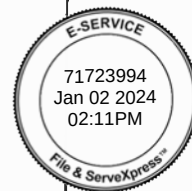


EXHIBIT V



FILED
Superior Court of California
County of Los Angeles

JAN 02 2024

David W. Slayton, Executive Officer/Clerk of Court
By: A. Morales, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AMY NEVILLE; AARON NEVILLE; JAIME
PUERTA; MARIAM HERNANDEZ; CINDY
CRUZ-SARANTOS; BRIDGETTE
NORRING; JAMES MCCARTHY;
KATHLEEN MCCARTHY; SAMANTHA
MCCARTHY; MATTHEW CAPELOUTO;
CHRISTINE CAPELOUTO; PERLA
MENDOZA; SAMUEL CHAPMAN; DR.
LAURA ANN CHAPMAN BERMAN;
JESSICA DIACONT; E.B.; AND P.B.,

Plaintiffs,

v.

SNAP, INC.,

Defendant.

Case No.: 22STCV33500

ORDER SUSTAINING IN PART AND
OVERRULING IN PART DEFENDANT'S
DEMURRER TO PLAINTIFFS' SECOND
AMENDED COMPLAINT

Hearing Date: October 18, 2023
Hearing Time: 11:00 a.m.
Dept.: 7

Plaintiffs assert¹ that the conduct of defendant Snap, Inc. ("Snap"), a social media company, has resulted in the foreseeable deaths of (and a serious personal injury to) their children. The law of the State of California provides, or should provide, them with a

¹ Six other cases, asserting similar claims, are related, and assigned to this department.

1 remedy for their alleged losses, they say. Snap disagrees. Snap claims that none of
2 plaintiffs' allegations, even if true, constitute a "cause of action." Alternatively, Snap
3 claims that for one or more other reasons apparent from the face of plaintiffs' operative
4 complaint, their lawsuit should be dismissed. Now before the court is Snap's demurrer to
5 the operative complaint.

6 Both sides contend that the law is clear and the legal path forward obvious. Not
7 so. The depth of disagreement is revealed by the parties' inability jointly to label Snap's
8 social media presence and activities: "service," "app," "product", "tool," "interactive course
9 of conduct," "platform," "website," "software" or something else. What is clear and obvious
10 is that the law is unsettled and in a state of development in at least two principal regards:
11 (1) whether "section 230" (a federal statute) immunizes Snap from potential legal liability
12 under the specific allegations asserted and (2) whether concepts of strict products liability
13 — usually applicable to suppliers of tangible products — already do or now should extend
14 to specified alleged conduct of Snap.

15 **Overview of the Case**

16 Snap operates Snapchat, a social media app for smartphones that allows users to
17 send text, picture, and video messages, called "snaps," to other users. (Second
18 Amended Complaint (July 20, 2023) ("SAC") ¶ 19, 33.) Plaintiffs' SAC is voluminous and
19 detailed: 216 pages and 991 separately numbered paragraphs. Its tenor is captured in
20 the first paragraph:

21 This case is about a social media product, Snapchat, that has caused
22 thousands of American teens to die from fentanyl overdoses. Despite Snap
23 promoting and portraying Snapchat as a "goofy" app for kids to use to send
24 each other silly pictures, its known common use is an "open air drug
25 market." As detailed below, Snap and Snapchat's role in illicit drug sales to
26 teens was the foreseeable result of the designs, structures, and policies
27 Snap chose to implement increase its revenues. Worse, as the predictable
28 use of Snapchat for drug sales—and deaths from fentanyl poisoning—took
29 off, Snap not only failed to make feasible changes to Snapchat to make the
app safer for kids, but it also engaged in a concerted corporate campaign
to delay and dissuade legal action. Snap falsely claimed it was taking
meaningful and effective steps to protect kids and when using the app, lying
to regulators and to grieving parents.

1 Although Snap has not yet formally responded to the allegations, it is clear from its
2 demurrer papers that it vehemently denies them. It asserts that it abhors the criminal
3 behavior of drug dealers who sold fentanyl to these minors; that it is on the frontlines to
4 stop drug dealers from engaging in this illegal conduct; that it has expended tremendous
5 financial and human capital resources to that end; and that it has worked closely and
6 cooperatively with law enforcement. More generally it contends that it promotes and
7 protects user safety for its 390 million daily users, and specifies some of its practices and
8 policies in furtherance of that goal. (Snap not only denies the allegations but seeks
9 monetary sanctions from plaintiffs' counsel for their allegedly asserting allegations that
10 they know are false — a motion the court has set out for hearing in the future.)

11 **Plaintiffs' Legal Claims**

12 Because this is a demurrer, which examines the legal sufficiency of *allegations*,
13 the court cites extensively to the SAC. The SAC claims that plaintiffs are parents of
14 children who allegedly purchased illicit drugs from other Snapchat users. The plaintiff
15 parents allege that unknowingly, their children purchased drugs that contained fentanyl,
16 a synthetic opioid that can be lethal in small doses. (SAC, ¶ 24.) Except for A.B., the
17 child of plaintiffs E.B. and P.B., who survived a near-fatal fentanyl overdose, plaintiffs'
18 children died of fentanyl poisoning after ingesting the drugs they obtained from other
19 Snapchat users. (*Id.* at ¶ 17.)

20 According to plaintiffs: Snapchat is specifically chosen by children, teens and
21 young adults for drug distribution because of how Snap designs, markets, distributes,
22 programs and operates Snapchat (SAC, ¶ 2); Snapchat's many data-deletion features
23 and functions made it foreseeable, if not intended, that Snapchat would become a haven
24 for drug trafficking (*Id.* at ¶ 3); the combination of practices and multiple features Snap
25 chose to build into its Snapchat product—such as ineffective age and identify verification,
26 facilitating easy creation of multiple, fake accounting, connecting kids with strangers and
27 drug dealers “in-app” through the “quick add” features and a live mapping feature makes
28 Snap an inherently dangerous product for young users (*Id.* at ¶ 13); Snap was on notice
29 that Snapchat was facilitating an enormous number of drug deals (*Id.* at ¶ 14); Snap

1 knowingly aided and abetted drug distribution to kids through its platform (*Id.* at ¶ 15);
2 fentanyl is highly toxic, is widely abused and has resulted in about 175 deaths per day in
3 the United States (*Id.* at ¶¶ 23-32); Snapchat has evolved into a digital open-air drug
4 market, Snap has targeted minor users and misrepresented the safety of Snapchat, and
5 Snapchat is a “product” (*Id.* at ¶¶ 33-88); Snap has ineffective age verification and
6 parental controls, Snapchat’s automatic message deletion feature facilitates illicit drug
7 sales and is unreasonably dangerous, Snapchat’s screenshot notification and blocking
8 features discourage reporting illicit drug sales and are unreasonably dangerous,
9 Snapchat’s “quick add” feature facilitates drug dealers’ targeting of minors with drug
10 menus and solicitations and is unreasonably dangerous, Snapchat’s “stories” feature
11 facilitates drug dealers’ engagement with minors and is unreasonably dangerous,
12 Snapchat’s “snap map” feature provides drug dealers with unique tools to evade detection
13 and is unreasonably dangerous, Snapchat’s reporting mechanisms are defective, and
14 Snapchat’s “my eyes only” feature facilitates illicit drug sales and is unreasonably
15 dangerous because it serves as a self-destructing vault to evade law enforcement (*Id.* at
16 ¶¶ 89-182); Snap relies on misleading messaging and attempts to spin, control, and
17 manage public outrage on Snapchat’s status as an open-air drug market, Snap’s role in
18 the drug trade has been reported to Snap within the media and law enforcement since at
19 least 2017, Snap ignored years’ worth of grieving parents’ warnings and requests for
20 product modifications, Snap convinced grieving parents that they had no legal recourse,
21 rather than make meaningful changes to its product, Snap pursued a more than two year
22 strategy of false assurances and misdirection (*Id.* at ¶¶ 183-268); Snap’s re-direction
23 product modifications are ineffective (*Id.* at ¶¶ 269-276); and Snap actively frustrates law
24 enforcement efforts to prosecute criminals who sell illegal drugs on Snapchat (*Id.* at ¶¶
25 277-290). Plaintiff-specific allegations are found in the SAC at paragraphs 299 through
26 719.
27
28
29

1 Plaintiffs disavow² any claim based upon Snap's activities as a publisher of the
2 third-party (drug seller) content. That is, plaintiffs do not contend that Snap is liable for
3 failing to eliminate or otherwise moderate some or all of the third-party drug sellers'
4 content. Instead, plaintiffs' sole focus, they say, is on (1) *Snap's* alleged independent
5 tortious conduct and (2) Snapchat (a "feature-packed social media app.") as a defective
6 *product*. (Plaintiffs' Opposition to Defendant Snap's Demurrer (Aug. 17, 2023)
7 ("Opposition") 3.)

8 So focusing, plaintiffs assert:

9 Snap developed and launched Snapchat for the express purpose of encouraging
10 and enabling lewd, illicit, and illegal conduct (SAC ¶¶ 54-61, 1342, 723, 893). Snap
11 marketed and designed Snapchat to encourage and incentivize young users to
12 engage in inherently risky behavior and in a manner that prevented them from
13 appreciating and/or recognizing the risks Snap itself created (SAC ¶¶ 34, 41, 65-
14 72, 134-139, 141-143, 145-149, 156-159, 162-168, 177-182, 246, 723, 885).
15 Snapchat's artificial intelligence targets young users with drug advertisements
16 (SAC ¶¶ 789, 146-158, 307-308, 324, 349-350, 382-383, 393, 414-415, 428, 444,
17 496-497, 529-531, 568-569, 603-605, 679-690) and affirmatively matches them to
18 Snapchat drug dealers (SAC ¶¶ 49, 133-148, 245, 247, 307, 349, 382, 414, 418,
19 444, 496, 529, 568, 613, 626, 680, 687, 695, 705, 723, 911, 963). Snap designed
20 features to ensure accessibility by minors even where parents object and attempt
21 to keep their children away from Snapchat (SAC ¶¶ 48, 89-95, 102-112), prevents
22 parents and law enforcement from being able to monitor and protect those
23 children, and implements product changes and updates intended to render third
24 party monitoring software ineffective (SAC ¶¶ 106-108, 121-122, 170-174, 196,
25 223, 457, 468, 533, 619, 642-643, 748, 942(b).) Finally, Snap knowingly assisted
26 the drug dealers who flocked to Snapchat by designing several unique tools and
27 mechanisms to destroy and otherwise prevent the preservation of data. (SAC ¶¶
28 60, 114-116, 119-120, 125-126, 130, 297-298, 431, 452, 546, 577-579).

23 (Opposition, 3.)

24 Plaintiffs have "allege[d] more than 21 specific design defects including a defective
25 age verification system, defective parental controls and reporting mechanisms, use of
26

27
28 ² The sincerity, *vel non*, of their disavowal is not relevant. The issue is the legal
29 sufficiency of plaintiffs' allegations, not their intentions. Footnote seven, below, comments
on "artful pleading" and "*Lemmon*-lingo."

1 inherently dangerous products in connection with minor users, creating and sending
2 harmful notifications and communications, defective data retention policies or cooperate
3 [sic, "cooperation?"] with parents and law enforcement, the random and/or discriminatory
4 matchmaking between minors and adult strangers, defective system for implementing
5 limits on product downloads and account usage, and more. (SAC ¶¶ 293-296, 731-754,
6 790, 869-870.)" (Opposition, 13.) Plaintiffs allege that Snapchat was also defective due
7 to inadequate warnings. (SAC ¶¶ 104-105, 112, 143, 160-166, 177, 221, 263, 271-272,
8 294, 761-781.)

9
10
11 Plaintiffs state their legal claims and theories in the form of 16 "counts," thus
12 warranting a comment on vocabulary. To be sustained, a demurrer must dispose of the
13 entire complaint or an entire "cause of action." (Code Civ. Proc., § 430.50, subd. (a);
14 *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113.) A
15 challenge to less than an entire cause of action in a pleading must be made by a motion
16 to strike, not demurrer. (*Olson v. Hornbrook Community Services Dist.* (2019) 33
17 Cal.App.5th 502, 522, fn. 9.) Unlike our colleagues in the federal courts, California state
18 court judges have no "line-item veto" of allegations on a demurrer.

19 Snap has made no motion to strike.

20 There is diversity of language commonly used in the California Superior Court to
21 describe a plaintiff's claim for relief and confusion surrounds the terms "cause of action"
22 and "counts." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5
23 Cal.4th 854, 860, fn.1 [terms "cause of action" and "counts" often used "imprecisely and
24 indiscriminately"].) Technically, a cause of action refers to a "primary right" of a plaintiff,
25 a corresponding "primary duty" of a defendant, and a wrongful act by the defendant
26 constituting a breach of that duty. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th
27 888, 904.) A cause of action is to be distinguished from both the relief sought (e.g.,
28 specific performance vs. damages) and "the legal theory on which liability for that injury
29 is premised: Even where there are multiple legal theories upon which recovery may be

1 predicated, one injury gives rise to one claim for relief." (*Ibid.*, emphasis and internal
2 quotes omitted.) The distinction — legal theory versus true cause of action — matters
3 when it comes to applying rules of claim preclusion, motions for summary adjudication,
4 and, as noted, demurrers.

5 In practice, parties often use "cause of action" or "count" to describe a legal theory
6 even though multiple "counts" stating various legal theories may all be directed to the
7 same "cause of action." (Edmon & Karnow, Cal. Practice Guide: Civil Procedure Before
8 Trial (The Rutter Group 2023) ¶ 6:107.) For example, California recognizes a cause of
9 action for wrongful death, which may be pursued, based upon the facts, under legal
10 theories ("counts") of negligence or strict product liability.

11 Here, plaintiffs purport to assert 16 counts. (SAC, ¶¶ 720-991.) The court
12 understands plaintiffs intend to describe by each count a separate legal theory relating to
13 one or more true causes of action. Snap appears to share that understanding as its
14 demurrer is asserted to each such count (which Snap calls a cause of action.) The court
15 will employ plaintiffs' language (and will substitute Arabic for Roman numerals). Plaintiffs'
16 counts are:

- 17 Count 1: Strict product liability (design defect)
- 18 Count 2: Strict product liability (failure to warn)
- 19 Count 3: Risk benefit test (defective design)
- 20 Count 4: Negligence (design defect)
- 21 Count 5: Negligence (failure to warn)
- 22 Count 6: Negligence
- 23 Count 7: Negligence per se
- 24 Count 8: Tortious interference with parental rights
- 25 Count 9: Public nuisance
- 26 Count 10: Aiding and abetting
- 27 Count 11: Fraudulent concealment and misrepresentation
- 28 Count 12: Fraudulent misrepresentation
- 29 Count 13: Negligent misrepresentation

1 Count 14: Wrongful death

2 Count 15: Survival action

3 Count 16: Loss of consortium and society

4 Plaintiffs seek compensatory and punitive damages and declaratory and injunctive
5 relief. It appears to the court that the SAC actually asserts three causes of action in the
6 technical sense: wrongful death, personal injury, and public nuisance. And it alleges
7 multiple legal theories ("counts") applicable to one or more of the causes of action, several
8 of which are sub-species of negligence and fraud. As the court understands it, "aiding
9 and abetting" is neither a cause of action nor an independent legal theory, but a method
10 of extending and imposing liability upon an entity for the acts of another. (CACI No. 3610.)
11 The court understands the count denominated "loss of consortium and society" to be a
12 purported cause of action applicable to spouses, not parents, although a parent asserting
13 a wrongful death action may seek, as a species of damages, "loss of society" of a
14 deceased minor child. (CACI Nos. 3920, 3922.) The claim for "tortious interference with
15 parental rights" is asserted under Virginia law (Opposition, 33), and is discussed further
16 below.

17 **The Nature of a Demurrer**

18 A demurrer is not in any sense a test of the truth of any allegation or denial. Should
19 the case proceed, there are other phases of the proceedings where the truth or falsity of
20 allegations and denials are tested — principally trial, where the parties have the
21 opportunity to present to a factfinder information that meets the strictures of the Evidence
22 Code.

23 The demurrer proceeding is far more limited. A demurrer raises one or more of
24 eight potential legal objections to a pleading. The grounds for the objection must "appear[]
25 on the face" of the complaint or "from any matter of which the court is required to or may
26 take judicial notice." (Code Civ. Proc., §§ 430.10, 430.30, subd. (a).) Less abstractly, a
27 demurrer asks: assuming for argument that all of the factual allegations *are* true, do those
28 allegations constitute a "cause of action" — meaning, do they allege an invasion of a
29 legally protected interest for which the law, under one or more legal theories asserted,

1 provides appropriate relief? If so, the case proceeds. If not, normally the court provides
2 an opportunity for the plaintiffs to make additional or different allegations ("leave to
3 amend") if the plaintiffs request. Otherwise, the court dismisses some or all of the case.

4 Here, however, plaintiffs have made clear they do not seek leave to amend should
5 the court find Snap's demurrer, or any part of it, has merit. They choose to stand on their
6 pleading.

7 In assuming the truth of the allegations of the SAC for the analysis of the demurrer,
8 the court does not employ a "plausibility" test as would be the case in federal court under
9 the analogous procedure to test the sufficiency of allegations in a complaint. (*Bell Atlantic*
10 *Corp. v. Twombly* (2007) 550 U.S. 544, 556-557; *Ashcroft v. Iqbal* (2000) 556 U.S. 662,
11 678-679 [district court disregards legal conclusions, determines whether factual
12 allegations "plausibly give rise to an entitlement for relief"].) Instead, under California
13 procedure, "[a]s a general rule in testing a pleading against a demurrer[,] the facts alleged
14 in the pleading are deemed to be true, however improbable they may be." (*Del E. Webb*
15 *Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

16 **ANALYSIS**

17 **Snap's Section 230 Challenge**

18 Snap demurs "[t]o all causes of action alleged in the SAC — which are based on
19 content created and exchanged by third parties — [and which] are barred as a matter of
20 law under Section 230 of the Communications Decency Act." (CDA) (Snap's Demurrer to
21 Plaintiffs' Second Amended Complaint (Aug. 3, 2023) ("Demurrer") 2.) Snap invokes
22 section 230 of title 47 of the United States Code ("section 230"), a federal statute
23 promulgated in 1996 that has generated an extensive jurisprudence. Federal circuit
24 courts of appeal, federal district courts, and state courts, including California state courts,
25 have considered and applied section 230 in a variety of factual circumstances.

26 **What law must this court apply?**

27 As a state court, this court is bound by the United States Supreme Court's
28 interpretation of federal statutes (*Mullaney v. Woods* (1979) 97 Cal.App.3d 710, 719), but
29

1 “the decisions of federal district and circuit courts, although entitled to great weight, are
2 not binding on state courts even as to issues of federal law.” (*Alan v. Superior Court*
3 (2003) 111 Cal.App.4th 217, 229; *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486,
4 497.) By contrast, this court must apply a binding precedent of the California Court of
5 Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d. 450, 455-456.)
6 Likewise, the California Court of Appeal is bound by the California Supreme Court’s
7 interpretation of federal questions in the absence of a contrary decision of the United
8 States Supreme Court and despite contrary holdings of other federal courts. (*People v.*
9 *Greenwood* (1986) 182 Cal.App.2d 729, 734.) But when appellate decisions of the
10 California Court of Appeal are in conflict, “the court exercising inferior jurisdiction can and
11 must make a choice between the conflicting decisions.” (*Auto Equity*, at p. 456.)

12 The United States Supreme Court has not yet construed the immunizing reach of
13 section 230 with respect to the claims plaintiffs assert here, namely, (1) for the allegedly
14 tortious independent conduct of a social media company (independent, that is, of
15 “publishing” third-party conduct), and (2) for providing a defective social media platform
16 “product.” As to the first, there was anticipation in early 2023 that the court would decide
17 whether section 230 immunizes social media platforms for the act of recommending third-
18 party content users. But it did not. “We therefore decline to address the application of
19 the section 230 to a complaint that appears to offer little, if any, plausible claim for relief.”
20 (*Gonzalez v. Google LLC* (2023) 598 U.S 617, 622.)

21 **The statute**

22 Section 230(c)(1) provides:

23 Treatment of publisher or speaker: No provider or user of an interactive computer
24 service shall be treated as the publisher or speaker of any information provided by
25 another information content provider.

26 These are, it has been famously (and at this point monotonously) said, “the twenty-
27 six words that created the internet.” At least dozens if not hundreds of courts, academics,
28 and other commentators have by now explained that the provision was designed, in 1996,
29 to protect then-fledgling internet companies from incurring liability when millions of users

1 posted content and when the companies made moves to police that content.³ Much of
2 the judicial and academic analysis has focused on an issue that is not involved in this
3 case, namely, the potential liability of a social media company for its decision to remove
4 or *not* to remove certain third-party content from its site. It seems clear that such
5 decisions are in the sweet spot of a traditional publisher's discretion and section 230
6 immunizes those decisions from tort liability. Plaintiffs' theories here do not purport to
7 hold Snap liable for failing to remove some or all of the drug sellers' third-party content
8 from Snapchat.

9 Congress expressed its intention with respect to the preemptive effect of section
10 230 on state law with a classic "consistent/inconsistent" construct:

11 Nothing in this section shall be construed to prevent any State from enforcing any
12 State law that is consistent with this section. No cause of action may be brought
13 and no liability may be imposed under any State or local law that is inconsistent
14 with this section.

15 (47 U.S.C. § 230(e)(3).) This construct kicks back to the courts to decide whether a state's
16 law including its tort common law is or is not consistent with section 230 — exactly what
17 this court is doing now.

18 And Congress also expressed its five policy goals in enacting section 230 in
19 subdivision (b):

20 It is the policy of the United States—

- 21 (1) to promote the continued development of the Internet and other interactive
22 computer services and other interactive media;
- 23 (2) to preserve the vibrant and competitive free market that presently exists for
24 the Internet and other interactive computer services, unfettered by Federal
25 or State regulation;

26 ³ A few examples from the enormous literature in the academic and popular press
27 discussing the history and purpose of section 230 include an article by section 230's
28 preeminent historian, Kossoff, *A User's Guide to Section 230, and a Legislator's Guide to*
29 *Amending It (or Not)* (2022) 37 Berk. Tech. L.J. 757; Klapper, *Reading Section 230* (2022)
70 Buffalo L.Rev. 1237; Weintraub & Moore, *Section 230* (2020) 4 Geo. L. Tech Rev.
625; and Rozenshtein, *Interpreting the ambiguities of Section 230* (Oct. 26, 2023)
Brookings Institute <bookings.edu/articles/interpreting-the-ambiguities-of-section-230/>
(as of Dec. 26, 2023).

- 1 (3) to encourage the development of technologies which maximize user control
2 over what information is received by individuals, families, and schools who
3 use the Internet and other interactive computer services;
4 (4) to remove disincentives for the development and utilization of blocking and
5 filtering technologies that empower parents to restrict their children's access
6 to objectionable or inappropriate online material; and
7 (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish
8 trafficking in obscenity, stalking, and harassment by means of computer.

9 (47 U.S.C § 230(b).)⁴

10 **Construing the statute**

11 What do the twenty-six words mean — specifically, to be “treated as a publisher or
12 speaker” — and how do they apply here? Snap’s demurrer advocates for the broadest
13 possible construction: it asserts that it is immunized from any claim “based on” the third-
14 party content. “No matter how the claims are styled, if the alleged harm *flows from* the
15 content provided by third parties, Section 230 applies.” (Demurrer, 14, emphasis
16 supplied.) Snap’s “based on”/“flows from” test is a “but for” test; if the plaintiffs would
17 have no claim but for the presence of the drug sellers’ third-party content on Snap’s
18 platform, then section 230 immunizes Snap. If Snap is correct, the court’s work is done:

19 ⁴ These policy statements are in some tension. A free market “unfettered by state
20 or federal regulation” is inconsistent with “vigorous enforcement of federal criminal laws.”
21 The related policy goals of “removing disincentives for the development and utilization of
22 blocking and filtering technologies that empower parents to restrict their children’s
23 access” and “encourag[ing] the development of technologies which maximize user control
24 over what information is received by individuals, families, and schools who use
25 the Internet” may be illusory if any “state or federal regulation” is off the table. This tension
26 and other drafting oddities of the CDA may be attributable to the legislative genesis of the
27 final Telecommunications Act of 1996, of which the Communications Decency Act (and
28 section 230) was a part. The congressional conference committee, faced with a Senate
29 version sponsored by Senator Exon and a House version sponsored by Representatives
Cox and Wyden, “rather than taking the logical step of choosing between the Exon and
Cox-Wyden proposals, included both provisions as part of a single ‘Communications
Decency Act,’ with the Cox-Wyden proposal as an added final section to Exon’s original
legislation.” (Rozenshtein, *supra*, <bookings.edu/articles/interpreting-the-ambiguities-of-
section-230/> (as of Dec. 26, 2023).)

1 the demurrer must be sustained and the case dismissed because plaintiffs' claims surely
2 would not exist but for the presence of the drug sellers' content.

3 But Snap has cited no binding California authority so holding, and at least some
4 federal authority upon which Snap relies says otherwise. The CDA does not declare "a
5 general immunity from liability deriving from third-party content." (*Barnes v. Yahoo!, Inc.*
6 (9th Cir. 2009) 570 F3d 1096, 1100) (*Barnes*.) Moreover, it seems clear that a "but for"/
7 "based on"/"flows from" test is not consistent with a plain meaning analysis of the words
8 Congress chose to employ. If Congress had intended to immunize all interactive
9 computer services from liabilities "based on" third-party content, there are straightforward
10 elocutions to express that intention.⁵ But that is neither what Congress did nor what
11 Congress could have done consistent with the policy statements in subdivision (b) of
12 section 230. Instead, Congress chose to invoke words of art drawn from common law
13 defamation-liability distinctions between "publishers" and "speakers," on the one hand,
14 and, apparently, "distributors" on the other.

15 Again, why those words and why in 1996?

16 At common law, including in New York state in 1996, publishers were held to a
17 higher standard than distributors over defamatory or other illegal content on the theory
18 they did, or at least reasonably could, exercise editorial control. Distributors, on the other
19

20
21 ⁵ For example, see the clarity of Congressional intent regarding immunities for
22 firearm manufacturers in the Protection of Lawful Commerce in Arms Act, title 15 of United
23 States Code, sections 7901-7903. "A qualified civil liability action may not be brought in
24 any Federal or State court." (15 U.S.C. § 7902(a).) A "qualified civil liability action" means
25 "a civil action or proceeding or an administrative proceeding brought by any person
26 against a manufacturer or seller of a qualified product, or a trade association, for
27 damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines,
28 or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified
29 product by the person or a third party." (§ 7903(5)(A).) The phrase "qualified product"
means "a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18),
including any antique firearm (as defined in section 921(a)(16) of such title), or
ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a
firearm or ammunition, that has been shipped or transported in interstate or foreign
commerce." (§ 7903(4).)

1 hand, were liable only when they knew or should have known that the publication
2 contained illegal content. It is universally accepted by knowledgeable persons, including
3 the members of the California Supreme Court, that Congress's decision to use the
4 publisher/distributor distinction for section 230 was in response to a New York decision,
5 *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y. Sup.Ct. 1995) 1995 WL 323710
6 (*Stratton Oakmont*), applying New York law. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33,
7 44 (*Barrett*).) An early Internet case, *Stratton Oakmont* held that because the defendant
8 had exercised some editorial control — removing offensive content and automatically
9 screening for offensive language — over the third-party content, it was properly treated
10 as a publisher and not a mere distributor. Section 230(c)(1) overruled, as it were, the
11 *Stratton Oakmont* decision by eliminating common law strict liability for acting like a
12 publisher by posting, or removing some of, a third-party's false statement.⁶

13 An early federal appellate decision, *Zeran v. America Online, Inc.* (4th Cir. 1997)
14 129 F.3d 327, had an outsized influence on the interpretation of section 230. According
15 to the California Supreme Court (among other courts), *Zeran* rejected the notion of any
16 distinction between publisher and distributor liability, instead finding that Congress
17 intended to broadly shield all providers from liability for publishing information received
18 from third parties. (*Barrett, supra*, 40 Cal.4th at p. 53.) The *Barrett* court explained, "We
19 agree with the *Zeran* court, and others considering the question, that subjecting Internet
20 service providers and users to defamation liability would tend to chill online speech." (*Id.*
21 at p. 56; see also *Hassell v. Bird* (2018) 5 Cal.5th 522, 556-558 (conc. opn. of Kruger, J.)
22 [*Zeran's* broad reach did not, however, prevent the Ninth Circuit's conclusion in *Barnes*,
23 namely, that section 230 did not immunize Yahoo for alleged promissory estoppel
24 because the claim did not seek to hold Yahoo liable as a publisher or speaker of third-
25 party content].)

26
27 ⁶ Note the odd, if not perverse incentives imposed upon an Internet company
28 based on *Stratton Oakmont*. If a company removes offensive third-party material, it might
29 face publisher defamation liability, whereas if it does not remove offensive third-party
material, it might retain common law immunity as a mere distributor.

1 In federal courts — in the Ninth Circuit at least — the broad section 230 immunity
2 of *Zeran* and its progeny retains vitality. Snap repeatedly directs the court to the Ninth
3 Circuit’s decision in *Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093
4 (*Dyroff*) as a case on all fours with our case. There, the defendant, Ultimate, operated a
5 social networking site designed to permit anonymous postings and communications
6 among users. A user, Wesley Greer, a recovering heroin addict, conducted a Google
7 search to purchase heroin and was directed to Ultimate’s website. He posted to a group
8 title, “where can i score heroin in Jacksonville, fl.” Ultimate’s website sent Greer an email
9 notifying him that another user posted a response and provided a hyperlink and URL
10 directing his response. The response was posted by Hugo Margenat-Castro, an Orlando-
11 based heroin dealer who regularly used Ultimate’s website to sell heroin. Greer obtain
12 Castro’s telephone number from Ultimate’s website, made contact with Castro, and
13 purchased heroin from him that contained fentanyl. Greer suffered a fentanyl overdose
14 and died. (*Id.* at pp. 1094-1095.)

15 Greer’s mother, Dyroff, sued Ultimate. The district court held that section 230
16 immunized Ultimate. The Ninth Circuit affirmed. Employing the Ninth Circuit’s three-part
17 *Barnes* test (*Barnes, supra*, 570 F.3d at pp. 1100-1101), the court held that (1) Ultimate
18 was an interactive computer service and (2) plaintiff sought to treat it as a publisher or
19 speaker of (3) information provided by another information content provider. To the key
20 second point, the court found that Ultimate was not an information content provider (i.e.,
21 a publisher or speaker of content) by virtue of its website utilizing content-neutral website
22 functions. (*Dyroff, supra*, 934 F.3d at p. 1097.) Although Dyroff argued that Ultimate’s
23 website-recommendation algorithms and push notification system constituted the
24 creation of content, the Court disagreed and reasoned the website features were “tools
25 meant to facilitate the communication and content of others,” but were not actually
26 content. (*Id.* at p. 1098.)

27 Snap cites other decisions in accord with the broadly immunizing holding in *Dyroff*.
28 These include *Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, cert. den., 140 S.Ct.
29 2761 (2020) (*Force*), which held that Section 230 immunizes claims based on “friend-

1 suggestion algorithms [applying] such factors as the users' common membership in
2 Facebook's online 'groups,' geographic location, attendance at events, spoken language,
3 and mutual friend connections on Facebook," and *Jackson v. Airbnb, Inc.* (C.D. Cal. 2022)
4 2022 WL 16753197 *1, in which the trial court granted Snap's motion to dismiss the case
5 that alleged Snapchat had allowed users to engage in sales and purchase of unlawful
6 guns — "exactly the sort of case for which Section 230 provides an impenetrable shield."

7 Some federal appellate and trial courts have disagreed with *Zeran* and its
8 progeny's broad immunity construction of section 230. Analyzing the words of the statute,
9 these authorities explain that "publisher" — the word Congress chose — has (and in 1996
10 had) at least two meanings: (1) one who is in the business of publishing — and under this
11 expansive view of the word, any activity customarily undertaken by a publisher, even
12 making recommendations about (but not literally publishing) third-party content, is
13 immunized by section 230 — and (2) the meaning ascribed by the common law of
14 defamation, as expressed by *Stratton Oakmont*. The plain meaning of the words of
15 section 230 and the context in which it was promulgated, namely, to overrule *Stratton*
16 *Oakmont*, support the view that the better reading is the more limited one. Some powerful
17 judicial voices, some in dissent, have so explained.

18 A principal expression of a narrower reading of Section 230 is found in Chief Judge
19 Katzmann's influential concurrence and dissent to the majority opinion in *Force*. He
20 wrote:

21 Suppose that you are a published author. One day, an acquaintance calls. "I've
22 been reading over everything you've ever published," he informs you. "I've also
23 been looking at everything you've ever said on the Internet. I've done the same for
24 this other author. You two have very similar interests; I think you'd get along." The
25 acquaintance then gives you the other author's contact information and photo,
26 along with a link to all her published works. He calls back three more times over
27 the next week with more names of writers you should get to know.

28 Now, you might say your acquaintance fancies himself a matchmaker. But would
29 you say he's acting as the *publisher* of the other authors' work?

Facebook and the majority would have us answer this question "yes." I, however,
cannot do so. For the scenario I have just described is little different from how

1 Facebook's algorithms allegedly work. And while those algorithms do end up
2 showing users profile, group, or event pages written by other users, it strains the
3 English language to say that in targeting and recommending these writings to
4 users—and thereby forging connections, developing new social networks—
Facebook is acting as “the *publisher* of ... information provided by another
information content provider.”

5 He further explained:

6 Another way to consider the [section 230] immunity question is to “look ...
7 to what the duty at issue actually requires: specifically, whether the duty
8 would necessarily require an internet company to monitor[, alter, or remove]
9 third-party content.” [HomeAway.com, Inc. v. City of Santa Monica (9th Cir.
10 2019) 918 F.3d 676, 682.] Here, too, the claims regarding the algorithms
11 are a poor fit for statutory immunity. The duty not to provide material support
12 to terrorism, as applied to Facebook’s use of the algorithms, simply requires
13 that Facebook not actively use that material to determine which of its users
14 to connect to each other. It could stop using the algorithms altogether, for
15 instance. Or, short of that, Facebook could modify its algorithms to stop
them introducing terrorists to one another. None of this would change any
underlying content, nor would it necessarily require courts to assess further
the difficult question of whether there is an affirmative obligation to monitor
that content.

16 (*Force*, *supra*, 934 F.3d at pp. 76-77.)

17 Judge Kaufmann’s opinion influenced Judges Berzon and Gould in their respective
18 concurrence and dissent in *Gonzalez v. Google, Inc.* (9th Cir. 2021) 2 F.4th 871, 913, 919
19 (revd. *Twitter, Inc. v. Taamaneh* (2023) 598 U.S. 471.) Judge Berzon wrote:

20 I concur in the majority opinion in full. I write separately to explain that, although
21 we are bound by Ninth Circuit precedent compelling the outcome in this case, I
22 join the growing chorus of voices calling for a more limited reading of the scope of
23 section 230 immunity. For the reasons compellingly given by Judge Katzmann in
24 his partial dissent in *Force v. Facebook* [citations omitted], if not bound by Circuit
25 precedent I would hold that the term “publisher” under section 230 reaches only
26 traditional activities of publication and distribution — such as deciding whether to
27 publish, withdraw, or alter content — and does not include activities that promote
or recommend content or connect content users to each other. I urge this Court
to reconsider our precedent en banc to the extent that it holds that section 230
extends to the use of machine-learning algorithms to recommend content and
connections to users.

28 And Judge Gould wrote:
29

1 Although Section 230 arguably means that Google and YouTube cannot be
2 liable for the mere content of the posts made by ISIS, that provision in no
3 way provides immunity for other conduct of Google or YouTube or
4 Facebook or Twitter that goes beyond merely publishing the post. Here,
5 Plaintiffs allege that Google's "Services" include not just publishing content,
6 but also "use of Google's infrastructure, network, applications, tools and
7 features, communications services," and other specialized tools like "Social
8 Plugins" and "Badges." Similar allegations are made about other platforms'
9 tools and procedures. I would affirm in part to the extent the district court
10 applied Section 230 immunity to YouTube or other platforms simply carrying
11 the posts from ISIS on its platform, but not to the extent that it amplified and
12 in part developed the terrorist message by encouraging similar views to be
13 given to those already determined to be most susceptible to the ISIS cause.

14 (*Id.* at p. 919.)

15 Justice Clarence Thomas expressed reservations about courts' broad reading of
16 immunity flowing from section 230 in his statement respecting the denial of certiorari in
17 *Malwarebytes, Inc. v. Enigma Software Group USA, LLC* (2020) ____ U.S. ____ [141 S.
18 Ct. 13]. Agreeing with the court's denial of certiorari in that case, Justice Thomas wrote
19 separately to explain "why, in an appropriate case, we should consider whether the text
20 of this increasingly important statute [section 230] aligns with the current state of immunity
21 enjoyed by Internet Platforms." (141 S. Ct. at p. 14.) Explaining what he considered the
22 "modest understanding" of how section 230 altered the *Stratton Oakmont* rule, he decried
23 the "far cry from what has prevailed in court. Adopting the too-common practice of reading
24 extra immunity into statutes where it does not belong [citations omitted], courts have relied
25 on policy and purpose arguments to grant sweeping protection to Internet Platforms." (*Id.*
26 at p. 15.) He cited with approval 1. R. Smolla, *Law of Defamation* (2d ed. 2019) § 4:86,
27 p. 4-380 ("[C]ourts have extended the immunity in § 230 far beyond anything that plausibly
28 could have been intended by Congress.") (*Ibid.*)
29

1 Limitations on the breadth of section 230 immunity are found in reported decisions
2 deriving from the (1) distinctions between a defendant's independent *conduct* as opposed
3 to only posting third-party *content* and/or (2) when the interactive computer service
4 involvement with the third-party content rises to the level of "development" or even partial
5 creation of that content. A prime example is *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995
6 F.3d 1085 (*Lemmon*). The Ninth Circuit rejected section 230 immunity for a wrongful-
7 death claim alleged arising from the SnapChat "Speed Filter" feature, which the Ninth
8 Circuit did not characterize as "third-party content."⁷ Another example is *Lee v. Amazon*
9 (2022) 76 Cal.App.5th 200, reversing the trial court's determination that section 230
10 immunized the defendant against liability for listing a third-party cosmetic manufacturer's
11 content without the warning required by Proposition 65. The Court of Appeal explained
12 that plaintiffs sought to hold Amazon liable for "violation of its own independent [state law]
13 obligations." (*Id.* at pp. 252, 254-255.) California courts "must be careful not to exceed
14 the scope of [section 230] immunity provided by Congress." (*Id.* at pp. 258, 260.)

15 In *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F3d 846, the Ninth Circuit
16 reversed the trial court's order dismissing the claim of an aspiring model who used a
17 social networking website for people in the modeling industry. She claimed to have been
18 raped by two individuals who used the website, "Model Mayhem," as part of a scheme to
19 lure her to a fake audition. The question, according to the Ninth Circuit, was "whether the
20 CDA bars Jane Doe's negligent failure to warn claim under California law." (*Id.* at p. 851.)
21 The court distinguished the line of authority premised on treating the website proprietor
22 as a publisher. "Jane Doe's claim is different ... [she] attempts to hold Internet Brands
23

24
25 ⁷ The *Lemmon* distinction, in turn, has resulted in courts confronting claims of "artful
26 pleading" — the notion that clever plaintiffs' counsel plead a defendant's conduct (not
27 immunized) but are actually asserting content-based claims (immunized). So, too, here:
28 Snap argues plaintiffs' disavowal of liability based on the drug sellers' content is indeed
29 mere artful pleading. "Such attempts to use 'Lemmon lingo' do not overcome Section
230." (Snap's Reply in Support of Demurrer (Sept. 21, 2023) ("Reply") 2.)

1 liable for failing to warn her about information it obtained from an outside source about
2 how third parties targeted and lured victims through Model Mayhem. The duty to warn
3 allegedly imposed by California law would not require Internet Brands to remove any user
4 content or otherwise affect how it publishes or monitors such content.” (*Ibid.*)

5 In *A.M. v. Omegle.com, LLC* (D. Or. 2022) 614 F.Supp.3d 814 (*A.M.*), plaintiff, who
6 was an 11-year-old girl in 2014, alleged that she was, at that time, sexually abused by an
7 adult man, Ryan Fordyce, through the defendant’s online “chat room.” Fordyce allegedly
8 forced A.M. to send pornographic images and videos of herself to him, perform for
9 Fordyce and his friends, and recruit other minors for Fordyce to abuse. He allegedly
10 threatened that if she did not comply, he would release the videos and pictures and A.M.
11 would be arrested. (*Id.* at p. 817.) Among A.M.’s legal claims were theories of negligence
12 and strict liability for defective product design and warnings. Relying on *Barnes*, the
13 district court identified the question to be answered: “courts must ask whether the duty
14 that the plaintiff alleges the defendant violated derives from the defendant’s status or
15 conduct as a ‘publisher or speaker.” (*A.M.*, *supra*, 614 F.Supp.3d at p. 819 [quoting
16 *Barnes*, *supra*, 570 F.3d at pp. 1101-1102].) “Here, Plaintiff’s complaint adequately
17 pleads a product liability lawsuit as to claims one through four. Omegle could have
18 satisfied its alleged obligation to Plaintiff by designing its product differently — for
19 example, by designing a product so that it did not match minors and adults. Plaintiff is
20 not claiming that Omegle needed to review, edit or withdraw any third-party content to
21 meet this obligation ... Because this products liability case does not rest on Defendant’s
22 publication of third-party content, I find that Section 230 immunity does not apply....”
23 (*A.M.*, at p. 821; but see *In re Social Media Adolescent Addiction/Personal Injury Products*
24 *Liability Litigation* (N.D. Cal. 2023) ___ F.Supp.3d ___ [2023 WL 7524912 *15] [section
25 230 immunizes defendants from allegations that they recommended adult accounts to
26 adolescents, distinguishing *A.M.* on the basis that “at the time the matching occurred, the
27 ‘content’ or conversation did not exist”].)

28 In *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910 (*Liapes*), the Court of
29 Appeal reversed the trial court’s sustaining of the defendant’s demurrer which was

1 premised, in part, on immunity under section 230. The 48-year-old female plaintiff alleged
2 that the defendant's social media website did not provide women and older people equal
3 access to insurance ads in violation of state law prohibiting business discrimination.
4 Facebook allowed advertisers to target their ads through a "Lookalike Audience" tool,
5 whereby advertisers provided to Facebook a list of users "who they believe are the type
6 of customers they want to reach." (*Id.* at p. 917.) Facebook then applied its own analysis
7 and algorithm to identify a larger audience that resembled the sample audience; the
8 resulting audience was eligible to receive the ads. (*Ibid.*) The Court of Appeal concluded
9 that Facebook's activities made it a content provider, not merely a publisher of third-party
10 content. "Because the algorithm ascertains data about a user and then targets ads based
11 on the user's characteristics, the algorithm renders Facebook more akin to a content
12 developer." (*Id.* at p. 930.)⁸

13 **Rulings re: Section 230**

14 The court agrees with Snap that it, as an "interactive computer service," cannot be
15 liable as a publisher of the third-party drug sellers' content. But the allegations of the SAC
16 do not purport to impose liability upon Snap for publishing or failing to moderate the drug
17 sellers' content (i.e., to "treat Snap as a publisher") but instead on account of its alleged
18
19

20
21 ⁸ The *Liapes* court did not cite *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561.
22 In *Doe II*, plaintiffs, minor teenage girls, alleged they were sexually assaulted by men they
23 met through the defendant's Internet social networking site. The *Doe II* court concluded
24 that plaintiffs' allegations that MySpace "should have implemented 'readily available and
25 practicable age-verification software' or set the default security settings on the Julie Does'
26 accounts to 'private'" were "precisely" allegations going to MySpace's status as a
27 publisher, explaining that plaintiffs "want MySpace to ensure that sexual predators do not
28 again access to (i.e., communicate) with minors on its Website. That type of activity —
29 to restrict or make available certain material — is expressly covered by section 230." (*Id.*
at pp. 565, 573.) That court also found that plaintiffs' allegations that MySpace "allowed
the attackers to channel information in profiles, search and browse profiles for particular
characteristics and then us the results of those queries to locate, contact and eventually
sexually assault the Julie Does" did not cause MySpace to become a "content provider."
(*Id.* at pp. 574-575.) As noted, on that point, *Liapes* holds otherwise.

1 independent tortious conduct — independent, that is, of the drug sellers’ posted content.⁹
2 The allegations assert conduct beyond “incidental editorial functions” for which a
3 publisher may still enjoy section 230 immunity. (See, *Batzel v. Smith* (9th Cir. 2003) 333
4 F.3d 1018, 1031.) Additionally, the court finds that the alleged attributes and features of
5 Snapchat cross the line into “content” — as the *Liapes* and *Lee* courts found, too. The
6 court rejects, as did the Ninth Circuit in *Barnes*, Snap’s assertion of “general immunity”
7 under its “based on”/“flows from”/“but for” reading of the scope of section 230.

8 Recall, Snap demurs to “[a]ll causes of action alleged in the SAC — which are
9 based on content created and exchanged by third parties — [as] barred as a matter of
10 law under Section 230 of the Communications Decency Act.” (Demurrer, 2.) The
11 demurrer is overruled on that ground as to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14,
12 15, 16.

13 The demurrer is sustained without leave to amend on this ground as to count 10
14 for “aiding and abetting.” Paragraph 931 of the SAC makes clear that plaintiffs seek to
15 impose liability upon Snap because it “encouraged and assisted each of the above-
16 referenced Snapchat Drug Dealers in their use of Snap’s unique product features to sell
17 deadly counterfeit pills....” Unlike their other counts, which focus on Snap’s alleged
18 independent tortious acts, count 10 is too intimately tied to Snap’s publication of the drug
19 sellers’ third-party content to operate outside the zone of section 230 immunity.¹⁰

20 **Snap’s Strict Product Liability Challenge: Counts 1, 2, and 3**

22
23 ⁹ It is an unremarkable proposition that California law recognizes that independent
24 tortious conduct can combine to cause an indivisible harm. A “defendant’s negligence is
25 a legal cause of injury, even though it operated in combination with other causes, whether
26 tortious or nontortious.” (*Uriell v. Regents of University of California* (2015) 234
27 Cal.App.4th 735, 746-747.) California law permits a factfinder to allocate fault or
28 responsibility among joint tortfeasors. (Civ. Code § 1431.2; CACI No. 406.)

29 ¹⁰ In so ruling, the court treats count 10 as an independent legal theory which, as
noted earlier, it is not. That said, whether sustained as a demurrer or dealt with later as a
motion in limine, plaintiffs may not proceed on their aiding and abetting theory on account
of section 230 immunity.

1 Once again, vocabulary. “‘Products liability’ is the name currently given to the area
2 of law involving the liability of those who supply goods or products for the use by others
3 to purchasers, users and bystanders for losses of various kinds resulting from so-called
4 defects in those products.” (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th
5 22, 30.) “One may seek recovery in a products liability case on theories of both
6 negligence and strict liability.” (*Id.* at pp. 30-31, page number omitted.)

7 “Strict liability” is the term used to describe legal responsibility for certain activities
8 that arises irrespective of the care undertaken by the defendant to avoid the harm. This
9 is in contrast to negligence liability, which requires that a defendant breach a duty of
10 reasonable care. Examples of strict liability include harms arising from defendants’
11 engaging in “ultrahazardous activities” such as blasting with explosives, crop dusting,
12 testing rocket motors, using blowtorches near oil and the like. Irrespective of the amount
13 of care employed, including utmost care, liability attaches for harm caused by the activity
14 due to its ultrahazardous character. Another species of strict liability arises with respect
15 to injuries caused by domestic animals with known dangerous propensities (from which
16 the so-called “one free dog bite” rule derives.) These examples of strict liability have
17 nothing to do with products.

18 And then, relevant to this case, there is “strict *products* liability,” which is a cross-
19 over subspecies both of “product liability” and “strict liability.” Generally, strict product
20 liability rules allow victims who are hurt by defective products to pursue claims for
21 compensation without showing the defendant’s negligence or intentional wrongdoing.
22 California law recognizes strict products liability for three types of defects: manufacturing
23 defects, design defects, and warning defects. (This case asserts no manufacturing defect
24 theory.)

25 Strict liability for product design defects can arise under two prongs: either because
26 the product’s design fails to perform as safely as an ordinary consumer would have
27 expected it to perform (“the consumer expectation test”) or because the risks attendant
28 to the design of the product outweigh the benefits of that design (“the risk-benefit” test).
29 The two prongs are not mutually exclusive. (*Demara v. The Raymond Corp.* (2017) 13

1 Cal.App.5th 545, 554.) (This case does not assert a claim under the consumer
2 expectation test.)

3 Strict liability for product warning defects likewise can arise under two prongs:
4 because warnings were non-existent or existed but were inadequate. (*Anderson v.*
5 *Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995.)

6 The development of strict products liability in the U.S. is a long and storied history,
7 with California jurisprudence playing a pivotal role. It is judge-made law deriving from
8 decisions of Justice Benjamin Cardozo in *MacPherson v. Buick Motor Co.* (1916) 217
9 N.Y. 382 (reducing the role of privity of contract in warranty claims) and Justice Robert
10 Traynor's concurrence in *Escola v. Coca Cola Bottling Co. of Fresno* (1944) 24 Cal.2d
11 453 (*Escola*). Justice Traynor there observed, "[a]s handicrafts have been replaced by
12 mass production with its great markets and transportation facilities, the close relationship
13 between the producer and consumer of a product has been altered.... The consumer no
14 longer has the means or skill enough to investigate for himself the soundness of a
15 product." (*Id.* at p. 467.) Three years earlier, in 1941, Dean William Prosser had urged
16 the case for imposition of strict liability upon the manufacturers of defective products in
17 his *Handbook of the Law of Torts* treatise.

18 Then came *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57
19 (*Greenman*) in which Justice Traynor returned to his *Escola* theme but now in a majority
20 opinion. He famously explained, "[a] manufacturer is strictly liable in tort when an article
21 he places on the market, knowing that it is to be used without inspection for defects,
22 proves to have a defect that causes injury to a human being... The purpose of such
23 liability is to insure that the costs of injuries resulting from defective products are borne
24 by the manufacturers that put such products on the market rather than by injured persons
25 who are powerless to protect themselves." (*Id.* at pp. 62-63.) The *Greenman* rule was
26 quickly adopted in several other jurisdictions and embodied in section 402A of the
27 Restatement Second of Torts. In 1997, the American Law Institute adopted a new
28 element of the Restatement Third of Torts, entitled "Products Liability," and the general
29 rule of strict products liability was set out in section 1 thereto.

1 Strict products liability arose in the early- and mid-20th century from the perceived
2 inability of the law of warranty and negligence to provide an adequate means of redress
3 for injuries arising in a new kind of industrialized economy. That economy was
4 characterized by mass production, the introduction of wholesale intermediaries in supply
5 chains, and the expansion of product advertising. Makers and users of products had an
6 increasingly attenuated relationship. Redress for injury arising from product defect,
7 rooted in legal theories of warranty (requiring of privity of contract and immunizing
8 defendants via warranty disclaimers) and negligence (with its virtually unattainable
9 requirement to establish someone's unreasonable conduct somewhere in a complex
10 multi-level production process), required rethinking. The question presented was who
11 should bear the costs of such harms: an innocent purchaser or the product supplier who
12 had means and motivation to eliminate defects, and the ability to spread that cost widely
13 via the mechanism of price and the securing of insurance?¹¹

14 Plaintiffs' SAC implies similar questions now about Snapchat and its place in
15 society and the economy.

16
17 The SAC purports to state legal theories for strict product liability under counts 1,
18 2 and 3. As pleaded, counts 1 and 3 are duplicative; both assert strict products liability
19 claims for design defect under the risk-benefit prong. (See, e.g., SAC ¶¶ 728, 730-731,
20 750, 753, 789, 798.) Count 2 asserts a claim for strict products liability for failure to warn.

21 Snap demurs to these counts on the ground that Snapchat is "is a service, not a
22 'tangible product.'" (Demurrer, 1-2.) Plaintiffs assert otherwise: "Snapchat is a product
23 under California law." (Opposition, 11.) The parties in their papers compare and contrast
24

25
26 ¹¹ Histories of the development of strict product liability law include Graham, *Strict*
27 *Products Liability at 50: Four Histories* (2014) 98 Marq. L.Rev. 555; Note, *A Broken*
28 *Theory: The Malfunction Theory of Strict Products Liability and the Need for a New*
29 *Doctrine in the Field of Surgical Robotics* Note (2019) 104 Minn. L.Rev. 3245; and
Rothstein & Coleman, *Differentiating Strict Product Liability's Cost-Benefit Analysis From*
Negligence (2023) 56 Loyola L.A. L.Rev. 637.

1 issues of “product versus service” and “tangibility” drawn from the definition of “product”
2 found in section 19(a) of the Restatement Third of Torts, Products Liability: “A product is
3 tangible personal property distributed commercially for use or consumption.”

4 The tangible product versus (intangible) service test is a false dichotomy as applied
5 to Snapchat, at least as Snapchat is described in the SAC. As noted, even the parties
6 struggle to find language with which to categorize Snapchat,¹² but neither “product” nor
7 “service” are up to the job. Snap’s reliance on the Restatement definition falls short for
8 several reasons. First, because that definition was drafted long before the applicable
9 technology existed and does not account for an item with Snapchat’s characteristics and
10 functionalities; second, because as to “computer software” (probably the most apt
11 category), the Restatement Third reporters found “no cases on point” (Rest.3d Torts,
12 Products Liability, § 19, com. d) — again speaking to the obsolescence of the definition;
13 and third, notwithstanding “tangibility,” the definition opens the door to treat intangible
14 items as products “such as electricity” when the context of their distribution and use is
15 sufficiently analogous to the distribution and use of tangible personal property.¹³

16 Snap’s arguments rely heavily on tangibility — a concept the court finds unhelpful
17 to the analysis. Under the Restatement’s definition, “tangibility,” viz., perceptibility to the
18

19
20 ¹² The court agrees with Snap that its calling Snapchat its “flagship product” in its
21 2022 annual report, and its counsel at argument referring to Snapchat as a product before
22 correcting herself, is not dispositive.

23 ¹³ There are, of course, computer software cases since the promulgation of the
24 Third Restatement 25 years ago. They go both ways. On the one hand, for example, is
25 *Quinteros v. InnoGames* (W.D. Wash. 2022) 2022 WL 898560 (online computer game
26 was not a “product” as defined under Washington State law [collecting cases]). On the
27 other side of the ledger are, for example, *Brookes v. Lyft Inc.* (Cir. Ct. Fla. 2022) 2022 WL
28 19799628 (Lyft’s ride-sharing software application is a product for purposes of Florida
29 products liability law); *In re Social Media Adolescent Addiction/Personal Injury Products
Liability Litigation*, *supra*, 2023 WL 7524912 (motion to dismiss denied to permit “more
fulsome analysis than the global approaches” take by counsel; the court analyzes whether
the various functionalities of defendants’ platforms are products); and *A.M.*, *supra*, 614
F.Supp.3d at p. 817 (although it is not clear that the defense raised the “not a product”
defense).

1 touch, appears to the court as merely another way of describing a service — something
2 offered for use or consumption that one cannot perceive by touch. It adds nothing to the
3 product versus service binary. What's more, even in 1998, the American Law Institute
4 noted that intangibility *per se* does not answer the question given that the context of the
5 distribution and use of an item may be sufficiently analogous to the distribution and use
6 of tangible personal property for it to be subject to strict products liability.¹⁴

7 The parties' analyses, relying on the false dichotomy of product versus service and
8 on tangibility, fall far short of the weighty social and economic issues embedded in the
9 question of the applicability of strict liability principles, questions with which Justices
10 Cardozo and Traynor, and Dean Prosser, earlier struggled.

11 **Ruling Re: "Not A Tangible Product"**

12 The court sees the issue as follows: is Snapchat, with its features, functionalities,
13 and its place in our society and economy in 2023, something (pick your descriptor:
14 product, service, interactive platform, app, website, software, tool) for which strict
15 products liability does or should apply? Or, using the 25-year-old Third Restatement's
16 formulation, is the context of Snapchat's distribution and use sufficiently analogous to the
17 distribution and use of tangible personal property to warrant its being treated under the
18 law of strict products liability?

19 The court's answer is: not enough information yet to tell, and the question cannot
20 be resolved on demurrer. Accordingly, the court overrules Snap's demurrer to counts 1,
21 2, and 3 on the ground that Snapchat is not a tangible product. The court will permit the
22 parties to create a factual record as the characteristics, functionalities, distribution, and
23 uses of Snapchat. The court has no doubt that it will revisit later whether California strict
24

25
26 ¹⁴ The unhelpfulness of the tangibility test is further revealed by considering
27 whether Snapchat, to the extent it exists as a collection of electrons flitting among silicon
28 atoms, has mass and thus could potentially be "tangible" by a profoundly sensitive
29 measuring device. The answer, absurdist and theoretical, is "yes." An electron weighs
9.11 x 10e-28 grams. (Encyclopedia Britannica (2023) Electron
<[britannica.com/science/electron](https://www.britannica.com/science/electron)> [as of Dec. 27, 2023].)

1 products liability law does or should apply in this case, but it will do so on a developed
2 factual record.

3 **Snap's Challenges to Negligence: Counts 4, 5, 6, 7**

4 In California, a plaintiff states a claim for negligence by alleging the existence of a
5 legal duty, a breach of that duty, harm caused by the breach, and resulting damages.
6 (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) Civil Code section 1714,
7 subdivision (a) establishes a general duty for "everyone" to exercise ordinary care and
8 skill in their property or person. Failure to do so imposes responsibility for resulting injury
9 except where the injured person willfully or for want of ordinary care brought the injury
10 upon himself or herself.¹⁵

11 Snap asserts that under the facts as alleged, it is evident that California law
12 recognizes an exception to the general rule of duty based on public policy. Snap invokes
13 the considerations identified by the California Supreme Court in *Rowland v. Christian*
14 (1968) 69 Cal.2d 108 which, when balanced together, justify a departure from the
15 fundamental principal embodied in section 1714, subdivision (a). These include the
16 foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered
17 injury, the closeness of the connection between the defendant's conduct and the injury
18 suffered, the moral blame attached to the defendant's conduct, the policy of preventing
19 future harm, the extent of the burden to the defendant and consequences to the
20 community of imposing a duty to exercise care with resulting liability for breach, and the
21 availability, cost and prevalence of insurance for the risk involved. (*Id.* at pp. 112-113.)

22 The court disagrees with Snap: the allegations of the SAC are sufficient to
23 establish the duty of reasonable care and do not establish as a matter of law an exception
24 under public policy. The California Supreme Court stated, "As we have explained,
25 however, in the absence of a statutory provision establish an exception to the general
26 rule of [section 1714, subdivision (a)], courts should create one only where clearly
27

28 ¹⁵ In the modern era, California employs a comparative negligence regime to
29 reduce a plaintiff's damages attributable to his or her own fault in bringing about harm.

1 supported by public policy.” (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771
2 (internal quotes omitted).) Once again, however, the question of duty is not resolved for
3 all time. On a factual record, where the court has the ability to appropriately weigh the
4 competing policy factors, the question of the existence of duty may well come up again.

5 Snap also asserts that the SAC fails to allege causation. The court disagrees.
6 “The element of causation requires there to a connection between the defendant’s breach
7 and the plaintiff’s injury.” (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627,
8 645.) “A substantial factor in causing harm is a factor that a reasonable person would
9 consider to have contributed to the harm. It must be more than a remote or trivial factor.
10 It does not have to be the only cause of the harm.” (CACI No. 430.) The SAC alleges
11 causation sufficiently to survive attack by demurrer.

12 Snap demurs to count 6 (negligent failure to warn) on the basis that “the danger of
13 buying illegal drugs online is obvious, so no warning is required.” (Demurrer, 2.) The
14 SAC, however, alleges that the harm arose from a non-obvious danger, namely, the
15 presence of fentanyl in the drugs purchased by the minors. The SAC does not allege an
16 obvious danger for which no warning is required.

17 With respect to count 7 (negligence per se), plaintiffs allege, “At all relevant times,
18 Snap had an obligation to comply with applicable statutes and regulations governing the
19 sale and distribution of illegal drugs to minors and distribution of controlled substances to
20 Americans more generally.” (SAC, ¶ 879.) Plaintiffs do not identify the statutes or
21 regulations. The negligence per se doctrine is codified in Evidence Code section 669.
22 Under this doctrine, the plaintiff “borrows” statutes or regulations to establish a duty of
23 care and a standard of care. Proof of violation of the statute or regulation raises a
24 presumption of negligence which then may be rebutted by evidence showing justification
25 or an excuse for the violation. (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584;
26 *Spiesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263.)

27 Snap’s demurrer is premised on “failure to state facts sufficient to constitute a
28 cause of action” but does not demur on the grounds of uncertainty. (Code Civ. Proc., §
29 430.10, subds. (e)-(f).) The demurrer on this ground is overruled. Even were the

1 demurrer based on uncertainty, it would be overruled. The statutes and regulations at
2 issue may be ascertained through the discovery process. Plaintiffs' negligence per se
3 theories may be subject to later challenge once the statutes and regulations are identified.

4 **Rulings re: Negligence Challenges**

5 Snap's demurrers to counts 4, 5, 6, and 7 are overruled.

6 **Snap's Challenge to Tortious Interference with Parental Rights: Count 8**

7 Plaintiff Jessica Diacont, a resident of Virginia, asserts Snap tortiously interfered
8 with her custodial rights and parental relationship arising from the death of her child,
9 Jacob. (SAC, ¶¶ 900-909.) She invokes Virginia state law¹⁶; in the heading of count 8,
10 she refers to the Virginia Code Annotated, section 1-240.1.¹⁷ She explains in her
11 Opposition that the Virginia Supreme Court recognized the tort of interference in parental
12 rights in *Wyatt v. McDermott* (Va. 2012) 725 S.E.2d 555. She is correct. Borrowing from
13 extant Florida law, the Virginia Supreme Court stated the elements of this common law
14 tort including, as relevant here, that "a party outside of the relationship between the
15 complaining parent and his/her child intentionally interfered with the complaining parent's
16 parental or custodial relationship by removing or detaining the child from returning to the
17 complaining parent, without that parent's consent, or by otherwise preventing the
18 complaining parent from exercising his/her parental or custodial rights." (*Id.* at p. 562.)

19 Plaintiff Diacont's theory apparently is not that the death of Jacob was the
20 interference at issue; it was the denial of the mother's parental ability to prevent access
21 to the Snapchat. (Opposition, 33.) Nowhere, however, does Diacont allege that Jacob's
22 access to Snapchat was without her consent.

26 ¹⁶ It is not clear whether the court would apply Virginia law and neither side briefs
27 the court on the choice-of-law question. For purposes of this demurrer only, the court will
28 assume that Virginia law applies.

29 ¹⁷ This section reads, "A parent has a fundamental right to make decisions
concerning the upbringing, education, and care of the parent's child."

1 **Ruling re: Count 8**

2 Assuming for argument that the Virginia law applies in this California proceeding,
3 the court sustains Snap's demurrer without leave to amend for failing to state facts
4 constituting a cause of action.

5 **Snap's Challenge to Public Nuisance: Count 9**

6 A claim for public nuisance requires allegations, among others, that the defendant,
7 by acting or failing to act, caused a "condition" that was harmful to health and that the
8 condition affected a substantial number of people at the same time. It is an offense
9 against the exercise of rights common to the public. (*People ex rel. Gallo v. Acuna* (1997)
10 14 Cal.4th 1090, 1103.) A "public right," the California Supreme Court explained with
11 citation to section 821B of the Second Restatement of Torts, "is common to all members
12 of the general public. It is collective in nature and not like the individual right that everyone
13 has not to be assaulted or defamed or defrauded or negligently injured." (*Id.* at p. 1104.)

14 The essence of plaintiffs' claims is that Snap's conduct resulting in the death (or
15 serious injury) to their specific children. While the SAC asserts that a substantial number
16 of other children have also died or been so injured, the rights involved are not "public
17 rights" designed to be vindicated by the law of nuisance. They are personal in nature.

18 **Ruling re: Count 9**

19 The court sustains Snap's demurrer without leave to amend.

20 **Snap's Challenges to Fraud, Concealment and Misrepresentation:**

21 **Counts 11, 12 and 13**

22 In California, a claim for fraudulent misrepresentation or concealment requires
23 pleading (a) misrepresentation (false representation, concealment or nondisclosure); (b)
24 knowledge of falsity (scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable
25 reliance; and (e) resulting damage. (*Engalla v. Permanente Medical Group, Inc.* (1997)
26 15 Cal.4th 951, 974.) Negligent misrepresentation does not include the element of intent
27 to deceive. (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 781.)
28 The pleading requirements for fraud require particularity and specificity: how, when,
29 where, to whom, and by what means the representations were tendered. (*Lazar v.*

1 *Superior Court* (1996) 12 Cal.4th 631, 645.) Witkin explains, “The effect of this rule is
2 twofold: (a) general pleading of the legal conclusion of “fraud” is insufficient; the facts
3 constituting the fraud must be alleged; and (b) every element of the cause of action for
4 fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy
5 of liberal construction of the pleadings [citation omitted] will not ordinarily be invoked to
6 sustain a pleading defective in any material respect.” (5 Witkin, Cal. Procedure (6th ed.
7 2023) Pleading, § 707.)

8 Snap asserts that plaintiffs have failed to meet the particularity and specificity
9 requirements; plaintiffs assert they have and direct the court to footnotes 26 and 27 of
10 their Opposition, citing specific paragraphs of the SAC.

11 The court finds that the allegations contained in paragraph 942, subsections (a)
12 through (l), at a minimum, are sufficiently particular and specific to meet the pleading
13 standard. The allegations of reliance likewise are sufficient. Given that a demurrer must
14 eliminate an entire cause of action, these allegations are sufficient to overcome the
15 demurrer.

16 In so finding, the court has in mind the Court of Appeal’s explanation in *West v.*
17 *JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793 (*West*) (cleaned up): “We
18 enforce the specificity requirement in consideration of its purposes. The first purpose is
19 to give notice to the defendant with sufficiently definite charges that the defendant can
20 meet them. [Citations omitted.] The second is to permit a court to weed out meritless
21 fraud claims on the basis of the pleadings; thus, the pleadings should be sufficient to
22 enable the court to determine whether, on the facts pleaded, there is any foundation,
23 prima facie at least, for the charge of fraud.”

24 Here, the SAC has sufficiently apprised Snap of the allegations of fraud,
25 concealment, and misrepresentation (which may or may not be supplemented by
26 information obtained in discovery). “Prima facie” — meaning assuming the allegations
27 are true — the court finds the SAC meets the “any foundation” test of *West*.

28 **Ruling re: Fraud, Concealment and Misrepresentation**

29 The court overrules Snap’s demurrer to counts 11, 12 and 13.

1
2 **Snap's Challenges to Counts 14, 15 and 16**

3 **Rulings**

4 Snap's demurrer to count 14 (wrongful death) and 15 (survival action) are
5 overruled. The allegations are sufficient to state causes of action for wrongful death and
6 survival under California law.

7 Snap's demurrer to count 16 ("loss of consortium and society") is sustained without
8 leave to amend because California law recognizes no cause of action for parents of
9 minors. This ruling does not affect any entitlement under law for the recovery of damages
10 under a recognized legal theory.

11 **Snap's Statute of Limitations Challenges**

12 Snap asserts that some of plaintiffs Chapmans' and Diacont's claims are time-
13 barred by California (or Virginia's¹⁸) two-year statute of limitations. Plaintiffs respond by
14 invoking the delayed discovery rule. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th
15 797, 803.) On reply, Snap argues that the delayed discovery allegations in the SAC are
16 "implausible." (Reply, 20.) Plausibility, however, is not the test on demurrer in the
17 California state courts.

18 **Rulings**

19 Snap's demurrers, as presented, based on the statute of limitations are overruled.
20 To the extent Virginia law applies to a claim and such law provides a defense under a
21 statute of limitations, the matter may be raised later on a motion for summary judgment.
22

23 **CONCLUSION**

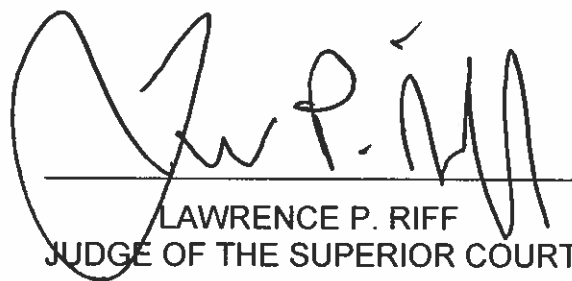
24 Snap's demurrers to counts 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14 and 15 are overruled.

25 Snap's demurrers to counts 8, 9, 10 and 16 are sustained without leave to amend
26 (recall, plaintiffs do not seek leave to amend.)
27

28 ¹⁸ Again, neither side briefs the court on the applicability of Virginia law including
29 whether Virginia recognizes a delayed discovery rule.

Snap is ordered to file its answer to the SAC within 30 days of service of this order.

Dated: January 2, 2024



LAWRENCE P. RIFF
JUDGE OF THE SUPERIOR COURT