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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOANN BOGARD, et al.,  
Plaintiffs,  
v.  
TIKTOK INC., et al.,  
Defendants.

Case No. 24-cv-03131-VKD

**ORDER GRANTING DEFENDANTS’  
MOTION TO DISMISS THE  
COMPLAINT WITH LEAVE TO  
AMEND**

Re: Dkt. No. 76

Plaintiffs Joann Bogard, Annie McGrath, Jane Doe, and the Becca Schmill Foundation (“Foundation”) (collectively, “Plaintiffs”) bring this action against defendants Alphabet Inc., Google LLC, YouTube LLC, and XXVI Holdings Inc. (together, “Google Defendants”) and TikTok Inc. and ByteDance Inc. (together, “TikTok Defendants”) (collectively, “Defendants”), asserting tort claims of strict products liability, negligence, fraudulent misrepresentation, and negligent misrepresentation, as well as violations of Indiana, Wisconsin, Oregon, and California law regarding unfair and deceptive trade practices. Dkt. No. 1 ¶¶ 161-247. Defendants move to dismiss all claims in the complaint on the grounds that: (1) Plaintiffs’ claims are barred by Section 230 of the Communications Decency Act (CDA) or alternatively the First Amendment; (2) Plaintiffs fail to allege fraud with particularity as required by Federal Rule of Civil Procedure 9(b); and (3) Plaintiffs otherwise fail to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. No. 76 at 1-2. Plaintiffs oppose Defendants’ motion. Dkt. No. 82. The Court held oral argument on October 22, 2024. Dkt. No. 97.

Upon consideration of the moving and responding papers, and the parties’ arguments at the

1 hearing, the Court grants Defendants’ motion to dismiss with leave to amend.

2 **I. BACKGROUND**

3 **A. Parties**

4 **1. Plaintiffs**

5 Plaintiff Joann Bogard is a resident of Indiana. Dkt. No. 1 ¶ 43. Her son died in 2019  
6 when he participated in a “choking challenge” after viewing videos regarding this challenge on  
7 YouTube. *Id.* ¶¶ 59, 62, 64.

8 Plaintiff Annie McGrath is a resident of Wisconsin. *Id.* ¶ 44. Her son died in 2018 when  
9 he participated in a “choking challenge” after viewing videos regarding this challenge on  
10 YouTube. *Id.* ¶ 80.

11 Plaintiff Jane Doe (proceeding anonymously) is a resident of Oregon. *Id.* ¶ 45. Ms. Doe’s  
12 son H.F. was the victim of verbal harassment and bullying in a video promoted on the TikTok  
13 platform in 2022. *Id.* ¶ 90.

14 Plaintiff Becca Schmill Foundation is a 501(c)(3) nonprofit registered in Massachusetts.  
15 *Id.* ¶ 46. It was founded by the parents of Becca Schmill who died after overdosing on fentanyl  
16 she obtained via a social media platform. *Id.* ¶ 105. The Foundation seeks to protect children and  
17 young adults from harm associated with social media through research, community programming,  
18 and advocacy. *Id.*

19 Plaintiffs describe themselves as “modern-day champions and vigilantes.” *Id.* ¶ 7. They  
20 allege that, having all suffered loss or harm due to, or influenced by, content posted on social  
21 media, they now regularly seek out and report harmful content found on the YouTube and TikTok  
22 platforms for which Defendants are responsible. *Id.* ¶ 8. Plaintiffs assert that their “good-faith  
23 efforts to report harm” have been “unheeded, ignored, and arbitrarily dismissed” by Defendants.  
24 *Id.* Plaintiffs bring this action on behalf of a putative class of “[a]ll people who used TikTok and  
25 YouTube and who made safety reports through the process set forth by Defendants from January  
26 2020 through the date of dispositive judgment made in this action.” *Id.* ¶ 144.

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**2. TikTok Defendants**

Defendant TikTok Inc. (“TikTok”) is a California corporation with its principal place of business in Culver City, California. *Id.* ¶ 47. TikTok is the provider of the popular TikTok social media platform that permits third-party users to create, share and stream videos. *See* Dkt. No. 76 at 3.

Defendant ByteDance Inc. is a Delaware corporation with its principal place of business in Mountain View, California. Dkt. No. 1 ¶ 48. It is the parent company of TikTok.

**3. Google Defendants**

Defendant YouTube LLC (“YouTube”) is a limited liability company organized under the laws of the state of Delaware and is a wholly owned subsidiary of Google LLC. *Id.* ¶ 52. Its principal place of business is in San Bruno, California. *Id.* YouTube is the provider of the popular YouTube social media platform that, similar to TikTok, permits third-party users to post and view videos. Dkt. No. 76 at 3.

Defendant Google LLC is a limited liability company organized under the laws of the state of Delaware and the managing member of YouTube, LLC. *Id.* ¶ 51. Its principal place of business is in Mountain View, California. *Id.*

Defendant XXVI Holdings Inc. is a Delaware corporation with its principal place of business in Mountain View, California. *Id.* ¶ 50. It is the managing member of Google LLC. *Id.*

Defendant Alphabet Inc. is a Delaware corporation with its principal place of business in Mountain View, California. Dkt. No. 1 ¶ 49. It is the sole stockholder of XXVI Holdings Inc. *Id.*

**B. Defendants’ Content Moderation**

TikTok’s Reporting Process and Content Moderation: According to the complaint, TikTok employs 40,000 human moderators who review approximately 1,000 videos a day. *Id.* ¶ 110. The videos are first screened by software that “is intended to automatically remove anything that would violate a community guideline.” *Id.* If the software cannot determine whether a video does or does not violate a community guideline, the video is forwarded to a human moderator. *Id.*

1 Videos with a number of views in excess of a certain threshold<sup>1</sup> are also sent to a human  
2 moderator for review. *Id.*

3 TikTok permits users to report videos that they believe violate TikTok’s community  
4 guidelines. *Id.* ¶ 111. To make a report, a user must have a TikTok account and be logged in to  
5 the platform. *Id.* If the user holds a finger to the screen displaying the video, a menu pops up, and  
6 the user may select “Report.” *Id.* ¶ 112. The user is then presented with an opportunity to identify  
7 the issue that he or she believes constitutes a violation, such as “Dangerous acts and challenges.”  
8 *Id.* ¶ 113. If a user selects “Dangerous acts and challenges,” a page displays describing TikTok’s  
9 rules regarding challenges.<sup>2</sup> *Id.* ¶ 114.

10 After a user submits a report, he or she “receive[s] a confirmation message stating:  
11 ‘Thanks for reporting. We’ll review your report and take action if there is a violation of our  
12 Community Guidelines.’” *Id.* ¶ 115. The user can check on the status of removal. *Id.* ¶ 116. If  
13 TikTok determines the reported video does not violate its guidelines, the user will receive the  
14 following message: “We found that the reported content doesn’t violate our Community  
15 Guidelines. We understand that you may not want to see this type of content, and you have the  
16 option to block the account that posted it.” *Id.* ¶ 117. TikTok provides no option for the user to  
17 appeal its decision regarding the reported violation. *Id.*

18 YouTube’s Reporting Process and Content Moderation: According to the complaint,  
19 YouTube uses a similar combination of automated review and review by human moderators to  
20 police content posted on its platform. *Id.* ¶ 122. YouTube also permits users to report videos that  
21 they believe violate community guidelines. *Id.* ¶ 131. To make a report, the user selects the  
22 reporting option from a menu. *Id.* The user may select a reason for the report from a list, and  
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24 <sup>1</sup> The threshold number of views for a video to be sent to a human moderator varies depending on  
25 the country. *Id.*

26 <sup>2</sup> A “challenge” “typically involve[s] people recording themselves doing something difficult,  
27 which they share online to encourage others to respond.” Dkt. No. 89-3, Ex. B. Some challenges,  
28 however, encourage “harmful behavior, including the risk of serious injury” and are classified by  
TikTok and YouTube as dangerous challenges. *Id.*; *see also* Dkt. No. 89-4, Ex. C.

1 receives a “confirmation banner” confirming the submission of the report. *Id.* ¶¶ 132-33. The  
2 user can manually track his or her report using the “‘Report History’ section” of the user’s account  
3 on the platform. *Id.* ¶ 133. If YouTube determines a video violates its community guidelines, “it  
4 will either remove the content from its platform or restrict the content to mature audiences.” *Id.*  
5 ¶ 134. If YouTube determines a video does not violate its community guidelines, it takes no  
6 action and does not notify the reporting user. *Id.* YouTube provides no option for the user to  
7 appeal its decision regarding the reported violation. *Id.* ¶¶ 134-35.

8 **C. Plaintiffs’ Claims**

9 Plaintiff Joann Bogard: Since the loss of her son in 2019, Ms. Bogard “has been reporting  
10 numerous ‘choking challenge’ videos” to YouTube and TikTok. *Id.* ¶¶ 60-61, 66, 73. In doing so,  
11 she alleges that she relied on YouTube’s and TikTok’s policies prohibiting harmful or dangerous  
12 content, such as “asphyxiation: any activity that prevents breathing or can lead to suffocation like:  
13 Choking, drowning, or hanging games.” *Id.* ¶ 68. However, although the content she reported  
14 “featured choking challenge videos for minor audiences,” she alleges that neither YouTube nor  
15 TikTok removed the majority of the reported videos and that she received responses from TikTok  
16 that the reported videos were deemed “not to violate TikTok’s community guidelines.” *Id.* ¶¶ 69-  
17 75.

18 Plaintiff Annie McGrath: Since the loss of her son in 2018, Ms. McGrath has “reported  
19 several choking challenge videos (a.k.a. SpaceMonkey Challenge videos) to YouTube as harmful  
20 content.” *Id.* ¶¶ 81-82. In making these reports, she relied on YouTube’s policies against posting  
21 harmful or dangerous content. *Id.* ¶ 84. Ms. McGrath alleges that YouTube has not removed the  
22 videos she reported. *Id.* ¶ 85.

23 Plaintiff Jane Doe: Ms. Doe alleges that in May of 2022, she was informed that a “video  
24 containing verbal harassment and bullying against her son H.F.[ ] was being promoted in the ‘For  
25 You’ feed of certain TikTok users.” *Id.* ¶ 90. Both the “informant” and Ms. Doe reported the  
26 video to TikTok and received an automated response that the video “did not violate community  
27 guidelines.” *Id.* ¶¶ 91-94. She alleges that “[t]here was no option in the reporting process . . . to  
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1 escalate the video review for re-consideration by a human reviewer.” *Id.* ¶ 95. She further alleges  
2 that she brought the video to “the attention of TikTok’s executives” who ultimately determined  
3 that “the video was violative of community guidelines.” *Id.* ¶ 98. Her other son, M.F., has also  
4 reported a number of videos. *Id.* ¶ 100. Ms. Doe alleges that “TikTok’s automated response [to  
5 these videos] would arbitrarily determine that one of the videos posted by a user is violative of the  
6 community guidelines, while the same video posted by another user is not.” *Id.* ¶¶ 100-101.

7 Becca Schmill Foundation: The Becca Schmill Foundation’s mission is to “protect . . .  
8 teenagers and young adults from online harms” and “to fund research, sponsor community  
9 programming, and advocate for policies that promote and safeguard the emotional wellbeing of  
10 adolescents and young adults.” *Id.* ¶ 105. In 2022, the Foundation hired researchers at the  
11 Alliance to Counter Crime Online (ACCO) to “research [] the report and response processes of  
12 harmful and illegal content on social media prevalently used by minor children,” including the  
13 choking challenge. *Id.* ¶¶ 107-108. As part of the research, they identified choking challenge  
14 videos and reported them to social media platforms, including YouTube and TikTok, in order to  
15 record the response. *Id.* ¶ 108. The Foundation determined that there were numerous choking  
16 challenge videos that YouTube and TikTok had determined did not violate their policies and  
17 guidelines. *Id.*

18 Plaintiffs assert eight claims. Four claims are based in common law tort: strict products  
19 liability against YouTube and TikTok (claim 1); negligence against YouTube and TikTok (claim  
20 2); fraudulent misrepresentation against YouTube and TikTok (claim 3); and negligent  
21 misrepresentation against YouTube and TikTok (claim 4). The remaining four claims are based  
22 on state statutes: a claim by Ms. Bogard against YouTube and TikTok for violations of the Indiana  
23 Deceptive Consumer Sales Act (IDCSA), Ind. Code § 24-5-0.5 *et seq.* (claim 5); a claim by Ms.  
24 McGrath against YouTube<sup>3</sup> for violations of the Wisconsin Deceptive Trade Practices Act  
25

26 \_\_\_\_\_  
27 <sup>3</sup> The complaint states that this claim is brought against TikTok on behalf of an Oregon subclass  
28 but as all of the subsequent allegations reference YouTube and Wisconsin, the Court assumes the  
TikTok/Oregon references were included in error.

1 (WDTPA), Wis. Stat. § 100.18 *et seq.* (claim 6); a claim by Ms. Doe against TikTok for violations  
2 of the Oregon Unlawful Trade Practices Act (OUTPA), ORS § 646.605 *et seq.* (claim 7); and  
3 claims by Ms. Bogard, Ms. McGrath, and the Foundation against YouTube, and by Ms. Bogard,  
4 Ms. Doe, and the Foundation against TikTok for violations of the California Business and  
5 Professions Code §§17200 and 17500 *et seq.* (claim 8). Plaintiffs allege that the failure of  
6 YouTube and TikTok to remove these videos despite their reporting has caused “emotional  
7 distress, anxiety, helplessness, invalidation, grief, re-traumatization, and frustration.” *Id.* ¶¶ 75,  
8 86-87, 103. Plaintiffs seek compensatory and punitive damages, as well as declaratory relief,  
9 injunctive relief, attorneys’ fees, and costs. Dkt. No. 1 at 52-55.

10 **D. Procedural History**

11 On February 1, 2023, Plaintiffs filed this action against Defendants in the Southern District  
12 of Indiana. Dkt. No. 1. On April 14, 2023, Defendants moved to dismiss Plaintiffs’ complaint for  
13 lack of jurisdiction and failure to state a claim or, in the alternative, to transfer the case to the  
14 Northern District of California. Dkt. Nos. 38-41. The Southern District of Indiana granted  
15 Defendants’ request to transfer on March 25, 2024, but did not address any of Defendants’ other  
16 motions or arguments. Dkt. No. 62. Defendants filed the present motion to dismiss on July 12,  
17 2024.

18 **II. LEGAL STANDARD**

19 A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal  
20 sufficiency of the claims in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).  
21 Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts  
22 alleged to support a cognizable legal theory. *Id.* (citing *Balistreri v. Pacifica Police Dep’t*, 901  
23 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be  
24 taken as true and construed in the light most favorable to the claimant. *Id.*

25 However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
26 conclusory statements, do not suffice,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and “[f]actual  
27 allegations must be enough to raise a right to relief above the speculative level,” *Bell Atl. Corp. v.*

1 *Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Moreover, the Court is not required to  
2 “assume the truth of legal conclusions merely because they are cast in the form of factual  
3 allegations.” *Prager Univ. v. Google LLC* (“Prager I”), No. 17-cv-06064-LHK, 2018 WL  
4 1471939, at \*3 (N.D. Cal. Mar. 26, 2018) (quoting *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th  
5 Cir. 2011) (per curiam)). Nor does the Court accept “allegations that are merely conclusory,  
6 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536  
7 F.3d 1049, 1055 (9th Cir. 2008).

8 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the  
9 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means that the “[f]actual allegations  
10 must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555  
11 (citations omitted). However, only plausible claims for relief will survive a motion to dismiss.  
12 *Iqbal*, 556 U.S. at 679. A claim is plausible if the facts pled permit the court to draw a reasonable  
13 inference that the defendant is liable for the alleged misconduct. *Id.* A plaintiff does not have to  
14 provide detailed facts, but the pleading must include “more than an unadorned, the-defendant-  
15 unlawfully-harmed-me accusation.” *Id.* at 678.

16 Under Rule 9(b), allegations of fraud or mistake must be pled “with particularity.” Fed R.  
17 Civ. P. 9(b). “A pleading is sufficient under Rule 9(b) if it identifies the circumstances  
18 constituting fraud so that the defendant can prepare an adequate answer from the allegations.”  
19 *Neubronner v. Milken*, 6 F.3d 666, 671-72 (9th Cir. 1993) (citations and quotations omitted). This  
20 includes pleading “the who, what, when, where, and how of the misconduct charged.” *Whiteside*  
21 *v. Kimberly Clark Corp.*, 108 F.4th 771, 785 (9th Cir. 2024) (citation and quotations omitted).

### 22 **III. DISCUSSION**

#### 23 **A. Standing for Becca Schmill Foundation**

24 The Court first addresses Defendants’ argument that the Becca Schmill Foundation lacks  
25 standing to pursue any of its claims. Dkt. No. 76 at 32-33. Plaintiffs do not disagree that the  
26 Foundation lacks associational standing, but they argue that it has standing on its own behalf. Dkt.  
27 No. 82 at 27-28.



1           According to recent Ninth Circuit authority, an organization does not have Article III  
2 standing unless it meets the traditional standing requirements: (1) injury-in-fact; (2) causation; and  
3 (3) redressability. *Arizona All. for Retired Americans v. Mayes*, 117 F.4th 1165, 1178 (9th Cir.  
4 2024) (citing *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393-94 (2024)).  
5 As relevant here, an organization must show that the defendant’s action “directly harms its  
6 *already-existing* core activities,” and may not rely on allegations that the defendant’s action  
7 caused it to divert resources in response. *Id.* at 1177-78 (recognizing that Ninth Circuit precedents  
8 on organizational standing are “irreconcilable with *Hippocratic Medicine* and thus overruled.”).

9           The Foundation’s mission is to “fund research, sponsor community programming, and  
10 advocate for policies that promote and safeguard the emotional wellbeing of adolescents and  
11 young adults.” Dkt. No. 1 ¶ 105. In support of this mission, the Foundation “conducts research  
12 and promotes advocacy in the areas of social media accountability and online safety.” *Id.* ¶ 106.  
13 Plaintiffs allege that, in 2022, the Foundation hired researchers to examine “the report and  
14 response process of harmful and illegal content on social media prevalently used by minor  
15 children.” *Id.* ¶ 107. They assert that part of this study focused on the reporting of choking  
16 challenge videos specifically. *Id.* ¶ 108.

17           Defendants argue that Plaintiffs’ own allegations make clear that any research the  
18 Foundation says it did was *part of* the Foundation’s normal activities in aid of its mission and,  
19 therefore, cannot support standing. Dkt. No. 89 at 20. Plaintiffs counter that the Foundation took  
20 on “substantial costs associated with research and investigation efforts” and that its mission was  
21 “frustrated” as its ability to protect minors from online harms was “threatened by Defendants’  
22 defective reporting tools.” Dkt. No. 82 at 28. However, the question for standing is whether  
23 Defendants’ conduct “directly harmed” the Foundation’s “core activities.” The Foundation does  
24 not plausibly allege that conducting the research described in the complaint harms its core  
25 activities; rather, conducting such research is described as one of its core activities.

26           The Court grants Defendants’ motion to dismiss the Foundation’s claims for lack of  
27 standing. If Plaintiffs believe they can plead facts sufficient to satisfy the Ninth Circuit’s current  
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1 test for organizational standing, they may amend their complaint to include these allegations with  
2 respect to the Foundation.

3 **B. Dismissal of XXVI Holdings Inc. and Alphabet Inc.**

4 Defendants argue that the Court should dismiss all claims against defendants XXVI  
5 Holdings Inc. and Alphabet Inc. because the only allegations against them are that they are parent  
6 companies of Google and YouTube. Dkt. No. 76 at 33. Plaintiffs do not respond to this argument  
7 in their opposition. Dkt. No. 82. At the hearing, Plaintiffs confirmed that they can plead no other  
8 allegations against these entities. Dkt. No. 102 at 72:9-16.

9 The Court agrees with Defendants that a parent company is not generally liable for the acts  
10 of its subsidiaries merely by virtue of the parent-subsidiary corporate relationship. *United States*  
11 *v. Bestfoods*, 524 U.S. 51, 61-62 (1998). For this reason, the Court grants Defendants’ motion to  
12 dismiss all claims against XXVI Holdings Inc. and Alphabet Inc. without leave to amend.

13 **C. Plaintiffs’ Common Law Tort Claims**

14 Defendants argue that Plaintiffs fail to state any claim for relief under state common law  
15 tort theories because they owe no duty to prevent harm to any Plaintiffs and because Plaintiffs’  
16 alleged harms are not a reasonably foreseeable result of any actions by Defendants. Dkt. No. 76 at  
17 2. Defendants argue that California law applies to Plaintiffs’ claims,<sup>4</sup> although they insist that the  
18 Court may resolve their motion without deciding which state’s law—Indiana or California—  
19 applies, as the tort law principles in question apply equally in both jurisdictions. Dkt. No. 76 at  
20 15 n.8. As Plaintiffs do not dispute that California law applies, *see* Dkt. No. 82 at 15, 17, the  
21 Court assumes for purposes of this motion that California law governs Plaintiffs’ common law tort  
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23 <sup>4</sup> According to Defendants, the Southern District of Indiana, as the transferring court, would apply  
24 Indiana law choice of law rules, and those rules dictate that California law governs Plaintiffs’ tort  
25 claims. *See* Dkt. No. 76 at 15 n.8; *see also Enigma Software Grp. USA, LLC v. Malwarebytes,*  
26 *Inc.*, 69 F.4th 665, 674 (9th Cir. 2023) (“Generally, diversity cases transferred under 28 U.S.C.  
27 § 1404(a) require that the transferee district court apply the state law, including the choice-of-law  
28 rules, of the original transferor court.”); *Simon v. United States*, 805 N.E.2d 798, 805 (Ind. 2004)  
(citations and quotations omitted) (Under Indiana choice of law rules, if there is a conflict, the law  
of “the state where the last event necessary to make an actor liable for the alleged wrong takes  
place” applies unless “the place of the tort ‘bears little connection’ to this legal action.”).

1 claims.

2 **1. Claim 1: Strict Products Liability – Design Defect**

3 Plaintiffs allege that Defendants “created a reporting feature in their platforms” which was  
4 defectively designed, and that Defendants knew or should have known that “[the reporting feature]  
5 would pose a serious danger of emotional and physical harm if their purported reporting process  
6 were ineffective.” Dkt. No. 1 ¶¶ 165, 167. Defendants argue that this claim fails because  
7 “Defendants’ content moderation processes are not a ‘product’ subject to product liability law”  
8 and because Plaintiffs allege no physical injury. Dkt. No. 76 at 2.

9 “A design defect . . . exists when the product is built in accordance with its intended  
10 specifications, but the design itself is inherently defective.” *McCabe v. Am. Honda Motor Co.*,  
11 100 Cal. App. 4th 1111, 1120 (Ct. App. 2002). A design defect may be shown in two ways: (1)  
12 that the product did not perform “as safely as an ordinary consumer would expect”; or (2) that “the  
13 risk of danger inherent in the challenged design outweigh[ed] the benefits of such design.” *Soule*  
14 *v. Gen. Motors Corp.*, 8 Cal. 4th 548, 562 (Cal. 1994) (citation omitted). However, as a threshold  
15 matter, such a claim may only proceed if the allegedly defective item qualifies as a “product,” a  
16 “question of law” to be resolved by the trial court. *Brooks v. Eugene Burger Mgmt. Corp.*, 215  
17 Cal. App. 3d 1611, 1626 (Ct. App. 1989).

18 “A ‘product’ is broadly defined to include any ‘tangible personal property distributed  
19 commercially for use or consumption.’” *Johnson v. United States Steel Corp.*, 240 Cal. App. 4th  
20 22, 31 (Ct. App. 2015) (citing Restatement (Third) of Torts: Prods. Liab. § 19 (1998)); *see also In*  
21 *re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. MDL 3084 CRB, 2024 WL 4211217, at  
22 \*22 (N.D. Cal. Aug. 15, 2024) (“The parties agree that, in California and Texas, the Restatement  
23 (Third) of Torts: Prods. Liab. § 19 provides the applicable definition of a ‘product.’”). Where the  
24 tangible nature of an item is not clear, courts consider whether the “‘context of [the item’s]  
25 distribution and use is sufficiently analogous to the distribution and use of tangible personal  
26 property that it is appropriate to apply the rules’ of strict liability.” *In re Uber*, 2024 WL 4211217,  
27 at \*22 (quoting Restatement (Third) of Torts: Prods. Liab. § 19 (1998)); *see also id.* at \*24-25

1 (concluding Uber could be liable for defects in the “design or functionality of” its ride-sharing  
2 mobile application); *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F.  
3 Supp. 3d 809, 848-49 (N.D. Cal. 2023), *motion to certify appeal denied*, No. 4:22-MD-03047-  
4 YGR, 2024 WL 1205486 (N.D. Cal. Feb. 2, 2024) (finding that social media platforms as a whole  
5 were not necessarily products but that individual functionalities of the platforms could be  
6 products).

7 Here, Plaintiffs do not clearly identify the “product” at issue or the “design defect” it  
8 allegedly contains. Plaintiffs argue that Defendants’ “reporting tools” are defective, but they also  
9 argue that they were harmed when Defendants did not remove the videos they reported for having  
10 harmful content. Dkt. No. 82 at 14-15; Dkt. No. 102 at 41:5-42:4, 46:2-5; Dkt. No. 1 ¶ 75.  
11 Defendants argue that Plaintiffs’ products liability claim concerns Defendants’ “content  
12 moderation processes” and reporting practices, and that such processes and practices are not  
13 products. Dkt. No. 76 at 16. Moreover, Defendants argue that the purported “defect” on which  
14 Plaintiffs rely is merely their own disagreement with Defendants’ content moderation decisions,  
15 i.e., not removing all videos Plaintiffs reported. *Id.* at 16-17.

16 While the Court agrees that in certain circumstances a “reporting tool” could be a defective  
17 product and could plausibly support a products liability theory of relief, *see In re Social Media*  
18 *Adolescent Addiction*, 702 F. Supp. 3d at 853 (finding plaintiffs’ allegations that social media  
19 platforms failed to implement sexual abuse reporting tools that could be used without an account  
20 alleged a plausible design defect for purposes of products liability claims), Plaintiffs have not  
21 alleged any such theory. Plaintiffs do not challenge Defendants’ reporting tools *per se*. Indeed,  
22 Plaintiffs allege that they make frequent use of the tools to report videos containing harmful  
23 content. They argue that the tools are ineffective because Defendants do not always remove the  
24 videos they report. But this is an objection to Defendants’ decisions, after receiving Plaintiffs’  
25 reports, to remove or not remove certain videos; it is not an objection to the functionality of the  
26 reporting tool itself. *Cf. Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021) (“[Plaintiffs’]  
27 negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently  
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1 designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and  
 2 the Speed Filter) . . . .”). As framed by Plaintiffs, the alleged “defect” is not “content-agnostic,”  
 3 but instead reflects a disagreement about “ideas, content, and free expression upon which products  
 4 liability claims cannot be based.” *In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 851;  
 5 *see also Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (“[W]e decline to  
 6 expand products liability law to embrace the ideas and expression in a book.”). The crux of  
 7 Plaintiffs’ allegations is that the Defendants’ reporting systems are defective because Plaintiffs’  
 8 reports do not produce the outcomes that Plaintiffs believe they should—i.e. removal of the  
 9 reported videos. Thus, to remedy the alleged defect, Defendants would have to change the content  
 10 posted on their platforms. *Cf. Lemmon*, 995 F.3d at 1092 (defect not content-related as “Snap  
 11 could have satisfied its ‘alleged obligation’—to take reasonable measures to design a product  
 12 more useful than it was foreseeably dangerous—without altering the content that Snapchat’s users  
 13 generate.”). Such allegations fail to state a claim under products liability law.

14 In addition, Defendants argue that Plaintiffs do not state a claim for strict products liability  
 15 because they have not alleged physical injury. Defendants rely principally on *Jimenez v. Superior*  
 16 *Court*, which holds, in relevant part, that “recovery under the doctrine of strict liability is limited  
 17 solely to ‘physical harm to person or property.’” 29 Cal. 4th 473, 482 (2002) (citation omitted).  
 18 Plaintiffs respond that “‘loss of . . . general health, strength and vitality’ and ‘emotional distress’”  
 19 are cognizable as physical harms under California law and that the case law Defendants cite is not  
 20 directly on point. Dkt. No. 82 at 15 (citing *Ziencik v. Snap, Inc.*, No. 21-cv-7292-DMG (PDX),  
 21 2023 WL 2638314, at \*11 (C.D. Cal. Feb. 3, 2023)).

22 The Court agrees with Plaintiffs that *Jimenez*, which considered only whether allegations  
 23 of economic harm were sufficient to support a claim for strict products liability, did not address  
 24 whether *emotional harm* could support such a claim. *Id.* at 15 (emphasis added); *see also Hughes*  
 25 *v. Apple, Inc.*, 723 F. Supp. 3d 693, 710 (N.D. Cal. 2024) (“Apple is invoking a doctrine that  
 26 draws a distinction between economic harm and physical harm to argue that there must also be a  
 27 distinction between emotional harm and physical harm. One does not follow from the other.”);

1 *Ziencik*, 2023 WL 2638314, at \*4 (“[T]he distinction elucidated in *Jimenez* is between physical  
2 and economic harms, not between physical and emotional harms.”). However, even assuming that  
3 California law recognizes emotional harm as sufficient injury for a products liability claim,  
4 Plaintiffs do not allege any harm caused by Defendants’ purportedly defective reporting tools.  
5 Instead, they allege they suffered emotional harm when Defendants decided not to remove the  
6 videos they reported. *See, e.g.*, Dkt. No. 1 ¶ 32 (“Upon repeatedly receiving these responses  
7 where Defendants’ platforms upheld the harmful contents that Plaintiffs report, Plaintiffs felt  
8 helpless, retraumatized, invalidated, frustrated, insulated, and deceived.”); ¶ 75 (“YouTube and  
9 TikTok’s repeated arbitrary determinations, failure to enforce their guidelines, and ultimate  
10 invalidation of her voluntary efforts to report harmful content, caused [Ms. Bogard] to feel  
11 emotional distress, anxiety, helplessness, invalidation, grief, re-traumatization, and frustration.”);  
12 ¶ 103 (Ms. Doe “feels betrayed that the platform would uphold the posting of harassing content  
13 while ignoring her pleas to take it down.”). Plaintiffs’ allegations of harm are not tethered to a  
14 product defect, and thus, Plaintiffs have not alleged actionable harm for their products liability  
15 claim.

16 Because Plaintiffs fail to state a claim for strict products liability based on a design defect,  
17 the Court dismisses claim 1.

18 **2. Claim 2: Negligence**

19 Plaintiffs assert that Defendants were negligent because they “had a duty . . . to protect  
20 users from an unreasonable risk of harm arising out of the use of their apps” and that, in offering a  
21 reporting system, “Defendants put users in a worse position of feeling frustrated, helpless and  
22 anxious about the reporting process, retraumatizing those whose reports are invalidated, and  
23 wasting valuable time and resources of users . . .” Dkt. No. 1 ¶¶ 177-178. Defendants respond  
24 that this claim fails because they owe no legal duty of care “to remove content or protect against  
25 ‘harmful’ videos uploaded by third parties” and that they have assumed no particular  
26 responsibility to Plaintiffs by providing a reporting system. Dkt. No. 76 at 2; Dkt. No. 89 at 12-  
27 13.

1 To state a claim for negligence under California law, a plaintiff must plausibly allege “(1)  
2 the existence of a duty to exercise due care, (2) breach of that duty, (3) causation, and (4)  
3 damages.” *Dyroff v. Ultimate Software Grp., Inc.*, No. 17-cv-05359-LB, 2017 WL 5665670, at  
4 \*12 (N.D. Cal. Nov. 26, 2017), *aff’d*, 934 F.3d 1093 (9th Cir. 2019). With respect to the duty to  
5 exercise due care, there is a general duty to not “create an unreasonable risk of injury to others.”  
6 *Zelig v. Cnty. of Los Angeles*, 27 Cal. 4th 1112, 1128 (Cal. 2002) (citation omitted). However, “if  
7 a person has not created a danger, then generally he [or she] has no duty to come to the aid of  
8 another person (a victim) absent a relationship that gives rise to a duty to protect.” *Dyroff*, 2017  
9 WL 5665670, at \*12.

10 Plaintiffs argue that by offering a means to report videos for violating Defendants’ policies  
11 or guidelines, Defendants created a special relationship between Defendants and Plaintiffs. Dkt.  
12 No. 82 at 16-17. Plaintiffs assert that Defendants “positioned themselves as a first-response  
13 hotline” and, in doing so, “assumed the duty to undertake responses to the reports” that would be  
14 made. *Id.* at 17. Defendants respond that they “never undertook a duty to remove all reported  
15 content” but rather “explain[ed] that not every report results in removal of content.” Dkt. No. 89  
16 at 12. They assert that any other interpretation would result in “limitless and arbitrary duties on  
17 any company that offers reporting tools to customers . . . .” Dkt. No. 76 at 20.

18 The Court is not persuaded that Plaintiffs have plausibly alleged any Defendant assumed  
19 the obligation of a “first response hotline,” such as 911 dispatcher or suicide prevention hotline,  
20 and thereby assumed a corresponding duty of care. The allegations in the complaint, summarized  
21 above, reflect that Defendants merely offer an opportunity for users to report videos that users  
22 believe violate Defendants’ policies or guidelines to Defendants for review. Plaintiffs plead no  
23 facts suggesting that Defendants have undertaken an obligation to remove immediately any video  
24 Plaintiffs or other users report. These circumstances distinguish this case from *Barnes*, the sole  
25 authority on which Plaintiffs rely, in which the Ninth Circuit concluded that Yahoo! was bound by  
26 a specific promise its representative made to the plaintiff to remove specific content. *See Barnes*  
27 *v. Yahoo!, Inc.*, 570 F.3d 1096, 1107-09 (9th Cir. 2009) (finding plaintiff stated a claim for  
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1 promissory estoppel). Likewise, the Court is not persuaded that by offering a reporting system  
2 Defendants have put Plaintiffs in a “worse position” by “hinder[ing] [them], and other users, from  
3 contacting adult guardians or law enforcement.” Dkt. No. 82 at 17. Plaintiffs do not plausibly  
4 allege, let alone explain, how the existence of Defendants’ reporting system prevents them from  
5 taking any other action, including reporting videos they believe are harmful to law enforcement.

6 Plaintiffs also fail to plausibly allege that Defendants assumed a special duty of care  
7 because Plaintiffs’ reports concern videos they believe are harmful to children. Plaintiffs are  
8 adults who assert claims on their own behalf, not on behalf of children, and their claims are based  
9 on their own interactions with Defendants’ platforms. Plaintiffs cite no authority to support their  
10 theory that Defendants have a special duty of care in these circumstances. *See In re Soc. Media*  
11 *Adolescent Addiction*, 702 F. Supp. 3d at 855 n.63 (rejecting argument that defendants operating  
12 social media platforms have an “elevated” duty because of the involvement of minors); *see also*  
13 *Dyroff*, 2017 WL 5665670, at \*14 (as a general matter, there is no special relationship between a  
14 social media platform and its users).

15 Because Plaintiffs fail to state a claim of negligence, the Court dismisses claim 2.

16 **3. Claim 3 and 4: Misrepresentation**

17 Plaintiffs assert claims of fraudulent and negligent misrepresentation, alleging that  
18 Defendants made material, false representations regarding prohibited content on their platforms  
19 and the process for reporting such content, and that Plaintiffs reasonably relied on these  
20 representations to their detriment. Dkt. No. 1 ¶¶ 192, 196, 199-200.<sup>5</sup> Defendants argue that both  
21 claims sound in fraud, and neither is pled with particularity, as required by Rule 9(b). Dkt. No. 76  
22 at 24-25. In addition, Defendants argue that Plaintiffs have not identified any actionable statement  
23 on which they could have reasonably relied. *Id.* at 26-27. Although there is a question whether  
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25 <sup>5</sup> Plaintiffs also assert that “Defendants made material representations by setting forth concrete  
26 features on their platforms for users to report harms.” Dkt. No. 1 ¶ 192. To the extent Plaintiffs  
27 mean to suggest that the mere fact of creating a reporting system is in itself a misrepresentation  
28 that the system is effective, they have cited no support for such a proposition.



1 Rule 9(b)'s heightened pleading standard applies to a claim of negligent misrepresentation, *see*  
2 *Villegas v. Wells Fargo Bank, N.A.*, No. 12-cv-02004 LB, 2012 WL 4097747, at \*7 (N.D. Cal.  
3 Sept. 17, 2012) (observing that the Ninth Circuit has not yet decided this question), Plaintiffs do  
4 not disagree that their pleading must meet this standard for purposes of this motion.<sup>6</sup> *See*  
5 *generally* Dkt. No. 82 at 19-20.

6 To state a claim of negligent misrepresentation, a plaintiff must plausibly allege: “(1) a  
7 misrepresentation of a past or existing material fact, (2) made without reasonable ground for  
8 believing it to be true, (3) made with the intent to induce another’s reliance on the fact  
9 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” *Alafi*  
10 *v. Cohen*, 106 Cal. App. 5th 46, 65 (Ct. App. 2024) (quoting *Ragland v. U.S. Bank Nat’l Assn.*,  
11 209 Cal. App. 4th 182, 196 (Ct. App. 2012)). A claim of fraudulent misrepresentation requires  
12 similar allegations, except that a plaintiff must also allege that the defendant knew “the  
13 representation was false when the defendant made it, or the defendant made the representation  
14 recklessly and without regard for its truth.” *Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594,  
15 605-06 (Ct. App. 2014). A plaintiff must allege precisely “*what* is false or misleading about [the  
16 alleged misrepresentation], and *why* it is false.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541,  
17 1548 (9th Cir. 1994), *superseded by statute on other grounds* (emphasis added). “To satisfy Rule  
18 9(b), allegations of fraud ‘must be accompanied by the who, what, when, where, and how of the  
19 misconduct charged.’” *In re Uber*, 2024 WL 4211217, at \*19 (quoting *Kearns v. Ford Motor Co.*,  
20 567 F.3d 1120, 1125 (9th Cir. 2009)).

21 Plaintiffs identify the following statements by YouTube as the misrepresentations at issue:

- 22 (1) **YouTube Policies:** “YouTube doesn’t allow content that encourages  
23 dangerous or illegal activities that risk serious physical harm or death.  
24 If you find content that violates this policy, report it. Instructions for  
25 reporting violations of our Community Guidelines are available here.  
26 When content is reported, it’s not automatically taken down. Reported  
27 content is reviewed along these guidelines: Content that violates our

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27 <sup>6</sup> The Court would reach the same conclusion even if the heightened pleading standard did not  
28 apply.

Community Guidelines is removed from YouTube.”

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- 2 (2) **YouTube Guidelines:** We enforce these Community Guidelines using
- 3 a combination of human reviewers and machine learning, and apply
- 4 them to everyone equally—regardless of the subject or the creator’s
- 5 background, political viewpoint, position, or affiliation.
- 6 (3) **YouTube Policies:** The following types of content are not allowed on
- 7 YouTube. This isn't a complete list. Asphyxiation: Any activity that
- 8 prevents breathing or can lead to suffocation like: Choking, drowning,
- 9 or hanging games.”

Dkt. No. 1 ¶¶ 17, 68; Dkt. No. 102 at 66:3-14. Plaintiffs identify the following statements by  
TikTok as the misrepresentations at issue:

- 10 (4) **TikTok Guidelines:** We don’t allow: Content that shows or suggests
- 11 inappropriate use of dangerous tools or objects. Content that shows
- 12 dangerous driving behavior. Content that shows or promotes ingesting
- 13 substances that are not meant for consumption and could lead to severe
- 14 harm. Content that describes or provides instructions on how to
- 15 perform a dangerous activity. Dangerous games, dares, challenges or
- 16 stunts that might lead to injury or property damage.
- 17 (5) **TikTok Statement at Senate Hearing:** Senator we have not been able
- 18 to find any evidence of a black out challenge on TikTok at all. And
- 19 again it would violate our guidelines but it’s something that we would
- 20 proactively search [for] both with AI and Human Moderators. We have
- 21 found absolutely no evidence of it.
- 22 (6) **TikTok’s self-created public campaign and content,**
- 23 **“#safertogether” in November 2021:** TikTok claims in their “Learn
- 24 How Reporting Works” video that “every report that is sent to TikTok is
- 25 checked.”
- 26 (7) **TikTok’s statement in the Safety Page:** We remove content that
- 27 features dangerous, harmful or criminal behaviors. We will also remove
- 28 videos that discuss dangerous challenges if they contain unfounded
- warnings which seek to spread fear and panic, or include instructions or
- depictions of harmful behavior. If you’re not sure whether a video is
- potentially harmful, report it to us and we’ll take a look.

Dkt. No. 1 ¶ 17; Dkt. No. 102 at 66:3-14.

Plaintiffs contend that these seven statements essentially convey the following  
representations: (1) that Defendants “review and act upon harms that violate their policies” (2) in

1 a way that is meaningful and “accurate enough to respond to a majority of harms,” (3) such that  
2 their platforms will be free of certain content. *Id.* ¶¶ 187-209; Dkt. No. 82 at 19. They assert that  
3 Defendants’ statements are false because the reporting processes did not, in Plaintiffs’ experience,  
4 result in the removal of content that violated Defendants’ policies or guidelines. Dkt. No. 82 at 18  
5 (“Defendants’ reporting systems do not work as Defendants represented, as demonstrated by  
6 Plaintiffs’ own experiences.”), 19 (videos were removed “for ‘violating YouTube’s community  
7 guidelines’ after the filing of the Complaint”), 20 (“Defendants’ statements that the reporting tool  
8 would trigger or result in a review and response per Defendants’ guidelines . . . were false.”).

9 The Court agrees with Defendants that Plaintiffs largely fail to plead what is false about  
10 each challenged statement or why each is false. Dkt. No. 89 at 15. Many of the statements simply  
11 describe what content is allowed on the platforms. Dkt. No. 82 at 19. Indeed, it is difficult to  
12 imagine how such statements of policy could be considered “false” for purposes of Plaintiffs’  
13 claims. *See Doe v. Grindr Inc.*, No. 24-475, 2025 WL 517817, at \*4 (9th Cir. Feb. 18, 2025)  
14 (“[T]he statement that an interactive computer service provider will create a safe and secure  
15 environment is too general to be enforced.”); *Lloyd v. Facebook, Inc.*, No. 21-cv-10075-EMC,  
16 2022 WL 4913347, at \*9 (N.D. Cal. Oct. 3, 2022) (“[M]erely stating that Facebook does not allow  
17 users to post harmful content and that they will remove them is mere ‘a general monitoring policy’  
18 that the Ninth Circuit noted was insufficient [to establish an obligation].”). The Court is not  
19 persuaded that such “not allowed” statements of policy are equivalent to a representation that  
20 Defendants’ platforms *do not have* content that violates Defendants’ policies or guidelines.

21 Other statements present a closer question. For example, statements such as “Content that  
22 violates our Community Guidelines is removed” (YouTube) or “We will . . . remove videos that  
23 discuss dangerous challenges if they contain unfounded warnings which seek to spread fear and  
24 panic, or include instructions or depictions of harmful behavior” (TikTok) may be understood as  
25 affirmative statements that Defendants take a specific action (i.e. remove a video from their  
26 platforms), if the video contains specific prohibited content. Defendants argue that these  
27 statements constitute future-looking promises, i.e. that Defendants will remove violative content,

1 and that such statements are not actionable misrepresentations under California law, which  
2 requires a statement about a “past or existing material fact.” Dkt. No. 76 at 26-27. Plaintiffs do  
3 not address this argument. The Court agrees that future statements are generally not actionable as  
4 negligent misrepresentations. *See Aton Ctr., Inc. v. United Healthcare Ins. Co.*, 93 Cal. App. 5th  
5 1214, 1245-46 (Ct. App. 2023). However, California law suggests that certain species of  
6 *intentionally* fraudulent misrepresentations, wherein a defendant makes a promise that he or she  
7 has no intention of performing, are actionable. *See Lazar v. Superior Ct.*, 12 Cal. 4th 631, 638  
8 (Cal. 1996); *see also Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 158 (Ct.  
9 App. 1991) (“Certain broken promises of future conduct may, however, be actionable.”).

10       Regardless, the complaint does not identify any specific video that contained prohibited  
11 conduct and was not removed once it was determined to violate a Defendant’s guidelines.  
12 Moreover, to the extent determination of whether a video violates a policy or guideline or contains  
13 specific prohibited content requires a subjective determination that must be made by Defendants,  
14 even these affirmative “we remove” statements may not be susceptible of being “true” or “false.”  
15 *See Humphrey v. J.M. Smucker Co.*, No. 22-cv-06913-WHO, 2023 WL 3592093, at \*7 (N.D. Cal.  
16 May 22, 2023) (“A representation of fact is one which makes a specific and measurable claim,  
17 capable of being proved false or of being reasonably interpreted as a statement of objective fact.”)  
18 (internal citations and quotations omitted). Plaintiffs appear to concede as much in framing the  
19 alleged misrepresentations as statements that Defendants will review and act upon reports in a way  
20 that is “meaningful” and “accurate enough to respond to a majority of harms.” Dkt. No. 1 ¶¶ 20-  
21 21, 192. It is difficult to imagine standards more subjective than “meaningful” and “accurate  
22 enough.” *See Dena' Nena' Henash, Inc. v. Oracle Corp.*, No. 07-cv-0633 CW, 2007 WL 1455905,  
23 at \*6 (N.D. Cal. May 16, 2007) (“The concept of ‘almost complete’ is too vague to support a  
24 claim of fraud, and it is not clear that the statement was knowingly false when made. Plaintiff’s  
25 allegation that there remained ‘substantial work’ is itself a subjective statement.”).

26       In any event, as to all seven statements in question, Plaintiffs do not plead with the  
27 necessary specificity the elements of justifiable reliance on a particular statement or statements

1 and the resulting damages.

2 Because Plaintiffs fail to adequately plead their claims of negligent misrepresentation and  
3 fraudulent misrepresentation, including with the specificity required by Rule 9(b), the Court  
4 dismisses claims 3 and 4.

5 **D. State Statutory Claims**

6 Defendants argue that Plaintiffs fail to state any claim for relief under the state statutes  
7 identified in their complaint because all such claims rely on the same alleged misrepresentations  
8 asserted in claims 3 and 4. As the Court has found that these common law claims are not  
9 adequately pled, most of the same deficiencies apply equally to Plaintiffs' claims 5-8, which are  
10 also dismissed for the same reasons. However, the Court will also consider the additional  
11 challenges Defendants raise to each of claims 5-8.

12 **1. Claim 5: Indiana Deceptive Consumer Sales Act (IDCSA)**

13 Plaintiff Joann Bogard asserts that Defendants "engaged in 'unfair, abusive, or deceptive  
14 act[s] or practice[s] in connection with a consumer transaction' [citation omitted] when they set  
15 forth representations and a reporting process which they knew to be defective and ineffective" in  
16 violation of the Indiana Deceptive Consumer Sales Act (IDCSA), Ind. Code § 24-5-0.5 *et seq.*  
17 Dkt. No. 1 ¶ 214. Defendants argue that the IDCSA does not apply because the free downloading  
18 of the YouTube or TikTok applications is not a consumer transaction within the meaning of the  
19 statute. Dkt. No. 76 at 27. They also assert that the IDCSA applies only to "transactions" made  
20 for personal purposes and not for purposes of educating and protecting the public or advocating  
21 for children's safety. *Id.* at 28. Finally, they assert that the emotional injury Ms. Bogard alleges is  
22 not cognizable because it does not have "physical impact" as required by the statute. *Id.*

23 The IDSCA states in relevant part:

24 A supplier may not commit an unfair, abusive, or deceptive act,  
25 omission, or practice in connection with a consumer transaction.  
26 Such an act, omission, or practice by a supplier is a violation of this  
27 chapter whether it occurs before, during, or after the transaction. An  
28 act, omission, or practice prohibited by this section includes both  
implicit and explicit misrepresentations.

1 Ind. Code Ann. § 24-5-0.5-3(a). The statute defines consumer transaction as:

2 a sale, lease, assignment, award by chance, or other disposition of an  
3 item of personal property, real property, a service, or an intangible,  
4 except securities and policies or contracts of insurance issued by  
5 corporations authorized to transact an insurance business under the  
6 laws of the state of Indiana, with or without an extension of credit,  
7 to a person for purposes that are primarily personal, familial,  
8 charitable, agricultural, or household, or a solicitation to supply any  
9 of these things.

10 *Id.* § 24-5-0.5-2(a)(1). A recent decision by the Indiana Court of Appeals holds that a consumer  
11 transaction is not limited to an “exchange for money” and that TikTok’s exchange of “access to its  
12 app’s content library for end-user personal data” is a consumer transaction within the meaning of  
13 the statute. *State v. TikTok Inc.*, 245 N.E.3d 681, 693 (Ind. Ct. App. 2024).

14 Here, Ms. Bogard does not clearly identify the “consumer transaction” at issue. The  
15 complaint generally alleges that Ms. Bogard was induced to use Defendants’ reporting system by  
16 means of deceptive practices (presumably, the alleged misrepresentations described above) which  
17 allegedly caused her emotional harm. However, Ms. Bogard does not appear to argue that  
18 Defendants’ alleged misrepresentations induced her to use the TikTok or YouTube applications in  
19 the first place. Thus, it is not clear that Ms. Bogard’s use of Defendants’ reporting systems—  
20 functionalities available on their respective platforms—qualify as “consumer transactions” within  
21 the scope of the IDSCA. *See State*, 245 N.E.3d at 693 (“Thus, the plain and ordinary definition of  
22 the word ‘sale,’ which is not otherwise defined in the DCSA, includes any *consideration* to  
23 effectuate the transfer of property, not only an exchange for money.”) (emphasis added).

24 Even assuming that Ms. Bogard’s use of Defendants’ reporting systems satisfies the  
25 “consumer transaction” requirement of the IDSCA, Plaintiffs do not disagree that the IDSCA  
26 requires allegations of physical impact or harm. Dkt. No. 82 at 22. Plaintiffs fail to state a claim  
27 for relief under this statute because they plead no such allegations.

28 Because Plaintiffs fail to state a claim for violation of the IDSCA, the Court dismisses  
claim 5.

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**2. Claim 6: Wisconsin Deceptive Trade Practices Act (WDPTA)**

Plaintiff Annie McGrath asserts that YouTube “marketed and placed before the public various statements, representations, and announcements of its safety features” and “made false and material statements to its users about its reporting feature” in violation of the Wisconsin Deceptive Trade Practices Act (WDTPA), Wis. Stat. § 100.18 *et seq.* Dkt. No. 1 ¶¶ 220-21. Defendants argue that this claim fails because there is no “commercial transaction” alleged and Ms. McGrath has not shown an “economic injury” as required by the WDPTA. Dkt. No. 76 at 28-29.

The WDPTA states in relevant part:

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public . . . an advertisement, announcement, statement or representation of any kind to the public . . . which . . . contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Wis. Stat. Ann. § 100.18(1). To establish a violation of this statute, a plaintiff 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.” *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 301 Wis. 2d 109, 122 (Wis. 2007).

Ms. McGrath asserts that the WDPTA applies because Defendants made certain misrepresentations “in order to promote the engagement of users so they may increase the volume of data collected and revenue earned through advertisements.” Dkt. No. 82 at 22-23. While she does not cite any case law in support of this theory, this argument is not dissimilar to the view

1 endorsed by the Indiana Court of Appeals—i.e. that a transaction occurs when Defendants  
2 exchange access to their platform for user data. The cases Defendants cite do not foreclose this  
3 result. In *Slane v. Emoto*, the court determined that that the books at issue were not written with  
4 the intent “to induce readers to purchase [an item]”; it did not, however, discuss whether a  
5 commercial transaction must always involve an exchange of money. 582 F. Supp. 2d 1067, 182-  
6 83 (W.D. Wis. 2008). In *Hydraulics Int'l, Inc. v. Amalga Composites, Inc.*, the primary question  
7 before the court was whether the statute could apply to consumers outside Wisconsin, not what  
8 constitutes a commercial transaction. No. 20-cv-371, 2022 WL 4273475, at \*10 (E.D. Wis. Sept.  
9 15, 2022). Similarly, in *T&M Farms v. CNH Indus. Am., LLC*, the WDPTA claim ultimately  
10 turned on whether the deceptive representation would “reach and induce action by a purchaser in  
11 Wisconsin.” 488 F. Supp. 3d 756, 763 (E.D. Wis. 2020). While these cases generally support  
12 Defendants’ argument that the primary purpose of the statute is to prevent false advertising in  
13 commercial transactions, they do not define the outer boundaries of what constitutes a  
14 “commercial transaction” under the WDPTA. On this record, the Court cannot conclude that  
15 Plaintiffs’ claim fails as a matter of law with respect to this element.

16 In terms of pecuniary loss, Ms. McGrath argues that she “suffered loss due to her  
17 prolonged leave from work before and after she discovered the extent of Defendants’ defective  
18 reporting systems.” Dkt. No. 82 at 23; *see also* Dkt. No. 1 ¶ 87 (“Because of the tragedy that  
19 happened to Griffin, Annie could not return to work for three years. In part, Defendants’ failure to  
20 respond to Annie’s reports exacerbated feelings of helplessness, anxiety, and lack of closure.”).  
21 As presently alleged, the connection between Ms. McGrath’s pecuniary loss and Defendants’  
22 flawed reporting systems is not adequately pled. Rather, the allegations contradict this element of  
23 the claim to the extent they indicate that Ms. Griffin was unable to work primarily due to the  
24 experience of losing her son, rather than her use of Defendants’ reporting systems. *Hackel v.*  
25 *National Feeds, Inc.* does not suggest a contrary conclusion. In that case, the plaintiff suffered the  
26 loss of his mink herd as a direct consequence of the defendant’s false representation that the mink  
27 feed it supplied was not defective, a representation on which the plaintiff relied in continuing to



1 provide the feed to his mink herd. 986 F. Supp. 2d 963, 980-81 (W.D. Wis. 2013). The  
2 connection between Ms. McGrath’s pecuniary loss and her alleged reliance on Defendants’  
3 reporting system is far more attenuated.

4 Because Plaintiffs fail to state a claim for violation of the WDPTA, the Court dismisses  
5 claim 6.

6 **3. Claim 7: Oregon Unfair Trade Practices Act (OUTPA)**

7 Plaintiff Jane Doe asserts that TikTok “made false and material statements to its users,  
8 including Jane Doe about its reporting feature” in violation of the Oregon Unlawful Trade  
9 Practices Act (OUTPA), Or. Rev. Stat. Ann. § 646.605 *et seq.* Dkt. No. 1 ¶ 231. Defendants  
10 argue that in addition to identifying no “actionable misrepresentation,” the complaint pleads no  
11 “ascertainable loss of money or property.” Dkt. No. 76 at 29 (citing *Egbukichi v. Wells Fargo*  
12 *Bank, NA*, 184 F. Supp. 3d 971, 978 (D. Or. 2016)).

13 The OUTPA states in relevant part:

14 (1) A person engages in an unlawful practice if in the course of the  
15 person's business, vocation or occupation the person does any of the  
16 following . . . .

17 (e) Represents that real estate, goods or services have  
18 sponsorship, approval, characteristics, ingredients, uses,  
19 benefits, quantities or qualities that the real estate, goods or  
20 services do not have or that a person has a sponsorship,  
approval, status, qualification, affiliation, or connection that  
the person does not have.

21 Or. Rev. Stat. Ann. § 646.608(1)(e). It further states:

22 (1) Except as provided in subsections (8) and (9) of this section, a  
23 person that suffers *an ascertainable loss of money or property*, real  
24 or personal, as a result of another person's willful use or  
25 employment of a method, act or practice declared unlawful under  
26 ORS 646.608, may bring an individual action in an appropriate court  
to recover actual damages or statutory damages of \$200, whichever  
is greater.

27 Or. Rev. Stat. Ann. § 646.638(1) (emphasis added). “Pleading an ascertainable loss of money or  
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1 property is an essential element of a private UTPA claim.” *Egbukichi*, 184 F. Supp. 3d at 978. A  
2 qualifying ascertainable loss must be “objectively verifiable” and “specifically of ‘money or  
3 property.’” *Pearson v. Philip Morris, Inc.*, 358 Or. 88, 117 (Or. 2015) (quoting Or. Rev. Stat.  
4 Ann. § 646.638(1)). “[N]oneconomic losses cognizable in a civil action—such as physical pain,  
5 emotional distress, or humiliation [citation omitted]—will not satisfy a private UTPA plaintiff’s  
6 burden.” *Id.*

7 Here, Ms. Doe argues that she alleges ascertainable loss of money or property because she  
8 “lost[] work, time, and sleep” attempting to get the video removed. Dkt. No. 82 at 24. She also  
9 states that monetary loss can be estimated from how “TikTok values the personal data it collects  
10 from its users as well as TikTok’s advertising revenue.” *Id.* At the hearing, Plaintiffs’ counsel  
11 directed the Court to *Solano v. Kroger Co.*, No. 18-cv-01488-AC, 2020 WL 7028473 (D. Or. Nov.  
12 30, 2020) in support of Ms. Doe’s argument that such loss is cognizable. Dkt. No. 102 at 73:21-  
13 74:5. In *Solano*, the court noted that OUTPA “does not require, for example, a customer’s  
14 reliance on the unlawful trade practice to cause the loss. It simply requires that the unlawful  
15 practice caused the loss.” 2020 WL 7028473, at \*4. To the extent Ms. Doe suggests that her loss  
16 may be untethered to her reliance on Defendants’ alleged misrepresentations, the Court finds this  
17 argument unpersuasive. In any event, the complaint contains no allegations regarding how Ms.  
18 Doe specifically suffered a loss of money or property as a result of Defendants’  
19 misrepresentations. *Solano* does not excuse the need to plead an ascertainable loss which Ms. Doe  
20 fails to do. The claim fails on this basis.

21 Because Plaintiffs fail to state a claim for violation of the OUTPA, the Court dismisses  
22 claim 7.

23 **4. Claim 8: California Business and Professions Code**

24 Plaintiffs allege that Defendants have made “false and material statements to [their] users,  
25 including Plaintiffs,” in violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. &  
26 Prof. Code, §17200 *et seq.* and its False Advertising Law (“FAL”), Cal. Bus. & Prof. Code  
27 §17500 *et seq.* Dkt. No. 1 ¶¶ 240, 242. Defendants argue that, in addition to asserting no  
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1 actionable misrepresentations, Plaintiffs fail to state a UCL or FAL claim for two reasons: (1) they  
2 have not established statutory standing because they have not pled they suffered an economic  
3 injury or loss; and (2) they have not established their entitlement to restitution or injunctive relief  
4 which are the only forms of relief available. Dkt. No. 76 at 30-32.

5 Section 17200 of the California Business and Professions Code prohibits “any unlawful,  
6 unfair or fraudulent business act or practice . . . .” and “unfair, deceptive, untrue or misleading  
7 advertising,” as well as any act prohibited Section 17500. Cal. Bus. & Prof. Code § 17200.

8 Section 17500 states in relevant part:

9 It is unlawful for any person, firm, corporation or  
10 association, or any employee thereof with intent directly or  
11 indirectly to dispose of real or personal property or to perform  
12 services, professional or otherwise, or anything of any nature  
13 whatsoever or to induce the public to enter into any obligation  
14 relating thereto, to make or disseminate . . . any statement,  
15 concerning that real or personal property or those services,  
16 professional or otherwise, or concerning any circumstance or matter  
17 of fact connected with the proposed performance or disposition  
18 thereof, which is untrue or misleading, and which is known, or  
19 which by the exercise of reasonable care should be known, to be  
20 untrue or misleading . . .

21 Cal. Bus. & Prof. Code § 17500. California courts “ha[ve] recognized that ‘[a]ny violation of the  
22 false advertising law . . . necessarily violates’ the UCL. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950  
23 (Ct. App. 2002), *as modified* (May 22, 2002) (citation omitted).

24 To establish standing to sue under the UCL or the FAL, a plaintiff must “(1) establish a  
25 loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic*  
26 *injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business  
27 practice or false advertising that is the gravamen of the claim.” *Kwikset Corp. v. Superior Ct.*, 51  
28 Cal. 4th 310, 322 (Cal. 2011). Economic injury may be shown, for example, where a plaintiff “(1)  
surrender[s] in a transaction more, or acquire[s] in a transaction less, than he or she otherwise  
would have; (2) ha[s] a present or future property interest diminished; (3) [is] deprived of money  
or property to which he or she has a cognizable claim; or (4) [is] required to enter into a

1 transaction, costing money or property, that would otherwise have been unnecessary.” *Id.* at 323.  
2 In addition, “[a]ctions under the UCL and FAL are actions in equity.” *Sharpe v. Puritan's Pride,*  
3 *Inc.*, 466 F. Supp. 3d 1066, 1070 (N.D. Cal. 2020). Thus, remedies are “generally limited to  
4 injunctive relief and restitution.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,  
5 1144 (Cal. 2003) (citations and quotations omitted).

6 Plaintiffs do not dispute that an economic injury is required under the UCL and FAL, but  
7 they argue that they have alleged such an injury—“the monetary value of personal data  
8 Defendants obtained at least in part by their misrepresentations.” Dkt. No. 82 at 25. Plaintiffs do  
9 not cite any authority in support of this assertion, nor do they point to any such allegations in the  
10 complaint. Other than the above conclusory statement, Plaintiffs do not explain how Defendants’  
11 alleged misrepresentations about their reporting system allowed Defendants to obtain, let alone  
12 monetize, the Plaintiffs’ personal data (or anyone else’s).

13 Plaintiffs also do not dispute that the only remedies available under the UCL and the FAL  
14 are restitution and injunctive relief. They assert that they seek injunctive relief “because monetary  
15 relief would fall short of repairing the damages asserted in the Complaint.” Dkt. No. 82 at 25. To  
16 the extent Defendants contend that Plaintiffs are not entitled to injunctive relief because they also  
17 seek damages in connection with other claims, the Court is not persuaded that this determination  
18 can be made as a matter of law at the pleading stage. However, as Plaintiffs have not pled any  
19 harm that is cognizable under the UCL or the FAL, this claim fails.

20 Because Plaintiffs fail to state a claim for violation of California Business and Professions  
21 Code §§ 17200 or 17500, the Court dismisses claim 8.

22 **E. Proximate Cause**

23 Defendants argue that all of Plaintiffs’ claims fail because Plaintiffs have insufficiently  
24 alleged that Defendants’ actions are the proximate cause of the harm they suffered. Dkt. No. 76 at  
25 20-21. They argue that it is not reasonably foreseeable that, in providing a means to report videos,  
26 Defendants’ responses to Plaintiffs’ reports would cause the harm Plaintiffs claim. Rather,  
27 Defendants argue that Plaintiffs decided to proactively search out videos they believe are harmful  
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1 and report them, and that to the extent Plaintiffs suffered distress when they received Defendants’  
2 responses to their reports, Defendants’ conduct cannot be considered the legal or proximate cause  
3 of that distress. Dkt. No. 76 at 21-22. Plaintiffs respond that it was reasonably foreseeable that  
4 when Defendants created an inadequate reporting system and made misrepresentations regarding  
5 that system, those using the system would be harmed. Dkt. No. 82 at 26-27. Plaintiffs further  
6 argue that causation is a question of fact that should not be resolved at the pleading stage. *Id.* at  
7 25.

8 “At tort, plaintiffs bear the burden of demonstrating that the defendant's conduct caused  
9 some harm suffered by the plaintiffs.” *Pac. Shores Properties, LLC v. City of Newport Beach*, 730  
10 F.3d 1142, 1168 (9th Cir. 2013). “The doctrine of proximate cause limits liability; i.e., in certain  
11 situations where the defendant's conduct is an actual cause of the harm, the defendant will  
12 nevertheless be absolved because of the manner in which the injury occurred. Thus, where there is  
13 an independent intervening act that is not reasonably foreseeable, the defendant's conduct is not  
14 deemed the ‘legal’ or proximate cause.” 6 Witkin, *Summary of California Law: Torts* (11th ed.  
15 2024), § 1335; *see also Riggs v. Apple Inc.*, No. 17CV308219, 2017 WL 4018064, at \*2 (Cal.  
16 Super. Aug. 24, 2017).

17 The Court agrees that causation generally is not a matter that can be resolved on the  
18 pleadings. *See Riggs*, 2017 WL 4018064, at \*2 (“Causation is a usually a question of fact for the  
19 jury, and it ordinarily may not be resolved on demurrer unless there is no room for a reasonable  
20 difference of opinion.”). However, Plaintiffs are required to *plead* causation based on plausible  
21 allegations of fact. As explained above, Plaintiffs have generally failed to state cognizable tort  
22 claims against Defendants as to the elements of duty, breach, and harm. Whether Plaintiffs have  
23 also failed to satisfy their burden to plead causation is difficult to assess unless and until these  
24 other elements of their tort claims are adequately pled. Defendants may raise the issue of  
25 proximate causation again if Plaintiffs amend their pleadings.

26 **F. Immunity under the Communications Decency Act**

27 Defendants argue that all of Plaintiffs’ claims are barred by Section 230(c)(1) of the  
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1 Communications Decency Act (CDA), 47 U.S.C. § 230. Plaintiffs respond that their claims are  
2 not barred by Section 230(c)(1) because they do not challenge Defendants’ content moderation  
3 decisions *per se*, but instead challenge Defendants’ actions in “developing, designing, and offering  
4 a product and making representations upon which consumers rely.” Dkt. No. 82 at 12.

5 Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall  
6 be treated as the publisher or speaker of any information provided by another information content  
7 provider.” 47 U.S.C. § 230(c)(1). The Ninth Circuit has interpreted this provision to protect from  
8 liability: “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to  
9 treat, under a state law cause of action, as a publisher or speaker (3) of information provided by  
10 another information content provider.” *Barnes*, 570 F.3d at 1100-01. Acting as a publisher  
11 includes “reviewing, editing, and deciding whether to publish or to withdraw from publication  
12 third-party content.” *Id.* at 1102. However, “it is not enough that a claim, including its underlying  
13 facts, stems from third-party content for Section 230 immunity to apply. *Calise v. Meta*  
14 *Platforms, Inc.*, 103 F.4th 732, 742 (9th Cir. 2024). Rather, “[t]he proper analysis is to examine  
15 closely the duty underlying each cause of action and decide if it ‘derives from the defendant’s  
16 status or conduct as a publisher or speaker.’” *Est. of Bride by & through Bride v. Yolo Techs.,*  
17 *Inc.*, 112 F.4th 1168, 1179 (9th Cir. 2024) (quoting *Barnes*, 570 F.3d at 1107). As the court in  
18 *Bride* explained:

19 First, we examine the “right from which the duty springs.” Does it  
20 stem from the platform’s status as a publisher (in which case it is  
21 barred by § 230)? Or does it spring from some other obligation, such  
22 as a promise or contract (which, under *Barnes*, is distinct from  
23 publication and not barred by § 230)? Second, we ask what “this  
24 duty requir[es] the defendant to do.” If it *requires* that [defendant]  
25 moderate content to fulfill its duty, then § 230 immunity attaches.

26 *Id.* at 1177 (internal citations omitted).

27 There is no dispute that Defendants are providers of interactive computer services. The  
28 question is whether Plaintiffs’ claims seek to treat Defendants as a publisher or speaker of  
information provided by others. Following *Bride*’s two-step approach, the Court considers each of

1 Plaintiffs’ claims.

2 **1. Claim 1: Strict Products liability**

3 Plaintiffs contend that Defendants failed to design effective reporting tools and that this  
4 claim, therefore, is based on a product manufacturer’s duty to not create “an unreasonably  
5 dangerous” product. Dkt. No. ¶¶ 164-65. On its face, such a duty is not inherently dependent on  
6 Defendants’ status as a publisher or speaker. However, considering what this asserted duty  
7 “requires [Defendants] to do,” the Court concludes that fulfillment of the alleged duty necessarily  
8 requires Defendants to moderate content posted by third parties.

9 Plaintiffs’ theory of liability is that Defendants designed a reporting tool that is defective  
10 because objectionable content persists on their platforms even after it is reported; in other words,  
11 the breach of duty alleged is Defendants’ failure to remove reported videos. *See, e.g.*, Dkt. No. 1  
12 ¶ 74 (“The majority of the reports to TikTok made by [Ms. Bogard] were deemed not to violate  
13 TikTok’s community guidelines, even though the videos apparently featured choking challenge  
14 videos for minor audiences.”); ¶ 101 (“TikTok’s automated response would arbitrarily determine  
15 that one of the videos posted by a user is violative of the community guidelines, while the same  
16 video which is posted by another user is not.”); ¶ 141 (“Researchers reported 20 of the videos, but  
17 none of them were removed.”). These are precisely the circumstances in which Section 230  
18 applies. *See In re Soc. Media Adolescent Addiction*, 702 F. Supp. 3d at 832 (“Plaintiffs do not  
19 explain how such defect could be rectified other than through limitations on Defendants’  
20 publication of third-party content.”).

21 As currently pled, claim 1 is barred by Section 230(c)(1).

22 **2. Claim 2: Negligence**

23 To the extent Plaintiffs contend that Defendants have a duty arising from Defendants’ role  
24 as manufacturers or providers of a product, and a corresponding obligation to remove content, this  
25 claim is barred by Section 230(c)(1) for the same reasons Plaintiffs’ claim 1 is barred.

26 To the extent Plaintiffs contend that Defendants have a duty to protect others because they  
27 assumed responsibility for creating a reporting system that reliably resulted in removal of all

1 prohibited content, such a claim is also barred under Section 230(c)(1). *See Bride*, 112 F.4th at  
2 1175-76 (“In short, § 230 protects apps and websites which receive content posted by third-party  
3 users (i.e., Facebook, Instagram, Snapchat, LinkedIn, etc.) from liability for any of the content  
4 posted on their services, even if they take it upon themselves to establish a moderation or filtering  
5 system, *however imperfect it proves to be.*”) (emphasis added).

6 As currently pled, claim 2 is barred by Section 230(c)(1).

7 **3. Claims 3 and 4: Misrepresentation**

8 It is well-established in this Circuit that Section 230(c)(1) “does not immunize  
9 [Defendants] from breaking their promises . . . . [e]ven if those promises regard content  
10 moderation . . . .” *Bride*, 112 F.4th at 1182; *see also Barnes*, 570 F.3d at 1107 (“[W]hereas one  
11 cannot undertake to do something without simultaneously doing it, one can, and often does,  
12 promise to do something without actually doing it at the same time.”). Here, Plaintiffs assert that  
13 Defendants “falsely represented that [they] had a system in place to respond to users’ complaints  
14 about violations of [their] policies” and that Plaintiffs suffered harm as a result of this  
15 representation. *See* Dkt. No. 1 ¶ 198. In other words, the duty at issue arises from Defendants’  
16 alleged promises about how they handle prohibited content on their platforms, including  
17 prohibited content reported to them. However, considering what this asserted duty “requires  
18 [Defendants] to do,” it appears that fulfillment of the duty Plaintiffs say Defendants undertook in  
19 making the alleged representations would necessarily require Defendants to change how they  
20 moderate content posted by third parties—i.e. to remove all reported videos. Unlike *Bride*, where  
21 the representations at issue involved *banning or unmasking users* who posted objectionable  
22 content—implicating duties other than those of a publisher—it is difficult to see how Plaintiffs’  
23 misrepresentation claims treat Defendants as anything other than a publisher or speaker of third-  
24 party content. *Cf. Bride*, 112 F.4th at 1178-1179.

25 As currently pled, claims 3 and 4 are barred by Section 230(c)(1).

26 **4. Claims 5-8: State Statutory Claims**

27 As Defendants observe, Plaintiffs’ state statutory claims rely on the same alleged  
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1 misrepresentations asserted in support of Plaintiffs’ common law misrepresentation claims. *See*  
2 Dkt. No. 1 ¶ 214 (alleging liability under IDSCA for “false representations”); ¶ 221 (liability  
3 under WDTPA for “false and material statements”); ¶ 231 (liability under OUTPA for “false and  
4 material statements”); ¶ 242 (liability under California Business and Professions Code for “false  
5 and material statements”). However, it is not clear that the statutory claims implicate the same  
6 duties for purposes of the Section 230 immunity analysis. Because the Court will permit Plaintiffs  
7 to amend their complaint, the Court does not reach this question here.

8 **G. First Amendment Defense**

9 Defendants argue that “Plaintiffs’ claims target Defendants’ ‘decisions’ about published  
10 content—including whether the content should have been published at all, whether to remove it  
11 from publication, or whether instead to continue to make it available to users” and are thus barred  
12 by the protections of the First Amendment. Dkt. No. 76 at 13-14. Plaintiffs argue that they are  
13 merely seeking to hold Defendants accountable for their misrepresentations and for designing  
14 defective tools, and that any statements implicated by their claims constitute commercial speech  
15 that is not protected by the First Amendment. Dkt. No. 82 at 12-13.

16 “The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort  
17 suits . . . .” *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). Content moderation by social media  
18 platforms is generally considered expressive activity and is protected under the First Amendment.  
19 *See Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024) (“Deciding on the third-party speech that  
20 will be included in or excluded from a compilation—and then organizing and presenting the  
21 included items—is expressive activity of its own.”); *O’Handley v. Padilla*, 579 F. Supp. 3d 1163,  
22 1186-87 (N.D. Cal. 2022) (“Like a newspaper or a news network, Twitter makes decisions about  
23 what content to include, exclude, moderate, filter, label, restrict, or promote, and those decisions  
24 are protected by the First Amendment.”). However, “[t]he Supreme Court has recognized a  
25 ‘distinction between speech proposing a commercial transaction, which occurs in an area  
26 traditionally subject to government regulation, and other varieties of speech.’” *Kellman v. Spokeo,*  
27 *Inc.*, 599 F. Supp. 3d 877, 899 (N.D. Cal. 2022) (quoting *Bolger v. Youngs Drug Prods. Corp.*,

1 463 U.S. 60, 64 (1983)). Thus, “[t]he Constitution accords less protection to commercial speech  
2 than to other constitutionally safeguarded forms of expression.” *Bolger*, 463 U.S. at 64-65.

3 “Where the facts present a close question, ‘strong support’ that the speech should be characterized  
4 as commercial speech is found where [1] the speech is an advertisement, [2] the speech refers to a  
5 particular product, and [3] the speaker has an economic motivation.” *X Corp. v. Bonta*, 116 F.4th  
6 888, 900 (9th Cir. 2024) (citations and quotations omitted).

7 Defendants’ First Amendment arguments largely mirror their arguments in support of  
8 Section 230 immunity. However, having concluded that Plaintiffs fail to state any claim for relief,  
9 the Court does not reach Defendants’ First Amendment arguments at this time.

#### 10 **IV. LEAVE TO AMEND**

11 Rule 15(a) provides that leave to amend “should be freely given when justice so requires,”  
12 and “the court must remain guided by the underlying purpose of Rule 15 . . . to facilitate decision  
13 on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127  
14 (9th Cir. 2000) (en banc) (quotations and citations omitted). “The decision of whether to grant  
15 leave to amend nevertheless remains within the discretion of the district court,” which may deny  
16 leave to amend if allowing amendment would unduly prejudice the opposing party, cause undue  
17 delay, or be futile, or if the party seeking amendment has acted in bad faith. *Leadsinger, Inc. v.*  
18 *BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182  
19 (1962)).

20 Because it is possible that Plaintiffs may be able amend their complaint to plead plausible  
21 claims for relief that are not barred by Section 230(c)(1) of the CDA, the Court will permit them to  
22 amend those claims to address the deficiencies discussed in this order.

#### 23 **V. CONCLUSION**

24 For the reasons explained above, the Court grants Defendants’ motion to dismiss and  
25 dismisses claims 1-8 with leave to amend. Defendants Alphabet Inc. and XXVI Holdings Inc. are  
26 dismissed from this action with prejudice. Plaintiff Becca Schmill Foundation is also dismissed  
27 for lack of standing without prejudice to repleading standing in an amended complaint.

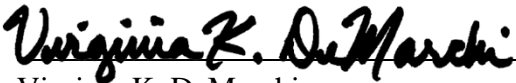
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Plaintiffs may file any amended complaint no later than **March 24, 2025**.

The initial case management conference scheduled for February 25, 2025 is continued to **April 15, 2025**.

**IT IS SO ORDERED.**

Dated: February 24, 2025

  
Virginia K. DeMarchi  
United States Magistrate Judge