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18 **Attorneys for Plaintiffs and the Proposed Classes**

19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**

21 CATS AND DOGS ANIMAL HOSPITAL,
 22 INC.; ASTRO APPLIANCE SERVICE;
 23 BLEEDING HEART, LLC; CALIFORNIA
 24 FURNISHINGS, INC.; CELIBRÉ, INC.; J.L.
 25 FERRI ENTERTAINMENT, INC.; LE
 26 PETITE RETREAT DAY SPA, LLC; SAN
 27 FRANCISCO BAY BOAT CRUISES, LLC;
 28 WAG MY TAIL, INC.; and ZODIAC
 RESTAURANT GROUP, INC., on behalf of
 themselves and all others similarly situated,

Plaintiffs,

v.

YELP! INC.,

Defendant.

Case No. 3:10-cv-02351 MHP
 Pleading Type: Class Action

**PLAINTIFFS' OPPOSITION TO YELP'S
 MOTION FOR CONSOLIDATION AND
 CROSS-MOTION FOR:**

**(A1) DESIGNATION OF *CATS AND DOGS*
 AS LEAD ACTION AND STAY OF
LEVITT ACT OR, IN THE
ALTERNATIVE, (A2) CONSOLIDATION
 OF ACTIONS, DEEMING *CATS AND*
DOGS FIRST AMENDED COMPLAINT
 AS THE OPERATIVE PLEADING;**

**(B) APPOINTMENT THE WESTON FIRM
 AND BECK & LEE AS INTERIM CLASS
 COUNSEL; AND**

**(C) SUBMISSION OF FULLY-BRIEFED
 MOTION TO DISMISS FOR HEARING.**

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

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 *Cats and Dogs* has already brought about substantial changes to Yelp’s business
4 practices—changes which Yelp made in direct response to the *Cats and Dogs* action, but almost
5 two weeks before Mr. Levitt brought his third-filed copycat complaint.¹ Yelp now permits its
6 users and businesses listed on Yelp to see “filtered” reviews of businesses on its website, which
7 were previously completely hidden. And Yelp no longer allows a business to pay Yelp for the
8 privilege of designating a “favorite” monthly review at the top of its listing. Yelp made both
9 changes to correct practices specifically challenged as extortionate and unfair by the first-filed
10 *Cats and Dogs* Complaint. (See Weston Decl. ¶¶ 12-13 & Ex. A; Fitzgerald Decl. ¶¶ 8-9; J. Beck
11 Decl. ¶¶ 9-10; E. Beck Decl. ¶¶ 10-11.)

12 While the *Cats and Dogs* action has already resulted in tangible benefits for the proposed
13 Class members, Yelp has also been successful at delaying its progress. Since *Cats and Dogs* was
14 filed in February of this year, Yelp has achieved delay by:

- 15 • Moving *ex parte* to consolidate *Cats and Dogs* with *LaPausky*, and seeking the filing of a
16 consolidated complaint providing Yelp an additional 30 days to respond, even though
17 *LaPausky* was a word-for-word copy of the *Cats and Dogs* Complaint (Dkt. No. 15)—the
18 exact unnecessary relief Yelp’s current motion seeks;² and

19 _____
20 ¹ Before *Levitt*, Christine LaPausky filed a first copycat suit against Yelp in the Central District
of California, styled *LaPausky v. Yelp! Inc.* No. CV 10-1578 (C.D. Cal., filed March 3, 2010).

21 ² The *Cats and Dogs* Plaintiffs successfully obtained control of the *LaPausky* action, with Ms.
22 LaPausky’s counsel agreeing that The Weston Firm and Beck & Lee were best suited to
23 represent the interests of the Classes. Because the *Cats and Dogs* action includes ten
geographically-diverse Plaintiffs embodying a variety of small business types, covering the
24 gamut of Yelp’s unlawful practices, and representing both proposed Classes—such that the
addition of Ms. LaPausky to the action was unnecessary and would only further delay the
25 action—counsel subsequently dismissed the *LaPausky* action, mooted Yelp’s Consolidation
Motion (see Dkt. No. 55). Plaintiffs submit that for the same reasons, the Court should designate
26 the *Cats and Dogs* action as the lead action and stay the *Levitt* action, or designate the *Cats and*
Dogs First Amended Complaint the operative pleading in a consolidated action without the need
27 to file an unnecessary new consolidated complaint, which will effectively delay the case at least
three months (30 days to file, 30 days to respond, 35 days briefing schedule on Motion to
28 Dismiss).

1 • Moving to transfer the action more than a week after filing a Motion to Dismiss, which
2 resulted in at least another month’s delay, plus whatever delay this set of motions causes.

3 While Yelp delays, Plaintiffs and the Class members continue to suffer tremendously at
4 the hands of Yelp’s unlawful business practices, which continue despite the pendency of this
5 action and the two changes Yelp has already implemented in response to the *Cats and Dogs*
6 lawsuit. Respectfully, the Court should not allow further delay under the guise of consolidation.

7 Moreover, after spending nearly 1,000 attorney hours and over 1,000 law firm hours
8 investigating, preparing and prosecuting this case; interviewing hundreds of small businesses all
9 over the country about Yelp’s practices; being retained by at least 60 clients seeking to pursue
10 claims against Yelp; and pushing this case forward with vigor at every opportunity, attorneys for
11 the *Cats and Dogs* Plaintiffs are—by far—the most knowledgeable and invested counsel, and are
12 best suited to forward the interests of the Class members. By contract, counsel for the third-filed
13 copycat *Levitt* action has done nothing more than agree to the substantial delays Yelp
14 consistently requests, including stipulating to the relief Yelp seeks by its instant motion. For this
15 reason the Court should appoint *Cats and Dogs*’ counsel as Interim Class Counsel until a motion
16 on class certification can be heard.

17 Once the *Cats and Dogs* First Amended Complaint is the operative complaint in this
18 action—either because the Court designates it the lead action or the operative pleading in a
19 consolidated action—the fully-briefed Motion to Dismiss Plaintiffs’ First Amended Complaint
20 should be submitted to the Court and set for hearing at the Court’s convenience. Doing so is in
21 the parties’ best interests because it will avoid any unnecessary duplication of already-expended
22 effort and move the action toward resolution.

23 **II. BACKGROUND: THE CLASS ACTIONS AGAINST YELP**

24 On January 12, 2010, Dr. Gregory Perrault, the owner of Plaintiff Cats and Dogs Animal
25 Hospital, Inc., contacted his current counsel in this action, Gregory Weston, and informed him
26 that Yelp’s sales employees were trying to extort him into purchasing an advertising package that
27 would require a payment of \$3,600 a year. (*See* Weston Decl. ¶ 7.) Dr. Perrault knew Mr.
28 Weston because he was a member of the class of Los Angeles-area condominium buyers that

1 obtained, as a result of Mr. Weston’s effort, a \$1.35 million all-cash settlement in late 2009.
2 (Weston Decl. ¶ 8.)

3 In response to Dr. Perrault’s inquiry, The Weston Firm, together with its co-counsel Beck
4 & Lee Business Trial Lawyers (“Proposed Interim Class Counsel”), spent the next six weeks
5 extensively investigating Dr. Perrault’s claims and preparing the initial complaint, which was
6 filed on February 23, 2010 and served on Yelp the following day. *Id.* Since then, hundreds of
7 additional small business owners across the United States have contacted The Weston Firm and
8 Beck & Lee with stories echoing Dr. Perrault’s, and the firms continue to receive numerous
9 inquires each day. (Weston Decl. ¶ 7; Fitzgerald Decl. ¶ 4; J. Beck Decl. ¶ 6; E. Beck Decl. ¶ 6.)
10 As of the date of this motion, 60 of these business owners have formally retained The Weston
11 Firm and Beck & Lee to pursue claims against Yelp for its extortionate sales practices, and they
12 have agreed to serve as class representatives along with Cats and Dogs. *Id.*

13 Proposed Interim Class Counsel expended substantial time interviewing these small
14 business owners and investigating their stories. Then, on March 16, 2010, Proposed Interim
15 Class Counsel filed the First Amended Complaint, joining nine additional Plaintiffs from
16 California, New York, Illinois, and Washington D.C. to the action. The First Amended
17 Complaint added significant detail concerning Yelp’s unlawful business practices, and included
18 several additional claims for relief. (*See* First Amended Complaint, Dkt. No. 10; Weston Decl. ¶
19 10; Fitzgerald Decl. ¶ 5; J. Beck Decl. ¶ 7; E. Beck Decl. ¶ 7.)

20 **III. THE COURT SHOULD DESIGNATE *CATS AND DOGS* THE LEAD ACTION**
21 **OR, IF CONSOLIDATION IS GRANTED, DESIGNATE THE *CATS AND DOGS***
22 **FIRST AMENDED COMPLAINT THE OPERATIVE PLEADING**

23 Although the Court in its discretion could consolidate the *Cats and Dogs* and *Levitt*
24 actions under Rule 42(a) because they involve common questions of law and fact, consolidation
25 here is unnecessary because *Levitt* does not add—but instead only mimics—the allegations first
26 set forth by the *Cats and Dogs* Plaintiffs. Further, the *Cats and Dogs* case is far more advanced,
27 with the parties already having fully briefed a Motion to Dismiss, which is ready to be heard.
28 Moreover, the *Cats and Dogs* case is already well-along in discovery. (*See* Weston Decl. ¶ 11;
Fitzgerald Decl. ¶ 6; J. Beck Decl. ¶ 8; E. Beck Decl. ¶ 8.) Here, consolidation will only result in

1 delay and prejudice to Plaintiffs, who continue to be harmed by Yelp’s business practices. In
2 determining whether to consolidate cases, the Court should “weigh the interest of judicial
3 convenience against the potential for delay, confusion and prejudice.” *Sw. Marine, Inc. v. Triple*
4 *A Machine Shop, Inc.*, 720 F. Supp. 805, 807 (N.D. Cal. 1989).

5 Yelp and Mr. Levitt seek consolidation requiring the filing of a “single consolidated and
6 superseding amended complaint” within 30 days after the Court orders consolidation. This, in
7 turn, would mean “Yelp is relieved of the obligation of filing a response to the individual
8 complaints currently on file”—even though Yelp has *already* filed a Motion to Dismiss the *Cats*
9 *and Dogs* action, and that motion is fully-briefed and ready to be heard. Further, Yelp proposes it
10 be given 30 *more* days to respond (Mot. at 2), undoubtedly with a Motion to Dismiss noticed on
11 a 35-day schedule (but which could put a hearing out much further, depending on what day Yelp
12 chooses for the hearing). The harm from the delay inherent in Yelp’s requested relief, sanctioned
13 by Mr. Levitt, far outweighs the benefit of consolidation.

14 With 10 Plaintiffs situated in diverse jurisdictions, the first-filed *Cats and Dogs* action
15 needs no further class representatives. Adding factual allegations pertaining to Mr. Levitt serves
16 no substantive purpose because his scenario is identical to seven of the *Cats and Dogs* Plaintiffs.
17 Further, Mr. Levitt’s Complaint includes common-law claims for Negligent Misrepresentation
18 and Intentional Misrepresentation (*see* Case No. 10-1321, Dkt. No. 1). These claims impose an
19 element of reliance that would unnecessarily complicate, and potentially derail, class
20 certification. *See, e.g., Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 661 (1988)
21 (declining to apply a class-wide presumption of reliance to a claim of negligent
22 misrepresentation where plaintiffs failed to show the same representation was made to each class
23 member); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644 (1993) (affirming denial of class
24 certification for action alleging misrepresentations because reliance issues would require highly
25 individualized proof); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (“a fraud
26 class action cannot be certified when individual reliance will be an issue”). Plaintiffs strongly
27 oppose bringing such claims in this case, and submit that Mr. Levitt’s decision to bring them
28 demonstrates misapprehension of the law governing class actions.

1 Moreover, Mr. Levitt does not allege he paid Yelp any funds, unlike the *Cats and Dogs*
2 “Sponsor” Plaintiffs, and thus has no standing to seek restitution or damages. Accordingly, Mr.
3 Levitt is not typical of the proposed *Levitt* class, or an adequate class representative of the class,
4 which encompasses both businesses that succumbed to Yelp’s extortion and paid Yelp money to
5 become a “Sponsor,” and businesses that never agreed to become Sponsors, and were harmed by
6 Yelp’s retribution for that decision (a class the *Cats and Dogs* Complaint deems “Non-
7 Sponsors”). The *Cats and Dogs* action, by contrast, defines two Classes: an injunctive relief class
8 for those Non-Sponsors that suffered from Yelp’s unsuccessful attempts at extortion, and a
9 Sponsor class comprised of businesses that purchased Yelp advertising packages under duress
10 and that are therefore eligible for restitution. The *Cats and Dogs* action is thus not only better
11 pled, but better suited for class certification.

12 Finally, counsel for *Cats and Dogs* do not wish to work with counsel for Mr. Levitt, nor
13 do they see how doing so would benefit the proposed Classes. *Levitt* counsel’s labor on the case
14 consists entirely of filing a clearly-removable third-filed copycat class action in state court,
15 stipulating to allow Yelp *four extra months* to respond to the *Levitt* Complaint,³ and now
16 stipulating at Yelp’s request to the filing of an unnecessary new pleading, the effect of which
17 will be another long delay.

18 In sum, while counsel for *Cats and Dogs* is aggressively litigating Plaintiffs’ claims on
19 behalf of the Classes and has already obtained substantial concessions from Yelp that benefit all
20 Class members, counsel for *Levitt* is not “fairly and adequately represent[ing] the interests of the
21 class[es]” as Federal Rule of Civil Procedure 23(g)(1)(B) requires. For all these reasons, the
22 Court should, respectfully, designate *Cats and Dogs* the lead action, and stay the *Levitt* action
23 pending resolution of *Cats and Dogs*. If the Court is nevertheless inclined to consolidate the
24 actions, Plaintiffs respectfully request that, rather than grant Yelp’s/Mr. Levitt’s request to file a
25 new, unnecessary pleading, the Court designate the *Cats and Dogs* First Amended Complaint as

26 _____
27 ³ *Levitt* was filed on March 12, 2010 and Mr. Levitt stipulated on April 8, 2010 that Yelp’s
28 motion to dismiss be filed on August 18, 2010. By contrast, the *Cats and Dogs* initial Complaint
was filed on February 23, 2010, the First Amended Complaint on March 16, 2010, and Yelp’s
Motion to Dismiss on April 1, 2010.

1 the operative pleading—to which Yelp has already responded by way of its Motion to Dismiss—
2 in the consolidated action.

3 **IV. THE COURT SHOULD APPOINT THE WESTON FIRM AND BECK & LEE**
4 **INTERIM CLASS COUNSEL**

5 **A. Appointment Of Interim Counsel Is Warranted Where There Are**
6 **Competing, Overlapping Class Actions**

7 The Court “may designate interim counsel to act on behalf of a putative class before
8 determining whether to certify the action as a class action.” Fed. R. Civ. P. 23(g)(3). The
9 appointment of interim class counsel during the pre-certification period is appropriate because “it
10 will usually be important for an attorney to take action to prepare for the certification decision.”
11 Advisory Committee Note to Rule 23(g)(2)(A)⁴ (2003 amendments). Appointment of interim
12 class counsel is especially appropriate where “there are a number of overlapping, duplicative, or
13 competing suits pending in other courts, and some or all of those suits may be consolidated,
14 [and] a number of lawyers may compete for class counsel appointment. In such cases,
15 designation of interim counsel clarifies responsibility for protecting the interests of the class
16 during precertification activities” *Manual of Complex Litigation* 4th § 21.11 (2004).

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

24 **B. The Weston Firm And Beck & Lee Are Qualified To Represent The**
25 **Proposed Classes**

26 Where there is no dispute that attorneys competing for lead class counsel have adequate
27 experience, skill and knowledge, “the first factor favors appointment of [counsel who have] done
28 a majority of the preparation work leading to the filing of these actions, including investigation

⁴ This was the equivalent of what is now Rule 23(g)(3).

1 into the alleged misconduct and identification of the legal theory of the case.” *Carlin v. Dairy*
2 *Am., Inc.*, 2009 U.S. Dist. LEXIS 50493, at *7 (E.D. Cal. May 29, 2009) (appointing attorneys in
3 first-filed suit as lead counsel where “a simple comparison of the original complaint in this
4 action with the [later filed complaints] reveals that they are almost identical”).

5 The attorneys comprising the Proposed Interim Class Counsel have a history of
6 representing plaintiffs together in several class actions. For example, the attorneys communicate
7 daily and hold weekly telephonic conference calls to divide work efficiently and avoid
8 duplication of efforts in the best interests of the Classes, thus meeting the Rule 23(g)(1)(B)
9 criterion. Proposed Interim Class Counsel have already demonstrated their ability to manage the
10 Yelp class action, with some 60 small business clients from across the country choosing to retain
11 the two firms to pursue their claims against Yelp. Proposed Interim Class Counsel have also
12 conferred a number of times with Yelp’s counsel, including one in-person conference in San
13 Francisco, engaged in the Rule 26(f) conference, and fully briefed Yelp’s Motion to Dismiss and
14 Motion to Transfer Venue from the Central District of California where the *Cats and Dogs* case
15 was originally filed. Proposed Interim Class Counsel have also served and obtained responses
16 and objections to requests for production and interrogatories, have provided responses and
17 objections to 120 interrogatories and 510 requests for production served on their clients by Yelp,
18 and have scheduled Yelp’s corporate representative for deposition to occur in one week.
19 Proposed Interim Class Counsel are now working with the *Cats and Dogs* Plaintiffs to collect
20 and review responsive documents in preparation for production to Yelp. (*See* Weston Decl. ¶¶
21 11, 14 & Ex. B ; Fitzgerald Decl. ¶ 6; J. Beck Decl. ¶ 8, E. Beck Decl. ¶ 8).

22 Proposed Interim Class Counsel is composed of four experienced attorneys who
23 substantially devote their practice to the prosecution of class actions in federal court. (*See*
24 Weston Decl. ¶¶ 1-6; Fitzgerald Decl. ¶¶ 1-3; J. Beck Decl. ¶¶ 1-5; E. Beck Decl. ¶¶ 1-5.) The
25 Honorable Margaret M. Morrow, of the Central District of California, has found “The Weston
26 Firm is qualified to serve as Class Counsel.” Order, Dkt. No. 101, *Adachi et al. v.*
27 *Carlyle/Galaxy San Pedro L.P. et al.*, No. CV09-00793 (C.D. Cal. May 18, 2009). Similarly,
28 Beck & Lee was appointed by the Honorable Chris McAliley as interim class counsel in *Katz et*

1 *al. v. Fifield Realty Corp. et al.*, No. 07-61626-CIV (S.D. Fla.).

2 Moreover, the appointment of Proposed Interim Class Counsel will avoid “the risk of
3 overstaffing or an ungainly counsel structure.” Advisory Committee Note to Rule 23(g)(2) (2003
4 amendments). Such a measure “will greatly reduce the inevitable duplication of effort” and the
5 “danger of duplication of fees,” that would arise from any sort of joint appointment of counsel.
6 *See Castaneda v. Burger King Corp.*, No. C 08-04262, 2009 U.S. Dist. LEXIS 99084, at *50
7 (N.D. Cal. Sept. 25, 2009) (“overall number of timekeepers should be kept to a small, efficient
8 core group of lawyers”).

9 Finally, the attorneys appointed to serve as class counsel must “fairly and adequately
10 represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). A review of the *Cats and Dogs*
11 First Amended Complaint, docket, and the declarations filed with this motion describing the
12 work Proposed Interim Class Counsel have undertaken to obtain discovery and prepare for class
13 certification, demonstrates that consideration of this factor strongly favors their appointment. All
14 *Levitt* counsel has done, by contrast, is to file a copycat complaint in March, and then stipulate to
15 a stay of all activity until August. This is unfair to the proposed Class members, and not in their
16 interest.

17 **V. THE COURT SHOULD SET A HEARING ON YELP’S FULLY-SUBMITTED**
18 **MOTION TO DISMISS**

19 Although this case was transferred from the Central District to the Northern District
20 pursuant to Yelp’s motion, nothing else about the case has changed. Prior to the transfer, Yelp’s
21 Motion to Dismiss was briefed and fully-submitted, and calendared for hearing before Judge
22 Fairbank on May 10, 2010. Plaintiffs are eager to move forward because Yelp’s unlawful
23 practices continue to damage their businesses. Plaintiffs respectfully request that the Court take
24 Yelp’s fully-briefed Motion to Dismiss (Dkt. Nos. 22-23, 27, 40, 51) under submission and set a
25 hearing at the Court’s earliest convenience.

26 **VI. CONCLUSION**

27 For the foregoing reasons, the Court should deny Yelp’s Motion for Consolidation and
28 related relief, and order that: (a) the *Cats and Dogs* action be designated the lead action, and the

1 *Levitt* action be stayed pending resolution of the *Cats and Dogs* action; (b) The Weston Firm and
2 Beck & Lee be appointed interim class counsel; and (c) Yelp's Motion to Dismiss the *Cats and*
3 *Dogs* First Amended Complaint be taken under submission (with a hearing date to be set by the
4 Court).

5
6 DATED: June 14, 2010

Respectfully Submitted,

7 /s/ Jack Fitzgerald
8 Jack Fitzgerald

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