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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DEBBIE GODWIN,
Plaintiff

FACEBOOK, INC. ET AL.
Defendant

Case No: CV-18-891841

Judge: TIMOTHY MCCORMICK

JOURNAL ENTRY

89 DIS. W/PREJ - PARTIAL

THE FACEBOOK DEFENDANTS' MOTION TO DISMISS UNDER CIV. R. 12(B) IS GRANTED. THE PLAINTIFF'S CLAIMS ARE DISMISSED WITH PREJUDICE. ORDER: SEE JOURNAL.
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date 10/5/18

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CUYAHOGA COUNTY

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10/03/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Debbie Godwin, etc.	)	Case No. CV-18-891841
	)	
Plaintiff;	)	Judge Timothy P. McCormick
	)	
-v.-	)	
	)	
Facebook, Inc., et al.,	)	**Opinion and Order**
	)	
Defendants.	)	
	)	

On April 16, 2018, Steve Stephens ("Stephens") posted a message on his Facebook page which read:

> FB my life for the pass year has really been fuck up!!! [sic] lost everything ever had due to gambling at the Cleveland Jack casino and Erie Casino...I not going to go into details [sic] but my breaking point really on some murder shit. FB you have 4 minutes to tell me why I shouldn't be on deathrow!!!! dead serious #teamdeathrow (Compl. at ¶68.)

Moments later, Stephens murdered Robert Godwin Sr.. (Compl. at ¶¶68-78.) Stephens did not know Mr. Godwin, and the murder appeared to have been random. (Compl. at ¶72.)

Following Stephens's suicide, Defendant Joseph A. Kaycon was appointed the administrator of his estate.[1] Plaintiff Debbie Godwin ("Godwin"), the executrix of the estate of her father Mr. Godwin brought claims against Stephens's estate for wrongful death and survivorship. " (Count Four Compl. at ¶¶ 107-110; Count Five Compl. at ¶¶ 111-115.)

[1] Kaycon was substituted for the original administrator Brenda D. Joiner-Haymon on April 23, 2018.

But, as the caption to this case indicates, this lawsuit is not simply a wrongful death action against the estate of the killer. Godwin also makes claims against Facebook Inc., the company which owns and manages the social media network Facebook where Stephens posted his final messages, and its subsidiaries, Facebook Payments, Inc., Facebook Services, Inc., Atlas Solutions, LLC, and CrowdTangle, Inc (collectively "The Facebook Defendants"). Godwin makes claims against the Facebook Defendants for, "Negligence/Failure to Warn" (Count One Compl. at ¶¶ 81-89), "Civil Recovery for Criminal Act" (Count Two Compl. at ¶¶90-100), "Negligence/Failure to Warn" (Count Three Compl. at ¶¶101-106), as well as the "Wrongful Death" (Count Four Compl. at ¶¶ 107-110), and "Survivorship" claims she has made against Stephens's estate. (Compl. at ¶¶ 111-115).

The Facebook Defendants moved to dismiss Godwin's claims against them for lack of personal jurisdiction under Civ. R. 12(B)(2), and for failure to state a claim on which relief can be granted under Civ. R. 12(B)(6).

I. Personal Jurisdiction

When a defendant files a motion to dismiss for lack of personal jurisdiction under Ohio Civ. R. 12(B)(2), the burden falls to the plaintiff to demonstrate that the court has jurisdiction over the defendants. If the court is only relying on written submissions, the plaintiff is only required to make a prima facie showing that the court has jurisdiction. *Fallang v. Hickey*, (1988) 40 Ohio St.3d 106, 107, 532 N.E.2d 117. "'The court must view allegations in the pleadings and the documentary evidence in a light most favorable' to the plaintiff and resolving all reasonable competing inferences in favor of the plaintiff." *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St. 3d 81,

85, 2010-Ohio-2551, ¶ 27, 930 N.E.2d 784, 790 (quoting *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 236, 1994 Ohio 229, 638 N.E.2d 541). If the plaintiff makes a prima facie showing on the papers, the Court may not dismiss the complaint without an evidentiary hearing. *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, ¶ 11.

Ordinarily, an Ohio court must first determine whether jurisdiction over a party is conferred by Ohio's long-arm statute. See *Id.* at ¶ 12. If the long-arm statute confers jurisdiction, the court must then determine if jurisdiction is consistent with the due process clause of the Fourteenth Amendment. *Id.* In this case, the parties are not disputing, and have not provided briefing on the issue of whether personal jurisdiction would be consistent with the long-arm statute. (Br. in Opp'n at 10.) Because the parties do not address it, and arguments over personal jurisdiction are waived if not raised in the first instance, the analysis will be confined to the constitutional issue.

The due process clause of the Fourteenth Amendment governs the constitutional contours of personal jurisdiction. To satisfy due process, a defendant must have, "'certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting *Milken v. Meyer*, 311 U.S. 457, 463 (1940)).

The Facebook Defendants are Delaware corporations with their principal place of business in California. (Compl. at ¶¶ 11-15.) Under *Daimler AG v. Bauman*, 571 U.S. 117, 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), their state of incorporation and principal place of business constitute sufficient minimum contacts to subject them to

general personal jurisdiction in those forums. Since Ohio is neither California or Delaware, Godwin must demonstrate that Ohio can exercise specific personal jurisdiction over the Facebook Defendants.

Unlike general personal jurisdiction, specific personal jurisdiction "arises out of the defendants' contacts with the forum." *Helicopteros Nacionales De Colombia v. Hall,* 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). "[T]he relationship among the defendant, the forum, and the litigation is the essential foundation of in personam jurisdiction." *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)(internal quotations omitted)(emphasis deleted).

The Ohio Supreme Court has adopted a three-part test used by the Sixth Circuit Court of Appeals to determine if specific personal jurisdiction exists:

> "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.'" *Kauffman Racing Equip., L.L.C. v. Roberts,* 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, ¶ 49 (quoting *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir.1968)). See also *Bristol-Myers Squibb Co. v. Superior Court*, ___U.S.___, 137 S.Ct. 1773, 1785-1786, 198 L.Ed.2d 395 (2017).

The Supreme Court has not yet addressed when virtual contacts are sufficient to establish purposeful availment. See *Walden* v. Fiore, 134 S. Ct. 1115, 1125 n.9 (2014) ("We leave questions about virtual contacts for another day"). Godwin argues that this Court should apply the "sliding scale" test developed in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). (See Br. in Opp'n at 12.) In *Zippo*, the

court held that, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* at 1124. It then described a "sliding scale" where personal jurisdiction is tied to the level of "interactivity" that a defendant's website has:

> (1) If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper;
>
> (2) A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction;
>
> (3) The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *Id.*

Godwin argues that, the Facebook Defendants easily fall into category one because the social networking website Facebook is a highly interactive website. (Br. in Opp'n at 15.)

The *Zippo* test has been the subject of a great deal of scholarly and judicial criticism despite its widespread influence. There are two reasons to doubt the applicability of the *Zippo* test to this case. First, the *Zippo* court explicitly described its sliding scale test in terms of contracts and commercial activity. *Id.* This fact was recognized by the Ohio Supreme Court in *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St. 3d 81, 2010-Ohio-2551, ¶ 26, 930 N.E.2d 784. In *Kauffman*, the Court rejected the application of the *Zippo* framework to a defamation claim. It stated that, "[w]hen the Internet activity in question, "is non-commercial in nature, the *Zippo*

analysis offers little to supplement the traditional framework for considering questions of personal jurisdiction." *Id.* (quoting *Oasis Corp. v. Judd* 132 F. Supp.2d 612, 622, fn. 9 (S.D.Ohio 2001)). Although this is arguably dicta, because the Court was determining whether the *Zippo* test applied to defamation actions in particular, it is nonetheless instructive. The *Zippo* court used website interactivity as a proxy for selling products and services in a forum, and did not appear to really contemplate websites that are not directly selling specific products to customers. Second, the distinction between interactivity and passivity is a "poor proxy" for evaluating purposeful contacts with a forum. See Alan M. Trammell and Derek E. Bambauer, *Article: Personal Jurisdiction and the 'Interwebs,'* 100 Cornell L. Rev. 1129, 1147 (2015). No website is truly passive and owning or operating a "highly interactive" website does not mean that a defendant is actually purposefully availing itself of a particular forum.

Nonetheless, just because Godwin has proposed an unworkable test does not mean that the Court must automatically adopt the Facebook Defendants' position. The approach that the Facebook Defendants propose also suffers from serious flaws. They argue that the suit-related conduct is not "substantial" and that, "the complaint never identifies the specific conduct Facebook undertook *in Ohio* giving rise to her causes of action." (Mot. to Dis. at 5)(emphasis in original). Instead, the Facebook Defendants state that personal jurisdiction should not be exercised based on the fact that their website, which it implicitly concedes is highly interactive, is merely "accessible" in Ohio. (Mot. to Dismiss at 5.) It further points to cases that emphasize that personal jurisdiction is not supported by "random" contact over the Internet. (Mot. to Dis. at 5)(quoting *Blue Flame Energy Corp. v. Ohio Dept. of Commerce*, 171 Ohio App.3d 514,

2006-Ohio-6892, 871 N.E.2d 1227, ¶ 22 (10th Dist.)("Personal jurisdiction exists only in forums in which a party has purposeful, deliberate contact, not random contact occasioned by the wide accessibility of the internet.")[2]

But, Godwin is not alleging that the Facebook Defendants operate a website that is merely accessible to users in Ohio. She is not alleging that either Robert Godwin Sr. or Stephens randomly accessed Facebook giving rise to the alleged injuries. Rather she is alleging that the Facebook Defendants "mine," "collect," and "analyze" the information they receive from users to sell to advertisers. In her complaint she states:

- The Facebook Defendants also collect and analyze information about device locations, including specific geographic locations, such as through GPS, Cellular, Bluetooth, or WIFI signals, as well as connection information such as the name of the mobile operator or ISP, browser type, language and time zone, mobile phone number and IP address. (Compl. at ¶31.)

- "The Facebook Defendants also use the information collected, including information about the location of users to suggest local events or offers." (Compl. at ¶39.)

- "Likewise, visit to local shoe store can prompt ads in the Facebook news feed for shoes." (Compl. at ¶33.)

While it is true Godwin does not allege that the Facebook Defendants expressly targeted "Ohio" in her complaint, her allegations describe a company which obtains information, including information that is specifically about location, from users in this forum and then use that information to generate revenue through advertising, including locally targeted advertising.

The Facebook Defendants argue this is not specific enough. They point to *Gullen v. Facebook.com, Inc.*, 2016 U.S. Dist. LEXIS 6958, *4, 2016 WL 245910 as a precedent

[2] While the Facebook Defendants' brief uses the word "random," the Tenth District actually used the word "fortuitous."

easily applicable to this case. In *Gullen*, the plaintiff was a non-user of Facebook who sued Facebook for violating Illinois's Biometric Information Privacy Act ("BIPA"). He claimed that once a third-party user uploaded a picture of him to Facebook:

> "[I]t [used] facial recognition technology, which scans every user-uploaded photo for faces, extracts . . . [the] biometric identifiers of each face, and then uses that data to create and store a template of each face. Facebook's 'tag suggestion' feature, which prompts a user to 'tag' a preselected name to a particular face, compares the face templates of people in newly-uploaded photos with the face templates already saved in Facebook's database. If no match is found, the user is prompted to 'tag' (i.e., identify by name) a person to that face, at which point the face template and corresponding name identification are saved in Facebook's face database. However, if a face template is generated that matches a face template already in Facebook's face database, then Facebook suggests that the user 'tag' to that face the name already associated with [it]." *Id.* at *2. (record citations and quotations omitted).

Based on these allegations, the *Gullen* court held that Facebook was not subject to personal jurisdiction in Illinois. It stated that, "[p]laintiff alleges that Facebook uses facial recognition technology on 'every user-uploaded photo,' not just on photos uploaded in or by residents of Illinois. Given this tacit admission that Facebook's alleged collection of biometric information is not targeted at Illinois residents, the third 'contact' becomes simply that Facebook operates an interactive website available to Illinois residents." *Id.* at *4. (record citations and quotations omitted).

While the Facebook Defendants would like this Court to adopt the approach in *Gullen*, this approach is unduly restrictive and does not comport with what Godwin has actually alleged about the Facebook Defendants' activities. Although Godwin has alleged that the Facebook Defendants collect and analyze data from every user, she has made clear that the data includes geographically specific information. This would

include Ohio. She has further alleged that the data collection is for the purpose of selling specifically targeted advertising, which includes advertising that is locally tailored. So even if the indiscriminate collection of information is not specifically directed at a forum, the use of that information to create locally targeted and specific advertising is.

Even in the absence of the location specific allegations, this Court could still exercise jurisdiction based on the allegations that the Facebook Defendants' data collection results in nationwide market exploitation. The issue of what to do when a defendant is conducting its activities all over the nation (or world) is neither unique to the Internet nor particularly new. The Supreme Court addressed the issue of nationwide market exploitation in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984). In *Keeton*, the plaintiff chose to sue the defendant in New Hampshire for the publication of a defamatory article because it had the longest statute of limitations available. *Id.* at 773. The plaintiff did not live in New Hampshire but, the magazine had thousands of subscribers which could potentially view the article. *Id.*

In holding that the defendant was subject to personal jurisdiction to New Hampshire, it made several observations on the consequences of having a business model that reaches a national audience. It observed that, "regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Id.* at 774. And that "[w]here, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the

New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id* at 801.

The reasoning of *Keeton* was applied by the Seventh Circuit to claims arising from Internet contacts in *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421 (7th Cir. 2010) In *uBid*, "uBID alleged that GoDaddy violated the Anti-Cybersquatting Consumer Protection Act by intentionally registering domain names that are confusingly similar to uBID's trademarks and domain names for the purpose of profiting from uBID's marks and exploiting web surfers' confusion by selling advertising for those confusingly similar websites. *Id.* at 423.

The Seventh Circuit concluded that, "[i]t is true that there is no evidence that GoDaddy specifically targets Illinois customers in its advertising. The same could have been said of the defendant in *Keeton v. Hustler Magazine*, and those arguments did not prevail. Instead, what mattered was that the magazine had purposefully directed its business activities toward New Hampshire *just as it had toward all other states*." *Id.* at 428 (emphasis added). "GoDaddy has thoroughly, deliberately, and successfully exploited the Illinois market. Its attempt to portray itself either as a local Arizona outfit or as a mindless collection of servers is unconvincing." *Id.*

The arguments the Facebook Defendants make today are similar to the ones the Seventh Circuit rejected in *uBid*, and the Supreme Court had rejected in *Keeton*. When a business engages in activity that exploits the markets of multiple forums simultaneously it cannot also be said to be acting to the exclusion of other forums. Nothing in the law of personal jurisdiction requires that a defendant make their contacts with a forum exclusive compared to other forums. Although the Facebook

Defendants contend the issue is a lack of "express aiming" at the forum it is counterintuitive to suggest that the more pervasive the course of activities is, the less likely there is to be specific personal jurisdiction in any particular forum. See Adam R. Kleven, *Minimum Virtual Contacts: A Framework for Specific Jurisdiction in Cyberspace*, Note, 116 Mich. L. Rev. 785, 800 (2018).

The consistent theme of specific personal jurisdiction is that, "[t]his purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party or a third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Godwin's allegations about the Facebook Defendants' business demonstrate that their contacts with Ohio (and other states) are neither random, fortuitous, nor attenuated.

Although the parties focused their briefing on the issue of purposeful availment, there are two other requirements for exercising personal jurisdiction. Once the plaintiff has demonstrated that a defendant has sufficient minimum contacts, it next must demonstrate that the claims "arise from" the defendant's contacts with the forum. Then it must demonstrate that there is, "a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." See *Kauffman Racing Equip.* at ¶ 49. An inference typically arises that this requirement is met when the first two requirements are met. *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002). Still, the Court should consider several factors, including the burden on the Defendant, the interests of the forum state, Plaintiff's interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies. *Id.*

Godwin's claims are based on the theory that the widespread business of collecting and analyzing user information imposes affirmative duties to act upon the Facebook Defendants. It is apparent that the claims, whatever their merits, arise from the alleged contacts in Ohio. Thus the second requirement is met.

As for the final requirement, an inference arises that the Facebook Defendants' contacts are substantial enough for this Court to exercise jurisdiction. Furthermore, the reasonableness factors break in Godwin's favor. Godwin has a high degree of interest in litigating in this forum because she represents the Ohio estate of a man who was killed in Ohio. (Br. In Opp' at 19.) The Facebook Defendants have not rebutted Godwin's argument that its resources make it unlikely to suffer a substantial burden by litigating the case here. (Br. In Opp'n at 19.) Ohio itself has a strong interest in seeing that the litigation occurs in this forum because the merits of Godwin's claims center on novel interpretations of state law. Therefore, there does not appear to be any compelling factor which would make the exercise of jurisdiction over the Facebook Defendants unreasonable.

The Court finds that it has specific personal jurisdiction over the Facebook Defendants, and the motion to dismiss under Civ. R. 12(B)(2) is denied.

II. Failure to State a Claim

Because the Court holds that it has personal jurisdiction over the Facebook Defendants, it now turns to their Civ. R. 12(B)(6) motion to dismiss for failure to state upon which relief can be granted. The Court's task is a narrow one. The Court's review is confined to the four corners of the complaint and within those confines all material allegations are accepted as true and all reasonable inferences are drawn in favor of the

nonmoving party. *Grady v. Lenders Interactive Servs.*, 8th Dist. Cuyahoga No. 83966, 2004-Ohio-4239, ¶ 6. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 1995 Ohio 295, 653 N.E.2d 1186 (1995). "As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). Ohio does not apply a plausibility pleading standard, unlike the federal system. *Tuleta v. Medical Mut. of Ohio*, 2014-Ohio-396, ¶ 31 6 N.E.3d 106, 115 (8th Dist.).

The Facebook Defendants argue that Godwin's complaint should be dismissed for two reasons. First, because they are immune from suit under Section 230 of the Communications Decency Act and second because, Godwin has failed to show that she is entitled to relief under state law.

A. Communications Decency Act

The Facebook Defendants argue that Godwin's claims are barred by Section 230 of the Communications Decency Act. (Mot. to Dis. at 1.)

Section 230 of the Communications Decency Act of 1996 is a federal statute that has an express preemptive effect on state law. It 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). And further, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. 230(e)(3).

"The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users

to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. 230(f)(2). Both parties agree that Defendant Facebook Inc. is an interactive computer service because it is the defendant responsible for operating the social networking website, Facebook. (Br. in Opp'n at 23.) The parties disagree, however, on the status of the Facebook Subsidiary Defendants. Before proceeding further, it is necessary to determine which defendants are within the potential scope of the immunity.

1. "Disaggregation" of the Facebook Defendants

Godwin contends that they are not interactive computer services because they do not meet the statutory definition. (Br. in Opp'n at 23.) The Facebook Defendants do not dispute that, and instead argue that because Godwin made the bulk of her allegations against the defendants as a group, or as they term it "lumping," she cannot now "disaggregate" the Facebook Defendants for the purposes of immunity. (Reply Br. At 13.) They further argue that those claims should be dismissed because Godwin did not identify specific conduct that each Facebook Defendant allegedly did. (Reply Br. At 14.)

Ohio Civ. R. 8(A) merely states that a complaint requires, "a short and plain statement of the claim showing that the party is entitled to relief." "The rule is designed to give the defendant fair notice of the claim and to give the defendant an opportunity to respond." *Gurry v. C.P.*, 2012-Ohio-2640, 972 N.E.2d 154, ¶ 17 (8th Dist.).

The Facebook Defendants argue that Godwin has failed to comply with even these basic requirements, stating that, "it is well-established that plaintiff cannot just lump all defendants into single name, make allegations about them collectively, and

survive motion to dismiss." (Reply Br. at 13.) Unfortunately for the Facebook Defendants, that is *not* well-established, at least under Ohio law.

The Facebook Defendants point to *Hernandez v. Riggle*, 2016-Ohio-8032, 74 N.E.3d 822, ¶ 16 (7th Dist.). But, nothing in *Riggle* discusses limits on making claims against multiple defendants. They implicitly concede this by citing to *Atuahene v. City of Hartford*, 10 F.App'x 33, 34 (2d Cir. 2001). This was a federal civil rights lawsuit against a municipality and several individual officers which alleged a "host of constitutional and common law claims." *Id.* In *Athauhene*, the Second Circuit dismissed the complaint under Fed. R. Civ. P. 12(b)(6) because the plaintiff, "lump[ed] all the defendants together in each claim and providing no factual basis to distinguish their conduct." *Id.*

But, "[n]othing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant." *Hudak v. Berkley Group, Inc.*, D.Conn. No. 3:13-cv-00089-WWE, 2014 U.S. Dist. LEXIS 8168, at *10-11 (Jan. 23, 2014)(examining the federal analog to Civ. R. 8(A)).

Here, Godwin is making the exact same claims against all the Facebook Defendants. She is alleging that the Facebook Defendants all engaged in the same data collection business which in turn gave rise to affirmative duties. The details of each entity's technical role in this business is not important at this stage. "Prior to discovery, plaintiff need not explain the details of each defendant's role in the planning, funding, and executing [of] defendant's alleged joint scheme." *Vantone Group LLC v. Yangpu*

NGT Indus. Co., S.D.N.Y. No. 13CV7639-LTS-MHD, 2015 U.S. Dist. LEXIS 86653, at *14 (July 2, 2015)(quoting *Hudak* at *10-11).

The issue of Section 230 immunity complicates things, however. The Facebook Defendants assert that because the same claims exist against all defendants, then immunity should apply to all defendants. That might be true if Godwin's complaint did not provide sufficient facts to determine which entities are interactive computer services and which are not. Godwin has provided enough information to determine this. Godwin has identified the Facebook Subsidiary Defendants as such:

- "Facebook Payments is affiliated, and conducts business in concert, with Facebook by providing services to receive and disburse payment from third parties in exchange for the services/conduct at issue in this lawsuit." (Compl. at ¶12.)

- "Facebook Services is affiliated, and conducts business in concert, with Facebook by providing support for the services/conduct at issue in this lawsuit." (Compl. at ¶13.)

- "Atlas is affiliated, and conducts business in concert, with Facebook by providing ad-serving and measurement support for the services/conduct at issue in this lawsuit." (Compl. at ¶14.)

- "CrowdTangle is affiliated, and conducts business in concert, with Facebook by providing a social analytic platform to support the services/conduct at issue in this lawsuit." (Compl. at ¶15.)

While these allegations point to endeavors in "support" of Facebook Inc.'s role as an interactive computer service, there are no allegations in the complaint which indicate that the Facebook Subsidiary Defendants are actually providing third party users access to servers or the Internet as the statute requires. The complaint gives the Facebook Defendants adequate notice that the Godwin is asserting the same claims against all defendants, and that only Facebook Inc. is considered an interactive computer service.

Godwin's complaint complies with Civ. R. 8(A) insofar as it puts the Facebook Defendants on notice as to the factual basis of the claims against them. But, a court reviewing a motion under Civ. R. 12(B)(6) is assessing whether these are claims "upon which relief can be granted." While Godwin may have placed the Facebook Defendants on notice of the claims against them; that does not necessarily imply that those claims, taken as true, entitle her to relief.

2. Facebook Inc.'s Section 230 Immunity

Godwin's primary argument is that she is not seeking to hold the Facebook Inc. liable as publishers under Section 230. (Br. in Opp'n at 24.) She argues that the Facebook Defendant are not engaged in publication as it has been previously understood because the suit is based on Facebook Inc.'s alleged data collection and data mining activities, rather than particular posts. (Br. in Opp'n at 25.) She emphasizes that this business is, "separate and distinct from the provision of any interactive computer services." (Compl. at ¶ 2.) The Facebook Defendants argue that Section 230 provides a broad immunity to interactive computer services when their claims stem from third-party uploaded information. (Mot. to Dis.at 9.)

Godwin raises two main arguments about why the Facebook Inc. cannot claim immunity under Section 230. First is that that she is not seeking to hold them liable as "publishers." Second is that they could not claim publisher immunity because they were in fact "information content providers" under the statute.

a. Liability as Publisher

Congress did not define who qualifies as a publisher or when someone is acting as a publisher under Section 230. "When a word is not defined, we use its common, ordinary, and accepted meaning unless it is contrary to clear legislative intent." *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 122 Ohio St.3d 557, 2009-Ohio-3628, 913 N.E.2d 421, ¶ 15 (quoting *Hughes v. Ohio DOC*, 114 Ohio St.3d 47, 2007-Ohio-2877, 868 N.E.2d 246, ¶ 14). The *Oxford English Dictionary* defines "publish" as, "[t]o make publically or generally known; to declare or report openly or publically; to announce." *Oxford English Dictionary* 785 (2d ed. 1989). *Webster's Third* defines "publish" also as "mak[ing] generally known" but also as publisher as, "to produce for publication or allow to be issued for distribution or sale." *Webster's Third New International Dictionary* 1837 (Philip Babcock Gove ed., 1986). It defines a "publisher" as "one whose business is publication," but also as "the reproducer of a work intended for public consumption." Id. This suggests that the crux of publishing in the common-sense use of the term is to make information available for the wider public. It also indicates that "publishers" and "publication" involves the business of selling or distributing information.

It is also important to note that "publish" is not just a word in common usage but also a legal term of art in the defamation context. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." Restat. 2d of Torts, § 577 (2d 1979). Courts which have investigated the history of Section 230, have concluded that Congress was concerned with defamation claims against the operators of online bulletin boards and other platforms that allowed

third parties to post comments.[3] See *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009)(tracing the history of Section 230 and concluding that, "[t]he prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others.)

Prevailing judicial interpretations on the meaning of "publisher" under section 230 do not focus on the fact that a publisher is someone making something "widely known." Furthermore, no court has held that Section 230 is limited to defamation claims despite the established legal meaning of "publish." Instead, the courts have uniformly approached the issue by examining the process behind publishing.

In an early and influential case construing Section 230, the Fourth Circuit concluded that it protects interactive service providers for exercising "traditional editorial functions— such as *deciding* whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir.1997)(emphasis added). The Ninth Circuit, relying in part on the *Webster's Third* definition concluded that a publisher, "reviews, edits, and *decides whether to publish* or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir.)(citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008)(en banc)(emphasis added). It further stated that, "a publisher reviews material submitted for publication, perhaps edits it for style or

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[3] In particular, Congress was concerned about the holding in *Stratton Oakmont v. Prodigy Servs. Co.*, Sup.Ct. INDEX No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *1 (May 24, 1995), which held that the operator of an online bulletin board who moderated content was liable as a publisher for failing to remove defamatory postings. See *Accusearch, Inc.*, 570 F.3d at 1195; *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc).

technical fluency, and then decides whether to publish it." *Id.* The D.C. Circuit concluded that, "the very essence of publishing is *making the decision* whether to print or retract a given piece of content." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (emphasis added).

The circuit courts have also referenced the policy purposes behind Section 230, such as Congress's desire, "to promote the continued development of the Internet and other interactive computer services and other interactive media," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 230(b)(1)-(2). See *Zeran*, 129 F.3d at 330; *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

The focus on the decision making process behind publishing and the statutory context and policy have resulted in the courts adopting the view that Section 230 imposes a broad immunity from claims that stem from third-party provided content. "Read together, these provisions bar plaintiffs from holding ISPs legally responsible for information that third parties created and developed." *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010). "Under § 230(c), . . . so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) "In general, this section protects websites from liability for material posted on the website by someone else." *Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016). The First Circuit gave a particularly broad statement

about what constitutes publication activity under § 230, "[i]f the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its *inherent decisions about how to treat postings generally.*" *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007)(emphasis added).

Godwin claims she is not seeking to treat Facebook, Inc. as a publisher for two reasons. First, she claims Facebook, Inc. takes direct action to obtain the information. (Br. in Opp'n at 26.) Second, she claims she is not seeking to hold the Facebook Inc. liable for any of the actions which the courts have labeled as traditional publishing functions. The Facebook Defendants rely upon the broad consensus that Section 230 grants interactive computer services a broad immunity from suits based on third-party provided content. (See Mot. to Dis. at 12.) Both of Godwin's arguments fail.

Although, Godwin does refer to the collection and mining of data, her complaint makes clear that the data collected and mined by the Facebook Defendants is provided by Facebook users. Godwin states at several points in her complaint that the information that Facebook users, including Stephens, are the ones who provide the information:

- "In order to use Facebook interactive computer services- its platform for 'free speech'- users are required to relinquish control over wide array of information about themselves. Facebook then uses this information, not to help the world stay connected or further free speech, but rather to generate billions of dollars. (Compl. at ¶ 3.)

- The Facebook Defendants collect and analyze the content and other information their users provide while using Facebook services. (Compl. at ¶ 24.)

- The Facebook Defendants also collect and analyze information about how their

users view content and the frequency and duration of their activities. This includes collecting and mining information shared among users such as messages or photos. (Compl. at ¶ 25.)

- The Facebook Defendants also collect and analyze contact information users provide if they upload, sync or import information (such as an address book) from another device. (Compl. at ¶26.)

- "This special relationship arose out of the Facebook Defendants collection of, and control over, the data and information provided by, and received from, Mr. Stephens." (Compl. at ¶ 82.)

Godwin does make some broader claims about data collection that do not necessarily require the user to be logged onto Facebook. For instance, she claims that:

- "The Facebook Defendants collect and analyze information about their users' activities away from Facebook, including offline activities in traditional brick and mortar stores. For example, if a user visits website with a "Like" button, information about the user activity is sent to the Facebook Defendants, whether or not the user is actually logged into their Facebook account. Likewise, a visit to a local shoe store can prompt ads in the Facebook news feed for shoes." (Compl. at ¶ 33.)

But, again, this claim still indicates that users are proving the Facebook Defendants with the information they need so that they can mine, collect, analyze, and sell it. It is apparent from the complaint that everything the Facebook Defendants are alleged to know about users comes from the users themselves.

Godwin also argues that:

> "she is not seeking to hold the Facebook [D]efendants responsible in any publisher, speaker, or intermediary capacity. She is not challenging any publishing or editorial decision of the Facebook defendants, specifically alleging that her claims 'do not require the Facebook Defendants to monitor, edit, withdraw or block any content supplied by its users. Plaintiff does not challenge the Facebook Defendants right to publish or permit any information they receive from their users on their interactive computer services." (Br. in Opp'n. at 24.)

One immediate problem with this line of argument is that for Godwin's state law claims to succeed, the Facebook Defendants must be engaged in some sort of monitoring of the content provided by their users so that they can develop the knowledge required to be able to warn people. But Godwin has a different problem beyond the fact that her claims likely depend on Facebook Inc.'s failure to monitor. As noted above, publishers at their most basic level are involved in the distribution of information to an audience. In this case, Facebook, Inc. is selling the information it receives to advertisers. Godwin has alleged repeatedly, that the Facebook Defendants collect and analyze user information to sell to people:

- "Facebook prides itself on having the ability to collect and analyze, in real time, and there after sell vast array of information so that others can specifically identify and target users for variety of business purposes, including, but not limited to, very pointed and specific advertising activities. (Compl. at ¶ 4)

- Rather, Facebook markets itself as very sophisticated business that collects and sells data relating to virtually every aspect of its users lives and lifestyles. (Compl. at ¶ 5.)

- The Facebook Defendants made very calculated business decision to take control of information provided by its users, and then mine, organize and sell the information as a business that is separate and distinct from the provision of any interactive computer services. (Compl. at ¶ 7.)

- The Facebook Defendants generate massive amounts of money by selling the information they collect from their users to others who wish to communicate with, and/or market/advertise/sell goods and services to Facebook users.(Compl. at ¶44.)

Congress was likely originally concerned with content moderators being held liable for defamation for failure to remove defamatory posts when it chose the term "publisher" in Section 230. "But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v.*

Sundowner Offshore Servs., 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Here, the "comparable evil" is holding an interactive computer service liable for a breach of a duty to warn based on another routine function of publishers: the sale and distribution of the information of another. This reading of "publisher" is not only consistent with the plain meaning of publisher, it is consistent with Congress's broad policy purpose, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 230(c)(2). Congress did not intend the free flow of information on the Internet to become itself the basis of liability, independent of some other unlawful act. Therefore the Court concludes that Facebook, Inc. is a publisher under Section 230.[4]

b. Information Content Provider

Godwin next argues that even if the Facebook, Inc. was engaged in publishing, it is still not entitled to immunity because it is also acting as an information content provider due to its "development "of the information it obtains from users. (Br. in Opp'n at 27.) The Facebook Defendants argue that it is using "neutral algorithms" of the sort that courts have consistently determined do not transform a party into an information content provider. (Reply Br. at 11-12.)

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[4] The Court is of course aware of the dueling failure-to-warn cases of *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008) and *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). The former held that MySpace could not be liable for failing to screen the profiles of underage users which were eventually found by sexual assaulters for failure-to-warn under Section 230. The latter held that Section 230 did not preempt failure-to-warn claims against a company which hosted model profiles that rapists used to lure their victims. In *Internet Brands*, the Ninth Circuit found it significant that the plaintiff alleged that the defendants knew about the rapists' activities, not from any particular postings, but from outside sources. *Id.* at 851. Because neither of these cases constitute binding authority on this Court, and the question presented is resolved by text of the statute, it is unnecessary to delve further into their potential application to this case.

Under Section 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 230(c)(1). "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 230(f)(3). Section 230 indicates that publisher liability will not attach based on information "provided by another information content provider." 230(c)(1). It follows then, that if an interactive computer service is itself an information content provider, then it cannot be treated as a publisher of another's information. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009).

So far most courts have concluded that the use of "neutral tools" to organize the data collected through user input does not mean that the interactive computer service is also acting as a "developer" of that information and therefore is an information content provider not entitled to Section 230 immunity. *Jones*, 755 F.3d at 416; *Klayman*, 753 F.3d at 1358. This can include algorithms designed to put "voluntary inputs" in an "aggregate" form, like a star-rating system. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016).

But occasionally, the methods of collecting and sorting information go beyond a neutral algorithm designed to sort information to become content development. In *Roommates.com, LLC*, for instance, the Ninth Circuit held that Section 230 did not prevent a claim against Roommate.com for violating the Fair Housing Act. It stated that, "by requiring subscribers to provide the information as a condition of accessing its

service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." *Id.* at 1166.

Godwin's complaint does not allege that the Facebook Defendants limit the type of information that can be uploaded. Instead, her complaint focuses on the Facebook Defendants' ability to "collect and analyze" information. (Compl. at ¶¶ 24-34.) She also alleges that, "[t]he Facebook Defendants organize and prioritize the content they collect from their users. The Facebook Defendants are able to accomplish their organization, prioritization and distribution tasks in real time, often delivering information in less than one second." (Compl. at ¶ 20.) And that, "[t]he Facebook Defendants require each user to relinquish control over information concerning their feelings, beliefs, intentions, wants, desires, likes, dislikes, location, goals, tendencies, etc., so that the Facebook Defendants can collect, analyze, package, exploit and sell the information as business venture." (Compl. at ¶ 21.)

The complaint does not describe the active development of information. Instead, the repeated use of phrases like, "collect and analyze" and "organize and prioritize" are describing the application of neutral sorting mechanisms to the information uploaded by Facebook users. Therefore, Godwin has not alleged sufficient facts to demonstrate that Facebook, Inc. is not entitled to immunity on the grounds that it develops information in whole or in part.

Because Godwin's complaint demonstrates that she is seeking to hold Facebook. Inc. liable as a publisher, it contains insufficient facts to indicate that Facebook, Inc. is responsible for the development of the information it collects; the claims against

Facebook, Inc. are barred by Section 230. Therefore, Godwin's has failed to demonstrate that the Court can grant her relief, and her claims against Facebook, Inc. are dismissed.

C. State Law Claims

Because the Facebook Subsidiary Defendants are not "interactive computer services" under Section 230, the Court must determine whether Godwin has failed to state a claim against them under Ohio law. If Defendant Facebook Inc. was not entitled to Section 230, the following analysis would apply to them as well. Godwin's state law claims fall into two broad categories. First, there are the claims based on negligence. Second, there are the claims based on statutory duties to report crimes.

1. Common Law Duty to Control

Godwin is asserting that the Facebook Defendants had, "a duty to warn potential victims of Mr. Stephens intended actions." (Compl. at ¶ 84.) She claims that "the duty owed by the Facebook Defendants arises entirely from the special relationship they have with their users." (Compl. at ¶ 85.) She claims that the Facebook Defendants were negligent because they breached their duty, and that as a proximate cause of that breach, Stephens was not prevented from committing homicide. (Compl. at ¶ 86-88.)

The existence of a duty is an essential element of any negligence claim. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 Ohio B. Rep. 179, 180, 472 N.E.2d 707, 710. The existence of a duty is a question of law. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). "The existence of a duty depends on the foreseeability of the injury." *Id.* 15 Ohio St.3d at 77 (1984). Even when an event may be foreseeable, there is generally no duty to prevent a third person from harming another.

See *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 133, 1995-Ohio-203, 652 N.E.2d 702. As a result, "the law usually does not require the prudent person to expect the criminal activity of others." *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 740, 680 N.E.2d 161 (10th Dist. 1996)(quoting *Federal Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St. 3d 171, 173-174, 543 N.E.2d 769).

In *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 284, 1997-Ohio-194, 673 N.E.2d 131, paragraph 1 of the syllabus, the Ohio Supreme Court stated that:

> "Generally, a defendant has no duty to control the violent conduct of a third person as to prevent that person from causing physical harm to another unless a "special relation" exists between the defendant and the third person or between the defendant and the other. In order for a special relation to exist between the defendant and the third person, the defendant must have the ability to control the third person's conduct."

In *Estates of Morgan*, the Court concluded that a psychotherapist has a special relationship with their patient in the outpatient setting, extending their prior announcement in *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St. 3d 86, 529 N.E.2d 449, that a special relationship existed between voluntarily hospitalized patients and psychotherapists.

In *Estates of Morgan*, the Court, relying on the approach of the Second Restatement of Torts, set out a middle path for analyzing questions of control. It acknowledged that control cannot be "fictitious" in the way vicarious liability is a legal fiction. Instead, "[c]ontrol" is used in a "very real sense." *Estates of Morgan*, 77 Ohio St.3d at 298. But, it also rejected, the "myopic" view of some courts that control is limited to, "actual constraint or confinement, whereby the third person's physical

liberty is taken away or restricted. *Id.* The Court's overall conclusion was that control is "commensurate such ability to control as the defendant actually has." *Id.* (citations omitted.) "In other words, it is within the contemplation of the Restatement that there will be diverse levels of control which give rise to corresponding degrees of responsibility." *Id.* at 299.

Godwin's complaint does not allege any facts which demonstrate that the Facebook Defendants had the actual ability to control Stephens as the term is understood. Godwin claims at various points in the complaint that the Facebook Defendants have "control" over the information that the users provide. (Compl. at ¶¶ 7, 21, 61, 65, 68, 82.) This is not the same as "control" over Stephens's person, however. Even assuming that the Facebook Defendants developed an intimate understanding of Stephens based on the information he uploaded, this does not automatically result in the Facebook Defendants actually having control over Stephens.

Based on *Estates of Morgan*, and other courts that have approached this issue, intimate knowledge is only one relevant factor. For instance, in *M.S. v. Harvery*, 5th Dist. Richland No. 13CA105, 2014-Ohio-4236, a minor sued the family members of a man who sexually abused her for failure to warn them that they were in danger of abuse. *Id.* at ¶ 25. The family members had known of the man's previous sexual abuse of children. *Id.* at ¶ 30. Although the Fifth District discussed the fact that the family members had intimate knowledge of the man in general, the court found it significant that the family members knew about sexual abuse in particular. *Id.*

Here, Godwin has made no allegations in her complaint that the Facebook Defendants had knowledge of any violent acts prior to the murder of Robert Godwin Sr.

Moreover, there are also no allegations that Stephens committed any prior violent acts that the Facebook Defendants could have known about. Godwin's claims that, "[t]he Facebook Defendants took no action in response to the information they collected despite having prior knowledge/notice of Mr. Stephens ownership and use of firearms which were suggestive of his violent tendencies." (Compl. at ¶ 69.) Godwin's formulation defeats her premise. Something being "suggestive" of violent tendencies is not the equivalent of knowledge of violent tendencies. Merely having a suggestion of something is not the same as the kind of intimate knowledge that the family members had in *Harvey*.

Godwin alleges that, "[t]he Facebook Defendants also have the unique ability to control every aspect of *the relationship* while the user engages in services offered by Facebook and third-party partners." (Compl. at ¶ 36)(emphasis added). Control of the relationship is not equivalent to control of the person themselves. This merely means that the Facebook Defendant gets to control how users like Stephens use their platform. It does not mean they have the ability to control Stephens' actions offline.

Two allegations in the complaint actually point to the Facebook Defendants relationship in terms of their ability to actually affect the behavior of their users:

- "[a]s a result of this special relationship, the Facebook Defendants have the ability to observe, analyze, predict, anticipate, and even manipulate the behavior of individuals, including Mr. Stephens. Indeed, as a result of the special relationship between the Facebook Defendants and Mr. Stephens, the Facebook Defendants possessed complete and holistic picture of Mr. Stephens's thoughts, emotions, desires, location and intentions." (Compl. at ¶ 82).

- "The Facebook Defendants use the information collected to predict, and sometimes manipulate, the behaviors and moods of their users." (Compl. at ¶ 40.)

But the ability to manipulate is not the same as the ability to control under Ohio law. For instance, when describing the acts a therapist might be required to take in response to a violent patient, The Ohio Supreme Court described, "prescribing medication, fashioning a program for treatment, using whatever ability he or she has to control access to weapons or to persuade the patient to voluntarily enter a hospital, issuing warnings or notifying the authorities and, if appropriate, initiating involuntary commitment proceedings." *Estates of Morgan* , 77 Ohio St.3d at 296. These acts are far more concrete than a vague ability to "manipulate the behavior" of a user.

In the absence of allegations of specialized knowledge or a meaningful ability to control Stephens, the Court must conclude that Godwin has failed to state a claim for negligence based on the breach of a duty-to-warn.

To her credit, Godwin recognizes the novelty of her claims, and asks the Court to recognize that societal and technological changes necessitate the recognition of a special relationship between the Facebook Defendants and the users of the Facebook platform. (Br. in Opp'n at 36.) Indeed, Ohio courts have recognized that the existence of a common law duty is not something set in stone. "The common law is ever-evolving and [courts] have the duty, absent action by the General Assembly on a specific question, to be certain that the law keeps up with the ever-changing needs of a modern society." *Gallimore v. Children's Hosp. Med. Ctr.*, (1993) 67 Ohio St.3d 244, 251, 1993-Ohio-205, 617 N.E.2d 1052. "These principles do not shed their inherent flexibility when applied in the context of a defendant's duty to control the violent conduct of a third person." *Estates of Morgan* 77 Ohio St.3d at 298. While the common law is flexible, this Court cannot stray from the precedent of the Ohio Supreme Court.

Moreover, to the extent that it would be appropriate to reevaluate these limits, the Court is mindful that imposing such a duty on Facebook or similar social networking companies would be difficult as a practical matter and could at best result in a vague and general warning to users and law enforcement about vague potential harms. See generally *Dyroff v. Ultimate Software Group, Inc.*, N.D.Cal. No. 17-cv-05359-LB, 2017 U.S. Dist. LEXIS 194524, at *37 (Nov. 26, 2017).

Therefore, Godwin's claim for negligence for failure to want in Count One is dismissed. To the extent that Count Four and Five derive from the allegations in Count One they are dismissed.

2. Statutory Claims

Godwin also makes claims against the Facebook Defendants that stem from statutorily imposed duties. In Count Two she makes a claim for "Civil Recovery for a Criminal Act." (Compl. at ¶¶ 90-100.) In Count Three she makes a claim for negligence based on the violation of a statutory duty. (Compl. at ¶¶ 101-106.)

Godwin alleges in both counts that the Facebook Defendants violated R.C. 2921.22(A)(1) which states that, "no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." Count Two is based on R.C. 2307.60 which, "creates a civil cause of action for damages resulting from any criminal act." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 12. Count Three is based on a negligence for breach of a statutory duty.

Godwin claims the Facebook Defendants were aware of and did not report Stephens' "terroristic threats" in violation of R.C. 2909.23(A), which states that, "[n]o

person shall threaten to commit or threaten to cause to be committed a specified offense when both of the following apply:

(1) The person makes the threat with purpose to do any of the following:

(a) Intimidate or coerce a civilian population;

(b) Influence the policy of any government by intimidation or coercion;

(c) Affect the conduct of any government by the threat or by the specified offense.

(2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense.

The Facebook Defendants argue that Stephens' alleged posts do not qualify as a terroristic threat under R.C. 2909.23, and that even if they did; Godwin has not alleged sufficient facts to demonstrate that the Facebook Defendants had the knowledge required under R.C. 2921.22. (Mot. to Dis. At 24-25.)

Whether these claims survive a motion to dismiss first depends on whether Godwin has alleged sufficient facts in her complaint that Stephens violated R.C. 2909.23. Unlike the common law claims which depend upon the holistic picture which the Facebook Defendants have allegedly developed of Stephens, the statutory claims depend on whether this post constitutes a terroristic threat under R.C. 2909.23:

> FB my life for the pass year has really been fuck up!!! [sic] lost everything ever had due to gambling at the Cleveland Jack casino and Erie Casino...I not going to go into details [sic] but my breaking point really on some murder shit. FB you have 4 minutes to tell me why I shouldn't be on deathrow!!!! dead serious #teamdeathrow (Compl. at ¶68.)

It is clear from the face of the complaint that Stephens's post was not an attempt to influence the conduct or policy of any government since he does not mention

anything that he hoped to accomplish. Godwin does not attempt to argue that it is. The provision prohibiting threats to "intimidate or coerce" a civilian population is certainly broader than those prohibiting threats to influence government policy. But, Stephens's post is not attempting to "coerce a civilian population." Even though he makes what could potentially be construed as an ultimatum to Facebook, there is nothing else in the complaint which indicates he wanted the population at large to do anything. The question remains whether he is trying to intimidate a civilian population. The General Assembly did not define "intimidate." So this Court again begins with the ordinary meaning. See *Cincinnati City School Dist. Bd. of Edn.* at ¶ 15. To intimidate generally means, "to make timid or fearful: inspire or effect with fear." *Webster's Third New International Dictionary* 1184 (Philip Babcock Gove ed., 1986). It is especially used to, "compel action or inaction." *Id.* The post does not indicate that Stephens was trying to frighten a civilian population into doing anything.

Godwin asserts she has sufficient facts to survive a motion to dismiss because she alleges that Stephens "intended to do some murder shit." (Br. in Opp'n at 38.)(Compl at ¶93.) But, intending to do some "murder shit" is not the same as intending intimidate a civilian population. Godwin implicitly recognizes the limitations of her argument and requests the Court permit her to amend her complaint to add statutory language regarding the intent to coerce or intimidate the civilian population, (Compl. at ¶ 39 n.9). Simply alleging that "Mr. Stephens statement that he intended to do some 'murder shit,' of which the Facebook Defendants were aware, constituted terroristic threats in violation of Ohio R.C. 2909.23," does not cure the issue if the post upon which the claim depends does not contain any of the elements of a terrorist threat.

This would not change even if Godwin were permitted to amend her complaint to claim that Stephens's post was intended to coerce or intimidate a civilian population, since the content of the post would not change.

Even if the content of the post did meet the elements of R.C. 2909.23(A)(1), Godwin has not provided any facts demonstrating that the post created, a "reasonable expectation or fear of the imminent commission of the specified offense," under R.C. 2909.23(A)(2). Godwin only alleges that, "Mr. Stephens threats caused reasonable expectation of the imminent commission of making terroristic threats." (Compl. at ¶ 92.) Stephens's post did not indicate that he would be making future terroristic threats.[5] Even assuming Godwin actually meant Stephens was threatening the commission of murder or something similar, there are no facts which demonstrate anyone had a "reasonable expectation of [its] imminent commission." There is only Godwin's conclusion that it happened. While it is true that a complaint only needs to provide defendants with fair notice of the claims against them, "to constitute fair notice, the complaint must allege sufficient underlying facts that relate to and support the alleged claim; the complaint may not simply state legal conclusions." *Allstate Ins. Co. v. Electrolux Home Prods.*, 8th Dist. Cuyahoga No. 97065, 2012-Ohio-90, ¶ 9.

Because Stephens' post does not constitute a terroristic threat under R.C. 2909.23, there was no crime for the Facebook Defendants to report, and they could not have violated R.C. 2921.22. Therefore Counts Two and Three fail and are dismissed. To the extent that Counts Four and Five rely on the violation of a statutory duty, those counts are dismissed.

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[5] Although it does seem somewhat circular, a specified offense under R.C. 2909.23 does include a violation of R.C. 2909.23. See 2909.21(M)(1).

Conclusion

Although the Court finds that it has personal jurisdiction over the Facebook Defendants, Godwin has failed to state a claim upon which relief can be granted. Therefore, Godwin's claims against the Facebook Defendants are dismissed with prejudice.

It is so ordered.

Judge Timothy P. McCormick