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CASE NO. A143233

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

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

NON PARTY APPELLANT YELP INC.'S REPLY BRIEF

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INTRODUCTION

This lawsuit is between plaintiff Dawn Hassell and defendant Ava Bird. Yelp Inc. is not a party and never has been. And although Hassell alleged that Bird had posted allegedly defamatory content on Yelp.com, and evidently hoped to obtain an order that would restrain Yelp's publication of content on Yelp.com, she did not name Yelp as a defendant in her Complaint or properly serve that Complaint on Yelp. Her intent to deprive Yelp of the opportunity to defend its own First Amendment rights, and of the protection afforded to Yelp by the Communications Decency Act,[1] seems undeniable.

Hassell does not pretend that she served Yelp or that Yelp is a party to this lawsuit. Instead, she argues that Yelp had "actual notice" that she would seek an injunction against it because—in an early effort to persuade Yelp that the review was defamatory and should be removed from Yelp's website—in May 2013, her lawyer merely mailed Yelp a copy of the Complaint that *does not name Yelp as a party or ask for an injunction against Yelp*. Respondent's Brief ("R.B.") at 4, 30; *see* AA00601-602. This argument is absurd as a matter of fact and irrelevant as a matter of law. Yelp had no reason to assume that plaintiff would seek relief against it, and no obligation to inject itself into the dispute between Hassell and Bird. But even if the Complaint could be deemed to allege the opposite of what it

[1] 47 U.S.C. § 230(c)(1) ("Section 230" or the "CDA").

says—that Yelp is a defendant when the Complaint names only Bird—"actual notice" is not and has never been the standard for establishing service of process.

If this Court were to adopt Hassell's argument that a plaintiff can obtain a mandatory injunction without naming or serving the enjoined party—or even asking for the injunction at issue—chaos would ensue. Entities such as Yelp that routinely host millions of comments that could at any time be the basis of litigation between others, would not know whether they might be subjected to an injunction in any particular case. To protect their rights under such a regime, they would need to interplead into every action that involved a review posted on their website, or in which they were mentioned. California's rules of civil procedure—and basic notions of due process—exist precisely to prevent such paralyzing uncertainty and inefficiency.

Hassell tries to defend the injunction against Yelp by claiming that Yelp is Bird's agent, aider and abettor. R.B. at 11. But Hassell cannot show that Yelp and Bird have any actual relationship. They are not successors or assigns, or members of a group or organization with a common purpose, as required to establish that a non-party can be enjoined. Yelp is not affiliated with Bird in any way. Yelp is not Bird's agent. The central tenet of agency law is that principals have the power to control their agents' conduct, but nothing in Yelp's terms of service gives Bird the

power to control Yelp's conduct. Moreover, Yelp's publication of Defendant Bird's posts is not a "continuing act," as Hassell claims; the single publication rule provides otherwise. And Hassell does not provide any authority whatsoever for her proposition that Yelp's legal arguments may constitute aiding and abetting. *See infra*, Section I.

Hassell invokes yet another unsupportable theory in an attempt to evade Yelp's immunity under Section 230. She uses her own intentional decision to not name Yelp as a party—thereby depriving Yelp of due process—to argue that while Yelp might have been immune from claims for relief under Section 230 had she named it as a party, no such immunity exists here. The immunity here, afforded by Section 230, cannot be so easily thwarted. Hassell is not entitled to greater relief against a *non-party* than she could possibly obtain against a *party*. Section 230 is clear that "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 (2006) (emphasis added). Hassell's gamesmanship must be flatly rejected. Under Section 230, her *only* remedy is against Defendant Bird. *See infra*, Section II.

Hassell's remaining thin arguments are also easily rejected. She goes through the motions of denying that the injunction is an unconstitutional prior restraint on future speech, but makes no effort to

satisfy the almost impossible burden to justify such a restraint, because she cannot. *See infra*, Section III. Hassell argues that Yelp's motion to vacate was untimely while she tacitly admits that the original default judgment was void, and thus Yelp was entitled to challenge it at any time. *See infra*, Section IV.

In summary, lacking any support from existing law, Hassell asks this Court to create a new remedy where none is needed. She could have named Yelp in her Complaint and tried to defend her claims on the merits. But Hassell knew she could not win that battle, and so she decided to ignore Yelp's due process rights and try to back her way into relief that she never could have obtained if Yelp had been given an opportunity to defend itself. Thus, she insists:

- That simply mailing a non-party a letter with a complaint that seeks no relief from that non-party is somehow notice that its rights are implicated and judgment will be entered against it if it does not intervene in the litigation;
- That a free user-generated internet publication is an agent of the hundreds of thousands of members of the public who post comments on its pages;
- That advancing legal arguments in moving papers that incidentally benefit a party – but are asserted for the sole

purpose of advancing the non-party's interests – constitutes aiding and abetting the party;

- That Section 580's strict procedural protections for defaulting defendants are satisfied merely if the relief granted is "foreseeable";
- That providers of interactive computer services are only immune under Section 230(c)(1) if they are named as defendants, and receive no protection if a court enters relief against them—even without notice or an opportunity to be heard; and
- That the Court should adopt reasonable inferences to uphold prior restraints—which the Supreme Court has said are subject to constitutional scrutiny as the "most serious and least tolerable infringement on First Amendment rights" (*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)).

Were this Court to rule in Hassell's favor on any one of these departures from established legal principles—much less, all of them—the decision would offend deeply settled principles of civil procedure, agency law, due process and freedom of speech. It would threaten the ability of any website to display user generated content. For all of these reasons, the Court should reverse the trial court's denial of Yelp's motion, and order the trial court to vacate the injunction against Yelp.

STANDARD OF REVIEW

Hassell misstates the standard of review applicable to Yelp's appeal. Even accepting at face value Hassell's overly narrow definition of the issues before the Court—that this Court should set aside any First Amendment concerns because the "sole issues are whether the judgment violated Yelp's due process rights, and whether Yelp has statutory immunity" (R.B. at 10)—Hassell ignores the cases cited in Yelp's Opening Brief holding that questions regarding an appellant's due process rights are matters of law subject to *independent* review. *See* Appellant's Opening Brief ("A.O.B.") at 19-20 (citing *Mohilef v. Janovici*, 51 Cal.App.4th 267, 285 (1996); *In re A.B.*, 230 Cal.App.4th 1420, 1434 (2014); *Menge v. Reed*, 84 Cal.App.4th 1134, 1139 (2000)).

Moreover, Hassell's attempt to evade Yelp's First Amendment rights reflects her misunderstanding of those rights. Hassell states that "[w]hile the underlying defamation case implicates issues of free speech, this appeal does not," and that the lower court's "determination of whether the reviews were defamatory and therefore not entitled to First Amendment protections is final." R.B. at 10.[2] Of course, this is the reason that she intentionally did not name Yelp as a defendant—because she hoped to deprive Yelp of the

[2] The claim that the alleged defamatory reviews are "not entitled to First Amendment protections" also overlooks the Supreme Court's seminal opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."

protections afforded by the First Amendment and Section 230. AA00837:13-15. But her argument overlooks the facts that (1) the injunction expressly prohibits Yelp from exercising *its* right to publish both extant and future comments—an unconstitutional prior restraint—and (2) Yelp's immunity under the CDA implicates core free speech protections for Yelp, not Bird. *See* A.O.B. at 32-34, 48-50. As such, this Court must exercise independent review. *Id.* at 18-19.

Finally, Hassell's claim that the lower court's "determination that Yelp aided and abetted was one of fact" (R.B. at 17), is simply incorrect. The conclusion that a nonparty is an aider and abettor is a *legal* conclusion based on factual determinations—something the lower court itself implicitly admitted when it pointed to a purported "factual basis to support Hassell's contention." AA00809. *See also People v. Campbell*, 25 Cal.App.4th 402, 412 (1994) (cited by Hassell, R.B. at 17) ("The statutory phrase 'aid and abet' is a term of art not commonly used or understood by laypersons and represents a legal theory under which one may be held vicariously liable as a principal for the criminal acts of another.").[3] As the California Supreme Court has made clear, if "the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is

[3] None of the cases Hassell cites regarding aiding and abetting in the criminal context discuss the standard of review to be applied in the context of an injunction on a non-party in a civil litigation.

reviewed independently." *Haworth v. Superior Court*, 50 Cal. 4th 372, 384 (2010), *as modified* (Sept. 1, 2010). That is precisely the case here. As discussed below, the trial court made clear errors in concluding that Yelp aided and abetted Bird in her violation of the injunction; as such, its legal conclusion as to Yelp is entitled to no deference at all.

ARGUMENT

I. DUE PROCESS BARS THE INJUNCTION AGAINST YELP

The trial court granted Hassell an injunction against non-party Yelp *before* Hassell proffered any evidence concerning Yelp's conduct and without making any factual findings regarding Yelp. For this reason alone, the trial court should have granted Yelp's motion to vacate the injunction, and this Court should reverse the trial court's holding. *See infra*, Section A.

Hassell cannot defend the trial court's denial of Yelp's motion by arguing that Yelp was allegedly aiding and abetting Bird. As set forth below, neither the applicable law nor the facts in the record support such a finding. *See infra*, Section B. In addition, the trial court erred because the injunction violated the guarantee of fundamental fairness contained in Code of Civil Procedure Section 580. *See infra*, Section C.

A. Applying The Injunction To Yelp Violated Yelp's Right To Due Process Because Yelp Had No Notice Or Opportunity To Be Heard.

There is no dispute that Yelp had no notice of the hearing at which the trial court granted the injunction. It was not a party. It was not present

and had no opportunity to be heard, depriving it of a fair hearing. This was a textbook violation of the bedrock principles of due process.

Hassell argues that "Yelp had actual notice of the litigation from the start" because her counsel sent Yelp's General Counsel "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.'" R.B. at 4; *see also id.* at 30 ("Yelp was on actual notice of the suit even before Bird's time to answer had expired"). But mailing the Complaint—which did not name Yelp as a defendant or request any relief against Yelp—with a cover letter noting the Complaint was supposedly evidence in support of a request that Yelp remove certain content from its website, did not make Yelp a party to the lawsuit, and Hassell cannot and does not argue otherwise.

Hassell claims that "[w]hen Yelp failed to respond [to her letter], Plaintiffs requested a default." R.B. at 5. Implicit in Hassell's statement is the claim that Yelp was under some obligation to respond in the first place—which it was not, because Yelp was not named as a defendant in the Complaint, and the accompanying cover letter made clear Yelp was only to view the Complaint as some sort of evidence. AA00001-14. In any event, Hassell did *not* inform Yelp that she was seeking a default judgment against Bird—the only named defendant—much less that she would also ask for relief against it.

Finally, Hassell defends her intentional denial of Yelp's due process rights by proclaiming that the trial court held a "hearing" in which it "reviewed and heard extensive evidence and argument in support of the default." R.B. at 5. Having received no notice of that hearing, and no opportunity to be heard before the trial court entered an injunction against it, this was a manifest violation of Yelp's fundamental due process rights to notice and a hearing. A.O.B. at 21-26.

B. The Narrow Rule Allowing Courts To Enjoin Aiders And Abettors, And Agents, Of Parties Does Not Apply Here.

Hassell argues that she can ignore Yelp's due process rights because Yelp allegedly aided and abetted Bird, or acted as her agent by (1) opposing the prior restraint entered against it by making arguments that would have incidentally also benefited Bird, (2) refusing to abide by the unconstitutional injunction entered against it by removing the reviews that Hassell claims were posted by Bird, and (3) providing a forum for the public to post reviews of businesses, and subjecting all posted reviews to an algorithm that assesses their reliability based on a set of factors and rules applied in the same way to all reviews on Yelp.com. Her unprecedented overreach is not supported by the cases she cites or the facts of this case.

1. California Law Only Permits Enforcement Of An Injunction Against Non-Parties That Have A Close Relationship To A Party.

The Opening Brief established that, as a matter of constitutional law and common sense, a court may not enter an injunction against a non-party—especially where, as here, the non-party has no notice that the plaintiff will seek an injunction against it and no opportunity to be heard. A.O.B. at 21-26. Courts have recognized a narrow exception to this general principle, allowing an injunction to be entered against a non-party where the defendant and the non-party are members of a group or organization, or have an actual relationship such as successors, assigns or agents. Thus, as discussed in the Opening Brief, *Ross v. Superior Court*, 19 Cal. 3d 899 (1977), and *Berger v. Superior Court*, 175 Cal. 719 (1917), provide an administrative solution to enforce an injunction against groups or organizations. A.O.B. at 26-27.

The Supreme Court clarified in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1124 (1997), however, that *Berger* and *Ross* narrowly authorized enforcing injunctions against groups that could "act only through the medium of their membership." Although Hassell boldly declares that the rule from *Ross* and *Berger* "encompasses any situation where another helps the enjoined party violate the injunction, whether as an agent, aider or abettor, or otherwise," (R.B. at 14) she does not cite a single

case that actually adopts that rule, or even a case in which a non-party was held to be properly subject to an injunction as a purported aider and abettor.

But even assuming *arguendo* that the holdings of *Ross* and *Berger* and the other cases Hassell cites could be read as broadly as Hassell urges, they still undercut her position because they specifically provide for a hearing *before* binding a nonparty to an injunction. In *Berger*, for example, the California Supreme Court was careful to note that while it was not addressing the specific issue of whether a nonparty might be subject to an injunction as an aider or abettor, any such conclusion would be drawn as a "matter of evidence, from the facts set forth in the affidavit, that [the nonparty] was acting in concert with the enjoined parties as an agent or servant of some kind or as an aider or abettor." 175 Cal. at 720; *see also id.* at 723 (referring to "the right of a court, in a case where contempt is sufficiently charged by complaint or affidavit, to make such reasonable inferences from the evidence as to the character in which a party acted *as are warranted by such evidence*") (emphasis added). Here, however, the injunction was issued against Yelp without *any* evidence of its alleged aiding and abetting, let alone giving Yelp an opportunity to rebut any such evidence.

In *Planned Parenthood Golden Gate v. Garibaldi*, 107 Cal.App.4th 345 (2003), while another division of this appeals court did state, as Hassell points out, that "an injunction can properly run to classes of persons with or

through whom the enjoined party may act" (*id.* at 353), the court ultimately held that the nonparties were not bound by the injunction, pointing to the lack of "evidence that Foti and the Garibaldis act together with or on behalf of parties enjoined by the 1995 injunction" (*id.* at 358). Accordingly, *Planned Parenthood* underscores the need for a factual determination *before* an injunction may be enforced against a nonparty. *See also Ex Parte Lennon*, 166 U.S. 548, 557 (1897) (enforcing injunction based on lower court's finding "upon the testimony, that the petitioner did not quit in good faith in the morning, but intended to continue in the company's service, and that his conduct was a trick and device to avoid obeying the order of the court").[4]

Indeed, Hassell admits that the need for a factual determination before a court may enjoin a nonparty is embodied in the Supreme Court's

[4] The other cases Hassell cites are also distinguishable. In *Ross v. Superior Court*, the non-party county boards of supervisors found to be bound by the injunction were deemed "general agents" of the enjoined parties as a matter of statutory law because the "existence of such a principal-agent relationship between the state welfare agency and the county boards of supervisors is confirmed by a long and unbroken line of California decisions." 19 Cal. 3d 899, 908 (1977). There was, therefore, no factual dispute as to the agency relationship that would raise due process concerns. Similarly, in *United States v. Baker*, 641 F.2d 1311, 1314 (9th Cir. 1981), the court relied on prior Supreme Court authority that the nonparty fishers were "bound by the district court's orders regulating salmon fishing because they are in privity with the parties"—once again obviating the need for a factual determination as to the relationship between the enjoined party and the non-party. And in *United States v. Paccione*, 964 F.2d 1269, 1275 (2d Cir. 1992), the nonparty was significantly involved in the underlying action, including making appearances and agreements in the matter related to the injunction—a relationship that does not even arguably exist here.

holding in *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945), agreeing that "whether a nonparty is bound 'depends on an appraisal of his relations and behavior.'" R.B. at 16 (citing *Regal Knitwear*, 324 U.S. at 15). But in *Regal Knitwear*, the Court addressed an injunction that also included the petitioner's "successors and assigns" in general, while recognizing that a decision to enjoin a *specific party* as a successor or assign would require "a judicial hearing, in which their operation could be determined on a concrete set of facts." 324 U.S. at 16. Here, there was no such appraisal of Yelp's behavior, or judicial hearing as to Yelp's operation, before Yelp was explicitly named in the injunction. While Hassell's brief emphasizes repeatedly the purported factual findings of the court below, *none* of the factual findings as to Yelp occurred *before* the default judgment and injunction were entered against Yelp. Hassell obtained an injunction specifically naming Yelp without Yelp ever having the opportunity to set foot in court and defend itself.

As such, the cases cited in Yelp's Opening Brief are directly on point. A.O.B. at 21-25. In each case, those sought to be enjoined—whether a party or a nonparty—were held to be entitled to a hearing before being held subject to the injunction. *See id.* Indeed, Hassell's attempt to distinguish *Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.*, 75 Cal.App.4th 110 (1999), reflects the weakness in her argument. Hassell claims that *Tokio Marine* is distinguishable because the Court of Appeal

did not address the theory she advances—namely, that the nonparty insurance underwriter was an aider and abettor of the judgment debtors. R.B. at 15-16. But Hassell's reasoning overlooks her own argument.

As discussed above, Hassell claims that Yelp's due process rights were not violated because her attorney sent Yelp the Complaint she had filed against Bird; she contends that because Yelp was aware of her claims against Bird, it had no right to notice or an opportunity to be heard. *See* R.B. at 4, 30. But if due process requires that an insurance underwriter who had entered into a contract concerning the underlying litigation receive notice and a hearing before being bound to a judgment arising from the litigation—as the court held in *Tokio Marine*—then it necessarily follows that Yelp, who merely received Hassell's Complaint against Bird alone, was entitled to notice and a hearing as well. The injunction violated Yelp's due process rights, and the motion to vacate should have been granted.

2. The Trial Court's Reasons For Denying Yelp's Motion To Vacate Do Not Support Its Order.

Even if this Court accepts Hassell's argument that due process may be satisfied by after-the-fact determinations of aiding and abetting, the motion to vacate still should have been granted. The conclusion that Yelp was aiding and abetting Bird is one of law that this Court must review de novo and the record does not support the court's conclusion.

a. Asserting Legal Arguments Is Not Aiding And Abetting.

It is little surprise that Hassell cannot point to a single case supporting her claim that Yelp acted in concert with Bird by asserting legal arguments in defending against an unconstitutional prior restraint entered against Yelp without notice or an opportunity to be heard. Indeed, Hassell provides no authority at all defining the conduct that might constitute aiding and abetting the violation of an injunction, justifying an order holding a non-party subject to the injunction. *See* R.B. at 19-22. Instead, Hassell tries to defend the unconstitutional injunction by arguing that Yelp raised some arguments improperly (*id.* at 21) and that Yelp's attack on the basis for the underlying injunction included arguments that applied to Bird (*id.* at 21-22).[5] But even the lone case she cites concerning a nonparty's "actual relationship" with an enjoined party actually *supports* Yelp's position here.

[5] Hassell also claims, incredibly, that Yelp's arguments were not in good faith because "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." R.B. at 20. In essence, Hassell is claiming that because Yelp did not attempt to reveal information sufficient to satisfy Hassell's burdens as a plaintiff, it should be deemed an aider and abettor of the defendant. Her argument is nonsensical. If non-parties could be penalized for simply choosing not to volunteer information, there would be no point in having subpoenas. Regardless, Hassell offers no authority for the proposition that even an argument brought in bad faith—much less Yelp's meritorious arguments in the lower court—constitutes aiding and abetting.

Hassell relies on *People v. Conrad*, 55 Cal.App.4th 896, 902-03 (1997), as "finding a nonparty in contempt for knowingly violating an injunction's terms 'with or for those who are restrained.'" *See* R.B. at 22 (emphasis omitted). First, Hassell misstates the holding of *Conrad*. The court in *Conrad* actually *vacated* the trial court's holding that the nonparties were in contempt—the exact opposite of what Hassell claims. *See id.* at 904.

More importantly, however, *Conrad* provides meaningful guidance—directly applicable here—as to what activities are *insufficient* to bind a nonparty to an injunction. In *Conrad*, certain abortion protesters were enjoined from "picketing, demonstrating and counseling" outside an abortion clinic. 55 Cal.App.4th at 899 (internal quotations omitted). Following the issuance of the injunction, individuals who were not party to the injunction—the appellants in *Conrad*—demonstrated outside of the clinic, even though they were aware of the injunction. *Id.* at 899-900. The prosecution claimed that the nonparty appellants, who were "doing the very things that are enjoined in the permanent injunction with knowledge of the injunction[,] are in a sense standing in the shoes of the named litigants. Appellants say they are acting independently. That's playing games; that is the shell game." *Id.* at 901 (internal quotations omitted). The trial court found appellants in violation of the injunction, pointing to "a mutuality of

purpose" and the nonparties' participation "in the same prohibited activity." *Id.* (internal quotations omitted).

The Court of Appeal reversed, holding that "[m]ere 'mutuality of purpose' is not enough. Here, it must be appellants' actual relationship to an enjoined party ... that make them [subject to the injunction]." *Id.* at 903. The Court found the evidence of an "actual relationship" to be lacking, pointing to the failure to establish "appellants' membership in, or affiliation with, any enjoined organization or person; it did not show a connection between [appellant's organization], or any of the groups that sponsored appellants' journey to Vallejo, and any enjoined organization or person; and it did not show that appellants were playing the 'shell games' with which the court was properly concerned." *Id.* at 904.

Here, Hassell cannot even point to a "mutuality of purpose," let alone any "actual relationship" between Bird and Yelp or any "shell games" being played (although as the Court made clear in *Conrad*, that would not have been enough).[6] Yelp simply made legal arguments that the injunction was invalid, pointing out that, in addition to the reasons the injunction was invalid as to Yelp, it appeared facially invalid based on both the failure to

[6] Hassell makes no attempt to reconcile the holding of *Conrad* with her reliance on the Fifth Circuit's decision in *United States v. Hall*, 472 F.2d 261, 268 (5th Cir. 1972), which permitted "an interim ex parte order against an undefinable class of persons" based on a common purpose: preventing the desegregation of schools. *See* R.B. at 32-33. Regardless, the record does not support the existence of a "common purpose" between Yelp and Bird, and thus *Hall* is inapplicable here.

serve Bird and the failure to satisfy the standards of the First Amendment. AA00236-37. If the injunction was invalid on its face, it clearly could not have been applied to Yelp, which is precisely the reason Yelp made the argument. Mere legal arguments are not evidence that Yelp has any desire to further Bird's purported purpose—to defame Hassell—or that there is an ongoing connection or affiliation between Yelp and Bird to enable Yelp to further that purpose, and Hassell provides no authority to the contrary. Yelp's legal arguments, which would have benefitted Yelp if they had been sustained, do not constitute aiding and abetting.

b. Failure To Abide By An Unconstitutional Injunction Is Not Continual Violation Of The Injunction Through Ongoing Republication.

Next, Hassell argues, applying circular reasoning, that the injunction is justified because Yelp is allegedly violating that injunction by "continually displaying its 'Recommendation' highlighting the 'Birdzeye B' review." R.B. at 18. Yelp's refusal to abide by an injunction that was entered against it in clear violation of its constitutional rights is evidence of nothing more than the fact that Yelp values those rights, and continues to fight for them. It certainly does not justify a continuing deprivation of Yelp's rights under the First Amendment and the CDA.

Regardless, Hassell's argument reflects her misunderstanding of the protections afforded to online postings under California law. Hassell claims that "[b]ecause internet sites are perpetually available and

accessible, posts do not occur solely at the moment they appear for the first time." R.B. at 18; *see also id.* at 25 ("an internet post is not a discrete, one-time event ... it persists over time"); 26 (referencing "Yelp's decision to keep Bird's posts up and continue to promote them"); 33 ("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"); 44 (claim that Yelp is arguing that it can "republish the statements forever"). In other words, Hassell's theory of Yelp's "ongoing" violation of the injunction is premised on the theory that keeping a website posting active on the Internet constitutes an "ongoing" publication. But Hassell's argument ignores the single publication rule, Civil Code Section 3425.3, which fully applies to Internet publications.

The single publication rule was first applied to the internet in California in *Traditional Cat Ass'n, Inc. v. Gilbreath*, 118 Cal.App.4th 392 (2004). There, the plaintiffs brought a defamation claim, complaining of a website containing descriptions that were "highly critical" of the plaintiffs. *Id.* at 396. Defendants argued that the action was barred by the statute of limitations. *Id.* Plaintiffs argued that "their defamation cause of action arose continuously while the Web site was operating" so that "the one-year statute of limitations for defamation . . . had not expired at the time they filed their complaint." *Id.* at 399.

The court rejected this argument. The court pointed to New York's rule of law set forth in *Firth v. State*, 98 N.Y.2d 365, 747 N.Y.S.2d 69 (Ct. App. 2002), that viewing an internet posting as a continual republication "would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise." *Gilbreath*, 118 Cal.App.4th at 404. The *Gilbreath* found the reasoning in *Firth* "persuasive," holding that "the need to protect Web publishers from almost perpetual liability for statements they make available to the hundreds of millions of people who have access to the Internet is greater even than the need to protect the publishers of conventional hard copy newspapers, magazines and books." *Id.* Thus, the court concluded that "our Supreme Court would find that those interests require application of the single-publication rule to Web page publication." *Id.*

Subsequent courts have reaffirmed the application of the protections of the single publication rule to Internet publications. *See Cole v. Patricia A. Meyer & Assocs., APC*, 206 Cal.App.4th 1095, 1121 n.8 (2012) ("The single publication rule applies to Internet publication .... Under that rule, publication occurs when the allegedly defamatory statement is first made available to the public"); *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir.

2012) ("under California law, a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience").

Indeed, Hassell's arguments here echo those rejected in *Roberts v. McAfee, Inc.*, 660 F.3d 1156 (9th Cir. 2011). There, plaintiff complained that a press release was defamatory, and that "McAfee's failure to take down the press release 'once it received substantial indications of falsity' amounted to a republication, restarting the limitations period and keeping his defamation and false light claims alive." *Id.* at 1167. The Ninth Circuit Court of Appeals rejected plaintiff's argument, holding that "[t]he fundamental problem with Roberts' theory—that a mass communication is republished when the defendant fails to retract it after receiving notice of its falsity—is that it undermines the single-publication rule." *Id.* at 1168.

Hassell's argument as to Yelp's "ongoing" violation of the injunction is therefore premised on an incorrect understanding of California law, which is clear that refraining from taking down website content is simply not a continued publication. Yelp cannot, therefore, be deemed an aider and abettor based on the continuing accessibility of the reviews at issue here.

Moreover, as discussed in the Opening Brief, *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010) is directly on point, holding that "mere inactivity is simply inadequate to render [website hosts] aiders and

abettors in violating the injunction." *Id*. at 568; *see also* A.O.B. at 30-31. Hassell urges this Court to ignore *Blockowicz*, although it squarely addresses injunctions, nonparties, and online publishers of user generated content, because it "is not binding in California" and "factually and procedurally distinct." R.B. at 23. Instead, she asks this Court to adopt the reasoning of a Louisiana District Court from 1969, *S. Central Bell Tel. Co. v. Constant, Inc.*, 304 F. Supp. 732 (E.D. La. 1969). But the facts in *South Central* are easily distinguished from *Blockowicz* and this case.

In *Blockowicz*, a website provider conceded it had notice of the injunction at issue, and the plaintiffs in the underlying litigation argued that by failing to take down the third-party defamatory comments, the website provider was aiding and abetting the defendants. 630 F.3d at 567. The court rejected plaintiffs' argument, holding that a "non-party who engages in conduct before an injunction is imposed cannot have 'actual notice' of the injunction at the time of their relevant conduct." *Id.* at 568. The service providers, the Seventh Circuit held, "simply failed to act in any way relevant to this dispute since agreeing to the Terms of Service with the defendants, which they did before the injunction was issued and before the statements at issue were even posted," which was insufficient to bind the service provider to the injunction. *Id*. at 569.

The same facts are present here. Everything Hassell accuses Yelp of doing with respect to the posts at issue—keeping them displayed on the

Yelp website, and designating one of them as non-filtered or "Recommended"—occurred before the injunction was issued. AA00018-20.[7] Hassell tries to distinguish *Blockowicz* by arguing that the website provider at issue there "merely kept the offending posts up and defended *its own* case in court." R.B. at 24. But even if this was relevant – although, as discussed above, it is not – Hassell is simply incorrect. In *Blockowicz*, the nonparty internet service provider specifically raised a statute of limitations defense applicable only to *the defendants*. 630 F.3d at 570. And while the court rejected the provider's attempt to invoke the statute of limitations because that defense was personal to the defendants, the court did not find that asserting such a defense amounted to aiding and abetting.[8] *Id.* The same conclusion is warranted here.

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[7] Hassell ignores that Yelp's automated software filtered one of the reviews about which she complains, by user J.D., as a "not recommended" review, before the injunction was issued, and that it currently remains filtered. *See* AA00020. Hassell also claims that a purported April 29, 2013 amendment to Bird's review "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." R.B. at 24. The court below did not, however, make such a factual finding, and in any case Hassell fails to explain how her mere speculation based on inadmissible double hearsay amounts to "substantial evidence" that would support a determination of aiding and abetting.

[8] Hassell also argues that the reasoning in *Blockowicz* is "flawed" because "an internet post ... persists over time, at the sufferance of the service provider." R.B. at 24-25. As discussed above, this reflects a misunderstanding of the single publication rule.

The Eastern District of Louisiana's opinion in *South Central Bell*, in contrast, is based on very different facts. There, the nonparty telephone company actively sought to be included in the underlying injunction; it also engaged in affirmative action following notice of the injunction to prevent Constant, the enjoined party, from violating the injunction by intercepting calls directed to Constant. 304 F. Supp. at 734.[9] As such, the district court concluded that instructing the telephone company to cease intercepting calls would constitute an order "to do the very thing that this Court has ordered Constant and all others acting in concert with him not to do." *Id.* at 736. Here, in contrast to the telephone company in *South Central*, Yelp is obviously not seeking to be *included* in the injunction, and has done nothing since the issuance of the injunction. *South Central* is simply inapplicable.

c. The Designation Of The Birdzeye B. Review As "Recommended" Is Not Aiding And Abetting.

Hassell also points to the trial court's determination that Yelp is an aider and abettor because it "highlighted at least one of Bird's defamatory posts by making it a 'Recommended Review.'" R.B. at 17. As discussed

[9] For that reason, the *South Central* court's statement that failure to take action to prevent use of its equipment in violation of the injunction would amount to "passive participation in the violation" is mere dicta. The telephone company had already taken action by intercepting calls; the question of whether doing nothing would have amounted to a violation of the injunction therefore had no bearing on the court's ultimate holding.

in Yelp's Opening Brief, that characterization of Yelp's conduct is clearly erroneous, as it ignores the fact that the purported "highlighting" was an automated process that occurred *before* the issuance of the injunction, and cannot constitute an intentional act to aid and abet the violation of the injunction. *See* A.O.B. at 27-28.

Moreover, Hassell's argument also makes no logical sense based on the undisputed record. If Yelp's goal were to aid and abet Bird's alleged defamation of Hassell, why would The Hassell Law Group have an average ranking of four and a half stars on Yelp's website—half a star short of the highest possible ranking? *See* AA00518. Why would Yelp designate as "Recommended" a five-star review from "Art B." dated April 20, 2012, that recommends that The Hassell Law Group be the first call to make following an injury resulting from negligence? *Id.* Conversely, why would Yelp designate the "J.D." comment, which Hassell alleges is defamatory, as not "Recommended" if its goal were to aid and abet the defamation of Hassell? *See* AA00519. Indeed, the presence of both positive and negative reviews in both categories is indicative of nothing more than Yelp's exercise of traditional editorial functions through automated software. *See* A.O.B. at 38-42. These logical flaws severely undermine the trial court's conclusions, but Hassell provides no explanation for why they should be ignored.

d. Yelp Is Not Bird's Agent.

Finally, this Court should reject Hassell's specious argument that Yelp's terms of service somehow transform Yelp into Hassell's agent. R.B. at 26-28. Hassell cannot cite a single case holding that obtaining a non-exclusive license, such as the one contained in Yelp's terms of service, renders the licensee an agent of the licensor. Indeed, the very definition of agency under California law bars such a broad conclusion. California Civil Code § 2295 defines an agent as "one who represents another, called the principal, in dealings with third persons." Further, it is well-settled law that one of the "essential characteristics of an agency relationship" is that "a principal has the right to control the conduct of the agent with respect to matters entrusted to him." *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.*, 148 Cal.App.4th 937, 964, (2007) (citation omitted).

Nowhere in the language from the terms of service on which Hassell relies does a user grant Yelp *any* authority to represent it in dealings with third persons. *See* AA00747. The grant of "world-wide, perpetual, non-exclusive, royalty-free, assignable, sublicenseable, transferable rights" affirmatively establishes that Yelp may display a user's content, irrespective of the user's wishes. *See id.* That is the antithesis of granting the user the right to control the conduct of Yelp, the supposed agent in this scenario.

This case is a far cry from the only case Hassell cites to support her agency argument, *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973). R.B. at 27-28. There, All American "bought Golden State's soft drink bottling and distribution business after the National Labor Relations Board had ordered Golden State, 'its officers, agents, successors, and assigns' to reinstate with backpay a driver-salesman, Kenneth L. Baker, whose discharge by Golden State was found by the Board to have been an unfair labor practice." *Id.* at 170. The Board found that "All American, having acquired the business with knowledge of the outstanding Board order, was a 'successor' for purposes of the National Labor Relations Act and liable for the reinstatement of Baker with backpay." *Id.* at 171.

The Ninth Circuit upheld the Board's decision, and the Supreme Court affirmed, holding 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)." *Id.* at 180. In so holding, the Supreme Court pointed out that "substantial evidence supported the Board's finding that All American purchased the business with knowledge of the unfair labor practice litigation." *Id.* at 173.[10]

[10] Yelp also notes that, consistent with *Regal Knitwear*, the Supreme Court in *Golden State Bottling* specifically observed that "There will be no adjudication of liability against a bona fide successor without affording (it) a full opportunity at a hearing, after adequate notice, to present evidence on

Hassell's attempt to shoehorn the relevant facts here into the *Golden State Bottling* holding demonstrates the dearth of support for her argument. Yelp is not a bona fide purchaser of anything. Nor can it be said that it acquired rights in Bird's allegedly defamatory posts with knowledge that they were unlawful; the terms of service granting Yelp its non-exclusive license over Bird's posts went into effect when they were posted on Yelp's website—before the court below found those posts to be defamatory. Acquiring non-exclusive copyrights to display a user's content is not the same as assuming the obligations of an entire business upon purchase.

Principles of agency and contract law do not establish that Yelp was aiding and abetting Bird, and the injunction should have been vacated.

C. The Injunction Against Yelp Is Void Under Code Of Civil Procedure Section 580 Because The Relief Granted To Hassell Exceeds That Demanded In The Complaint.

The entire Judgment, including the injunction against Yelp, is void for violating California Code of Civil Procedure Section 580, which requires that "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint."

Hassell largely concedes that the injunctive relief the trial court granted Hassell exceeds the demand in the Complaint in three ways. *First*,

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the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices." *Id.* at 180 (citation and internal quotations omitted). As discussed at length in Section I.B.1, above, Yelp due process rights were violated when it was named in the injunction without being afforded any notice or hearing.

the Complaint only requested injunctive relief as to Bird, but the Judgment ordered mandatory injunctive relief against Yelp. *Second*, the injunctive relief sought in the Complaint was limited to removal of comments already posted on the Internet "about plaintiffs" (AA00013:24), but the Judgment extended the injunction to future comments on any topic. AA00212-213. *Third*, the Complaint identified with particularity only statements from the first review from Birdzeye B. AA00006:21-8:7. The Judgment, in contrast, was based on three statements, one of which had not even been posted at the time the Complaint was filed. AA00050-51. These violations of Section 580 require reversal of the trial court's ruling.

According to Hassell, so long as the Complaint sought an "injunction," at all, Section 580 is satisfied, regardless of whether the parties enjoined are the ones named in the Complaint, and regardless of the scope of the relief requested and obtained. Hassell insists that even adding a non-party to the injunction does not qualify as ordering "materially different injunctive relief." R.B. at 31.

Hassell's interpretation of Section 580 runs counter to the statute's very purpose. The "primary purpose" of the section is to ensure that a party who receives a complaint but does not appear to defend itself has "adequate notice of the *maximum judgment* that may be assessed against them." *Stein v. York*, 181 Cal.App.4th 320, 325 (2010) (emphasis added; citations omitted). "This section is not merely procedural but a statutory expression

of the mandates of due process, which require formal notice of *potential liability*." *Janssen v. Luu*, 57 Cal.App.4th 272, 278 (1997) (emphasis added; citation and internal quotations omitted). To be sure, the "language of section 580 does not distinguish between the *type* and the amount of relief sought." *Becker v. S.P.V. Constr. Co*., 27 Cal. 3d 489, 493-94 (1980) (emphasis added); *see also Finney v. Gomez*, 111 Cal.App.4th 527, 539 (2003). Thus, the trial court cannot award relief broader in scope, or exceeding the potential liability requested in the complaint, regardless of whether that relief is monetary or injunctive. Here, it is undisputed that the trial court granted relief far broader in scope, by including an additional party and incorporating additional statements than those described in the Complaint.

Hassell acknowledges that the Complaint identified only one allegedly defamatory statement, and yet her default papers sought relief (both monetary and injunctive) as to three allegedly defamatory statements. R.B. at 31, n.11. In defense of this clear error, she argues that a plaintiff may recover relief greater than was sought in the complaint so long as the plaintiff's increased harm was foreseeable. Specifically, Hassell claims that the relief the court granted for the two additional statements is of no moment because it was "foreseeable" that Bird might make additional statements. *Id*. Not only is this argument contrary to the strict construction of Section 580 that the Supreme Court has mandated (*see Greenup v.*

Rodman, 42 Cal. 3d 822, 826 (1986)), but it also is contrary to the guiding principle behind Section 580: that no matter the circumstances or how foreseeable a plaintiff's damage might be, Section 580 provides a hard and fast rule that a plaintiff cannot recover from a defaulting defendant more than the relief sought in the complaint. *See In Re Marriage of Lippel*, 51 Cal. 3d 1160, 1166 (1990).

Similarly, Hassell argues that the trial court's order satisfied the *purpose* of Section 580, because Yelp purportedly was "on actual notice of the suit even before Bird's time to answer had expired." R.B. at 30. Of course, as described above, Hassell purposefully chose *not* to name Yelp as a defendant or serve it with the Complaint—she did not give Yelp "actual notice" of the suit. Mailing a letter to a Yelp executive, attaching a copy of a Complaint in which Yelp was not named as a party, and which sought relief only against Defendant Bird, is not notice of anything other than the sender's desire that Yelp voluntarily remove the content at issue. It does not constitute actual notice that Hassell might seek an injunction against Yelp. Indeed, Section 580 stands for the proposition that due process requires plaintiffs to give defendants *more* than the general knowledge that they could be held liable (which did not even occur here); rather, defendants are entitled to notice of the exact amount and scope of the relief sought against them should they choose not to appear. Hassell cannot evade that clear purpose by claiming that Yelp should somehow have

known the injunction was possible based on a letter she mailed the previous year which said no such thing. Hassell's contorted rationale does not comport with the fairness guarantees embodied in Section 580.

In addition, Hassell's Complaint sought general damages "in excess of" $25,000, and special damages "in excess of" $25,000. AA00013. The trial court awarded Hassell a whopping $557,918.85. *See* AA00212. The California Supreme Court has long held that "a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint." *Becker v. S.P.V. Constr. Co.*, 27 Cal. 3d 489, 493-94 (1980). In *Becker*, the Supreme Court held that where a Complaint included a prayer for compensatory damages "in excess of $20,000", a default judgment awarding the plaintiff damages greater than $20,000 violated the statute. *Id*. at 494. Having awarded Hassell more than half a million dollars in monetary damages against Defendant Bird, the default judgment violated section 580 and is void for this reason alone. *See Greenup v. Rodman*, 42 Cal. 3d 822 (award on default of $676,000 improperly exceeds $100,000 amount sought in complaint), cited at R.B. at 31.

II. THE CDA BARS THE INJUNCTION AGAINST YELP

Hassell admits that the "CDA was intended to protect internet service providers from being held at fault for the third-party content they post" (R.B. at 39), yet that is precisely the circumstances in which Yelp

finds itself here. Hassell is attempting to hold Yelp at fault as an "aider and abettor," through its act of publishing third-party content on its website. Because Congress expressly granted immunity to such publishing activities under the CDA, the trial court should have granted Yelp's motion to vacate the injunction. *See* A.O.B. at 32-47.

A. The Injunction Imposes Liability on Yelp, Based on Its Conduct as a Publisher.

Hassell argues that the CDA "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." R.B. at 40. This is flatly wrong. The trial court expressly based its finding of liability on Yelp's conduct as the publisher of Defendant Bird's comments. AA00809-10. Under clear law—and as a matter of common sense—enjoining a party from publishing content is a remedy that can only follow from a finding of liability, and thus the injunction entered against Yelp cannot survive the robust protection of the CDA.

First, Hassell states that the central question under Section 230 is whether "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker." R.B. at

41, *citing Barnes v. Yahoo! Inc*., 570 F.3d 1096, 1102 (9th Cir. 2009).[11] She then conclusorily asserts, without explanation, that "[h]ere, Plaintiffs have not sought to treat Yelp 'as a "speaker" of the poster's words.'" R.B. at 41 (citations omitted).

To the contrary, "[a]n action to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher, and is therefore inconsistent with section 230." *Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So.3d 727, 731 (Fla. Dist. Ct. App., 2014) (dismissing plaintiffs' claim for injunctive relief). Moreover, Hassell's own representations to the Court throughout this action make clear that she is, in fact, seeking an injunction against Yelp based on its conduct as a publisher or speaker. In her Opposition to Yelp's Motion to Set Aside and Vacate Judgment, Hassell argued explicitly that Yelp was not immune under the CDA because, "Yelp may not have initially created the defamatory reviews, but its active promotion of the defamation and passive statement that it is truthful *demonstrates that Yelp is acting as a*

[11] In *Barnes v. Yahoo, Inc.!*, the court held that Section 230 barred a negligence claim against the interactive computer service, Yahoo, but did not bar a promissory estoppel claim based on Yahoo's promise to remove from its website nude photographs of the plaintiff and other indecent materials posted by the plaintiff's ex-boyfriend; the asserted liability for promissory estoppel was not based upon Yahoo's status as a publisher, but rather from its status as a promisor who displayed a manifest intention to be legally obligated to do something. Here, Hassell's claim that Yelp should be enjoined is based on Yelp's conduct in hosting Bird's content, and thus is based upon Yelp's status as a publisher.

'publisher' or 'speaker.'" AA00663:10-12 (emphasis added). It is plain on the face of her papers that Hassell is targeting Yelp because of its conduct as a publisher of Bird's content. *See, e.g.*, A.O.B. at 38-42.

Second, Hassell argues that the CDA does not apply in this action because she did not name Yelp as a party, and she did not bring any causes of action against Yelp. But this fact undercuts Hassell's argument, rather than supports it. Hassell is not entitled to greater relief against a *non-party* than she could possibly obtain against a *party* facing causes of action for allegedly tortious conduct and specified claims for relief.

Struggling to find any way to avoid the absolute protection of Section 230, Hassell suggests that Yelp invited an injunction entered without due process of law by only arguing below that it "cannot be sued or face tort liability." R.B. at 41. Hassell attempts to conflate the distinction between "be[ing] sued" (*i.e.*, being given notice and opportunity to be heard before being enjoined, to which Yelp was entitled), and "fac[ing] tort liability" (*i.e.*, being held liable). R.B. at 41. But the immunity from liability that Section 230 provides is not limited to a prohibition on an interactive computer service *being sued*, and Hassell does not cite a single case holding that it is.

Unable to find a case to support her claims, Hassell attempts to distinguish the legion of case law cited by Yelp in its Opening Brief by claiming that "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." R.B. at 41 (emphasis omitted). Thus, she attempts to use her own procedural misconduct to distinguish the applicable case law. The cases interpreting the CDA involve parties rather than non-parties, *not* because the CDA does not apply where a plaintiff pursues an injunction against a non-party, but because the trial court should never have enjoined a non-party, for all the reasons explained in Section I.

While Section 230 normally arises when a defendant invokes it, that is only because a party seeking an injunction against an interactive computer service must name it as a party in a lawsuit and serve its registered agent with legally sufficient notice, *i.e.*, service of process. *See infra*, Section I; *cf.* C.C.P. §§ 415.10-415.95. Letters mailed to executives do not suffice to subject an interactive computer service to the court's jurisdiction. After being served, the interactive computer service then has an opportunity to explain to the court that it is immune from an injunction under Section 230. In Hassell's upside-down version of the law, a plaintiff who wants to enjoin an interactive computer service can nullify its immunity under the CDA by suing the creator of the third-party content and then obtaining an injunction binding the interactive computer service—all

without giving the interactive computer service notice, naming it as a party, or bringing any claims against it. This is not, and cannot be, the law.

In any event—and contrary to Hassell's claims—Section 230 immunity encompasses claims for injunctive relief, and the cases do not distinguish between defendants and non-parties. *See Kathleen R. v. City of Livermore*, 87 Cal.App.4th 684 (2001) (Section 230 barred all the plaintiff's state law claims, including those for injunctive relief, arising out of a city library's failure to restrict her minor son's access to sexually explicit Internet materials); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (4th Cir. 2004) ("Indeed, given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief."); *Smith v. Intercosmos Media Grp., Inc.*, No. Civ.A. 02-1964, 2002 WL 31844907, at *5 (E.D. La. Dec. 17, 2002) (Section 230 provides immunity from claims for injunctive relief).

Hassell's attempts to distinguish *Kathleen R.* are unavailing. She claims the case is inapposite because it involved a plaintiff who "sued the defendant directly" (in other words, in a manner respecting the due process rights of the party sought to be enjoined), not to "effectuate a judgment against the original content provider." R.B. at 43. Again, while Hassell identifies a difference, it is one without distinction. She cannot circumvent

the protections of the CDA by seeking an injunction against a non-party website, when the non-party website would be immune from the same remedy as a named defendant. And while Hassell concedes that there is "vibrant, extensive national jurisprudence on section 230" (R.B. at 43), she is unable to cite a *single case* in support of her proposition that the CDA allows internet computer services to be subject to injunctions to remove third-party content so long as they are not named in an action. Indeed, not a single court in any jurisdiction, state or federal, has so held—unsurprising, given plaintiffs typically (and easily) satisfy the basic due process requirements that Hassell ignored here.

B. Hassell's Purported Inability To Enforce Her Judgment Against Bird Is Legally Irrelevant And Unproven.

Hassell concedes that "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 (2006) (emphasis added)), and that "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" (*M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1055 (E.D. Mo. 2011)). R.B. at 45. Despite these clear edicts that she can seek recovery only from Defendant Bird, and cannot seek to punish or deter Yelp, Hassell jumps to the unsupported, and unsupportable conclusion that "[e]ach of these

passages necessarily assumes that the internet service provider would comply with recourse ordered in a suit against the original wrongdoer." R.B. at 45.

The assumption Hassell proposes makes no sense. The plain language of the CDA and uniform case law mean that under the CDA, a court may not order recourse against an interactive computer service in a suit over content created by a third-party wrongdoer. Period. The court may order recourse against the original wrongdoer, but the interactive computer service has no place in the action. *See Barrett*, 40 Cal. 4th at 40 (recognizing that interactive computer services receive "broad immunity for defamatory republications on the Internet").

Hassell similarly claims that the CDA "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." R.B. at 45. But again, a valid court order finding user content defamatory can only apply to the *original source* of the statement. *See Barrett*, 40 Cal. 4th at 40. There can be no *valid* court order against the interactive computer service obligating it to remove the content. *See M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1055. Indeed, Hassell fails to cite a single case in which a court required an interactive computer service to remove a defamatory posting. That is because doing so would violate the CDA's broad immunity for republications by interactive computer services.

Hassell suggests that the CDA does not apply to this action because the jurisprudence interpreting the CDA "assumes victims will have recourse against the original content provider." R.B. at 44. But the CDA contains no exception for plaintiffs who are unable to enforce their rights against the original content provider, and again, Hassell offers no case that actually supports her novel theory. Each of the cases she cites supports Yelp, making clear that under the CDA, her *only* remedy is against Bird.

But even if it were legally relevant whether Hassell could obtain meaningful relief from Bird—although it is not—it would not matter because Hassell has not provided any evidence to support her claim that she does not have recourse against Defendant Bird. The fact that Bird chose not to respond to the Complaint does not mean Hassell cannot enforce a judgment against her. As Yelp's counsel stated at the oral argument before the trial court, Hassell could institute contempt proceedings against Bird (*see* AA00842) and could also seek to impose a lien. To be sure, Hassell may have already taken these actions, but she has remained silent during this appeal as to any efforts to enforce the judgment against Bird. She asks this Court to simply presume that she has no recourse, and therefore is entitled to circumvent the CDA and pursue remedies against Yelp. Even if the CDA was susceptible to that interpretation, Hassell still could not prevail because the Court may not accept Plaintiff's bare argument as established fact.

C. Congress Enacted the CDA to Protect Interactive Computer Services Like Yelp from Actions Like This One.

In her Respondent's Brief, Hassell parrots the purposes of the CDA, and yet fails to see the way in which her own conduct undermines them. She recites that one of the "deleterious effects" of imposing liability on an interactive computer service based on notice is that "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 … would provide a natural incentive to simply remove messages upon notification, chilling the freedom of Internet speech." R.B. at 47, quoting *Barrett*, 40 Cal. 4th at 54-55.

Yet the very basis of Hassell's argument that Yelp may be enjoined is her insistence that it was enough that she sent a letter to Yelp "notifying" it that Defendant Bird's posts were defamatory and demanding that Yelp voluntarily remove them, and that Yelp somehow committed a wrongful act, aiding and abetting Bird, by choosing to do nothing. R.B. at 1. Hassell should not be allowed to obtain an injunctive remedy against Yelp where Yelp acted strictly in accordance with the immunity provided to it by the CDA. Indeed, the CDA was enacted to protect website providers like Yelp from efforts to chill the freedom of Internet speech by plaintiffs like Hassell.

Hassell's demand that Yelp be enjoined based upon her purported "notification" to Yelp, is not her only attempt to circumvent the the CDA. At the hearing on the motion to vacate, Hassell admitted that she did not name Yelp in her action *because* Yelp informed her that it was immune from suit under Section 230. AA00837:13-15. Thus, because she was convinced that Yelp would be immune from an injunction if it were named as a defendant, she purposefully chose to wait until she had a default judgment against Bird. Only then did she seek to add Yelp to the resulting injunction—without providing it notice or an opportunity to raise its immunity under Section 230—so that she could argue that Section 230 does not apply. If her tactics succeed, this case has the potential to set a precedent dangerous to the freedom of Internet speech, and directly contrary to the Congressional purpose in enacting Section 230. Hassell may only seek her recovery, injunctive or otherwise, from Defendant Bird, and not from Yelp. That Hassell attempted to obtain injunctive relief against a non-party does not alter that rule of law.

III. THE INJUNCTION IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

In its Opening Brief, Yelp explained that the injunction against Yelp is impermissibly broad, and on that basis alone, must be vacated as an unconstitutional prior restraint. *See* A.O.B. at 48-52. In her Respondents' Brief, Hassell offers virtually no response. *See* R.B. at 50. Instead, she

quotes *Balboa Island* at length, including the Court's explanation that "[p]rohibiting 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." 40 Cal. 4th at 1150. Yet this very rule dooms the injunction. The injunction, as written, prohibits Yelp from hosting posts by Birdzeye B. or J.D. *before* either user has written such posts.

Moreover, the injunction violates Yelp's First Amendment rights. Hassell conclusorily states that "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." R.B. at 51. Hassell is conflating *Bird's* First Amendment rights, with *Yelp's* independent First Amendment rights not to be enjoined from publishing future speech. It is well settled that distributors or publishers suffer their own constitutional injury when they are foreclosed from publishing another's speech. *See, e.g.*, *Marcus v. Search Warrants of Property*, 367 U.S. 717, 736-37 (1961); *see* A.O.B. at 23.

Finally, in a footnote, Hassell acknowledges Yelp's argument that the injunction is overbroad but argues that the "rational reading of the court's order, in context and as it relates to Yelp," is that the reference to

"subsequent comments" of these reviewers means "updates to these reviews, like the April 29, 2013 post." R.B. at 50, n.18.

Hassell's efforts to narrow the injunction's scope are unavailing. *First*, she claims that this "Court must draw reasonable inference in support of the judgment," and cites to *Leung v. Verdugo Hills Hosp.*, 55 Cal. 4th 291, 308 (2012). But the Supreme Court in *Leung* did not evaluate the constitutionality of an injunction on speech. Instead, the Court in *Leung* held that "in *evaluating a claim of insufficiency of evidence*, a reviewing court must resolve all conflicts in the evidence in favor of the prevailing party and must draw all reasonable inferences in support of the trial court's judgment." *Id*. (emphasis added). Here, the Court is not merely evaluating a claim of insufficiency of evidence as to the injunction. It is assessing whether the injunction—as worded—is broader than necessary and therefore constitutionally invalid.

Second, rather than draw reasonable inferences in support of the injunction, this Court is required to evaluate the injunction "with a 'heavy presumption' *against* its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added; citations omitted); *see* A.O.B. at 49. Moreover, restrictions on speech must be specific and clear, and will be stricken down if they are vague or uncertain. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (1976) (rejecting part of

order that was "too vague and too broad to survive the scrutiny [the Supreme Court has] given to restraints on First Amendment rights").

Here, the injunction orders Yelp to remove speech, and is therefore a prior restraint. The injunction refers to "subsequent comments" by Birdzeye B. and J.D., and it is irrelevant whether the court meant future "updates" to existing reviews, or future separate posts. While a court can, in the extremely rare instance, enjoin the republication of statements found at a jury trial to be defamatory—if the party to be enjoined had an opportunity to defend itself to the jury—it *cannot* enjoin future speech beyond that republication. The court erred in issuing an unconstitutional prior restraint that required Yelp to remove future comments by Birdzeye B. or J.D.

IV. YELP'S MOTION TO VACATE WAS TIMELY AND THE COURT HAS JURISDICTION

Hassell provides only circular reasoning in trying to overcome Yelp's showing that its motion to vacate was timely. R.B. at 34-39. *First*, as Hassell concedes, so long as the original default judgment enjoining Yelp was void, the motion to vacate that judgment could be brought at any time. *See* R.B. at 34. As detailed throughout this brief, the trial court's original default judgment violates Yelp's and Bird's rights; Yelp's motion to vacate that order was timely; and the trial court had the jurisdiction to rule on it.

Moreover, in her Respondents' Brief, Hassell does not dispute Yelp's argument that the trial court originally lacked any basis for enjoining Yelp, because there was no evidence Yelp had aided and abetted Bird at the time the original default judgment was entered. *See* R.B. at 28. She claims that despite this, Yelp was not denied due process, arguing that "application of the injunction to Yelp was correct *at the time of Yelp's belated challenge months later*…" R.B. at 28 (emphasis added). Her argument effectively concedes that the original default judgment enjoining Yelp was void for lack of due process. Her reliance on the trial court's subsequent findings on the motion to vacate dooms her argument as to timeliness.

Second, the time limit in C.C.P. § 663a "only applies to those who were parties of record when judgment was entered." *Aries Dev. Co. v. Cal. Coastal Zone Conservation Comm'n*, 48 Cal.App.3d 534, 542 (1975). Here, Yelp was not a party of record when the judgment against it was entered, and therefore the time limitation in Section 663a does not apply.

Hassell argues that the rule in *Aries*, exempting non-parties from the Section 663a time limits, should not govern here because in *Aries*, while the non-party (the Charles family) knew about the underlying proceedings, no formal notice of the type listed in section 663a was sent to them. In fact, the decision in *Aries* is simply silent as to whether the Charles family

received notice prior to moving to vacate the judgment. The Court's statement, 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), is equally true of Yelp. Moreover, the Court of Appeal's holding that the time limit in Section 663a "only applies to those who were parties of record when judgment was entered," was not premised on an analysis or discussion of what kind of notice the Charles family received; it simply noted the Charles family members were not parties of record. That holding governs here.

Again, Hassell can find no case to support her argument. She does not cite a single case in which the Court barred a non-party from bringing a motion to vacate more than 60 days after service of notice of entry of a judgment against it. Case law subsequent to *Aries* suggests that where a judgment impacts the rights of a non-party, it "may be set aside on motion within a reasonable time after its entry," not exceeding the six-month time limit prescribed by section 473 of the Code of Civil Procedure. *Plaza Hollister Ltd. P'ship v. County of San Benito*, 72 Cal.App.4th 1, 19 (1999), *citing In re Dahnke*, 64 Cal.App. 555, 560-61 (1923) (maximum of six months to move to vacate for lack of notice as statutorily required for appointment of a guardian).

In *Plaza Hollister*, the Court of Appeal noted that "the motion, in such case, is not necessarily based upon [former] section 473; but in

determining whether it is presented within a reasonable time, the period prescribed by [former] section 473 within which motions under it may be made is, as said in *Smith v. Jones*, the standard or criterion in all cases." *Id.* (citing *Smith v. Jones*, 174 Cal. 513, 516 (1917)). There, a county assessor intervened in a property tax refund action filed by a corporation against a county. The assessor moved to vacate a stipulated judgment between the parties, and the trial court denied the motion. *Id.* The Court of Appeal reversed and remanded with directions to vacate the judgment. The Court held that because the assessor filed a notice of motion to vacate the judgment within six months after entry of judgment, it was brought within a reasonable time and the motion was timely. *Id.*

As the Courts in *Aries* and *Plaza Hollister* recognized, there is good reason to afford non-parties a "reasonable time" to challenge the judgment in an action in which it was not a party. When it received notice of the injunction, Yelp was a stranger to the lawsuit. It would hardly be fair to afford a non-party no more than 15 days from receipt of service to respond to an Order against it arising from an action in which it had not been involved. Indeed, the Code of Civil Procedure entitles defendants to a greater amount of time to respond to allegations in a complaint against them.

Here, Yelp brought its motion within a reasonable time. As Hassell concedes, she did not serve anything on Yelp until January 29, 2014. R.B.

at 6. Yelp moved to vacate the judgment against it less than four months later, on May 23, 2014. *See* AA00225. During that time, Yelp tried to resolve the matter outside of court. Yelp wrote to Hassell within days of receipt of the Order, on February 3, 2014, explaining why Yelp objected to the Order. *See* AA00732. Hassell responded nearly two months later, on April 30, 2014. *See* AA00736. Within three weeks of Hassell's response, Yelp moved the court to vacate the Order. Because it did so within a reasonable amount of time, and certainly within six months of receiving proper service of the Order, its motion was timely.

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 against future speech, this Court should reverse the denial of Yelp's motion to vacate the judgment.

Dated: May 4, 2015

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court 8.204 & 8.490)

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Dated: May 4, 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 REPLY 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 **May 4, 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 **May 4, 2015**, at San Francisco, California.

Natasha Majorko