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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF LOS ANGELES – CENTRAL DISTRICT  
17

18 KATHLEEN SPIEGELMAN, GARY  
19 GAGGOSIAN, and DUDLEY DANOFF, on  
behalf of themselves and all others similarly  
20 situated,

21 Plaintiffs,

22 vs.

23 YELP, INC., and DOES 1 through 100, inclusive,

24 Defendants.  
25  
26  
27  
28

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ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

APR 18 2019

Sherri R. Carter, Executive Officer/Clerk of Court  
By: Brigitte De La Rosa, Deputy

Case No. 18STCV05378

Assigned for all purposes to Presiding Judge  
Daniel J. Buckley

**YELP INC.'S NOTICE OF MOTION AND  
SPECIAL MOTION TO STRIKE  
PLAINTIFFS' FIRST AMENDED  
COMPLAINT UNDER CCP § 425.16;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: June 11, 2019  
Time: 10:30 a.m.  
Place: Dept: 1, Spring Street Courthouse

Complaint filed: Nov. 16, 2018  
First Am. Compl. filed: Dec. 3, 2018

*[Filed concurrently with Declaration of Ian  
MacBean; and [Proposed] Order]*

1 **TO PLAINTIFFS, ON BEHALF OF THEMSELVES AND ALL OTHERS**  
2 **SIMILARLY SITUATED, AND THEIR COUNSEL OF RECORD:**

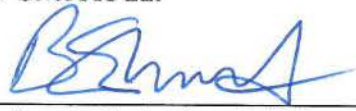
3 PLEASE TAKE NOTICE that on June 11, 2019, at 10:30 a.m., or as soon thereafter as the  
4 matter may be heard in Department 1 of the above-entitled court located at 312 North Spring Street,  
5 Los Angeles, CA 90012, defendant Yelp Inc. (“Yelp”) will and hereby does move this Court,  
6 pursuant to Code of Civil Procedure Section 425.16, for an order striking the first amended  
7 complaint filed by plaintiffs Kathleen Spiegelman, Gary Gaggosian, and Dudley Danoff  
8 (“Plaintiffs”).

9 The Motion is based on this Notice, the attached Memorandum of Points and Authorities, the  
10 declaration of Ian MacBean in support of the Motion, the complete files and records in this matter,  
11 and upon such further oral and documentary evidence as may be presented at the time of the hearing  
12 in this matter.

13 Please take further notice that if the Court grants Yelp’s Special Motion to Strike, Yelp  
14 reserves the right to file a separate motion against Plaintiffs for the recovery of attorneys’ fees and  
15 costs as provided in Code of Civil Procedure section 425.16, subdivision (c). *See Ketchum v. Moses*,  
16 24 Cal. 4th 1122, 1131 (2001) (“any SLAPP defendant who brings a successful motion to strike is  
17 entitled to mandatory attorney fees.”).

18 DATED: April 17, 2019

19 REED SMITH LLP

20 By:   
21 \_\_\_\_\_  
22 Brian A. Sutherland  
23 Anthony S. Newman

24 YELP INC.  
25 Aaron Schur  
26 Nicolette D. Martz

27 *Attorneys for defendant Yelp Inc.*  
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1 meritless attempt to threaten Yelp’s platform as a pretext for demanding class compensation. This  
2 Court should reject that effort and grant Yelp’s anti-SLAPP motion.

3 **STATEMENT OF FACTS**

4 **A. Yelp Provides a Forum for Members of the Public to Review Businesses**

5 Since 2004, Yelp has owned and operated Yelp.com, a popular social networking and search  
6 website, and related websites and mobile applications (collectively, “Yelp”) for users to share  
7 information about their communities. Yelp provides and publishes a forum for members of the  
8 public to read and write reviews about local businesses, services, and other entities, including non-  
9 profits and government agencies. Yelp helps the public make more informed choices about local  
10 businesses and activities. Declaration of Ian MacBean ¶ 4.

11 Yelp is available to the public at no charge and without any registration requirement. Those  
12 who choose to register may create an individual consumer account, also free of charge. MacBean  
13 Decl. ¶ 5. A registered user can write reviews about and submit photos of local businesses and  
14 service providers, such as schools, dentists, child care providers, restaurants, charitable  
15 organizations, and places of worship—to name just a few. MacBean Decl. ¶ 5.

16 Yelp users write reviews about businesses by logging in to the website and entering their  
17 review into a text box. Along with their reviews, users rate businesses on a scale of one to five stars.  
18 Yelp also allows users to delete or edit their reviews or write review updates that appear alongside  
19 the original review. MacBean Decl. ¶¶ 8-10, Exs. B-C. Reviews and ratings appear on the Yelp page  
20 of the reviewed business, as well as on the Yelp page of the review author. Any member of the  
21 public with access to the internet can view these reviews, and any account holder who has registered  
22 can post reviews. On the page of a reviewed business, Yelp uses star ratings provided by users to  
23 create an aggregate rating which is assigned to the business. MacBean Decl. ¶ 11. Reviews on Yelp  
24 are more often positive than negative. *See* MacBean Decl. ¶ 12, Ex. A.

25 Yelp is also a local search engine, which allows users to find businesses and associated  
26 reviews by entering search queries (like “plumbers” or “delicious chicken tacos” or “Episcopal  
27 Church”) and specifying a geographic location (such as an address, city, or neighborhood). The  
28 search engine is “local” because Yelp limits its search results to content on the Yelp website relating

1 to a particular geographic area. Tens of millions of users search Yelp for local businesses and read  
2 reviews about them for free, every month. MacBean Decl. ¶¶ 5, 7, Ex. A.

3 **B. Yelp Provides Free Accounts to Businesses to Post Information about Their Business**

4 A business’s name may appear on Yelp in one of two ways. First, any user—whether  
5 affiliated with the business or not—may provide the name of the business to Yelp when creating or  
6 editing a business page. Second, other business names are provided to populate business pages by  
7 Acxiom Corporation, a company that obtains business data from publicly-available sources such as  
8 government records and business directories. Acxiom was the source of the original business names  
9 at issue in this case. MacBean Decl. ¶ 14.

10 Once a business page is displayed on Yelp, a business representative may “claim” it without  
11 charge. A business representative claims a business by affirming that he or she has authority to claim  
12 the account on behalf of the business and agreeing to Yelp’s Terms of Service and Privacy Policy.  
13 Once a business representative does so, he or she may provide additional or updated information  
14 about the business, such a new name, address, telephone number, website, and hours of operation.  
15 Business account holders also may view statistics about their Yelp page, such as the number of  
16 people who viewed their Yelp profile or contacted them through Yelp’s mobile applications. In  
17 addition, businesses may post public responses to user reviews, which are placed directly below the  
18 review and are visible to any visitor to the website. Through these features, Yelp encourages  
19 dialogue regarding local businesses and consumers. MacBean Decl. ¶ 13.

20 **C. Yelp Sells Advertising to Businesses**

21 To support its free services and earn revenue, Yelp sells advertising packages to enable  
22 businesses to promote themselves on Yelp through the display of ads around search results, on Yelp  
23 business pages, and elsewhere on Yelp. Yelp’s ads feature the name and location of the business and  
24 incorporate content supplied by the advertising business and/or photos, review snippets, and ratings  
25 supplied by third-party Yelp users. MacBean Decl. ¶ 15. Businesses typically pay for advertising  
26 based on the number of “clicks” their ads receive. MacBean Decl. ¶ 15.

27 The available space on Yelp’s website where it may display ads may be thought of as Yelp’s  
28 inventory. For example, if a visitor to Yelp’s website runs a search for “sushi” in Los Angeles, the

1 corresponding search results page will have specific spaces (inventory relevant for sushi restaurants  
2 in L.A.) in which ads may appear. MacBean Decl. ¶ 15. Likewise, if a user clicks on a business’s  
3 name, the resulting business page will have specific spaces (inventory) in which ads may appear.  
4 Businesses may purchase ads to display in the available inventory. Businesses may also purchase  
5 upgrades to their own business pages, which will preclude ads from anyone else appearing on those  
6 pages—effectively buying out their business pages’ own ad inventory. MacBean Decl. ¶¶ 15-16.

7 **D. Plaintiffs and Third Parties Provide Business Information, Reviews, and Photos to Yelp**

8 Yelp did not draft or create the business information at issue here. Rather, third parties  
9 provided the information, photos, and reviews that appear for businesses, including the corporations  
10 through which plaintiffs here conduct their businesses.

11 **1. K. Spiegelman Interiors.** In November 2010, Yelp displayed business information  
12 on its website provided by Acxiom, including the name and address of “Spiegelman Interiors.” In  
13 March 2011, a Yelp user—based on the email provided, kathleenspiegelman@yahoo.com, likely  
14 Kathleen Spiegelman herself—changed the name of the business to “K Spiegelman Interiors” and  
15 edited its address, zip code, and phone number. On November 18, 2011, a user identifying herself as  
16 “Kathleen Spiegelman” and again using the email address “kathleenspiegelman@yahoo.com”  
17 registered for a Yelp business account and claimed the K Spiegelman Interiors business page. *See*  
18 MacBean Decl. ¶¶ 19-20, Ex. H. Ms. Spiegelman has used this business account to make other edits  
19 to this business page.

20 In early 2018, an anonymous third-party user added a business called “Spiegelman K  
21 Interiors” to Yelp’s website. In line with Yelp’s policies, the “Spiegelman K Interiors” page was  
22 merged into the existing “K Spiegelman Interiors” page to ensure only one page for the business is  
23 displayed on Yelp, thereby avoiding consumer confusion. MacBean Decl. ¶ 22. As of January 4,  
24 2019, three third-party users had contributed reviews that appear on the “K Spiegelman Interiors”  
25 business page. MacBean Decl. ¶ 19, Ex. I. Ms. Spiegelman conducts her business through two  
26 corporations bearing her name, K. Spiegelman Antiques, Inc. and Kathleen Spiegelman Design  
27 Studio, Inc., and a website, kspiegelmaninteriors.com. MacBean Decl., Exs. Q, T, U.

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1           **2. Gary Gagossian.** As with “Spiegelman Interiors,” Acxiom provided the business  
2 name “Gary Gagossian” to Yelp for publication on its website in November 2010. A Yelp user  
3 subsequently edited the business information for “Gary Gagossian” to categorize it as “Sewing and  
4 Alterations” and “Bespoke Clothing.” MacBean Decl. ¶¶ 23-24, Ex. L. On April 30, 2014, a user  
5 identifying himself as “Gary Gagossian” and using the email address “garygagossian@gmail.com”  
6 registered for an individual consumer user account on Yelp. That same day, Mr. Gagossian used this  
7 individual consumer account to add 16 business photos to the “Gary Gagossian” business page, one  
8 of which he later removed. As of January 4, 2019, six third-party users had contributed reviews that  
9 appear on the “Gary Gagossian” business page. MacBean Decl. ¶¶ 23-25, Exs. M-N. Mr. Gagossian  
10 conducts his business through a corporation bearing his name, Gary Gagossian Bespoke Tailoring,  
11 Inc., and website bearing his name, garygagossian.com. MacBean Decl., Exs. R, V.

12           **3. Dudley Danoff, MD.** Yelp’s records indicate that Acxiom provided the business  
13 name “Dudley S Danoff, MD”, likely in 2004, when Yelp first began to publish business directory  
14 information. As of January 4, 2019, three third-party users had provided reviews that appear on the  
15 “Dudley S Danoff, MD” business page. MacBean Decl. ¶¶ 26-27, Exs. O-P. Dr. Danoff conducts his  
16 business through a corporation bearing his name, Dudley S. Danoff, M.D., Inc., and a website.  
17 MacBean Decl., Exs. S, W.

18 **E. Plaintiffs Sue Yelp for Selling Advertising That Appears on Their Business Pages**

19 Kathleen Spiegelman filed her class action complaint against Yelp in November 2018.  
20 Shortly thereafter, she and plaintiffs Gagossian and Danoff filed their first amended class action  
21 complaint (“FAC”). Plaintiffs allege that Yelp misappropriates their individual names and likenesses  
22 when, on the Yelp pages for their businesses that contain all or part of Plaintiffs’ names, it sells and  
23 displays advertising relating to other businesses. Plaintiffs assert four causes of action. The first and  
24 second causes of action allege violation of the statutory and common-law right of publicity,  
25 respectively. FAC ¶¶ 83-93. The third cause of action alleges violations of Business & Professions  
26 Code § 17200 and is based entirely on alleged violations of the right-of-publicity statute, Civil Code  
27 § 3344. FAC ¶ 96. For their fourth cause of action, Plaintiffs allege that Yelp violated their  
28 constitutional right to privacy by using their “personal information” on its website. FAC ¶ 100.

1 Plaintiffs allege that a nationwide class of persons “who Yelp used their personal data” should be  
2 certified to bring these same claims. FAC ¶¶ 20-28.

### 3 ARGUMENT

#### 4 I. Courts Apply the Anti-SLAPP Statute Broadly to Protect Free Speech Activities

5 The Legislature enacted California’s anti-SLAPP statute to respond to meritless lawsuits  
6 brought to “chill the valid exercise of the constitutional rights of freedom of speech and petition for  
7 the redress of grievances.” Stats. 1992, ch. 726, § 2. The Legislature amended the statute in 1997 to  
8 ensure that “it shall be construed broadly” to encourage participation in matters of public  
9 significance.” Stats. 1997, ch. 271, § 1; CCP § 425.16(a). Thus, “whenever possible,” courts “should  
10 interpret the First Amendment and section 425.16 in a manner favorable to the exercise of freedom  
11 of speech, not to its curtailment.” *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106,  
12 1110 (1999); *see Nyg Ard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1037 (2008) (recognizing  
13 “mandate” to construe the anti-SLAPP statute “broadly”).

14 In ruling on Yelp’s motion, this Court should conduct a two-part analysis. First, the Court  
15 should decide whether Yelp has shown that plaintiffs’ causes of action arise from protected activity.  
16 *See Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 733 (2003). Second, if Yelp has met its  
17 initial burden to show that plaintiffs’ causes of action arise from protected activity, the burden shifts  
18 to plaintiffs to show a probability that they will prevail on their claims. *See* CCP § 425.16(b)(1).  
19 “The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a  
20 sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by  
21 the plaintiff is credited.” *Wilson v. Parker*, 28 Cal. 4th 811, 821 (2002) (quotation marks omitted). If  
22 plaintiffs do not carry their burden, the Yelp’s special motion to strike must be granted. *Varian*  
23 *Medical Systems, Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005).

#### 24 II. Plaintiffs’ Claims Arise from Yelp’s Protected Activity

25 Any cause of action arises from protected activity if it is premised on a defendant’s “written  
26 ... statement or writing made in a ... public forum in connection with an issue of public interest” or  
27 the defendant’s conduct in furtherance of the exercise of the “constitutional right of free speech in  
28 connection with a public issue or an issue of public interest.” CCP § 425.16(e)(3)-(4).

1           **A.     Yelp’s Publication of Statements in Public Forum about Issues of Public Interest**

2           Statements published on a website to which the public has access are made in a “public  
3 forum” for the purposes of the anti-SLAPP statute. Indeed, such “statements hardly could be more  
4 public.” *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 895 (2004). And California courts have repeatedly  
5 recognized that information about a business is a matter of public interest under the anti-SLAPP  
6 statute. In *Wilbanks*, for example, the defendant’s statements, which she made in “the context of  
7 information ostensibly provided to aid consumers choosing among brokers ... were directly  
8 connected to an issue of public concern,” *i.e.*, which business to choose. *Id.* at 900; *see also Chaker v.*  
9 *Mateo*, 209 Cal. App. 4th 1138, 1146 (2012); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23-24 (2007);  
10 *Carver v. Bonds*, 135 Cal. App. 4th 328, 343 (2005); Cal. Civil Code 1670.8(a)(1).

11           Here, plaintiffs’ claims arise out of information that Yelp published on its website to aid  
12 consumers in choosing among businesses. *See* MacBean Decl. ¶¶ 4-12; FAC ¶¶ 85, 91, 96, 100.  
13 Therefore, the information on Yelp’s business pages—including the names of the businesses, their  
14 locations, ratings and reviews—is a matter of public interest. *See, e.g., Wolk*, 121 Cal. App. 4th at  
15 900; *see also Edwards v. District of Columbia*, 755 F.3d 996, 1006-07 (D.C. Cir. 2014) (“Further  
16 incentivizing a quality consumer experience are the numerous consumer review websites, like Yelp  
17 ... which provide consumers a forum to rate the quality of their experiences .... That the coal of self-  
18 interest often yields a gem-like consumer experience should come as no surprise.”); *Levitt v. Yelp!*  
19 *Inc.*, 765 F.3d 1123, 1126 (9th Cir. 2014) (“Today, individuals can share their opinions with the entire  
20 world courtesy of a few taps on the keyboard. [Yelp] provides an online forum on which its users  
21 express opinions as to services ranging from dog walkers to taco trucks.”).

22           Moreover, plaintiffs themselves demonstrate that they and their businesses are matters of  
23 public interest. Plaintiffs advertised their businesses online and offline using the same names Yelp  
24 displays, showing they too believe their businesses are of interest to the public. *See Summit Bank v.*  
25 *Rogers*, 206 Cal. App. 4th 669, 694 (2012) (public interest requirement was satisfied, where, among  
26 other things, defendant promoted itself on the internet). Spiegelman alleges that her “work has been  
27 seen in tens of magazines” and she has “designed furniture for many top celebrities.” FAC ¶ 44.  
28 Likewise, Gagossian alleges that he “is a well-known tailor to the ‘stars.’” FAC ¶ 57. And Danoff

1 alleges that he “is an accomplished medical doctor” who has “authored numerous books” that are  
2 “available on [Amazon] as well as other outlets.” FAC ¶ 66. By alleging that they and their work are  
3 well-publicized, plaintiffs reinforce the conclusion that their businesses are a matter of public interest.  
4 *See Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 807-08 (2002).

5 **B. Yelp’s Conduct in Furtherance of the Constitutional Right of Free Speech**

6 The right of freedom of speech is “broad” and includes the right to distribute information.  
7 *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Van Nuys Publishing Co. v. City of Thousand*  
8 *Oaks*, 5 Cal. 3d 817, 821 (1971). “Maintaining a forum for discussion of issues of public interest is a  
9 quintessential way to facilitate [speech] rights ....” *Hupp v. Freedom Communications, Inc.*, 221  
10 Cal. App. 4th 398, 405 (2013) (claims that newspaper failed to remove comments from its website  
11 arose from protected activity).

12 Two published opinions have squarely held that a right-of-publicity claim premised on the  
13 defendant’s decision to publish advertising next to the plaintiff’s name or likeness arises from  
14 protected activity. *See Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 202, 209 (2017) (right-of-  
15 publicity claims based on Facebook’s display of ads on webpages with plaintiff’s name and likeness  
16 arose from protected activity); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 677-78 (2010)  
17 (right-of-publicity claims based on magazine’s display of ads next to plaintiff arose from protected  
18 activity). These opinions control here. Because Yelp maintains a forum for discussion of public  
19 issues and enables consumers to opine on businesses, it acts in furtherance of the constitutional right  
20 of free speech. Plaintiffs base their claims directly on these acts, *i.e.*, the publication of their business  
21 names and information on pages that may display ads. Thus, Yelp is entitled to protection from  
22 plaintiffs’ claims under the anti-SLAPP statute.

23 **C. No Exception to the Anti-SLAPP Statute Applies in this Case**

24 The Legislature created two exceptions to the anti-SLAPP statute. *See* Code Civ. Proc.  
25 § 425.17. Neither applies here. First, the “public interest” exception (§ 425.17(b)) does not apply  
26 because plaintiffs’ claims seek to vindicate their *personal* right to monetize their celebrity and their  
27 individual right to privacy and have nothing to do with the “public’s good.” *Save Westwood Vill. v.*  
28 *Luskin*, 233 Cal. App. 4th 135, 143 (2014) (“term ‘public interest’ is used to define suits brought for



1 the public’s good or on behalf of the public”). The plaintiffs’ objective is to obtain “actual damages,”  
2 “compensatory damages,” and restitution for themselves in connection with their publicity claims.  
3 FAC ¶¶ 86, 88, 93, 98, 103. But the plaintiffs’ objective “must go beyond—transcend—those things  
4 that concretely, specifically and significantly affect the litigant to affect the broader world or general  
5 public.” *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 915-16 (2004) (quotation marks and  
6 ellipsis omitted). Here, it does not. Plaintiffs’ case is about money for the small percentage of  
7 famous people who might claim that their name and likeness are monetizable assets. FAC ¶¶ 44, 48,  
8 57-58, 61, 66, 69. It was not brought “solely in the public interest.” Code Civ. Proc. § 425.17(b).

9       Second, the anti-SLAPP statute does not apply to claims against a business arising from the  
10 business’s statements of fact about its or a competitor’s operations, goods, or services, where the  
11 statement was made for the purpose of selling goods or services or in the course of delivering such  
12 goods or services, and the intended audience for the statement was a buyer or customer of the  
13 business’s goods or services or someone likely to repeat the statement to a buyer or customer. *See*  
14 Code Civ. Proc. § 425.17(c); *Simpson Strong-Tie Co. v. Gore*, 49 Cal. 4th 12, 30 (2010). But the  
15 statements at issue were not about *Yelp’s* goods or services; rather, plaintiffs contend that *Yelp*  
16 improperly published *their* names next to ads featuring *their* competitors. A business page with  
17 information about plaintiffs and ads about plaintiffs’ competitors is not a statement of fact about  
18 *Yelp*. *See Cross*, 14 Cal. App. 5th at 203; *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 4 Cal.  
19 App. 5th 1135, 1153 (2016).

20 **III. Plaintiffs Cannot Demonstrate a Probability of Prevailing on Any of Their Claims**

21       Because *Yelp* has shown that plaintiffs’ complaint arises from conduct protected under  
22 section 425.16, the burden shifts to plaintiffs to establish a probability of prevailing on their claims.  
23 *Wilson*, 28 Cal. 4th at 821. They cannot do so for several independent reasons discussed below.

24 **A. The Communications Decency Act Bars Plaintiffs’ Claims**

25       The Communications Decency Act (“CDA”), 47 U.S.C. § 230, provides expansive immunity  
26 to websites for claims arising from their publication of third-party content—such as the business  
27 names and information at issue here. *See Hassell v. Bird*, 5 Cal. 5th 522, 535, 538 (2018) (stating  
28 that § 230 immunity is “broad” and “quite robust”), *cert. denied sub nom. Hassell v. Yelp, Inc.*, No.

1 18-506, 2019 U.S. LEXIS 790 (Jan. 22, 2019). The CDA provides that: “no provider or user of an  
2 interactive computer service shall be treated as the publisher or speaker of any information provided  
3 by another information content provider.” 47 U.S.C. § 230(c)(1). The statute also provides that “[n]o  
4 cause of action may be brought and no liability may be imposed under any State or local law that is  
5 inconsistent with” the CDA. 47 U.S.C. § 230(c)(3). Thus, the CDA provides immunity where:  
6 (1) the defendant is a provider of an interactive computer service; (2) the information alleged to be  
7 harmful was provided by another information content provider; and (3) the plaintiff seeks to treat the  
8 defendant as a publisher. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997);  
9 *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 804-05 (2006). Each of these  
10 requirements is satisfied here.

11 *First*, “[t]here is no doubt that Yelp is a ‘provider or user of an interactive computer service’  
12 within the meaning of section 230(c)(1).” *Hassell*, 5 Cal. 5th at 540.

13 *Second*, the information alleged to be harmful—the names of plaintiffs’ businesses and  
14 business information—was provided by other information content providers. MacBean Decl. ¶ 14.  
15 Yelp published business names provided by Acxiom and other third parties, along with information  
16 about those businesses, which was also provided by third parties or plaintiffs themselves. Indeed,  
17 plaintiffs contributed most of the information and photos on their respective business pages.  
18 MacBean Decl. ¶¶ 20-26. Yelp did *not* provide the information that, plaintiffs contend, has publicity  
19 value—the names of businesses that include or reference the name of an individual person. MacBean  
20 Decl. ¶¶ 14, 20, 24, 27. Nor did it provide the advertising content that it displays on business pages  
21 and search result pages. MacBean Decl. ¶¶ 14-15.

22 *Third*, plaintiffs’ claims treat Yelp as a publisher. A plaintiff’s claim treats a website as a  
23 “publisher” if the plaintiff bases its claim on the website’s dissemination (publication) of third-party  
24 information or its “exercise of a publisher’s traditional editorial functions—such as deciding whether  
25 to publish, withdraw, postpone or alter content[.]” *Hassell*, 5 Cal. 5th at 532 (quotation marks  
26 omitted). Here, plaintiffs seek to hold Yelp liable for publishing business information and because,  
27 like a newspaper or the Yellow Pages, it made editorial choices when it decided where on the “page”  
28 to publish that information and advertisements. *See Stewart*, 181 Cal. App. 4th at 691 (noting that

1 publisher’s editorial functions and rights include “the content and placement of advertisements”).  
2 Because “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s  
3 traditional editorial functions ... are barred” (*Barrett v. Rosenthal*, 40 Cal. 4th 33, 43 (2006)), Yelp  
4 is entitled to CDA immunity.

5 In sum, Yelp provides a structured and searchable public forum in which tens of millions of  
6 users can freely read and discuss the information about businesses they find there. It is exactly the  
7 type of website that Congress had in mind when it enacted the CDA—one that facilitates a  
8 “staggering” amount of free speech. *Zeran*, 129 F. 3d at 331 (4th Cir. 1997); *see also Hassell*, 5 Cal.  
9 5th at 540; *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016). Congress made an explicit  
10 choice to allow that free speech to flourish, rather than hobble websites by subjecting them to tort  
11 liability based on information provided by others. *See Zeran*, 129 F. 3d at 331. Accordingly, courts  
12 frequently hold that the CDA bars right-of-publicity claims brought against a website such as Yelp.<sup>1</sup>  
13 This Court should hold that the CDA bars all of plaintiffs’ claims against Yelp in this case.

14 **B. The First Amendment Bars Plaintiffs’ Claims**

15 The First Amendment fully protects Yelp’s right to publish business information. And  
16 plaintiffs cannot show that any exception to the First Amendment’s protection would apply here.

17 **1. Yelp Has a First Amendment Right to Publish Information about Businesses**

18 Abundant precedent makes clear that Yelp’s business pages—the modern equivalent of the  
19 Yellow Pages—are entitled to the full protection of the First Amendment accorded to non-  
20 commercial speech. *See Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 964-65 (9th Cir. 2012)  
21 (Yellow Pages with ads not commercial speech); *Vrdolyak v. Avvo, Inc.*, 206 F. Supp. 3d 1384, 1388  
22 (N.D. Ill. 2016) (attorney directory with ads not commercial speech); *Davis v. Avvo, Inc.*, 345 F.

23 \_\_\_\_\_  
24 <sup>1</sup> *See Perfect 10, Inc. v. CCBILL LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (reversing district court’s order denying  
25 motion to dismiss right of publicity claim); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1067 (N.D. Cal. 2016)  
26 (leave to amend denied because pleading right of publicity claim would be futile in light of CDA); *Joude v. WordPress*  
27 *Found.*, No. C 14–01656, 2014 WL 3107441, at \*7-8 (N.D. Cal. July 3, 2014) (dismissing right of publicity claim under  
28 CDA); *Perfect 10, Inc. v. Giganews, Inc.*, No. CV11-07098, 2013 WL 2109963, at \*15-16 (C.D. Cal. Mar. 8, 2013)  
(same). Likewise, the CDA plainly bars a plaintiff’s right of privacy claim against a website based on information  
provided by a third party. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Caraccioli v.*  
*Facebook, Inc.*, 700 F. App’x 588, 589-90 (9th Cir. 2017); *see also Delfino*, 145 Cal. App. 4th at 806 (stating that “it is  
clear that immunity under section 230 is not [limited to defamation claims]” and listing other claims to which the CDA  
provides immunity, including privacy and right of publicity claims).

1 Supp. 3d 534, 540 (S.D.N.Y. 2018) (same). As the Court of Appeal held in *Stewart*, non-commercial  
2 speech is not “transformed into commercial speech merely because of its proximity to  
3 advertisements touching on the same subject matter.” 181 Cal. App. 4th at 687. So too here.

4 Moreover, members of the public “clearly have an interest in matters which affect their roles  
5 as consumers, and peaceful activities, such as [Yelp’s], which inform them about such matters are  
6 protected by the First Amendment.” *Paradise Hills Assocs. v. Procel*, 235 Cal. App. 3d 1528, 1544  
7 (1991), *disapproved on an unrelated ground in Kowis v. Howard*, 3 Cal. 4th 888 (1992); *see also*  
8 *Wilbanks*, 121 Cal.App.4th at 899 (same). Yelp’s business listings help consumers to find and  
9 choose among businesses and create a public forum for the free flow of information about those  
10 businesses. The public has a strong interest in this information affecting their role as consumers (*see*  
11 *supra*, at 7-8), and plaintiffs cannot deprive the public of its right to receive that information or  
12 deprive Yelp of its First Amendment right to publish it by naming their businesses after themselves.

## 13 2. Plaintiffs Cannot Show That Any Exception to the First Amendment Applies

14 As the Court of Appeal held in *Stewart*, plaintiffs cannot prevail on a right of publicity claim  
15 against a First-Amendment protected publisher such as Yelp unless they prove with “clear and  
16 convincing evidence” that Yelp acted with “actual malice” in placing advertisements within its  
17 business pages and reviews. *Stewart*, 181 Cal. App. 4th at 689. Plaintiffs cannot do so; no reasonable  
18 person could conclude that Yelp acted maliciously by engaging in conduct that courts have upheld as  
19 lawful and that Congress has protected as a matter of public policy. *See* 47 U.S.C. § 230(a)-(b);  
20 *Stewart*, 181 Cal. App. 4th at 689 (publisher entitled to judgment under anti-SLAPP statute where no  
21 evidence showed “intentional collusion” between advertiser and publisher to misappropriate  
22 plaintiffs’ identities); *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1192 (C.D. Cal. 2011).

## 23 C. Plaintiffs’ Right of Publicity Claims Are Meritless in Any Event

24 Plaintiffs’ publicity claims are meritless for three additional, independent reasons.

### 25 1. Yelp Did Not Use Plaintiffs’ Identities for Purposes of Advertising or Selling

26 Plaintiffs assert a common-law claim and two statutory claims premised on alleged violations  
27 of the right of publicity. Compl. ¶¶ 83-96. The common-law and statutory claims both include the  
28 following elements: (1) defendant’s use of plaintiff’s identity; (2) the appropriation of plaintiff’s

1 name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4)  
2 resulting injury.” *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 208 (2017); *see id.*; Civil Code  
3 § 3344(a). Such claims “require that [Yelp] use the plaintiff’s identity” for Yelp’s advantage or  
4 benefit. *Cross*, 14 Cal. App. 5th at 208 (brackets omitted). Yelp does not do so.

5 A publisher that places ads next to a person’s name does not “use” the person’s name for its  
6 own benefit or advantage merely because it receives payment for the advertising space. *See Cross*,  
7 14 Cal. App. 5th at 211 (citing *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 693 (9th Cir. 1998)).  
8 And if the ad at issue makes no use of the person’s name or likeness, then the person’s name has not  
9 been used for purposes of advertising by *anyone*, including the publisher. Thus, in *Cross*, the Court  
10 of Appeal held that the plaintiff could not “establish that anyone, let alone Facebook, obtained an  
11 advantage through use of his identity” where “the advertisements that [appeared] adjacent to the  
12 content posted by third parties made no use of his name or likeness.” 14 Cal. App. 5th at 211.

13 *Cross*’s principles are controlling here. Yelp did not “use” plaintiffs’ names for its benefit  
14 when it published business data provided by third parties and placed ads that made no use of those  
15 listings next to them. Plaintiffs allege that the ads that appeared on their business pages depicted  
16 “alternative interior designers,” or “alternative tailors,” or “alternative doctors.” Compl. ¶¶ 49, 61,  
17 69. Plaintiffs are not *sponsoring* or *endorsing* these alternatives, which are allegedly “similar  
18 providers” (Compl. ¶¶ 49, 62, 70); they are competitors. And plaintiffs’ businesses’ names have  
19 nothing to do with Yelp; neither plaintiffs’ names nor the adjacent ads promote Yelp or any of  
20 Yelp’s own goods or services.

21 At bottom, plaintiffs’ core contention is that Yelp generated profit through ads without their  
22 consent merely because ads appeared next to their names. Compl. ¶¶ 48, 61, 69. No court has  
23 accepted that theory and numerous courts have rejected it, including in published opinions of the  
24 Court of Appeal (*e.g.*, *Cross* and *Stewart*). Virtually all publications of all kinds sell ads; financing  
25 through subscriptions is the exception, not the rule. *Dex Media W.*, 696 F.3d at 963. As a matter of  
26 law, these publications do not use plaintiffs’ names merely because they profit from the sale of ads  
27 to another party. *See, e.g.*, *Cross*, 14 Cal. App. 5th at 211-12; *Stewart*, 181 Cal. App. 4th at 689.

28

1           **2.       The Names of Plaintiffs’ Businesses Is a “Public Affair”**

2           Plaintiffs’ right-of-publicity claims fail for an additional reason: the “use of a name, voice,  
3 signature, photograph, or likeness in connection with any news [or] public affairs ... shall not  
4 constitute a use for which consent is required ....” Civil Code § 3344(d). The statutory defense is  
5 also a complete defense to the common-law claim. *See New Kids on the Block v. News Am.*  
6 *Publishing, Inc.*, 971 F.2d 302, 310 (9th Cir. 1992). California’s state-law defenses are broader and  
7 more protective of speech than is the First Amendment; they are “designed to avoid First  
8 Amendment questions in the area of misappropriation by providing extra breathing space for the use  
9 of a person’s name in connection with matters of public interest.” *Id.* at 310 n.10; *see also Gerawan*  
10 *Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 491 (2000) (California’s constitutional protections of free  
11 speech “are even broader and greater” than First Amendment’s).

12           The term “public affairs” in Civil Code section 3344(d) is even broader than the term “news”  
13 and encompasses a broad range of subjects. *See Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536,  
14 545 (1993); *Doe v. Gangland Productions, Inc.*, 730 F. 3d 946, 961 (9th Cir. 2013). And as  
15 numerous precedents reflect, members of the public, as consumers, have a right to know and an  
16 interest in the businesses operating in the community. *See, e.g., Wilbanks*, 121 Cal. App. 4th at 895;  
17 *Chaker*, 209 Cal. App. 4th at 1146. All three plaintiffs operate their businesses through corporations.  
18 *See MacBean Decl., Exs. T-W.* As such, they seek to conduct business with the benefit of corporate  
19 privileges bestowed upon them by the State, such as perpetual existence and limited shareholder  
20 liability. They cannot claim these privileges and seek to conduct commerce in the community under  
21 these names while at the same time claiming that their names are not a matter of public interest.

22           **3.       Publishing the Names of Plaintiffs’ Businesses Was at Most Only an Incidental**  
23           **Use of Plaintiffs’ Personal Names**

24           Yelp publishes the names of businesses provided by third parties. But these corporations do  
25 not have a right of publicity. *See VIRAG, S.R.L. v. Sony Computer Entm’t Am. LLC*, 2015 WL  
26 5000102, at \*5 (N.D. Cal. Aug. 21, 2015) (“no court has held or even suggested that the right of  
27 publicity extends to non-human beings”); J. Thomas McCarthy, 1 Rights of Publicity and Privacy  
28

1 § 4:41 (2d ed. 2018 update). Thus, plaintiffs have no claim arising from the publication of the names  
2 of their *businesses*, all of which are corporations. MacBean Decl., Exs. T-W.

3 Even if publication of the name of an eponymous corporation somehow implicated a human  
4 being’s right of publicity (and it does not), such use would be at most incidental and inactionable.  
5 *See Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 26 n.6 (1994) (“mere incidental use not  
6 actionable”); Restatement (Second) Torts § 652C, cmt. d (“The value of the plaintiff’s name is not  
7 appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his  
8 public activities ....”). Yelp’s publication of plaintiffs’ names is an incident of publishing the names  
9 of their corporate businesses and operating a consumer-facing business is a “public activity” that  
10 Yelp may legitimately mention without incurring tort liability. *See id.*<sup>2</sup>

11 **D. Plaintiffs’ Privacy Claim Is Also Meritless**

12 Plaintiffs assert a claim for violation of privacy under the California Constitution based on an  
13 alleged unauthorized use of their “identities, data, photographs, and communication.” Compl.  
14 ¶¶ 100-01. As noted, however, Yelp published the names of plaintiffs’ businesses, which are a  
15 matter of public record (MacBean Decl., Exs. T-W) and, therefore, cannot be the subject of a privacy  
16 claim. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); *Gates v. Discovery*  
17 *Communications, Inc.*, 34 Cal. 4th 679, 696 (2004). Plaintiffs have no privacy interest in their names  
18 and Mr. Gagossian has no privacy interest in his public appearance nor any reasonable expectation  
19 of privacy in photos that he posted to Yelp. *See Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th  
20 1125, 1130 (2009) (plaintiff had no privacy interest in her name and no reasonable expectation of  
21 privacy in information that she submitted to a website). Accordingly, plaintiffs cannot show that they  
22 have a probability of success on their constitutional privacy claims.

23 **CONCLUSION**

24 For the reasons stated above, this Court should strike plaintiffs’ first amended complaint and  
25 award Yelp attorneys’ fees in an amount to be determined after hearing a noticed motion for fees.

26 <sup>2</sup> Plaintiffs inexplicably allege that Yelp not only published plaintiffs’ businesses’ names, but also used their  
27 “photographs” and “likenesses knowingly and deliberately, without the prior consent of the Plaintiffs ....” Compl. ¶ 85.  
28 But this allegation is false. *No* photographs or “likenesses” of Ms. Spiegelman or Dr. Danoff appears on Yelp, and the  
only photographs of Mr. Gagossian that appear on Yelp are ones that *he* uploaded *himself*, thereby consenting to the  
publication. MacBean Decl. ¶ 25.

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Superior Court of California  
County of Los Angeles  
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Los Angeles, CA 90012

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CASE # 18STCV05378  
KATHLEEN SPIEGELMAN vs YELP, INC.

Motion Fee- GC 70617	60.00
(a)(3)(6)(7) CCP 116.620	
<b>Case Total:</b>	<u>60.00</u>

Check #: 7693	60.00
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<b>Total Paid:</b>	<u>60.00</u>
Change	0.00

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