No. 18-15175

In the United States Court of Appeals
For the Ninth Circuit

KRISTANALEA DYROFF,
Plaintiff-Appellant,

v.

THE ULTIMATE SOFTWARE GROUP, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
District Court Case No. 3:17-cv-05359-LB
The Honorable Laurel Beeler

ANSWERING BRIEF OF APPELLEE THE ULTIMATE SOFTWARE GROUP, INC.

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CORPORATE DISCLOSURE STATEMENT
(Fed. R. App. P. 26.1)

The Ultimate Software Group, Inc. does not have a parent corporation. As of September 10, 2018, Janus Henderson Group PLC holds a ten percent interest in The Ultimate Software Group, Inc.

DATED: September 12, 2018 LEWIS BRISBOIS BISGAARD & SMITH LLP

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

Statutory Authorities

Additional Authorities

INTRODUCTION

This appeal raises a crucial issue of our times. Most Americans access the Internet daily to review the news of the day, make a purchase, or answer a question. The seemingly endless supply of information made available through the Internet is directly attributable to Congress' declaration, in enacting the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230 ("section 230"), that the Internet's continued growth was in the national interest. Congress recognized that a key to achieving this goal was conferring statutory immunity on Internet publishers of content created or developed by third parties, such as Appellee The Ultimate Software Group, Inc. ("Ultimate Software"). The tort-related claims brought here by Appellant Kristanalea Dyroff ("Dyroff") against Ultimate Software warrant dismissal—as properly entered below by the district court—because they cannot survive such immunity. Dyroff's appeal asks this Court to rewrite section 230 to establish liability that does not otherwise exist. Ultimate Software respectfully submits that this Court should deny Dyroff's request in its entirety and affirm the judgment of dismissal.

JURISDICTIONAL STATEMENT

A. The district court's subject-matter jurisdiction.

The United States District Court for the Northern District of California ("district court") exercised subject-matter jurisdiction over the underlying litigation pursuant to 28 U.S.C. § 1332(a) (diversity jurisdiction) following removal from the Superior

Court of San Francisco County, California, by Ultimate Software pursuant to 28 U.S.C. § 1441(b). *See* Appellant's Excerpts of Record, Volume II, ("2 ER") at 90.

B. The Court of Appeals' jurisdiction.

This Court's jurisdiction derives from 28 U.S.C. § 1291. The district court dismissed with leave to amend all claims alleged by Dyroff, who subsequently gave notice of her intent not to file an amended complaint. (1 ER 1-27.) The district court thereafter entered final judgment, which disposed of all claims in Ultimate Software's favor. (1 ER 1.)

C. Timeliness of the appeal.

The district court entered the judgment appealed from on January 19, 2018. (1 ER 1.) Dyroff filed her notice of appeal on February 2, 2018, which was timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. (2 ER 28-31.)

ISSUES PRESENTED

1. Did the district court properly dismiss all of Dyroff's claims, other than her failure to warn claim, because Ultimate Software is immune from liability under section 230 of the CDA given that it is an interactive computer service provider that Dyroff seeks to hold liable solely as the publisher of content produced by users of its Experience Project website?

2. Did the district court properly hold that Experience Project's tools, design, and functionalities—including anonymity, algorithms, recommendations, and

email/push notifications—did not make Ultimate Software an information content provider under section 230 and thereby nullify its statutory immunity given they were merely content-neutral tools that facilitated website use without creating or developing content?

3. Did the district court properly dismiss Dyroff's failure to warn claim given that no special relationship existed, the alleged functionalities of the Experience Project website were neutral features that did not create a risk of harm that imposed an ordinary duty of care, and the decedent assumed the risk of an obviously dangerous activity when he ingested illegal drugs that he purchased from an unknown drug dealer?

Ultimate Software asserts that the answer to each of these questions is "yes."

STATEMENT OF THE CASE

A. Wesley Greer's drug use and addiction.

Wesley Greer ("Greer") had a long history of drug use and addiction, which began after he suffered a knee injury in 2007. (2 ER 49.) During his recovery, Greer was overprescribed opioid pain killers. *Id*. Greer subsequently became addicted to opioids and then to heroin. *Id*. Although Greer entered five separate rehabilitation programs beginning in 2011, he relapsed each time. *Id*.

After completing a nine-month stay at a faith-based rehabilitation center in Florida in August 2013, Greer continued to live and work there while remaining drug

free. (2 ER 49.) In January 2015, when the center was unable to offer Greer full-time employment, he left to run a halfway house. *Id*. A month later, however, Greer relocated to Brunswick, Georgia, to live with his mother and stepfather because he thought that the drug-seeking environment at the halfway house would cause him to relapse. *Id*. Despite his move, Greer relapsed in August 2015. (2 ER 50.) During that time, Greer conducted a Google search to find heroin in Jacksonville, Florida, and was directed to "Experience Project." *Id*.

B. The Experience Project website.

Experience Project was a social networking website that operated from 2007 until March 2016. (2 ER 33, 38.) The website consisted of various online communities or groups in which users could anonymously share experiences, post and answer questions, and interact with others about any subjects that were important to them. (2 ER 36, 38.) The experiences shared on the website were diverse, with topics including "I like dogs," "I have lung cancer," "I'm going to Stanford," and "I Am a Drug Addict." (2 ER 33, 38.) Each experience included first-person stories and related comments. (2 ER 38.) Although users registered for the website, they picked anonymous user names because Experience Project did not want to know their identities, phone numbers, or addresses. (2 ER 38-39, 47.) The principle underlying Experience Project was that users would be more willing to share their experiences if they were assured anonymity. (2 ER 46.) The website had more than 67 million

"experiences shared," 15 million "friendships made," and 6 million "questions asked" as of May 2016. (2 ER 39.)

Experience Project grouped its users based on shared experiences and attributes by utilizing algorithms to identify the content of its users' posts. (2 ER 33.) When a user posted a new message or response, the website sent an email to inform other users in the group. (2 ER 35, 50, 56.) Ultimate Software utilized data acquired from such posts for commercial purposes and to direct users to additional groups through a proprietary recommendations functionality. (2 ER 33, 42.) The website generated revenue through advertisements and the sale of tokens that users could spend to ask questions to others in their groups. (2 ER 39-41.)

The anonymity of Experience Project's users, coupled with the grouping of users according to common attributes, allegedly facilitated the development of a drug trafficking culture on the website. (2 ER 33.) Dyroff, Greer's mother, alleges that Ultimate Software: (1) allowed users to traffic anonymously in illegal, deadly narcotics and to create groups dedicated to their sale and use; (2) steered users to additional groups dedicated to the sale and use of narcotics; (3) sent users alerts to posts within groups that were dedicated to the sale and use of narcotics; (4) permitted users to remain active accountholders despite evidence that they openly engaged in drug trafficking and that law enforcement had undertaken related investigations; and

(5) demonstrated antipathy toward law enforcement efforts to stop illegal activity on Experience Project. (2 ER 56-57.)

C. Greer uses Experience Project to solicit heroin.

Soon after his Google search for heroin directed him to Experience Project in August 2015, Greer created an account with the website under the handle "Gaboy5224" and purchased tokens that enabled him to ask questions to other users. (2 ER 50.) Greer proceeded to post to the group called "where can i [sic] score heroin in jacksonville, fl." *Id*. Experience Project subsequently sent Greer an email stating that "Someone posted a new update to the question 'where can i [sic] score heroin in jacksonville, fl'" and providing a hyperlink and URL directing Greer to the update. *Id*. Hugo Margenat-Castro, an Orlando-based drug dealer that purported to sell heroin, had posted the update or a similar one under his Experience Project handle "Potheadjuice." *Id*.

Margenat-Castro used his participation in Experience Project groups and forums to sell a mixture of heroin and fentanyl between January and October 2015. (2 ER 51.) During this time, Margenat-Castro made posts to groups such as "I Love Heroin" and "Heroin in Orlando," which included his telephone number and statements that he sold good quality heroin. *Id*. A law enforcement investigation of Margenat-Castro resulted in controlled buys of heroin in March and June 2015. (2 ER 52-53.) Margenat-Castro was arrested for possession with the intent to sell fentanyl,

among other drugs, in April and June 2015 stemming from his sale of drugs through Experience Project. (2 ER 53.)

D. Greer travels to Florida to purchase heroin.

Before midnight on August 17, 2015, Greer called Margenat-Castro using the telephone number he had received through Experience Project. (2 ER 50.) Greer drove from Brunswick, Georgia to Orlando, Florida during the early morning hours of August 18, 2015, to meet with Margenat-Castro and called him several times along the way. (2 ER 50-51.) After making a drug purchase from Margenat-Castro, which he did not know contained a lethal dose of fentanyl, Greer made the return drive to Brunswick, Georgia. (2 ER 51.)

E. Greer's death.

Greer was found dead on the morning of August 19, 2015. (2 ER 51.) The cause of death was fentanyl toxicity, which resulted from the drugs Greer had purchased from Margenat-Castro. (2 ER 51, 54.) The medical examiner declared Greer's death a homicide. (2 ER 51.) Law enforcement authorities thereafter made another controlled buy from Margenat-Castro in early September 2015 and arrested him a month later. (2 ER 54.) Margenat-Castro ultimately entered into a plea agreement in March 2017 and acknowledged that he sold heroin laced with fentanyl while he was active on Experience Project. (2 ER 51.)

F. Experience Project suspends operations.

On March 21, 2016, Experience Project announced that it was suspending operations in an open letter to its users. (2 ER 47-48, 78-83.) Experience Project stated that user privacy was paramount and a core part of its website, but expressed concern that government action was jeopardizing the future of online anonymity. (2 ER 48, 78-79.) Although Experience Project stated that it always supports proper law enforcement efforts, it recognized the growing potential for abuse and did not have the resources to respond to increased government information requests. (2 ER 48, 79.) The website therefore no longer supported future posts, messages, or new registrations after April 21, 2016. (2 ER 79.)

G. Dyroff's complaint.

Dyroff, Greer's mother, commenced this action in the Superior Court of San Francisco County, California, on August 16, 2017. (2 ER 32.) In her complaint, Dyroff purported to state claims against Ultimate Software for negligence (Count I), wrongful death (Count II), premises liability (Count III), failure to warn (Count IV), civil conspiracy (Count V), unjust enrichment (Count VI), and violation of California's Drug Dealer Liability Act (Count VII). (2 ER 56-68.) Each of these claims allegedly arose out of Greer's death, which followed his purchase of fentanyl-laced heroin from a drug dealer he allegedly met while using the Experience Project social networking website owned by Ultimate Software. The relief sought included,

among other things, general, special, and punitive damages. (2 ER 68.) Ultimate Software removed this action to the district court on September 15, 2017. (2 ER 90.)

H. The district court grants Ultimate Software's motion to dismiss and enters judgment.

Ultimate Software moved to dismiss all of Dyroff's claims with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)"). (Appellee's Supplemental Excerpts of Record, ("SER"), at 3-32, 33-52, 53-75; 2 ER 91-92.) On November 26, 2017, the district court entered its written order granting Ultimate Software's motion with leave to amend. (1 ER 2-27.) The district court held that Ultimate Software is immune from liability as to Counts I, II, III, V, VI, and VII under section 230 of the CDA on the basis that:

(1) Ultimate Software is an interactive computer service provider under section 230. (1 ER 13.)

(2) Dyroff cannot plead around Ultimate Software's section 230 immunity because her claims "at their core" seek to hold Ultimate Software liable for publishing third-party content. (1 ER 13-14.)

(3) Ultimate Software is not an information content provider under section 230 because only third parties posted on Experience Project and it did not solicit unlawful information or otherwise create or develop content. (1 ER 16.) Experience Project's alleged functionalities, including anonymity, algorithms, recommendations and emails, were

content-neutral tools that facilitated communications between users without creating or developing content. (1 ER 16-20.)

For these reasons, the district court dismissed all of Dyroff's claims against Ultimate Software other than her failure to warn claim (Count IV), which is not subject to the CDA. (1 ER 20.)

The district court separately found that Dyroff did not state a failure to warn claim for two reasons. (1 ER 20-26.) First, Ultimate Software had no duty to warn Greer that Margenat-Castro was selling fentanyl-laced heroin because it had no special relationship with him. (*Id*.) Second, Ultimate Software's use of neutral tools and functionalities did not create a risk of harm that imposed an ordinary duty of care regardless of whether it allowed users to access Experience Project anonymously. (1 ER 26.) The district court did not reach the question of whether the assumption of risk doctrine barred Dyroff's failure to warn claim because no duty to warn existed, but observed that Greer "assumed the obviously dangerous risk of buying drugs from an anonymous Internet drug dealer." (*Id*.)

On these grounds, the district court granted Ultimate Software's motion to dismiss without prejudice and allowed Dyroff twenty-one days to file an amended complaint. (1 ER 27.) On January 19, 2018, however, Dyroff filed a notice stating that she did not intend to file an amended complaint and requested that the court enter judgment pursuant to its November 26, 2017 order. (1 ER 1.) The district court

therefore entered judgment in Ultimate Software's favor that same day. (*Id*.) This appeal followed. (2 ER 28-31.)

STANDARD OF REVIEW

The Court reviews de novo a district court order granting a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) as well as questions of statutory interpretation. *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018). A court must accept all facts alleged in a complaint as true and construe them in the light most favorable to the plaintiff when presented with a motion to dismiss, but it is not required "'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 978 (9th Cir. 2004). Only a complaint that states a "plausible" claim for relief may survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility only exists when the court may "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The Court will affirm a dismissal for failure to state a claim where, as in this case, "there is no cognizable legal theory or an absence of sufficient facts to support a cognizable legal theory." *Los Angeles Lakers, Inc. v. Fed. Ins. Co*., 869 F.3d 795, 800 (9th Cir. 2017).

SUMMARY OF ARGUMENT

Nearly two years after Greer's death, Dyroff filed a variety of state law claims against Ultimate Software in her individual capacity as Greer's mother and as the successor-in-interest of Greer's estate. (2 ER 32-88.) The gravamen of Dyroff's claims is that Greer's death resulted from his access to unlawful and harmful drug-related content posted by Experience Project users, including Greer and Margenat-Castro. *See id*. Ultimate Software is immune from liability for all such claims, other than Dyroff's failure to warn claim, under section 230 of the CDA because they seek to hold Ultimate Software liable for content provided solely by third parties to which it made no material contribution.

Because the legal principles that establish Ultimate Software's immunity from liability for the posts made by Experience Project users are well settled, Dyroff attempts to salvage her claims by asking this Court to adopt a legal theory never previously recognized by any court. Specifically, Dyroff maintains that Ultimate Software has no immunity under section 230 because it created or developed additional harmful website content by manipulating third-party content through Experience Project's tools, design, and functionalities, such as its utilization of data mining techniques and algorithms to generate recommendations for delivery to users through email notifications. (*See* Appellant's Opening Brief ("AOB"), at 19.)

The district court properly dismissed Dyroff's complaint. Her appeal lacks merit for *four* overriding reasons.

First, Ultimate Software has immunity from liability for Dyroff's claims under the plain language of section 230 of the CDA. Ultimate Software is an interactive computer service provider that merely published the posts of Experience Project's users and did not materially contribute to them in any way.

Second, no legal authority supports Dyroff's notion that Ultimate Software became an information content provider and thereby lost its section 230 immunity. Ultimate Software did not create or develop website content by manipulating third-party content through Experience Project's tools, design, and functionalities, which were content-neutral website features.

Third, according to Dyroff's own allegations in her complaint, Greer's own voluntary conduct, rather than Experience Project's tools, design, and functionalities, was responsible for creating the circumstances that led to Greer's death.

Fourth, Dyroff's failure to warn claim is unsustainable because Ultimate Software did not owe Greer a legal duty or have a special relationship with him. Greer assumed the risk of an obviously dangerous activity when he solicited and bought heroin from a complete stranger. Thus, on each of these separate and independent grounds, this Court should affirm the district court's order and judgment dismissing Dyroff's claims.

ARGUMENT

I. Section 230 of the CDA Immunizes Ultimate Software from Liability for Dyroff's Claims.

One of the primary purposes of the Cox-Wyden Amendment to the CDA, codified at section 230, has been "to promote the free exchange of information and ideas over the Internet." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003); *see also Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) ("there is little doubt" that the Cox-Wyden Amendment "sought to further First Amendment and e-commerce interests on the Internet") (emphasis omitted), *superseded by statute on other grounds as stated in Breazeale v. Victim Servs.*, 878 F.3d 759 (9th Cir. 2017). "'Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum.'" *Batzel*, 333 F.3d at 1027.

Not only did Congress find when it enacted section 230 that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," it declared that the policy of the United States is "to promote the continued development of the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(4), (b)(1) , and (b)(2). To fulfill this policy, Congress ensured that section 230 "protects certain internet-based actors from

certain kinds of lawsuits." *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1099 (9th Cir. 2008).

Pertinent here is the broad immunity that section 230 confers on "providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1162 (9th Cir. 2007); *Carafano*, 339 F.3d at 1123 ("§ 230 provides broad immunity for publishing content provided primarily by third parties"). Such immunity derives from the statutory definition of "interactive computer services," which includes "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2); *see also Barnes*, 570 F.3d at 1100-01 & n.5. This Court "'expansive[ly]'" interprets the term "interactive computer service." *Kimzey v. Yelp! Inc*., 836 F.3d 1263, 1268 (9th Cir. 2016).

Under section 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). A "publisher" has been defined as "'the reproducer of a work intended for public consumption' and also as 'one whose business is publication.'" *Barnes*, 570 F.3d at 1102. A publisher's responsibilities include "reviewing, editing, and deciding whether to publish or to

withdraw from publication third-party content." *Id*. This exception establishes immunity for interactive service providers because section 230 states 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." 47 U.S.C. § 230(e)(3); *Barnes*, 570 F.3d at 1100; *see also Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) ("[t]he majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service") (internal quotation marks omitted).

"The prototypical service qualifying for [Section 230] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Kimzey*, 836 F.3d at 1266. As long as a third party "provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Carafano*, 339 F.3d at 1124; *see also Zeran v. Am. Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997) ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred"). This "exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while

retaining its basic form and message." *Batzel*, 333 F.3d at 1031. Section 230 therefore treats Internet publishers "differently from corresponding publishers in print, television and radio." *Barnes*, 570 F.3d at 1122.

The immunity granted to interactive computer services under Section 230 ameliorates Congress' concern that litigation over published content would impair its goal of promoting free speech on the Internet. *See Batzel*, 333 F.3d at 1027-28. As this Court has recognized, "[m]aking interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet." *Id*. By enacting section 230, Congress "sought to prevent lawsuits from shutting down websites and other services on the Internet." *Id*.; *see also Roommates.com*, 521 F.3d at 1174 ("[w]e must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content"); *Zeran*, 129 F.3d at 330 (section 230 immunity resulted from Congress' recognition of "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium").

This Court has condensed these fundamental principles into a three-prong test for determining the availability of section 230 immunity. *Barnes*, 570 F.3d at 1100. Specifically, such immunity protects from liability: "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law

cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Id*. at 1100-01 (footnote omitted). When a plaintiff cannot allege sufficient facts to overcome section 230 immunity, his or her claims should be dismissed. *See Kimzey*, 836 F.3d at 1268-71.

This is the situation here, where all three prongs of the section 230 immunity test are satisfied. Given that the essence of Dyroff's allegations is that Experience Project's users provided the allegedly unlawful and harmful content that led to Greer's death, the district court properly found that Ultimate Software was entitled to section 230 immunity.

A. The first prong of the section 230 immunity test is satisfied because Ultimate Software is an interactive computer service provider.

It is undisputed that Ultimate Software is an interactive computer service provider. (1 ER 13, 33, 38; SER 61.) Dyroff's claims arise out of Greer's use of an account he created with Ultimate Software's Experience Project website, which enables access by multiple users to a computer server for social networking purposes. (1 ER 13; 2 ER 33, 36, 38-39.) Websites are now the most common interactive computer services. *Kimzey*, 836 F.3d at 1268; *see also Roommates.com*, 521 F.3d at 1162 n.6 ("[t]oday, the most common interactive computer services are websites"). Ultimate Software therefore satisfies the first prerequisite for section 230 immunity.

B. The second and third prongs of the section 230 immunity test are satisfied because Dyroff seeks to treat Ultimate Software as a publisher of third-party content.

Although Dyroff acknowledges that Ultimate Software is an interactive computer service provider, she argues that it is also an "information content provider" in an unfounded attempt to defeat section 230 immunity. By definition, an "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Unlike an interactive computer service provider that merely publishes information created or developed by a third party, an information content provider enjoys no immunity from liability for the information it creates or develops. *See Roommates.com*, 521 F.3d at 1162; *see also Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) ("there is a dividing line between 'interactive computer service' providers—which are generally eligible for CDA section 230 immunity—and 'information content provider[s],' which are not entitled to immunity"). Consistent with the legislative history and intent, courts have treated immunity under section 230 "as quite robust, adopting a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'" *See Carafano*, 339 F.3d at 1123 (footnotes omitted); *see also* 47 U.S.C. § 230(a)-(b) (stating congressional findings and federal policy).

An interactive computer service provider, such as Ultimate Software, has a right to immunity under section 230 "so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue." *Carafano*, 339 F.3d at 1123. Whether an interactive computer service provider is also an information content provider is inconsequential unless it created or developed the content at issue because section 230 "precludes treatment as a publisher or speaker for '*any* information provided by *another* information content provider.'" *Id*. at 1125 (emphasis in original). "The reference to '*another* information content provider' distinguishes the circumstance in which the interactive computer service itself meets the definition of 'information content provider' with respect to the information in question." *Batzel*, 333 F.3d at 1031 (emphasis in original; parenthetical omitted).

Because Ultimate Software did not create or develop the drug-related communications that underlie Dyroff's complaint, it is not an information content provider with respect to such information as a matter of law. *See* 47 U.S.C. § 230(f)(3). Dyroff's allegations demonstrate that content provided by Experience Project users establish the foundation of her claims:

> "[D]ealers would openly advertise in groups with names such as 'I Am a Drug Addict,' 'I Can Help With Connect in Orlando FL,' 'I AM a Heroin Addict,' 'I Miss Using Heroin,' and 'Heroin Heroin Heroin and more Heroin.'" (2 ER 33.)
>
> "Experience Project was, at all times relevant to this litigation, a social network consisting of various online communities or groups, and

> allowing its members to anonymously post and answer questions in said communities or groups." (2 ER 36.)
>
> "[M]embers would submit 'experiences'—their personal, first-person stories about various life experiences they had. Users could then form or join communities based on these experiences and/or interests, and interact with other members who shared them." (2 ER 38.)
>
> "Once users established an account and joined a group or groups, they could ask questions of—or answer questions posed by—other members." (2 ER 39.)
>
> "For example, a screenshot of the following group, titled 'I Need Heroin,' contains numerous posts in which members offer contact information to sell opiates in and around the Orlando area." (2 ER 41.)
>
> "Perversely, users are able to provide 'reviews' of drug dealers who traffic on Experience Project, as demonstrated by the following post…." (2 ER 43.)
>
> "Experience Project created and nurtured an anonymous environment in which fatally dangerous narcotics were brazenly sold by its users, with no consequences coming from Defendant." (2 ER 45.)
>
> "[T]he more users felt that they could post anonymously, the more likely they would perceive Experience Project as an exclusive outlet for their online communications with others." (2 ER 46.)
>
> "[A] core tenet of Experience Project was to provide a space to users…." (2 ER 48.)

The nature and breath of such allegations confirm that Dyroff seeks to hold Ultimate Software liable for publishing third-party content rather than for content that it created or developed. Thus, based on these allegations alone, Ultimate Software is not an information content provider for the content at issue.

Further compelling this conclusion are Dyroff's allegations regarding Greer's connection with Margenat-Castro using Experience Project. The posts made on the website by Greer and Margenat-Castro provide the basis of these allegations:

> "Wesley Greer, a recovering heroin addict who, suffering a relapse, joined Experience Project . . . [H]e encountered the drug dealer Hugo Margenat-Castro, who advertised heroin on the website." (2 ER 35.)
>
> "Wesley Greer contacted Margenat-Castro and purchased what he believed to be heroin." (*Id*.)
>
> "Wesley then posted the to the [sic] Experience Project group 'where can i [sic] score heroin in jacksonville, fl.'" (2 ER 50.)
>
> "[T]hat update—or one substantially similar—was posted by Hugo Margenat-Castro, an Orlando-based drug dealer who maintained an Experience Project account under the handle 'Potheadjuice.'" (*Id*.)
>
> "Margenat-Castro's Experience Project posts purported to sell heroin—they are posted in groups such as "I Love Heroin" and "Heroin in Orlando"—but in reality Margenat-Castro was selling heroin mixed with fentanyl." (*Id*.)
>
> "Under the handle 'Potheadjuice,' Margenat-Castro actively and routinely used Experience Project groups and forums . . . posting in groups such as 'I Love Heroin' and 'Heroin in Orlando.'" (2 ER 51.)
>
> "Margenat-Castro's Experience Project profile page shows 1,439 profile views. Beyond Wesley's unknowing purchase of a lethal dose of fentanyl from Margenat-Castro, virtually all of those 1,439 visitors *also* viewed his page to message and buy drugs from Margenat-Castro." (2 ER 52) (emphasis in original).

In sum, Dyroff's complaint is replete with allegations that establish the second and third prerequisites for section 230 immunity. Dyroff makes no allegation that Ultimate Software created or developed the website content on which she bases her claims. Instead, her complaint seeks to hold Ultimate Software liable for publishing

third-party content. Ultimate Software accordingly has section 230 immunity. 47 U.S.C. § 230(c)(1) and (e)(3). Because Dyroff cannot overcome the preclusive effect of such immunity on her claims, the judgment below should be affirmed. (1 ER 1-27.)

II. *Roommates.com* and Its Progeny Do Not Support Dyroff's "Manipulation" Theory of Liability.

Dyroff seeks to circumvent section 230 immunity, which bars her claims by characterizing Ultimate Software as an information content provider based on a fundamental misinterpretation of this Court's seminal opinion in *Roommates.com*, 521 F.3d at 1157. Specifically, Dyroff alleges that Ultimate Software created or developed additional website content by manipulating third-party content through Experience Project's tools, design, and functionalities, which include user anonymity, algorithmic-generated recommendations, and emails. (AOB at 26-27.) According to Dyroff, *Roommates.com* holds that a website develops content under section 230 if it "manipulates the content in a unique way," which "can take myriad forms, including the content's generation, either through posting guidelines that signal or direct the poster, content requirements for posts, or even *post hoc* use of content that was generated either in whole or in part by a third party." *Id. Roommates.com*, however, does not stand for such a proposition.

The question presented in *Roommates.com* was whether section 230 immunized a website, which matched people renting spare rooms with people looking for somewhere to live, from claims that it violated federal and state housing

discrimination laws by requiring subscribers to disclose their sex, sexual orientation, and family status. *See Roommates.com*, 521 F.3d at 1161. This Court found the answer to this question in the nature and extent of the website's role in creating or developing the allegedly unlawful content. *See id*. at 1164-70.

Although this Court observed that "development" could encompass "just about any function performed by a website," it recognized that "to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides." *Roommates.com*, 521 F.3d at 1167. This Court also noted that context is an important part of the inquiry. *Id*. at 1168-69 & n.22 ("[o]ur interpretation of 'development' is entirely in line with the context-appropriate meaning of the term, and easily fits the activities [the website] engages in"). Based on such considerations, this Court adopted a "material contribution" test in narrowly defining when a website "develops" information:

> [W]e interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230 [immunity], if it contributes materially to the alleged illegality of the conduct.

Id. at 1167-68. "A material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content," but rather means "being responsible for what makes the displayed content

allegedly unlawful." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014) (adopting and construing *Roommate.com*'s definition of "development").

Under this test, the website in *Roommates* plainly was the developer of the content at issue. *See Roommates.com*, 521 F.3d at 1170. Not only did the website prepare the allegedly discriminatory questions and answer choices that served as the focus of the registration process and, ultimately, became the cornerstone of each subscriber's online profile, it designed the search function to guide users through allegedly discriminatory criteria. *Id*. at 1164, 1167. The website then allegedly hid housing opportunities from subscribers based on their responses to the questions it unlawfully required them to answer about protected characteristics. *Id*. at 1169.

Because of the website's "direct and palpable" role in the alleged discriminatory filtering process, this Court concluded that it "forfeit[ed] any immunity to which it was otherwise entitled under section 230."[1] *Roommates.com*, 521 F.3d at 1170. The website, therefore, could not claim section 230 immunity for: (1) its own acts of posting questions and requiring answers that produced discriminatory

[1] For this same reason, the court in *J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wn.2d 95, 359 P.3d 714 (Wash. 2015), held that the plaintiffs stated a claim for relief because the website had allegedly helped develop the content at issue. *Id*. at 717. Dyroff's reliance on *J.S.* is misplaced because Ultimate Software did not develop any content here. AOB 25-26.

preferences [*id*. at 1165]; (2) the content provided by subscribers because, "[b]y requiring subscribers to provide the information as a condition of accessing its service and by providing a limited set of pre-populated answers," the website "becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information," [*id*. at 1166]; and (3) the design and operation of its search system, which filters listings and guides users, or its email notification system, which directs emails to subscribers, according to unlawful discriminatory criteria. *Id*. at 1167, 1169.

By contrast, this Court in *Roommates.com* identified the type of conduct that does *not* constitute the "development" of content under section 230. *Roommates.com*, 521 F.3d at 1169. For example, a website does not become a developer when it provides neutral tools that an individual uses to perform illicit searches. *Id*. Likewise, a housing website that allows users to establish their own standards for denying receipt of emails from potential roommates of "a particular race or sex" does not become a developer provided that it does not require the use of discriminatory criteria. *Id*. Finally, a website does not become a developer by editing unlawful user-created content so long as its edits do not contribute to the unlawfulness. *Id*. Simply stated, a website enjoys section 230 immunity in each of these cases because its users are responsible for generating the content and it has made no material contribution to the alleged illegality. *Id*.

On this basis, the *Roomates.com* Court distinguished the website's request that subscribers complete an "Additional Comments" section of their profile page from its requirement that they input discriminatory preferences. *Roommates.com*, 521 F.3d at 1173-75. This section of the website prompted subscribers to "'tak[e] a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate'" and gave them a "blank text box" in which they could provide further information about themselves. *Id*. at 1173. The website did not urge subscribers to express discriminatory preferences in this section or otherwise provide guidance regarding content, which resulted in diverse comments ranging from subscribers that "'[p]ref[er] white Male roommates' or require that '[t]he person applying for the room MUST be a BLACK GAY MALE' to those who are 'NOT looking for black muslims.'" *Id*. The website published the comments as written, but was not the content's developer because subscribers controlled the information provided. *Id*. at 1174. Without reviewing every entry, which subscribers submitted expecting publication, the website would have no way to "distinguish unlawful discriminatory preferences from perfectly legitimate statements." *Id*. This Court concluded that "[t]his is precisely the kind of situation for which section 230 was designed to provide immunity." *Id*.

The *Roommates.com* website did not lose its section 230 immunity regarding the information provided in the "Additional Comments" section even though it

encouraged subscribers to include "something." *Roommates.com*, 521 F.3d at 1174. The "simple, generic prompt" did not make the website a "developer of the information posted" because it neither instructed subscribers to include certain information nor encouraged them to make discriminatory comments. *Id*. This Court elaborated:

> Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged--or at least tacitly assented to--the illegality of third parties.

Id. (emphasis in original).

Thus, this Court in *Roommates.com* concluded that "[w]here it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to [the website's] questions, answers and the resulting profile pages—immunity will be lost," while "in cases of enhancement by inference—such as with respect to the 'Additional Comments' here—section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[2] *Id*. at 1174-75.

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[2] *Roommates.com* confirms that Dyroff's criticism of the district court's reliance on *Carafano*, 339 F.3d at 1119, is unfounded. (AOB 37-39.) The district court cited *Carafano* for the principle that, "when a website collects information about users and (footnote continued)

Dyroff therefore is mistaken when she suggests that *Roommates.com* "established a nuanced standard" for determining what amounts to the development of content under section 230. (AOB 22.) There was no nuance to the holding in *Roommates.com*. Rather, this Court was straightforward and direct. A website enjoys immunity under section 230 as long as it does not materially contribute to the alleged unlawfulness of the content. *Roommates.com*, 521 F.3d at 1175; *see also Kimzey*, 836 F.3d at 1269 n.4 (the material contribution test makes a "'crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable'"); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) ("[a]s the Ninth Circuit noted, a website operator who does not 'encourage illegal content' or 'design' its 'website to require users to input illegal content' is 'immune' under § 230 of the

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classifies user characteristics," it is "immune, and not an 'information content provider,' as long as users generate all content." (1 ER 18.) This principle is consistent with *Roommates.com* because a user generates all content when, as in *Carafano*, he or she acts "without prompting or help from the website operator." *Roommates.com*, 521 F.3d at 1171. The point made by the district court and confirmed by Dyroff's allegations is that Experience Project's users were solely responsible for the content at issue because Ultimate Software did not materially contribute to their posts. As a result, Ultimate Software is immune from liability for Dyroff's claims under section 230.

CDA"). Ultimate Software plainly satisfies this standard, which mandated the dismissal of Dyroff's complaint.

Dispositive here is Dyroff's inability to allege that Ultimate Software materially contributed to any content posted on the Experience Project website that purportedly led to Greer's death. Nowhere does Dyroff allege that Ultimate Software required users to post specific content, made suggestions regarding the content of potential user posts, or contributed to making unlawful or objectionable user posts. *See Gonzalez v. Google, Inc*., 282 F. Supp. 3d 1150, 1169-70 (N.D. Cal. 2017). Rather, Dyroff merely seeks to hold Ultimate Software liable for publishing third-party content, including posts by Greer and Margenat-Castro relating to Greer's interest in buying heroin. Because Experience Project functioned like the "Additional Comments" section at issue in *Roommates.com*—where subscribers voluntarily made all posts without any instruction or direction from the website—Ultimate Software is entitled to immunity under the plain terms of section 230 as a publisher of third-party content.

To escape this inevitable conclusion, Dyroff posits that a website can be a developer under section 230 even though it is not responsible for producing the content at-issue so long as it "makes its own use of that content in some material way." (AOB 22) (emphasis deleted). Dyroff's sole authority for this erroneous notion is the Court's dictum in *Roommates.com* that "'making usable or available'" is a more

suitable definition of "development" than the definition relied on by the dissent. *Id.* (citing *Roommates.com*, 521 F.3d at 1168).

Dyroff's reliance on this definition is misplaced, not only because it is dictum, but also because she takes it out of context while misapprehending the difference between making something "usable or available" and making "use" of something. "Usable" is an adjective that means "capable of being used" while "available" is an adjective that means "present or ready for immediate use." Merriam Webster, *Webster's Ninth New Collegiate Dictionary* 119, 1299 (1988). By contrast, "use" is a verb that means "to put into action or service." *Id*. at 1299. In the context of its analysis in *Roommates.com*, this Court necessarily observed that "usable and available" was a suitable definition of "development" because the website materially contributed to making the allegedly unlawful content capable and ready for use by others through its publication of the information it required subscribers to submit in response to its discriminatory criteria.

Contrary to Dyroff's premise, this Court did not even consider whether making material "use" of allegedly unlawful content constitutes "development" for purposes of section 230, which is not surprising because the law "distinguishes 'service' from 'content'" rather than service from use. *See Bennett*, 882 F.3d at 1167. Thus, because no grounds exist on which the district court could have found that Dyroff stated a

claim upon which relief could be granted, the judgment entered in Ultimate Software's favor should be affirmed.

III. Dyroff's Allegations Indicate That Greer's Own Voluntary Conduct, Rather Than Experience Project's Tools, Design, and Functionalities, Led to Greer's Death.

Dyroff's theory that Ultimate Software created the online content that led to Greer's death by utilizing Experience Project's tools, design, and functionalities to manipulate content posted by its users is unsustainable. The features complained about by Dyroff include alleged data mining techniques and machine learning algorithms that collect and analyze posts for the purpose of making recommendations through emails, which Dyroff characterizes as "push notifications" that allegedly "steered" users. (2 ER 33, 55-56, 65; AOB 6-7.) Noticeably absent from Dyroff's complaint, however, are allegations that the website's algorithms and other features: (1) generated and sent drug-related recommendations to Greer by email and (2) enticed Greer to buy the fentanyl-laced heroin that caused his death.

Instead, according to Dyroff's allegations, Greer used Experience Project for the sole purpose of effectuating the drug purchase that he had already intended before his Google search for a heroin dealer directed him to the website. (2 ER 50-51.) Dyroff's allegations reveal that it was Greer's and Margenat-Castro's Experience Project posts that put the events in motion that ultimately resulted in Greer's death, not any content attributable to Ultimate Software. Dyroff alleges that within about a

day of when he first accessed Experience Project, Greer had voluntarily accessed and posted a message to the group called "where can i [sic] score heroin in jacksonville, fl," received a response from drug dealer Margenat-Castro, called Margenat-Castro multiple times, crossed state lines from his home in Brunswick, Georgia to Orlando, Florida to make a drug purchase from Margenat-Castro, returned home to Brunswick, Georgia, and ingested a deadly overdose of fentanyl-laced heroin. (2 ER 50-51.) Thus, Dyroff essentially acknowledges through her allegations that Greer acted under his own free will.

Because Dyroff's premise that Ultimate Software created the content that led to Greer's death has no support in her allegations, her complaint lacks sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678. Without such factual matter, no court can draw a "reasonable inference" that Ultimate Software "is liable for the misconduct alleged." *Id*. On this basis, the dismissal of Dyroff's claims was necessary and proper.

IV. Experience Project's Use of Neutral Website Features to Publish Third-Party Content Did Not Transform Ultimate Software Into an Information Content Provider.

When Dyroff complains that Ultimate Software manipulated third-party content through Experience Project's website features, such as its utilization of algorithms to develop recommendations, which it then forwarded to users through notification emails, she is essentially objecting to its exercise of traditional publishing functions.

See Barnes, 570 F.3d at 1102. Not only does publication involve reviewing and editing, it also includes the decision to make available or withdraw third-party content. *See id*. Whether by reproducing or supplying links to third-party content, the recommendation process necessarily involves the decision to make such content available to others, which is inherently a publishing function. *See Barnes*, 570 F.3d at 1101-02; *see also Batzel*, 333 F.3d at 1031 (the "'development of information'" means "'something more than merely editing portions of an e-mail and selecting material for publication"). Dyroff's manipulation claims therefore fall squarely within the scope of section 230 immunity. *See Roommates.com*, 521 F.3d at 1172 ("[t]he mere fact that an interactive computer service classifies user characteristics . . . does not transform [it] into a 'developer' of the 'underlying misinformation'") (omission in original); *see also Dowbenko v. Google Inc*., 582 F. App'x 801, 805 (11th Cir. 2014) (claim that website "manipulated its search results" is preempted under section 230); *Roca Labs, Inc. v. Consumer Op. Corp*., 140 F. Supp. 3d 1311, 1322 (M.D. Fla. 2015) (manipulation of data "does not preclude Section 230 immunity"); *Levitt v. Yelp! Inc*., No. C10-1321 EMC, 2011 U.S. Dist. LEXIS 124082, at *20 (N.D. Cal. Oct. 26, 2011) (manipulation of third-party content is "within the conduct immunized by § 230(c)(1)"), *aff'd*, 2014 U.S. App. LEXIS 17079 (9th Cir. Sept. 2, 2014).

Regardless of how Dyroff subjectively characterizes her claims, this Court must objectively examine their substance. In doing so, it becomes readily apparent that

Dyroff seeks to hold Ultimate Software liable solely for the protected act of publishing content prepared by Experience Project users, particularly Greer and Margenat-Castro. This Court has explained this relevant inquiry:

> What matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability.

Barnes, 570 F.3d at 1101-02; *see also Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017) (taking "guidance" from *Barnes* that "Section 230(c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party communications").

These considerations confirm that Dyroff is pushing "the envelope of creative pleading in an effort to work around § 230" for the purpose of denying Ultimate Software its statutory right to immunity. *See Kimzey*, 836 F.3d at 1265; *see also Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) ("artful pleading" would not deprive a website of its section 230 immunity).

The absence of any allegations by Dyroff that Experience Project's tools, design, and functionalities differed for each community or group that operated within

the website is determinative. Nowhere does Dyroff allege that the features used to navigate the drug-related groups accessed by Greer and Margenat-Castro were different in any way from the features used to navigate other groups within the website, such as the "I like dogs" or "I underwent chemotherapy" groups. (2 ER 38.) Rather, the features complained about by Dyroff comprise a "framework" that facilitates use throughout the website. *See Roommates.com*, 521 F.3d at 1172. Hence, by definition, Experience Project's tools, design, and functionalities are "content-neutral" no matter how stridently Dyroff argues otherwise. *See, e.g., Fields v. Twitter, Inc*., 217 F. Supp. 3d 1116 (N.D. Cal. 2016) ("[t]he decision to furnish accounts would be content-neutral if Twitter made no attempt to distinguish between users based on content—for example if they prohibited everyone from obtaining an account, or they prohibited every fifth person from obtaining an account"); *see also Gonzalez v. Google, Inc.*, No. 16-cv-03282-DMR, 2018 U.S. Dist. LEXIS 138367, at *35 (N.D. Cal. Aug. 15, 2018) ("[a]s with Google's targeted ad algorithm, there is no indication that its content recommendation tool is anything other than content neutral").

The recommendations functionality complained about by Dyroff exemplifies the content-neutral nature of Experience Project's website features. (AOB 28-34.) This feature alerts a user by email when other users post to a group in which he or she has participated or responds to a post that he or she has made. (2 ER 50.) Although Dyroff misleadingly suggests that this feature merely serves to facilitate drug-

trafficking, she does not and cannot allege that the algorithms employed by Experience Project only generated emails to make recommendations to users in drug-related groups. By this omission, Dyroff impliedly concedes that this feature is content-neutral.

Like Greer, Margenat-Castro, and other users who may have engaged in drug-related forums, participants in all other Experience Project communities, such as the "I like dogs" or "I underwent chemotherapy" groups, receive emails that make recommendations relevant to them based on their use of the website. This feature, accordingly, is not "designed to steer users based on unlawful criteria" or to "force users to participate in [an] unlawful process," as Dyroff erroneously maintains. (AOB 34.) For the same reason, Dyroff is wrong when she asserts that this feature "knowingly" steers website users toward harmful posts and pressures them to interact with such content. (*Id*. at 35.) This feature is quintessentially content-neutral, as Dyroff's complaint makes clear, because it does not distinguish between users based on content, whether lawful or unlawful. As such, it is "fully protected by CDA immunity."[3] *Roommates.com*, 521 F.3d at 1174 n.37; *see also Force v. Facebook*,

[3] This conclusion demonstrates why Dyroff's reliance on *Anthony v. Yahoo!, Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006), is misplaced. (AOB 23.) In *Anthony*, the plaintiff alleged that, in connection with its online dating services, Yahoo! created false and/or nonexistent user profiles, which it sent to subscribers whose subscriptions were about to expire in an effort to convince them to renew. *Id*. at 1259, 1261. Yahoo! also allegedly sent profiles, created by legitimate former subscribers whose (footnote continued)

Inc., 304 F. Supp. 3d 315, 319 (E.D.N.Y. 2018) (website immune under section 230 where networking algorithms recommended content to accountholders solely in conjunction with content posted by its users); *Cohen*, 252 F. Supp. 3d at 146, 157 (website immune under section 230 where, like here, plaintiff alleged that, "[u]sing proprietary algorithms, Facebook generates targeted recommendations for each user, promoting content, websites, advertisements, users, groups, and events that may appeal to a user based on their usage history").

Dyroff fares no better when she asserts that Experience Project's recommendation and email-notification features, instead of the website's users, produced the harmful content and conduct that underlie her claims. (AOB 35-36.) Such a notion is untenable because, as set forth above, these features are content-neutral tools that merely facilitated the use of the Experience Project website by third parties that provided the online content, including Greer and Margenat-Castro. *See Lasoff v. Amazon.com, Inc.*, No. C16-151 BJR, 2017 U.S. Dist. LEXIS 11093, at *7

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subscriptions had lapsed, to current members of the service. *Id*. Consistent with this Court's subsequent holding in *Roommates.com*, Yahoo! did not have section 230 immunity from liability for the plaintiff's fraud and negligent misrepresentation claims because it had materially contributed to the allegedly harmful content. *Id*. at 1263-63; *Roommates.com*, 521 F.3d at 1168. The user profiles that Yahoo! sent to its users are inapplicable to the email notifications of third-party posts allegedly generated by Experience Project to notify users when other users posted to a discussion. Not only were such notifications neutral tools, they did not materially contribute to any unlawful content.

(W.D. Wash. Jan. 26, 2017) (emails and online advertising generated through keyword algorithm did not nullify section 230 immunity because the actual basis of plaintiff's claims was the underlying content, which the website did not create or develop).

These features also do not develop content because they neither require nor encourage the posting of unlawful or objectionable content. *See Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 891 (N.D. Cal. 2017) ("Defendants' 'provision of neutral tools, including targeted advertising, does not equate to content development under section 230, because . . . the tools do not encourage the posting of unlawful or objectionable material'") (omission in original). Taking her argument to its logical conclusion, Dyroff would subject every social networking website to endless liability, which would devastate the Internet, because "[s]ocial media algorithms are what all social media platforms run on these days." AJ Agrawal, *What Do Social Media Algorithms Mean For You?* (April 20, 2016, 6:22 PM), https://www.forbes.com/sites/ajagrawal/2016/04/20/what-do-social-media-algorithms-mean-for-you/#16bca55da515 (last visited Sept. 4, 2018).

There are no allegations by Dyroff that these website features altered the message of any third-party posts. *See Gonzalez*, 2018 U.S. Dist. LEXIS 138367, at *35 ("Google's use of an algorithm that aggregates user and video data to make content recommendations across YouTube, whether the recommended content is an

ISIS video or a cat video, does not turn Google into an 'information content provider' with respect to the videos themselves"); *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006) (website entitled to section 230 immunity relating to its archive system, search tool, and caching system). At most, these features could be deemed to have augmented the content provided by all Experience Project users, which is both neutral and within the scope of a website's section 230 immunity. *See Roommates.com*, 521 F.3d at 1167-68; *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009). Neutral tools "operating on 'voluntary inputs'" by a third-party "d[o] not amount to content development or creation." *Kimzey*, 836 F.3d at 1270 (adding that a "'website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online'"); *see also Black v. Google Inc.*, No. 10-02381 CW, 2010 U.S. Dist. LEXIS 82905, at *7-9 (N.D. Cal. Aug. 13, 2010) (section 230 barred claims based on website's "programming" or "source code," which did not transform the website into the creator of the offending content).

Finally, Dyroff's suggestion that third-party users, like Greer and Margenat-Castro, had no control over the website features on which she bases her claims is contradicted by her complaint. (AOB 36.) Dyroff alleges that Experience Project's users could "form or join communities based on [their] experiences and/or interests, and interact with other members who shared them" as well as "ask questions of other

users in their groups." (2 ER 38, 41.) As a result, once Greer posted to the "where can i [sic] score heroin in jacksonville, fl" group, Margenat-Castro knew that Experience Project would alert Greer by email that he responded to the post because that is how the website operated. (2 ER 50.) Greer and Margenat-Castro thereafter controlled whether they connected with each other. Thus, Dyroff cannot use Experience Project's neutral website features to plead around the section 230 immunity that bars her claims and essentially hold Ultimate Software liable as the insurer of Greer's fateful decision to buy drugs from Margenat-Castro.

V. Dyroff Has Not Plausibly Alleged That Ultimate Software Colluded with Drug-Traffickers to Thwart Law Enforcement.

Absent from Dyroff's complaint are any plausible allegations that Ultimate Software colluded with drug-traffickers using Experience Project and shielded them from law enforcement. (AOB 39-44.) "'Collusion' is '[a] secret combination conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose'" and "implies the existence of fraud, the employment of fraudulent means, or the employment of lawful means to accomplish an unlawful purpose." *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984). Dyroff does not allege that Ultimate Software entered into an agreement with purported drug-traffickers "to accomplish an illegal objective" or that they worked together "'with a single design for the accomplishment of a common purpose.'" *United States v. Cloud*, 872 F.2d 846, 852 (9th Cir. 1989) (defining "conspiracy" and "concert of action").

Instead, Dyroff charges collusion based solely on Experience Project's anonymity policy and March 2016 letter announcing that it was suspending operations because of its apprehension over the future of Internet privacy, the growing potential for abuse even though it "always support[s] proper law enforcement efforts," and its shortage of resources to respond to increased government information requests. (2 ER 47-49, 79; AOB 40.) The district court aptly concluded that Experience Project's statement explaining its suspension of operations simply "manifests a concern with Internet privacy that has been widespread in the technology sector and does not establish antipathy to law enforcement, especially given the statement about supporting 'proper law enforcement requests.'" (1 ER 19.) This Court has to look no further than Apple's website, which states that, "[a]t Apple, we believe privacy is a fundamental human right," to find perhaps the most prominent expression of this sentiment.[4] Apple Inc., *Apple products are designed to do amazing things. And designed to protect your privacy*, https://www.apple.com/privacy (last visited Sept. 3, 2018).

[4] Dyroff's discussion of *J.S.*, 184 Wn.2d 95, 359 P.3d at 714, to support her charge of collusion is irrelevant because, unlike here, the plaintiffs there plausibly alleged that the website was working in concert with the sex traffickers that were the subject of their complaint. (AOB 41-43.) Here, by contrast, Dyroff cites concerns commonly expressed regarding Internet privacy as evidence of wrongdoing. Consequently, a claim made on such a basis is implausible under *Ashcroft,* 556 U.S. 662.

Pleading nothing more than a "sheer possibility that a defendant has acted unlawfully," as Dyroff has done here, is insufficient to survive a motion to dismiss. *See Ashcroft*, 556 U.S. at 678. No court can draw a "reasonable inference" from the facts alleged by Dyroff that Ultimate Software colluded in any way with drug-traffickers that may have used the Experience Project website. *See id*. Such facts reveal legitimate, lawful concerns expressed by Experience Project about the prospects for the Internet and its own ability to fulfill its growing legal obligations. Much more is required by a plaintiff seeking to overcome section 230 immunity. *See Kimzey*, 836 F.3d at 1269 (recognizing that "the immunity in the CDA is broad enough to require plaintiffs" to state the facts that plausibly suggest their claim).

Moreover, Dyroff mistakenly equates Ultimate Software's exercise of its legal right to publish third-party content, including content posted by possible drug-traffickers, with collusion. As an Internet publisher, Ultimate Software has the right to remove or not remove any or all third-party content with impunity. This Court has explained that "[i]t is because such conduct is *publishing conduct* that we have insisted that section 230 protects from liability 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'" *Barnes*, 570 F.3d at 1103 (emphasis in original); *see also Batzel*, 333 F.3d at 1031 n.18 ("'the exercise of a publisher's traditional editorial functions—such as deciding whether to

publish, withdraw, post-pone or alter content' do not transform an individual into a 'content provider' within the meaning of § 230").

Dyroff additionally overlooks that Ultimate Software did not become the developer of content or otherwise transform into an information content provider merely because bad actors may have used its neutral tools for unlawful purposes. *See Barnes*, 570 F.3d at 1101 n.6 ("'providing *neutral* tools to carry out what may be unlawful or illicit . . . does not amount to 'development' for these purposes") (emphasis and omission in original); *see also Goddard*, 640 F. Supp. 2d at 1198 ("the provision of neutral tools generally will not affect the availability of CDA immunity 'even if a service provider *knows* that third parties are using such tools to create illegal content'") (emphasis in original). Congress made the policy choice "not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330-31.

A website is entitled to immunity under section 230 even when it acquiesces in its users' misconduct, "even if the users committed their misconduct using electronic tools of general applicability provided by the website operator." *Roommates.com*, 521 F.3d at 1169 n.24. "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." *Universal Commc'n Sys., Inc.*, 478 F.3d at 420; *see also Zeran*, 129 F.3d at 333

("notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits"). Thus, Ultimate Software could not and did not lose its section 230 immunity even if it knew or had reason to know, through its receipt of subpoenas or otherwise, that drug-traffickers were posting on Experience Project. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) ("[s]imply put, the immunity provision was 'enacted to protect websites against the evil of liability for failure to remove offensive content'").

In sum, Dyroff's allegations of collusion fail, as a matter of law, for three reasons. First, Dyroff has not pleaded facts that create a reasonable inference of complicity between Ultimate Software and drug-traffickers. Second, Dyroff's allegations ignore Ultimate Software's legal rights as a publisher of third-party content. Third, Dyroff's allegations do not suggest "substantial affirmative conduct" by Ultimate Software that would amount to "promoting the use of [its neutral] tools for unlawful purposes." *Roommates.com*, 521 F.3d at 1174 n.37. The district court therefore properly rejected these allegations in their entirety.

VI. Dyroff's Failure to Warn Claim Lacks Merit As a Matter of Law.

A. Ultimate Software owed Greer no legal duty.

A misguided premise of Dyroff's failure to warn claim is that misfeasance by Ultimate Software created a duty to Greer. (AOB 44-46.) "The existence and scope of duty are legal questions for the court." *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 477,

28 P.3d 116, 123 (2001). California courts distinguish between "misfeasance" and "nonfeasance" when they analyze "duty in the context of third party acts." *Melton v. Boustred*, 183 Cal. App. 4th 521, 531, 107 Cal. Rptr. 3d 481, 490 (2010). It is well-settled that "[m]isfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk" while "nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention." *Lugtu v. Cal. Highway Patrol*, 26 Cal. 4th 703, 716, 28 P.3d 249, 256-57 (2001). An ordinary duty of care applies to claims of misfeasance. *See id*. at 716 ("a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others, and this legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct").

In this case, Ultimate Software owed Greer no duty of care because, as the district court concluded, Experience Project's website features amounted to content-neutral tools and functionalities that did not create any risk of harm. (1 ER 26.) These features applied across the website regardless of the group in which a user participated. In other words, the same tools and functionalities, such as recommendations made by email notifications based on user inputs, applied equally to users participating in the "I like dogs" group as they did to Greer when he posted to the "where can i [sic] score heroin in jacksonville, fl" group. Dyroff overlooks that

websites could not survive if their provision of ordinary content-neutral tools and functionalities resulted in endless liability. Thus, Dyroff has not plausibly alleged misfeasance by Ultimate Software. *See Ashcroft*, 556 U.S. at 678.

B. No special relationship existed between Ultimate Software and Greer.

Although Dyroff contends that "California law recognizes that a special relationship exists in circumstances analogous to social media websites," she is unable to cite any case holding that a website has a special relationship with its users. (AOB 46.) The courts that have considered this issue have found no special relationship. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359-60 (D.C. Cir. 2014) (no special relationship between Facebook and its users); *Beckman v. Match.com, LLC*, No. 2:13-CV-97 JCM (NJK), 2017 U.S. Dist. LEXIS 35562, at *6-8 (D. Nev. Mar. 10, 2017) (attack victim had no special relationship with the dating website through which she met the perpetrator); *Doe No. 14 v. Internet Brands, Inc.*, No. CV 12-3626-JFW (PJWx), 2016 U.S. Dist. LEXIS 192144, at *12 (C.D. Cal. Nov. 14, 2016) (rape victim had no special relationship with the modeling website used to identify targets for a rape scheme).

Given her inability to cite a case finding a special relationship between a website and its users, Dyroff turns instead to *Ebay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000), where the court granted eBay's request for a preliminary injunction to prevent a competing auction website from accessing its

computer system to copy information from its database. While observing that "applying traditional legal principles to the Internet can be troublesome," the court compared online businesses to traditional "brick and mortar" businesses and invoked the concept of trespass to real property. *See id.* at 1065 n.11, 1067 & n.16. It is noteworthy that, in the nearly two decades since *Bidder's Edge* was decided, no court has extended its holding to find a special relationship between a website and its users.

The lack of such an extension is not surprising because Dyroff's idea that websites should be considered the 21st century legal equivalent of traditional brick and mortar businesses is contrary to the public interest. (AOB 46.) The number of customers that may visit a traditional business, such as a store, restaurant, or movie theater, is miniscule in comparison to the number of Internet users that can access a website at any particular moment. Experience Project alone had more than 67 million experiences shared. (2 ER 39.) Contrary to Dyroff's assertion otherwise, common sense dictates that a website cannot monitor user activity from potentially millions of people throughout the world as expeditiously as a traditional business can monitor the few customers that may be in its establishment at any given time. Imposing the same legal duties on websites that have been traditionally imposed on brick and mortar businesses therefore would subject websites to the potential for incalculable liability and inevitably lead to the demise of the Internet. In the process, it would undermine the longstanding federal policy to promote the continued development of a free,

vibrant, and competitive Internet. *See* 47 U.S.C. § 230(b)(1) and (b)(2). Consequently, Dyroff's proposal is neither practical nor legally expedient.

Finally, as the district court implied, a traditional brick and mortar business is not analogous to a social networking website. (1 ER 24.) Unlike an online store, which may function like a brick and mortar store, a social networking website is designed for users to make connections with other people. Dyroff's leap from citing trespass cases to asserting the existence of a special relationship between Greer and Ultimate Software therefore has no legal basis. (AOB 49-50.) No such relationship existed as a matter of law.

C. Greer assumed the risk of an obviously dangerous activity when he purchased heroin from an unknown Internet drug dealer.

Dyroff's failure to warn claim ignores that Greer engaged in an obviously dangerous activity when he purchased heroin from Margenat-Castro after having allegedly initiated only brief contact with him over the Internet. (2 ER 50-51.) This indisputable fact omitted from Dyroff's complaint disposes of her failure to warn claim because no duty to warn exists when "'the danger, or potentiality of danger is generally known and recognized.'" *Bojorquez v. House of Toys, Inc.*, 62 Cal. App. 3d 930, 933-34, 133 Cal. Rptr. 483, 484 (1976). Given that California law recognizes that "it is unnecessary to warn persons of the dangerous nature of alcohol," it is self-evident that the same is true with respect to heroin purchased from an unknown Internet drug dealer. *See id.*; *see also Holmes v. J.C. Penney Co.*, 133 Cal. App. 3d

216, 220, 183 Cal. Rptr. 777, 779 (1982) (the dangers of the potential for harm arising from the firing of a pellet gun are "obvious"). As a result, from the time he began his Google search for heroin to his ingestion of the drugs he purchased from Margenat-Castro, Greer voluntarily assumed the risks inherent in such obviously dangerous conduct. The assumption of risk doctrine therefore bars Dyroff's failure to warn claim. *See Souza v. Squaw Valley Ski Corp.*, 138 Cal. App. 4th 262, 266-70, 41 Cal. Rptr. 3d 389, 392-95 (2006).

VII. The Relief Sought by Dyroff Requires Congressional Approval.

Because Dyroff advocates a position that has no support in the plain language of section 230, her relief lies legislatively with Congress rather than judicially with the courts. The Supreme Court has long recognized that it is the "judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952); *see also In re Baldinger*, 356 F. Supp. 153, 167 (C.D. Cal. 1973) ("[i]t is universal that when a statute uses plain understandable words, the court cannot legislate but must interpret the words as they read without any modification"). In this regard, it is instructive that, on April 11, 2018, Congress amended section 230 to exclude certain civil and criminal sex-related claims from its immunity provisions. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. Law No. 115-164, 132 Stat. 1253 (2018) (codified at 47 U.S.C. § 230). Congress could have taken the same action

regarding the types of drug-related claims asserted by Dyroff, but has opted not to do so. As a result, Dyroff's claims against Ultimate Software are barred as a matter of law. This Court therefore should enforce the immunity that Ultimate Software is entitled to under the plain language of section 230 and affirm the district court's dismissal order and judgment.

CONCLUSION

For the foregoing reasons, Ultimate Software respectfully requests that this Court affirm, in its entirety, the district court's order granting Ultimate Software's motion to dismiss and related judgment.

DATED: September 12, 2018 LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Jeffry A. Miller*
Jeffry A. Miller
Scott M. Schoenwald
Attorneys for Defendant-Appellee
THE ULTIMATE SOFTWARE GROUP, INC.

STATEMENT OF RELATED CASES

Defendant-Appellee, The Ultimate Software Group, Inc. states that it is not aware of any related cases pending in this Court.

DATED: September 12, 2018 LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Jeffry A. Miller*
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THE ULTIMATE SOFTWARE GROUP, INC.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 18-15175

Pursuant to Federal Rule Appellate Procedure 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellee's Answering Brief is proportionately spaced, has a typeface of 14-points or more and contains 12,140 words.

DATED: September 12, 2018 LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Jeffry A. Miller*
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Attorneys for Defendant-Appellee
THE ULTIMATE SOFTWARE GROUP, INC.

ADDENDUM

ADDENDUM TABLE OF CONTENTS

47 U.S.C. § 230: Protection for private blocking and screening of offensive material

(a) Findings. The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy. It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove 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; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

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

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law. Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the

creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CERTIFICATE OF SERVICE
FOR CASE NUMBER 18-15175

I hereby certify that on September 12, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

ANSWERING BRIEF OF APPELLEE
THE ULTIMATE SOFTWARE GROUP, INC.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Theresa Burge
Theresa Burge

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