


**HONORABLE MARK DAVIDSON**  
**Multi-District Litigation Judge**  
**201 Caroline, 17<sup>th</sup> Floor**  
**Houston, Texas 77002**

August 28, 2020

**FILED**  
Marilyn Burgess  
District Clerk  
AUG 28 2020  
Time: 10:42 AM  
By:   
Harris County, Texas  
Deputy

Ms. Annie McAdams

Mr. Michael L. Raiff

In Re: Cause No. 2020-28545; Jane Doe Cases

Dear Counsel:

You will recall that oral argument was held on July 31, 2020 on Salesforce.com's Motion to Dismiss and Special Exceptions in the above case.<sup>1</sup> The record before the Court was then supplemented by briefs that were filed on August 7, 2020. This letter is the ruling of the Court on those motions.

The Motion to Dismiss is brought pursuant to Rule 91a of the Rules of Civil Procedure. The rule states:

A party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

During argument, the Defendant conceded that the motion was being brought under the first of those grounds – that the causes of action plead by the Plaintiffs have no basis in law. They are not claiming, for purposes of this motion, that no reasonable person could believe the facts pleaded. (Transcript – p. 13, l. 22). It is important to note that the motion is not one seeking a Motion for Summary Judgement, which has both a different standard and a different procedural rule.

Defendant's first argument is that Section 230 of the Communications Decency Act (CDA) provides immunity from a State Court suit brought against an interactive computer service for any content that may appear on the internet. The language in Section e(3) of Section 230 is sweeping - "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." The prohibition against any action being brought is broad. It not only prevents liability, but the bringing of a lawsuit. During argument, counsel for the Defendant stated that Section 230's reach extended to a computer

platform provider *knowingly* providing a program specially designed to violate the laws and to prohibit governmental criminal investigations. (Transcript, p.11). If this is the law, then, even with inferences drawn from the Plaintiffs pleadings read in a light most favorable to the Plaintiff, the motion to dismiss must be granted.

There appear to be two exceptions to this rule. The sentence before that prohibition is “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.” While the Plaintiff claimed that the Texas statute<sup>ii</sup> was “parallel” to the Federal statute, neither side discussed at argument the similarities or differences between the two. Supplemental briefing helped me greatly. More about this below.

The second exception is contained in Section 1595 of the Fight Online Sex Trafficking Act of 2017 (“FOSTA”), in which Congress expressly gave up presumed federal preemption of sex trafficking suits in state criminal actions and in civil actions brought by state attorney generals. During the legislative process, a proposed amendment of Section 1595 removed language that also would have overruled federal preemption of state civil suits such as the ones before the Court. Salesforce argues this is a strong indication of legislative intent that Congress did not want to allow this kind of lawsuits. I agree. The argument made by the Plaintiffs is that since Section 230 of the CDA does not preempt or bar this lawsuit, the deleted proposal is not an indication of legislative intent. At best, the argument fails to note why the Congress chose to specifically allow state criminal actions and state actions brought by the attorneys general, but chose not to allow suits such as this. Additionally, the Plaintiffs argue that there are many reasons that bills may be amended during the legislative process.<sup>iii</sup> This is true, but they fail to give a reason, other than the obvious one, that *this* bill was amended to exclude authorization for the very kind of suit they are bringing here.

The failure to allow these suits through the FOSTA legislation brings us back to Section 230 of the CDA, and to the question of whether Chapter 98 of the Civil Practice and Remedies Code is consistent with Section 230. The Plaintiff capably and correctly argues that the civil remedy under state law is consistent with and parallel to the criminal statute under federal law. However, if Chapter 98 can give a civil cause of action to a victim of sex trafficking against a computer platform provider, it ceases to be consistent with or parallel to Section 230 of the CDA, except to the extent to which the CDA allows such a suit.

Now for the remedy. The Defendant seeks dismissal. It also filed special exceptions. Since the Defendant’s motion did not expressly set forth in any detail the inconsistency between Chapter 98 of the CPRC and Section 230 of the CDA, I will deny the Motion to Dismiss, without prejudice, and grant the Special Exceptions. I will give the Plaintiffs the opportunity to plead, if they can, a cause of action against Salesforce that is consistent with the letter of Federal law, as interpreted in this ruling. Failure to do so within 20 days of the date of this letter will lead to dismissal of the case against Salesforce under rule 91a.

The Defendant has also sought dismissal on more traditional grounds – the absence of duty and the inability of the Plaintiff to prove causation. Under the slight burden of maintaining a cause of action against a Rule 91a motion, I find that the pleadings plead a cause of action against the Defendant, and deny the motion on those grounds. These grounds are more appropriately brought as a no-evidence motion for summary judgement under Rule 166 a-1.

I am not unaware of the pendency of an application for a writ of mandamus currently pending before the Supreme Court of Texas in *In Re: Facebook*.<sup>iv</sup> The facts in those cases are similar, but slightly different from those here. Should the application be successful, I will, on my own motion, reconsider this ruling in light of any opinion of the Supreme Court of Texas.

Counsel may prepare an order consistent with this ruling.

Respectfully,

A handwritten signature in black ink, appearing to read 'Mark Davidson', with a stylized flourish at the end.

MARK DAVIDSON

MD/ms

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<sup>i</sup> There are other Defendants in this case, but none have, or could have, brought this motion before the court. For purposes of this letter, “Defendant” refers to Salesforce.com. Incidentally, I was puzzled as to whether the “S” in Salesforce should be capitalized. The Plaintiffs do not, and the Defendant does. The Company’s website capitalizes their name, and so I have done in this ruling.

<sup>ii</sup> Chapter 98 of the Texas Civil Practice and Remedies Code.

<sup>iii</sup> Transcript – p. 58, l. 20-22. “Laws are Like Sausages. Better Not to See Them Being Made”. Otto Von Bismarck.

<sup>iv</sup> Cause No. 20-0434.