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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

12 STEVEN WITKOFF, Individually, and LAUREN
13 WITKOFF, Individually,

14 Plaintiffs,

15 v.

16 TOPIX, DANIEL PARK; and Does 1 THROUGH
17 100, Inclusive,

18 Defendants.

) CASE NO. BC517897
) Complaint Filed: August 12, 2013
) Assigned for all purposes to: Hon. Amy
) Hogue
) Dept.: 92
)
) TOPIX, LLC'S DEMURRER TO
) ALL CAUSES OF ACTION IN
) PLAINTIFFS' COMPLAINT;
) MEMORANDUM OF POINTS &
) AUTHORITIES IN SUPPORT
) THEREOF

19)
20)
21)
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23)
24)
25)
26)
27)
28)
Hearing Date: 12/6/2013
Hearing Time: 1:30 p.m.
Dept.: 92

DEMURRER

23 Defendant TOPIX, LLC ("Topix") hereby demurrers specially and generally to all of the
24 causes of action of plaintiffs, STEVEN WITKOFF, Individually, and LAUREN WITKOFF,
25 Individually, complaint ("Complaint") on the following grounds:
26

28 TOPIX, LLC'S DEMURRER TO ALL CAUSES OF ACTION IN PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF

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1 **DEMURRER TO FIRST CAUSE OF ACTION**

2 **(Nuisance)**

3 Plaintiffs' first cause of action against Topix for nuisance is barred by Section 230 of the
4 federal Communications Decency Act, 47 U.S.C. § 230 because Topix is an interactive computer
5 services provider and therefore not subject to any liability, as interpreted and affirmed by the Los
6 Angeles County Superior Court, the California Court of Appeal and the California Supreme Court as
7 well as federal and state courts throughout the United States which have upheld immunity for website
8 operators such as Topix. As such, plaintiffs' complaint does not state facts sufficient to constitute a
9 cause of action under Cal. Code Civ. Proc. § 430.10 and must be dismissed with prejudice, without
10 leave to amend.

11 **DEMURRER TO SECOND CAUSE OF ACTION**

12 **(Wrongful Death)**

13 Plaintiffs' second cause of action against Topix for wrongful death is barred by Section 230 of
14 the federal Communications Decency Act, 47 U.S.C. § 230 because Topix is an interactive computer
15 services provider and therefore not subject to any liability, as interpreted and affirmed by the Los
16 Angeles County Superior Court, the California Court of Appeal and the California Supreme Court as
17 well as federal and state courts throughout the United States which have upheld immunity for website
18 operators such as Topix. As such, plaintiffs' complaint does not state facts sufficient to constitute a
19 cause of action under Cal. Code Civ. Proc. § 430.10 and must be dismissed with prejudice, without
20 leave to amend.

21 Respectfully submitted,

22 DATED: November 8, 2013

PALUMBO BERGSTROM LLP

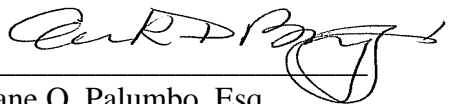
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Founded in 2004 and located in Palo Alto, California, defendant Topix, LLC (“Topix”)
4 operates Topix.com, a news aggregating website composed of feeds and links to news pages for U.S.
5 and international cities which are categorized by locality or subject and includes a forum system
6 allowing its users to comment on news articles and community happenings. Topix links news stories
7 from thousands of sources directly to hundreds of thousands of news topics and works with media
8 companies to augment their online audiences through these forums and news feeds.¹

9 On **August 12, 2013**, plaintiffs Steven Witkoff and Lauren Witkoff (“plaintiffs”) filed this
10 action (“Complaint”) against Topix, asserting claims for nuisance and wrongful death. Plaintiffs
11 essentially allege that:

- 12 1) Topix operates its website in a manner that facilitates trafficking in illegal drugs and
13 controlled substances because the website is utilized by drug traffickers, drug dealers and
14 drug buyers to locate persons in the community via various forums where Topix’s users can
15 view and create discussion threads and post responses;²
- 16 2) Topix enables and encourages unlawful activity by not monitoring the communications and
17 even if they do monitor such posts, Topix does not remove any of the “drug trafficking”
18 related threads, posts or communications, constituting an unconscionable disregard for public
19 health and safety.³

20 Plaintiffs’ Complaint alleges that in **March 2011**, their son, Andrew Witkoff entered a drug treatment
21 program in Los Angeles which failed to monitor his internet use such that on **August 7, 2011**,
22 Andrew made contact via Topix.com with a known drug trafficker, Daniel Park. According to
23 _____

24 ¹ Plaintiffs’ allegations regarding the general functionality of Topix.com are consistent with Topix’s assertions regarding
25 its website. See Topix’s Request for Judicial Notice in Support of Demurrer to All Causes of action in Plaintiffs’
26 Complaint; Declaration of Erik D. Buzzard (“RJR”), Exhibit 1 – plaintiffs’ complaint dated 8/12/2013 (“Complaint”) at ¶
13-16.

² RJR, Exhibit 1, Complaint at ¶¶13-16, 22.

1 plaintiffs, Andrew and Park further communicated via email and phone text messages and at least one
2 face to face meeting on **August 12, 2011** where Andrew purchased Oxycontin, a Schedule II
3 controlled substance and died two days later from an accidental overdose of those same drugs.⁴ The
4 Complaint also names Park as to the wrongful death cause of action, alleging that Park sold Andrew
5 the Oxycontin which he ingested, resulting in his death.⁵

6 **II. SUMMARY OF ARGUMENT**

7 This demurrer is a straightforward matter for this court requiring disposition of the Complaint
8 without leave to amend. As a matter of law, the Complaint must be dismissed with prejudice in its
9 entirety as to Topix because the claims therein, on their face are explicitly barred by Section 230 of
10 the federal Communications Decency Act, 47 U.S.C. § 230, as interpreted and affirmed by this court,
11 the California Court of Appeal and the California Supreme Court, in addition to other state and
12 federal courts throughout the United States in countless decisions uniformly providing immunity to
13 website operators such as Topix for third party content since Section 230 was passed by Congress in
14 1996. As shown herein, **plaintiffs are absolutely precluded from bringing any causes of action**
15 **against Topix because it is undisputed that:**

- 16 1) Topix is classified as an internet service provider under Section 230;
- 17 2) Topix is not an information content provider under Section 230, as the information which
18 plaintiffs seeks to hold Topix liable for allegedly originates from drug traffickers, drug sellers
19 and drug users;
- 20 3) Plaintiffs allege that Topix is subject to suit for communications made on Topix's forums
21 between third parties, i.e., the alleged drug traffickers, drug sellers, drug users and
22 specifically, drug seller Daniel Park and Andrew Witkoff.

23
24
25 ³ RJN, Exhibit A, Complaint at ¶¶ 18, 23, 24.

26 ⁴ RJN, Exhibit A, Complaint at ¶¶ 25, 28-34.

27 ⁵ Plaintiffs also filed a separate action currently pending in Dept. 92 of this court captioned *Steven Witkoff, et al. v. 1775*
28 *Summitridge Drive, LLC*, et al, case no. BC517918, against eight defendants, including the detoxification facility and

1 The Second Appellate district has affirmed in *Julie Doe II, a Minor, et al. v. MySpace Inc.*, 175 Cal.
2 App. 4th 561 (2009) that website operators such as Topix are subject to the broad immunity of
3 Section 230 based on Topix’s role as the “publisher” of the information provided by third parties.

4 California law mandates that leave to amend should be denied where the facts are not in
5 dispute and the nature of the claim is clear, but no liability exists under substantive law. *Lawrence v.*
6 *Bank of America*, 163 Cal.App.3d 431, 436 (1985). Taking all of the allegations as true, no amended
7 pleading can change the fact that plaintiffs seek to hold Topix liable for internet activity by third
8 party drug suppliers and purchasers who have allegedly been utilizing Topix as “the Internet’s most
9 prominent bazaar for trafficking illegal drugs” including use of the Topix website by alleged drug
10 trafficker Daniel Park and Andrew Witkoff. Plaintiffs attach as exhibits printouts of the alleged
11 Topix web pages to the Complaint, confirming that the underlying facts will not change. As such,
12 this is precisely the type of case warranting dismissal without amendment because there is no
13 reasonable method by which plaintiffs can amend their claims against Topix such that an amended
14 complaint would fall out of reach of the immunity provided by Section 230. The underlying facts on
15 the face of the complaint are that plaintiffs allege that Topix is liable for third party content provided
16 by others.

17 **III. THE DEMURRER MUST BE SUSTAINED WITHOUT LEAVE TO AMEND**

18 California Code of Civil Procedure § 430.10 governs the grounds for a demurrer and provides
19 in pertinent part:

20 The party against whom a complaint . . . has been filed may object, by
21 Demurrer . . . to the pleading on any one or more of the following
22 grounds:

23 *****

24 (e) **The pleading does not state facts sufficient to constitute a cause
25 of action.**

26 sober living facility in Los Angeles which Andrew was under the care and supervision of from March 2011 to the time of

1 A demurrer tests the sufficiency of the allegations contained within the complaint. *Pacifica*
2 *Homeowners' Ass'n v. Wesley Palms Ret. Cmty.*, 178 Cal. App. 3d 1147, 1151 (1986). Though the
3 court is to take as true the facts as pled, the court should disregard the contentions, conclusions,
4 assumptions and deductions of law or fact raised in the complaint. *Blank v. Kirwan*, 39 Cal. 3d 311,
5 318 (1985). As the California Supreme Court noted in *Blank*, the Court should take into
6 consideration the matters which are judicially noticed, and “**give the complaint a reasonable**
7 **interpretation, reading it as a whole and its parts in their context.**” *Id.* Where the complaint's
8 allegations or judicially noticeable facts reveal the existence of an affirmative defense, the plaintiff
9 must plead around the defense, by alleging specific facts that would avoid the apparent defense.
10 Absent such allegations, the complaint is subject to demurrer for failure to state a cause of action. *Id.*

11 **A. Section 230 of the Communications Decency Act**

12 In 1996, the United States Congress passed the Communications Decency Act (“the Act”),
13 wherein it declared that “[t]he rapidly developing array of Internet and other interactive computer
14 services available to individual Americans represent an extraordinary advance in the availability of
15 educational and informational resources to our citizens” and “the Internet and other interactive
16 computer services have flourished, to the benefit of all Americans, with a minimum of government
17 regulation.”⁶ Congress further declared that “it is the policy of the United States ... to preserve the
18 vibrant and competitive free market that presently exists for the Internet and other interactive
19 computer services, unfettered by Federal or State regulation.”⁷ In furtherance of this policy, the Act
20 provided immunity to interactive computer services such as Topix as follows:

21 (c) Protection for “Good Samaritan” blocking and screening of offensive
22 material

23 (1) Treatment of publisher or speaker

24
25 his death on August 14, 2011.

26 ⁶ RJN, Ex. B, 47 U.S.C. § 230(a).

27 ⁷ *Id.* at 47 U.S.C. § 230(b)

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

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁸

Section 230(e) further commanded that “no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” Since its passage by the United States Congress, state and federal courts throughout the country, including in this court, have consistently found that Section 230(c) strictly bars any and all claims against an interactive computer service such as Topix from liability for information posted by third parties.

B. The Second District Court of Appeal Recently Affirmed Section 230’s immunity to websites such as Topix in *Julie Doe II, a Minor, et al. v. MySpace Inc.*

In 2009, the Court of Appeal for the Second Appellate District re-affirmed Section 230’s broad immunity for website operators in *Julie Doe II, a Minor, et al. v. MySpace Inc.*, 175 Cal. App. 4th 561, 564 (2009) which involved four lawsuits regarding six teenage girls filed in the Los Angeles Superior Court and consolidated for purposes of appeal. In each of the related cases, one or more “Julie Does” – girls aged 13 to 15 – were sexually assaulted by older men they met through the Internet social networking site, MySpace.com. *Id.* Julie Doe III was 15 when she created a

1 MySpace.com profile and she subsequently met a 25-year-old man on MySpace, who “lured Julie
2 Doe from her home, heavily drugged her, and brutally sexually assaulted her.” Her attacker pled
3 guilty to charges stemming from the incident and is currently incarcerated. *Id.*, 175 Cal. App. 4th at
4 565. 14 year-old Julie Doe IV met an 18-year old MySpace user, who, together with his friend,
5 drugged her and took turns brutally sexually assaulting her. *Id.* The appellants each brought
6 substantially identical claims against MySpace for negligence, gross negligence, and strict product
7 liability for the sexual assaults. The court noted that each of the Julie Does brought similar causes of
8 action against MySpace:

9 “MySpace has made a decision to not implement reasonable, basic safety precautions
10 with regard to protecting young children from sexual predators[.] [¶] MySpace is
11 aware of the dangers that it poses to under-aged minors using [its Web site]. MySpace
12 is aware that its Web site poses a danger to children, facilitating an astounding number
of attempted and actual sexual assaults...”

13 *Id.* MySpace demurred and the Court of Appeal affirmed the trial court’s ruling that Section 230
14 barred all causes of action against the website.⁹ In holding so, the Second Appellate District
15 reviewed the legislative history of Section 230 as well as its interpreting authorities and concluded
16 that “parties complaining that they were harmed by a Web site’s publication of user-generated content
17 have recourse; they may sue the third-party user who generated the content, but not the interactive
18 computer service that enabled them to publish the content online.” *Id.* at 570.

19 The *Doe II* court also noted the California Supreme Court’s 2006 holding in *Barrett v.*
20 *Rosenthal*, 40 Cal. 4th 33 (2006):

21
22
23 ⁸ *Id.* at 47 U.S.C. § 230(c), **RJN, Exhibit B.**

24 ⁹ One such case was *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (2002), a mother whose son had downloaded
25 sexually explicit photos from the Internet on a computer at the city library, sued the city for, among other causes of
26 action, nuisance and premises liability. The trial court sustained the city’s demurrer without leave to amend and entered
judgment of dismissal which was affirmed by the California Court of Appeal, who held that Section 230 provides broadly
that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent
with this section” in dismissing all of plaintiff’s claims without leave to amend. *Id.* at 690, 698.

1 It appears the only California Supreme Court case that addresses immunity under
2 Section 230 is Barrett, supra, 40 Cal.4th 33. There, the high court was concerned
3 with the distinction between a publisher and a distributor in the context of a
4 defamation suit. While not exactly on point, the court's construction of Section 230
5 provides us with some guidance on how broadly to interpret Section 230 immunity.
6 **Importantly, the court noted in Barrett that “the immunity conferred by
7 Section 230 applies even when self-regulation is unsuccessful, or completely
8 unattempted.”** (Barrett, supra, 40 Cal.4th at p. 53, italics added.) The [Barrett]
9 court also cited to the legislative history contained in a subsequent federal statute
10 that explicitly supported a broad interpretation of Section 230 immunity in
11 negligence cases...[‘The Committee notes that ISPs [Internet service providers]
12 have successfully defended many lawsuits using Section 230(c). The courts have
13 correctly interpreted Section 230(c), which was aimed at protecting against liability
14 for such claims as negligence.]

15 *Doe II*, supra, 175 Cal. App. 4th at 571. The *Doe II* court was referring to *Barrett v. Rosenthal*, 40
16 Cal 4th 33, 57-58 (2006), wherein the California Supreme Court further upheld Section 230
17 immunity to a website operator in a defamation suit, holding:

18 Notice-based liability for service providers would allow complaining parties to
19 impose substantial burdens on the freedom of Internet speech by **lodging
20 complaints whenever they were displeased by an online posting.** The volume
21 and range of Internet communications make the "heckler's veto" a real threat. The
22 United States Supreme Court has cautioned against reading the federal
23 Communications Decency Act of 1996 to confer such a broad power of censorship
24 on those offended by Internet speech.

25 The *Doe II* Court further held that “California's intermediate appellate courts have also consistently
26 extended liability to negligence claims similar to the one at hand.” *Doe II*, supra, 175 Cal. App. 4th
27 at 572. The comprehensive holding of *Doe II* which mandates dismissal of this case must be
28 followed. As in *Doe II*, the Witkoffs similarly seek to hold Topix liable for alleged communications
between users of Topix.com, Andrew Witkoff and Daniel Park. Plaintiffs plead that the Topix
website is a nuisance under California Civil Code section 3294 and that Topix should be held liable
for Andrew Witkoff’s wrongful death due to Andrew’s searches for Oxycontin on google.com and

1 reliance on the Topix website. Simply put, both causes of action are barred by Section 230 as a
2 matter of law. *Doe II* affirmed that immunity under Section 230 requires proof of three elements:

- 3 (1) MySpace is an interactive computer services provider,
 - 4 (2) MySpace is not an information content provider with respect to the disputed activity, and
 - 5 (3) appellants seek to hold MySpace liable for information originating with a third party user
- 6 of its service. *Doe II, supra*, 175 Cal. App. 4th at 569.

7 In this case, Topix undisputedly satisfies all three elements and as such, is afforded complete
8 immunity from all of plaintiffs' causes of action.

9 **1. There is no dispute that Topix is an interactive computer service provider.**

10 Section 230 broadly defines an interactive computer service as "any information service,
11 system, or access software provider that provides or enables computer access by multiple users to a
12 computer server, including specifically a service or system that provides access to the Internet and
13 such systems operated or services offered by libraries or educational institutions." 47 U.S.C. §
14 230(f)(2). It is undisputed that, as a website operator, Topix is an interactive computer service
15 provider which enables access by its users to its internet news forums. See Plaintiff's Complaint, ¶¶
16 13-24.

17 **2. Topix is not an information content provider with respect to the disputed activity**
18 **and Plaintiff seeks to hold Topix liable for information originating with a third**
19 **party user of its service.**

20 Plaintiffs' complaint alleges that the posts concerning alleged drug transactions originate with
21 third parties, not Topix, see RJN, Exhibit A, Complaint:

22 ¶15. In 2005, Topix added "comment" capability to its site **allowing readers to create**
23 **and publish their own comments** about what they were reading on Topix.com.
24 Essentially, comments to news stories on a website are analogous to "letters to the
25 editor" in a print newspaper, except that such comments can appear immediately under
26 the article to which they refer. At or around the same time, Topix created "forums," a
27 platform of subject-matter headings within which **Topix.com users can create**
28 **individual discussions, sometimes called "threads,"** on any subject of particular

1 interest to them. Other users can then enter "comments" on discussion threads as if
2 they were commenting on a news article, and in so doing can communicate with either
3 the creator of the particular thread, or with other commenters. As Topix was, or
4 should have been, well-aware, a significant number of these "comments" on
5 Topix.com occur in the context of illegal drug trafficking and routinely reflect offers to
6 buy or sell controlled substances illegally.

7 ¶16. Visitors to and users of Topix.com can view articles and forum content, create
8 new discussion threads within a forum, and post personal comments on articles or
9 forum threads, without creating a user profile or providing any other identifiable
10 information to Topix.com. Topix.com users cannot exchange private messages, or
11 messages which cannot be seen by other users of Topix.com, through the site without
12 creating a user profile.

13 ¶ 18....The manner in which Topix operates its website, knowing the extent to which it
14 is used by drug traffickers to commit crimes, reflects its unconscionable disregard for
15 public health and safety...

16 ¶ 21 The magnitude of this public menace is so great that, as of a date shortly before
17 the filing date of this complaint, the subject-matter forum for "Oxycontin, Roxycodone,
18 Oxycodone" on Topix.com contained more than 100,000 separate discussion threads
19 created by individual users.

20 ¶ 22 Other users can and do post responses. in these discussion threads, many of
21 which respond to the thread creator's request to buy or sell drugs or controlled
22 substances, or to other requests posted by other users...

23 ¶ 22... In addition, drug buyers can, and frequently do, post evaluations of the quality
24 of the illegal drugs or other controlled substances they have obtained, or warn that a
25 particular dealer failed to deliver drugs or controlled substances of suitable quality.

26 ¶23... when creating these threads on Topix.com, these buyers and sellers of illegal
27 drugs or controlled substances apparently feel free to openly discuss their illicit
28 activities

Plaintiffs' complaint is undeniably grounded in allegations seeking to hold Topix liable for
statements made by third parties, not statements made on the Topix website by Topix. In addition to
the general allegations regarding alleged drug buyers, drug traffickers and drug sellers use of the

1 Topix website, the complaint further alleges and attaches as exhibits printouts of specific postings on
2 the Topix.com website which were posted allegedly by Andrew Witkoff and drug dealer Daniel Park:

3 ¶ 29 ...on August 7, 2011, while on a trip to Las Vegas accompanied by a sober living
4 companion, Andrew Witkoff was able to make contact, through Topix.com, with an
5 individual using the screen name "CJ Vegas." Although Andrew was unable to meet
6 and purchase drugs from "CJ Vegas," he promised to keep "CJ Vegas" in mind for his
7 next trip to Las Vegas.

8 ¶ 30 On his arrival back in Los Angeles on August 7, seven days before his death,
9 Andrew Witkoff executed several Google searches on his MacBook Pro using the
10 following search terms: "where to buy oxycodone los angeles." Google's top-ranked
11 result for this search was a Topix.com discussion forum.

12 ¶ 31 Upon reviewing his search results, Andrew Witkoff's next destination, according
13 to his browser history, was a discussion thread entitled "Los Angeles, help me out!
14 F2F looking!!!" (hereafter the "Oxy Thread") contained in Topix.com's "Oxycontin,
15 Roxycotin, Oxycodone" forum (hereafter the "Oxy Forum") located at the following
16 address: www.topix.com/forum/drug/oxycotin/T!G8RMP8UEEPECKT6. This Oxy
17 Thread was created on or around June 18, 2011, and, on information and belief, was
18 created by a person seeking a face to face meeting to purchase oxycodone in Los
19 Angeles.....

20 ¶32. a. Immediately after this thread was created, "Dane" aka Daniel Park
21 (hereafter "Park"), responded as follows: "shoot me your email and I'll help you out."
22 Park is a long-time trafficker in illegal drugs, including Oxycodone,

23 b. On June 18, 2011, commenter "yung one" writes "What you got?" in
24 response to Dane's comment above. On June 19, Dane replies, "mostly 30mg roxi. I
25 happen to have some norcos 10mg/325 hydrocodone too."

26 c. On June 19, 2011, commenter "CTS2011" writes "Dane!! Message me
27 please! In Los Angeles, also looking!"

28 d. On June 22, 2011, commenter "makeuptogogo" replies to Dane's June
29 19 comment as follows: "Help ... scarlett.piazza@gmail.com"

30 e. On June 22, 2011, Dane replies to CTS2011's June 19 comment by
31 stating "CTS 2011... give me your email so we can chat." On July 15, CTS 2011
32 replies, "I don't want to post my email on here, can you send me a message so we can
33 get together?"

34 ¶33 In this fashion, Park was able to use Topix' subject-matter forum and commenting
35 capability to meet potential purchasers of this deadly product.

1 ¶34. On August 7, 2011, Andrew Witkoff posted the phrase "Dane hit me up", i.e.
2 contact me, followed by b email address, in the Oxy Thread. Defendant Park wrote
3 back to him the very same day, using the email address Andrew provided. Park and
4 Andrew subsequently negotiated and agreed on the terms of their drug deal via direct
5 emails and text messages, as well as at least one face-to-face meeting on August 12 at
6 which Andrew gave Park cash in exchange for the drugs that ultimately killed him.
7 Only two days later, Andrew died of an accidental overdose of those drugs.

8 ¶39. Topix.com reaches hundreds of thousands of individual users. At any one time,
9 tens of thousands of discussion threads devoted to facilitating the illegal sale of
10 controlled substances can be accessed on Topix.com. As a result, on information and
11 belief, thousands of individuals have purchased illegal drugs and illegally purchased
12 controlled substances via transactions which were facilitated via Topix.com, and
13 therefore the nuisance created by Topix affects a considerable number of persons and
14 constitutes a public nuisance as defined by section 3480 of the California Civil Code.

15 ¶41. Andrew Witkoff obtained the drugs which took his life via a transaction which
16 began on a Topix.com discussion thread while he was physically at his residence.

17 ¶45. Topix and defendants could use and could have used readily available software
18 programs to monitor and/or filter the content of the forums and discussion threads, and
19 in fact Topix retains the right to do so in its Terms of Service.

20 Here, the second and third requirements of *Doe II* which confers immunity on Topix are satisfied,
21 because plaintiffs' allegations are that third party users and posters on Topix.com ultimately created
22 the communications which allegedly resulted in Andrew Witkoff's death. The Ninth Circuit recently
23 clarified what amounts to creation by an information content provider:

24 [Section 230] tells that "information content provider" means any person or entity that
25 is responsible, in whole or in part, for the creation or development of information
26 provided through the Internet or any other interactive computer service. 47 U.S.C.S. §
27 230(f)(3). We have recently reiterated that providing neutral tools to carry out what
28 may be unlawful or illicit does not amount to "development" for these purposes.

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 at Fn. 6 (9th Cir. 2009). The court went on to explain:

publication involves reviewing, editing, and deciding whether to publish or to
withdraw from publication third-party content. See *Roommates*, 521 F.3d at 1170-71
("[A]ny activity that can be boiled down to deciding whether to exclude material
that third parties seek to post online is perforce immune under section 230."). . .

1 Thus, a publisher reviews material submitted for publication, perhaps edits it for style
2 or technical fluency, and then decides whether to publish it...

3 * * *

4 a plaintiff cannot sue someone for publishing third-party content simply by changing
5 the name of the theory from defamation to negligence. Nor can he or she escape 47
6 U.S.C.S. § 230(c) by labeling as a "negligent undertaking" an action that is
7 quintessentially that of a publisher. ...**removing content is something publishers do,**
8 **and to impose liability on the basis of such conduct necessarily involves treating**
9 **the liable party as a publisher of the content it failed to remove.** . . .It is because
10 such conduct is publishing conduct that we have insisted that **section 230 protects**
11 **from liability “any activity that can be boiled down to deciding whether to**
12 **exclude material that third parties seek to post online.”**

13 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009). In this case, plaintiffs allege that Topix
14 should have known and edited the third party posts and is therefore liable. No such requirements
15 exist at law and Section 230 immunizes Topix from all causes of action. Thus, plaintiffs’ allegations
16 that Topix may edit or remove content simply reiterates that Topix is immune from liability under
17 Section 230. Even cursory perusal of universal interpretation of Section 230 confirms that the
18 immunities it confers to websites has been consistently been affirmed by state and federal courts
19 throughout the country. As the court in *Doe II* confirmed, “where the decisions of the federal courts
20 on a federal question are both numerous and consistent, we should hesitate to reject their authority.”
21 *Doe II*, *supra*, 175 Cal. App. 4th, at 571.

22 For example, in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009), a sheriff sought
23 an injunction against the website Craigslist, claiming that the “adult” services section of Craigslist’s
24 classified service constituted a nuisance because Craigslist causes or induces its users to post
25 unlawful ads -- by having an "adult services" category with subsections like "w4m" and by permitting
26 its users to search through the ads "based on their preferences." The court found that **there was no**
27 **allegation that Craigslist itself created the offending advertisements, Craigslist did not provide**
28 **contact information of prostitutes and brothels as its users did, that intermediaries were not**

1 culpable for "aiding and abetting" their customers who misused their services to commit
2 unlawful acts and that Craigslist did not cause or induce anyone to create, post, or search for
3 illegal content. As such, Craigslist was shielded from liability due to the CDA. *Dart v. Craigslist,*
4 *Inc.*, 665 F. Supp. 2d 961, 966-969 (N.D. Ill. 2009).¹⁰ Similarly, in this case, Topix did not create the
5 offending advertisements, Topix did not provide contact information of drug dealers, and Topix did
6 not cause or induce anyone to create, post, or search for illegal content.

7 **C. The Complaint Should Be Dismissed Without Leave to Amend**

8 Denial of leave to amend is proper where a cause of action is incapable of amendment.
9 *McDonald v. Sup.Ct. (Flintkote Co.)*, 180 Cal.App.3d 297, 303-304 (1980). That is, where there is
10 no "reasonable possibility that plaintiff can state a good cause of action," leave should be denied.
11 *Goodman v. Kennedy*, 18 Cal.3d 335, 349 (1976); see *Okun v. Sup.Ct. (Maple Properties)*, 29 Cal.3d
12 442, 460 (1981). **Leave to amend should be denied where the facts are not in dispute and the**
13 **nature of the claim is clear, but no liability exists under substantive law.** *Lawrence v. Bank of*
14

15 ¹⁰ Numerous other federal cases have consistently upheld Section 230 immunity, for example:

- 16 • *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997) (Section 230 "creates a federal immunity to any cause of action
17 that would make service providers liable for information originating with a third-party user of the service).
- 18 • Plaintiff argued that defendant website operator was not service provider for purposes of 47 USCS § 230's
19 immunity because, in part, (a) its website had search engine for adult categories that allowed searches of postings
20 by keywords; (b) it developed value of posted ads by working to create highly viewed website; (c) its website
21 was claimed to be highly tuned marketing site; (d) website had instructions, for fee, on how to increase impact of
22 posted ads; and (e) it offered special ad placement and re-posting for fee; none of these characteristics
23 distinguish website operator from other Internet service providers that courts have found to be within reach of §
24 230 immunity. *M.A. v Vill. Voice Media Holdings* 809 F Supp. 2d 1041, (2011, ED Mo).
- 25 • Writer's defamation, invasion of privacy, and negligence claims against internet service provider (ISP) were
26 barred by 47 USCS § 230; there was no doubt that ISP, which provided internet search technology to internet
27 users, was "interactive computer service" rather than "information content provider," and ISP was eligible for
28 immunity under § 230 because it merely archived, cached, or provided access to content that was created by
third parties. *Parker v Google, Inc.* 422 F Supp 2d 492 (2006, ED Pa).
- *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-53 (D.D.C. 1998) (Court noted that Congress made a policy choice
by "providing immunity even where the interactive service provider has an active, even aggressive role in
making available content prepared by others.)
- *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 984-985 (10th Cir. 2000) (Immunity for AOL was
upheld against liability for a user's posting of incorrect stock information.)
- *Doe v. America Online*, 783 So. 2d 1010, 1013-1017 (Fl. 2001)(The court upheld immunity against state claims
of negligence based on "chat room marketing" of obscene photographs of minor by a third party.)

1 *America* (1985) 163 Cal.App.3d 431, 436 (1985). **The burden is on the plaintiff to show in what**
2 **manner he or she can amend the complaint, and how that amendment will change the legal**
3 **effect of the pleading.** *Goodman v. Kennedy, supra*, 18 Cal.3d at 349; *Hendy v. Losse* 54 Cal.3d
4 723, 742 (1991).

5 In *Casterson v. Superior Court*, 101 Cal. App. 4th 177, 180 (2002), plaintiff sued a school
6 teacher for injuries sustained while on a field trip with defendant acting as his chaperone. The trial
7 court overruled defendant's demurrer to the original complaint, which was based on California's
8 statutory immunity for school field trips and the court of appeal reversed, holding:

9 A general demurrer will lie where the complaint "has included allegations that clearly
10 disclose some defense or bar to recovery." [citations omitted] Thus, a demurrer based
11 on an affirmative defense will be sustained only where the face of the complaint
12 discloses that the action is necessarily barred by the defense. [citations omitted]. In
13 the present case, we must determine whether the affirmative defense of the section
14 35330 field trip immunity necessarily bars plaintiff's personal injury claim against
15 defendant Casterson.

14 *Id.* at 183. The *Casterson* court found that the face of the complaint showed that the action was
15 barred by the affirmative defense of field trip immunity and issued a writ of mandate directing the
16 trial court to **sustain the demurrer to plaintiff's original complaint, without leave to amend.** *Id.*
17 at 190.

18 This is precisely the type of case which warrants dismissal without leave to amend because
19 there is no conceivable amendment to the Complaint which would change the underlying facts of
20 plaintiffs' case which seeks to hold Topix liable for content provided by third party users which
21 allegedly resulted in the drug transaction leading to Andrew Witkoff's death. This basic fact is
22 further evidenced by the Topix website printouts attached to the Complaint as all are taken as true for
23 purposes of the demurrer. In sum, creative pleading will not remove these deficiencies nor conceal
24 these clear facts regarding Andrew Witkoff's alleged use of the Topix website.

1 **IV. CONCLUSION**

2 This Court should dismiss Topix from this action, with prejudice, as it is absolutely immune
3 from suit by Section 230 and supporting authorities. As the Court of Appeal for the Second
4 Appellate District made abundantly clear in *Doe II*, plaintiffs may pursue their claims against the
5 alleged third party user who generated the offensive content, defendant Daniel Park, but not the
6 interactive computer service that enabled Mr. Park to publish his statements online, Topix.

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9 DATED: November 8, 2013

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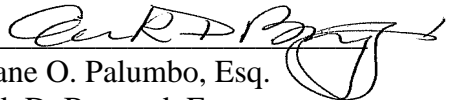
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Respectfully submitted,

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