Cats and Dogs Animal Hospital, Inc. v. Yelp! Inc. Doc. 16

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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

CATS AND DOGS ANIMAL HOSPITAL, INC.; ASTRO APPLIANCE SERVICE; BLEEDING HEART, LLC d/b/a BLEEDING HEART BAKERY; CALIFORNIA FURNISHINGS, INC. d/b/a SOFA OUTLET; CELIBRÉ, INC.; J.L. FERRI ENTERTAINMENT, INC. d/b/a ADULT SOCIALS; LE PETITE RETREAT DAY SPA, LLC; SAN FRANCISCO BAY BOAT CRUISES, LLC d/b/a MERMAIDS CRUISE; WAG MY TAIL, INC.; and ZODIAC RESTAURANT GROUP, INC. d/b/a SCION RESTAURANT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

YELP! INC.,

Defendant.

Case No: 2:10-cv-01340-VBF-SS
Pleading Type: Class Action

**EX PARTE MOTION FOR REASSIGNMENT, CONSOLIDATION, DESIGNATION OF LEAD CASE, AND APPOINTMENT OF INTERIM CLASS COUNSEL**

Judge: Hon. Valerie Baker Fairbank
Action Filed: February 23, 2010



Dockets.Justia.com

**TO ALL PARTIES OF RECORD:**

**PLEASE TAKE NOTICE THAT** pursuant to C.D. Cal. L.R. 7-19, Plaintiffs will and hereby do apply ex parte to the Court for an order:

(1) Consolidating the later-filed action styled *LaPausky v. Yelp! Inc.*, No. 2:10cv01578 (C.D. Cal, filed March 3, 2010), and any subsequent action to their first-filed action, and reassigning any such actions to this Court;

(2) Designating their First Amended Complaint as the Consolidated Class Complaint; and

(3) Appointing their counsel interim class counsel.

Pursuant to the Court's Standing Order, any opposition by Yelp! Inc. must be filed no later than twenty-four hours (1 court day) following service, and any opposition by Christine LaPausky must be filed no later than forty-eight hours (2 court days) following service.

The Contact information for the attorneys representing the Defendant and the action Plaintiffs propose be reassigned and consolidated are:

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## I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(g)(2)(A), and the Court's inherent authority to manage this litigation, counsel for Plaintiffs, The Weston Firm and Beck & Lee Business Trial Lawyers (collectively, the "Proposed Interim Class Counsel") respectfully move the Court for an Order (1) consolidating this action with the related *LaPausky* action, and (2) appointing them interim class counsel for the consolidated action and any future related actions alleging similar claims against Defendant Yelp! Inc. ("Yelp").

## II. BACKGROUND OF THE PRESENT AND THE RELATED CLASS ACTION AGAINST YELP

On January 12, 2010 Dr. Gregory Perrault, the owner of Plaintiff Cats and Dogs Animal Hospital, contacted his current counsel in this action, Gregory Weston, and informed him that Yelp's sales employees were trying to extort him into purchasing an advertising package that would require a payment of $3,600 a year. (*See* Declaration of Gregory S. Weston ("Weston Decl.") ¶5.) Dr. Perrault knew Mr. Weston because he was a member of the class of Los Angeles-area condominium buyers that obtained, as a result of Mr. Weston's effort, a $1.35 million all-cash settlement in late 2009. (Weston Decl. ¶6.)

In response to Dr. Perrault's inquiry, Mr. Weston, together will his co-counsel Beck & Lee Business Trial Lawyers ("Beck & Lee"), spent the next six weeks investigating Dr. Perrault's claims and preparing and preparing the initial complaint filed on February 23, and served on Yelp the following day (the "First Complaint"). (Weston Decl. ¶6.)

Since then, more than 150 additional small business owners have contacted The Weston Firm and Beck & Lee with stories similar Dr. Perrault's, and the firms continue to receive numerous inquires each day. (Weston Decl. ¶7; Declaration of

Jared H. Beck ("J. Beck Decl.") ¶6.) Proposed Interim Class Counsel have expended substantial time interviewing these small business owners, and preparing the First Amended Class Action Complaint ("Amended Complaint"), which was filed on March 16. The Amended Complaint added a great amount of detail concerning Yelp's unlawful business practices, included several more claims for relief, and named nine additional small business representative plaintiffs. (*See* Amended Complaint, attached to the Weston Decl. as Exhibit A; Weston Decl. ¶8; J. Beck Decl. ¶7.)

Since February, when the Proposed Interim Class Counsel filed the First Complaint, counsel have, among other things:

- Filed a detailed 39-page Amended Complaint;
- Conferred with Yelp and stipulated to extend Yelp's time to respond;
- Further conferred with Yelp's counsel, including in person in San Francisco on March 18, on case management issues;
- Scheduled a Rule 26(f) discovery conference with Yelp for April 8;
- Conferred with Yelp's counsel on issues of class certification, proposed injunctive relief, and electronic discovery; and
- Begun preparing Rule 26 disclosures.

(Weston Decl. ¶9; J. Beck Decl. ¶8.)

On March 3, a mostly verbatim copycat[1] of the older First Complaint was filed in this District and assigned to the Hon. Manuel L. Real. On March 11, Yelp filed a Notice of Related Case (Dkt. No. 7), proposing that because "the cases call for determination of the same or substantially related or similar questions of law and fact and would entail substantial duplication of labor if heard by different judges . . . they are related and should be heard by the same judge." Plaintiffs agree

[1] *Compare* the First Complaint to the *LaPausky* complaint, attached to the Weston Decl. as Exhibit B and Exhibit C, respectively.

with consolidation and have provided for the same in the Proposed Order filed concurrently with this motion.

Before filing this motion, Plaintiffs conferred with and gave notice to counsel for both Yelp and LaPausky on March 22, and again on March 23, but despite these efforts were unable to obtain a stipulation to the relief proposed herein. (Weston Decl. ¶10 & Exhibit D; Declaration of Elizabeth Lee Beck ("E. Beck Decl.") ¶9.)

## III. ARGUMENT

### A. Reassignment and Consolidation of the *LaPausky* and Any Subsequent Actions is Appropriate.

Fed. R. Civ. P. 42(a) authorizes the Court to grant consolidation where "actions before the court involve a common question of law or fact." In determining whether to consolidate cases, the Court should "weigh the interest of judicial convenience against the potential for delay, confusion and prejudice." *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, 720 F.Supp. 805, 807 (N.D. Cal. 1989).

The two actions here "cover the same class period, are brought against the same defendant[], allege the same violation of law, and allege similar predicate facts." *Curry v. Hansen Med. Inc.*, Nos. 5:09-cv-05094, 5:09-05212, 3:09-cv-05367, 2010 U.S. Dist. LEXIS, at *3 (N.D. Cal. Feb. 25, 2010) (granting motion to consolidate three related cases and appointing movant lead counsel). In fact, the later-filed *LaPaulsky* action copies the *Cats and Dogs* action verbatim except in the small number of allegations specific to the respective plaintiffs—the former is completely subsumed in the latter.

Moreover, some factors that might weigh against consolidation—such as differing trial dates or stages of discovery, *see Lewis v. City of Fresno*, Nos. CV-F-

08-1062, CV-F-09-304, 2009 U.S. Dist. LEXIS 57083, at *3 (E.D. Cal. July 6, 2009)—are not present here, as not even an initial case management conference has been held in either action.

In sum, because granting the Motion would mean "only one case will remain open and all further litigation will proceed under only one case number, [and therefore] any potential for delay, confusion and prejudice will be greatly reduced," the Court should, respectfully, consolidate the actions. *Sisneroz v. Whitman*, Nos. 05-cv-00519, 08-cv-01971, 2009 U.S. Dist. LEXIS 48430, at *7-8 (E.D. Cal. June 1, 2009).

Finally, if the Court grants the Motion, it should, respectfully, order that Plaintiffs' Amended Complaint be designated the Consolidated Class Complaint, since the Amended Complaint entirely subsumes the *LaPausky* Complaint and better represents the interests of the proposed classes through additional factual allegations and counts.

**B. The Court Should Appoint The Weston Firm and Beck & Lee Business Trial Lawyers as Interim Lead Counsel.**

The Court "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The appointment of interim counsel during the pre-certification period is appropriate because "it will usually be important for an attorney to take action to prepare for the certification decision." Advisory Committee Note to Rule 23(g)(2)(A)[2] (2003 amendments). Appointment of interim class counsel is especially appropriate where "there are a number of overlapping, duplicative, or competing suits pending in other courts, and some or all of those suits may be consolidated, [and] a number of lawyers may compete for class counsel

[2] The equivalent of what is now Rule 23(g)(3).

appointment. In such cases, designation of interim counsel clarifies responsibility for protecting the interests of the class during precertification activities . . . ." Manual of Complex Litigation Fourth § 21.11 (2004).

Factors the Court should consider when appointing class counsel include: (1) the work the counsel have done in identifying or investigating potential claims in the action; (2) counsels' experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A); *see Levitte v. Google, Inc.*, Nos. C 08-03369, C 08-03452, C 08-03888, C 08-04701, 2009 U.S. Dist. LEXIS 18198, at *5 (N.D. Cal. Feb. 25, 2009) (court may consider Rule 23(g)(1)(A) factors in appointing interim class counsel).

The Proposed Interim Class Counsel is composed of four experienced trial lawyers familiar with class actions and other complex civil litigation, who have previously been appointed counsel in federal class actions. (*See* Weston Decl. ¶¶1-4; J. Beck Decl. ¶¶1-5; E. Beck Decl., ¶¶1-5; Declaration of Jack Fitzgerald ¶¶1-3.). The attorneys of the Proposed Interim Class Counsel have a history of working together on public interest class action lawsuits. For example, the attorneys communicate daily and hold weekly telephonic conference calls to divide work efficiently and avoid duplication of efforts, in the best interests of the Class, thus meeting the Rule 23(g)(1)(B) criterion. Proposed Interim Class Counsel have already demonstrated their ability to manage the Yelp class action, for example by retaining small business clients from across the country to represent two proposed classes, already conferring several times with opposing counsel including once in person, setting dates for the Rule 26(f) conference, stipulating to extend Yelp's time to answer, and beginning discussions on class certification and other case management issues. (Weston Decl. ¶9; J. Beck Decl. ¶8.)

Where there is no dispute that attorneys competing for lead class counsel have adequate experience, skill and knowledge, "the first factor favors appointment of [counsel who have] done a majority of the preparation work leading to the filing of these actions, including investigation into the alleged misconduct and identification of the legal theory of the case." *Carlin v. Dairy Am., Inc.*, Nos. 1:09cv0430, 1:09cv0556, 1:09cv0558, 1:09cv0607, 2009 U.S. Dist. LEXIS 50493, at *7 (E.D. Cal. May 29, 2009) (appointing first firm to file suit as lead counsel where "a simple comparison of the original complaint in this action with the [later filed complaints] reveals that they are almost identical.")

Moreover, appointing the Proposed Interim Class Counsel as interim class counsel will avoid "the risk of overstaffing or an ungainly counsel structure." Advisory Committee Note to Rule 23(g)(2) (2003 amendments). By appointing the Proposed Class Counsel as interim lead counsel, the Court "will greatly reduce the inevitable duplication of effort" and the "danger of duplication of fees," that would arise from assigning as interim lead counsel anyone other than the Proposed Class Counsel. *See Castaneda v. Burger King Corp.*, No. C 08-04262, 2009 U.S. Dist. LEXIS 99084, at *50 (N.D. Cal. Sept. 25, 2009) (stating that the "overall number of timekeepers should be kept to a small, efficient core group of lawyers . . .").

Finally, the attorneys appointed to serve as class counsel must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Here, the approaches of the Proposed Interim Class Counsel and counsel for Ms. LaPausky have varied dramatically and weigh in favor of appointing the Proposed Interim Class Counsel as interim class counsel. Mr. Marron's involvement in this matter smacks of collusion and has been entirely limited to:

- Filing a verbatim copycat action, in which the class allegations that are alleged to be "like Plaintiff" do not actually correspond to the plaintiff-specific facts alleged;

- Serving a Notice of Unavailability of Counsel (annexed to the Weston Decl. as Exhibit E), in which Mr. Marron says he will be "unavailable for any purposes whatsoever . . . including but not limited to receiving notices of any kind, responding to ex-parte applications, appearing in court or appearing at depositions" for over six weeks; and
- Giving Yelp 60 days to answer the *LaPausky* Complaint even though, as a verbatim copycat, Yelp had already been served with the same pleading (in the form of *Cats and Dogs'* Complaint) almost three weeks before being served with the *LaPausky* Complaint (*see* Case No. CV 10-1578-VBF, Dkt. No. 11).

## IV. THE OTHER PARTIES' POSITIONS

### A. POSITION OF RON MARRON, COUNSEL FOR *LAPAUSKY*

Mr. Marron agrees that the *Cats and Dogs* and *LaPausky* actions should be consolidated, but opposes the other relief requested herein, including the appointment of Proposed Interim Class Counsel as interim class counsel, and the designation of the Amended Complaint as the Consolidated Class Complaint.

### B. YELP'S POSITION

Yelp's position is described in its own *ex parte* application, filed today.

## V. CONCLUSION

For the reasons described herein, Plaintiffs respectfully request the Motion be granted and that the Court (1) order that the *Cats and Dogs* and *LaPausky* cases, and any further related cases, be consolidated; (2) that the Amended Complaint be designated the Consolidated Class Complaint; and (3) that the Proposed Interim Class Counsel be appointed interim class counsel.

DATED: March 24, 2010 Respectfully Submitted,

/s/ Gregory S. Weston
Gregory S. Weston

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