

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

ALEX VESELY, individually and as special	)	
administrator and brother of JITKA VESELY,	)	
(Deceased),	)	No. 1:13-cv-00607
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ARMSLIST, LLC, an Oklahoma Limited	)	
Liability Company,	)	
Defendants.	)	

**DEFENDANT ARMSLIST, LLC’S MEMORANDUM OF LAW IN SUPPORT OF ITS  
RULE 12(B)(6) MOTION TO DISMISS PLAINTIFF’S COMPLAINT**

Defendant Armslist, LLC (“Armslist”) submits this memorandum of law in support of its motion to dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

**I. INTRODUCTION**

Plaintiff’s lawsuit against Armslist for the wrongful death of Jitka Vesely is based on an advertisement of a pistol posted on Armslist’s website, [www.armslist.com](http://www.armslist.com), by a third-party, Benedict Ladera, a private seller and resident of Seattle, Washington. The website serves as an electronic bulletin board on which persons can post advertisements for the sale of firearms and other outdoor sporting gear. (Doc. 1-1, Compl. at Ex. A; *see generally* [www.armslist.com](http://www.armslist.com)). The pistol advertised on the website by Ladera was eventually sold by him to Demtry Smirnov, who then used the pistol to murder Vesely.

While Vesely’s senseless murder is a terrible tragedy, there is no legal basis to hold Armslist civilly liable for her death. Plaintiff’s claim, that Armslist is legally responsible for Vesely’s death, is barred by federal statute and is not viable under Illinois common law. Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. §230, protects Armslist from

Plaintiff's claim. Congress enacted Section 230 to protect operators of interactive computer services, like Armslist, from lawsuits seeking to hold them liable for online activity and content originated by third-parties and against claims alleging service providers failed to screen or exercise editorial control over third-party content. Section 230 provides an absolute bar to Plaintiff's claims in this case.

Plaintiff's Complaint also fails to state a cause of action under Illinois common law. He has failed to allege a cognizable legal duty owed by Armslist to protect Vesely from a third-party's criminal attack. Moreover, Plaintiff's allegations affirmatively establish that Armslist's website was not the legal and proximate cause of Vesely's death as a matter of law.

## **II. THE ALLEGATIONS OF PLAINTIFF'S COMPLAINT**

Plaintiff's Complaint has three counts: Count I—Wrongful Death Act; Count II—Survival Action; and Count III—Family Expense Act.<sup>1</sup> All three claims arise from the shooting death of Vesely in Illinois by Smirnov, a resident of Canada. (Compl. at ¶¶37-41). Smirnov illegally purchased the pistol used in the shooting from Ladera, a private firearm seller and resident of Seattle, Washington. *Id.* at ¶¶30-32. Smirnov learned that Ladera was selling the pistol when he saw Ladera's advertisement for the pistol on Armslist's website, which provides a forum for private sellers of outdoor sporting equipment, including firearms, to post "for sale" advertisements. *See id.* at ¶5.

After contacting Landera, Smirnov purchased the pistol directly from Ladera. *Id.* at ¶34. Smirnov then drove to Chicago and located Vesely, whom he had met online years earlier. As Vesely left work and walked to her car on April 13, 2011, Smirnov shot Vesely with the pistol he

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<sup>1</sup> These Illinois statutes do not create substantive causes of action. Rather, each statute creates rights in certain family members to collect specified damages resulting from the death of a relative. Claims made for damages under each of these statutes must be based on an underlying cause of action (*e.g.*, negligence, strict product liability, breach of warranty).

had acquired from Ladera. *Id.* at ¶¶37-41. “Smirnov immediately turned himself in to police, pled guilty, and is currently serving a life sentence without parole.” *Id.* at ¶1. Ladera pleaded guilty to illegally transferring the pistol to Smirnov and was sentenced to prison. *Id.* at ¶44.

Plaintiff’s claim is predicated on the allegations that Armslist’s website “facilitated” Smirnov’s purchase of the pistol from Ladera and the website was thus the legal and proximate cause of Vesely’s death. (Compl. at ¶¶31, 34 & 51). Plaintiff alleges that Armslist “design[ed] its website to encourage its users to circumvent existing gun laws” which, according to Plaintiff, “prohibit private sellers from selling firearms to residents of another state or country, by easily enabling prospective purchasers to search for and find gun sellers in any and all states.” (Compl. ¶50). As demonstrated below, Plaintiff’s claims are barred under Section 230 of the CDA and are not otherwise viable under Illinois common law.<sup>2</sup>

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<sup>2</sup> Separate and apart from the Complaint’s legal deficiencies, Plaintiff’s allegation that Armslist’s website encourages illegal out-of-state firearm sales is based on a misunderstanding of federal firearms law. Although it is illegal under federal law for an unlicensed seller to directly transfer a firearm to an unlicensed buyer who resides in another state, a seller may lawfully sell a firearm to an out-of-state buyer if the transfer is completed through a federally licensed firearms dealer located in the state where the buyer resides. Thus, for example, an unlicensed seller in Wisconsin can lawfully sell a firearm to an unlicensed buyer in Illinois, provided the firearm is shipped to a federally licensed firearms dealer in Illinois who then transfers the firearm to the buyer under the state and federal laws applicable to its business, including completion of a federal background check. *See* 18 U.S.C. §922(a)(3) and (a)(5); *see also* Compl. at ¶18; *accord* [www.atf.gov/firearms/faq/unlicensed-persons.html](http://www.atf.gov/firearms/faq/unlicensed-persons.html) (“A person not licensed under the GCA and not prohibited from acquiring firearms may purchase a firearm from an out-of-State source and obtain the firearm if an arrangement is made with a licensed dealer in the purchaser’s State of residence for the purchaser to obtain the firearm from the dealer.”) (last visited Feb. 20, 2013). Accordingly, the fact that Armslist’s website allows users to search for firearms (and other merchandise) offered for sale by persons in other states is not encouragement “to circumvent existing gun laws” because a firearm sale to a person in another state can be lawful. *See* 18 U.S.C. §922(a)(3) and (a)(5); *contra* Compl. at ¶50. As part of the disclaimers posted by Armslist and referenced in the Complaint, Armslist informs users to “contact the Bureau of Alcohol, Tobacco, Firearms & Explosives at 1-800-ATF-GUNS or visit the ATF website at <http://www.atf.gov>” if they are “unsure about firearms sales and transfers”. (*See* Compl. at ¶45; *see* Armslist’s “Terms of Use” at [www.armslist.com](http://www.armslist.com)).

### **III. ARGUMENT AND AUTHORITIES**

#### **A. Rule 12(b)(6) Standards.**

Under Rule 12(b)(6), dismissal is appropriate if plaintiff cannot demonstrate that she is plausibly entitled to relief under the facts alleged. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007). The allegations must show that it is plausible, rather than merely speculative, that the plaintiff is entitled to relief. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008). In considering the plaintiff's factual allegations, the Court should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Whether a complaint is subject to dismissal under 47 U.S.C. §230 is appropriately considered on a Rule 12(b)(6) motion to dismiss. *Gibson v. Craigslist, Inc.*, 08-cv-7735-RMB, 2009 WL 1704355, \*1 n.1 (S.D.N.Y. June 15, 2009); *Nieman v. Versuslaw, Inc.*, 12-3104, 2012 WL 3201935 (C.D. Ill. June 13, 2012) *report and recommendation adopted*, 12-cv-3104, 2012 WL 3201931 (C.D. Ill. Aug. 3, 2012); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). Moreover, whether a defendant owes a duty to a plaintiff is a question of law that is appropriately decided under Rule 12(b)(6). *Skyview Film & Video, Inc. v. Safeco Life Ins. Co.*, 864 F. Supp. 755, 757 (N.D. Ill. 1994).

#### **B. Section 230 of the CDA Bars Plaintiff's Claims.**

##### **1. The Scope of Section 230.**

Since Congressional enactment of Section 230 in 1996, numerous federal and state courts have upheld, enforced and bolstered protection for interactive computer service providers against all types of claims, including negligence-based claims against online service providers where advertisements for the sale of firearms are posted by third-parties. *Cf. Gibson v. Craigslist, Inc.*, 08-cv-7735-RMB, 2009 WL 1704355 (S.D.N.Y. June 15, 2009). Several pertinent parts of the

CDA are controlling. First, Section 230(c)(1) states, in pertinent part:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. §230 (c)(1). Section 230 (e)(3) states:

No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. §230(e)(3). Under the CDA, an “interactive computer service” includes any service or system that “provides or enables computer access by multiple users to a computer server.” 47 U.S.C. §230(f)(2). An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3).

Thus, “[b]y its plain language, § 230 creates a federal immunity to any cause of action that could make service providers liable for information originating with a third-party user of the service.” *Chicago Lawyers' Comm. For Civil Rights Under The Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006), *aff'd sub nom.*, *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)).<sup>3</sup>

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<sup>3</sup> Federal courts throughout the country have reached the same conclusion as *Chicago Lawyers'* (“Section 230 . . . plainly immunizes computer service providers . . . from liability for information that originates with third parties”), which confirms that Section 230 protection is designed to be broad and robust. *See, e.g., Universal Commc'n Sys. Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (“We too find that Section 230 immunity should be broadly construed.”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (the “consensus developing across other courts of appeal that Section 230(c) provides broad immunity for publishing content provided primarily by third parties”); *Green v. Am. Online, Inc.*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000) (affirming dismissal of, *inter alia*, negligence claim because Section 230 “creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third-party”).

**2. Application of Section 230 to Plaintiff's Complaint.**

There are three elements to be satisfied to invoke Section 230 protection: (1) the defendant must be a “provider or user of an interactive computer service”; (2) the content was “provided by another information content provider” (*i.e.*, the third-party); and (3) the claim attempts to treat the defendant as the “publisher or speaker” of the allegedly harmful content. 47 U.S.C. § 230(c)(1); *Gibson*, 2009 WL 1704355, at \*3; *see also Zeran*, 129 F.3d at 330 and *Ben Ezra, Weinstein & Co*, 206 F.3d at 984-85. Here, each of these elements is satisfied; thus, Section 230 bars Plaintiff’s claims.

**i. Armslist is a “provider or user of interactive computer services.”**

Under the CDA, “interactive computer services” is broadly defined as “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). In his Complaint, Plaintiff alleges that Armslist operates an “online” internet “website” that allows “users” to “post” and “search” advertisements to buy and sell, among other things, firearms from each other. (Compl. at ¶¶ 5, 6, 20, 22). Based on these allegations alone, Armslist is plainly a provider of an interactive computer service under Section 230’s definition—that is, Armslist provides an interactive website (*i.e.*, the “service” and the “system”) which enables the public (*i.e.*, “multiple users”) to access information stored on Armslist’s website, [www.armslist.com](http://www.armslist.com), by way of the internet (*i.e.*, “computer access”).<sup>4</sup>

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<sup>4</sup> There can be little dispute that website operators, like Armslist, are “interactive computer service providers.” *See, e.g., Chicago Lawyers'*, 461 F. Supp. 2d at 698 ([www.craigsl.com](http://www.craigsl.com) is an interactive computer service provider), *aff'd*, 519 F.3d 666 (7th Cir. 2008); *Carafano*, 339 F.3d at 1123-24 ([www.matchmaker.com](http://www.matchmaker.com) is an interactive computer service provider); *Barnes v. Yahoo!, Inc.*, 05-cv-926-AA, 2005 WL 3005602, at \*1 (D.Or. Nov. 8, 2005) (“Yahoo! is an interactive computer service provider . . . . Any person with access to the Internet may, at no charge, register as a Yahoo! user, obtain an online Yahoo! identifier and account, and then engage in various online activities . . . .”).

**ii. The pistol advertisement was “provided by another information content provider.”**

Under the CDA, an “information content provider” is a person or entity responsible, in whole or in part, for creating or developing information provided through the internet or another interactive computer service. 47 U.S.C. § 230(f)(3). Plaintiff’s Complaint makes clear that the pistol advertisement was posted to [www.armslist.com](http://www.armslist.com) by Ladera:

In January 2011, Benedict Ladera, who had previously sold over 20 firearms on armslist.com, purchased a handgun from his landlord’s cousin, confident that he could turn around and sell it for profit on armslist.com. Ladera, a resident of Seattle, quickly found a buyer for the gun – Demetry Smirnov. Upon information and belief, Smirnov found the handgun using armslist.com’s “Power Search” function, and through armslist.com contacted Ladera.

(Compl. at ¶¶29-30). Indeed, Plaintiff’s complaint specifically states that the “seller creates a ‘post’ for the firearm it is selling[.]” (Compl. at ¶22; *see also* ¶24 (“Armslist requires users to advertise”). Ladera is clearly not Armslist; nor does Plaintiff allege that Armslist created or placed the advertisement for Ladera’s pistol. Ladera posted the pistol advertisement, and therefore under the plain language of the CDA, Ladera is “another information content provider”—*i.e.*, a third-party.

**iii. Plaintiff’s Complaint attempts to hold Armslist responsible for the advertisement as the “publisher or speaker.”**

Plaintiff attempts to plead around the “publisher or speaker” requirement by alleging that Armslist “matches buyers and sellers solely based on Armslist’s mandatory drop-down menus that steer illegal buyers to illegal sellers. Armslist’s development of content thus materially contributes to the illegality of the gun sales it promotes.” (Compl. at ¶27). Plaintiff also alleges that Armslist “has demonstrated that it possess the capability to filter content on its website when it chooses to do so.” *Id.* at ¶28.

*First*, these activities—matching users, monitoring, regulating, maintaining and developing content—are traditional editorial functions of a publisher for which an interactive computer service provider cannot be liable. *Zeran*, 129 F.3d at 330 (“lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred”). As aptly stated by one federal court:

Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.

*Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998) (emphasis added). Consequently, Plaintiff’s Complaint, on its face, improperly treats Armslist as the publisher or speaker of Ladera’s pistol advertisement. *See Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 41 (Wash. App. Ct. 2001) (applying CDA and barring claims against Amazon.com for alleged exercise of editorial discretion and decision-making authority over postings on its website).

*Second*, even “artful” pleading cannot side-step Section 230 protection. *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) (“No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs’ claims as directed toward [defendant] in its publishing, editorial, and/or screening capacities.”), *aff’d*, 528 F.3d 413 (5th Cir. 2008). Even with Plaintiff’s mischaracterization of Armslist as a facilitator of “illegal gun sales” with the “capability to filter content” cannot change the application or outcome under Section 230. At bottom, Plaintiff’s Complaint still treats Armslist as the publisher of third-party content regardless of the alleged commercial nature of Armslist’s services. *See Corbis Corp. v.*

*Amazon.com*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (holding Section 230 barred state law claims against Amazon.com for third parties' advertisement and sale of allegedly unlawful items on Amazon.com's third-party selling service); *Stoner v. eBay Inc.*, No. 305666, 2000 WL 1705637, \*1 (Cal. Super, Ct. Nov. 1, 2000) (Section 230 protected eBay from liability stemming from the sale of material by third-party users of its internet services).<sup>5</sup>

The plaintiff's allegations in *Gibson v. Craigslist, Inc.*, 08-cv-7735-RMB, 2009 WL 1704355 (S.D.N.Y. June 15, 2009), were nearly identical to the allegations in this case. In *Gibson*, the plaintiff, the victim of a shooting where the assailant had acquired a firearm through a Craigslist advertisement, sought "to hold [Craigslist] liable for its alleged failure to block, screen, or otherwise prevent the dissemination of a third party's content, *i.e.*, the gun advertisement in question[.]" *Id.* at \*4. Plaintiff further alleged that Craigslist "failed to monitor, regulate, properly maintain and police the merchandise being bought and sold on its . . . website" and "is either unable or unwilling to allocate the necessary resources to monitor, police, maintain and properly supervise the goods and services sold on its . . . website." *Id.* at \*4. The Court strongly rejected the plaintiff's argument that, under the circumstances, he was not a trying to impose liability on Craigslist as a "publisher of third-party content[.]" *Id.* at \*4. In sum, Craigslist was entitled to immunity under Section 230, and the plaintiff's complaint was dismissed pursuant to Rule 12(b)(6).

Courts in this district have reached similar decisions. In *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d. 961, 967-68 (N.D. Ill. 2009) (Grady, J.), the Northern District of Illinois held that "[a]

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<sup>5</sup> Furthermore, holding Armslist liable for third-party content would inevitably treat Armslist as a publisher because it would (1) put Armslist in the posture of the original poster (here, Ladera) who is the actual "publisher," *Zeran*, 129 F.3d at 333; and (2) mandate Armslist to conduct the very "quintessential" publishing functions, *e.g.*, reviewing, editing, monitoring and screening of third-party content, that Section 230 is designed to eliminate the need for in the first place. *Zeran*, 129 F.3d at 330.

claim against an online service provider for negligently publishing harmful information created by its users treats the defendant as the ‘publisher’ of that information.” *Id.* In dismissing the plaintiff’s claim, the Court rejected plaintiff’s argument that “Craigslist causes or induces its users to post unlawful ads-by having an ‘adult services’ category with subsections like ‘w4m’ and by permitting its users to search through the ads ‘based on their preferences.’” *Id.* at 968. As stated by the court,

[w]hile we accept as true for the purposes of this motion plaintiff’s allegation that users routinely flout Craigslist’s guidelines, it is not because Craigslist has caused them to do so. Or if it has, it is only “in the sense that no one could post [unlawful content] if craigslist did not offer a forum.” *Chicago Lawyers’*, 519 F.3d at 671. Section 230(c)(1) would serve little if any purpose if companies like Craigslist were found liable under state law for “causing” or “inducing” users to post unlawful content in this fashion. (citation omitted). The fact that Craigslist also provides a wordsearch function does not change the analysis. The word-search function is a “neutral tool” that permits users to search for terms that they select in ads created by other users.

*Dart*, 665 F.Supp.2d at 969.

The allegation in *Dart* that Craigslist was “[f]acilitating” and “assisting” in illegal activity was held by to be within the immunity provided by the CDA. *Id.* at 967. The court emphasized that “[i]ntermediaries are not culpable for ‘aiding and abetting’ their customers who misuse their services to commit unlawful acts.” *Id.* (citation omitted). *See also Chicago Lawyers’*, 519 F.3d at 672 (under § 230(c)(1) a plaintiff “cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful [activity].”).

As in *Gibson* and *Dart*, Plaintiff’s claim against Armslist is based on the manner in which Armslist exercises its function and discretion in its publishing, editorial, and/or screening capacities. Under the CDA, Armslist cannot be liable for the advertisement published on its website by Ladera, the manner in which Smirnov used the website or the illegal activity that

transpired between Landera and Smirnov. Armslist is protected from liability to the Plaintiff, and the Complaint should be dismissed for failure to state a claim.

***C. Plaintiff's Complaint Fails to State a Viable Claim Under Illinois Law.***

Even assuming, *arguendo*, that the CDA does not bar Plaintiff's action, Plaintiff's Complaint should be dismissed because it fails to state a viable claim under Illinois law. Illinois substantive law applies to this case because federal jurisdiction is based on diversity of citizenship. *Reynolds v. CB Sports, Inc.*, 623 F.3d 1143, 1148 (7th Cir. 2010); *see also Casio, Inc. v. S.M. & R. Co.*, 755 F.2d 528, 531 (7th Cir.1985). To properly plead a cause of action, "the plaintiff must establish that the defendant owed a duty of care, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach." *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 441 (7th Cir. 2009); *Young v. Bryco Arms*, 213 Ill.2d 433, 444, 821 N.E.2d 1078, 1085 (Ill. 2004). As explained below, Plaintiff has not and cannot allege that Armslist owed Vesely a recognized duty under Illinois law. Even assuming a cognizable duty exists, Plaintiff's allegations affirmatively establish that Armslist was not the legal and proximate cause of Vesely's death.

**1. Plaintiff has failed to plead a cognizable duty under Illinois law.**

A claim must be dismissed in the absence of a duty owed by the defendant. *Young*, 213 Ill.2d at 444; *see also Linton v. Smith & Wesson, a Div. of Bangor Punta Corp.*, 127 Ill. App. 3d 676, 469 N.E.2d 339 (1st Dist. 1984) (granting defendant's motion to dismiss, holding that firearm manufacturer owed no duty to prevent sale of its pistols to persons likely to cause harm to the public).

Here, Plaintiff asserts that "[a]t all relevant times Armslist owed a duty to the public, including Jitka, to operate its website, armslist.com, in a commercially reasonable manner."

(Compl. at ¶49). This so-called duty to “operate” a website in a “commercially reasonable manner” is not a cognizable duty under Illinois tort law and Plaintiff’s claim therefore fails as a matter of law. However, assuming that Plaintiff means to claim that Armslist owed Vesely a duty under Illinois negligence law, his claim still fails.

Under Illinois negligence law, a duty to protect someone from criminal acts by third-parties may exist only where the parties stand in one of four “special relationships,” namely: “(1) common carrier and passenger, (2) innkeeper and guest, (3) business invitor and invitee, and (4) voluntary custodian and protectee.” *Hernandez v. Rapid Bus Co.*, 267 Ill. App. 3d 519, 524, 641 N.E. 2d 886, 890 (1st Dist. 1994) (citing *Fancil v. Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 328 (Ill. 1975) (citing Restatement (Second) of Torts §314(a) (1965)); and *Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 215-216 (Ill.1988)). These relationships can involve situations in which the party owning the duty had the ability or right to “control” the person causing the harm. *Cf. Geimer v. Chicago Park Dist.*, 272 Ill. App. 3d 629, 650 N.E.2d 585 (1st Dist. 1995) (rejecting plaintiff’s argument that defendant park district owed plaintiff a duty to prevent intentional harmful conduct inflicted by fellow football participant). At bottom, Plaintiff has not alleged that Armslist and Vesely stood in one of the recognized “special relationships” from which a duty may arise to protect another against criminal acts by third parties; nor did Armslist have any “control” over Vesely’s assailant, Smirnov. Thus, Plaintiffs Complaint should be dismissed.

**2. Plaintiff’s allegations affirmatively establish that Armslist did not proximately cause Vesely’s death.**

In addition to pleading a cognizable duty under Illinois law, Plaintiff must plead facts showing that Armslist’s conduct was a proximate cause of Vesely’s death. *Estate of Johnson by Johnson v. Condell Mem’l Hosp.*, 119 Ill.2d 496, 503, 520 N.E.2d 37, 39 (Ill. 1988). While

proximate cause is generally a question of fact, the lack of proximate cause may be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate defendant's conduct was the proximate cause of the harm claimed. *Young*, 213 Ill.2d at 447 (citation omitted); *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439 (7th Cir. 2009) (affirming Rule 12(b)(6) dismissal of plaintiff's claim for lack of proximate cause).

The term "proximate cause" encompasses two distinct elements: cause in fact and legal cause. *Young*, 213 Ill.2d at 446-447. Cause in fact exists where there is reasonable certainty that a defendant's acts or omissions caused the plaintiff's injury. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455, 605 N.E.2d 493, 502 (Ill. 1992). Cause in fact requires an analysis of the nexus (if any) between defendant's conduct and plaintiff's injury: the defendant's actions must be a material element and substantial factor in causing plaintiff's injury. *Id.* at 455. Importantly, "liability cannot be premised merely upon surmise or conjecture as to the cause of the injury." *Id.* Here, nothing in the service offered by Armslist induces users to post advertisements for unlawful firearms sales or to complete an unlawful firearms sale, and, most fundamentally, it does not induce persons to commit murder. *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, illustrates the point:

Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings. If craigslist "causes" the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for "causing" discriminatory advertisements.

519 F.3d 666, 671-72 (7th Cir. 2008).

The legal cause requirement is met only if the defendant's conduct is "so closely tied to the plaintiff's injury that he should be held legally responsible for it." *Simmons v. Garces*, 198

Ill. 2d 541, 558, 763 N.E.2d 720, 732 (Ill. 2002). Illinois law differentiates a mere condition conducive to injury from the legal cause of an injury. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 259, 811 N.E.2d 670, 675 (Ill. 2004). “Where a negligent act or omission does nothing more than furnish a condition which makes an injury possible, but the injury is caused by the subsequent independent act of a third person, the two acts are not concurrent and the condition is not the proximate cause of the injury.” *Sokolowski v. All Points Distrib. Serv., Inc.*, 243 Ill.App. 3d 539, 542-43, 612 N.E.2d 79, 82 (1st Dist. 1993). Illinois law is clear that if the act of a third-party is the immediate cause of the injury, and, the third-party is not under the “control” of the one guilty of the alleged original wrong, the connection is broken and the first alleged act or omission is not the proximate cause of the injury. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 406, 408, 821 N.E.2d 1099, 1134 (Ill. 2004). Consequently, a defendant’s conduct cannot be the legal cause of an injury where an intervening criminal act of a third-party breaks the causal connection. *Id.* at 408.

As a matter of law, Plaintiff’s allegations affirmatively establish that Armslist did not proximately cause Vesely’s death. Armslist’s website was merely a forum where Smirnov was able to view an advertisement posted by Ladera offering to sell a lawful product. Indeed, Plaintiff affirmatively pleads at least three intervening criminal acts, each of which breaks any causal connection between the website and Vesely’s death: (1) Smirnov’s intentional homicidal act, (2) Smirnov’s illegal purchase of the pistol from Ladera, and (3) Ladera’s illegal sale of the pistol to Smirnov. Nor is there any allegation that Smirnov was under Armslist’s “control” at the time of the murder. To the contrary, Smirnov’s homicidal act was the result of his own volition. Under these allegations and as a matter of law, Armslist did not proximately cause Vesely’s

tragic death. *See City of Chicago*, 213 Ill.2d at 408.<sup>6</sup>

### CONCLUSION

For each of the foregoing reasons, Defendant respectfully requests that Plaintiff's Complaint be dismissed in its entirety with prejudice.

**DATED: February 22, 2013**

Respectfully submitted,

**ARMLIST, LLC**

By: /s/ James B. Vogts

One of Armslist, LLC's Attorneys

James B. Vogts, #6188442  
Andrew A. Lothson, #6297061  
Swanson, Martin & Bell, LLP  
330 North Wabash, Suite 3300  
Chicago, IL 60611  
(312) 321-9100  
(312) 321-0990 FAX

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<sup>6</sup> Numerous Illinois courts have refused to recognize a duty on firearm sellers for the tortious and criminal acts of firearms users. And those courts have consistently held that firearm sales were not the proximate cause of such shootings. *See, e.g., Riordan v. International Armament Corp.*, 132 Ill.App.3d 642 (1985) (manufacturers and distributors of firearms used in fatal shootings were not liable for wrongful deaths of victims because they owed no duty to the victims of crimes committed by third-parties); *Linton v. Smith & Wesson*, 127 Ill.App.3d 676 (1st Dist. 1984) (firearm manufacturer owed no duty to plaintiff who was shot by third-party); *Hartnett v. Boston Store of Chicago*, 265 Ill. 331 (1914) (store's sale of rifle and ammo to minor, while illegal, was not the proximate cause of plaintiff's injury because the store's negligence merely furnished a condition which made the injury possible); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir.1984) (recognizing that every Illinois court considering the issue has determined that the criminal misuse of firearms is not reasonably foreseeable to the manufacturer). Because manufacturers and distributors have no duty to shooting victims and cannot be the proximate cause of such shootings carried out by third-parties, certainly a website providing a forum for persons to advertise, among other things, their sale of firearms cannot owe a duty to victims of criminal firearm violence; nor can a website be the proximate cause of injuries caused by intentional criminal acts of others.

**CERTIFICATE OF SERVICE**

I, James B. Vogts, hereby certify that on the 22<sup>nd</sup> day of February, 2013, I caused to be served a copy of the foregoing document on all counsel of record listed below, via the Court's ECF system and/or by U.S. Mail.

1. Jonathan E. Lowy  
Arin M. Brenner  
Lindsey Merikas  
Brady Center to Prevent Gun Violence  
1225 Eye St. NW #1100  
Washington, DC 20005
  
2. Jay S. Dobrutsky  
Alexander D. Marks  
Burke, Warren, MacKay & Serritella, P.C.  
330 N. Wabash, 22<sup>nd</sup> Floor  
Chicago, IL 60611

/s/ James B. Vogts  
James B. Vogts