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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CARL FERRER, MICHAEL LACEY, and **JAMES LARKIN,**

Defendants.

Case No. 16FE024013[1]

NOTICE AND MOTION TO ENFORCE COURT'S ORDER OF DISMISSAL; ALTERNATIVE DEMURRER; AND REQUEST TO TRANSFER TO JUDGE BOWMAN AND FOR FURTHER RELIEF

[California Penal Code §§ 1004, 1007, 1008]

Hearing Date: January 24, 2017
Dept.: 8[1]

[1] As discussed herein, this matter is related to Case No. 16FE019224, and Defendants seek enforcement of Judge Bowman's Final Ruling and Dismissal Order in that case. Accordingly, Defendants also request that the present matter be transferred to Judge Bowman in Dept. 61.

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Carl Ferrer, Michael Lacey and James Larkin ("Defendants") hereby move to enforce the December 9, 2016 order of the Honorable Michael G. Bowman dismissing all charges against Defendants in case No. 16FE019224, to dismiss the new Criminal Complaint filed by the Attorney General on December 23, 2016 (the "Refiled Complaint"), alternatively to demur to the Refiled Complaint, and to transfer this matter for hearing to Judge Bowman, on the following grounds:

1. The Refiled Complaint is contrary to and in direct violation of the Court's Final Ruling on Demurrer entered December 9, 2016 ("Final Ruling," No. 16FE019224, *published at* 2016 WL 7237305 (2016)), and the Court's dismissal Order, entered December 13, 2016 (the Orders are attached hereto as Exhibits A and B), which held that the State's prosecution of Defendants based on Backpage.com's publication of third-party ads or receipt of payments for ads is foreclosed by Section 230 of the Communications Decency Act, 47 U.S.C. § 230;

2. Alternatively, the AG's Refiled Complaint is barred and the Court should grant a demurrer dismissal pursuant to Penal Code § 1004 on the same grounds that the Court sustained Defendants' demurrer to the Original Complaint.

In addition, Defendants request the following additional relief to prevent prejudice and ensure judicial efficiency:

3. This matter should be assigned to Judge Bowman (Department 61), as the motion seeks enforcement of his prior Orders and California law reflects that a related matter such as this should be decided by the judge who previously addressed and decided the same issues;

4. The Court should hear this motion as promptly as possible to comply with established law that Section 230 immunity should be applied at the earliest possible opportunity because it is a "foreclosure from prosecution" (Final Ruling at 1), and to avoid further prejudice to Defendants from pending improper criminal charges;

5. In the interim, until disposition of the motion, the Court should enjoin any actions by the AG's office to issue search warrants, subpoenas or other process or to take any other steps purportedly related to investigation of charges against Defendants or Backpage.com; and

6. In conjunction with dismissal of the Refiled Complaint, the Court should order that the AG immediately return all materials seized and obtained in the investigation of Backpage.com and Defendants, including some 9,000,000 documents the AG has collected, over $230,000 in customer checks and money orders, $5,200 in cash, and approximately $300,000 worth of computer equipment.

DATED: January 19, 2017

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: _____
James C. Grant

Attorneys for Carl Ferrer, Michael Lacey and James Larkin

DAVIS WRIGHT TREMAINE LLP

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I. INTRODUCTION

Three months ago, the Attorney General filed a criminal complaint against Messrs. Ferrer, Lacey and Larkin, asserting charges of pimping and conspiracy based on their relation to Backpage.com (the "Original Complaint"), a website that hosts third-party classified ads. After the AG arrested and jailed the Defendants, refused to agree to their release on bail, required a publicly televised arraignment, and harmed or destroyed longstanding relationships with financial service providers by issuing extensive third-party subpoenas, the Honorable Michael G. Bowman sustained Defendants' demurrer and ordered that all criminal charges be dismissed as of December 9, 2016. The Court entitled its December 9 order as its "Final Ruling on Demurrer." It made clear the AG cannot assert criminal charges based on Backpage.com's publication of third-party ads or receipt of payments for ads. Such claims are preempted and Defendants are immunized under the First Amendment protections embodied in Section 230 of the Communications Decency Act, 47 U.S.C. § 230. As the Court wrote, Section 230 provides "a foreclosure from prosecution." (*See* Final Ruling at 1, 15.)

Nonetheless, on December 23, 2016, the AG filed a new criminal complaint against Defendants based on the same theories and largely the same allegations as before. The Refiled Complaint asserts the same pimping and conspiracy charges as the Original Complaint based on the same premise—*i.e.*, that Defendants should be liable because Backpage.com received payments for ads the State alleges were for prostitution. The only difference in the latest complaint is that the AG attempts to recast those allegations as money laundering under Penal Code § 186.10 based on the identical premise the Court rejected—*i.e.*, now contending that *all* payments for *all* ads on Backpage.com constitute proceeds from pimping and prostitution. As the Court held in the Final Ruling, charging for online ads qualifies as "services rendered for legal purposes" protected by Section 230 immunity. (*See* Final Ruling at 13.)

The AG's Refiled Complaint is an attempt to amend the Original Complaint, but the Court's Final Ruling and Penal Code §§ 1007 and 1008 preclude amendment. Penal Code § 1387 also does not allow refiling here, after the Court has dismissed the AG's prior complaint with

prejudice because the State has no authority to prosecute. Permitting the State to continue with an unauthorized prosecution such as this, in violation of federal law, violates due process.

In the proceedings before Judge Bowman, the State had ample opportunity to address Section 230 and argue that its prosecution was not barred (including through a second round of briefing and an offer of proof). The Court expressly rejected the State's reasoning and evidence, but the AG refuses to respect Judge Bowman's ruling and now effectively seeks another round of "duck bites" at Defendants and the law. (*See* Final Ruling at 4 (quoting *Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1174 (en banc).) Indeed, given that the Refiled Complaint asserts much the same charges and the very same theories of criminal liability the Court has rejected (and that the AG previously admitted she was barred from pursuing), it appears the AG's objective is harassment rather than a good faith prosecution.

The Refiled Complaint is a patent violation of this Court's Orders and should be dismissed for this reason. Alternatively, the Refiled Complaint is subject to demurrer dismissal under Penal Code § 1004 on the same bases that the Court sustained Defendants' demurrer to the Original Complaint. Either way, the Court should dismiss the Refiled Complaint *immediately* to prevent further harm to Defendants and the chilling effect on First Amendment and Section 230 rights caused by outstanding, albeit baseless criminal charges. An immediate ruling is essential because "[c]riminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm," and even "[a] successful defense to a criminal prosecution would be small solace indeed." (*ACLU v. Reno* (E.D. Pa. 1996) 929 F. Supp. 824, 856, *aff'd* (1997) 521 U.S. 844.)

The Court should order further relief (as discussed below) to end the State's prosecution once and for all and to preclude the AG's office from using the mere filing of another complaint as an excuse to continue its vendetta and intimidating investigation. The Court should make clear that the State is barred from misusing the law as a perpetual "sword of Damocles." *Id.*

II. BACKGROUND

The Court is familiar with the background of this case prior to the AG's recent Refiled Complaint, so it can be summarized briefly.

A. The AG's Original Complaint and the Court's Dismissal on Demurrer.

The AG's office filed the Original Complaint against Messrs. Ferrer, Lacey and Larkin on September 26, 2016, and arrested and incarcerated Mr. Ferrer on October 6 and Messrs. Larkin and Lacey on October 10. At the first hearing before Judge Bowman in Department 61 on October 12, 2016, Defendants notified the Court and the AG that they would file a demurrer to dismiss the complaint on the grounds that the State's prosecution violated Section 230 of the CDA. Judge Bowman indicated that the Court would address and decide the demurrer first, before the case proceeded further. The parties fully briefed the demurrer, and the Court held a hearing on November 16, 2016. Before the hearing, Judge Bowman issued a tentative ruling indicating that he was inclined to grant the demurrer in its entirety. (*See* Tentative Ruling (Nov. 16, 2016).) But he allowed the State another opportunity to present any further arguments and any additional factual support for the charges. The State filed its supplemental brief and extensive exhibits on November 28, 2016, and Defendants responded on December 5.

The Court issued its Final Ruling on December 9, 2016. The Court rejected all of the AG's arguments and held the State's charges were barred by Section 230, concluding that "Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided ... a foreclosure from prosecution." (Final Ruling at 15.) More specifically, the Court rejected the AG's contentions that Defendants could be criminally liable because Backpage.com received payments from users for ads on the site, as this "qualif[ies] as services rendered for legal purposes" and "accepting payment for services" is a function "traditionally associated with publishing" which is "provided immunity under the CDA." (*Id.* at 13.)

The Final Ruling concluded by stating that "Defendants' demurrer is GRANTED," while also exonerating the bonds previously posted for the Defendants and indicating that all further court dates were vacated. (*Id.* at 15.) By Order dated December 13, 2016, the Court confirmed that the case "is and was dismissed on December 9, 2016" with the entry of the Final Ruling. (*See* Order (Dec. 13, 2016).)

B. The AG's Refiled Complaint.

Based on the Court's Orders, Defendants' counsel contacted the AG's office on December 14, 2016 to request that materials previously seized be immediately returned, given the dismissal of all charges and the State's lack of authority to prosecute. The AG's office refused to do so, but did not give any reason. Then, on December 23, 2016—the Friday before the Christmas weekend—the AG's office emailed to Defendants' counsel a new complaint. Attorney General Harris issued a press release that day, stating that she had filed "new criminal charges ... [f]ollowing the uncovering of new evidence" although she did not state what the new evidence was, instead repeating the same "online brothel" sound-bite she asserted in her earlier press release as the basis for the Original Complaint.[2]

The duplicative nature of the Refiled Complaint is discussed below (*see infra* Section III.B). In general, it alleges the same charges of pimping and a pimping conspiracy as in the Original Complaint. (*Compare* Orig. Compl. at 3-4, *to* Refiled Compl. at 12-13.)[3] The only difference now is that the State added vague allusions to the arguments it made and lost in its prior supplemental filing seeking to evade Section 230. (*See, e.g.*, Refiled Compl. at 14 ("Defendants designed ... BigCity and EvilEmpire, using content developed by Defendants" and "created profiles for thousands of victims").)

Otherwise, the Refiled Complaint asserts 27 counts of money laundering (and a related conspiracy count), alleging that all payments for all ads on Backpage.com are "proceeds of criminal activity," that Defendants knew this, and that they willfully conducted some unspecified financial transactions involving some "monetary instrument or instruments" in connection with ad revenues of Backpage.com. (*See, e.g.*, Refiled Compl. at 4.) The AG makes up 27 different charges by alleging separate counts for Backpage.com revenues on a month-by-month basis over a

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[2] (*See* https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-new-criminal-charges-against (AG Harris Dec. 23, 2016 press release); *compare* https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-criminal-charges-against-senior (AG Harris Oct. 6, 2016 press release).)

[3] The Refiled Complaint also adds charges and pseudonymous references to four other individuals, but provides no allegations about them or their circumstances. (*See* Refiled Compl. at 13-14.)

two-year period, whereas the charges about ad revenues in the Original Complaint were stated on a cumulative basis. (*See* Fitchner Decl. at 11 (referring to $51 million in payments from California users in 29-month period). The only other differences in the Refiled Complaint are that the AG filed it as a new action, in a different department of this Court (Department 8), and with a new cause number.

C. The AG's Other Actions in Connection with the Refiled Complaint.

The arraignment date for the Refiled Complaint was originally set for January 11, 2017, although the Defendants had been subpoenaed to appear before a Senate subcommittee the day before in Washington, D.C. (as the AG's office presumably knew). At that hearing, now-Senator Harris called for prison terms for Messrs. Ferrer, Lacey, and Larkin.[4] In a press statement after the hearing, Senator Harris described the actions of the AG's office against Backpage.com as "an ongoing effort," and, reacting to news that the website had closed its adult section, said, "I look forward to [Backpage.com] shutting down completely."[5]

The AG's office later agreed to reschedule the arraignment date for the Refiled Complaint, but when Defendants' counsel asked to do so at the earliest possible opportunity, the AG's representatives said they could not be available any time before January 24, 2017. In the meantime, the AG's office issued new third-party subpoenas to other companies providing financial services to Backpage.com, demanding responses by January 11.[6]

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[4] (*See* Senate Permanent Subcommittee on Investigations, January 10, 2017 Hearing Video at 49:15, 50:00 (comments of Sen. Harris), https://www.hsgac.senate.gov/subcommittees/investigations/hearings/backpagecoms-knowing-facilitation-of-online-sex-trafficking.)

[5] (Sarah D. Wire, *Sen. Kamala Harris Praises Closure of Backpage.com Adult Section*, L.A. Times (Jan. 10, 2017), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-sen-harris-praises-closure-of-1484084089-htmlstory.html.)

[6] On January 11, 2017, when counsel appeared to reschedule the arraignment date, the AG announced it was expecting two subpoena responses; and the Court indicated it had received one. The Court provided those materials to the AG's representative with direction that they be produced to Defendants in discovery. The State has not produced these materials or indicated what they are, consistent with its prior refusal to provide essentially *any* discovery. But Defendants have learned the AG issued a new subpoena to a Backpage.com payment processor demanding production of all customer transaction records purportedly based on the Refiled Complaint without regard to (or mention of) the Court's Final Ruling and Dismissal Order.

III. ARGUMENT

A. The AG Is Prohibited from Refiling Charges after the Court's Orders Granting the Demurrer and Dismissing the Case.

This Court has already rejected the AG's prosecution and theories as a matter of law, without leave to amend and with prejudice. The AG does not get yet another bite at the apple. The Court's prior Orders, the Penal Code, California case law and the Constitution preclude this tack.

By all appearances, the AG's newest complaint is an attempt to amend the Original Complaint in a misguided effort to avoid the Court's previous Orders. In response to the demurrer, the AG requested leave to amend. (*See* Transcript at 6:12-16 (Nov. 16, 2016); People's Supp. Br. at 14). The Court instead gave the State the opportunity to provide an offer of proof and then, after rejecting the State's arguments and offer, dismissed the AG's prosecution and all charges outright, without leave to amend (*see* Final Ruling at 15). The Court confirmed in its December 13 Order that its dismissal was final and conclusive.

The Court's Orders fully complied with the Penal Code provisions concerning demurrers. Penal Code § 1007 provides that the Court must enter an order "overruling or sustaining" a demurrer. "If a demurrer is sustained, "the court *must* ... permit the filing of an amended complaint" "if the defect can be remedied." (Penal Code § 1007 (emphasis added).) But "[i]f the demurrer is sustained[] and no amendment of the accusatory pleading is permitted ... the action *shall be dismissed.*" (Penal Code § 1008 (emphasis added).) Thus, if a court grants a demurrer based on a pleading deficiency, it must allow the prosecutor an opportunity to amend. However, when a demurrer is granted because the State has no authority to prosecute or its charges are precluded as a matter of law (as here), a demurrer must be granted with prejudice. These Penal Code requirements are mandatory, and the Court properly adhered to them.

Why the AG's office believes it can refile a complaint asserting the same rejected theory of criminal liability and effectively the same charges is unclear and unsupported in the law. If the AG's office is trying to invoke Penal Code § 1387, it misreads the law. Section 1387 governs the prosecution's ability to refile charges after dismissals based on specific provisions of the Penal

Code, but does not address the refiling of charges that have been dismissed on demurrer as a matter of law.[7]

When a demurrer is sustained without leave to amend, a court's order is a bar to further prosecution on the charges and grounds as to which the demurrer was granted. (*See People v. Busick* (1939) 32 Cal. App. 2d 315, 324-25 ("[W]here the demurrer is sustained ... the judgment becomes a bar unless the court directs a resubmission to the grand jury."); 20A Cal. Jur. 3d Criminal Law, Pretrial Proceedings § 819 (2016).) Thus, in *People v. Seitz* (1929) 100 Cal. App. 113, *partially overruled on other grounds, People v. Collup* (1946) 27 Cal.2d 829, 838-39), the Court of Appeal reversed a conviction when the district attorney amended an information to refile a burglary charge against the defendant after the trial court sustained a demurrer on the same charge, without leave to amend. (*Id.* at 116.) The court held that the judgment of conviction on this count "cannot be allowed to stand." (*Id.* at 117.)[8]

This rule precluding refiling applies in particular when a criminal complaint was dismissed on constitutional grounds, as *People v. Pinedo* (2005) 128 Cal. App. 4th 968, illustrates. There, a magistrate judge dismissed a felony embezzlement charge against the defendant after finding a due process violation because of the prosecutor's delay in bringing charges (*i.e.*, a violation of constitutional speedy trial rights rather than a statutory violation). (*Id.* at 971.) The prosecutor

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[7] Section 1387(a) provides in relevant part: "An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995." However, none of the specified code sections concern demurrers, which are addressed in a different chapter (Chapter 3, Title 6, Part 2, "Demurrer and Amendment"). (*See* 2 Cal. Crim. Practice: Motions, Jury Instructions & Sentencing § 26:1 (4th ed.) (listing code provisions for which refiling is permitted under Section 1387); *Casey v. Superior Ct.* (1989) 207 Cal. App. 3d 837, 842-43 ("[t]his chapter" as used in Section 1387 "refers to chapter 8 of title 10 of part 2 of the Penal Code").)

[8] (*Cf. Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal. App. 4th 157, 162 (sustaining trial court dismissal of civil case refiled by plaintiff after grant of a demurrer without leave to amend, noting: "A trial court has authority to strike sham pleadings, or those not filed in conformity with its prior ruling."); *Chappelle v. City of Concord*, (1956) 144 Cal. App. 2d 822, 824-25 (affirming dismissal in civil case: "A judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts which were held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained, is equally applicable to the second one.").)

urged that he was entitled to have "two bites at the same apple" under Section 1387. (*Id.* at 972.) The Court of Appeal disagreed, noting that the prosecutor "had every opportunity to litigate the merits of [the prior dismissal] motion and to appeal from that order." (*Id.*) The court held that the State could not invoke Section 1387 to relitigate a constitutional flaw: "[W]e conclude that a dismissal ... on this due process ground terminates the proceedings and is an order that must be appealed or it becomes final." (*Id.* at 973.) Apropos here, the court observed that, "although prosecutorial discretion is broad, it is not unfettered," and "courts ... have the inherent power to limit prosecutorial filing discretion whenever it is used in a way that is oppressive and unconstitutional." (*Id.* at 974-75 (quoting *Wayte v. United States* (1985) 470 U.S. 598, 608 (alterations and internal quotation marks omitted).)

In short, the AG's office *cannot* amend its prior complaint, and its attempt to do so violates this Court's Orders, the Penal Code and the Constitution. The pimping-related charges in the Refiled Complaint are nothing but restated versions of the charges the Court dismissed. (*Compare* Refiled Compl. at 12-18, Counts 28-40, *with* Orig. Compl. at 1-9, Counts 1-10.) To the extent there are differences in the substantive allegations between the two complaints, the AG has merely stripped out specifics that were stated before, to assert the same charges in more vague and conclusory terms.[9] Even if the AG's office had been permitted leave to amend (which was not permitted), it is unfathomable that it could do so by pleading *less* information—instead asking the Court to accept conclusory characterizations and disregard prior admissions.

[9] For example, the Refiled Complaint no longer incorporates the Fitchner Declaration, which made clear the individuals who posted ads created and provided all content themselves and evaded Backpage.com's rules so the website could not know if the ads concerned illegal conduct. (*See* Fitchner Decl. at 7-11; Demurrer at 6.) It also omits Agent Fitchner's admissions that Mr. Ferrer and Backpage.com cooperated with law enforcement and took down ads when asked to do so. (*See* Fitchner Decl. at 6.) Similarly, the Refiled Complaint makes vague accusations about the BigCity.com and EvilEmpire.com websites (*i.e.*, that "Defendants created profiles" and "designed ... [the] websites ... with the purpose of promoting Backpage's prostitution business" (Refiled Compl. at 14)), while omitting the specific information the AG provided before that the listings on these sites were taken from and "essentially identical" to Backpage.com ads (*see* Fitchner Decl. at 3; Defendants' Response to AG's Supp. Br. at 4-5). Yet, this was the information the Court cited in holding that the AG could not avoid Section 230 for such republication of third-party content. (*See* Final Ruling at 7-10.)

The AG had a full opportunity to contest the Court's Tentative Ruling and offer proof to show that its prosecution was not foreclosed by Section 230. The Penal Code does not permit another "second bite" here. The AG is foreclosed from prosecuting, as the Court has held.

B. The AG's Refiled Complaint Violates the Court's Final Ruling Granting the Demurrer.

Regardless of whether the Refiled Complaint is an improper amendment or refiling (or something else), it contravenes this Court's Final Ruling that the AG's prosecution of Defendants is barred by Section 230. The Court should dismiss the Refiled Complaint to prevent circumvention of its orders, or, alternatively, should grant this motion as a demurrer for the same reasons the Court sustained the first demurrer.

As noted, the AG has maintained in the press that the Refiled Complaint asserts "new criminal charges ... [f]ollowing the uncovering of new evidence."[10] In fact, there is nothing new in the AG's latest complaint except that she has recast her "guilt by revenues" theory as allegedly constituting money laundering under Penal Code § 186.10, as well as receipt of pimping proceeds under § 266h. However, as the AG well knows, the flaw of her prosecution is not a matter of labels or pleading, but rather that she seeks to hold Defendants liable on the theory that Backpage.com earned revenues for publishing third-party content, conduct that is immunized by Section 230.

The AG's office filed its charges after a *three-year investigation.* (Fitchner Decl. at 4.) It is disingenuous, at best, for the AG to represent that her office uncovered "new evidence" in the two weeks after the Court granted the demurrer. The few factual allegations in the Refiled Complaint (and there are very few) merely state Backpage.com's revenues from California ads on a monthly basis dating back to July 1, 2014,[11] or concern payment processing arrangements through affiliates and for other websites from 2013-15.[12] The AG's Original Complaint alleged

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[10] (*See supra* AG Harris Dec. 23, 2016 press release.)

[11] (*See, e.g.*, Refiled Compl. at 4 (alleging that "[o]n or about and between July 1, 2014 and July 31, 2014, throughout California," Backpage.com "conduct[ed] transactions [of] $1,082,934.67," each and all of which the AG alleges were for criminal activity of which the Defendants knew.)

[12] (*See* Refiled Compl. at 3-4.)

much the same.[13] In fact, the AG's press release promoting the Original Complaint three months ago touted the same revenue figures.[14]

The central theme of the AG's Original Complaint was that Defendants knowingly "profited from prostitution" because users paid to post ads on Backpage.com. (*See, e.g.*, Opp. to Demurrer at 1, 3, 4, 7, 8-9, 16.) The theme is the same now, but the State seeks to recharacterize the receipt of payments for advertising services as "money laundering" under Penal Code § 186.10(a)(2). That section requires the state to prove that a defendant has:

> conduct[ed] or attempt[ed] to conduct a transaction or more than one transaction ... involving a monetary instrument or instruments of ... a total value exceeding twenty-five thousand dollars ($25,000) within a 30-day period ... knowing that the monetary instrument represents the proceeds of, or is derived directly or indirectly from the proceeds of, criminal activity ....[15]

To make out a charge of money laundering, the state must establish that a defendant engaged in a specified transaction *knowing that all of the proceeds* from a monetary instrument were from *criminal activity.* (*See People v. Mays* (2007) 148 Cal. App. 4th 13, 31-32.) In the Refiled Complaint, the only criminal activity alleged is the same as in the Original Complaint—*i.e.*, that Backpage.com's receipt of ad payments constitutes pimping because the AG alleges that all escort ads are for prostitution. (*See* Refiled Compl. at 12-18.)

The AG persists in advancing a theory that has been rejected many times in many cases concerning Backpage.com. Defendants addressed this case law before (*see* Demurrer at 9-12, 20-21), and the Court drew support from these authorities in sustaining the prior demurrer (*see* Final Ruling at 13-14). In summary, the cases hold that escort ads on Backpage.com are protected

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[13] (*Compare* Fitchner Decl. at 11 (asserting Backpage.com's California revenues for 29-month period through May 2015 were "$51,723,615.23"), *with* Refiled Compl. at 4 (alleging Backpage.com revenues from California for 27-month period through October 31, 2016 were "$45,202,288.49"); *see also, e.g.*, Orig. Compl. at 2-3 (concerning payment processing).)

[14] (*See supra* AG Harris Oct. 6, 2016 press release (asserting Backpage.com revenues from California were more than $2.5 million per month and over $51 million in total).)

[15] Section 186.10 alternatively allows prosecution based on a showing that a defendant had "specific intent" to promote or carry on a criminal activity (Penal Code § 186.10(a)(1)), but the AG has not charged under this provision (*see, e.g.*, Refiled Compl. at 4 ("Defendants ... did willfully and unlawfully conduct transactions involving monetary instruments ... knowing that such monetary instrument represent[ed] the proceeds of ... criminal activity.").)

speech under the First Amendment; the government may not presume that such ads concern criminal activities; a website's conduct in publishing third-party ads cannot establish participation in sex trafficking or prostitution of individuals who may misuse the site; and allegations that a website facilitates unlawful conduct such as prostitution based on its structure, posting rules or charges are barred under Section 230, because these are traditional publisher functions for which the CDA provides immunity. (*See Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 20-22, *cert. denied* (Jan. 9, 2017) 2017 WL 69715; *Backpage.com, LLC v. Dart* (7th Cir. 2015) 807 F.3d 229, 230, *cert. denied* (2016) 137 S. Ct. 46; *Doe ex rel. Roe v. Backpage.com, LLC* (D. Mass. 2015) 104 F. Supp. 3d 149, 162-63, *aff'd sub nom. Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12; *Backpage.com, LLC v. Hoffman* (D.N.J. Aug. 20, 2013) 2013 WL 4502097, at *6-7; *Backpage.com, LLC v. Cooper* (M.D. Tenn. 2013) 939 F. Supp. 2d 805, 831; *Backpage.com, LLC v. McKenna* (W.D. Wash. 2012) 881 F. Supp. 2d 1262, 1282; *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F. Supp. 2d 1041, 1052.)

More importantly in this case, the Court's Final Ruling rejected the AG's "[t]heory that Defendant[]s derived financial support from prostitution," and held that Section 230 provides immunity for such charges. (Final Ruling at 12.) The Court stated:

> Here, there is no dispute that Backpage charged money for the placement of advertisements. Does this qualify as services rendered for legal purposes? Given the services provided by the online publisher the answer to that question is yes. Providing a forum for online publishing is a recognized legal purpose that is generally provided immunity under the CDA. This immunity has been extended by the courts to apply to functions traditionally associated with publishing decisions, such as accepting payment for services and editing.

(*Id.* at 13.) The State's theory failed because the only alleged "whiff of illegality" impermissibly "require[d] the presumption that illegal content was contained in the ads." (*Id.* at 12.) Given that "the prosecution depends on consideration of speech provided by a third party," Section 230 immunity applies and forecloses the state's charges. (*Id.*) Again, in the Court's words:

> Even in viewing the offer of proof of the evidence most favorabl[y] to the Attorney General[']s office, this case is very similar to [*Doe*, 817 F.3d at 20-22, and *M.A.*, 809 F. Supp. 2d at 1044, 1052]. As alleged here, the prostitution took place as a result of an advertisement placed by a third party. *Backpage's decision to charge money to allow a third party to post content,* as well as any decisions regarding posting rules, search engines and information on how a user can

> increase ad visibility *are all traditional publishing decisions and are generally immunized under the CDA.* In short, the victimization resulted from the third party's placement of the ad, not because Backpage profit[ed] from the ad placement.

(*Id.* at 14 (emphasis added).) In short, liability for unlawful online content turns on the "pedigree" of the content. (*Id.* at 10 (citing *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263, 1268-69; *Jones v. Dirty World Entm't Recordings, LLC* (6th Cir. 2014) 755 F.3d 398, 408-09).) As an online publisher, Backpage.com is immune and cannot be held liable for "content generated by third parties." (Final Ruling at 4 (citing *Barrett v. Rosenthal* (2006) 40 Cal. 4th 33, 39.) This is so regardless of how the state seeks to label warmed-over claims.

In a vain effort to support its charges of pimping, the AG alleged previously that users' payments for ads on Backpage.com constituted knowing receipt of proceeds from prostitution. The state now alleges Backpage.com's receipt of ad payments is money laundering because, the AG says, they are proceeds from prostitution. For purposes of § 230, the State's prosecution is foreclosed now every bit as much as it was before. Indeed, if anything, the AG's claims in the Refiled Complaint—alleging that *all* payments for *all* ads on Backpage.com are derived from criminal activity and that Defendants knew this about *each and every ad*—are far more attenuated and less supportable than before. In fact, they are absurd.[16]

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[16] Section 186.10(a)(2) requires the state to prove that *all* of the allegedly laundered funds making up the $25,000 threshold were the proceeds of criminal activity *and* that the defendant knew this. (*Mays*, 148 Cal. App. 4th at 31.) Given First Amendment requirements regarding prosecutions of publishers, the AG would have to establish that each Defendant knew that each ad the AG's office alleges as the basis for its money laundering charges in fact concerned criminal activity. (*See Smith v. California* (1959) 361 U.S. 147, 151-54(to prevent chilling of speech, the state must prove scienter as to specific expressive materials alleged to be unlawful); *United States v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 73, 78 (state statutes that do not require scienter as to unlawfulness of specific speech are unconstitutional); *Castro v. Superior Ct.* (1970) 9 Cal. App. 3d 675, 682, 694-98 (in a case implicating First Amendment speech, the State may not establish knowledge for conspiracy claims based on circumstantial evidence but must prove by direct evidence that defendants sought to bring about unlawful conduct); *In re Rudolfo A.* (1980) 110 Cal. App. 3d 845, 855 (in criminal prosecutions implicating First Amendment rights, the State may not assert charges simply by reciting statutory terms); *see generally* Demurrer at 12-14; Demurrer Reply at 8-11.)

In the Original Complaint, the AG sought to impose liability on Defendants based on nine ads individuals created and posted on Backpage.com, paying charges totaling $79.60. (*See* Orig. Compl. at 3-8.) These charges were baseless in their own right—the AG offered no showing or allegations that *any* of the Defendants every saw or knew *anything* about *any* of these ads, much

The Court's Final Ruling held, consistent with well-established law interpreting § 230, that the AG cannot prosecute Defendants based on Backpage.com's publication of ads posted by third parties or charges for ads. Section 230 provides immunity for such claims, no matter how the state might try to plead around the law. (*See* Final Ruling at 10 (noting that, in *Kimzey*, 836 F.3d at 1266, the Ninth Circuit rejected "artful skirting of the CDA's safe harbor provisions"); *accord Universal Commc'ns Sys., Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 418 ("[n]o amount of artful pleading can avoid" § 230); *Doe v. MySpace, Inc.* (5th Cir. 2008) 528 F.3d 413, 419-20 ("No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities.") (internal quotation marks omitted).)

C. The AG's Refiling of Charges Is Harassment and Not a Good Faith Prosecution.

The criminal justice system depends on governmental authorities abiding by the rule of law and acting in good faith. The AG's refiling of another complaint contrary to Section 230 and the Court's Orders underscores that this is not a good faith prosecution but is an effort to censor Backpage.com through threats, intimidation and incarceration.

The AG's motives are reflected by the actions she and her office have taken.

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less had knowledge that any of the individuals were offering prostitution. (*See* Demurrer at 24-26.) But the AG's charges now are utter nonsense. The Refiled Complaint alleges that *every paid ad* posted on Backpage.com in California in the 26-month period since July 1, 2014 was for criminal activity (*see* Refiled Compl. at 4-12), meaning the AG would have to prove that each Defendant knew that each one of millions of ads was criminal. Yet, this Court and many others have held that users' payments to Backpage.com for posting ads *are legal services.* (*See* Final Ruling at 13.)

The AG's money laundering charges also are deficient on their face for other reasons (although the Court need not address the other flaws now). To provide just one example, the AG has given no indication what "monetary instrument" allegedly was the subject of some money laundering transaction. Credit card payments do not constitute a "monetary instrument." (*See* Penal Code § 186.9(d); *People v. Keller* (1998) 673 N.Y.S.2d 563, 566-67 (receipt of checks from American Express for credit card transactions did not constitute "monetary instruments" under New York's analogous money laundering statute).)

- In 2013, the AG admitted that Section 230 barred her from prosecuting Backpage.com,[17] but she thereafter instituted an extraordinarily broad "three-year investigation" to pursue charges against the Defendants.[18]
- The AG's office enlisted Texas authorities to arrest Mr. Ferrer on October 6 at the Houston airport, simultaneously issuing an inflammatory press release.[19]
- The authorities also conducted a dragnet search of Backpage.com's offices and Mr. Ferrer's home, seizing hundreds of items, including $300,000 worth of computer equipment used to run the website and $235,000 in checks, money orders and cash.
- The AG refused to agree to bail terms for Mr. Ferrer or for Messrs. Larkin and Lacey, who the AG's office also arrested and jailed on October 10 (after they voluntarily traveled to Sacramento), holding them in custody until October 14.
- The AG objected to bail under Penal Code § 1275.1 so as to require Defendants to appear for a publicly televised arraignment on October 12, 2016 (with the Defendants appearing in prison jumpsuits in a courtroom cage)—objections the Court summarily rejected the next day.
- The AG's office continued its pursuit of Defendants even after the Court indicated it would hear the demurrer, issuing new subpoenas to third parties without notifying them of the demurrer or the Court's Tentative Ruling.[20]
- The AG's office has collected over 9,000,000 documents from third parties through subpoenas and search warrants but has refused to produce them or to provide the applications for warrants (thus blocking Defendants from assessing the propriety of the warrants, particularly whether the AG revealed her lack of authority to prosecute).

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[17] (July 23, 2013 letter from National Association of Attorneys General to members of Congress, signed by Attorney General Harris, acknowledging that "[f]ederal courts have broadly interpreted the immunity provided by the CDA" to "prevent[] State and local law enforcement agencies from prosecuting" Backpage.com, insisting "[t]his must change," and urging amendment of § 230); *see* https://www.eff.org/files/cda-ag-letter.pdf).)

[18] (*See supra* AG Harris Oct. 6, 2016 press release.)

[19] (*Id.*)

[20] (*See* Nov. 22, 2016 letter to Ms. Krell and Ms. Mailman, previously provided to the Court.)

- After the Court issued its Final Ruling and dismissed all charges, the AG's office served the Refiled Complaint on December 23, and then took the same tack as before, using this as an excuse to issue new third-party subpoenas demanding millions of Backpage.com customer transaction records.
- And, as discussed above, the AG's Refiled Complaint is based on the same theory (and many of the same claims) the Court rejected before, while now-Senator Harris has stated that her aim is to shut down Backpage.com altogether.

Bringing criminal charges when the AG admits she has no authority to do so is not a good-faith prosecution. Doing so once is appalling; refiling charges in the face of the Court's express, contrary Orders is unquestionably bad faith.

The AG's vendetta against Backpage.com and Defendants contravenes fundamental protections in the law. "The gravamen of a vindictive prosecution is the increase in charges or a new prosecution brought in retaliation for the exercise of constitutional rights." (*People v. Valli* (2010) 187 Cal. App. 4th 786, 802.) Repetition of charges reflecting "harassment through baseless or unjustified litigation" constitutes "vexatiousness." (*Lucido v. Superior Ct.* (1990) 51 Cal. 3d 335, 351.) Here, the AG' s office has repeated the same charges and rejected theory, while upping the ante, asserting the same previously alleged conduct supports 39 charges against Defendants rather than nine.

It is clear the AG's actions—and especially the Refiled Complaint—are targeted at Defendants' First Amendment rights and third-party speech on Backpage.com the AG dislikes and seeks to censor. (*See* Final Ruling at 4 (explaining that the Court's ruling sustaining the demurrer was premised on the First Amendment rights implicated by the AG's prosecution and the protection of those rights in Section 230).) As the Supreme Court held over 60 years ago, when a state authority pursues prosecution without an expectation of securing a valid conviction but instead to use "arrests, seizures, and threats … to harass" parties and infringe constitutional rights, the state's actions can and should be enjoined. (*Dombrowski v. Pfister* (1965) 380 U.S. 479, 482, 488-90; *see also Perez v. Ledesma* (1971) 401 U.S. 82, 117-18 & n.11 (Brennan, J., concurring and dissenting in part) (explaining the holding of *Dombrowski*: "[I]f in order to discourage

conduct protected by the First Amendment ... a State brings or threatens to bring a criminal prosecution in bad faith and for the purpose of harassment, the bringing of the prosecution or the threat is itself a constitutional deprivation since it subjects a person to a burden of criminal defense which he should not have to bear, and there then exists a situation 'in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights.'") (quoting *Dombrowski*, 380 U.S. at 485).)[21]

"[B]edrock First Amendment principles and legal rules ... applied for decades, if not centuries" hold that the government may not institute a long-running investigation, "accus[e individuals] of law-breaking, threaten[] subpoenas, [and make] improper broad demands for documents and information" in retaliation for protected speech. (*White v. Lee* (9th Cir. 2000) 227 F.3d 1214, 1239 (upholding 42 USC § 1983 suit against federal officials for eight-month investigation and harassment of neighbors who opposed housing project); *see also Lacey v. Maricopa Cnty.* (9th Cir. 2012) 693 F.3d 896, 917 (en banc) (permitting § 1983 claims for sheriff's investigation and arrest of Messrs. Larkin and Lacey after their newspaper published articles critical of the sheriff).) These principles were applied by the Seventh Circuit to enjoin the Cook County sheriff's efforts to intimidate credit card companies to discontinue use of their cards on Backpage.com. (*Backpage.com, LLC v. Dart*, 807 F.3d at 229.) Rejecting the same arguments the AG makes here (*i.e.*, that all escort ads are illegal, *see id.* at 234), Judge Posner explained that the sheriff's campaign to "crush Backpage" was an unconstitutional prior restraint: "[A] public official who tries to shut down an avenue of expression ... through 'actual or threatened imposition of government power or sanction' is violating the First Amendment." (*Id.* at 230 (quoting *Am. Family Assoc. Inc. v. City & Cnty. of S.F.* (9th Cir. 2002) 277 F.3d 1114, 1125).)

The AG's actions are more egregious because she did not just threaten criminal charges, her office *brought charges* (now twice), despite knowing it has no authority to do so. Like Sheriff

[21] In fact, baseless prosecutions of state authorities such as this permit federal courts to impose injunctive relief (notwithstanding abstention principles), but, regardless, the same principles apply in California courts to preclude State prosecutions. (*See Pitchess v. Superior Ct.* (1969) 2 Cal. App. 3d 644, 650 (principles enunciated in *Dombrowski* are the "appropriate model for state courts when First Amendment rights are involved").)

Dart before, the AG's aim plainly is to "crush Backpage" by using the State's considerable prosecutorial powers, knowing the coercive effect and opprobrium of arresting Defendants and imposing criminal charges, even when there is no hope of convictions. The AG's other actions—issuing press releases, making baseless bail objections to require a televised arraignment, refusing to provide discovery or warrant applications, and using the mere filing of criminal complaints as an excuse to continue its prosecution and investigation despite the Courts' Orders—make the State's apparent purpose obvious.[22] At this point it is clear the State's arrest and incarceration of Defendants was unlawful, and likely the same is true of other aspects of their investigation.[23]

It is important that the Court dismiss the State's Refiled Complaint as soon as possible and shut down the State's baseless prosecution once and for all. As the Court has recognized, Section 230 must be applied at the earliest possible opportunity because the law is a "foreclosure from prosecution," and the "entitle[ment] to immunity" it provides is effectively lost if a case is permitted to proceed and defendants are forced to fight "costly and protracted legal battles" as the State tries to take successive duck-bites to avoid the law. (*See* Final Ruling at 1-2; *Roommates.com*, 521 F.3d at 1174-75; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250, 254.) The same is true under the First Amendment—early and prompt dismissal is necessary to preserve speech rights because the "threat of sanctions may deter almost as potently as the application of sanctions" (*In re Kay* (1970) 1 Cal. 3d 930, 941 (internal

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[22] The AG's tactic of issuing new third-party subpoenas to Backpage.com's payment processors *after* the Court's Final Ruling is especially egregious. With no authority to prosecute, the AG fired off a subpoena to parties not within the jurisdiction of the California courts, demanding millions of customer transaction records, accompanied by threats of fine or imprisonment. Threatening criminal sanctions based on an invalid subpoena is bad faith. It reflects that the real objective was to intimidate parties to cease doing business with Backpage.com, which, as the Seventh Circuit has held, is an unconstitutional prior restraint. (*Backpage.com, LLC v. Dart*, 807 F.3d at 231 (enjoining Sheriff Dart's similar tactic attempting to kill Backpage.com "by suffocation," *i.e.*, "depriving the company of ad revenues by scaring off its payments-service providers").)

[23] For example, it would be bad faith if, as Defendants suspect, the AG obtained search warrants without disclosing the AG's admitted lack of authority to prosecute. So too, refiling unauthorized charges as an excuse to continue an investigation, or not informing third-party targets of this Court's Orders, or obtaining information under such guises merely to share with other law enforcement authorities, would also be bad faith.

quotation marks omitted)), and thus continued litigation by itself has a chilling effect (*Osmond v. EWAP, Inc.* (1984) 153 Cal. App. 3d 842, 854).

D. The Court Should Grant Other Relief in Light of the AG's Actions and to Properly Decide This Motion.

In light of the State's actions and the posture of this case, Defendants urge the Court should order further relief now and in conjunction with dismissing the AG's Refiled Complaint.

First, this Motion should be assigned to Judge Bowman, as it seeks enforcement of his Orders. In many respects, California law reflects that when a new criminal complaint or motion concerns a prior ruling of a judge, the matter should be assigned to the same judge for efficiency and to prevent forum-shopping. (*See, e.g., Burris v. Superior Ct.* (2005) 34 Cal. 4th 1012, 1018 (one of the principle purposes of Penal Code § 1387 precluding successive refiling of charges by prosecutors is to prevent forum-shopping); *People v. Superior Ct. (Jimenez)* (2002) 28 Cal. 4th 798, 807 (concerning Penal Code § 1538.5 requirement that a motion concerning suppression of evidence decided in a prior proceeding must be heard by the same judge); *In re Alberto* (2002) 102 Cal. App. 4th 421, 428 (any judge of a Superior Court is bound by rulings of a prior judge of the Court; "because a superior court is but one tribunal, an order 'made in one department during the progress of a cause can neither be ignored not overlooked in another department'") (quoting *Ford v. Superior Ct.* (1986) 188 Cal. App. 3d 737, 741); *Lucido*, 51 Cal.3d at 341 ("Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.").) Judge Bowman should decide this Motion and whether the Refiled Complaint is contrary to his Final Ruling and Dismissal Order precluding the State's prosecution.

Upon transfer of this motion to Judge Bowman, Defendants also request that the Court set an immediate schedule to decide the motion to prevent continued prejudice to Defendants because baseless charges remain outstanding.

Further, the AG's office should not be allowed to use the pendency of its Refiled Complaint as an excuse to pursue investigatory demands to third parties as though it is conducting a legitimate prosecution. The Court should immediately enjoin the AG's office from issuing or seeking to enforce any search warrants or subpoenas, at least until the Court decides this Motion.

The Court should also order the AG's office to inform any third parties subject to prior subpoenas, warrants or other demands that they need not respond pending the Court's decision on this Motion and the propriety of the AG's demands and good faith. The Court should also order that the AG's office may not disclose any information or materials it has obtained to other authorities pending resolution of this Motion.

Along with dismissing the AG's Refiled Complaint, the Court should also order that all documents, data and materials the AG has seized and obtained must be immediately returned to Backpage.com and Defendants. (*See People v. Lamonte* (1997) 53 Cal. App. 4th 544, 549 ("Continued official retention of legal property with no further criminal action pending violates the owner's due process rights."); *People v. Superior Ct. (Loar)* (1972) 28 Cal. App. 3d 600, 619; Penal Code § 1536.) As the AG's office has no good faith basis to prosecute, it should not be permitted to continue to rifle through millions of improperly obtained documents to try to find some other basis to pursue its vendetta.

IV. CONCLUSION

With the Refiled Complaint, the AG has squarely placed before this Court the question of whether its Final Ruling and Dismissal Order are worth the paper they are printed on. The Court's holding that the State is foreclosed from prosecuting was abundantly clear. The AG's office seems to believe it can refile and reargue what it lost. In this context, where First Amendment rights are at stake, the State may not so cavalierly refile criminal charges that once have been dismissed. The AG's office cannot simply refile the same charges in the face of contrary Court orders as a perpetual "sword of Damocles" (*ACLU v. Reno*, 929 F. Supp. at 856) to achieve by threat and intimidation what it cannot do under the law. The State is not pursuing a good faith prosecution—the AG long ago admitted her office has no authority to prosecute and this Court confirmed this is correct under Section 230 and the First Amendment.

DATED: January 19, 2017

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: _____
James C. Grant

Attorneys for Carl Ferrer, Michael Lacey and James Larkin

DAVIS WRIGHT TREMAINE LLP

Exhibit A

COPY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE:	December 9, 2016	**DEPARTMENT:**	61
JUDGE:	Michael Bowman	**CLERK:**	D. Rios Sr.
REPORTER:	N/A	**BAILIFF:**	N/A

People of the State of California

CASE NO. 16FE019224

Vs.

Carl Ferrer et al,
Defendants

FILED/ENDORSED
DEC - 9 2016
By T. Shaddix, Deputy Clerk

Nature of Proceedings: **COURT'S FINAL RULING ON DEMURRER**

Introduction

Defendants face charges for their respective roles in owning and operating an online classified advertisement website. Allegedly, through third party use of this website, women and young girls were sexually exploited. The Attorney General seeks to hold the Defendants criminally liable for the victimization of these women. The People of the State of California have a strong and legitimate interest in combating human trafficking by all available legal means. Moreover, any rational mind would concur that the selling of minors for the purpose of sex is particularly horrifying and the government has a right and a duty to protect these most vulnerable victims.

The State's legitimate interest is not absolute, however, and must be constrained by the interests and protections of the First Amendment to the U.S. Constitution. In that vein, the United States Congress has created the Communications Decency Act under 47 USC section 230 ("herein CDA"). The CDA forecloses suit against an online publisher when that suit is based on speech provided by a third party. (47 USC §230 (c) (1) and (e) (3).) By enacting the CDA, Congress struck a balance in favor of free speech by providing for both a foreclosure from prosecution and an affirmative defense at trial for those who are deemed an internet service provider.

In fact, this Court garners strength for its ruling from the legislative history (or lack thereof). The CDA was created in direct response to a legal decision holding an online publisher strictly liable for defamatory statements posted by third parties. (*See Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229.) Since the creation of the CDA, several courts have construed the CDA's immunity provision broadly, such that close cases are resolved in favor of immunity. (*Fair Housing Council of San*

Fernando Valley v. Roommates.com LLC (9th Cir. 2008) 521 F.3d 1157, 1170-1171.) Congress has had ample opportunity to statutorily modify the immunity provision if it disagrees with prevailing judicial application of this provision. Congress has not done so, and the current legal framework binds this Court.

The key question in this case is not whether speech in furtherance with human trafficking is protected free speech: clearly it is not. The issue to resolve is whether the Defendants should be entitled to immunity under the CDA for providing a forum for third party speech, or whether the defendants have crossed the line of merely providing a forum for speech to become actual creators of speech, and thus not entitled to immunity under the CDA.

Background

Backpage.com is one of the largest on-line classified advertisement services, through which users may post advertisements in a variety of categories. Posting an advertisement in the "Adult Services" category requires a fee. Through various levels of involvement with Backpage.com, Defendants find themselves facing criminal charges regarding certain advertisements placed in the "Adult Services" category. Carl Ferrer, Michael Lacey and James Larkin currently face a charge of conspiracy to pimp, and Ferrer faces multiple additional charges of pimping and pimping of a minor.

The allegations are that Defendants conspired to create and organize a website that allows sex trafficking to take place. The People assert that Defendants created such a site, knowing that prostitutes and/or pimps use the site to advertise prostitution, and Defendants did so with the intent to derive support and maintenance from the prostitution resulting from the advertisements. The People allege that Defendants' plan has come to fruition and that they have derived financial support and maintenance from the prostitution resulting from the advertisements third parties pay Backpage.com to place. Allegedly, Defendants have also derived support from prostitution resulting from content "created" by Defendants themselves when they took content from the third party advertisements originally placed on Backpage.com and posted new advertisements on EvilEmpire.com and BigCity.com – sites also created and maintained by Defendant Ferrer.

On October 19, 2016, Defendants filed a demurrer to the felony complaint against them. Against the backdrop of unsuccessful attempts by the California and other state Attorneys General to shut down adult online advertising, the Defendants argue that the instant prosecution cannot go forward.

Defendants claim that the complaint and prosecution are: barred by the First Amendment, legally deficient under Section 230 of the Communications Decency Act ("CDA"), and devoid of any facts that constitute public offenses under the criminal statutes.

On November 16, 2016, this Court issued a tentative ruling on the matter, but allowed additional briefing. Both parties have filed additional arguments in response to the tentative ruling.

Court's legal analysis and ruling

1. Complaint states facts that constitute public offenses

The Defendants argue that the court should grant the demurrer because the Complaint fails to allege any public offense. Rather, Defendants maintain, the People are pursuing a theory of prosecution based on allegations that third parties posted content allegedly relating to unlawful conduct. Defendant Ferrer also claims that the pimping charges against him are deficient because there is nothing to connect Ferrer to any of the advertisements associated with the nine victims. (Def. 24-25) All the defendants allege that the complaint's conspiracy charge is deficient because it does not address several elements of conspiracy. (Def. 25-26) The People claim that the complaint expressly alleges that Defendant Ferrer "knowingly and repeatedly took the earnings of victims engaged in prostitution because his livelihood depended on it." (Opp. 18) As to the conspiracy between all the defendants, the People assert that the complaint expressly alleges they conspired together to commit pimping for the purpose of further enriching themselves. (Opp. 19) The People maintain that level of specificity is all that is required to provide notice under Penal Code section 952. (Opp. 18-20) The People argue that Defendants' assertion that the complaint does not adequately state facts that constitute public offenses belies confusion between civil and criminal pleading requirements. (Opp. 20) As stated below, the key issue here is whether Defendants are able to claim immunity under the CDA. Such ability to claim liability would not necessarily render the complaint deficient. The charging instrument however, is sufficient in this case.

2. Defendants Challenge is Appropriately Raised in a Demurrer

The People claim that a demurrer is not the appropriate vehicle in which to raise a defense of immunity under the CDA. Rather, the People contend that such immunity may only be raised as an affirmative defense. This Court disagrees.

A demurrer to a criminal complaint lies only to challenge the sufficiency of the pleading and raises only issues of law. (Pen. Code, § 1004; *People v. McConnell* (1890) 82 Cal. 620; *People v. Biane* (2013) 58 Cal.4th 381, 388.) A defendant may demur only on delineated statutory grounds. (Pen. Code, § 1004; *People v. Saffell* (1946) 74 Cal.App.2d supp. 967, 972.) These include the ability to challenge the accusatory pleading on the ground that the pleading includes information that would be a bar to

prosecution. (Pen. Code, § 1004(5). *See also People v. Goodman* (2014) 225 Cal.App.4th 950, 956.) The language of the CDA itself states, "No cause of action may be brought and no liability will may be imposed under any State or local law that is inconsistent with this section." (47 U.S.C. §230 (e) (3) (emphasis added).) This statutory language clearly demonstrates a legislative intent to provide both a bar to prosecution and an affirmative defense at trial

Stated more succinctly "...close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged--or at least tacitly assented to--the illegality of third parties." Fair Housing. Council v. Roommates.com, LLC, 521 F.3d 1157, 1174, 2008 U.S. App. LEXIS 7066, *45, 36 Media L. Rep. 1545 (9th Cir. Cal. 2008 (emphasis added).

3. The First Amendment is implicated

Defendants contend that the First Amendment bars prosecution, as the People are seeking to prosecute individuals for the act of publishing third party content. However, the instant charges are not based on an overt attempt to criminalize the act of publication, and traditional First Amendment analysis is not required here. That is not to say that the First Amendment is not implicated. As noted, the protections afforded by the First Amendment were the motivating factors behind the enactment of the CDA. Congress expressly intended to relieve online publishers from liability for publishing third-party speech. (47 U.S.C. § 230) Thus, the relevant question in this case is whether, and to what extent, Defendants' activities entitle them to protection of their First Amendment rights through the immunity provision of the CDA.

a. Immunity Under the Communications Decency Act

The CDA provides immunity for online publishers and distributors of content generated by third parties. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39.) Protection from the CDA is broken down into three parts. Conduct is shielded if the defendant (1) is a provider or user of an interactive computer service; (2) that the plaintiff seeks to treat as a publisher or speaker; (3) of information provided by another information content provider. (*Fields v. Twitter, Inc.* (2016 U.S. Dist. LEXIS 105768, *8; *Doe v. Backpage.com LLC* (2016) 817 F.3d 12, 19; 47 U.S.C. §230.) "There has been near-universal agreement that section 230 should not be construed grudgingly." (*Doe, supra*, 817 F.3d at 118 [citations omitted].)

The second component is the instant source of dispute. Defendants assert that Backpage.com is an internet service provider that merely allows third parties to publish their content, and the instant prosecution seeks to impermissibly treat them as the speaker. The People respond that the CDA does not

protect those who knowingly commit their own crimes on the internet. The People assert that Defendants should be viewed as content providers, and not entitled to immunity under the CDA.

b. Content provision versus editorial functions

To determine whether defendant faces a claim that seeks to treat the defendant as a publisher or speaker of information provided by a third party, "'courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker'." (*Fields, supra*, 2016 U.S. Dist. LEXIS 105768, *10, *quoting Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1101-02.) Moreover, because distributors are included in the publisher category, distributors are also entitled to protection under the CDA. After all, publication includes every repetition and distribution of material. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 45.) Under the CDA, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune." (*Fair Housing Council of San Fernando Valley v. Rommates.com, LLC,* (9th Cir. 2008) 521 F.3d 1157, 1170-1171.) The Ninth Circuit has recognized that although "there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality...Such close cases must be resolved in favor of immunity..." (*Id* at 1174.)

Although the People acknowledge that third parties provided the content for the original advertisements placed on Backpage.com, the prosecution asserts that Defendants developed the content on BigCity.com and EvilEmpire.com by deliberately manipulating that original content to generate the advertisements placed on BigCity and EvilEmpire. The People assert that Defendants created "fake profiles" when "Backpage staff took images and information from Backpage escort ads and used them to create dating profiles on BigCity.com." (Ex 1, p2) In support of this claim, the People refer to an internal Backpage email that states "The content will be pre-populated with millions of images from backpage where we hope to extract two words of the title, the phone number, and age of the person. The images will need to be processed to where we crop an area most likely to give us a wholesome image." (Ex A) Backpage also added new information, "in line with the alleged purpose of the profile." This information was not taken from the original Backpage ad, and required staff to choose one of the following: "Interested in Men," "Interested in Women," or "Interested in Everyone." (Ex 1, p4) There were no links to the original Backpage ad and Defendants hoped to pitch BigCity as a dating site to Backpage.com escort users.

The People also allege that "Defendants took images and information from Backpage escort ads and used them to create a phone directory for female escorts on EvilEmpire.com." (Ex 1, p3) Customers could contact the escort directly from the number listed on EvilEmpire or through a link to original Backpage ad. The People acknowledge that the escort phone directory used "much of the same data that was selected to create a BigCity profile that was generated for that Backage escort user." (Ex 1, p5) However, EvilEmpire provides no opportunity for users to sign up, modify or contribute to entries. (Ex 1, p5)

In support of its claim that these actions constituted content creation, the People rely on *People v. Bollaert* (2016) 248 Cal.App.4th 699. In *Bollaert,* the defendant was convicted of extortion and unlawful use of personal identifying information. He set up two websites: a revenge porn site and a site which victims of the former could utilize to have their information removed, for a fee. To use the revenge porn site, defendant designed "required fields" that required a user seeking to post a photo of another person to input that other person's full name, age, location and Facebook link. Bollaert had the only user account; he looked at every single post and decided what would get posted, placed watermarks on each photographs to discourage re-posting by third parties, and kept a spreadsheet recording every post. Bollaert would not post pictures that he considered "garbage" which included those that did not include nude persons. (*Id* at 706) At trial, the jury rejected defendant's assertion that he was immunized as a service provider under the CDA.

On appeal, the Fourth District affirmed the conviction. The court noted that the immunity under the CDA was limited to interactive computer services that do not retain or acquire personal information with the intent to defraud, or that do not act as content providers. (*Id.* at 709-710.) In Bollaert's case, the evidence showed that he designed the revenge porn site specifically for the purpose of eliciting nude photos and private information of others. Bollaert then used that personal information for his own purposes, *i.e.,* for display on his website, to gain advertising income and to obtain payments from his removal website. The court found there was sufficient evidence that Bollaert retained the personal information with the intent to defraud the victims.

The court also rejected defendant's claim that he was entitled to immunity under the CDA because the evidence demonstrated he was a content provider. The court determined that Bollaert's affirmative acts in designing the website to require users to provide content that violated other persons' privacy did not entitle him to immunity under the CDA. The court based its conclusion and reasoning on the Ninth Circuit's *Roommates* decision, which also involved a website that was "designed to solicit" content that was unlawful. These acts were not neutral, but rather "materially contributed to the illegality of the content" such that the defendant became a content provider. (*Bollaert, supra*, 248 Cal.App. 4th at 721.)

Defendants here contend that *Bollaert* is distinguishable from the instant case because in that case, the defendant Bollaert *required* the entry of unlawful information by the user, which fell into the narrow exception to immunity recognized by *Roommates.* (Def. Supp. 3) In contrast, Defendants argue, Backpage.com does not require users to enter unlawful information. This Court agrees with the Defendants.

In *Fair Housing v. Roommates.com* (9th Cir. 2008) 521 F.3d 1157, the defendant ran a website for the purposes of matching potential roommates together. In order to utilize the website, participants

were required to answer a series of questions regarding a user's sex, sexual orientation and whether they will bring children to the household. Paid subscriptions provided access to detailed preferences from potential roommates. (*Id* at 1161-1162) The Fair Housing Councils of two cities sued Roommates, and alleged a violation of the Fair Housing Act and California housing discrimination laws. The Councils alleged that the website was acting as a housing broker in ways that it could not lawfully do off-line. (*Id* at 162.) The district court granted Roommate's motion to dismiss based on immunity provided by the CDA. The Ninth Circuit reversed.

The Ninth Circuit found that by creating the questions and choice of answers that a real estate broker was legally prohibited from asking and then requiring subscribers to answer them, Roommate became an information content provider and not immune under the CDA. (*Id* at 1164.) The court contrasted Roommate's impermissible behavior, where it both elicited the allegedly illegal content and made aggressive use of it in conducting its business, with permissible utilization of a neutral classification tool or search engine that does nothing to enhance the illegality of the content. (*Id* at 1172.)

Here, there are no allegations that Backpage required a third-party user to provide any protected information when the original ad is placed. As the information posted on EvilEmpire and BigCity is mostly taken from the original ad, Defendants did not "design to solicit" protected content as a condition to placing the ad. In fact, according to the exhibits attached by the People, Backpage moderators were instructed to look for offending material and remove it. (AG Supp. 6, Ex 9)

The People argue that Defendants actively "manipulated" the content provided by third parties so that they could profit from activity resulting from the ad placement. In light of the People's acknowledgement that the substance of the ads came from the original ad placed on Backpage, the only "manipulation" would be in the act of extracting the content from the original ad and/or from the act of physically posting the extracted content on a new site. This is not prohibited activity. Indeed, it generally falls within the scope of protected editorial functions. (*See Doe v. Backpage.com LLC* (1st Cir. 2016) 817 F.3d 12, 20-21 [service providers' decisions on website structure, rules for posting and reposting are protected publisher functions] and *Fields v. Twitter, Inc.* (N.D. Cal 2016), 2016 U.S. Dist. Lexis 105768, *21 [protected publishing activity included decisions about what third party content may be posted or reposted online].) (*See also Jones v. Dirty World Entmt Recordings LLC* (6th Cir. 2014) 755 F.3d 398-408-409 [Sixth Circuit adopting the "material contribution test" and determining that within the context of web hosting, a service provider must require third-parties to enter unlawful or actionable content to be deemed a content provider].

Undeterred, the People assert that content was created when one piece of information was added to BigCity profiles. In generating a BigCity ad, Backpage staff was required to choose "Interested in Men," "Interested in Women," and "Interested in Everyone." This information was not taken from the original Backpage ad. Yet, as Defendants note, the People acknowledge that these headings were "in line" with

the purpose of each profile. (Def. Supp. 4, fn3) This creation of a headline "in line" with the content of the ad was not a material contribution to the offensive nature of the material. (*See Phan v. Pham* (2010) 182 Cal.App.4th 323 [holding when Defendant's own acts material contribute to the illegality of the material, immunity under the CDA will be lost]. *See also Kimzey v. Yelp! Inc* (9th Cir 2016) 836 F.3d 1263, 1270 (Court found the service provider's creation and addition of a star rating system was best characterized as the kind of "neutral tool" operating on "voluntary inputs" determined to be permissible in *Roommates.*)

The People also accuse Defendants of creating "fake profiles" for BigCity postings, similar to *Anthony v. Yahoo! Inc* (N.D. Cal. 2006) 421 F.Supp.2d 1257. In that case, Plaintiffs belonged to an online dating service through Yahoo. Plaintiffs alleged that Yahoo created false profiles and sent those false and expired profiles to them as enticement to renew their dating service subscription. The court refused Yahoo's claim of immunity under the CDA at the dismissal stage. The court stated that the allegations that Yahoo created false profiles were sufficient to allow the case to go forward.

Here, the People have acknowledged that the content posted on EvilEmpire and BigCity were taken directly from the original Backpage ad. This is different than the allegation in *Anthony* that Yahoo created a profile for a person who did not exist and represented to others that the fictitious person in the profile was available to date.

The People maintain Backpage created content similar to in *J.S. v. Vill. Voice Media Holdings, LLC* (2015) 184 Wn.2d 95J.S. In that case, advertisements featuring three minor girls were posted online on a site owned by Backpage. These girls became victims of sex trafficking and brought suit against Backpage. Backpage moved to dismiss the case on the basis of immunity provided by the CDA. The Washington Supreme Court refused to grant the motion to dismiss. (*Id* at 98-99.) The *J.S.* court stated that the case turned on whether Backpage merely hosted the advertisements or helped develop the content of those advertisements. (*Id* at 101)

Applying the applicable state standard for a motion to dismiss, the *J.S.* court found that the plaintiffs alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content. Specifically, those allegations included that Backpage intentionally developed its website to require information that allows and encourages illegal trafficking of underage girls, developed content requirements that it knows will allow solicitors to evade law enforcement and that Backpage knows that the foregoing content requirements are a fraud and ruse actually aimed at helping pimps and prostitutes. (*Id* at 102.) The *J.S.* court found that it did not appear beyond a reasonable doubt that no facts existed that would justify relief, and denied Backpage's motion to dismiss. (*Id* at 103.)

Here, the People allege that Defendants "created" content and are not entitled to immunity. However, on the face of the allegations, Defendants have, at most, republished material that was created by a third party. The People allege that the content was taken from ads placed by Backpage Escort users and posted onto EvilEmpire.com. The declaration in support of Defendants' arrest warrant states that the ads placed in EvilEmpire.com were "essentially identical" to the ads placed by the third party on Backpage.com and that EvilEmpire was an "additional platform for Backpage Escort ads." This demonstrates republication, not content creation. Republication is entitled to immunity under the CDA. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 63.)

Finally, the People assert that the Defendants' acts of pulling information from the original Backpage ad "constituted more than the mere reposting of information with 'slight' modifications." (AG Supp. 5) The People assert that when posting on BigCity, Backpage staff deleted all text, and converted the ad into a dating profile, contrary to the intent of the original ad poster. Yet, reposting content created by a third party is immune from liability for the offensive content under the CDA. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 63.) The act of reformatting original content to be placed on another site is also a traditionally protected editorial function. (*See Fair Housing Council of San Fernando Valley v. Roommates.com LLC* (9th Cir. 2008) 521 F.3d 1157, 1170-1171 [under the CDA, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune."].) Finally, assuming that the People's assertion is true; that the ad went from expressing intent to advertise prostitution to express a desire to "date," the People are essentially complaining that Backpage staff scrubbed[1] the original ad, removing any hint of illegality. (AG Supp. 5-6) If this was the alleged content "manipulation," the content was modified from being illegal to legal. Surely the AG is not seeking to hold Defendants liable for posting a legal ad; this behavior is exactly the type of "good Samaritan" behavior that the CDA encourages through the grant of immunity.

The People's overall theory is that Backpage knew prostitution ads were placed on its main site and, in response, created two additional websites with the goal of encouraging that prostitution through increased ad placement. There are at least two problems with this theory. First, online publishers are not subject to notice liability. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 45-46; *See also Jones v. Dirty World Entmt Recordings LLC* (6th Cir. 2014) 755 F.3d 398, 407-408 [explaining that immunity under the CDA bars notice liability in an effort to maintain the robust nature of the internet and encourage self-regulation].) Next, both the People's "encouragement theory" and suggestion that by reposting the ads, Defendants are ratifying the content of the original ad, thereby becoming a content provider themselves, have been rejected by the courts. (*Jones v. Dirty World Entmt Recordings LLC* (6th Cir. 2014) 755 F.3d 398,

[1] The internal Backpage email attached by the AG states, "The content [of BigCity] will be pre-populated with millions of images from backpage where we hope to extract two words of the title, the phone number, and age of the person. The images will need to be processed to where we crop an area most likely to give us a wholesome image." (Ex A)

413-414 [under the encouragement or ratification theory, service providers would be liable for inviting and commenting on illegal or actionable content, which impermissibly inflates the meaning of "development" to the point of eclipsing immunity from publisher-liability established by Congress]; *Ascentive LLC v. Opinion Corp.* (EDNY 2011) 842 F. Supp.2d 450, 476 [inviting postings then altering the way postings are displayed is not content development]; *Roommates, supra,* 521 F.3d at 1174 [encouragement, enhancement by implication or development by inference is protected conduct under the CDA]; *Black v. Google Inc* (N.D. Cal 2010) 2010 U.S. Dist. LEXIS 82905, *8 [even if defendants "sponsored or endorsed" an allegedly defamatory comment posted by a user, "the fact remains that Plaintiffs seek to hold it liable for content generated by a third-party" and defendants are entitled to immunity under the CDA].)

This Court finds *Kimzey v. Yelp! Inc* (9th Cir 2016) 836 F.3d 1263 helpful. Plaintiff Kimzey complained about offensive content in a negative business review posted on Yelp! and sought to hold Yelp! liable. Kimzey alleged that Yelp! Found the review on another website, reposted the offensive review on Yelp! and then republished the review as an advertisement or promotion on Google, all in an effort to increase online traffic to Yelp!. Kimzey's theory was that by repeatedly reposting the "found" review for Yelp!'s own use, Yelp! developed the content. (*Id* at 1267) The Ninth Circuit rejected Kimzey's "artful skirting of the CDA's safe harbor provision." (*Id* at 1266.)

The Ninth Circuit noted that Kimzey never specifically alleged that Yelp! authored the content of the statements posted. Instead, the allegations were that Yelp! adopted the statements from another website and transformed them into its own stylized promotions. The court determined that the allegations were insufficient to avoid immunity under the CDA. (*Id* at 1268) The court also rejected Kimzey's "convoluted" theory that Yelp! transformed the review into its own advertisement with the creation and addition of a star rating system that accompanied the promotion. Although this characterization had "superficial appeal" for the court, the court found that accepting the theory would extend the concept of "content provider" too far and would render the CDA's immunity provision meaningless. (*Id* at 1269.) The court stated that "Nothing in the text of the CDA indicates that immunity turns on how many times an interactive computer service publishes 'information provided by another information content provider.'" (*Ibid.*)

In short, courts have repeatedly held that an online service provider is protected whether he publishes third-party content for the first time, or republishes it for the nth time. To find the source of the liability for the unlawful or actionable content, one must trace the pedigree of the statement. (*Kimzey, supra,* 836 F.3d at 1268-1269; *Jones, supra,* 755 F.3d at 408-409; *Doe v. Friendfinder Network, Inc,* 540 F.Supp.2d 288, 295-296.)

4. Removal from Protection under the CDA

a. Victims' Intellectual Property Rights

The People assert that the CDA does not apply because Defendants violated the victims' rights of publicity when Defendants used the victims' likenesses posted in Backpage ads and used them either on BigCity or EvilEmpire sites without the victim's knowledge. In support, the People cite to *Doe v. Backpage.com LLC* (1st Cir. 2016) 817 F.3d 12. (AG Supp. 9) In that case, plaintiffs brought claims against Backpage alleging an unauthorized use of a person's picture. Plaintiffs alleged that by garnering advertising revenues from advertisements placed by their traffickers, Backpage profited from the unauthorized use of the plaintiffs' photographs. The plaintiffs alleged that Backpage's use of their images cannot be written off as incidental because their pictures were "the centerpieces of commercial advertisements." (*Id* at 27.) The court found that although Backpage profited from the sale of advertisements, "it is not the entity that benefits from the misappropriation." Rather, the party who benefits from the misappropriation is the person who placed the original ad. The court stated "Matters might be different if Backpage had used the pictures to advertise its own services..." (*Ibid.*)

The People assert that the "matters [that] might be different" are present here, when Defendants used pictures and text from Backpage ads to generate new ads on two additional websites. In response, Defendants call attention to the fact that users posting on Backpage.com accept the website's Terms of Use, in which they assign all intellectual property rights and agree that their photos and content may be reposted. (Def. Supp. 10)

The right of publicity derives from the right of privacy. Generally, the right of privacy protects an individual's peace and quiet. The right of publicity, in turn, protects an economic interest a person has in the value of his identity. These privacy rights are personal. (*Hill v. National Collegiate Athletic Assn* (1994) 7 Cal.4th 1, 24.) Thus, the prosecutor does not have standing to assert this right on behalf of the victims. It is on that crucial fact that sets this case apart from *Doe v. Friendfinder Network Inc* (2008) 540 F.Supp. 2d 288, 304. (See AG Supp. 9) *Friendfinder* involved a civil plaintiff seeking damages for the violation of her right to publicity after an unknown person created a profile on her behalf, without her knowledge or consent, and *Friendfinder* used portions of that profile as advertisements to increase the profitability of their business. The court found the allegations sufficient to survive a motion to dismiss. (*Ibid.*)

The People lack standing to assert this right. Moreover, existing case law indicates that these additional advertisements are permissible attempts at search engine optimization in an effort to increase the visibility of the information provided by the third party. (*See Asia Econ. Inst. V. Xcentric Ventures LLC* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 145380, *19 [increasing the prominence of a page in internet searches do not amount to "creation or development of information"].) Indeed, the very purpose behind

the third party's placing the ad on Backpage was to provide accessibility to the public on a large scale. (*Cf Ibid* [the purpose of consumer reports is to provide accessibility to the public on a grand scale and "increasing the visibility of a statement is not tantamount to altering its message"].)

b. Prosecution for pimping under Penal Code section 266H

The People maintain that Defendants' actions were not neutral, and they instead took an active role to further prostitution and seek to hold Defendants responsible for their own misconduct, not for the speech of others. "This is not a case against Backpage, a website; it is a case against three individual defendants who used multiple platforms to commercially sexually exploit vulnerable women and children." (AG, Supp 2)

This Court finds it difficult to see any illegal behavior outside of the reliance upon the content of speech created by others. The whiff of illegality is detected only when considering the alleged content of the statements contained in the ads. Indeed, the theory of prosecution requires the presumption that illegal content was contained in the ads, *i.e.*, that the ads were explicitly for prostitution. Under the prosecution's theory, Defendants would become liable at the point where information provided from third parties was transferred to the additional two websites because, according to the People, Defendants transferred the information intentionally to help to facilitate prostitution. (When prostitution transactions took place as a result of the ads, more ads would be placed.) Yet, the general actions required (absent consideration of speech content) to repost the ads would not be illegal. Thus, the prosecution depends on consideration of speech provided by a third party.

i. Theory that Defendant's derived financial support from prostitution

The People maintain that Defendants may be prosecuted under the theory is that defendants derived support from the earnings of another's act of prostitution. (*See McNulty, supra,* 202 Cal.App.3d at 630 [stating the two theories of prosecution for pimping].) The People assert that the allegations are that the Defendants "knowingly derived support from prostitution earnings, *i.e.*, profited from prostitution" when they created EvilEmpire to improve Backpage's search results (search engine optimization) and created BigCity to expand Backpage's share of "online commercial sex market" and profits. The People maintain that pimping will be shown when the People demonstrate that Defendants acquired income from prostitution resulting from advertisements placed in Backpage.com. The People assert that Defendants agreed upon a business model to maximize the receipt of prostitution earnings and committed many overt acts in furtherance of this objective. (Opp. 3)

In support, the People cite to *People v. Grant* (2011) 195 Cal.App.4th 107. *Grant* discusses a distinction between financial support received by the prostitute (illegal) and funds paid by the prostitute for services rendered or other purposes (legal). The appellate court made clear that "the statutory prohibition does not preclude a person from accepting a known prostitute's funds gained from the

prostitute's lawful activities or for purposes other than the person's support and maintenance." (*Id* at 116. *See also Allen v. Stratton* (C.D.Cal. 2006) 428 F.Supp.2d 1064, 1072, fn 7 [a natural reading of the pimping statute does not apply to an individual who provides a legitimate professional service to a prostitute even if paid with proceeds earned from prostitution, the service provider derives support from his own services]; *People v. Reitzke* (1913) 21 Cal.App.740, 742 [a legitimate defense to pimping is that a prostitute loaned the defendant money for the purpose of going into the saloon business, or for any other purpose except the purpose of being supported or maintained by the prostitute].)

Here, there is no dispute that Backpage charged money for the placement of advertisements. Does this qualify as services rendered for legal purposes? Given the services provided by the online publisher, the answer to that question is yes. Providing a forum for online publishing is a recognized legal purpose that is generally provided immunity under the CDA. This immunity has been extended by the courts to apply to functions traditionally associated with publishing decisions, such as accepting payment for services and editing. (*See e.g., Fields, supra,* 2016 U.S. Dist. LEXIS 105768, *11-12 [Twitter immune against claims that it provided ISIS material support through use of its services because protected publishing activity included decisions about: what third party content may be posted online; monitoring, screening, and deletion of content; and whether to prevent posting].) In fact, the People acknowledge that the mere act of accepting money for postings is permissible. (Opp. 9) The case law is clear that, as discussed above, immunity is removed when the service provider affirmatively acts to create the offensive content.

This Court draws support for its conclusion from cases in other jurisdictions. In *Doe*, for example, the plaintiffs alleged that, beginning at age 15, they were trafficked through advertisements on Backpage.com and Backpage profited from their victimization. The plaintiffs filed suit against Backpage.com for violating the Trafficking Victims Protection Reauthorization Act ("TVPRA") which prohibits knowingly benefitting financially from sex trafficking. (*Doe, supra,* 817 F.3d at 15.) Plaintiffs' theory was that Backpage engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website by only charging for posts made in the "Adult Entertainment" section, and allowing users to pay an additional fee for "Sponsored Ads," which increased the number of times the advertisement appeared. (*Id.* at 17.) Plaintiffs also alleged that Backpage tailored its posting requirements to make trafficking easier by not blocking repeated attempts to post and by allowing users to pay anonymously through prepaid credit cards or digital currencies. (*Id* at 16.)

Backpage moved to dismiss the suit under Federal Rule of Civil Procedure 12(b) (6). The district court granted the motion and found that the CDA provided immunity from the claims. On review, the First Circuit Court of Appeals affirmed the district court's ruling. The First Circuit rejected the plaintiffs' assertion that Backpage participated in an affirmative course of conduct and actual participation in sex trafficking. The court noted that the challenged were traditional publisher functions, and thus immune from suit under the CDA. (*Id.* at 20) The court also noted that the plaintiffs were harmed when they were

trafficked through the advertisements. Without the content of those advertisements – which was created by a third party - there would be no harm. (*Id.* at 20.) The court dismissed the plaintiffs' assertion that Backpage's decisions about what measures to implement demonstrate a deliberate attempt to make sex trafficking easier. The court stated, "Whatever Backpage's motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content." (*Id* at 21.) The court went on to state "even if we assume, for argument's sake, that Backpage's conduct amounts to 'participation in a [sex trafficking] venture' – a phrase that no published opinion has yet interpreted – the TVPRA claims as pleaded premise that participation on Backpage's actions as a publisher or speaker of third-party content. The strictures of section 230(c) foreclose such suits." (*Ibid.*) The First Circuit specifically held that "claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1)." (*Id.* at 22.)

Similarly, in *M.A. ex rel. P.D. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F.Supp.2d 1041, the plaintiff sought to hold Backpage responsible for her victimization through sex trafficking that took place as a result of advertisements placed on Backpage.com. The plaintiff alleged that Backpage accepted a fee for such advertisements, knew that advertisements were for prostitution and "created information" by hosting a search engine, providing instructions for increased visibility of advertisements and allowed for anonymous payment. (*M.A., supra*, 809 F.Supp.2d at 1044.) The court granted the Defendant's motion to dismiss on the basis that the CDA provided immunity. The court reasoned that there was no allegation that Backpage was responsible for the actual development of any portion of the content of the advertisements or specifically encouraged the development of the offensive nature. (*Id* at 1052.) (See also Opp. 21; Def. 21-22)

Even in viewing the offer of proof of the evidence most favorable to the Attorney Generals office, this case is very similar to the above cases. As alleged here, the prostitution took place as a result of an advertisement placed by a third party. Backpage's decision to charge money to allow a third party to post content, as well as any decisions regarding posting rules, search engines and information on how a user can increase ad visibility are all traditional publishing decisions and are generally immunized under the CDA. In short, the victimization resulted from the third party's placement of the ad, not because Backpage profiting from the ad placement.

Conclusion

The First Amendment "makes the individual, not government, the keeper of his tastes, beliefs, and ideas." *Paris Adult Theater I v. Slaton* (1973) 413 US 49, 73 (Douglas, J., dissenting). At the same time, the Court understands the importance and urgency in waging war against sexual exploitation. Regardless of

the grave potential for harm that may result in the exercise of this article of faith, Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial. **Congress has spoken on this matter and it is for Congress, not this Court, to revisit.**

Court's ruling:

Defendants' demurrer is GRANTED.
Defendants' request for judicial notice is DENIED.
Further court dates are vacated.
Bond is exonerated for each Defendant.

Dated: 12/9/16

Honorable Michael G. Bowman
Judge of the Superior Court of California
County of Sacramento

Exhibit B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CARL FERRER, MICHAEL GERARD LACEY, JAMES ANTHONY LARKIN,

Defendants.

Case No. 16FE019224

ORDER CONFIRMING DISMISSAL

Based upon this Court's ruling of December 9, 2016 granting the demurrer of the defendants and exonerating bail, the Court hereby confirms that this case is and was dismissed on December 9, 2016.

IT IS SO ORDERED

Dated: 12/12/16

HON. MICHAEL G. BOWMAN
Judge of the Superior Court

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is 1007 7th Street, Suite 305, Sacramento, California 95814.

On January 19, 2017, I served the following document: **DEFENDANTS' NOTICE AND MOTION TO ENFORCE COURT'S ORDER OF DISMISSAL, ALTERNATIVE DEMURRER; AND REQUEST TO TRANSFER TO JUDGE BOWMAN AND FOR OTHER RELIEF** by electronic mail on each addressee named below as follows:

KATHLEEN KENEALY (attorneygeneral@doj.ca.gov)
Acting Attorney General of California
ROBERT MORGESTER (Robert.Morgester@doj.ca.gov)
Senior Assistant Attorney General
RANDY MAILMAN (Randy.Mailman@doj.ca.gov)
Deputy Attorney General
MAGGY KRELL (Maggy.Krell@doj.ca.gov)

1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

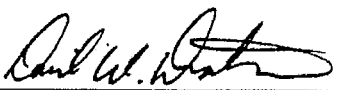
Attorneys for Plaintiff

☒ (ELECTRONIC MAIL) – I served a true and correct copy by electronic delivery pursuant to C.C.P. 1010.6, calling for agreement to accept service by electronic delivery, to the interested parties in this action as indicated above.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on January 19, 2017, at Sacramento, California.

David W. Dratman
Print Name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