

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE: November 16, 2016
JUDGE: Michael Bowman
REPORTER: Araceli Placencia

DEPARTMENT: 61
CLERK: Trevor Shaddix
BAILIFF: Jerry Thompson

People of the State of California

CASE NO. 16FE019224

Vs.

Carl Ferrer et al,
Defendants

Nature of Proceedings: Tentative ruling on Request for Judicial Notice and Demurrer

Introduction

The people of the state of California have a strong and legitimate interest in combating human trafficking by all available legal means. Moreover, any rational mind would concur that the selling of minors for the purpose of sex is particularly horrifying and the government has a right and a duty to protect those most vulnerable victims.

That legitimate state interest is not absolute, however, and must be constrained by the interests and protections of the First Amendment to the U.S. Constitution. In that vein, the United States Congress created the Communications Decency Act 47 USC section 230. The importance of the protection afforded by the First Amendment was the motivating factor behind the creation of CDA. Congress struck a balance in favor of free speech in that Congress did not wish to hold liable online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial. **Congress has spoken on this matter and it is for Congress, not this Court, to revisit.**

The key question in this case is whether the Defendants are entitled to immunity under the CDA for providing a forum for third party speech, or whether the defendants are actual creators of speech, and thus not entitled to immunity under the CDA. Under the latter scenario, the First Amendment might be implicated-if it were not for the fact that the speech at issue would be linked to a charge of pimping, which is unprotected speech.

Background

Backpage.com is one of the largest on-line classified advertisement services, through which users may post advertisements in a variety of categories. Posting an advertisement in the "Adult Services" category requires a fee. Through various levels of involvement with Backpage.com, Defendants find themselves facing criminal charges regarding certain advertisements placed in the "Adult Services" category. Carl Ferrer, Michael Lacey and James Larkin currently face a charge of conspiracy to pimp, and Ferrer faces multiple additional charges of pimping and pimping of a minor.

The allegations are that Defendants conspired to create and organize a website that allows sex trafficking to take place. The People assert that Defendants created such a site, knowing that prostitutes and/or pimps use the site to advertise prostitution, and Defendants did so with the intent to derive support and maintenance from the prostitution resulting from the advertisements. The People allege that Defendants' plan has come to fruition and that they have derived financial support and maintenance from the prostitution resulting from the advertisements third parties pay Backpage.com to place. Allegedly, Defendants have also derived support from prostitution resulting from content created by Defendants when they took content from third party advertisements placed on Backpage.com and posted new advertisements on EvilEmpire.com and BigCity.com – sites also created and maintained by Defendant Ferrer.

On October 19, 2016, Defendants filed a demurrer to the felony complaint against them. Against the backdrop of unsuccessful attempts by the California and other state Attorneys General to shut down adult online advertising, the Defendants argue that the instant prosecution cannot go forward. Defendants claim that the complaint and prosecution are: barred by the First Amendment, legally deficient under Section 230 of the Communications Decency Act ("CDA"), and devoid of any facts that constitute public offenses under the criminal statutes.

Defendants also sought this Court to take judicial notice of several documents related to the efforts of several Attorneys General to challenge Backpage's continued participation in the online "Adult Services" classified sector. The People have filed an opposition to both the demurrer and the request for judicial notice.

Courts legal analysis and tentative ruling

1. Complaint states facts that constitute public offenses

The Defendants argue that the court should grant the demurrer because the Complaint fails to allege any public offense. Rather, Defendants maintain, the People are pursuing a theory of prosecution based on allegations that third parties posted content allegedly relating to unlawful conduct. Defendant Ferrer also claims that the pimping charges against him are deficient because there is nothing to connect Ferrer to any of the advertisements associated with the nine victims. (Def. 24-25) All the defendants allege that the complaint's conspiracy charge is deficient because it does not address several elements of conspiracy. (Def. 25-26) The People claim that the complaint expressly alleges that Defendant Ferrer "knowingly and repeatedly took the earnings of victims engaged in prostitution because his livelihood depended on it." (Opp. 18) As to the conspiracy between all the defendants, the People assert that the complaint expressly alleges they conspired together to commit pimping for the purpose of further enriching themselves. (Opp. 19) The People maintain that level of specificity is all that is required to provide notice under Penal Code section 952. (Opp. 18-20) The People argue that Defendants' assertion that the complaint does not adequately state facts that constitute public offenses belies confusion between a civil and criminal pleading requirements. (Opp. 20) As stated below, the key issue here is whether Defendants are able to claim immunity under the CDA. Such ability to claim liability would not necessarily render the complaint deficient. The charging instrument however, is sufficient in this case.

2. Defendants Challenge is Appropriately Raised in a Demurrer

Initially, the People claim that a demurrer is not the appropriate vehicle in which to raise a defense of immunity under the CDA. Rather, the People contend that such immunity may only be raised as an affirmative defense. This Court disagrees.

A defendant may demur only on delineated statutory grounds. (Pen. Code, § 1004; *People v. Saffell* (1946) 74 Cal.App.2d supp. 967, 972.) These include the ability to challenge alleged defects on the face of the accusatory pleading and on the grounds that the pleading includes information that would be a bar to prosecution. (Pen. Code, § 1004. *See also People v. Goodman* (2014) 225 Cal.App.4th 950, 956.) The language of the CDA itself states, “No cause of action may be brought and no liability will may be imposed under any State or local law that is inconsistent with this section.” (47 U.S.C. §230 (e) (3) (emphasis added).) This statutory language clearly demonstrates a legislative intent to provide both a bar to prosecution and an affirmative defense at trial. Thus, the question of immunity under the CDA may be properly raised in a demurrer.

3. The First Amendment is implicated

Defendants contend that the First Amendment bars prosecution, as the People are seeking to prosecute individuals for publishing third party content. However, this case is different than other cases litigated by Backpage where state legislation attempted to prohibit the publication of advertisements for commercial sex abuse with a minor. (Compare *Backpage.com, LLC v. Hoffman*, 2013 U.S. Dist. LEXIS 119811 [New Jersey law directed at advertising commercial sexual abuse of a minor]; *Backpage.com, LLC v. McKenna* (2012) 681 F.Supp.2d 1262 [Washington state law criminalizing knowing publication of information containing a depiction of a minor and an offer of sex for “something of value”]; *Backpage.com LLC v. Cooper* (2013) 939 F.Supp.2d 805 [Tennessee law criminalizing the act of selling an advertisement for commercial sex with a minor].) Quite simply, the instant charges are not based on an overt attempt to criminalize the act of publication, and traditional First Amendment analysis is not required here. That is not to say that the First Amendment is not implicated. Indeed, the protections afforded by the First Amendment were the motivating factors behind the enactment of the CDA. Congress expressly intended to relieve online publishers from liability for publishing third-party speech. (47 U.S.C. § 230) Thus, the relevant question in this case is whether, and to what extent, Defendants’ activity entitles them to protection of their First Amendment rights through the immunity provision of the CDA.

4. Immunity Under the Communications Decency Act

The CDA provides immunity for online publishers and distributors of content generated by third parties. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39.) Protection from the CDA is broken down into three parts. Conduct is shielded if the defendant (1) is a provider or user of an interactive computer service; (2) that the plaintiff seeks to treat as a publisher or speaker; (3) of information provided by another information content provider. (*Fields v. Twitter, Inc.* (2016 U.S. Dist. LEXIS 105768, *8; *Doe v. Backpage.com LLC* (2016) 817 F.3d 12, 19; 47 U.S.C. §230.) “There has been near-universal agreement that section 230 should not be construed grudgingly.” (*Doe, supra*, 817 F.3d at 118 [citations omitted].)

The second component is the instant source of dispute. Defendants assert that Backpage.com is an internet service provider that merely allows third parties to publish their content, and any prosecution seeks to impermissibly treat them as the speaker. The People respond that the CDA does not protect those who knowingly commit their own crimes on the internet.

To determine whether defendant faces a claim that seeks to treat the defendant as a publisher or speaker of information provided by a third party, “courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a publisher or speaker.” (*Fields, supra*, 2016 U.S. Dist. LEXIS 105768, *10, quoting *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1101-02.) Moreover, because distributors are included in the publisher category, distributors are also entitled to protection under the CDA. After all, publication includes every repetition and distribution of material. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 45.) Under the CDA, “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce

immune.” (*Fair Housing Council of San Fernando Valley v. Rommates.com, LLC*, (9th Cir. 2008) 521 F.3d 1157, 1170-1171.) The Ninth Circuit has recognized that although “there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality...Such close cases must be resolved in favor of immunity...” (Id at 1174.)

There are two possible theories of prosecuting Defendants for pimping, the target offense in this case. A defendant can be convicted of pimping under a theory that involves actual solicitation of prostitution. Alternatively, defendants may be prosecuted under the theory is that defendants derived support from the earnings of another’s act of prostitution. (*See McNulty, supra*, 202 Cal.App.3d at 630 [stating the two theories of prosecution for pimping].) The People assert that the allegations are that the Defendants “knowingly derived support from prostitution earnings, *i.e.*, profited from prostitution.” The People also assert that Defendants have been charged “based on the content that they created.” (Opp. 14, 21) The People claim that Defendants created this content by posting advertisements on EvilEmpire.com and BigCity.com “using content developed from Backpage.com Escort users.” (Opp. 21) Notably, there are no allegations that the victims’ advertisements were listed on any site except for Backpage.com.

1. *Theory that Defendant’s derived financial support from prostitution*

The People maintain that pimping will be shown when the People demonstrate that Defendants acquired income from prostitution resulting from advertisements placed in Backpage.com. The People assert that Defendants agreed upon a business model to maximize the receipt of prostitution earnings and committed many overt acts in furtherance of this objective. (Opp. 3)

In support, the People cite to *People v. Grant* (2011) 195 Cal.App.4th 107. *Grant* discusses a distinction between financial support received by the prostitute (illegal) and funds paid by the prostitute for services rendered or other purposes (legal). The appellate court made clear that “the statutory prohibition does not preclude a person from accepting a known prostitute’s funds gained from the prostitute’s lawful activities or for purposes other than the person’s support and maintenance.” (*Id* at 116. *See also Allen v. Stratton* (C.D.Cal. 2006) 428 F.Supp.2d 1064, 1072, fn 7 [a natural reading of the pimping statute does not apply to an individual who provides a legitimate professional service to a prostitute even if paid with proceeds earned from prostitution, the service provider derives support from his own services]; *People v. Reitzke* (1913) 21 Cal.App.740, 742 [a legitimate defense to pimping is that a prostitute loaned the defendant money for the purpose of going into the saloon business, or for any other purpose except the purpose of being supported or maintained by the prostitute].)

Here, there is no dispute that Backpage charged money for the placement of advertisements. Does this qualify as services rendered for legal purposes? Given the services provided by the online publisher, the answer to that question is yes. Providing a forum for online publishing is a recognized legal purpose that is generally provided immunity under the CDA. This immunity has been extended by the courts to apply to functions traditionally associated with publishing decisions, such as accepting payment for services and editing. (*See e.g., Fields, supra*, 2016 U.S. Dist. LEXIS 105768, *11-12 [Twitter immune against claims that it provided ISIS material support through use of its services because protected publishing activity included decisions about: what third party content may be posted online; monitoring, screening, and deletion of content; and whether to prevent posting].) In fact, the People acknowledge that the mere act of accepting money for postings is permissible. (Opp. 9) The case law is clear that, immunity is removed when the service provider affirmatively acts to create the offensive content.

This Court draws support for its conclusion from cases in other jurisdictions. In *Doe*, for example, the plaintiffs alleged that, beginning at age 15, they were trafficked through advertisements on Backpage.com and Backpage profited from their victimization. The plaintiffs filed suit against Backpage.com for violating the Trafficking Victims Protection

Reauthorization Act (“TVPRA”) which prohibits knowingly benefitting financially from sex trafficking. (*Doe, supra*, 817 F.3d at 15.) Plaintiffs’ theory was that Backpage engaged in a course of conduct designed to facilitate sex traffickers’ efforts to advertise their victims on the website by only charging for posts made in the “Adult Entertainment” section, and allowing users to pay an additional fee for “Sponsored Ads,” which increased the number of times the advertisement appeared. (*Id.* at 17.) Plaintiffs also alleged that Backpage tailored its posting requirements to make trafficking easier by not blocking repeated attempts to post and by allowing users to pay anonymously through prepaid credit cards or digital currencies. (*Id.* at 16.)

Backpage moved to dismiss the suit under Federal Rule of Civil Procedure 12(b) (6). The district court granted the motion and found that the CDA provided immunity from the claims. On review, the First Circuit Court of Appeals affirmed the district court’s ruling. The First Circuit rejected the plaintiffs’ assertion that Backpage participated in an affirmative course of conduct and actual participation in sex trafficking. The court noted that the challenged were traditional publisher functions, and thus immune from suit under the CDA. (*Id.* at 20) The court also noted that the plaintiffs were harmed when they were trafficked through the advertisements. Without the content of those advertisements – which was created by a third party - there would be no harm. (*Id.* at 20.) The court dismissed the plaintiffs’ assertion that Backpage’s decisions about what measures to implement demonstrate a deliberate attempt to make sex trafficking easier. The court stated, “Whatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content.” (*Id.* at 21.) The court went on to state “even if we assume, for argument’s sake, that Backpage’s conduct amounts to ‘participation in a [sex trafficking] venture’ – a phrase that no published opinion has yet interpreted – the TVPRA claims as pleaded premise that participation on Backpage’s actions as a publisher or speaker of third-party content. The strictures of section 230(c) foreclose such suits.” (*Ibid.*) The First Circuit specifically held that “claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1).” (*Id.* at 22.)

Similarly, in *M.A. ex rel. P.D. v. Village Voice Media Holdings, LLC* (E.D. Mo. 2011) 809 F.Supp.2d 1041, the plaintiff sought to hold Backpage responsible for her victimization through sex trafficking that took place as a result of advertisements placed on Backpage.com. The plaintiff alleged that Backpage accepted a fee for such advertisements, knew that advertisements were for prostitution and “created information” by hosting a search engine, providing instructions for increased visibility of advertisements and allowed for anonymous payment. (*M.A., supra*, 809 F.Supp.2d at 1044.) The court granted the Defendant’s motion to dismiss on the basis that the CDA provided immunity. The court reasoned that there was no allegation that Backpage was responsible for the actual development of any portion of the content of the advertisements or specifically encouraged the development of the offensive nature. (*Id.* at 1052.) (See also Opp. 21; Def. 21-22)

This case is very similar to those discussed. As alleged here, the prostitution took place as a result of an advertisement placed by a third party. Backpage’s decision to charge money to allow a third party to post content, as well as any decisions regarding posting rules, search engines and information on how a user can increase ad visibility are all traditional publishing decisions and are generally immunized under the CDA. In short, the victimization resulted from the third party’s placement of the ad, not because Backpage profiting from the ad placement.

2. *Theory that Defendant solicited the prostitution*

The People argue that Defendant Ferrer created content from escort advertisements on Backpage to create advertisements on EvilEmpire.com and BigCity.com “using content developed from Backpage Escort users, giving users no apparent way to create or edit content on EvilEmpire.com.” (Opp. 14, 21; Comp. 2) The People assert that “the Complaint is predicated on the Defendants’ conduct – not Backpage’s content – and part of that conduct involved the

creation and development of sites like EvilEmpire.com to further Backpage's profits from prostitution." (Opp. 22) Under this theory, Defendants allegedly solicited prostitution and would not be entitled to immunity under the CDA.

Once a website does more than simply maintain neutral policies that prohibits or limits certain content, it runs the risk of becoming a content provider and not immune from liability under the CDA. (*See Phan v. Pham* (2010) 182 Cal.App.4th 323 [holding when Defendant's own acts material contribute to the illegality of the material, immunity under the CDA will be lost].) For example, in *Fair Housing v. Roommates.com* (9th Cir. 2008) 521 F.3d 1157, the defendant ran a website for the purposes of matching potential roommates together. In order to utilize the website, participants were required to answer a series of questions regarding a user's sex, sexual orientation and whether they will bring children to the household. Paid subscriptions provided access to detailed preferences from potential roommates. (*Id* at 1161-1162)

The Fair Housing Councils of two cities sued Roommates, and alleged a violation of the Fair Housing Act and California housing discrimination laws. The Councils alleged that the website was acting as a housing broker in ways that it could not lawfully do off-line. (*Id* at 162.) The district court granted Roommate's motion to dismiss based on immunity provided by the CDA. The Ninth Circuit reversed.

The Ninth Circuit found that by creating the questions and choice of answers that a real estate broker was legally prohibited from asking and then requiring subscribers to answer them, Roommate became an information content provider and not immune under the CDA. (*Id* at 1164.) The court contrasted Roommate's behavior, where it both elicited the allegedly illegal content and made aggressive use of it in conducting its business, with utilizing a neutral classification tool or search engine that does nothing to enhance the illegality of the content. (*Id* at 1172.)

The Ninth Circuit's reasoning in *Roommates* was adopted by the Tenth Circuit in *Federal Trade Commission v. Accusearch Inc.* (10th Cir. 2009) 370 F.3d 1187. In that case, the Tenth Circuit refused to allow Accusearch to claim immunity under the CDA against claims that Accusearch violated the Telecommunications Act by selling confidential telephone records without customer consent. Accusearch paid researchers to illegally obtain the phone numbers, then resold the numbers online. The court determined that such actions went beyond providing a neutral conduit for confidential telephone information. Rather, Accusearch actively developed the information and was therefore responsible for the creation of the offensive content. (*Id.* at 1198-1199.) The court ultimately determined that Accusearch engaged in practices of an information content provider and was not entitled to immunity. (*Id* at 1201.)

The People maintain Backpage created content similar to in *J.S. v. Vill. Voice Media Holdings, LLC* (2015) 184 Wn.2d 95J.S. In that case, advertisements featuring three minor girls were posted online on a site owned by Backpage. These girls became victims of sex trafficking and brought suit against Backpage. Backpage moved to dismiss the case on the basis of immunity provided by the CDA. The Washington Supreme Court refused to grant the motion to dismiss. (*Id* at 98-99.) The *J.S.* court stated that the case turned on whether Backpage merely hosted the advertisements or helped develop the content of those advertisements. (*Id* at 101)

Applying the applicable state standard for a motion to dismiss, the *J.S.* court found that the plaintiffs alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content. Specifically, those allegations included that Backpage intentionally developed its website to require information that allows and encourages illegal trafficking of underage girls, developed content requirements that it knows will allow solicitors to evade law enforcement and that Backpage knows that the foregoing content requirements are a fraud and ruse actually aimed at helping pimps and prostitutes. (*Id* at 102.) The *J.S.* court found that it did not appear

beyond a reasonable doubt that no facts existed that would justify relief, and denied Backpage’s motion to dismiss. (*Id* at 103.)

Here, the People allege that Defendants “created” content and are not entitled to immunity. However, on the face of the allegations, Defendants have, at most, republished material that was created by a third party. The People allege that the content was taken from ads placed by Backpage Escort users and posted onto EvilEmpire.com. The declaration in support of Defendants’ arrest warrant states that the ads placed in EvilEmpire.com were “essentially identical” to the ads placed by the third party on Backpage.com and that EvilEmpire was an “additional platform for Backpage Escort ads.” This demonstrates republication, not content creation. Republication is entitled to immunity under the CDA. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 63.) As stated above, Congress struck a balance in favor of free speech in that Congress did not wish to hold liable online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial. **Congress has spoken on this matter and it is for Congress, not this Court, to revisit.**

Courts tentative ruling:

Defendants’ demurrer is GRANTED.

Defendants’ request for judicial notice is DENIED.

Dated:

Honorable Michael G. Bowman
Judge of the Superior Court of California
County of Sacramento