Case No. S235968

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DAWN HASSELL, *et al.*
Plaintiffs and Respondents,

vs.

AVA BIRD,
Defendant,

YELP, INC.,
Appellant.

After a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233
Superior Court of the County of San Francisco
Case No. CGC-13-530525, The Honorable Ernest H. Goldsmith

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

Plaintiffs' arguments boil down to their dubious claim that Yelp enjoys no independent rights as an Internet publisher to select, organize, and display consumer-oriented content on Yelp.com. But Plaintiffs cannot cite a single case supporting their argument that Yelp has neither a First Amendment right to publish and protect third party-authored speech, nor a due process right to notice and a hearing in connection with Plaintiffs' attempt to enjoin its First Amendment rights. They also cannot cite a single case holding, as the appellate court did here, that Section 230(c)(1) does not apply to requests for injunctive relief. The court of appeal's ruling threatens settled due process, First Amendment and Section 230 principles and this Court should reverse for several reasons.

First, Yelp was not a party to the action that found the speech to be defamatory after an uncontested default hearing. Plaintiffs intentionally gave Yelp no notice of this hearing; Yelp had no opportunity to litigate this question. The trial court's holding against Bird is not binding on Yelp, and does not excuse denying Yelp its basic due process rights. *See, e.g., DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825. Yelp has a First Amendment right to publish consumer reviews on its website, and a due process right to defend itself when its interests are attacked. The narrow exception permitting injunctions against non-parties who act in collusion with parties to evade an injunction does not apply here, because Yelp acted

to advance its own interests and did not act in concert with Bird to violate the injunction. Section II, *infra*.

Second, Plaintiffs' analysis of Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230") is equally flawed. Again, Plaintiffs use the defamation ruling from an uncontested default hearing—that Yelp was not invited to attend—to support their claim that Yelp has no rights worthy of protection. Answering Brief on the Merits ("Answer") 32-33. And they continue to trumpet the appellate court's conclusion that Section 230 can be evaded by the simple expedient of not directly suing a website publisher. Answer 41-42. Plaintiffs plainly do not like Congress' decision to require defamation plaintiffs to look for their remedy against the original speaker, not the Internet publisher. But that does not excuse Plaintiffs' inexplicable choice not to enforce their Judgment against Bird—who indisputably could remove the reviews from Yelp's website—nor overcome the federal policy that those remedies adequately protect defamation plaintiffs like Hassell. Section III, *infra*.

Yelp was Plaintiffs' target from the beginning. A00837. But because Plaintiffs knew that Section 230 barred their claims, they decided to ignore Yelp's due process rights, in the hope of indirectly obtaining the injunction that Plaintiffs could not have obtained directly. *Id.* Their gambit worked in the lower courts, both of which treated Yelp as if it were a mere

bystander, with no interest in the content or the integrity of its website. This Court should remedy this injustice.

II. TRIAL COURTS MAY NOT ENJOIN NON-PARTIES, TAKING AWAY THEIR INDEPENDENT RIGHTS, WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD

Plaintiffs cannot deny that they did not sue Yelp or give it any notice that they intended to ask the trial court to issue an injunction against Yelp. They instead focus on the result, that Yelp did not appear in the action (Answer 7), ignoring that Yelp had no reason to suspect that it needed to intervene to protect its own interests.[1] Plaintiffs' actions flouted Yelp's due process rights, and the appellate Opinion should be reversed for this independent reason.

A. Yelp Has A Due Process Right To Protect Its Website.

In their effort to defend the appellate court's decision, Plaintiffs argue for the first time that Yelp does not have a liberty or property interest in its own website. Answer 23-25. Plaintiffs waived this argument by not raising it below. *See* A00481 (arguing that Yelp's due process rights were satisfied, without suggesting Yelp has no such rights); Court of Appeal Respondent's Brief (3/13/15) at 11-28 (same); Answer to Petition for

[1] Yelp regularly receives correspondence advising it about claims asserted against a user based on a review. It is absurd to suggest that Yelp must hire counsel and move to intervene in each one or risk waiving fundamental rights. Due process principles and statutes such as Code of Civil Procedure § 580 are designed to protect non-parties from such machinations.

Review (8/8/16) at 10. The Court should refuse to consider Plaintiffs' newly-minted argument. *See Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865 n.4 (argument not raised below or in counterpetition for review is "not cognizable before this court").

Regardless, as discussed below, Plaintiffs are simply wrong. As an Internet publisher, Yelp has a well-recognized First Amendment right to publish the content of others on the website that it has developed and maintains. *E.g.*, *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 849, 853 ("*Reno*"); *see* Section B, *infra*. Plainly, First Amendment rights fall within the broad protection of the due process clause. *E.g.*, *Marcus v. Search Warrant of Property* (1961) 367 U.S. 717, 731-32. Plaintiffs offer no authority holding otherwise.[2]

Plaintiffs continue to simply ignore the fundamental point of the many U.S. Supreme Court cases that require a hearing to enjoin speech. Answer 15-17 & n.6. Their authority focuses on the question of whether state officials must provide a hearing *before* enjoining speech. *Id.*; *see also id.* 1-2; Op. 23. But as Yelp explained, the question is not whether the hearing must always be held *before* the injunction is issued, but instead

[2] The plurality opinion in *Kerry v. Din* (2015) 135 S.Ct. 2128, 2134, does not support Plaintiffs' claim. There, the Court refused to recognize a *new* liberty interest for a woman whose non-resident husband was denied a visa. It did not limit the due process guaranteed to those, like Yelp, whose First Amendment rights are attacked.

whether Yelp was entitled to a prompt hearing to adjudicate its claimed rights, even if that hearing did not *precede* the injunction. O.B. 19-20, citing *Heller v. New York* (1973) 413 U.S. 483, 488; *see also Marcus*, 367 U.S. at 731-32. Contrary to Plaintiffs' claim (Answer 15-16), Yelp is *exactly like* the distributors in *Marcus*. It personally engages in protected speech activities by providing a forum for and publishing different types of third-party speech, which Yelp organizes for display, selects for recommendation or non-recommendation, or removes. A00240, A00495, A00567-00569. Indeed, Yelp regularly applies automated software to all reviews in an attempt to recommend the most helpful information to consumers—an ongoing and inherently editorial function. *Id.* Nonetheless, the appellate court denied Yelp its due process rights by holding that Yelp was entitled to no hearing at all to oppose the injunction against it. Op. 21.

Plaintiffs' argument that Yelp received actual notice of the claim against it, which purportedly satisfies due process, also is wrong. Answer 25. In Plaintiffs' cases, due process was satisfied only because the notice effectively communicated that the party's own interests were implicated. *See Benson v. California Coastal Comm'n* (2006) 139 Cal.App.4th 348, 353-54 (written notice to developer advising it of upcoming hearing satisfied due process); *United States Aid Funds, Inc. v. Espinosa* (2010) 559 U.S. 260, 272 (due process satisfied where creditor "received actual notice of the filing and contents of [debtor's] plan" and rule arguably violated was

procedural); *Oneida Indian Nation v. Madison County* (2d Cir. 2011) 665 F.3d 408, 431-32 (due process satisfied where plaintiffs received actual notice that fully informed them of impending action). Plaintiffs' vague letter advising Yelp that a lawsuit was filed against Bird, but not mentioning any intent to seek an injunction against Yelp, did not provide that notice here. A00601-00602.

This Court's jurisprudence on Code of Civil Procedure § 580 demonstrates why Plaintiffs' arguments are so misplaced. In *Greenup v. Rodman* (1986) 42 Cal.3d 822, the Court explained that Section 580 satisfies due process requirements by ensuring that parties receive adequate notice of the relief that will be sought against them in a default judgment. *Id.* at 826-27 (rejecting plaintiff's argument that trial court acted within its jurisdiction in granting greater relief than originally requested). As this Court explained in *In re Lippel* (1990) 51 Cal.3d 1160, 1166 "[i]t is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend. ... California satisfies these due process requirements in default cases through section 580." (Citations omitted.) *See also Warren v. Warren* (2015) 240 Cal.App.4th 373, 377-79 (reversing judgment in action seeking accounting because defendant did not receive notice of amount at issue).

Plaintiffs' other arguments fare no better. This case does not involve the "indirect" interest at issue in the only case Plaintiffs cite for their argument, *O'Bannon v. Town Court Nursing Center* (1980) 447 U.S. 773. There, the government's action *indirectly* harmed the interests of nursing home patients, who challenged revocation of the home's right to receive Medicaid and Medicare payments. *Id.* at 775. The Court found a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally. ..." *Id.* at 788. As the Ninth Circuit explained in *Greene v. Babbitt* (9th Cir. 1995) 64 F.3d 1266, 1272-73, the due process clause protects "individual entitlements," but not the "collective hopes" at issue in *O'Bannon*. Here, Yelp's "individual entitlement" to protect its website is under attack, and it is entitled to defend it.

Yelp is not challenging the ruling *against Bird* that the speech is defamatory, nor must it to assert its rights as a publisher. Yelp is advocating its *own* First Amendment rights, independent of any judgment entered against Bird in a proceeding to which Yelp was not a party. Plaintiffs do not discuss the legal requirements for their proclamation that Yelp is bound by the holding against Bird, perhaps because they know that they cannot possibly satisfy those requirements. Contrary to Plaintiffs' claims (Answer 24-25 & n.10), Yelp's cases directly support its due

process argument by establishing that *in personam* judgments are forbidden without notice and an opportunity to be heard. O.B. 17-18. As *Blonder-Tongue Labs., Inc. v. Univ. of Ill Found.* (1971) 402 U.S. 313, 329, and *Chase Nat'l Bank v. City of Norwalk* (1934) 291 U.S. 431, 440-41, make clear, *only* the parties to prior litigation are bound by any judgment entered in that litigation. "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein *will not affect his legal rights*." *Chase Nat'l Bank,* 291 U.S. at 441 (citations omitted; emphasis added).

Here, that straight-forward rule means that Yelp had no obligation to intervene in the litigation below, in which it was not named and received no notice that its rights were challenged, and it is not bound by the defamation ruling against Bird. *See DKN Holdings*, 61 Cal.4th at 824-25 (claim and issue preclusion are available only *against* parties to litigation); *Dillard v. McKnight* (1949) 34 Cal.2d 209, 215 (adopting the "accepted rule that in no case will a judgment entered after service on less than all the partners be given the effect of a personal judgment against partners not actually served" (citations omitted)); *Patel v. Crown Diamonds, Inc.* (2016) 247 Cal.App.4th 29, 38 (non-parties not bound where "they had no direct interest in the subject matter, nor any right to make a defense, control the proceeding, or appeal from the judgment").

Bird is one of millions of Yelp users. Because Plaintiffs chose *not* to make Yelp a party to this litigation, they cannot enforce the defamation holding against Yelp. The central theme of their Answer crumbles under this clear law.

B. Yelp Has A First Amendment Right To Publish Third Party Speech On Its Website.

The baseless theme at the heart of Plaintiffs' Answer Brief is that Yelp has no First Amendment right to publish, organize, and recommend third-party content on its website. This argument underlies Plaintiffs' theory that Yelp is merely an "online directory" that the court simply treated as the conduit through which its order would be enforced. Answer 31, 42. This led the appellate court to describe Yelp as nothing more than the "administrator of the forum" on which Plaintiffs' speech was posted. Op. 21-22. Plaintiffs cite no case to support this startling claim, nor could they.

Internet publishers like Yelp have a First Amendment right to publish third-party speech as part of their editorial operations. This was the fundamental premise underlying the United States Supreme Court's first discussion of the protections afforded to Internet publishers. *Reno*, 521 U.S. at 849, 853. The Court rejected the federal statute at issue because it "abridges 'the freedom of speech' protected by the First Amendment," including the rights of publishers "from which to address and hear from a

world-wide audience of millions of readers, viewers, researchers, and buyers." *Id.* Indeed, Section 230 specifically was adopted to protect Internet publishers who exercise "a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 330.[3] This Court reiterated long ago that traditional editorial functions fall squarely within the First Amendment's protection. *Shulman v. Group W Prods., Inc.* (1998) 18 Cal.4th 200, 224-25. *See also Miami Herald Publ'g Co. v. Tornillo* (1974) 418 U.S. 241, 258 ("[t]he choice of material to go into a newspaper ... constitute the exercise of editorial control and judgment"); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*

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[3] *See also Garcia v. Google, Inc.* (9th Cir. 2015) 786 F.3d 733, 747 (*en banc*) (request to enjoin Google from distributing a film in which plaintiff briefly appeared "gave short shrift to the First Amendment values at stake"); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (7th Cir. 2008) 519 F.3d 666, 668 ("any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment" (citations omitted)). *See generally Jian Zhang v. Baidu.com, Inc.* (S.D.N.Y. 2014) 10 F.Supp.3d 433, 438-30; *Google, Inc. v. Hood* (S.D. Miss. 2015) 96 F.Supp.3d 584, 593-94, *rev'd on procedural grounds*, (5th Cir. 2016) 822 F.3d 212; *Langdon v. Google, Inc.* (D. Del. 2007) 474 F.Supp.2d 622, 629-30. *Cf. Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 300, 301 ("the right to distribute newspapers and other periodicals on the public streets lies at the heart of our constitutional guarantees of freedom of speech and freedom of the press" and this protection extends "to virtually all modes of communication that may be utilized to disseminate ideas and protected expression on the public streets").

(1996) 518 U.S. 727, 753-63 (rejecting statute imposing programming obligations on broadcaster).[4]

Yelp acted on its own behalf—in advancement of *its* First Amendment rights—completely independently of Defendant Bird. Yelp's website includes tens of millions of consumer reviews, written by millions of independent users. A00240. Businesses listed on Yelp can create free accounts, which allow them to publicly respond to any review, with the response appearing next to the original review. *Id.* Yelp organizes reviews for display, removes reviews that violate its terms of service, and applies automated software to all reviews posted in an attempt to recommend the most helpful reviews to consumers. A00240, A00495, A00567-00569. This exercise of traditional editorial functions lies at the heart of the First Amendment.

Plaintiffs also are wrong in proclaiming that purportedly false speech has no First Amendment protection. The Supreme Court long ago recognized that some false speech must be protected in order to give "the freedoms of expression ... the 'breathing space' that they 'need ... to

[4] Plaintiffs attempt to distinguish many of Yelp's cases in a brief footnote. Answer 17 n.6; *see* O.B. 19-20 n.8. Their response to *Carroll v. President & Comm'rs of Princess Anne* (1968) 393 U.S. 175, turns on their debunked claim that the defamation ruling against Bird also binds Yelp. *Lee Art Theater, Inc. v. Virginia* (1968) 392 U.S. 636, 637; *Quantity of Copies of Books v. Kansas* (1964) 378 U.S. 205, 212-13; and *Kash Enterprises*, 19 Cal.3d at 309, all make clear that courts must engage in a careful, searching inquiry when enjoining speech. That did not occur here.

survive'"; thus plaintiffs bear the burden of proving falsity, and public officials and public figures must prove constitutional malice to state a defamation claim. *New York Times v. Sullivan* (1964) 376 U.S. 254, 271-72 (citations omitted); *see Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 776.

Plaintiffs' argument is undisguised bootstrapping and in exploiting this Court's earlier ruling in *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141 (Section C, *infra*), demonstrates the dangers the appellate decision creates. Under their reasoning, *any* judicial ruling that speech is defamatory—even one entered following questionable service (A00026) and an uncontested default hearing (A00211)—would bind third parties who receive no opportunity to contest that ruling. Plaintiffs could get uncontested judgments around the country and use them to deny California citizens their own First Amendment rights—all because a court somewhere entered a default judgment, based solely on a plaintiff's say-so, ruling the speech to be defamatory.[5] But as this Court explained in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 57, "[d]efamation law is complex, requiring consideration of multiple factors." (Citations omitted.) Despite this Court's admonition that "a court must tread lightly and carefully when

[5] Yelp does not contend that this is notice-based liability, but instead that similar concerns apply here, particularly in light of innovative attempts by plaintiffs to evade Section 230's protection. *E.g.*, RJN Exs. A-G; *see* Section III, *infra*.

issuing an order that prohibits speech" (*Balboa Island*, 40 Cal.4th at 1159 (citation omitted)), the trial court issued, and the appellate court approved, a broad injunction without analyzing the individual statements (A00211). This is not the law.[6]

Nor do Plaintiffs' other cases help them. Answer 2, 14. In *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-46, the Court addressed restrictions on "virtual child pornography." It stated in passing that freedom of speech does not embrace defamation, but did not apply that observation to the different facts of that case. *Id.* In *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776, the Court merely recognized the state's interest in preventing false statements of fact, in deciding whether the forum had personal jurisdiction over defendant. And in *Bill Johnson's Rests., Inc. v. N.L.R.B.* (1983) 461 U.S. 731, 743, the Court held that the First Amendment right to petition does not protect sham litigation, "[j]ust

[6] Plaintiffs accuse Yelp of "blatant[ly] misrepresent[ing]" the allegedly defamatory nature of Bird's statements (Answer 13), but cannot deny that the trial court's order following an uncontested default hearing did not evaluate the individual statements or any potential defenses. A00211. Plaintiffs also mischaracterize Yelp's Terms of Service, claiming they require Yelp to remove content deemed defamatory. Answer 47. They do not. A000637. Rather they make clear that Yelp assumes no obligation—and retains sole discretion to decide whether—to remove content that allegedly violates its terms. Thus, while it is Yelp's general practice to remove content adjudicated defamatory against third parties—assuming any appeals have been exhausted and a plausible showing of defamation has been made (A00734)—this almost never occurs, as Yelp users have the ability to remove their reviews at any time.

as false statements are not immunized by the First Amendment right to freedom of speech." *Id.* at 743 (citation omitted).[7]

None of these cases hold—as Plaintiffs insist—that once speech is found to be defamatory in *any* proceeding *anywhere*, that holding is binding on the entire world and everyone loses First Amendment rights related to that speech. To the contrary, the U.S. Supreme Court "has never endorsed the categorical rule [Plaintiffs] advance[]: that false statements receive no First Amendment protection." *U.S. v. Alvarez* (2012) 567 U.S. 709, 132 S.Ct. 2537, 2545 (reversing criminal conviction under Stolen Valor Act; government had no right to criminalize speech at issue, even if false).

Finally, Yelp's arguments are completely consistent. Yelp is entitled to protect its First Amendment right to *publish* speech created by others, *and* to assert its rights as an Internet publisher under Section 230. "The provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online

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[7] *See also Herbert v. Lando* (1979) 441 U.S. 153, 171-72 (to ensure protection of First Amendment principles, liability is limited "to instances where some degree of culpability is present"); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 771 (stating in dicta that false speech generally not protected "for its own sake"; no claim advertisements at issue were false). Plaintiffs' reliance on *Beauharnais v. Illinois* (1952) 343 U.S. 250, 256, is particularly misplaced. That decision preceded *New York Times v. Sullivan* by a dozen years, and no longer reflects controlling law.

expression." *Barrett*, 40 Cal.4th at 56; *see also Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027-28. Plaintiffs' argument—that only those who create speech have a First Amendment right in that speech—is simply wrong. *See, e.g.*, *Marcus*, 367 U.S. at 731-33; *Heller*, 413 U.S. at 488.

C. The Injunction Is An Unconstitutional Prior Restraint.

Contrary to Plaintiffs' claim that this Court has "conclusively resolve[d] this issue" (Answer 20), in none of Plaintiffs' cases did a court bind a *non-party* that lacked privity with a party to a holding that speech is defamatory. In *Balboa Island*, the Court reversed a prior restraint against defendant to the extent it applied to non-parties, while reserving the question of "whether the scope of the injunction properly could be broader if people other than [defendant] purported to act on her behalf." 40 Cal.4th at 1160 & n.11. It held that "following a trial at which it is determined that *the defendant* defamed the plaintiff, the court may issue an injunction prohibiting *the defendant* from repeating the statements determined to be defamatory." *Id.* at 1155-56 (emphasis added). Plaintiffs ignore this key difference between *Balboa Island* and this case.

Moreover, Plaintiffs' newly-minted argument that the injunction entered against Yelp is not a prior restraint demonstrates a fundamental misunderstanding of First Amendment jurisprudence. Answer 18-21. While many prior restraints enjoin speech before its initial publication, orders to stop or remove speech *also* are prior restraints and presumptively

unconstitutional. *E.g.*, *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 418-19 (injunction restraining distribution of leaflet already distributed to public was unconstitutional prior restraint). Thus, in *Flack v. Municipal Court* (1967) 66 Cal.2d 981, 990, this Court rejected a seizure of materials that *already had been publicly displayed*, explaining that it "effects a prior restraint upon freedom of speech or press and constitutes a denial of procedural due process of law." (Citation omitted.) *See also Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1482 (trial court's order requiring attorney to remove pages from website during trial was "unlawful prior restraint on the attorney's free speech rights"); *Garcia*, 786 F.3d at 747 ("[t]he panel's takedown order of a film of substantial interest to the public is a classic prior restraint of speech" (citations omitted)).

Plaintiffs take cases out of context in arguing to the contrary. This Court's plurality opinion in *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, involved unlawful *conduct*—sexual harassment in the workplace. *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241, did not purport to limit the term "prior restraint" to orders prohibiting speech not yet published, as Plaintiffs contend. Answer 18. Plaintiffs also misconstrue the decision in *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 659, in which this Court held that orders enjoining previously published speech are presumptively unconstitutional prior restraints. Answer 21. *Wilson* did not turn on the plaintiff's public figure status, as Plaintiffs

claim; the Court simply was describing the facts of *New York Times v. Sullivan*. *Wilson*, 13 Cal.3d at 659.

Plaintiffs cannot redefine the law governing prior restraints. Because the prior restraint against Yelp cannot satisfy the constitutional scrutiny required under the First Amendment, the injunction fails for this independent reason.

D. Injunctions Cannot Bind Non-Parties Like Yelp Without Evidence Of Aiding And Abetting The Enjoined Party.

Plaintiffs insist the trial court had the right to enter an injunction against Yelp without giving it any notice or opportunity to be heard, because Bird purportedly is acting through Yelp. Answer 26-31. They invoke a narrow exception to due process requirements, which allows courts to bind non-parties to an injunction if they are "instrumentalities through which defendant *seeks to evade an order* or [] come within the description of persons in *active* concert or participation with them in the violation of an injunction." *Regal Knitwear Co. v. NLRB* (1945) 324 U.S. 9, 14 (emphasis added). But this narrow exception was created to give courts the ability to enforce injunctions against large groups or unknown collaborators, when post-entry conduct creates problems with enforcement. It does not apply here, where Plaintiffs conceded that they intended Yelp as a target at the beginning of this lawsuit, but deliberately chose not to sue

Yelp (A00837), *and* have never attempted to enforce the injunction against Bird.

Plaintiffs ignore a critical difference between their cases and this case—the injunction infringed Yelp's independent First Amendment rights as an Internet publisher. Sections B, C, *supra*. Plaintiffs' attempt to distinguish *Alemite Mfg. Corp. v. Staff* (2d Cir. 1930) 42 F.2d 832, 833, exposes this fundamental flaw in their claims. They argue that there, "appellant was acting on its own behalf, completely independent from the enjoined defendants." Answer 27 n.11. But so was Yelp. A00240-00241; *see also Doctor's Assoc., Inc. v. Reinert & Duree, P.C.* (2d Cir. 1999) 191 F.3d 297, 303 (injunction against franchisor could not be applied to franchisees because it "bars appellant franchisees from prosecuting the … suits *on their own behalf* and on behalf of other" non-parties).

Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc. (Fed. Cir. 1996) 96 F.3d 1390, 1395, is instructive. There, the court reversed a district court injunction against non-parties based on a contractual relationship with defendant. The court explained that "[b]ecause they were not parties to the Adcon case, [] the appellants could not be enjoined from engaging in independent conduct with respect to the subject matter of that suit, and the … decree could not be interpreted to impose any such duty upon them." *Id.* It elaborated that "[h]aving a relationship to an enjoined party of the sort set forth in Rule 65(d) exposes a non-party to contempt *for*

assisting the party to violate the injunction, but does not justify granting injunctive relief against the non-party in its separate capacity." *Id.* at 1395-96.

This is a demanding standard, as it should be. As the court explained in *G.&C. Merriam Co. v. Webster Dictionary Co.* (1st Cir. 1980) 639 F.2d 29, in reversing a contempt finding against a non-party, "[p]roof of a relationship to the pre-injunction act of a party may be circumstantially suggestive, but ***a nonparty, if not legally identified with a party, can be found to be in contempt only if in active concert or participation with a party in post-injunction activity***." *Id.* at 35 (citations omitted; emphasis added).

These cases squarely apply here. Yelp always acted to advance its own First Amendment rights. Section B, *supra*. Yelp did not "assist" Bird to violate the injunction—which was entered well after the reviews first posted—and it certainly never acted in "active concert or participation" with Bird. Instead, Yelp acted well within its constitutional rights and as an Internet publisher protected by Section 230's immunity. Section III.C, *infra*. None of Plaintiffs' arguments get them past this critical distinction.

First, they erect a straw man to knock it down. Answer 26. Responding to Yelp's argument that the exception is narrow, Plaintiffs make the different point that the exception is firmly established. *Id.* Yelp never claimed otherwise.

Second, Yelp's cases do not support Plaintiffs' position. Answer 28-29. In most, plaintiff asked the court to enforce the injunction against a member of a group, such as an anti-abortion protester, because it would be effectively unenforceable if plaintiff were required to sue every current or future group member. *E.g.*, *Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 353 (abortion protestors).

A Florida court explained this critical distinction in rejecting the Secretary of Labor's request for an injunction against a creditor that sold the debtor's property. *Martin v. Carroll Graphics Corp.* (M.D. Fla. 1992) 804 F.Supp. 311, 312. In distinguishing cases allowing injunctions against groups, the court noted that those courts were "faced with a situation where the class of persons to which the injunction applied was undefinable." *Id.* at 313. In *Martin*, in contrast, the Secretary "could have named [the creditor] as a party to the preliminary injunction but failed to do so." *Id.* at 314.[8] The same is true here. Yelp was Plaintiffs' target from the

[8] The Secretary relied in part on *United States v. Hall* (5th Cir. 1972) 472 F.2d 261, 263-64, which Plaintiffs also invoke to misleadingly argue that "[i]njunctions targeting named nonparties [] have been upheld." Answer 30. *Hall* does not support the injunction issued in *Martin* or here. In *Hall*, the Court issued an injunction to prevent unrest and violence in a school desegregation case, and directed service on *non-party* Hall. 472 F.2d at 262-64. The Court explained that school orders "necessarily depend on the cooperation of the entire community for their implementation" and are "particularly vulnerable to disruption by an *undefinable* class of persons who are neither parties nor acting at the instigation of parties." *Id.* at 266 (emphasis added). *United States v. Paccione* (2d Cir. 1992) 964 F.2d 1269, is even further afield. There,

beginning. Answer 30; A00837. Plaintiffs could have named Yelp as a defendant—and faced the dismissal mandated by Section 230—but they chose not to do that, and instead sought to secure an injunction against Yelp without giving Yelp a chance to oppose it.

Third, Plaintiffs also are incorrect in arguing that if courts can apply injunctions to non-parties, they *a fortiori* can name non-parties in the injunction. In the few cases that permitted a non-party to be named, the party and non-party were in privity or closely aligned. *See Asetek Danmark A/S v. CMI USA, Inc.* (Fed. Cir. 2016) 842 F.3d 1350, 1364-67 (injunction may extend to non-party in close contractual relationship with party); *Aevoe Corp. v. AE Tech Co., Ltd.* (Fed. Cir. 2013) 727 F.3d 1375, 1383-84 (affirming injunction naming non-party that was privy of party). *See also* footnote 8, *supra*. Where no such relationship exists, courts apply injunctions to non-parties *only* if they hold an evidentiary hearing and conclude that the non-party's conduct justifies applying the injunction to it. *E.g.*, *Berger v. Superior Court* (1917) 175 Cal. 719, 721. Here, in contrast,

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following issuance of a TRO to preserve business assets, a court-appointed receiver signed a Forfeiture Consent Order on behalf of a business to implement the TRO. *Id.* at 1270-72. However, after a dispute, the receiver interfered with the business's interest and properties. *Id.* Although the receiver was not personally named in the Consent Order, he appropriately was held in contempt because it was similar to an attachment order and he had notice and "placed himself at risk of being held in contempt if he *undertook to thwart* the district court's efforts to enforce its judgments and orders." *Id.* at 1273, 1275, 1276 (citation omitted; emphasis added).

the appellate court disclaimed the need for any evidentiary hearing (Op. 21),[9] and affirmed the injunction against Yelp without legal authority or analysis to support its vast expansion of this narrow exception to due process rights.[10] Plaintiffs' argument that "but for" Yelp's website Bird would not be able to violate the injunction (Answer 31) demonstrates the remarkable breadth of the standard they ask this Court to embrace, but does not answer this key point.

Fourth, Yelp's Opening Brief focuses on the criteria and standards courts impose to justify extending injunctions to non-parties, which Plaintiffs largely ignore. O.B. 21-24. Plaintiffs focus instead on language taken from a few decisions out of context, suggesting that "injunctions can run against nonparties 'with or through whom the enjoined party may act.'"

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[9] Plaintiffs misstate Yelp's argument in accusing Yelp of misrepresentation. Answer 30. Yelp pointed out—correctly—that the appellate court did not base its decision on any conduct by Yelp, but instead said that evidence regarding Yelp's actions (or inactions) would be evaluated in connection with contempt proceedings. O.B. 25-26. Plaintiffs point out that the *trial court* received evidence of Yelp's alleged conduct. Answer 30-31. This is beside the point; this Court reviews the appellate court's decision.

[10] It is no answer that the court of appeal contemplated a second hearing, at which the trial court would decide whether Yelp should be held in contempt. Op. 18. Yelp should not have to choose between complying with an unconstitutional prior restraint and risking contempt sanctions. *Cf. In re Berry* (1968) 68 Cal.2d 137, 148-49 (person affected by injunction may challenge the injunction in advance or violate it and risk contempt sanctions). Under the appellate court's rationale, no reason exists to give anyone a prompt hearing to challenge an injunction. Op. 21. The enjoined party could just argue in opposing contempt proceedings that no facts support the injunction. This is not the law.

Answer 28, citing *Planned Parenthood*, 107 Cal.App.4th at 353. Thus, they claim the injunction applies to Yelp simply because Bird contributed her reviews to Yelp's website. But this cannot be enough. Yelp publishes a forum for Bird's statements and for millions of others to submit reviews but did nothing to actively support Bird.

Fifth, Plaintiffs' attempt to distinguish *Regal Knitwear* (Answer 27), also ignores the fact that there, the non-party was not named in the injunction, and the Court held it was entitled to a hearing *to determine if the injunction could be applied to it*. 324 U.S. at 16. Thus, the fact that the injunction took effect before the non-party was given a hearing is meaningless. Here, in contrast, Yelp is named in the injunction (A00213); it is accused of "ignor[ing]" that injunction, simply because it refuses to sacrifice its right to challenge the prior restraint entered against it (Answer 9); and it faces contempt and other sanctions if it refuses to comply with an injunction that ignores Yelp's interests in its own website (Op. 30-31).

Sixth, Plaintiffs misstate California law in attempting to distinguish *Blockowicz v. Williams* (N.D. Ill. 2009) 675 F.Supp.2d 912, *aff'd* (7th Cir. 2010) 630 F.3d 563. Answer 29. Under federal law, "a court may find a nonparty in contempt if that person has 'actual knowledge' of the court order and 'either abets the party named in the order or is legally identified with him.'" *Id.* at 915 (citation omitted). The same standard applies here. *See Berger*, 175 Cal. at 722 (injunction can be applied only to those named

in the injunction, their members, and those "acting as an aider and abetter" of the enjoined parties (citations omitted)). *Planned Parenthood*, 107 Cal.App.4th at 353, reiterated this limiting language from *Berger* in rejecting an injunction against abortion protestors neither named individually nor as class members. *Id.*; *see also* O.B. 21-25.

Finally, Plaintiffs again misconstrue Yelp's Opening Brief in an attempt to downplay the appellate court's decision to treat Yelp as nothing more than the "administrator" of Yelp's website. Answer 31; *see* Op. 22. Yelp explained that its First Amendment rights deserve at least as much protection as the monetary interests at issue in *Fazzi v. Peters* (1968) 68 Cal.2d 590, and *Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.* (1999) 75 Cal.App.4th 110, because prior restraints are "one of the most extraordinary remedies known to our jurisprudence [which] carry a heavy burden against constitutional validity." O.B. 28 (citation omitted). Plaintiffs have no answer to this important point.

The appellate court watered down the strict requirements of California law by approving the injunction here. Op. 21. If this narrow exception can be applied to Yelp—which is connected to Bird *only* because she is one of millions of people who post on Yelp—it can be applied to any non-party. The exception will have swallowed the rule. A newspaper that refuses to remove a published letter to the editor or quote from a source in an article, a bookstore that continues to sell a book found to be misleading,

and a library that provides Internet access, all are non-parties "with or through whom [an] enjoined party may act." Answer 14. But none has the close or contractual relationship with the enjoined party that courts consistently have required to bind them to an injunction to which they were not a party. This narrow exception to due process does not apply here.

III. PLAINTIFFS CANNOT EVADE SECTION 230 BY DENYING WEBSITE PUBLISHERS THEIR DUE PROCESS RIGHTS

A. The Injunction Against Yelp, Not Bird, Is At Issue Here.

Plaintiffs begin their arguments against Yelp's well-recognized Section 230 immunity with the uncontroversial point that the Judgment can be enforced against Bird. Answer 32. They then misstate the facts and law in arguing that under Code of Civil Procedure § 128(a)(4), the Court can also compel Yelp to comply with the injunction against Bird. They are wrong. *First*, they claim that Bird "escaped accountability, and refused to comply with the valid court judgment against her." Answer 33. They do not cite to the record for this claim because they cannot—as Yelp explained in its Opening Brief (at 7) and Plaintiffs have not denied, Plaintiffs have never attempted to enforce their injunction against Bird. The only injunction entered by the trial court was directed to Bird and Yelp together. A00213. Plaintiffs immediately sought to enforce this injunction against Yelp alone. A00243, A00494, A00522.

Second, Yelp has no obligation to act as the court's deputy and "put an end to [Bird's] illegal activity" (Answer 33), in contravention of Yelp's independent and significant interests in its own website. This argument is simply an unsupported enlargement of the formerly narrow exception to due process recognized in *Regal Knitwear*, without the benefit of any supporting authority. *See* Section II.D, *supra*. Section 128(a)(4) does not authorize enforcement of court orders against non-parties whose independent rights are at issue. *See Oksner v. Superior Court* (1964) 229 Cal.App.2d 672, 685 (Section 128(a)(4) "does not extend to application of the property of a third person to the debt of another without previously affording a full hearing to said third person"; order requiring third party to surrender property "was made in excess of jurisdiction and is void"); *cf. Barwis v. Superior Court* (1978) 87 Cal.App.3d 239, 242 (Section 128(a)(5) does not give court jurisdiction over non-party not "connected with" proceeding). And *Gompers v. Bucks Stove & Range Co.* (1911) 221 U.S. 418, 450, merely recognizes the court's authority to punish *parties* for contempt. Neither it nor Section 128(a)(4) supports Plaintiffs' overreach.

B. The Injunction Treats Yelp As The Publisher Of Bird's Speech.

Yelp demonstrated in its Opening Brief that Section 230(c)(1) and supporting case law, such as this Court's decision in *Barrett*, 42 Cal.4th at 60, 63, squarely prohibit entry of an injunction against Yelp here. O.B. 44-

46.[11] In response, Plaintiffs cite a combination of disparate cases to create a proposed test—that Sections 230(c)(1) and (e)(3) purportedly impose separate requirements, both of which must be satisfied for Section 230 to apply—that is not supported by any case they cite. Answer 34-35. This Court's careful analysis in *Barrett* makes clear that ***Section 230(c)(1)***, standing alone, creates the statutory immunity. 40 Cal.4th at 39-40; *see also* O.B. 45-47.

Barnes v. Yahoo!, Inc. (9th Cir. 2009) 570 F.3d 1096, fully supports this straight-forward interpretation. *Id.* at 1100-01.[12] There, the court rejected one claim, based on publication of content on the website *and nothing more* (*id.* at 1102-03), but permitted a different claim, based on an allegedly broken oral promise to remove content (*id.* at 1107). But Yelp made no such promise. Yelp challenges the court's authority to issue the order against it in the first instance—which is premised entirely on Yelp's publication of Bird's speech, and nothing else. This dispositive fact puts Yelp comfortably within the Section 230 protection recognized by the

[11] Yelp apologizes for its incorrect use of quotation marks in discussing Sections 230(c)(1) and (e)(3). O.B. 41.

[12] Plaintiffs deny their concession below that they seek to treat Yelp as the "publisher or speaker" of Bird's comments. Answer 35 n.15. The record, however, is clear. Plaintiffs argued that Yelp must be treated as the content provider because its website filters reviews and that in doing so, "Yelp is acting as a 'publisher' or 'speaker.'" A00486-00488. They wisely have abandoned that argument.

Zeran line of cases, including this Court's decision in *Barrett*.[13] Plaintiffs' argument would render Section 230 meaningless, giving courts *carte blanche* to issue injunctions without due process against website publishers.

The focus in *Barnes* was whether the action was based exclusively on free speech or publishing conduct, or instead included some other element—such as a broken promise from Yahoo's Director of Communications—that took it outside of Section 230 immunity. Answer 36-38; *accord* O.B. 42 n.18, 45-46 & n.20. Indeed, Plaintiffs' cases highlight this distinction by focusing on conduct other than publication of speech on an Internet site. Answer 35, citing *Lansing v. Southwest Airlines Co.* (2012) 2012 IL App. (1st) 101164 (Section 230 did not apply to negligent supervision claims based on employee's harassment using workplace computer system); *Airbnb, Inc. v. City & County of San Francisco* (N.D. Cal. 11/8/16) 2016 U.S. Dist. LEXIS 155039 (rejecting claim by short-term rental websites that Section 230 barred law targeting

[13] Plaintiffs ignore the facts in arguing that "Yelp is neither 'cast in the same position as the party who originally posted the offensive messages,' ... nor sought to be held accountable for its own editorial decisions of 'whether to publish, withdraw, postpone or alter [such] content, ... [nor] 'punish[ed or] deter[red].'" Answer 39, citing *Zeran*, 129 F.3d at 333; *Barrett*, 40 Cal.4th at 43. The injunction places Yelp exactly in these positions, ordering Yelp to do what Plaintiffs speculated Bird would not, *i.e.*, withdraw or alter content published on Yelp.com, or face the "punish[ment]" and "deterr[ence]" of contempt sanctions.

acceptance of fee for reservation and payment services).[14] In contrast, Yelp's conduct as a publisher is the only conduct at issue here.

Plaintiffs try to avoid this result by arguing that Yelp's duty "does not arise from its status as a publisher or speaker, but as a party through whom the court must enforce its order." Answer 38.[15] But this is not true; Yelp is not a party, and Bird could remove her reviews at any time, yet Plaintiffs have never enforced their Judgment against Defendant Bird to try to compel her to do so. It also is the kind of "artful skirting" of the CDA that courts across the nation uniformly have rejected. *E.g.*, *Kimzey v. Yelp! Inc.* (9th Cir. 2016) 836 F.3d 1263, 1266. Plaintiffs concede that "but for" Yelp's website, Bird's alleged libel "would not be published." Answer 31. Plainly, the order against Yelp derives from its status as a publisher or speaker of the content at issue. *E.g.*, *Delfino v. Agilent Tech., Inc.* (2006) 145 Cal.App.4th 790, 806-07 ("plaintiffs, in alleging that Moore's employer was liable for his cyberthreats, sought to treat [the employer] 'as the publisher or speaker' of those messages" (citing § 230(c)(1)).

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[14] *Airbnb* is contrary to the weight of authority interpreting Section 230, which has held websites immune under similar theories. *E.g.*, *Evans v. Hewlett-Packard Co.* (N.D. Cal. 10/10/13) 2013 WL 5594717. Regardless, this case does not concern a website's role in facilitating rental transactions, as *Airbnb* did.

[15] They bolster their equivocation by pointing to actions a court might take against Yelp that have nothing to do with the content of its website. Answer 38. These examples demonstrate the emptiness of Plaintiffs' claims.

C. The Injunction Against Yelp Violates Section 230.

Echoing the appellate court's unsupported conclusion, Plaintiffs insist that Section 230 only prohibits direct liability, not the injunction issued here. Answer 41; *see generally id.* 41-45.[16] But again, Plaintiffs' argument turns on their claim that Yelp has no interest in its own website. Yelp is nothing like a "garnishee bank" with no right to disputed money. Yelp has a profound interest in protecting its First Amendment rights to publish its website and make editorial decisions concerning it.

Here, too, Plaintiffs engage in naked bootstrapping. Answer 42. Yelp does not have a "duty of obedience" to California courts, absent a properly-issued order against it. This is the critical distinction that Plaintiffs refuse to acknowledge. The trial court had no right to enjoin Yelp's exercise of its First Amendment rights in the procedural void Plaintiffs intentionally created. The remedy of an injunction—or contempt for violation of an injunction—cannot be manufactured out of thin air. Permanent injunctions may be issued only as remedies against defendants that lose claims. Plaintiffs' insistence that they may sidestep the critical first step of actually asserting a claim against the party they seek to enjoin finds no support in law or fact. Section 230 necessarily precludes

[16] Plaintiffs try to narrow the reach of the appellate Opinion, accusing Yelp of misrepresenting it. Answer 41-42. The appellate court plainly held that Section 230 did not bar Plaintiffs' request for injunctive relief. Op. 29-30.

Plaintiffs' claim against Yelp, which Plaintiffs improperly added to their request for a default judgment against Bird.

Nor can Plaintiffs escape Section 230 by pointing out that contempt proceedings are not civil proceedings. Answer 42 (citing Op. 31 (quoting *Freeman v. Superior Court* (1955) 44 Cal.2d 533, 536)). Contempt proceedings are "of a criminal nature" in which "the affidavit on which the proceeding is based constitutes the complaint." *Id.* at 535-36 (citation omitted); *see also In Re M.R.* (2013) 220 Cal.App.4th 49, 58 ("[t]he issuance of the order to show cause commences a 'separate action' on the contempt charges" (citation omitted)). But by its plain terms, Section 230 also immunizes state criminal proceedings. 47 U.S.C. § 230(e)(3). As one court explained, "[i]f Congress had wanted all criminal statutes to trump the CDA, it could have written subsection [230(e)](1) to cover 'any criminal statute' or 'any similar State criminal statute.' Instead, *sub-subsection (1) is limited to federal criminal statutes*." *Voicenet Commn'cns, Inc. v. Corbett* (E.D. Pa. 8/30/06) 2006 WL 2506318, at *3 (emphasis added); *accord Backpage.com, LLC v. McKenna* (W.D. Wash. 2012) 881 F.Supp.2d 1262, 1274 ("[i]f Congress did not want the CDA to apply in state criminal actions, it would have said so").

Moreover, Plaintiffs' perfunctory distinction of the many cases that have held that Section 230 also bars injunctions—that they all involved "causes of action" (Answer 40-41)—ignores the reason courts *consistently*

reach this conclusion. As one court explained, "injunctive relief will [sometimes] be at least as burdensome to the service provider as damages, and is typically more intrusive." *Noah v. AOL Time Warner* (E.D. Va. 2003) 261 F.Supp.2d 532, 540, *aff'd* (4th Cir. 3/24/04) 2004 WL 602711. *See also* O.B. 50-52 & n.22. Plaintiffs concede the CDA generally bars injunctions, and can offer no reason why Congress would enact a statute that could so readily be sidestepped. The same congressional intent and policy choices that bar injunctions against website owners when they are demanded in the complaint fully apply here.

In addition, Plaintiffs' ignore the language of Section 230 in arguing that it should be defined by the facts of the cases that prompted its enactment. Answer 43-46. As the court noted in *Chicago Lawyers* in evaluating Section 230, "a law's scope often differs from its genesis. Once the legislative process gets rolling, interest groups seek (and often obtain) other provisions." 519 F.3d at 671; *see also Barrett*, 40 Cal.4th at 44 n.7 (*one* purpose of Section 230 was to overrule the case Plaintiffs cite). Thus, Section 230 broadly applies to "information" and bars courts from treating website publishers as a "publisher or speaker" of third-party content. It is not limited to damage claims. Plaintiffs' argument would upend the consistent consensus that Section 230 bars claims for injunctive relief, leaving California standing alone in any conclusion that it does not. O.B. 49-51 & n.22. This would be the "open invitation to forum shopping by

defamation plaintiffs" that this Court condemned in *Barrett*. 40 Cal.4th at 58 & n.18.

Finally, Plaintiffs' claim that their arguments further the "public good" again ignores both the facts and the law. Answer 47-48. Even if Plaintiffs had done everything correctly (although they did not, O.B. 10-11), it would not matter, because the plain language of Section 230 bars Plaintiffs' claims against Yelp. Congress made this policy determination, in enacting a statute that protects Yelp and other Internet publishers. Plaintiffs' argument that procedural safeguards prevent manipulation of the judicial system ignores the facts of this case—which has required this Court's intervention to remedy the violation of Yelp's due process rights—as well as Yelp's many examples demonstrating the ability of some reputation management companies to obtain court orders through deception. RJN Exs. A-G.

As Plaintiffs cannot deny, as with any other defamation plaintiff, they are not without a remedy against the original speaker—they have just chosen not to pursue it. Plaintiffs' speculation that they might not be able to enforce their judgment directly against Bird (Answer 3, 48) may give them a reason to lobby Congress to change existing law, but it does not give them an end-run around Section 230. Section 230 gives Yelp—and companies like it that host millions of third-party postings—the freedom they need to provide valuable information to the public without fear of

being dragged into court each time a business or powerful person is unhappy with criticism. This plainly advances the public good.

IV. CONCLUSION

Yelp respectfully requests that the Court reverse the orders of the trial and appellate courts, and direct those courts to enter an order granting Yelp's Motion to Vacate Judgment.

Dated: March 16, 2017

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court 8.504(d))

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Dated: March 16, 2017

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PROOF OF SERVICE
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I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 505 Montgomery Street, Suite 800, San Francisco, CA 94111. On March 16, 2017, I served the following document(s):

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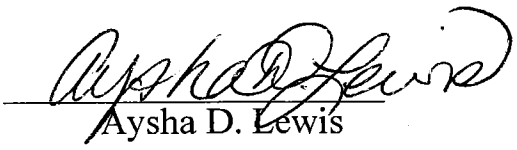
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 16, 2017, at San Francisco, California.



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