IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

YVONNE AMBROSE, individually and as Administrator for the Estate of Desiree Robinson, Deceased,

Plaintiff,

v.

BACKPAGE.COM, L.L.C.; BACK PAGE, L.L.C.; MEDALIST HOLDINGS, L.L.C.; LEEWARD HOLDINGS, L.L.C.; CAMARILLO HOLDINGS, L.L.C.; DARTMOOR HOLDINGS, L.L.C.; IC HOLDINGS, L.L.C.; UGC TECH GROUP C.V. and ANTONIO ROSALES

Defendants.

No. 1:17-cv-05081

Judge Manish S. Shah

Magistrate Judge Young B. Kim

DEFENDANTS BACKPAGE.COM, LLC, LEEWARD HOLDINGS, LLC, CAMARILLO HOLDINGS, LLC, DARTMOOR HOLDINGS, LLC, AND IC HOLDINGS, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

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Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Backpage.com, LLC, Leeward Holdings, LLC, Camarillo Holdings, LLC, Dartmoor Holdings, LLC, and IC Holdings, LLC (collectively, "Defendants" or "Backpage"), hereby move to dismiss the Complaint.[1]

I. INTRODUCTION

Plaintiff's daughter, Desiree Robinson, allegedly was victimized by Anthony Rosales, who was charged with her sexual assault and murder during an encounter facilitated by two "unnamed individuals" ("Traffickers") who involved her in sex trafficking and allegedly posted her pictures on the classified advertising website Backpage.com. The First Amended Complaint repeatedly acknowledges that ads on Backpage.com are created by users, that it was the Traffickers who created any ads concerning Ms. Robinson, and that the attacks on her were perpetrated by Rosales. Nonetheless, Plaintiff seeks to blame the website and affiliated entities for Rosales' and the Traffickers' criminal acts in contravention of scores of judicial decisions—including in cases against the same Backpage Defendants sued here, in virtually identical suits—holding that online publishing is protected by the First Amendment and immunized from liability by Section 230 of the Communications Decency Act ("CDA"), which provides: "No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another [] content provider." 47 U.S.C. § 230 ("Section 230").

Plaintiff seeks to circumvent Section 230 by peppering the Complaint with conclusory assertions that Backpage somehow "conspired" with those who purchased ads on its site, or in some way "helped" third-party users create content via editorial practices. It is rife with inflammatory rhetoric and allegations about Backpage's rules, policies, and moderation, focused almost exclusively on salaciousness and opprobrium—and not at all on the ads involving Ms. Robinson.

[1] Plaintiff named Back Page, L.L.C. but no such entity is affiliated with Backpage.com, and Medalist Holdings, L.L.C. rather than the likely target Medalist Holdings, Inc. Neither was served, nor was UGC Tech Group, C.V. though dismissal of all is merited for the same reasons as for the Backpage Defendants.

These same kinds of allegations have been rejected in, *e.g.*, *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), and *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 152 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017), each discussed *infra* at 11-12 & Appendix A, and they should be dismissed here as well.

That is particularly so in that the ads on Backpage.com involving Ms. Robinson, attached here as Appendix B, contain nothing that expressly proposes illegal activity or forecasts the harm Ms. Robinson suffered. More importantly, the Complaint's factual allegations admit the ads were ***conceived, created, and posted entirely by the Traffickers***, and not by anyone associated with Backpage.com. *See* Compl. ¶¶ 136-38. Plaintiff does not plausibly allege Backpage edited any ads relating to Ms. Robinson, much less that any such editing contributed in any way to unlawfulness. The practices alleged to make Backpage a "conspir[ator]," a "facilitat[or]," or a "help[er]" of her traffickers are nothing more than descriptions of publishing activities that courts uniformly have held are editorial practices immunized by Section 230. Such "artful pleading" cannot "skirt[]" the law. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016).

Backpage by no means minimizes the grievous harm Ms. Robinson and Plaintiff suffered. But "[w]hile the facts of a ... case such as this one may be highly offensive, Congress has decided [] the parties to be punished and deterred are not the internet service providers but rather those who created and posted the illegal material," *Doe v. Bates*, 2006 WL 3813758, at *4 (E.D. Tex. Dec. 27, 2006), so as not to cripple the Internet by allowing liability for online hosts of third-party-created content. Accordingly, this action should be dismissed, especially given that, even if Section 230 did not bar it in its entirety, Plaintiff fails to state a claim under Illinois law.

II. BACKGROUND

Defendants are all alleged former owners or operators of, or otherwise associated with, the online classified ad service Backpage.com, on which users can post ads in various categories,

including buy/sell/trade, rentals, real estate, jobs, dating, and services, among others. *See Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013). The site is organized geographically by state and municipality. *See* http://chicago.backpage.com.[2] Users post millions of ads on Backpage.com every month, making it the second-largest online classified ad service in the country, after Craigslist. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1266 (W.D. Wash. July 27, 2012). Users provide all content for ads they post, using an automated interface; Backpage.com does not dictate or require any content. *Cooper*, 939 F. Supp. 2d at 813. Until January 2017, the site included an "adult" category, but Backpage shuttered it after years of government pressure, including a campaign in Cook County that the Seventh Circuit called an unconstitutional effort to "crush Backpage." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46, 196 (2016).

Backpage.com has terms and rules to try to prevent improper posts or misuse of the site. To post ads in any category, users must affirmatively accept Terms of Use that expressly prohibit anyone under 18 years of age posting or viewing adult content or explicit material. *Cooper*, 939 F. Supp. 2d at 813-14. *See* Backpage.com Terms of Use ("Terms of Use") ¶ 4(a)(ii), available at http://chicago.backpage.com/classifieds/TermsOfUse. The Terms of Use bar advertising illegal activities and nude or lewd photos. *See id.* ¶¶ 4(b), 5. They also specifically forbid any: "solicitation directly or in 'coded' fashion for any illegal service exchanging sexual favors for money or other valuable consideration," (*id.* ¶ 4(c)); "material ... that exploits minors in any way" (*id.* ¶ 4(d)); and "material ... that in any way constitutes or assists in human trafficking" (*id.* ¶ 4(e)).

[2] As Plaintiff makes allegations concerning the Backpage.com website's asserted content throughout the Complaint (*see, e.g., id.* ¶¶ 53, 62, 66-69, 81, 84-87), the Court may consider it. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) ("incorporation-by-reference [] provides that if a plaintiff mentions a document in his complaint, [] defendant may then submit [it] to the court without converting defendant's 12(b)(6) motion"). The same applies to ads depicting Ms. Robinson (Appendix B) as discussed throughout the Complaint. The Court also may take judicial notice of court decisions about the site and similar claims. Fed R. Evid. 201; *see, e.g., Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996).

Users are directed to "report any violations of these Terms to: abuse@backpage.com." *Id.* ¶ 18. *See also Cooper*, 939 F. Supp. 2d at 814.

When a user attempts to post an ad in the Backpage.com dating section (or, while it was active, the adult section), the following highlighted "Posting Rules" appear:

> You agree to the following when posting in this category:
>
> - I will not post obscene or lewd and lascivious graphics or photographs which depict genitalia, actual or simulated sexual acts or naked images;
> - I will not post any solicitation directly or in "coded" fashion for any illegal service, including exchanging sexual favors for money or other valuable consideration;
> - I will not post any material on the Site that exploits minors in any way;
> - I will not post any material on the Site that in any way constitutes or assists in human trafficking;
> - I am at least 18 years of age or older and not considered to be a minor in my state of residence.
>
> **Any post exploiting a minor in any way will be subject to criminal prosecution and will be reported to the *Cybertipline* for law enforcement.**[3]
>
> Postings violating these rules and our Terms of Use are subject to removal without refund.

Other Backpage efforts to police user posts have included "monitor[ing] ... ads through automated and manual reviews," *Cooper*, 939 F. Supp. 2d at 814, which block and remove posts, and referring to NCMEC ads that may involve child exploitation. *See McKenna*, 881 F. Supp. 2d at 1266-67; *Cooper*, 939 F. Supp. 2d at 814. *See also* Compl. ¶¶ 66, 68, 76-77, 83-84, 105-108 (alluding to screening). It also "regularly works with local, state, and federal law enforcement officials by responding to subpoena requests, providing officials with Internet search tools, and removing posts and blocking users at the request of officials." *Cooper*, 939 F. Supp. 2d at 814.

Against this backdrop, Plaintiff alleges seven causes of action against the Backpage Defendants—wrongful death and survival negligence actions, wrongful death and survival

[3] The "Cybertipline"—provided as a hypertext link—is operated by the National Center for Missing and Exploited Children ("NCMEC"), to assist law enforcement. *U.S. v. Ackerman*, 831 F.3d 1292, 1294 (10th Cir. 2016). The site also has numerous hyperlinks to a "User Safety" page with links to NCMEC and like resources. *McKenna*, 881 F. Supp. 2d at 1266. All ads also have a "Report" button and email (abuse@backpage.com) for ads users believe are improper/suspect. *See Cooper*, 939 F. Supp. 2d at 814.

willful-and-wanton-conduct actions, intentional and negligent infliction of emotional distress, and civil conspiracy—based on Ms. Robinson's victimization by Rosales and the Traffickers. Compl. ¶¶ 136-138.[4] She alleges "two unknown individuals … paid [] Backpage.com [] a fee … to advertise on www.backpage.com," *id.* ¶ 138, and that, as a result, Ms. Robinson "was sexually abused and exploited by men, including ***[] Rosales, who purchased her for sex by paying money to the two unknown individuals*** and or other pimps." *Id.* ¶ 144 (emphasis added). Plaintiff further alleges Backpage failed to "take any steps to prevent [Ms. Robinson] from being advertised for sex," *id.* ¶ 141, but does not allege it had any special relationship with her.

Plaintiff conclusorily alleges Backpage "owned, operated, designed and controlled the website, including its content," *id.* ¶ 7, "edit[ed]" ads in accord with its posting rules, *id.* ¶ 72, and somehow "through [] moderating or editing practices, combined with their terms of use, was [*sic*] responsible in part for the creation and development of the content of the advertisements." *Id.* ¶ 140. But there is no plausible allegation Backpage actually created or developed content of ads at the site—or, more vitally—the ads that resulted in Ms. Robinson's victimization. The Complaint also makes the conclusory assertion that Backpage "intentionally developed their website to require information that promoted this illegal trade." *Id.* ¶ 48. But it does not explain what "information" was supposedly "required," or how it "promoted" any "illegal trade."

Rather, Plaintiff's allegations rely on Backpage's general exercise of editorial functions in operating a website available to millions of users as a basis for liability for its users' conduct. The Complaint asserts Backpage "intentionally helped sex traffickers to create and develop the content of their ads" by, paradoxically, prohibiting and removing content that might indicate sale of sex, *see id.* ¶ 59, and is replete with conclusory allegations that Backpage "helps" unspecified

[4] Plaintiff alleges wrongful death-battery and a survival action for battery against Rosales.

"sex traffickers" in the aggregate to "avoid detection" by law enforcement.[5] *E.g.*, Compl. ¶¶ 1, 59-60, 94, 120. These jaundiced characterizations of Backpage's use of posting rules, automatic filtering, and moderation to prohibit and remove objectionable content, *e.g.*, *id.* ¶¶ 59, 66, 68, 76-77, 83-84, 88, 105-08, only underscore that users conceive, create, and post all ads on the site.

These characterizations of general editorial practices allege the Backpage Defendants "trained potential sex traffickers, including those trafficking [Ms.] Robinson, to create sanitized ads," *id.* ¶¶ 138-39, but apart from alleging Backpage generally removes offending content, *e.g.*, *id.* ¶¶ 66, 68, 76-77, 83-84, 88, 105-108, there is no averment how it "moderated" ads depicting Ms. Robinson. *See generally* Compl., *passim*; *cf. id.* ¶ 140 (conclusory allegation that Backpage "through [] moderating or editing practices, combined with [] terms of use, was [*sic*] responsible in part for the creation and development of the content of the ad[s] featuring [Ms.] Robinson"). The Complaint instead makes clear that moderation and screening functions were applied as a ***systematic*** anti-abuse policy applicable to ***all*** users, not specific to Ms. Robinson's traffickers. *E.g.*, *id.* ¶¶ 81, 84 (allegations of "automatic 'moderation'" through which "the website would remove the offending language and then post the remainder of the ad").

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[5] These and related allegations that Backpage "knowingly" "helped" sex traffickers, *see, e.g.*, Compl. ¶ 1, rely on a Senate Report attached to the Complaint as Exhibit A, Compl. ¶¶ 21, 230. However, the Report is a polemic colored by argument, inadmissible hearsay and conjecture, and is not properly incorporated into the Complaint. Under F.R.C.P. 10(c), pleadings may incorporate only "written instruments" *i.e.*, "a document evidencing legal rights or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement." *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1115 (W.D.N.Y. 1996) ("supporting statements" in affidavit, affirmations and letter were not "written instruments"). The Report—which does not give rise to any legal rights or duties among the parties—is exactly the sort of extrinsic document courts refuse to incorporate into a complaint. *E.g., Sell v. Zions First Nation Bank*, 2006 WL 322469, at *5 (D. Ariz. Feb. 9, 2006) (report by court-appointed receiver that "expanded" on pleadings is not a "written instrument" as it "does not evidence any legal rights or duties, nor ... give formal expression to a legal act or agreement"); *Perkins v. Silverstein*, 939 F.2d 463, 467 n.2 (7th Cir. 1991) (articles and commentary "are not the type of documentary evidence or 'written instrument[s]' which Fed. R. Civ. P. 10(c) intended to be incorporated").

The Complaint alleges Backpage knew the Traffickers "were selling women and children for sex," and "made no effort to prevent the two unknown individuals" from doing so, *id.* ¶ 142, but makes no specific factual allegations for this claim. Instead, the assertion of knowledge rests on statements that (i) Backpage.com generally screens for objectionable content, *id.* ¶¶ 66, 68, 76-77, 83-84, 88, 105-108; and (ii) because the adult section had ads for "escorts," *id.* ¶ 46, it somehow knew "all advertisements therein were for sex," *id.* ¶ 46, because "in the world of ... sex trafficking, the word 'escort' stands for and in place of 'prostitute' and means virtually the same thing." *Id.* ¶ 47. Based on this chain of conjecture, the Complaint claims Backpage "intentionally developed their website to require information that promoted this illegal trade." *Id.* ¶ 48. However, the ads of Ms. Robinson convey no such "knowledge." Viewing Appendix B, there is no offer to engage in sex (for money or otherwise), and it is explicitly stated what is offered is companionship only. If anything, references to explicit talk, vulgar language, and calls from blocked numbers being unwanted, and to calls being terminated if those (and other) rules are not followed, suggest something other than in-person contact. The ad also reflects in a user-supplied header that the person depicted is 18 years old.

III. ARGUMENT

The Complaint must be dismissed under Rule 12(b)(6) because it omits "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Its "conclusory allegations ... are not entitled to [a] presumption of truth," *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011); *see Munson v. Gaetz*, 673 F.3d 630, 632 (7th Cir. 2012) ("We accept well-pleaded facts as true but not legal conclusions or conclus[ory] allegations ...."), and the plausibility standard requires pleading "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. This is met only if Plaintiff pleads facts to allow the

court to "draw the reasonable inference that the defendant is liable for the misconduct alleged," *McCauley*, 671 F.3d at 615, which the Complaint fails to do here.

Immunity under Section 230 should be resolved at the earliest phase of a case, because it "forecloses liability" where, as here, an online publisher "is not the author of the ads and [can]not be treated as the 'speaker' of the posters' words." *Dart v. Craigslist*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 2009) (citing *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-71 (7th Cir. 2008)).[6] Numerous cases have granted or affirmed dismissals of suits that, like this, seek to hold websites liable for content created by third parties. *E.g.*, *Craigslist*, 665 F. Supp. 2d 961; *Doe No. 1*, 817 F.3d 12; *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). This Court should do the same by applying Section 230's preclusive effect, and because Plaintiff has not alleged sufficient facts to plausibly state a claim on any of the seven purported causes of action against the Backpage Defendants.

A. Section 230 Bars All of Plaintiff's Claims.

Section 230 codifies First Amendment principles for online speech by granting immunity to "encourage unfettered and unregulated development of free speech on the Internet," "promote development of e-commerce," and incent online providers to "self-police" potentially harmful or offensive material. *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003). Congress sought to eliminate the "'obvious chilling effect'" that liability for online providers would cause, "'given the volume of material communicated through [the Internet], the difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect lawful speech.'" *Lycos*, 478 F.3d at 418-19 (citation omitted). Along with shielding interactive computer service providers,

[6] *See also, e.g.*, *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014) (invocation of § 230 "should be resolved ... earl[y]" given its intent to protect "an open and robust internet"); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (§ 230 protection is "effectively lost if a case is erroneously permitted to [proceed]").

47 U.S.C. § 230(c)(1), quoted *supra* at 1, Section 230(e)(3) preempts all civil claims and all state-law claims, whether civil or criminal, against such online publishers if based on third-party content. *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003); *Chi. Lawyers*, 519 F.3d 666, *aff'g*, 461 F. Supp. 2d 681 (N.D. Ill. 2006). The present Complaint flouts these protections.

Section 230 applies expansively, *Lycos*, 478 F.3d at 419, and "close cases ... must be resolved in favor of immunity," *Jones*, 755 F.3d at 408 (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (*en banc*)).[7] Immunity lies where "(1) [a defendant] is a provider or user of an interactive computer service, (2) the claim relies on information provided by another information content provider; and (3) the claim would treat [defendant] as the publisher or speaker of that information." *Doe No. 1*, 817 F.3d at 19. Under this test, at least six courts have afforded Section 230 protection to Backpage.[8]

The same should follow here. *First*, "Backpage.com is the quintessential publisher contemplated by the CDA." *Cooper*, 939 F. Supp. 2d at 823; *see also Ferrer*, 2016 WL 7237305, at *6. *Second*, Plaintiff's claims are based on ads relating to Ms. Robinson that Plaintiff alleges the third-party Traffickers created and posted on Backpage.com. *See* Compl. ¶¶ 134-136 (Ms. Robinson "was advertised for sex on www.backpage.com by two unknown individuals"); *id.* ¶ 150 ("Robinson was sold to [] Rosales by the two unknown individuals.). Such posts are the essence of "information provided by another content provider" under Section 230. *E.g.*, *Doe No.*

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[7] *See also Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) ("Nothing on the face of [§ 230] supports [a] narrow interpretation"), *aff'd*, 528 F.3d 413 (5th Cir. 2008); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (§ 230 protects against "any cause of action that would make service providers liable for information originating with a third-party user") (internal quotation marks omitted).

[8] *Doe No. 1*, 104 F. Supp. 3d at 157-58, *aff'd*, 817 F.3d at 20-22; *Cooper*, 939 F. Supp. 2d at 823-25; *McKenna*, 881 F. Supp. 2d at 1271-75; *M.A.*, 809 F. Supp. 2d at 1050-54; *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *8 (D.N.J. Aug. 20, 2013); *People v. Ferrer*, 2016 WL 7237305 (Sup. Ct. Sacramento Cty. Dec. 9, 2016).

1, 817 F.3d at 17-21; *M.A.*, 809 F. Supp. 2d at 1050-53. *Third*, Plaintiff's claims treat Backpage as "publisher or speaker" of the ads, by taking it to task for, essentially, decisions on "whether to publish, withdraw, postpone or alter content"—all traditional editorial functions that Section 230 protects. *Jones*, 755 F.3d at 407 (citation omitted). *See infra* 10-15.

"In keeping with this expansive view of the publisher's role, judicial decisions in this area consistently stress that decisions ... whether [] content should be removed from a website fall within the editorial prerogative." *Cohen v. Facebook, Inc.*, 2017 WL 2092621, at *11 (E.D.N.Y. May 18, 2017) (Section 230 barred holding Facebook.com liable for "'provision of services' to Hamas...'coupled with [] refusal to use available resources ... to identify and shut down [its] Hamas accounts.'"); *Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."); *Craigslist*, 665 F. Supp. 2d at 967 ("'Facilitating' and 'assisting' encompass a broad[] range of conduct" and doing so does not make service providers "culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts.") (quoting *GTE*, 347 at 659). Plaintiff's "artful pleading" cannot circumvent Section 230's well-established immunity. *Cohen*, 2017 WL 2092621, at *11.

1. Backpage's Editorial Choices Are Protected by Section 230.

Plaintiff seeks to impose liability based on Backpage.com's posting rules and alleged practice of "reviewing and editing" ads by filtering and moderation, Compl. ¶ 72, but these editorial practices do not preclude Section 230 immunity, as Backpage.com is not the originator or creator of the allegedly actionable content. Conclusory allegations that it "create[s]," or "develop[s]" content based on general website features fail, because a "plausible" claim requires "specific alleg[ations]" showing the defendant "created the content of the statements" at issue ***concerning Robinson***. *Kimzey,* 836 F.3d at 1268-69. Here, conclusory recitations of Back-

page.com's "authorship" are belied by averments that ads on the site are posted by third party users, and that the content of ads concerning Ms. Robinson were provided by the Traffickers.[9]

Plaintiff rests her claims against Backpage on conclusory allegations that it moderated ads to "help sex traffickers create and develop ads for sex that would evade law enforcement." *Id.* ¶¶ 91, 94. But this begins with the premise that it was the Traffickers who "advertised" Ms. Robinson, *id.* ¶ 136, and the Complaint makes clear any content involving her was provided by them, not Backpage. At most, then, Backpage applied its generally applicable moderation and filtering policies to ***remove*** harmful content from the post. *E.g.*, Compl. ¶¶ 75-78, 87-88, 93. Even narrow readings of Section 230 make clear the issue is "whether it is the third-party content (which would fall within Section 230(c)(1)'s protection) or the [site's] alteration (which would not) that caused the injury," *Chi. Lawyers*, 461 F. Supp. 2d at 695, and there is no allegation here that Backpage.com created or edited any ads depicting Ms. Robinson. *Cf. Blockowicz v. Williams*, 675 F. Supp. 2d 912, 916 (N.D. Ill. 2009), *aff'd*, 630 F.3d 563 (7th Cir. 2010) (website could not be liable based on allegation its terms of service were a "deliberate announcement to potential [users] that [site] is a safe haven" for criminal activity"). "A claim against an online service provider for negligently publishing harmful information created by users treats defendant as the 'publisher' of that information." *Craigslist*, 665 F. Supp. 2d at 967-68.

In *Doe No. 1*, which invoked strikingly similar theories of liability based on allegations that third-party traffickers advertised plaintiffs for sex on Backpage.com, the complaint similarly alleged Backpage deliberately structured its website, selectively removed content, permitted anonymous posting, stripped metadata from photos, accepted payments by means that allowed

[9] Compl. ¶ 94 ("***sex traffickers create and develop ads*** for sex trafficking"); *id.* ¶ 74 ("when a ***user posted*** an ad with certain words that ... indicated the ad was for sex, the website would remove the offending language"); *id.* ¶ 136 (Robinson "was advertised for sex on www.backpage.com ***by two unknown adult individuals***" (all emphases added). Paradoxically, Plaintiff also faults Backpage for ***not*** editing third-party ads, or not doing so quickly enough. *E.g.*, Compl. ¶¶ 98, 101, 102, 103, 112.

the poster of the ad to remain anonymous, and otherwise tailored its posting requirements to facilitate sex trafficking to maximize profits. *Id.* at 16-17 & n.2. In dismissing, the district court held those website features "amount to neither affirmative participation in an illegal venture nor active web content creation," and noted "courts have repeatedly rejected this 'entire website' theory as inconsistent with the substance and policy of section 230." *Doe No. 1*, 104 F. Supp. 3d at 152, 156-157, 162. The First Circuit affirmed, holding the claims uniformly "address the structure and operation of the Backpage website"—in other words, "Backpage's decisions about how to treat [third-party] postings." *Doe No. 1*, 817 F.3d at 21. As with the allegations here, the

> claims challenge features that are part and parcel of the overall design and operation of the website .... Features such as these, which reflect choices about what content can appear on the website and in what form, are ***editorial choices that fall within the purview of traditional publisher functions***.

Id. (emphasis added). *Compare also M.A.*, 809 F. Supp. 2d at 1053-54, *with* Compl. ¶¶ 139-43.[10]

In *M.A.*, plaintiff similarly alleged she was trafficked by a third party who posted ads on Backpage.com. 809 F. Supp. 2d at 1043-44. Like Plaintiff here, M.A. targeted the site's general features, alleging Backpage sought to create "a highly tuned marketing site" with a "veil of legality," but had "knowledge" posts were ads "for prostitution" and "illegal sexual contact with minors." *Id.* at 1044. The court rejected arguments challenging general aspects of the website's "construct and operation," *id.* at 1050, holding a provider is "immune under § 230 unless it created the offending ads," and "however horrific the consequences to M.A. ... the ads were created by [the pimp]." *Id.* at 1051 (quotation marks and citation omitted).[11]

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[10] Plaintiff's claims here mirror those in *Doe* in numerous ways. A full comparison showing the similarity of allegations in this case to those in *Doe No. 1* is attached as Appendix B.

[11] Numerous other decisions are to the same effect. *E.g.*, *Ferrer*, 2016 WL 7237305, at *1-5 (dismissing indictment against Backpage principals tracking allegations in Ambrose Complaint, on grounds "the only 'manipulation' would be ... extracting [] content from the original ad," which "is not prohibited activity" but rather "protected editorial functions"); *Caraccioli v. Facebook, Inc.*, 2017 WL 2445063, at *1 (9th Cir. 2017) (Facebook not liable for declining to take down photos and videos of plaintiff engaged

The common thread of these cases is that a plaintiff may not hold a website liable for traditional editorial functions, including deciding what third-party-created content—including classified ads—to post, delete, or edit, or what portions of third-party content violate the site's terms of use. *See, e.g., GTE*, 347 F.3d at 657-58, 662 (affirming § 230 dismissal where user violated use restrictions and GTE had "right to inspect [user's] site and cut off any customer engaged in improper activity" but "did not exercise that right," even if GTE personnel "may have realized the character" of user's content). Nor may plaintiffs evade Section 230's protection by attacking the fundamental design and configuration of a website. Where "third-party content ... appears as an essential component of each and all" of Plaintiff's claims, *Doe No. 1*, 817 F.3d at 22—as it does here—Plaintiff seeks to do what Section 230 expressly prohibits: impose liability on Backpage "as the publisher or speaker," 47 U.S.C. § 230(c)(1), of ads created by third parties.

2. Allegations Regarding Backpage.com's General Editorial Functions or "Profits" Do No Support Liability Based on the Ads at Issue.

Section 230 analysis "turns on who was responsible for ***the specific harmful material at issue***, not on whether the service provider was responsible for the general features and mechanisms of the service or other content...that might have also appeared on the service." *Bates*, 2006 WL 3813758, at *17 (citing *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003)) (emphasis added). Courts uniformly hold a website can be liable only to the extent it created or developed the "*specific content* that was the *source* of the alleged liability." *FTC v. Accusearch,*

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in explicit sexual activity posted without his consent); *Doe v. MySpace*, 528 F.3d at 419-20 (Section 230 barred holding social networking site liable for sexual assault of 14-year-old victim by a man who met her on site); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573 (2009) (plaintiffs "want MySpace to ensure that sexual predators do not gain access to (*i.e.*, communicate with) minors on its Web site," yet "[t]hat type of activity—to restrict or make available certain material—is expressly covered by section 230"); *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003) (plaintiff sought "to hold AOL liable for ... monitoring, screening, and deletion of content" which are "actions quintessentially related to a publisher's role"). *Cf. Doe v. AOL*, 783 So. 2d 1010, 1017 (Fla. 2001) (AOL immune from claims it knowingly hosted chat rooms where users violated child pornography laws).

Inc., 570 F.3d 1187, 1198-99 (10th Cir. 2009) (emphasis added). *See also, e.g.*, *Jones*, 755 F.3d at 410 (to overcome § 230 immunity, website must be "responsible for what makes the displayed content allegedly unlawful"). As the *M.A.* court held, Backpage cannot be liable for the "content and consequences of the ads posted by [traffickers]" because it did not develop "the specific content that was the source of the alleged liability." 809 F. Supp. 2d at 1051 (citation omitted).

Not only are Plaintiff's allegations about what happens on Backpage.com generally based on supposition and conjecture, malfeasance as to the ads in question "can't be presumed." *Hart v. Amazon.com, Inc.*, 845 F.3d 802, 803-04 (7th Cir. 2017).[12] Plaintiff only alleges harm to Ms. Robinson from ads *created by the third-party criminal* who trafficked her, and from *another third-party criminal (Rosales)* who assaulted and murdered her,[13] and not from particular ads (or

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[12] The First Amended Complaint added a new Section "C" of Allegations Common to All Claims alleging various efforts by Backpage.com to draw traffic to the site that are purported to bear on this case. Compl. ¶ 49-58. Backpage Defendants deny these allegations, but even if taken as true for purposes of this Motion, they are irrelevant. None allege conduct involving content on Backpage.com that involved Ms. Robinson, which is all that is germane to Section 230 immunity, as set out in the text. It is irrelevant if Backpage may create *other* content that Plaintiff does not plausibly allege caused harm. *See Prickett v. InfoUSA, Inc.*, 561 F. Supp. 646, 651-52 (E.D. Tex. 2006). Whatever else Backpage may do on the site generally—and, again, Defendants expressly deny Plaintiffs' allegations—under § 230, "an interactive computer service qualifies for immunity so long as it does not also function as an information content provider for the portion of the content at issue." *GW Equity LLC v. XCentric Ventures LLC*, 2009 WL 62173, at *3 (N.D. Tex. 2009). *See also Carafano*, 339 F.3d at 1123. Where "Plaintiffs' allegations, taken as true, establish[ed only] that Defendant created, hosted, and maintained" the site, they "do not establish, as they must to survive Section 230 immunity, that Defendant is responsible ... for the creation or development of [] information provided" by third-parties. *Bates*, 2006 WL 3813758, at *15.

In any case, the conduct described in the new Section C involves Backpage sites "outside the U.S." *See* http://www.nbcnews.com/feature/long-story-short/video/nbc-news-exclusive-inside-backpage-com-s-global-adult-ad-sales-operation-981487683699. Notably, Plaintiff's counsel acquired the information on which it appears to base these allegations from unrelated litigation, *see* http://www.nbcnews.com/ news/ us-news/backpage-critics-find-surprise-ammunition-philippines-raid-n778221 ("NBC [] obtained the data from Romanucci & Blandin, the law firm representing Yvonne Ambrose"), and—even more significantly—counsel knew "[t]he only [such] activity [involving Backpage] explicitly occurring in the U.S. that was found ... involved 'moderating' or policing adult ads for content." *Id.*

[13] *See* Compl. ¶¶ 22 ("Rosales engaged in communications with [Ms.] Robinson for immoral [] and illegal purposes, actively attempted to solicit sex ..., solicited sex ..., and raped, abused, assaulted, and eventually killed [Ms.] Robinson"); ¶ 136 ("Robinson was advertised for sex on www.backpage.com by two unknown adult individuals, who were sex trafficking [her]"); *id.* ¶ 138 ("two unknown individuals paid the Backpage.com defendants a fee ... to advertise"); *id.* 144 ("Robinson was sexually abused and

portions of them) Backpage supposedly created. Such allegations cannot overcome Section 230, *Bates*, at *16 (immunity even though complaint "asserts ... Does' neighbor [] took illegal child-pornographic photographs of [Doe] and uploaded them") (internal quotation marks omitted), nor does "sheer speculation" that a service provider contributed to the offending content. *Hadley v. Gatehouse Media Freeport Hldgs.*, 2012 WL 2866463, at *2 (N.D. Ill. 2012).

Attempts to impose liability on a service provider based on allegations it "profited from the activity" also must be dismissed under Section 230. *GTE*, 347 F.3d at 659 (GTE "*does* profit from the sale of server space and bandwidth, but these are lawful commodities whose uses are overwhelmingly socially productive"). That is so even if it is alleged those posting content engaged in such illegal activity as child pornography, obscenity, or non-consensual "revenge porn." *E.g.*, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760 (Tex. App. 2015). (§ 230's "plain language" affords "immunity from civil suit ... even when the posted content is illegal ... or ... criminal."). *Compare* Compl. ¶¶ 1, 7, 39, 42, 44, 79, 92 (alleging Backpage profited from trafficking by operating website hosting content posted by others). In *M.A.*, it was "immaterial" that Backpage allegedly "elicit[ed] online content for profit," because what matters for Section 230 is whether it is the website or third parties who create the content at issue. 809 F. Supp. 2d at 1050 (quotation marks omitted). *Compare, e.g.*, Compl. ¶ 140. *See also Ferrer*, 2016 WL 7237305, at *1-5 (allegations that Backpage "'manipulated' content ... [to] profit from activity resulting from [] ad placement" did not support state criminal counts in face of § 230).

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exploited by men, including [] Rosales, who purchased her for sex by paying ... unknown individuals or other pimps"); *id.* ¶ 146 ("the two unknown individuals forced [Ms.] Robinson into a vehicle and drove her to ... Rosales"); *id.* ¶¶ 150-51 ("Robinson was sold to [] Rosales by the two unknown individuals"); ¶ 160 ("Rosales tried to forcibly rape [Ms.] Robinson"); *id.* ¶¶ 161-62 ("Rosales beat Ms. Robinson ..., strangled her as she tried to call for help, and/or used a knife to slash [her] throat" and "left her dead"). In this respect, some things as stated in the allegations are so far-fetched as to be nonsensical. *E.g.*, Compl. ¶ 153 ("using www.backpage.com ... Defendant Rosales raped [Ms.] Robinson"); *id.* ¶ 160 ("using www.backpage.com Anthony Rosales tried to forcibly rape [Ms.] Robinson").

3. Notice Liability Cannot Defeat Section 230.

Plaintiff cannot evade Section 230 by alleging Backpage knew (or should have known) third parties may misuse its website. *See, e.g.*, Compl. ¶¶ 62-68, 101. Such general claims of "knowledge" invoke traditional editorial functions that Section 230 immunizes. *See supra* § III.A.1. The allegations of knowledge are also pure speculation, with no supporting facts tying Backpage's purported knowledge to ads of Ms. Robinson. "It is...well established that notice of the unlawful nature of the information [posted] is not enough to make it the service provider's own speech." *Lycos*, 478 F.3d at 420. *See Bates*, 2006 WL 3813758, at *3, *6, *18 (immunity applied even where it was alleged Yahoo! "knew or had reason to know about the illegal nature" of the activities of its users). As the Seventh Circuit held in *GTE*, 347 F.3d at 659, "[e]ven entities that know the information's content do not become liable for the sponsor's deeds." Any claim that Backpage.com is not protected by Section 230 based on the "alleged ... unlawful nature of the material ... on the website [] is without merit." *GoDaddy*, 429 S.W.3d at 760-61.

Even *actual* knowledge of the illegal posts does not make an online provider liable just because it fails to delete them. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331-32 (4th Cir. 1997). *Cf. GTE*, 347 F.3d at 658 (§ 230 dismissal affirmed despite GTE "policy of not censoring any hosted website"). That is because "[l]iability upon notice would defeat the [] purposes [of] § 230[,]" and instead "reinforce[] service providers' incentives to restrict speech and abstain from self-regulation." *Zeran*, 129 F.3d at 333. Courts consistently reject the argument Plaintiff makes here—that Backpage should be denied immunity because it allegedly knows or should know "of minors being sexually trafficked" on its site. *M.A.*, 809 F. Supp. 2d at 1050-51.[14]

[14] *See also Barrett v. Rosenthal*, 40 Cal. 4th 33, 41-50 (2006) (§ 230 barred claims against website even though defendants received notice challenged messages were allegedly defamatory); *Caraccioli*, 2017 WL 2445063 at *1 ("Facebook did not become the 'information content provider under § 230(c)(1) merely by virtue of reviewing the contents of the suspect account and deciding not to remove it").

Plaintiff fails to explain how, among Backpage.com's millions of users and ads, it gained knowledge about ads for Ms. Robinson. All such allegations of "knowledge" concern its alleged removal of objectionable content and its practices generally, *see, e.g.,* Compl. ¶¶ 139-42, or rest on unfounded and incorrect premises that all "escorts" are "prostitutes." *Id.* ¶¶ 46, 47.[15] And no facts are alleged that Backpage knew Robinson was a minor. Plaintiff's claims must be dismissed because the Complaint "does not contain facts alleging how [Backpage] received notice of [the traffickers' or Rosales]'s conduct against [Robinson]." *Davis v. Motiva Enters. L.L.C.*, 2015 WL 1535694, at *4 (Tex. App. Apr. 2, 2015).

This case illustrates precisely why Section 230 immunizes online intermediary publishers like Backpage.com. The ads depicting Ms. Robinson give no insight into her actual age, and nothing expressly suggests an illegal transaction is necessarily proposed. Plaintiff charges Backpage with "knowing [Ms.] Robinson was ... or likely a minor," Compl. ¶ 143; *see also id.* ¶ 193, but offers no explanation how that would be so.[16] And, as noted, escort ads are not illegal, *supra* note 15. If anything, the ads' text is more suggestive of phone sex. *See* App. B at 10 ("No Blocked Calls," "No Explicit Talk or Vulgar Language," "Violations ... Will Automatically End the Call ..."). Even if Backpage noticed these ads in the millions posted on the site each month, they certainly do not provide notice sufficient to trigger the kind of liability Plaintiff seeks to

[15] Courts—including this Court and the Seventh Circuit—repeatedly have rejected notions that ads for escort or adult services are *per se* illegal. *Dart*, 807 F.3d at 234 ("[N]ot all advertisements for sex are [] for illegal sex."); *McKenna*, 881 F. Supp. 2d at 1282 ("an advertisement for escort services may be just that"); *Craigslist*, 665 F. Supp. 2d at 968 ("The phrase 'adult,' even in conjunction with 'services,' is not unlawful in itself nor does it necessarily call for unlawful content."); *see also id.* ("Plaintiff is simply wrong when he insists that ['adult' is] synonymous for illegal sexual services.").

[16] In fact, the ad on its face indicates the opposite, stating the poster's age is 18 and repeating that age in the headline in describing the person identified. Significantly, for all of Plaintiff's allegations, the "18" in the header could not have resulted from "filtering," "stripping," "removing" or "deleting" material from ads. *E.g.*, Compl. ¶¶ 76-78, 82-85, 87-88, 93, 96, 173.g, 173.i, 235

impose—and that Section 230 forbids—in this case.[17] This is the "difficulty of separating lawful from unlawful speech'" against which Section 230 protects. *Lycos*, 478 F.3d at 418-19 (citation omitted). "Automated filters and human reviewers may be equally poor at sifting good from bad postings unless the [flaw] is blatant," *Chi. Lawyers*, 519 F.3d at 669, but they cannot be the basis for denying the protections of Section 230 for content posted by third parties.

4. Conclusory Allegations of Facilitation, Encouragement or Conspiracy Cannot Overcome Section 230.

Plaintiff cannot evade Section 230 by characterizing Backpage as "helping sex traffickers post their sex ads," *e.g.*, Compl. ¶ 170, or by stating claims under "facilitat[ion]" or "conspiracy" theories. *E.g.*, Compl. ¶ 234-35. To be clear, Backpage works to ***prevent*** misuse of the site and to ***combat*** sex trafficking. In any case, such claims "***necessarily*** treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1)." *Doe No. 1*, 817 F.3d at 22 (emphasis added). Further, the practices Plaintiff claims "facilitate" or "assist" traffickers are general functions not specifically tied to ads concerning Ms. Robinson.[18] Websites cannot be sued on an "encouragement" theory, because that would "eclips[e] the immunity from publisher-liability that Congress established." *Jones*, 755 F.3d at 414. No doubt "a clever lawyer could argue that ***something*** the website operator did encouraged the illegality," but such cases "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

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[17] Even law enforcement apparently requires more to proceed. *See Craigslist*, 665 F. Supp. 2d at 963 n.3. Plaintiff may claim entitlement to "all reasonable inferences" on a 12(b)(6) motion, *e.g.*, *Nieder v. Jackson Nat'l Life Ins. Co.*, 2011 WL 3798224, at *1 (N.D. Ill. Aug. 22, 2011), but the point is not whether Ms. Robinson was trafficked through the ads, but whether Backpage was responsible for the ads' content and/or became subject to any duty based on the face of the ads. These all are points on which the Complaint offers "mere conjecture." *Id.*

[18] *See* Compl. ¶¶ 102, 173, 184, 194, 205-206, 216-217, 226-227. *Compare GTE*, 347 F.3d at 657, 662 (affirming § 230 dismissal even though "complaint raise[d] the possibility that GTE's staff gave [content-providers] technical or artistic assistance in the creation" of content).

or encouraged—or at least tacitly assented—to the illegality of third parties." *Roommates.com*, 521 F.3d at 1174.

The same applies to claims that Backpage somehow "help[s]" or "coach[es]" traffickers to draft ads to avoid law enforcement detection. *See, e.g.*, Compl. ¶¶ 60, 64, 94, 173, 184, 194, 206, 235. This is pure speculation, contradicted by Backpage's well-documented efforts to assist law enforcement, *see supra* 3-4, and it distorts the facts that Backpage.com enforces posting and moderation policies (which disallow use of certain terms or images and prohibit posts by minors and posts for illegal activities), and generally does not ban or report a user simply for using a prohibited term. *See also* Compl. ¶¶ 64-66. As this Court held in *Craigslist*, 665 F. Supp. 2d at 969, any "argument that [a site] causes or induces illegal conduct is [] undercut" where it in fact "repeatedly warns users not to post such content." Just as website features "that are part and parcel of the overall design and operation of the site" do not make Backpage a content creator, Section 230 cannot be evaded by claiming it "enabled" sex trafficking. *Doe No. 1*, 817 F.3d at 21. Such allegations are precisely the sort that *Doe No. 1* held do not overcome Section 230.[19] Any other result would thwart the self-policing Section 230 was enacted to incent. *See Motiva*, at *4 (§ 230 "allows an interactive computer service provider to 'establish standards of decency without risking liability for doing so'") (citation omitted); *see also Batzel*, 333 F.3d at 1027-28.

Further, conclusory civil conspiracy claims, lacking supporting allegations of Backpage's agreement with Rosales, the Traffickers, or any other trafficker, *see* Compl. ¶¶ 136-43, cannot plausibly suggest Backpage conspired with any of them merely by operating a website available to millions of users, much less that Backpage knew Robinson was being sold for sex or Rosales would harm Robinson. *See supra* 17 (lack of knowledge of ads involving Ms. Robinson); *infra*

[19] *Id.* (citing such features as phone number verification, rules about whether a person may post after attempting to enter a forbidden term, and procedures for uploading photographs). *Compare* Compl. ¶¶ 60, 94, 140, 173, 184, 194, 206, 235.

§ III.B.3 (failure to sufficiently plead conspiracy). *See also Twombly*, 550 U.S. at 557 ("conclusory allegation of agreement at some unidentified point" does not establish conspiracy). Not only are Plaintiff's allegations about what happens on Backpage.com generally based on supposition and conjecture, malfeasance "can't be presumed," as noted, *see supra* 20 (citing *Hart v. Amazon*), nor can such presumptions serve as a basis for liability in the face of Section 230.

B. The Complaint Also Fails to State a Claim Against the Backpage Defendants

Even were there no Section 230 immunity (there is), the case against the Backpage Defendants still should be dismissed because each count in the Complaint naming them fails to state a claim under Illinois law. In particular, each of those claims—Negligent and/or Willful and Wanton Wrongful Death (Counts 1-4), Intentional and/or Negligent Infliction of Emotional District (Counts 5-6), and Civil Conspiracy (Count 7)—both fails to allege critical elements that make the cause of actions "plausible on [their] face,'" *Iqbal*, 556 U.S. at 678, and to support their legal conclusions with factual allegations. *Munson*, 673 F.3d at 632.

1. Claims Based on Negligence and/or Willful or Wrongful Death Are Not Sufficiently Pled.

Counts 1-4 seeking to impose liability on Backpage for Rosales' murder of Ms. Robinson are not plausibly pled. To state a claim, Plaintiff must plead a duty owed Plaintiff by the Backpage Defendants, breach of that duty, proximate cause, and harm, and for willful and wanton misconduct, either deliberate intent to harm, or utter indifference or conscious disregard for Ms. Robinson's welfare. *Shafer v. City of Springfield*, 2017 IL App (4th) 160475-U, ¶ 30 (May 26, 2017) (citing *Kirwan v. Lincolnshire–Riverwoods Fire Prot. Dist.*, 811 N.E.2d 1259, 1263 (Ill. Ct. App. 2004)). These counts fail, at a minimum, on lack of duty and proximate cause.[20]

[20] The Illinois Wrongful Death Act, 740 ILCS 180/1, *et seq.*, *cf.* Compl. ¶¶ 176, 197, 209, similarly requires Plaintiff to plead Backpage Defendants owed a duty to the deceased, a breach that proximately caused her death, and damages. *Lough v. BNSF Ry. Co.*, 988 N.E.2d 1090, ¶ 20 (Ill. Ct. App. 2013).

Plaintiff alleges Backpage had duties to "operate www.backpage.com in a manner that did not endanger minor children, including [Ms.] Robinson," Compl. ¶¶ 169, 181, 191, 203, to "take reasonable steps to protect foreseeable victims of the danger created by their ... online marketplace," *id.* ¶¶ 170, 182, and/or to "not intentionally and/or recklessly endanger minor[s], including [Ms.] Robinson," *id.* ¶¶ 192, 204, but offers no facts (or legal theory) on which such duty is based. *See, e.g., Cullota v. Cullota*, 678 N.E.2d 717, 720 (Ill. Ct. App. 1997) (citing *Pelham v. Greisheimer*, 440 N.E.2d 96 (Ill. 1982)). To the extent the Complaint means to imply a duty because Backpage "knew, or should have known, [] adults working as [] traffickers were using their website to post ... advertisements of [Ms.] Robinson, *e.g.*, Compl. ¶¶ 172, 183, 194, 205, that fails for reasons already stated. *See supra* 16-17. Moreover, a party "[o]rdinarily ... owes no duty of care to protect another" from "harmful or criminal acts of third persons," with one exception to that general rule being if "the parties are in a special relationship and the harm is foreseeable." *Johnson v. Pace Suburban Bus*, 2017 IL App (3d) 160304-U, ¶ 19 (2017).[21] The Complaint alleges no such special relation, nor that Ms. Robinson was even a Backpage.com user, or that Backpage had reason to know Rosales found her on the website and/or deceived her traffickers to assault and ultimately murder her. As the Seventh Circuit has held, websites have no duty to those harmed by its users. *Vesely*, 762 F.3d at 665-66 (site facilitating sales between private owners had no duty to plaintiff killed by buyer in illegal firearms transaction).

These claims also fail because Backpage's conduct cannot be the proximate cause of the Ms. Robinsons' injuries and death, notwithstanding Plaintiff's allegations. *See* Compl. ¶¶ 146, 157, 161, 167, 179, 183. This requirement is met only if a defendant's conduct is "so closely

[21] The four special relationships Illinois recognizes are common-carrier/passenger, innkeeper/guest, custodian/ward, and business invitor/invitee. *See, e.g., Vesely v. Armslist LLC*, 762 F.3d 661, 665 (7th Cir. 2014). Other exceptions also exist—employees in imminent danger known to employers, failure by principals to warn agents of unreasonable risk of harm, and contractual assumption of duty, *see Johnson* ¶ 19—but they have no application here.

tied to the plaintiff's injury that he should be held legally responsible for it," *Simmons v. Garces*, 763 N.E.2d 720, 732 (Ill. 2002), and no such close connection can be said to exist between Backpage's operation of a website for third-party ads and Rosales' murder of Ms. Robinson. Moreover, conduct cannot be the legal cause of an injury where intervening criminal acts of third-parties, all alleged in the Complaint—Ms. Robinson's trafficking by unknown persons, and her assault and murder by Rosales, *see supra* note 13—breaks the causal connection. Illinois law is clear that if such third-party acts are the immediate cause of the injury, and that third-party is not under the "control" of the entity to whom plaintiff seeks to assign liability, there is no proximate cause. *Kirschbaum v. Vill. of Homer Glen*, 848 N.E.2d 1052, 1058 (Ill. Ct. App. 2006).[22] Nothing in the service Backpage offers induces users to post ads for illegal conduct and, most fundamentally, it certainly does not induce persons to commit murder. The Seventh Circuit illustrated this point in *Chicago Lawyers* when it held that:

> Nothing ... craigslist offers induces anyone to post any particular listing .... If craigslist "causes" discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for "causing" discriminatory advertisements.

519 F.3d at 671-72. Thus, as a matter of law, Plaintiff's allegations affirmatively establish that Backpage did not proximately cause Ms. Robinson's injuries or death.

2. Key Elements of Negligent and/or Intentional Infliction of Emotional Distress Are Absent from the Complaint.

Counts 5 and 6 likewise must be dismissed for failure to plausibly plead key elements of the claims. The Complaint fails to plausibly plead Count 5's intentional infliction of emotional distress claim against the Backpage Defendants, which under Illinois law "requires [alleging]

[22] While proximate cause is generally a question of fact, lack of proximate cause may be determined as a matter of law if facts alleged do not sufficiently demonstrate defendant's conduct was the proximate cause of the harm claimed. *See, e.g., Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439 (7th Cir. 2009) (affirming Rule 12(b)(6) dismissal of plaintiff's claim for lack of proximate cause)

four elements: (1) extreme and outrageous conduct; (2) intent or recklessness to cause emotional distress; (3) severe or extreme emotional distress suffered by the plaintiff; and (4) actual and proximate causation of the emotional distress by defendant's outrageous conduct." *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1030 (7th Cir. 2006). The conduct "must go beyond all bounds of decency and be considered intolerable in a civilized community," with whether it is extreme and outrageous judged objectively. *Chambers v. Young*, 2017 WL 2152189, at *4 (S.D. Ill. May 5, 2017). Proximate cause is equally absent here as it was for negligence, *see supra* 21-22, and the Complaint does not allege extreme or outrageous conduct (intentional or otherwise) directed to Ms. Robinson (or Ms. Ambrose)—at most it alleges general editorial decision-making, as outlined above. *Supra* 10-15. Nor is operating a website with posting rules reinforced by filtering and moderation "intolerable in a civilized community"—in fact, Section 230 encourages it. *See supra* 10, 18-19. The Complaint also does not allege *intent* by the Backpage Defendants to cause emotional distress to anyone, let alone Ms. Robinson or Ms. Ambrose.

As to recklessness, just as Plaintiff cannot turn Backpage.com's filtering, moderation and other editorial functions designed to prevent postings that violate its Terms of Use as Section 230 encourages into "content creation," *see supra* 3-4, 10-13, she cannot claim these ameliorative efforts were "extreme and outrageous" conduct, Compl. ¶ 218, that "disregarded" or "took no steps" to address misuse of the site. *Id.* ¶¶ 216, 220. The Complaint not only fails to plausibly allege the Backpage Defendants were aware of ads depicting Ms. Robinson, or that Backpage edited those ads, *Hadley*, 2012 WL 2866463, at *2, but, even if it had, it is not "objectively" extreme and outrageous for Backpage to exercise its editorial prerogative to remove content that violates its Terms of Use. In this sense, there is no allegation of a "high probability," *Chambers*, at *4, that the Backpage Defendants' actions would cause severe emotional distress *to Ms. Robinson or Ms. Ambrose*. In fact, nothing in the Complaint, beyond pure speculation, suggests

that the Backpage Defendants were even aware of Ms. Robinson. Finally, as to "severe emotional distress," beyond "[m]erely reciting the element[]," *Sprong v. Elliott*, 2017 WL 2112489, at *1 (C.D. Ill. May 15, 2017), *compare, e.g.*, Compl. ¶¶ 221, 231, the Complaint does not allege Ms. Robinson suffered severe emotional distress as a result of Backpage's actions, as opposed to those of her traffickers and assailant. *See, e.g.*, Compl. ¶ 219 ("such exploitation, rape and/or sexual assault would inflict severe emotional distress upon [Ms.] Robinson").[23]

Finally, Count 6 does not state a negligent infliction of emotional distress claim for the same reasons Counts 1-4 fail: "[a] plaintiff claiming to be a direct victim of negligently inflicted emotional distress must establish the traditional elements of negligence," *i.e.*, "duty, breach, causation and injury." *Cooney v. Chi. Pub. Schs.*, 943 N.E.2d 23, 29 (Ill. Ct. App. 2010). As those elements are absent, *see supra* 20-22, the "negligent infliction of emotional distress claim must fall with the[] general negligence claim[s]." *Id.*[24] These claims must be dismissed.

3. The Conspiracy Claim Fails as a Matter of Law.

Count 7 of the Complaint for "conspiracy" directed solely at the Backpage Defendants must be dismissed because parent companies and their subsidiaries and corporate affiliates are not capable of conspiring. *E.g.*, *Frontline Commc'ns, Inc. v. Comcast Corp.*, 2013 WL 4777370, at *4 (N.D. Ill. Sept. 5, 2013); *Nissan Motor Acceptance Corp. v. Schaumburg Nissan, Inc.*, 1993 WL 360426, at *7-9 (N.D. Ill. Sept. 15, 1993). *Cf.* Compl. ¶¶ 18-21 (alleging Backpage Defendants have "unity of ownership and interest," and are "partners," "alter egos of one other," and/or

[23] There is also no allegation that Robinson or Ambrose were aware of Backpage's alleged conduct at any point prior to suffering the alleged emotional distress.

[24] To the extent Ms. Ambrose purports to allege that she is an *indirect* victim for this claim, it must be dismissed because there is no allegation either that she was in the "zone of danger" during Ms. Robinson's trafficking or assault, or that she feared for her safety as a result thereof, or that she sustained physical injury or illness from her emotional distress, all of which are necessary to such a claim. *See generally Evans v. Peters*, 2011 WL 10454527 (Ill. Ct. App. Apr. 15, 2011).

"a joint venture"). Count 7 also does not allege the agreement among alleged conspirators that is "'a necessary and important element'" of the claim, *Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 509 (7th Cir. 2007) (quoting *McClure v. Owens Corning Fiberglass Corp.*, 720 N.E.2d 242, 258 (Ill. 1999)), and it certainly does not allege conspiracy with specificity, as is required. *See Frontline*, at *4 (plaintiff "refers to the two individual defendants collectively ('Comcast') and never differentiates them in its civil conspiracy count"). And even factoring in co-Defendant Rosales—which Count 7 does not, but whom the Complaint makes clear was responsible for the attacks against Plaintiff—there is no allegation of agreement and/or coordination, or even direct contact, among the Backpage Defendants and Rosales. *Cf. GTE*, 347 F.3d at 658-59 (even though ISP had contractual right to inspect customer's website and some ISP personnel "may have realized the character of the [customer]'s wares," a "web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet").

IV. CONCLUSION

Consistent with Congress' binding policy judgment in Section 230 that "plaintiffs may hold liable the person who creates or develops [the] unlawful content, but not the interactive computer service provider," *Nemet*, 591 F.3d at 254, this Court should dismiss the Complaint.

Dated: July 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert Corn-Revere, Attorney for the Backpage.com Defendants, certify that on July 17, 2017 a copy of the foregoing was electronically filed with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

s/ Robert Corn-Revere
Robert Corn-Revere