No. A143233

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

DAWN L. HASSELL and THE HASSELL LAW GROUP, P.C.,
Plaintiffs and Respondents

v.

YELP, INC.
Appellant.

Appealing a Judgment of the Superior Court of the State of California,
County of San Francisco, Case No. CGC-13-53025,
The Honorable Donald J. Sullivan and the Honorable Ernest H. Goldsmith, presiding

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RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED PARTIES

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)(l)), 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)):

Dawn Hassell is the sole shareholder of The Hassell Law Group.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Yelp contorts the due process clause and federal Communications Decency Act beyond recognition by arguing they allow Yelp to post in perpetuity content duly adjudicated to be defamatory. The trial court held that Ava Bird's Yelp reviews and subsequent comments were defamatory, constituted trade libel, an invasion of privacy, and intentionally inflicted emotional distress on Plaintiffs The Hassell Law Group and Dawn Hassell. It did so on the basis of extensive argument, briefing, and evidence offered by Plaintiffs.

Yelp must comply with that portion of the Order requiring it to effectuate the judgment by removing Bird's reviews and updates identified in the order. Due process guarantees are not offended. Yelp was on actual notice of the suit within weeks of its filing. It could have sought to intervene, and raise arguments on Bird's behalf and on its own. It was also within its rights to ignore the suit and allow it to proceed to default against Bird. Yelp's own liability for defamation or other torts was never in question and never adjudicated.

Once the trial court ordered Bird and "anyone acting on her behalf" to remove the unlawful posts, however, Yelp was obliged to comply with the order. Instead, it blithely ignored the order, questioning the trial court's analysis, argued Bird's case for her after the fact both in and out of court, and continued its conduct which affirmatively promoted the defamatory posts for every minute that they remained accessible to the public. Under those circumstances, the trial court properly and within the confines of due process

applied the order to run against Yelp, on the ground that it was aiding and abetting Bird's continued violation of the injunction.

The circumstances presented here are rare; Plaintiffs' research has uncovered no analogous case, where a website or internet service provider refused to remove content that a court had already found unlawful. Whether an internet service provider could be forced to do so by a lawsuit directly against it under the Communications Decency Act is immaterial to the question before this Court: whether the trial court properly applied the injunction against Bird to Yelp. The trial court did not err, and this Court should affirm the judgment.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs The Hassell Law Group and its principal, attorney Dawn Hassell represented defendant Ava Bird in a personal injury case for less than a month. Bird first contacted The Hassell Law Group in June, 2012. (AA.V1.T6.00054).[1] An attorney at the Hassell Law Group met with Ms. Bird in July, and the parties exchanged correspondence, but Plaintiffs did not receive a signed retainer agreement from Bird until August 20, 2012. (AA.V1.T6.0054, AA.V1.T7.A00143). The retainer required Bird to cooperate and communicate promptly with the firm's attorneys. (AA.V1.T7.00165-167). Nonetheless, she failed to return a signed insurance authorization until September 6, 2012, and did not respond to repeated attempts to set up a phone conference to discuss

[1] References to the Appellant's Appendix will be designated by "AA" followed by the volume number, tab number, and page numbers, e.g. AA.V1.T3.1-3.

her unrealistic expectations about the pace of litigation. (AA.V1.T6.00054-55, 74-86; AA.V1.T7.00144-145, 168-183). For these and other reasons, The Hassell Law Group withdrew from the representation less than a month after the retainer was signed, on September 13, 2012, leaving her a year and nine months to pursue her claim within the statute of limitations. (AA.V1.T6.00055).

In response, Ava Bird wrote a defamatory review on Yelp that seriously and measurably harmed The Hassell Law Group's business. (AA.V1.T.6.A00055). The review, under the moniker "Birdzeye B.," gave Plaintiff one star of an available five stars, and contained malicious and false statements such as "dawn hassell made a bad situation much worse for me," "the hassell group didn't speak to the insurance company either," and that Hassell indicated "the insurance company was too much for her to handle." (AA.V1.T1. 00018).

Using details from the post, Hassell identified the reviewer as Ava Bird, and contacted her, pointing out that her review was demonstrably false and asking her to edit or rescind the review. (AA.V1.T6.00056, 94). Bird responded the next day, refusing to take down the post, threatening to have a friend post another bad review, and using abusive language. (AA.V1.T6.00056, 95-98). Days later, Bird posted another review under the moniker "J.D." (AA.V1.T6.57, 99-101).

Because the defamatory reviews had palpably harmed the law firm's business and Bird refused to remove them, Plaintiffs filed suit against Bird on April 10, 2013. (AA.V1.T1.00001-21). The Complaint alleged four causes of action for damages relating to the "Birdzeye B." and "J.D." posts, (*id.* at 6-13), and a fifth cause of action for

injunctive relief, which alleged that Plaintiffs were entitled to injunctive relief because the continued to suffer pecuniary losses, irreparable injury to their business reputation and goodwill from Bird's refusal to retract the Yelp reviews, and had no adequate remedy at law. (*Id.* at 13). The prayer sought an injunction prohibiting Bird from continuing to defame plaintiffs, and requiring her to remove every defamatory review, from Yelp.com and elsewhere. (*Id.*).

Over the next week, plaintiff attempted personal service on Bird. (AA.V1.T3.00024-27). She was served by substituted service on April 17, 2013. (*Id.)*

Just over a week later, on April 29, 2013, Bird "updated" her original post with a new post, stating that Hassell "has tried to threaten, bully, intimidate, harrass [sic] me into removing the review!" (AA.V1.T6.00057, 102-105).

Yelp had actual notice of the litigation from the start. On May 13, 2013, one month after the Complaint was filed, Appellant's attorney sent Yelp's General Counsel (and its support page) a letter enclosing the file-stamped Complaint and explaining that Appellant expected Yelp "will cause these two utterly false and unprivileged reviews to be removed as soon as possible." (AA.V3.T21.00601-601 (letter), 00617-634 (attached Complaint)). The Complaint and letter plainly raised both the demand and practical reality that if Ms. Bird refused to take down the reviews, some affirmative conduct by Yelp would be the sole other practical means stopping the ongoing defamation. (*Id.*).[2]

[2] Yelp all but confirmed receipt by citing its own counsel's conversations about the lawsuit with Respondent's counsel during that time period. (AOB at 24, *citing* AA.V3.T33.00837:13-15).

When Yelp failed to respond, Plaintiffs requested a default, which was entered on July 11, 2013. (AA.V1.T3.00023). Hearing on the application for default judgment and request for injunctive relief was set for January 14, 2014. (AA.V1.T4.00028-29).

The trial judge reviewed and heard extensive evidence and argument in support of the default, ranging from Bird's email admitting she had posted the review to teach Ms. Hassell "a lesson," (AA.V1.T6.00096), to Plaintiffs' efforts to serve Bird (AA.V1.T3.00024-26, AA.V1.T6.00124-140), to Bird's affirmative refusal to mediate the lawsuit, (AA.V1.T5.31-32), to detailed explanations why each of the reviews was demonstrably false, (AA.V1.T6-7), as well as thorough briefing on the merits of each claim. (AA.V1.T5.00036-51). Plaintiffs' briefing explained that if Bird refused to comply with the Order, the only way to remove the posts would be an injunction ordering Yelp to do so. (AA.V1.T5.50-51).

After hearing, the Court granted most of the relief Plaintiffs sought. (AA.V1.T8.00211; AA.V1.T9.00212-216). It ordered $557,918.85 in damages against Bird, denied the request for punitive damages, and granted injunctive relief. (*Id.)* The Judgment and Order provided:

> …Defendant AVA BIRD is ordered to remove each and every defamatory review published or caused to be published by her about plaintiffs HASSELL LAW GROUP and DAWN HASSELL from Yelp.com and from anywhere else they appear on the internet within 5 business day of the date of the court's order.
>
> Defendant AVA BIRD, her agents, officers, employees or representatives, or anyone acting on her behalf, are further enjoined form publishing or causing to

be published any written reviews, commentary, or descriptions of DAWN HASSELL or the HASSELL LAW GROUP on Yelp.com or any other internet location or website.

Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names "Birdzeye B." and "J.D." attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court's order.

(AA.V1.T9.00213).

Plaintiffs hand-delivered the Judgment and Order, with a letter requesting that Yelp remove the posts, on January 15, 2014. (AA.V3.T27.00704-718; AA.V3.T28.00798-799). Plaintiffs personally served Yelp's agent for service of process with the Order on January 29, 2014, along with a letter again requesting that Yelp remove the three reviews. (AA.V3.T27.00720-730).

Yelp flatly refused. Yelp's Senior Director of Litigation Aaron Schur responded by letter dated February 3, 2014, raising not only his theory that Yelp was not subject to the injunction, but multiple arguments that the default was improper and that Plaintiff had not adequately proved that Bird posted the reviews or that the reviews were defamatory. (AA.V3.T27.00732-734). He wrote:

In conclusion, the judgment and order are rife with deficiencies and Yelp sees no reason at this time to remove the reviews at issue. Of course, Yelp has no desire to display defamatory content on its site, but the defamation must be proven. A default judgment through a bench trial in a lawsuit in which it does not appear the

> defendant was ever served is an insufficient basis for Yelp to consider the review of Birdzeye B. to be defamatory – much less the review of J.D. Yelp would revisit its decision if the facts change, for example, if it receives evidence that the defendant is actually served, fails to defend herself, and is responsible for both reviews.

(AA.V3.T27.00734). In other words, Yelp chose to credit its own disingenuous[3] analysis over the Court's judgment after a default prove-up hearing.

Nonetheless, Yelp waited nearly four months to move to vacate the judgment. (AA.V1.T11.00225). The parties fully briefed the motion, but when it came on for hearing, the trial judge continued the hearing, finding that Judge Sullivan, who heard the matter and entered the default, should hear the motion. (AA.V3.T22.00640). The motion was renoticed, (AA.V3.T25.00641), and Plaintiffs timely opposed the motion anew. (AA.V3.T25-T28).[4]

Plaintiffs argued that the court could properly bind Yelp because an order requiring Yelp to remove the reviews was the sole meaningful remedy available to Plaintiffs, and because, by that time, as set out more fully below, Yelp was acting in concert with Bird. (AA.V3.T26.00658-662). Hassell explained that Bird had willfully refused to remove her reviews; collecting money damages against Bird would be all but impossible, and in any case damages could not remedy the ongoing harm to her business

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[3] As set out more fully below, Yelp has the records it faults Plaintiffs for not subpoenaing (AA.V1.T12.00228) and could check who posted the reviews.

[4] Respondent's brief cites to these operative opposition papers.

and reputation. (AA.V3.T26.658-59). She argued that since the order had issued, Yelp not only refused to take down the reviews, but continued to highlight them and to advance arguments relevant only to Bird both in and out of court. (AA.V3.T26.659-660). She also argued the motion was untimely, (AA.V3.T26.00655-56), and that federal Communications Decency Act did not apply because the injunction did not seek to impose tort liability on Yelp, but merely to effectuate a judgment that Yelp was helping Bird violate. (AA.V3.T26.00663-665)

After hearing extensive argument (AA.V3.T33.829-854), the trial court denied the motion on September 29, 2014. (AA.V3.T30.808-810). The Court observed that "injunctions can be applied to non-parties," citing the line of cases advanced by Plaintiffs allowing an injunction to run against those acting "in concert with or in support of" the enjoined party. (AA.V3.T30.00809, *quoting Ross v. Superior Court* (1977) 19 Cal.3d 899, 906). The court found "a factual basis to support Hassell's contention that Yelp is aiding and abetting Bird's violation of the injunction" – specifically, that Yelp highlighted some of the defamatory reviews while other favorable reviews were not factored into the rating.

Yelp appealed on October 2, 2014. The defamatory reviews remain online to this day.

III. ARGUMENT

A. Appellant's Burden on this Appeal Is High.

Appellant Yelp seeks review of the trial court's denial of its motion to vacate the judgment. This Court's review of the trial court's decision under Code of Civil

Procedure § 663 is "*confined*… to a determination of whether the conclusions of law and judgment are consistent with and supported by the findings of fact." (*Newbury v. Civil Service Commission of City of Los Angeles* (1940) 42 Cal.App.2d 258, 259 (*emphasis added*).

This Court should exercise independent appellate review on issues of law, including the trial court's interpretation of constitutional or statutory provisions. (*321 Henderson Receivables Origination LLC v. Sioteco* (2009) 173 Cal.App.4th 1059, 1070; *Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53).

The Court should give substantial deference to the trial court's factual determinations; to the extent they are disputed, they should be reviewed under the "substantial evidence" standard. *Vasquez v. Happy Valley Union School Dist*. (2008) 159 Cal.App.4th 969, 980). "The substantial evidence standard for review has been described by our Supreme Court as ... 'a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor....'" (*McIntyre v. Sonoma Valley Unified School Dist.* (2012) 206 Cal.App.4th 170, 179 (internal citations and quotations omitted)). If substantial evidence supports the trial court's determination, the reviewing Court cannot substitute its own factual conclusions for those of the trial court, even if it might have reached a contrary conclusion. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874).

Yelp's argument that this Court should review the trial court's factual determinations *de novo* (AOB 18-19) finds no basis in law. Each case Yelp cites in support of heightened scrutiny involves review of a trial court's rulings on First Amendment issues. (*See Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499-510 (discussing review of factual findings underpinning First Amendment rulings, from obscenity to "fighting words" to "actual malice" in defamation actions); *In re George T.* (2004) 33 Cal.4th 620, 631-34 (same; noting that factual determinations "not relevant to the First Amendment issue" are not subject to independent review)).

While the underlying defamation case implicates issues of free speech, this appeal does not. The sole issues are whether the judgment violated Yelp's due process rights, and whether Yelp has statutory immunity. The court's determination of whether the reviews were defamatory and therefore not entitled to First Amendment protections is final. (*Morris v. Jones* (1947) 329 U.S. 545, 550–51 (even default judgment has preclusive effect); *People v. Sims* (1982) 32 Cal.3d 468, 481)(same)). Yelp cannot bootstrap its way to reopening these issues in an appeal arguing the judgment is void on due process and federal statutory grounds.

Appellant cannot assert theories not raised in the trial court. (*Greenwich S.F. LCC v. Wong* (2010) 190 Cal.App.4th 739, 767); however, this Court can affirm the trial court's judgment so long as it can be supported by any legal theory. (*Muller v. Fresno Community Hosp. & Med. Center* (2009) 172 Cal.App.4th 887, 906-07).

B. The Trial Court's Order Directing Yelp to Remove Bird's Defamatory Statements Meets Constitutional Due Process Requirements, and Yelp's Continued Violation of Court Order Violates the Law

1. The Trial Court's Injunction Can Properly Bind Yelp Because Yelp Is Aiding and Abetting Bird's Continuing Defamation

Longstanding federal and state authorities hold that while due process prohibits enjoining a non-party who acts independently, the court can enjoin those persons and entities through whom a defendant acts in order to effectuate its orders. Even a century ago, the practice of making an injunction run against classes of persons through whom the enjoined party may act, such as agents, aiders and abettors, even if they are not parties to the action, had "always been upheld by the courts." (*Berger v. Superior Court of Sacramento County* (1917) 175 Cal. 719, 721). As the Supreme Court observed:

> It is true that persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in collusion or combination with them. … Authorities illustrating this rule might be cited to an indefinite extent, but the underlying principle in all cases of this class, on which is founded the power of the court to punish for the violation of its mandate persons not parties to the action, is that the parties so punished were acting either as the agents or servants of the defendants, or in combination or collusion with them or assertion of their rights or claims.

(*Id. at* 721-722, *quoting Rigas v. Livingston* (1904) 178 N.Y 20).[5] Accordingly, injunctions can properly be enforced against persons who are not parties, but who are on notice of an injunction and have aided and abetted violation, without contravening demands of due process.

Berger's analysis was in the context of a labor injunction enjoining union picketing, but the reasoning applies equally in other contexts. The California Supreme Court again observed that an injunction could bind a non-party, consistent with due process, in *Ross v. Superior Court* (1977) 19 Cal.3d 899. There, the Court had ordered the California Department of Health and Human Services and its Secretary to pay welfare beneficiaries improperly withheld benefits, requiring individual county welfare departments to redetermine eligibility and make restitution. (*Id.* at 902-903). The Plumas County Board of Supervisors was given notice of the order, but refused to comply, and the trial court held them in contempt. (*Id.* at 904-905).

On appeal, the supervisors argued, as Yelp does here, that the injunctive order could not bind them because they were not named defendants, had received no opportunity to defend that action, and were therefore denied due process. (*Ross*, 19 Cal.3d at 905). The Court reviewed applicable law, starting with the Supreme Court's decision in *In re Lennon* (1897) 166 U.S. 548, which held that an injunction against a railroad company could bind the company's employee, even if he was not a party to the

[5] As *Berger* noted, even an absolute stranger to the proceedings can be held in contempt for violating an injunction provided that party is on notice of it, although the court's power to do so flows from its inherent power to punish "acts in contempt of the power and dignity of the court." (*Id.* at 722, *citing Garrigan v. United States* (7th Cir. 1908) 163 F. 16, 20, *cert. denied* 214 U.S. 514).

suit or actually served with it, if he had actual notice of the suit. (*Ross*, 19 Cal.3d at 905-906, *quoting In re Lennon,* 166 U.S. at 554). It cited the "contours and basic rationale of the rule" as explained in *Berger:* "[T]he whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the enjoined party, who are fact his aiders and abettors." (*Ross*, 19 Cal.3d at 906, *quoting Berger*, 175 Cal. at 721.) The *Ross* court went on find that the injunction fell within rule because it was directed at the defendant's "agents," and under the statutory scheme for administering and distributing benefits the absent counties were agents of the enjoined state department. (*Id.* at 906-909).

Planned Parenthood Golden Gate v. Garibaldi (2003) 107 Cal.App.4th 345 reiterated the vitality of the rule. Although "injunctions are not effective against the world at large," an injunction "can properly run to classes of person with or though whom the enjoined party may act" and those who aid and abet a person named in an injunction, provided there is actual notice. (*Id.* at 352-353).[6]

Yelp argues that the Supreme Court limited application of injunctive relief to non-parties under *Ross* and *Berger* to "labor unions, abortion protestors, and other identifiable

[6] The fact that these cases arose after a trial court of finding of contempt, rather than on a motion to vacate a judgment, is immaterial. Each case considers the constitutional limits of the court's power to bind the person or entity in question by an injunction. The line of authority finding that a court can, consistent with due process, find an individual or entity in contempt for violating an injunction under an aiding and abetting theory assumes that applying the injunction to the third party is consistent with due process, and within the court's power under those circumstances.

groups" in *People ex rel Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1124. (AOB 27). The rule is not limited to particular factual circumstances (as *Ross* itself shows). In so limited – even *Ross* itself does not fall within those narrow strictures. In *Gallo*, the Court merely explained that the "time honored equitable practice" of making injunctions run to those whom enjoined parties may act had been applied in those contexts because "such groups can only act through the medium of their membership." (*Id.)* But no exact analogy is required; the rule encompasses any situation where another helps the enjoined party violate the injunction, whether as an agent, aider or abettor, or otherwise. Here, Bird's continuing defamation takes place through the "medium" of Yelp, and by Yelp's conscious choice.

Yelp's litany of general due process cases (AOB 21-23) does not contradict the rule set out in *Ross*, *Berger* and their progeny: that extending an injunction to a nonparty who aids and abets an enjoined party's violation thereof does not violate constitutional due process requirements. Yelp's authorities stand only for the broad and fundamental proposition that due process guarantees notice and opportunity to be heard. They are either utterly inapposite otherwise, both factually and legally,[7] support Respondent, or are readily distinguishable. *Fazzi v. Peters* (1968) 68 Cal.2d 590 held only that a statute

[7] *See, e.g., Estate of Buchman* (1954) 123 Cal.App.2d 546, 559 (whether executor can be removed for failure to perform duties without an opportunity to present evidence and without proof of dereliction of duty); *People v. Ramirez* (1979) 25 Cal.3d 260, 263-64 (whether procedures used to exclude a convicted felon from treatment at a state rehabilitation center comport with due process requirements); *Kash Enters, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 308 (whether administrative procedure for seizing news racks without a pre or post-taking hearing violates due process); *Randone v. Appellate Dept.* 5 Cal 3d 536, 547 (examining California's prejudgment attachment procedure).

about how a partnership could be sued did not abrogate the general rule that a partnership and its individual partners are distinct legal entities, and a suit naming only the partnership cannot bind the partners in their individual capacity or reach their assets. It did not even involve injunctive relief, much less discuss whether the court could enjoin entities through whom the partnership might act. *Bronco Wine Co. v. Frank A. Logouso Farms* (1989) 214 Cal.App.3d 699 held that a court violated due process when it found that grape buyer had engaged in unfair business practices, then awarded restitution not only to the plaintiff but 27 other grape growers who were not plaintiffs in the (non-class) action. There is no parallel between the unauthorized, i*n absentia* determination of a potential *plaintiff's* rights in *Bronco Wine*, and the trial court's injunction that binds Yelp because it aids and abets already-adjudicated defamation.

Marcus v. Search Warrants of Property (1961) 367 U.S. 717 involved distribution of content, but the analogy ends there. The Supreme Court found Missouri's procedure for seizing allegedly obscene magazines from unnamed distributors was constitutionally inadequate, where no judicial officer had reviewed the materials before seizure, they were seized at the discretion of individual police officers without standards to follow, and without a requirement that the court determine whether the materials are actually obscene within any particular time. (*Id.* at 731-732, 737). *Marcus* involved seizure from non-parties *before there had been any adjudication of whether the materials were entitled to First Amendment protection,* (*Id.* at 736-737), while here the trial court duly determined that Bird's reviews were defamatory. *Tokio Marine and Fire Ins. Corp. v. Western Pacific Roofing Corp*. (1999) 75 Cal.App.4th 110 is similarly inapposite. It held that

the court could not add insurance underwriters, not named in complaint, to judgment, making them liable for more than the insurance limits, simply because they had signed a stipulation out of court about how damages would be allocated. The Court of Appeal addressed many theories - whether the underwriters were *alter egos* of the losing party (*id.* at 115-116), whether they could be added under Code of Civil Procedure section 187 (*id.* at 116-117), whether adding them could be justified as correcting "clerical error," (*id.* at 117-119), and whether they were judgment debtors who could be added under Code of Civil Procedure section 664.6 (*id.* at 119), but not the rationale Plaintiffs advance.

Regal Knitwear v. N.L.R.B. (1944) 324 U.S. 9, the sole relevant case Yelp cites, approves of the rule that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." (*Id.* at 14). "Instrumentalities through which defendant seeks to evade an order" or "person in active concert or participation" with an enjoined party can also be enjoined. (*Id.*). *Regal Knitwear* declined to decide whether, in the abstract, a "successor" employer could be liable for violation of a National Labor Relations Board order. (*Id.* at 15-16). Instead, it held that whether a nonparty is bound "depends on an appraisal of his relations and behavior," *(Id.* at 15), making it a specific, factual inquiry. Here, as mandated by *Regal Knitwear,* the trial court made that factual determination after an appraisal of Yelp's conduct.

2. Substantial Evidence Support's The Trial Court's Factual Determination That Yelp Aided and Abetted Bird's Violation of the Injunction

The trial court correctly found that Yelp aided and abetted Bird's continuing defamation, and so was properly subject to the injunction. (AA.V3.T30.00809-810). Its determination that Yelp aided and abetted was one of fact. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *People v. Herrera* (1970) 6 Cal.App.3d 846, 852; *see also* CACI 3610, "Aiding and Abetting a Tort," and *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 324 (describing elements). This Court's review is limited to whether "any" substantial evidence supports the findings, giving them the "benefit of every reasonable inference." (*McIntyre, supra,* 206 Cal.App.4th 170, 179).

The trial court had three grounds for its factual finding, each correctly determined, which in combination fully support its conclusion.

a) Yelp Emphasized Bird's Posts, Giving Them Yelp's Imprimatur of Trustworthiness and Reliability

The trial court first held that Plaintiff had established that Yelp highlighted at least one of Bird's defamatory posts by making it a "Recommended Review," and giving emphasis to it by explaining that other reviews were not factored into Plaintiff's "star rating." (AA.V3.T30.00810). A highlighted box on the Yelp page for The Hassell Group explained to readers that "Recommended Reviews," like that under the moniker "Birdzeye B," were chosen by Yelp "to recommend the ones that are the most helpful for the Yelp community," using "measures of quality, reliability, and activity on Yelp." (AA.V3.T27.00701). Another box explained Yelp's "Review Filter," stating Yelp filters

reviews "to keep the site's content as useful and trustworthy as possible." (AA.V3.T27.00797). Moreover, Yelp's "FAQ" page states that Yelp "showcase[s]" recommended reviews, and in so doing "nurture[s] a community of users who actively contribute reliable and useful content." (AA.V3.T27.00756). On the other hand, Yelp not only failed to recommend but *removed* positive reviews of The Hassell Group "for violating our Content Guidelines or Terms of Service," (AA.V3.T27.00715), implying that the recommended reviews did not. (The FAQ page explains that users can remove their own reviews, or Yelp can remove reviews that violate its Content Guidelines). (AA.V.3.T27.00756).

Yelp argues that the Court improperly relied on this factor because the recommendation was made by Yelp's automated software before the injunction issued. (AOB 28). "The algorithm did it" is no excuse; whether a live person manipulated the ratings or they were generated automatically, the recommendation is attributable to Yelp itself, and furthers Bird's defamation. Yelp's artificially narrow theory of when it "recommended" the review is also incorrect. Because internet sites are perpetually available and accessible, posts do not occur solely at the moment they appear for the first time. Bird posted the offending reviews in 2013, but she continues to defame Plaintiffs to this day by refusing to remove them. In exactly the same way, Yelp is continually displaying its "Recommendation" highlighting the "Birdzeye B" review. Yelp's intentional refusal to act after the court's order mandating removal of the reviews is *conduct* postdating the order.

As one court explained:

> [T]he party giving assistance need not affirmatively desire to cause a violation of the injunction; it is enough that the party know a violation is highly likely to occur. In so ruling, we are guided by common law rules of fault-based liability. "Tort law ordinarily imputes to an actor the intention to cause the natural and probable consequences of his conduct." *DeVoto v. Pacific Fidelity Life Ins. Co.,* 618 F.2d 1340, 1347 (9th Cir.1980) (citing Restatement (Second) of Torts § 8A (1965)). "Intent is not ... limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by law as if he had in fact desired to produce the result."

(*Institute of Cetacean Research v. Sea Shepherd Conservation Society* (9th Cir. 2014) 774 F.3d 935, 950).[8] California law is in accord. (*See comment to* CACI 1320, "Intent," *quoting Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 746 (presumed to intend the natural and probable consequences of actions, including those consequences which "are known to be substantially certain to result (regardless of desire)").

b) Yelp Asserted Arguments that Went Only to Bird's Defenses Both In and Out of Court

Second, the Court found that Yelp was "acting on behalf of Bird," as well as in its own interest, by arguing that the injunction against Bird herself is invalid. (AA.V3.T30.00809.) From its first letter to Plaintiff, months before it moved to vacate

[8] *Institute of Cetacean Research* involved the enjoined party assisting the unnamed party; but the principles of intent and causation apply nonetheless.

the judgment, Yelp simply refused to comply with the default judgment and order. (AA.V3.T27.00732-34). Yelp's open defiance of the order was based not only on the court's alleged lack of authority to bind Yelp, but on its own view that the trial court's order just didn't warrant compliance, because Plaintiff had not adequately proved either service or defamation to its satisfaction. (*See id.* at 733-734). These arguments were scarcely made in good faith, since Yelp had the means to check the records it faults Plaintiffs for not subpoenaing which would confirm Bird was the reviewer, itself had means to check its own records to determine the identity of the reviewers, and to contact Bird and either give her actual notice or check whether she had received notice. Its Terms of Service provide that Yelp will make reasonable efforts to notify users of any "claim, action, or proceeding" arising from their use of the Site, (¶ 11, AA.V3.T27.00749), require her to provide "certain" information about herself to use the site that is "complete and accurate," (¶ 4(D), AA.V3.T27.00747), and specify it might communicate with her "by email, regular mail, or communications though the Site" (¶ 15(B), AA.V3.T27.00747).

Yelp went on to make the same arguments to the trial court. In its motion to vacate the judgment, it argued that Plaintiffs had made insufficient efforts to personally serve Bird (AA.T12.00228, 230-231, 237); that there was insufficient evidence that the postings by "Birdzeye B." and "J.D." were made by defendant Bird (AA.V1.T12.00288, 00229-30, 237); and that the injunction against Bird inappropriately chilled free speech (AA.V1.T12.00236-237) and was overbroad (AA.V3.T19.00574).

None of these arguments was properly raised on Yelp's motion to vacate the judgment. The court's implicit factual findings as to the adequacy of service and the identity of "Birdzeye" and "J.D" were not at issue on the motion to vacate. "According to a long line of authorities, the court, when acting under section 663, has no power or jurisdiction to change any finding of fact." (*Moklofsky v. Moklofsky* (1947) 79 Cal.App.2d 259, 264); *see also* 8 Witkin, Cal. Procedure (4th Ed. 1997), Attack on Judgment in Trial Court, § 148, at p. 651 (motion to vacate under section 663 attacks only the court's *legal basis* for its decision, as not supported by the facts)). Any efforts to reopen, supplement, or disturb a determination of fact would have "no force and effect." (*Knapp v. Newport Beach* (1960) 186 Cal.App.2d 669, 682).

The trial judge specifically noted during the hearing that Yelp was "acting on [Bird's] behalf" by raising those arguments and seeking to vacate the entire judgment, including that portion against Bird; the judge found that Yelp's efforts to argue Bird's case, as well as its own, "seems to implicate Yelp in a very direct way." (AA.V3.T33.00844-45). Later the judge observed:

> Throughout your papers and your argument, you're saying, hey, we're just a third party here. Can't touch us. Yet, you're asking for the judgment to be vacated against Ms. Bird. … It comes through like a freight train that you are here on behalf of Ms. Bird as much as you are of Yelp. … I just looked at the papers, and that's what they say. I mean, we're here and we're taking Ms. Bird's part."

(AA.V3.T33.00848-849). The Court held that these arguments "evidence[d] a unity of interest between Bird and Yelp." (AA.V3.T30.00810). While shared convictions alone are not enough to bind a nonparty to an injunction, an "actual relationship" that demonstrably implicates one in the other's activity, such as we have here, is sufficient. *People v. Conrad* (1997) 55 Cal.App.4th 896, 902-903 (finding a nonparty in contempt for knowingly violating an injunction's terms "*with or for* those who are restrained").

Yelp contends its legal arguments cannot, as a matter of law and policy, constitute "acting in concert" or aiding and abetting. (AOB at 29). But Yelp carried Bird's torch outside of court as well as on the motion to vacate. Moreover, Yelp's decision to raise and press those arguments is evidence of its intent to aid and abet the continued defamation, even if mere legal argument is insufficient. Yelp's arguments under Communications Decency Act fail; a statutory procedure allowing a service provider to challenge a subpoena *before* a judgment does not show that California "embraces" the service provider's efforts to offer belated, procedurally inappropriate arguments on behalf of the losing enjoined party *after* judgment has been entered.

c) Yelp's Continued Posting of Reviews the Trial Court Held Are Defamatory Is Inconsistent with Its Publicly Stated Stance against False, Defamatory Reviews

Third, the trial court found that Yelp's refusal to delete Bird's reviews inconsistent with its own Terms of Service.(AA.V3.T30.00810). Yelp clearly holds itself out as being opposed to unlawful defamation, and requires users not to post defamatory reviews. *See* Terms of Service ¶ 6(A)("You agree not to… (i) Violate our Content Guidelines, for

example, by writing a fake or defamatory review…. or (vii) Violate any applicable law"; (AA.V3.T27.00748); see also AA.V3.T27.00757) (FAQs: Yelp can "manually remove reviews that violate our Content Guidelines"). Yelp's refusal to delete Bird's reviews was also at odds with ¶ 7.B, which warns that Yelp may disclose information about users to third parties if believes doing so is reasonably necessary "(i) to take action regarding suspected illegal activities; …(iii) comply with legal process … such as a …judicial proceeding; or (iv) protect our rights, *reputation* and property, *or that of our users*…" (AA.V3.T27.00748).

Yelps argues that the Terms of Service give it "sole discretion" to decide whether to enforce them. (AOB at 30). True; in fact, Yelp had exercised its discretion to remove five other reviews of The Hassell Law Group for violating the Terms of Service or Content Guidelines, yet chose to keep Bird's reviews up despite the court's order and judgment. While Yelp usually engages in "self-policing" by filtering out certain reviews, (AA.V3.T33.00838), it decided against doing so here. That exercise of judgment is "inconsistent" with provisions of the Terms of Service, which, taken together, imply that Yelp actively discourages defamation and, in fact, requires users to not post defamatory reviews. This provides additional evidence of aiding and abetting.

Yelp argues that *Blockowicz v. Williams* (7th Cir. 2010) 630 F.3d 563 makes the court's reliance on this factor improper, as that court found that a website host's failure to remove defamatory statements after receiving notice of an injunction did not aid and abet violation of the injunction. (*Id.* at 568). *Blockowicz* is not binding in California, and this Court should reject its application here for several reasons. *Blockowicz* is both factually

and procedurally distinct. In *Blockowicz*, the internet service provider merely kept the offending posts up and defended *its own* case in court. There were no facts, as there are here, to support a finding of "active concert or participation" and a unity of interest, and the court did not make such findings at the trial court level there, whereas it did here.

Here, in contrast, Yelp highlighted the review, advanced legal arguments on behalf of Bird in and out of court, *and* continued to publish the defamatory reviews. Other evidence before the court suggests Yelp may have done even more. Bird amended her review on April 29, 2013 with a subsequent comment "the staff at YELP has stepped up and is defending my right to post a review. Once again, thanks YELP!" (AA.V3.T27.00674). The post suggests that Bird notified Yelp and Yelp's "staff" was acting to defend her posting of the defamatory review in concert with her – with her consent, approval, and public thanks. [9] In *Blockowicz,* it was the plaintiff who proceeded to the circuit court after losing a motion to enforce the injunction which lacked factual support that the non-party was in active concert. In our case, the trial court made *findings of fact* that Yelp was aiding and abetting Bird and that there was a unity of interest. Substantial evidence exists to support those findings, and Yelp has not demonstrated otherwise.

Finally, the reasoning of the circuit court is flawed. *Blockowicz* reasoned that the posting went up and the Terms of Service were agreed to before the injunction was

[9] Although paragraph 11 of Yelp's Terms of Service provides that Yelp will make reasonable efforts to notify users of any "claim, action, or proceeding" arising from their use of the Site. (AA.V3.T27.00749), Yelp did not receive actual notice from Plaintiff that the suit had been filed until two weeks later, on May 15, 2013. (AA.V3.T27.00761-797).

issued, and the service providers "have simply done nothing relevant to this dispute" since then. (*Id.* at 568). In the world of physical conduct, it makes sense to say that an act which occurred before an injunction cannot aid and abet its violation. In *Herrlein v. Kanakis* (7th Cir. 1995) 526 F.2d 252, 254, for example, the Seventh Circuit properly observed that sale of a company *before* an injunction is imposed cannot have been made to defy the injunction. But an internet post is not a discrete, one-time event, like the sale of a company; it persists over time, at the sufferance of the service provider. Once Yelp was on notice of the court's order, its refusal to remove the postings is, in fact, affirmative conduct.

This case is more closely analogous to the facts in *South Central Bell Telephone Company v. Constant, Inc.* (E.D. La. 1969) 304 F.Supp. 732, *aff'd* (5th Cir. 1971) 437 F.2d 1207. *South Central Bell* involved a dispute between two moving companies over use of the name "ATLAS." (*Id.* at 734). The court found in favor of Atlas Van-Lines, Inc., and restrained Dan J. Constant from use of the word "ATLAS." (*Id.*) South Central Bell was never a party to the action that resulted from the injunction against Constant. However, Constant's company was listed in South Central Bell's telephone directory as "ATLAS." (*Id.)*

Atlas Van-Lines notified South Central Bell of the injunction, and South Central Bell took appropriate action (namely, intercepting phone calls to Constant if the caller thought they were calling "ATLAS") to avoid "acting in concert" with Mr. Constant. (*South Central Bell Telephone*, 304 F.Supp. at 734). The court agreed with the plaintiff that "it would be in violation of the Court's injunction if, after being put on notice that

Constant was violating the injunction it, South Central Bell, knowingly allowed Constant to continue using its equipment to accomplish that purpose when it had the means to prevent it." (*Id.* at 735). The Court found Southern Central Bell itself would violate the injunction if "it in any way knowingly acts in concert with the defendant" to violate it. (*Id.* at 736). The court explained then when a nonparty, such as Southern Central Bell, was "apprised of the fact that its subscriber, Constant, was by the use of South Central Bell's equipment, violating the injunction imposed by this Court, it had a duty not to act in any way with Constant to effectuate or perpetuate the violation." (*Id.*). In fact, the Court determined if South Central Bell had the means to prevent its equipment from being used to violate the injunction, failure to take action to prevent it would amount to "passive participation in the violation" of the injunction." (*Id.*).

Below, Yelp argued that *South Central* was different because telephone operators were "actively connecting" callers to the enjoined party.AA.V3.T19.00582. It is not. The *South Central Bell* court properly understood that allowing an enjoined party to use a medium it controlled to perpetuate defamation was a form of participatory conduct, just as Yelp's decision to keep Bird's posts up and continue to promote them as reliable after it received the order was affirmative conduct.

d) The Trial Court Properly Bound Yelp with the Injunction

The same facts create an agency relationship between Bird and Yelp, which makes the injunction proper under *Ross, supra.* (*See* Code Civ. Pro. § 2295 (agent is "one who represents another, called the principal, in dealings with third persons.")). Yelp argued

below that it was in no way an agent because Yelp's Terms of Service give it its own rights to Bird's content on the site, allowing it to reproduce and distribute the reviews even without Bird's permission. (AA.V3.T19.00582). Paragraph 5(b) of the Terms of Service provide:

> We may use Your Content in a number of different ways, including publicly displaying it, reformatting it, incorporating it into advertisements and other works, creating derivative works from it, promoting it, distributing it, and allowing others to do the same in connection with their own websites and media platforms ("Other Media"). As such, you hereby irrevocably grant us world-wide, perpetual, non-exclusive, royalty-free, assignable sublicensable, transferable rights to use Your Content for any purpose. …

(AA.V3.T27.00747). If Yelp is relying on its independent right under the Terms of Service to post and distribute Bird's content, then it is in privity with Bird, making the injunction equally applicable. As the Supreme Court explained in *Golden State Bottling Co., Inc. v. N.L.R.B.* (1973) 414 U.S. 168, 179-180:

> Rule 65(d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14(1945). Persons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge. *Restatement of Judgments* s 89, and comment c (1942); see 1 J. Story, *Equity Jurisprudence* s 536 (14th ed. 1918).

> This principle has not been limited to *in rem* or *quasi in rem* proceedings. Restatement of Judgments § 89, and comment d (1942); *see ICC v. Western N.Y. & P.R. Co*., 82 F. 192, 194 (W.D.Pa.1897). We apply that principle here in order to effectuate the public policies of the Act. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginia R. Co. v. System Federation*, 300 U.S. 515, 552, (1937); *see Walling v. James V. Reuter, Inc.*, 321 U.S. at 674-675. We hold that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d).

Yelp asserts it has acquired the rights to Bird's posts; it knows of the wrong, and that it remains unremedied. It is in privity with Bird as to the posts themselves.

Finally, Yelp argues that the trial court erred because there was no evidence Yelp had aided and abetted Bird at the time the original default judgment was entered. But application of the injunction to Yelp was correct at the time of Yelp's belated challenge months later; at that time, Yelp was intentionally thwarting the court's order with its ongoing "recommendation" and refusal to remove the posts, and advancing Bird's interests in and out of court. The trial court's order finding that the injunction could apply to Yelp without violating due process guarantees was correct.

3. The Relief Granted Does Not Exceed That Sought in the Complaint, and Does Not Violate either Due Process Guarantees or Code of Civil Procedure Section 580

Yelp argues that the injunction against Yelp violates Code of Civil Procedure section 580, which provides that the relief granted on default cannot exceed that demanded in the complaint.

The Complaint sought the relief granted. The Complaint clearly sought an injunction that would result in Bird's defamatory comments being removed from the Yelp website. The Complaint complained of defamatory postings by Bird. (AA.V1.T1.00004-12). It sought injunctive relief as a separate cause of action. (AA.V1.T.00013). Paragraph 59 explained that Plaintiffs had suffered and would continue to suffer pecuniary losses and irreparable injury to their business reputation and goodwill. (*Id.*) Paragraph 60 alleged Plaintiffs had no adequate remedy at law, and so were entitled to "temporary, preliminary and permanent injunctive relief." (Id.). The prayer sought injunctive relief requiring Bird to "remove each and every defamatory review published by her about plaintiffs, from Yelp.com and from anywhere else they appear on the internet." (*Id.*). The injunctive relief that Bird sought was plainly an order requiring removal of the reviews from Yelp's website. Yelp's claim that the order granted "more" relief by binding Yelp merely rehashes Yelp's argument that an injunction cannot bind a non-party.

The due process requirement embodied in section 580 is that a party "be given notice of the existence of a lawsuit and notice of the specific relief which is sought in the

complaint," to be able to evaluate whether it should appear and defend. (*Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495.

> '[T]he primary purpose of the section is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them.' [Citations.]" (*Stein v. York* (2010) 181 Cal.App.4th 320, 325, 105 Cal.Rptr.3d 1.) "[D]ue process requires notice to defendants ... of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose ... between (1) giving up his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to defend at the cost of exposing himself to greater liability." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 829.)

In re Marriage of Kahn (2013) 215 Cal.App.4th 1113, 1117. The court engages in a practical analysis of whether the notice the complaint gives is sufficiently specific. Thus, for instance, a complaint seeks division of community assets and lists them, it gives constitutionally adequate notice even if it does not specify the value of those assets. (*Id.* at 1117-1118, *citing In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 878-880; *cf. Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 866-67 (discussing complaint which insufficiently describes damages sought in default).

Yelp was on actual notice of the suit even before Bird's time to answer had expired.[10] The complaint clearly conveyed that Plaintiffs sought the removal of Bird's

[10] Substitute Service on April 17, 2013 (AA.V1.T3.00024-27) was complete on April 27, 2013 under Code of Civil Procedure section 415.20(b).

defamatory reviews from Yelp's website. The court ordered just that; it did not order materially different injunctive relief,[11] or seek an unexpected type of relief, such as monetary damages, as in every single case cited by Yelp. *See, e.g.*, *In re Marriage of Lippel* (1990) 51 Cal.3d 1160 (where petition for divorce requests only child custody and not child support, award of child support improper); *Greenup v. Rodman* (1986) 42 Cal.3d 822 (award on default of $676,000 improperly exceeds $100,000 amount sought in complaint); *see also Baar v. Smith* (1927) 201 Cal.87, 100 ("If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract."). There was no such lack of notice or "fundamental unfairness" here.

4. Under the Circumstances Presented Here, the Court's Use of Its Inherent Power to Enforce the Judgment Against Yelp Does Not Violate Yelp's Due Process Rights

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[11] Yelp argues that the Judgment was based on three defamatory statements, rather than the two originally identified in the complaint. (AOB at 9-10, 32). The "new" statement was an "update" of the first review, posted after the complaint was filed. (AA.V1.T5.00036; AA.V1.T6.00102). Yelp has not explained how the addition of a new review robs it of adequate notice of what relief was sought or deprived it of the ability to evaluate the litigation. Moreover, given the facts, it was completely predictable that Bird might post another defamatory statement, with which Plaintiffs could readily amend their complaint were it to go forward. *See Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163 (leave to amend liberally granted). The inclusion of the updated review did not deprive Yelp of constitutional due process rights.

The principle that that the court can enforce an injunction against those who act in concert with an enjoined party stems from the court's inherent power to effectuate its judgments. In certain cases, courts conclude that enjoining a nonparty is the sole logistically feasible way to meaningfully enforce an order. The Fifth Circuit's discussion of that power in *United States v. Hall* (5th Cir. 1972) 472 F.2d 261, is instructive. There, a court order enjoined all students at a school and persons acting independently or in concert with them, and having notice of the order, from obstructing attendance at the school, harassing faculty or staff, and other conduct. The order was served on Hall, and when Hall went to the school campus he was held in criminal contempt. (*Id.* at 262-264).

Hall argued, as Yelp does here, that the court had no power to punish for contempt a nonparty acting solely in pursuit of his own interests. (*Hall*, 472 F.2d at 264). The Court began by distinguishing the cases relied on by the appellant, because in each, "the activities of third parties… would not have disturbed in any way the adjudication of rights and obligations as between the original plaintiffs and defendants." (*Id.* at 265). Each party could perform its duty, no matter what the third party did. Hall's conduct, in contrast, "imperiled the court's fundamental power to make a binding adjudication between the parties properly before it." (*Id.*). "Courts of equity have inherent jurisdiction to preserve their ability to render judgment in a case such as this." (*Id.).* The court explained:

> The principle that courts have jurisdiction to punish for contempt in order to protect their ability to render judgment is also found in the use of *in rem* injunctions. Federal courts have issued injunctions binding on all persons,

> regardless of notice, who come into contact with property which is the subject of a judicial decree. … A court entering a decree binding on a particular piece of property is necessarily faced with the danger that its judgment may be disrupted in the future by members of an undefinable class–those who may come into contact with the property. The *in rem* injunction protects the court's judgment. The district court here faced an analogous problem. The judgment in a school case, as in other civil rights actions, inures to the benefit of a large class of persons, regardless of whether the original action is cast in the form of a class action. … At the same time court orders in school cases, affecting as they do large numbers of people, necessarily depend on the cooperation of the entire community for their implementation."

(*Id.* at 265-66 (*internal citations omitted)*).

Here, in the same way, Yelp, by continuing to publish or republishing the defamatory reviews, interferes with both Plaintiffs' right to be free from defamation and Bird's duty to refrain from it. And here, as in *Hall*, application of the injunction is necessary if the court is to protect its "ability to design appropriate remedies and make [its] remedial orders effective." (*Id.* at 266).

The court's inherent power to effectuate its judgments has been invoked, and held to afford due process, in many contexts. In *United States v. Paccione* (2nd Cir. 1992) 964 F.2d 1269, the Second Circuit held a court's order enjoining RICO defendants from transferring or dissipating company assets may properly bind a nonparty on notice of the order, and subject him to criminal contempt for deliberately interfering with the business

of the company). And in *United States v. Baker* (9th Cir. 1981) 641 F.2d 1311, the Ninth Circuit held that holding non-party fishers in contempt for violating an injunction that managed the salmon fishing industry while tribal fishing rights were being litigated satisfied due process protections, provided that the fishers had actual knowledge of the injunction. (*Id.* at 1313-1315).

The trial court properly exercised its power to enforce its judgment. The transcript of the hearing shows that the Court was acutely aware that Plaintiff and the Court are powerless to effectuate the judgment without Yelp. The Court found Yelp's position "very distressing. 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." (Reporter's Transcript of August 27, 2014 hearing, at 6:5-8, AA.V3.T33.00834). Later it asked, "So what is she [Plaintiff] supposed to do? Is she supposed to – she can't find this person to serve her with any notice of other remedies." (*Id.* at 14:19-21, AA.V3.T33.00842; *see also id.* at 13:20-24, 14:6-7, AA.V3.T33.00841-842). Given the logistical reality of statements posted to a website Yelp controls, there is no other means of taking down the defamatory and false statements that continue to harm the Plaintiffs' law firm. Yelp's failure to remove the defamatory statements effectively preserves them in perpetuity, completely depriving the court of any means of effectuating the judgment. Longstanding authority gave the trial court the authority to avoid this unjust result by binding Yelp, through whom Bird acts.

C. Because The Judgment Was Not Void, Yelp's Motion Is Untimely

Yelp brought its motion to vacate solely under Code of Civil Procedure section 663, which allows the court to set aside and vacate its judgment if there was an "incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts." Section 663a sets strict time limits for the time that a party can bring such a motion, and the time the court has the power to vacate its own judgment. Section 663a(a) provides that a party must give notice it intends to file a motion to vacate either after the decision is rendered and before the entry of judgment, (section 663a(a)(1)) or within 15 days of the earliest of

- mailing of the notice of entry of judgment by the clerk;
- service upon him or her by any part of written notice of entry of judgment; or
- 180 days after the entry of judgment.

(Section 663a(a)(2)). Moreover, the "power of the court to rule" on a motion to vacate the judgment *expires* on the earliest of 60 days from the clerk's mailing the notice of entry of judgment, or "60 days after service upon the moving party by any party of written notice of entry of the judgment," or, alternately, 60 days after the "filing of the first notice of intention to move to set aside and vacate the judgment." If the motion is not determined with a signed order or entered into the court's permanent minutes within that time, "the effect shall be a denial of the motion without further order of the court." (Section 663a(b)).

Yelp's motion was plainly untimely. Notice of Entry of Judgment and the Judgment were hand-served on Yelp's agent for service of process on January 29, 2014. (AA.V.2.T18.00539-547). Yelp was required to file notice of its intent to move to

vacate the judgment within 15 days, under Code of Civil Procedure 663a(a)(2). It failed to file until May 23, 2014, almost four months later. (AA.V1.T11.00225).

Yelp argued below that its motion to vacate was timely because it is challenging the judgment as unconstitutional and thus void. Because, as detailed throughout this brief, the trial court's order does not violate Yelp's constitutional rights, Yelp's motion to vacate was untimely, and the trial court had no power to rule on it. Because the trial court lacked jurisdiction to rule on Yelp's motion, its appeal of the order on that motion was likewise untimely. Thus, the trial court did not have -- and this Court does not have -- jurisdiction to consider Yelp's alternative argument that the judgment violates the Communications Decency Act. To the extent that Yelp attempts to argue that it may bring a challenge on *any* grounds at *any* time, such an argument would eviscerate the intent and effect of California's carefully-articulated timeliness statutes and is unsupportable.

In the trial court, Yelp offered *Aries Development Company v. California Coastal Zone Conservation Comm'n* (1975) 48 Cal.App.3d 534, 542, which held that "the 15-day period prescribed by" section 663a "applies to those who were parties of record when the judgment was entered." But *Aries* does not govern here. In *Aries*, the Charles family knew about the underlying proceedings in which a developer sought exemption from coastal permit requirements for a construction project near their home. The court entered judgment finding the project was exempt. No formal notice of the type listed in section 663a was sent to the Charles family; the court explained simply that "[f]ollowing entry of judgment, the Charles who until then were not parties to the mandate proceeding

moved to vacate the judgment." (*Id.* at 540). With no service on them of the judgment or the notice of entry of judgment, there was no event to trigger the 15-day period set out in the statute, and the court logically held that the 15-day limitation did not apply to them. Notably, the Court's holding was limited to the 15-day period, and said nothing about whether the 180-day period or any other provision of 663a would apply to a non-party.

There is no rationale for extending *Aries's* exception to the time limits to the situation here, where Yelp was formally served with notice of entry of the judgment. There is no reason to distinguish between parties and non-parties who have been formally served, and give the latter an indefinite, open-ended time to collaterally attack the judgment. A nonparty "legally aggrieved by a judgment may, though not initially a party to the action, become a party of record and obtain a right to appeal from the judgment by moving to vacate the judgment *pursuant to Code of Civil Procedure section 663*." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736, *emphasis added*). Yelp ignored the procedure, and instead chose to simply write Ms. Hassell to say it would not comply with the judgment it viewed as "rife with deficiencies." AA.V3.T27.00745. It has no justification for filing long after the deadline. For instance, under Code of Civil Procedure section 473.5, a party seeking to set aside a default judgment must show not only a lack of actual notice, but that that the lack of notice was not caused by "avoidance of service or inexcusable neglect." Where a party has actual notice through personal service, there is a "presumption of neglect" that precludes relief from default. *Boland v. All Persons, etc.* (1911) 160 Cal. 486, 490. A party seeking relief from dismissal similarly has to show "mistake, inadvertence, surprise, or excusable neglect." Code of

Civil Procedure section 473(b). The same policies should apply here. Yelp is not exempt from California law merely for raising the "deficiencies" it found in the court's order.

Moreover, under Code of Civil Procedure section 663b, the court's power to rule on the motion expired 60 days after Plaintiffs served Yelp with notice of entry of the order on January 29, 2013. Again, there is no reason that this time limit, which promotes the finality of judgments, should not apply when Yelp was notice of entry of the order.

As the California Supreme Court explained in *Signal Oil and Gas v. Ashland Oil and Refining Co.* (1958) 49 Cal.2d 674, an injunction is not void merely because it is erroneous. There, the trial court issued a temporary restraining order against defendant companies Ashland, American, and two of Ashland's directors, based on its interpretation of a contract. (*Id.* at 769-771). Directors of American, believing that they were not subject to the TRO, made changes in the bylaws of the company at a subsequent board meeting. (*Id.* at 771-772). The court then issued a preliminary injunction barring American from making those changes effective. (*Id.* at 772). The Delaware Supreme Court subsequently found that the contract underlying the dispute was void as an illegal voting trust. (*Id.* at 773). The Supreme Court found that the court's preliminary injunction, although erroneous, was not "void." (*Id.* at 775-778). After surveying authorities, the court concluded that the legality of the contract was "a question of law," and the TRO enforcing the contract was not invalid "simply because the court decided that question erroneously." (*Id.* at 778); *Yeung v. Soos* (2004) 119 Cal.App.4th 576, 578-80 (finding motion to vacate untimely and rejecting argument that judgment was "void" merely because it failed to follow statutory procedures).

Yelp's remaining arguments are time-barred, as they are arguments of legal error that does not "appear as a matter of law on the face of the complaint." *Signal Oil*, 49 Cal.2d at 778. It could have raised its arguments in intervention, or by timely moving to vacate the judgment once served with notice of entry of the order. Instead, it chose to blithely ignore the order until months later, when the time for its filing had passed and the court's power to correct legal error had expired by statute.

D. Yelp Is Not Shielded by the Federal Communications Decency Act.

Yelp argues that the immunity from liability provided by the Communications Decency Act, 47 U.S.C. § 230 ("CDA") allows it to knowingly republish, in perpetuity, statements a court has found defamatory. The CDA was intended to protect internet service providers from being held at fault for the third-party content they post, not to put them entirely beyond the reach of the courts. Neither Plaintiffs' suit nor the injunction seeks to *impose liability* upon Yelp as a "publisher" of Bird's defamatory statements. The only "liability" at issue is Bird's, and the injunction just a means of implementing the remedy. Because the injunction does not make Yelp "liable" in any sense as a publisher, the CDA does not apply.

1. The CDA Is Intended to Protect Internet Service Providers from Being Held at Fault for the Content of What They Post, Not to Put Them Entirely Beyond the Reach of the Courts

Title 47 U.S.C. section 230(c)(1) 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." Section 230 further provides that "no cause of

action may be brought and no liability may be imposed under any State or local law" that is inconsistent with its mandate that ISPs may not be treated as publishers. (Section 230(e)(3)). With this section, "Congress made a policy choice ... not to deter harmful online speech through the separate route of *imposing tort liability* on companies that serve as intermediaries for other parties' potentially injurious messages." (*Carafano v. Metrosplash* (9th Cir. 2003) 339 F.3d 1119, 1123-24, *quoting Zeran v. America Online*, (4th Cir. 1997) 129 F.3d 327, 330-31 (emphasis added)).[12] Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, 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." (*Zeran,* 129 F.3d at 330).

Section 230 has no application here because the injunction commanding Yelp to remove Bird's posts neither imposed "liability" nor treated Yelp as a "publisher" or speaker under defamation or any other tort law.

a) The Injunction Does Not Impose Liability, or Treat Yelp as a Publisher or Speaker

The trial court held that "[i]njunctions can be *applied to* non-parties," (AA.V3.T30.00809 (emphasis added)) and the court could properly bind Yelp as aiding

[12] While section 230(c)(1) provides immunity from tort claims alleging an online statement is harmful, the same statute protects against internet service providers "against claims by those who might object to the restriction of access to an online publication." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 49, citing section 230(c)(2)).

and abetting Bird. Nothing about the Court's order suggests that it is treating Yelp itself as a "publisher" or speaker for the purposes of defamation law.

As the Ninth Circuit explained in *Barnes v. Yahoo! Inc.* (9th Cir. 2009) 570 F.3d 1096, 1102, *as amended* (September 28, 2009), the central question under section 230 is whether the "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." Here, Plaintiffs have not sought to treat Yelp "as a 'speaker' of the poster's words," *Chicago Lawyers' Committee*, 519 F. 3d at 671, "impose derivative liability on [Yelp] for [Bird's] Internet communications," (*Delfino v. Agilent Technologies, Inc.* (2012) 145 Cal.App.4th 790, 802), or to "imput[e]to it the alleged misinformation." (*Universal Comm'cn Sys., Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 422).

Moreover, the injunction does not impose liability upon Yelp for violation of any law. Yelp argues that it should have been named in the lawsuit, but then argues as if Plaintiff had, in fact, sued Yelp for defamation – citing to over 30 cases both in this court and below which find that providers of interactive computer services cannot *be sued or face tort liability*. But every single case Yelp cites but one involves an action *directly against* the internet service provider or user, trying to make that entity liable in a tort or statutory claim for damages caused by third party content or conduct.[13] In Judge

[13] *See, e.g. Almieda v. Amazon.com, Inc.* (11th Cir. 2006) 45 F.3d 1316 (suit against Amazon for invasion of privacy, theft, and right of publicity statute); *Barrett,* 40 Cal.4th at 40 (defamation claim against internet discussion group user); *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1022 (defamation claim against listserv moderator); *Carafano,* 339 F.3d at 1122 (claims against Matchmaker.com for invasion of privacy, misappropriation of the right of publicity, defamation, and negligence); *Green v. Am. Online* (3rd Cir.

Easterbrook's pithy summary, section 230 means you "cannot sue the messenger" for the content of the message. (*Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist*, *Inc.* (7th Cir. 2008) 519 F.3d 666, 672). Plaintiffs did not sue the messenger. They did not attempt to "impos[e] tort liability" on Yelp, (*Zeran,* 129 F.3d at 331), assert a "tort cause of action" against it, (*Gentry v. eBay, Inc.* (2002) 99 Cal. App.4th 816, 829), or "seek to hold [Yelp] responsible for the communications." (*Doe II v. MySpace Inc.* (0209) 175 Cal.app.4th 561, 573).

Instead, Plaintiffs have simply sought to have their judgment against Bird enforced.[14] Once Yelp refused to comply with the judgment, the trial court was justified in binding Yelp as an aider and abettor to prevent Bird's continued defiance of the order. The court's decision to enforce the injunction was a means of enforcing its order, not a determination that Yelp had defamed Bird. Because it does not treat Yelp as a publisher or impose liability as a publisher, the order is not inconsistent with section 230(c)(1). (*See* 47 U.S.C. §230(e)(3) (providing that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section").

2003) 318 F.3d 465, 470 (negligence claims for monetary and punitive damages against AOL); *Johnson v. Arden* (8th Cir. 2010) 614 F.3d 785 (defamation claims against provider); *Jones v. Dirty World Enterm't Recordings LLC* (6th Cir. 2014) 755 F.3d 398, 402 (defamation, libel, false light, and infliction of emotional distress claims against website owner).

[14] Yelp says Plaintiffs conceded below that they were seeking to treat Yelp as a publisher. (AOB at 36). They did not; on the contrary, they argued vehemently that this was not a case like those Yelp cited which tried to impose liability, rather than simply enforcing a remedy. (AA.V3.T26.00663-665). In any event, they are entitled to argue in the alternative.

Yelp argues that section 230 bars any suit that seeks an "injunction" as well as claims for damages, *citing Kathryn R. v. City of Livermore* (2001) 87 Cal.App.4th 684. But *Kathryn R.* is yet another case in which the plaintiff sued the defendant directly (for misuse of public funds, nuisance and premises liability), not to effectuate a judgment against the original content provider, and so is inapposite. Moreover, the plaintiff sought to enjoin the library from providing computers from which minors could access pornography as part of the *relief* she sought under her other tort causes of action. (*Kathryn R.,* 87 Cal.App.4th at 691).[15]

Despite vibrant, extensive national jurisprudence on section 230, Yelp's sole authority involving only injunctive relief is the Florida case *Medytox Solutions, Inc. v. Investorshub.com, Inc.* (Fla. Dist. Ct. App. Dec. 3, 2014) No. 4D13-3469, 2014 WL 6775236. There, the plaintiff brought only claims for declaratory and injunctive relief against the defendant website, seeking removal of defamatory postings. The Florida court held that these claims, brought directly against the website "to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher." (*Id*). The court distinguished cases where liability arose in

[15] If those other claims were barred, (*id.* at 697-698), then her request for injunctive relief would fail as well. *See Martin v. Aimco Venezia, LLC* (2007) 154 Cal.app.4th 154, 162 (there is no "cause of action" for injunction. An injunction is a remedy, not a cause of action"); *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc*. (2014) 225 Cal.App.4th 786, 800, *reh'g denied* (May 20, 2014), *review denied* (Aug. 13, 2014)(injunction is a remedy). The court's comment that the statute could bar "causes of action" for injunction or declaratory relief is questionable dictum.

other ways. (*Id*).[16] Here, again, Yelp is subject to the injunction as an aider and abettor, and because of the court's inherent power to enforce its judgments, not because of its status as a publisher.

b) Yelp's Theory that It Can Republish the Statements Forever Despite the Trial Court's Judgment Finding Bird Defamed Plaintiffs Is Contrary to the Jurisprudence Interpreting the Communications Decency Act, Which Assumes Victims Will Have Recourse Against the Original Content Provider

Over and over, courts deferring to Congress's policy choice to make internet service providers not liable for their publication of third party content, even when that publication caused severe harm, have reasoned that the victim still has recourse against the original creator of unlawful online conduct.[17] Courts repeatedly intone that "[p]arties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third party user who generated the content, but not the

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[16] Not all acts by an internet service provider fall within section 230. Section 230(c) is not "a general prohibition of liability for web-site operators and other online content hosts." (*Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666, 669). Courts are willing to carefully scrutinize whether the conduct at issue falls within section 230's reach; in *Reit v. Yelp! Inc.* (N.Y. Sup. Ct. 2010) 29 Misc. 3d 713, 717, for example, the court found that plaintiffs' extortions claims that Yelp manipulated the content of reviews to induce plaintiffs to pay for advertising did not assert a claim for liability "as a publisher," and so were not covered by the Communications Decency Act. *Reit,* 29 Misc. 3d at 717. *See also Barnes*, 570 F.3d at 1107-1108 (promissory estoppel theory seeks to hold Yahoo liable for breach of specific promise to remove content, not from general publishing conduct; § 230 therefore does not bar claim).

[17] In many cases, the internet service provider removed the harmful content even before any court adjudication, making the sole legal question whether it could be liable for its past posting. *See., e.g., Carafano, supra,* 339 F.3d at 1120, 1122 (internet dating site removed posts that constituted a "cruel and sadistic" identity theft within days of notice).

interactive computer service that enabled them to publish the content online." *Doe II v. MySpace, Inc.* 175 Cal.App.4th at 570, *quoting Doe v. MySpace, Inc.,* 528 F.3d 413, 419. As the California Supreme Court put it:

> We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.

Barrett v. Rosenthal, 40 Cal. 4th 33, 40, 146 P.3d 510, 513 (2006); *see also M.A. ex rel. P.K.* (2011) 809 F.Supp.2d 1041, 1055 ("Congress has decided that the parties to be punished and deterred are not the internet service providers but rather are those who created and posted the illegal material" (internal quotation and citation omitted)).

Each of these passages necessarily assumes that the internet service provider would comply with recourse ordered in a suit against the original wrongdoer. These courts clearly did not believe that section 230 would or could be used to preserve online forever defamatory comments, or those that endanger the victim's physical safety. The Communications Decency Act means that an ISP has no *independent* duty to exercise editorial discretion and remove allegedly unlawful content on notice, and so can face no *liability* for removing or failing to remove such content. It does not mean that ISPs have no duty to obey a valid court order finding user content defamatory, just because the order involves an online posting.

c) Barring Enforcement of the Judgment Against Bird Would Serve None of Congress's Purposes in Enacting Section 230

The underlying goals of the Act have been thoroughly examined by federal and state courts. With section 230, Congress chose to "override[] the traditional treatment of publishers, distributors and speakers under statutory and common law," under which a person who published or distributed speech over the Internet could be "held liable for defamation" (or other claims) "even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement." (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1026-27). It did so to serve two purposes.

The first straightforward goal was to promote free speech and the free exchange of ideas on the internet, without the "intrusive regulation" that the "imposition of tort liability on service providers for the communications of others represented." (*Zeran*, 129 F.3d at 330; *Barrett*, 40 Cal.4th at 44 (same)); *see also* § 230(b)(1) and (2)(setting out policies development of internet and its "vibrant and competitive free market"). Since the amount of information and speech communicated via internet service providers is "staggering," and would be impossible to screen for defamatory, obscene or other unlawful content, the "specter of tort liability in an area of such prolific speech would have an obvious chilling effect," because service providers "faced tort liability for republished messages on the internet," might choose to severely restrict the number and type of messages posted. (*Zeran*, 129 F.3d at 331; *Barrett*, 40 Cal.4th at 44 (same)).

The second goal was to encourage "self regulation" and promote to promote efforts by internet service providers to provide screening technologies to users that can give them control over what content appears (particularly materials inappropriate for children). (*Zeran*, 129 F.3d at 331; §§ 230(b)(4), (5), 230(c)(2)). Congress explicitly sought to undo the effects of *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y. Sup. Ct. 1995) 23 Media L. Rep. 1794, which applied traditional "distributor" liability to an internet service provider and held it could be liable for content of which it was aware. (*Zeran*, 129 F.3d at 331; *Batzel*, 333 F.3d 1029). Imposing liability if an ISP is on notice of the content would have "three deleterious effects":

> First, service providers who received notification of a defamatory message would be subject to liability only for maintaining the message, not for removing it. This fact, together with the burdens involved in evaluating the defamatory character of a great number of protested messages, would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech. 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. Finally, notice-based liability would give third parties a cost-free means of manufacturing claims, imposing on providers "ceaseless choices of suppressing controversial speech or sustaining prohibitive liability."

(*Barrett*, 40 Cal.4th at 54-55, *quoting Zeran, supra,* 129 F.3d at p. 333.) Accordingly, courts have repeatedly held that internet service providers are not liable for performing functions "quintessentially related to a publishers role," such as monitoring, screening and deleting content. (*Doe v. MySpace, Inc.* (5th Cir. 2008) 528 F.3d 413, 419-420; *Universal Commc'n Sys., Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 418-19).

Each of these purposes involves protecting internet service providers from the "evil of liability for failure to remove offensive comment," – from not only limitless damage awards for the all the unlawful and harmful expression that appears on the internet, but the potentially crushing burdens of defending against even meritless lawsuits. (*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1174-75 (section 230 protects not "merely from ultimate liability, but from having to fight costly and protracted legal battles"). Eliminating liability also relieves internet service providers of the herculean burden of accurately screening or filtering content to eliminate defamation, identify underage or sexually predatory users, or ferret out other possible unlawful use of the internet. (*See Barrett*, 40 Cal.4th at 45 (provider would face an "impossible" task given sheer number of postings of investigating and making legal judgment and editorial decision every time it received notice of a "potentially defamatory" statement.")

Not one of those concerns is present here. There is no danger that Yelp will engage in overbroad self-censorship by complying with the order. Nor will Yelp have any burden from investigating whether the comments are defamatory, screening reviews, evaluating whether the reviews are unlawful, or defending against a suit. Although Yelp

apparently recognizes the incentives underlying the CDA, it does not explain how forcing an internet service provider to comply with a specific court order about a *user's* liability for defamation, delineating which posts it must remove, could chill any speech or impose any undue burden that could affect the robust expression of ideas on the internet. There is no public policy served by protecting the republication of statements that have been conclusively found by a court of law to be defamatory.

d) Whether Yelp Is an "Information Content Provider" Under the Act Is Irrelevant

Yelp argues, at great length, that it is not a "content provider" under the statute. (AOB at 36-37). Whether it would qualify as a content provider in a suit brought to hold it liable for defamation, negligence, or other direct action, is immaterial. As set out above, the injunction ordering Yelp to remove the posts does not hold Yelp liable as a speaker or publisher for defamation.

Yelp does its best to conflate the analysis of the Court's power to enforce its orders under the due process clause, and of the "content provider" prong of the Communications Decency Act analysis. But they are not the same. While the facts at issue (such as Yelp's recommendations and filters) overlap, the legal standards are distinct, have different origin, and serve different purposes. Whether conduct meets an irrelevant standard under section 230 jurisprudence has no bearing on the court's ability to enforce its orders under *Ross* and *Berger*.

E. Yelp's Prior Restraint Arguments Are Meritless

Below, Yelp raised question about whether Plaintiffs had adduced sufficient evidence that Bird wrote the reviews, arguing that without sufficient factual support, the injunction requiring removal of the "Birdzeye B." and "J.D." comments and any updates thereto[18] might be overbroad. (AA.V1.T12.00237). On appeal, it raises vague arguments that the court cannot restrain future speech, (AOB at 48-49), ignoring the fact that the trial court finally adjudicated these issues, as to Bird, after a hearing, and its order as to Yelp is solely to effectuate that judgment. The trial court's order was proper under *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 which held that

> [A]n injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment…. Prohibiting a person from making a statement or publishing a writing *before* that statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined at trial to be defamatory and, thus, unlawful. This distinction is hardly novel.

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[18] Yelp argues that the judgment requires it to remove every posting, on any topic, by "Birdzeye B." and "J.D." (AOB at 32, 48, 51). This Court must draw reasonable inference in support of the judgment. *Leung v. Verdugo Hills Hosp.* (2012) 55 Cal.4th 291, 308. The rational reading of the court's order, in context and as it relates to Yelp, is that it required Yelp remove those comments attached to the judgment, and "subsequent comments" of these reviewers, meaning updates to these reviews, like the April 29, 2013 post.

Id. at 1148, 1150. The trial court made a factual finding that Bird wrote the reviews. Yelp cannot bootstrap Bird's already-adjudicated First Amendment arguments into its own appeal, arguing that extending the injunction to it violates due process or the Communications Decency Act.

IV. CONCLUSION

Plaintiffs and Respondents respectfully request that the Court affirm the trial court's order denying Yelp's motion to vacate the judgment and award Plaintiffs and Respondents their costs on appeal.

Dated: March 13, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, Plaintiffs and Respondents hereby certify that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 8.204(c)(3) is 13,988.

Dated: March 13, 2015

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