

Case Number: BC517897 **Hearing Date:** May 14, 2014 **Dept:** 56

Case Name: Witkoff, et al. v. Topix LLC, et al.

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Matter: Demurrer

Moving Party: Defendant Topix LLC

Responding Party: Plaintiffs Steven and Lauren Witkoff

Tentative Ruling: Demurrer is sustained.

Plaintiffs Steven and Lauren Witkoff filed this action against Defendants Topix LLC and Daniel Park arising out of the death of their son Andrew. The operative pleading is the First Amended Complaint, to which Defendant demurs. In connection with the demurrer, Defendant requests judicial notice of the FAC and 47 USC §230; the RJN is granted.

The FAC alleges that Plaintiffs' son Andrew overdosed from Oxycodone that he purchased from Park through the use of Defendant's website Topix.com. According to the FAC, Topix.com is a website that allows consumers "to post comments, polls and surveys in local forums for the purpose of facilitating discussion about news and other matters of local community interest, and thus provides consumers with an open platform to become more informed regarding local matters" (Ex A, p 1). It is the largest platform for local forums in the United States and has received over 100 million user-generated posts since its inception, averaging more than 125,000 user-generated posts per day (Id).

In addition to these general and wide-ranging subjects of discussion, Plaintiffs allege that Topix.com is also "one of the internet's most prominent drug bazaars" (¶ 19). They allege that Defendant facilitates the sales of controlled substances by providing forums in which website users engage in discussions with others; in these forums website users openly discuss sales of controlled substances, use private messages to negotiate details, and arrange for meetings to complete their transactions (¶¶ 20-21). Plaintiffs allege that their son purchased Oxycodone from Park by visiting a discussion forum on Oxycodone and related substances, finding a discussion thread by a person seeking an Oxycodone seller, locating a response by Park offering to sell Oxycodone, contacting Park and providing Park with his email, and then arranging a meeting with Park at which he purchased Oxycodone (¶¶ 16-18).

Plaintiffs allege that Defendant encourages and aids transactions of this kind

by providing forums; by permitting website users to create discussion threads and post comments on the forums without providing identifiable information; by permitting private messages to be exchanged with a user profile that requires only limited information; and by failing to remove or edit communications concerning illegal transactions, despite knowledge of those communications (§§21-29, 32, 37 & 40). Plaintiffs allege that Defendant's conduct supports causes of action for public nuisance in violation of Civ. Code §§3479-80 (§§42-55) and wrongful death based upon intentional, reckless or negligent conduct pursuant to Code Civ. Proc. §377.60 et seq. (§§56-63).

Defendant contends that it is immune from liability under these allegations, pursuant to Section 230 of the federal Communications Decency Act, 47 USC §230. Section 230 provides in relevant part that "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." Congress enacted Section 230 "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." §230(b)(1)-(2).

In *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, the Court of Appeal applied Section 230 to facts similar to our case. In *Doe II*, the court considered claims arising out of sexual assaults upon minors who met their assailants through communications conducted on MySpace, a social networking website. Users of MySpace created profiles that contained personal information and then contacted other users with whom they could communicate in public or private settings. Adults contacted minors through MySpace communications, arranged meetings, and then sexually assaulted them. Parents of the minors sued MySpace, asserting causes of action for negligence and similar claims, alleging that MySpace knew that its website had been used for improper purposes and deliberately failed to implement safety precautions that could have protected vulnerable minors from sexual predators. Based upon the immunity provisions of Section 230, the trial court sustained demurrers to the complaints without leave to amend.

The Court of Appeal affirmed the judgment of dismissal. The court held that Section 230 extends immunity to all manner of civil tort claims. 175 Cal.App.4th at 568. And it held that MySpace was immune from liability under Section 230 because (1) it was an interactive computer services provider, (2) it was not an information content provider with respect to the disputed activity,

and (3) the plaintiffs sought to hold it liable for information originating with a third party user of its service. 175 Cal.App.4th at 568.

Doe II is part of a consistent line of cases that have applied Section 230 immunity to the operators of websites similar to Topix.com. See Barrett v. Rosenthal (2006) 40 Cal.4th 33 (online discussion groups); Gentry v. eBay Inc. (2002) 99 Cal.App.4th 816 (online shopping service); Johnson v. Arden (8th Cir. 2010) 614 F.3d 785 (business review site); Nemet Chevrolet v. Consumeraffairs.com (4th Cir. 2009) 591 F.3d 250 (consumer review site); Barnes v. Yahoo! Inc. (9th Cir. 2009) 570 F.3d 1096 (social networking site); Doe v. MySpace Inc. (5th Cir. 2008) 528 F.3d 413 (social networking site); Chicago Lawyers' Comm. v. Craigslist (7th Cir. 2008) 519 F.3d 666 (housing listings); Universal Comm. Systems v. Lycos (1st Cir. 2007) 478 F.3d 413 (message boards); Carafano v. Metrosplash.com Inc. (9th Cir. 2003) 339 F.3d 1119 (online dating service); Green v. America Online (3d Cir. 2003) 318 F.3d 465 (chat rooms); Ben Ezra v. America Online (10th Cir. 2000) 206 F.3d 980 (stock quotation services); Zeran v. America Online Inc. (4th Cir. 1997) 129 F.3d 327 (message boards).

Courts have applied Section 230 broadly and have held that immunity does not apply only when a website operator provides or explicitly requires the offending content. See Fair Housing Council v. Roommates.com (9th Cir. 2008) 521 F.3d 1157 (roommate service became a content provider by requiring discriminatory information to be disclosed in listings and used in listing searches); Anthony v. Yahoo! Inc. (ND Cal. 2006) 421 F.Supp.2d 1257, 1262-64 (dating service became a content provider by creating phony user profiles to entice participation).

These authorities are directly applicable, and they compel dismissal of Plaintiffs' complaint. The FAC focuses on communications in which third party users conduct illegal drug transactions on Defendant's website. Like Doe II, these communications are created by the users themselves, without Defendant's control of the content. Plaintiffs seek to impose liability on Defendant for conduct by third party users who utilize Defendant's website and forums, and that is not permissible under the immunity provided by Section 230.

The demurrer is sustained. Although this is the first challenge to the pleadings, the demurrer is sustained without leave to amend. The FAC is Plaintiffs' second complaint, and the essential factual allegations are consistent with the original complaint. Although Plaintiffs have requested

leave to amend, they have not offered any factual allegations that would support a viable cause of action. Leave to amend may be denied where the facts and nature of the claim are clear, and no liability exists under substantive law. See *Routh v. Quinn* (1942) 20 Cal.2d 488, 493; *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436. Leave may also be denied when there appears to be no reasonable probability that Plaintiff can amend the complaint to state a viable claim. See *Sprinkles v. Associated Indemnity* (2010) 188 Cal.App.4th 69, 76.

Defendant has submitted portions of its responses to Plaintiffs' discovery conditionally under seal, and it moves to seal the documents pursuant to CRC 2.551(B). The court did not consider this evidence, as it is not proper on a demurrer. Nevertheless, the motion to seal is not opposed and it is granted.