

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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SENATE PERMANENT SUBCOMMITTEE)	
ON INVESTIGATIONS,)	
)	
Applicant,)	
)	
v.)	Misc. Action No. 16-621 (RMC)
)	
CARL FERRER,)	
)	
Respondent.)	
)	

ORDER

The Senate Permanent Subcommittee on Investigations is investigating the use of the Internet for illegal sex trafficking, as well as evaluating potential legislation and the effectiveness of existing statutes, programs, and regulatory initiatives addressing this problem. The Subcommittee initiated its investigation in April 2015. Interested in learning more about the measures being taken by online commercial marketplaces to prevent illegal sex trafficking, the Subcommittee sought the cooperation of Backpage.com, LLC, an online website for classified ads. As part of the investigation, the Subcommittee issued a documentary subpoena on July 7, 2015, requiring Carl Ferrer, Chief Executive Officer of Backpage, to produce certain documents concerning the company’s moderation procedures, interaction with law enforcement, terms of use, data retention policies, and basic corporate structure. Mr. Ferrer and Backpage objected to the subpoena on a number of grounds, including the breadth and prosecutorial nature of the subpoena and the alleged infringement of First Amendment rights.

The Subcommittee spent months in discussions and negotiations with Backpage in an effort to obtain compliance with the subpoena and minimize its burden. On October 1,

2015, the Subcommittee withdrew its subpoena and issued a new one with more targeted requests and fewer categories. This new subpoena, like the previous one, did not request any materials concerning the identity of Backpage users. To further facilitate Mr. Ferrer's compliance and encourage his cooperation, the Subcommittee offered to negotiate the use of limited electronic search terms and to focus on particular document custodians or employees of the company. Mr. Ferrer did not accept the offer. Instead, Backpage provided a small number of publicly available and outdated documents. With respect to the subpoena's first three requests, which are the subject of this miscellaneous action, Mr. Ferrer's production was practically non-existent. Moreover, Mr. Ferrer did not produce a privilege log with specific objections to the production of any materials or explain his claims to such privileges, as required by the subpoena. In fact, Mr. Ferrer argued that he had a First Amendment right not to conduct a full and comprehensive search for responsive documents.

The Subcommittee filed the instant action to enforce a limited portion of its October 1, 2015 subpoena — specifically, requests 1, 2, and 3:

1. Any documents concerning Backpage's reviewing, blocking, deleting, editing, or modifying advertisements in Adult Sections, either by Backpage personnel or by automated software processes, including but not limited to policies, manuals, memoranda, and guidelines.
2. Any documents concerning advertising posting limitations, including but not limited to the "Banned Terms List," the "Grey List," and error messages, prompts, or other messages conveyed to users during the advertisement drafting or creation process.
3. Any documents concerning reviewing, verifying, blocking, deleting, disabling, or flagging user accounts or user account information, including but not limited to the verification of name, age, phone number, payment information, email address, photo, and IP address. *This request does not include the personally identifying information of any Backpage user or account holder.*

Mem. Op. [Dkt. 17] at 9-10 (emphasis in original).¹ Mr. Ferrer opposed the Subcommittee's Application to Enforce its Subpoena on the basis that: (1) the Court lacked subject matter jurisdiction over the Application; (2) the Subpoena lacked a legislative purpose and did not seek information pertinent to an investigation within the Subcommittee's jurisdiction or power; (3) the Subpoena violated the First Amendment and was overly broad, burdensome, and part of a targeted campaign against Backpage; and (4) the Subpoena violated the Due Process Clause.

On August 5, 2016, the Court rejected Mr. Ferrer's objections and ordered him to search for and produce responsive documents to the first three requests of the Subpoena within a period of ten days. On August 8, 2016, Mr. Ferrer filed the current Motion to Stay the Court's Order Pending Appeal, *see* Mot. [Dkt. 19], which is opposed by the Subcommittee, *see* Opp'n [Dkt. 22]. The following day, on August 9, Mr. Ferrer filed its notice of appeal to the D.C. Circuit.²

In determining whether to grant a motion to stay pending appeal, the moving party bears the burden of showing the balance of the following four factors favors the stay: "(1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of harm to other parties if relief

¹ For a more detailed recitation of the underlying facts in this miscellaneous action, *see* the Court's August 5, 2016 Memorandum Opinion, *available at Senate Permanent Subcomm. v. Ferrer*, No. 16-MC-621 (RMC), 2016 WL 4179289, at *1-5 (D.D.C. Aug. 5, 2016).

² "Although a party's filing of a notice of appeal generally divests the district court of jurisdiction over the matter being appealed, it does *not* deprive a district court of jurisdiction over a motion for stay of its judgment or to grant an injunction pending appeal." *McCammon v. United States*, 588 F. Supp. 2d 43, 45 n.2 (D.D.C. 2008) (citing Fed. R. Civ. P. 62) (other citations omitted).

is granted; and (4) the public interest.” D.C. Cir. R. 8(a); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Moreover, “granting a stay pending appeal is ‘always an *extraordinary remedy*,’ and . . . the moving party carries a *heavy burden* to demonstrate that the stay is warranted.” *United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (internal citations omitted) (emphasis added). Mr. Ferrer has failed to meet that burden.

With respect to the first factor of likelihood of success on the merits, Mr. Ferrer exclusively focuses on his First Amendment objection. The Court readily recognizes that First Amendment rights might be strongly implicated in a congressional investigation and the use of documentary subpoenas. The Court is not insensitive to Mr. Ferrer’s First Amendment rights. However, the Court cannot accept Mr. Ferrer’s position that he has a First Amendment right to withhold — much less to refuse to search for — documents that are relevant to the Subcommittee’s investigation on Backpage’s practices to prevent advertisements for illegal sex trafficking. The Court noted in its Memorandum Opinion that “[s]ome of the documents that the Subcommittee is requesting may contain information that is not subject to First Amendment protection due to its illegal nature.” *Ferrer*, 2016 WL 4179289, at *11 (citing *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir. 2015) (noting that “the advertising of illegal activity has never been protected speech”). In the absence of specific evidence or a privilege log, Mr. Ferrer cannot expect the Court to simply assume that the subpoena violates the First Amendment.

Mr. Ferrer again argues generally that Backpage is entitled to “significant First Amendment protection.” Mot. at 4. Once again, Mr. Ferrer does not elaborate on the conclusory assertion that the “Subcommittee’s demands impinge on significant and demonstrable First Amendment interests” *Id.* The Court already noted that “merely arguing that Backpage

enjoys ‘significant’ First Amendment protections proves nothing as a matter of fact or law.” *Ferrer*, 2016 WL 4179289, at *13. Mr. Ferrer’s First Amendment objection requires a balancing of “the nature of the intrusion against the asserted governmental interest — an exercise that Mr. Ferrer simply does not acknowledge, let alone discuss, in his briefs or letters.” *Id.* at *10 (citing *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 (1961)). Mr. Ferrer’s failure to recognize and undertake the First Amendment’s balancing of competing interests is fatal to his claim and to his motion to stay. “By not attempting to balance the parties’ competing interests and failing to identify the applicable level of First Amendment scrutiny, Mr. Ferrer is essentially saying: The Court should presume that any responsive document that has not been produced contains constitutionally-protected information that no governmental need could possibly overcome.” *Id.* at *13. The likelihood of success on the merits is not very high.

Mr. Ferrer is long on First Amendment law and short on dealing with the only facts in the record, that is, his refusals to negotiate more favorable terms, to search for and produce responsive documents, or to provide a privilege log asserting applicable objections. To be frank, in the face of such intransigence and the blanket nature of his objections, the Court cannot find that Mr. Ferrer has made a strong showing on likelihood of success.

With respect to the second factor of irreparable harm, Mr. Ferrer has failed to establish an injury that is “both certain and great.” *Wisconsin Gas Co. v. Federal Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985). In fact, since Mr. Ferrer has not conducted a full search for responsive documents, any showing of harm would be “theoretical” and comprised of “unsubstantiated and speculative allegations.” *Id.* In the absence of a privilege log or concrete evidence of prejudice by Mr. Ferrer, the Court cannot find that actual harm would flow from a search for responsive materials and production of non-privileged documents once

identified. Finally, given Mr. Ferrer's failure to show that he has a meritorious appeal warranting a stay, he "cannot be permitted to manufacture irreparable harm" on the basis of a categorical First Amendment objection, "a legal principle with no precedential support whatsoever" *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 17 (D.D.C. 2003).

Mr. Ferrer's refusal to comply with the subpoena has stymied the Subcommittee's investigation. To grant a stay would further delay the Subcommittee's efforts, interfere with the investigation, and reward Mr. Ferrer's dilatory conduct. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 & n.17 (1975) (recognizing that "protracted delay has frustrated a valid congressional inquiry"); *see also Judicial Watch, Inc.*, 241 F. Supp. 2d at 18. In addition, given the seriousness of the inquiry's subject (illegal sex trafficking), a stay would undermine the public interest in ensuring that the Subcommittee is able to complete its investigation promptly and make informed recommendations to the Senate on potential legislation addressing the use of the Internet for illegal sex trafficking. *McCammon*, 588 F. Supp. 2d at 49 (stating that "the public interest in fact favors a prompt and final resolution of the instant lawsuit, which has delayed the Government's effort to carry out its duties to collect and lay taxes").

In conclusion, the Court finds that the balance of the equities weighs against the issuance of a stay in this case. Mr. Ferrer has not met the "heavy burden" required to demonstrate that such an "extraordinary remedy" is warranted. *Phillip Morris USA*, 449 F. Supp. 2d at 990. As the Court previously noted, "Mr. Ferrer has had ample time to perform the necessary duties of searching for, locating, identifying, and producing either responsive documents or a privilege log with an explanation for any withheld material. Having done none of the above, he is hard put to plead a barren First Amendment claim without underlying facts." *Ferrer*, 2016 WL 4179289, at *11. Accordingly, in its discretion, it is hereby

