

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

J.S., S.L., and L.C.,	)	
	)	
Plaintiffs,	)	
	)	Superior Court
v.	)	No. 12-2-11362-4
	)	Court of Appeals
VILLAGE VOICE MEDIA HOLDINGS,	)	No. 44920-0-II
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,	)	
	)	
Defendants.	)	

---

**VERBATIM TRANSCRIPT OF PROCEEDINGS**

April 26, 2013  
Pierce County Courthouse  
Tacoma, Washington  
Before the  
Honorable Susan K. Serko

**A P P E A R A N C E S**

For the Plaintiffs:  
ERIK BAUER  
DARRELL COCHRAN  
*THE LAW OFFICE OF ERIK BAUER*

For the Defendants:  
JAMES GRANT  
AMBIKA DORAN  
*DAVIS WRIGHT TREMAINE, LLP*

Lanre Adebayo, CCR  
Official Court Reporter  
Department 14 Superior Court  
(253) 798-2977

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

T A B L E O F C O N T E N T S

PROCEEDINGS

PAGE

APRIL 26, 2013

TESTIMONY

(No witnesses heard.)

OTHER

Motion to Dismiss.....	3
Court's Oral Ruling.....	49

E X H I B I T

EXHIBIT

DESCRIPTION

MARKED/ADMITTED

PAGE

(No exhibits marked or admitted.)

1 BE IT REMEMBERED that on FRIDAY, APRIL 26, 2013, the  
2 above-captioned cause came on duly for hearing before the  
3 **HONORABLE SUSAN K. SERKO**, Judge of the Superior Court in and  
4 for the County of Pierce, State of Washington; the following  
5 proceedings were had, to wit:

6  
7 <<<<<< >>>>>>

8  
9 THE COURT: This is Cause Number 12-2-11362-4; J.S.  
10 v. Village Voice Media Holdings, et al. I have it as J.S.,  
11 S.L., L.C. v. Video Voice Media; Backpage.com; New Times  
12 Media; and Hopson, an individual. Mr. Grant and his  
13 cocounsel -- whose name escapes me -- is present representing  
14 the defendant. Counsel?

15 MS. DORAN: Ambika Doran.

16 THE COURT: Nice to see you again. And counsel for  
17 the plaintiff, go ahead.

18 MR. BAUER: Good morning, Your Honor. For the minor  
19 plaintiffs, Erik Bauer and Darrell Cochran.

20 THE COURT: This is the defendant's motion to  
21 dismiss based on 12(b)(6); there is also a motion to compel  
22 which will await the outcome of the motion to dismiss. I'll  
23 tell you what I focused on so that you know, since that's my  
24 practice.

25 First and foremost, this is a fascinating issue and I

1 appreciate that it's a difficult issue for the parties, not  
2 necessarily the lawyers; but from a legal standpoint, it's a  
3 very, very interesting issue. When I really got immersed in  
4 the issue and started reading your briefs, really I went  
5 right back to the cases and focused on the some of the cases  
6 and I'll tell you which ones I focused on. And then based on  
7 my review of the cases, I went and pulled the complaint  
8 because I think -- or not the complaint, the first amended  
9 complaint which I think was the last complaint that was filed  
10 by the plaintiffs, true?

11 MR. BAUER: Right.

12 MR. COCHRAN: Correct.

13 THE COURT: Because I think that the decision of the  
14 Court turns on the allegations, based on the case law. The  
15 cases that I read most carefully -- I really wanted something  
16 close to home, obviously. I wanted something out of Division  
17 I, II, III, or the Washington Supreme Court. 9th Circuit  
18 came closest, I guess, with the Roommates case. And then  
19 because it is so close to the facts of this case, I also  
20 focused on the M.A. case, and those are really -- the three  
21 cases that I looked at the most carefully were Schneider v.  
22 Amazon which is the Division I case, albeit from 2001 and in  
23 my opinion not directly on point; M.A. v. Village Voice which  
24 is out of the Eastern District of Missouri and is a Federal  
25 District Court judge's opinion, and so while I'm satisfied

1 that the facts are very, very close, it's a Federal District  
2 Court judge's opinion which I'm not sure binds a Washington  
3 State Superior Court judge; and then, of course, the M.A.  
4 case which is out of the 9th Circuit; Fair Housing Council v.  
5 -- I'm sorry, not M.A., I misspoke. Fair Housing Council v.  
6 Roommates, LLC, which is a 2008 case and goes in great detail  
7 talking about the Communications Decency Act.

8 So just so you all know where I am in terms of my  
9 review and what I focused on. And I will have some questions  
10 for you, but I'm going to give you an opportunity first to  
11 argue.

12 Counsel, this is defendant's motion. I think I  
13 understand the facts of this case. It's not necessary to  
14 repeat them.

15 MR. GRANT: Understood, Your Honor. And what I will  
16 try to do, because I think having observed Your Honor, is to  
17 focus in on what I think is the central question here. The  
18 central question really is the statutory meaning of what is  
19 an information contact provider under Section 230 of the  
20 Communications Decency Act; or to put that a little bit  
21 differently and more specifically, what does it mean for a  
22 party to be responsible for the creation or development of  
23 information on the internet. That's really the issue we're  
24 here to deal with.

25 THE COURT: My question for you is --

1 MR. GRANT: Uh-huh?

2 THE COURT: Are they a neutral conduit or are they a  
3 content developer? Is that really the nut of what we're  
4 arguing about today?

5 MR. GRANT: And what it means to be a content  
6 developer within the meaning of the statute.

7 THE COURT: Right.

8 MR. GRANT: And the answer is they are a neutral  
9 conduit.

10 THE COURT: All right.

11 MR. GRANT: What Backpage.com does is the same thing  
12 as any classified ad service; it has categories for various  
13 kinds of ads that you can publish, it's very similar to  
14 Craigslist, and in fact in the 9th Circuit decision in  
15 Roommates when it was addressing the second half of the issue  
16 in Roommates involving the open comments field, 9th Circuit  
17 said this is very much like what Craigslist does. It  
18 provides a forum, it provides an opportunity for users to  
19 submit whatever content they choose to submit and therefore  
20 is a neutral content provider. So that -- I'm sorry, it is a  
21 neutral conduit for a content provider by third party.

22 THE COURT: Right.

23 MR. GRANT: So as I say, this is an issue of  
24 statutory interpretation, which to this Court presents an  
25 issue of law. The question of what is immunity and the

1 question of what is federal preemption, those are issues of  
2 law and the Washington cases stand for that. The plaintiffs'  
3 argument throughout has been that Backpage.com encourages,  
4 develops or creates content.

5 THE COURT: Right.

6 MR. GRANT: Now there are several problems with  
7 that. First and foremost, what they're doing is attacking  
8 the web site as a whole. The case law is clear, you can't do  
9 that. What you need to do instead is to point to the  
10 specific content that is the subject matter of their  
11 challenges and show who created that content, who provided  
12 that content.

13 In our case, the plaintiffs have actually admitted the  
14 content that it's a subject of their challenges; the ads or  
15 the posts that are about the plaintiffs was created by the  
16 pimps who posted the ads. They say that those pimps actually  
17 complied with all the rules of Backpage.com when they  
18 submitted the ads; so on the face and by all appearances,  
19 they were permissible ads.

20 I want to sort of go through the pieces of the  
21 plaintiffs' argument because as you look at what they're  
22 arguing, you find that none of it's relevant under Section  
23 230 of CDA. First of all, they're arguing that Backpage  
24 encourages unlawful content on the web site. Your Honor,  
25 that's wrong as a matter of law. That is not something

1 that's sufficient under Section 230 to defeat immunity under  
2 the statute.

3 The fact that a web site acted in such a manner as to  
4 encourage the publication of unlawful material does not  
5 preclude a finding of immunity pursuant to Section 230. And  
6 that's Hill v. Stubhub.

7 As a matter of law, and even if true, encouraging  
8 defamatory post is not sufficient to defeat CDA immunity.  
9 That's the S.C. v. The Dirty World case. So there are many,  
10 many cases including the 9th Circuit in Roommates that say  
11 implicitly encouraging something, having a web site that by  
12 its nature or its structure allegedly encourages some kind of  
13 content, that does not take you out of Section 230 immunity.

14 It's not a statement that's in the statute itself, it  
15 doesn't say if a web site encourages content it loses its  
16 immunity. It says that only when there is an information  
17 content provider, those who create or develop content, that  
18 in some circumstances can defeat immunity; but there's  
19 nothing about encouraging content of one kind or another, so  
20 I suggest the Court really needs to set that part aside and  
21 look at statutory terms.

22 THE COURT: I mean, that's what I focused on too. I  
23 used terms of art, if you will, from some of the cases. So  
24 questions for the defendants were; doesn't Backpage create  
25 "the ad" by defining the parameters, limiting and suggesting

1 the language that's going to be used in an ad? Isn't the ISP  
2 -- if that's the right term -- a "developer, at least in  
3 part" versus a passive transmitter? And I'm trying to --  
4 hopefully you appreciate that I'm playing the devil's  
5 advocate which I intend to do as well with the plaintiff.

6 MR. GRANT: I understand.

7 THE COURT: But that's what this case turns on. I  
8 mean, at what point do you cross that line and become a  
9 developer, a content developer as they did in Roommates.

10 MR. GRANT: So I would say two answers, and I think  
11 roommates is kind of the key to explain what the difference  
12 is as well as some of the other cases that plaintiffs have  
13 cited that actually demonstrate what create or develop means.  
14 First of all, create does not mean to restrict or prohibit  
15 improper content on the web site; that's what Congress said  
16 specifically in Section 230. That's what we're trying to  
17 encourage. We want web sites to police themselves; we want  
18 them to have rules and restrictions; we want them to prevent  
19 improper content. So you can't create content by precluding  
20 content, by saying you can't post an ad that's for an  
21 unlawful activity, you can't post an ad that involves sex  
22 trafficking or prostitution, that's not allowed. But that  
23 doesn't create content; so what does?

24 THE COURT: So under 3.9 of the complaint --

25 MR. GRANT: Uh-huh.

1           THE COURT:  -- where the plaintiff alleges that  
2 Backpage instructs, requires pimps and prostitutes to post  
3 their ads in a manner, and then they go on to say all the  
4 language that you can't use and what you can.  And you can't  
5 do services in terms of minutes, it can only be an hour and  
6 so forth.  That you're saying is prohibited language and  
7 therefore it's not suggesting content; is that right?

8           MR. GRANT:  Absolutely right, Your Honor.

9           THE COURT:  Okay.

10          MR. GRANT:  When a web site sets out to say you  
11 cannot post certain things because that's unlawful and that's  
12 not permitted on our web site, it's doing what Congress meant  
13 to have done.  It's trying to police the web site, it's  
14 trying to preclude people from using an escort service which  
15 could be a lawful thing to advertise about, but using it in  
16 an improper way.  So when Backpage makes prescribed rules and  
17 says you cannot do this and you cannot do that, it's doing  
18 what any other web site does; in fact, it's exactly what web  
19 sites are supposed to do.

20          So the example we gave is, well, if E-Bay says you  
21 cannot post things that are counterfeit goods, you cannot  
22 post things that are supposed to be authentic antiques if in  
23 fact they are not; if E-Bay posts those rules, according to  
24 plaintiffs' theory, if in fact they can show that the  
25 counterfeit goods were sold on E-Bay, then they could sue

1 E-Bay because it didn't abide by its own rules and in fact  
2 sue E-Bay because it imposed those rules. This is turning  
3 Section 230 upside down.

4 If what we're going to do is say that a web site that  
5 sets out to impose rules and sets out to remove improper  
6 content thereby becomes liable for that content, then what  
7 you're going to encourage web sites to do is say no rules, we  
8 won't police our web sites at all. And according to  
9 plaintiffs apparently, that would be permissible. Posting an  
10 ad on a web site that says sex with a 16-year-old girl for  
11 \$150.00, according to them, because our rules would prohibit  
12 that and we'd never allow that ad, but if we didn't have the  
13 rules their theory is then we would be immune, which makes no  
14 sense.

15 THE COURT: Right.

16 MR. GRANT: So let me go back to the question of  
17 what it is to create content and what does Roommates tell us.  
18 Creating content and the cases that actually plaintiffs have  
19 pointed out are the circumstances where a web sites itself  
20 posts information. So take the example of the case that they  
21 cited in their sur-reply, the Badbusinessbureau.com, I think  
22 it's called the rip-off report. What they actually did was  
23 they posted their own editorial content on top of the user's  
24 content, making criticisms of the business, saying that they  
25 were corrupt, saying that they were a scam.

1           They were sued for that content, they were sued for the  
2 headings that they put on top of those ads. They were sued  
3 as well because the web site even contacted the person who  
4 originally submitted the information and said, go out and get  
5 us photographs of this business, go out and confront them,  
6 submit that information back to us and we'll post that as  
7 well. So they were soliciting content and creating content.  
8 The court had very little difficulty saying that takes you  
9 out of Section 230 immunity, but they were being sued for  
10 what they created not for the third-party content.

11           Roommates is a little different example because  
12 Roommates was a situation where because of the structure of  
13 the web site, in order to participate, you were required to  
14 provide information that was allegedly discriminatory about  
15 your sex, about your sexual orientation and about children.

16           THE COURT: Right.

17           MR. GRANT: And that was what the 9th Circuit said  
18 is -- put Roommates past the line to become a developer of  
19 content and not simply the conduit of third-party  
20 information. But the court went on and said any clever  
21 plaintiff's lawyer can artfully plead around to say that  
22 somebody does something, that in some way a web site does  
23 something to encourage content or to implicitly develop  
24 content. The court said that we can't allow. That would sap  
25 Section 230 of all its force and that would gut the meaning

1 of the statute. So where it's very clear that a web site is  
2 doing something that requires --

3 THE COURT: I'm homing in right on the words you  
4 just used, the clever lawyer argument.

5 MR. GRANT: Well, that's actually -- that's a  
6 central part of the decision, Your Honor.

7 THE COURT: Right.

8 MR. GRANT: Because what the 9th Circuit goes  
9 through there is this notion that you can't artfully plead  
10 something and thereby force a web site to face --

11 THE COURT: Death by ten thousand duck-bites.

12 MR. GRANT: That's right, by being forced to face  
13 protracted and difficult litigation including discovery every  
14 time a lawyer comes in and says they must have done something  
15 to develop the content implicitly. So development by  
16 inference or by implication is exactly what the 9th Circuit  
17 says you can't do. That's all we have here. Plaintiffs seem  
18 to think that so long as they use the words 'create' and  
19 'develop' and they use them often enough, that that's enough  
20 to say that they should be outside the scope of Section 230  
21 immunity. But if the Court focuses on what it is they're  
22 actually saying or the factual allegations to get there, none  
23 of them support the plaintiffs' argument.

24 So, for instance, first, plaintiffs argue that Backpage  
25 develops content because it has a category for escorts. Your

1 Honor mentioned that one of the cases that you focused on was  
2 the M.A. case, and I would also encourage you to read the  
3 Dart case because this is the exact same argument that was  
4 raised in those cases. In Dart, it had to do with a category  
5 called Erotic Services and variety of subcategories under  
6 that. The Dark court said that does not make Craigslist a  
7 content provider.

8 The same was true in M.A., the exact same argument  
9 about the exact same categories and about the exact same  
10 descriptions was raised in M.A. the court said Backpage.com  
11 was not a developer there either. Categorizing information  
12 is what web sites do. Escorts is a term that Judge Martinez  
13 held in the McKenna case not long ago, it's a lawful  
14 business. Escort businesses have been advertised in Yellow  
15 Pages, they've been in phone directories, they've been in  
16 newspapers for years.

17 There are some 20-plus states that have statutes on the  
18 books about escort services and the State of Washington  
19 recognizes escort services as subject to B&O tax, and 35  
20 communities in the state regulate tax and license escort  
21 services. So having a category for lawful ads and  
22 representations about escorts is perfectly permissible. And  
23 then what Backpage does atop that is to try to prohibit  
24 improper ads within that category. So that part I suggest,  
25 Your Honor, does not equate to developing content.

1           The second part of the argument they've made is that  
2 Backpage makes information useful and available by  
3 categorizing it and putting it on the web site. I'm not  
4 going to spend much time there --

5           THE COURT: I wouldn't.

6           MR. GRANT: -- because that's what every web site  
7 does.

8           THE COURT: I wouldn't.

9           MR. GRANT: The third, Your Honor, is this notion of  
10 the rules. And plaintiffs' argument is effectively that when  
11 they make factual allegations that there are all these rules  
12 and that Backpage enforces the rules, that they thereby can  
13 override all their factual allegations by conclusory legal  
14 allegation that Backpage creates or develops content, even  
15 though there's no fact to support that. It's effectively an  
16 argument that says though the facts show something's white,  
17 if we call it black, we should be entitled to continue with  
18 our arguments.

19           No court has ever accepted that and, as I suggest, it  
20 would destroy Section 230 all together if you could simply  
21 come in and say, because you've got rules, that must mean  
22 you're telling people how to evade those rules. That's not  
23 what Congress intended and, in fact, I suggest it would be  
24 the end of 230 if every plaintiff could get around 230 simply  
25 by throwing out an allegations such as plaintiffs have done

1 here. I'm happy to address other questions.

2 THE COURT: You have addressed my questions.

3 MR. GRANT: Very good, Your Honor. I think the  
4 upshot is the Congress in enacting Section 230 intended to  
5 preserve free speech on the internet and intended to preserve  
6 and to encourage web sites to self-police the content that  
7 was on their web sites. What plaintiffs are seeking to do  
8 here is to sort of artfully plead their way around that to  
9 come up with some way to attack a web site. The fact of the  
10 matter is they're not without a remedy. The plaintiffs can  
11 sue the person that actually posted the content; they can sue  
12 the people who actually victimized them; and it's a very  
13 unfortunate circumstance, Your Honor, but you can't sue the  
14 messenger and that's what the case law quotes.

15 THE COURT: All right. Actually one or two more  
16 questions --

17 MR. GRANT: Uh-huh.

18 THE COURT: -- and that is; what is the status of  
19 the M.A. case? Is it --

20 MR. GRANT: It's over.

21 THE COURT: Did it end there?

22 MR. GRANT: Yes, it was dismissed outright.

23 THE COURT: So it wasn't appealed?

24 MR. GRANT: It was not appealed.

25 THE COURT: Interesting. And same --

1 MR. GRANT: Same is true for Dart.

2 THE COURT: -- for the Fair Housing Council case,  
3 the Roommates case, is that still --

4 MR. GRANT: It's over.

5 THE COURT: Okay.

6 MR. GRANT: It's also -- oh, I apologize, there was  
7 a further opinion in Roommates. The 9th Circuit ultimately  
8 held -- actually, the District Court had originally held and  
9 then the 9th Circuit held as well that there was no  
10 discrimination under the Fair Housing Act because an  
11 individual roommate, individuals can choose to select to live  
12 with someone of the same gender or a different gender,  
13 whatever their choices are, but that didn't fall as  
14 discrimination under the Fair Housing Act, so ultimately that  
15 case was dismissed too.

16 THE COURT: Oh, interesting. Okay, thank you. I  
17 just was curious as to whether or not there was anything  
18 pending that might give the Court direction. Thank you.

19 MR. GRANT: Thank you, Your Honor.

20 THE COURT: On behalf of the plaintiff?

21 MR. BAUER: Thank you, Your Honor. Erik Bauer on  
22 behalf of the plaintiffs. I have so much I could say.

23 THE COURT: Yeah, please, you know, limit your  
24 remarks. I mean, I've read these materials, I've read the  
25 complaint. I looked briefly at the attachments to the

1 complaint, painful as it was, I have to confess I scrolled  
2 quickly --

3 MR. BAUER: Uh-huh.

4 THE COURT: -- but I got a sense of what --

5 MR. BAUER: What's going on.

6 THE COURT: -- the allegations are. And I start  
7 with the premise, of course, that a defendant's motion to  
8 dismiss based on 12(b)(6) is a pretty high standard; but, you  
9 know, I considered that in light of what's been done in the  
10 past by many other judges. And so those are going to be my  
11 questions for you all representing the plaintiffs is, how do  
12 you --

13 MR. BAUER: Distinguish.

14 THE COURT: -- distinguish or -- no, really it goes  
15 even further than that, Mr. Bauer. My first question is how  
16 did the allegations in the plaintiffs' amended complaint in  
17 this case differ from those dismissed in M.A. v. Backpage?

18 MR. BAUER: Well, that's pretty easy, that's an easy  
19 answer to give you, Your Honor. In M.A. -- and it's right  
20 here. Quoting directly from M.A., so I'm on Page 9 of what I  
21 have here.

22 THE COURT: I'm on Page 64, so I'm not sure where  
23 Page 9 falls.

24 MR. BAUER: Okay. 1053 is what it says here at the  
25 bottom but, at any rate, I'll just quote. It says, "In the

1 instant case, there is no allegation that Backpage was  
2 responsible for the development of any portion of the content  
3 of McFarland's posted ads or specifically encouraged the  
4 development of the offensive nature of that content."

5 No allegation. Well, we allege that, we do have an  
6 allegation that Backpage developed some content. We do have  
7 an allegation that Backpage developed some content. We very  
8 specifically have that allegation in our complaint in  
9 multiple places. And we've done more than allege, we've  
10 actually provided specific examples, facts. They keep saying  
11 we haven't provided any facts; we have. We have some -- I  
12 think it's 800 ads that are actually embedded into our  
13 complaint and, you know, are part of our complaint that have  
14 a wealth of information in them about content on the ads,  
15 which is Backpage's content, as well as how they develop.  
16 And if you'd let me proceed a little bit with that.

17 Now we've entitled on a 12(b)(6) to every reasonable  
18 inference; you know, is there a possibility that we're right  
19 here? Now here is one of the ads that's in the complaint  
20 that we have embedded. This is this young girl, she looks  
21 like she could be 11 through 15, something like that, she's  
22 obviously very young. And it says all sorts of quick stuff  
23 at the top, do you feel like something's missing, it's  
24 probably because you haven't met me. You can see her -- what  
25 looks to be a bare bottom here. She really doesn't have any

1 breasts developed yet, which tells me she's very, very young.

2 MR. GRANT: I'm sorry, Your Honor.

3 THE COURT: Well, I wouldn't -- don't worry about  
4 objecting. I'm not going to consider Mr. Bauer's opinion  
5 that this girl is 11 or 12, or 21 for that matter. I will  
6 not consider that.

7 MR. GRANT: I appreciate that, Your Honor. Let me  
8 also ask though since he's using materials that we weren't  
9 provided before the argument --

10 MR. BAUER: They're in the complaint you have.

11 MR. GRANT: Do you have a copy?

12 MR. BAUER: You have this in the complaint.

13 THE COURT: Please don't interrupt each other and  
14 don't talk to each other. And it makes it very difficult for  
15 my court reporter to take down what you're saying if you're  
16 interrupting each other. Don't do that.

17 Mr. Grant?

18 MR. GRANT: My question was simply does he have a  
19 copy that I can look at since I can't see them from -- I  
20 guess what he's looking at. But if you don't, Mr. Bauer,  
21 that's fine.

22 THE COURT: If you know where it is in the exhibit,  
23 if you could at least identify that, because it may be  
24 important for the Court of Appeals.

25 MR. BAUER: It's in the exhibit, Your Honor.

1 There's such a wealth of stuff and we didn't -- we're under  
2 some time constraints.

3 THE COURT: All right. Well, let me then for the  
4 record say that you have blown up some pictures and text and  
5 it's up at the top in the left-hand corner, it says  
6 Backpage.com, and the first thing that I can read is: Do you  
7 feel like something's missing? It's probably because you --  
8 the letter U -- haven't met me -- capitalized, and then some  
9 little scrawly thing. And that's as much as I'm going to  
10 read. I assume that if the Court of Appeals wants to know  
11 what I was looking at at the time that I considered this  
12 motion --

13 MR. BAUER: Sure.

14 THE COURT: -- they'll be able to identify that in  
15 the exhibits that you attached to the complaint.

16 MR. BAUER: Absolutely, Your Honor. One thing I  
17 really want to point out to the Court is right up here is  
18 some letters and some wording that appears on this individual  
19 ad. And this is Backpage's -- you can come over here and  
20 look at it, Mr. Grant, if you need to. It says Backpage.com  
21 Seattle adult entertainment, and then right here Seattle  
22 Escorts, right here Seattle Escorts appears in this  
23 individual ad. Now escort --

24 THE COURT: I'm not sure why that should be so  
25 shocking to me.

1 MR. BAUER: Well, it's words that Backpage puts  
2 here. Every ad has this on it, every one of these escorts  
3 have this word that Backpage puts on the ad. The people  
4 posting the ad did not put Seattle Escorts up here. My  
5 clients didn't put Seattle Escorts up here.

6 THE COURT: I assume that Mr. Hopson goes into  
7 Backpage and goes Backpage and then a drop-down menu for  
8 something else and then a drop-down menu for something else  
9 and he selects.

10 MR. BAUER: Yeah --

11 THE COURT: He did select eventually the category of  
12 escort where he wanted to put this advertisement.

13 MR. BAUER: That's correct, he selected that  
14 category of escort.

15 THE COURT: Okay.

16 MR. BAUER: And the way it works when it's  
17 advertised on the web, Your Honor, it's this kind of a  
18 classified ad format and then you have over here and it  
19 sometimes says adult entertainment. You click on that and  
20 you can pick escorts or male escorts or strippers or, you  
21 know, a variety of stuff. Well, escorts as we specifically  
22 allege in the complaint means prostitute. And we said that  
23 in the complaint, we have specifically alleged that, it's  
24 illegal, it's against the law, it's unlawful content right  
25 there. It means prostitute. That's what it means, and in

1 the content --

2 THE COURT: You don't have to convince me of that.

3 MR. BAUER: Okay, thanks.

4 THE COURT: If that's the argument --

5 MR. BAUER: That's part of the argument.

6 THE COURT: -- you can move on because --

7 MR. BAUER: Okay. Move on there.

8 THE COURT: -- you don't have to convince me and,  
9 probably, you don't have to convince Mr. Grant. However,  
10 that's been held to be legal. Your argument is not going to  
11 turn on whether or not somebody intended to place an ad under  
12 escort so that a John or somebody else out there who wanted a  
13 prostitute would go there. That's -- I agree with you. I'm  
14 going to assume that escort service means prostitution; but  
15 there is also a legal, found to be legal category of escort.

16 MR. BAUER: Well, and I'll kind of --

17 THE COURT: You're going to take issue with that.

18 MR. BAUER: I'll take issue with that --

19 THE COURT: Okay. Go ahead.

20 MR. BAUER: -- and if the Court would listen to my  
21 thoughts on that subject. I mean, they've quoted all these  
22 B&O taxes and stuff like that, some categories that they say  
23 somehow legitimize escorts; well, escort's just a term, it's  
24 a term, it's a coverage term. There's nothing inherently  
25 wrong with any word. I mean, prostitute itself is just a

1 word; it's the act of prostitution that's illegal; it's  
2 promoting prostitution that's illegal; it's promoting escorts  
3 that are really prostitutes, that's also illegal. That's  
4 what's illegal. It's the act, it's not just the words.

5 So what do these words mean? Do they mean lawful  
6 content or unlawful content? What are they really doing  
7 here? And what they're really doing here is promoting  
8 prostitution, that's what's really going on. Whether you  
9 call it escort, whether you call it call girl, whether you  
10 call it prostitute, whatever you call it, what's really going  
11 on? I know what our clients really experienced out there. I  
12 know what's really going on and we're prepared to prove this  
13 at trial.

14 THE COURT: We're not arguing.

15 MR. BAUER: Okay.

16 THE COURT: We're not arguing about that.

17 MR. BAUER: Okay, we're not arguing that. Okay.

18 Very good. As far as all these B&O taxes, I mean, that might  
19 be some evidence that perhaps it is legal and they could  
20 certainly argue that later on. What I would find more  
21 interesting is how much revenue has been collected by the tax  
22 department under those categories. I mean, has any revenue  
23 been collected or not, or very minimal. I mean, are they  
24 making any money off it?

25 THE COURT: Let's get to the heart of the issue

1 today.

2 MR. BAUER: Okay. Well, the heart of the issue is  
3 we're saying this is content put on this web site by  
4 Backpage. It's not just content that is part of the  
5 advertisement, Your Honor, but it also serves as a search  
6 function on the internet. So if I go to Google and I type in  
7 Seattle Escorts, first of all the whole Backpage web site  
8 pops right up. If I'm a John looking for an escort and I  
9 just type it in, the whole web site will pop up, but also the  
10 individual ads pop up as well individually on Google, on  
11 Yahoo, on all the major search engines out there. So this is  
12 content information which is credible and important on each  
13 and every ad and it's material.

14 How is it material? It's material in that it alerts  
15 all the Johns out there as to what is for sale, what's  
16 available out here and it's unlawful what's going on here.  
17 It is material in that sense and it's not content neutral, it  
18 takes it out of content neutral zone. It puts it right into  
19 prostitution zone is what it does.

20 THE COURT: Okay.

21 MR. BAUER: Okay.

22 THE COURT: And I appreciate your passion.

23 MR. BAUER: Okay. And I do --

24 THE COURT: And I do not condone what is happening  
25 and I'm certain that Mr. Grant does not condone what occurred

1 and that it's appropriate to prostitute a 13-year-old or a  
2 16-year-old, it absolutely is not.

3 MR. BAUER: Sure, it's not.

4 THE COURT: The question is whether or not the CDA  
5 protects Backpage from a lawsuit against it for the content  
6 that's found on its web page.

7 MR. BAUER: Right.

8 THE COURT: And I'm going further.

9 MR. BAUER: Okay.

10 THE COURT: The question really is how do you as a  
11 plaintiff counsel distinguish M.A.? I mean, why is this not  
12 exactly the same as the M.A. case?

13 MR. BAUER: As the M.A. case? Well --

14 THE COURT: How does it differ?

15 MR. BAUER: It differs in that M.A., number one, did  
16 not allege that there was any content on the ad. I mean,  
17 that's an important consideration, and they didn't allege  
18 that Backpage somehow developed in part the content. And  
19 development means a bunch of different terms according to  
20 Roommates.

21 THE COURT: Well, let's look at M.A. because this is  
22 the heart of this case --

23 MR. BAUER: Sure. No, I understand.

24 THE COURT: -- is whether or not Backpage is  
25 developing content --

1 MR. BAUER: Sure.

2 THE COURT: -- by the parameters which they impose  
3 upon those who post ads on the site.

4 MR. BAUER: Well --

5 THE COURT: In MA -- let me finish, please.

6 MR. BAUER: Okay. Will do.

7 THE COURT: In M.A., and I'm looking at Page 58 but  
8 it's really 1044, some of the allegations in the complaint in  
9 M.A. were set out, all the verbiage in it. And in response  
10 to your last remark, I would direct you specifically to  
11 Paragraph 9 of the complaint in M.A. which says: Backpage  
12 was responsible in part for the development and/or creation  
13 of information provided through the internet. Backpage's web  
14 site also has a search engine to allow focused searches by  
15 key words of the posting -- just what you were arguing,  
16 Mr. Bauer. Highly tuned marketing site, research tools,  
17 adult sex focused categories, and directions and features  
18 offered regarding how to increase the impact of your ad for a  
19 fee. Now isn't that exactly what you're talking about?

20 MR. BAUER: Not exactly.

21 THE COURT: Okay.

22 MR. BAUER: It is partially what I'm talking about  
23 but not exactly, no.

24 THE COURT: All right.

25 MR. BAUER: They're referring to the Backpage search

1 site, Backpage does have a search site itself where you can  
2 click on "escorts" to find a whole variety of prostitution  
3 ads underneath it. That's what you do is you click on  
4 "escorts" and the way the Backpage search engine functions,  
5 click on the word "escorts" and then all these prostitution  
6 ads come up is what happens; I mean, thousands of them. So  
7 that's the Backpage search engine.

8 What I was referring to on this here, Your Honor, was  
9 how the word "escort" here would click into other search  
10 engines out there such as Google, such as Yahoo. It's  
11 information provided by Backpage put on the advertisements  
12 and then it goes out there. You might not think it's much to  
13 have this "escort" word up here in the corner like this on  
14 this ad, you might not think it's a great deal of content but  
15 it's important material content because it goes out there all  
16 across the internet and every other search engine out there  
17 where these johns are looking for a prostitute, they'll find  
18 them is what I'm saying on that. So important verbiage is  
19 what it is.

20 In addition to that, we believe there's other -- what  
21 they call metadata, which is essentially hidden terms in  
22 these ads and hidden terms on the Backpage web site. You  
23 can't read them, you can't see them right now, but they're  
24 there nonetheless. And what that means is web site  
25 developers will put all sorts of language in the web site

1 that you can't read it, but it'll trigger a search function  
2 from Google or Yahoo or any of the other big search engines  
3 out there so people get directed to the site. So it's  
4 information content put on the internet by ISP. We can't  
5 read that information without discovery. We want to get that  
6 information and that is very important. Now we are allowed  
7 under the law every reasonable inference in our favor on this  
8 case.

9 THE COURT: You're preaching to the choir.

10 MR. BAUER: Thank you, Your Honor. And with that in  
11 mind, we think it's very reasonable to infer that a big ISP  
12 like Backpage.com knows about hidden metadata and has it,  
13 it's out there, and we want to find out -- we want to find  
14 out in discovery what they have done. Now there is a lot of  
15 other ways you can develop a web site without -- you know,  
16 the term "development" doesn't mean that you are restricted  
17 to these ads themselves or the web site. You develop a web  
18 site by doing all sorts of things.

19 In the case of Accusearch what was held to be -- I have  
20 the cite somewhere on that -- I'll get you that cite, Your  
21 Honor, but in the Accusearch case, what was found to be  
22 developing unlawful content was they had researchers that  
23 were going out and not even on the web but getting  
24 information from other parties illegally is what they found  
25 out and engaging in essentially illegal activity. And that

1 was held to be part of developing unlawful nature of what was  
2 going on and took it outside of CDA protection is what  
3 happened there.

4 And what we have here is we have a big web site. We  
5 have a web site that these guys are posting -- we believe  
6 it's between 4 and 10 million prostitution ads every year.  
7 It's a huge number; and we have included in our complaint  
8 just -- it was like 800 ads from just our area, which is two  
9 days worth. I mean, it's enormous. With that volume going  
10 through there and the money that's attached to it, we think  
11 that it's reasonable, a reasonable inference is that this  
12 company is doing a lot to serve their customers out there.  
13 They're having board meetings; they're talking about it;  
14 they're having strategy sessions; they're doing everything  
15 they can to keep this thing going and to keep the unlawful  
16 content of these ads going. To keep that going as well  
17 because it's what's working for them. I mean, it's what's  
18 making sense.

19 When I first took this case on, I looked at it and I  
20 was thinking, well, how can this be? How can Congress -- did  
21 Congress really intend to allow anything like this to happen?  
22 I mean, what was the intent of Congress? And that's an  
23 important consideration.

24 THE COURT: I think that the intent of Congress is  
25 pretty well defined and identified even in the M.A. case

1 where they talk about the act itself and the policy --

2 MR. BAUER: Well, it is to a degree.

3 THE COURT: -- and the findings.

4 MR. BAUER: To a degree. It's kind of interesting,  
5 though, Your Honor. We have the Batzel case and I have the  
6 House Report from enactment of CDA right here. And there  
7 were two major concerns when they enacted it. I'll just read  
8 -- and we have the one part where they're trying to protect  
9 the robust flow of information on the internet.

10 THE COURT: Correct. Right.

11 MR. BAUER: And that's the part that counsel had  
12 cited time and time again in their business briefs. Most of  
13 the cases they have cited are essentially commerce cases;  
14 AOL, Amazon, E-Bay, good web sites not doing illegal stuff;  
15 instead, you have a random people, random players on Facebook  
16 or something like that that decide to post an illegal  
17 message, but the point of the web site and the purpose of the  
18 web site is not to conduct unlawful business. E-Bay is a  
19 good company, Craigslist is a good company and they have a  
20 lawful purpose out there, and that's what Congress was  
21 concerned about.

22 Now, I'm quoting right out of Batzel here; "The second  
23 reason for enacting Section 230(c) was to encourage  
24 interactive computer services and users of such services to  
25 self-police the internet from the insanity and other

1 offensive materials so as to aid parents in limiting their  
2 children's access to such material."

3 Okay. And it goes on and it says down here; "sought to  
4 further First Amendment and e-commerce interests on the  
5 internet while also promoting the protection of minors."

6 So it's the second part of the Act. And right here,  
7 Your Honor -- and I have a copy for you and counsel here --  
8 is a copy of the House Report and this is language right out  
9 of the House Report and that's 104-45(A).

10 THE COURT: Go ahead.

11 MR. BAUER: And it says what -- and this is Congress  
12 talking here; "One of the specific purposes of this action is  
13 to overrule Stratton Oakmont v. Prodigy and any other similar  
14 decisions which have treated such providers and users as  
15 publishers or speakers of content that's not their own  
16 because they have restricted access to objectionable  
17 material. The conferees believe that such decisions create  
18 serious obstacles to the important federal policy of  
19 empowering parents to determine the content of communications  
20 their children receive through interactive computer  
21 services."

22 Now I don't think Congress intended for this to service  
23 protection for children to be prostituted out over the  
24 internet and to be sold online like chattel. Congress never  
25 intended that result at all. That's an absurdity to think

1 that they did. They did not intend that result. And  
2 absurdity is an important concept in the law. It's a power  
3 that this Court has, it's a power that every court has to  
4 prevent a result that makes no sense, that is way outside the  
5 realm of Congress, that's obviously outside the realm of  
6 Congress.

7 And what you do when you look at that, according to the  
8 case law, is you look at congressional intent. And this is  
9 the Communications Decency Act, that's the entire Act.

10 Communications Decency Act. The entire Act was first enacted  
11 to do just that; it was all about pornography and obscenity  
12 on the internet, that's what it was about. It was not about  
13 selling kids on the internet or letting anyone ever do that.  
14 I mean, I start thinking, how is it possibly lawful? How is  
15 it possibly lawful to sell children on the internet? How can  
16 you do that? How can that be immunized? And the answer I  
17 come up with is it's not, it's not.

18 THE COURT: And how do you get around the case law?

19 MR. BAUER: Of course it's not. Well, by using  
20 judicial interpretation and really looking at what Congress  
21 intended. Did they intend this result or did they intend  
22 something else? I mean, if Congress intended to let  
23 companies sell children on the internet and they passed a law  
24 saying that was okay to do, I think it would be  
25 unconstitutional; it would violate the precepts of the 14th

1 Amendment, of slavery, of everything else. It would not be  
2 right.

3 THE COURT: We're all on the same page.

4 MR. BAUER: Okay. But we're --

5 THE COURT: Pardon the pun, but we are.

6 MR. BAUER: Well, I know we are.

7 THE COURT: Congress did not intend to have anyone  
8 selling minors on the internet.

9 MR. BAUER: Okay.

10 THE COURT: Period.

11 MR. BAUER: Okay.

12 THE COURT: I'm going to guess that Mr. Grant in  
13 rebuttal is going to concede that.

14 MR. BAUER: Okay. I don't think Congress intended  
15 to have anyone sold on the internet as a prostitute. I'll  
16 take it one step further, I don't think they intended for  
17 human trafficking as a whole to be allowed.

18 THE COURT: Okay. I think we're getting --

19 MR. BAUER: Well, we are and we're not.

20 THE COURT: I want you to define as the plaintiff,  
21 how Backpage is a content developer because that's what this  
22 entire case turns on.

23 MR. BAUER: Okay.

24 THE COURT: How are they a content developer?

25 MR. BAUER: Okay.

1 THE COURT: And the other question which you haven't  
2 answered yet.

3 MR. BAUER: Okay.

4 THE COURT: And that is -- well, it's really  
5 two-fold, I'm going to repeat myself. How did the  
6 allegations in the plaintiffs' complaint in this case differ  
7 from those dismissed in M.A. v. Backpage? And the follow-up  
8 question to that is; does the complaint in this case allege  
9 aiding and abetting -- which I think it does -- and if so, is  
10 the specific intent described?

11 MR. BAUER: Okay.

12 THE COURT: Those are the issues that come up in  
13 M.A.

14 MR. BAUER: That's what you're interested in right  
15 now.

16 THE COURT: Yep.

17 MR. BAUER: Okay. We did allege civil conspiracy,  
18 that's number one, okay?

19 THE COURT: And I looked at that --

20 MR. BAUER: Okay.

21 THE COURT: -- specifically and highlighted it and  
22 said, what are the factual allegations that support a  
23 conspiracy allegation?

24 MR. BAUER: Okay. Well, that's -- a conspiracy as  
25 the Court knows is an agreement between two parties to commit

1 a crime, correct? I mean, that's what it is, an agreement  
2 between two parties to do an unlawful act. Well, here we  
3 have thousands and thousands and thousands of agreements  
4 every time a pimp uploads these ads for a fee. And Backpage  
5 publishes the ad, that's a consummated contract. We have a  
6 meeting of the minds. It's an agreement by law. It's done  
7 and it's done again and in this case we have millions of  
8 these. There is the agreement right there. You don't need  
9 to meet face to face to have an agreement, especially in the  
10 world of the internet and that's what we're talking about  
11 here. What we're talking about is -- is conspiracy law, and  
12 conspiracy law requires an agreement. So there's the  
13 agreement right there.

14 And what's the overarch in furtherance of? And I'm  
15 talking about promoting prostitution, Your Honor. I'm  
16 talking about conspiracy to promote prostitution; and I have  
17 the words for that. To promote prostitution, it's really  
18 helping or aiding in any way to promote prostitution  
19 specifically, or -- or an enterprise of prostitution. Help  
20 in any way to promote an enterprise of prostitution. So you  
21 have an agreement between two or more parties to promote an  
22 enterprise of prostitution right there.

23 And we've alleged that in the complaint, we've alleged  
24 how they have these agreements and they upload them and  
25 another way they develop stuff like that. Anything that

1 they're doing, any agreement that they're making, any words  
2 that they are saying, any actions they are taking between the  
3 pimps and Backpage.com becomes unlawful because it's part of  
4 the conspiratorial agreement in and of itself. I mean, the  
5 crime and the unlawful act in a conspiracy case is actually  
6 the agreement, and so anything that is in furtherance of the  
7 agreement or part of the agreement becomes exactly that,  
8 unlawful content. And that's worked, I mean, by law.

9 So what we have here are so many agreements, it's  
10 insane, but we certainly have the agreements that our clients  
11 were subjected to and we've clearly alleged those in the  
12 complaint, Your Honor, in very clear language. And, you  
13 know, it's clearly unlawful behavior. I think we're past  
14 that, we know we're past that at this point. So, you know,  
15 quite honestly, I think that there is a paper and pixel trail  
16 across the United States of America, mile wide and a foot  
17 deep that shows these unlawful agreements. In M.A. they  
18 didn't discuss it and I don't think anyone's thought of it  
19 before and it wasn't alleged, it wasn't pled in that fashion  
20 or thought of in that fashion, but it's there. And in our  
21 briefing, Your Honor, we -- we included in our briefing the  
22 definition of prostitution in the second degree and what it  
23 takes and what -- here we go.

24 Here's the promoting prostitution definition exactly.  
25 And, you know, under the definitional section -- I'll just

1 read it: A person advances prostitution if, acting as other  
2 than a prostitute or a customer thereof, he or she causes or  
3 aids a person to commit or engage in prostitution, procures  
4 or solicits customers for prostitution, provides persons or  
5 premises for prostitution purposes, operates or assists in  
6 the operation of a house of prostitution or a prostitution  
7 enterprise, or engages in any other conduct designed to  
8 institute, aid, or facilitate an act or enterprise of  
9 prostitution.

10 It's unlawful. So anytime you have an agreement  
11 between two or more parties with that as the overriding goal  
12 --

13 THE COURT: I'm running out of time.

14 MR. BAUER: I got you.

15 THE COURT: Is there anything else that you think I  
16 need to know?

17 MR. BAUER: Well -- yeah, I may probably -- if  
18 you're still interested in more of the development argument  
19 that we had and theory that we had --

20 THE COURT: Well, that is the issue in this case.  
21 The issue isn't the shocking pictures.

22 MR. BAUER: No, I didn't want to even show you  
23 those. I've got --

24 THE COURT: Well, that's not the issue. The issue  
25 is not the passionate argument that you make, Mr. Bauer,

1 about none of us condoning prostitution and certainly not the  
2 prostitution of underage girls.

3 MR. BAUER: That's correct.

4 THE COURT: The key to this 12(b)(6) motion is  
5 whether or not Backpage crosses the line to become a content  
6 developer, and that's it, period.

7 MR. BAUER: Sure, a content developer.

8 THE COURT: And I disagree with you a little bit on  
9 the comparison of M.A. and this case side by side because I  
10 think M.A. has all the same markers --

11 MR. BAUER: Right.

12 THE COURT: -- that this case has --

13 MR. BAUER: Has a lot of them.

14 THE COURT: -- with perhaps a few exceptions; but I  
15 haven't heard you identify what those might be.

16 MR. BAUER: Well, I've certainly tried my best and,  
17 I mean, straight up I'm not overly impressed with the  
18 analysis in M.A., and as the Court indicated, it was a  
19 magistrate judge's decision over there in Missouri and it's  
20 not binding on this Court. It's, you know, as the Court  
21 knows, the magistrate in the federal system is akin to a  
22 commissioner in ours. It's not even a Federal District Court  
23 judge.

24 THE COURT: Don't tell Judge Kelley Arnold or Judge  
25 Karen Strombom that.

1 MR. BAUER: Well, I know, they're -- and they're  
2 both -- but they are, as you see.

3 THE COURT: Yeah. Sorry, I threw you off.

4 MR. BAUER: Yeah, you did. Okay.

5 THE COURT: The posting guidelines that you have up  
6 there?

7 MR. BAUER: Yeah.

8 THE COURT: Are highlighted by me in the briefing --  
9 or actually not in the briefing, in your complaint. I was  
10 concerned about that and I focused on that.

11 MR. BAUER: It's pretty interesting though how these  
12 things work, because in our complaint we have said, hey, this  
13 is not the big cover, this is nothing but a how-to for the  
14 pimps, how to develop an ad that will pass muster, will not  
15 leave a huge evidence trail behind, and that we can keep  
16 doing this thing and keep perpetuating and this thing can  
17 stay. I mean, if the pimps -- you've got to think this  
18 through a little bit, and pimps are essentially street people  
19 as a whole. They're not always that bright, they're not  
20 always that square. People that work for corporations, they  
21 can think things through a little bit to have a better idea  
22 of what societal norms are, mores, what the law is all about,  
23 they get it a little bit better.

24 THE COURT: I'm not sure I agree with that, but --

25 MR. BAUER: Not always.

1 THE COURT: Having presided over a few trials with  
2 people who promoted prostitution, but -- they can be very  
3 smart individuals.

4 MR. BAUER: Well, they probably can. They probably  
5 can. But what this is -- and when you actually read the  
6 language of 230, what it says here: Any action voluntarily  
7 taken in good faith to restrict access or availability of  
8 material that the provider or user considers to be obscene,  
9 lewd, lascivious, filthy, excessively violent, et cetera, et  
10 cetera.

11 But that's the user or provider. Okay. So who are the  
12 users of backpage.com's escort web sites? It's johns. They  
13 don't care about nipples or bare butts, they like that,  
14 that's why they're there. So when they're talking about do  
15 not post naked images of uncovered genitalia, bare butts,  
16 nipples or nipple area, sex acts, et cetera, they're not  
17 trying to protect the sensibilities of the johns from  
18 excessively lascivious or filthy or obscene stuff. No, this  
19 is a how-to. This is a how-to. And, you know, same with --

20 THE COURT: And these posting guidelines have been  
21 in place since before M.A., true?

22 MR. BAUER: Yeah, as far as I can tell. I think  
23 it's -- actually, I don't know that. They were in place with  
24 our client, I do know that much.

25 THE COURT: I'm going to give you about one more

1 minute to sum up because I --

2 MR. BAUER: One more minute on it? Okay. At any  
3 rate, you know, on the Roommates case, Your Honor, what we  
4 had here is we had these drop-down menus. And the way  
5 Backpage has it organized -- number one; Roommates didn't  
6 involve a specific ad or a specific posting, it was an  
7 overall web site approach. Okay. So when they say you have  
8 to focus on the individual ads, that's incorrect in this  
9 jurisdiction. And if Roommates had, say, a category for  
10 white roommates, one for black roommates like that, it would  
11 have violated the Fair Housing Act clearly.

12 This setup might be a little different than drop-down  
13 ad but it's the same idea, it's not content neutral. The way  
14 they have their ad set up is not content neutral and it  
15 follows everything towards the escort ad, towards the  
16 unlawful content. That's what it does; it's how it's set up;  
17 just like, you know, they could have set it up differently  
18 with drop-down menus, I imagine, but they didn't.

19 So what we have here, Your Honor, is -- I think we've  
20 hit all the marks in our pleadings that we need to. We've  
21 hit that they have developed, we've hit that they have  
22 encouraged. As soon as that one little word appears on this  
23 -- on any of these ads that says "escorts," that shows it's  
24 no longer a blank bulletin board or additional comment  
25 section in Roommates. It shows that they're steering it,

1 they're steering it towards this unlawful category, which  
2 they cannot do.

3 THE COURT: Thank you very much.

4 MR. BAUER: All right. Thank you.

5 THE COURT: Mr. Grant?

6 MR. GRANT: Just a few points, Your Honor, and I'll  
7 try to be succinct. First, I listened to Mr. Bauer again go  
8 on and on about his view of what an escort is and what it  
9 means. I think the Court is right, escort is a legal  
10 category. And, in fact, I'll just point out the comments of  
11 Judge Martinez in the McKenna decision. It's actually  
12 protected speech under the First Amendment, so escort does  
13 not per se make something unlawful.

14 The Court's comments about the M.A. case I think are  
15 exactly right. Looking at the actual allegations in that  
16 case, they mirror the allegations in this case. The theory  
17 is the same.

18 THE COURT: I'm not going to go that far. I'm not  
19 going to agree with you that they mirror. I mean, M.A.  
20 specifically said; "In the instant case, there is no  
21 allegation that Backpage was responsible for the development  
22 of any portion of the content." And I think that the  
23 plaintiffs at least attempt in their allegations to suggest  
24 that they were responsible for some of the contents, so  
25 that's one slight difference.

1 MR. GRANT: It's an interesting comment of the court  
2 and I know the part you're talking about because the court  
3 says that later in the opinion, but what this Court focused  
4 on was the actual allegations in the complaint. And if you  
5 read them, they actually do allege that Backpage was  
6 responsible for the development and creation of the ad.  
7 Those two things don't quite fit --

8 THE COURT: I agree. I agree, because I kept going  
9 back to the allegations in the complaint in M.A. and I had a  
10 hard time with it, obviously.

11 MR. GRANT: Now the difference though too -- and  
12 this is really kind of the crux of plaintiffs' argument here,  
13 it is essentially all we've got to do is say the words  
14 "create" and "develop," no factual allegations, no premise  
15 for that, no nothing else; all we've got to do is say those  
16 words and they say we're out of M.A.

17 THE COURT: Right.

18 MR. GRANT: Your Honor, I strongly urge, you have to  
19 read the entirety of M.A. and all the reasoning, and once you  
20 do, you see it is this case and Dart is this case, and they  
21 derive from long principles in many, many other cases.

22 Mr. Bauer raised a few arguments that we've not heard  
23 before so I should just briefly touch on them.

24 THE COURT: Okay.

25 MR. GRANT: One is this notion that in some fashion

1 Backpage creates content because it's indexed on search  
2 engines like Google. I would suggest Mr. Bauer's argument  
3 now puts Google at risk because the algorithms that cause --  
4 I'm getting a little beyond the pleadings in this case.

5 THE COURT: Sure.

6 MR. GRANT: But the algorithms that cause Google or  
7 any other search engine to be able to search things merely  
8 have to do with where those web sites are, how frequently  
9 they're called up; it's not because something secret is going  
10 on and being provided by the web site. So this notion that  
11 the search engine is now responsible points out, if anything,  
12 just how dangerous plaintiffs' arguments are about Section  
13 230 and how they would misinterpret it.

14 Also, as to conspiracy, I think the Court asked the  
15 question of Mr. Bauer about where are the factual allegations  
16 of conspiracy. And I would say the only fact allegation here  
17 that's relevant to that issue is plaintiffs' admission that  
18 the only contact between the pimps and Backpage.com was the  
19 fact that they went online and uploaded through the automatic  
20 computer process these ads. There is no allegation of any  
21 kind of an agreement and there couldn't be. And, again, and  
22 this is an overarching point for all of this, Your Honor, the  
23 problem is that with the interpretation plaintiffs are  
24 offering, if that's a conspiracy, then again 230 is gone  
25 because every web site conspires every day with every user.

1 THE COURT: I agree.

2 MR. GRANT: So that can't be a conspiracy.

3 THE COURT: I agree.

4 MR. GRANT: And a conclusory allegation to that  
5 effect is irrelevant and should be tossed.

6 THE COURT: I agree.

7 MR. GRANT: That's really the gist of all Mr.  
8 Bauer's comments. I listened to a lot of vague generalities  
9 about what he thinks the web site does and what his  
10 interpretations are. That's not what Section 230 does.  
11 Section 230 is objective criteria; it says specifically what  
12 are the three things you need to show in order to have  
13 immunity under the statute. And Congress did that on  
14 purpose; it made it objective criteria rather than saying  
15 it's something vague or generalized.

16 One other point about that I should note -- two  
17 actually. Mr. Bauer talked about the good faith requirement;  
18 he was actually quoting a different section of 230. He was  
19 quoting Sections 230(c)(2). Our motion is based on 230(c)(1)  
20 which has to do with third-party content. (C)(2) is a  
21 different -- well, actually, it could apply here as well, but  
22 our motion is based on (c)(1). (C)(2) does talk about good  
23 faith but then actually goes broader and then just to the  
24 party content and protects the web site for what it does  
25 itself, but that's a separate issue. I just wanted the Court

1 to understand that this good faith notion is not a  
2 requirement under section 230 (c) (1). I believe the case is  
3 Levitt v. Yelp that's made that clear.

4 One other point of clarification; when Mr. Bauer was  
5 talking about the intent and purposes of the CDA. The CDA is  
6 a long and complicated statute. It actually had a whole  
7 nother section in it that was struck down by the Supreme  
8 Court. The other section of the CDA had to do with  
9 restrictions on online materials and attempts to protect  
10 minors from exposure to those things.

11 Now that's not to say web sites weren't also encouraged  
12 to self-police to protect those things, but the portion that  
13 tried to limit what could actually be posted and how that  
14 would be done, that was Reno v. ACLU when the court struck  
15 that down. So that piece of the CDA is no longer in  
16 existence; the piece we're talking about is 230(c)(1). But  
17 the gist, I think, of the problem with Mr. Bauer's argument  
18 and plaintiffs' argument is always they don't like Congress's  
19 choice. Congress set out to say the freedom of speech on the  
20 internet is so important that we're going to grant this very,  
21 very broad immunity and that way we can ensure that there  
22 will be that robust speech on the internet.

23 If plaintiffs have a problem with this, several cases  
24 have said this, their problem is with Congress and with  
25 Congress's intent and with the mechanism Congress chose to

1 enforce that intent.

2 The Court asked a couple of questions about the posting  
3 rules and I wanted to touch on that briefly as well. The  
4 other part of the problem with plaintiffs' argument is,  
5 apparently, it is the more specific posting rules are, the  
6 more they say we're supposedly giving a road map to people  
7 how to avoid detection; how to avoid having their adds  
8 removed. Well, Your Honor, it's again what the CDA is trying  
9 to encourage is the more specificity --

10 THE COURT: Excuse me.

11 MR. GRANT: No problem.

12 (Brief pause in proceedings.)

13 THE COURT: Sorry. Back up three sentences.

14 MR. GRANT: I'll back up to just touch on one point  
15 briefly and then I will wrap up, Your Honor.

16 THE COURT: Sure.

17 MR. GRANT: You had asked questions about posting  
18 rules.

19 THE COURT: Yes.

20 MR. GRANT: My point was simply that what web sites  
21 do is make posting rules more and more specific because  
22 they're trying to make sure nobody can evade those rules.  
23 And according to plaintiffs' theory, the more specificity you  
24 provide, the more you tell people don't do this, then the  
25 more you're liable. That again is completely backwards.

1           Your Honor, the Court does need to assume the truth of  
2 well pleaded factual allegations, we accept that, the  
3 difficulty is that everything we've heard from plaintiffs and  
4 again from Mr. Bauer here are not fact allegations, they're  
5 conclusions. They want the Court to believe that  
6 Backpage.com is an information content provider and that it  
7 develops and creates information. Those are the conclusions  
8 the Court needs to draw as a matter of law under the statute  
9 based on the admitted facts -- or based on alleged facts.  
10 And I suggest, Your Honor, you cannot do that on this  
11 complaint.

12           THE COURT: Thank you. This is defendants' motion;  
13 they get the first chance and the last chance and they had  
14 it. I have to say that this case is disturbing on many  
15 levels. And as I've said several times to Mr. Bauer, I don't  
16 think anyone condones the type of advertising and what's  
17 happening on these web sites.

18           On the other, the question is did Congress tell  
19 Superior Court trial judges that you have to -- that you are  
20 entitled to ignore the CDA or do you have to enforce it?  
21 This case is -- honestly, this is, I think, of all the cases  
22 in terms of the 12(b)(6) or summary judgment for that matter,  
23 is the closest that I've ever come. I mean, it's right on  
24 the line and with all due respect to the fabulous briefing  
25 and the great arguments, it really walks the line for me this

1 case, it's right on the edge. And I don't believe that the  
2 plaintiffs have supported a conspiracy theory with  
3 allegations of fact. You make the conclusory allegation in  
4 the complaint that says this is a conspiracy, but I don't  
5 think you get there. These are where I'm most concerned,  
6 this is what I highlighted over and over again and reread,  
7 it's the posting guidelines.

8 And, frankly, my note to myself in the sideline was  
9 Backpage doesn't know this is for prostitution and isn't  
10 assisting with the development? And despite the case law, I  
11 answer that question just on the side of the plaintiffs and  
12 I'm denying a 12(b)(6). Now, I think this needs appellate  
13 review frankly, and if the defendants were to ask me to enter  
14 a 54(b) order, which I think it is, no just reason for delay.

15 MR. GRANT: It's actually --

16 THE COURT: Is that not 54(b)?

17 MR. GRANT: I'm going to suggest, Your Honor, it's  
18 actually Rules of Appellate Procedure 2.3(b)(4).

19 THE COURT: Okay. Whatever it is, you know what I'm  
20 talking about.

21 MR. GRANT: Yes.

22 THE COURT: I used to ask for it in the good old  
23 days when I practiced law and I spaced out the rule, I guess.  
24 I don't think anyone should have to go through the  
25 extraordinary discovery in this case without having some

1 direction from the appellate courts, and something that's on  
2 point because I don't think our Division I case is on point.  
3 And, honestly, I focused on M.A., you know that I read that  
4 and reread that and highlighted it, and I felt like the  
5 plaintiffs in this case just crossed the line in terms of  
6 trying to establish that Backpage was a content developer.  
7 But whether that's going to hold up in the Court of Appeals,  
8 who knows? And I don't think it's appropriate to make you  
9 all go through a ton of discovery before you take this up to  
10 the Court of Appeals.

11 MR. GRANT: Can I make the motion the Court suggests  
12 that the Court permits immediate review under Appellate Rule  
13 2.3 --

14 THE COURT: Honestly, I've done that in the past and  
15 it's been thrown right back in my face. So you might get up  
16 to the Court of Appeals, Division II, and they might say, no,  
17 you wait until this case is over and then we'll pick it up.

18 MR. GRANT: That's understood, but it follows on the  
19 Schneider case, it is the sort of thing that at least we can  
20 make very strong argument. This is dispositive and it's a  
21 controlling issue of law that the court should address.

22 THE COURT: Right. Counsel, I didn't even give you  
23 a chance.

24 MR. COCHRAN: Right. Darrell Cochran, Your Honor.  
25 Our position would be that we would resist that. We think

1 that our discovery was extremely narrowly limited and not  
2 overbroad, not seeking corporate stuff in general but  
3 specifically at these points which distinguish our case from  
4 M.A. case, and we would like to have the Court of Appeals to  
5 have that information rather than get into a situation where  
6 they say, well, we think it's conclusory and that's why we  
7 narrowly tailored our discovery. So our position would be  
8 that we should not do that, that we should do extremely  
9 limited discovery on these M.A. distinctions, and that we  
10 would then go to the Court of Appeals at some point after  
11 that.

12 THE COURT: If M.A. had been decided on summary  
13 judgment, I would agree with you; but it was decided on a  
14 12(b)(6). I mean, that was the first thing I did when I  
15 looked at this motion; I went straight to that and said,  
16 okay, where is it? Is this a 12(b)(6)? And it was, and so  
17 I'm going to grant the defendants' motion which also means  
18 I'm probably staying the rest of the case and sending this up  
19 to the Court of Appeals.

20 So if you all would fashion an order that complies with  
21 my ruling. And I wish you the best of luck and I'll be  
22 looking forward to seeing what the Court of Appeals does with  
23 this, because either Division II or maybe even our Supreme  
24 Court or maybe the Supreme Court needs to make this decision.  
25 I presume you agree.

1 MR. GRANT: Thank you, Your Honor.

2 THE COURT: Thank you. So the motion to compel is  
3 moot at this point.

4 MR. COCHRAN: Understood. Thank you.

5 THE COURT: Thank you.

6 MR. BAUER: Thank you, Your Honor.

7 THE COURT: And I do have to be out at Remann Hall  
8 at noon but I'm going to wait for that order because I want  
9 to make sure you get that done and you agree on the terms.

10 MR COCHRAN: We'll work on them, thank you, Your  
11 Honor.

12 THE COURT: I expect you can if you do that quickly.  
13 Thank you very much. Again, this is a really fascinating  
14 issue. It's my pleasure to read all the case law and hear  
15 your arguments on it. Thank you.

16 MR. GRANT: Thank you for your time, Your Honor.

17 MS. DORAN: Thank you.

18 THE COURT: Thank you.

19 (Proceedings concluded at 11:13 a.m.)  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

J.S., S.L., and L.C., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 ) Superior Court  
 VILLAGE VOICE MEDIA HOLDINGS, ) No. 12-2-11362-4  
 L.L.C., d/b/a Backpage.com; ) Court of Appeals  
 BACKPAGE.COM, L.L.C; NEW TIMES ) No. 44920-0-II  
 MEDIA, L.L.C., d/b/a Backpage.com; )  
 and BARUTI HOPSON, )  
 )  
 Defendants. )

---

REPORTER'S CERTIFICATE

---

STATE OF WASHINGTON )  
 ) ss  
 COUNTY OF PIERCE )

I, Lanre G. Adebayo, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

Dated this 23rd day of October, 2013.

---

LANRE G. ADEBAYO, CCR  
 Official Court Reporter  
 CCR #2964