

June 15 2017 9:27 AM

KEVIN STOCK  
COUNTY CLERK  
NO. 12-2-11362-4

HONORABLE KATHRYN J. NELSON  
Hearing date: May 24, 2017, at 1:00 p.m.  
With oral argument

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

J.S., et al.,

Plaintiffs,

v.

VILLAGE VOICE MEDIA HOLDINGS,  
L.L.C., d/b/a Backpage.com;  
BACKPAGE.COM, L.L.C.; NEW TIMES  
MEDIA, L.L.C., d/b/a Backpage.com; and,  
BARUTI HOPSON,

Defendants.

NO. 12-2-11362-4

PLAINTIFFS' RESPONSE IN  
OPPOSITION TO VILLAGE VOICE  
MEDIA HOLDINGS, LLC;  
BACKPAGE.COM, LLC, AND NEW  
TIMES MEDIA, LLC'S MOTION FOR  
SUMMARY JUDGMENT

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## I. RELIEF REQUESTED

Plaintiffs J.S., S.L., and L.C. respectfully request the Court deny Backpage’s motion for summary judgment because the evidence obtained to date *overwhelmingly* shows that Backpage designed and operated its website to induce, encourage, and facilitate sex trafficking and prostitution. In ruling on the present motion, however, this Court is not obliged to reinterpret the extensive and often conflicting web of case law dealing with Section 230. Yet Backpage goes to great lengths in its motion to inundate the Court with cherry-picked case law in an obvious attempt to refashion a self-serving framework for applying Section 230. Backpage’s arguments are improper because the matter has already been decided on appeal. The “law of the case” is therefore fixed and Backpage cannot re-posit its interpretation of Section 230, particularly given the Supreme Court’s clear and concise instructions for applying Section 230 to this case.

Simply put, Section 230 provides protection to neutral websites that are not “information content providers.” An “information content provider” “means any person or entity that is *responsible*, in whole *or in part*, for the creation *or development* of information provided through the internet.”<sup>1</sup> The Washington Supreme Court adopted a distinct interpretation of Section 230 wherein “a website [i.e. Backpage] helps *to develop* unlawful content, and thus falls within the exception to section 230, if it *contributes materially* to the alleged illegality of the conduct.”<sup>2</sup> As applied to this case, the Supreme Court held that if Backpage designed and operated its website “to *induce* sex trafficking” then it is deemed to have materially contributed to the underlying illegal conduct and cannot invoke Section 230.<sup>3</sup> Put another way, the dispositive inquiry on the present motion is: *Did Backpage induce sex trafficking on its website?*

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<sup>1</sup> 47 U.S.C. § 230 (f)(3) (emphasis added).

<sup>2</sup> *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 103, 359 P.3d 714 (2015) (emphasis added) (quoting *Roommates.com, LLC*, 521 F.3d 1157, 1168).

<sup>3</sup> *Id.* (emphasis added).

1 Backpage's motion is staunchly focused on refuting Plaintiffs' allegations from five  
2 years ago but devotes remarkably little attention to the newly discovered evidence. Before  
3 discovery was ordered, Plaintiffs knew next to nothing about Backpage's internal policies and  
4 practices for operating the "escort" section of its website. All Plaintiffs had were the publicly  
5 available "posting rules" and hundreds of thousands of "escort" ads that blatantly appeared to  
6 sell sex for money.<sup>4</sup> Yet even then, the Supreme Court affirmed Judge Serko's denial of  
7 Backpage's motion to dismiss under Section 230.

8 Subsequent discovery has revealed Backpage's efforts to induce sex trafficking and  
9 prostitution extend well beyond its posting rules. The *overwhelming* evidence shows Backpage  
10 developed and employed a sophisticated practice of actively "editing" and "moderating" escort  
11 ads to facilitate sex trafficking and conceal the blatantly illegal conduct from law enforcement  
12 and the media. Backpage's employees also worked directly with its users (pimps) to help draft  
13 more discrete and undetectable sex trafficking and prostitution ads. Backpage's practices were  
14 so egregious that the company was investigated by Congress and, in January 2017, the United  
15 States Senate Permanent Subcommittee on Investigations issued a 53-page report titled  
16 BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING.<sup>5</sup> Still Backpage  
17 continues to represent that its website was merely "misused" and that it bears no responsibility  
18 for the vast criminal enterprise that it intentionally created, actively induced, and lucratively  
19 profited from.<sup>6</sup>

20 Backpage's motion must be denied because a reasonable juror could easily conclude that  
21 Backpage systematically induced and materially contributed to prostitution and sex trafficking  
22 on its website. A reasonable juror could also easily conclude that Backpage's conduct extended  
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24 <sup>4</sup> See e.g. Exhibits A and B attached to Plaintiffs First Amended Complaint for Damages.

25 <sup>5</sup> STAFF REP. OF S. PERM. SUBCOMM. ON INVESTIG., 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF  
ONLINE SEX TRAFFICKING (Comm. Print 2017) ("Senate Report"), Pfau Decl., Ex. 47.

26 <sup>6</sup> Promoting prostitution is a felony crime in Washington State (see RCW 9A.88.060), so is acting as an accomplice  
in the rape of a child (see RCW 9A.08.020 and RCW 9A.44.076-079).

1 well beyond mere “editorial choices” but instead formed an integral part of the criminal activity  
2 occurring on its website. Both findings would disqualify Backpage from Section 230 and First  
3 Amendment protection. The Court should deny Backpage’s motion for summary judgment.

## 4 II. STATEMENT OF FACTS

5 Over the last decade, Backpage has operated the largest online sex trafficking and  
6 prostitution enterprise in the United States. Annual revenues in 2013 and 2014 surpassed \$100  
7 million from the sale of “escort” ads,<sup>7</sup> which make up nearly 100% of Backpage’s income due  
8 to their “high degree of monetization.”<sup>8</sup> Backpage’s corporate records and testimony of key  
9 witnesses show that it utilized the following tactics to induce, facilitate, and ultimately profit  
10 from sex trafficking on the backpage.com website: (1) instructing pimps “how to” draft sex  
11 trafficking ads that are less obvious, and thus, less troublesome for Backpage; (2) directly  
12 assisting pimps in drafting sex trafficking ads that are less obvious, and thus, less troublesome  
13 for Backpage; (3) removing evidence of criminality from the website; and (4) providing a  
14 means of “cover” (i.e. plausible deniability) to enable Backpage to continue its illicit operation  
15 by claiming its website is being “misused” and is not intended to encourage or facilitate sex  
16 trafficking.

17 The tactics outlined above comprise a combination of measures designed and  
18 implemented by Backpage to induce and facilitate sex trafficking and prostitution ads within the  
19 “escort” section of its website.

### 20 A. Backpage Designed and Continuously Refined its Editing and Moderation 21 Practices to Actively Induce and Facilitate Sex Trafficking

22 Despite the fact that Backpage’s executives categorically pled the Fifth Amendment, the  
23 limited discovery provided to Plaintiffs reveals a long and concerted history of Backpage  
24 designing and continuously developing screening, editing, and “moderation practices” to induce  
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26 <sup>7</sup> Backpage Financial Data 2012 to present, Pfau Decl. at Ex. 4.

<sup>8</sup> Backpage.com Financial Audit, May 2011, at p. 8, Pfau Decl. at Ex. 5.

1 and facilitate criminal activity on its website. Numerous internal correspondence, training  
2 materials, and documents show that the purpose was to actively remove certain terms and  
3 images indicative of prostitution, sex trafficking, and child sex trafficking. The  
4 “clean/sanitized” version of the illegal ad was then posted to the website, leaving all essential  
5 information to complete the transaction, such as phone number, pricing terms, coded solicitation  
6 language, and non-nude photographs. As Backpage grew more sophisticated and wary of  
7 criminal and civil consequences, its practices “evolved” to include a streamlined combination of  
8 manual and automatic measures. But the obvious intent never changed.

9 Beginning in 2008 and 2009, Backpage employed a combination of posting rules,  
10 content requirements, manual moderation techniques, and automated filters to remove  
11 “references to acts of prostitution or sex acts in exchange for money.” To start, Backpage  
12 utilized its “Posting Rules” and “Content Requirements” to instruct pimps “how to” post sex  
13 trafficking ads according to the “Backpage format” and thereby avoid detection by law  
14 enforcement:

### 15 **Posting Rules**

16 You agree to the following when posting in this category:

- 17 • I will not post obscene or lewd and lascivious graphics or photographs which  
18 depict genitalia or actual or simulated sexual acts;
- 19 • I will not post any solicitation directly or in “coded” fashion for any illegal  
20 service exchanging sexual favors for money or other valuable consideration;
- 21 • I will not post any material on the Site that exploits minors in any way;
- 22 • I will not post any material on the Site that in any way constitutes or assists  
23 in human trafficking. ...
- 24 • Any post with terms or misspelled versions of terms implying an illegal  
25 service will be rejected. Examples of such terms include without limitation:  
26 'greek', 'gr33k', 'bbbj', 'blow', 'trips to greece', etc. ...<sup>9</sup>

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<sup>9</sup> Backpage Internal Correspondence Regarding Posting Rules, Pfau Decl. at Ex. 6.

## Content Requirements

- Do not post naked images, e.g. uncovered genitalia, bare butts, nipple or nipple area, sex acts, etc.;
- Do not post images using hands, arms, transparent clothing, graphic box or pixelization to cover bare breasts or genitalia.
- Pricing for legal adult services must be for a minimum of one hour Example: 15 minute services are not allowed, no blank pricing, etc. ...
- Do not use code words such as ‘greek’, gr33k ‘bbbj’, ‘blow’, GFE, PSE, ‘trips to greece’, etc.
- Do not suggest an exchange of sex acts for money.
- Do not post content which advertises an illegal service.<sup>10</sup>

Users who failed to adhere to would receive an error message prompting them to “try again.”<sup>11</sup>

For manual review, Backpage maintained a list of “forbidden words,” starting at least as early as 2009. These words included terms indicative of sex trafficking, such as pricing increments of less than an hour (e.g. 15 minutes, half-hour, etc.). For part of that year, moderators were instructed to delete an entire ad if certain forbidden terms appeared. These terms included the most unambiguous references to prostitution, such as “Full Service,” “Blowjob,” or other “blatant sex act” terms.<sup>12</sup> In addition, as early as March 2008, Backpage used automated filters to delete ads containing a set of similar “blatant sex ad” words.<sup>13</sup> Backpage would delete the ad and not refund the money to the sex trafficker. However, users (pimps) were free to submit a milder version of a previously rejected ad, which Backpage would then post to its “escort” section. Over time, this practice “trained” users to submit ads that fit within the Backpage sex trafficking format.<sup>14</sup>

By 2009, however, it became clear to Backpage that this policy was not sufficiently effective at disguising widespread illegal activity. In one representative exchange, a manager of

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<sup>10</sup> Content Requirements, Pfau Decl. at Ex. 7.

<sup>11</sup> *Id.*

<sup>12</sup> Email instructing moderators about “Forbidden Terms,” dated July 22, 2009, Pfau Decl. at Ex. 8.

<sup>13</sup> Correspondence with DesertNet regarding Global Filter, dated March 27, 2008, Pfau Decl. at Ex. 9.

<sup>14</sup> Declaration of Dr. Dominique Roe-Sepowitz, Pfau Decl. at Ex. 10.

1 emailed Backpage's CEO, Carl Ferrer, asking why Backpage advised users to post "legal" ads  
2 and to "not suggest an exchange of sexual favors for money." The manager wrote, "[c]learly  
3 everyone on the entire backpage network breaks" those rules. Ferrer did not disagree. Instead  
4 he replied that the posting rules are "about CDA protection per our attorney."<sup>15</sup>

5 By May 2009, however, Ferrer was moving toward a new solution: directing Backpage  
6 employees to manually *edit* the language of adult ads to conceal the nature of the underlying  
7 transaction. In response to a news article regarding a potential criminal investigation of sex  
8 trafficking in South Carolina, Ferrer instructed the company's Operations and Abuse Manager,  
9 Andrew Padilla, to scrub local Backpage ads that South Carolina authorities might review: "Sex  
10 act pics remove ... In South Carolina, we need to remove any sex for money language also."<sup>16</sup>  
11 Significantly, Ferrer did not direct employees to *reject* "sex for money" ads in South Carolina,  
12 but rather to sanitize those ads to give them a veneer of lawfulness. Padilla replied to Ferrer  
13 that he would "implement the text and pic cleanup in South Carolina only."

14 Those editing practices soon evolved into a systematic process. By December 2009,  
15 Backpage executives prepared a training session for their team of "moderators." The  
16 PowerPoint presentation prepared for the session indicates that the "Adult Moderation pre-  
17 posting review queue" would be "fully implemented by Jan. 1[, 2010]."<sup>17</sup> The presentation  
18 reiterated Backpage's "Terms of Use," including the rule against "[p]osting any solicitation  
19 directly or in 'coded' fashion for any illegal service exchanging sexual favors for money or  
20 other valuable consideration." Importantly, however, the presentation explained that "Terms  
21 and code words indicating illegal activities require removal of ad *or words*." One slide of the  
22 presentation posed several questions including: "Can you eliminate some words and not  
23 others?"<sup>18</sup> Internal company documents confirm that the answer was *yes*: Backpage executives  
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25 <sup>15</sup> Email from Carl Ferrer to Joel Pollock dated February 26, 2009, Pfau Decl. at Ex. 11.

26 <sup>16</sup> Internal emails dated May 17, 2009, Pfau Decl. at Ex. 12.

<sup>17</sup> Moderation Training PowerPoint, Pfau Decl. at Ex. 13.

<sup>18</sup> *Id.* at p. 7.

1 soon began instructing all moderators to manually remove words, phrases, and images that  
2 indicated an illegal transaction was being offered—and then publish the edited ads.<sup>19</sup>

3 Backpage began to formalize these new instructions on manual editing of content in  
4 early 2010. In an April 2010 email to himself with the subject line “Adult clean up tasks,”  
5 Ferrer confirmed that, as of April 2010, staff were “moderating ads on a 24/7 basis.”<sup>20</sup> With  
6 regards to “current” practices, Ferrer noted that “Ads with bad images or bad test [sic – text]  
7 *will have the image removed or the offending text removed.*” As for “additional steps,” Ferrer  
8 noted that “text could be cleaned up more as users become more creative.”<sup>21</sup>

9 Backpage executives were busy developing a sophisticated system to help street pimps  
10 create effective human sex trafficking ads that were less prosecutable by law enforcement. It  
11 was a system designed to suppress evidence by controlling words, phrases, and images that  
12 were too indicative of sex trafficking. Evidence the less sophisticated street pimps would  
13 unwittingly provide but for Backpage’s moderation practices.<sup>22</sup>

14 By July 2010, Backpage executives were praising moderation staff for their editing  
15 efforts. Ferrer circulated an agenda for a July 2010 meeting that applauded moderators for their  
16 work on “Adult content” and encouraged staff to “Keep up the good work removing bad  
17 content.” Ferrer elaborated in an August 2010 email to an outside vendor: “We currently staff  
18 20 moderators 24/7 who do the following: \*Remove any sex act pics in escorts \*Remove any  
19 illegal text in escorts to include code words for sex for money.”<sup>23</sup>

20 On September 1, 2010, Backpage notified its moderators that the company was being  
21 “pushed to get the site as clean as possible in the next 7 days. I’m empowering the Phoenix  
22 staff to start deleting ads when the violations are extreme and repeat offenses. When we delete  
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24 <sup>19</sup> See e.g. Carl Ferrer emails dated April 25 and 26, 2010, Pfau Decl. at Ex. 14 and Ex. 15.

25 <sup>20</sup> Carl Ferrer email dated April 26, 2010, Pfau Decl. at Ex. 14.

26 <sup>21</sup> *Id.*

<sup>22</sup> Decl. of Dr. Roe-Sepowitz, Pfau Decl. at Ex. 10.

<sup>23</sup> Email from Ferrer dated August 25, 2010, Pfau Decl. at Ex. 15.



1 ads, we're going to send an email from Sales. . . . We'll do everything we can to notify the users  
2 so it's not a total snub and we'll do everything we can to affect only the worst apples."<sup>24</sup>

3 On September 4, 2010, when Craigslist, Backpage's chief competitor, shut down its  
4 entire adult section, Backpage executives recognized it was "an opportunity" and "[a]lso a time  
5 when we need to make sure our content is not illegal" due to expected public scrutiny.<sup>25</sup>

6 Backpage executives initially responded by expanding the list of forbidden terms that  
7 could trigger the complete deletion of an entire ad—whether by operation of an automated filter  
8 or by moderators.<sup>26</sup> But Backpage executives quickly recognized that the deletion of ads with  
9 illegal content was bad for business. Ferrer explained his rationale to the company's outside  
10 technology consultant, DesertNet:

11 We are in the process of removing ads and pissing off a lot of users who will  
12 migrate elsewhere. I would like to go back to having our moderators remove bad  
13 content in a post and then locking the post from being edited.<sup>27</sup>

14 The more "[c]onsumer friendly" approach, Ferrer concluded, was to "[r]emove bad  
15 content in the post" and allow moderators "to be subjective and not cause too much damage."  
16 By contrast, removing the *entire* post "[h]urts [the] user financially" and does not teach the user  
17 "what they did wrong."<sup>28</sup> Backpage decided to focus on ad editing—both automatic and  
18 manual. As part of that process, Backpage instructed its moderators:

19 To make your efforts count, you'll want to lock any ad you have to edit. You  
20 can do this by Editing the Ad in Object Editor. In the Ad Object, scroll down to  
21 the Violation Flag field and check the Violated Terms of Use box. Then update  
22 the ad object. This prevents a user from making any future edits to that specific  
23 ad.<sup>29</sup>

24 To be perfectly clear, the above emails show Backpage (Ferrer and Padilla) recognizes  
25 (1) the content of the escort ads indicate illegal activity; (2) the moderators were instructed to  
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<sup>24</sup> Email from Padilla dated September 1, 2010, Pfau Decl. at Ex. 55.

<sup>25</sup> Email from Ferrer dated September 4, 2010, Pfau Decl. at Ex. 16.

<sup>26</sup> Email from Padilla dated September 6, 2010, Pfau Decl. at Ex. 17.

<sup>27</sup> Email from Ferrer dated September 25, 2010, Pfau Decl. at Ex. 18.

<sup>28</sup> *Id.*

<sup>29</sup> Email from Padilla, dated October 16, 2010, Pfau Decl. at Ex. 54.

1 edit out any content indicative of illegal conduct and lock the ad to prevent the user from  
2 changing the edited ad; and (3) these efforts were undertaken to remove evidence of criminality  
3 in a manner that would maximize company profits.

4 Internal correspondence reveals that Backpage sought to maintain sufficient veiled  
5 terminology in each ad to communicate its illegal nature: “We’re still allowing phrases with  
6 *nuance* but if something strikes you as crude or obvious, remove the phrase.”<sup>30</sup> Clearly the  
7 posting rules, content requirements, and moderation practices were intended purely to solicit  
8 and encourage more discrete sex trafficking ads. This was because Backpage actively sought to  
9 conceal the illegal nature of ads from the authorities. Backpage would ramp up its “editing”  
10 efforts whenever an investigation into its illegal practices was pending: “You’re not going to  
11 get in trouble for being too clean right now. . . . it’s the language in ads that’s really killing us  
12 with the Attorney’s General.”<sup>31</sup>

13 On October 27, 2010, Ferrer emailed Padilla: “Removing bad pics and removing bad  
14 text like 15 min 1/2hour is critical. I think you will be busy.”<sup>32</sup> Later that same day, Ferrer also  
15 told Padilla that these alterations to the Posting Rules and Content Requirements “is such a big  
16 change to our users removing their ads is too harsh. Better to edit by removing bad text or  
17 removing bad language. We will do this for a few weeks to give users a chance to adjust.  
18 Editing takes time so we expect the queues to pile up some.”<sup>33</sup>

19 Padilla, in turn, instructed Backpage’s moderators “we won’t be removing ads for [bare  
20 butts, erect penises, breast sucking, GFE, PSE, pricing less than an hour]. These ads should be  
21 edited and ‘violated terms of use’ should be selected. We have to be fair to the users and give  
22 them time to adapt.”<sup>34</sup>

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25 <sup>30</sup> *Id.*

26 <sup>31</sup> Email from Padilla, dated 10/17/2010, Pfau Decl. at Ex. 63.

<sup>32</sup> Email from Ferrer, dated October 27, 2010, Pfau Decl. at Ex. 19.

<sup>33</sup> Email by Ferrer, dated October 27, 2010, Pfau Decl. at Ex. 20.

<sup>34</sup> Email from Padilla, dated October 27, 2010, Pfau Decl. at Ex. 21.

1           Around this same time, Ferrer and Padilla hired a company in India to help “moderate”  
2 thousands of “escort” ads per day. The moderation company emailed Padilla, assuring “editing  
3 the ads is a great idea and the team is certainly skilled for this, . . . We would also need to  
4 understand how unobtrusively we can achieve editing so that we maintain the essence of the  
5 [sex trafficking] ad.”<sup>35</sup>

6           Backpage’s moderators continued to create “clean” versions of sex trafficking ads by  
7 removing certain text and images well after 2010, and even went so far as to start sending “error  
8 messages” to “help” the user understand which sex trafficking term was not allowed in future  
9 postings. In a 2012 email, Ferrer complained to Padilla that a user/pimp was not properly  
10 informed which term in his ad prompted its rejection: “[The website] did not give the user a  
11 message. So, [the offending term] results in the user getting an error message *with no help*. I  
12 would like to verify all banned messages have errors that say, ‘Sorry this term ‘xxxxxxx’ is a  
13 banned term.’”<sup>36</sup>

14           Just as Plaintiffs initially alleged,

15           Finally, following an overhaul of the rules and requirements in October 2010, Backpage  
16 temporarily stopped rejecting sex trafficking ads that violated the new rules and requirements  
17 because to do so would be “too harsh” and users needed a “chance to adjust.”<sup>37</sup>

18       **B. Backpage Developed Sophisticated Editing Tools to “Strip” Words and Images**  
19       **From Ads Indicative of Prostitution and Child Sex Trafficking Before Posting the**  
20       **Same Ads to its Website**

21           Before September 2010, Backpage moderators manually reviewed and flagged ads with  
22 “inappropriate content.” Starting in September 2010, Backpage added the “Strip Term From  
23 Ad” function to its moderation practices, which soon became Backpage’s most important tool  
24 for sanitizing prostitution ads. By operation of this new filter, most of the “banned” words that

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25 <sup>35</sup> Email from moderation company, dated October 27, 2010, Pfau Decl. at Ex. 22.

26 <sup>36</sup> Email from Ferrer, dated May 11, 2012, Pfau Decl. at Ex. 23.

<sup>37</sup> Email by Ferrer, dated October 27, 2010, Pfau Decl. at Ex. 20.

1 previously resulted in rejection of an ad would simply be “stripped”—that is, automatically  
2 deleted—approximately 5 minutes after publication.<sup>38</sup>

3 The Strip Term from Ad filter concealed the illegal nature of countless ads,  
4 systematically deleted words indicative of criminality, and posted the new ad. In a December 1,  
5 2010, email addressed to Backpage moderators and copying Ferrer, Padilla touted the success of  
6 the Strip Term from Ad Filter, solicited ideas for additional words to be stripped, and attached  
7 the list of words to be stripped:

8 Between everyone’s manual moderation, both in the queue and on the site, and  
9 the Strip Term From Ads Filters, things are cleaner than ever in the Adult  
10 section.

11 In an effort to strengthen the filters even more and avoid the repetitive task of  
12 manually removing the same phrases everyday, can every moderator start  
13 making a list of phrases you manually remove on a regular basis? ...

14 Included in your lists should be popular misspellings of previously banned terms  
15 that are still slipping by.

16 To avoid unnecessary duplicates, I'm attaching a spreadsheet with the most  
17 current list of coded terms set to be stripped out.<sup>39</sup>

18 The spreadsheet attached to Padilla’s email reveals hundreds of terms Backpage  
19 identified as “solid sex for money terms” that were automatically stripped from escort ads  
20 before publication. These terms included “insider” terminology, such as “BBBJTCWS,” which  
21 according to Ferrer and Padilla, means “bare back blow job to completion with swallow.”<sup>40</sup>  
22 Backpage was especially sensitive to terms that undermined its fallacious cover story:  
23 “‘lactating’ is a little trickier, it implies some exchange of bodily fluids which kills our  
24 ‘companionship’ argument.”<sup>41</sup> Backpage also automatically removed more commonly known  
25 “solid sex for money terms” like “blowjob” and “quickie.”<sup>42</sup>

26 <sup>38</sup> Email from Ferrer dated September 25, 2010, Pfau Decl. at Ex. 18.

<sup>39</sup> Email from Padilla dated December 1, 2010, Pfau Decl. at Ex. 25.

<sup>40</sup> Email from Ferrer dated August 31, 2011, Pfau Decl. at Ex. 26.

<sup>41</sup> Email from Padilla, dated February 16, 2011, Pfau Decl. at Ex. 64.

<sup>42</sup> *Id.*

1 When a user submitted an adult ad containing one of the banned terms, Backpage's filter  
2 would automatically delete the term and the remainder of the ad *would be published*. As  
3 explained by Plaintiff's expert, Dr. Roe-Sepowitz, however, the Strip Term From Ad filter  
4 changed nothing about the real age of the person being sold for sex or the real nature of the  
5 advertised transaction.<sup>43</sup> But, as Padilla explained, the filter worked well to remove evidence of  
6 criminality, and as a result, Backpage's adult ads looked "cleaner than ever."<sup>44</sup>

7 Backpage did not stop at sanitizing adult ads for prostitution. Instead, Ferrer personally  
8 directed and approved the addition of terms to the Strip Term From Ad Filter with the full  
9 understanding of their references to *child* sex trafficking, such as "lolita," "teenage," "rape,"  
10 "amber alert," "little girl," "teen," "fresh," "innocent," "school girl," and "young."<sup>45</sup> For  
11 example, Ferrer told Padilla the word "Lolita" "is code for under aged girl [sic]."<sup>46</sup> When  
12 confronted with this at her 30(b)(6), Elizabeth McDougall initially stated that "Lolita" was  
13 added to the list not "because [Backpage] believed that the ad was an ad for sex with a minor"  
14 but merely because Backpage believed the ad was "just distasteful or objectionable."<sup>47</sup> When  
15 pressed on this response, Ms. McDougall finally admitted that a term like "Lolita" is indicative  
16 of "sex trafficking of minors."<sup>48</sup>

17 Similarly, in a June 7, 2011 email, Ferrer told a Texas law enforcement official that a  
18 word found in one Backpage ad, "amber alert," "is either a horrible marketing ploy *or some*  
19 *kind of bizarre new code word for an under aged person.*"<sup>49</sup> He told the official that he would  
20 "forbid" that phrase—without explaining that, inside Backpage, this meant filters would simply  
21 conceal the phrase through automatic deletion. Ferrer forwarded the same email chain to  
22 Padilla and noted that he had instructed a staff member to "add [amber alert] to strip out." A  
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24 <sup>43</sup> Decl. of Dr. Roe-Sepowitz, Pfau Decl. at Ex. 10.

<sup>44</sup> Email from Padilla dated December 1, 2010, Pfau Decl. at Ex. 25.

<sup>45</sup> Email from Padilla dated December 1, 2010, Pfau Decl. at Ex. 25.

<sup>46</sup> Email from Ferrer dated November 17, 2010, Pfau Decl. at Ex. 27.

<sup>47</sup> Dep. of Backpage's CR 30(b)(6), Pfau Decl. at Ex. 61 at p.53.

<sup>48</sup> *Id.* at p 54.

<sup>49</sup> Emails from Ferrer dated January 20, 2011 and June 8, 2011, Pfau Decl. at Ex. 28.

1 June 11, 2012 version of the banned terms list shows “amber alert” was deleted by the Strip  
2 Term From Ad filter.<sup>50</sup> Again, Ms. McDougall gave the same disingenuous excuse for why  
3 “amber alert” was added to the filter and the remaining “sanitized” ad was posted.<sup>51</sup>

4 In addition to automatically removing hundreds of words and phrases indicative of  
5 prostitution and child sex trafficking, Backpage programmed the filter to edit obvious  
6 prostitution price lists by deleting any time increments less than an hour (*e.g.*, \$50 for 15  
7 minutes)<sup>52</sup> and to strip references to a website called “The Erotic Review” or “TER”—a  
8 prominent online review site for prostitution.<sup>53</sup>

9 To the extent Backpage still permitted moderators to reject entire ads, it limited those  
10 rejections to (at most) egregious, literal sex-for-money offers. Backpage documents indicate  
11 that the company permitted moderators to delete only a *de minimis* share of adult ads in their  
12 entirety. In January 2011, for example, Ferrer estimated that “[a]bout 5 [adult] postings are  
13 removed ‘sex for money’ aka illegal ads out of a 1000 [sic]”—that is, 0.5% of ads.<sup>54</sup>

14 In fact, Backpage edited the language of the vast majority of ads in its adult section. On  
15 October 27, 2010, Sales and Marketing Director Dan Hyer wrote that “[w]ith the new changes,  
16 we are editing 70 to 80% of ads.”<sup>55</sup> By February 2011, Ferrer was boasting that “strip out  
17 affects almost every adult ad.”<sup>56</sup> “That’s pretty cool,” he continued, “to see how aggressive we  
18 are in using strip out.” This is an admission that Backpage more likely than not edited the  
19 content of the each Plaintiff’s ads.

---

22 <sup>50</sup> Email from Padilla with spreadsheet of stripped out terms, dated May 11, 2012, Pfau Decl. at Ex. 29.

23 <sup>51</sup> Pfau Decl. at Ex. 61, pp 51-52. Notably, when questioned about “Lolita” and “amber alert,” Ms. McDougall  
24 admitted that she did not discuss the reasons for including either term in the filters with *anyone* at Backpage.  
[30(b)(6) at 52-53]. Instead, like everything else she selectively testified to under the guise of privilege, she merely  
read it in a document. *Id.*

25 <sup>52</sup> Email from Padilla, dated December 15, 2010, Pfau Decl. at Ex. 30.

26 <sup>53</sup> Email from Padilla, dated February 18, 2011, Pfau Decl. at Ex. 31.

<sup>54</sup> Email from Ferrer, dated January 31, 2011, Pfau Decl. at Ex. 32.

<sup>55</sup> Email from Hyer dated October 27, 2010, Pfau Decl. at Ex. 33.

<sup>56</sup> Email from Ferrer dated February 4, 2011, Pfau Decl. at Ex. 34.

1 Backpage designed its “aggressive” editing to conceal the true nature of sex trafficking  
2 ads while leaving no record behind; the filter was structured in such a way that Backpage  
3 “wouldn’t run the risk of caching stripped terms.”<sup>57</sup> And Backpage did not save the original  
4 version of ads it edited.<sup>58</sup>

5 Even more concerning, Backpage would inexplicably strip terms and images indicative  
6 of sex trafficking from *archived ads* that were no longer listed on its website. Backpage  
7 referred to this practice as “Deep Cleaning.” Further, Backpage recognized the implications for  
8 evidence tampering and spoliation, and sought to shield itself by outsourcing the dirty work: “I  
9 think it is too dangerous to let our staff strip out some terms from every old ad in the database.  
10 Perhaps, we need desertnet [outside technology consultant] to do this.”<sup>59</sup> Carl Ferrer took  
11 special measures to destroy evidence of sex trafficking in archived ads whenever there was a  
12 risk of discovery in legal proceedings: “As always, ads under review are top priority. However,  
13 I am being evaluated by lawyers later this week so cleaning up old stuff is also important.”<sup>60</sup>  
14 The “deep cleaning” was not performed neutrally across all of Backpage’s archived ads, but was  
15 instead limited to only the “adult” categories. However, “deep cleaning” was performed on  
16 “*every new and old ad in the database.*”<sup>61</sup> Thus, Backpage admits to “scrubbing Plaintiffs’ ads  
17 prior to producing them in the context of this litigation. This conduct may be tantamount to  
18 criminal tampering<sup>62</sup> and/or spoliation. Of course, Plaintiffs have been unable to uncover the  
19 extent of evidence destruction because every Backpage executive with knowledge of these  
20 events pled the Fifth Amendment.  
21  
22  
23

24 <sup>57</sup> Email from Padilla, dated November 2, 2010, Pfau Decl. at Ex. 35.

25 <sup>58</sup> Email from Hyer, dated December 15, 2010, Pfau Decl. at Ex. 36.

26 <sup>59</sup> Email dated Nov. 3, 2010, Pfau Decl. at Ex. 59.

<sup>60</sup> Email from Mohan, dated Nov. 4, 2010, Pfau Decl. at Ex. 60.

<sup>61</sup> Email dated Nov. 3, 2010, Pfau Decl. at Ex. 59.

<sup>62</sup> See RCW 9A.72.150 (Tampering with physical evidence).

1     **C.     Backpage Worked Directly With Users to Control and Dictate the Format of the**  
2     **Prostitution Ads and Generate Sex Trafficking Profits**

3             Backpage not only employed manual and automated measures to “sanitize” sex  
4     trafficking ads, it also worked directly with users (pimps and prostitutes) to advise them on  
5     Backpage’s posting rules and content requirements and help them post less detectable sex  
6     trafficking ads. Ferrer commonly worked directly with users who spent large sums of money—  
7     up to \$30,000 per month—posting ads in Backpage’s escort section.

8             For instance, in 2010, Mr. Ferrer was in regular communication with a user named Sean  
9     Kim, who was spending **\$25,000 to \$30,000 per month** to help him “adjust” to Backpage’s  
10    new posting rules. Ferrer advised: “You can expect the following: tighter standards on  
11    language forbidding sex for money code words, no sex act pics, [and] no pics showing pink  
12    vaginas.”<sup>63</sup>

13            In another email, Ferrer wrote to backpage.com user “grktrt@aol.com,” advising, “we  
14    will be reviewing ads in violation of our terms of use. Post legal escort and massage ads here.  
15    Do not post obscene pics or any illegal service exchanging sexual favors for money. Could you  
16    please clean up the language of your ads before our abuse team removes the postings?”<sup>64</sup>

17            In another email, Ferrer was contacted by the user “Urban Pimp,” who was having  
18    trouble posting his ad titled, **“You Can Fuck This Hot Horny Mature Woman Tonight!!!!”**  
19    Rather than refuse to post his ad (or report Urban Pimp to law enforcement), Ferrer told him to  
20    “try editing [his] ads now. It should work. If not, email me back direct. Please don’t put in  
21    escorts. We are testing the user experience in Nov with the escort category being cleaner.”<sup>65</sup>  
22    When questioned about this particular interaction at her CR 30(b)(6) deposition on behalf of  
23    Backpage, Elizabeth McDougall insisted that “Urban Pimp” was merely advertising phone  
24    and/or webcam sex—although she was unable to recall how she knew or heard that.<sup>66</sup> Ms.

25    <sup>63</sup> Email to and from Ferrer and Sean Kim, Pfau Decl. at Ex. 38.

26    <sup>64</sup> Emails from Ferrer dated November 6, 2007, Pfau Decl. at Ex. 39.

<sup>65</sup> Emails to and from Ferrer and Urban Pimp, Pfau Decl. at Ex. 37.

<sup>66</sup> Dep. of CR 30 (b)(6) Representative, Elizabeth McDougall, Pfau Decl., Ex. 61, 113-117.



1 McDougall also refused to answer any questions about her conversations with Carl Ferrer  
2 regarding his correspondence with Urban Pimp, including the foregoing email, citing attorney-  
3 client privilege.<sup>67</sup>

4 Ferrer also wrote to user “muttslutt@doramail.com” advising, “Hey, your recent ads  
5 violate our terms of use and were removed. We cannot allow any ads with illegal language as  
6 in sex for money.”<sup>68</sup> In another email, Ferrer contacted user “SuperSlinky6d9,” explaining she  
7 was *temporarily* banned because “your posting have [sic] violated our terms of use.” Ferrer  
8 instructed her how to clean up her prostitution ad: “You can’t post ads saying things like ‘I  
9 CAN SLIDE YOU IN THE TIGHTEST SLIT EVER’ etc.” In case there was any confusion,  
10 Ferrer invited the user to call him directly: “If you have any questions, you can call me at 602-  
11 229-8512.”<sup>69</sup>

12 Finally, in yet another email, Backpage worked with user “Juicy Lucy” to make sure her  
13 ads titled, “==== xxx ==== THERE’s A PARTY IN MY PANTIES WANNA CUM?” and  
14 “NAUGHTY NYMPHO ::: I ::: DO ::: WHAT ::: YOU’RE ::: WIFE ::: WON’T! :::” were  
15 properly posting. Backpage wrote, “your ad is live and working properly. Here is a link to your  
16 ad . . . . We frequently find that when users are having difficulty locating or viewing their ads, it  
17 can easily be remedied by clearing out their web browser’s cache. . . .”<sup>70</sup>

18 **D. Backpage Used Intimidation and Payoff Tactics to Silence Its Employee-**  
19 **Moderators**

20 Backpage has a history of intimidating and threatening employees who challenge or  
21 suggest that the website facilitates prostitution. For example, Backpage threatened to fire one of  
22 its moderators for merely acknowledging prostitution on the website:

23  
24  
25 <sup>67</sup> *Id.*

26 <sup>68</sup> Email from Ferrer dated November 5, 2007, Pfau Decl. at Ex. 40.

<sup>69</sup> Email from Ferrer dated April 15, 2008, Pfau Decl. at Ex. 41.

<sup>70</sup> Emails to and from Juicy Lucy, Pfau Decl. at Ex. 42.

1 Backpage, and you in particular, cannot determine if any user on the site is  
2 involved with prostitution. Leaving notes on our site that imply that we're aware  
of prostitution, or in any position to define it, is enough to lose your job over.

3 This isn't open for discussion. If you don't agree with what I'm saying  
completely, you need to find another job.<sup>71</sup>

4 The same moderator was later threatened again after questioning the company's "moderation"  
5 practices:"

6 The moderators that do the adult section must be able to adjust to the fluxing  
7 changes of the ToU and policies within that section. I feel that adult moderation  
is not the right section for you to be working.<sup>72</sup>

8 In 2015, Backpage sent letters, along with severance agreements, to its ex-"moderators,"  
9 stating "it may not be in your best interest" to cooperate or communicate with persons,  
10 including government investigators, concerning their work at Backpage:

11 The company is now and may again in the future be involved in civil and  
12 government-related litigation and investigations. You may be contacted by  
13 persons wanting to talk to you about the Company or your employment with the  
14 Company or Releases (for example, lawyers, investigators or government  
15 agencies). . . . **[I]t may not be in your best interests to do so. Before talking  
to any such persons, you are asked to notify the Company. If appropriate,  
the Company can retain legal counsel for you (at the Company's expense) to  
provide independent legal advice directly to you regarding the situation.** In  
the event of any such contact, please notify via telephone or e-mail Janey Henze  
Cook at (602) 402-9576 or Janey@henzecoockmurphy.com.<sup>73</sup>

16 In 2016, one of Backpage's owners, Mike Lacey, sent \$5,000 checks to former  
17 Backpage employees with a mysterious note indicating the recipient was a "beneficiary of a  
18 gift" from Lacey "as a small token of his appreciation."<sup>74</sup> For many, it was the first  
19 communication they ever received from Lacey.<sup>75</sup>

## 20 **E. Backpage Moderators Have Testified Their Job Was to Sanitize Prostitution Ads**

21 Another ex-"moderator," [REDACTED] who is also the Chief Operating Officer's  
22 brother, was much more forthcoming about his work responsibilities at Backpage. He candidly  
23 admitted that his job was to "sanitize ads for prostitution":

24  
25 <sup>71</sup> Email from Padilla, dated October 8, 2010, Pfau Decl. at Ex. 43.

<sup>72</sup> Email from [REDACTED] dated June 30, 2011, Pfau Decl. at Ex. 44.

<sup>73</sup> Severance Agreements, Pfau Decl. at Ex. 45.

<sup>74</sup> Mike Lacey, Backpage.com, and the Mystery of the \$5,000 Checks, October 11, 2016, Pfau Decl. at Ex. 62.

<sup>75</sup> *Id.*

1 Q. Mr. Padilla, you don't deny that a significant number of the ads on  
2 Backpage.com during the time that you worked for the company were for  
3 prostitution, correct?

4 A. I'm thinking. **No, I don't deny it....**

5 Q. Do you agree that your job as a moderator for Backpage.com was to  
6 basically sanitize ads for prostitution, to remove terms or images that  
7 were suggested the ads were advertisements for sex for money?

8 A. **Yeah. ...**

9 Q. And do you agree with me if you removed language from an ad that  
10 blatantly sells, says that "I'm willing to have sex with you for money,"  
11 and then you post the remainder, you know as the person who edited the  
12 ad that the ad is someone who is trying to sell sex for money, correct?

13 A. **Yes.**<sup>76</sup>

14 El Camino, the third-party moderation company that Backpage hired to assist with its  
15 moderation efforts, likewise indicated that its job was to facilitate sex trafficking. When the  
16 company's CR 30(b)(6) representative was questioned during his deposition as to whether El  
17 Camino believed it had "aided and abetted Backpage.com in illegal activity," "helped  
18 Backpage.com promote prostitution," or helped Backpage.com promote "child sex trafficking,"  
19 El Camino declined to answer asserting the Fifth Amendment right against self-incrimination.<sup>77</sup>

20 **F. The United States Senate Found that Backpage Has Knowingly and Purposely**  
21 **Promoted and Profited from Online Sex Trafficking**

22 For nearly two years, a Congressional Subcommittee has investigated Backpage's role in  
23 online sex trafficking. On January 10, 2017, the Subcommittee issued a 53-page report,  
24 supported by an 800-page appendix, that details its findings and cites a number of records  
25 produced in response to a Congressional subpoena (many of which are included hereto as

26 <sup>76</sup> Deposition of [REDACTED] dated August 2, 2016, Pfau Decl. at Ex. 46.

<sup>77</sup> Deposition of CR 30(b)(6) witness of El Camino, Pfau Decl. at Ex. 49, pp. 114-118.

1 exhibits).<sup>78</sup> Within hours of the Senates Report, Backpage purported to shut down the “escort”  
2 section of its website because of “censorship” by the Senate.<sup>79</sup>

3 Although Backpage’s executives and owners refused to testify and asserted the Fifth  
4 Amendment, several moderators cooperated with the Senate’s investigation. Like [REDACTED]  
5 [REDACTED], one moderator explained, “everyone at the company knew the adult-section ads were  
6 for prostitution and that their job was to ‘put lipstick on a pig’ by sanitizing them.”<sup>80</sup>

7 The Senate reached several findings: (1) Backpage has actively promoted sex trafficking  
8 for over a decade, including trafficking of children, by sanitizing “Escort” ads and instructing  
9 users how to write prostitution ads that will avoid the scrutiny of law enforcement; and (2)  
10 Backpage knowingly concealed evidence of criminality by systematically removing sex  
11 trafficking terms from the website’s “Escort” ads to conceal the true nature of the underlying  
12 transaction, and then posting the sanitized ads for a profit.<sup>81</sup> While the Senate Report does not  
13 bind this Court, its bipartisan findings vividly illustrate that a reasonably juror could reach the  
14 same conclusions.

15 The Senate also uncovered internal company records that show Backpage derives  
16 virtually all of its revenue from sex trafficking. According to the Senate, Backpage is the  
17 “market leader” in online sex trafficking and has made millions of dollars in profits each year  
18 from sex trafficking ads. In 2011, for example, 93.4% of Backpage’s average weekly paid ad  
19 revenue came from “adult” ads. The Senate’s report also revealed new evidence concerning  
20 Backpage’s financials, including evidence that Backpage’s sex trafficking revenue has grown  
21 tremendously over the years, from \$71.2 million in 2012, to \$112.7 million in 2013, to \$135  
22 million in 2014. In 2013, Backpage reportedly netted more than 80% of all revenue from online  
23

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24 <sup>78</sup> STAFF REP. OF S. PERM. SUBCOMM. ON INVESTIG., 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF  
25 ONLINE SEX TRAFFICKING (Comm. Print 2017) (“Senate Report”), Pfau Decl., Ex. 47.

<sup>79</sup> Backpage.com Shuts Down Adult Services Ads After Relentless Pressure from Authorities, The Washington  
Post, dated January 10, 2017, Pfau Decl., at Ex. 48.

<sup>80</sup> Pfau Decl., Ex. 47, at 3.

<sup>81</sup> Pfau Decl., Ex. 47 (see general findings).

1 commercial sex advertising in the United States. According to the latest report from National  
2 Center for Missing and Exploited Children, 73% of reports concerning suspected child  
3 trafficking it receives from the public involve ads on Backpage.<sup>82</sup>

4 **G. Backpage's Top Executives, Including CEO Carl Ferrer and COO Andrew Padilla,**  
5 **Asserted the Fifth Amendment and Refused to Answer Any Questions at Their**  
6 **Depositions**

7 In December 2016, Plaintiffs took the depositions of Backpage top executives, CEO-  
8 Carl Ferrer, COO-Andrew Padilla, Director of Sales- [REDACTED] and Operations Manager- [REDACTED]  
9 [REDACTED].<sup>83</sup> Each of these witnesses invoked the Fifth Amendment and refused to answer a single  
10 question about the allegations in this case, the records produced in discovery, the Backpage.com  
11 website, anything relating to their personal involvement/employment with Backpage,  
12 Backpage's involvement or role in promoting sex trafficking, anything about Backpage's  
13 policies and procedures, or how Backpage edited and developed the content of Plaintiffs' ads.<sup>84</sup>

14 Each witness was asked essentially the same questions and gave the same Fifth  
15 Amendment responses. To illustrate the testimony these witnesses provided, Backpage CEO  
16 Carl Ferrer's responses are outlined below:

17 Q: One of your goals for Backpage.com is to be the largest source of online  
18 sex trafficking in the United States, correct?

19 A: **I decline to answer; Amendment 1 and Amendment 5.**<sup>85</sup>

20 Q: When you started Backpage.com, you intentionally created an online  
21 marketplace for sex trafficking, correct?

22 A: **I decline to answer; Amendment 1 and Amendment 5.**<sup>86</sup>

23 Q: One of those steps for creating an online marketplace for sex trafficking  
24 was creating posting rules for users, correct?

25 <sup>82</sup> *Id.* at pp. 1, 6, and 43-44.

26 <sup>83</sup> All of whom, with the exception of Vaught, were upper-level management at Backpage in 2010. [McDougall 30(b)(6) at 17-19.

<sup>84</sup> Dep. of Andrew Padilla dated December 6, 2016, Pfau Decl., Ex. 51; Dep. of [REDACTED] dated December 7, 2016, Pfau Decl. at Ex. 52; and Dep. of [REDACTED] dated December 6, 2016, Pfau Decl., Ex. 53.

<sup>85</sup> Deposition of Carl Ferrer, dated December 6, 2016, Pfau Decl., Ex. 50, at 28.

<sup>86</sup> *Id.*, at 30.

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>87</sup>**

Q: When those posting rules were created, you knew that the posting rules would help sex traffickers avoid prosecution by law enforcement, correct?

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>88</sup>**

Q: Another step taken by you in order to create an online marketplace for sex trafficking on Backpage.com was the creation of content requirements, correct?

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>89</sup>**

Q: The entire purpose of the posting rules was to help sex traffickers avoid detection by law enforcement, correct?

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>90</sup>**

\*\*\*

Q: One of your goals with creating the content requirements was to promote sex trafficking on the website Backpage.com as well, correct?

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>91</sup>**

\*\*\*

Q: And the purpose for creating an online marketplace for sex trafficking was so you could profit from the ads posted in the escort section for sex trafficking, correct?

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>92</sup>**

Q: Before and during the time that the plaintiffs were advertised for sex on the website Backpage.com, you were intentionally developing the website's reputation as a website for sex trafficking, correct?

**A: I decline to answer; Amendment 1 and Amendment 5.<sup>93</sup>**

\*\*\*

Q: As of January 2010, you were instructing the people who were reviewing and revising the ads in the escort section of the website Backpage.com to

<sup>87</sup> *Id.*, at 31.

<sup>88</sup> *Id.*, at 31.

<sup>89</sup> *Id.*, at 31-32.

<sup>90</sup> *Id.*, at 32.

<sup>91</sup> *Id.*, at 33.

<sup>92</sup> *Id.*, at 33.

<sup>93</sup> *Id.*, at 34.

1 edit and revise language that suggested the ad was an ad for paid sex,  
2 correct?

3 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>94</sup>**

4 **Q:** And you were instructing those people to then post the edited ad, correct?

5 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>95</sup>**

6 **Q:** You instructed those people to revise the language of the ads and then  
7 post the ads because you wanted to cover up the fact that the ads were for  
8 paid sex, correct?

9 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>96</sup>**

10 **Q:** And you wanted to continue profiting from such ads, correct?

11 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>97</sup>**

12 **Q:** And those ads were posted on the website, even though Backpage.com  
13 knew that the ads were for sex, correct?

14 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>98</sup>**

15 \*\*\*

16 **Q:** As of January 2010, you knew that the purported efforts by  
17 Backpage.com to help law enforcement stop—stop sex trafficking was a  
18 shame, correct?

19 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>99</sup>**

20 **Q:** You had no real intention to help stop sex trafficking, correct?

21 **A: I decline to answer; Amendment 1 and Amendment 5.<sup>100</sup>**

22 \*\*\*

23 **Q:** Backpage.com profited from each of the ads regarding Plaintiff L.C. that  
24 were posted in the escort section of Backpage.com, correct?

25 **A: I decline to answer; Amendment 1 and 5. ...**

26 <sup>94</sup> *Id.*, at 62.

<sup>95</sup> *Id.*, at 62.

<sup>96</sup> *Id.*, at 62.

<sup>97</sup> *Id.*, at 62.

<sup>98</sup> *Id.*, at 64.

<sup>99</sup> *Id.*, at 69.

<sup>100</sup> *Id.*, at 69.

1 Q: A moderator working for Backpage.com edited each of the ads that were  
2 posted in the escort section of Backpage.com regarding Plaintiff L.C. in  
3 order to make the ads less obvious that they were for paid sex, correct?

4 A: I decline to answer; Amendment 1 and 5. ...

5 Q: You knew that each of the ads that were posted in the escort section of  
6 Backpage.com regarding Plaintiff L.C. was an ad for paid sex, correct?

7 A: I decline to answer; Amendment 1 and 5. ...

8 Ferrer, and the other executives, were asked the same questions regarding Backpage's criminal  
9 efforts, as well as ads for each of the other plaintiffs, and they answered the same way—by  
10 invoking the Fifth Amendment and refusing to answer.<sup>101</sup>

11 **H. A Human Trafficking Expert, Dr. Dominique Roe-Sepowitz, Will Testify that**  
12 **Backpage.com Created and Operated an Online Marketplace for Sex Trafficking**  
13 **Through the Use of Its So Called Posting Rules, Content Requirements, and**  
14 **Moderation Practices**

15 Dr. Dominique Roe-Sepowitz, M.S.W., Ph.D., is the head of the Office of Sex  
16 Trafficking and Intervention Research at Arizona State University. Dr. Roe-Sepowitz has  
17 conducted extensive research and studies on the process by which ads are posted and responded  
18 to on the “escort” section of Backpage. Based on this work, Dr. Roe-Sepowitz opines that, on a  
19 more probable than not basis, the vast majority of the ads in the “escort” section of Backpage  
20 are prostitution ads and indicative of sex trafficking and sex trafficking of minors.<sup>102</sup> Her  
21 research and studies demonstrate statistically that the overwhelming number of responses to ads  
22 in the “escort” section of Backpage were from individuals attempting to solicit prostitution.<sup>103</sup>  
23 Her studies have included submitting test ads with terms and images indicative of prostitution  
24 and sex trafficking to the “escort” section of Backpage's website.<sup>104</sup> And she consistently

25 <sup>101</sup> *Id.*, at 80-100; Dep. of Andrew Padilla dated December 6, 2016, Pfau Decl., Ex. 51; Dep. of [REDACTED] dated  
26 December 7, 2016, Pfau Decl. at Ex. 52; and Dep. of [REDACTED] dated December 6, 2016, Pfau Decl., Ex. 53.

<sup>102</sup> Decl. of Dr. Roe-Sepowitz, Pfau Decl., Ex. 10 at ¶ 5.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*



1 observed that Backpage would remove the most blatantly suggestive terms and images before  
2 posting a sanitized version of the ad.<sup>105</sup>

3 Dr. Roe-Sepowitz opines that the Backpage website was created and utilized by the  
4 defendants to make millions of dollars selling prostitution and sex trafficking ads online.<sup>106</sup>  
5 Contrary to the statements made in the Declaration of Elizabeth McDougall (that the website is  
6 “misused”), Dr. Roe-Sepowitz opines that Backpage’s editing and moderation practices were  
7 designed and implemented with to conceal criminal activity and thereby induce, facilitate, and  
8 profit from sex trafficking on its website.<sup>107</sup> Dr. Roe-Sepowitz also notes that by editing so  
9 many ads, Backpage essentially trained sex traffickers to submit ads according to the “Backpage  
10 format,” which trained and encouraged sex traffickers to use discreet terminology and  
11 innuendo.<sup>108</sup> Backpage used this “normalization” process as another method to generate and  
12 solicit illegal content, including the child sex trafficking ads of J.S., S.L., and L.C.<sup>109</sup>

13 **I. Plaintiffs J.S., S.L., and L.C. Were Trafficked and Sold Like Chattel on the**  
14 **Backpage.com Website**

15 Amidst the appalling revelations outlined above, it is important to reiterate that this case  
16 is about three girls—ages twelve, thirteen, and fifteen—who were advertised on the sex  
17 trafficking platform Backpage created and facilitated.<sup>110</sup>

18 In September 2010, thirteen-year-old S.L. was in the seventh grade when she ran away  
19 from home and was picked up by a pair of sex traffickers. The sex traffickers dressed S.L. in  
20 lingerie and took photographs of her to create ads for backpage.com in accordance with  
21 Backpage’s “posting rules” and content requirements.” They then paid Backpage a fee, and,  
22

---

23 <sup>105</sup> *Id.*

24 <sup>106</sup> *Id.* ¶ 10.

25 <sup>107</sup> *Id.* ¶¶ 10–12.

26 <sup>108</sup> *Id.* ¶¶ 13–15.

<sup>109</sup> *Id.*

<sup>110</sup> Copies of the Backpage ads posted for S.L., L.C., and J.S. are included as Exhibits 56–58 respectively, to the attached Declaration of Michael T. Pfau.

1 using the “Backpage format,” uploaded ads of S.L. in the website’s “escorts” section to solicit  
2 customers to have sex with a thirteen-year-old. The ads were drafted in accordance with  
3 Backpage’s “posting rules” and “content requirements,” and were plainly for prostitution. *Id.*  
4 As a result of these ads, S.L. was raped numerous times through backpage.com.<sup>111</sup>

5 From July 2010 to September 2010, twelve-year-old L.C. had just finished seventh  
6 grade when she left home and was picked up by the same pair of sex traffickers who victimized  
7 S.L. After paying Backpage’s fee with a prepaid credit card, the sex traffickers posted ads of  
8 L.C. nude and in skimpy clothing in the website’s “escorts” section. The ads were developed in  
9 accordance with Backpage’s “posting rules” and “content requirements,” and were obviously  
10 for prostitution. One ad, for instance, included photographs of L.C. and stated “80 DOLLAR  
11 DAY SPECIAL, ask for Tasha.” *Id.* Another was titled, “Face down Ass Up.” *Id.* As a result  
12 of these ads and many others, L.C. was raped countless times through backpage.com.<sup>112</sup>

13 From June 2010 to September 2010, fifteen-year-old, J.S. became controlled by an adult  
14 pimp, who posted ads of her for sex on www.backpage.com. Like S.L. and L.C., J.S. clearly  
15 appeared underage. *Id.* Furthermore, the ads that sold J.S. on www.backpage.com were  
16 developed in accordance with Backpage’s “posting rules” and “content requirements” and used  
17 language that obviously offered sex for money. For example, one ad promised J.S. was  
18 “W’E’L’L \_W’O’R’TH \_I’T \*\*\*^\*\*\* 150HR” and “IT WONT TAKE LONG AT ALL !!!!!!!”  
19 *Id.* On at least two occasions the text in J.S.’s ad was edited by Backpage. J.S. noticed the  
20 defendants removed “\$” signs and added the term “roses” in their place. On another occasion,  
21 the defendant removed “\$” signs and added images of “roses” in their place. As a result of  
22 these ads, J.S. was raped countless times by men who found her on backpage.com.<sup>113</sup>

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25 <sup>111</sup> Declaration of S.L., Pfau Decl. at Ex. 1.

26 <sup>112</sup> Declaration of L.C., Pfau Decl. at Ex. 2.

<sup>113</sup> Declaration of J.S., Pfau Decl. at Ex. 3.

1 Contrary to Backpage’s assertion, the evidence indicates Backpage edited the Plaintiffs  
2 ads. According to Backpage’s internal records, Backpage’s moderators were trained to check  
3 the “violated terms of use” box to indicate their efforts, and then “lock any ad you have edited”  
4 to prevent users from reinserting the removed content.<sup>114</sup> Ads for both J.S. and L.C. indicate the  
5 ads *were* edited by Backpage—they are marked for “Inappropriate Content”—and then posted  
6 online. J.S. also observed that at least two of her ads were edited when the moderator replaced  
7 “\$” signs with “roses” and an image of a rose. (presumably to hide the fact that the ad was  
8 offering sex for \$\$). Additionally, as outlined above, Backpage admits to “scrubbing” every  
9 archived ad in its database via its “deep cleaning” practices, which means the pre-edited  
10 versions of the Plaintiffs’ ads have been destroyed. Backpage also admits to removing terms  
11 and images indicative of sex trafficking and child sex trafficking from 70 to 80% of ads.

12 **J. The Court Should Disregard the Declaration of Elizabeth McDougall as Baseless**  
13 **and Lacking Foundation**

14 Because all of its executives pled the Fifth Amendment in connection with this case,  
15 Backpage’s motion relies exclusively on the declaration of its current general counsel, Elizabeth  
16 McDougall. Ms. McDougall makes several sweeping representations regarding Backpage’s  
17 intent with respect to the design and application of its posting rules, content requirements, and  
18 moderation policies and procedures in connection with sex trafficking ads. (*See* McDougall  
19 Decl. at ¶¶ 17 & 20.) Specifically, Ms. McDougall disclaims that Backpage “intended to induce  
20 sex trafficking or exploitation of any sort.” (*Id.* ¶ 20.)

22 However, Ms. McDougall was not an employee at Backpage until February 15, 2012,  
23 well after the events giving rise to this case.<sup>115</sup> Further, Ms. McDougall admitted in her  
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25 <sup>114</sup> Email from Ferrer dated September 25, 2010, Pfau Decl. at Ex. 18.

26 <sup>115</sup> Dep. of Elizabeth McDougall, Pfau Decl. at Ex. 66 at p 69.

1 deposition that she did not consult with a single person at Backpage regarding the legitimacy of  
2 the representations she makes in her declaration.<sup>116</sup> Instead, she professes to have relied  
3 exclusively on documents and her recollection from general discussions over the years. When  
4 questioned on what these general conversations with Backpage executives entailed, Ms.  
5 McDougall, as she so often did, refused to answer citing the attorney-client privilege.<sup>117</sup> These  
6 antics entirely prevented Plaintiffs from ascertaining the basis and foundation for the contested  
7 assertions in Ms. McDougall's Declaration.  
8

9 Backpage's general counsel cannot claim that it never intended to induce sex trafficking  
10 and then conceal the basis for that knowledge behind the attorney-client privilege. To do so is a  
11 textbook sword-and-shield example of abusing the attorney-client privilege. *See generally*  
12 *Pappas v. Holloway*, 114 Wn.2d 198 (1990). Accordingly, Plaintiffs objects to the McDougall  
13 Declaration in its entirety and ask the Court to disregard it in ruling on the present motion.  
14

### 15 III. STATEMENT OF ISSUES

16 (1) Whether the Court should deny Backpage's summary judgment motion because  
17 the evidence *overwhelmingly* demonstrates that Backpage induced and materially contributed to  
sex trafficking and child sex trafficking on its website?

18 (2) Whether the Court should deny Backpage's summary judgment motion based on  
19 the First Amendment because the evidence *overwhelmingly* demonstrates that Backpage's  
"editorial choices" were designed to conceal and facilitate prostitution and sex trafficking, and  
therefore are not subject to First Amendment protection?

### 20 IV. EVIDENCE RELIED UPON

21 This opposition brief relies upon the Declaration of Michael T. Pfau in Support of  
22 Plaintiffs' Opposition to the Backpage Defendants' Motion for Summary Judgment ("Pfau  
23 Decl."), and the pleadings and evidence previously filed in this case.  
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25 <sup>116</sup> *Id.* at 96.

26 <sup>117</sup> *Id.* at 97-102.

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## V. AUTHORITY

### A. Summary Judgement Standard

Summary judgment is improper unless the evidence and affidavits “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). In ruling on a motion for summary judgment, the court must view all facts and draw any reasonable inferences in favorable of the nonmoving party. *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523 (2009). The court may grant the motion only if reasonable minds could reach but one conclusion based on the evidence. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630 (2003).

### B. The Washington Supreme Court’s Established the “Law of the Case” for Constructing and Applying Section 230

As stated at the outset, this Court is not tasked with wading through the extensive and inconsistent web of case law dealing with Section 230 to discern the standard for analyzing this motion. The parties have previously argued the meaning, construction, and proper application of Section 230 on appeal. The Washington Supreme Court considered these arguments and determined the relevant construction and application of Section 230 in this case. *See generally J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95 (2015). Ultimately, the Supreme Court adopted the construction of Section 230 articulated by the Ninth Circuit in *Roommates.com*. *See id*; *see also Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc)). Further, the Supreme Court specifically crafted the “inducement” test, which is outlined in the following section, as the proper application of Section 230 to this case. *See id.* at 103 (quoting *Roommates.com*, 521 F.3d at 1168).

The Supreme Court’s construction along with its instructions for applying Section 230 on remand are the “law of the case” and must guide all future rulings. The “law of the case” doctrine mandates “that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” *Roberson v. Perez*, 156

1 Wn.2d 33, 41 (2005) (citing 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON  
2 PRACTICE: JUDGMENTS § 380, at 55–56 (4th ed. 1986)). Specifically, under the doctrine, a trial  
3 court is bound by the decisions of an appellate court on the issue(s) of law raised in a previous  
4 appeal. See *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 54–58, 366 P.3d 1246 (Div. I,  
5 2015). The “law of the case” doctrine is universally followed by Washington Courts and is  
6 codified in the Rules of Appellate Procedure. See *State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d  
7 905 (1996); RAP 2.5(c).

8 **C. The Washington Supreme Court Held That Backpage Cannot Invoke Section 230 if**  
9 **it “Induced” or “Materially Contributed” to Sex Trafficking**

10 In rejecting the same arguments Backpage makes in its pending motion, the Washington  
11 Supreme Court held that any one of the following allegations, “if proven,” disqualifies  
12 Backpage from Section 230 protection:

13 (1) Backpage.com . . . intentionally developed its website to require information  
14 that allows and encourages . . . illegal trade to occur through its website,  
including the illegal trafficking of underage girls;

15 (2) Backpage.com has developed content requirements that it knows will allow  
16 pimps and prostitutes to evade law enforcement;

17 (3) Backpage.com knows that the foregoing content requirements are a fraud and  
18 a ruse that is aimed at helping pimps, prostitutes, and Backpage.com evade law  
enforcement by giving the [false] appearance that Backpage.com does not allow  
sex trafficking on its website;

19 (4) “the content requirements are nothing more than a method developed by  
20 Backpage.com to allow pimps, prostitutes, and Backpage.com to evade law  
21 enforcement for illegal sex trafficking, including the trafficking of minors for  
sex;

22 (5) Backpage's content requirements are specifically designed to control the  
23 nature and context of those advertisements so that pimps can continue to use  
Backpage.com to traffic in sex, including the trafficking of children, and so  
Backpage.com can continue to profit from those advertisements; and

24 (6) Backpage has a substantial role in creating the content and context of the  
25 advertisements on its website.  
26

1 *Id.* at 102–03 (quotation marks omitted, alterations in original). The Supreme Court concluded  
2 that if the evidence shows Backpage designed its posting rules “*to induce sex trafficking*,” then  
3 it is deemed to have “contribute[d] materially to the alleged illegality of the conduct” and  
4 cannot invoke Section 230. *See id.* at 103 (emphasis added) (quoting *Roommates.com*, 521 F.3d  
5 at 1168.

6 The Supreme Court expressly and repeatedly relied on the Ninth Circuit’s decision in  
7 *Roommates.com* as a basis for the “inducement” standard, it is helpful to highlight that decision  
8 here. In *Roommates.com*, the defendant designed its website to require users to input housing  
9 preferences that violated federal and state discrimination laws. *Roommates.com*, 521 F.3d at  
10 1164. The Ninth Circuit rejected the defendant’s argument that because the actual content was  
11 provided by third parties it was entirely immune under Section 230. *Id.* at 1171. Specifically,  
12 the Court held that even if the information is supplied by third parties, “a website operator may  
13 still contribute to the content’s illegality and thus be liable as a developer.” *Id.*<sup>118</sup> The Ninth  
14 Circuit expressly disavowed the holding in *Carafano v. Metrosplash.com Inc.*—a holding relied  
15 on repeatedly by Backpage—that a website is “*automatically* immune so long as the content  
16 originated with another information content provider.” *Id.* at 1171 n.31 (citing *Carafano v.*  
17 *Metrosplash.com Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003)). The Ninth Circuit also rejected the  
18 narrow interpretation of the word “development” that Backpage continues to insist on: “we  
19 interpret the term ‘development’ as referring not merely to augmenting the content generally,  
20 but to *materially contributing to its alleged unlawfulness*.” *Id.* 1168-69 (emphasis added).

21 \_\_\_\_\_  
22 <sup>118</sup> The Ninth Circuit offered several examples to illustrate the type of criminal activity that would render the  
website a “co-developer” of criminal content, and thus not eligible for CDA protection:

23 A website operator who edits user-created content—such as by correcting spelling, removing  
24 obscenity or trimming for length—retains his immunity for any illegality in the user-created  
content, **provided that the edits are unrelated to the illegality. However, a website operator  
25 who edits in a manner that contributes to the alleged illegality**—such as by removing the word  
“not” from a user’s message reading “[Name] did not steal the artwork” in order to transform an  
innocent message into a libelous one—**is directly involved in the alleged illegality and thus not  
immune.**

26 *Roommates.com*, 521 F.3d at 1169.

1 Instead, the Ninth Circuit held that “[t]he CDA does not grant immunity for *inducing* third  
2 parties to express illegal preferences.” *Id.* at 1165 (emphasis added). In short, “[t]he message  
3 to website operators is clear: If you don’t *encourage illegal content*, or design your website to  
4 require users to input illegal content, you will be immune.” *Id.* at 1175 (emphasis added).

5 The *Roommates.com* “inducement” standard has been employed by a number of courts  
6 dealing with circumstances similar to this case. In *NPS LLC v. StubHub, Inc.*, the New England  
7 Patriots football organization sued StubHub, Inc., for violating state anti-scalping laws. *NPS*  
8 *LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 WL 995483, at \*1–3 (Mass. Super. 2009).  
9 Like Backpage, StubHub had a list of phony disclaimers on its website requiring users agree to  
10 “comply with all applicable local, state, federal and international laws, statutes and regulations  
11 regarding the use of the site and the selling of tickets.” *Id.* at \*11. Also like Backpage,  
12 StubHub assisted scalpers’ criminal conduct by “allowing [them] to ‘mask’ ticket locations by  
13 listing a different row, up to five rows away, than that printed on the original ticket and by not  
14 informing the buyer of the exact location of the ticket until the buyer received them in a fashion  
15 which made it difficult for the New England Patriots to identify fans who had unlawfully  
16 purchased scalped tickets.” *Id.* at 8. The court concluded StubHub “intentionally induced or  
17 encouraged” third parties to use its site to violate anti-scalping laws, and StubHub actively and  
18 knowingly profited from these violations. *Id.* at 10–11. These actions were enough to take  
19 StubHub outside the scope of § 230 protection. *Id.* at 11.

20 Again, in *People v. Bollaert*, the court held that a revenge porn website was not entitled  
21 to CDA protection because the evidence showed the website was designed and operated for  
22 illegal purposes. *People v. Bollaert*, 248 Cal. App. 4th 699, 721 (Cal. Ct. App. 2016), *rev.*  
23 *denied* (Oct. 12, 2016). The court observed, “[a]s in *Roommates* . . . Bollaert's website was  
24 ‘*designed to solicit*’ content that was unlawful, demonstrating that Bollaert's actions were not  
25 neutral, but rather materially contributed to the illegality of the content and the privacy  
26



1 invasions suffered by the victims. In that way, he developed in part the content, taking him  
2 outside the scope of CDA immunity.” *Id.*

3 As another example, in *Fed. Trade Comm'n v. LeadClick Media, LLC*, the website  
4 LeadClick was not entitled to immunity because it participated, via third-party affiliates, in the  
5 development of deceptive advertising content posted on fake news websites. *Fed. Trade*  
6 *Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 176–77 (2d Cir. 2016). By so doing, the  
7 Second Circuit found, “LeadClick's role in managing the affiliate network far exceeded that of  
8 neutral assistance. Instead, it participated in the development of its affiliates' deceptive  
9 websites, ‘materially contributing to [the content's] alleged unlawfulness.’” *Id.* (citing  
10 *Roommates.com, LLC*, 521 F.3d at 1168). Accordingly, LeadClick was found to be an  
11 information content provider with respect to the deceptive content at issue and was not entitled  
12 to immunity under Section 230. *Id.* See also *Federal Trade Commission v. Accusearch*, 570  
13 F.3d 1187 (10th Cir. 2009) (holding website not protected by Section 230 because it was not  
14 “neutral but instead “affirmatively solicited” and “intended to generate” offensive content).

15 While *Roommates.com* and its progeny are helpful for understanding the “inducement”  
16 standard, the touchstone for determining applicability of Section 230 in this case begins and  
17 ends with the Supreme Court’s decision. The Supreme Court remanded this case with clear and  
18 concise instructions to determine whether Backpage designed and operated its website to  
19 “induce sex trafficking.” *J.S.*, 184 Wn.2d at 103. “*Induce*” means “to move and lead (as by  
20 persuasion or influence),” and “to inspire, call forth, or bring about by influence or stimulation.”  
21 MERRIAM-WEBSTER UNABRIDGED, available at <http://unabridged.merriam-webster.com>.  
22 Likewise, “*inducement*” is defined as “[t]he act or process of enticing or persuading another  
23 person to take a certain course of action.” BLACK’S LAW DICTIONARY (10th ed. 2014).

24 It bears repeating that at the time this case was heard on appeal, neither Plaintiffs, the  
25 Supreme Court, nor the public at-large were aware of Backpage’s internal policies and practices  
26

1 with respect to the “escort section” of its website. All anyone knew was that Backpage  
2 employed “posting rules” and “content requirements” in an illusory effort to regulate sex  
3 trafficking on its website. Since then Backpage has been forced to disclose the details of its  
4 policies and practices in response to a Congressional subpoena as well as the court-ordered  
5 discovery in this case. The subsequent internal documents and testimony have revealed that the  
6 “posting rules” and “content requirements” were just the tip of the iceberg. In its motion,  
7 Backpage repeatedly claims that Plaintiffs have admitted their ads were not “created or  
8 developed” by Backpage. This is categorically false. Plaintiffs’ allegations are explicitly  
9 premised on the exact opposite. Both Judge Serko and the Supreme Court cited Plaintiffs’  
10 allegations that Backpage created and developed sex trafficking ads, including Plaintiffs’ ads,  
11 when Backpage’s motion to dismiss was denied

12 In reality, Backpage has developed, implemented, and continuously refined a  
13 sophisticated arsenal of “editing” and “moderation” practices designed to conceal and further  
14 sex trafficking and prostitution on its website. These revelations blow the proverbial doors off  
15 the Supreme Court’s decision, which was only aware of “posting rules” and “content  
16 requirements” that appeared more like instructions. Nevertheless, per the Supreme Court,  
17 applicability of the “inducement” standard remains the dispositive inquiry and must be applied  
18 to the entirety of Backpage’s conduct.

19 **D. Backpage’s Top Executives Pled the Fifth Amendment; As a Result, the Jury is**  
20 **Permitted to Draw an Adverse Inference of Criminality**

21 The exercise by a party of his or her Fifth Amendment privilege against compulsory  
22 self-incrimination in a civil case “does not protect the invoking party from adverse inferences  
23 that may logically be drawn from its exercise.” *Diaz v. Washington State Migrant Council*, 165  
24 Wn. App. 59, 85 (2011) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). Invocations  
25 of the Fifth Amendment privilege against compulsory self-incrimination by corporate  
26 employees or principals may result in an adverse inference drawn against the corporation in a

1 civil proceeding. *Id.* at 86.<sup>119</sup> Likewise, a party's refusal to comply with a subpoena related to  
2 the subject matter of the case entitles the trial court to draw a negative inference that the party's  
3 actions were in bad faith. *In re Recall of Lindquist*, 172 Wn.2d 120, 137–38 (2011) (citations  
4 omitted). An adverse inference is permissible “not as a sanction or remedy for any unfairness  
5 created by exercise of the privilege, but simply because the inference is relevant and outside the  
6 scope of the privilege.” *Diaz*, 165 Wn. App. at 86 (citation omitted).

7 The Washington Supreme Court's holding in *Ikeda v. Curtis*, 43 Wn.2d 449 (1953),  
8 provides an eerily analogous case in point. Plaintiff George Ikeda purchased a hotel in Pike  
9 Place market from defendant Nellie Curtis. *Id.* at 450–52. Upon taking possession, Ikeda  
10 quickly realized the hotel's monthly income was derived predominantly through unlawful  
11 prostitution. *Id.* At the time of sale, Curtis did not disclose the illegal revenue source and  
12 instead simply represented that the hotel's monthly income was \$1900 to \$2000. *Id.* Ikeda  
13 brought fraud claims against Curtis for misrepresenting the hotel's value. *Id.* at 452–53.  
14 During the bench trial, Curtis was questioned regarding a financial ledger detailing the hotel's  
15 monthly revenue prior to the sale. *Id.* at 453–54. Curtis pled the Fifth Amendment and refused  
16 to answer questions regarding income and prostitution:

17 Q. Isn't it a fact, Mrs. Curtis, the two columns on the left-hand side of the  
18 page, that the left hand column represents the income from roomers and  
19 the right hand column represents income from the whore house business?

20 A. I refuse to answer.

21 Q. Mrs. Curtis, do you also refuse to answer with respect to the month of  
October, 1946 on the same ground?

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22 <sup>119</sup> Citing *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987) (former  
23 employee invoking privilege); *Rad Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271 (3d Cir. 1986) (past or  
24 present corporate employees); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 523 (8th Cir. 1984)  
25 (inference from tribal chair's invoking privilege), *cert. denied*, 469 U.S. 1072 (1984); *Brink's Inc. v. City of New*  
26 *York*, 717 F.2d 700, 710 (2d Cir. 1983) (probative value of assertion of Fifth Amendment by former employees  
outweighed prejudice); *City of Chicago v. Reliable Truck Parts Co.*, 768 F. Supp. 642 (N.D. Ill. 1991) (corporate  
agent invoking privilege); *see also LiButti v. United States*, 107 F.3d 110, 122, (2d Cir. 1997) (invocation of Fifth  
Amendment by nonparty witness supports inference if there is a relationship of loyalty with a party); *Fed. Deposit*  
*Ins. Corp. v. Fid. & Deposit Co.*, 45 F.3d 969, 978 (5th Cir. 1995) (adverse inference can be drawn from any  
relevant invocation of the Fifth Amendment by a nonparty witness).

1 A. Yes, all through the book.

2 Q. And on the ground of self-incrimination, is that correct?

3 A. Yes.

4 *Id.* at 454. The trial court drew an adverse inference based on Curtis' assertion of the Fifth  
5 Amendment to find "that the chief source of revenue to defendant from the LaSalle Hotel  
6 business during the period of her ownership was from use of the premises for lewdness,  
7 assignation and prostitution; that the defendant used the said hotel primarily for her business of  
8 trafficking in lewd women and that said hotel was regularly resorted to by prostitutes with  
9 defendant's knowledge, consent and approval." *Id.* at 455.

10 On appeal, the Supreme Court agreed that it was proper for the finder of fact to draw an  
11 adverse inference based on Curtis' assertion of the Fifth Amendment. The court noted that the  
12 Fifth Amendment privilege applies to compulsory disclosure of "*criminal liability*." *Id.* at 458  
13 (emphasis added). However, "[t]o hold that no inference could be drawn from the refusal of  
14 these witnesses to explain their dealings, in the face of so many suspicious circumstances,  
15 would be an unjustifiable extension of the privilege for a purpose it was never intended to  
16 fulfill." *Id.* Rather, "[i]n a civil case, if one of the parties insists upon his privilege to exclude  
17 testimony that would throw light upon the merits of the case and the truth of his testimony, we  
18 are of opinion that it is a proper subject for comment." *Id.* at 459 (citations omitted).

19 As noted above, Backpage's top executives, CEO Carl Ferrer, COO Andrew Padilla,  
20 Operations Manager [REDACTED] and Sales Director [REDACTED] and El Camino's CR 30(b)(6)  
21 representative pled the Fifth Amendment and refused to answer questions regarding the  
22 website's involvement in online sex trafficking and prostitution; and the website's efforts to  
23 encourage, induce, and solicit sex trafficking and prostitution ads through direct and indirect  
24 actions, including so called moderation practices, Posting Rules and Content Requirements, and  
25 direct correspondence with users (pimps and prostitutes).

1           Thus, and in light of the *overwhelming* additional evidence of criminal activity outlined  
2 above, the Court, as finder of fact on this motion, is entitled to draw adverse inferences that:

3           (1) Backpage.com . . . intentionally developed its website to require information  
4 that allows and encourages . . . illegal trade to occur through its website,  
5 including the illegal trafficking of underage girls;

6           (2) Backpage.com has developed content requirements that it knows will allow  
7 pimps and prostitutes to evade law enforcement;

8           (3) Backpage.com knows that the foregoing content requirements are a fraud and  
9 a ruse that is aimed at helping pimps, prostitutes, and Backpage.com evade law  
10 enforcement by giving the [false] appearance that Backpage.com does not allow  
11 sex trafficking on its website;

12           (4) the content requirements are nothing more than a method developed by  
13 Backpage.com to allow pimps, prostitutes, and Backpage.com to evade law  
14 enforcement for illegal sex trafficking, including the trafficking of minors for  
15 sex;

16           (5) Backpage's content requirements are specifically designed to control the  
17 nature and context of those advertisements so that pimps can continue to use  
18 Backpage.com to traffic in sex, including the trafficking of children, and so  
19 Backpage.com can continue to profit from those advertisements; and

20           (6) Backpage has a substantial role in creating the content and context of the  
21 advertisements on its website.

22 **E.     Backpage Actively Induced Sex Trafficking and Materially Contributed to the**  
23 **Illegal Conduct on its Escort Website**

24           The Court should deny Backpage's motion for summary judgment because there are  
25 disputed issues of material fact as to whether Backpage designed and operated its website to  
26 "induce" and "materially contribute" to sex trafficking and prostitution. The evidence reveals  
that Backpage developed and employed a variety of measures designed to induce users (pimps)  
to post illegal prostitution, sex trafficking, and even child sex trafficking ads on its website.  
These measures were multi-layered and operated in concert to induce, facilitate, and ultimately  
conceal these illicit ads from detection by law enforcement.

## 1                   **1. The “Posting Rules” and “Content Requirements”**

2                   The evidence demonstrates that Backpage’s “posting rules” and “content requirements”  
3 were designed and tailored to serve as “how to” instructions for users to post sex trafficking ads  
4 that evaded obvious detection by law enforcement. Specifically, the structure and wording of  
5 the rules themselves provided instructions designed to induce users to remove terms, images,  
6 and/or pricing that would blatantly indicated sex trafficking. The fact that users who violated  
7 the rules and requirements would get a “try again” message also indicates that Backpage was  
8 encouraging users to post veiled sex trafficking ads. And Backpage’s CEO, Carl Ferrer  
9 expressly stated that the posting rules and requirements are merely “about CDA protection per  
10 our attorney.”<sup>120</sup> Finally, following an overhaul of the rules and requirements in October 2010,  
11 Backpage deliberately stopped rejecting ads that violated the new criteria because to do so  
12 would be “too harsh” and users needed a “chance to adjust.”<sup>121</sup>

13                  Based on this evidence, especially when factoring in adverse inferences based on the  
14 Backpage executives’ assertion of the Fifth Amendment, a reasonable juror could infer that  
15 Backpage’s “posting rules” and “content requirements” were designed to influence users  
16 (pimps) to post prostitution ads that were less detectable by law enforcement. A reasonable  
17 juror could therefore conclude that Backpage induced and materially contributed to sex  
18 trafficking on its website.

## 19                   **2. The Manual “Editing” and “Moderation Practices”**

20                  Backpage’s manual “editing” and “moderation practices” comprise a concerted effort to  
21 conceal illegal sex trafficking ads on its website and to protect the users (pimps) from law  
22 enforcement. Beginning in 2008, ads that contained references to acts for prostitution or sex  
23 acts in exchange for money” were deleted by moderators without a refund in an effort to “train”  
24

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25                  <sup>120</sup> Email from Carl Ferrer to Joel Pollock dated February 26, 2009, Pfau Decl. at Ex. 11.

26                  <sup>121</sup> Email by Ferrer, dated October 27, 2010, Pfau Decl. at Ex. 20.

1 the users to post clean ads.<sup>122</sup> By May 2009, Backpage began directing moderators to instead  
2 edit “escort” ads to remove terms, pricing criteria, and images indicative of sex trafficking but  
3 otherwise post the remainder of the ad.<sup>123</sup> Backpage continuously directed moderators to  
4 undertake “additional steps” to conceal signs of sex trafficking on its website because, as Ferrer  
5 noted, “text could be cleaned up more as users become more creative.”<sup>124</sup> Backpage was  
6 expressly reluctant to remove sex trafficking ads because doing so would “piss[] off a lot of  
7 users who will migrate elsewhere.”<sup>125</sup> Moderators were therefore instructed moderators to “not  
8 cause too much damage,” but instead to teach the user (pimp) “what they did wrong.”<sup>126</sup>  
9 Backpage would instruct third-party moderators in India to edit ads indicative of sex trafficking  
10 as “unobtrusively” as possible to “maintain the essence of the ad.”<sup>127</sup>

11 Based on this evidence, especially when factoring in adverse inferences based on the  
12 Backpage executives’ assertion of the Fifth Amendment, a reasonable juror could infer that  
13 Backpage’s manual “editing” and “moderation practices” were employed to conceal the illegal  
14 nature of sex trafficking ads and thereby create a safe-harbor for criminal activity on its website.  
15 A reasonable juror could also infer that Backpage utilized its moderators to influence and  
16 persuade users to post “sanitized” sex trafficking ads. And a reasonable juror could infer that  
17 the moderation practices, over time, encouraged sex traffickers to continue posting ads because  
18 they knew Backpage would ensure that their ads were “scrubbed” and therefore less detectible  
19 by law enforcement. A reasonable juror could therefore conclude that Backpage induced and  
20 materially contributed to sex trafficking on its website.

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22 <sup>122</sup> Email instructing moderators about “Forbidden Terms,” dated July 22, 2009, Pfau Decl. at Ex. 8; Declaration of  
23 Dr. Dominique Roe-Sepowitz, Pfau Decl. at Ex. 10.

24 <sup>123</sup> Moderation Training PowerPoint, Pfau Decl. at Ex. 13.

25 <sup>124</sup> Ferrer Email dated April 26, 2010, Pfau Decl. at Ex. 14.

26 <sup>125</sup> Ferrer Email dated September 25, 2010, Pfau Decl. at Ex. 18.

<sup>126</sup> *Id.*

<sup>127</sup> Email from moderation company, dated October 27, 2010, Pfau Decl. at Ex. 22.

### 3. The “Strip Term From Ad” Function

Backpage’s “Strip Term From Ad” function essentially automated the practice that of removing terms indicative of sex trafficking from ads and then posting the “sanitized” version of the ad.<sup>128</sup> Backpage programed the automated tool to delete “solid sex for money terms” and “insider” sex trafficking terms and publish the remainder of the ad.<sup>129</sup> The tool was also programmed to detect and remove pricing criteria in increments that indicated sex trafficking.<sup>130</sup> This, according to Backpage executives, made the adult ads look “cleaner than ever.”<sup>131</sup>

Like the manual moderation practices, a reasonable juror could infer from the evidence that Backpage’s “Strip Term From Ad” function was implemented to conceal the illegal nature of sex trafficking ads and thereby create a safe-harbor for criminal activity on its website. A reasonable juror could therefore conclude that Backpage induced and materially contributed to sex trafficking on its website, especially when factoring in adverse inferences based on the Backpage executives’ assertion of the Fifth Amendment.

### 4. The Practice of Actively Removing Terms Indicative of Child Sex Trafficking

The evidence shows that Backpage CEO Carl Ferrer personally directed and approved of the addition of terms to the banned terms lists and “Strip Term From Ad” function that were indicative of child sex trafficking.<sup>132</sup> These lists included terms such as “lolita,” “teenage,” “rape,” “amber alert,” “little girl,” “teen,” “fresh,” “innocent,” “school girl,” and “young.”<sup>133</sup> Ferrer expressly confirmed his knowledge that such terms, including “lolita” and “amber alert,” were code for a child prostitute.<sup>134</sup> Backpage did not notify authorities when its moderators or

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<sup>128</sup> Ferrer email dated September 25, 2010, Pfau Decl. at Ex. 18.

<sup>129</sup> Ferrer email dated August 31, 2011, Pfau Decl. at Ex. 26.

<sup>130</sup> Email from Padilla, dated December 15, 2010, Pfau Decl. at Ex. 30.

<sup>131</sup> Email from Padilla dated December 1, 2010, Pfau Decl. at Ex. 25.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Email from Ferrer dated November 17, 2010, Pfau Decl. at Ex. 27; Emails from Ferrer dated January 20, 2011 and June 8, 2011, Pfau Decl. at Ex. 28.



1 filters detected a term indicating that the victim featured in a sex trafficking ad was a child.  
2 Instead, the evidence shows that these terms were merely removed from ads and the “scrubbed”  
3 ads were then posted to the Backpage website.<sup>135</sup> Backpage knew these ads likely involved  
4 child sex trafficking and instead of immediately reporting the ads to the authorities, Backpage  
5 actively hid the only shred of evidence that the persons being sold for sex were, in fact,  
6 children. And then Backpage made money off those same ads. It seems unthinkable, but this  
7 appears to have happened hundreds if not many thousands of times. It is utterly outrageous.

8 A reasonable juror could infer that Backpage’s practice of removing terms from ads  
9 indicative of child sex trafficking, not informing the authorities, and then posting the remaining  
10 ad to its website was done to conceal the illegal nature of child sex trafficking ads. A  
11 reasonable juror could therefore conclude that Backpage induced and materially contributed to  
12 child sex trafficking on its website, especially when factoring in adverse inferences based on the  
13 Backpage executives’ assertion of the Fifth Amendment.

#### 14 **5. The Practice of Working Directly with Users to Tailor Ads**

15 The evidence shows that Backpage worked directly with users (pimps) who spent large  
16 sums of money posting ads on Backpage. Specifically, Backpage would “coach” high-paying  
17 users to “adjust” their ads to be less indicative of sex trafficking.<sup>136</sup> A reasonable juror could  
18 infer that this practice directly encouraged, aided, and facilitated sex traffickers. A reasonable  
19 juror could therefore conclude that Backpage induced and materially contributed to sex  
20 trafficking on its website, especially when factoring in adverse inferences intent based on the  
21 Backpage executives’ assertion of the Fifth Amendment.

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25 <sup>135</sup> Email from Padilla with spreadsheet of stripped out terms, Pfau Decl. at Ex. 29.

26 <sup>136</sup> Email to and from Ferrer to Sean Kim, Pfau Decl. at Ex. 38.

## 6. Over 70% of Ads Were Edited But Only 0.5% of Ads Were Removed

The evidence shows that Backpage edited/stripped out banned terms and images from the vast majority of the ads in its adult section—between 70%–80%.<sup>137</sup> Despite this, Backpage only removed 5 out of every 1000 ads (0.5%) for being indicative of “sex for money.”<sup>138</sup> A reasonable juror could infer that this practice suggests that Backpage’s intent was to “sanitize” sex trafficking ads and conceal illegal activity on its website. A reasonable juror could therefore conclude that Backpage induced and materially contributed to sex trafficking on its website, especially when factoring in adverse inferences based on the Backpage executives’ assertion of the Fifth Amendment.

## 7. The Editing of Archived Ads

Backpage employed the practice of scrubbing banned terms, pricing criteria, and images from archived ads—ads that were no longer listed on its website. This process was referred to as “deep cleaning.”<sup>139</sup> Carl Ferrer expressly indicated that destroying evidence of sex trafficking in archived ads was done to keep those materials from discovery in legal proceedings.<sup>140</sup> A reasonable juror could infer that Backpage’s editing of archived ads was done to conceal evidence of sex trafficking, and to protect users (pimps) and itself from criminal and civil prosecution. A reasonable juror could therefore conclude that Backpage induced and materially contributed to sex trafficking on its website, especially when factoring in adverse inferences based on the Backpage executives’ assertion of the Fifth Amendment.

## 8. The Testimony and Intimidation of Backpage Employees

Former Backpage employees have testified that (1) a significant number of ads were for prostitution, (2) that their job was to “sanitize ads for prostitution,” and (3) that a sex trafficking

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<sup>137</sup> Email from Hyer dated October 27, 2010, Pfau Decl. at Ex. 33.

<sup>138</sup> Email from Ferrer, dated January 31, 2011, Pfau Decl. at Ex. 32.

<sup>139</sup> Email dated Nov. 3, 2010, Pfau Decl. at Ex. 59.

<sup>140</sup> *Id.*

1 ad remains a sex trafficking ad even after you remove blatant terms indicating sex for money.<sup>141</sup>  
2 Backpage also threatened to fire employees who questioned whether the website was facilitating  
3 prostitution.<sup>142</sup> This finding was supported by 800 pages of documents, many of which were  
4 produced by Backpage in response to a federal subpoena, as well as testimony from Backpage  
5 employees (the ones who chose not to plead the Fifth Amendment). A reasonable juror could  
6 infer that the testimony and intimidation of Backpage employees supports a conclusion that  
7 Backpage induced and materially contributed to sex trafficking on its website, especially when  
8 factoring in adverse inferences based on the Backpage executives' assertion of the Fifth  
9 Amendment.

## 10 **9. The U.S. Senate Report**

11 The 53-page Senate Subcommittee report found that (1) Backpage has knowingly  
12 concealed evidence of criminality by systematically editing its "adult" ads and (2) Backpage  
13 knows that it facilitates prostitution and child sex trafficking.<sup>143</sup> This finding was supported by  
14 800 pages of documents, many of which were produced by Backpage in response to a federal  
15 subpoena, as well as testimony from Backpage employees (the ones who chose not to plead the  
16 Fifth Amendment). A reasonable juror could rely on the Senate Report as evidence to support a  
17 conclusion that Backpage induced and materially contributed to sex trafficking on its website,  
18 especially when factoring in adverse inferences based on the Backpage executives' assertion of  
19 the Fifth Amendment.

## 20 **10. Expert Testimony**

21 Plaintiff's expert Dr. Roe-Sepowitz will testify that her research and studies confirm that  
22 the vast majority of the ads in the "escort" section of Backpage are prostitution ads and  
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24 <sup>141</sup> Deposition of [REDACTED] dated August 2, 2016, Pfau Decl. at Ex. 46.

25 <sup>142</sup> Email from Padilla, Pfau Decl. at Ex. 42.

26 <sup>143</sup> U.S. Senate Subcommittee Report, Pfau Decl., Ex. 47.

1 indicative of sex trafficking and sex trafficking of minors. She will testify that Backpage's  
2 editing and moderation practices were designed and implemented with the goal of concealing  
3 criminal activity on its website and thereby facilitate sex trafficking. She will also testify  
4 regarding her observations of the "Backpage format" and how, over time, this "normalization"  
5 process is designed to generate and solicit sex trafficking ads.

6 Dr. Roe-Sepowitz's expert testimony in combination with the substantial evidence in  
7 this case, could allow a reasonable juror to conclude that Backpage induced and materially  
8 contributed to sex trafficking on its website.

9 **F. Backpage's Editing and Moderating Practices Constitute "Development" Under**  
10 **Even the Most Narrow Interpretation of Section 230**

11 Even without the Supreme Court's clear and concise instructions regarding the "law of  
12 the case," Backpage would still not be entitled to summary judgment under a narrow reading of  
13 Section 230 because the evidence shows that Backpage did, in fact, "develop" the content of  
14 illegal ads. Under the plain language of Section 230, a website is not immune if it is  
15 "responsible, in whole *or in part*, for the creation *or development*" of the allegedly unlawful  
16 content. *See Roommates.com*, 521 F.3d at 1162 (citing 47 U.S.C. § 230(f)(3)).

17 The evidence shows that Backpage consistently knew or should have known that ads  
18 containing certain terms and images were prostitution and child sex trafficking ads.  
19 Nevertheless, Backpage utilized its "editing" and "moderation practices" to remove the terms  
20 and images indicating ads were related to sex trafficking. Backpage would then post the  
21 "clean" version of the ad to its website and an illegal sex-for-money transaction would  
22 nevertheless occur. By removing the terms and images indicating sex trafficking from an ad,  
23 which Backpage knew was related to sex trafficking, Backpage was "*developing*" the unlawful  
24 content a given ad. Specifically, Backpage was concealing and disguising prostitution ads from  
25 law enforcement thereby enhancing the illegality of each ad and creating a safe harbor for sex  
26 trafficking and child sex trafficking on its website.

1 Here, there are disputed issues of material fact regarding the extent to which Backpage  
2 moderated and edited the Plaintiffs' ads. According to Backpage's internal records, Backpage's  
3 moderators were trained to check the "violated terms of use" box to indicate their efforts, and  
4 then "lock any ad you have edited" to prevent users from reinserting the removed content.<sup>144</sup>  
5 Ads for both J.S. and L.C. indicate the ads were edited, flagged by moderators for  
6 "Inappropriate Content," and then posted online. J.S. also observed that at least two of her ads  
7 were edited when the moderator replaced "\$" signs with "roses" and an image of a rose.  
8 (presumably to hide the fact that the ad was offering sex for \$\$).

9 **G. Backpage.com is Not Covered By Section 230(c)(2) Because It Does Not Act in**  
10 **"Good Faith."**

11 Section 230(c)(2)(A) states that no internet content service provider shall be held liable  
12 for "any action voluntarily taken *in good faith* to restrict access" to offensive material.  
13 Curiously, Backpage has not attempted to claim protection under this "good Samaritan" portion  
14 of Section 230. This is odd considering the provision is intended to protect websites who make  
15 *good faith* efforts to restrict access to offensive content—something Backpage decries its  
16 editing and moderating practices were intended to do. In any case, to the extent Backpage seeks  
17 protection under Section 230(c)(2) of the CDA, the Court should deny Backpage's motion for  
18 summary judgment because the evidence articulated above *overwhelmingly* shows that  
19 Backpage acted in *bad* faith in its so-called moderation efforts, as well as its use of supposed  
20 "posting rules" and "content requirements." At the very least, there is a genuine issue of  
21 material fact regarding Backpage's good or bad faith that must be decided by the trier of fact.

22 **H. The First Amendment Does Not Allow Backpage to Traffic Sex Online**

23 Backpage makes a last-ditch attempt to bootstrap itself under the protections afforded by the  
24 First Amendment by mischaracterizing its practices as "editorial choices." This is a non-starter.  
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26 <sup>144</sup> Email from Ferrer dated September 25, 2010, Pfau Decl. at Ex. 18.

1 “The First Amendment does not protect speech that is itself criminal because it is too intertwined  
2 with illegal activity.” *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D. Cal. 1997) (citing *Giboney*  
3 *v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)) (other citation omitted). Just as  
4 “[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage  
5 to defeat a valid statute aimed at penalizing and terminating illegal uses of premises,” *Arcara v.*  
6 *Cloud Books, Inc.*, 478 U.S. 697, 707 (1986), engaging in editorial decisions on a website used for  
7 sex trafficking does not immunize Backpage from civil liability.

8 The overwhelming evidence shows Backpage used its editing and moderation practices (its  
9 “editorial choices”) for criminal purposes—to further the sex trafficking of women and children and  
10 avoid criminal prosecution by destroying evidence of criminality. “[W]here speech becomes an  
11 integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on  
12 words alone.” *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). For the multitude of  
13 reasons outlined above, a reasonable juror could conclude that Backpage’s editing and moderations  
14 practices were integral parts of the prostitution, sex trafficking, and child sex trafficking that  
15 occurred on its website. Accordingly, the Court should deny Backpage’s motion for summary  
16 judgment based on the First Amendment.

17 **I. The Court Should Continue Backpage’s Summary Judgment Motion Under CR**  
18 **56(f) to Allow Plaintiffs to Compel Elizabeth McDougall to Respond to**  
19 **Unanswered, Outstanding Discovery**

20 In its motion for summary judgment, Backpage relies only on the testimony and  
21 opinions of its general counsel, Elizabeth McDougall, who did not work for the company until  
22 2012, two years after the Plaintiffs were exploited. Backpage also designated Ms. McDougall  
23 as its corporate representative under CR 30(b)(6). Backpage therefore waived the attorney-  
24 client privilege on matters discussed in Ms. McDougall’s declaration, as well as matters  
25 identified in Plaintiffs’ CR 30(b)(6) notice. *Dietz. V. Doe*, 131 Wn.2d 835 (1997) (when  
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1 attorney is authorized to speak and act for client on particular matters, disclosures by attorney  
2 that are within scope of that authority waive privilege to same extent as disclosures by client);  
3 *State v. Webbe*, 122 Wn. App. 683, 691 (2004) (“A party's offer of his attorney's testimony as to  
4 a part of any communication to the attorney constitutes a waiver of the privilege as to the whole  
5 of that communication.”).

6  
7 Yet, as detailed in the supporting declaration of Jason P. Amala, during her deposition  
8 and the CR 30(b)(6) deposition, Ms. McDougall refused to answer even the most basic  
9 foundational inquiries, including questions concerning Backpage employees and executives  
10 knowledge and intentions to encourage, induce, and facilitate sex trafficking and prostitution  
11 through so called moderation practices and other efforts. The Court should deny Backpage’s  
12 motion for summary judgment based on the evidence above, but if the Court is inclined to grant  
13 Backpage’s motion, Plaintiffs request a short continuance so they can compel Backpage’s CR  
14 30(b)(6) representative and sole declarant on the underlying motion, Elizabeth McDougall, to  
15 respond to questions directly related to the issues at hand that she refused to answer based on  
16 the improper assertion of attorney-client privilege.<sup>145</sup> Plaintiffs maintain the assertion of  
17 privilege under these circumstances was improper, and would ask the Court grant a continuance  
18 to allow the parties to fully brief these outstanding discovery issues, as outlined in the attached  
19 declaration per CR 56(f).  
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26 <sup>145</sup>Declaration of Jason P. Amala, Pfau Decl. at Ex. 65.

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## VI. CONCLUSION

Backpage.com makes over \$100 million per year as the nation's largest purveyor of prostitution and sex trafficking online. Because of websites like Backpage.com, modern day prostitution and sex trafficking is marketed mostly on the internet. Countless children—like Plaintiffs J.S., S.L. and L.C.—are sold for sex on the Backpage.com website before they reach high school. While Backpage.com maintains it is somehow entitled to federal immunity, the Washington Supreme Court's ruling in this case clearly says otherwise in light of the *overwhelming* evidence that shows Backpage materially contributed to the illegal activity on its website by actively inducing and facilitating sex trafficking and prostitution ads, including ads depicting children like J.S. S.L. and L.C., through so called moderation practices, Posting Rules, Content Requirements, and direct interaction with users (pimps and prostitutes). For the reasons stated above, Plaintiffs ask that the Court deny the Backpage defendants' Motion for Summary Judgment.

Dated this 8th day of May 2017.

PFAU COCHRAN VERTETIS AMALA PLLC

By 

Michael T. Pfau, WSBA #24649

michael@pcvalaw.com

Jason P. Amala, WSBA #37054

jason@pcvalaw.com

Vincent T. Nappo, WSBA #44191

vincent@pcvalaw.com

Attorneys for Plaintiffs

THE LAW OFFICE OF ERIK L. BAUER

/s/ Erik L. Bauer

Erik L. Bauer, WSBA #14937

Attorney for Plaintiffs



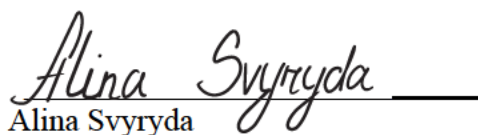
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**CERTIFICATE OF SERVICE**

I, Alina Svyryda, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Amala PLLC, and that on this 8th day of May 2017, I served the foregoing motion, as well as the supporting Declaration of Michael T. Pfau, via email, hand delivery, and/or U.S. Mail by directing delivery addressed to:

Harry Schneider  
Breena Roos  
Perkins Coie  
1201 Third Ave., Ste. 4900  
Seattle, WA 98101  
Email: hschneider@perkinscoie.com  
Email: broos@perkinscoie.com

  
Alina Svyryda

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