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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

vs.

Michael Lacey, *et al.*,

Defendants.

NO. CR-18-00422-PHX-DJH

**DEFENDANTS' MOTION FOR A NEW
TRIAL**

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Defendants Michael Lacey, Scott Spear, and John Brunst move, under Fed. R. Crim. P. 33, for the Court to vacate their convictions and grant a new trial if the Court does not grant their motions for a judgment of acquittal on all counts. For the reasons set forth below, the interests of justice require a new trial.

1. The Court Should Grant a New Trial Based on the Grounds Advanced in Defendants' Rule 29 Motions If Those Motions Are Not Granted.

Defendants incorporate by reference the factual and legal bases for relief advanced in their Motions for Judgments of Acquittal, as if set forth here in full. If the Court does not grant those motions, the bases asserted in them also justify the granting of a new trial.

2. The Court Should Grant a New Trial (or Dismiss) Based on the Government's Failure to Make Disclosures Required by the Jencks Act and by *Brady*.

Defendants seek a new trial based on multiple failures by the government to timely disclose materials to the defense as required both by the Jencks Act, 18 U.S.C. § 3500, and by the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Defendants focus on two discrete failures: 1) the government's failure to timely disclose Carl Ferrer's emails with its case agent, Lyndon Versoza, which the government disclosed to the defense only after the jury in this case was deliberating; and 2) the government's failure to disclose the factual information the government developed during its investigation of Backpage.com in the Western District of Washington in 2012-2013 (the "WDWA Investigation"), which, among other things, undermines, if not contradicts, the government's trial positions that "anyone could tell" from looking at the adult ads that ran on Backpage.com that those ads were associated with illegal conduct and that Backpage's moderation practices showed criminal intent.

With respect to the first failure, Defendants incorporate by reference the factual and legal bases for relief advanced in the Supplement to Defendants' Motion to Dismiss or to Strike Testimony, and Request for a Hearing Due to the Government's Jencks and Brady Violations (Doc. 1972), and the reply. To the extent that the indictment is not dismissed, those same arguments support this request for a new trial.

1 With respect to the second failure, throughout the presentation of its case, the
 2 government advanced the narrative that “anyone could tell” that most adult ads on Backpage
 3 related to prostitution, just by looking at the ads. The government presented significant
 4 testimony and other evidence to that effect, such as exhibit 52 (expressing the opinion that
 5 “blatant prostitution ads are rampant” on Backpage) and exhibit 119 (“[i]t does not require
 6 forensic training to understand that these advertisements are for prostitution”), as well as so-
 7 called not-for-the-truth “notice” evidence from financial institutions, credit card companies,
 8 and non-profit organizations. From its opening¹ to both of its closings,² the government
 9 repeatedly exhorted the jury to conclude that *all* Backpage adult ads related to prostitution
 10 *because they look like they do*.

11 The government has steadfastly refused, despite repeated requests from and motions
 12 by the defense, to produce nearly all the factual information developed during the WDWA
 13 Investigation, a federal investigation that took place right in the middle of the alleged
 14 conspiracy and did not result in a prosecution of Backpage or its owners. The government
 15 has claimed that the WDWA Investigation is irrelevant to this case, but the government
 16 elicited testimony from its cooperating witness at trial that Backpage.com was under
 17 “pressure” from the WDWA Investigation, so used the investigation as a sword at trial while
 18

19 ¹ 08/31/23 p.m. Tr. at 147:10-11 (“the evidence is going to show that the Adult section was
 20 for prostitution ads”).

21 ² 11/01/23 a.m. Tr. at 45:9-15 (“Mr. Eisenberg talked about in his closing argument about
 22 Grant Snyder saying that the ads did not provide direct evidence of prostitution. You may
 23 remember him talking about that. Well, remember he said it was suggestive, and so did their
 24 expert. That is essentially circumstantial evidence. They are saying, ‘Yeah, it looks like
 25 prostitution.’ It is circumstantial evidence of prostitution.”); 11/01/23 a.m. Tr. at 61:3-8
 26 (“And then don’t forget the expert Dr. Mehlman-Orozco, the person who can’t answer a
 27 straight yes or no question.... She cannot be taken seriously, ladies and gentlemen. She says
 28 she doesn’t know whether they were real ads or not, but you know.”); 10/27/23 a.m. Tr. at
 10:21-11:2 (“And you can look at her postings. Look at a few – at least one of them. You
 will see all the indicators of prostitution... [T]hey have this term that you see in a lot of these
 things because this is trying to give them, you know, some type of plausible deniability and
 smoke out law enforcement. This is not an offer for prostitution. All donations are for my
 time and companionship only. We saw that in some form in a lot of the postings. It’s
 nonsense, though; right? This is really for prostitution.”).

1 seeking to shield disclosures relating to that investigation.³ Defendants believe the WDWA
2 Investigation determined that, even though many people who saw Backpage.com adult ads
3 might conclude the ads related to prostitution, their conclusions would be unsound because
4 so many activities involving sex and money are *lawful*, even if those activities might look like
5 prostitution to an average person. That determination seriously undermined one of the core
6 tenets of the government's case and would have been both exculpatory and impeaching at
7 trial. Defendants also believe the WDWA Investigation determined that Backpage.com's
8 moderation practices were consistent with industry standards. That determination
9 undermines another core tenet of the government's case, that Backpage.com's moderation
10 program was designed to facilitate prostitution, and would have been both exculpatory and
11 impeaching at trial.

12 When the Court first stepped into this case, it declined to dismiss this case based on
13 the government's failure to produce these materials, saying that the government's case was
14 "in its infancy" when the issue arose in the previous trial, and that the "materiality of the
15 documents ha[d] not been established." Doc. 1444 at 14:8-16. The Court "decline[d] to
16 make a ruling as to the relevancy or materiality of the WDWA documents *at th[at] juncture*."
17 *Id.* (emphasis added). Having now seen the entirety of the government's case, the Court
18 should have little difficulty seeing how the information the government has withheld from
19 the defense would be both relevant and material to the defense, particularly given the low
20 bar for materiality under *Brady*: "materiality is a low threshold; it is satisfied so long as the
21 information . . . *would have helped to prepare a defense*." *United States v. Soto-Zuniga*, 837 F.3d 992,
22 1003 (9th Cir. 2016) (emphasis added). The government's refusal to produce to the defense
23 these plainly exculpatory and impeaching materials warrants, at a minimum, at new trial, if
24 not the granting of the defense's previous motion to dismiss with prejudice based on the
25 government's failure to provide these materials before the first trial. (Docs. 1355, 1410).

26
27
28 ³ "Q. And in 2012, if you know, were you experiencing any pressure regarding the website?
A. Yes, there was another prostitution investigation of the site." 09/13/23 am Tr. at 80:5-8.

3. **The Court Should Grant a New Trial Because the Government Elicited False or Misleading Testimony from Carl Ferrer.**

If a prosecutor elicits false or misleading testimony from a trial witness about a material fact, the defendant has been denied due process of law, requiring reversal of his conviction. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (a prosecutor’s elicitation of testimony that “gave the jury the false impression” about a material fact “was not accorded due process of law,” requiring the reversal of the conviction). “A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth....That the prosecutor’s silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.” *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959); accord *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (“prosecutor had a duty not to mislead the jury” by presenting testimony “in such a way as to suggest the opposite of what she alone knew to be true;” by violating this duty, she “pervert[ed] the adversarial system and endanger[ed] its ability to produce just results,” which required the conviction to “be overturned unless the misconduct can be proven to be harmless beyond a reasonable doubt”).

To establish a constitutional violation requiring reversal under *Napue*: a defendant must show: (1) testimony or evidence presented at trial was actually false or misleading; (2) the government knew or should have known that it was false; and (3) the testimony was material, meaning there is a reasonable likelihood that the false testimony *could* have affected the judgment of the jury.

United States v. Kabov, 2023 U.S. App. LEXIS 18214, at *2 (9th Cir. July 18, 2023) (emphasis in original; internal quote marks omitted). “Mere speculation is insufficient to establish a claim under *Napue*. There must be something in the prosecutor’s questioning, or the answers given, that may be construed to reflect an intention by the prosecutor to mislead the jury.” *United States v. Renzi*, 2013 U.S. Dist. LEXIS 202881, at *13 (D. Ariz. Oct. 25, 2013) (cleaned up; internal citation omitted). “Although *Napue* does not create a per se rule of reversal, [the Ninth Circuit] has gone so far as to say that if it is established that the

1 government knowingly permitted the introduction of false testimony reversal is virtually
2 automatic.” *Sivak v. Hardison*, 658 F.3d 898, 912 (9th Cir. 2011) (cleaned up).

3 One thing that was glaringly absent from the government’s case was evidence that
4 Messrs. Lacey, Spear, or Brunst had any contemporaneous knowledge about any of the
5 charged ads or took any action connected to the publication of any charged ad. The only
6 evidence that the government presented to try to connect any Defendant or even any
7 purported co-conspirator to any of charged ads or the persons posting them related to
8 Pamela Robinson—notably the testimony the government elicited from Carl Ferrer about
9 “his” emails with Ms. Robinson. 09/14/23 p.m. Tr. at 79:7-102:8. The prosecution asked
10 Mr. Ferrer: “did you have e-mail exchanges with somebody by the name of Pamela
11 Robinson?” Mr. Ferrer answered: “Yes.” *Id.* at 79:7-9. The government then asked Mr.
12 Ferrer numerous questions about exhibits 162, 162-a, 163-165, and 168, which were a series
13 of emails between Pamela Robinson and “Carl” or “carl@backpage.com.” Those questions
14 were intended to convey the false impression that Carl Ferrer was one of the parties to these
15 emails, while both the prosecutor and the witness knew that he was not and, therefore,
16 generally referred in their questions and answers to emails to and from an email address—
17 carl@backpage.com—rather than by referring to emails to and from Mr. Ferrer. The
18 following examples are illustrative:

19 Q. So looking at Page 2 of 162, what question is Pamela Robinson asking Carl
20 at carl@backpage.com?

21 A. She’s asking, “can i use the promo code to get a discount on my escort
22 ads?”

23 Q. And what do you respond? What does carl@backpage.com respond?

24 A. “Yes. It will work in any category. Carl.”

25 09/14/23 p.m. Tr. at 80:24-81:5.

26 Q. All right. Then let’s go to Exhibit 164 for the witness’ eyes only. Now,
27 Exhibit 164, is this also a continuation of an exchange between you and
28 Pam—or carl@backpage and Pamela Robinson?

A. Yes.

09/14/23 p.m. Tr. at 88:19-23.

1 Q. What is this? Can you tell us what -- what is this in effort -- or what are
2 you saying here to Pamela Robinson?

3 A. So Pamela Robinson, she received a marketing e-mail from
4 carl@backpage.com and it had her last post on 2010 March 27th in the
category of biz ops.

09/14/23 p.m. Tr. at 89:4-8.

5 Q. Now, what does carl@backpage.com tell her?

6 A. "Hi, you should be able to edit now. Please let us know if you are still
having trouble."

7 Q. All right. What is she—what is she talking about here in this e-mail
exchange? We're now—we started in 2010. Now we're in 2012, right?

8 A. Yes.

9 Q. All right. What is -- what is she saying here to you?

10 A. She's concerned about an article that broke in Seattle about the possible
addition of—

09/14/23 p.m. Tr. at 90:15-24.

11 After the government left the jury with the impression for nearly a month that Mr.
12 Ferrer had been directly exchanging emails in 2010, 2011, and 2012 with Pamela Robison,
13 whose ads accounted for ten of the fifty charged ads, Mr. Ferrer was confronted about his
14 testimony on cross-examination and admitted: "It really wasn't my email address."

15 10/10/23 a.m. Tr. at 104:10. Mr. Ferrer then admitted that emails to the
16 carl@backpage.com address went to his staff and that the emails from that address to Ms.
17 Robinson could have been written by any of several members of his staff. 10/10/23 a.m.
18 Tr. at 104:11-24.

19 There can be no doubt that Mr. Ferrer's testimony was false (or at least highly
20 misleading), that the prosecutor knew it was false (or at least highly misleading), and that the
21 testimony was material. As to the first point, Mr. Ferrer admitted on cross-examination that
22 the emails to and from the carl@backpage.com email address were received by and
23 responded to by his staff, not by him, contrary to his testimony on direct examination. As to
24 the second point, this is a textbook case of there being "something in the prosecutor's
25 questioning, or the answers given, that may be construed to reflect an intention by the
26 prosecutor to mislead the jury." *Renzi*, 2013 U.S. Dist. LEXIS 202881, at *13.⁴

27
28 ⁴ The prosecutor's questions to Mr. Ferrer were so far from norm, and forced, that the
prosecutor kept saying "you," and then quickly correcting himself to say

As to materiality, there can be no question that the false or misleading testimony the prosecutor elicited from Mr. Ferrer could have affected the judgment of the jury. First, Pamela Robinson's ads were ten of the fifty charged ads (eight of the seventeen substantive Travel Act convictions). Second, Mr. Ferrer's false testimony about emails with Pamela Robinson was the principal means the government used to try to link the Defendants to any of the charged ads, if only through Mr. Ferrer, their purported co-conspirator. Finally, the same prosecutor who elicited the false testimony from Mr. Ferrer on direct went on to exploit Ferrer's false testimony in his closing argument, as if Ferrer had never recanted:

You remember this bit of testimony with Mr. Ferrer. He talked about this email exchange. There's a number of email exchanges between a woman by the name of Pamela Robinson. Her email address is clprovider@yahoo.com. This is one of the emails. This is Exhibit 164. She says: I don't do this because I want to. I do it because I have to.... You also know from the email exchange she had problems with them deleting her posts -- her picture.

10/27/23 a.m. Tr. at 10:5-14. Given the weakness of the government's case and the lack of evidence to tie any defendant or any purported co-conspirator to any charged ad, Mr. Ferrer's false testimony unquestionably could have affected the judgment of the jury. Because the government purposely elicited false or misleading testimony at trial, on a material point, reversal is warranted as "virtually automatic." *Sivak*, 658 F.3d at 912.

4. The Court Should Grant a New Trial Because the Government Repeatedly Made Improper Arguments in its Opening and Closings.

A. The Government Improperly Urged the Jury to Convict Defendants of Conspiracy Based on a Legally Insufficient Object.

As discussed in Mr. Brunst's Rule 29 motion, the government exhorted the jury to convict on conspiracy under Count 1 arguing the object of the conspiracy was to "make money," which is not a federal crime:

"carl@backpage.com." On one occasion, the prosecutor failed to use "carl@backpage.com," but the witness then used the email address in his response in an apparent attempt to cover for the prosecutor.

Defendant [sic] became members of the conspiracy knowing of at least one of its objects and intending to help accomplishment -- accomplish it. What is the object in this case? Well, one of the object [sic] is to make money. And they did.

10/27/23 a.m. Tr. at 6:22-23. Because there is no way to know now whether the jury followed the prosecutor's exhortation and convicted Spear and Brunst based on this legally insufficient object, at a minimum a new trial is warranted if the Court does not acquit. Because Defendants' motion to dismiss Count 1 for stating the same legally insufficient object remains pending (Doc. 1744), a more appropriate outcome would be to dismiss Count 1 for the reasons set forth in the motion to dismiss, as a sanction for the government urging the jury to convict Defendants on patently legally insufficient grounds, or both.

B. The Government Improperly Urged the Jury to Convict Defendants of Conspiracy Based on an Impermissible Boundless Conspiracy.

In 2019, Defendants moved to dismiss Count 1 because it improperly charged a boundless conspiracy to promote prostitution in general. *See, e.g.*, Doc. 798 at 3-6. The Court denied Defendants' motion, holding:

Defendants' suggestion that the SI improperly indicts a 'boundless conspiracy to facilitate prostitution in general,' (Reply at 4), however, mischaracterizes the charges against them. Such a claim is simply untrue. They were not indicted for facilitating the amorphous notion of 'prostitution.' They were indicted for facilitating (via publishing ads) on fifty distinct occasions where prostitutes, prostitution-related businesses, or other groups were involved in the business of prostitution.

Doc. 946 at 13:17-22.

Moreover, Defendants repeatedly objected to the government's proposed jury instructions on related grounds—that the government's instructions suggested that any person who posted an ad on Backpage.com could be a member of the conspiracy, but such a boundless conspiracy was legally impermissible because it necessarily would amount to multiple conspiracies, not one conspiracy:

Such a boundless conspiracy also would be a classic hub and spoke conspiracy lacking a rim, which the Supreme Court held impermissible in *Kotteakos v. United States*, 328 U.S. 750, 754–55 (1946) (“[T]he pattern was ‘that of separate spokes meeting at a common center,’ though we may add without the rim of

the wheel to enclose the spokes.”); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir. 2002) (“A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant’s involvement in each transaction In *Kotteakos*, the Supreme Court made clear that a rimless wheel conspiracy is not a single, general conspiracy but instead amounts to multiple conspiracies between the common defendant and each of the other defendants.”).

Doc. 1626-3 at 64-65, 72, 77.

In its closing, the government ignored both this Court’s ruling on Defendants’ motion to dismiss and the law cited in Defendants’ objections to the government’s proposed jury instructions, and told the jury it could convict Defendants of the boundless conspiracy the Court previously held had not been charged:

Three elements to conspiracy. There was an agreement between two or more persons to commit violations of the Travel Act. That’s all we need, is two people. But you know from the testimony and the evidence that there were more than two. There’s [sic] these five defendants. There’s Mr. Ferrer. Mr. Hyer. There’s Mr. Adams. There’s even Dollar Bill, Mr. Mersey. There’s David Elms, who was running The Erotic Review. Those were the conspirators. Then every pimp who posted on Backpage.com and used the money to run their criminal—their—their small criminal enterprise of prostitution, they are your conspirators.

10/27/23 a.m. Tr. at 6:8-18.

Because the government asked the jury to convict the Defendants in its closing based on a legally impermissible boundless conspiracy, the Court should reconsider its denial of Defendants’ prior motion to dismiss Count 1, dismiss Count 1, and vacate the convictions for violating Count 1. Alternatively, because there is no way to know now whether the jury followed the prosecutor’s exhortation and convicted Messrs. Spear and Brunst based on the legally impermissible boundless conspiracy, at a minimum a new trial is warranted if the Court does not dismiss or acquit on Count 1.

C. The Government Improperly Urged the Jury to Convict Defendants of “Promoting Prostitution.”

From the start of its opening statement to the end of its rebuttal closing, the government repeatedly conflated promoting a specific business enterprise involving

1 prostitution offenses with “promoting prostitution,” telling the jury repeatedly that the
 2 Defendants could be convicted for “promoting prostitution.”⁵ For example:

3 “The evidence at trial will show how defendants used three different strategies
 4 to market and promote prostitution...” 08/31/23 p.m. Tr. at 146:18-19.

5 “The charges for these five defendants, they’re all charged with promoting
 6 prostitution...”. 08/31/23 p.m. Tr. at 147:24-25.

7 “At the end of the trial, you will be asked to deliberate on whether or not
 8 these five individual defendants are guilty or not guilty of promoting
 9 prostitution. Three of the defendants are also charged with money laundering
 10 offenses, money laundering meaning when they get the proceeds from the
 11 promotions of—from the promoting prostitution, what they did with it.”
 12 08/31/23 p.m. Tr. at 148:6-13.

11 “These defendants promoted prostitution when they built up the website...”
 12 08/31/23 p.m. Tr. at 173:12-13.

13 “What’s the evidence in this case? What is the evidence that Backpage
 14 promoted prostitution? Well, who did you hear from? You heard the
 15 testimony of Carl Ferrer and Dan Hyer and Jess Adams, all insiders of
 16 Backpage.” 10/26/23 p.m. Tr. at 52:24-53:2.

16 “The defendants’ own words in the form of their own internal emails
 17 demonstrate that three knew they were running a prostitution website and
 18 they were promoting prostitution.” 10/26/23 p.m. Tr. at 53:18-20.

19 “Mr. Ferrer...estimated that they received 20,000 subpoenas...Isn’t that just
 20 evidence enough, frankly, that they were running a criminal enterprise that was
 21 facilitating and promoting prostitution, just the mere fact that they are getting
 22 these subpoenas?” 10/26/23 p.m. Tr. at 83:9-15.

22 “There is a lot of evidence in the charges, but the case is actually quite simple.
 23 There are 51 counts focused on how the defendants promoted prostitution,
 24 and there are 49 counts focused on how the defendants engaged in money
 25 laundering of the illegal profits they made from promoting prostitution.”
 11/01/23 p.m. Tr. at 38:12-17.

26 ⁵ The government’s repeated claims in its opening and each closing could not have been
 27 inadvertent, given the Court’s ruling that Defendants: “were not indicted for facilitating the
 28 amorphous notion of ‘prostitution.’ They were indicted for facilitating (via publishing ads)
 on fifty distinct occasions where prostitutes, prostitution-related businesses, or other groups
 were involved in the business of prostitution.” Doc. 946 at 13:17-22.

1 “What else do you have, though, to show that those laws were violated and
2 that they were in fact promoting prostitution? We brought before you
multiple witnesses.” 11/01/23 p.m. Tr. at 49:13-15.

3 “Promoting prostitution” is not a federal crime, but the prosecutors told the jury repeatedly
4 that they could convict Defendants for “promoting prostitution.”

5 The government also told the jury in the rebuttal closing that promoting prostitution
6 “means helping someone commit a prostitution offense, and that’s what Backpage did”
7 (11/01/23 p.m. Tr. at 51:12-13), but the law plainly does not permit Defendants to be
8 convicted of either substantive Travel Act offenses or conspiracy to violate the Travel Act
9 simply because the Backpage.com website helped someone commit a prostitution offense.
10 Because the government presented absolutely no evidence that any Defendant knew
11 anything about any of the charged ads, or knew anything about any person who posted or
12 who was featured in any of the charged ads, or took any action connected to the publication
13 of any of the charged ads, Mr. Spear’s substantive Travel Act convictions and Messrs.
14 Spear’s and Brunst’s conspiracy convictions are far more likely to have resulted from the
15 government repeatedly telling the jury that they could be convicted if Backpage.com
16 “promoted prostitution” rather than the jury having found that either Messrs. Spear or
17 Brunst did something to help publish an ad with the specific intent to facilitate a business
18 enterprise they knew to be involved in prostitution offenses. Indeed, there was no such
19 evidence even as to Mr. Ferrer with respect to the fifty charged ads—except for the false
20 testimony the government elicited from him regarding Pamela Robinson.

21 **D. The Government Improperly and Repeatedly Told the Jury It Could Convict**
22 **Defendants Without a Showing of Specific Intent.**

23 In its closing, the government repeatedly implied that the jury could convict
24 Defendants without need to find the specific intent required for violations of the statutes. It
25 did not do so using those words, but by repeatedly telling the jury that it could convict on
26 grounds that were utterly lacking in specific intent.

27 For example, the government told the jury that Carl Ferrer’s testimony that Backpage
28 received thousands of subpoenas over the years was, standing alone, sufficient for the jury to

1 convict the Defendants of the fifty-one charges relating to the Travel Act: “Isn’t that just
 2 evidence enough, frankly, that they were running a criminal enterprise that was facilitating
 3 and promoting prostitution, *just the mere fact that they are getting these subpoenas?*” 10/26/23 p.m.
 4 Tr. at 83:9-15 (emphasis added). There was absolutely no basis in fact or in law to support
 5 that outlandish and outrageous claim, which not only bypassed any requirement to prove
 6 specific intent, but also required no subsequent overt act.

7 In the rebuttal closing, the government doubled down—telling the jury it had
 8 absolutely no obligation to prove that any Defendant had any knowledge of any of the
 9 charged ads:

10 Next, the defendants argue, well, they had [no] knowledge of these specific 50
 11 ads. Ladies and gentlemen, these ads are just a sample. We’re not going to
 12 charge them with a million counts based upon the millions of ads. That’s why
 13 there’s a conspiracy charge covering the statute, covering the 14-year life of
 14 the conspiracy. What I’m not -- what I’m not going to show you is a jury
 instruction says we must prove that any defendant had specific knowledge of
 these particular ads because it isn’t in there. We don’t have to do that.

15 11/01/23 a.m. Tr. at 50:6-14. Here, the government not only told the jury that it did not
 16 need to find specific intent, but the government gratuitously added the highly inflammatory
 17 and prejudicial suggestion that it could have charged Defendants with “a million counts,”
 18 but only was asking the jury to convict them of a modest fifty counts—which by itself
 19 justifies a new trial. *See United States v. Ballard*, 727 F. App’x 6, 10 (2d Cir. 2018) (vacating
 20 convictions because trial court should have granted a new trial under Fed. R. Crim. P. 33 due
 21 to improper prosecutorial summation comments suggesting that incriminating evidence had
 22 not been put before the jury). As the government introduced no evidence that any of those
 23 millions of ads proposed an illegal transaction, and thus the jury was obligated to presume
 24 that Backpage.com’s publication of those ads was protected by the First Amendment, the
 25 government’s suggestion to the jury that Defendants could have been charged with a
 26 “million counts” was highly improper.

27 Responding to the argument of Mr. Brunst’s counsel that Brunst was not involved in
 28 the operations of Backpage.com (and thus could not have had the specific intent to violate

the Travel Act), the government told the jury that what mattered was not what Mr. Brunst's role was, but that he made a lot of money—again telling the jury to ignore the need to find specific intent:

You heard some back and forth essentially between Mr. Rapp, Mr. Lincenberg about what Mr. Brunst's role was. You heard Mr. Lincenberg refer to him as a nonoperational CFO, whatever that means. You've heard him refer to as a bill collector, a bag man. Ladies and gentlemen, I am telling you, you can call him bananas. It doesn't matter what you call him. What matters is that he made millions off of Backpage.

11/01/23 a.m. Tr. at 47:1-8.

It is no wonder that the jurors were confused about how to apply the Court's instructions, since the government repeatedly told the jury that it should convict Defendants on grounds that the instructions did not allow, like making money, receiving subpoenas, or the millions of purported counts that the government did not charge. These are just a few examples of the government trying to induce the jury to disregard the Court's instructions and convict the Defendants regardless of the law, which it appears the jury ultimately did. The government's repeated statements to the jury that it could convict Defendants on factually and legally insufficient grounds was highly prejudicial and warrants a new trial.

E. The Government Improperly Exhorted The Jury To Convict Defendants Based On Backpage.com's Publication of Ads Protected by the First Amendment.

Defendants incorporate by reference the First Amendment argument set forth in Mr. Spear's Rule 29 motion as a basis for a new trial and supplement that argument with the following. Throughout the trial, the government elicited evidence, most of which was admitted under the not for the truth hearsay exception, of politicians, clergy, representatives of non-governmental organizations, and reporters claiming that Backpage.com adult advertisements were associated with illegal activity and calling for Backpage.com to either cease publishing adult advertisements or to shut down the website altogether. But those calls for Backpage.com to stop publishing were made on political, religious, moral, and other grounds—not legal grounds. The government told the jury in the closing that “[t]hey know

1 about the Attorney Generals letters, and they know they are not on solid ground”
 2 (11//01/23 a.m. Tr. at 54:13-14), but that was not true, as the National Association of
 3 Attorneys’ General letters admitted at trial claimed that many Backpage.com ads *related to*
 4 *illegal activity* but the N.A.A.G. letters *never* claimed that Backpage was engaged in unlawful
 5 conduct for publishing such ads. Nor did the N.A.A.G. letters claim that Backpage.com’s
 6 publication of those ads was unprotected by the First Amendment.⁶ To the contrary, in its
 7 letter calling on Backpage.com to shut down its adult services section, N.A.A.G. justified its
 8 call on moral, not legal, grounds, saying: “We too, call on backpage to listen, to care, and
 9 respond now by shutting down the adult services section of its website. It is the right thing
 10 to do to protect innocent women and children.” Exhibit 52. The government’s
 11 introduction of prodigious amounts of evidence, both testimonial and documentary, of calls
 12 for the shutdown of Backpage.com on political, religious, moral, and other grounds—not
 13 because Backpage.com’s publication of adult advertising was unprotected by the First
 14 Amendment and subject to criminal sanction—was highly prejudicial to Defendants and of
 15 no relevance to the jury’s determination under the Court’s jury instructions of whether “an
 16 ad propose[d] an illegal transaction” and, therefore, was “not protected by the First
 17 Amendment.” Doc. 1998 at 48. Instead, the government’s evidence and its argument to the
 18 jury in closing that the jury could convict Defendants because they did not shut down the
 19 website was yet another call for the jury to ignore the Court’s jury instructions, by failing to
 20 apply the presumption that Backpage’s publication of adult ads was protected by the First
 21 Amendment unless the government proved that “an ad propose[d] an illegal transaction.”
 22 *Id.*

23 **5. The Court Should Grant a New Trial Because the Government Used Evidence**
 24 **Admitted Under the Not for the Truth Hearsay Exception For Its Truth,**
 25 **Making That Evidence Impermissible Hearsay.**

26 ⁶ Moreover, as the government well knows, Backpage.com’s response letters to N.A.A.G.
 27 expressly asserted that its publication of such ads was First Amendment protected and
 28 N.A.A.G. never responded asserting a contrary opinion. See the government’s exhibits 487
 and 820a, which the government did not move into evidence, attached hereto as Ex. A, B.

During the trial, the Court, at the government's request, admitted a large amount of evidence as non-hearsay because the government said it was offering the evidence not for its truth, but only to prove notice. The government then proceeded to use that evidence for its truth throughout the trial, including in its closing arguments. For example, in its closing the government told the jury that the Defendants "know about the Attorney Generals letters, and they know they are not on solid ground." 11//01/23 a.m. Tr. at 54:13-14. This is just one of many examples of "not for the truth" evidence being argued for the truth, *i.e.*, as the government claimed that Defendants were not on "solid ground" meant the N.A.A.G. letters were evidence of legal wrongdoing. As another example, the government argued in its closing that the clip from the CNN documentary showed that Backpage.com had "cornered the market on prostitution advertisement" and "all you had to do was go to Backpage" and post an ad and the "phone started ringing in minutes." *Id.* at 49:21-50:1. The government's repeated claims that all the adult ads on Backpage.com were prostitution ads, and that nearly all of Backpage.com's revenues were from prostitution ads, were backstopped with not for the truth evidence that was used for the truth—which was just inadmissible hearsay.

5. The Court Should Grant a New Trial Because the Significant Changes in the Jury Instructions Just Before Closing Arguments Commenced Were Highly Prejudicial to the Defense.

In advance of the trial, the government and the defense submitted their proposed jury instructions, with the defense requesting instructions that the First Amendment protected Backpage.com's publication of adult speech "unless the transaction proposed in the ad necessarily would be an illegal act" (Doc. 1626-3 at 161), citing, among other authorities, *Valle Del Sol Inc. v. Whiting*, 709 F3d 808, 822 (9th Cir. 2013). Defendants also requested an instruction that, "to satisfy the specific intent requirements of the Travel Act, the government must prove beyond a reasonable doubt, for each Count, that each defendant in some significant manner associated himself or herself with a particular business enterprise associated with the ad charged in that Count with the intent to promote, or facilitate the

1 promotion of, the prostitution offenses committed by that business enterprise” (Doc. 1626-3
2 at 47), citing, among other authorities, *United States v. Hansen*, 599 U.S. 762 (2023). Before
3 the trial commenced, the Court provided the parties with its proposed jury instructions,
4 which rejected these two instructions proposed by Defendants, but included a First
5 Amendment instruction saying, among other things, that: “the First Amendment does not
6 protect speech relating to illegal activity.”

7 While disagreeing with the Court’s decisions regarding these instructions, Defendants
8 nonetheless prepared to try their case in accordance with them. Given these instructions,
9 Defendants were effectively precluded from mounting a First Amendment defense, which
10 was mentioned only in passing in one defense opening and in the presentation of evidence
11 during the trial. Defendants likewise were unable to mount the specific intent defense they
12 had intended—an aiding and abetting defense—whether in their openings or through
13 eliciting evidence during the trial.

14 On the morning before closing arguments commenced, the Court made material
15 alterations to the jury instructions, including changing the First Amendment jury instruction
16 so that it no longer read “the First Amendment does not protect speech relating to illegal
17 activity” but instead said “the First Amendment does not protect speech that proposes an
18 illegal transaction.” Doc. 1998 at 48. The Court also modified the Travel Act jury
19 instruction to include language saying: “To prove specific intent, the government must
20 establish that each defendant in some significant manner associated himself or herself with
21 the purpose of promoting or facilitating the promotion of any business enterprise involving
22 prostitution offenses that the defendant knew to be unlawful under state law.” Each of
23 these changes was dramatic from the standpoint of the defense case.

24 While the defense welcomed these modifications to the jury instructions (while still
25 believing they were legally insufficient), these last-minute changes nonetheless severely
26 prejudiced the defense for three reasons. First, the defense was unable make use of the
27 instructions in their openings, in shaping the testimony that was elicited on cross-
28 examination, or in assessing the witnesses they would call in the defense case. The Court’s

original First Amendment instruction, for example, would have dramatically undermined the effectiveness of an advice of counsel defense, while the instruction ultimately given would have allowed for a viable advice of counsel defense. Second, because the defense learned of these instructions on the cusp of closings, some defense counsel had no ability to adjust their closing arguments to account for the changes, particularly Mr. Cambria. But even those counsel who had a few days to adjust could not comb through 4,500 pages of transcripts to look for testimony that was not helpful under the original instructions but would have been helpful under the final instructions. Third, and critically, during the trial the Court admitted large quantities of evidence that was highly prejudicial to the defense that arguably could have been relevant under a “speech relating to illegal activity” standard, but which would not have been relevant under the “speech that proposes an illegal transaction” standard. The defense objected to all this evidence, but its objections were overruled. If the defense had known the case would go to the jury under the “speech that proposes an illegal transaction” standard, the defense would have had much stronger arguments to exclude most, if not all, of the “notice” evidence, which could have dramatically altered the evidence admitted.

6. The Court Should Grant a New Trial Because the Jury Instructions Provided Inadequate Guidance to the Jury and Allowed the Jury to Convict on Legally Invalid Grounds—Which the Government Repeatedly Urged the Jury to Do.

Even with the Court’s modifications to the jury instructions after the close of evidence, the instructions still suffered from three significant flaws.

First, the Court’s First Amendment instruction included the correct legal standard—“the First Amendment does not protect speech that proposes an illegal transaction”—but the instruction failed to tell the jury how those words have been interpreted by the Ninth Circuit and other courts. As set forth in Mr. Spear’s Rule 29 motion and in the authorities supporting Defendants’ proposed jury instructions (Doc. 1626-3 at 161-164), whether a particular instance of speech is protected must be evaluated from the content of the speech alone and speech is presumptively protected unless it proposes a transaction would *necessarily* constitute an illegal act. The failure to provide such guidance to the jury resulted in the jury

convicting Mr. Spear on numerous Travel Act counts, even though the publication of the ads underlying those counts were protected by the First Amendment because, as a matter of law, the ads did not propose transactions that would necessarily constitute an illegal act (and nine of the ads expressly disclaimed being solicitations of prostitution—exhibits 216-a, 504-511). Moreover, the lack of guidance also allowed the government to turn the law on its head, telling the jury that it could determine that a facially lawful ad saying “this is not an offer of prostitution” “is really for prostitution” and that contrary claims were “nonsense.” 10/27/23 a.m. Tr. at 10:21-11:2.

Second, although the Court added language looking somewhat like an aiding and abetting instruction to the Travel Act instruction, that language not only varied materially from the pertinent Ninth Circuit law, but it greatly eroded what was required for the jury to find specific intent, as it required the jury to find not that a defendant associated himself with a specific criminal enterprise with the intent of promoting it, but with the “purpose” of promoting “any business enterprise involving prostitution offenses.” In *United States v. Gibson Specialty Co.*, 507 F.2d 446, 449 (9th Cir. 1974), the Ninth Circuit held that a conviction under the Travel Act requires the prosecutor to “show that the [defendant] in some significant manner associated himself *with the purchaser’s criminal venture* for the purpose of its advancement”) (emphasis added). The Court’s instruction only required the prosecution to show that Defendants “in some significant manner associated himself or herself with the purpose of promoting or facilitating the promotion of any business enterprise involving prostitution offenses that the defendant knew to be unlawful under state law” (Doc. 1998 at 30), which would allow conviction based on an intent to promote “the amorphous notion of ‘prostitution’” (Doc. 946 at 13:17-22) and based on an intent “to promote/facilitate a business enterprise one does not know exists” (*Id.* at 15:26-16:1), both of which are inconsistent with this Court’s prior rulings, as well as with the holding of the Ninth Circuit in *Gibson* and the Supreme Court in *Hansen*.

Finally, the Court overruled Defendants’ objection to having just one Travel Act instruction for fifty separate Travel Act counts and also rejected Defendants’ proposed

Travel Act jury instruction that made clear that the government had to prove that each Defendant had the specific intent to facilitate the prostitution offenses of the specific business enterprise associated with the charged ad for that count. The instruction given to the jury improperly allowed it to mix and match the elements among all the Travel Act counts, to find that an intent to promote “any” business enterprise, even if unconnected to a count, allowed the jury to convict as to that count, and to find specific intent through proof of general intent. And that is exactly what the government told the jury it could do in its closing: “But what this instruction makes clear is that the if the defendant associated himself with the purpose of promoting any business enterprise involving prostitution, then he is guilty.” 11/01/23 a.m. Tr. at 51:4-7.

Because of these flaws in the jury instructions, the jury could have (and likely did) convict Defendants for crimes based on Backpage’s publication of ads that were protected by the First Amendment and without finding every required element of the applicable offense. Because it is not possible to determine whether the jury convicted on a legally valid or a legally invalid basis, the verdict cannot stand. *Keating v. Hood*, 191 F.3d 1053, 1062 (9th Cir. 1999) (“The fundamental rule that applies when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground is clear: the verdict may not stand when there is no way to determine its basis.”). Because the jury instructions allowed the jury verdicts in this case to rest on legally invalid bases, the Court should order a new trial.

RESPECTFULLY SUBMITTED this 4th day of December, 2023,

Paul J. Cambria, Jr.
Erin McCampbell Paris
LIPSITZ GREEN SCIME CAMBRIA LLP

By: /s/ Paul J. Cambria, Jr.
Paul J. Cambria, Jr.
Attorneys for Michael Lacey

Pursuant to the District’s Electronic Case Filing Administrative Policies and Procedures Manual (Jan. 2020) § II (C) (3), Paul J. Cambria hereby attests that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing’s content, and have authorized its filing.

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September 23, 2011

BY U.S. MAIL AND E-MAIL

Mrs. Hedda Litwin
National Association of Attorneys General
2030 M Street, NW
Washington, DC 20036

Re: Response of Backpage.com to NAAG Letter of August 31, 2011

Dear Mrs. Litwin:

On behalf of our client, Backpage.com, we acknowledge receipt of an August 31, 2011 letter from the National Association of Attorneys General (NAAG). We appreciate the additional time you accorded us to reply.

Permit us to respond to your request for information and suggest a meeting at your earliest convenience to help chart a meaningful course, congruent with the law and with the critical importance of the 2011-2012 Presidential Initiative, to protect children from the terrible tragedy that is child trafficking. Toward this end, Backpage.com has requested that Jeff Modisett of this firm and Don Bennett Moon, an Independent Director on the Village Voice Media board, represent the company in its interaction with NAAG. Mr. Modisett is a former member of NAAG with wide experience in Internet-related issues. Mr. Moon has headed our client's site safety and mitigation efforts with the National Center for Missing and Exploited Children (NCMEC) since last March, and both Mr. Modisett and Mr. Moon are former elected prosecutors with strong backgrounds in child protection issues.

Backpage.com understands and shares the concerns expressed by the Attorneys General. There is no gap between our mutual goal of eradicating the scourge of child trafficking as quickly and effectively as possible. We are pledged to work cooperatively with law enforcement to protect children and we have already taken bold measures to remove postings on our site that could in any way involve child trafficking.

Today, Backpage.com continues to take effective measures to track and eliminate illegal activity by third parties using the adult services sections of its website and

continues to closely cooperate with law enforcement, including NAAG's Attorneys General Working Group, in order to better understand the law enforcement community's needs and more effectively prevent criminal activity on its website. Mr. Matt Dameron, the Chief of Staff to Missouri Attorney General Christopher Koster, one of the leaders of the Working Group, can confirm Backpage.com's involvement with the Working Group's efforts, the progress that has been made, and the openness and professionalism of our continuing dialogue.

In addition to its cooperation with the Working Group, Backpage.com has developed a strong cooperative relationship with front-line state and federal law enforcers around the country—assisting with sting operations, promptly responding to subpoenas, and otherwise aiding in the prosecution of those who misuse the site.¹

Backpage.com continues to use the twin tools of aggressive content moderation and programmatic content filtration to limit the nature and extent of objectionable material in the adult services section of its site and we look forward to the opportunity to set out these measures for you in detail. Similarly, the company has worked closely with NCMEC to develop logarithmic "screens" that detect and filter terms that are believed to be improper or that propose an illegal transaction and we look forward to the opportunity to share this technology with you.

The effectiveness of these and other measures has extended beyond the moderation of the adult services sections of the site. We look forward to sharing with you the security measures that have succeeded in rooting out and eliminating other types of illegal and harmful material, including scammers, "phishers", would-be perpetrators of economic frauds and others, including those engaged in prostitution. Not every instance of such activity can be quickly and successfully interdicted, as anyone involved in law enforcement knows. But there can be no question that Backpage.com does its best to provide a safe and legal environment for its customers and to be a responsible corporate citizen. The company's successful partnership with law enforcement is vivid testament to that. As a member of a Law Enforcement agency recently wrote, in an August 29, 2011 message to Backpage.com's Carl Ferrer:

¹This active cooperation is exemplified by a recent (February 2011) case in which a user created a message to alert others to the existence of an FBI sting operation in the Chicago area. Backpage.com took the offending post down within an hour. The company learned of this posting when the FBI quickly communicated via email with support@backpage.com.

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[We] can't thank you and your staff enough for being so responsive and supportive of [our] and other law enforcement efforts concerning these cases. Your company's level of cooperation is not the norm and makes a huge difference in our ability to target and ultimately arrest the offender.

While we fully embrace the opportunity and look forward to working with the Attorneys General on our own behalf, Backpage.com's conduct stands in stark contrast to others in the industry and compares favorably with (1) telephone directory listings for "Escort Services"; (2) newspaper personal ad sections; (3) give-away "adult services" papers and magazines widely distributed in urban areas and found in "honor" boxes in heavily trafficked areas and (4) escort sites, such as those found on major search engines, and large escort domain hosting companies.

The following responds generally to your queries as regards information that is not proprietary in nature or inappropriate for public viewing. We routinely share proprietary and sensitive law enforcement-related information with NCMEC, and with law enforcement generally, and have no objection to providing the same to NAAG under some reasonable agreed-upon confidentiality protocol. The company has compiled detailed responses to your query in those areas that involve proprietary or law enforcement-sensitive answers.

As to prohibited terms for which Backpage.com is screening, our newly upgraded and automated filters have already banned several thousand terms from ads, many of them code words or intentionally misspelled words designed to circumvent standard filters. Here, again, we will submit to you under separate cover a sample of banned terms and phrases and the processes under which terms, URLs, IP addresses, and other proprietary information are blocked.

As to the individualized or hand-review process undertaken by Backpage.com, including the number of personnel assigned to conduct such review, we will gladly supply you with this proprietary information under separate cover. We believe that our level of resources dedicated to these processes compares favorably with any other web or social media site and we are given to believe by NCMEC staff that no industry site does more in this area than Backpage.com. For example, recently, ads were posted by local law enforcement personnel on Backpage.com as part of a sting operation. Our moderators, who had no knowledge of the sting, removed their postings, blocked their credit card and reported the ad to NCMEC. Shortly thereafter, the law enforcement agency sent the email below:

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**From: [Name omitted for privacy purposes]
Date: August 29, 2011
To: Carl Ferrer<carl.ferrer@ backpage.com>
Subject: Re: Special Request**

Certainly Carl, your staff did a great job! We appreciate Backpage's vigilance to help protect kids. On our team over the weekend were the Secret Service, Department of Homeland Security, the United States Attorney's Office and several local law enforcement agencies and all commented on how effective Backpage was on getting the ads removed quickly and blocking future ads from the same posters. I'll give you a call shortly. Thanks.

As to Backpage.com's ad review processes, including the number of adult advertisements submitted since September 1, 2010, those subjected to individualized or hand review, those rejected prior to publication, and criteria used to determine whether a published advertisement should be removed due to actual or suspected criminal activity, we have compiled this proprietary information and will submit it under separate cover.

As to law enforcement agencies and safety advocates/experts with whom Backpage.com has partnered, we have a well-documented history of working proactively and effectively with law enforcement to prevent underage prostitution and other exploitation and to assist in the identification and arrest of perpetrators who are intent on breaking the law.

Examples of Backpage.com's actions in partnership with law enforcement include:

- Regularly providing live testimony at trial to authenticate the evidence of criminals who have wrongfully used Backpage.com's web site. For example, in federal court alone, Backpage.com recently provided testimony in five prosecutions—all resulting in convictions or indictments in Atlanta, Jacksonville, Miami, Minneapolis and New York City.
- Posting free and highly targeted Public Service Announcements for law enforcement seeking witnesses to crimes.
- Distributing law enforcement guides with FAQs to further expedite investigations.
- Working by phone and email with law enforcement in connection with special investigations involving multivariate search requests.

- Removing postings when requested by law enforcement. On numerous occasions Backpage.com has been asked to quickly remove postings interfering with law enforcement investigations, i.e. where the post is alerting users to a sting.
- Blocking future postings from users when law enforcement has advised Backpage.com that the user is engaged in illegal activity.
- Prompt and complete subpoena response. Many other websites or cellular providers take weeks to provide records. Backpage.com responds to about 100 subpoenas from law enforcement each month, often turning around responses to those subpoenas the same day. With respect to any child exploitation investigation, it has often provided records within an hour.
- Even without a subpoena, in exigent circumstances such as a child rescue situation Backpage.com will provide the maximum information and assistance permitted under the law.
- Investigators quickly receive records requested, including IP addresses with time, date and time zone stamps, email address, full credit card data and all images as four-color electronic documents.
- Backpage.com has added further information to each NCMEC report, at law enforcement's urging, including the user name of the Backpage.com staff member reporting the post in order for law enforcement to contact them directly for further information.

On August 9, 2011 Backpage.com held two well-attended workshops for law enforcement agencies at the Crimes Against Children Conference in Dallas. At those workshops, Backpage.com distributed Law Enforcement Guides, described the data it can secure for law enforcement, and fielded questions regarding how it handles sting postings and future tools requested by law enforcement.

The Agencies with whom Backpage.com has partnered include:

- **Federal (Department of Homeland Security and Federal Bureau of Investigation):** Backpage.com has initiated contact with the FBI about possible illegal activity from stolen credit card use, employment scams, and possible child endangerment. Backpage.com has worked with dozens of federal agents, quickly providing records in response to federal subpoenas, and assisting with unique investigations often requiring multivariate search requirements.

- **State and Local Law Enforcement:** Backpage.com's Cyber Tip Line reports are sent to both state and local law enforcement. Backpage.com works with hundreds of state attorney general investigators, sheriff's departments, and vice/high risk victims unit detectives across the country; as well as with Internet Crimes Against Children (IPAC) Task Forces, establishing communication channels, presenting tools for law enforcement's use, and discussing improvements to the web site.
- **Non-Governmental Organizations:**

NCMEC. The company has regular monthly meetings with NCMEC staff. We have received invaluable suggestions from NCMEC as to available online tools and resources for deterring, reporting and removing objectionable postings.

SSP Blue. We have worked with the nationally known internet security expert Hemanshu Nigam of SSP Blue to further develop and refine Backpage.com's protection strategy, and implement his recommendations on moderation, reporting mechanisms and content policy standards.

Any user report of suspected exploitation of minors and/or human trafficking automatically subjects the ad to further internal review. As to your request for the number of advertisements Backpage.com has reported to law enforcement and NCMEC since September 1, 2010 because of suspected illegal activity, and the number of these reports that were user-generated, the company has compiled this information for your review and will submit it under separate cover.

With regard to Backpage.com's "understanding" or what does and does not constitute "illegal activity" on its website, the company acknowledges and appreciates NAAG's request that we set out our view of the law. The following is the text of the page displayed when an advertiser first enters the site wishing to place an adult services ad:

You agree to the following when posting in this category:

- **I will not post obscene or lewd and lascivious graphics or photographs which depict genitalia or actual or simulated sexual acts;**

- I will not post any solicitation directly or in “coded” fashion for any illegal service exchanging sexual favors for money or other valuable consideration;
- I will not post any material on the Site that exploits minors in any way;
- I will not post any material on the Site that in any way constitutes or assists in human trafficking;
- I am at least 18 years of age or older and not considered to be a minor in my state of residence.

Any post exploiting a minor in any way will be subject to criminal prosecution and will be reported to the Cyber Tip Line and law enforcement.

Any post with terms or misspelled versions of terms implying an illegal service will be rejected. *[We are happy to provide examples of these terms under separate confidential cover].*

Postings violating these rules and our Terms of Use are subject to removal without refund.

What follows is the text appearing on the next screen, where the potential advertiser has the opportunity to post the actual text of an ad:

NOTICE:

- Do not post naked images, e.g. uncovered genitalia, bare butts, nipple or nipple area, sex acts, etc.
- Do not post images using transparent clothing, graphic box or pixelization to cover bare breasts or genitalia
- Pricing for legal adult services must be for a minimum of one hour²

² Your letter indicates Backpage.com “requires” adult service advertisements to “include hourly rates.” It does not.

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- **Example: 15 minute services are not allowed, no blank pricing, etc.**
- **Ads can be a maximum of 500 characters**
- **Do not use code words such as [omitted in this copy; will be submitted under separate confidential cover]³.**
- **Do not suggest an exchange of sex acts for money**
- **Do not post content which advertises an illegal service**

Postings not complying with the terms of use are subject to removal.

In addition to the foregoing, users are empowered and encouraged to report abuse by other users to Backpage.com involving inappropriate or illegal content, spam, ads posted in an incorrect category, etc. Any such abuse that involves a threat to children is afforded special treatment: **"If this involves a threat to a child or an image of child exploitation, please email abuse@backpage.com the URL of the posting."**

You have asked for our understanding of what constitutes "illegal activity" for classified advertising content on Backpage.com.

Our view is informed by the clearly stated purpose and language of the Communications Decency Act of 1996 (CDA) 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." 47 U.S.C. § 230 (c) (1). The Act "plainly immunizes computer service providers...from liability for information that originates with third parties". *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997); see also 47 U.S.C. § 230 (e) (3) ("[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section").

Our view is also informed by federal case authority that is unencumbered by ambiguity as to the scope of the CDA's immunity and pre-emption provisions for Internet

³ Your letter states that, based on a visit to the "Seattle Escorts" section of Backpage.com, the company's guideline requiring adult services advertisers not to "post any solicitation directly or in 'coded' fashion for any illegal service" is "not enforced." We found no violations of the posting rules in a September 2 visit to the Seattle Escorts site.

Service Providers like Backpage.com who publish third-party generated content, including as to claims of any kind asserted by state and local law enforcement.⁴

Last month, in the *M.A.* case, the court emphatically rejected the notion that Backpage.com had somehow forfeited its statutory immunity because it is a for-profit enterprise: "the fact that a website elicits online content for profit is immaterial...[T]o find Backpage to be not immune from suit [because of] how it structured its website in order to increase its profits would be to create a for-profit exception to Section 230's broad grant of immunity. This the Court may not do". 2011 WL 3607660 at *7-8. Nor did Backpage.com's alleged notice of "prior cases of minors being sexually trafficked on its website" affect its Section 230 immunity. Relying on the *Dart* case, the court held that "neither notice or profit make Backpage liable for the content and consequences of the [offending] ads..." Id. at *8-9 and n. 8 (noting that letter to Backpage.com from 21 Attorneys General "asking that the adult sections portion of its website be taken down" was "irrelevant for purposes of Section 230 immunity").⁵

⁴See, e.g. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (Craigslist's "Erotic Services" section did not "direct" people to prostitutes in violation of Illinois law, where Craigslist itself did not "create[] the offending ads," and "given section 230 (c) (1), we cannot treat Craigslist as if it did create those ads"; "Intermediaries are not culpable for 'aiding and abetting' their customers who misuse their services to commit unlawful acts"; dismissing Cook County Sheriff's claims; See also, *Voicenet Comm., Inc. v. Corbett*, 2006 WL 2506318, at *4 (E.D. Pa., August 30, 2006) ("the plain language of the CDA provides internet service providers immunity from state criminal laws"); *M.A. ex rel P.K. v. Village Voice Media Holdings*, 2011 WL 3607660 (E.D. Mo., August 15, 2011) (holding Backpage.com website is an interactive computer service and dismissing civil claims based on purported violation of federal criminal statutes).

⁵ Your letter references a meeting between Village Voice Media board member Don Moon and officials of the Washington State Attorney General's office and certain comments arising out of that meeting. Mr. Moon's comments were in response to an assertion that "anyone can see that Backpage.com carries prostitution ads". Mr. Moon simply pointed out that an investigation of Backpage.com advertisements, like an investigation of Fed Ex, U.P.S. or the U.S. Postal Service for illicit drugs, would produce third-party users who are misusing a lawful enterprise and others who are not and that federal cases, such as *Dart*, had specifically rejected this "anyone can see" argument in the adult classifieds context. Cf. *Chicago Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F. 3d 666, 671-672, wherein the plaintiff unsuccessfully sought to hold Craigslist responsible for "illegal" online classified ads: "Online services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services"; "[i]f Craigslist 'causes' [the offending posts] then so

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Mrs. Hedda Litwin
September 23, 2011
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Finally, it is our view that any prosecution or threatened prosecution of Backpage.com would infringe free speech rights under the First Amendment since a governmental attempt to shut down all or part of a perfectly lawful website would silence vast amounts of constitutionally protected speech.⁶ We believe this infringed-upon right was both clearly established on and before August 31, 2011 and that the application of extra-legal governmental pressure short of arrest or indictment would chill or silence a person of ordinary firmness from the exercise of future First Amendment activities.

While we appreciate the opportunity to respond to your request as to our view of the law, and would welcome your views if they conflict with ours, such legal precedent and protections do not diminish our absolute commitment to work with law enforcement to keep individuals from misusing our site. Mr. Modisett will be in touch immediately to schedule a meeting and will be in a position to produce proprietary or law enforcement-sensitive data compiled by Backpage.com in response to your letter of August 31, 2011.

Very truly yours,

SNR DENTON US LLP

By: 
Samuel Fifer

cc: Mr. Derek Sarshad
Paula Selis, Esq.
Jeff Modisett, Esq.
Don Bennett Moon, Esq.

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do phone companies and courier services." Mr. Moon did not state an admission. He stated a judicially sanctioned legal truism with which no one in the meeting expressed disagreement.

⁶ See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252-55 (2002); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). See also 42 U.S.C. § 1983.

VILLAGE VOICE MEDIA HOLDINGS, LLC
BACKPAGE.COM, LLC
Office of General Counsel
1008 Western Avenue, Suite 300
Seattle, Washington 98104

March 23, 2012

BY U.S. MAIL AND E-MAIL

National Association of Attorneys General
c/o Paula Selis, Esq., Senior Counsel
Office of the Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104-3188

WITHOUT PREJUDICE

Re: National Association of Attorneys General Demand for Elimination of
Backpage.com's Adult Category and Requests for Information

Dear Attorneys General:

On behalf of Backpage.com, LLC, this letter responds to correspondence from various members of the National Association of Attorneys General since 2009, including NAAG's August 31, 2011 demand for elimination of Backpage.com's adult advertisements category and request for more information.

We agree with NAAG regarding many issues that have become prominent on the Internet. It should go without saying that those issues include human trafficking and the sexual exploitation of children, which are abhorrent. Our goal has been and continues to be to work with NAAG, individual states' Attorneys General, law enforcement agencies, NGOs, and other online industry participants to fight child traffickers. As experts and law enforcement personnel have recognized, websites such as Backpage.com and their technology, resources and willingness to cooperate can and should be key participants in the solution to global and domestic human trafficking.

We disagree, however, with NAAG's approach to address, prevent, combat and prosecute human trafficking and exploitation, which appears limited to public demands for closure of adult categories on online classified websites. Irrespective of your admitted lack of legal grounds for this demand, it is the evident futility of the approach to which we most strongly object. Because we want to help solve the problem—not run away from it—we repeat our offer of the following.

As an initial matter, censorship is not the answer. The First Amendment to the United States Constitution respects and protects speech, including sexually explicit statements between adults. Moreover, the Communications Decency Act of 1996 makes clear that Congress expressly intended to preserve open discourse on the Internet, by immunizing websites like Backpage.com from state law liability for content generated by third parties, and to encourage websites to use best efforts to filter content themselves. 47 U.S.C. § 230. Concession to your demand would instead allow the elected officials of various states to decide what content is acceptable on the Internet and specifically to determine that it is acceptable to prohibit an entire category of speech on an unproven assumption that it does more harm than good or

more harm than justifies the online presence of all such speech. This type of censorship would be extraordinary state action, akin to book-banning efforts in the 1960's.

Free speech issues aside, as a practical matter, the Internet has unquestionably made trafficking and exploitation more visible, but visibility should not beget misguided policy. As Dr. danah boyd of Harvard's Berkman Center for Internet and Society has stated, "Heightened visibility can easily prompt fear, as we become concerned about the things that we see that we don't like. But the least productive thing that we can do with visibility is use it to generate fear. While fear and outrage can propel us to act, driving policy by fear can easily backfire and harm those that we're trying to help."¹

To be sure, more empirical data regarding the role of the Internet in human trafficking and child sex exploitation is desperately needed. A literature review on human trafficking conducted for the U.S. Department of Justice emphasized: "[T]he most important arena which needs urgent exploration is the way the knowledge upon which the public debate about trafficking for sexual and labor exploitation is based is generated."² In the interim, "in no area of the social sciences has ideology contaminated knowledge more pervasively than in writings on the sex industry," and "[t]oo often in this area, the canons of scientific inquiry are suspended and research deliberately skewed to serve a particular political agenda."³ For example, anti-prostitution advocates often cite *Men Who Buy Sex with Adolescent Girls: A Scientific Research Study*, which was prepared by a marketing company hired by an anti-prostitution organization. Although the study purported to assess men's propensity to sexually exploit minors online, its methodology and conclusions were soundly refuted by The Urban Institute in its report to the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security.⁴

Yet, even while further data is pending, scholars and law enforcement officials recognize that online service providers are in a unique position to combat human trafficking and exploitation. Through online technology, we have more people watching for and reporting potential victims or signs of trafficking or exploitation, and enhanced means of detecting and prosecuting these practices. Internet traffickers leave digital trails that can lead to their capture and provide useable insights into their behavior, techniques and patterns.⁵ As the U.S.C. study also found, "Trafficking online thus presents the anti-trafficking community

¹ Dr. danah boyd, *Combating Sexual Exploitation Online: Focus on the Networks of People, not the Technology*, Statement to Massachusetts Attorney General Martha Coakley as part of the Hearing on Sexual Exploitation Online, at 1 (October 19, 2010).

² Dr. Mark Latonero, *Human Trafficking Online – The Role of Social Networking Sites and Online Classifieds*, U.S.C. Annenberg School for Communications & Journalism (Sept. 2011), available at <http://technologyandtrafficking.usc.edu/report>, at 11 (quoting Elzbieta M. Gozdzak and Micah N. Bump, *Data and Research on Human Trafficking: Bibliography of Research-Based Literature*, Georgetown University Institute for the Study of International Migration, Oct. 2008, at 45.).

³ *Id.*, at 12 (quoting Sheld Zhang, *Beyond the 'Natasha' story—a review and critique of current research on sex trafficking*, GLOBAL CRIME vol. 10, no. 3, at 179 (Aug. 2009)).

⁴ Colleen E. Owens and William Adams, *Feedback on Men Who Buy Sex with Adolescent Girls: A Scientific Research Study* (September 2010).

⁵ See *Human Trafficking Online*, at 34-37 ("As people turn to technology to negotiate exchanges, new data becomes available and new interactions become traceable. If everyone is willing and engaged, it becomes possible to track the flow of information around an exploitative trade in entirely new ways."); *Combating Sexual Exploitation Online*, at 2 ("Historically, human trafficking has occurred underground,

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with an unprecedented window to observe, track, and monitor the conduct of both the supply and demand sides of the trafficking trade.”⁶ An Immigration and Customs Enforcement agent involved in trafficking investigations and arrests explained succinctly: “Some child predators mistakenly believe the anonymity of cyberspace shields them from scrutiny. In fact, their use of the Internet gives us new tools in our efforts to investigate this insidious behavior.”⁷

In recognition of this principle, several programs dedicated to studying the role of communications technologies in the fight against human trafficking have recently been launched, including the Annenberg Center’s Technology & Trafficking Initiative⁸ and a program sponsored by Microsoft Research and the Microsoft Digital Crimes Unit.⁹ We believe that NAAG and its members would benefit from taking into account and understanding this ongoing work, and we would be happy to keep you apprised of it.

Backpage.com has already demonstrated the valuable role that online service providers can play in the identification and rescue of trafficking victims and the perpetrators of these crimes. The very investigations and prosecutions that NAAG repeatedly and publicly cites as proving that Backpage.com is a hub for human traffickers were made possible *because of* Backpage.com’s eagerness to help law enforcement officials. Backpage.com regularly receives praise from those officials; the following are a few of hundreds of similar messages:

From: [REDACTED] <[REDACTED]@ic.fbi.gov>
Date: [REDACTED], 2011 [REDACTED] AM MST

Mr. Ferrer,

You just made my day.
What is your official title. We want to submit your name for recognition of your assistance following this case.
Thanks
[REDACTED]

From: [REDACTED] <[REDACTED]@REDACTEDtexas.gov>
Date: [REDACTED], 2011, at [REDACTED] AM CST

Certainly Carl, your staff did a great job! We appreciate Backpage’s vigilance to help protect kids. On our team over the weekend were the Secret Service, Department of Homeland Security, the United States Attorney’s Office and several local law enforcement agencies and all commented on how effective Backpage was on getting the ads removed quickly and blocking future ads from

making it extremely difficult for law enforcement and rescue organizations to identify and act to capture perpetrators and save victims.”)

⁶ *Human Trafficking Online*, at 9.

⁷ *Id.* at 20, notes 112-113.

⁸ Adam Powell, *CCLP forum explores new technological tools to combat human trafficking*, USC Annenberg Center on Communication Leadership & Policy, (Nov. 7, 2011), available at http://communicationleadership.usc.edu/blog/ccip_forum_explores_new_technological_tools_to_combat_human_trafficking.html.

⁹ *The Role of Technology in Human Trafficking—RFP*, available at <http://research.microsoft.com/en-us/collaboration/focus/education/human-trafficking-rfp.aspx>.

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the same posters.

I'll give you a call shortly. Thanks.

From: [REDACTED] <[REDACTED]@ic.fbi.gov>

Date: [REDACTED], 2012 at [REDACTED] PM

Dear Backpage Staff,

As always, thank you for the exceptionally prompt response and for your research efforts. It is always a pleasure to deal with Backpage.

Sincerely,
[REDACTED]

From: [REDACTED] <[REDACTED]@state.ma.us>

Date: [REDACTED], 2011 [REDACTED] AM CST

... I can't thank you and your staff enough for being so responsive and supportive of my and other law enforcement efforts concerning these cases. Your company's level of cooperation is not the norm and makes a huge difference in our ability to target and ultimately arrest the offender.

Respectfully submitted,
[REDACTED]¹⁰

Similarly, the president of the National Center for Missing and Exploited Children has lauded Backpage.com's genuine commitment to help stop sex trafficking and observed that its employees are "aggressively reviewing their ads" and had "reported 1,600 ads that they believe are suspicious."¹¹ Indeed, Backpage.com established a special "expedited" line to NCMEC for urgent reports of potentially trafficked minors (i.e., situations where imminent rescue of child sex crime victims may be possible).

At base, NAAG's approach ignores a fundamental and indisputable fact: The Internet is not going away. As experts have explained, if one portal is closed, criminals will find another and another and another: "You may be able to see transactions through Craigslist or Back Page [sic], but there are countless other technologies that are employed in exploitation. And every time that you try to make it disappear one place, it pops up on another. Increasingly, those sites are offshore and far out of jurisdiction."¹² As Dr. Boyd of Harvard has stated: "Going after specific sites where exploitation becomes visible and attempting to eradicate the visibility does nothing to address the networks of supply and demand—it simply pushes them to evolve and exploiters find new digital haunts and go further underground. . . . Eradicating

¹⁰ We have redacted the names and personally identifying information of the agents and officers.

¹¹ Cornelius Frolik, *Sex trade thrives by exploiting Internet*, DAYTON DAILY NEWS (Sept. 27, 2011), available at <http://www.daytondailynews.com/news/crime/sex-trade-thrives-by-exploiting-internet-1260014.html>.

¹² *Combating Sexual Exploitation Online*, at 2. As merely one example, the Erotic Review website (www.theeroticreview.com) transferred its ownership to Europe and has endeavored to conceal the location and trail of its online operations through a Washington State domain name privacy registration service.

visibility does not break the trade network itself but it does make it harder to get to the source of exploitation.”¹³ In other words, traffickers can and will migrate between any of 5,000 or more websites suspected of directly or indirectly facilitating sex trafficking and sex tourism.¹⁴ “If you focus on the sites, you will be playing whack-a-mole and helping no one.”¹⁵

We agree with the calls for a collaborative effort among governments, NGOs, online service providers and other public and private interests to critically analyze the role of the Internet in human trafficking and to work toward meaningful solutions¹⁶. And we have consistently demonstrated our genuine commitment to such collaboration for more than four years, by consulting NAAG members, implementing their suggestions, retaining child safety consultants, and continuing to meet with public interest groups (including monthly meetings with NCMEC) and public officials.

Backpage.com would like this collaboration to continue, although we must say that we do not view NAAG's demand for information in a letter that simultaneously and publicly accuses Backpage.com of complicity in the horrific crime of child sex trafficking as collaborative. Nonetheless, we provide under separate cover responses to the questions posed by NAAG in its August 31, 2011 letter. Pursuant to our agreement with NAAG, we have designated this information as confidential because, for example, it would obviously hinder law enforcement efforts to make public Backpage.com's practices for reviewing and reporting suspect ads. Backpage.com provides the supplemental information and this letter without prejudice and while preserving all legal rights, including under the First Amendment, the Communications Decency Act, and the Civil Rights Act, 42 U.S.C. § 1983.

Backpage.com stands ready to continue collaboration with NAAG and individual Attorneys General, as we do routinely with front-line law enforcement, NGOs and other online industry participants to fight child and human trafficking. If NAAG or its members would like to further discuss Backpage.com's moderation practices or the technological means with which to prevent and combat trafficking or exploitation, we would be happy to do so. To be clear, however, we believe it would be unwise and, in fact, counterproductive to eliminate the adult category from the website. We also believe that your public statements castigating Backpage.com are counterproductive, particularly given the admission by Attorney General Rob McKenna, NAAG's president, that he and other Attorneys General “know they have little legal standing to forcibly shut down [Backpage.com].”¹⁷ If NAAG and its members are interested in cooperation, and will stop instead simply continuing demanding elimination of the adult category, please let me know by March 28, 2012 so that we may determine how to proceed.

¹³ *Id.*, at 2.

¹⁴ This figure comes from a web analysis performed by the anti-trafficking organization, Shared Hope International. See *Human Trafficking Online*, at 14.

¹⁵ *Combating Child Exploitation Online*, at 3.

¹⁶ *Human Trafficking Online*, at vi & 39 (“Successful implementation of anti-trafficking technologies requires cooperation among actors across government, nongovernmental, and private sectors, sharing information and communicating in a coordinated manner.”); see also *Combating Sexual Exploitation Online*, at 3 (urging General Coakley to “[e]ngage companies to collaborate with you in combating exploitation”).

¹⁷ Rob McKenna for Governor website, reprinting editorial, *It's an uphill fight, but officials right to go after backpage.com*, THE OLYMPIAN (Sept. 8, 2011), available at: <http://www.robmckenna.org/newsitem/it%E2%80%99s-uphill-fight-officials-right-go-after-backpagecom>.

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We sincerely hope to work with you to combat this issue.

Very truly yours,



Elizabeth L. McDougall
General Counsel
Village Voice Media Holdings, LLC

CONFIDENTIAL Enclosures:

Exhibit A (BACKPAGE.COM SUPPLEMENTAL REPONSES, *WITHOUT PREJUDICE*, TO
NAAG REQUESTS FOR INFORMATION)

Exhibit B (In the Matter of Backpage.com AFFIDAVIT OF CARL FERRER)

Exhibit C (SAMPLE OF BACKPAGE.COM PROHIBITED WORDS, ACRONYMS AND CODES)

Exhibit D (In the Matter of Backpage.com CONFIDENTIALITY AGREEMENT)

cc: Don Bennett Moon