**CASE NO. A143233**

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

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DAWN L. HASSELL and HASSELL LAW GROUP, a P.C.

Plaintiffs and Respondents,

vs.

AVA BIRD,

Defendant.

Non-Party Appellant YELP INC.'s Appeal from an Order Denying Motion to Set Aside and Vacate Judgment

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Appeal Arising from the Superior Court of the County of San Francisco
Case No. CGC-13-530525
The Honorable Ernest H. Goldsmith

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# NON PARTY APPELLANT YELP INC.'S OPENING BRIEF

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## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2).):

Wellington Management Company LLC, beneficial owner in its capacity as an investment advisor.

Dated: January 7, 2015

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## PRELIMINARY STATEMENT

Due process requires, at a minimum, notice and an opportunity to be heard. In this case, plaintiff Dawn Hassell intentionally maneuvered to deprive non-party Yelp of both. She gave Yelp no notice of her request for an injunction against Yelp, preventing the company from responding to her unfounded and unlawful requests. Incredibly, Hassell's tactics succeeded and she secured a mandatory injunction directing Yelp to remove content on its website before it had even been served or had any opportunity to oppose the unconstitutional injunction she sought. A clearer violation of due process rarely presents itself, and yet the trial court denied Yelp's motion to vacate its order and judgment. This Court should reverse and vacate the trial court's judgment.

Non-party Yelp allows members of the public to read and write reviews – free of charge – about businesses, government agencies, and other local entities, on its website, Yelp.com. Hassell and the law firm she owns ("Hassell") sued her former client Ava Bird, alleging that Bird authored and posted defamatory statements about Hassell on Yelp's website. The lawsuit does not name Yelp as a defendant or seek any relief against Yelp, and the only named defendant, Bird, defaulted. Hassell then, without providing any notice to Yelp, sought an injunction against Bird *and* Yelp. The court granted the injunction as requested (without separately

analyzing whether or not such an injunction was proper as to Yelp) and ordered Yelp to remove the statements from its website.

In the months that followed, after receiving notice of the judgment and injunction, Yelp attempted to resolve the dispute with Hassell outside of court, explaining that the injunction was void given the lack of due process afforded to Yelp, and that Yelp itself was immune from such an injunction under Section 230 of the federal Communications Decency Act ("Section 230" or "CDA"). When its attempts were unsuccessful, Yelp moved the trial court to vacate the judgment. The trial court rejected Yelp's due process arguments on the ground that Yelp was "acting in concert" with Bird due to Yelp's attempts to overturn the injunction and its continued publication of the content at issue. The trial court did not address Yelp's Section 230 arguments in its decision.

This Court should reverse and vacate the trial court's judgment for three reasons.

*First*, the court's issuance of an injunction without notice to Yelp denied Yelp its due process rights. Hassell's intentional decision to not provide Yelp with any notice of her application for an injunction deprived Yelp of the ability to object and prevent entry of the injunction. No evidence supports the trial court's primary reason for refusing to vacate the injunction – that Yelp purportedly acted in concert with Bird in some way. The trial court's conclusion to the contrary overlooks that as a matter of

law, simply continuing to display third-party authored content on its website cannot transform Yelp into an aider or abetter. Yelp's decision not to remove the reviews from its website reflects nothing more than Yelp's legitimate objections to, and its refusal to comply with, an injunction that ignored the federal immunity that Yelp enjoys under Section 230, and is unconstitutional on its face. The legal arguments Yelp made in seeking relief from the void injunction merely reflect Yelp's determination to assert its statutory and constitutional rights. In addition, the injunction is void for the independent reason that it violates the notice requirements of due process protected by Code of Civil Procedure Section 580 which provides that a default judgment cannot award relief greater than that sought in the complaint. Here, having sought an injunction *only* against Bird in her Complaint, Hassell cannot obtain an injunction against Yelp as part of a default judgment. *See infra* at Argument I.

*Second*, federal law that was enacted with companies like Yelp in mind—47 U.S.C. § 230(c)(1)—prohibits courts from ordering website providers like Yelp to remove content provided by third parties. Yelp did not author the allegedly defamatory statements at issue. Hassell alleges that Yelp was an "active participant" in publishing the information, but such editorial conduct is precisely what Section 230 shields. Every entity protected by Section 230 takes action to publish third-party content, and there is no "operative distinction between 'active' and 'passive' Internet

use" for purposes of applying immunity under Section 230. *Barrett v. Rosenthal*, 40 Cal. 4th 33, 62 (2006). None of the practices that Hassell identified below transform Yelp into the creator or developer of the comments, and as such, Yelp is immune from an injunction. *See infra* at Argument II.

*Third*, the injunction is overbroad, and thus constitutes an unconstitutional prior restraint against speech. The injunction purports to prevent two unnamed users from posting any *future* reviews on Yelp's website, regardless of topic or content. The injunction here also applies to two statements that were not properly before the trial court, as Hassell failed to identify them with particularity as libelous statements in the Complaint. Indeed, one of the two statements was not posted on Yelp until months *after* Hassell filed and served her Complaint. As such, Hassell cannot overcome the heavy presumption against this prior restraint's constitutional validity. *See infra* at Argument III.

For all these reasons, the trial court's denial of Yelp's motion to vacate should be reversed.

## SUMMARY OF FACTS

### A. Yelp Learns that the Trial Court, without Notice, Has Entered Judgment Against It in a Lawsuit to which It Was Not a Party.

Yelp's website, Yelp.com, allows members of the public to read and write reviews about local businesses, government services, and other

entities. A00240, ¶ 2. Yelp is available to the public at no charge and without any registration requirement. *Id.* ¶ 4. Those who register by creating an account may write reviews about businesses and service providers, and thus contribute to a growing body of publicly-available consumer reviews. A00240, ¶ 6. The reviews on Yelp.com are read by tens of millions of other users when making a wide range of consumer and other decisions. *Id.* The website provides both a search function and a social network to its users. *Id.*, ¶ 2.

On January 28, 2014, Yelp's registered agent for service of process received notice of entry of judgment or order, together with a letter threatening Yelp with contempt proceedings if it did not comply with the order. A00537-547. Yelp had never been served or otherwise notified that the plaintiff in the action, Dawn Hassell, had asked a trial court to enter a mandatory injunction compelling Yelp to remove both existing and future third-party content from its website. A00243, ¶¶ 3-5.

Yelp soon learned that Hassell is an attorney located in San Francisco and owns The Hassell Law Group, P.C. A00006, ¶¶ 21, 22. Hassell and her firm had sued Ava Bird, a resident of Berkeley, California. A00002 ¶ 1. According to Hassell's Complaint, Bird had suffered a personal injury on June 16, 2012, and first met with The Hassell Law Group on July 9, 2012, to discuss hiring Hassell to represent her in a personal injury suit. A00003, ¶ 5. On August 20, 2012, Bird returned a

signed copy of Hassell's attorney-client fee agreement and thus hired The Hassell Law Group. A00003, ¶ 7. Hassell claims that thereafter, her firm contacted Bird's insurance company and communicated with Bird herself. A00004, ¶¶ 9 and 10. On September 13, 2012, Hassell withdrew from legal representation of Bird. A00003, ¶ 8.

### 1. Third-party users write negative reviews about Hassell Law Group on Yelp.com.

On January 28, 2013, a user with the screen name "Birdzeye B.", identified as located in Los Angeles, CA, posted a one-star review (out of a possible five stars) of The Hassell Law Group on Yelp.com, complaining that "dawn hassell made a bad situation much worse for me. she told me she could help with my personal injury case … then reneged on the case because her mom had a broken leg, or something like that, and that the insurance company was too much for her to handle." The review went on to state, "the hassell law group didn't ever speak with the insurance company either, neglecting their said responsibilities and not living up to their own legal contract! nor did they bother to communicate with me, the client or the insurance company AT ALL." A00018.

Believing that "Birdzeye B." was Bird, Hassell sent Bird an email on January 28, 2013, requesting she remove the "factual inaccuracies and defamatory remarks" from Yelp.com. A00005, ¶ 15. Bird sent a reply email the next day, complaining about Hassell's representation, stating,

"the few calls you did make to the insurance were feeble: once to say you were handling the case, once you left a belated non-sense voicemail and once you called them to withdraw from the case. [B]ut, at no time, DID YOU ACTUALLY FOLLOW THROUGH ON ANYTHING SUBSTANTIAL!" A00348. The email also indicated that Hassell's landlord might write a review as well. A00350.

On February 6, 2013, a new one star review for The Hassell Law Group appeared on Yelp from a different user account with the screen name "J.D.," identified as being located in Alameda, California. The review stated, "Did not like the fact that they charged me their client to make COPIES, send out FAXES, POSTAGE, AND FOR MAKING PHONE CALLS about my case!!! Isn't that your job. That's just ridiculous!!! They [d]educted all those expenses out of my settlement." A00020. The firm's apparently standard attorney-client fee agreement does provide that costs, including making copies, faxing, postage, and phone calls, are deducted from settlement amounts. *See* A00071.

Hassell alleges that the firm "conducted a diligent and comprehensive investigation to determine if plaintiffs had ever represented anyone with the initials 'J.D.' from Alameda and determined that plaintiffs had not done so." A00005, ¶ 18. Despite the fact that the author of the review could plainly be using a pseudonym, that Bird's initials were also *not* J.D., that Bird had not received any settlement amount, and that she had

not previously used capital letters at the beginning of her sentences, Hassell assumed that the poster "J.D." was Bird, based solely on the use of capitalization and the dates of the reviews. A00005, ¶ 18.

### 2. Hassell brings a defamation suit against Bird based on the "Birdzeye B." Review.

On April 10, 2014, both Dawn Hassell individually, and the Hassell Law Group P.C., filed a complaint against Bird in San Francisco Superior Court. *See* A00002. The suit included claims for libel, trade libel, invasion of privacy – false light, and intentional infliction of emotional distress, and sought both compensatory and punitive damages. It also sought injunctive relief against Bird only. *See* A00013:6-13. While the Complaint referenced the review by "J.D." dated February 6, 2013, and attached that review as Exhibit C, it did not identify the statements with particularity as defamatory statements, or explain what was allegedly libelous about them, as it did with Birdzeye B.'s review. *See* A0006-8, ¶ 26 (a)-(g), ¶ 27 (a)-(g).

Hassell's process server began attempting personal service at what he believed to be Bird's home in Oakland on April 13, 2013 (despite Hassell's Complaint stating that Bird resided in Berkeley and that the Yelp profile page for Birdzeye B. describes the user's location as Los Angeles). *See* A00026. Four days later, on April 17 at 8:30 a.m., Hassell relied on substitute service. The neighbor with whom the process server left the

documents said that "he owns [the] property and hasn't seen her [sic] in a couple months." A00026.

On June 20, 2013, Hassell sought an entry of default against Bird. *See* A00022. The Court rejected the request as premature and incomplete. *Id.*

On July 11, 2013, the court entered a default against Bird because she failed to appear and contest the allegations of Hassell's Complaint. A00023.

### 3. The trial court awards an injunction, without notice, against non-party Yelp, enjoining *three* statements and all future speech of two user accounts.

On November 1, 2013, Hassell filed a Summary of the Case in Support of Default Judgment and Request for Injunctive Relief that differed from the Complaint in a number of significant respects.

*First*, Hassell expanded her libel claim and sought relief based on *three reviews*, when the Complaint had only identified statements with particularity from *one review*. *Compare* A00033-36 *with* A00006-08. In addition to BirdzEye B.'s January 28, 2013 review, which was the basis of the libel claim in the Complaint (A000006-08), her Summary of the Case in support of her Application for Default Judgment and Request for Injunctive Relief also sought to enjoin the "J.D." review, which merely stated that the poster "did not like" the firm's admitted policy of deducting from clients'

settlements for costs of the firm making copies, sending faxes, using postage and making phone calls, and then opined, "Isn't that your job. That's just ridiculous!!" A00050-51. Hassell argued—for the first time—that this review was "accusing Plaintiff of a crime, either fraud or theft by taking more money from the recovery than Plaintiff was allowed." A00035 at 6:20-23.

The Summary also sought relief for statements that were posted on April 29, 2013, *after* Hassell had filed the Complaint, which was never amended. A00036, A00050-51. The comments, posted by "Birdzeye B." were an update on the original review, and stated that Hassell:

> "has filed a lawsuit against me over this review I posted on yelp! she has tried to threaten, bully, intimidate, harass me into removing the review! she actually hired another bad attorney to fight this. lol! well, looks like my original review has turned out to be truer than ever. avoid this business like the plague folks! and the staff at YELP has stepped up and is defending my right to post a review. once again, thanks YELP! And I have reported her actions to the Better Business Bureau as well, so they have a record of how she handles business. [A]nother good resource is the BBB, by the way."[1]

A00102. Hassell explained in her Summary that the update "implies again that Plaintiffs are unethical in their business practices." A00036 at 7:13.

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[1] In response to this posting, Dawn H. of The Hassell Law Group responded on Yelp.com, writing a lengthy explanation of her view of the events, including that "The statements in this review are simply not TRUE." *See* A00244.

*Second*, Hassell significantly expanded the relief being sought. In addition to seeking over a half million dollars in damages, Hassell for the first time demanded that the "Court should also make an order compelling Defendant and Yelp.com to *remove* the defamatory statements, including all 3 entire posts, immediately. If for any reason Defendant does not remove them all by the Court-ordered deadline (which is likely given Defendant's refusal to answer the complaint), *the Court should order Yelp.com to remove all 3 of them.*" A00051 at 22:2-6 (emphasis in original).

Plaintiffs' Request for Judgment went even further. There, Hassell sought "an Order ordering Yelp.com to remove the reviews *and subsequent comments* of the reviewer within 7 business days of the date of the court's Order." A00051 at 22:25-26 (emphasis added). Thus, based on speculation that Bird posted as both Birdzeye B. and J.D., Hassell sought to enjoin any future speech by these users, and Yelp's display of that speech, regardless of whether any future comment might be true, or constitutionally protected opinion, or on a different topic, or absolutely privileged.

Even though the speech at issue was on Yelp.com and she specifically sought an order enjoining Yelp's publication of that speech, Hassell did not serve her application for default judgment on Yelp. The

court granted the requested injunction. *See* A00213 at 2:7-9.[2] The court did not make any factual findings as to non-party Yelp.

### B. Yelp Moves the Trial Court to Vacate the Injunction of Which It Had No Prior Notice.

On January 28, 2014, Hassell sent a letter attaching the Order to Yelp's registered agent of process, with a Notice of Entry of Judgment or Order. A00537-547. In the letter, Hassell threatened that "Yelp, Inc.'s non-compliance with the court's order will become the subject of contempt proceedings and a further lawsuit against Yelp if Yelp refuses to comply as my business is being further damaged." A00537.

On February 3, 2014, Yelp's Senior Director of Litigation, Aaron Schur, responded to Hassell by letter. He stated that as a non-party who did not receive notice or an opportunity to be heard, Yelp was not bound by the terms of the Judgment. A00548-550. He further explained that the Communications Decency Act Section 230 precludes enforcement of the injunction, or liability as to Yelp, given that Hassell's claim arose from third-party content published on Yelp's website. A00549. Finally, Mr. Schur stated that "your threats against Yelp are not well taken. If you pursue an action against Yelp premised on its publication of these reviews, Yelp will promptly seek dismissal of such action and its attorneys' fees

[2] The court also accepted Hassell's representations about the damages she suffered and ordered that Bird pay Hassell *over half a million dollars* in monetary damages. *See* A00212.

under California's anti-SLAPP law, as it has in the past in similar cases." A00550.

Hassell did not respond until April 30, 2014, nearly three months later. In a letter bearing that date, she claimed that her office was "currently setting a motion to enforce the court's order against Yelp." A00551. She did not respond or acknowledge Yelp's arguments that the injunction was procedurally and substantively improper.

On May 23, 2014, Yelp moved the court to vacate the Judgment. A00225-226. Yelp argued that the Judgment was void because it (a) was issued without notice or an opportunity for Yelp to be heard, and thus violated Yelp's due process rights; (b) exceeded the scope of relief requested in the Complaint, and was therefore barred by Code Civ. Proc. § 580; (c) was prohibited under Section 230 of the Federal Communications Decency Act; and (d) was issued in violation of the First Amendment. A00231-36.

### C. Hassell Opposes the Motion to Vacate, Claiming that Yelp is "Aiding and Abetting" Defendant Bird by Challenging the Injunction.

Hassell opposed Yelp's motion to vacate. She argued that Yelp's motion to vacate was untimely, and that the court's authority to rule on the motion to set aside and vacate the judgment had expired. A00480:1-A00481:19. She also argued, for the first time in the litigation, that the lack of notice and due process afforded to Yelp was permissible because (1) it

"was the only meaningful remedy available to Plaintiff" and (2) Yelp was allegedly "acting in concert with Defendant Bird." A00481:20-21. Similarly, Hassell argued that Section 230 did not bar injunctive relief against Yelp because Yelp was "actively participating in promoting the defamation of Plaintiffs." A00486:19-20.

Hassell primarily based her argument that Yelp was "acting in concert" with Bird on Yelp's refusal to comply with an injunction that Yelp had received no prior notice of or an opportunity to contest before it was entered. A00482:27-A00483:3. Hassell argued that "Yelp's continued persistence refusing to take down Bird's review has caused and continues to cause injury to Plaintiffs, but Yelp has done nothing and *here defends itself and Ava Bird* arguing that the findings against Bird are even invalid!" A00483:18-21 (emphasis in original). Thus, according to Hassell, Yelp's act of merely challenging the validity of the injunction against Yelp, *pointing out that it was entered without prior notice to Yelp*, was itself sufficient evidence of Yelp "aiding and abetting" Bird.

In addition, Hassell argued that "Yelp has maintained and classified the 'Birdzeye' review as a 'Recommended Review' constituting action by Yelp of representing the review as truthful." A00483:4-5. In support of this argument, Hassell submitted a print-out from Yelp's website for The Hassell Law Group. A00518. It showed that The Hassell Law Group had an average ranking of four and a half stars – half a star short of the highest

possible ranking – based on 12 reviews. The 12 reviews were listed under the small heading, "Recommended Reviews for The Hassell Law Group"—the same heading format used for all reviewed businesses listed on Yelp's website. Birdzeye B's review, with Dawn H's comment in response below it, were listed among the 12. On a separate web-page, Yelp displayed a number of reviews for The Hassell Law Group that are currently not recommended. A00519. This included the J.D. review, about which Hassell also complains, as well as nine other reviews that Hassell claimed were positive. The page also included the following explanation from Yelp:

> **What Are Recommended Reviews?**
>
> We get millions of reviews from our users, so we use automated software to recommend the ones that are most helpful for the Yelp community. The software looks at dozens of different signals, including various measures of quality, reliability, and activity on Yelp. The process has nothing to do with whether a business advertises on Yelp or not. The reviews that currently don't make the cut are listed below and are not factored into this business's overall star rating. Learn more here.

A00519.

Hassell also argued that Yelp was "acting in concert with Bird" because "Yelp's Terms of Services expressly state that a Yelp user agrees to not post defamatory reviews," and Yelp "chose not to enforce its own rules prohibiting defamatory reviews." A00483:5-6, 14-15.

Finally, Hassell argued that Yelp's Terms of Service created an agent-principal relationship with Bird through licensing provisions. A00484:11-16.

In its reply brief and at oral argument, Yelp contested each of these arguments and repeatedly represented that it was not acting on behalf of Bird.

### D. The Trial Court Denies the Motion to Vacate and this Appeal Follows.

On September 29, 2014, the trial court denied Yelp's motion to set aside and vacate the judgment. A00808. It quoted from *Ross v. Superior Court*, 19 Cal. 3d 899, 906 (1977), and *Berger v. Superior Court*, 175 Cal. 719, 721 (1917), for the proposition that injunctions may run to non-parties who are aiding and abetting an enjoined person to violate an injunction. It found "a factual basis to support Hassell's contention that Yelp is aiding and abetting Bird's violation of the injunction." A00809.

*First*, it described Yelp's automated software that distinguished between "recommended" and "not recommended" reviews as evidence "that Yelp highlighted at least one of Bird's defamatory reviews about the Hassell Law Firm on its website by featuring it as a 'Recommended Review.'" A00809. The court also noted that "Yelp's website also indicates that a litany of favorable reviews are not factored into the Hassell Law Firm's star rating, appearing to give emphasis to Bird's defamatory

review." *Id.* The court failed to acknowledge that the Birdzeye B. review was displayed as "recommended" prior to the entry of the injunction, that Yelp's system of categorizing reviews as "recommended" or "not recommended" undisputedly occurs through automated software, or that Yelp's recommendation software system was also in operation before the entry of the injunction. A00519.[3] Thus, no facts demonstrated that Yelp took any intentional act to conspire with Bird to thwart the injunction.

*Second*, the court believed that Yelp was "acting on behalf of Bird" by moving to set aside the judgment in its entirety, even though Yelp had alternatively asked for the judgment to be partially vacated to eliminate all provisions pertaining to Yelp. The court stated that it concluded that Yelp was "acting on behalf of Bird" because Yelp argued that Hassell had failed to establish that Bird actually posted the Yelp reviews, and that Hassell had not properly effectuated substitute service on Bird. A00809. The court described these arguments as having been made "on behalf of Bird," despite acknowledging Yelp's contention that "it is an uninterested third party." The court stated that there was "a unity of interest between Bird and Yelp." A00810.

*Third*, the court believed that Yelp was aiding and abetting the alleged ongoing violation of the injunction because "Yelp refuses to delete"

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[3] *See also* http://officialblog.yelp.com/2013/11/yelp-recommended-reviews.html

the reviews, and claimed that Yelp's refusal is inconsistent with its Terms of Service, which requires *its users* not to write defamatory reviews (but does not represent that Yelp will remove all allegedly defamatory reviews). A00810.

The court did not address Yelp's argument that the initial grant of the injunction against Yelp – which occurred before Yelp had notice or an opportunity to argue on its behalf, and before Hassell had provided any evidence or argument regarding "recommended reviews" – was void. Nor did the court make any reference to or discuss the immunity provided by Section 230 of the Communications Decency Act.

## STANDARD OF REVIEW

This Court should conduct an independent, de novo review of the trial court's denial of Yelp's Motion to Vacate. Both the United States and California Supreme Courts have held that appellate courts, when reviewing appeals raising fundamental issues of free speech such as Yelp has raised here, should exercise independent appellate review. In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984) the United States Supreme Court made clear that "[t]he requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such

review in order to preserve the precious liberties established and ordained by the Constitution."

The California Supreme Court echoed those sentiments in *In re George T.*, 33 Cal. 4th 620, 632 (2004): "What is evident is that the high court has employed the independent review standard in varied First Amendment contexts as an added safeguard against infringement of First Amendment rights." The Supreme Court further instructed that a reviewing court must "make an independent examination of the whole record, including a review of the constitutionally relevant facts de novo, independently of any previous determinations by [the lower court]." *Id.* at 634 (citations and internal quotation marks omitted). Because application of Section 230 raises First Amendment issues as well (*see* Argument II, below), independent review is also appropriate. And, of course, when deciding "the proper interpretation and application of a statute or constitutional provision, our review is de novo." *In re Lugo*, 164 Cal. App. 4th 1522, 1535 (2008).

Similarly, the law is clear that questions regarding an appellant's due process rights are matters of law subject to independent review. *See Mohilef v. Janovici*, 51 Cal. App. 4th 267, 285 (1996) ("Because the [appellants'] contention regarding procedural matters presents a pure question of law involving the application of the due process clause, we review the trial court's decision de novo"); *In re A.B.*, 230 Cal. App. 4th

1420, 1434 (2014) ("Mother's due process contentions present an issue of law which we review de novo"); *Menge v. Reed*, 84 Cal. App. 4th 1134, 1139 (2000) ("Whether the DMV's administrative procedures comply with due process is a question of law, and we review the trial court's determination of that question de novo").

De novo review by this Court is also required under Code of Civil Procedure section 663. Appellate review of a denial of a motion under section 663 is ordinarily limited "to a determination of whether the conclusions of law and judgment are consistent with and supported by the findings of fact." *Newbury v. Civil Serv. Comm'n of City of Los Angeles*, 42 Cal. App. 2d 258, 259 (1940). Whether the trial court has drawn an incorrect legal conclusion from the facts found is a question of law to which the Court applies de novo review. *See, e.g., People ex rel. Dep't of Corporations v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1144 (1999). Likewise, "[c]onstruction and application of a statute involve questions of law, which require independent review." *Delfino v. Agilent Techs., Inc.,* 145 Cal. App. 4th 790 (2006) (citations omitted); *see also Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38, 49 (1998).

## ARGUMENT

### I. DUE PROCESS BARS THE INJUNCTION AGAINST YELP

#### A. The Trial Court Erred in Denying Yelp's Motion to Vacate the Injunction, Which Violates Yelp's Due Process Rights.

The trial court's order denying Yelp's motion to vacate should be overturned because the injunction violates Yelp's due process rights under both the United States and California Constitutions. The requirement of notice and hearing is firmly rooted in principles of justice, and indeed, the United States and California Constitutions.[4] As the court made clear in *Estate of Buchman*, 123 Cal. App. 2d 546, 559 (1954), "The fundamental conception of a court of justice is condemnation only after notice and hearing." The court further noted that "[t]he power vested in a judge is to hear and determine, not to determine without hearing," and that the Constitution *requires* a fair hearing. *Id.* at 560. *See also People v. Ramirez*, 25 Cal. 3d 260, 263-64 (1979) (holding that application of the due process clauses of the California Constitution (Cal. Const., art. I, § 7 subd. (a); *id.*, § 15.), "must be determined in the context of the individual's due process liberty interest in freedom from arbitrary adjudicative procedures"); *Kash Enters., Inc. v. City of Los Angeles*, 19 Cal. 3d 294, 308 (1977) ("the

[4] Although interpretations of the scope of the Due Process clause of the Fifth and Fourteenth Amendments are not binding on interpretations of the Due Process clauses of the California Constitution, Courts generally apply such holdings unless given a reason not to do so. *See, e.g., Garfinkle v. Superior Court*, 21 Cal. 3d 268, 282 (1978).

Constitution generally requires that an individual be accorded notice and some form of hearing before he is deprived of a protected property or liberty interest"); *Today's Fresh Start, Inc. v. Los Angeles Cnty. Office of Educ.*, 57 Cal. 4th 197, 212 (2013) ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.") (internal marks and citations omitted); *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 547 (1971) (recognizing "the long-standing procedural due process principle which dictates that, except in extraordinary circumstances, an individual may not be deprived of his life, liberty or property without notice and hearing").

Consequently, as the United States Supreme Court has held, courts "may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945). And the Supreme Court of California long ago reaffirmed as a "seemingly self-evident proposition that a judgment in personam may not be entered against one not a party to the action." *Fazzi v. Peters*, 68 Cal. 2d 590, 591 (1968). As one court later observed, "[r]endering a judgment for or against a nonparty to a lawsuit may constitute denial of due process under the United States and California Constitutions" because the "nonjoined party has not been given notice of the proceedings or an opportunity to be heard." *Bronco Wine Co. v. Frank*

*A. Logoluso Farms*, 214 Cal. App. 3d 699, 717-18 (1989) (citations omitted).

Yet despite this settled constitutional principle, and without Yelp having any notice or an opportunity to object to the injunction before it was entered, the trial court granted Hassell's request for entry of an injunction to enjoin speech hosted by Yelp, violating Yelp's constitutional rights. The First Amendment protects Yelp's right to distribute the speech of others without an injunction, regardless of the fact that the speech was created and developed by others. Yelp simply cannot be denied those rights without notice of the proceedings and an opportunity to be heard. *See, e.g., Marcus v. Search Warrants of Property*, 367 U.S. 717, 736-37 (1961) (distributors suffered unconstitutional denial of due process where state seized allegedly obscene publications without notice or a hearing prior to seizure, impairing distributors' freedom of speech).

Hassell was well aware that Yelp's rights would be implicated when she moved for a default judgment; as she put it, she "anticipated that Defendant Bird would refuse to remove the Yelp review" and therefore "asked the court to also order Yelp to take the review down." A00482 at 6:14-17. Nevertheless, rather than pursue contempt proceedings against Bird, or add Yelp as a defendant to her initial suit and provide notice of this action, she instead sought to enjoin Yelp directly knowing that Yelp had not been named as a defendant, or served with any summons, pleadings,

discovery, subpoenas, or motions, in the Action prior to the Judgment. A00243, ¶¶ 3-5. In fact, at the hearing on the motion to vacate, Hassell made the remarkable admission that she did not name Yelp in her Complaint because Yelp informed her that it was immune from suit under Section 230. A00837:13-15 ("They also told my lawyer that they are immune from suit under 230 … so they were not sued.").[5] In other words, *because she was convinced of Yelp's Section 230 immunity, she decided to wait until she had a default judgment against Bird, then sought to add Yelp to the resulting injunction rather than give Yelp an opportunity in court to argue its immunity from suit and injunction under Section 230.* That is the essence of a due process violation. Instead of recognizing this clear violation of Yelp's due process rights, however, the trial court granted the relief Hassell requested.[6]

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[5] Yelp's immunity from suit and injunction under Section 230 is discussed *infra*, Argument II.

[6] In a Supplemental Opposition to Nonparty Yelp Inc.'s Reply Memorandum of Points and Authorities, Hassell asserted that Yelp *did* have notice, because Hassell's former counsel had sent Yelp's general counsel, *not* Yelp's registered agent for service of process, a letter in May 2013, attaching the Complaint – which did not name Yelp as a party – and included the boiler plate language in its Prayer for Relief that it sought "such other and further relief as the court may deem proper." A00586:3-24. Of course, if such conduct constituted sufficient notice, California's rules regarding service of process would be superfluous and the concept of due process would lose all meaning. There is no dispute that Hassell failed to serve Yelp with any notice that she was seeking an injunction against Yelp before the injunction was issued.

*Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.*, 75 Cal. App. 4th 110, 120-21 (1999) is instructive. In that case, insurance underwriters ("Underwriters") entered into an agreement to reimburse a roofing contractor in its litigation against a general contractor. After the roofing contractor obtained a judgment against the general contractor (but not the Underwriters), the roofing contractor moved for the Underwriters to be added as judgment debtors. The trial court granted the contractor's motion. *Tokio Marine*, 75 Cal. App. 4th at 113-15.

The Court of Appeal reversed, noting that the "Underwriters themselves did not assert any claim in this action, and no litigant sued the Underwriters in this litigation to determine any issue whatsoever." *Tokio Marine*, 75 Cal. App. 4th at 119. Accordingly, when the trial court granted the roofing contractor's motion, the Underwriters were deprived of a "summons or complaint setting forth the issues to be joined," "discovery," "setting of a trial date," the "opportunity to assemble evidence or witnesses on the merits or to prepare for a trial," the "opportunity to brief and be heard on the legal issues raised," the "opportunity to cross-examine adverse witnesses," and a "trial (either jury or non-jury)." *Id.* at 120-21. In all, the court concluded that the trial court's order "*was a rather straightforward denial of due process.*" *Id.* at 121 (emphasis added). If due process requires that insurance underwriters, having entered into a contract concerning litigation, be given notice and a hearing before they are bound

by any judgment arising from that litigation, then it necessarily requires that Yelp also have been given a notice and hearing before being enjoined for hosting third-party speech. The conclusion that the Judgment should have been vacated on due process grounds alone is inescapable.

### B. The Trial Court Erred in Finding the Lack of Notice Was Justified.

The trial court erred in determining that Yelp could be bound by the injunction despite having received no prior notice of it or any opportunity to object. It relied on *Ross v. Superior Court*, 19 Cal. 3d 899, 906 (1977) and *Berger v. Superior Court*, 175 Cal. 719, 721 (1917), which both state, "In matters of injunction ... it has been a common practice to make the injunction run also to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders, abetters, etc., though not parties to the action." *Ross*, 10 Cal. 3d at 906, *citing Berger*, 175 Cal. at 721. The trial court believed that there was "a factual basis to support Hassell's contention that Yelp is aiding and abetting Bird's violation of the injunction," and on that basis, concluded that the injunction could run to non-party Yelp despite the lack of notice. A00809.

The rule articulated in *Ross* and *Berger* however, applies where a group or organization has been enjoined, so as to prevent the group's individual members who are not named in the injunction from acting on behalf of that group. It is, in essence, an administrative solution to secure a

*group's* compliance with an injunction by applying the injunction to its individual members. As the Supreme Court clarified in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1124 (1997), application of injunctive relief to non-parties permitted in *Ross* and *Berger* applies "to labor unions, abortion protesters or other identifiable groups" because "such groups can act *only through the medium of their membership*" (emphasis added). Thus, in *Ross*, the Supreme Court held that the boards of supervisors were bound by an injunction against the state welfare agency because "[i]nasmuch as county boards of supervisors bear an on-going statutory responsibility for the local administration of welfare benefits, such boards of supervisors are clearly general agents of the state welfare agency with respect to such administrative duties." 19 Cal. 3d at 908.

In this case, indisputably however, Bird is not a "group" and Yelp is not a member. None of the practical considerations about enjoining members of a group that existed in *Ross* and *Berger* exist here because naming Yelp in the initial complaint and giving Yelp notice and opportunity to be heard to object to the injunction would have imposed no additional burden on Hassell – other than forcing her to establish her right to relief, if any, against Yelp.

Moreover, even if *Ross* and *Berger* were applicable, the facts do not support the theory that Yelp was somehow "aiding and abetting" Bird's violation of the injunction. The trial court cited its belief that Yelp

"highlighted at least one of Bird's defamatory reviews about the Hassell Law Firm on its website by featuring it as a 'Recommended Review'" and that Yelp's website failed to factor into Hassell's review "a litany of favorable reviews . . . appearing to give emphasis to Bird's defamatory review." A00809. A closer examination of the Yelp website, however, belies the trial court's conclusions. Yelp uses automated software—in place for years before the injunction issued— to determine whether a review is categorized as "recommended" or "not recommended"; therefore, Yelp did not choose to "highlight" any particular review after the injunction was issued. *See* A00519; *see also* http://officialblog.yelp.com/2013/11/yelp-recommended-reviews.html. In fact, the review at issue was "recommended" before the injunction existed. Merely continuing to host third-party content, and continuing to apply to it the same software that is applied to all third-party content, cannot constitute aiding and abetting. Yelp did not take any affirmative action at all in response to the injunction and instead, as Hassell herself wrote, "has done nothing." A00483:18-21.

Further, the trial court found that "Yelp is acting on behalf of Bird" by making *legal arguments* as to the validity of the judgment. A00809. But the trial court itself acknowledged that the rule articulated in *Ross* and *Berger* requires that Yelp be "aiding and abetting Bird's *violation of the injunction*." *Id.* (emphasis added). Simply asserting legal arguments in

court about the validity of the injunction cannot constitute aiding and abetting a violation of the injunction. Yelp did nothing more than appropriately assert its objections to the constitutionality of the injunction, even if some of those arguments would be equally available to Bird. Pursuing such defenses in court can hardly be said to be "acting in concert" with Bird, or all co-defendants that happen to make arguments that benefit the other would be said to be "acting in concert" with each other. Indeed, California law provides not only that an Internet service provider protected under Section 230 may move to quash a subpoena for personally identifying information, where the action is pending in another state; it also provides that if the underlying action arises from the service provider's exercise of free speech, and if the respondent has failed to make a prima facie showing of a cause of action, the successful service provider may be awarded attorney's fees for so challenging. *See* Code Civ. Proc. § 1987.2(c) (providing process for quashing subpoena seeking identity of users where issuing party fails to make a prima facie showing of a cause of action). Given California's embrace of Internet service providers challenging actions that seek users' personal information, it cannot be the law that Yelp's legal arguments as to the validity of the default judgment constitute aiding and abetting.

Finally, the trial court found that Yelp was aiding and abetting Bird because its refusal to delete Bird's allegedly defamatory reviews was

"inconsistent with its own terms of service." A00810. Yelp's Terms of Service, however, require *its users* not to write defamatory reviews, but does not represent that *Yelp itself* will remove all allegedly defamatory reviews. A00561-564. Indeed, in those same Terms of Service, Yelp states, "We are under no obligation to enforce the Terms on your behalf against another user. While we encourage you to let us know if you believe another user has violated the Terms, we reserve the right to investigate and take appropriate action at our sole discretion." A00562.

Nor does Yelp's refusal to remove the reviews pending appeal of the injunction constitute aiding and abetting Bird. In *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010), the court rejected the exact arguments that Hassell makes here. It held that a website host was *not* aiding and abetting defendants and could not be compelled to remove defamatory material from their website pursuant to a permanent injunction issued in an action to which it was not a party. The court disregarded arguments that – like here – the website host's terms of service did not allow users to post defamatory content. The court noted that the website host did nothing after receiving notice of the injunction, and found that "mere inactivity is simply inadequate to render them aiders and abettors in violating the injunction." *Id.* at 568. Similarly here, Yelp's refusal to remove the posts prior to the resolution of this appeal cannot render Yelp into an aider or abettor. The

grant of injunction against Yelp, a non-party to the underlying action, was thus a clear violation of Yelp's due process rights.

### C. The Injunction Also Violates the Guarantee of Fundamental Fairness Contained in Code of Civil Procedure Section 580.

The entire Judgment, including the injunction against Yelp, is void for another reason: it violates the "notice requirements of due process" that "lie at the core of [Code of Civil Procedure] section 580." *Finney v. Gomez*, 111 Cal. App. 4th 527, 535 (2003). Section 580 requires that "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint." As a result, a "default judgment awarding damages in excess of the amount allowed under Section 580 is beyond the court's jurisdiction and therefore is void." *Matera v. McLeod*, 145 Cal. App. 4th 44, 59 (2006). The rule applies equally to injunctions. *Becker v. S.P.V. Constr. Co.*, 27 Cal. 3d 489, 493-94 (1980).

California's Supreme Court has affirmed that Section 580 must be strictly construed. *See Greenup v. Rodman*, 42 Cal. 3d 822, 826 (1986). That is because Section 580 functions as "a guarantee of fundamental fairness." *Finney*, 111 Cal. App. 4th at 534. "The 'primary purpose of the section is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them.'" *In re Marriage of Lippel*, 51 Cal. 3d 1160, (1990), *citing Greenup*, 42 Cal. 3d at 826. As the California Supreme Court has "repeatedly stated, [Section 580] means what

it says and says what it means: that a plaintiff cannot be granted more relief than is asked for in the complaint." *In re Marriage of Lippel*, 51 Cal. 3d at 1166.

Here, the Complaint *only* requested injunctive relief as to Bird, but the Judgment ordered mandatory injunctive relief against Yelp. And while the injunctive relief sought in the Complaint was limited to removal of comments already posted on the Internet "about plaintiffs," (A00013:24), the Judgment provided much broader relief, extending the injunction to *future* comments on any topic. A00212-213. In addition, the Complaint identified with particularity only statements from one review, the first review from Birdzeye B. A00006:22-A00008:7. The Judgment, however, was based on *three* statements, one of which had not yet been posted at the time the Complaint was filed. A00050-51 ("The Court should also make an order compelling Defendant and Yelp.com to remove the defamatory statements, including all 3 entire posts, immediately"). These violations of Section 580 require reversal of the trial court's ruling.

## II. THE COMMUNICATIONS DECENCY ACT BARS THE INJUNCTION AGAINST YELP

The Internet has effected one of the greatest expansions of free speech and communications in history. It is "a tool for bringing together

the small contributions of millions of people and making them matter."[7] Today, more than *2.7 billion* people use the Internet, submitting and viewing hundreds of millions of posts, comments, photos, videos and other content every day.[8] As the Supreme Court put it, "the content on the Internet is as diverse as human thought." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 852 (1997) (citation omitted).

This is no accident. In 1996, to promote the free flow of information on the Internet, Congress resolved to protect websites and other online providers from state-law liability for their users' content. Section 230 of the Communications Decency Act embodies that command, prohibiting courts from treating such a provider as the "publisher or speaker" of third-party content or holding it liable for taking steps to screen such material. 47 U.S.C. § 230(c)(1). Grounded in core First Amendment principles, Section 230 offers strong protection for innovation and expansion of free speech on the Internet. Since its enactment, federal and state courts have consistently interpreted it to provide a "robust" immunity to companies that

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[7] Lev Grossman, *You – Yes, You – Are TIME's Person of the Year*, TIME MAGAZINE (Dec. 25, 2006).

[8] International Telecommunications Union, 2013 ICT Facts & Figures, http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013.pdf; Mary Madden and Kathryn Zickuhr, *65% of online adults use social networking sites* (Aug. 26, 2011), available at http://pewinternet.org/Reports/2011/Social-Networking-Sites.aspx (as of 2011, 65% of online adults used social networking sites); Josh James, *How Much Data Is Created Every Minute?* (June 8, 2012), available at http://www.domo.com/blog/2012/06/how-much-data-is-created-every-minute/?dkw=socf3.

operate websites, such as Yelp, "from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1122-23 (9th Cir. 2003). In the words of California's Supreme Court, the statute is so broad as to provide "blanket immunity for those who intentionally redistribute defamatory statements on the internet." *Barrett* , 40 Cal. 4th at 62-63.[9] It does so "to protect online freedom of expression and to encourage self-regulation, as Congress intended." *Id.* at 63.

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[9] During oral argument on Yelp's motion, the trial court expressed disbelief that the statute could mean what the California Supreme Court, and uniform federal courts nationwide, have said it means. In first turning to Yelp's counsel during the argument, the trial court said, "What you're saying is you can post any kind of defamatory information for the world to see, and you can say, we don't have anything to do with it. We don't care if they say Ms. Hassell shot her mother, or something like that. It doesn't make any difference. I think your position is a very hard one to swallow." A00834:6-11. While the Supreme Court expressed similar reservations about the statute, it followed Congress' directive and held that as a matter of law, websites like Yelp cannot be held liable for content posted by third-parties, regardless of what that content contains. *Barrett*, 40 Cal. 4th at 62-63. *See also Batzel v. Smith*, 333 F.3d 1018, 1026-30 (9th Cir. 2003); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.") (internal citations and quotations omitted); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 402 (6th Cir. 2014) (holding TheDirty.com is not an "information content provider" with respect to information it publishes such that Section 230(c)(1) bars state-law tort claims predicated on that information); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471

Specifically, the Act provides: "No 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," and it preempts any state law, including imposition of tort liability, that is inconsistent with its protections. 47 U.S.C. § 230(c)(1) & (e)(3). Thus, while a plaintiff may still pursue remedies against the actual creator of allegedly unlawful online content, that plaintiff may *not* pursue common law tort claims against a party so long as that party (1) is a "provider or user of an interactive computer service"; (2) the complaint seeks to hold the defendant liable as a "publisher or speaker"; and (3) the action is based on "information provided by another information content provider." *Id.*; *see Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 828-29 (2002).

Section 230 bars the injunction against Yelp, as well as any liability for failing to comply with the injunction. *First*, Yelp qualifies as a provider of "an interactive computer service" because it operates a website. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("web site operators ... are providers of interactive computer services within the meaning of Section 230"); *Batzel*, 333 F.3d at 1030 n.16. *Second*, the injunction against Yelp treats it as a publisher or speaker. *See Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698 (2001);

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(3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

*Medytox Solutions, Inc. v. Investorshub.com, Inc.*, No. 4D13-3469, 2014 WL 6775236 (Fla. Dist. Ct. App. Dec. 3, 2014). In *Kathleen R.*, this Court specifically found that Section 230, by its terms, precludes injunctive relief, noting that "claims for... injunctive relief are no less causes of action than tort claims for damages, and thus fall squarely within the section 230(e)(3) prohibition." *See Kathryn R.*, 87 Cal. App. 4th at 698. *Third*, "Birdzeye B." and "J.D.," the two users who posted comments on Yelp, are "information content providers" because they are wholly responsible for the creation of the content of the comments. *See* 47 U.S.C. § 230(f)(3). Hassell has never alleged, and cannot, that Yelp played *any* role in the authorship of Birdzeye B. or J.D.'s comments. Consequently, Yelp enjoys the immunity of Section 230.

In the briefing below, Hassell conceded that Yelp is a provider of interactive computer services, and that she is seeking to treat them as publishers or speakers of information provided by readers. (A00486:27-A00488:13.) Hassell argued, however, that Yelp should not be immune because it "is actively participating in promoting the defamation of Plaintiffs." A00486:19-20. While Hassell did not analyze the provisions of Section 230 or rely on any case law, she seemed to be articulating an argument that Yelp was an "information content provider," and was therefore not shielded from liability. The statute defines an information

content provider as any party "responsible … in part" for the "creation or development of information." 47 U.S.C. § 230(f)(3).

Hassell claimed that Yelp's alleged active participation took two forms. *First*, she claimed that by applying its automated software to distinguish between "non-recommended reviews" and "recommended reviews," Yelp is an "active participant here, publishing information itself recommending some reviews, over other reviews." A00487:21-22. She claimed that "Yelp is expressing an opinion and affecting the opinion of others by its act of recommending this review and deciding which reviews will affect a 'Yelp rating' and which will not." A00487:25-27. *Second*, she claimed that Yelp's Terms of Service grant Yelp such an "extraordinary" license to the rights in reviews that Yelp "effectively claims ownership of the user's reviews to do as it wishes with them." A00487:1-5. She concluded that this somehow results in Yelp "adopt[ing] Ms. Bird's legally declared defamatory statement in full, despite having the ability to remove or alter the review…" A00487:7-9. Hassell's arguments fail because neither Yelp's automated software, nor the scope of its license, is sufficient to turn Yelp into an "information content provider," as required to defeat immunity.

### A. Yelp's Practice of "Recommending" Reviews Is a Traditional Editorial Function Immunized by Section 230.

California courts, like those throughout the country, have squarely rejected the same over-reaching theory of liability on which Hassell relies, and instead adopted a "restrictive definition" of an "information content provider" to narrow the kind of conduct a defendant must engage in before losing its immunity under Section 230. *Carafano*, 339 F.3d at 1123.

For example, in *Carafano*, the Ninth Circuit held that the defendant did not facilitate the development of offending content where it provided users with a "detailed questionnaire" that included multiple-choice questions wherein members selected answers from menus providing between four and nineteen options that were capable of resulting in libelous profiles. *Id.* at 1121. In *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 572-73 (2009) the Court found a web site, as a publisher of third-party content, had immunity, and that the decision "to restrict or make available certain material – is expressly covered by section 230." In *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196-97 (N.D. Cal. 2009), the court held that "a website operator does not become liable as an 'information content provider' merely by 'augmenting the content [of online material] generally.'" (citation omitted). In *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 400, 405 (2013), the Court held that Section 230 barred a lawsuit where the plaintiff alleged a newspaper "breached its user

agreement with [plaintiff] by failing to remove comments made on their website concerning" him where the comments were written and posted by third parties. In *Delfino v. Agilent Techs., Inc.,* 145 Cal. App. 4th 790, 807-08 (2006), the Court held that Section 230 immunity applied to claims brought by recipients of Internet threats against the transmitter of threats and his employer, whose computer system he used. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009), the Ninth Circuit found Yahoo immune where it failed to remove from its website material that was harmful to plaintiff and "a dangerous, cruel, and highly indecent use of the internet." [10]

These decisions are part of a national consensus that Section 230 provides immunity even where a website "has an active, even aggressive role in making available content prepared by others." *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998). *See also M.A. v. Village Voice*

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[10] Similarly, in *Donato v. Moldow*, 374 N.J. Super. 475, 499 (N.J. Super. Ct. App. Div. 2005), New Jersey's highest court held that a website operator was not an "information content provider" where it selectively deleted reader posts while allowing others to remain. In *Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 285 (Ct. App. 2011), New York's highest court held that a website that "promoted" a user's allegedly defamatory comment to a stand-alone post, and accompanied the post with an insulting illustration, remained immune from suit under Section 230. While the website did provide some content, the Court held that the "added headings and illustration do not materially contribute to the defamatory nature of the third-party statements." *Id.* at 293. In *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (2001), the Florida Supreme Court found an Internet service provider immune from claims of negligence by a mother who alleged that a user had marketed obscene photographs and videotapes of mother's minor son on the service provider's chat rooms.

*Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1049 (E.D. Mo. 2011) (finding Backpage immune under Section 230, rejecting plaintiff's arguments that search functions and ad revenue optimization methods transformed it into a content provider); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 2009) (similar holding). In keeping with this consensus, the California Supreme Court specifically held that there is no "operative distinction between 'active' and 'passive' Internet use" for purposes of applying immunity under Section 230. *Barrett,* 40 Cal. 4th at 62. It reasoned that a "user who actively selects and posts material based on its content fits well within the traditional role of 'publisher.' Congress has exempted that role from liability." *Id.* at 62. It further noted that were it to depart from the national consensus that active service providers are immune, it would be encouraging forum shopping. *Id.* at 58.

Courts have repeatedly and consistently found that the *exact* conduct Hassell identifies here - Yelp's practice of separating out non-recommended reviews - is merely a traditional editorial function, and does not serve to defeat Yelp's immunity under Section 230. For example, in *Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *affirmed on other grounds*, 765 F.3d 1123 (9th Cir. 2014), the court found that "Yelp's alleged manipulation of [Plaintiffs'] review pages – by removing certain reviews and publishing others or changing their order of appearance – falls within the conduct immunized by §

230(c)(1)." *Id.* at *6. That is because lawsuits "seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content - are barred." *Id.*, *citing Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Similarly, in *Braverman v. Yelp, Inc.*, No. 155629/12, 2013 WL 3335071 (NY. Sup. Ct. June 28, 2013), the court found that "Yelp's alleged act of filtering out positive reviews does not make Yelp the creator or developer of the alleged defamatory reviews. Yelp's choice to publish certain reviews – whether positive or negative – is an exercise of a publisher's traditional editorial function protected by the CDA." *Braverman*, 2011 WL 3335071 at *3, *citing Batzel v. Smith*, 333 F.3d at 1030 and *Barnes v. Yahoo! Inc.*, 570 F.3d 1096 (9th Cir. 2009).

In *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 716 (N.Y. Sup. Ct. 2010), a New York court found that allegations that Yelp's business plan included removing positive reviews of businesses who refused to advertise, even if true (which Yelp denied), could not negate the immunity provided by Section 230. The court specifically held that the act of selecting which material to publish is the publisher's quintessential role and a website will not lose its immunity for acting as a publisher. *See* 29 Misc.3d at 717, 907 N.Y.S.2d at 414 (*citing Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003)).

And in *Kimzey v. Yelp Inc.*, No. C13-1734 RAJ, 2014 WL 1805551 (W.D. Wash. May 7, 2014), a plaintiff sued Yelp for libel based on the display of a review strikingly similar to Birdzeye B's, capitals and all. The court found that Section 230 applied to bar the defamation claims, and that because the user "Sarah K." posted the review, Yelp could not qualify as the information content provider of the reviews, regardless of its provision of a star rating system.

Here, Hassell's claims are no different than those that came before it. She alleges that "Yelp's actions of specifically categorizing reviews, recommending and making Ms. Bird's review more visible than others precludes Yelp in this case from 47 USC 230 § (c)(1) protection." A00487:27-28. Thus, Hassell identifies the same editorial conduct that no less than four courts have each specifically found to be immunized, and that the California Supreme Court generally found exempted from liability, *i.e.*, actively selecting and posting material based on its content. *Barrett*, 40 Cal. 4th at 62. Moreover, conduct far more aggressive and active than this consistently has been found to be immunized: Yelp did not sponsor the review, add content to it, or solicit the specific content of the review with a questionnaire. Because Yelp's conduct of categorizing reviews and making some more visible than others is merely an exercise of a publisher's traditional editorial function, it is entirely protected by Section 230.

### B. Yelp's Standard License Contained in Its Terms of Service Does Not Transform Yelp into a Content Provider.

Nor can Yelp's Terms of Service, which grant Yelp a non-exclusive license to use user-submitted content – a license that Yelp uses to display others' content on its website – transform Yelp into an information content provider and deprive it of Section 230 immunity. Hassell provided no case law to support the notion that Yelp can become a content provider merely through license terms. And indeed, licensing content is not the equivalent of creating or developing it for purposes of Section 230. The ruling in *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-52 (D.D.C. 1998), is instructive. There, AOL had a license agreement with Matt Drudge to provide the "Drudge Report" for AOL in exchange for a salary. The agreement "by its terms contemplates more than a passive role for AOL; in it, AOL reserves the 'right to remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL ... violates AOL's then-standard Terms of Service...'". *Id.* at 51. Additionally, AOL was aware of the Drudge Report's propensity for gossip, issuing a press release stating that, "AOL has made Matt Drudge instantly accessible to members who crave instant gossip and news breaks." *Id.* Nonetheless, despite this active role and the direct financial benefit to AOL, the court held that AOL was immune from suit under Section 230 for claims related to the Drudge Report. The court noted that as a matter of policy, "Congress decided not

to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others." *Id.* at 49.

Far from the facts of *Blumenthal*, in which AOL entered an exclusive license with Drudge knowing in advance the type of content it was buying, all Hassell alleges is that Yelp's standard Terms of Service includes a broad license to all reviews on its website, which enables Yelp to publish them. Yelp is not aware of any court ever denying Section 230 immunity based on licensing terms, much less the standard terms at issue here. If these standard Terms of Service were sufficient to transform Yelp into a content provider, then it would be a content provider for every statement posted on Yelp based on the mere existence of the licensing provisions that enable it to publish that content, a nonsensical result entirely incompatible with the purpose of Section 230.

### C. Yelp's Refusal to Remove the Review Pending Resolution of Its Motion to Vacate, and Its Challenge to the Unconstitutional Injunction, Have No Bearing on Its Immunity Under Section 230.

In denying Yelp's motion to vacate the injunction, the trial court did not address Section 230 or explain how its findings overcame the immunity provided under the statute. Instead, it found only that the injunction could apply to Yelp, as a non-party, because it deemed Yelp to be "aiding and

abetting Bird's violation of the injunction." It listed three findings in support of this conclusion. None of the three provide a basis to overcome Yelp's immunity under Section 230.

The first basis was that Yelp designated Birdzeye B.'s review as a "recommended review." A00809:12-16. As explained above (*see supra* Argument II.A), Yelp's practice of displaying recommended reviews separate from non-recommended reviews is merely an exercise of Yelp's editorial control and cannot defeat Yelp's immunity under Section 230. *Barrett*, 40 Cal. 4th at 62.

The remaining findings address Yelp's conduct well after the content at issue was posted on Yelp and the injunction had issued. The trial court's second basis was that Yelp was "acting on behalf of Bird" by moving the court to set aside the judgment in its entirety, and questioning whether Hassell provided adequate notice to Bird of the Action. A00809:16-A00810:2. As discussed above, (*see supra* Argument I.B), Yelp's conduct in this litigation provides no grounds for denying the motion to vacate. The third basis was that Yelp refused to delete the reviews prior to a judicial determination of its motion to vacate the injunction. A00810:3-6. But this also cannot defeat the immunity that Section 230 provides to Yelp.

The law is clear that a service provider is immune from liability for content it does not create or develop, even where it refuses to remove that content after receiving notice to do so. *M.A. v. Village Voice Media*, 809 F.

Supp. 2d at 1051 ("[E]ven if a service provider knows that third parties are posting illegal content, the service provider's failure to intervene is immunized,") (citation and internal quotation omitted); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) ("Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content."; no liability even where provider was allegedly "manifestly aware" of the unlawful speech); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (no liability where AOL delayed in taking down allegedly defamatory messages and failed to screen for similar postings thereafter). Thus, even if a provider has actual knowledge that third parties are posting illegal content, "the service provider's failure to intervene is immunized." *Goddard*, 2008 WL 5245490, at *3; *see also Gregerson v. Vilano Fin., Inc.*, No. 06-1164 ADM/AJB, 2008 WL 451060, at *9 n.3 (D. Minn. Feb. 15, 2008) (upholding Section 230 immunity even after website operator was made aware of objections to third-party comments posted on site); *see Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 463-64 (2001) (Amazon entitled to Section 230 immunity even though plaintiff provided notice of unlawful content and Amazon failed to remove it).

In *Barrett v. Rosenthal*, the Supreme Court explained at length *why* Section 230 immunizes websites from liability for their conduct after they have received notice that they are hosting defamatory material. *First*, notice liability "would provide a natural incentive to simply remove

messages upon notification, chilling the freedom of Internet speech." 40 Cal. 4th at 54-55. *Second*, "notice-based liability would deter service providers from actively screening the content of material posted on its service, because discovering potentially defamatory material would only increase the provider's liability." *Id.* at 55. *Third*, notice-based liability "would allow complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting." *Id.* at 57. The Supreme Court noted that the "volume and range of Internet communications make the 'heckler's veto' a real threat" under a notice-based liability rule, and that the United States Supreme Court "has cautioned against reading the CDA to confer such a broad power of censorship on those offended by Internet speech." *Id.*

Under this uniform authority, Yelp cannot be enjoined. Regardless of whether or not Yelp removed the Birdzeye B. posting, and regardless of what arguments it made in challenging the validity of the injunction against it, it did not create the posts at issue, and is therefore immune from liability under Section 230. Any other holding would confer the power of censorship on plaintiffs like Hassell. Her reward for denying Yelp its due process should not be the ability to censor Yelp while Yelp appeals the injunction.

## III. THE INJUNCTION AGAINST YELP IS AN UNCONSTITUTIONAL PRIOR RESTRAINT

The injunction requires non-party Yelp to banish all record of not just Birdzeye B's first review, but also two additional comments from two different user accounts that were not properly before the trial court – one of which was written *after* the Complaint was filed and served. Even more egregiously, the injunction seeks to ban non-party Yelp from publishing future comments from these two users, *regardless of what they may write* – whether true statements, constitutionally protected opinion, or even an absolutely privileged fair and true report of judicial proceedings.

Such an order would "freeze[]," not just chill, Yelp's exercise of its rights to publish comments that already exist and future writings. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "The right to free speech is ... one of the cornerstones of our society," and is protected under the First Amendment of the United States Constitution and under an "even broader" provision of the California Constitution. *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241 (2000); *see* Cal. Const., art. I, § 2, subd. (a).) The California Constitution provides that: "Every person may freely speak, write and publish his or her sentiments, on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const., art. I, § 2, subd. (a). As the California Supreme Court held long ago, "[t]he wording of this section is

terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited .... He shall have no censor over him to whom he must apply for permission to speak, write, or publish...." *Dailey v. Superior Court,* 112 Cal. 94, 97 (1896).

An injunction that forbids a citizen from speaking is known as a "prior restraint." *Evans v. Evans,* 162 Cal. App. 4th 1157, 1169 (2008) (finding that a preliminary injunction prohibiting the defendant in that case from making defamatory statements was unconstitutional). A prior restraint on expression "comes ... with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citation omitted); *accord Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Maggi v. Superior Court*, 119 Cal. App. 4th 1218, 1225 (2004). This antipathy toward prior restraints remains strong even where substantial competing interests are asserted. *See Near v. State of Minnesota*, 283 U.S. 697, 704-705 (1931) (rejecting restraint on publication of any periodical containing "malicious, scandalous and defamatory" matter). For example, in *Nebraska Press*, the United States Supreme Court rejected a prior restraint against the publication of a criminal defendant's murder confession, even though the Court found that such publicity "might impair the defendant's right to a fair trial" under the Sixth Amendment. 427 U.S. at 563. Likewise, the Supreme Court repeatedly has found that

First Amendment rights to publish must prevail even in cases involving such strong interests as the confidentiality of rape victims, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (invalidating Georgia law restricting publication of rape victim's name), *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (involving publication of a rape victim's name), and the interest in protecting minors charged with murder, *Okla. Publ'g Co. v. Dist. Court for Okla. Cnty.*, 430 U.S. 308, 311 (1977).

Below, Hassell relied entirely on *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141 (2007), a case arising under a unique set of facts not presented by this case, and which supports a finding that the injunction issued against Yelp is overbroad and unconstitutional. In *Balboa Island*, the California Supreme Court held that a court may enjoin the repetition of a statement "which a jury has determined to be defamatory." *Id.* at 1158. It also held that "it is crucial to distinguish requests for preventive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory." *Id.* at 1158. The Supreme Court found the injunction in *Balboa Island* to be invalid because it was "broader than necessary to provide relief to plaintiff while minimizing the restriction of expression." *Id.* at 1160. Specifically, it applied not just to the defendant but also to "all other persons in active concert and participation with her," when there was no evidence in the record to support a finding that anyone other than the defendant had made the defamatory statements. *Id.* at 1160.

In addition, it prohibited defendant from making privileged statements, such as "presenting her grievances to government officials," which the Supreme Court noted is among the most precious of the liberties safeguarded by the Bill of Rights. *Id.* at 1160.

Under *Balboa Island*, the trial court's injunction here is impermissibly broad. Even assuming that Birdzeye B's first statement may be enjoined after a default judgment rather than a jury trial determination – although the Supreme Court in *Balboa Island* carefully limited its narrow holding to judgments entered *after a jury trial* (40 Cal. 4th at 1158) – the trial court plainly erred in refusing to vacate the injunction to the extent it applies to future statements. Indeed, the injunction is *so* broad as to ban any "subsequent comments of the reviewer," either Birdzeye B. or J.D., regardless of what either of them write. That would include statements regarding the judicial proceedings, which are privileged under Civil Code Section 47(d). Because the injunction against future comments is not limited to repetition of defamatory statements, it is impermissibly overbroad and unconstitutional. *See Balboa Island*, 40 Cal. 4th at 1160.

In addition, the injunction purports to enjoin two statements that were not properly before the trial court. One of those two statements, Birdzeye B's comment on the litigation, had not been posted at the time Hassell filed and served her Complaint, which was never amended to include the subsequent comment. And while Hassell had included J.D.'s

statement in the Complaint, she did not identify those statements with particularity as part of her libel claim as required to obtain an injunction. *See Oakley, Inc. v. McWilliams*, No. CV 09-07666 DDP (RNBx), 2011 WL 4352408, at *5 (C.D. Cal. Sept. 16, 2011). In *Oakley*, the court found that "unlike in *Balboa Island*, the defamatory statements at issue have not been identified with sufficient particularity to rule on them one by one." *Id.* It held that "[w]ithout argument and a record that permits the court to consider Plaintiffs' request for a permanent injunction enjoining Defendant's speech on a statement by statement [basis], the court is not in a position to consider Defendants' request." *Id.* Similarly here, the court lacked a record to permit it to legitimately enjoin either the J.D. statement, or BirdzeyeB's second comment.

For these reasons, the First Amendment plainly bars the injunctive relief the trial court granted against Yelp.

## CONCLUSION

Because Yelp received no notice of the injunction against it, in breach of its due process rights; and because Section 230 bars the injunction; and because the injunction is so broad as to constitute an unconstitutional prior restraint, this Court should reverse the denial of Yelp's motion to vacate the judgment.

Dated: January 7, 2015

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**CERTIFICATE OF WORD COUNT**
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Dated: January 7, 2015

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## PROOF OF SERVICE

**Dawn L. Hassell and The Hassell Law Group, a P.C. v. Ava Bird**
**Case No. A143233**

I, Natasha Majorko, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111.

I caused to be served copies of **NON-PARTY APPELLANT YELP INC.'S OPENING BRIEF** on counsel via electronic service and regular mail and via regular mail to Judge Goldsmith of the San Francisco Superior Court by enclosing true and correct copies of said document in an envelope and placed it for collection and mailing with the United States Post Office on **January 8, 2015**:

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I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on **January 8, 2015**, at San Francisco, California.

Natasha Majorko