

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Backpage.com, LLC,)	
)	
plaintiff,)	
)	No. 15 C 6340
v.)	
)	Hon. John J. Tharp, Jr.
Thomas J. Dart, Sheriff of Cook County,)	
Illinois,)	
)	
defendant.)	

MOTION FOR LEAVE TO ISSUE SUBPOENAS

Thomas J. Dart, Sheriff of Cook County, Illinois, in his official capacity, by his undersigned Special Assistant State’s Attorneys, requests that this Court enter an order pursuant to Federal Rule of Civil Procedure 16(b) granting leave to propound subpoenas to discover evidence proving that Backpage has been and is engaged in criminal activities, including the solicitation of prostitutes and creation of advertisements for prostitution, and in support of this motion states:

Introduction

This July, THE WASHINGTON POST and NBC NEWS each published explosive articles reporting that Backpage is actively recruiting prostitutes and even creating ads for them to post on its website. Copies of these articles are attached as Exhibits A and B, respectively.¹

¹ The audio and video content can be accessed online at https://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7b38e35fd8e0c288f_story.html?utm_term=.ec5807c52693 and <http://www.nbcnews.com/news/us-news/backpage-critics-find-surprise-ammunition-philippines-raid-n778221>.

While “Backpage has always claimed it doesn’t control sex-related ads, [n]ew documents show otherwise.” Exhibit A. Backpage has been “aggressively soliciting *and creating sex-related ads.*” *Id.* (emphasis added).

The articles explain that the discovery of incriminating documents showing Backpage’s solicitation and ad creation came about accidentally following the seizure of computers from one of Backpage’s Philippine agents in an unrelated civil lawsuit, but the fact that the revelations were accidental does not take away from their explosive character. The seized documents, if authentic and the reporting about them correct, prove that the essential premise of the original and amended complaints—that Backpage does not provide any of the content of the ads soliciting prostitution—is not well grounded in fact. Backpage has been lying to this Court, *e.g.*:

Users provide all the content for ads they post on Backpage.com using an automated interface. Backpage.com does not dictate or require any content. (ECF No. 1, ¶ 19)

Backpage.com does not dictate or require users to post any content. Instead, users provide all the content for ads they post using an automated interface. (Ferrer Declaration, ECF No. 6, ¶ 4.)

lying to the Seventh Circuit:

Users provide all content for their ads; Backpage.com hosts the forum for their speech. (Backpage’s opening brief at 3.)

lying to many attorneys general throughout the nation, for example, Missouri’s:

Individuals post on Backpage.com using an automated interface, providing all content for ads they post (*e.g.*, titles, text and images). Backpage.com does not dictate or require any content, although it does block and remove content that violates the website’s rules or may be improper. (*Backpage.com v. Hawley*, No. 17-CV-1951, 2017 WL 3283402, ECF No. 1, ¶ 21 (E.D. Mo. filed July 11, 2017))

and lying to scores of civil judges hearing personal injury claims of women and children victimized by Backpage's abominable business practices or, in some instances, wrongful death claims of their estates. Backpage also misled the U.S. Supreme Court (page 3 of its opposition to the Sheriff's *certiorari* petition) and the U.S. Senate Permanent Subcommittee on Investigations (counsel's October 23, 2015 letter to Senators Portman and McCaskill, ECF No. 130-10 at p. 11) by implying that only third-party users provided information content for ads placed on its website.

Based on the date range of a few of the incriminating documents that are available from the docket in Backpage's case against Missouri Attorney General Hawley, it appears that Backpage was sanitizing ads of their criminal content in 2015 and 2016, the same time it was telling this Court that it was not. The few emails which the Missouri Attorney General attached to his filings do not provide a date range for when Backpage began creating ads for prostitutes it solicited from other websites, but it is reasonable to assume that these will be of like date. If it is established that Backpage itself authored ads for prostitutes and child traffickers to post on its platform, as reported by the press, it can have no immunity under the Communications Decency Act.

As defendant previously informed this Court, evidence exists of Backpage's illegal actions through its sanitization of ads and the promotion of juvenile prostitution, such as the Red Beauty Sting operation.² See ECF No. 155 at 5—6 & ECF No. 161 at 8—11. In that

² In addition, Special Agent Brian Fichtner of the California Department of Justice led a three-year criminal investigation into Backpage and its owner-operators. He submitted a sworn statement that "BACKPAGE's escort services section essentially operates as an online brothel" in support of the issuance of an arrest warrant for them in a now-pending criminal action titled *People v. Ferrer, Lacey and Larkin*, No. 16 FE 019224 (Superior Court of Sacramento County, California) (filed September 26, 2016). A copy of that criminal complaint and Special Agent Fichtner's affidavit are attached hereto as Exhibits C & D, respectively.

sting operation, an investigator at the Cook County Sheriff's Office had submitted a paid advertisement to Backpage, but rather than rejecting the advertisement that clearly promoted child prostitution, Backpage scrubbed the ad of its blatant criminality, scrubbed the age reference ("14—18") and scrubbed the remark about "just graduating from grade school." Backpage knew this advertisement was prostituting a juvenile, yet re-wrote the ad so as to hide the illegal activity from law enforcement officials, thus promoting the illegal act so that Backpage could profit from the criminal undertaking. Documents collected during the Senate investigation show that "sanitization" was not an isolated event but part of a deliberate, orchestrated criminal undertaking by Backpage. U.S. Senate Permanent Subcommittee on Investigations, *Backpage.com's Knowing Facilitation of Online Sex Trafficking*, Staff Report. Available at: <https://www.hsgac.senate.gov/subcommittees/investigations/reports>. (Accessed: 9/7/2017.)

Defendant now seeks leave to obtain through subpoena the very documents discussed in the two news articles—documents which, if authentic, corroborate the Red Beauty Sting and prove that Backpage has encouraged and participated in illegal activities, including the creation of advertisements that would destroy its Communications Decency Act defense that it is merely a web platform posting the advertisements of others. Specifically, defendant seeks leave to serve the subpoena attached as Exhibit E to the litigants who first assembled the documents. However, because there are pending motions and substantial briefing directed to what is the appropriate scope of discovery in this matter at this time, defendant is seeking leave to propound this subpoena pursuant to Federal Rule of Civil Procedure 16(b).

Procedural History

On June 8, 2016 the Court granted the parties' joint motion to extend the period for fact discovery, striking the previously-set June 15, 2016 date and indicating that the "Court

will set a further status hearing regarding the discovery schedule upon ruling on the pending discovery motions.” ECF No. 164. Then, on August 2, 2016, Backpage filed a motion to renew its request for summary judgment (ECF No. 169), reintroducing its earlier request for summary judgment (ECF No. 124) that previously had been denied without prejudice (ECF No. 137). Defendant responded to the motion arguing, in part, that the motion should be denied because defendant should be allowed discovery to prove that Backpage was participating in criminal activity, which is not constitutionally protected. (ECF Nos. 178 & 184.) The motion is fully briefed and awaiting a ruling.

On August 9, 2016 Backpage filed its first amended complaint abandoning its claims for monetary damages. ECF No. 173. On September 20, 2016, defendant filed a motion to dismiss because, as a result of its abandonment of monetary damage claims, Backpage cannot state a claim against Thomas J. Dart individually. The motion to dismiss is fully briefed and awaiting a ruling.

On February 7, 2017, the Court *sua sponte* raised the issue of whether the case is now moot as a result of Backpage itself shutting down the Adult Services section of its website, and invited the parties to submit briefs on the issue. ECF No. 195. In response, on February 21, 2017, defendant initially filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that Backpage recently had ceased operating its adult services website hosting platform, rendering the injunctive prayers which are the sole remaining claims asserted by Backpage moot, and depriving the Court of an actual case or controversy within the meaning of article III of the United States Constitution and Federal Rule of Civil Procedure 57. ECF No. 197. The same day, Backpage filed its “Opposition to Suggestion of Mootness” arguing that the case was not moot. ECF No. 196.

On March 7, 2017 defendant amended his position on mootness because it had come to his attention that prostitution ads had not disappeared from Backpage.com, they only migrated from the Adult Services section to the Personals section. ECF No. 200. Backpage acutely is aware of this inasmuch as it then increased the advertising fees for the Personals section in order to profit from the move.³ *Id.* As Backpage has not left the business of soliciting prostitution, as it now appears, the controversy is hardly moot.

Argument

“Under Rule 26, a district court has broad discretion in matters relating to discovery. Rule 26 permits the discovery of any ‘nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.’” *Simon v. Northwestern Univ.*, No. 1:15-CV-1433, 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) (citations omitted). “Prior to limiting discovery, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, and taking into account society's interest in furthering the truth-seeking function in the particular case before the court.” *Id.* (citations and quotations omitted). Whether the material is admissible is a question for another day, but under this liberal standard, defendant is entitled to obtain this discovery.

At this point, defendant has not reviewed the documents and does not know everything they contain. However, based on the news reports and quotes therein from an individual who reviewed the documents, and the small sample of documents that were attached to the Missouri Attorney General's filings, the seized documents likely prove that Backpage deliberately has engaged in illegal activity—a conclusion which strips it of first amendment

³ THE WASHINGTON POST similarly reports that “[m]ost ads on Backpage are free ... [b]ut ads in the ‘dating’ section cost at least \$3, and more for posting in more than one city or periodically moving the ad to the top of the list.” Ex. A.

protection—and even authored criminal ads—a conclusion which strips it of any possible immunity under the Communications Decency Act.

If Backpage was engaging in illegal behavior, there can be no prior restraint claim against defendant for encouraging Visa and MasterCard to stop helping Backpage profit from its illegal activity. Specifically, when the preliminary injunction was on appeal, Judge Posner held:

Visa and MasterCard were victims of government coercion aimed at shutting up or shutting down Backpage's adult section (more likely aimed at bankrupting Backpage—lest the ads that the sheriff doesn't like simply migrate to other sections of the website), when it is unclear that Backpage is engaged in illegal activity, and if it is not then the credit card companies cannot be accomplices and should not be threatened as accomplices by the sheriff and his staff.

Backpage.com, LLC v. Dart, 807 F.3d 229, 233 (7th Cir. 2015) (emphasis added). Judge Posner acknowledged that illegality on the part of Backpage was key to this case. This Court is obligated to follow that acknowledgment, it cannot choose one part of the mandate to abide over another. Whether or not “Backpage is engaged in illegal activity” is the *sine qua non* of this matter. 807 F.3d at 233.

When Judge Posner rendered his opinion, he was not working with a full evidentiary record, and no actual discovery had taken place with respect to the limited preliminary injunctive record. But since the time of Judge Posner’s opinion, the record in this case has been supplemented with evidence of Backpage’s illegal activities, from the defendant’s own Red Beauty sting operation, Agent Fichtner’s investigation, testimony and findings by the U.S. Senate Permanent Subcommittee on Investigations, and most recently THE WASHINGTON POST and NBC NEWS articles.

Importantly, the documents discussed in THE WASHINGTON POST and NBC NEWS articles apparently prove that Backpage was actively soliciting and encouraging illegal

advertisements on its website, indeed, scripting them. This goes well beyond the sanitization of ads uncovered in the Red Beauty Sting, and unquestionably brings the actions of Backpage outside of the protection of the Communications Decency Act, which provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” *Backpage.com, LLC*, 807 F.3d at 233. At the time Judge Posner wrote his opinion, he stated, in analyzing the Communications Decency Act, that “Backpage is an intermediary between the advertisers of adult services and visitors to Backpage's website.” *Backpage.com, LLC*, 807 F.3d at 234. He compared Backpage to a newspaper “that carries an advertisement for ‘escort services’” and “make[s] money from that activity,” but is not liable for the “content of what it transmits” because another provides the content. But since the time Judge Posner wrote his opinion, it has now become clear, and the documents sought through this subpoena likely demonstrate that, Backpage is no longer shielded by the Communications Decency Act because it is not an intermediary, it is actually the provider of illegal content on its website and thus can be held liable for the prostitution ads that it has encouraged and in some cases itself authored. *See, e.g., Huon v. Denton*, 841 F.3d 733, 742—43 (7th Cir. 2016) (no immunity for website platform that solicited or created information content).

Moreover, permitting defendant to obtain these documents furthers society's interest in the truth-seeking function of the Court. In a case involving allegations regarding sexual slavery, prostitution and the sexual exploitation of children, society's interest compels the conclusion that defendant should be permitted to the discovery he seeks. *See, e.g., Simon v. Northwestern University*, No. 1:15-CV-1433, 2017 WL 467677, at *2 (N.D. Ill. Feb. 3, 2017) (in applying the factors articulated in F.R.C.P. 26, the Court found “the importance of the issues at

stake” to be “extremely high” in a case involving murder, false imprisonment and “a high profile journalism professor accused of employing unethical investigatory tactics at the behest of one of the nation's most prestigious universities”).

Finally, there is another important societal interest calling for the discovery of incriminating documents seized in the Philippines besides the public importance in rooting out sexual slavery and the sexual exploitation of children. It is important for this Court to preserve its resources for the redress of legitimate grievances, not trumped up ones. Defendant reasonably expects the Philippine evidence to show that Backpage itself is an information content provider for ads soliciting the prostitution of minors. If that proves true—likely, as heralded by the Red Beauty sting operation—then it will be difficult to measure the temerity required to have sought Communications Decency Act immunity *as a civil rights plaintiff* in this Court. Its entire case appears to be based on a false disclaimer of ad authorship, and Backpage’s deception has wasted this Court’s resources and cost Cook County taxpayers attorneys’ fees defending a trumped up first amendment claim needlessly. Backpage has trumpeted the absoluteness of the statutory immunity available to it as a mere web platform, trumpeted it to state courts,⁴ district courts,⁵ circuit courts⁶ and the Senate,⁷ but in light of the recent revelations, it appears that the claim is

⁴ See, e.g., *J.S. v. Village Voice Media Holdings, L.L.C.*, 184 Wash. 2d 95, 359 P.3d 714 (2015) (Appellants’ Opening Brief, 2013 WL 9582408 (Wash. App.) at *3).

⁵ See, e.g., *Backpage.com, LLC v. Hawley*, No. 17-CV-1951, 2017 WL 3283402 (E.D. Mo. July 11, 2017) (Complaint, ¶¶ 20, 29 & 32); *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 105 (D.D.C. 2016) (Pl. Reply Br. at 3); *Senate Permanent Subcommittee v. Ferrer*, 199 F. Supp. 3d 125, 138 (D.D.C. 2016), *vacated as moot sub nom. Ferrer v. Senate Permanent Subcommittee on Investigations*, 856 F.3d 1080 (D.C. Cir. 2016).

⁶ See, e.g., *Ferrer v. Senate Permanent Subcommittee on Investigations*, 856 F.3d 1080 (D.C. Cir. 2016) (Appellant’s Br. at 4).

⁷ See, e.g., *Aug. 6, 2015 letter from Backpage.com counsel to Sens. Portman and McCaskill* at 1; *Aug. 26, 2015 letter from Backpage.com counsel to Sens. Portman and*

without evidentiary support and never should have been made in the first place. The requested discovery may compel the conclusion that the initial complaint, the amendment, numerous briefs and the remarks of counsel to this Court are not well grounded in fact.

WHEREFORE, for the foregoing reasons, Sheriff Thomas J. Dart requests that this motion for leave to serve a subpoena for documents be granted and this Court grant whatever other relief this Court deems appropriate.

Respectfully submitted,

THOMAS J. DART,
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By: /s/ Paul J. Kozacky
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McCaskill at 1; Oct. 23, 2015 letter from Backpage.com counsel to Sens. Portman and McCaskill, ECF No. 130-10 at p. 11 (all letters attached hereto as Exhibit F).