**ASSIGNED TO THE HONORABLE SUSAN K. SERKO**
**HEARING DATE: APRIL 26, 2013, at 9:00 A.M.**
**WITH ORAL ARGUMENT**

**SUPERIOR COURT OF THE STATE OF WASHINGTON**
**FOR PIERCE COUNTY**

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| J.S., S.L., and L.C.,<br><br>Plaintiffs,<br><br>v.<br>VILLAGE VOICE MEDIA HOLDINGS, L.L.C., d/b/a Backpage.com; BACKPAGE.COM, L.L.C.; NEW TIMES MEDIA, L.L.C., d/b/a Backpage.com; and, BARUTI HOPSON,<br><br>Defendants. | NO. 12-2-11362-4<br><br>PLAINTIFFS' SUR-REPLY TO DEFENDANTS VILLAGE VOICE MEDIA HOLDINGS, L.L.C., d/b/a Backpage.com; BACKPAGE.COM, L.L.C.; NEW TIMES MEDIA, L.L.C., d/b/a Backpage.com MOTION TO DISMISS |

Plaintiffs submit this sur-reply to address new arguments raised in the Backpage.com defendants' ("Backpage") 21-page reply brief regarding the proper pleading standard for this Court to dismiss a case under CR 12(b)(6).

## A. Washington Law Expressly Rejects the Federal Court's Heightened Pleading Standard

For over 50 years, Washington courts have expressly rejected the federal court's heightened standard. *McCurry v.Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101-02 (2010). Thus, in Washington, "[u]nder CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support allegations in the complaint." *Id*. The *McCurry* Court further explained:



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> The [United States] Supreme Court's plausibility standard is predicated on policy determinations specific to the federal trial courts. The *Twombly* Court concluded: federal trial courts are incapable of adequately preventing discovery abuses, weak claims cannot be effectively weeded out early in the discovery process, and this makes discovery expensive and encourages defendants to settle "largely groundless" claims. *See* 550 U.S. at 557–58, 559, 127 S.Ct. 1955. **Neither party has shown these policy determinations hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure.**
>
> **Nor has either party here addressed countervailing policy considerations. For example, do current discovery expenses justify plaintiffs' loss of access to that discovery and general access to the courts, particularly in cases where evidence is almost exclusively in the possession of defendants? Could runaway discovery expenses be addressed by better means—perhaps involving more court oversight of the discovery process or a change in the discovery rules?**
>
> Currently this court lacks the type of facts and figures (specific to the Washington trial courts) that were presented to, and persuaded, the United States Supreme Court to alter its interpretation of Fed.R.Civ.P. 12(b)(6). *See Twombly*, 550 U.S. at 557–58, 559, 127 S.Ct. 1955. **We thus have no similar basis to fundamentally alter our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years**, *see Christensen*, 59 Wash.2d at 548, 368 P.2d 897, **and decline to do so here.**
>
> **Even if such facts and figures had been presented, this court would be hesitant to effectively rewrite CR 12(b)(6) based on policy considerations. The appropriate forum for revising the Washington rules is the rule-making process.** *See Twombly*, 550 U.S. at 579, 595, 127 S.Ct. 1955 (Stevens, J., dissenting). This process permits policy considerations to be raised, studied, and argued in the legal community and the community at large.
>
> *Id*. at 103 (emphasis added).

Furthermore, although Backpage suggests this case would be over and done with if it were in federal court, the district court rejected Backpage's request for it to ignore factual pleadings in the First Amended Complaint, as evidenced in its order on remand:



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> Plaintiffs have alleged claims against all defendants for civil conspiracy, violation of the Sexual Exploitation of Children Act ("SECA"), unjust enrichment, and ratification, which arise from Plaintiffs' allegations that the Backpage.com Defendants knowingly facilitated and promoted the sexual exploitation of Plaintiffs through their website. It is difficult for this Court to understand how there is "no real connection" between the claims against the diverse and nondiverse defendants when it is alleged that the defendants conspired to use the Backpage.com website as a means to sexually exploit Plaintiffs.

Moreover, a number of federal courts have denied dismissal on a CR 12(b)(6), when like here, the plaintiff alleged the website created, developed, or encouraged the unlawful content. *E.g. Anthony v. Yahoo Inc.*, 421 F.Supp.2d 1257, 1262-63 (N.D. Cal. 2006) (section 230(c)(1) did not apply where the plaintiff alleged that the defendant created fake user profiles to persuade users to renew their subscriptions to the defendant's online dating service); *Hy Cite Corp. v. badbusinessbureau.com*, 418 F.Supp.2d 1142, 1148-49 (D. Ariz. 2005) (immunity not appropriate at the pleading stage where the plaintiff alleged that the defendant created the allegedly defamatory content); *MCW, Inc. v. badbusinessbureau.com*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, *10 (N.D. Tex. 2004) (concluding that the defendant could be held liable for actively soliciting defamatory content and for creating "disparaging titles, headings, and editorial messages").

**B. Plaintiffs' Factual Allegations Are Strongly Supported by Exhibits A and B, Should be Accepted as True, and Should Not Be Treated As Mere Speculative Legal Conclusions**

Plaintiffs have plead a number of factual allegations that, if proven, would negate Backpage's immunity defense.[1] Moreover, Plaintiffs attached over 2,000 pages of exhibits in

[1] As explained in *Fair housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1175 (9th Cir. 2008), "the message to website operators is clear: If you don't encourage illegal content, or design your



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support of these factual allegations, which clearly show the unlawful nature of the postings. More importantly, these exhibits show that Plaintiffs' factual allegations are not baseless or speculative. For instance these exhibits support Plaintiffs' allegations that Backpage's posting rules and requirements were created and developed to help users draft unlawful prostitution ads, thereby increasing the use and viability of its website. These exhibits also support Plaintiffs' allegations that Backpage created and developed its "escort" section for unlawful purposes—namely prostitution—and that Backpage chose the word "escort" because it means "prostitute," and therefore would most effectively convey the true meaning of each posting. Not surprisingly, Backpage.com not once mentions Exhibits A and B in any of their briefing.

Furthermore, Backpage cites only one case, *State ex rel. Pirak v. Schoeter*, 45 Wn.2d 367 (1954), for the proposition "the Court should not assume that a complaint's legal conclusions are correct." But, *Pirak* is inapposite to the present matter.

In *Pirak*, the plaintiffs filed a lawsuit to enjoin the state director of fisheries from issuing licenses for the use of reef nets. In the complaint, the plaintiffs plead "reef nets" were "fish traps," and therefore were prohibited by RCW 75.12.060, which prohibits the use of "fish traps" to catch salmon. In deciding the state's 12(b)(6) motion, the *Pirak* Court explained it did not have to accept the plaintiffs' allegation that a "reef net" is a "fish trap" prohibited by RCW 75012.060 because interpreting the meaning of a statute (i.e. whether "fish trap" encompasses "reef nets") is a legal, not factual, matter.

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website to require users to input illegal content, you will be immune." Put another way, Backpage.com cannot encourage unlawful content on its website *and* be immune from liability stemming from it.



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For the present motion, this Court must decide whether Plaintiffs' factual allegations regarding Backpage's efforts to create, develop, and encourage unlawful content, if proven, would overcome Backpage's immunity defense. Whether "escort" means prostitute, as alleged in the First Amended Complaint, is a disputed issue of fact, not law.

To the extent Backpage relies on *Schneider v. Amazon.com, Inc*., 108 Wn. App., 454 (2001), that case is much different than the one at bar and is therefore also irrelevant. Most notably, unlike the present case, Schneider did not allege Amazon created or developed the defamatory content. Instead, he argued Amazon should be liable because it knew of the defamatory postings and failed to remove them—acts clearly immune under the CDA.

**C. Backpage.com Does Not Have A Substantive Federal Right To Create, Develop, and/or Encourage Unlawful Content On Its Website**

The Defendants' argument that state procedural law somehow infringes on their federal substantive rights is illogical and, at best, a red herring. The CDA does not give Backpage a substantive federal right to create or develop unlawful content.[2] Indeed, "Section 230 of the CDA only applies if the interactive computer service provider is not also an "information content provider," which is defined as someone who is "responsible, in whole or in part, for the creation or development of" the offending content. . *Roommates.com, LLC*, 521 F.3d at 1162 citing § 230(f)(3)." Likewise, the CDA does not grant Backpage.com a substantive federal right to avoid discovery:

> Requiring website owners to refrain from taking affirmative acts that are unlawful does not strike us as an undue burden. These are, after all, businesses that are being held responsible only for their own conduct; there is no vicarious liability for the misconduct of their customers. Compliance with laws of general applicability seems like an entirely justified burden for all businesses, whether they operate online or through quaint brick-and-mortar facilities.

[2] Ironically, "[t]he primary goal of the [Communications Decency [Act] was to control the exposure of minors to indecent material." *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (citing Pub. L. No. 104-104, Title v. (1996), and H.R. Rep. No. 104-458, at 81-91 (1996) (".



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> Insofar, however, as a plaintiff would bring a claim under state or federal law based on a website operator's passive acquiescence in the misconduct of its users, the website operator would likely be entitled to CDA immunity. This is true even if the users committed their misconduct using electronic tools of general applicability provided by the website operator.
>
> *Id.* at 1189, fn 24.

Furthermore, none of the cases cited in Backpage's brief found that a state court's lenient pleading standard infringed on the defendant's federal rights. Rather, each case involved a final judgment in which the plaintiff's federal right to bring a claim was improperly deprived by state law.

For instance, in *Brown v. Western Ry. Of Ala.*, 338 U.S. 294 (1949), the U.S. Supreme Court reversed the state court's dismissal of the plaintiff's federal tort claim because the state court improperly decided issues of fact, thereby negating the plaintiff's federal right to bring a lawsuit under the Federal Employers' Liability Act. The state court explained that it based its decision on a local rule of practice to construe pleading allegations most strongly against the pleader. The U.S. Supreme Court issued a strong rebuke of the local law explaining, "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."

The two other case cited in Backpage's brief, *Felder v. Casey*, 487 U.S. 131 (1988), and *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64 (1993), are even further off point, as they were both decided on the basis of federal preemption, which has nothing to do with the present case.



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For the foregoing reasons, in addition those raised in Plaintiffs' response brief, Plaintiffs respectfully request the Court deny the Backpage.com Defendants' Motion to Dismiss.

Dated this 24th day of April 2013.

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**Certificate of Service**

I, Ami Erpenbach, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala PLLC, and that on this 24th day of April, I served the above, via E-Mail, **E-Service,** Hand Delivery**,** and/or U.S. Mail by directing delivery addressed to:

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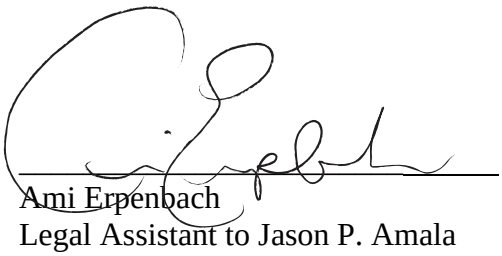

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