Court of Appeal Civil Case No. B257656

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEVEN WITKOFF, ET AL.

Plaintiffs and Appellants

vs.

TOPIX LLC, ET AL.

Defendant and Respondent

FROM THE SUPERIOR COURT FOR THE COUNTY OF

LOS ANGELES

THE HONORABLE MICHAEL JOHNSON, JUDGE

CASE NUMBER: BC517897

RESPONDENT'S RESPONSIVE BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second APPELLATE DISTRICT, DIVISION 5	Court of Appeal Case Number: B257656
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APPELLANT/PETITIONER: STEVEN WITKOFF, et al. RESPONDENT/REAL PARTY IN INTEREST: TOPIX LLC	

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(1) Gannett Company, Inc.	partial owner
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(5)	

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Date: March 6, 2015

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I. INTRODUCTION

Appellants Steven and Lauren Witkoff ("Witkoffs") seek to hold Respondent website operator Topix, LLC ("Topix") liable for their son's death from an overdose of pharmaceutical Oxycodone he allegedly purchased from a drug seller he first communicated with through Respondent's website Topix.com. The trial court thoroughly analyzed and correctly applied the overwhelming and uniform authorities from the California Supreme Court, the California Court of Appeal for the Second Appellate District, the Ninth Circuit Court of Appeal and federal courts throughout the United States interpreting the federal Communications Decency Act, 47 U.S.C. § 230 ("the CDA") confirming that websites such as Topix are absolutely immune from suit for the content posted on the internet by third party users of its website.

In attempts to remove this case from the immunity provided by the CDA, Witkoffs construe their amended complaint as one against Topix's ***creation and maintenance of the forums***, not the alleged third party content and communications on those same purported forums. Even cursory review of the amended complaint reveals that Witkoffs initiated the instant suit based on the third party content. The trial court properly found that the purported "nuisance" that Witkoffs allege Topix has "created and developed" would not be a nuisance without the alleged third party posts by

drug dealers, drug sellers and drug buyers as alleged in the amended complaint. This Court as well as courts throughout the country have consistently dismissed claims where plaintiffs such as Witkoffs attempt to misconstrue their complaint to plead around the CDA's immunity and the trial court's finding must be affirmed. This Court's review of the pleadings should find that Witkoffs' claims are barred as a matter of law.

II. STANDARD OF REVIEW

On appeal, the appellate court reviews the trial court's sustaining of a demurrer without leave to amend de novo, exercising its independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court's dismissal. *Kong v. City of Hawaiian Gardens Redevelopment Agency*, 108 Cal. App. 4th 1028, 1038 (2002). Witkoffs bear the burden of proving the trial court erred in sustaining the demurrer. *Id*. A judgment of dismissal entered after the trial court has sustained a demurrer without leave to amend will be affirmed on appeal if any of the grounds stated in the demurrer is well taken. *E. L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 504 (1978). This Court also reviews de novo the trial court's interpretation of the CDA, the federal Communications Decency Act, 47 U.S.C. § 230,

that was the basis of the trial court's dismissal. *Julie Doe II, a Minor, et al. v. MySpace Inc*., 175 Cal. App. 4th 561, 566 (2009).

III. FACTUAL & PROCEDURAL BACKGROUND

A. Topix.com is a News Website With Forum Features

Founded in 2004 in Palo Alto, California, Respondent Topix, LLC ("Topix") operates Topix.com, a popular news aggregating website composed of feeds and links to news and subject pages for the U.S. as well as international cities which are further categorized by locality or subject matter. (Clerk's Transcript, shall be referred to hereinafter as "CT" at 308). Topix is the largest platform for local forums in the United States and has received over 100 million user-generated posts since its inception. (CT at 222; CT at 293).

Topix allows users to post comments, polls and surveys in local forums for the purpose of facilitating discussions about news and other matters of local community interest and thus provides consumers with an open platform to become more informed regarding local matters. (CT at 222; CT at 293).[1] Topix links news stories from thousands of sources

[1] The 2010 Consent Decree that Witkoffs continuously claim Topix is "bound by" is also irrelevant to the instant case. As attached to the first amended complaint as Exhibit A (CT at 171-176.), the Consent Decree was in relation to changes to Topix's priority review system in response to

directly to hundreds of thousands of subjects and works with media companies to augment their online audiences through these forums and newsfeeds. (CT at 308).

B. Witkoffs Allege that Their Son Met a Drug Dealer Through Topix.com

Witkoffs allege that in March 2011, their son Andrew entered a residential drug treatment program in Los Angeles where he had access to the internet and on August 7, 2011 made contact via Topix.com with a known drug trafficker, Daniel Park. (CT at 155-156). According to Witkoffs, Andrew Witkoff and Daniel Park further communicated via email and phone text messages and then met in person on August 12, 2011 where Andrew purchased Oxycodone and allegedly died two days later from an accidental overdose of those same drugs purchased from Daniel Park. (CT at 155-156).

Witkoffs erroneously claim that "Topix never disputed that its conduct constitutes a public nuisance under California law" (Appellants'

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reports of abusive posts. (CT at 222-226). Witkoffs desperately cling to the Consent Decree to erroneously suggest that Topix entered into the Consent Decree in response to allegations of "drug dealing" is simply false, as the Consent Decree itself confirms that it is not. (CT at 222-226). This misrepresentation was also presented to the trial court in its determination. (CT at 604).

Opening Brief shall be referred to hereinafter as "Opening Brief," pg. 3), because throughout this litigation Topix has disputed Witkoffs' characterization of its website as "the internet's most prominent bazaar for trafficking in illegal drugs" (CT at 151) and Witkoffs' unfounded claims that "Topix designed, created and maintained the largest and most dangerous black market on the internet" (Opening Brief at pg. 11) as well as other allegations regarding the organization of Topix's forum in its news based website. (CT at 289:12-18; CT at 292:14-293:24; CT at 309:3; CT at 451:7-452:16; CT at 612:7-10).

C. The Court Sustained Topix's Demurrer to the Amended Complaint

On August 12, 2013, Witkoffs filed their action against Topix for the wrongful death of their son, alleging that 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, rendering the website a nuisance under Cal. Civil Code §§ 3479, 3480.[2] (CT at 16-20, ¶¶34-53).

On November 8, 2013, Topix demurred to both causes of action in the original complaint – nuisance and wrongful death (CT at 122-140). Prior to the January 13, 2014 hearing date, Witkoffs filed an amended complaint on January 9, 2014 with the same two causes of action (CT at 141-185) that Topix further demurred to on January 14, 2014. (CT at 304-322).[3]

At the original demurrer hearing on April 30, 2014, the court indicated that it was prepared to make a ruling on Topix's demurrer but that he believed that it made more sense for the court to hear Topix's demurrer and Anti-SLAPP motion at the same time. (Reporters Transcript at R1-

[2] Witkoffs also filed a separate action currently pending in the Los Angeles Superior Court captioned *Steven Witkoff, et al. v. 1775 Summitridge Drive, LLC, et al.,* case no. BC517918, against at least eight defendants, including the detoxification facility and sober living facility in Los Angeles which Andrew was allegedly under the care and supervision of from March 2011 to the time of his death on August 14, 2011. (CT at 309; fn. 5).

[3] Topix also filed a special motion to strike plaintiffs' amended complaint pursuant to Cal. Code Civ. Proc. § 425.16 ("Anti-SLAPP") on the same day it filed its demurrer. (CT at 323-324). However, pursuant to the parties' agreement, the hearing for Topix's Anti-SLAPP Motion was continued to after the demurrer hearing date and the court dismissed the amended complaint based on the demurrer. (CT at 676-681). As such, the instant appeal does not concern Topix's Anti-SLAPP Motion.

R35, pages 1-300:21 to 9-300:9 of Reporter's Transcript of Oral Proceedings for April 30, 2014). The parties and the court agreed that the court would further review the pleadings and prepare a written tentative ruling before holding a continued hearing on Topix's demurrer. (Reporters Transcript at R1-R35, pages 1-300:21 to 9-300:9 of Reporter's Transcript of Oral Proceedings for April 30, 2014).

On May 14, 2014, the hearing on the demurrer went forward, oral arguments occurred and presiding Judge Michael Johnson explained to Witkoffs that he had reviewed all of the applicable cases in his ruling and expressed that "I looked at this very carefully particularly after it was continued…I was just struck by how clear the case law is…" (Reporters Transcript at R1-R35, page 314:3-10 of Reporter's Transcript of May 14, 2014 Proceedings, Hearing on Demurrer).

Judge Johnson analyzed Witkoffs' allegations and considered that "Topix.com is a website that allows its 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" in ruling that "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…These authorities are directly applicable, and they compel dismissal of Plaintiffs' complaint." (CT at 680-681).

IV. LEGAL DISCUSSION

A. Congress Passed the CDA to Bar Precisely the Types of Claims that Witkoffs Pursue Against Topix

In 1996, the United States Congress passed the Communications Decency Act, 47 U.S.C. § 230 ("the CDA"), 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 regulation."[4] Congress further declared that "it is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal

[4] 47 U.S.C. § 230(a).

or State regulation."[5] In furtherance of this policy, the Act provided immunity to interactive computer services such as Topix as follows:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> **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).[6]

Section 230(e) of the CDA 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 Congress, state and federal courts throughout the country, including in this court, have

[5] *Id*. at 47 U.S.C. § 230(b).

[6] *Id*. at 47 U.S.C. § 230(c).

consistently found that the CDA strictly bars any and all claims against an interactive computer service such as Topix from liability for information posted by third parties.

In 2009, the California Court of Appeal for the Second Appellate District re-affirmed the CDA'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 networking website, 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 sexually assaulted her." Her attacker pled guilty to charges stemming from the incident and was 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 sexually assaulted her. *Id*.

The *Doe II* plaintiffs 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[.] [¶] 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 the CDA barred all causes of action against the website. In holding so, the Second Appellate District reviewed the legislative history of the CDA as well as its interpreting authorities and concluded that "parties complaining that they were harmed by a website'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.

The *Doe II* court also discussed 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…

Doe II, 175 Cal. App. 4th at 571. In *Barrett*, the California Supreme Court upheld the CDA’s immunity to a website operator by 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.

Barrett, 40 Cal 4th at 57. The *Doe II* Court held that to be entitled to the CDA’s immunity, the defendant website must satisfy three elements:

1. the defendant must be an interactive computer services provider;

2. the defendant must not be an information content provider with respect to the disputed activity, and;

3. claimants seek to hold defendant liable for information originating with a third party user of its service.

Doe II, 175 Cal. App. 4th at 569. As in *Doe II*, Topix is also an interactive service provider, satisfying the first element. [7] Further, as shown herein, Topix is not an information content provider as Witkoffs seek to show, and Witkoffs seek to hold Topix liable for alleged communications between users of Topix.com, satisfying the second and third elements in *Doe II*. The comprehensive holding of *Doe II* which mandates dismissal of this case must be followed.[8]

B. Witkoffs Distort Their Claims As Against Topix's Creation and Maintenance of the Forums Themselves to Attempt to Plead Around the CDA

While Witkoffs claim that Topix has maintained and is currently maintaining an unlawful public nuisance, ***the alleged nuisance is due to third party content***. The amended complaint on its face indicates that the allegedly offensive material supporting Witkoffs' nuisance claim originates

[7] The CDA 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. (CT at 156-158, ¶¶ 19-25)

from third party visitors and users of Topix, alleged illegal drug purchasers and illegal drug sellers and Daniel Park and decedent Andrew Witkoff.:

> *¶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.* ***Topix.com users*** *can and do communicate on the forums created and developed by Topix…*
>
> *¶22 …when operating on Topix.com's forums, these* ***buyers and sellers of illegal drugs*** *or controlled substances apparently feel free to openly discuss their illicit activities…*
>
> *¶23* ***Visitors to, and users of, Topix.com*** *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* ***drug traffickers*** *to readily use Topix.com forums…*
>
> *¶27 …there were 891 communications from* ***individuals seeking to illegally purchase or sell*** *Oxycodone and other drugs exclusively through the use of Topix's Oxy Forum.*
>
> *¶28 …****users*** *of its website were openly and illegally purchasing and selling…*
>
> *¶40…c. having actual and/or constructive knowledge that it was and is serving as a "go-between" for* ***illegal drug sellers and illegal drug purchasers****; d. having actual and/or constructive knowledge that it was and is providing the forum or "facility" for illegal* ***drug transactions to be consummated by others****…*
>
> *¶41 Topix has left intact other threads and posts involving* ***Park and other drug dealers and their customers****..*

(CT at 151-170; CT at 315-316). Witkoffs further supplement their vague allegations regarding alleged drug buyers, drug traffickers and drug sellers and attaches as exhibits printouts of alleged specific postings on the Topix website posted by Andrew Witkoff and Daniel Park:

> *¶8 …On August 7, 2011, **Park**, a known drug dealer, made contact with **Andrew** on Topix.com and arranged to sell him what turned out to be a lethal dose of Oxycodone…*
>
> *¶16 …**Andrew** used Topix.com on several occasions…*
>
> *¶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:*
>
> *a. On June 18, 2011, **commenter "yung one" writes "What you got?"** in response to Dane's comment above. On June 19, Dane replies, "mostly 30mg roxi. I happen to have some norcos 10mg/325 hydrocodone too."*
>
> *b. On June 19, 2011, **commenter "CTS2011**" writes "Dane!! Message me please! In Los Angeles, also looking!"*
>
> *c. On June 22, 2011**, commenter "makeuptogogo" replies to Dane's June 19 comment as follows:** "Help ... scarlett.piazza@gmail.com"*
>
> *d. On June 22, 2011, **Dane replies to CTS2011's June 19 comment** by stating "CTS 2011... give me your email so we can chat."*
>
> *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?"*
>
> *¶18 …**Andrew** then used Topix's Oxy Forum…*
>
> *¶58…**Defendant Park** is a drug dealer, who made contact with **Andrew** through defendants' website, Topix.com*

(CT at 151-170; 316-317). Witkoffs' instant appeal rests on their claim that "***Topix's liability arises not from its decision to publish Park's offer to sell drugs to Andrew, but from its creation and maintenance of the drug-trafficking forums in the first place***." (Opening Brief at pg. 3). However, the amended complaint is squarely grounded in allegations of third party posts on the Topix website and plaintiffs fail to explain how they are not holding Topix liable as the publisher of this content generated by its users.

Witkoffs' Opening Brief states that "Topix's conduct is indistinguishable from the prototypical public nuisance defendant, i.e., the apartment building owner that encourages and permits the hand-to-hand sale of drug trafficking on his property" and that "Topix's liability arises from its creation of a safe haven for drug dealers to violate federal and state narcotics laws." (Opening Brief at pg. 22-23). This analogy fails because such a prototypical apartment owner ***would not be maintaining a nuisance in the first place if there were no alleged drug traffickers on his property***.[9] In the instant case, the origin and cause of the alleged nuisance is the

[9] Witkoffs cite to *Lew v. Superior Court*, 20 Cal. App. 4th 866, 869 (1993) for its analogy that an apartment owner is liable for maintaining a nuisance when it permits hand-to-hand sale of drugs on his property. (Opening Brief at pg. 22). The *Lew* court noted that at trial, many plaintiffs signed a statement saying "I have been confronted by the drug dealers, drug customers, and/or prostitutes that frequent and work around and from 1615-1617 Russell Street." *Id*.

actions of third parties, i.e., the forum posts by anonymous users of the Topix website. The alleged nuisance that Witkoffs claim Topix's forums are in violation of California law ***would not be an alleged nuisance without the posts by the alleged third party drug users, drug buyers and drug sellers***.[10]

In *Doe II*, 175 Cal. App. 4th at 564, the plaintiffs also argued in opposition to Myspace's demurrer that their complaint did not seek to hold Myspace liable as a publisher of third party content but instead alleged a breach of a legal duty to provide reasonable safety measures to ensure that sexual predators did not gain otherwise unavailable access to minors through the use of the Myspace.com website. *Id*. at 569. This District properly recognized and dismissed the *Doe II* plaintiffs' attempts to mischaracterize their complaint to circumvent the CDA's immunity:

> **That Appellants characterize their complaint as one for failure to adopt reasonable safety measures does not avoid the immunity granted by section 230. It is undeniable that appellants seek to hold MySpace responsible for the communications between the Julie Does and their assailants**. At its core, plaintiffs want MySpace to regulate

[10] Witkoffs state at that in the trial court, "Topix argued that because the illegal drug sales *occurred online* rather than at a physical location, the [CDA] immunized Topix." (Opening Brief at pg. 3). Witkoffs' statement is peculiar because Topix has never claimed that "any drug sales occurred online" but only that Witkoffs sought to hold Topix liable for alleged posts from third parties on its online website. (CT at 315-317).

> what appears on its Web site. Plaintiffs argue they do not "allege liability on account of MySpace's exercise of a publisher's traditional editorial functions, such as editing, altering, or deciding whether or not to publish certain material, which is the test for whether a claim treats a website as a publisher under *Barrett*." But that is precisely what they allege; that is, they want MySpace to ensure that sexual predators do not gain access to (i.e., communicate with) minors on its Web site. **That type of activity – to restrict or make available certain material—is expressly covered by section 230**.

Id. at 573. Similarly, in an earlier CDA case Witkoffs cite, *Gentry v. Ebay,* 99 Cal. App. 4th 816 (2002) (Opening Brief at pg. 25), the Court dismissed plaintiffs' suit on the grounds that "The substance of appellants' allegations reveal they ultimately seek to hold eBay responsible for conduct falling within the reach of section 230, namely, eBay's dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties." *Id*. at 831.

Here, it is undeniable that Witkoffs seek to hold Topix liable for the third party communications between alleged drug dealers, drug sellers and drug buyers as well as Andrew Witkoff and alleged drug dealer Daniel Park.[11] Witkoffs further expressly allege that Topix failed to monitor such

[11] The Fifth Circuit analyzed similar arguments in a separate federal case *Doe v. MySpace Inc.*, 528 F.3d 413 (5th Cir. 2008) wherein a 13 year-old was sexually assaulted and the court affirmed dismissal of the complaint on the grounds that the CDA applied and held that "their allegations are

communications, and/or deliberately ignored them in the amended complaint at paragraphs 20-26 (CT at 156-160).[12] As such, Witkoffs' mischaracterization of the amended complaint as grounded in a "nuisance" cause of action which does not seek to hold Topix liable in its role as a *publisher* defies logic because the primary theory of liability in the amended complaint is that Topix should be accountable for third party content which created an alleged nuisance.[13]

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merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." *Id*. at 420.

[12] In *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. 2014), plaintiff sued website Facebook for hosting a website page which allegedly called for Muslims to rise up and kill Jewish people and argued that the claims did not arise from Facebook's conduct as a publisher or speaker but were based on Facebook's breach of its duties arising from a special relationship between Facebook and its users. *Id*. at 1357-1359. The court concluded: "[t]hat argument does not work." *Id*.

[13] Similarly, in *Beckman v. Match.com*, No. 2:13-CV-97 JCM (NJK), 2013 U.S. Dist. LEXIS 78339 (Dist. NV. May 29, 2013), plaintiff alleged she was attacked by someone she met on Match.com and the court held that all of the claims were "irreducibly based on contented posted by a third party" and barred because "[t]he problem with plaintiff's attempt to focus on Match.com's alleged failure to warn or alleged negligent misrepresentation is that all of Match.com's conduct must trace back to the publication of third-party user content or profiles." *Id*. at *12-13.

C. Witkoffs' Vague References to "Creation and Development" does Not Negate the CDA's Immunity

Witkoffs assert that Topix is not entitled to the CDA's immunity because it also functions as an "information content provider" and also creates and maintains the alleged forums per various authorities including *Carafano v. Metrosplash, Inc*. 339 F.3d 1119, 1123 (9th Cir. 2003). (Opening Brief at pgs. 17-20). The amended complaint does indeed make vague and conclusory statements alleging Topix's "development and creation" of the forums and "aiding and abetting" by Topix including at paragraphs 19-22, 24-25, 29, 32, 46, 59 and 60 (CT at 605; CT at 473-492).

A court has already analyzed and rejected such arguments in *Goddard v. Google, Inc*., 640 F. Supp. 2d 1193 (N.D. Cal. 2009) wherein plaintiffs alleged that "Google's involvement [in creating the allegedly fraudulent advertisements] was so pervasive that the company controlled much of the underlying commercial activity engaged in by the third-party advertisers" and that Google "not only encourages illegal conduct, [but] collaborates in the development of the illegal content and, effectively,

requires its advertiser customers to engage in it."[14] *Id*. at 1196. The court reasoned that such allegations do not circumvent the CDA:

> Thus, a website operator does not become liable as an "information content provider" merely by "augmenting the content [of online material] generally." Roommates, 521 F.3d at 1167-68. **Rather, the website must contribute "materially . . . to its alleged unlawfulness." *Id*. at 1167-68. A website does not so "contribute" when it merely provides third parties with neutral tools to create web content, even if the website knows that the third parties are using such tools to create illegal content**.[15]

The *Goddard* court further discussed the reasoning in *Carafano v. Metrosplash*, 339 F.3d 1119 (9th Cir. 2003), and explained that "even if a particular tool 'facilitate[s] the expression of information,' id. at 1124, it generally will be considered 'neutral' so long as users ultimately determine what content to post, such that the tool merely provides 'a framework that

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[14] Similarly, in *Corbis Corp. v Amazon.com, Inc.* 351 F. Supp. 2d 1090 (W.D. Wash, 2004) state law causes of action against the website for vendors' violations of state Consumer Protection Act were barred by the CDA where it was undisputed that vendors provided images that were displayed on sites and although the website may have encouraged third parties to use platform and provided tools to assist them, vendors ultimately decided what information to put on the website. *Id*. at 1118.

[15] In *Black v. Google Inc.*, No. 10-02381 CW, 2010 U.S. Dist. LEXIS 82905 (N.D. Cal. August 13, 2010), the Northern District reiterated its analysis regarding claims to plead around the CDA's immunity when addressing plaintiffs' arguments that their causes of action were based on "defendant's programming" and not third party content. The court noted that defendant's programming does not transform it into the creator of the offending content and dismissed the case based on the CDA. *Id*. at *7-8.

could be utilized for proper or improper purposes.'"[16] *Goddard*, 640 F. Supp. at 1197. The *Goddard* court concluded that:

> Plaintiff has failed to allege facts that plausibly would support a conclusion that Google created or developed, in whole or in part, any of the allegedly fraudulent AdWords advertisements. **Plaintiff offers numerous theories of such involvement, but these theories merely lend truth to the Ninth Circuit's observation that there almost always will be some "argu[ment] that something the website operator did encouraged the illegality.". . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.**

Goddard, 640 F. Supp. 2d at 1201-1202. Similarly, in this case, Witkoffs offer numerous theories as to Topix's "aiding and abetting" and "creating and developing" its website and forums but, ultimately, Witkoffs' entire theory of liability rests upon the third party posts of alleged drug dealers, drug purchasers and drug sellers and Daniel Park and Witkoffs' son Andrew Witkoff. As such, the conclusory allegations peppered into Witkoffs' amended complaint that Topix "creates and develops" the forums in efforts to circumvent the CDA's immunity completely fails.

Witkoffs refer to cases where courts properly found that the CDA's immunity did not apply to suggest that the CDA's immunity is inapplicable in this case. However, as shown below, the cases involve a vastly different

set of facts underlying the defendant websites where it was undisputed that the websites created content or that the claimants were not seeking to hold the website liable for third party content.

1. The CDA Immunizes Topix Under the Reasoning of *Roommates.com* because Topix Did Not Create or Develop Content

Witkoffs' Opening Brief relies heavily on *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164-1169 (2007) wherein the Ninth Circuit found that the CDA did not provide immunity because website Roommates.com created and developed discriminatory questions for its users who were searching for housing in violation of the Fair Housing Act by requiring its users to disclose their sex, family status and sexual orientation. Roommates.com created the questions and choice of answers, and designed its website registration process around them and further synthesized this information to channel subscribers away from listings where the individual offering housing had expressed preferences that were not compatible with the subscriber's answers. *Id*. at 1165. Therefore, the court concluded that Roommates.com was an "information content provider" due to its role in forcing subscribers to answer the discriminatory questions as a condition of using its services and further utilizing this data to match perspective tenants. *Id*. at 1164-1169.

In *Roommates.com*, the Ninth Circuit analyzed the immunity provided by the CDA in depth in their lengthy opinion, reiterating the position of earlier courts and reinforcing that "any 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…[b]ut if the editor publishes material that ***he does not believe*** was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination." *Id*. at 1170. The Ninth Circuit further affirmed that:

> **Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality**. Such close cases, we believe, must be resolved in favor of immunity lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to Roommate's questions, answers and the resulting profile pages—immunity will be lost.

Id. at 1174. In this case, Topix did not require any of its users to provide any discriminatory or illegal content as a condition of using its services and did not synthesize, republish or otherwise use any information provided by its users or any third parties to engage in any further activities or services connected with Topix. (CT at 461:4-8). Topix's users wholly choose if and when and where they wish to post any content on Topix's website.

(CT at 157:13-17). Under the reasoning of *Roommates.com*, the CDA bars Witkoffs' claims.[17]

2. The Claims in *Internet Brands* Were not Based on Third Party Content and therefore the CDA did not Apply

Witkoffs further cite to *Doe v. Internet Brands, Inc.*, 767 F.3d 894, 895-896 (9th Cir. 2014) wherein fictitious plaintiff Jane Doe joined Model Mayhem, a networking website for professional and aspiring models. Unbeknownst to Jane Doe, two persons, Flanders and Callum allegedly browsed profiles on Model Mayhem posted by models, and contacted potential victims with fake identities posing as talent scouts to identify targets for a rape scheme. *Id*.

In 2008, defendant Internet Brands purchased Model Mayhem from Donald and Taylor Waitts, the original developers of the website. *Id*. Shortly after the purchase, Internet Brands learned of how Flanders and Callum were using the website and in August 2010, Internet Brands sued the Waitts for failing to disclose the potential for civil suits arising from the activities of Flanders and Callum. *Id*. In February 2011, Flanders,

[17] In *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) the defendant dating service utilized a questionnaire to facilitate creation of profiles and the court found that it did not transform the website into a content provider because the selection of content was left exclusively to posters and no profile had any content until poster created it.

pretending to be a talent scout, contacted Jane Doe, who went to Florida for a purported audition, where Flanders and Callum drugged, raped and recorded her. *Id*. Jane Doe sued Internet Brands alleging that they failed to warn Model Mayhem users that they were at risk of being victimized. *Id*.

The *Internet Brands* court analyzed other CDA cases provided by the parties including *Doe II*, 175 Cal. App. 4th at 573 yet did not find any close analogies and held that the CDA did not bar Jane Doe's failure to warn cause of action because the claim did not seek to hold Internet Brands liable as the 'publisher or speaker' of any information provided by another information content provider and "***had nothing to do with Internet Brands' efforts, or lack thereof, to edit or remove user generated content***." *Id*. at 896-898.[18]

[18] In support of its proposition that there is no general immunity for websites hosting content from third parties (Opening Brief at pg. 16), Witkoffs refer to *Chig. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006), which held that the CDA did not create an "absolute immunity" but rather, bars those causes of action that would require treating a website as a publisher of third-party content. *Id*. at 693. The court then found that under the CDA, plaintiffs' claim failed on the pleadings because Craigslist operates a website, accessible by multiple public users who created allegedly discriminatory housing notices which constituted information from the users of Craigslist's website and that Craigslist was serving as a conduit for this third party information. *Id*. As such, because Craigslist was being treated as the publisher of third party content, the CDA foreclosed these causes of action. *Id*.

In this case, prior to the inception of the instant lawsuit, Topix did not have any knowledge of even the existence of alleged drug dealer Daniel Park or decedent Andrew Witkoff (and Witkoffs do not allege otherwise) as the defendant *Internet Brands* did.[19] Witkoffs state that "because the plaintiff [in *Internet Brands*] sought to hold the defendant liable for its own words and not the content supplied by third parties, the CDA provided no defense to the plaintiff's claim." (Opening Brief at pg. 19). In this case, Witkoffs pursue Topix based on Topix's failure to remove the third party posts by alleged drug users and drug buyers on its forums, not Topix's failure to specifically warn Andrew Witkoff about Daniel Park.

3. Topix did not Create Content Based on Its Users' Names and Likenesses as Linkedin Was Alleged to Have Done

Witkoffs further refer to *Perkins v. Linkedin*, No. 13-CV-04303-LHK, 2014 U.S. Dist. LEXIS 160381 (N.D. Cal. Nov. 13, 2014) wherein the Court found that the CDA did not bar plaintiffs' claims because the networking website Linkedin was alleged to have sent emails to thousands of recipients using plaintiffs' names and likenesses as personalized endorsements without plaintiffs' consent. *Id*. at *42-46. The court

[19] There would be no method by which Topix could have such knowledge considering the Witkoffs' allegations that Topix's users can post without creating a user profile and the user would not have to provide any identifiable information. (CT at 158, ¶ 23).

concluded that the CDA did not apply because plaintiffs alleged that Linkedin "sent remainder emails to thousands of recipients making use of Plaintiffs' names and likenesses as personalized endorsements for Linkedin," "the text and layout of those emails were created by Linkedin without any input from the user," "Linkedin provided no means by which a user could edit or otherwise select that language included" and Linkedin alone chose to include a user's photograph in the second reminder email, but not in the first remainder email or in the initial invitation email." *Id.* at *42-46. The court concluded that the "Linkedin " arranged Plaintiffs' names and likenesses in those emails to give the impression that Plaintiffs were endorsing Linkedin and offered no opportunity for Plaintiffs to offer those emails." *Id*.

In this case, Witkoffs claim they seek to hold Topix liable for creation and development of the forums, not creation and development of internet content as Linkedin was alleged to have done when it sent unauthorized emails with plaintiffs' likeness. To suggest that Topix is creating content when in fact it is merely providing a forum, the quintessential type of online communication medium meant to be protected by the CDA is yet another attempt by Witkoffs to remove their case from CDA immunity. Topix did not generate any content based on its users' information, likenesses or names. (CT at 461:4-5). There are no

allegations that Topix published content that was unauthorized by its users or any third parties for that matter. Topix did not participate in conjunction with any alleged drug dealers or drug users, including Daniel Park and Andrew Witkoff in any manner. (CT at 460:25-461:12).

4. Witkoffs' reference to *Demetriades v. Yelp* is Misplaced Because Yelp Created and Developed Content

Witkoffs' additionally cite *Demetriades v. Yelp*, 228 Cal. App. 4th 294, 312 (2014). In *Demetriades*, plaintiffs' sought an injunction under the unfair competition and false advertising law to prevent the website Yelp from making claims about the accuracy and efficacy of its filter for unreliable or biased customer reviews. *Id*. at 299. Plaintiffs claimed that the statements Yelp made were misleading and untrue and Yelp invoked the CDA as one of its numerous defenses. *Id*. at 300. The Second Appellate District found that the CDA did not apply as it briefly addressed: "nowhere does plaintiff seek to enjoin or hold Yelp liable for statements of third parties (i.e., reviewers) on its Web site. Rather, plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter." *Id*. at 313.

D. Federal Courts Interpreting the CDA Confirm That it Immunizes Websites From Allegedly Illegal Content

1. Witkoffs' Profound Claims against Topix Alleging Involvement in a "Criminal Enterprise" Do Not Remove this Case from CDA Immunity

When a claimant initiates a civil lawsuit for alleged violations of federal criminal law that also allows a private cause of action through a federal law, the CDA still provides immunity. *M.A. v. Village Voice Media Holdings*, 809 F. Supp. 2d 1041, 1054-1056 (E.D. Mo. 2011). In *Village Voice*, plaintiff M.A., a minor, sued website Backpage.com for damages sustained while being sexually trafficked from the age of fourteen. *Id*.

M.A. alleged that Backpage.com operated an online classified marketplace which allowed the public to post advertising which included explicit nude photographs of her for sex and Backpage.com directly received fees for each posting from its users, thus facilitating child sex trafficking in violation of 18 USCS § 1595 which provides a civil cause of action to victims of sexual trafficking against any entity that "knowingly benefits financially, or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in [peonage, slavery and trafficking in persons]." *Id*. at 1044-1045; 18 USCS

§ 1595.[20] Defendant demurred. The court considered and referenced in its opinion plaintiff M.A.'s extensive allegations against Backpage.com with regard to Backpage.com's alleged participation in a sex trafficking enterprise including:

> 8.…[Backpage] developed the value and impact of the posted ad alleged herein by creating the highly viewed website, wherein [Backpage] advertised that there are billions of page views of their ads per week and the website is a highly tuned marketing site with search tools, adult sex focused categories, and directions and features offered regarding how to increase the impact of your ad for a fee; [Backpage] offer[s] special ad placement for a fee; [Backpage] offer[s] automatic reposting to a top spot for a fee; [Backpage] offer[s] knowledge regarding how to post ads and pay anonymously; [Backpage] advertise[s] its website to increase page views of the ads; [Backpage] remove[s] spam from its website to increase page views of placed ad; [Backpage] offer[s] commissions to customers for referrals of other customers; and [Backpage] enable[s] viewers and posters to search and review popular searches; [Backpage has] posting rules and limitations which aid in the sight veiling of illegal sex services ads to create the veil of legality.
>
> 11. In 2009 and 2010, [Backpage] posted many advertisements which included explicit nude photographs of Plaintiff, M.A., a minor, advertising her services as an escort for sex on backpage.com and received fees for each posting.

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[20] Plaintiff M.A. also sought to hold Backpage.com liable under 18 USCS § 2255 which specifically allows a victim who suffers injuries as a result of sex trafficking to sue in federal court and recover damages and attorneys' fees. Plaintiff M.A. argued that per 18 USCS § 2255, she did not seek to hold backpage.com liable as a publisher of content, but as "an aider and abettor of minor sex trafficking by virtue of its culpable conduct." *Village Voice*, at 1053-1054.

> 12. That [Backpage] had knowledge that: explicit sexual pornographic photographs were being posted on its website; that postings on their website were advertisements for prostitution; that numerous minors were included in these postings for prostitution on its website; that sex trafficking of minors is prolific in the United States of America; that the internet, including their website, was used for advertisements for illegal sexual contact with minors; that on numerous prior occasions [Backpage was] made aware of minors being trafficked on their website; that according to [Backpage], on five prior occasions [Backpage] responded to subpoenas involving the trafficking of minors on backpage.com and this does not include other cases involving minors of which [Backpage is] aware wherein [Backpage] cooperated with authorities without subpoenas.
>
> 13. By posting explicit nude photographs of Plaintiff, M.A., a minor, in an advertisement which advertised her services as an escort for sex on backpage.com, [Backpage] facilitated child sex trafficking and aided and abetted McFarland in violating each criminal statute and United States Treaty Optional Protocol herein alleged, in that: [Backpage] had a strong suspicion that the aforementioned crimes were being committed yet was so indifferent that [it] failed to investigate for fear of what it would learn; [Backpage] had a desire that these posters accomplished their nefarious illegal prostitution activities so that the posters would return to the website and pay for more posting; and [Backpage] continued to maintain their website so as to participate in these illegal transactions. . .

Id. at 1044-1045. Despite M.A.'s profound allegations, the court conducted a thorough analysis and concluded that the claims on demurrer were barred by the CDA as "Plaintiff artfully and eloquently attempts to phrase her allegations to avoid the reach of § 230. Those allegations, however, do not distinguish the complained-of actions of Backpage from any other website

that posted content that led to an innocent person's injury. Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity." *Id*. at 1058.[21]

Here, there are not even any allegations in Witkoffs' amended complaint that Topix received fees from its users in connection with the alleged sale of drugs as posting on the Topix website is free. Further, while Witkoffs attempt to differentiate their case on the grounds that the alleged trafficking on Topix's website is "illegal on its face," (Opening Brief at pg. 26) the court in *Village Voice* analyzed the posting of explicit nude photographs of minors which are undoubtedly "illegal on their face" and Witkoffs cannot dispute that such content originates from third parties. Topix cannot be held liable for this allegedly illegal third party content.[22]

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[21] Witkoffs also allege that Topix "profited from the illegal drug trafficking on its forums" by selling advertising space based on the subject of the forum and engaging in targeted advertising. (Opening Brief at pg. 10; CT at 161-162). The *Village Voice* court further confirmed that "the fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider 'creates' or 'develops' that content." *Village Voice*, 809 F. Supp. 2d at 1050.

[22] The District of Maryland concurs in *Beyond Sys. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D.Md. 2006) in finding that "Case law clearly establishes that CDA immunity applies even where an ISP knew of its customers' potentially illegal activity" based on the Fourth Circuit's

2. In *Dart v. Craigslist,* the Court Dismissed the Nuisance Claims Which Were Identical Allegations Against Website Craigslist

The court in *Dart v. Craigslist, Inc.*, 665 F. Supp.2d 961 (N.D. Ill. 2009) evaluated defendant website Craigslist's motion for judgment on the pleadings and without reservation held that the CDA absolutely immunized the website Craigslist from a lawsuit brought by the Sheriff of Cook County ("Sheriff") alleging that Craigslist was a public nuisance that facilitated prostitution, in violation of federal, state and local prostitution laws. As in this case, ***Sheriff alleged that Craigslist created and organized categories (including an "erotic" category) for its website*** where its users create the content of the ads and select where their ads will appear and Craigslist allows its users to search through the ads. *Id*. at 961-962.[23]

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reasoning in an early CDA case which has consistently been upheld – *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

[23] In *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 U.S. Dist. LEXIS 53246 at *1-2 (S.D.N.Y. June 15, 2009), Craigslist defended another suit where plaintiff claimed that he was shot with a handgun purchased from an individual who advertised the gun's sale on Craiglist. While plaintiff argued that he was seeking to treat Craigslist as a business (not as a publisher or speaker) the court concluded the CDA mandated dismissal of the entire amended complaint. *Id*. at *8-9.

Sheriff alleged that users posted advertisements "openly promis[ing] sex for money" and that law enforcement routinely conducted prostitution sting rings using information from advertisements in Craigslist's erotic services category as "Craigslist is now the single largest source for prostitution, including child exploitation, in the country" and a public nuisance because Craigslist violated criminal laws by facilitating prostitution. *Id*. at 967-968. Sheriff alleged that Craigslist causes or induces its users to post unlawful ads by having an "adult services" category with subsections like "w4m" and by permitting users to search through ads based on preferences, making Craigslist an information content provider. *Id*.[24]

The *Dart* court concluded that there were no allegations that Craigslist *itself created* the offending advertisements, Craigslist did not provide contact information of prostitutes and brothels as its users did, that

[24] The California Appellate Courts has also previously dismissed nuisance causes of action based on the CDA. 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. 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 the CDA 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. *Id*. at 690, 698.

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 "Sheriff Dart's lengthy complaint relies heavily on a few conclusory allegations to support the contention that Craigslist induces users to post ads for illegal services."[25] *Id*. at 966-969. The court dismissed the complaint. *Id*. In this case, Witkoffs cannot and do not allege that:

- Topix itself (via through a software program or directly via any of its agents or employees) posted the purported phone numbers or other contact information of drug dealers and/or alleged interested drug buyers on any of its forums;

- Topix itself (via through a software program or directly via any of its agents or employees) posted any communications regarding drugs,

[25] Among other courts, the First Circuit has also held that "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech…We confirm that view and join the other courts that have held that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content." *Universal Commun. Sys. v. Lycos, Inc.*, 478 F.3d 413, 420 (5th Cir.2007).

e.g., content such as "Can't find heroin in your area? I got the best . . ." [26] or any other content regarding drugs on any of Topix's forums;

- Topix in any fashion synthesizes the third party content on its forums and then utilizes or publishes any material based on the third party content.

- Topix in any fashion induced and/or caused anyone, including defendant Daniel Park and decedent Andrew Witkoff to create, post or search for illegal content, i.e., any information to ultimately engage in an illegal transaction of a controlled substance;

- Topix in any fashion induced and/or caused anyone, including defendant Daniel Park and decedent Andrew Witkoff to create anonymous accounts;

- Topix compensates any of its users in connection with the alleged drug related forums or even communicates in any manner whatsoever with any of its users in the drug related forums.

(CT at 460:24-462:12). Again, the alleged solicitations by prostitutes on Craigslist's website were also "illegal on their face" and under the

[26] Plaintiffs' Ex Parte Application for Limited Discovery Responsive to Defendant Topix's Special Motion to Strike. (CT at 340:20-21).

reasoning in *Dart v. Craiglist*, all of Witkoffs' causes of action must be dismissed.

3. *Doe v. Bates* Provides Additional Clarification that a Website Cannot be Held Liable for the Criminal Acts of Its Users

Mark Bates was imprisoned for his criminal involvement as a moderator in a group that distributed child pornography allegedly through an "e-group"[27] called "Candyman" hosted by the website Yahoo.com. *Doe v. Mark Bates & Yahoo!, Inc.*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348 (E.D. Tex. December 27, 2006). Plaintiffs sued Yahoo, claiming that it knowingly profited from the trafficking of illegal child pornography, that other cases addressing CDA immunity did not involve such intentional conduct and that Yahoo knowingly received and displayed the pornographic photographs at issue. *Id.* at *6-7. Again, the court considered material that is "illegal on its face," child pornography. The Court barred the claim in finding that "While the facts of a child pornography case such as this one may be highly offensive, Congress has decided that the parties to be punished and deterred are not the internet

[27] An "e-group" was interpreted by the court as "an internet-based forum where users can "engage in discussions; share photos and files; plan events; exchange ideas and information; and nurture interests and activities." *Id*. at *2.

service providers but rather are those who created and posted the illegal material such as defendant Mark Bates, the moderator of the 'Candyman' e-group." *Id.* at *11.

Again, the Witkoffs' causes of action against Topix for nuisance and wrongful death undeniably stem from the alleged third party material posted on Topix's website by its users. Topix is not liable as a matter of law for these postings.

V. CONCLUSION

In the trial court as well as this Court, Witkoffs contend that Topix is somehow involved in a vast criminal drug trafficking enterprise that directly sells and profits from "illegal drugs." It is not. Topix is a website built on forums and news stories covering virtually every topic which includes the forums named after pharmaceutical medications. Witkoffs allege that Daniel Park met Andrew Witkoff through one such forum and then further communicated with him via personal email and text messages to negotiate the terms of a drug transaction.

Andrew Witkoff did not purchase drugs from Topix.com. Topix did not have any knowledge whatsoever regarding the activities or existence of Daniel Park and Andrew Witkoff and Witkoffs cannot allege otherwise. The "drug" forums are not an alleged "nuisance" without the postings by

alleged third parties including Daniel Park and Andrew Witkoff. Witkoffs cannot and do not cite to one case in support of their proposition that Topix is liable due to the forums or that the CDA's immunity provisions do not apply to Topix. For the reasons stated herein, Respondent Topix respectfully requests that this Court of Appeal affirm the trial court's order dismissing each of the Witkoffs' causes of action.

Topix further respectfully requests that the Court of Appeal award Topix its costs on this appeal and remand to the trial court to determine the amount of Topix's costs on appeal.

Dated: March 6, 2015

Respectfully submitted,

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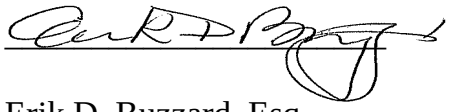
CERTIFICATE OF WORD COUNT

The text of this response consists of 11,098 words as counted by the Microsoft Word 2013 word-processing program used to generate the response.

Dated: March 6, 2015



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