NO. 14-19-00845-CV

IN THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

***In re* FACEBOOK, INC.**

Original proceeding from the 334TH District Court of Harris County, Texas, Cause No. 2018-69816

REPLY IN SUPPORT OF MOTION FOR STAY

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ATTORNEYS FOR RELATOR FACEBOOK, INC.

TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

Relator Facebook, Inc. ("Facebook") files this reply in support of its motion to stay the underlying trial court proceedings pending review of Facebook's petition for writ of mandamus filed on October 24, 2019. *See* TEX. R. APP. P. 52.10(b).

SUMMARY

Real Party in Interest Jane Doe will not be prejudiced if the underlying case is temporarily stayed while this Court decides Facebook's petition for mandamus, but Facebook will be irreparably prejudiced if it is not. The FOSTA amendments upon which Plaintiff attempts to undercut Facebook's grounds for mandamus do not apply here, and her counsel's baseless conjecture about destruction of evidence is just that. Neither argument justifies forcing Facebook to engage in expansive discovery and defend against a lawsuit that federal law bars from the outset. That outcome is precisely what both Rule 91a and Section 230 were intended to prevent and why the Court should

grant a temporary stay while it considers Facebook's mandamus petition.[1]

FOSTA DOES NOT APPLY

Jane Doe's opposition to Facebook's motion for a stay focuses less on any purported prejudice from a temporary stay and more on attempting to discredit the grounds on which Facebook seeks mandamus. But the grounds for mandamus here are strong – the trial court's decision denying Facebook's statutory immunity under Section 230 is at odds with literally hundreds of reported cases, including 19 cases from state appellate and federal courts in Texas (one from the Fifth Circuit, 15 from U.S. district courts, and three from state appellate courts).

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[1] Plaintiff's counsel acknowledges that discovery is in its infancy, but claims that "but for Facebook's continued efforts to resist discovery, the case would be much further along." Resp. at 8. But there have been no motions to compel granted against Facebook in the underlying proceeding, and Plaintiff's counsel neglects to mention that until last month, the trial court had not yet ruled on Facebook's special appearance. A party is not required to respond to merits discovery when it is contesting personal jurisdiction. *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014); *see also In re Stern*, 321 S.W.3d 828, 839-40 (Tex. App.—Houston [1st Dist.] 2010, no pet.). With respect to jurisdictional discovery, Facebook asserted that Plaintiff failed to satisfy the affidavit requirements of Rule 120a(3) and that discovery would be futile, because nothing Plaintiff alleged would establish specific jurisdiction.

Faced with this weight of authority, Jane Doe asserts that the Fight Online Sex Trafficking Act of 2017 ("FOSTA") removed her claims from Section 230's purview. But although FOSTA amended Section 230 in several ways, none of them have anything to do with Plaintiff's claims. *See Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 190 (D.D.C. 2018) (detailing the scope of FOSTA's amendments to Section 230).

FOSTA (1) expanded and exempted from Section 230 a *federal* civil action for facilitating sex trafficking (which Plaintiff has not alleged); and (2) exempted *state criminal* prosecutions and *state attorney general enforcement* actions from Section 230 (which Plaintiff could not allege). *See* 47 U.S.C. § 230(e)(5); *Woodhull*, 334 F. Supp. 3d at 190. While the original version of the bill also would have exempted certain private state law civil actions, that proposal was rejected because Congress wanted to ensure a uniform national standard in this area rather than a patchwork of state laws. *See* H.R. 1865, 115th Cong., § 3 (a)(2)(C) (1st Sess. Apr. 3, 2017). Because FOSTA did not amend Section 230 in any way relevant to Plaintiff's claims (all of which are state law civil claims),

it does not change the relevance of the hundreds of pre-2018 cases establishing that Section 230 bars them.[2]

That there are few post-FOSTA decisions regarding Section 230 is a function of time—FOSTA was enacted in April of 2018—not an indication of the law's reach. Indeed, where courts have considered Section 230's post-FOSTA applicability to claims involving allegations of sex trafficking, they have recognized continued immunity from state law claims. For example, in a case brought by Jane Doe's same counsel, the California Superior Court — which frequently resolves cases involving Section 230 immunity—just last month rejected the very arguments made here: "FOSTA exempted only three categories of sex trafficking claims," and "[n]othing in the text of the statutes exempted private civil state law

[2] The FOSTA prefatory clause language that Plaintiff cites changes nothing. A prefatory clause does not change the meaning of unambiguous operative text. *See Kingdomware Techs., Inc. v. U.S,* 136 S. Ct. 1969, 1977 (2016); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009). Here, the operative text making limited amendments to Section 230 is unambiguous, and FOSTA's prefatory language is consistent with it. The "State and federal criminal and civil law" language in the preface accurately describes the three enacted exemptions for (1) federal private civil actions, (2) state AG *parens patriae* actions, and (3) criminal enforcement actions by state AGs. The same is true for the "Sense of Congress" recitals in FOSTA § 2, which generally state that § 230 was "never intended" to immunize bad actor websites that "facilitate" sex trafficking. The word "facilitate" is not defined, but whatever the meaning, it cannot alter the operative text of FOSTA's limited amendments to Section 230. *Kingdomware*, 136 S. Ct. at 1978.

claims from immunity." Ex. A, *Jane Does #1-#50 v. Salesforce, Inc.*, CGC-19-574770 (Cal. Super. Ct. Sept. 23, 2019).

A STAY WILL NOT IMPACT EVIDENCE PRESERVATION

As a last resort, Plaintiff's counsel suggests that a stay could result in the destruction of evidence by Facebook users through Facebook's "Off-Facebook Activity" feature. But, Plaintiff's claims are already seven years old (six years at the time of suit), and, with respect to any relevant evidence that actually still exists at this juncture, Facebook's preservation obligations are the same whether there is a stay of proceedings in place or not. Facebook and its counsel take those obligations seriously. Put simply, unfounded scare tactics regarding evidence destruction do not justify forcing Facebook to defend against litigation from which it is immune.

CONCLUSION

A stay here will "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings" and "preserve important substantive and

procedural rights from impairment or loss," *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004), while not prejudicing Real Party in Interest Jane Doe. This Court should therefore issue a temporary stay of proceedings pending review of Facebook's petition for mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record for Real Party in Interest Jane Doe via electronic transmission on November 5, 2019:

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

DOES #1 through #90, sex trafficking survivors,

Plaintiffs,

vs.

SALESFORCE.COM, INC.,

Defendant.

CASE NO. CGC-19-574770

ORDER SUSTAINING DEFENDANT'S DEMURRER TO THE SECOND AMENDED COMPLAINT AND DISMISSING ACTION WITH PREJUDICE

On September 23, 2019, Defendant Salesforce.com, Inc.'s demurrer to plaintiffs' Second Amended Complaint came on regularly for hearing before the Court. Sharon Arkin appeared on behalf of plaintiffs; Kristin A. Linsley and Matthew S. Kahn appeared for defendant. Having considered the pleadings and arguments of counsel, the Court rules as follows:

At the threshold, the Court must decide whether to rule on the demurrer, based on the following facts. On Friday afternoon, September 20, the Court issued its tentative ruling sustaining defendant's demurrer without leave to amend.[1] The same afternoon, pursuant to the Rules of Court and the Court's local rules, plaintiffs' counsel notified the Court and defendant's counsel that they intended to appear on Monday, September 23, to contest the tentative ruling. However, late on the evening of Sunday, September 22, plaintiffs electronically served and filed a request for dismissal of the entire action without prejudice. In light of this background, plaintiffs contend that the demurrer is moot; defendant, on the other hand, contends that plaintiffs' purported voluntary dismissal is ineffective. The Court permitted the parties to file supplemental briefs addressing this issue, and now agrees with defendants' position.

In general, a plaintiff may voluntarily dismiss an action at any time before the "actual commencement of trial." (Code Civ. Proc. § 581(c).) Although the right to dismiss is sometimes referred to loosely as "absolute," it is not: "Code of Civil Procedure section 581 recognizes exceptions to the right; other limitations have evolved through the court's construction of the term 'commencement of trial.'" (*Cravens v. State Board of Equalization* (1997) 52 Cal.App.4th 253, 256.) The meaning of the term "trial" is not restricted to jury or court trials on the merits, but includes other procedures, such as an order sustaining a defendant's general demurrer without leave to amend, that "effectively dispose of the case." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 785, citing *Goldtree v. Spreckels* (1902) 135 Cal. 666, 672-673.) "The 'purpose' in cutting off the plaintiff's absolute right to dismissal upon commencement of trial is to avoid abuse by plaintiffs who,

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[1] Plaintiffs' "objection" to the Court's tentative ruling on the ground that it was emailed to only one of plaintiffs' multiple attorneys is groundless. The tentative ruling sustaining the demurrer without leave to amend was posted on the Court's website, as contemplated by Cal. R. Ct. 3.1308 and the Court's Local Rules; the Court emailed the full tentative to counsel as a courtesy. And plaintiffs' counsel unquestionably received it, as shown by their email the same afternoon stating their intention to appear to contest the tentative.

when led to suppose a decision would be adverse, would prevent such decision by dismissing without prejudice and refiling, thus subjecting the defendant and the courts to wasteful proceedings and continuous litigation.'" (*Mesa Shopping Center-East, LLC v. Hill* (2014) 232 Cal.App.4th 890, 904, quoting *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 909.)

The issue presented here is whether a plaintiff's right to dismiss without prejudice is cut off before the court actually rules on a demurrer or motion for summary judgment, but after it issues a tentative ruling granting such a dispositive motion. While our Supreme Court has not decided the issue, and the Courts of Appeal have reached varying conclusions on the issue, the weight of recent authority holds that after an adverse tentative ruling on a dispositive motion has been announced, the plaintiff may not thereafter voluntarily dismiss the action without prejudice to avoid the anticipated ruling. (E.g., *Franklin Capital Corp.* (2007) 148 Cal.App.4th 187, 200-203 [summarizing rule as follows: voluntary dismissal is ineffective if taken "in the light of a public and formal indication by the trial court of the legal merits of the case"] [collecting authority]; *Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, 776 ["a tentative ruling sustaining a demurrer without leave to amend bars a voluntary dismissal"]; *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, 70.) The rationale for this rule has been articulated as follows:

> Not only does allowing a plaintiff to file a voluntary dismissal without prejudice in the face of a tentative ruling that the court will sustain the demurrer without leave to amend waste the time and resources of the court and other parties and promote annoying and continuous litigation, but we are persuaded that allowing such dismissal in the circumstances of this case undermines . . . the tentative ruling system.

(*Groth Bros. Oldsmobile, Inc.*, 97 Cal.App.4th at 70; see also *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919 [such "conduct smacks of gamesmanship, undercuts the tentative ruling system, and wastes the resources of the court and opposing parties"]; *California Practice Guide: Civil Procedure Before Trial* ¶ 11:25.3, at 11-14 (The Rutter Group 2018) [observing that rule precluding dismissal following adverse tentative ruling "seems correct from a policy standpoint"].) This Court agrees. Accordingly, plaintiffs' request for dismissal is denied, and the Court will proceed to decide the demurrer.

Defendant Salesforce.com, Inc.'s demurrer to plaintiffs' Second Amended Complaint is sustained without leave to amend. Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230, bars the instant claims.

"There are three essential elements that a defendant must establish in order to claim section 230 immunity. They are '(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider.'" (*Delfino v. Agilent Techs., Inc.* (2006) 145 Cal.App.4th 790, 804-805.)

The CDA provides that the provider of an "interactive computer service" is immune from liability for third-party information (like the advertisements on Backpage) unless the provider "is responsible, in whole or in part, for the creation or development of [the] information." (47 U.S.C. §§ 230(c)(1) and (f)(3).) The term "interactive computer service" is broadly defined and applies to software providers such as defendant. (47 U.S.C. 230(f)(2),(4) [defining "interactive computer service" to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server" and "access software provider" as "a provider of software (including client or server software), or enabling tools" that "(A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content."]; see *Zango, Inc. v. Kaspersky Lab, Inc.* (9th Cir. 2009) 568 F.3d 1169, 1173-1176 [holding that antivirus software company is a provider of an "interactive computer service" entitled to immunity under section 230]; *Delfino v. Agilent Techs., Inc.* (2006) 145 Cal.App.4th 790, 805 ["Courts have broadly interpreted the term 'interactive computer service' under the CDA."]; see also, e.g., *Gonzalez v. Google, Inc.* (N.D. Cal. 2017) 282 F.Supp.3d 1150, 1164-166 [holding that plaintiffs sought to treat Google as a publisher of ISIS's content where they alleged that it knowingly provided ISIS followers with material support including "expert assistance, communications equipment, and personnel"].) Here, although plaintiffs strenuously argue that defendant Salesforce is outside these broad statutory definitions, their argument is belied by their own allegations in the second amended complaint, which expressly allege that defendant's customer relationship management (CRM) software provides

"operational support" to Backpage by supplying "tools" that enabled it, among other things, to create platforms for Backpage to contact and procure customers, manage customer histories, provide and manage Backpage's customer database, and provide and manage a secure cloud storage database for Backpage to store and secure the details of its business. (Second Amended Complaint, ¶¶ 147, 150, 152.) Further, as they concede, defendant is not responsible, in whole or in part, for the advertisements placed by third parties on Backpage.com. Defendant therefore meets prong one of the above test.

Plaintiffs' claims also treat defendant as the publisher of the information. Plaintiffs allege that Backpage's third-party classified advertisements caused them to be exploited. (Second Amended Complaint, ¶¶131, 138.) Defendant can only be liable if it is linked to these advertisements and therefore, plaintiff is treating defendant as a publisher, since its "platform and CRM" enabled Backpage to publish and disseminate content. "Section 230(c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party [c]ommunications." (*Cohen v. Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140, 156.) Plaintiffs' argument that the CDA applies only to "defamation-type" claims is erroneous as a matter of law. (See *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 568 ["The express language of the statute indicates Congress did not intend to limit its grant of immunity to defamation claims. Instead, the legislative history demonstrates Congress intended to extend immunity to all civil claims…"].) Defendant meets prong two.[2]

Backpage's advertisements caused the harm. (Second Amended Complaint, ¶¶131, 138.) There is no allegation that defendant created the specific content at issue (i.e. Backpage's

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[2] Significantly, Backpage itself has been held to be protected by section 230. (See, e.g., *Jane Doe No. 1 v. Backpage.Com, LLC* (1st Cir. 2016) 817 F.3d 12, 19-21 [affirming dismissal of claims against Backpage for engaging in sex trafficking of minors, finding that claims treat Backpage as the publisher or speaker of the content of the challenged advertisements].) If Backpage itself is immune under section 230, it is difficult to fathom why a third-party software provider such as defendant Salesforce, whose connection to the offending advertisements is far more attenuated, would not be entitled to the same protection.

advertisements), and indeed plaintiffs concede it did not. Plaintiffs' claim is that Backpage misused defendant's CRM tools. (Second Amended Complaint, ¶150 [listing defendant's services]; ¶152 ["Backpage implemented Salesforce's tools and platforms"].) Defendant meets prong three.

The court rejects plaintiffs' argument that recent amendments to the CDA allow their state law claims to proceed. These amendments, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 or "FOSTA," Pub. L. No. 115-164, 132 Stat. 1253 (2018), were signed into law on April 11, 2018. (*Woodhull Freedom Foundation v. United States* (D.D.C. 2018) 334 F.Supp.3d 185, 190 [upholding constitutionality of FOSTA].) FOSTA exempted only three categories of sex trafficking claims: (1) private federal civil claims brought in federal court under 18 U.S.C. § 1595; (2) state criminal prosecutions; and (3) state attorney general civil actions. (47 U.S.C. § 230(e)(5); 18 U.S.C. § 1595(d); see *Woodhull Freedom Foundation*, 334 F.Supp.3d at 191-192.) Nothing in the text of the statutes exempted private civil state law claims from immunity. The Court is not persuaded by plaintiffs' argument that the general language in the preamble to the amendments overrides the plain language of the amendments themselves. (See *Kingdomware Technologies, Inc. v. United States* (2016) 136 S. Ct. 1969, 1978 [prefatory clause to legislation "announces an objective that Congress hoped that the Department would achieve . . . , but it does not change the plain meaning of the operative clause"]; *Gonzalez v. Google, Inc.*, 282 F.Supp.3d at 1160-1161 ["It is well settled that prefatory clauses or statements of purpose do not change the plain meaning of an operative clause"].)

Finally, the Court declines plaintiffs' request for leave to amend. Plaintiffs had an opportunity to amend their complaint after defendant filed a prior demurrer on the same grounds, although the Court did not rule on that demurrer because plaintiffs submitted their second amended complaint for filing before it could be heard. Further, amendment of the complaint would be futile because plaintiffs' claims "fall squarely within the CDA's immunity provision, as a matter of law, and cannot be cured by amendment." (*Igbonwa v. Facebook, Inc.* (N.D. Cal. 2018) 2018 WL 4907632, at *7; see also, e.g., *Sikhs for Justice v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1095-1096 [dismissing claims against Facebook without leave to amend on the basis that they were barred under section 230(c) as a matter of law].)

Accordingly, defendant's demurrer to the second amended complaint is sustained without leave to amend, and the action is dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 22, 2019

HON. ETHAN P. SCHULMAN

CGC-19-574770 JANE DOES #1 THROUGH #50,SE RAFFICKING SURVIVORS VS. SALESFORCE, INC., A LAWARE CORPORATION AND

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on October 03, 2019 I served the foregoing ORDER SUSTAINING DEFENDANT'S DEMURRER TO THE SECOND AMENDED COMPLAINT AND DISMISSING ACTION WITH PREJUDICEon each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: October 03, 2019

By: M. GOODMAN

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