UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

M.H. and J.H., on behalf of their minor child C.H., Plaintiffs, v. OMEGLE.COM, LLC, Defendant.	Case No. 8:21-cv-00814-VMC-TGW

DEFENDANT OMEGLE.COM, LLC'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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Defendant Omegle.com, LLC ("Omegle") moves pursuant to FED. R. CIV. P. 12(b)(6) to dismiss Plaintiffs' Second Amended Complaint (Dkt. 75) ("SAC"). In support of this Motion, Omegle incorporates the following Memorandum of Law. WHEREFORE, for the reasons stated herein, Omegle respectfully requests that the Court dismiss the SAC in its entirety, with prejudice.

MEMORANDUM OF LAW IN SUPPORT

Despite having the opportunity to twice amend the complaint, Plaintiffs' SAC is still fatally flawed and subject to dismissal with prejudice. Specifically, Plaintiffs seek to hold Omegle liable as the publisher or speaker of third-party content on its website contrary to the immunity provided by Section 230 of the Communications Decency Act ("CDA 230"). Therefore, for the reasons stated herein, the SAC should be dismissed with prejudice.

FACTUAL ALLEGATIONS

The SAC alleges that M.H. and J.H. are the parents of 11-year-old C.H. and reside in Morris County, New Jersey. (Dkt. 75 at ¶¶ 8-10.) In 2009, Omegle launched its free online real-time chat service, through which users can meet and chat in real time with new people by text or video via its website. (Id. ¶¶ 13, 33.) There is no registration or log in requirement to chat with other users. (Id. ¶ 36.)

As Plaintiffs acknowledged in their original complaint, the Omegle website clearly prohibits users under 13 years of age from using the real-time chat service and prohibits users under 18 years of age from using the service without a parent's or guardian's permission. (Dkt. 1 ¶ 32; *see also* Dkt. 10-2 ¶ 3, Ex. 1.) Despite this prohibition, the SAC alleges 11-year-old C.H. visited the

Omegle website in March 2020, apparently without parental permission. (Dkt. 75 ¶ 57.) C.H. had never used the Omegle website before. C.H. elected to be randomly paired with another user via the video chat option at least twice. The first random pairing was with a group of older minors. She elected to end that chat and start a second video chat. (Id.) In the second chat, C.H. allegedly observed a black screen on which text began appearing. (Id. ¶ 58.) The SAC alleges that the other user in the chat said "he knew where C.H. lived" and provided her "geolocation." The SAC does not explain what is meant by "geolocation." (Id. ¶ 59.) The SAC alleges that the third-party user instructed C.H. to remove her clothing and touch herself in front of the camera on her computer. She complied with the user's instructions. The user allegedly captured screenshots or videos of C.H.'s actions. (Id. ¶¶ 61-62.)

DISCUSSION

I. Plaintiffs' SAC Cannot Withstand Rule 12(b)(6) Scrutiny

Although FED. R. CIV. P. 8(a)(2) only requires that a pleading provide a "short and plain statement of the claim showing that the pleader is entitled to relief," that standard requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). A complaint has facial plausibility only "when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) ("*ADA*"). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. But no such assumption of veracity applies to legal conclusions or "unwarranted deduction[s] of fact." *Id.* at 678; *ADA*, 605 F.3d at 1290, 1294.

II. Omegle is Entitled to Immunity Under CDA 230

CDA 230 states that "[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). It preempts any contrary state law, 47 U.S.C. § 230(e)(3), and creates "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," *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (internal quotation marks omitted). CDA 230 provides immunity to a wide range of state and federal law claims, including the claims Plaintiffs assert. *See, e.g.*, *DiMeo v. Max*, 248 F. App'x 280, 281-83 (3d Cir. 2007) (IIED and defamation claims); *Dart v. craigslist*, 665 F. Supp. 2d 961, 963, 969 (N.D. Ill. 2009) (public nuisance claim); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006) (defamation, invasion of privacy, and negligence claims), *aff'd*, 242 F. App'x 833 (3d Cir. 2007).

A defendant is immune under CDA 230 if: (1) it is the provider of an "interactive computer service" ("ICS"); (2) the asserted claims treat it as the

publisher or speaker of the information; and (3) the information is provided by another information content provider. *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1319 (M.D. Fla. 2015).

A. Omegle is an interactive computer service provider

The SAC alleges that Omegle is a website "that enables individuals to communicate with random individuals across the world anonymously via text and video." (Dkt. 75 ¶ 33.) Thus, Omegle fits squarely within the ICS definition[1] because it is a website "that allow[s] third parties" to provide content to other users "regardless of whether [that content] is made anonymously or under a pseudonym." *Roca*, 140 F. Supp. 3d at 1318; *see also Mezey v. Twitter, Inc.*, No. 1:18-cv-21069-KMM, 2018 U.S. Dist. LEXIS 121775, *3 (S.D. Fla. July 19, 2018).

B. The claims seek to treat Omegle as the publisher of content from another information content provider

As to the second and third elements, the claims seek to treat Omegle as the publisher or speaker of content, specifically video and/or text communications of another information content provider. Courts have held that the second element is satisfied where a plaintiff alleges that an ICS published offending content that it should have filtered. *See, e.g.*, *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (element satisfied where plaintiff "attempt[ed] to hold [defendant] liable for decisions relating to the monitoring, screening, and deletion of content"). Courts have also found this element satisfied where a plaintiff's claims

[1] An ICS is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]" 47 U.S.C. § 230(f)(2).

are based on an offending interaction which occurs through the site, which are ultimately based on content posted by third parties, and an alleged failure to monitor or supervise the site. *See*, *e.g.*, *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 323 (D.N.J. 2015) (claim of failure to monitor and supervise site users was an attempt to treat defendant as a publisher of information provided by a third party); *see also Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 590 (S.D.N.Y. 2018) (claim that defendant failed to "incorporate adequate protections against impersonating or fake accounts is just another way of asserting that [defendant] is liable because it fails to police and remove" content), *aff'd*, 765 F. App'x 586 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019). Nor does an allegation that the ICS received notice of the alleged unlawful nature of the content negate CDA 230 immunity. *See, e.g.*, *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 994 (S.D. Tex. 2017).

At its core, the SAC alleges that Omegle failed to adequately monitor or screen the content or interactions of its users. (Dkt. 75 ¶¶ 120-121, 123, 132, 136, 142-145.) The Fifth Circuit's conclusion in a factually similar case is on point. In *Doe v. MySpace Inc.*, the mother of a 13-year-old girl sued MySpace for allowing her daughter to use the site and meet a 19 year old, who communicated with her via the site to arrange a meeting and assault her. 528 F.3d 413, 416 (5th Cir. 2008). Similar to the allegations here, the mother argued the site was liable for failing to implement proper safeguards. The court rejected the argument, concluding that the "allegations are merely another way of claiming that MySpace was liable for publishing the communications" between the users. *Id.* at 420.

The SAC makes vague allegations directed at Omegle's website design (*see* Dkt. 75 ¶¶ 45-47, 107, 120, 148), but courts have rejected this type of a claim where neutral tools that "are not intrinsically offensive or unlawful" are used by a third party to harass another user. *Herrick*, 306 F. Supp. 3d at 589-90; *see also Saponaro*, 93 F. Supp. 3d at 324. Here, the SAC fails to state—in a manner consistent with the plausibility standard—any claims regarding the allegedly defective design that would overcome CDA immunity. Nor could it make any such plausible allegation as Omegle's service—a means for users to communicate with one another via text or video—is the type of neutral tool that courts routinely find are covered by CDA 230 immunity.[2] *See, e.g.*, *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (rejecting attempt to equate "content" with the website's offering of "tools meant to facilitate the communication and content of others"), *cert. denied*, 140 S. Ct. 2761 (2020); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014).

Additionally, the SAC alleges that the allegedly offending communication originated from a third-party user as did the screenshots or video allegedly captured by that user. (*See, e.g.*, Dkt. 75 ¶¶ 59, 61-62.) The SAC is bereft of any allegation that Omegle "created or authored" the allegedly offensive communications or content. A plaintiff who claims a defendant "created or

[2] The decision in *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), is of no assistance to Plaintiffs. The court concluded that plaintiffs alleged a product liability claim targeted at the interplay between the Snap "speed filter" and Snap's alleged incentive system, both of which Snap created and which plaintiffs alleged "encouraged users to drive at dangerous speeds." But the court reiterated that ICS providers are not liable for "neutral tools" when plaintiff's claims "blame them for the content that third parties generate with those tools." *Id.* at 1093-94. That is precisely the case here where Plaintiffs' claims arise from C.H.'s interaction with the other user.

developed" allegedly offensive content must do so based on "well-pleaded facts [that] permit the court to infer more than the mere possibility" of such creation and development. *Marfione v. Kai U.S.A., Ltd.*, No. 17-70, 2018 U.S. Dist. LEXIS 51066, *18-19 (W.D. Pa. Mar. 27, 2018). Plaintiffs have not satisfied that standard.

As a result, CDA 230 bars Plaintiffs' claims against Omegle.

III. No CDA 230 Exceptions Apply to Plaintiffs' Claims Under the Federal Child Pornography and Sex Trafficking Criminal Statutes

CDA 230 immunity is not absolute. It contains two exclusions potentially implicated by the claims alleging violations of (1) 18 U.S.C. § 2252A and (2) 18 U.S.C. §§ 1591 and 1595. First, CDA 230(e)(1) provides that CDA 230 is not intended to "impair the enforcement of [any] Federal criminal statute," including Section 2252A, the criminal statute upon which the first cause of action is based. Second, CDA 230(e)(5)(A) is a new exclusion added by the Fight Online Sex Trafficking Act ("FOSTA") that is targeted at – and limited to – alleged violations of the federal sex trafficking criminal statute, 18 U.S.C. § 1591. Both exclusions are narrow in scope and neither divest Omegle of CDA 230 immunity.

A. Plaintiffs' claim for alleged violation of 18 U.S.C. § 2252A is not excluded by CDA 230(e)(1)

In the first cause of action, the SAC alleges that Omegle violated 18 U.S.C. § 2252A, which makes it a crime for any person to knowingly possess or access with intent to view material that contains an image of child pornography. But this claim—which is based on the child pornography allegedly created by the other user with whom C.H. interacted—is also barred by CDA 230.

CDA 230(e)(1) states, in relevant part, that nothing in CDA 230 shall

"impair the enforcement of . . . chapter . . . 110 (relating to sexual exploitation of children) of [18 U.S.C. § 2251 *et seq.*], or any other Federal criminal statute." 47 U.S.C. § 230(e)(1). But courts have consistently construed this exception to apply only to "government prosecutions, not to civil private rights of action under [statutes] with criminal aspects." *Obado v. Magedson*, No. 13-2382 (JAP), 2014 U.S. Dist. LEXIS 104575, *27 (D.N.J. July 31, 2014), *aff'd*, 612 F. App'x 90 (3d Cir. 2015); *see also Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019) ("[CDA] 230(e)(1) is quite clearly . . . limited to criminal prosecutions") (internal quotation marks omitted), *cert. denied*, 140 S. Ct. 2761 (2020). Courts have reached that conclusion with respect to the same criminal statute on which Plaintiffs' first claim is based – 18 U.S.C. § 2252A. *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, *7-8, 12 (E.D. Tex. Dec. 27, 2006) (holding – in case alleging that Yahoo! was civilly liable under Section 2252A for knowingly hosting child pornography – that CDA 230(e)(1) did not apply to such private civil suits); *see also Doe v. Reddit, Inc.*, No. SACV 21-768 JVS (KESx) at p. 10 (C.D. Cal. Oct. 7, 2021) (hereinafter, "*Reddit*, Appendix A")[3] (CDA 230 "provides immunity for interactive computer services in civil suits under § 2252A"). FOSTA did not change CDA 230(e)(1). Therefore, CDA 230 also bars Plaintiffs' civil claim based on alleged violation of Section 2252A.

Moreover, even if CDA 230 was not a bar, the SAC fails to state a plausible claim that Omegle violated Section 2252A. The SAC simply quotes the statutory

[3] The *Reddit* decision does not appear to be available on Lexis, therefore, for the Court's convenience, a copy obtained from PACER is attached hereto in Appendix A.

language but offers no *facts* that Omegle ever "knowingly" possessed or accessed any "image of child pornography" of C.H. that was allegedly created by the other user. (Dkt. 75 ¶ 74.) Although the SAC adds references to prior allegations in the complaint with respect to this claim (id. ¶¶ 70-72), those assertions have no apparent connection to a claim that Omegle knowingly possessed or accessed – with the intent to view – any child pornography of C.H. Rather they simply state – in conclusory fashion – "that Omegle.com knowingly possessed child pornography of C.H. that was produced" on the website. (Id. ¶ 72.) Nor can Plaintiffs plead such knowing possession or access by Omegle because there is no allegation that it had any knowledge of C.H. or her interaction with the other user before the filing of this case. To find that Omegle could be liable under such circumstances would improperly read the knowledge element out of the statute.

Thus, the Section 2252A claim (1) is barred by CDA 230 and (2) fails to state any plausible claim for relief, either of which ground warrants dismissal.

B. The SAC does not state a plausible claim for violation of 18 U.S.C. § 1591 and thus CDA 230(e)(5)(A)'s exception does not apply

1. To overcome CDA immunity, the SAC must plausibly allege that Omegle violated Section 1591

As relevant to the second cause of action, FOSTA removed CDA immunity for sex trafficking claims only where the ICS provider's conduct constitutes a violation of 18 U.S.C. § 1591, which imposes an actual knowledge standard. *See* 47 U.S.C. § 230(e)(5)(A) (exempting a claim under Section 1595 but only "if the conduct underlying the claim constitutes a violation of section 1591").

The growing weight of authority – relying on CDA 230(e)(5)(A)'s plain

meaning, contextual analysis, and legislative history – holds that "the most straightforward reading" is that FOSTA "provides an exemption from CDA immunity for a section 1595 claim if the civil defendant's conduct amounts to a violation of section 1591." *J.B. v. G6 Hosp., LLC*, No. 19-cv-07848-HSG, 2021 U.S. Dist. LEXIS 170338, *18 (N.D. Cal. Sept. 8, 2021). Notably, the *J.B.* court reversed its prior decision that reached a contrary conclusion. The court, "[h]aving closely reexamined the issue," concluded that the plain language of CDA 230(e)(5)(A) "withdraws immunity only for claims asserting that the defendant's own conduct amounts to a violation of section 1591." *Id.* at *14.

The *J.B.* court's conclusion is consistent with that reached by the Southern District of Florida in the earlier *Doe v. Kik Interactive, Inc.* case where it similarly held that the "plain language of the statute removes [CDA 230] immunity only for conduct that violates 18 U.S.C. § 1591." 482 F. Supp. 3d 1242, 1249 (S.D. Fla. 2020). The Central District of California also recently agreed with both the *J.B.* and *Kik* courts that the civil defendant's conduct must constitute a violation of Section 1591 to fall within CDA 230(e)(5)(A)'s narrow exception to immunity. *Reddit*, Appendix A at p. 11; *see also M.L. v. craigslist Inc.*, No. C 19-6153 BHS-TLF, 2020 U.S. Dist. LEXIS 166334, *12-14 (W.D. Wash. Sept. 11, 2020) (agreeing that "FOSTA does not create an exemption for all § 1595 claims" but concluding that CDA immunity may not apply as well-pleaded allegations indicated that craigslist may have materially contributed to the ads that trafficked plaintiff).

In reaching its conclusion, the *J.B.* court examined FOSTA's legislative history and found nothing that ran counter to the plain language reading:

> Ultimately, Congress passed a bill incorporating the provision that . . . presented a narrowed federal civil carve-out that is subject to a heightened pleading standard. Notwithstanding the well-understood challenges inherent in showing a website's knowledge, it thus appears that Congress reached a compromise by including a narrowed federal civil sex trafficking carve-out that requires plaintiffs to show the civil defendant's knowing assistance, support or facilitation[.]

2021 U.S. Dist. LEXIS 170338 at *37 (internal quotation marks and citation omitted); *see also Reddit*, Appendix A at p. 12 (stating that the "legislative history comports with the [c]ourt's reading of the plain text"). The *Kik* court likewise looked to the language of CDA 230(e)(5)(A) and FOSTA's legislative history and reached the conclusion that the *J.B.* court would later agree with:

> By its terms, FOSTA did not abrogate CDA immunity for all claims arising from sex trafficking; FOSTA permits civil liability for websites only "if the conduct underlying the claim constitutes a violation of section 1591." And section 1591 requires knowing and active participation in sex trafficking by the defendants.

Kik, 482 F. Supp. 3d at 1251.

The only other decision of which Omegle is aware that reached the opposite conclusion to *Kik*, *J.B.*, and *Reddit* with any significant analysis is the Northern District of California in *Doe v. Twitter, Inc.*, No. 21-cv-00485-JCS, 2021 U.S. Dist. LEXIS 157158 (N.D. Cal. Aug. 19, 2021).[4] But, although the *Twitter* court engaged in *some* analysis in concluding that the plaintiffs' claim against Twitter "based on alleged violation of Section 1591(a)(2) is not subject to the more stringent requirements that apply to criminal violations of that provision," 2021

[4] The Central District of California issued a decision agreeing with the *Twitter* court's conclusion but did not engage in its own analysis. *See Doe v. Mindgeek USA Inc.*, No. SACV 21-00338-CJC (ADSx), 2021 U.S. Dist. LEXIS 176833, *14 (C.D. Cal. Sept. 3, 2021). Notably, the *Mindgeek* court also relied on the earlier decision by the *J.B.* court, which that court has since reconsidered and reached the opposite conclusion. *See id.*

U.S. Dist. LEXIS 157158 at *72, little of the analysis was relevant to interpreting CDA 230(e)(5)(A) and the little that was relevant was conclusory.

For example, the court spent considerable time discussing a line of cases involving sex trafficking claims against hotel defendants. *Twitter*, 2021 U.S. Dist. LEXIS 157158 at *58-65. But, as the court itself recognized, because those cases did not involve ICS providers and therefore did not implicate CDA 230, they did not answer the question before the court. *Id.* at *65. The court then discussed the *Kik* decision but simply stated that it disagreed with that court's analysis, apparently largely relying on the principle that FOSTA is a remedial statute. *Id.* at 65-69. Purporting to rely on the "natural reading" of CDA 230(e)(5)(A), the *Twitter* court then concluded that this exception to immunity does not require proof that the ICS defendant's conduct violated Section 1591. *Id.* at *70-72. The court's alleged plain language reading was based on the premise that FOSTA intended ICS defendants to be treated no differently than other defendants to whom CDA 230 did not apply. *See id.* at *70-71. But that premise is faulty as Congress recognized the distinct circumstances and challenges presented by ICS defendants, as the *J.B.* court acknowledged in its extensive discussion of FOSTA's legislative history. 2021 U.S. Dist. LEXIS 170338 at *23-39. As a result, the *Twitter* court's alleged plain language reading is fatally undermined by its faulty premise that FOSTA – despite all evidence to the contrary – intended to treat ICS defendants no different than, for example, the hotel defendants in the cases that the court had recognized did not answer the question before it. Additionally, the remedial nature of FOSTA cannot "overcome the plain

language of the statute, especially given that section 230 as a whole is designed to provide immunity to [ICS] providers." *Reddit*, Appendix A at p. 12.

In contrast, each of the *Kik*, *J.B.*, and *Reddit* courts correctly recognized FOSTA's limited carve out to CDA immunity in concluding that the carve out applies "**if, but only if,** the defendant's conduct amounts to a violation of section 1591." *J.B.*, 2021 U.S. Dist. LEXIS 170338 at *39 (emphasis added); *see also Reddit*, Appendix A at p. 11; *Kik*, 482 F. Supp. 3d at 1250-51.

2. The SAC is devoid of allegations that Omegle knowingly engaged in conduct prohibited by Section 1591

Thus, to overcome CDA immunity, the SAC must, but does not, plausibly allege that Omegle's conduct constitutes a violation of Section 1591. The SAC is devoid of facts showing that Omegle either (1) directly engaged in the alleged sex trafficking of C.H., *see* 18 U.S.C. § 1591(a)(1),[5] or (2) **knowingly** "benefit[ed], financially or by receiving anything of value, from participation in a venture" which engaged in the alleged sex trafficking of C.H., *see* 18 U.S.C. § 1591(a)(2).

a. No plausible allegation that Omegle engaged in the alleged sex trafficking of C.H.

As to any claim that Omegle itself engaged in the alleged sex trafficking of C.H., there are no allegations to support such a claim. To the contrary, the SAC

[5] As relevant here, Section 1591(a)(1) criminalizes the following conduct:

> (a) Whoever **knowingly** –
>
> (1) . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . .
>
> . . .
>
> knowing, or . . . in reckless disregard of the fact, . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act[.]

18 U.S.C. § 1591(a)(1) (emphasis added).

contains no facts showing that Omegle had any knowledge whatsoever of C.H. or her interaction with the other user, much less that Omegle knowingly recruited, obtained, provided or maintained C.H. knowing that she was under 18 and would be caused to engage in a commercial sex act. Instead, the SAC asserts generally that some users have used the Omegle website to engage in unlawful activities and exploit children "like C.H." (*See, e.g.*, Dkt. 75 ¶¶ 78-79.) Even the conclusory "assertion" that Omegle "knowingly paired C.H. with a stranger knowing that C.H. was a minor child at risk of becoming a victim" only cites to general allegations about other alleged incidents or C.H.'s interaction with the other user. (Id. ¶ 80.) But neither type of allegation contains any facts showing that *Omegle* knowingly engaged in the alleged sex trafficking of C.H. *See Kik*, 482 F. Supp. 3d at 1251 (rejecting general allegation that Kik knew of other sex trafficking incidents occurring on its platform as "section 1591 requires knowing and active participation in sex trafficking by the defendants"). The SAC, therefore, fails to plausibly allege a claim against Omegle for a primary sex trafficking violation under Section 1591(a)(1).

b. No plausible allegation that Omegle knowingly benefited from knowingly participating in a venture

Plaintiffs' claim that Omegle knowingly benefited from knowingly participating in the alleged sex trafficking venture of C.H. under Section 1591(a)(2) is similarly deficient. To state a claim under that section, the SAC must allege that Omegle "**knowingly** . . . benefit[ed], financially or by receiving anything of value, from participation in a venture" that engaged in the

alleged sex trafficking of C.H. 18 U.S.C. § 1591(a)(2) (emphasis added). "Participation in a venture" is defined as "**knowingly** assisting, supporting, or facilitating a violation of subsection (a)(1)." 18 U.S.C. § 1591(e)(4) (emphasis added). A "venture" is defined as "any group of two or more individuals associated in fact, whether or not a legal entity." 18 U.S.C. § 1591(e)(6). The SAC fails to plausibly allege that there was a venture of any kind between Omegle and the other user, much less that Omegle knowingly assisted, supported or facilitated that user's alleged sex trafficking venture involving C.H.

First, Plaintiffs' theory of beneficiary liability under Section 1591(a)(2) is defective for the same reason that their claim for a direct violation under subsection (a)(1) is fatally flawed. Specifically, the SAC does not allege any facts that Omegle ***knowingly*** benefited from ***knowingly*** participating in the alleged sex trafficking venture of C.H. with the other user. At its core, Plaintiffs' claim is that some individuals have used Omegle's real-time chat service to exploit children and that Omegle is aware such incidents have occurred based on news reports or law enforcement inquiries. (*See, e.g.*, Dkt. 75 ¶ 79 (citing, in part, ¶¶ 41-43).) But such general awareness of alleged past incidents unrelated to C.H. does not – and cannot – establish that Omegle "knowingly" participated in and "knowingly" benefited from the alleged sex trafficking venture of C.H. To conclude otherwise would improperly sever the actual knowledge standard from Section 1591. As in *Kik*, Plaintiffs' allegation that Omegle allegedly "knew that other sex trafficking incidents occurred" on its real-time chat platform fails to "plausibly establish that [Omegle] knowingly participated in the sex trafficking

venture involving [C.H.]." 482 F. Supp. 3d at 1251.

Second, even under courts' interpretation of "participation in a venture" under Section 1595 – which has a lower *mens rea* standard than that applicable here under Section 1591 – the SAC fails to plausibly allege a sex trafficking venture between Omegle and the other user involving C.H.[6] A plaintiff must either allege a "direct association" between the defendant and the trafficker or "facts from which the [c]ourt could reasonably infer [defendant] could be said to have a tacit agreement with the trafficker." *Doe v. Rickey Patel, LLC*, No. 0:20-60683-WPD-CIV-DIMITROULEAS, 2020 U.S. Dist. LEXIS 195811, *13-14 (S.D. Fla. Sept. 30, 2020) (internal quotation marks omitted); *see also Reddit*, Appendix A at p. 12 (same). This requires "at least a showing of a continuous business relationship between the trafficker and [defendant]". *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019).

But any such allegation is critically lacking here. The SAC fails to allege a single fact showing either a "direct association" or "continuous business relationship" between the user who allegedly engaged in the sex trafficking of C.H. and Omegle that would support the existence of a "venture." The SAC simply makes conclusory statements based on a recitation of the language of Section 1591 and references prior allegations that fail to establish any relationship between Omegle and the other user (Dkt. 75 ¶¶ 78-87), which are insufficient to

[6] Therefore, even in the absence of CDA immunity, Plaintiffs' claim for violation of Sections 1591 and 1595 would fail as the SAC fails to plausibly allege that Omegle participated in a "venture" under either section.

state a plausible claim. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Nor could Plaintiffs allege any such direct association or ongoing relationship between Omegle and the other user that would permit the reasonable inference of a tacit agreement between them because Omegle does not require users to register or log in to use the website (Dkt. 75 ¶¶ 36-37). Therefore, there can be no plausible allegation that Omegle had any knowledge of C.H., the other user, or that user's actions towards C.H. prior to this case, much less that Omegle had any prior or ongoing relationship with the other user.

The *J.B.* court found generalized allegations like Plaintiffs'—such as that craigslist knew its erotic services section was well known "as a place to easily locate victims"—were insufficient to establish that "Craigslist tacitly agreed to the sex trafficking of Plaintiff or others." *J.B. v. G6 Hosp., LLC*, No. 19-cv-07848-HSG, 2020 U.S. Dist. LEXIS 151213, *26-27 (N.D. Cal. Aug. 20, 2020). To conclude otherwise would result in the implausible suggestion "that Craigslist enters into tacit agreements with all traffickers (or even all posters) that use its website." *Id.* at 27. Thus, "[b]ecause Craigslist cannot be deemed to have participated in all ventures arising out of each post on its site, Plaintiff must [but did not] allege facts supporting the inference that Craigslist made a tacit agreement with the sex traffickers who victimized Plaintiff." *Id.* at 28. The *Reddit* court – agreeing with the *J.B.* court's analysis on the same question – similarly found that allegations that "Reddit has 'affiliations with sex traffickers by enabling the posting of child pornography on its websites'" and by "'making it easier to connect traffickers

with those who want to view'" such content were "not sufficient to show 'a continuous business relationship between' Reddit and traffickers." *Reddit*, Appendix A at p. 13. The SAC's allegations are even weaker than those in *J.B.* and *Reddit* given the lack of any prior or ongoing relationship between Omegle and the other user, much less any relationship involving the alleged sex trafficking of C.H. Even the *Twitter* decision is distinguishable on its facts. That court agreed with the "continuous business relationship" standard but found it was satisfied in part because of allegations that Twitter was notified on several occasions of the nature of the content at issue but either refused or failed to take action. *Twitter*, 2021 U.S. Dist. LEXIS 157158 at *73-77. No such allegation of any relationship between Omegle and the alleged perpetrator has been nor could be made here that could plausibly support a tacit agreement between Omegle and the other user with respect to the alleged sex trafficking of C.H.

Third, Section 1591 requires a "causal relationship between affirmative conduct furthering the sex-trafficking venture and receipt of a benefit, with . . . knowledge of that causal relationship." *Geiss v. Weinstein Co. Holdings LLC*, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019). But the SAC alleges no facts demonstrating Omegle's receipt of a benefit causally related to any affirmative conduct that furthered the alleged sex trafficking venture of C.H.[7] To the contrary, it simply

[7] Notably, in *Geiss*, the court recognized that the "knowingly benefit" language is the same in Sections 1591 and 1595 and therefore "consider[ed] the 'benefits' element to have the same content in both provisions." 383 F. Supp. 3d at 169 n.5. Thus, even in the absence of CDA immunity, Plaintiffs' claim would fail because the SAC fails to plausibly allege that Omegle "knowingly" benefited from participating in the alleged sex trafficking venture involving C.H. as required by both Section 1591 and Section 1595.

repeats the statutory language, stating without factual support that Omegle "knowingly" benefited from the alleged sex trafficking venture perpetrated by the other user. (Dkt. 75 ¶¶ 83-84, 87.) The assertions added to this claim in the SAC do not cure this deficiency. (*See* id. ¶¶ 78-80.) Such conclusory statements that merely parrot the statutory language are insufficient to state a claim for relief. *Jabagat v. Lombardi*, No. 1:14CV89-HSO-RHW, 2015 U.S. Dist. LEXIS 178762, *11 (S.D. Miss. Jan. 30, 2015) (plaintiff's "conclusory allegation[] that 'Defendants knowingly benefitted financially' [was a] mere recitation of the elements of the cause of action" and insufficient to state a claim).

IV. Plaintiffs' Other Claims Also Fail As a Matter of Law

As shown above, CDA 230 bars Plaintiffs' claims. But Plaintiffs' other claims discussed below also fail on their own merits as a matter of law.

A. Plaintiffs' VPPA claim is fatally and irreparably deficient

The Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA"), was enacted with the narrow purpose of "preserv[ing] personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials[.]" *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1253 (11th Cir. 2015) (internal quotation marks omitted). As an initial matter, this claim fails because it is abundantly clear from the SAC that Plaintiffs are attempting to bring a COPPA (Children's Online Privacy Protection Act) claim cloaked awkwardly as a VPPA claim. For example, in the "assertions" added by the SAC, Plaintiffs explicitly reference and implicitly rely on COPPA's prohibitions and definitions. (Dkt. 75 ¶¶ 90-93.) But Plaintiffs cannot use the VPPA – which does not apply to

Omegle's real-time chat service – to bring a COPPA claim when COPPA provides them no private right of action. *See Hubbard v. Google LLC*, No. 19-cv-07016-BLF, 2020 U.S. Dist. LEXIS 239936, *17 (N.D. Cal. Dec. 21, 2020).

Plaintiffs fail to state a VPPA claim for at least three other independent reasons: (1) Omegle is not a "video tape service provider" ("VTSP"); (2) C.H. is not a "consumer"; and (3) Omegle did not disclose C.H.'s "personally identifiable information" ("PII") to a third party.

Omegle is Not a VTSP. The SAC must, but does not, plausibly allege that Omegle is a VTSP, which is narrowly defined as "any person, engaged in the business . . . of rental, sale, or delivery of **prerecorded video cassette tapes or similar audio visual materials**[.]" 18 U.S.C. § 2710(a)(4) (emphasis added). The SAC is devoid of any facts showing that Omegle falls within this definition. The new "assertions" in the SAC only relate to COPPA and are therefore irrelevant to whether Omegle is a VTSP. (Dkt. 75 ¶¶ 90-93.) Instead, Plaintiffs simply quote the VTSP definition and then assert, in conclusory fashion, that Omegle "deliver[s] videos recorded on its website." (Id. ¶ 94.) But that conclusion is false; Plaintiffs do not and cannot allege that Omegle is a VTSP as it does not offer "prerecorded" videos. As Plaintiffs' own allegations show, the Omegle website permits users to engage in *real-time* chats with one another using text or their webcams. (Id. ¶¶ 33, 36.) Offering users a means to essentially engage in a video call in no way equates with offering prerecorded video content for viewing. Even assuming that services that stream prerecorded content are encompassed within the VTSP definition (an issue the Court need not decide), Omegle is not such a

service as it merely provides a means for users to chat with one another in real time. Thus, the SAC does not, and cannot, allege that Omegle is a VTSP.

C.H. is not a consumer under the VPPA. The VPPA claim also fails for the independent reason that C.H. is not a "consumer," defined as "any renter, purchaser, or subscriber of goods or services from a [VTSP]." 18 U.S.C. § 2710(a)(1). C.H. does not claim to be a "renter" or "purchaser," therefore, only the "subscriber" option remains. The SAC alleges only that "[a]s a user of the [Omegle] website, C.H. is a consumer". (Dkt. 75 ¶ 95.) But being a "user" of a website does not make one a "subscriber."

Courts have held that "something more" than visiting a website or downloading an app and viewing videos is required to be a "subscriber" under the VPPA. In *Ellis v. Cartoon Network, Inc.*, the Eleventh Circuit found that the "common thread" of the dictionary definitions was that "'subscription' involves some type of commitment, relationship, or association (financial or otherwise) between a person and an entity." 803 F.3d at 1256. The court found that plaintiff—who downloaded defendant's free app and viewed free content—did not satisfy the definition. *Id.* at 1257; *see also Perry v. CNN, Inc.*, 854 F.3d 1336, 1343-44 (11th Cir. 2017) (merely downloading an app was insufficient to be a "subscriber"). Similarly, in *Austin-Spearman v. AMC Network Entm't LLC*, plaintiff viewed video clips on AMC's website for free without any required login. 98 F. Supp. 3d 662, 664 (S.D.N.Y. 2015). Like *Ellis*, the court required evidence of a more "durable" and "ongoing" relationship for plaintiff to be a "subscriber." *Id.* at 669. *Compare Yershov v. Gannett Satellite Info. Network, Inc.*, 820 F.3d 482, 489 (1st

Cir. 2016) (distinguishing the insufficient allegations in *Ellis* and finding that the plaintiff in the case before the court had alleged the required "something more").

The SAC fails to plausibly allege the "something more" required for C.H. to be a "subscriber" of Omegle's real-time chat service. C.H. admits to being a one-time user of the website where no payment, registration or log in is required. (Dkt. 75 ¶¶ 36, 57, 95.) "Such casual consumption of web content, without any attempt to affiliate with or connect to the provider, exhibits none of the critical characteristics of 'subscription' and therefore does not suffice to render [C.H.] a 'subscriber'." *Austin-Spearman*, 98 F. Supp. 3d at 669. Thus, because C.H. is not a "consumer," the VPPA claim should be dismissed on this independent ground.

No PII Disclosed as Defined by the VPPA. The VPPA claim should be dismissed on the independent ground that the SAC does not allege that Omegle disclosed PII, which the VPPA defines as "information which identifies a person as having requested or obtained specific video materials or services from a [VTSP]." 18 U.S.C. § 2710(a)(3).

Courts have recognized the narrow purpose of, and the correspondingly narrow definition of PII in, the VPPA. *See In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 284 (3d Cir. 2016) (the VPPA's purpose "was quite narrow: to prevent disclosures of information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person's video-watching habits"). Courts have also rejected attempts—like that which Plaintiffs make here—to import COPPA's definition of PII to expand or replace the VPPA's narrow definition. *Id.* at 286-88. Consistent with its limited purpose, the VPPA

only "protects [PII] that identifies a specific person and ties that person to particular videos that the person watched." *In re Nickelodeon*, 827 F.3d at 285 (internal quotation marks omitted); *see also Perry v. CNN*, No. 1:14-CV-02926-ELR, 2016 U.S. Dist. LEXIS 179395, *9 (N.D. Ga. Apr. 20, 2016). Thus, a VPPA claim must plausibly allege the VTSP knew it was disclosing: "1) a user's identity; 2) the identity of the video material; and 3) the connection between the two—*i.e.*, that the given user had 'requested or obtained' the given video material." *In re Hulu Privacy Litig.*, 86 F. Supp. 3d 1090, 1097 (N.D. Cal. 2015).

The VPPA claim fails to plausibly allege any of these requirements for PII. The only information alleged to be PII under the VPPA is the unspecified "geolocation" allegedly disclosed by the other user. (Dkt. 75 ¶ 92.) But the SAC does not, and cannot, allege that this "geolocation" is capable, by itself, of (1) identifying C.H., (2) identifying video material, and (3) identifying the connection between the two (e.g., that she requested or obtained that specifically-identified video material).

Any of these reasons support dismissing the VPPA claim with prejudice.

B. Plaintiffs' IIED claim is properly dismissed

To state a claim for intentional infliction of emotion distress ("IIED") under Florida law,[8] Plaintiffs must establish that: (1) defendant's conduct was

[8] The substantive law of the forum state, Florida, applies to the state law claims absent an actual conflict of law. *Stone v. Wall*, 135 F.3d 1438, 1441 (11th Cir. 1998). There only appears to be a false conflict between the law of Florida and the law of New Jersey (Plaintiffs' state of residence) with respect to the state law claims, at least for purposes of the limited issues addressed in this Motion. *Estate of Miller v. Thrifty Rent-A-Car Sys., Inc.*, 609 F. Supp. 2d 1235, 1244 (M.D. Fla. 2009) (a false conflict exists where, among other situations, the laws of the states are the same or different but would produce the same outcome).

"intentional or reckless, *i.e.*, he intended his behavior when he knew or should have known that emotional distress would likely result;" (2) the conduct was "outrageous, *i.e.*, beyond all bounds of decency, atrocious and utterly intolerable in a civilized community;" and (3) the conduct caused severe emotional distress. *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210, 1212 (Fla. Dist. Ct. App. 1995); *see also Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988). But an IIED claim "will lie only where the defendant's conduct is so outrageous in character and so extreme in degree as to go beyond the bounds of decency and to be deemed utterly intolerable in a civilized society." *State Farm*, 657 So. 2d at 1212; *see also Buckley*, 544 A.2d at 863. Whether the SAC meets this exceedingly high standard is for the Court to decide as a matter of law. *Hendricks v. Rambosk*, No. 2:10-cv-526-FtM-29DNF, 2011 U.S. Dist. LEXIS 40608, *11 (M.D. Fla. Apr. 14, 2011); *Buckley*, 544 A.2d at 864. The SAC alleges that Omegle's "outrageous conduct" was its alleged failure to prevent children from using its website and to monitor the site "to ensure that its users were not being sexually abused, mistreated, or exploited[.]" (Dkt. 75 ¶ 132.) But this general allegation fails to state a plausible IIED claim.

First, there is no IIED claim where a party "does no more than pursue his legal rights in a permissible way, even if he knows his conduct will cause emotional distress to the plaintiff." *State Farm*, 657 So. 2d at 1212; *see also* RESTATEMENT (SECOND) OF TORTS § 46 cmt. g. As discussed above, Omegle has no obligation to monitor or police third-party users of its site. Stated differently, Omegle has the legal right to make decisions about monitoring its site and

therefore its exercise of that right cannot give rise to an IIED claim.

Second, this alleged conduct does not rise to the "extremely high" level of outrageous conduct necessary for an IIED claim. Demonstrating the extreme conduct necessary for an IIED claim, Florida courts have found insufficiently outrageous "even offensive and harmful conduct[] such as accusing someone of committing a felony or making explicit racial slurs." *Neely v. Wells Fargo Fin., Inc.*, No. 8:12-cv-542-T-33AEP, 2012 U.S. Dist. LEXIS 168669, *8 (M.D. Fla. Nov. 28, 2012); *see also Griffin v. Tops Appliance City, Inc.*, 766 A.2d 292, 296-97 (N.J. Super. Ct. App. Div. 2001) (New Jersey courts have found the "elevated threshold" for outrageous conduct "only in extreme cases"). The alleged conduct by Omegle is no different in kind than any other social networking website or app that offers users the means to communicate with one another in real time, including Facebook, Twitter, Discord, WhatsApp, Zoom, Microsoft Teams and many others. Therefore, Omegle's alleged conduct is not out of the norm and cannot be considered so "outrageous" or "extreme" as to permit liability for IIED.

Therefore, even setting aside the conclusion that CDA 230 bars this claim, the SAC fails to state a claim for IIED as a matter of law.

C. The intrusion upon seclusion claim fails to state a plausible claim

An intrusion upon seclusion claim requires three elements: (1) "a private quarter"; (2) "some physical or electronic intrusion into that private quarter"; and (3) "the intrusion must be highly offensive to a reasonable person." *Stasiak v. Kingswood Co-op, Inc.*, No. 8:11-cv-1828-T-33MAP, 2012 U.S. Dist. LEXIS 20609, *5 (M.D. Fla. Feb. 17, 2012); *see also Friedman v. Martinez*, 231 A.3d 719, 722 (N.J.

2020). As to the third element, Florida courts have incorporated the outrageousness standard of IIED claims. *Stasiak*, 2012 U.S. Dist. LEXIS 20609 at *6; *compare Friedman*, 231 A.3d at 729 (New Jersey courts require a "highly offensive" intrusion). Here, the SAC vaguely alleges that C.H.'s PII and "viewing data" were "surreptitious[ly] collect[ed] and track[ed]," and that Omegle purportedly engaged in "surreptitious highly-refined tracking of its website's users through video." (Dkt. 75 ¶¶ 105-106.) But these vague allegations, which omit any actual facts, do not state a plausible claim for intrusion. Moreover, the "assertions" added to the SAC – regarding alleged exposure of geolocation, age verification for children, and the alleged pairing of C.H. with another user of the real-time chat (id. ¶¶ 101-103) – have no bearing on an intrusion claim.

First, the intrusion claim cannot be based only on C.H.'s use of her webcam in the real-time chat with other users. Although Plaintiffs attempt to paint Omegle as a "voyeur" surreptitiously commandeering the webcam to secretly observe C.H. (*see* id. ¶ 104), that is false. C.H. elected to engage in video chats with other users, which necessarily required use of a webcam.

Second, the SAC's vague allegations fail to either establish an objectively reasonable expectation of privacy or demonstrate that the alleged intrusion would be highly offensive or outrageous to a reasonable person. The SAC fails to allege that Omegle collected any information that in fact identified C.H. or her "viewing data." It also fails to allege any facts to explain how Omegle "tracked" C.H. "through video." (Id. ¶ 106.) And to the extent Plaintiffs contend the intrusion was any screenshots or video captured by the other user, that alleged

intrusion was committed by the user, not Omegle. Finally, to the extent Plaintiffs rely on the alleged collection or exposure of C.H.'s "geolocation," such collection is not sufficiently offensive to support an intrusion claim.

Courts have rejected intrusion claims alleging the collection of much more specific information than the unspecified "geolocation" or "viewing data" alleged here. For example, in one such case, plaintiffs alleged an intrusion claim against Viacom and Google for the use of cookies placed on the computers of visitors to their websites. They alleged that the cookies collected information about their children and tracked their web browsing and video viewing activities. *In re Nickelodeon*, 827 F.3d at 269. As to Google, the court found that the use of tracking cookies was not "sufficiently offensive, standing alone, to survive a motion to dismiss."[9] *Id.* at 294-95. Similarly, in *Manigault-Johnson v. Google, LLC*, the court rejected an intrusion claim based on the alleged collection of children's PII. No. 2:18-cv-1032-BHH, 2019 U.S. Dist. LEXIS 59892 (D.S.C. Mar. 31, 2019). Defendants had collected PII from children under 13 who viewed videos on their apps and websites without parental notice and consent. The court concluded that this was not "sufficiently offensive conduct" to state an intrusion claim. *Id.* at *14-18; *see also Popa v. Harriet Carter Gifts, Inc.*, 426 F. Supp. 3d 108, 112, 122-23 (W.D. Pa. 2019) (website's collection of user's name, residential and email addresses, keystrokes and mouse clicks, not sufficiently outrageous conduct).

Similarly, here, the allegation that Omegle collected C.H.'s "geolocation"

[9] As to Viacom, the court reached a different conclusion because of the "duplicitous tactics" it used in collecting the information. *Id.* at 295.

or "viewing data" fails to allege the type of highly offensive conduct required for an intrusion claim. This claim should be dismissed on this independent ground.

D. Plaintiffs fail to state a claim for negligence as a matter of law

The elements of a negligence claim are familiar: "1) the existence of a duty recognized by law; 2) failure to perform that duty; and 3) injury or damage to the plaintiff proximately caused by such failure." *Action Sec. Serv., Inc. v. Am. Online, Inc.*, No. 6:03-cv-1170-Orl-22DAB, 2005 U.S. Dist. LEXIS 50842, *20 (M.D. Fla. May 27, 2005); *see also Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 59 A.3d 561, 571 (N.J. 2013). The existence of a duty is a threshold requirement and a question of law for the court. *Virgilio v. Ryland Group, Inc.*, 680 F.3d 1329, 1339 (11th Cir. 2012); *see also Carvalho v. Toll Bros. & Developers*, 675 A.2d 209, 212 (N.J. 1996). Plaintiffs allege variously that Omegle owed "C.H. and the general public" (1) "a duty to use ordinary care in designing, maintaining, and distributing its products and services to children", (2) "a duty of care to provide a safe online community," and (3) "an ongoing, non-delegable duty to continue to monitor, supervise, inspect, and assess the use of service and application [sic] to prevent the mistreatment of its users." (Dkt. 75 ¶¶ 117, 119, 121.)

Although foreseeability is an important component of the determination whether a duty exists, public policy considerations can also play a role. *See e.g., Estate of Desir ex rel. Estiverne v. Vertus*, 69 A.3d 1247, 1256 (N.J. 2013) (noting that "because imposing a duty based on foreseeability alone could result in virtually unbounded liability," New Jersey courts have "been careful to require that the analysis be tempered by broader considerations of fairness and public policy");

Biglen v. Fla. Power & Light Co., 910 So. 2d 405, 409 (Fla. Dist. Ct. App. 2005) ("Finding that a legal duty exists in a negligence case involves the public policy decision that a defendant should bear a given loss, as opposed to distributing the loss among the general public.") (internal quotation marks omitted).

Even assuming the SAC plausibly alleges the foreseeability of harm, other considerations weigh heavily against imposing a duty upon Omegle to be the guarantor of the safety of the users of its website against harm perpetrated by their fellow users. For example, the relationship between Omegle and C.H. is at best fleeting—C.H. had never used the Omegle website before the day the alleged incident occurred, she was not required to register with or log into the website, and she was not required to make any payment to Omegle. In short, C.H.'s "relationship" with Omegle was no more substantial than her "relationship" with any other website she visited. The SAC's vague allegations also do not demonstrate any "special relationship" that would support imposing a duty. Fairness and public policy counsel against imposing a duty of care under these circumstances. A number of cases have declined to impose such a duty on websites that facilitate users' communications.

For example, in *Dyroff v. Ultimate Software Group, Inc.*, plaintiff alleged that a website had a duty to warn her son who died from an overdose of fentanyl-laced heroin purchased from a dealer he met on the website. No. 17-cv-05359-LB, 2017 U.S. Dist. LEXIS 194524, *1, 30 (N.D. Cal. Nov. 26, 2017). The district court found that there was no special relationship between a website and its users that would support imposing a duty to warn and no other ground to impose an

ordinary duty of care. *Id.* at *36-40. The Ninth Circuit affirmed, noting that "[n]o website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content." *Dyroff*, 934 F.3d at 1101. Similarly, in *Doe No. 14 v. Internet Brands, Inc.*, defendant offered a website on which aspiring models could post profiles. No. CV 12-3626-JFW (PJWx), 2016 U.S. Dist. LEXIS 192144, *1-2 (C.D. Cal. Nov. 14, 2016). Two individuals used the website to identify targets for a scheme under which they would pose as talent scouts and lure the models to a fake audition where they were drugged and assaulted. Defendant learned that these individuals were using the website to identify targets and plaintiff subsequently became a victim of it. *Id.* at *2, 4. Plaintiff sued the site alleging a negligent failure to warn. But the court dismissed the claim, finding that the site had no duty to warn either plaintiff or its users generally about the risk of the perpetrators' scheme. *Id.* at *13-14 (finding "no exceptional reason to depart from the general common law rule that one owes no duty to control the conduct of another, nor to warn those endangered by such conduct") (internal quotation marks omitted).

Imposing a duty of care on Omegle—much less the impossible duty of guaranteeing website users' safety—would be both ineffectual and unjust. No website that facilitates users' communications—including all social networking sites—could function if such a duty were imposed. Thus, because no duty exists, the negligence claim fails (in addition to being barred by CDA 230).

E. The public nuisance claim is implausible and should be dismissed

The SAC asserts that "Omegle created and developed a public nuisance

Omegle.com which violates public rights, and subverts public order, decency, and morals [and] inconveniences and damages the general public, including Plaintiff [sic].” (Dkt. 75 ¶¶ 148-149.) But “the tort of public nuisance fundamentally involves the vindication of a right common to the public.” *In re Lead Paint Litig.*, 924 A.2d 484, 496 (N.J. 2007) (citing RESTATEMENT § 821B). Critical to such a claim is “some interference with a public right”, which is a right “common to all members of the general public.” RESTATEMENT § 821B, cmt. g (“It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”). But the SAC fails to plausibly allege that Omegle’s chat service implicates a “public right” that is “common to all members of the general public.” Their conclusory statements do not “raise a right to relief above the speculative level” and are insufficient to state a claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, even if CDA 230 did not bar this claim, it would fail on its own merit as a matter of law.

F. There is no cause of action for ratification/vicarious liability

The SAC’s addition of “assertions” to the cause of action for “ratification/vicarious liability” cannot rescue it because it is not a cognizable cause of action. In that “claim,” the SAC alleges that Omegle is “vicariously liable for the conduct of the ‘cappers’ because they [sic] ratified their conduct, knowingly received the benefits of said conduct [and] created, developed, and maintained a forum to entice, encourage and enable the sharing of such conduct.” (Dkt. 75 ¶¶ 143-144.) But “ratification” and “vicarious liability” “are not independent causes of action[,] they are theories of liability for other claims.”

Ceithami v. Celebrity Cruises, Inc., 207 F. Supp. 3d 1345, 1349 (S.D. Fla. 2016); *see also Williams v. Verizon N.J., Inc.*, No. 2:19-09350-KM-MAH, 2020 U.S. Dist. LEXIS 43528, *32 (D.N.J. Mar. 12, 2020). Thus, this "claim" should be dismissed.

V. Leave to Amend Should Not Be Granted

Notwithstanding the general liberal standard for pleading amendments, courts routinely deny leave to amend when CDA 230 bars the claims on the ground that amendment would be futile. *See, e.g.*, *Kik*, 482 F. Supp. 3d at 1251-52 (amendment futile as CDA 230 would also bar plaintiff's proposed new claims); *Saponaro*, 93 F. Supp. 3d at 322 (dismissing complaint with prejudice based in part on CDA 230). This case is no different. Plaintiffs' claims are largely, if not entirely, barred by CDA 230. Even assuming that the VPPA claim is not barred by CDA 230, any attempted amendment to that claim is futile as the statute simply does not apply. Additionally, the deficiencies in Plaintiffs' claims were described in Omegle's prior two motions to dismiss. But despite having the opportunity to twice amend their complaint, Plaintiffs failed to address those deficiencies, strongly suggesting that they cannot be cured by amendment. Thus, because further amendment would be futile, the SAC should be dismissed with prejudice. *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010) (futility of amendment is a proper ground to dismiss with prejudice).

CONCLUSION

Therefore, for the reasons stated herein, Omegle respectfully requests that Plaintiffs' SAC be dismissed in its entirety and without leave to amend.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), counsel for Defendant represents that they have conferred with counsel for Plaintiffs. However, the parties were unable to reach agreement with respect to the relief requested in this Motion.

DATED: October 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, a true and correct copy of the foregoing will be served electronically through the Clerk of Court's CM/ECF filing system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail, postage prepaid, to any parties that do not participate in the CM/ECF filing system.

s/ *Stacia N. Lay*
Stacia N. Lay

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 21-00768 JVS (KESx)	Date	October 7, 2021
Title	Jane Doe et al. v. Reddit, Inc.		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**
Deborah Lewman	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **[IN CHAMBERS] Order Regarding Motion to Dismiss**

Defendant Reddit, Inc. ("Reddit") filed a motion to dismiss the complaint of Plaintiffs Jane Does Nos. 1-6 and John Does Nos. 2, 3, and 5 (collectively — "Plaintiffs"). Mot., Dkt. No. 40. Plaintiffs filed an opposition. Opp'n, ECF No. 43. Reddit responded. Reply, ECF No. 44.

Plaintiffs filed a request for a hearing. Request, Dkt. No. 55. Reddit opposed the request for hearing. Dkt. No. 57. The Court finds that oral argument would not be helpful in this matter.

For the following reasons, the Court **GRANTS** the motion.

I. BACKGROUND

This is a class action lawsuit that arises from the posting on Reddit's website sexually explicit videos and images of individuals under the age of 18 — commonly referred to as child sexual exploitation material ("CSEM"). First Amended Complaint ("FAC"), ECF No. 31, ¶ 1. Before addressing Plaintiffs' claims, the Court briefly reviews how Reddit is structured.

Reddit is one of the Internet's most popular websites and is built around users submitting links, pictures, and text that everyone can view and vote on. Id. ¶¶ 36-37. Reddit is organized into what are called "Subreddits," which are online bulletin boards that are focused on particular themes or interests. Id. ¶ 38. Subreddits are governed as follows. Reddit allows users to create Subreddits. Id. ¶ 44. Each Subreddit is managed by a small group of users, who are given the title of "moderator." Moderators can dictate

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what type of content is allowed on the Subreddit, subject to certain overall limitations placed by Reddit. Id.

Reddit itself has four teams of employees that engage in content moderation for the company. Id. ¶¶ 44-47. "Administrators" have the power to strip moderators of their privileges and ban Subreddits or particular content from Reddit. Id. ¶ 44. Administrators are primarily supposed to identify and remove content that violates Reddit's Content Policy, whether on Subreddits or in private messages between users. Id. ¶ 44. The Trust & Safety Team focuses on enforcing Reddit's Content Policy against malicious users and when content violations may have urgent legal or safety implications. Id. ¶ 45. The Anti-Evil internal security team consists of back-end engineers who create automated software that flags content that violates Reddit's policies. Id. ¶ 46. Finally, the Legal Operations Team removes or disables content that it finds to be in violation of the Digital Millennium Copyright Act. Id. ¶ 47.

Jane Doe No. 1 is an individual who is now of the age of majority under United States and California law. Id. ¶ 8. An ex-boyfriend of Jane Doe No. 1 posted sexually explicit images and videos of Jane Doe No. 1 from when she was 16 years old on websites, including Reddit, without her consent. Id. ¶¶ 143-46. Each time that Jane Doe No. 1 reported the CSEM of herself to Subreddit moderators, it would take days for the CSEM to come down, only for it to reappear within minutes. Id. ¶¶ 148-49. When she had her ex-boyfriend's account banned, he was able to make a new account and post the CSEM anew. Id. ¶ 151.

Jane Does Nos. 2-6 and John Does Nos. 2, 3, and 5 are the parents of daughters who are below the age of majority under United States and California law. Id. ¶¶ 9-13. Each of their daughters has had CSEM images or videos of them posted on Reddit and have had to repeatedly request that various Subreddit moderators and Reddit administrators remove the CSEM, often only to have the CSEM reappear shortly after it is removed. Id. ¶¶ 156-229.

Plaintiffs allege that Reddit knowingly facilitates the posting of CSEM and benefits from the CSEM in the form of increased advertising revenue and subscription fees by premium Reddit users. Id. ¶¶ 61-65, 75, 119. Plaintiffs allege that Reddit facilitates the posting of CSEM to achieve these benefits in a variety of ways, including (1) allowing the creation of a number of Subreddits that target users seeking CSEM, id. ¶

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94; (2) rarely removing CSEM when it is reported by users, id. ¶ 82; (3) failure to verify users' age, id. ¶ 51; (4) reliance on poorly trained, volunteer moderators to manage Subreddits, id. ¶¶ 106-07, 110; (5) having ineffective and inefficient administrators managing content moderation for Reddit, id. ¶¶ 108-09, 112; (6) failing to take steps to prevent banned users from creating new user accounts on the website, id. ¶¶ 113-14; (7) failing to report all CSEM to the National Council for Missing and Exploited Children ("NCMEC"), id. ¶ 124; and (8) failing to use PhotoDNA, an automated means of identifying images of CSEM previously identified to NCMEC, until 2019, and at that point only using PhotoDNA minimally, id. ¶¶ 122-124.

Plaintiffs bring this lawsuit on behalf of one class and two subclasses. The Class is defined as:

> all persons who were under the age of 18 when they appeared in a sexually explicit video or image that has been uploaded or otherwise made available for viewing on any website owned or operated by Reddit, Inc. in the last ten years.

Id. ¶ 239. Jane Doe No. 1 seeks to represent the following California subclass:

> all persons residing in California who were under the age of 18 when they appeared in a sexually explicit video or image that has been uploaded or otherwise made available for viewing on any website owned or operated by Reddit, Inc. in the last ten years.

Id. ¶ 240. The remaining Plaintiffs seek to represent the following New Jersey subclass:

> all persons residing in New Jersey who were under the age of 18 when they appeared in a sexually explicit video or image that has been uploaded or otherwise made available for viewing on any website owned or operated by Reddit, Inc. in the last ten years.

Id. ¶ 241.

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Plaintiffs filed their Complaint on April 22, 2021. See generally Complaint, ECF No. 1. Following the filing of the instant motion and a motion to stay discovery, Plaintiffs filed the FAC. See generally FAC. Plaintiffs now bring nine claims for relief: (1) violation of the federal Trafficking Victims Protection Act, 18 U.S.C. §§ 1591, 1595; (2) violation of the duty to report child sexual abuse material under 18 U.S.C. § 2258A; (3) receipt and distribution of child pornography in violation of 18 U.S.C. § 2252A; (4) distribution of private sexually explicit materials in violation of Cal. Civ. Code § 1708.85; (5) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200; (6) violation of California's Trafficking Victims Protection Act, Cal. Civ. Code § 52.5; (7) violation of New Jersey's child exploitation laws, N.J. Rev. Stat. § 2A:30B-3; (8) unjust enrichment; and (9) intentional infliction of emotional distress. FAC ¶¶ 248-98. Of these claims, the three claims for violation of California law are brought on behalf of the California subclass while the claim for violation of New Jersey law is brought on behalf of the New Jersey subclass. Id. ¶¶ 273-89.

Reddit moved to stay discovery pending resolution of this motion. Stay Mot., ECF No. 25. The Court granted that motion. Order, ECF No. 35.

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Nor must the Court "'accept as true a legal conclusion couched as a factual allegation.'" Id. at 678-80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the

well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Section 230 Generally

Reddit's primary argument is that dismissal is appropriate because Plaintiffs' claims are barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. See Mot. at 5-18. Under § 230(c)(1), "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In other words, "Section 230(c)(1) precludes liability for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat as a publisher or speaker (3) of information provided by another information content provider." Gonzalez v. Google LLC, 2 F.4th 871, 891 (9th Cir. 2021) (internal quotation marks omitted).

The Court concludes that § 230 immunizes Reddit from many of Plaintiffs' claims.[1] First, Reddit is a provider of an interactive computer service. Under § 230(f)(2), an "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." Reddit provides a system that enables computer access by multiple users to a server. See also Hepp v. Facebook, Inc., 465 F. Supp. 3d 491, 498 (E.D. Pa. 2020) (finding that Reddit "falls squarely within" the definition of interactive computer service).

Plaintiffs argue that "the complaint alleges Reddit is responsible in whole or in part, for the creation or development of information." Opp'n at 18. As a consequence,

[1] Plaintiffs argue that the Court should not consider whether § 230 bars Plaintiffs' claims because § 230 provides an affirmative defense to claims. Opp'n at 18 n.9 (citing Gonzalez, 2 F.4th at 889; Lusnak v. Bank of America, N.A., 883 F.3d 1185, 1194 n.6 (9th Cir. 2018)). But the Ninth Circuit has held that § 230 can be considered on a motion to dismiss where "the allegations in the complaint suffice to establish the defense." Gonzalez, 2 F.4th at 890 n.8. The Court concludes that such is the case here. The Court does agree with Plaintiffs that if the complaint does contain sufficient factual allegations suggesting that Reddit is not immune under § 230, then the Court cannot dismiss the claims on that basis. See Opp'n at 18 n.10. But this is not the case here.

Plaintiffs contend that Reddit is an "information content provider" and not an "interactive computer service." Under 47 U.S.C. § 230(f)(3) 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." Under Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1167-68 (9th Cir. 2008), a website is classified as an information content provider if it "materially contributes to [the information's] unlawfulness." Cases applying this test "have consistently drawn the line at the '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.'" Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 n.4 (9th Cir. 2016) (quoting Jones v. Dirty World Entertainment Recordings LLC, 755 F.3d 398, 413–14 (6th Cir. 2014)) (citing Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 257–58 (4th Cir. 2009); Federal Trade Commission v. Accusearch Inc., 570 F.3d 1187, 1197-1201 (10th Cir. 2009)). Thus, "providing neutral tools to carry out what may be unlawful or illicit" is not sufficient to make an entity an "information content provider." Fair Housing Council, 521 F.3d at 1169.

In making their argument, Plaintiffs rely most heavily on M.L. v. craigslist Inc., 2020 WL 5494903, at *4 (W.D. Wash. Sept. 11, 2020). See Opp'n at 19. In that case, the court held that craigslist was an information content provider with respect to sex trafficking advertisements posted to its website. M.L., 2020 WL 5494903 at *3-4. The court so held because (1) trafficking advertisements were posted on craigslist's website while complying with its rules and guidelines, (2) traffickers paid craigslist to display trafficking advertisements in the "erotic services" section of the website, and (3) traffickers were able to evade law enforcement by making use of craigslist's anonymous communications system. Id. at *3. These allegations collectively described "specific, concrete actions taken by craigslist that facilitated [the plaintiff's] trafficking."[2] Id.

[2] Reddit attempts to characterize M.L. as holding that a website provider can only become an information content provider if the "website was designed" to take the illegal action. Reply at 3 (emphasis in original). But the M.L. court does not use the word "designed" in reaching its conclusion. See generally 2020 WL 5494903. Also, as noted previously, the test in the Ninth Circuit is whether the website provider being "responsib[le] for what makes the displayed content illegal or actionable." Kimzey, 836 F.3d at 1269 n.4. The Court will look to this test.

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Here, Plaintiffs contend that the FAC alleges that Reddit is an information content provider because of Reddit's (1) "refusal to enforce its policies," (2) provision of "karma" awards for subreddits featuring CSEM, (3) pseudonymous, private messaging system that allows evasion of law enforcement, (4) "elevation" of subreddits involving CSEM, and (5) use of "barely-trained moderators who failed to enforce its policies and propagated the spread of" CSEM. Mot. at 19. Before considering this argument, the Court first elaborates on the exact allegations in the FAC. First, the FAC states that Reddit "tries to ban as little content as possible" and so provides a reporting tool that includes "no opportunity for a user to explain to Reddit why the content is child pornography, [leaving] the user . . . to rely on a Reddit administrator or moderator to decide whether to remove the content." FAC ¶¶ 80, 82. Plaintiffs summarize these allegations as showing Reddit's "refusal to enforce its policies." Opp'n at 19. Second, contrary to Plaintiffs' summary, paragraphs 115 and 116 of the FAC do not include allegations that Reddit took any actions that "elevated" subreddits where users had posted CSEM. Rather, those paragraphs allege that those subreddits were often searched for by users and rated highly in user polls. FAC ¶ 115.

The Court is not persuaded that these allegations are sufficient for the Court to find that Reddit is an information content provider. The Court does not believe that the allegations show that Reddit is responsible for the illegal content on its website. Many allegations that Plaintiffs point to do not speak to whether Reddit "materially contributed" to the CSEM because the allegations relate to "neutral tools." Karma awards, which are an aggregate metric representing how many user votes a user has received,[3] and pseudonymous, private messaging apply broadly across Reddit and do not play any special role in the illegality of the CSEM. See Kimzey, 836 F.3d at 1270 (holding that "inputs from third parties [that] reduce[] . . . information into a single, aggregate metric . . . is best characterized as the kind of 'neutral tool[ ]' operating on 'voluntary inputs' that we determined did not amount to content development or creation");[4] Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1127-29 (N.D. Cal. 2016)

[3] Karma "reflects how much a user has contributed to the Reddit community by an approximate indication of the total votes a user has earned on their submissions ('post karma') and comments ('comment karma')." FAC ¶ 41 (citation omitted).

[4] Plaintiffs' argument that karma is awarded by Reddit is irrelevant because the amount that users receive is determined by votes the user receives from other users. Opp'n at 20. While Reddit may have created a system for awarding karma, this does not change the fact that it is an aggregate metric.

(holding that the provider of a direct messaging service is not a publisher and is therefore immune under § 230). Nor does the Court believe that having a reporting tool without a comment section amounts to "materially contributing" to users posting CSEM on its website.

The remaining issue is whether Reddit's use of community moderators causes Reddit to material contribute to users posting CSEM on its website. First, the Court notes that having community moderators instead of company moderators does not appear to the Court to have any bearing on whether Reddit is responsible for users posting CSEM on its website. In theory, a very highly trained set of committed community moderators could create an effective system for taking down CSEM.

Plaintiffs' more promising argument is that Reddit's community moderators are poorly trained, and this means Reddit materially contributes to users posting CSEM on its website. Plaintiffs allege that community moderators are slow, can engage in "seemingly arbitrary behavior," can have difficulty communicating with Reddit administrators, and may be overruled by Reddit when moderators find that content violates Reddit's Content Policy. See FAC ¶ 108-12. But the Court notes that these allegations do not appear to be specific to Reddit's treatment of CSEM; rather, the complaints about Reddit's use of community managers generally relate to handling of content that violates Reddit's Content Policy. This is a key distinction with M.L. In that case, the allegations indicated that craigslist had rules, guidelines, and processes in place for its "erotic services" section by which traffickers could post advertising on craigslist's website such that they could avoid law enforcement. M.L., 2020 WL 5494903 at *3-4. By contrast, here Reddit does not have a special way of handling CSEM that is particularly permissive relative to other kinds of content. The allegations against Reddit here are not sufficiently targeted such that there is "responsibility for what makes the displayed content illegal." Kimzey, 836 F.3d at 1269 n.4; see F.T.C. v. Accusearch, 570 F.3d 1187, 1199 (10th Cir. 2009) (holding that "a service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content" (emphasis added)).

Plaintiffs also advance a different theory that community moderators who upload CSEM are Reddit's agents. Opp'n at 19-20. But this argument is unavailing. Plaintiffs

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All such metrics must be created by an interactive service provider.

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analogize this case to Accusearch, in which "defendant's knowledge that third-party 'researchers were obtaining the information through fraud or other illegality' that was posted on defendant's platform indicated its responsibility for developing unlawful content." Opp'n at 19 (quoting Accusearch, 570 F.3d at 1199). But here there is no allegation that Reddit knew that the accused moderators were also posting CSEM. Cf. Reply at 7. Plaintiffs then compare the case to Mavrix Photographs, LLC v. Livejournal, Inc., 873 F.3d 1045, 1054 (9th Cir. 2017), in which the Ninth Circuit held that the Court should consider "common law agency principles" when deciding whether to hold a social media platform liable for the actions of moderators. Opp'n at 19-20. This case is inapposite for two reasons. First, Marvix related to copyright law, not Section 230, and therefore is no directly relevant to the analysis here. See generally Marvix, 873 F.3d 1045. Moreover, in Marvix it was alleged that Marvix gave "explicit and varying levels of authority to screen posts," and this made Marvix an agent for purposes of screening and posting images. Id. at 1054. By contrast, there is no allegation that Reddit gave authority to the moderators to post CSEM or that they appeared to be agents of Reddit as they were posting CSEM. See generally FAC. The Court therefore concludes that Reddit is an information service provider that could be covered by § 230.

Returning to the remaining requirements for § 230 immunity, it is readily apparent that several of Plaintiffs' claims seek to treat Reddit as a publisher or speaker of information provided by other content providers. Plaintiffs assert a claim for unjust enrichment because "[b]y permitting users to upload videos and images of Plaintiffs (and/or their daughters) and the Class and profiting from those videos and images, Defendant have [sic] become unjustly enriched at the expense of Plaintiffs and the Class . . .." FAC ¶ 292. The decision to permit users to upload content to a website is a quintessential function of a publisher under § 230. See Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105 (9th Cir. 2009) ("Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." (emphasis added)).[5] Similarly, Plaintiffs' claim for

[5] Plaintiffs attempt to distinguish the claim for unjust enrichment relating to advertising revenue as involving functions unrelated to publishing and therefore exempt from § 230 immunity. Opp'n at 21-22. The Court is not persuaded. Plaintiffs rely on Gonzalez, 2 F.4th at 897-99. Id. But in that case, the Ninth Circuit concluded that § 230 did not immunize Google from the allegation that it illegally provided material support to the terrorist group ISIS by sharing advertising revenue from YouTube with ISIS. Gonzalez, 2 F.4th at 898. In so holding, the Ninth Circuit noted that the claim "does not depend on

distribution of private sexually explicit materials stems from users being permitted to upload the relevant videos and images to Reddit. That claim is therefore barred. The same analysis holds true for Plaintiffs' claim for intentional infliction of emotional distress, which is premised on Reddit "knowingly tolerat[ing]" CSEM on its website. FAC ¶ 295. See Fair Housing Council, 521 F.3d at 1163 ("Congress sought to immunize the removal of user-generated content . . .."). The Court **DISMISSES** these claims.

B. Child Pornography Claims

Of course, providers of interactive computer services, like Reddit, do still have obligations for dealing with CSEM. Plaintiffs attempt to sue under the two statutes that provide the most stringent requirements: 18 U.S.C. §§ 2252A and 2258A. Neither, however, can form the basis of a claim that can proceed here. Although Plaintiffs assert a claim against Reddit for failing to report CSEM as required under 18 U.S.C. § 2258A, there is no private cause of action that allows Plaintiffs to assert that claim. See 18 U.S.C. § 2255 (providing causes of action for various violations of criminal CSEM statutes but not listing § 2258A).

18 U.S.C. § 2252A makes it illegal to knowingly receive and distribute CSEM. In contrast to § 2258A, § 2252A does provide a private right of action for individuals who are aggrieved by another's knowing receipt and distribution of CSEM. 18 U.S.C. § 2252A(f). But § 230 provides immunity for interactive computer services in civil suits under § 2252A as well. Notably, § 230(e)(1) states that § 230 "shall not be construed to impair the enforcement of . . . chapter 110 (relating to sexual exploitation of children) of title 18 . . .." Chapter 110 includes § 2252A. But, the Ninth Circuit has held that § 230(e)(1)'s use of the word "enforcement" shows an intent to only exclude criminal enforcement under that chapter, not civil claims. See Gonzalez, 2 F.4th at 890 (collecting cases); see also Doe v. Bates, 2006 WL 3813758, at *3-4 (E.D. Tex. Dec. 27, 2006) (holding that § 230(e)(1) does not provide an exception permitting civil suit under § 2252A). While the Government could prosecute interactive computer services for

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the particular content ISIS places on YouTube; this theory is solely directed to Google's unlawful payments of money to ISIS." Id. Here, by contrast, Plaintiffs' claim for unjust enrichment is the only one for which the illegality is the receipt of advertising revenue. That claim is inherently premised on the CSEM appearing near the advertising being improper. The particular content on Reddit therefore does matter, and Gonzalez is distinguishable.

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knowingly distributing CSEM, they cannot be subject to civil suits under these statutes. The Court therefore **DISMISSES** the child pornography claims.

C. Trafficking Claims

1. Federal Claim

This brings the Court to the Plaintiffs' attempt to assert a claim for violation of the federal sex trafficking laws that are exempted from § 230 immunity. In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"), which added § 230(e)(5). Pub. L. No. 115-164, 132 Stat. 1253. Under § 230(e)(5)(A), § 230 "shall not be construed to impair or limit" "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." 47 U.S.C. § 230(e)(5)(A). Under § 1595, "[a]n individual who is a victim of a violation of this chapter may bring a civil action against . . . whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter . . . ." 18 U.S.C. § 1595(a) (emphasis added). Section 1591, in turn, defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation" of subsection (a)(1)." Id. § 1591(e)(4).

The parties have substantial disagreement over what is required to state a claim under Section 1595 that is exempt from § 230 immunity. See Opp'n at 6-18; Reply at 18-23. The Court agrees with other courts that found that "the most persuasive reading of section 230(e)(5)(A) is that it provides an exemption from immunity for a section 1595 claim if, but only if, the defendant's conduct amounts to a violation of section 1591." J.B. v. G6 Hospitality, LLC, No. 19-cv-07848-HSG, 2021 WL 4079207 (N.D. Cal. Sept. 8, 2021); see also Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1251 (S.D. Fla. 2020); M.L. v. craigslist Inc., 2020 WL 5494903, at *4. Plaintiffs argue that the statutory language does not require the defendant to personally violate section 1591, but instead that the underlying conduct violates section 1591 as opposed to other provisions of chapter 77 of the criminal code. Request at 2. While other courts have adopted that reading, see Doe v. Twitter, Inc., No. 21-cv-00485-JCS, 2021 WL 3675207, at *23-*24 (N.D. Cal. Aug. 19, 2021); Doe v. Mindgeek USA Inc., -- F. Supp. 3d --, 2021 WL 4167054, at *4 (C.D. Cal. Sept. 3, 2021), the Court does not find their reasoning persuasive.

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It is more logical to read the statute as requiring the conduct underlying the claim against the defendant to be the same as the claim in the civil action brought under section 1595. The legislative history comports with the Court's reading of the plain text. See J.B., 2021 WL 4079207, at *7-*11 (reviewing the legislative history and determining that "Congress reached a compromise by including a narrowed federal civil sex trafficking carve-out"). Plaintiffs argue for a broad reading of § 230(e)(5) in light of the remedial nature of the law. Request at 3. That is not enough, however, to overcome the plain language of the statute, especially given that section 230 as a whole is designed to provide immunity to interactive computer service providers. See Fair Hous. Council of San Fernando Valley v. Roommates.Com, 521 F.3d 1157, 1174 (9th Cir. 2008) ("[T]his is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content."). In interpreting the statute in that manner, the Court will apply the "knowingly" standard from section 1591 instead of the more lenient mens rea standard under section 1595 of "known or should have known."

In the Court's order granting Reddit's motion for a stay of discovery pending resolution of this motion, the Court held that it "does not see any indication from the facts alleged that Plaintiffs would be able to state a claim under § 1591." Order at 8. This was because "courts defining participation under § 1595 have, in the absence of direct association, required a showing of a continuous business relationship between the trafficker and the defendant such that it would appear that the trafficker and the defendant have established a pattern of conduct or could be said to have a tacit agreement." Id. at 7 (quoting J.B. v. G6 Hospitality, LLC, 2020 WL 4901196, at *9 (N.D. Cal. Aug. 20, 2020)). The Court found that the allegations in the FAC were insufficient to show a "continuous business relationship." Id.

Plaintiffs now point to other allegations that they allege indicate that Reddit "knowingly fostered a business relationship with sex traffickers to support their trafficking ventures." Opp'n at 13-14. But there is no indication that there was a "business relationship" with such traffickers. It is true that there can be a "tacit agreement" that gives rise to participation in a venture. But where Reddit is not accused of having made a business deal with the alleged traffickers – and did not have any

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monetary relationship with those traffickers – the standard for stating a claim under § 1595 has not be satisfied.[6]

The core of the Court's analysis from the previous order still holds true. Although Plaintiffs cite to a variety of other paragraphs in the FAC, see Opp'n at 13-14 (collecting citations), these allegations can be summarized as stating that Reddit has "affiliations with sex traffickers by enabling the posting of child pornography on its websites" and "making it easier to connect traffickers with those who want to view child pornography." FAC ¶ 255. But this allegation is not sufficient to show "a continuous business relationship between" Reddit and traffickers. "To conclude otherwise would mean that all web-based communications platforms have a legal duty to inspect every single user-generated message before it is communicated to a single person or displayed to the public, lest such platforms be deemed to have participated in the venture." J.B., 2020 WL 4901196, at *9. "[T]here is no indication that Congress intended to create such a duty, or that it would be reasonable in light of the volume of posts generated by third parties daily." Id. The Court agrees with the J.B. court and does not see any indication from the facts alleged that Plaintiffs would be able to state a claim under § 1591.[7]

While other courts have recently found allegations sufficient to support a finding that web-based communication platforms were participating in a venture, those courts were both applying a different legal standard and considering different facts. See Doe v. Mindgeek, 2021 WL 4167054, at *5-*6 (Sept. 3, 2021) (finding plaintiffs sufficiently allege participation in a venture where an employee of the defendant reviewed, approved, and uploaded a video of a plaintiff); Doe v. Twitter, 2021 WL 3675207, at *23-*24 (N.D. Cal. Aug. 19, 2021) (finding participation in a venture where employees of defendant allegedly refused to take down videos of plaintiff after being notified of a police

[6] Plaintiffs argue that a footnote in J.B. expands the scope of what constitutes participation in a venture. Opp'n at 13 (citing J.B., 2020 WL 4901196, at *9 n.3). In that footnote, the J.B. court stated that it "can envision a circumstance, for example, in which a website operator openly and knowingly makes a deal with sex traffickers to support the venture by posting advertisements featuring trafficked minors in exchange for a cut of the proceeds," and thereby participated in a sex trafficking venture. J.B., 2020 WL 4901196 at *9 n.3. But that footnote discusses a hypothetical and one in which the defendant received a "cut of the proceeds." Id. The footnote therefore has no bearing on the Court's analysis.

[7] This analysis does not address whether the distribution of CSEM is a form of sex trafficking as contemplated by § 1591(a)(1), an issue which the Court does not reach.

complaint regarding the images at issue and prior complaints regarding the specific account at issue posting CSEM); M.L., 2020 WL 5494903, at *5-*6 (finding allegations sufficient to support knowing participation in venture where it was alleged that craigslist received advertising fees paid directly by traffickers and developed specific policies requiring the blurring and cropping of images to obscure age and identity of trafficking victims). The allegations cited by Plaintiffs are insufficient to support a finding that Reddit knowingly participated in a venture, as defined by § 1591. See Opp'n at 7 n.2. The Court **DISMISSES** Plaintiffs' federal sex trafficking claim.

2. State Claims

Reddit argues that the state law trafficking claims are barred by Section 230. Mot. at 18. The Court previously found that Section 230 did bar these claims. Order at 8-11. Plaintiffs do not raise any new arguments in response to the Court's previous holding. Opp'n at 22 n.12. The Court therefore **DISMISSES** Plaintiffs' state law trafficking claims.

D. UCL Claim

Finally, the Court notes that Plaintiffs cannot assert their remaining UCL claim. For an individual to assert a UCL claim, the person must have "suffered injury in fact and . . . lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. But, there is no indication in the FAC that Plaintiffs have lost money or property as a result of Reddit's alleged conduct. The Court **DISMISSES** this claim.

E. Leave to Amend

Plaintiffs seek leave to amend the allegations of their complaint. Opp'n at 25. "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). In all other cases, a party may amend its pleading only with written consent from the opposing party or the court's leave, which should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2); see Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (requiring that policy favoring amendment be applied with "extreme liberality").

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 21-00768 JVS (KESx) Date October 7, 2021

Title Jane Doe et al. v. Reddit, Inc.

In the absence of an "apparent or declared reason," such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by prior amendments, prejudice to the opposing party, or futility of amendment, it is an abuse of discretion for a district court to refuse to grant leave to amend a complaint. Foman v. Davis, 371 U.S. 178, 182 (1962); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 538 (9th Cir. 1989). The consideration of prejudice to the opposing party "carries the greatest weight." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility, or where the amended complaint would also be subject to dismissal." Steckman v. Hart Brewing, 143 F.3d 1293, 1298 (9th Cir. 1998) (internal citations omitted).

Here, the Court does not find that there was undue delay given that Plaintiffs' complaint has only been amended once. The Court is not convinced that the action was filed in bad faith. The Court is not convinced that most amendments would be futile or that Reddit will be unduly prejudiced. The exception is that the Court has concluded that there is no legal basis for bringing a claim under 18 U.S.C. § 2258A. Therefore, the Court **GRANTS** Plaintiffs thirty-days' leave to amend its claims, except as to the § 2258A claim.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion. The Court finds that oral argument would not be helpful in this matter and **VACATES** the hearing. Fed. R. Civ. P. 78; L.R. 7-15.

IT IS SO ORDERED.

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