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 7 YELP! INC.

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

11 BORIS Y. LEVITT, on behalf of himself
 12 and all others similarly situated,

13 Plaintiff,

14 v.

15 YELP! INC.; and DOES 1 through 100,
 inclusive,

16 Defendants.

No. CV 10-01321 MHP

**DEFENDANT YELP! INC.'S NOTICE OF MOTION
 AND MOTION TO CONSOLIDATE RELATED
 CASES FOR ALL PURPOSES AND TO SET DATES
 FOR CONSOLIDATED AMENDED COMPLAINT
 AND RESPONSE THERETO**

Date: Monday, July 19, 2010
 Time: 2:00 p.m. _
 Judge: Hon. Marilyn Hall Patel

18 CATS AND DOGS ANIMAL
 19 HOSPITAL, INC., et al., on behalf of
 20 itself and all others similarly situated,

21 Plaintiffs,

22 v.

23 YELP! INC.,

24 Defendant.

No. CV 10-02351 MHP

1 NOTICE OF MOTION AND MOTION TO CONSOLIDATE

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on Monday, July 19, 2010 at 2:00 p.m., or as soon
4 thereafter as this motion may be heard, Defendant Yelp! Inc. (“Yelp”) will and hereby does move
5 for an order providing the following:

6 1. The following cases shall be consolidated for all purposes: *Boris Y. Levitt, on*
7 *behalf of himself and all others similarly situated v. Yelp! Inc.*; and *Does 1 through 100,*
8 *inclusive*, No. CV 10-01321 MHP (originally filed in Cal. Super. Ct. on Mar. 12, 2010)
9 (hereinafter “*Levitt*”); and *Cats and Dogs Animal Hospital, Inc. et al. v. Yelp! Inc.*, No. CV 10-
10 02351 MHP (originally filed in C.D. Cal. on Feb. 23, 2010, with case number CV 10-01340-
11 VBF-SS) (hereinafter “*Cats and Dogs*”);

12 2. Plaintiffs in both *Levitt* and *Cats and Dogs* shall file and serve a single,
13 consolidated and superseding amended complaint 30 days after the Court enters its order
14 granting consolidation; and;

15 3. Yelp is relieved of the obligation of filing a response to the individual complaints
16 currently on file in both *Levitt* and *Cats and Dogs* (answer, motion to dismiss, or other
17 response), and Yelp shall instead file a response (answer, motion to dismiss, or other response)
18 to the consolidated amended complaint within 30 days after it is filed.

19 In the event the Court denies this motion, Yelp respectfully requests that the Court order
20 that Yelp’s date to respond or otherwise move with respect to either the *Levitt* Complaint or the
21 *Cats and Dogs* Complaint be moved to 30 days after the entry of the Court’s order or 30 days
22 following the initial Case Management Conference, whichever is later.

23 This motion is made under Federal Rule of Civil Procedure 42(a) and the Court’s inherent
24 power to control and manage its docket. This motion is based on this Notice of Motion and
25 Motion, the accompanying Memorandum of Points and Authorities, the accompanying
26 Declaration of Matthew D. Brown and exhibits thereto, including the stipulation of Plaintiff in
27 *Levitt* to this motion, all previous papers and proceedings in *Levitt* and *Cats and Dogs*, oral
28

1 argument of counsel, and such other materials and argument as may be presented in connection
2 with the hearing on the motion.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 With the stipulation of Plaintiff in *Levitt*, Yelp moves for an order consolidating the two
6 above-captioned putative class actions for all purposes, and requiring plaintiffs to file a
7 consolidated and superseding amended complaint.¹ There is good cause for consolidating these
8 two related cases for all purposes. Both the *Cats and Dogs* and *Levitt* cases arise from the same
9 core factual allegation (which Yelp denies), allege substantially similar class definitions, and
10 raise related and overlapping legal issues. Consolidating these cases will promote the interests of
11 justice by precluding the possibility of inconsistent results, and will promote efficiency and
12 judicial economy by streamlining the discovery process and halving the required motions and
13 filings. Consolidation at this early stage in the litigation will neither prejudice nor inconvenience
14 the parties or the Court.

15 **II. RELEVANT FACTS & PROCEDURAL HISTORY**

16 **A. Relevant Background on Yelp**

17 Founded in 2004, Yelp owns and operates a popular website, www.yelp.com (the “Yelp
18 Website”), which allows users to talk about the many experiences they have with the businesses
19 in their communities, such as restaurants, mechanics, dentists, and more. Users read and write
20 reviews about these businesses on the Yelp Website, and rate them on a scale of one to five stars.
21 Yelp sells advertisements to local businesses, which also appear on the Yelp Website as
22 “Sponsored Results.” More than 32 million people use the Yelp website every month.

23 Not all reviews are equally trustworthy. For example, some business owners write fake
24 reviews to enhance their image or to tarnish that of a competitor, and disgruntled former
25 employees sometimes write negative reviews about their former employees. This problem
26 permeates most online review sites, artificially inflating or deflating a business’s rating and

27 ¹ Plaintiffs in *Cats and Dogs* do not agree to consolidation at all, despite their previous agreement
28 to the consolidation of *Cats and Dogs* with another related case in the Central District.

1 misleading consumers. Yelp internally and informally refers to these less trustworthy reviews as
2 “spam,” the same term often used to describe unwanted, “junk” email.

3 To combat this spam, Yelp uses proprietary and confidential software called the “Review
4 Filter.” The Review Filter attempts to identify and filter out less trustworthy reviews. These
5 filtered reviews are viewable by clicking on a link at the bottom of each business page.² The
6 Review filter affects both positive and negative reviews, and runs on a nearly continual basis. As
7 circumstances change over time (e.g., the Review Filter gleans new information about a particular
8 review or reviewer), a review may be designated and undesignated as spam. Therefore, the
9 review may be unfiltered at one point in time, thus appearing on the business review page, and
10 filtered at another point in time, thus “disappearing” from the review page.³

11 Separate and apart from the Review Filter, a review may be removed from the Yelp
12 Website if it violates Yelp’s posted Terms of Service or Review Guidelines, or if the author of
13 that review removes it.

14 **B. Plaintiffs Have Filed Substantially Similar Complaints.**

15 In *Cats and Dogs*, Plaintiff filed its initial complaint against Yelp on February 23, 2010.
16 Just over two weeks later, on March 12, Plaintiff in *Levitt* filed a similar complaint against Yelp.⁴
17 (See *Cats and Dogs*, Initial Complaint (“*Cats and Dogs* Compl.”), Docket No. 1); and *Levitt*,
18 Initial Complaint (“*Levitt* Compl.”), Docket No. 1.) The gravamen of both complaints is that
19 Yelp manipulates the reviews for plaintiff businesses depending on whether or not they advertise
20 with Yelp. (E.g., *Cats and Dogs* Compl. ¶¶ 14-35; *Levitt* Compl. ¶¶ 7-13.)

21 The initial complaint in *Cats and Dogs* alleges that Yelp employees stated that if *Cats and*
22 *Dogs* purchased Yelp’s advertising services, Yelp would hide or remove negative reviews from
23 the *Cats and Dogs* webpage on www.yelp.com. According to the initial complaint, after

24 _____
25 ² See Yelp Website, http://www.yelp.com/faq#remove_review, available online June 8, 2010
(explaining Review Filter).

26 ³ See Yelp Website, <http://officialblog.yelp.com/2010/03/yelp-review-filter-explained.html>,
27 available online June 8, 2010 (explaining Review Filter).

28 ⁴ *Levitt* was initially filed in the Superior Court of California, County of San Francisco. Yelp removed the case to this Court.

1 declining to purchase Yelp’s advertising services, negative reviews appeared on the webpage.
2 (*Cats and Dogs* Compl. ¶¶ 14-25.) Similarly, the *Levitt* complaint alleges that after declining to
3 purchase Yelp’s advertising services, the majority of positive reviews disappeared from Levitt’s
4 business webpage on www.yelp.com. (*Levitt* Compl. ¶¶ 24-33.) Both complaints pleaded a
5 claim for violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200,
6 seeking to permanently enjoin Yelp from engaging in the complained-of practices, and seeking
7 disgorgement of profits, restitution, and attorneys’ fees and costs, individually and on behalf of a
8 similarly defined nationwide class. (*Cats and Dogs* Compl. ¶¶ 36, 43-45; *Levitt* Compl. ¶¶ 36 49-
9 53.) In addition, Plaintiff in *Levitt* pleads claims for violation of Bus. & Prof. Code § 17500,
10 Negligent Misrepresentation, and Intentional Misrepresentation. (*Levitt* Compl. ¶¶ 54-79.)

11 Later, on March 16, 2010, *Cats and Dogs* Plaintiffs filed their First Amended Complaint
12 (“*Cats and Dogs* FAC”). (See *Cats and Dogs* FAC, Docket No. 10.) Although the *Cats and*
13 *Dogs* FAC adds a number of named plaintiffs (now divided into two putative classes, businesses
14 that purchased advertising and those that did not) and three additional causes of action (Extortion,
15 Attempted Extortion, and Intentional Interference with Prospective Economic Advantage), the
16 core factual allegation of *Cats and Dogs* is still the same as before. (E.g., *Cats and Dogs* FAC
17 ¶¶ 20-21.)

18 **C. Transfer of *Cats and Dogs* to the Northern District of California.**

19 The *Cats and Dogs* action was initially filed in the United States District Court for the
20 Central District of California and assigned to the Honorable Valerie Baker Fairbank. On May 4,
21 2010, on Yelp’s motion to transfer venue pursuant to 28 U.S.C. § 1404(a), Judge Fairbank
22 ordered *Cats and Dogs* transferred to this Court. (*Cats and Dogs*, Docket No. 56.) As one of the
23 reasons supporting the order of transfer, Judge Fairbank cited the potential for consolidation of
24 *Cats and Dogs* with *Levitt*. (*Id.* at 6 (“The potential consolidation of this case with a related
25 action currently pending in the Northern District of California also weighs for transfer.”).)

26 On May 28, 2010, *Cats and Dogs* was opened on this Court’s docket and assigned to
27 Chief Magistrate Judge Maria-Elena James. (*Cats and Dogs*, Docket No. 57.) On June 2, 2010,
28 Yelp filed in the *Levitt* action an Administrative Motion to Consider Whether Cases Should Be

1 Related pursuant to Civil Local Rules 3-12(b) and 7-11, moving that the *Levitt* and *Cats and Dogs*
2 cases be related and assigned to the same judge. (See *Levitt*, Docket No. 10.) Plaintiffs in both
3 *Cats and Dogs* and *Levitt* joined Yelp in stipulating to the relief requested. (See *Levitt*, Docket
4 No. 10-4.) On June 4, 2010, the cases were ordered related and the *Cats and Dogs* action was
5 reassigned to Your Honor. (*Levitt*, Docket No. 11; *Cats and Dogs*, Docket No. 62.)

6 **D. Yelp’s Meet-and-Confer Efforts with Plaintiffs in Both *Levitt* and *Cats and***
7 ***Dogs* Concerning Consolidation and Related Issues.**

8 On June 4, after this Court issued its order relating the cases, Yelp met and conferred with
9 opposing counsel in both cases, seeking their stipulation to this motion. (Declaration of Matthew
10 D. Brown, (“Brown Decl.”) ¶ 2.) Plaintiff in *Levitt* has stipulated to this motion and all of the
11 relief requested herein. (*Id.* ¶ 3, Ex. A.)

12 When *Cats and Dogs* was still in the Central District, before being transferred to this
13 Court, Plaintiffs in *Cats and Dogs* agreed to the consolidation of *Cats and Dogs* with *LaPausky*
14 *d/b/a D’Ames Day Spa v. Yelp! Inc.*, Case No. CV 10-01578 (C.D. Cal.) (“*LaPausky*”), a related
15 action that was pending in the Central District but has since been voluntarily dismissed. (*Id.* ¶ 4,
16 Ex. B.) At that time, Plaintiffs in *Cats and Dogs* did not oppose consolidation, but opposed
17 Yelp’s proposed method for effectuating consolidation. (*Id.*) Through its recent meet-and-confer
18 efforts, however, Yelp has learned that Plaintiffs in *Cats and Dogs* now oppose consolidation.
19 Plaintiffs in *Cats and Dogs* also oppose the filing of a consolidated amended complaint and all
20 relief requested herein. (*Id.* ¶ 5.)

21 **III. ARGUMENT**

22 Consistent with the agreement of Plaintiff in *Levitt* and Yelp, the *Cats and Dogs* case and
23 the *Levitt* case should be consolidated for all purposes because the cases present common
24 questions of law and fact, and consolidation will promote the interests of justice, judicial
25 economy, and efficiency. Consolidation will also preclude the possibility of inconsistent results.
26 Furthermore, consolidation at this early stage in the litigation will neither prejudice nor
27 inconvenience the parties or the Court.

28

1 **A. Legal Standard.**

2 “If actions before the court involve a common question of law or fact, the court may . . .
3 consolidate the actions” Fed. R. Civ. P. 42(a)(2). “[T]he main question for a court in
4 deciding whether to consolidate is whether there is a common question of law or fact.” *Indiana*
5 *State Dist. Council of Laborers and HOD Carriers Pension Fund v. Gecht*, No. C-06-7274 EMC,
6 2007 WL 902554, at *1 (N.D. Cal. Mar. 22, 2007). “The purpose of consolidation is to avoid the
7 unnecessary costs or delays that would ensue from proceeding separately with claims or issues
8 sharing common aspects of law or fact.” *Siegall v. Tibco Software, Inc.*, No. C 05-2146 SBA,
9 2006 WL 1050173, at *2 (N.D. Cal. Feb. 24, 2006). Further, consolidation serves “to avoid
10 inconsistent adjudications.” *Team Enters., LLC v. W. Inv. Real Estate Trust*, No. 1:08-cv-00872
11 LJO-SMS, 2008 WL 4712759, at *1 (E.D. Cal. Oct. 23, 2008).

12 “The district court has broad discretion under . . . Rule [42(a)] to consolidate cases
13 pending in the same district.” *Investors Research Co. v. U.S. Dist. Ct. for Central Dist. of Cal.*,
14 877 F.2d 777 (9th Cir. 1989). While “exercising its broad discretion to order consolidation of
15 actions,” a district court also “weighs the saving of time and effort consolidation would produce
16 against any inconvenience, delay, or expense that it would cause.” *Huene v. U.S.*, 743 F.2d 703,
17 704 (9th Cir. 1984).

18 **B. The Cases Should Be Consolidated Because They Involve the Same Defendant**
19 **and Present Common Questions of Law and Fact.**

20 *Cats & Dogs* and *Levitt* share common questions of law and fact, making consolidation
21 for all matters appropriate. *See* Fed. R. Civ. P. 42(a)(2). The core factual allegations in these two
22 cases are the same: that Yelp manipulates the reviews for plaintiff businesses depending on
23 whether or not they advertise with Yelp. Although the original *Cats and Dogs* Plaintiff amended
24 its complaint to add additional named Plaintiffs and to divide its original class definition into two
25 putative classes of Plaintiffs (businesses that purchased advertising services and those that did
26 not), these classes are subsumed by *Levitt* Plaintiff’s current class definition (businesses and
27 persons “who were contacted by Yelp regarding the option to advertise on Yelp and who were
28

1 subsequently subject to the manipulation of reviews of their businesses”). (*See Cats and Dogs*
2 FAC ¶ 171; *Levitt* Compl. ¶ 36.)

3 These cases share a common question of law, as plaintiffs in both cases allege that Yelp
4 violated California’s Unfair Competition Law, Cal. Bus. & Prof. Code §17200. This is sufficient
5 for a finding of consolidation, as common questions of law need not predominate. *See Indiana*
6 *State Dist. Council*, 2007 WL 902554, at *1 (“A common question or questions do not have to
7 predominate. All that is required is that the district court find that they exist and that
8 consolidation will prove beneficial.”); *Osher v. JNI Corp.*, No. 01-CV-0557-J (NLS), 2001 WL
9 36176415, at *2 (S.D. Cal. July 10, 2001) (finding that Rule 42 does not “require[] that the
10 actions be identical before they may be consolidated”).

11 Further, although both *Levitt* and *Cats and Dogs* each allege three additional claims, all of
12 them center on the allegation (which Yelp denies) that Yelp manipulates reviews in order to
13 secure advertising sales. Thus, the existence of some differing legal claims is not sufficient to
14 overcome consolidation where cases share a common question of law **and** common questions of
15 fact. *See In re Century Aluminum Co. Sec. Litig.*, No. C 09-1001 SI, 2009 WL 2905962, at *2
16 (N.D. Cal. Sept. 8, 2009) (consolidating cases that “share common questions of fact,” where
17 “each makes claims centering on [Defendant’s] restatement of cash flows,” and finding “[w]hile
18 there are some legal differences [between the claims] . . . the similarities are far greater because
19 the claims in all cases revolve around whether [Defendant] materially misrepresented its financial
20 condition”); *Hutchens v. Alameda County Social Servs. Agency*, No. C 06-06870 SBA, 2008 WL
21 927899, at *2 (N.D. Cal. Apr. 4, 2008) (consolidating cases where “[t]he same facts are at issue in
22 both cases,” “[t]he legal issues are the same or similar,” and “the relief sought is similar in both
23 cases”).

24 Both cases here are putative class actions seeking certification of the same class of
25 businesses for overlapping claims involving the same **core issue** against the same defendant.
26 These circumstances strongly support consolidation. *See Levitte v. Google, Inc.*, No. C 08-03369
27 JW, 2009 WL 482252, at *1 (N.D. Cal. Feb. 25, 2009) (finding consolidation of related cases
28 with the same defendant appropriate where the related cases shared the same “core issue”);

1 *Brown v. Kelly*, No. C 06-04671 JW, 2006 WL 3411868, at *1 (N.D. Cal. Nov. 27, 2006)
2 (consolidating two cases that “involve virtually identical legal and factual issues,” with “the core
3 issue of both cases” being “whether executives at [Defendant company] breached their fiduciary
4 duties when they backdated stock options”); *Burnett v. Rowzee*, No. SACV07-641 DOC (ANx),
5 *et al.*, 2007 WL 4191991, at *2 (C.D. Cal. Nov. 26, 2007) (finding defendant’s “scheme to
6 defraud is a common factual issue among all of the cases,” even though “the complaints differ in
7 specifics, [because] as a general matter each rests on the same series of transactions –
8 [defendant’s] sale of non-existent securities by herself and through others”).

9 **C. The Cases Should Be Consolidated Because It Would Serve the Interests of**
10 **Justice, Judicial Economy, and Efficiency.**

11 Consolidation is also warranted because any discovery concerning Yelp’s conduct or
12 policies relating to Yelp’s advertising sales practices will be substantially identical in both
13 actions. *See Backe v. Novatel Wireless, Inc.*, No. 08-CV-01689-H (RBB), 2008 WL 5214264, at
14 *2 (S.D. Cal. Dec. 10, 2008) (finding consolidation of related cases naming the same defendants
15 appropriate “[b]ecause [where] the related actions are based on the same facts and involve the
16 same subject matter, the same discovery will be relevant to both lawsuits”). If these cases
17 proceed separately, duplicative discovery will force Yelp to expend significant extra efforts and
18 costs in its defense of substantially identical claims.

19 Consolidation would also allow the Court to avoid unnecessary time and effort presiding
20 over duplicative motions to dismiss, class certification proceedings, discovery matters, and other
21 motions and proceedings if these matters are not consolidated. Furthermore, in these cases
22 arising from the same facts and affecting the same substantive rights of overlapping class
23 members, divided proceedings create a risk of potentially inconsistent results. *See Burnett*, 2007
24 WL 4191991, at *3 (after finding a common factual issue, the court also held that “[t]he real risk
25 of inconsistent judgments arises if the parties are allowed to proceed with dispositive motions or
26 trial in an uncoordinated manner”).

27 Finally, there will be no prejudice or inconvenience to Plaintiffs or the Court, particularly
28 given that all Plaintiffs are in the same, early stage of the proceedings. *See id.* (finding no

1 prejudice where “no case is close to trial” and all of the cases to be consolidated arose within a
2 four-month period so that “the risk of prejudice due to cases being at different stages of
3 preparation is minimal”).

4 **D. Plaintiffs Should File a Consolidated Amended and Superseding Complaint.**

5 Upon consolidating these two cases, the Court has the power to order Plaintiffs to file a
6 consolidated amended complaint. *See* Fed. R. Civ. P. 42(a)(3); *In re Equity Funding Co. of Am.*
7 *Sec. Litig.*, 416 F. Supp. 161, 176-77 (C.D. Cal. 1976) (court has power to order consolidated
8 pleadings where it would tend to avoid unnecessary cost or delay and would not cause serious
9 prejudice to a party’s rights). Yelp suggests that having Plaintiffs file a consolidated amended
10 complaint would be the most sensible course after consolidation. It is a common procedure in
11 consolidated class actions because having one coherent pleading provides clarity and reduces
12 burdens on both the Court and the parties. “As a management tool for complex litigation, the
13 consolidated complaint has been found to have significant advantages.” 8-42 Moore’s Federal
14 Practice – Civil § 42.13(5)(a) (2010) (identifying certain advantages). *See also In re Equity*
15 *Funding*, 416 F. Supp. at 176 (finding that a consolidated complaint avoided unnecessary costs
16 and delay, allowed the court “to receive memoranda and hear argument directed to one coherent
17 pleading,” made “consideration of class action issues . . . considerably easier,” “lessened” the
18 “burdens of discovery management,” and made “clerical and administrative matters . . . much less
19 burdensome”).

20 **IV. CONCLUSION**

21 For these reasons, Yelp respectfully requests that this Court grant this Motion and enter an
22 order providing the following:

23 1. The following two cases shall be consolidated for all purposes: *Boris Y. Levitt, on*
24 *behalf of himself and all others similarly situated v. Yelp! Inc.*; and *Does 1 through 100,*
25 *inclusive*, No. CV 10-01321 MHP; and *Cats and Dogs Animal Hospital, Inc. et al. v. Yelp! Inc.*,
26 No. CV 10-02351 MHP.

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1 2. Plaintiffs in both *Levitt* and *Cats and Dogs* shall file and serve a single,
2 consolidated and superseding amended complaint 30 days after the Court enters its order
3 granting consolidation; and

4 3. Yelp is relieved of the obligation of filing a response to the individual complaints
5 currently on file in both *Levitt* and *Cats and Dogs* (answer, motion to dismiss, or other
6 response), and Yelp shall instead file a response (answer, motion to dismiss, or other response)
7 to the consolidated amended complaint within 30 days after it is filed.

8 In the event the Court denies this motion, Yelp respectfully requests that the Court order
9 that Yelp's date to file an answer, motion to dismiss, or other response to the *Levitt* Complaint
10 or the *Cats and Dogs* Complaint be moved to 30 days after entry of the Court's order or 30 days
11 following the initial Case Management Conference, whichever is later (relief to which Plaintiff
12 *Levitt* has stipulated). (*See* Brown Decl., Ex. A.)

13 Dated: June 9, 2010

COOLEY LLP

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/s/ Matthew D. Brown

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Matthew D. Brown (196972)

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Attorneys for Defendant Yelp! Inc.

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