STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

FRAGRANCE HARRIS STANFIELD, YAHNIA BROWN-MCREYNOLDS, TIARA JOHNSON, SHONNELL HARRIS-TEAGUE, ROSE MARIE WYSOCKI, CURT BAKER, DENNISJANEE BROWN, DANA MOORE, SCHACANA GETER, SHAMIKA MCCOY, RAZZ'ANI MILES, PATRICK PATTERSON, MERCEDES WRIGHT, QUANDRELL PATTERSON, VON HARMON, and NASIR ZINNERMAN, JULIE HARWELL, individually and as parent and natural guardian of L.T., a minor, LAMONT THOMAS, individually and as parent and natural guardian of L.T., a minor, LAROSE PALMER, JEROME BRIDGES, MORRIS VINSON ROBINSON-MCCULLEY, KIM BULLS, CARLTON STEVERSON,and QUINNAE THOMPSON,

Plaintiffs,

Hon. Paula L. Feroleto
Index No. 810317/2023

-vs

Decision and Order
Motions #3 and 5

MEAN LLC; VINTAGE FIREARMS, LLC; RMA ARMAMENT, INC.; ALPHABET INC.; GOOGLE LLC; YOUTUBE, LLC; REDDIT, INC.; PAUL GENDRON; AND PAMELA GENDRON,

Defendants.

HON. PAULA L. FEROLETO, J.S.C.

Argued by: Allison Barnes, Esq. Attorney for Plaintiffs Fragrance Harris Stanfield, et al.
Brian Willen, Esq., Attorney for Alphabet, Inc., Google, LLC and Youtube, LLC
Ryan T. Mrazik, Esq., Attorney for Reddit, Inc.

DECISION AND ORDER

Defendants Alphabet Inc., Google, LLC, YouTube, LLC and Reddit, Inc (hereinafter Social Media/Internet defendants") have brought Motions to Dismiss pursuant to CPLR §§3211(a)(7) filed on November 9, 2023 (NYSCEF Doc. Nos. 34 and 58). Affidavits and

exhibits in support of the defense motions have been filed as documents 35-39 and 59-60. An affidavit in joint opposition to the Social Media/Internet defendants motions along with a memorandum of law in opposition has been filed as documents 76-77. Reply memos of law were filed as documents 93 and 94. These have all been considered in this decision along with the plaintiff's Amended Complaint (NYSCEF Doc. No. 3).

On May 14, 2022, Tops Friendly Markets supermarket on the East Side of Buffalo was the site of a horrifying racially motivated killing incited by white supremacist, white replacement ideology that the shooter developed through his alleged addiction to certain online platforms as outlined at ¶¶ 125 - 135 of the Amended Complaint (NYSCEF Doc. 3). The plaintiffs in this action are "customers, employees and community members" caught in the attack (¶ 3 NYSCEF Doc.3). The plaintiffs assert they have sustained damages and injuries as a result of their proximity to the attack. Specifically, they allege the social media/internet defendants unleashed a harmful, addictive and damaging product which, through algorithms, were instrumental in causing the shooter to become consumed with racist extremist ideology which caused him to commit the attack at Tops (¶¶ 147 and 148 NYSCEF Doc. 3).

The plaintiffs assert causes of action against the social media/internet defendants premised upon strict products liability, negligence and negligent infliction of emotional distress (NYSCEF Doc. 3).

The core issue regarding the social media/internet defendants' motions to dismiss pursuant to CPLR 3211(a)(7) is how the Court views/treats the claims raised by plaintiffs. It is essentially undisputed that the horrific acts perpetrated by Gendron on May 14, 2022 were motivated by the concept of "white replacement theory." That fact is not based upon conjecture

or speculation, but comes from the words of Gendron cited in the Complaint. Further, the Complaint states Gendron became aware of this concept from information and posts on defendants' platforms. Defendants would contend that this "theory" is third-party content/speech and as a result, section 230 of the Communications Decency Act (CDA) and the First Amendment preclude the plaintiffs' claims for damages. Plaintiffs acknowledge the protections afforded to the defendants by the CDA and the First Amendment and instead contend the defendants' platforms are "products" that were negligently, defectively and harmfully designed in a manner that drove Gendron to the materials and they are therefore liable.

First, on the instant motions pursuant to 3211(a)(7) the Court must assume as true the facts alleged in the complaint because, "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, [citation omitted]). As such, when the Court analyzes whether this case deals with third-party content/speech or a defectively designed product it must do so in the framework of whether the facts alleged support a viable cause of action.

The defendants contend that no matter how the plaintiffs frame their complaint the only conceivable actionable activity of the defendants is the hosting of third-party content on their platforms. If that is the case, even plaintiffs would acknowledge the third-party content would make the defendants immune from suit due to the CDA. However, plaintiffs contend the defendants' platforms are more than just message boards containing third-party content. They allege they are sophisticated products designed to be addictive to young users and they

specifically directed Gendron to further platforms or postings that indoctrinated him with "white replacement theory."

Specifically defendants point to Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("CDA" or § 230) as requiring dismissal of the plaintiffs' complaint. The CDA was passed in 1996 by Congress to address and promote the "rapidly developing array of Internet and other interactive computer services available to individual Americans"(CDA [a][1]) while at the same time removing "disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material" (CDA [b][4]) and "maximiz[ing] user control over what information is received by individuals, families, and schools" (CDA [b][3]). In doing so, section 230 indicated "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," (CDA [c][1]), and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section" (CDA [e][3]). In other words, Internet services would be immune from liability for publishing material, so long as the information is provided by another party. Conversely, an interactive computer service provider will be liable for its own speech (*Universal Communication Sys. v. Lycos*, 478 F.3d 413, 419-20 [2007]), or for its material contribution to the content of a third party's statement (*see Fair Hous. Council of San Fernando Val. v, Roommates Com*, 521 F.3d 1157 [2008]). In New York, the Court of Appeals followed other Courts interpretations of the CDA in *Shiamili v. Real Estate Group of New York, Inc.* (17 NY3d 281 [2011]). The Court found determining immunity from state law liability under Section 230 of the CDA requires the Court to take into consideration, "if

(1) [defendant] is a provider or user of an interactive computer service; (2) the complaint seeks to hold the defendant liable as a publisher or speaker; and (3) the action is based on information given by another information content provider" (*Shiamili* at 286-287).

On the other hand, plaintiffs contend the defendants' platforms should be considered "products" which makes Section 230 irrelevant. Under that premise, what constitutes a product under New York law is not confined to tangible chattels. (Restatement (Third) of Torts, Prods. Liab. § 19, cmt. a (1998) ("[a]part from statutes that define 'product' for purposes of determining products liability, in every instance it is for the court to determine as a matter of law whether something is, or is not, a product")). New York has expressly rejected a bright-line rule for the application of product liability law (*See Matter of Eighth Jud. Dist. Asbestos Litig. v Beazer*, 33 N.Y.3d 488, 499-500 [2019]; *see also Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 139 (2002) (describing the Court's rejection of open-ended tort liability, but acknowledging the 'policy-laden' nature of duty and liability which then precludes the use of bright-line rules). Further, *In the Matter of Eighth Jud. Dist. Asbestos Litig*., the New York Court of Appeals analyzed the definition of a product within a broader context of common-law duty, stating: the court's overarching concern in assigning a duty to warn is to "settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty." 33 N.Y.3d 488, 495-96) (*quoting In re New York City Asbestos Litig.*, 27 N.Y.3d 765, 788). The Court of Appeals also emphasized the following factors in determining whether an item is a product: (1) a

defendant's control over the design and standardization of the product, (2) the party responsible for placing the product into the stream of commerce and deriving a financial benefit, and (3) a party's superior ability to know—and warn about—the dangers inherent in the product's reasonably foreseeable uses or misuses. *Id.* (*citing In re New York City Asbestos Litig.*, 27 N.Y.3d at 793, 800–01).

As noted above, for the Court to dismiss the complaint on a motion pursuant to CPLR 3211(a)(7) defendants must show that plaintiffs' complaint fails to state a viable cause of action. The court must accept all the alleged facts in the complaint as true and draw all inferences in favor of the plaintiffs to determine "whether the facts as alleged fit within any cognizable legal theory." *Cerciello v. Admiral Ins. Brokerage Corp.*, 90 A.D.3d 967, 967 (2d Dep't 2011). When doing so in this case, plaintiffs have set forth sufficient facts with regard to each defendant to allege viable causes of action under a products liability theory. Contrary to the assertions of the defendants, the factual allegations as a whole in the 116 pages of the complaint are sufficient to allege viable causes of action against each of the social media/internet defendants.

The social media/internet defendants may still prove that their platforms were mere message boards and/or do not contain sophisticated algorithms thereby providing them with the protections of the CDA and/or First Amendment. In addition, they may yet establish that their platforms are not products or that the negligent design features plaintiffs have alleged are not part of their platforms. However, at this stage of the litigation the Court must base its ruling on the allegations of the complaint and not "facts" asserted by the defendants in their briefs or during oral argument and those allegations allege viable causes of action under a products liability theory.

Causal Chain/Proximate Cause

As has been noted by the Court in its prior decisions, there were many events and actions that took place between the shooter beginning and ending his plan to commit a mass shooting which included criminal acts. The Complaint sets forth in detail the development of the plan culminating in the shootings (NYSCEF Doc. 3). Part of the social media/internet defendants argument is that the criminal actions of the shooter break the chain of causation between his use of their platforms and the ensuing shooting.

As a general proposition the issue of proximate cause between the defendants alleged negligence and the plaintiffs' injuries is a question of fact for a jury to determine. *Oishei v. Gebura* 2023 NY Slip Op 05868 (4th Dept 2023). Part of the argument is that the criminal acts of the third party, break any causal connection, and therefore causation can be decided as a matter of law. There are limited situations in which the New York Court of Appeals has found intervening third party acts to break the causal link between parties. These instances are where "only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law." *Derdiarian v Felix Contr. Corp*., 51 NY2d 308 at 315 (1980). These exceptions involve independent intervening acts that do not flow from the original alleged negligence. *Id.*

At this juncture of the litigation it is far too early to rule as a matter of law that the actions, or inaction, of the social media/internet defendants through their platforms require dismissal on proximate cause. The facts alleged do not show "only one conclusion" that could be made as to the connection between these defendants alleged negligence and the plaintiffs' injuries (quoting *Derdiarian* 51 NY2d). The acts of the third party, even though criminal, do not necessarily

transform the inquiry into a question of law. (*See Oishei v. Gebura*, 2023 NY Slip Op 05868, 221 A.D.3d 1529 (4th Dept.), holding the intervening criminal act did not amount to an exception to the general rule of allowing the fact finder to determine proximate cause).

Duty

The social media/internet defendants argue plaintiffs have failed to allege negligence-based claims against them because plaintiffs cannot allege that the social media/internet defendants owe them a cognizable duty of care. Duty is "a legal term by which we express our conclusion that there can be liability." *DeAngelis v. Lutheran Med. Center*, 58 N.Y.2d 1053, 1055 (1983). It requires a person "to conform to a certain standard of conduct, for the protection of others against unreasonable risks." Prosser and Keeton, Torts §§ 30 & 53, at 164, 356 (5th ed.). It is a "policy-laden" analysis (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 139 (2002)), requiring the balancing of interests, including the wrongfulness of the defendant's actions and the reasonable expectation of care owed. *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579 (1994); *Turcotte v. Fell*, 68 N.Y.2d 432, 437 (1986).

It is long-established in New York products liability jurisprudence that a manufacturer of a defective product is liable to "any person" injured from the product. See *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 68 (1962). In fact, a manufacturer is liable even where its defective product injures an innocent bystander not using or working with the product. See, e.g., *Ciampichini v. Ring Bros., Inc.*, 40 A.D.2d 289 (4th Dep't 1973). Contrary to the defense assertions, at this stage of the proceedings, the plaintiffs allegations concerning products liability establish a basis for "duty" to these plaintiffs. As such, based on the facts alleged in the complaint it is pre-mature to dismiss the plaintiffs' causes of action against the social

media/internet defendants under CPLR § 3211(a)(7).

Negligent Infliction of Emotional Distress

"New York recognizes three variants of negligent infliction of emotional distress." *Ranta v. City of New York*, 481 F. Supp. 3d 115, 118 (2020). Those variants are: (1) the bystander theory; (2) the "direct duty" theory, under which "a plaintiff has a cause of action for negligent infliction of emotional distress if she suffers an emotional injury from defendant's breach of a duty which unreasonably endangered her own physical safety," id.; and (3) cases in which "'an especial likelihood of genuine and serious mental distress, arising from the special circumstances, . . . serves as a guarantee that the claim is not spurious.'" Id. at 119 *(quoting Johnson v. State*, 37 N.Y.2d 378, 382 (1975)). While some of the plaintiffs may fall under the bystander theory, all of the plaintiffs' negligent infliction of emotional distress allegations are more than sufficiently pled under the latter two theories.

Plaintiffs have made sufficient allegations in their complaint under a "direct duty" theory. Plaintiffs have alleged that the social media/internet defendants owed them a duty as a result of their negligent design and marketing of their products, their launching of an instrument of harm, and their special relationship with the shooter. As a result, it can be said, at this stage of the litigation, that the social media/internet defendants conduct unreasonably endangered plaintiffs' physical safety and caused them to fear for their safety. *See Nicholson v. A. Anastasio & Sons Trucking Co.*, 77 A.D.3d 1330, 1331 (2010) (lower court erred in dismissing NIED claim against trucking company that owned tractor-trailer that crashed into plaintiffs' home, resulting in no physical injuries, but causing plaintiffs to "have moments when they relive the terror, panic and shock of being trapped in their house and thinking that they would die"). In addition, the

complaint contains sufficient allegations to support the argument that the plaintiffs' survival of a horrific mass shooting is a special circumstance. The shooter fired about 60 rounds, first shooting four people in the parking lot, shooting the store windows before entering, then shooting shoppers and a security guard in the store. (¶¶ 196 -200 NYSCEF Doc. 3). The shooter continued walking around the store and shooting, including into the back wall where some plaintiffs hid.(¶¶ 14, 24, 27, 30, 66, 69,71, 78 and 87 NYSCEF Doc. 3). As alleged in multiple paragraphs of the complaint, plaintiffs fled, hid in terror and feared for their lives (NYSCEF Doc. 3). All of these allegations are sufficient to support a special circumstances argument (*compare Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 443 (1985) (the unusually disturbing experience plaintiff endured when a commercial flight plunged into a tailspin for 40 seconds, causing the plane to violently shake was of a nature that the experience guarantees plaintiff suffered severe emotional distress and warrants the law's recognition of such a claim). It would be premature to dismiss the negligent infliction of emotional distress claims before allowing plaintiffs a chance to prove their allegations through discovery.

Alphabet, Inc.

Alphabet, Inc. contends it should be dismissed from the action because it "cannot be held liable for the actions of its subsidiary, YouTube" and [p]laintiffs only allege facts as to YouTube and make no direct allegations against Alphabet, Inc. (¶ 17 NYSCEF Doc. 35). Although plaintiffs' complaint identifies Alphabet Inc. as "a holding company" the factual allegations asserted in the complaint that give rise to the causes of action asserted are attributed to the "YouTube Defendants" which collectively include Alphabet Inc., Google, LLC and YouTube, LLC (NYSCEF Doc. 3 pages 26 and 33). While Alphabet's assertion may yet prove true, at this

stage of the litigation the Court has no basis to dismiss Alphabet from the action. Alphabet may renew this argument after further discovery.

THEREFORE, IT IS HEREBY

ORDERED, the Social Media/Internet Defendants motions to dismiss are denied in their entirety. This constitutes the Decision and Order of this court. Submission of an Order by the parties is not necessary. Receipt of notice of the uploading of this Decision and Order by the court to NYSCEF shall not constitute notice of entry.

Signed this 18th day of March, 2024 at Buffalo, New York.

Hon. Paula L. Feroleto, J.S.C.