facts that the Court previously held to be inadequate to state fraudulent or negligent misrepresentation claims. Order at 16–21.

Plaintiffs still fail to point to a single statement by Defendants that reporting a video will yield a specific result. Quite the opposite. Defendants make clear that *they* are the sole arbiters of whether third-party content violates their Guidelines. FAC ¶ 66 (YouTube's message stating "[i]f *we find* this content to be in violation of our Community Guidelines, we will remove it"); ¶ 116 (TikTok's message stating "[w]e'll review your report and take action *if there is a violation* of our Community Guidelines"). And as the Court previously held, statements that Defendants do "not allow" certain content are not "equivalent to a representation that Defendants' platforms *do not have* content that violates Defendants' policies or guidelines." Order at 19. The FAC therefore "fail[s] to plead what is false about each challenged statement or why each is false." *Id.*

To the extent Plaintiffs allege that Defendants' statements about the actions they will take regarding violative videos are false, those allegations fail to state a claim. Plaintiffs still have not identified any specific video that contained prohibited conduct that was not removed once a Defendant determined it violated that Defendant's guidelines.[14] Plaintiffs' own allegations, which

[14] As noted above, there is no well-pleaded allegation that Plaintiffs (or anyone other than Defendants) are responsible for determining if third-party content violates Defendants' guidelines.

describe Defendants' content moderation policies and processes, would belie any such contention. Plaintiffs have alleged that some of the videos they reported have, in fact, been removed by Defendants—which logically requires Defendants to have reviewed the reported video, determined that it violated their respective policies, and taken action to remove them. *See* FAC ¶¶ 117 ("If TikTok deems the reported content to violate its guidelines, the following message appears: "We removed [reported video]. We removed the video you reported for violating our Community Guidelines. Thank you for helping us keep TikTok safe."). That Plaintiffs disagree with Defendants' subjective determination of whether a video was violative or should be subject to removal does not render Defendants' description of their determinations—or of the criteria they use to make those determinations—false. *See Id.* ¶ 20; Order at 20 ("Moreover, to the extent determination of whether a video violates a policy or guideline or contains specific prohibited content requires a subjective determination that must be made by Defendants, even these affirmative 'we remove' statements may not be susceptible of being 'true' or 'false.'").

Even for the statements that the Court previously considered a "closer question," *see* Order at 19–20, Plaintiffs make no attempt to allege new facts that could save their claims based on future-looking statements—nor could they, as future-looking statements are not actionable as negligent misrepresentations. *Id.* at 20 (citing *Aton Ctr., Inc. v. United Healthcare Ins. Co.*, 93 Cal. App. 5th 1214, 1245-46 (2023)); *see also* Ex. A at 53-54.

Plaintiffs have not pleaded any other aspect of their Fraud Claims with the particularity required by Rule 9(b). They have set forth, at best, conclusory allegations of reliance that this Court need not accept as true. *See* Order at 8 ("[T]he Court is not required to 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" (quoting *Prager I*, 2018 WL 1471939, at *3)). The Court should therefore dismiss the Fraud Claims.

D. Plaintiffs' Statutory Claims Fail for Additional, Independent Reasons (Counts V-VII).

IDCSA. Plaintiff Bogard's IDCSA remains deficient. The Court previously dismissed this claim because Plaintiff Bogard had failed to identify a relevant "consumer transaction," and because she had failed to adequately allege that she suffered physical impact or harm. Order at 22.

The sole amendment to this claim alleges that Defendants "misrepresented about the reporting tools so that they may continue to upkeep a pretense of safety, while they gained profit such as advertising packages specifically targeted at children and minor users." FAC ¶ 215. As a threshold matter, it is unclear how this allegation is relevant to Plaintiff Bogard, who is an adult. But in any event, this single amendment does not cure the deficiencies previously identified. Plaintiff Bogard does not assert that "Defendants' alleged misrepresentations induced her to use the TikTok or YouTube applications in the first place," nor does she allege any "physical impact or harm." Order at 22; *see Bank v. Huizar*, 178 N.E.3d 326, 341 (Ind. Ct. App. 2021) (noting that "a direct physical impact" constitutes damages under the IDCSA).

WDTPA. Plaintiff McGrath again fails to state a claim under the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18 *et seq.* ("WDTPA").

The purpose of the WDTPA "is to compensate members of 'the public' who, as a result of 'untrue, deceptive, or misleading statements,' are induced to take certain actions." *Fricano v. Bank of America NA*, 366 Wis.2d 748, 770 (Ct. App. 2015). As such, and as this Court recognized, to adequately state a WDTPA claim, Plaintiffs "must plausibly allege that: (1) 'with the intent to induce an obligation, the defendant made a representation to 'the public'; (2) 'the representation was untrue, deceptive or misleading'; and (3) 'the representation caused the plaintiff a pecuniary loss.'" *See* Order at 23 (quoting *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 301 Wis.2d 109, 121–22 (Wis. 2007)).

The Court previously dismissed this claim on the grounds that Plaintiffs failed to allege the requisite causal connection between Defendants' allegedly flawed reporting systems and Plaintiff McGrath's alleged pecuniary loss. Order at 24–25. The Court pointed out that according to Plaintiffs' own allegations, McGrath did not return to work for three years because of the tragic loss of her son, not because of any of Defendants' alleged conduct. *Id.* In the FAC, McGrath re-alleges that she suffered a pecuniary loss by "having to take time off her work," FAC ¶ 86, but this time removed the explicit reference linking McGrath's time off to the loss of her son.

But merely omitting that adverse fact is insufficient to cure the fatal flaw previously identified by the Court. *See Cole v. Sunnyvale*, No. C-08-05017 RMW, 2010 WL 532428, *4 (N.D. Cal. Feb. 9, 2010) ("The court may also consider the prior allegations [from the original complaint] as part of its 'context-specific' inquiry based on its judicial experience and common sense to assess whether the Third Amended Complaint plausibly suggests an entitlement to relief, as required under *Iqbal*."); *Lee*, 2024 WL 5439275, at *2-3 (dismissing claim where "amended complaint's allegations are difficult to reconcile with those in the original complaint… [Plaintiff] cannot, however, avoid dismissal simply by eliminating allegations that would otherwise defeat her…claim, especially where she fails to explain why she decided to omit such adverse facts in the amended complaint.").[15] And in any event, the allegations in the FAC that otherwise reference her leave from work are always tethered to her existing feelings being "exacerbated," or her being "re-traumatized" from that loss. FAC ¶ 85; *see also id.* at ¶ 86 ("Defendants' failure to review [her] reports *exacerbated* feelings of helplessness, anxiety, and lack of closure because of the concern that other children are exposed to the fatal harms that took her son away. This has caused both emotional and financial injury to [her] due to the loss of health, time, and having to take time off her work." (emphasis added)).

Setting aside the inadequacy of allegations related to causation, Plaintiff McGrath also does not claim that the alleged misrepresentations induced any action or inaction. Whether a representation "induced" an obligation turns on whether the plaintiff would have acted in its absence. *Fricano*, 366 Wis. 2d at 772. The FAC repeatedly alleges the opposite and is replete with allegations about Plaintiffs' *voluntary* efforts. *See, e.g.*, FAC ¶¶ 10 (alleging that Plaintiffs "*voluntarily* contributed labor and resources to help TikTok and YouTube's content moderation teams"); 85 (describing McGrath's "*voluntary* efforts to report harmful content.") (emphases added). Read as a whole (and consistent with Plaintiffs' identifying as "vigilantes," *Id.* ¶ 7), the

[15] Plaintiffs' strategic omission of this fact raises other problems, too: it indicates that McGrath's claim accrued prior to February 1, 2020, the earliest possible date under which a WDPTA claim can be timely. Section 100.18 is a statute of repose, which requires that a cause of action be brought within three years of Defendants' actions to led to any alleged injury, "regardless of whether Plaintiffs had discovered the injury or wrongdoing." *Fricano*, 366 Wis. 2d at 770. Accordingly, to the extent Plaintiffs' claim is tethered to any action Defendants took prior to February 1, 2020, the action is time barred. *Id*., *see* FAC ¶¶ 81-82.

only reasonable inference is that Plaintiffs used YouTube's reporting tools of their own volition and were not *induced* to do so. Plaintiffs' WDTPA claim thus fails.

OUTPA. Doe again pleads a claim under the Oregon Unlawful Trade Practices Act, ORS § 646.605 *et seq.* ("OUTPA") against the TikTok Defendants. As the Court already recognized, to adequately state a claim under the OUTPA, Doe must, at minimum, allege a misrepresentation and an "ascertainable loss of money or property." Order at 25–26 (analyzing Or. Rev. Stat. Ann § 646.608(1)).

As the Court already determined, "pleading an ascertainable loss of money or property is an essential element of a private UTPA claim." Order at 26 (quoting *Egbukichi v. Wells Fargo Bank, NA*, 184 F. Supp. 3d 971, 978 (D. Or. 2016)). The Court previously dismissed the OUTPA claim because Doe failed to adequately allege an ascertainable loss of money or property based on the allegation that she lost "work, time, and sleep" in attempting to get objectionable videos removed. Order at 26. As this Court held, "a qualifying ascertainable loss must be 'objectively verifiable' and 'specifically of money or property.'" *Id*. (quoting *Pearson v. Philip Morris, Inc.*, 358 Or. 88, 117 (Or. 2015)).

Doe has attempted to cure this deficiency by adding allegations that she "lost time and resources" and thereby suffered an ascertainable loss of injury, "including a loss of money and property." FAC ¶¶ 233, 234. Lost time is a noneconomic loss and "noneconomic losses cognizable in a civil action—such as physical pain, emotional distress, or humiliation—will not satisfy a private UTPA plaintiff's burden." Order at 26 (quoting *Pearson*, 358 Or. at 117) (citation omitted). And vague allegations of lost "resources," which could constitute further noneconomic losses like mental bandwidth or emotional capacity, does not adequately plead an "ascertainable loss" that is "objectively verifiable" and "specifically of 'money or property.'" *Pearson*, 358 Or. at 117. Without more, the Court need not accept as true the bare legal conclusion that Doe suffered a loss of money or property—particularly not when the Court previously dismissed this claim due to Doe's same failure to plead a qualifying ascertainable, objectively verifiable, money or property loss. *Prager I*, 2018 WL 1471939, at *3.

Because the OUPTA claim suffers from the same defects as before, the Court should again dismiss.

UCL and FAL. Plaintiffs repeat their allegations that Defendants made false and material statements about their content reporting tools in violation of California law. As the Court previously explained, remedies under the UCL and FAL are limited to injunctive relief and restitution arising out of an economic injury. Order at 27–28; *see Hinojos v. Kohl's Corp*., 718 F.3d 1098, 1104 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) ("The 'lost money or property' requirement therefore requires a plaintiff to demonstrate 'some form of economic injury' as a result of his transactions with the defendant"). And the Court previously determined that Plaintiffs failed to allege economic injury based on monetary value of personal data Defendants obtained, as Plaintiffs could not explain how Defendants supposedly derived any value from the alleged misrepresentations. Order at 28. The only amendment to the UCL and FAL claim is paragraph 247, which alleges that "Defendants misrepresented about the reporting tools so that they may continue to upkeep a pretense of safety, while they gained profit such as advertising . . . [which] allowed Defendants to purposely derive economic benefits, including ad revenue." FAC ¶ 247. This still does not allege the required economic injury. Plaintiffs do not allege they paid anything to watch or report videos on YouTube or TikTok, much less that they lost money or property as a result of Defendants' content moderation processes. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 715 (N.D. Cal. 2011) (dismissing UCL claim with prejudice because "Plaintiffs allege that they received Defendant's services for free," and therefore, "as a matter of law, Plaintiffs cannot state a UCL claim.").

E. Plaintiffs Do Not Plausibly Plead Proximate Causation or Foreseeability.

While recognizing that causation is an issue not *generally* resolved during the pleadings stage, the Court nevertheless held that Plaintiffs are still "required to *plead* causation based on plausible allegations of fact" and invited Defendants to raise causation and foreseeability in light of Plaintiffs' amendment. Order at 29. Plaintiffs failed to adequately plead causation and foreseeability in their original complaint and their scant amendments to the FAC do not fix this defect.

Either proximate cause or foreseeability are requisite aspects of each of Plaintiffs' common law tort claims[16] and state statutory claims.[17] But Plaintiffs still do not plead facts that draw a causal nexus between their alleged injuries and Defendants' reporting tools and statements regarding those tools. Plaintiffs' theory of liability remains that after their children passed, they affirmatively sought out, viewed, and reported videos that they believed to be harmful. FAC ¶¶ 7, 10. To the extent Plaintiffs allege emotional harm from this "re-experience," their self-exposure to specific triggering content is not attributable to (or foreseeable by) Defendants and is clearly barred by Section 230. *See supra* Section IV.A. And any claim that the harms were allegedly caused by Plaintiffs receiving inadequate responses from Defendants after Plaintiffs submitted their reports necessarily fails a causation and foreseeability analysis. Plaintiffs' own independent choices—not Defendants' actions—started the chain that eventually (but not always) resulted in responses they (sometimes) found unsatisfactory. *See Wawanesa Mut. Ins. Co. v. Matlock*, 60 Cal. App. 4th 583,

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[16] *Shih v. Starbucks Corp.*, 53 Cal. App. 5th 1063, 1070 (2020) (dismissing products liability claim because Plaintiffs' alleged injury "was not a foreseeable result of the alleged defects"); *Modisette v. Apple Inc.*, 30 Cal. App. 5th 136, 155 (2018) (affirming dismissal of products liability and negligence claims arising from car accident for lack of causation because "the gap between Apple's design of the iPhone and the Modisettes' injuries is too great for the tort system to hold Apple responsible" (citation omitted)); *Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594, 609 (2014) (dismissing misrepresentation claim because "[plaintiff] has not sufficiently pleaded a causal connection between any damages and any actionable conduct by the defendants"); *Karimi v. Wells Fargo*, No. 11-cv-00461, 2011 WL 10653746, at *2 (C.D. Cal. May 4, 2011) (dismissing fraudulent misrepresentation claim because Plaintiffs' alleged damages, including emotional distress, were not the result of Defendant's allegedly fraudulent misrepresentation that Plaintiffs' property would not be foreclosed on while loan modification request was pending, but rather, were "the natural consequences of foreclosure, even when it is completely legal").

[17] *See In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, 2009 WL 3460218, at *5 (N.D. Ill. Oct. 20, 2009) (denying motion for class certification for IDCSA claim where plaintiffs did not adequately allege class members' damages were proximately caused by reliance upon misrepresentations); *Sherwood v. Finch*, 2000 WL 1862562, at *14 (D. Or. Dec. 20, 2000) (OUTPA's requirement that "plaintiffs prove that the 'ascertainable loss' was a result of defendant's violation" is "akin to a traditional proximate cause analysis"); *Haley v. Kolbe & Kolbe Millwork Co.*, 863 F.3d 600, 615 (7th Cir. 2017) ("[T]he absence of a reliance requirement does not relieve plaintiffs of the need to establish causation—i.e., that the alleged misrepresentation somehow caused them loss" under WDPTA); *Lorenzo v. Qualcomm Inc.*, 2009 WL 2448375, at *6 (S.D. Cal. Aug. 10, 2009) (dismissing UCL claim where the plaintiff's alleged injury was "at least three intermediaries between" the alleged claim); *Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103, 1135 (S.D. Cal. 2021) ("A plaintiff alleging false advertising or misrepresentation to consumers 'must show that the misrepresentation was an immediate cause of the injury-producing conduct.'") (emphasis in original).

588 (1997) (dismissing when alleged harm was not "reasonably within the scope of the risk created by the initial act"). In light of these allegations, Plaintiffs' alleged harms are far too attenuated to have been foreseeable or proximately caused by Defendants' actions.

VI. THE FIRST AMENDMENT INDEPENDENTLY BARS PLAINTIFFS' CLAIMS.

As this Court has already held, "content moderation by social media platforms is generally considered expressive activity and is protected under the First Amendment." Order at 33 (citing *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024) ("Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity on its own.")). Indeed, the First Amendment independently bars each of Plaintiffs' claims for seeking to impose liability for Defendants' own expressive activity—*i.e.*, content moderation decisions.

Plaintiffs' claims *still* indisputably target Defendants' protected content moderation decisions because each claim asks this Court to second-guess those decisions. *See Moody*, 144 S. Ct. at 2402, 2405–06 (holding that statutes interfered with protected speech of social media platforms by "overriding [the platforms'] expressive choices," choices which include deciding how third-party content is moderated). Indeed, Plaintiffs' own allegations highlight that the basis of their claims is merely a disagreement with Defendants' content moderation decisions:

> Plaintiffs bring this lawsuit after . . . they had made reports through [Defendants] faulty reporting tools. Plaintiffs voluntarily contributed labor and resources to help TikTok and YouTube's *content moderation teams* to identify toxic, fatal, and dangerous *content* . . . [i]n response, all they received was a canned response stating that the clearly harmful videos that were not allowed per Defendants' own policies – e.g. , choking challenge videos, harassing contents, and child pornography – does not violate their community guidelines . . . [w]hen tested, the reporting features yielded arbitrary and contradictory *decisions* which shows that the reporting tools were incapable of reviewing and responding to the user reports.

FAC ¶¶ 10–11 (emphases added).

Even as articulated by Plaintiffs, their underlying theory is merely that they disagree with Defendants' decisions about whether or when to remove certain content—precisely the kind of

editorial judgment that the First Amendment protects. Order at 33. Accordingly, the First Amendment bars Plaintiffs' claims.

Although the Court acknowledged that a different First Amendment analysis may apply to commercial speech, *see id.* at 34, Plaintiffs have not alleged any facts that warrant engaging in this inquiry. Nor could they. As the Ninth Circuit has held, a social media platform's terms of service, including processes for flagging content and potential actions that may be taken with respect to flagged content "do not satisfy the 'usual definition' of commercial speech—*i.e.*, speech that does no more than propose a commercial transaction." *X Corp. v. Bonta*, 116 F.4th 888, 901 (9th Cir. 2024), *see also NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1119 (9th Cir. Aug. 16, 2024) (striking down statute's reporting requirement because it regulates "far more than mere commercial speech" by requiring businesses to "opine on potential speech-based harms").

Even if *X Corp* did not squarely foreclose the assertion that the speech at issue constitutes commercial speech (which it does), at least two of the *Bolger* factors weigh against a finding of commercial speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983) (holding that if there is a "close question" as to whether speech is commercial, the following factors serve as a guidepost in that determination: whether [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation). Plaintiffs have not alleged that any speech at issue constitutes an advertisement, nor have they alleged that Defendants had an economic motivation in having Community Guidelines or making content moderation decisions. *See Arixx, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116-17 (9th Cir. 2021) (finding that the economic motivation factor "asks whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had *any* economic motivation," and finding that "not all types of economic motivation support commercial speech" like "to obtain an incidental economic benefit"); *see also X Corp. v. Bonta,* 116 F.4th at 895 (finding that social media companies have no economic motivation in reports regarding content-moderation practices).

VII. THE BECCA SCHMILL FOUNDATION LACKS ARTICLE III STANDING AS A MATTER OF LAW.

In addition to the arguments above, the Foundation should be dismissed for lack of Article III standing. "[O]rganizations must satisfy the usual standards for injury in fact, causation, and redressability." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 393, 393–94 (2024). As the Supreme Court has emphasized, organizational plaintiffs "must show far more than simply a setback to the organization's abstract social interests." *Id.* at 394 (internal quotations & citation omitted). Nor can they "spend [their] way into standing simply by expending money to gather information and advocate against the defendant's action." *Id*. Instead, organizational plaintiffs must plead "concrete injury caused by a defendant's action," *i.e.*, defendant's "actions directly affected and interfered with [plaintiff']s core [ ] activities." *Id.*

The Foundation previously sought to establish organizational standing[18] by pointing to its decision to hire researchers focused on "the report and response process of harmful and illegal content on social media prevalently used by minor children." Order at 9. This Court rejected this theory because research was "one of [the Foundation's] core activities," and Plaintiffs had "not plausibly allege[d] that conducting the research" resulted in concrete injury. *Id.*

The FAC contains an obscure but similarly flawed theory of organizational standing:

> The Foundation's core activities include legislative advocacy which includes the Kids Online Safety Act (KOSA), . . . that aims to protect children online. One of the major provisions of KOSA has been to require social media platforms to implement easy-to-use reporting tools and establish dedicated harms-report-channel for users.
>
> Defendants' conduct of developing defective reporting tools the Defendants' misrepresentations about the tools and commitment to remove harmful videos in Senate Hearings directly cause harm to the core activities of the Becca Schmill Foundation who have been advocating tirelessly in Congress to show the deficiencies of the Defendants' conduct and need for regulation.

FAC ¶¶ 106, 107.

[18] Plaintiffs previously conceded the Foundation "lacks associational standing." Order at 8. Defendants preserve the right to challenge the Foundation's associational standing, as the FAC lacks "specific allegations establishing that at least one *identified member* ha[s] suffered or would suffer harm," and fails to establish that at least one of the Foundation's members would have standing in their own right. *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (citation omitted) (emphasis in original).

The Foundation still asserts an injury based on its core activity—legislative advocacy—which is not sufficient. Order at 9. As before, the mere fact that the Foundation expended resources on such advocacy is of no significance, as it cannot "spend [its] way into standing . . . ." *Hippocratic Med.*, 602 U.S. at 394. To establish organizational standing, the Foundation must allege that Defendants' actions "directly affected and interfered with" Plaintiffs' advocacy efforts. *Hippocratic Med.*, 602 U.S. at 305. It has not done so.

The FAC's new allegations also fail for the independent reason that they fall short of Federal Rule of Civil Procedure 8(a)'s plausibility standard.[19] The FAC makes precisely the kind of "unadorned, the-defendant-unlawfully-harmed-me-accusations" this Court previously recognized as insufficient. *Faizi v. Temori*, 2022 WL 7146059, at *2 (N.D. Cal. Oct. 12, 2022) (DeMarchi, J.). Plaintiffs' new allegations are conclusory and implausible for at least two reasons. One, Plaintiffs mention only one hearing in the FAC[20]; it is therefore unclear what they mean when they refer to "Senate Hearings." FAC ¶ 107. Two, Plaintiffs nowhere tie Defendants' alleged statements before Congress to the Foundation's legislative activity. There is no indication, for instance, that any statements made by Defendants expressed an opinion that affected the single bill referenced in the FAC (*e.g.*, the Kids Online Safety Act). Plaintiffs therefore fail to explain the role each Defendant allegedly played in causing harm to the Foundation's legislative agenda, depriving Defendants of information necessary to formulate their defenses.[21] The Foundation should therefore be dismissed for failure to adequately allege Article III standing.

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[19] It is well established that Rule 8(a) applies, at the pleading stage, to allegations of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."); *Incorp Servs., Inc. v. IncSmart.biz, Inc.*, 2013 WL 394023, at *1 (N.D. Cal. Jan. 30, 2013) (requiring the pleadings to include "sufficient specificity to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'") (quoting *Bell Atl.*,at 555).

[20] *See* FAC ¶ 119 (referring to an exchange between a TikTok representative and Senator Blumenthal during a Senate Subcommittee on Consumer Protection, Product Safety, and Data Security hearing). The FAC does not identify any statements allegedly made by a YouTube representative during any hearing.

[21] *See Leakas v. Monterey Bay Mil. Hous., Inc.*, 2022 WL 2161608, at *4 (N.D. Cal. June 15, 2022) (DeMarchi, J.) ("As a general rule, when a pleading fails to allege what role each Defendant played in the alleged harm, this makes it exceedingly difficult, if not impossible, for individual Defendants

VIII. THE COURT SHOULD DISMISS WITHOUT LEAVE TO AMEND

The Court may deny leave to amend for a variety of reasons, including undue delay, bad faith, repeated failures to cure deficiencies, undue prejudice to Defendants by virtue of allowance of amendment, and futility. *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

Plaintiffs' meager and ineffective attempt at curing *some* of the many deficiencies identified by the Court as a basis for dismissal flies in the face of allowing further amendment. Plaintiffs had ample opportunity to adequately allege their claims—particularly after the Court explained, in great detail, exactly how Plaintiffs' theory of the case and claims were flawed. Rather than take advantage of this opportunity to heed the Court's well-reasoned ruling, Plaintiffs again set forth the same claims barred by Section 230 and the First Amendment and marred by the same litany of claim-specific deficiencies.[22]

Plaintiffs' inability to adequately allege their claims shows the futility of any future amendment. Furthermore, any additional amendment would prejudice Defendants, especially considering that one of the bases for dismissal is Section 230 immunity. The Court should not give Plaintiffs another opportunity to set forth yet another deficient complaint.

IX. CONCLUSION

The Court should dismiss Plaintiffs' claims without leave to amend.

Respectfully submitted,

Dated: May 5, 2025

COOLEY LLP

/s/ Tiana Demas
Tiana Demas

Attorneys for Defendants GOOGLE LLC and YOUTUBE, LLC

to respond to Plaintiffs' allegations.") (quoting *Adobe Sys., Inc. v. Blue Source Grp., Inc.*, 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015)).

[22] Plaintiffs' FAC even carries the same typos that were present in the original complaint.

Dated: May 5, 2025

KING & SPALDING LLP

/s/ Bailey J. Langer
Bailey J. Langner

Bailey J. Langner
KING & SPALDING LLP
50 California Street, Suite 3300
San Francisco, CA 94111
Tel: (415) 318-1214
Email: blangner@kslaw.com

Geoffrey M. Drake
(*pro hac vice*)
KING & SPALDING LLP
1180 Peachtree Street NE, Suite 1600
Atlanta, GA 30309
Tel: (404) 572-4726
Email: gdrake@kslaw.com

David Mattern
(*pro hac vice*)
KING & SPALDING LLP
1700 Pennsylvania Ave. NW, Suite 900
Washington, D.C. 20006
Tel: (202) 626-2946
Email: dmattern@kslaw.com

Attorneys for Defendants TIKTOK INC. and BYTEDANCE INC.

ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1(i)(3)

I, Tiana Demas, attest that concurrence in the filing of this document has been obtained from all other signatories. Executed on May 5, 2025, in Washington, D.C.

/s/ Tiana Demas
Tiana Demas