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Attorneys for defendant Topix, LLC

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

STEVEN WITKOFF, Individually, and LAUREN **CASE NO. BC517897** WITKOFF, Individually, Complaint Filed: 8/12/2013 1st Amended Complaint Filed: 1/9/2014 Plaintiffs, Assigned for all purposes to: Hon. Teresa Beaudet v. Dept.: 97 TOPIX, DANIEL PARK; and Does 1 THROUGH TOPIX, LLC'S DEMURRER TO 100, Inclusive, ALL CAUSES OF ACTION IN PLAINTIFFS' FIRST AMENDED Defendants. COMPLAINT; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF **Reservation ID: 140114011619 Hearing Date:** March 20, 2014 **Hearing Time:** 1:30 p.m. Dept.: 97

## **DEMURRER**

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

-1-

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

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DATED: January 14, 2014

### DEMURRER TO FIRST CAUSE OF ACTION

(Nuisance)

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

## DEMURRER TO SECOND CAUSE OF ACTION

(Wrongful Death)

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

Respectfully submitted,

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By:

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Justin S. Kim, Esq.

Attorneys for Defendant Topix, LLC

-2-

TABLE OF CONTENTS	
Table of Contents	<b>PAGE</b> i
Table of Authorities	ii
Table of Authorities	11
I. INTRODUCTION	1
II. SUMMARY OF ARGUMENT	2
III. THE DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND	4
A. The Communications Decency Act, 47 U.S.C. § 230.	4
B. In <i>Julie Doe II</i> , a <i>Minor</i> , v. <i>MySpace Inc.</i> , the Second Appellate District recently affirmed Section 230's broad immunity provided to websites such as Topix	6
1. There is no dispute that Topix is an interactive computer service provider	8
2. Topix is not an information content provider with respect to the disputed activity and Plaintiff seeks to hold Topix liable for information originating with a third party user of its service	8
C. The Amended Complaint Should Be Dismissed Without Leave to Amend	13
IV. CONCLUSION	14
- <b>i-</b>	

1	TABLE OF AUTHORITIES
2	STATE CASES
3	Barrett v. Rosenthal, 40 Cal. 4th 33 (2006)
4	Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985)
5	Casterson v. Superior Court, 101 Cal. App. 4th 177 (2002)
6	Goodman v. Kennedy, 18 Cal.3d 335, 349 (1976)
7	Hendy v. Losse 54 Cal.3d 723, 742 (1991)
8	Julie Doe II, a Minor, et al. v. MySpace Inc., 175 Cal. App. 4th 561 (2009) 3, 6, 7, 8, 10, 12, 14
9	<i>Kathleen R. v. City of Livermore</i> , 87 Cal. App. 4th 684 (2002)
10	Lawrence v. Bank of America, 163 Cal.App.3d 431, 436 (1985)
11	McDonald v. Sup.Ct. (Flintkote Co.), 180 Cal.App.3d 297, 303-304 (1980)
12	Okun v. Sup.Ct. (Maple Properties), 29 Cal.3d 442, 460 (1981)
13	Pacifica Homeowners' v. Wesley Palms Ret. Cmty., 178 Cal. App. 3d 1147, 1151 (1986)
14	FEDERAL CASES
15	Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009)
16	Ben Ezra, Weinstein & Co. v. America Online, 206 F.3d 980, 984-985 (10th Cir. 2000)12
17	Blumenthal v. Drudge, 992 F. Supp. 44, 49-53 (D.D.C. 1998)
18	Dart v. Craigslist, Inc., 665 F. Supp. 2d 961 (N.D. Ill. 2009)
19	Doe v. America Online, 783 So. 2d 1010, 1013-1017 (Fl. 2001)
20	M.A. v Vill. Voice Media Holdings 809 F Supp. 2d 1041, (2011, ED Mo)
21	Parker v Google, Inc. 422 F Supp 2d 492 (2006, ED Pa)
22	Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997)
23	STATUTES
24	47 U.S.C. § 230
25	Cal. Code Civ. Proc. § 430.10(e)
26	Cal. Civ. Code §§ 3479, 3480
27	-ii-
28	TOPIX 11 C'S DEMURRER TO ALL CAUSES OF ACTION IN PLAINTIEES' FIRST AMENDED COMPLAINT:

 ${\bf MEMORANDUM\ OF\ POINTS\ \&\ AUTHORITIES\ IN\ SUPPORT\ THEREOF}$ 

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. <u>INTRODUCTION</u>

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

On August 12, 2013, plaintiffs Steven Witkoff and Lauren Witkoff ("plaintiffs") filed this action against Topix, asserting claims for nuisance and wrongful death. Topix filed a demurrer to all causes of action in the original complaint, which was set for hearing in this court on January 13, 2014. On January 9, 2014, plaintiffs filed an amended complaint, resulting in the instant demurrer. Plaintiffs essentially allege that:

- 1) Topix willfully and intentionally operates its website in an unlawful manner that facilitates extensive trafficking in illegal drugs and controlled substances because the website is utilized by drug traffickers, drug dealers and drug buyers to locate persons in the community via various forums where Topix's users can view and create discussion threads and post responses;<sup>2</sup>
- 2) Topix aids and abets the unlawful marketing, distribution and acquisition of illegal drugs and controlled substances by not monitoring the communications and even if they do monitor such posts, Topix does not remove any of the "drug trafficking" related threads, posts or

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<sup>&</sup>lt;sup>1</sup> Plaintiffs' allegations regarding the general functionality of Topix.com are consistent with Topix's assertions regarding its website. See Topix's Request for Judicial Notice in Support of Demurrer to All Causes of action in Plaintiffs' First Amended Complaint; Declaration of Erik D. Buzzard ("RJN"), Exhibit 1 – First Amended Complaint dated 1/9/2014 at ¶ 19-21.

<sup>&</sup>lt;sup>2</sup> RJN, Exhibit 1, First Amended Complaint at ¶¶ 2, 19-25.

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communications, constituting an unconscionable disregard for public health and safety and a nuisance under California law.<sup>3</sup>

Topix disputes the allegations in the amended complaint. Plaintiffs allege that in March 2011, their son, Andrew Witkoff entered a residential drug treatment program in Los Angeles where he had access to the internet such that on August 7, 2011, Andrew made contact via Topix.com with a known drug trafficker, Daniel Park. According to plaintiffs, Andrew and Park further communicated via email and phone text messages and then met on August 12, 2011 in San Fernando Valley where Andrew purchased Oxycodone and died two days later from an accidental overdose of those same drugs.4 The amended complaint also names Park as to the wrongful death cause of action, alleging that Park sold Andrew the drugs which he ingested, resulting in his death.<sup>5</sup>

#### II. SUMMARY OF ARGUMENT

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

1) Topix is classified as an internet service provider under Section 230;

<sup>&</sup>lt;sup>3</sup> RJN, Exhibit A, First Amended Complaint at ¶¶ 28-30, 44-47, 51-54.

<sup>&</sup>lt;sup>4</sup> RJN, Exhibit A, First Amended Complaint at ¶¶ 15-18.

<sup>&</sup>lt;sup>5</sup> Plaintiffs also filed a separate action currently pending in Dept. 92 of this court captioned *Steven Witkoff, et al. v. 1775* Summitridge Drive, LLC, et al, case no. BC517918, against eight defendants, including the detoxification facility and sober living facility in Los Angeles which Andrew was under the care and supervision of from March 2011 to the time of his death on August 14, 2011.

- 2) Topix is not an information <u>content</u> provider under Section 230, as the information which plaintiffs seeks to hold Topix liable for allegedly originates from drug traffickers, drug sellers and drug users;
- 3) Plaintiffs allege that Topix is subject to suit for communications made on Topix's forums between third parties, i.e., the alleged drug traffickers, drug sellers, drug users and specifically, drug seller Daniel Park and Andrew Witkoff.

The Second Appellate district has affirmed in Julie Doe II, a Minor, et al. v. MySpace Inc., 175 Cal. App. 4th 561 (2009) that website operators such as Topix are subject to the broad immunity of Section 230 based on Topix's role as the "publisher" of the information provided by third parties, regardless of whether or not Topix is unsuccessful in monitoring third party communications, or does not even attempt to monitor such communications at all.

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

-3-

## III. THE DEMURRER MUST BE SUSTAINED WITHOUT LEAVE TO AMEND

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

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

\*\*\*\*

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

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

## A. Section 230 of the Communications Decency Act

In 1996, the United States Congress passed the Communications Decency Act ("the Act"), wherein it declared that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens" and "the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government

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1	regulation." Congress further declared that "it is the policy of the United States to preserve the
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2	vibrant and competitive free market that presently exists for the Internet and other interactive
3	computer services, unfettered by Federal or State regulation." In furtherance of this policy, the Act
4	provided immunity to interactive computer services such as Topix as follows:
5	(c) Protection for "Good Samaritan" blocking and screening of offensive
6	<u>material</u>
7	(1) Treatment of publisher or speaker  No provider or user of an interactive computer service shall be
8	treated as the publisher or speaker of any information provided by
9	another information content provider.
10	(2) Civil liability
11	No provider or user of an interactive computer service shall be held liable
12	on account of—
13	(A) any action voluntarily taken in good faith to restrict access to or
14	availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise
15	objectionable, whether or not such material is constitutionally protected; or
16	(B) any action taken to enable or make available to information content
17 18	providers or others the technical means to restrict access to material described in paragraph (1).8
	Section 220(a) further commonded that "up agus of getien may be brought and no lightlift, may be
19	Section 230(e) further commanded that " <u>no cause of action may be brought and no liability may be</u>
20	imposed under any State or local law that is inconsistent with this section." Since its passage by the
21	United States Congress, state and federal courts throughout the country, including in this court, have
22	consistently found that Section 230(c) strictly bars any and all claims against an interactive computer
23	service such as Topix from liability for information posted by third parties.
24	
25	<sup>6</sup> RJN, Ex. B, 47 U.S.C. § 230(a).
26	<sup>7</sup> <i>Id.</i> at 47 U.S.C. § 230(b) <sup>8</sup> <i>Id.</i> at 47 U.S.C. § 230(c), <b>RJN, Exhibit B</b> .
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28	TOPIX, LLC'S DEMURRER TO ALL CAUSES OF ACTION IN PLAINTIFFS' FIRST AMENDED COMPLAINT;

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

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

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

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

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

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

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

The Doe II Court further held that "California's intermediate appellate courts have also consistently extended liability to negligence claims similar to the one at hand." Doe II, supra, 175 Cal. App. 4th at 572. The comprehensive holding of *Doe II* which mandates dismissal of this case must be 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 sections 3479, 3480 and that Topix should be held

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liable for Andrew Witkoff's wrongful death due to Andrew's searches for Oxycodone on google.com and reliance on the Topix website. Simply put, both causes of action are barred by Section 230 as a matter of law. Doe II affirmed that immunity under Section 230 requires proof of three elements:

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

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

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

Section 230 broadly defines an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). It is undisputed that, as a website operator, Topix is an interactive computer service provider which enables access by its users to its internet news forums. See amended complaint, ¶¶ 7, 19-25.

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

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

¶20. In or around 2005, Topix created and developed a special feature for **users of Topix.com**. This new feature, known as "forums" was, and still is, a platform of subject-headings within which **Topix.com users** can engage in discussions, sometimes called "threads." Topix.com users can enter "comments" on these discussion, threads, and communicate with others on the forum...

¶21. <b>Topix.com users</b> can and do communicate on the forums created and developed
by Topix
¶22when operating on Topix.com's forums, these <b>buyers and sellers of illegal drugs</b> or controlled substances apparently feel free to openly discuss their illicit activities
¶23 <b>Visitors to, and users of, Topix.com</b> can view forum content, create new
discussion threads within a forum, and post personal comments, all without creating a user profile or providing any other identifiable information to Topix.com further
enable <b>drug traffickers</b> to readily use Topix.com forums
¶27there were 891 communications from <b>individuals seeking to illegally purchase or sell</b> Oxycodone and other drugs exclusively through the use of Topix's Oxy Forum.
128 usans of its waksite wave enough and illegally never as and selling
¶28 <b>users</b> of its website were openly and illegally purchasing and selling
¶40c. having actual and/or constructive knowledge that it was and is serving as a "go-between" for <b>illegal drug sellers and illegal drug purchasers</b> ; d. having actual
and/or constructive knowledge that it was and is providing the forum or "facility" for illegal <b>drug transactions to be consummated by others</b>
¶41 Topix has left intact other threads and posts involving <b>Park and other drug</b>
¶41 Topix has left intact other threads and posts involving <b>Park and other drug</b> dealers and their customers
Plaintiffs' complaint is undeniably grounded in allegations seeking to hold Topix liab
statements made by third parties, not statements made on the Topix website by Topix. In additional statements made on the Topix website by Topix.
the general allegations regarding alleged drug buyers, drug traffickers and drug sellers use
Topix website, the complaint further alleges and attaches as exhibits printouts of specific posting
the Topix.com website which were posted allegedly by Andrew Witkoff and drug dealer Daniel
¶8On August 7, 2011, <b>Park</b> , a known drug dealer, made contact with <b>Andrew</b> on
Topix.com and arranged to sell him what turned out to be a lethal dose of Oxycodone
¶16 <b>Andrew</b> used Topix.com on several occasions
$\P 17$ Park, using the screen name "Dane", responded immediately to the post, as
follows: "shoot me your email and I'll help you out." Also in the Oxy Thread, the following posts, to and from Park, appeared:

1	a. On June 18, 2011, commenter "yung one" writes "What you got?" in
1	response to Dane's comment above. On June 19, Dane replies, "mostly 30mg roxi. I
2	happen to have some norcos 10mg/325 hydrocodone too."
3	b. On June 19, 2011, commenter "CTS2011" writes "Dane!! Message me
4	please! In Los Angeles, also looking!" c. On June 22, 2011, commenter ''makeuptogogo'' replies to Dane's June 19
	c. On June 22, 2011, commenter makeuplogogo repues to Dane's June 19 comment as follows: "Help scarlett.piazza@gmail.com"
5	d. On June 22, 2011, Dane replies to CTS2011's June 19 comment by stating
6	"CTS 2011 give me your email so we can chat."
7	e. On July 15, CTS 2011 replies, "I don't want to post my email on here, can you send me a message so we can get together?"
	sena me a message so we can get together:
8	¶18 <b>Andrew</b> then used Topix's Oxy Forum
9	USS Defendant Park is a drug dealer who made contact with Andrew through
10	¶58 <b>Defendant Park</b> is a drug dealer, who made contact with <b>Andrew</b> through defendants' website, Topix.com
11	Here, the second and third requirements of <i>Doe II</i> which confers immunity on Topix are satisfied,
12	because plaintiffs' allege that third party users and posters on Topix.com ultimately created the
13	communications which allegedly resulted in Andrew Witkoff's death. The Ninth Circuit recently
14	clarified what amounts to creation by an information content provider:
15	[Section 230] tells that "information content provider" means any person or entity that
16	is responsible, in whole or in part, for the creation or development of information
17	provided through the Internet or any other interactive computer service. 47 U.S.C.S. § 230(f)(3). We have recently reiterated that <b>providing</b> <i>neutral</i> tools to carry out what
	may be unlawful or illicit does not amount to "development" for these purposes.
18	
19	Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 at Fn. 6 (9th Cir. 2009). The court went on to explain:
20	publication involves reviewing, editing, and deciding whether to publish or to
21	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
22	that third parties seek to post online is perforce immune under section 230.")
23	Thus, a publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it
24	* * *
25	a plaintiff cannot sue someone for publishing third-party content simply by changing
	the name of the theory from defamation to negligence. Nor can he or she escape 47 U.S.C.S. § 230(c) by labeling as a "negligent undertaking" an action that is
26	U.S.C.S. § 250(c) by labeling as a negligent undertaking an action that is
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quintessentially that of a publisher. ... removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove. . .It is because such conduct is publishing conduct that we have insisted that section 230 protects from liability "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online."

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

For example, in Dart v. Craigslist, Inc., 665 F. Supp. 2d 961 (N.D. Ill. 2009), a sheriff sought an injunction against the website Craigslist, claiming that the "adult" services section of Craigslist's classified service constituted a nuisance because Craigslist causes or induces its users to post unlawful ads -- by having an "adult services" category with subsections like "w4m" and by permitting its users to search through the ads "based on their preferences." The court found that there was no allegation that Craigslist itself created the offending advertisements, Craigslist did not provide contact information of prostitutes and brothels as its users did, that intermediaries were not culpable for "aiding and abetting" their customers who misused their services to commit unlawful acts and that Craigslist did not cause or induce anyone to create, post, or search for illegal content. As such, Craiglist was shielded from liability due to the CDA. Dart v. Craigslist,

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It is also inapposite that plaintiffs have framed their complaint as a nuisance cause of action under California Civil Code ¶¶ 3479, 3480. In Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (2002), a mother whose son had downloaded sexually explicit photos from the Internet on a computer at the city library, sued the city for, among other causes of 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 reiterated 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.

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

Zeran v. AOL, 129 F.3d 327, 330 (4th Cir. 1997) (Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service).

Plaintiff argued that defendant website operator was not service provider for purposes of 47 USCS § 230's immunity because, in part, (a) its website had search engine for adult categories that allowed searches of postings by keywords; (b) it developed value of posted ads by working to create highly viewed website; (c) its website was claimed to be highly tuned marketing site; (d) website had instructions, for fee, on how to increase impact of posted ads; and (e) it offered special ad placement and re-posting for fee; none of these characteristics distinguish website operator from other Internet service providers that courts have found to be within reach of § 230 immunity. M.A. v Vill. Voice Media Holdings 809 F Supp. 2d 1041, (2011, ED Mo).

Writer's defamation, invasion of privacy, and negligence claims against internet service provider (ISP) were barred by 47 USCS § 230; there was no doubt that ISP, which provided internet search technology to internet users, was "interactive computer service" rather than "information content provider," and ISP was eligible for 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.)

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#### C. The Amended Complaint Should Be Dismissed Without Leave to Amend

Denial of leave to amend is proper where a cause of action is incapable of amendment. McDonald v. Sup.Ct. (Flintkote Co.), 180 Cal.App.3d 297, 303-304 (1980). That is, where there is no "reasonable possibility that plaintiff can state a good cause of action," leave should be denied. Goodman v. Kennedy, 18 Cal.3d 335, 349 (1976); see Okun v. Sup.Ct. (Maple Properties), 29 Cal.3d 442, 460 (1981). Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law. Lawrence v. Bank of America (1985) 163 Cal.App.3d 431, 436 (1985). The burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading. Goodman v. Kennedy, supra, 18 Cal.3d at 349; Hendy v. Losse 54 Cal.3d 723, 742 (1991).

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

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

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

This is precisely the type of case which warrants dismissal without leave to amend because there is no conceivable amendment to the already amended complaint which would change the

underlying facts of plaintiffs' case which seeks to hold Topix liable for content provided by third party users which allegedly resulted in the drug transaction leading to Andrew Witkoff's death. This basic fact is further evidenced by the Topix website printouts attached to the amended complaint as all are taken as true for purposes of the demurrer. In sum, creative pleading will not remove these deficiencies nor conceal these clear facts regarding Andrew Witkoff's alleged use of the Topix website.

## IV. CONCLUSION

DATED: January 14, 2014

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

Respectfully submitted,

PALUMBO BERGSTROM LLP

By: Diane O. Palumbo, Esq.

Erik D. Buzzard, Esq.

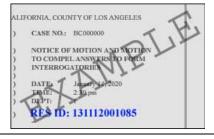
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