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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CARL FERRER (DOB 03/16/1961)

MICHAEL LACEY (DOB 07/30/1948)

JAMES LARKIN (DOB 06/16/1949),

Defendant.

Case No. 16FE019224

PEOPLE'S OPPOSITION TO DEFENDANTS' DEMURRER TO FELONY COMPLAINT

Date: November 16, 2016
Time: 1:30 p.m.
Dept.: 61
Judge: The Honorable Michael G. Bowman

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I. INTRODUCTION

Defendants Carl Ferrer, Michael Lacey, and James Larkin demur to the Complaint, asserting that it is defective under[1] section 1004 Penal Code because (i) the First Amendment bars this prosecution; (ii) Section 230 of the federal Communications Decency Act (CDA) bars this prosecution; and (iii) the Complaint does not "state facts that constitute public offenses under the criminal statutes charged." (Defendants' Demurrer at 1 ("Demurrer").)

This Court should overrule Defendants' demurrer. First, the crimes of pimping and conspiracy to commit pimping do not implicate any protected First Amendment interest; as with any other pimping case, the charges here involve Defendants' conduct in supporting themselves by profiting from prostitution – not the words used in any speech. Second, Defendants are not entitled to the CDA's protection and are premature in raising the CDA as a defense. Last, the Complaint properly alleges Defendants' crimes under California and constitutional requirements. There is no defect on the face of the Complaint that would justify granting a demurrer. The claims that Defendants attempt to raise via demurrer are affirmative defenses which must be evaluated by a fact finder, after hearing the totality of the evidence. Their claims are premature now and will be shown to be meritless later.

II. STANDARD OF REVIEW

Criminal Defendants may not use a demurrer to attack the sufficiency of evidence supporting an accusatory pleading. (*People v. Biane* (2013) 58 Cal.4th 381, 388.) A demurrer solely serves to test "whether the pleading is facially—not factually—deficient." (*People v. Jimenez* (1993) 19 Cal.App.4th 1175, 1177, fn. 3, italics in original.) "[A]ll well pleaded facts are taken to be true." (*Ratner v. Municipal Court of Los Angeles* (1967) 256 Cal.App.2d 925, 929.) Extrinsic evidence should not be considered by the court in ruling on the demurrer. (*Jimenez, supra*, 19 Cal.App.4th at p. 1177, fn. 3.)

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[1] Statutory references are to the California Penal Code unless stated otherwise.

Section 1004 specifically delimits the legal grounds upon which a demurrer can be based. (§ 1004; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1090.) Here, Defendants demur under the following subdivisions of section 1004:

> (2) That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;
> (4) That the facts stated do not constitute a public offense;
> (5) That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

A court should only grant a demurrer if a defect in an accusatory pleading would "prejudice a substantial right of the defendant[s] upon the merits." (§ 960.)

III. ARGUMENT

A. THE FIRST AMENDMENT DOES NOT BAR THIS PROSECUTION BECAUSE THE CHARGES ARE BASED ON DEFENDANTS' CRIMINAL CONDUCT, NOT THEIR SPEECH

Invoking subdivisions (4) and (5) of section 1004, Defendants assert that the First Amendment bars their prosecution. (Demurrer at 1.) They read the Complaint (i) as "hold[ing] an online publisher of third-party speech criminally liable," (ii) as containing "no allegation of scienter that Backpage.com knew the specific speech upon which the charges are based was unlawful, much less the named Defendants had any knowledge of or participated in any way in the creation or posting of the speech," and (iii) as "imposing an obligation on publishers to review all speech to ensure that none is unlawful," which they claim "would severely chill free expression." (Demurrer at 1.)

Defendants are mistaken. The First Amendment is not "an omnipotent and unbreakable shield," as a federal court recently reminded Defendant Ferrer. (*Senate Permanent Subcommittee v. Ferrer* (D.D.C., Aug. 5, 2016, No. 16-MC-621) __F.Supp.3d__, 2016 WL 4179289, at *10 ("*Ferrer*").) Moreover, the People's theory of prosecution is *not* premised on "unknowing criminal liability" (Defs.' Memorandum of Points and Authorities ("Defs.' MPA") at 9) and the Complaint plainly alleges Defendants' requisite criminal intent (see Complaint ("Compl") at 4-8). Backpage.com's trilogy of federal challenges to other states' statutes does not establish a First Amendment bar to California's pimping prosecution. (See Defs.' MPA at 9-11.) Finally, although Defendants ignore the Complaint's repeated allegations of criminal intent and contend

that speech "is the basis for criminal charges" (Defs.' MPA at 12), the People will present evidence, at the appropriate time, that the Defendants committed pimping because they intentionally and knowingly profited from prostitution.

1. Defendants Have No First Amendment Defense Because on Its Face, the Complaint Is Not Based on Speech and Alleges the Requisite Intent

The Complaint alleges that Defendants conspired to commit the crime of pimping, and that Defendant Ferrer committed five counts of pimping a minor and four counts of pimping. Nothing on the face of these allegations raises a First Amendment defense. The First Amendment is commonly regarded as an affirmative defense. (See, e.g., *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 404.) As such, it should generally not be considered on demurrer unless the defense appears on the face of the complaint. (See *Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 376 [civil case].) Here, no First Amendment violation appears on the face of the complaint. The pimping counts all allege that Defendant Ferrer knew the victims engaged in prostitution and derived support from their earnings. The conspiracy count (count one) alleges that the Defendants conspired together to commit pimping and committed specific acts to further their conspiracy to pimp.

California's pimping statute targets criminal conduct and was designed to discourage "persons other than the prostitute from augmenting and expanding a prostitute's operation or increasing the available supply of prostitutes." (*People v. McNulty* (1988) 202 Cal.App.3d 624, 632, citing *People v. Hashimoto* (1976) 54 Cal.App.3d 862, 867.) "To establish the offense of pimping by deriving support from the earnings of a known prostitute, the People must demonstrate that 'the money acquired [came] from the earnings of the illicit . . . [prostitution], and [was] used toward the recipient's support or maintenance.'" (*People v. Grant* (2011) 195 Cal.App.4th 107, 115.) At the preliminary hearing, the People plan to present evidence that Defendants agreed on a business model to maximize the receipt of prostitution earnings, operated their business accordingly for years, and committed many overt acts in furtherance of this objective. (See *id.* at p. 113 [citing *People v. Stage* (1978) 195 Colo. 110, 113, upholding Colorado's pimping statute against claim that it "infringed freedom to transact business with all

people, including prostitutes"].) The People also intend to show that Defendant Ferrer had the requisite knowledge and intent when he accepted money from the victims referenced in counts 2-10.

Prosecuting a defendant whose business is designed to profit from and promote prostitution is not a new theory. For instance, in *People v. Frey* (1964) 228 Cal.App.2d 33, the defendant was charged with pimping as the owner-manager of a residential motel. The evidence showed that he encouraged the use of his rooms by women who he knew engaged in prostitution; that he charged these women an inflated rate, which he took a percentage of; that he suggested ways they could pay for rooms without attracting the suspicion of the hotel clerk; that at one point, prostitution in the hotel increased to where there were "as many as fifty girls working there," and in one year, "as many as 75 to 100 transactions with prostitutes per day in the hotel." (*Frey*, *supra*, 228 Cal.App.2d at pp. 42-48.) Thus, *Frey* teaches that someone who runs a business, such as renting apartments, is not immune from prosecution if that person knowingly designs the business to profit from prostitution. "Knowledge is a question of fact to be determined by the jury from the evidence, including all reasonable inferences to be drawn therefrom." (*People v. Robison* (1970) 4 Cal.App.3d 1014, 1017-1018, citing *People v. Lauria* (1967) 251 Cal.App.2d 471, 477.) Here, the evidence will show that like the motel owner in *Frey*, Defendants designed a business to profit from the illegal sex trade. While the business operated online instead of on a street corner, evidence presented at the preliminary hearing and trial will show Defendants charged inflated prices for Escort ads, encouraged anonymous payments, and designed other websites unbeknownst to victims to maximize Backpage's visibility and profits.

Defendants assert it is a "basic proposition of First Amendment law" that states cannot criminally punish publishers or distributors of speech without proof of scienter. (Defs.' MPA at 12.) The People do not disagree, and indeed, California's pimping statute has been upheld against facial overbreadth challenges, among other constitutional challenges. (See, e.g., *Allen v. Stratton* (C.D. Cal. 2006) 428 F.Supp.2d 1064, 1072 [denying federal habeas relief on overbreadth grounds because section 266h "regulates conduct, i.e., supporting or maintaining

oneself from the proceeds of another's prostitution, not speech or conduct necessarily associated with speech"]; see also *Grant*, *supra*, 195 Cal.App.4th at p. 113, fn. 2 [rejecting facial overbreadth challenge]; *People v. Maita* (1984) 157 Cal.App.3d 309, 317 ["[T]he First Amendment is not a shield against prosecution under the pimping and pandering laws"].) In any event, Defendants' point is irrelevant because none of the crimes charged target speech and all of the charges allege the requisite scienter. Without acknowledging the Complaint's intent allegations, Defendants attempt to impose their own definition of "scienter" onto California law. They claim that the People must present "sufficient proof that a defendant knew that the *specific speech* that is the basis for criminal charges was unlawful." (Defs.' MPA at 12, italics added.) From this premise they claim that the Complaint is deficient because it fails to allege that the Defendants had "any knowledge of the ads." (Defs.' MPA at 13.) Defendants' premise is faulty because the basis for the charges is criminal conduct, not speech; equally important, the cases Defendants cite do not support the requirement that scienter under the Constitution can only be established by demonstrating the Defendants knew of the specific ads in question.

For instance, Defendants cite *Smith v. California* (1959) 361 U.S. 147, where a bookstore owner was charged with obscenity for possessing *a single* obscene book. (Defs.' MPA at 12.) The obscenity ordinance did not require proof of *any* scienter; it imposed strict liability. (*Smith*, *supra*, 361 U.S. at pp. 148-150.) In holding that this strict liability ordinance was unconstitutional, the court questioned "whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (*Id.* at p. 154.) The People will show at the preliminary hearing that unlike the single obscene book found in Smith's bookstore, the vast majority of Defendants' profits- between 90 and 99%, derive from Escort ads selling commercial sex. The evidence will show that Defendants know this to be true, and for purposes of this opposition to Defendants' demurrer, the Complaint properly alleges their knowledge.

In any event, because this prosecution is based on conduct rather than speech, the cases Defendants cite regarding obscenity are not directly on point. To whatever extent relevant, the

lesson of those cases is that prosecutions under obscenity statutes are permissible so long as the statute contains a scienter element. For instance, Defendants cite *Mishkin v. New York* (1966) 383 U.S. 502, where the defendant was prosecuted for possessing 50 obscene books and challenged the proof of scienter. (Defs.' MPA at 12.) The underlying statute, as interpreted, applied only to those "'who are *in some manner aware* of the character of the material they attempt to distribute. . . .'" (*Id.* at p. 510, italics added.) This definition, said the court, "fully meets the demands of the Constitution." (*Id.* at p. 511.) The court also found sufficient evidence to support this element:

> The evidence of scienter in this record consists, in part, of [defendant]'s instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books [defendant] published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that [defendant] was 'aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.'

(*Id.* at pp. 511-512; see also *Ginsberg v. New York* (1968) 390 U.S. 629, 643-645 [rejecting scienter challenge based on "knowing" distribution of obscene materials to minors, which included the Defendants' reason to know of character and content of the materials].) Like the statute in question, section 266h adequately contains a scienter element, an element which the People stand ready to prove with substantial, credible evidence that Defendants were *knowingly* earning money from prostitution. As the United States Supreme Court has long observed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (*Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 502.) And, of course, even when "speech" and "nonspeech" elements are combined in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first Amendment freedoms." (*United States v. O'Brien* (1968) 391 U.S. 367, 376.)

The People have alleged that Defendant Ferrer had knowledge that the victims engaged in prostitution. To the extent the First Amendment is even incidentally implicated by this conduct, the People intend to demonstrate the requisite scienter. As in *Mishkin*, the People intend to prove this knowledge based on the totality of the circumstances. Similar to the evidence of scienter held to be sufficient in Supreme Court cases such as *Mishkin* and *Ginsberg*, the People intend to show that Defendants had the requisite level scienter to avoid any First Amendment challenge based on, among other things, their knowledge that their business depended on profits from prostitution and their acts to further those illicit profits. Ultimately, these are factual questions that cannot be answered without a developed record. The question of scienter has been amply pleaded in each of the counts; the specific evidence to support those allegations will be shown at the preliminary hearing and later at trial.

2. Backpage's Past Challenges to Other States' Statutes Are Inapplicable Because California's Pimping Law Does Not Target Speech

Defendants claim that the People pursued this prosecution "in the face of an *unbroken* line of cases holding that online forums for classified ads – and specifically Backpage.com – are protected by the First Amendment." (Defs.' MPA at 9, italics added.) Specifically, Defendants rely on three federal injunctions against state laws that were enacted to criminalize Backpage's business model of the sale of sex-oriented ads. (Defs.' MPA at 10-11, citing *Backpage.com, LLC v. McKenna* (W.D. Wash. 2012) 881 F.Supp.2d 1262, *Backpage.com, LLC v. Cooper* (M.D. Tenn. 2013) 939 F.Supp.2d 805, and *Backpage.com, LLC v. Hoffman* (D.N.J. Aug 20, 2013) 2013 WL 4502097.) These few federal decisions do not bar Defendants' current criminal prosecution because (i) California's pimping law targets commercial sexual exploitation, not speech; (ii) the Complaint sufficiently details the conduct underlying Defendants' charges; and (iii) the Complaint sufficiently alleges scienter – an allegation which the People will prove independent of any publishing conduct. (See *Backpage.com, LLC v. Lynch* (Dist. D.C. October 24, 2016) __ F.Supp.3d __ 2016 WL 6208368. *6-9 [distinguishing *McKenna*, *Cooper*, and *Hoffman*, the court noted that if Backpage knowingly hosted advertisements for sex trafficking, "it could not argue that such speech is arguably affected with a constitutional interest"].)

> Under California's pimping statute, the prosecution must prove that the defendant:
>
> (1) knew or would reasonably be expected to know that another person was a prostitute, and
> (2) the money/proceeds that person earned from prostitution supported the defendant, in whole or in part.

(See *Grant*, *supra*, 195 Cal.App.4th at p. 114; see also CALCRIM 1150.)

> In contrast, Washington's statute in *McKenna* provided in pertinent part:
>
> A person commits the offense of *advertising* commercial sexual abuse of a minor if he or she knowingly *publishes*, *disseminates*, or *displays*, or causes directly or indirectly, to be *published, disseminated, or displayed*, any *advertisement* for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.

(*McKenna*, *supra*, 881 F.Supp.2d at p. 1268, italics added.) Similarly, the statutes at issue in *Cooper* and *Hoffman* also included "advertising" as a key element. (See *Cooper*, *supra*, 939 F.Supp.2d at p. 817; *Hoffman*, *supra*, 2013 WL 4502097, at *3 [legislative history stated that it was modeled after Washington's law].)

Federal courts concluded those statutes would likely violate the First Amendment and conflict with the CDA because they imposed liability on Backpage.com "*for information* created by third parties—namely ads for commercial sex acts depicting minors—so long as" Backpage.com knew it was publishing such information. (*McKenna*, *supra*, 881 F.Supp.2d at p. 1273, italics added.) By its plain terms, the statutes in the Defendants' triad of cases based liability on not only third-party *information* but also the *publication* of it – two terms that expressly implicate speech and the CDA.

The People's case is different from *Cooper*, *McKenna*, and *Hoffman*. In contrast, the People have alleged that Defendants are guilty of conspiring to commit pimping because they knowingly derived support from prostitution earnings, i.e., profited from prostitution. Just as the federal sex trafficking law, 18 U.S.C. section 1591, targets criminal conduct and not speech – those who knowingly benefit financially from forcing minors into commercial sex – the People are prosecuting Defendants under California criminal law because of their conduct, of benefitting

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financially from commercial sex. (See *McKenna*, *supra*, 881 F.Supp.2d at pp. 1273-1274 ["Most importantly, Section 1591 pertains to conduct, whereas SB 6251 pertains to speech"].)

Further, California's pimping statute does not mention publishing, unlike Washington's law which required it. The Defendants will likely counter that they only profit because Backpage.com publishes users' ads, which is only criminal because of the user-provided content. (See, e.g., *Backpage.com, LLC v. Dart* (7th Cir. 2015) 807 F.3d 229, 237 [acknowledging that credit card companies knew Backpage's "advertisers peddle flesh" before Sheriff Dart's letters because, "of course they knew about the nature of the advertising on Backpage—everyone does"].) Defendants are wrong: the ads' content does not make the Defendants guilty of pimping – their conduct does. The mere posting of the ads does not constitute pimping. Even Defendants' profiting from the ads is not pimping by itself. This distinction is important in light of *Cooper* where the court recognized that the statute at issue did not criminalize prostitution but instead, targeted the sale of ads. (*Cooper*, *supra*, 939 F.Supp.2d at p. 824.)

"Just as '[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises,'" selling ads on a site dependent on prostitution does not constitutionally cloak the Defendants' violations of state laws that target illicit profiteering. (*Ferrer, supra*, 2016 WL 4179289, at *11, *quoting Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 707.)

Pimping under California law does not require a defendant to perform a service of any kind through publication, speaking, or otherwise – all it requires is knowingly profiting from prostitution earnings. Here, Defendants are guilty of pimping because they know their profits come from prostitution; without that knowledge, there is no pimping.

Given that the People have alleged, and will demonstrate, scienter, Defendants' claims of a "chilling effect" on free speech (Defs.' MPA at 9) necessarily fail. This case does not involve an overbreadth challenge or a prior restraint of speech. To the extent that the alleged conduct involves speech at all, the governmental interest in regulating pimping is unrelated to the suppression of free expression and any incidental restriction on alleged First Amendment freedoms is no greater than essential to further the government's interest in prohibiting

commercial sexual exploitation and protecting human trafficking victims. (See *Grant*, *supra*, 195 Cal.App.4th at pp. 113-117 [rejecting overbreadth challenge to pimping statute]; *Maita*, *supra*, 157 Cal.App.3d at pp. 316- 317 [rejecting First Amendment challenge to pimping and pandering laws based on sexual performances].)

B. DEFENDANTS HAVE NOT SHOWN THAT THE FACE OF THE COMPLAINT IS DEFECTIVE; THEY ARE NOT ENTITLED TO A DEMURRER UNDER THE CDA

Under section 1004, subdivisions (4) and (5), Defendants claim that the CDA bars their prosecution. They claim immunity from "any liability based on publishing third-party content or for failing to remove any such content, regardless of any allegations that the website knew or should have known of illegal content." (Demurrer at 1.) Notably, their claim that the CDA preempts all state criminal laws is directly refuted not only by their own prior briefing, but also by controlling California authority (*People v. Bollaert* (2016) 248 Cal.App.4th 699, 709 (*Bollaert*). (See Motion of Plaintiff Backpage.Com for Temporary Restraining Order and Preliminary Injunction, *McKenna*, *supra*, 2012 WL 12509202, at *10 (W.D.Wash.), quoting *Voicenet Commun'cns, Inc. v. Corbett*, 2006 WL 2506318, at *4 (E.D. Pa. Aug. 30, 2006) ["[T]he plain language of the CDA provides internet service providers immunity from *inconsistent* state criminal laws"], italics added.) This authority, among other recent cases involving Backpage that Defendants fail to cite, demonstrates that even if applicable, the CDA is an affirmative defense at trial, and not a bar to prosecution. Because this potential affirmative defense does not appear on the face of the Complaint, and because it must be assessed on a complete factual record, Defendants' motion is premature at best.

1. The Legal Limits of CDA Protection

Two decades ago, the Internet was in its infancy. Congress sought to protect children from exposure to "indecent" Internet content by enacting the Communications Decency Act of 1996. (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 868.) Some protections for children were struck down as unconstitutional. (See, e.g., *id.* at p. 885.) Section 230 of the CDA still stands. ("The CDA"; 47 U.S.C. § 230(c)). Section 230 furthers "First Amendment and

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e-commerce interests on the Internet while also promoting the protection of minors." (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1028.)

a. The statutory framework

Section 230(c) is the "operative section" of the CDA. (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1100.) Entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," Section 230(c) states:

> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

Courts have interpreted Section 230(c)(1) as protecting a website "from liability for material posted on the website by someone else." (*Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 850 (*Internet Brands*).) But Congress did not declare a "a general immunity from liability deriving from third-party content" anywhere in Section 230(c). (*Barnes, supra*, 570 F.3d at p. 1100; see generally *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39-40, 62; *Bollaert, supra*, 248 Cal.App.4th at p. 709.)

The CDA limits its own reach in subsection (e), which is titled "Effect on other laws" and provides in subsection (e)(3): "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Thus, subsection (e)(3) expressly limits the CDA's "preemptive effect" to State laws that are inconsistent with Section 230. (*Internet Brands, supra*, 824 F.3d at p. 850; § 230(e)(3).)

b. The trigger for federal preemption

In practice, courts have found that Section 230 preempted state statutes which specifically prohibited "the use of online marketplaces for advertising the sexual abuse of minors." (*Ferrer, supra*, 2016 WL 4179289, at *7; see *ibid* [citing cases where "Backpage has invoked successfully this provision to avoid liability"].)

However, the CDA does not provide "an all purpose get-out-of-jail-free card" for internet-based actors because granting "immunity every time a website uses data initially obtained from

third parties would eviscerate the exception to section 230" found in subsection (f)(3). (*Internet Brands, supra*, 824 F.3d at p. 853; *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1171, quoting § 230(f)(3).)

Subsection (f)(3) excepts websites from CDA protection if they are "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." In that case, a website has become a "content provider" under the CDA. (*Roommates, supra*, 521 F.3d at p. 1162.) A website is "responsible for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content." (*F.T.C. v. Accusearch Inc.* (10th Cir. 2009) 570 F.3d 1187, 1199.) If the operator passively displays content created by third parties, then it is only a service provider with respect to that content. "But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider." (*Roommates, supra*, 521 F.3d at p. 1162.)

Thus, the CDA does not protect those who knowingly commit crimes on the Internet. "When Congress passed Section 230 it didn't intend to prevent the enforcement of all laws online; rather, it sought to encourage interactive computer services that provide users *neutral* tools to post content online to police that content without fear that through their 'good samaritan [*sic*]. . . screening of offensive material,' 47 U.S.C. § 230(c), they would become liable for every single message posted by third parties on their website." (*Roommates, supra*, 521 F.3d at p. 1175, italics in original.) If a website operator's conduct is "unlawful when [conducted] face-to-face or by telephone, [it doesn't] magically become lawful when [conducted] electronically online." (*Id.* at p. 1164.)

c. The People are not required to plead the absence of a CDA defense

Whichever party claims a federal law bars enforcement of a state statute bears the burden of proving preemption. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956; see also *People v. West Valley Caregivers, Inc.* (2015) 242 Cal.App.4th Supp. 24, 32-33 [when "such a defense does not negate any element of the crime in question, and is in place for policy considerations apart

from a defendant's culpability, there is no impediment to placing the burden on the defendant to prove the defense by a preponderance of the evidence"].)

> The basic rules of preemption "are not in dispute":
>
> > Under the Supremacy Clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. In determining whether federal law preempts state law, a court's task is to discern congressional intent. Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law; (ii) when compliance with both federal and state regulations is an impossibility; or (iii) when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

(*Jolly*, *supra*, 33 Cal.4th at p. 955, internal quotes and citations omitted.)

The CDA is no different from any other preemption claim. "Preemption under the Communications Decency Act is an affirmative defense," and as such it can "support a motion to dismiss *if the statute's barrier to suit is evident from the face of the complaint.*" (*Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1357, italics added; see also *Barnes*, *supra*, 570 F.3d at p. 1109 [noting Section 230(c)(2) constitutes an affirmative defense]; cf. *Nemet Chevrolet, Ltd v. Consumeraffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254 [concluding that CDA provides immunity from suit and should be given effect "at the first logical point in the litigation process"].) Here, as discussed with respect to the First Amendment, the face of the Complaint charging the Defendants with conspiracy and pimping does not implicate the CDA. Defendants' claims rely on and will be proved meritless by additional facts. Thus, a CDA defense is not appropriately raised at this juncture. "[L]ike most other defenses," the CDA and the First Amendment "need not be specifically negated by the People's accusatory pleading." (*People v. McGee* (1977) 19 Cal.3d 948, 967.)

Moreover, all preemption cases begin with the presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485, citation omitted.) Contrary to Defendants' assertions (Defs.' MPA at 14), the CDA does not "expressly

preempt[] state laws." Instead, the CDA expressly provides that it *does not* prevent States from enforcing consistent State laws (47 U.S.C. § 230(e)(3)); Congress thereby demonstrated it did not intend to occupy the entire field of regulation. (Cf. *McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 422 ["ERISA expressly and broadly preempts state law, providing it 'shall supersede *any and all State laws* insofar as they may now or hereafter relate to any employee benefit plan. . .'"].)

Here, any CDA defense is not evident from the face of the Complaint. The pimping charges make absolutely no reference to publishing of any kind. As previously discussed, those charges are predicated on conduct, not third-party speech. As for the conspiracy charge, the Complaint, alleges that Defendants created content. Because they are content providers, they are not entitled to protection under the CDA.

2. Defendants Are Not Entitled to the CDA's Shield Because They Created and Developed Content to Further Their Conspiracy to Pimp

The CDA is not a defense to this prosecution because Defendants are responsible for the creation and development, in whole or in part, of content, and therefore, Defendants are unprotected content providers under the CDA.

The Complaint does not allege wrongdoing based on Defendants' "decision to permit third parties to post content." (*Fields v. Twitter, Inc.* (N.D. Cal., Aug. 10, 2016, No. 16-CV-00213) 2016 WL 4205687, at *6.) Defendants are charged with pimping because they knowingly profited from others' sexual exploitation. As the Complaint states, defendant Ferrer "directed the creation of two additional websites, EvilEmpire.com and BigCity.com." He "used content from escort advertisements on Backpage.com to create advertisements on EvilEmpire.com and BigCity.com." (Compl. at 2.) Defendants simply ignore these allegations and maintain that they are being prosecuted for "publishing information online and alleged harms 'caused by content provided by . . . third part[ies].'" (Defs.' MPA at 20, internal citation omitted.) However, the People have charged Defendants based on the content that *they* created.

Recently, the Court of Appeal concluded that the CDA did not immunize a website

administrator from criminal liability under state law based on his actions in helping to create the website's content. (*Bollaert, supra*, 248 Cal.App.4th at pp. 717-722.) There, the website administrator created a website on which users posted naked and compromising photos of others for the purpose of embarrassing them. The website was specifically designed to require that the posters' personal identifying information be included before a submission could be accepted, thereby violating their privacy rights. These facts constituted sufficient evidence that the website administrator developed the content of the submissions in whole or part, and therefore was an information content provider not immunized by the CDA. (*Id.* at p. 722.) Importantly, the complaint was not dismissed by the court at the demurrer phase just because a website was involved. Instead, the CDA was properly used by the defendant as an affirmative defense at trial, but ultimately rejected by the jury.

In the civil context, the Washington Supreme Court has held that minors who were featured in Backpage ads sufficiently alleged that the website operators helped develop content for the advertisements, and therefore the plaintiffs' various tort claims for sexual exploitation of children and invasion of privacy, among others, were not preempted by the CDA. (*J.S. v. Village Voice Media Holdings, LLC* (2015) 184 Wash.2d 95.) There, the court concluded that the plaintiffs' claims were sufficient to withstand a motion to dismiss where the plaintiffs alleged that Backpage intentionally developed the website to require information that allows and encourages illegal trafficking of minors; Backpage developed content that it knew would allow pimps and prostitutes to evade law enforcement; and Backpage has a substantial role in creating the content of the ads. (*Id.* at pp. 102-103.) Based on these allegations, the court concluded that fact-finding was required to determine whether Backpage was subject to suit under the CDA as a content provider. (*Id.* at p. 103.) Notably, while Defendants cite some cases involving Backpage, they completely omit any reference to *J.S. v. Village Voice Media Holdings, LLC*, nor do they discuss *Jane Doe No. 1 v. Backpage.com*, LLC (1st Cir. 2016) 817 F.3d 12. While the First Circuit in *Jane Doe No.1* affirmed the grant of civil demurrer based on the specific allegations pled, the court stated that it might reach a different result if Backpage had used victim photographs to advertise its own services, a fact which had not been alleged in the victims' complaint. (*Id.* at pp.

26-27.)

While the civil complaints filed in both *J.S.* and *Jane Doe* needed to allege sufficient factual allegations to survive a civil dismissal motion, a criminal complaint in California simply requires the accusation that the Defendants committed a public offense. (§ 952; see also *People v. Jeff* (1988) 204 Cal.App.3d 309, 342 [stating that the complaint need not include the specific evidence the People intend to rely on because "the time, place, and circumstances of charged offenses are left to the preliminary hearing"].) Because Defendants are charged with conspiracy, the People have alleged overt acts, including that Defendants intentionally developed Backpage's related sites of EvilEmpire.com and BigCity.com to further their profits from prostitution; and that Defendants created and developed content for these sites to promote Backpage's business. These allegations are similar to those that survived Backpage's attempted demurrer in *J.S. v. Village Voice Media Holdings, LLC.* At the preliminary hearing and trial, the People intend to present evidence showing Defendants' extensive content development, the images they appropriated from Backpage to their affiliated escort sites, and that the content of Backpage's other sites was developed in large part by Defendants, not by third party users. The People intend to show that Defendants' purpose in creating the additional sites was to increase their prostitution profits. Because Defendants are content providers, they cannot use the CDA as a shield.

3. Defendants Do Not Have a Viable Affirmative Defense Under the CDA Because Consistent with the CDA, California's Pimping Statute Targets Defendants' Intentional and Criminal Profiteering

Simply put, the Complaint does not base Defendants' pimping on material posted by their victims on Backpage.com. Indeed, the victims would not be liable in Defendants' stead because the content of Backpage.com Escort ads cannot be the basis for pimping charges. Pimping requires a defendant to derive support from another's prostitution earnings. Here, the Complaint alleges that Defendants knew their victims engaged in prostitution and still repeatedly took their earnings because prostitution proceeds supported Defendants' business. The People are not prosecuting Defendants because of another's speech; the People are prosecuting Defendants because they intentionally conspired to profit from prostitution.

As California criminal cases such as *People v. Bollaert* illustrate, not to mention civil

cases such as *J.S. v. Village Voice Media Holdings, LLC, supra,* 184 Wash.2d 95, the question whether the CDA preempts state law is ultimately a question of fact; it is not a question of law that can be decided on the pleadings. Defendants assertion that "[e]very court to consider this issue has reached the same conclusion, holding that Section 230 preempts state criminal laws" (Defs' MPA at 18.) is patently false. In a footnote, Defendants later recognize *Bollaert*, but they attempt to backhand that decision as "inapplicable." (Defs.' MPA at 20 fn. 19.) The People submit that *Bollaert* is wholly applicable and instructive on several relevant points. Like *Bollaert*, Defendants developed content, and therefore are not shielded by the CDA. Rather than dismiss the prosecution at the demurrer phase or even following a preliminary hearing and a section 995 motion, the court allowed the jury to make the factual determination as to whether *Bollaert* created or developed content in whole or in part. The People must be given the opportunity to provide this proof at a preliminary hearing and trial based on a fully developed factual record.

Here, Defendants urge, in essence, that the Complaint does not go far enough to specify the facts and theories that would show this action is not preempted by the CDA. (See, Defs.' MPA at 19 ["The AG nowhere alleges that Defendants authored, created, or participated in posting the ads of the nine individuals."].) But the Penal Code does not require such specific pleading. The People are not obligated to negate facts potentially showing that the action is preempted under the CDA. As a general rule, "where the exceptions are not a part of the statute defining the offense and constitute a matter of defense, the pleading is sufficient without any allegation showing that the exception does not exist." (*People v. Mason* (1960) 184 Cal.App.2d 317, 356.) And as noted above, the party claiming a state statute is preempted by federal law bears the burden of demonstrating preemption. (*Jolly, supra*, 33 Cal.4th at p. 956.) Accordingly, the People were not required to plead a lack of preemption.

Consequently, Defendants' motion to dismiss based on preemption is premature. There is nothing on the face of the complaint that shows the CDA preempts this criminal case. At the preliminary hearing and trial, the People fully intend to provide detailed evidence of the ways in which Defendants used Backpage to create and develop content. Further, the facts will

distinguish this case from *Jane Doe No. 1*, both in terms of the Defendants' use of victims' content to promote Backpage through its EvilEmpire and BigCity affiliate sites, and the actions that Defendants undertook to develop, in whole or in part, the content of ads on Backpage as well as EvilEmpire and BigCity.

Once again, Defendants rely on the same trilogy of cases that prevented enforcement of entirely distinguishable statutes in other states. (Defs.' MPA at 18-19, citing *McKenna*, *supra*, 881 F.Supp.2d at p. 1273; *Cooper*, *supra*, 939 F.Supp.2d at p. 823; *Hoffman*, *supra*, 2013 WL 4502097.) Essentially, the Defendants succeeded in these cases because they challenged state statutes that, on their face, *explicitly targeted publishing conduct*. As *McKenna* stated, "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause." (*McKenna*, *supra*, 881 F.Supp.2d at p. 1274, quoting *United States v. Arizona* (9th Cir.2011) 641 F.3d 339, 346.) California's pimping statute does not mention publishing, and predates the Internet, unlike Washington's law which required advertising.

The People's case does not turn on Defendants' publishing conduct; they are guilty of conspiracy to pimp because they knowingly agreed to profit from prostitution and acted in furtherance of that illegal objective.

C. THE COMPLAINT STATES FACTS THAT CONSTITUTE PUBLIC OFFENSES UNDER THE CRIMINAL STATUTES CHARGED

Defendants contend that the Complaint does not state facts that constitute a public offense under the criminal statutes charged because it does not allege facts supporting every element of each offense. (Demurrer at 1, citing § 1004, subds. (2) & (4).) Not only do Defendants misapply the civil pleading standard, but they ignore California precedent. Defendants are entitled simply to notice of the crimes charged because the preliminary hearing serves to provide notice of the particular circumstances surrounding their criminal conduct.

As to Defendant Ferrer's pimping charges, the Complaint expressly alleges in the language of the statute that he knowingly and repeatedly took the earnings of victims engaged in prostitution because his livelihood depended on it. "That is enough." (*People v. Singer* (1963)

217 Cal.App.2d 743, 762.) Defendants assert that the First Amendment required the People to allege that Defendant Ferrer "knew of the unlawful nature and content of the specific ads" that exploited the victims, and moreover, that Defendant Ferrer knew the age of the minor victims. (Demurrer at 2.) As detailed below, Defendants' claims are meritless.

As to the conspiracy charged between the Defendants, the Complaint also expressly alleges that the Defendants conspired together to commit pimping for the purpose of further enriching themselves. They claim there are no allegations that the Defendants "entered into any agreement with anyone, or that they had any specific intent to commit a public offense of pimping." (Demurrer at 2.) Below, the People explain why the Defendants' conclusory claims do not suffice under section 1004.

1. The Complaint Comports with California's Criminal Pleading Requirements Because It Plainly Alleges that the Defendants Violated the Crimes Charged

Traditionally, a defendant demurs under subdivision (2) of section 1004 "if he or she believes the lack of greater specificity hampers the ability to defend against the charges." (*Jeff, supra*, 204 Cal.App.3d at p.342.) Defendants' demurrer reveals that their concern is not a lack of specificity but rather the sufficiency of the evidence. Because the latter is not a ground under section 1004, Defendants' demurrer fails.

A demurrer under subdivision (2) of section 1004 claims that the Complaint "does not substantially conform to the provisions of Sections 950 and 952." In particular, section 952 provides:

> In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.

The People's theory is plainly pled in the Complaint. Defendants conspired together to commit the crime of pimping and committed overt acts for the purpose of carrying out that

specific objective. (Compl. at 1-2.) The People are not required to state in the criminal complaint each item of evidence that the prosecution will rely upon to prove its case; "*the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript.* This is the touchstone of due process notice to a defendant." (*Jeff, supra*, 204 Cal.App.3d at p. 342, italics added.)

Unlike a civil action in which the complaint provides notice of the violations alleged, "'in modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which he must defend.'" (*People v. Jones* (1990) 51 Cal.3d 294, 317.) Consequently, a demurrer in a felony proceeding on section 952 grounds generally requires consideration of the preliminary hearing or grand jury transcript. (*People v. Jordan* (1971) 19 Cal.App.3d 362, 369-370 ["Since the constitutional application of section 952 relies in part upon notice afforded by the transcript, it follows a demurrer under section 1004 for failure of the indictment to substantially conform to section 952 contemplates testing the adequacy of the notice to defendant by allegations in the language of the statute when viewed in light of the transcript"]; *People v. Tolbert* (1986) 176 Cal.App.3d 685, 689, fn. 2 [accord].)

These principles are illustrated *in Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, a case upon which Defendants rely. (See Demurrer at 2; Defs.' MPA at 25.) There, strip club managers were charged with pimping and pandering. After a preliminary hearing where they were held to answer, they filed a petition for writ of prohibition. Based on the developed record, the Court of Appeal held that the information should have been set aside because the conduct complained of failed to meet the definition of prostitution and because there was no evidence that either manager knew any dancer had offered to commit an act of prostitution. (*Id.* at pp. 426-438.)

The People do not need to describe the theory of the case in a criminal complaint, nor do they need to specify the manner or means employed to perpetrate the crime. Rather, the complaint is sufficient because it uses the language of the statute defining the crimes, concretely as to the

person charged. (*People v. Waller* (1923) 64 Cal.App.4th 390, 395.) Mirroring the language of the statutes, the Complaint provides sufficient notice under section 952.

2. The Theory Underlying the Complaint Is Based on the Defendants' Intentional Criminal Conduct – Not Backpage's Speech

Defendants claim the Complaint advances the theory that they would be liable "regardless of whether the Defendants knew of or participated in the unlawful activity." (Defs.' MPA at 21.) However, the Complaint clearly alleges that Defendants knew of their users' unlawful activity – namely, prostitution – and that Defendants knowingly profited from that prostitution, structuring their business to further it and their profits.

Defendants also mistakenly rely on *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F.Supp.2d 1041. (See Defs.' MPA at 21-22.) *M.A.* was a sex trafficking victim who sued Backpage because her trafficker posted ads featuring *M.A.* in "child pornography" on Backpage.com. (*Id.* at p. 1044.) *M.A.* claimed that Backpage was an unprotected content provider under the CDA because "regardless of being on notice that its website might be being used for illegal purposes, [Backpage] did nothing to stop the ads from being posted and instead profited from such ads." (*Id.* at p. 1051.) The court rejected *M.A.'s* claim because she did not allege that Backpage "specifically encouraged the development of the offensive nature of that content." (*Id.* at p. 1052.)

The People's case is different. The Complaint alleges that the Defendants created related websites, EvilEmpire.com and BigCity.com, and then created Escort ads on those sites using content developed from Backpage Escort users, giving users no apparent way to create or edit content on EvilEmpire.com. It further alleges that the Defendants created this content to further their criminal profiteering. Thus, the Complaint alleges that Backpage is an unprotected content provider under the CDA, just as Yahoo was in *Anthony v. Yahoo Inc.* (N.D. Cal. 2006) 421 F.Supp.2d 1257. *Anthony* held that the CDA did not protect Yahoo "from claims that it created false profiles to lure users into renewing their subscriptions." (*Anthony, supra*, 421 F.Supp.2d at pp. 1262-1263.) The *M.A.* court distinguished *Anthony* because the claim was that "Yahoo's manner of presenting the profiles—not the underlying profiles themselves—constitute[d] fraud,"

and therefore the CDA did not apply. (*M.A.*, *supra*, 809 F.Supp.2d at p. 1052, fn. 10.) Here similarly, the Complaint is predicated on the Defendants' conduct – not Backpage's content – and part of that conduct involved the creation and development of sites like EvilEmpire.com to further Backpage's profits from prostitution. The Complaint alleges this conduct as part of Defendants' overt acts in furtherance of their conspiracy to commit pimping.

Defendants also err in relying on the lower court decision in *Doe ex rel. Roe* (D. Mass. 2015) 104 F.Supp.3d 149. (Defs.' MPA at 5.) They neglect the First Circuit's decision that followed where the court recognized that if the plaintiffs had claimed that "Backpage had used [the plaintiffs'] pictures to advertise its own services," then "[m]atters might be different." (*Jane Doe No. 1*, *supra*, 817 F.3d at p. 27.) Here, the Complaint does allege such conduct, demonstrating that the People's case is different from Backpage's past civil cases. Unlike civil pleading standards, a criminal complaint merely has to state the public offense with which the defendant is charged. Under California criminal law, "the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment or information is founded." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 384 [specifically discussing pleading under section 266h].) At the preliminary hearing, the People will present the facts upon which the Complaint relies, including facts showing that Defendants are content providers and therefore cannot successfully defend themselves using the CDA or the First Amendment. The Court should overrule Defendants' demurrer so that the People have an opportunity to present those facts.

IV. CONCLUSION

Defendants fail to state a proper basis upon which this Court should grant their motion. The Complaint properly alleges that Defendants violated California's criminal laws and gives due notice of the criminal conduct underlying the charges. Defendants have failed to show that they are entitled to any affirmative defense at this stage. The Court should overrule Defendants' demurrer.

Dated: This 4th day of November, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **People of the State of California v. Carl Ferrer, Michael Lacey, James Larkin**
No.: **16FE019224**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 4, 2016, I served the attached **PEOPLE'S OPPOSITION TO DEFENDANTS' DEMURRER TO FELONY COMPLAINT** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 4, 2016, at Sacramento, California.

Tamara Yeh
Declarant

Signature

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