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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN FRANCISCO DIVISION

19 BORIS Y. LEVITT D/B/A RENAISSANCE
 20 RESTORATION, CATS AND DOGS ANIMAL
 21 HOSPITAL, INC., TRACY CHAN D/B/A
 22 MARINA DENTAL CARE and JOHN
 23 MERCURIO D/B/A WHEEL TECHNIQUES;
 24 on behalf of themselves and all others similarly
 25 situated,

26 Plaintiff,

27 v.

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

Defendants.

Case No. CV 10-01321 EMC
 Consolidated with CV 10-02351 EMC

CLASS ACTION

**DEFENDANT YELP! INC.'S NOTICE OF
 MOTION AND MOTION TO DISMISS
 THIRD AMENDED CLASS ACTION
 COMPLAINT AND TO DISMISS OR
 STRIKE CLASS ACTION
 ALLEGATIONS; MEMORANDUM OF
 POINTS AND AUTHORITIES**

Date: September 9, 2011
 Time: 1:30 p.m.
 Place: Courtroom 5, 17th Floor
 450 Golden Gate Avenue
 San Francisco, California
 Judge: The Honorable Edward M. Chen

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1 **NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED CLASS ACTION**
2 **COMPLAINT AND TO DISMISS OR STRIKE CLASS ACTION ALLEGATIONS**

3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE that at 1:30 p.m. on September 9, 2011, or as soon thereafter as the
5 matter may be heard by the above-entitled Court, in the courtroom of the Honorable Edward M.
6 Chen, 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Yelp! Inc. (“Yelp”) will
7 and hereby does move for an order dismissing Plaintiffs’ Third Amended Class Action Complaint
8 (“TAC” or “Third Amended Complaint”) for a violation of California Business and Professions
9 Code Section 17200 *et seq.* (the “Unfair Competition Law” or “UCL”), civil extortion, and attempted
10 civil extortion under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Yelp also
11 moves to strike and/or dismiss the class action allegations in the TAC under Rules 12(b)(6), 12(f)
12 and/or 23 of the Federal Rules of Civil Procedure. This motion is based on this Notice of Motion and
13 Motion, the Memorandum of Points and Authorities, the Declarations of S. Ashlie Beringer and Ian
14 MacBean, the Court’s files in this action, the arguments of counsel, and any other matter that the
15 Court may properly consider.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. ISSUES TO BE DECIDED**

- 18 1. Do Plaintiffs state a legally sufficient claim against Yelp for violations of the UCL or
19 for civil extortion or attempted civil extortion?
20 2. Do Plaintiffs lack standing under Article III of the United States Constitution?
21 3. Should Plaintiffs’ class allegations be dismissed or stricken pursuant to Federal Rules
22 of Civil Procedure 12(b)(6), 12(f) and 23?

23 **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

24 Having failed in their earlier attempts to suppress legitimate – and protected – online
25 consumer commentary about their businesses, Plaintiffs filed the Third Amended Complaint, the
26 *sixth* complaint in this case. Yelp is a leading Internet review website that allows members of the
27 public (over 50 million unique visitors in March 2011 alone) to read and share online reviews about
28 their experiences with local businesses. The integrity of these reviews has fueled the success of
 Yelp’s service, and Yelp goes to great lengths to combat attempts (including by some of the Plaintiffs

1 here) to post or solicit fake reviews. As Plaintiffs acknowledge, Yelp employs a proprietary,
2 automated software algorithm to filter less reliable reviews from the tens of millions of consumer
3 reviews that are posted on its website, regardless of whether those reviews are positive or negative or
4 are written about businesses that advertise with Yelp.

5 The Third Amended Complaint continues to complain that Plaintiffs were harmed by
6 consumer reviews about their businesses on Yelp’s website. Like their earlier, deficient pleadings,
7 Plaintiffs attempt to portray Yelp’s traditional editorial functions in publishing or filtering these
8 reviews as “extortion,” even as they fail to cite any actual instance where Yelp threatened to harm
9 Plaintiffs unless they advertised on Yelp.

10 This Court squarely rejected this theory in a detailed, 21-page opinion holding that Plaintiffs’
11 claims that Yelp “actively manipulates user reviews to force businesses into purchasing advertising”
12 does not state a “plausible claim for relief”. *See* Order Granting Mot. to Dismiss, March 22, 2011,
13 Dkt. No. 70 (“Order”), at 2:26-27, 20:17. Specifically, the Court found that Plaintiffs’ claims were
14 barred by Section 230(c)(1) of the Communications Decency Act (“CDA”) and failed to plausibly
15 allege that Yelp engaged in “manipulation,” since it was not possible to “reasonably attribute the
16 appearance and disappearance of various user reviews to Yelp’s wrongdoing as opposed to its efforts
17 to filter out unreliable reviews.” *Id.* at 20:8-9.

18 Because “plaintiffs’ counsel represented at the motion hearing that *continued investigation*
19 *has produced additional facts*,” the Court gave Plaintiffs one more chance to plead a viable claim.
20 *Id.* at 20:17-19 (emphasis added). In response, Plaintiffs filed the Third Amended Complaint, which
21 is *virtually identical* to its deficient Second Amended Complaint. In fact, Plaintiffs’ latest pleading
22 adds no new allegations beyond 12 new paragraphs asserted on behalf of newly-added Plaintiff John
23 Mercurio d/b/a Wheel Techniques (“Wheel Techniques”), and adds *no new allegations at all* on
24 behalf of Plaintiffs Levitt, Cats and Dogs, and Chan.

25 Wheel Techniques’ allegations fail for the same reasons previously addressed by this Court –
26 and for additional reasons. Wheel Techniques fails to allege any facts that give rise to a plausible
27 inference that Yelp engaged in “extortion” or other “unfair” conduct. Instead, Wheel Techniques
28 speculates that Yelp created “some or all” of the negative reviews on its review page based entirely

1 on its purported inability to locate service records for a “Kevin T,” who posted a single one-star
2 review about Wheel Techniques. And, like the other Plaintiffs, Wheel Techniques founds its claims
3 for “extortion” entirely on the purported fluctuations in two reviews, without citing any facts that
4 reasonably support an inference that these fluctuations resulted from anything other than the routine
5 operation of Yelp’s automated software filter. As this Court has already held, speculative allegations
6 like these – where Plaintiffs fail to allege a specific instance where Yelp threatened unlawful injury –
7 fall well short of the requirements to state a claim for “extortion” or other “unfair” conduct under
8 California law.

9 Moreover, evidence that this Court may consider in connection with a factual challenge to
10 Plaintiffs’ Article III standing under Rule 12(b)(1) conclusively demonstrates that Plaintiffs’
11 purported injuries stem from content authored by third party reviewers, rather than content that Yelp
12 itself supposedly authored or manipulated in a scheme to extort Plaintiffs. Indeed, Yelp’s detailed
13 investigation of every review posted about each of the named Plaintiffs establishes that *none* of the
14 reviews were created by Yelp, and *all* removed reviews were removed by Yelp’s automated filter,
15 Yelp’s user operations’ team for documented terms of service violations, or by the users who wrote
16 them. In fact, many of the “positive reviews” that Plaintiffs complain were removed by Yelp due to
17 supposed “extortion” were *fake reviews planted by the Plaintiffs themselves – including 7 fake 5-star*
18 *reviews posted by Plaintiff Wheel Techniques using the name “Ellyn M.”* In the face of this
19 evidence, Plaintiffs cannot meet their burden of proving that their alleged injuries are “fairly
20 traceable” to any wrongful conduct by Yelp, as they must to establish standing under Article III of
21 the United States Constitution.

22 Finally, even at the pleading stage, it also is apparent that Plaintiffs cannot pursue their claims
23 on behalf of a putative class of all businesses contacted by Yelp about advertising. Any attempt to
24 assess whether or not Yelp made a threat of unlawful injury that reasonably induced fear in individual
25 discussions with hundreds of thousands of businesses – or to determine whether millions of consumer
26 reviews were properly removed or reinstated – would be impossible. Indeed, far from alleging a
27 uniform pattern or policy of “manipulation,” Plaintiffs’ recent allegations plead the *opposite* and
28 assert (based on triple hearsay) that Yelp fired employees and took other steps to *prevent* employees

1 from altering consumer reviews. Plaintiffs’ own allegations defeat its claims that a uniform policy or
2 practice existed, and its pleading establishes that Plaintiffs cannot certify a class on the fact-intensive
3 claims asserted here.

4 Plaintiffs’ claims have been a moving target, and they have filed no fewer than six different
5 pleadings in an attempt to state a viable theory against Yelp. The Third Amended Complaint should
6 therefore be dismissed with prejudice.

7 **III. ALLEGATIONS IN THE COMPLAINT AND PROCEDURAL BACKGROUND¹**

8 **A. Yelp’s Online Review Service**

9 Yelp publishes a popular website at www.yelp.com, which allows consumers to read and
10 write reviews about local businesses online. TAC ¶¶ 2, 21-24. As Plaintiffs admit, the reviews on
11 Yelp’s website are written by members of the public, who rate local businesses on a scale of one to
12 five stars. *Id.* ¶¶ 2, 22-23. As disclosed on portions of Yelp’s website referenced in the Third
13 Amended Complaint,² over 20 million reviews have been posted to Yelp’s website, and the
14 overwhelming majority of reviews shown on Yelp are positive – approximately 83% of reviews are
15 3 stars or higher, whether or not the business advertises on Yelp. *See* Exhibit 1 to Declaration of
16 Ashlie Beringer (“Beringer Decl.”) (referenced in ¶¶ 2-3, 5, and footnote 1 of the TAC).

17 **1. Yelp’s Automated Review Filter**

18 As Plaintiffs concede, Yelp discloses on its website that it “has an automated filter that
19 suppresses a small portion of reviews – it targets those suspicious ones you see on other sites.” TAC
20 ¶ 5. The review filter is critical to ensuring that consumers see the most reliable reviews posted on
21 Yelp, rather than those that might have been written by a business owner seeking to deceptively
22 promote its own business or tarnish a competitor. *See id.* ¶ 6; Beringer Decl. Ex. 2 (cited in ¶¶ 3, 5 of
23 the TAC). The filter software does not take into account whether or not a business advertises with
24 Yelp, and instead filters reviews based on an automated multi-factor analysis of “how established a

25 ¹ The following allegations are deemed to be true solely for purposes of this motion. Yelp vigorously
26 denies that it engaged in any misconduct or manipulated reviews, and if this case were to proceed
past the pleading stage, Yelp would demonstrate that Plaintiffs’ allegations are false.

27 ² Because the TAC specifically references and relies upon disclosures contained on Yelp.com, the
28 Court may consider the complete contents of these statements when assessing Plaintiffs’ allegations.
See, e.g., United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

1 particular reviewer is.” *Id.* As Yelp discloses on its website (in disclosures referenced in the TAC),
2 because a reviewer’s activities and “trustworth[iness]” can vary over time, “reviews can disappear
3 and reappear over time.” Beringer Decl. Ex. 2.

4 **2. Yelp’s Advertising Program**

5 Yelp also provides businesses with an opportunity to advertise on Yelp.com. *See* Beringer
6 Decl. Ex. 3. Businesses that advertise with Yelp are featured in clearly-designated sponsored search
7 results in response to user searches, as well as on related business pages. *Id.*³ In addition, advertising
8 businesses are able to “enhance [their] business page” with a photo slideshow, and to prevent
9 competitors’ advertisements from appearing on their business pages. *Id.*

10 **B. Plaintiffs’ Original and First Amended Complaints**

11 On July 20, 2010, this Court consolidated two cases filed, *inter alia*, by Plaintiffs Cats and
12 Dogs Animal Hospital (“C&D”) and Boris Y. Levitt (“Levitt”) – both of whom are also plaintiffs in
13 the TAC. Plaintiffs filed a First Amended Class Action Complaint (“FAC”) on September 23, 2010,
14 asserting violations of California’s UCL and Business & Professions Code Section 17500 *et seq.*, and
15 intentional interference with prospective business advantage. FAC ¶ 12. After Yelp filed a motion to
16 dismiss, Plaintiffs withdrew the FAC and filed the Second Amended Complaint (“SAC”), asserting
17 solely a UCL claim based on allegations that Yelp had engaged in unlawful “extortion”. SAC ¶ 11.

18 **C. This Court’s Order Dismissing Plaintiffs’ Second Amended Complaint**

19 On March 22, 2011, the Honorable Marilyn Hall Patel dismissed the SAC, finding Plaintiffs’
20 allegations that Yelp “actively manipulates user reviews to force businesses into purchasing
21 advertising” insufficient to state a claim under the UCL. Order at 2:26, 19:1, 20:13-14. Specifically,
22 the Court held that Plaintiffs had “fail[ed] to plausibly allege that any of Yelp’s conduct amounted to
23 an implied extortionate threat,” as required to satisfy the “unlawful” prong of the UCL. *Id.* at 17:6-7.

24 After finding that Plaintiffs did not identify any instance where Yelp “explicitly threatened to
25 harm their businesses,” the Court proceeded to reject each of Plaintiffs’ four theories that Yelp had
26 engaged in conduct “from which an extortionate threat ‘may be implied.’” *Id.* at 14:13-15.

27 ³ Although Yelp previously offered advertisers the option to select a single “Favorite Review”
28 (clearly labeled as such) to display prominently on the business’s review page, it has since
discontinued this program.

1 First, the Court held that to the extent that Plaintiffs’ extortion claim was premised on Yelp’s
2 failure to remove third-party negative reviews, such “activity is clearly immunized by the CDA,” and
3 cannot give rise to any claim against Yelp. *Id.* at 14:25-15:18. Because Yelp is an “interactive
4 computer service” under 47 U.S.C. § 230(c)(1), the Court found that it “cannot be held liable on a
5 theory that it extorted plaintiffs by refusing to de-publish negative business reviews,” regardless of
6 how “incendiary or blatantly harassing” a user’s content, or whether Yelp “has knowledge of the
7 complained-of content” or a “general monitoring policy” for such content. *Id.* at 15:2-18.

8 Second, the Court held that Plaintiffs had failed to allege any “basis from which to infer that
9 Yelp authored or manipulated *the content* of the negative reviews complained of by plaintiffs.” *Id.* at
10 17:9-10 (emphasis supplied). Instead, the Court found Plaintiffs’ nonspecific allegations that Yelp
11 “manufacture[d]” or “deliberately manipulate[d]” various negative reviews to the “detriment of
12 businesses who refuse[d] to purchase advertising” to be “entirely speculative.” *Id.* at 17:7-9.

13 Third, the Court held that Plaintiffs’ allegations that Yelp “remov[ed] positive reviews for the
14 alleged purpose of coercing businesses to purchase advertising” failed to plausibly allege an implied
15 extortionate threat. *Id.* at 16:6-7, 17:6-7. The Court found that the “close temporal proximity
16 between plaintiffs’ decisions not to purchase advertising and the removal of positive user reviews”
17 did not establish a plausible basis for inferring a threat because “[t]he removal of positive reviews . . .
18 is entirely consistent with Yelp’s policy . . . that it automatically filters potentially fake positive and
19 negative reviews.” *Id.* at 17:16-20. Likewise, the Court held that any “apparent[] correlat[ion]”
20 between “fluctuations in plaintiffs’ overall star ratings” and “their advertising decisions” was due to
21 the SAC’s focus on “select snapshots of plaintiffs’ overall star ratings” – and was belied by other
22 allegations that Plaintiffs’ “mixture of positive and negative reviews fluctuated over time irrespective
23 of the activities complained of in the SAC,” and in some cases, “long before any communications
24 with Yelp about advertising.” *Id.* at 17:21-18:6. The Court held that it could not “equate a few drops
25 in overall star ratings to an implied threat of harm,” since it would be equally plausible to view these
26 fluctuations as “the result of planted ads by plaintiffs, the functioning of Yelp’s automated filter, or
27 negative attacks from competitors or former employees.” *Id.* at 17:27-18:3.

28 Finally, the Court found that each of the alleged statements by Yelp sales representatives “that

1 they could manipulate ads in favor of advertisers are also insufficient to imply a threat of harm to
2 plaintiffs”. Order 18:11-23. Specifically:

- 3 ■ Allegations that a sales rep informed Levitt that advertising on Yelp could increase the
4 number of “page views” and other statements “nowhere near indicate an ability or a
5 regular practice of ‘manipulating’ user reviews” (and instead, are “a reasonable, and fairly
6 obvious consequence of advertising.”) *Id.* 18:12-16.
- 7 ■ Statements allegedly made by Yelp to Plaintiffs C&D and Tracy Chan d/b/a Marina
8 Dental Care (“Chan”) – to the effect that “Yelp would hide negative reviews” or that
9 “Yelp ‘tweaks’ the ratings” (SAC ¶¶ 63,81) – were at most “offers of favorable treatment
10 in exchange for ad purchases [that] are not the equivalent of an extortionate threat of
11 harm.” Order at 18:17-19.

12 The Court also dismissed Plaintiffs’ claim under the “unfairness prong” of the UCL, finding
13 that Plaintiffs “point to no legislatively declared policy allegedly contravened by Yelp” and “do not
14 allege beyond a speculative level that Yelp’s actions threaten competition.” *Id.* at 19:27-20:2.
15 Having found that the SAC “fails to state a plausible claim for relief,” the Court held that it was
16 “unnecessary” to address the sufficiency of Plaintiffs’ class allegations. *Id.* at 20:22-23.

17 **D. Plaintiffs’ Third Amended Complaint**

18 When granting Plaintiffs leave to amend, the Court observed that “[a]lthough the SAC fails to
19 state a plausible claim for relief in its present form, plaintiffs’ counsel represented at the motion
20 hearing that continued investigation has produced additional facts that would bolster plaintiffs’
21 allegations.” Order at 20:17-19. Specifically, Plaintiffs’ counsel advised that he had been “besieged
22 with phone calls” from businesses and had engaged in an ongoing investigation of “all the people that
23 are calling us.” Tr. of Proceedings, Dkt. No. 69, at 22:22, 29:14. In response to the Court’s question:
24 “Well if you are developing more facts as you are getting these phone calls, then would those facts
25 make for a stronger complaint?,” Plaintiffs’ counsel responded, “Yes.” *Id.* at 29:24-30:2.

26 Despite informing the Court that counsel’s investigation had uncovered additional facts that
27 could support Plaintiffs’ claims, Plaintiffs’ latest complaint – the *sixth* filed in this action – is
28 virtually identical to their earlier, deficient pleading. For the convenience of the Court, a red-lined
comparison of the TAC to the SAC is attached as Exhibit 6 to the Declaration of S. Ashlie Beringer.

Indeed, with a few, trivial exceptions⁴, the *only* new allegations in the TAC consist of

⁴ As part of the “General Allegations,” the TAC adds one conclusory allegation “[u]pon information and belief” that “Yelp employees or individuals acting on behalf of Yelp have written reviews of
[Footnote continued on next page]

1 12 paragraphs asserted by a single new Plaintiff – Wheel Techniques – which the TAC substitutes for
2 former Plaintiff Paver Pro. Critically, the TAC makes *no new allegations* whatsoever on behalf of
3 Plaintiffs Levitt, C&D, or Chan, instead repeating the very same allegations that this Court previously
4 held were insufficient to state a claim.⁵ Order at 17:6-7. Because Yelp’s prior motion papers (Dkt.
5 Nos. 59, 63) and this Court’s Order address the deficiencies of those Plaintiffs’ allegations in detail,
6 Yelp does not repeat that discussion here.⁶

7 **E. Wheel Techniques’ Allegations**

8 Wheel Techniques’ allegations are as speculative and deficient as those previously dismissed
9 by this Court. Like the other Plaintiffs, Wheel Techniques complains that “negative reviews” about
10 its business appeared on Yelp in “late 2008 and early 2009” – *more than one year before it was*
11 *“contacted by Yelp to purchase advertising”* on March 8, 2010.⁷ TAC ¶¶ 74-75, 79. Wheel
12 Techniques contends that it has “no record of the names” of these unidentified reviewers (who, by
13 convention, are identified on Yelp by first name and last initial), and cites as a single example, a
14 review by a “Kevin T” that appeared on its business page on March 5, 2009. TAC ¶¶ 74-75, 79-80.
15 Based entirely on its claim that it could not locate records for a “Kevin T” or for a weld job “during
16 or around the time period” of the review, Wheel Techniques speculates “[u]pon information and
17 belief” that “Yelp employees or individuals acting on behalf of Yelp posted some or all of the false

18 [Footnote continued from previous page]

19 businesses on Yelp,” but fails to provide any specifics or connect this claim to any of the named
20 Plaintiffs. TAC ¶ 37. In addition, the TAC cites an excerpt from a May 2008 New York Times Bits
21 Blog (which pre-dates the reviews that give rise to Plaintiffs’ claims by many months) in which
22 Yelp’s CEO confirms that Yelp “does not pay for reviews.” *Id.* ¶ 38.

23 ⁵ Although the TAC does not add any allegations for the three named Plaintiffs, it seeks to *remove*
24 factual allegations and admissions from their earlier pleadings that contained information and context
25 that undermined their claims. For example, the TAC deletes the text of an email that Yelp sent to
26 Plaintiff C&D after it requested that Yelp remove two negative reviews (SAC ¶ 69), which the Court
27 cited in its Order. Order at 18:3-4.

28 ⁶ In addition, the TAC re-alleges two claims for civil extortion and attempted civil extortion which
were originally alleged by C&D in its Amended Complaint, but omitted from subsequent pleadings.
TAC ¶¶ 131-146; see also Case No. 10-cv-02351, Dkt. No. 10. These reasserted claims rely upon the
exact same allegations as those contained in Plaintiffs’ SAC (as well as the new allegations by
Plaintiff Wheel Techniques).

⁷ Although Wheel Techniques claims it “began receiving” phone calls from Yelp “around the same
time” as the posting of the “Kevin T.” review, it does not provide any specifics about these alleged
calls or indicate that it actually spoke with a Yelp sales representative until the March 8, 2010 sales
call described in the TAC. TAC ¶¶ 76, 79-80.

1 reviews” as a “threat to induce Wheel Techniques to advertise.” TAC ¶ 77. But Wheel Techniques
2 fails to point to a single fact that supports this bald conclusion, nor does it make any effort to explain
3 why its purported inability to locate records relating to “Kevin T.” in its files could not be explained
4 by any number of more plausible facts, including poor record keeping, “Kevin T’s” use of a slightly
5 different name when contracting for service, or a delay between the date of service and the date of the
6 review.

7 More than one year *after* “Kevin T” posted a negative review, Wheel Techniques alleges it
8 was “contacted by Yelp to purchase advertising.” TAC ¶ 79. Like the other Plaintiffs, Wheel
9 Techniques does not allege that anyone from Yelp threatened to harm Wheel Techniques’ business
10 unless it advertised. Instead, it claims that after it “declined to purchase advertising,” an unspecified
11 “one-star review was moved to the top of its Yelp review page.” *Id.* ¶ 80. Wheel Techniques does
12 not allege that Yelp in any way created or manipulated *the content* of this single, one-star review.
13 Instead, it contends “upon information and belief” that Yelp “*placed*” (*i.e.* published) the review “at
14 the top of the Wheel Techniques review page as a threat to cause Wheel Techniques to fear that”
15 unless it advertised, “the negative review would remain at the top of its Yelp review page and/or
16 additional negative reviews would appear.” *Id.* ¶ 81 (emphasis added). Wheel Techniques provides
17 no support for the notion that Yelp published this single review “as a threat,” and in no way explains
18 why the appearance of this single, one-star review at the top of Wheel Techniques’ review page was
19 not entirely consistent with the operation of Yelp’s review filter software or the result of a user
20 posting a negative review about their experience with Wheel Techniques.

21 Wheel Techniques also claims that at some point “[i]n 2009,” it “called Yelp” to complain
22 that its overall star rating was “2.5 or 3 stars” while one of its unnamed “competitors” – which Wheel
23 Techniques contends performs “shotty work” – had an overall star rating of five stars. TAC ¶ 78.
24 Wheel Techniques claims that Yelp informed it that the competitor advertised and that Yelp would
25 “work with your reviews if you advertise with us” – but does not allege that this or any other
26 representative stated or implied that Yelp would harm Wheel Techniques unless it advertised. *Id.*

27 Finally, Wheel Techniques claims that it “was told several times” “that a former Yelp
28 employee stated that Yelp, upon information and belief” fired a “group of sales employees” for

1 engaging in unspecified “scamming relating to advertising” and “froz[e]” the “computers of sales
2 employees . . . to prohibit employees from being able to change reviews.” TAC ¶ 82. It does not
3 identify who supposedly “told” it this, much less allege that these unspecified employees in any way
4 interacted with Wheel Techniques. (Nor is there any factual basis to these triple hearsay allegations,
5 which – ironically – defeat Plaintiffs’ claim that Yelp had a “policy” of manipulating reviews).

6 **F. Class Allegations**

7 Plaintiffs purport to assert claims individually and on behalf of all “businesses and persons
8 nationwide who were in contact with Yelp regarding the option to advertise on Yelp,” and who were
9 subsequently “subject to the manipulation of the reviews of their businesses by Yelp – in a manner
10 that did not comply with Yelp’s representations regarding its Review Terms.” TAC ¶ 105(a) & (b).

11 The proposed class is divided into two subclasses:

- 12 ■ *Non-Sponsors*: Plaintiffs Levitt, C&D, and newly added Wheel Techniques purport to
13 represent a subclass of “Non-Sponsors,” consisting of businesses that “declined to
14 purchase advertising.” *Id.*
- 15 ■ *Sponsors*: Plaintiff Chan – whose allegations this Court already has held are insufficient to
16 state a claim – is the sole plaintiff purporting to represent a class of “Sponsors,” consisting
17 of businesses that “advertis[ed].” *Id.*

18 **IV. Plaintiffs Fail to State a Viable Claim for Relief**

19 **A. Legal Standard Under Rule 12 (b)(6)**

20 A complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) when it
21 lacks sufficient facts to support a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*,
22 749 F.2d 530, 533-34 (9th Cir. 1984). Although this Court must accept a plaintiff’s allegations as
23 true and construe them in a light most favorable to the plaintiff, “[c]onclusory allegations of law and
24 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” *In*
25 *re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996). To avoid dismissal, a complaint must
26 do more than “plead[] facts that are ‘merely consistent with’ a defendant’s liability,” and, instead, a
27 plaintiff must set forth enough factual information to make it “plausible,” not merely “possib[le],”
28 that the defendant is liable. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see also Bell Atl. Corp.*
v. Twombly, 550 U.S. 544, 569 (2007).

29 **B. Plaintiffs Fail to State a Claim Under the UCL**

Plaintiffs once again fail to state a valid claim under the UCL, which requires a plausible

1 showing that Yelp engaged in an “unlawful, unfair or fraudulent business act or practice.” Cal. Bus.
2 & Prof. Code § 17200; *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 837 (2006).

3 **1. Plaintiffs Have Not Alleged “Unlawful” Conduct**

4 The “unlawful” prong of the UCL “borrows violations of other laws . . . and makes those
5 unlawful practices actionable under the UCL.” *In re Actimmune Mktg. Litig.*, No. C 08-02376 MHP,
6 2009 WL 3740648, at *15 (N.D. Cal. Nov. 6, 2009). “Thus, a violation of another law is a predicate
7 for stating a cause of action under the UCL’s unlawful prong.” *Id.* As with their earlier pleading,
8 Plaintiffs base their UCL claim entirely on claims that Yelp “attempted to and/or did in fact commit
9 extortion” as defined in Cal. Penal Code §§ 518, 519, 523, 524, the federal Hobbs Act (18 U.S.C. §
10 1951) and “civil extortion and civil attempted extortion.” TAC ¶ 118. Because Plaintiffs fall well
11 short of the requirements to plead extortion or attempted extortion, their claim under the UCL’s
12 “unlawful” prong must again be dismissed. *See, e.g., Actimmune*, 2009 WL 3740648, at *15
13 (dismissing UCL claims for failure to sufficiently allege violations of the predicate regulations).

14 **a. Plaintiffs Fail to Allege That Yelp Engaged in a Threat**

15 Most fundamentally, and as this Court previously held when dismissing the SAC, Plaintiffs
16 still do not point to a single instance of Yelp engaging in any threat of unlawful injury or wrongful
17 use of fear, as required to demonstrate extortion or attempted extortion. In fact, with the exception of
18 12 new paragraphs relating to new Plaintiff Wheel Techniques (which likewise fail to plead the
19 existence of a threat), the TAC contains no new allegations at all.

20 An unlawful threat is an essential element of extortion and attempted extortion. *See* Order at
21 14:4-10; *Mitchell v. Sharon*, 59 F. 980, 982 (9th Cir. 1894); *People v. Sales*, 116 Cal. App. 4th 741,
22 751 (2004) (reversing attempted extortion conviction because “extortion requires a threat”).

23 This Court previously held that Plaintiffs Levitt, C&D, and Chan failed to allege “factual
24 allegations from which any distinct communication of a threat might be inferred,” requiring dismissal
25 of Plaintiffs’ UCL claim in the SAC. Order at 17:11-12. Because Plaintiffs have not added *any*
26 allegations for these Plaintiffs to their amended pleading, the TAC necessarily fails to state a claim
27 under the “unlawful prong” of the UCL claim for these Plaintiffs under this Court’s Order. *United*
28 *States v. Phillips*, 367 F.3d 846, 856 (9th Cir. 2004) (“Issues that a district court determines during

1 pretrial motions become law of the case.”); *Baymiller v. Guarantee Mut. Life Co.*, No. SA CV99-
2 1566 DOC (ANX), 2000 WL 33774562, at *5 (C.D. Cal. 2000) (“[T]he SAC . . . fails to present any
3 new, substantially different evidence, and hence fails the test for reversal under ‘law of the case’
4 doctrine.”).

5 The newly-added allegations for Plaintiff Wheel Techniques are equally deficient, for the
6 reasons set forth in this Court’s Order. As a threshold matter, Wheel Techniques does not allege that
7 Yelp ever “explicitly threatened to harm [its] business[], through manipulating user reviews, if [it]
8 refused to purchase advertising.” Order at 14:13-14. Instead, Wheel Techniques asserts that after it
9 complained to Yelp about the positive reviews for its competitor, an unidentified Yelp representative
10 indicated that “we work with your reviews if you advertise with us.” TAC ¶ 78. As this Court
11 previously held, such a vague alleged statement is at most an “offer[] of favorable treatment” that is
12 “not the equivalent of an extortionate threat of harm.” Order at 18:17-19; *see also United States v.*
13 *Tomblin*, 46 F.3d 1369, 1384 (5th Cir. 1995) (under the Hobbs Act, “the fear . . . must be of a loss;
14 fear of losing a potential benefit does not suffice.”); *United States v. Capo*, 817 F.2d 947, 951 (2d
15 Cir. 1987) (request for payment in exchange for improved chance of getting hired not an extortionate
16 threat); *Sigmund v. Brown*, 645 F. Supp. 243, 246 (C.D. Cal. 1986) (offer to provide chiropractor
17 with favorable reviews in exchange for client referrals not an extortionate threat).

18 Nor does Wheel Techniques “plausibly allege that any of Yelp’s conduct amounted to an
19 implied extortionate threat.” Order at 17:6-7. First, although it asserts that “Yelp placed [a] one-star
20 review at the top of the Wheel Techniques review page as a threat” to cause it to fear that this review
21 would “remain” on Yelp unless it advertised (TAC ¶ 81), it is well-settled that Yelp’s publication or
22 failure to remove negative third-party reviews cannot give rise to a claim for extortion. Indeed, this
23 Court correctly held that to the extent Plaintiffs’ extortion claims are premised upon Yelp’s posting or
24 failure to remove negative reviews, such activity is “clearly immunized” by the CDA. Order at
25 14:25-26; *see also Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d
26 1157, 1170-71 (9th Cir. 2008) (en banc) (“[A]ny activity that can be boiled down to deciding whether
27 to exclude material that third parties seek to post online is perforce immune under section 230.”).

28 Second, and as with the other Plaintiffs, Wheel Techniques has alleged no plausible facts

1 “from which to infer that Yelp authored or manipulated *the content* of the negative reviews
2 complained of.” Order at 17:7-9 (emphasis added); *see Carafano v. Metrosplash.com, Inc.*, 339 F.3d
3 1119, 1125 (9th Cir. 2003) (CDA 230 immunity applies unless defendant “created or developed the
4 particular information at issue”). Although it speculates upon “information and belief” that Yelp
5 “employees or individuals acting on behalf of Yelp” posted “some or all” of the negative reviews that
6 appeared on its review page, Wheel Techniques fails to provide any non-speculative facts that
7 support this claim. TAC ¶ 77. Instead, it bases this conjecture entirely on its purported inability to
8 locate a “Kevin T” in its records “during or around the time” of his review. TAC ¶ 75. Yet, this
9 could be explained by any number of more plausible factors having nothing to do with Yelp
10 “manufacturing” reviews, including poor record keeping, the use of a slightly different name by
11 “Kevin T” when obtaining service, the possibility that a family member with a different name paid
12 for the services, or even “negative attacks from competitors or former employees.” Order 18:2-3.

13 The leap from Plaintiffs’ purported inability to locate a “Kevin T” in its records to its
14 unsupported claim that Yelp manufactured or manipulated reviews as part of an extortionate scheme
15 is “entirely speculative” and does not create a plausible inference that Yelp created or manipulated
16 the content of user reviews about which Wheel Techniques complains. *See* Order 17:7-10; *Nemet*
17 *Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258-60 (4th Cir. 2009) (bare allegations
18 that review website “fabricated” third-party reviews at issue were “devoid of further factual
19 enhancement” and insufficient to overcome CDA 230 immunity).⁸

20 Finally, Wheel Techniques alleges no facts that in any way suggest that the purported removal
21 of a single, five-star review from the “top of [Wheel Techniques’] Yelp review page” shortly after it
22 allegedly was contacted by Yelp to purchase advertising (which allegedly resulted in a “one-star
23 review” being “moved to the top of its Yelp review page”) resulted from any “deliberate[]
24 manipul[at]ion” by Yelp. TAC ¶ 79-80; Order at 17:8. As this Court held when dismissing similar
25 claims by the other Plaintiffs, the “removal of positive reviews” is “entirely consistent with Yelp’s

26 _____
27 ⁸ Moreover, Wheel Techniques concedes that the allegedly false “Kevin T review” appeared over one
28 year before Wheel Techniques “was contacted by Yelp to purchase advertising” on March 8, 2010,
further straining credulity that this review somehow was manufactured by Yelp as a threat to induce
Wheel Techniques to advertise one year later. TAC ¶ 75, 79; *see* Order at 17:16-23.

1 policy, stated in its FAQs and referenced in the SAC, that it automatically filters potentially fake
2 positive and negative reviews.” Order at 17:18-20.

3 Nor does Wheel Techniques’ suggestion that a single one-star review moved to the top of its
4 review page “within minutes” give rise to a plausible inference of “deliberate manipulation”. TAC
5 ¶ 80. Under this Court’s prior order, such a claim that “fluctuations [in reviews about Wheel
6 Techniques] apparently correlate[d] with [its] advertising decisions” is insufficient to establish a
7 policy of “deliberate manipulation” because the fluctuations “only provide select snapshots of
8 plaintiffs’ overall” reviews – and in the case of Wheel Techniques, provide only a single snapshot
9 focusing on the purported movement of a single unspecified review. Order at 17:21-23; *see also id.*
10 at 18:1-3 (“These fluctuations could just as easily be the result of planted ads by plaintiffs, the
11 functioning of Yelp’s automated filter, or negative attacks from competitors or former employees.”)
12 “[I]n the absence of a more complete picture of [Wheel Techniques’] reviews,” it is not plausible or
13 possible to attribute the purported movement of a single, one-star review to “deliberate manipulation”
14 by Yelp, particularly as Wheel Techniques concedes that it had received negative reviews for a two
15 year period *before* it “was contacted by Yelp to purchase advertising.” *Id.* at 17:26-27; TAC ¶ 79.

16 In short, Wheel Techniques – like the other Plaintiffs whose allegations this Court previously
17 held to be deficient – has failed to allege that Yelp in any way threatened to harm the company unless
18 it advertised on Yelp. Because a threat is an essential element of an extortion claim, Plaintiffs have
19 failed to state a claim for violations of the UCL under the “unlawful prong”.

20 **2. Plaintiffs Have Not Alleged “Unfair” Conduct**

21 Plaintiffs also fail to allege that Yelp engaged in any “unfair” conduct within the meaning of
22 the UCL. This Court previously held that the SAC failed to allege facts that demonstrate “unfair”
23 conduct under any of the tests that have been applied by courts. *See* Order at 19:24-20:9. Plaintiffs’
24 sixth pleading fares no better and contains no new factual allegations at all aside from the inclusion of
25 a single new plaintiff (Wheel Techniques). *See supra* pp. 7-10.

26 Like the other Plaintiffs, Wheel Techniques “point[s] to no legislatively declared policy
27 allegedly contravened by Yelp, and the only statutes cited by [Plaintiffs] relate to extortion.” Order
28 at 19:27-20:1 (finding lack of such allegations precludes finding of unfairness under the test

1 articulated in *Cel-Tech Commc 'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999)).
2 Likewise, Wheel Techniques “do[es] not allege beyond a speculative level that Yelp’s actions
3 threaten competition.” Order at 20:1-4. Although the TAC adds the conclusory claim that Yelp
4 “harms competition by favoring businesses that submit to Yelp’s manipulative conduct and purchase
5 advertising” (TAC ¶ 119), it provides no new allegations that support this contention or “from which
6 the court could reasonably infer that Yelp is materially tilting the economic playing field in favor of
7 plaintiffs’ competitors.” Order at 20:3-4. To the contrary, Plaintiff Chan – the only “Sponsor
8 Plaintiff” in the TAC – concedes that she continued to receive negative reviews and that her business’
9 star rating was “again declining” within a few months of purchasing advertising on Yelp, belying any
10 suggestion that Yelp “materially tilt[s] the economic playing field” in favor of businesses that
11 advertise on Yelp. TAC ¶¶ 93-94; Order at 20:3-4.

12 Moreover, Wheel Techniques has made no attempt to “quantify the extent to which [it has]
13 been harmed by Yelp’s user review manipulations” (Order at 20:6-7), and also has failed to provide
14 any facts that plausibly suggest that the “appearance and disappearance of various user reviews” can
15 be “reasonably attribute[d] . . . to Yelp’s wrongdoing as opposed to its efforts to filter out unreliable
16 reviews.” *Id.* at 20:7-9; *see supra* pp. 8-10. As such, the TAC fails to to allege any additional facts
17 that could overcome this Court’s prior ruling that Plaintiffs fail to sufficiently plead that “the harm
18 caused by [Yelp’s] manipulation” outweighs “any benefit to [Yelp] in advertising sales,” under the
19 test for “unfairness” articulated in *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal.
20 App. 4th 861, 886 (1999). *Id.* at 20:4-9; TAC ¶ 120.

21 Because Plaintiffs have failed to provide any allegations that support their conclusory claim
22 that Yelp’s conduct is “unfair” within the meaning of the UCL, their claim under the UCL
23 “unfairness” prong should be dismissed. *See, e.g., Smith & Hawken, Ltd. v. Gardendance, Inc.*, No.
24 C04-1664, 2004 WL 2496163, at *5 (N.D. Cal. Nov. 5, 2004) (dismissing UCL claim, finding that
25 “[a plaintiff] alleging unfair business practices under the unfair competition statutes must state with
26 reasonable particularity the facts supporting the statutory elements of the violation”).

27 **C. Plaintiffs Also Fail to State a Claim for Civil Extortion or Attempted Civil Extortion**

28 During the July 19, 2010 Case Management Conference in this case, Judge Patel pointedly

1 admonished Plaintiffs for asserting a civil claim for extortion, stating:

2 *There is no civil cause of action for extortion in the State of California.* The closest
3 that it comes to it is fraud or duress...[Civil extortion is] not a separate cause of action,
if you allege it as a separate cause of action.

4 Tr. of Proceedings, Dkt. No. 32, 16:25-17:2 and 17:20-21 (emphasis supplied). The Court thus
5 affirmed the longstanding view that California does not permit claims for civil extortion (or
6 attempted extortion, or, indeed, any attempted tort) at all. But even if Plaintiffs could assert civil
7 extortion as a stand alone claim, these claims would fail for the same reasons as their UCL claim:
8 Plaintiffs fail to plead the existence of a threat.

9 Traditionally, California courts have not recognized a claim for civil extortion because
10 “[e]xtortion is a criminal offense, not a civil cause of action.” *Arista Records v. Sanchez*, No. CV 05-
11 07046 FMC (PJWx), 2006 WL 5908359, at *2 (C.D. Cal. Mar. 1, 2006) (“[T]here is no private right
12 of action for ‘extortion.’”); *see also Wolk v. Green*, 516 F. Supp. 2d 1121, 1129 (N.D. Cal. 2007)
13 (same). As the Court correctly observed, the closest claim that California courts recognize is a cause
14 of action to recover money obtained by duress. *See Fuhrman v. Cal. Satellite Sys.*, 179 Cal. App. 3d
15 408, 426 (1986) *disapproved on other grounds by Silberg v. Anderson*, 50 Cal. 3d 205 (1990) (claim
16 labeled extortion “is essentially a cause of action for moneys obtained by duress”). Moreover, the
17 elements of a duress claim specifically require that the plaintiff paid money to the defendant as a
18 direct result of a threat to perform an unlawful act “under circumstances sufficient to control the
19 action of a reasonable man” – facts that Plaintiffs do not allege here. *Young v. Hoagland*, 212 Cal.
20 426, 431 (1931).⁹

21 Even if civil extortion or attempted extortion could be deemed separate causes of action,
22 however, these claims necessarily would fail for the same reasons set forth in this Court’s Order and

23 ⁹ Although some courts have allowed claims styled as “extortion” to proceed, they have made clear
24 that the underlying cause of action is limited to circumstances that would satisfy the requirements for
25 fraud or duress. *See Fuhrman*, 179 Cal. App. 3d at 426 (“However denominated (e.g., extortion,
26 menace, duress), our Supreme Court has recognized a cause of action for the recovery of money
27 obtained by the wrongful threat of criminal or civil prosecution.”). More recently, a few district
28 courts also have permitted civil “extortion” claims in the face of egregious extortionate behavior that
– unlike here – involved explicit threats of harm. *See Monex Deposit Co. v. Gilliam*, 680 F. Supp. 2d
1148, 1157 (defendant threatened to “accuse and expose Monex of crimes” and “to expose Monex
secrets” unless paid at least \$10 million).

1 addressed above: Plaintiffs fail to make a single allegation sufficient to demonstrate that Yelp
2 threatened to unlawfully harm Plaintiffs unless they advertised, the essential element of any claim for
3 extortion. *See supra* pp. 11-14; *Hisamatsu v. Niroula*, No. C-07-04371-JSW (EDL), 2009 WL
4 4456392, at *5 (N.D. Cal. Oct. 22, 2009) (elements for a claim of “civil extortion” are identical to
5 those of criminal extortion).¹⁰

6 **D. Yelp Is Immune from Plaintiffs’ Claims Under CDA Sections 230(c)(1) & (c)(2)**

7 The TAC fails for two additional and independent reasons: Plaintiffs’ claims arise solely
8 from complaints about the content of third-party consumer reviews and Yelp’s decisions about which
9 of those reviews to publish, or remove, which is protected activity under Sections 230(c)(1) and
10 (c)(2) of the Communications Decency Act. 47 U.S.C. § 230; *see Carafano v. Metrosplash.com Inc.*,
11 339 F.3d 1119, 1124 (9th Cir. 2003); Order at 11:15-19.

12 **1. Plaintiffs Fail to Allege that Yelp Engages in Conduct Outside the Safe Harbor of**
13 **CDA 230(c)(1)**

14 Section 230(c)(1) of the Communications Decency Act ensures that “[n]o provider or user of
15 an interactive computer service shall be treated as the publisher or speaker of any information
16 provided by another information content provider.” 47 U.S.C. § 230(c)(1); *see Carafano*, 339 F.3d at
17 1124 (“Under § 230(c), therefore, so long as a third party willingly provides the essential published
18 content, the interactive service provider receives full immunity regardless of the specific editing or
19 selection process.”).

20 It is well settled that “Section 230(c)(1) of the CDA establishes immunity for providers of an
21 online platform . . . where liability hinges on content independently created or developed by third-
22 party users.” Order at 15:7-9. As this Court held, Yelp cannot be held liable for publishing negative
23 (or positive) reviews created by third parties, no matter “how incendiary or blatantly harassing that
24 content may be, whether [Yelp] has knowledge of the complained-of conduct, or whether it has a
25 ‘general monitoring policy’ for such content.” Order at 15:9-12, 15:17-18.

26 Nor can Yelp be held liable for purportedly “manipulating” third-party reviews to benefit

27 ¹⁰ To the extent Plaintiffs are trying to assert a defamation-type claim against Yelp under the cover of
28 their “extortion” allegations, it would also fail because Plaintiffs present no facts showing that the
content of any negative review was actually false, or that the reviews were authored by Yelp.

1 advertisers or disadvantage non-advertisers, as confirmed in two recent decisions dismissing claims
2 against a website that publishes third-party “complaints about companies or individuals.” In *Asia*
3 *Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal.
4 May 4, 2011), the court held that Xcentric Ventures was immune under CDA Section 230(c)(1) from
5 various claims (including a UCL claim) asserting that Xcentric unfairly charged businesses that are
6 the subject of consumer complaints on its site to make those “negative reports . . . less prominent in
7 internet searches.” *Id.* at *3. Importantly, the court found that Xcentric’s practice of “increasing the
8 prominence” of negative complaints about a particular business on its site (unless the business paid
9 money to Xcentric) “is not tantamount to *altering [the] message*” of the consumer’s complaint, and
10 thus “is insufficient to remove Defendants from the ambit of the CDA.” *Id.* at *6 (emphasis added).
11 The court made clear that “[a]bsent a *changing of the complaints’ substantive content*, liability
12 cannot be found.” *Id.* (emphasis supplied).

13 Likewise, another court recently confirmed that CDA Section 230 immunizes Xcentric
14 Ventures from claims alleging that it “request[s] money from companies in exchange for removing or
15 reducing the visibility of allegedly defamatory content.” *A-1 Technology, Inc. v. Magedson*, No.
16 150033/10, slip op. at 3 (N.Y. Sup. Ct. June 22, 2011). Critically, the court held that Section 230
17 barred the plaintiffs’ claims, even if Xcentric charged businesses to remove or “reduc[e] the
18 visibility” of negative complaints on its website. *Id.* at 10.

19 Although Yelp does not in any way offer businesses the ability to remove negative reviews
20 that appear on Yelp.com (whether or not they advertise), these cases confirm that Yelp is squarely
21 immune from claims arising from alleged “manipulation” of user reviews, given the absence of any
22 allegation that Yelp in any way “chang[ed] . . . the substantive content” or “alter[ed the] message” of
23 the reviews giving rise to their claims. *Id.*; *see Xcentric*, 2011 WL 2469822, at *6.

24 **2. Plaintiffs Fail to Plead That Yelp’s Removal of Reviews Was Made in “an**
25 **Absence of Bad Faith”**

26 Notwithstanding the immunity afforded under Section 230(c)(1) of the CDA, Yelp is also
27 immune under the safe harbor of Section 230(c)(2). Section 230(c)(2) shields website providers from
28 liability arising from “any action voluntarily taken in good faith to restrict access to or availability of
materiality that the provider or user considers to be . . . objectionable.” 47 U.S.C. § 230(c)(2)(A); *see*

1 also Order at 11:15-19 (CDA 230(c)(2) “prohibits causes of action in which a plaintiff seeks . . . to
2 challenge the good faith blocking or removal of certain categories of objectionable content”) (citing
3 *e360insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008)).

4 To avoid the Section 230(c)(2) defense, Plaintiffs must plead facts sufficient to allege “an
5 absence of good faith” -- that Yelp could have had no legitimate reason to remove the reviews that it
6 is alleged to have removed. *Holomaxx Tech. v. Microsoft Corp.*, No. CV-10-4924-JF, 2011 U.S.
7 Dist. LEXIS 29402, at *14 (N.D. Cal. Mar. 11, 2011). Indeed, this Court recently invoked the CDA
8 Section 230(c)(2) defense in two related cases to dismiss various claims, *including* a UCL claim,
9 where – like here – the defense was “apparent from the face of the [c]omplaint.” *Microsoft Corp.*,
10 2011 U.S. Dist. LEXIS 29402, at *10; *Holomaxx Tech. v. Yahoo!, Inc.*, No. CV-10-4926 JF, 2011
11 U.S. Dist. LEXIS 30819, at *9 (N.D. Cal. March 11, 2011).

12 As discussed above, Plaintiffs fail to plead any non-speculative facts that Yelp’s filtering of
13 user reviews, including “positive” reviews about Plaintiffs, was conducted in “an absence of good
14 faith.” *Id.* To the contrary, the Court found that allegations that Yelp “manipulates” reviews are
15 more reasonably explained by Yelp’s “efforts to filter out unreliable reviews.” Order at 20:7-9; *see*
16 *also id.* 17:18-20 (“fluctuations” in reviews were “entirely consistent with Yelp’s policy, stated in its
17 FAQs and referenced in [Plaintiffs’ pleading], that it automatically filters potentially fake positive
18 and negative reviews.”). Because Plaintiffs fail to allege facts giving rise to a plausible inference that
19 the “disappearance of various user reviews [was attributable] to Yelp’s wrongdoing as opposed to its
20 efforts to filter out unreliable reviews,” they have failed to plausibly allege that Yelp’s filtering
21 decisions were taken in “the absence of good faith.” *Id.* at 20:7-9. As such, CDA 230(c)(2) provides
22 an independent basis to dismiss Plaintiffs’ claims.

23 **V. Plaintiffs’ Claims Should Be Dismissed for Lack of Article III Standing**

24 **A. Legal Standard Under Rule 12(b)(1)**

25 Plaintiffs’ claims against Yelp must also be dismissed for lack of standing under Article III of
26 the United States Constitution. A challenge to standing under Article III “pertain[s] to a federal
27 court’s subject-matter jurisdiction” and is therefore “properly raised in a motion to dismiss under
28 Federal Rule of Civil Procedure 12(b)(1).” *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 983-84 (N.D.

1 Cal. 2009). A Rule 12(b)(1) motion may assert a facial challenge, where the inquiry is confined to
2 the allegations in the complaint, or it may be a factual challenge, where the court “is permitted to
3 look beyond the complaint to extrinsic evidence.” *In re Facebook Privacy Litig.*, No. C 10-02389
4 JW, 2011 WL 2039995, at *2 (N.D. Cal. 2011) (citing *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th
5 Cir. 2004)). “When a defendant makes a factual challenge ‘by presenting affidavits or other evidence
6 properly brought before the court, the party opposing the motion must furnish affidavits or other
7 evidence necessary to satisfy its burden of establishing subject-matter jurisdiction.” *Id.* (quoting *Safe
8 Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). On a motion to dismiss for lack of
9 standing involving a factual attack, “[n]o presumptive truthfulness attaches to plaintiff’s allegations,
10 and the existence of disputed material facts will not preclude the trial court from evaluating for itself
11 the merits of jurisdictional claims.” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983);
12 *see White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

13 **B. Plaintiffs Lack Standing to Pursue Their Claims**

14 Plaintiffs cannot satisfy the “the irreducible constitutional minimum of standing” under
15 Article III because they cannot demonstrate that their purported injuries are “fairly traceable to the
16 challenged action” of Yelp, as opposed to the content of third party consumer reviews. *Friends of the
17 Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *see also Lujan v.
18 Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (injury may not be “the result of the independent
19 action of some third party not before the court.”); *Sanders*, 672 F. Supp. at 984 (dismissing a
20 plaintiff’s claim for lack of causal nexus between alleged misconduct and injury); *Kaing v. Pulte
21 Homes, Inc.*, No. 09-5057 SC, 2010 WL 625365, at *6 (N.D. Cal. Feb. 18, 2010) (dismissing
22 complaint where causal chain “includes numerous individual decisions of ‘some third part[ies] not
23 before the court.’”).

24 In response to Yelp’s facial challenge to standing based on the allegations of the SAC, the
25 Court held that allegations that Yelp “manipulated user reviews . . . at the very least *alleged*
26 circumstances from which a causal nexus to their injuries can be inferred” – even as the Court found
27 those allegations to be deficient under Fed. R. Civ. P. 12(b)(6). Order at 10:13-14 (emphasis added).

28 In the face of a factual challenge to standing under Rule 12(b)(1), however, this Court need

1 not “assum[e] *arguendo*” that there is a “causal nexus” between Plaintiffs’ alleged injuries and
2 supposed “manipulation” by Yelp (Order 10:13-16), and may “evaluat[e] for itself the merits of
3 jurisdictional claims.” *Augustine*, 704 F.2d at 1077. Pursuant to Rule 12(b)(1), Yelp has furnished
4 affirmative evidence demonstrating that Plaintiffs’ putative injuries are in no way connected to any
5 wrongful conduct or “manipulation” by Yelp, and instead (and at most), are due to the content of
6 reviews posted by third-party consumers, the routine operation of Yelp’s automated filter software, or
7 the fraudulent conduct of Plaintiffs themselves. Specifically, as is detailed in the Declaration of Ian
8 MacBean and its accompanying exhibits, this evidence establishes:

9 1. **None of the reviews published about Plaintiffs were created or modified by Yelp.**

10 Yelp conducted an analysis of every review posted about each of the named Plaintiffs on Yelp
11 (whether or not the review was filtered) and confirmed that *none* of the consumers who created and
12 posted these reviews are current or former employees or agents of Yelp. MacBean Decl. at ¶¶ 2-5.
13 Likewise, Yelp’s employees lack the ability to modify the content of user reviews. *Id.* ¶ 6.

14 2. **All reviews removed from Plaintiffs’ review pages were removed by the**
15 **automated filter, by reviewers, or due to Terms of Service violations.** Despite Plaintiffs’
16 contention that they were injured by Yelp’s “manipulation” of reviews, Yelp has analyzed the
17 administrative records for each review that has appeared on the review pages for each of the Plaintiffs
18 and confirmed that each review that has been removed was either: (1) removed by Yelp’s automated
19 software filter, (2) removed by a member of Yelp’s User Operations team (not by a sales
20 representative) for documented violations of Yelp’s Terms of Service or at the reviewer’s request, or
21 (3) removed by the reviewers themselves. MacBean Decl. ¶¶ 13, 14-15, 19, 20-21, 24, 25-28.
22 Specifically, of the 309 total reviews that have been posted about the named Plaintiffs through July
23 21, 2011, 175 have been removed by Yelp’s automated filter, which does not, cannot, and has never
24 considered whether or not a particular business advertises on Yelp. *Id.* ¶ 8. Of the remaining 134
25 reviews, 24 were removed following investigation by a User Operations employee after determining
26 that these reviews violated Yelp’s Terms of Service. *Id.* ¶¶ 15, 19, 21, 24, 26, 28.

27 Likewise, Yelp has furnished evidence that its sales employees have never had the ability to
28 manually alter the order or placement of reviews that appear on a review page. Instead, the default

1 order of reviews is determined by an automated “sorting” software algorithm. *Id.* ¶¶ 7-8. ¹¹

2 3. **Several of the “positive reviews” removed by Yelp and referenced in the TAC**
3 **were fake reviews posted by Plaintiffs themselves.** As is set forth in the MacBean Declaration,
4 several of the positive reviews that Plaintiffs complain were “manipulated” by Yelp were in fact fake
5 reviews created by Plaintiffs, in violation of Yelp’s Terms of Service. *Id.* ¶¶ 15-18. As one example,
6 seven of the 5-star reviews that were removed from Plaintiff Wheel Techniques’ Yelp page were
7 posted by “Ellyn M.” who identified herself as “ellyn mercurio” (*id.* ¶ 15, 17) (but without revealing
8 that the user was an owner of Wheel Techniques), including fake reviews stating :

- 9 ■ Still great after all these years. I would'nt [sic] trust my 22" rims to anyone else. My
10 porsche looks show ready!! MacBean Decl. Ex. 3 (Nov. 11, 2009 review).
- 11 ■ Best repair shop ever. Yes there are some haters out there but I love this place and the
12 customer service is awesome [sic]. Been in business for over 23 years which says
13 something right there. Hit a curb? See Wheel Techniques. *Id.* (May 2, 2011 review).

14 “Ellyn M.” is an account used by Plaintiff John Mercurio – the owner of Wheel Techniques –
15 as evidenced by the fact that Mercurio previously used Ellyn M.’s Yelp account to contact a Yelp
16 user in a private communication, in which he specifically identified himself as the owner of Wheel
17 Techniques and threatened to “sue” the Yelp user for posting “any positive OR negative reviews.”
18 MacBean Decl. ¶ 16. This evidence demonstrates that Wheel Techniques’ complaints that “5-star
19 review[s]” were removed from its review page are not attributable to any “manipulation” by Yelp,
20 and instead, resulted from the fact that these were fake reviews posted by Mercurio himself.

21 In short, affirmative evidence conclusively demonstrates that Plaintiffs’ purported injuries are
22 not “fairly traceable” to any “manipulation” or “threat” by Yelp. *See Friends of the Earth*, 528 U.S.
23 at 180-81. Moreover, because Yelp has furnished affirmative evidence negating a required element
24 of Article III standing, Plaintiffs cannot continue to rely on conclusory allegations of causation, and
25 instead, “must furnish affidavits or other evidence necessary to satisfy its burden of establishing
26 subject-matter jurisdiction.” *In re Facebook*, 2011 WL 2039995, at *2 (quoting *Safe Air*, 373 F.3d at
27 1039; *see also Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844,

28 ¹¹ Separate from Yelp Sort, Yelp also formerly allowed advertisers to select a single review as a
“Favorite Review” (clearly identified as such) for display on their Yelp profile page above the
default, or user selected, ordering of reviews.

1 at *3-*4, *6 (N.D. Cal. June 18, 2010) (dismissing complaint based on factual challenge under
2 12(b)(1) because un rebutted declarations demonstrated that plaintiffs had not sustained injury in fact).

3 Because plaintiffs cannot meet their burden of establishing the requirements of Article III
4 standing through specific evidence, their claims must be dismissed.

5 **VI. The Class Allegations Also Must Be Dismissed**

6 It is well-settled that claims asserted on behalf of a putative class cannot go forward where, as
7 here, the named plaintiffs lack standing or fail to state a legally sufficient claim for relief. *O’Shea v.*
8 *Littleton*, 414 U.S. 488, 494-95 (1974). Because each of Plaintiffs’ claims fails for the reasons
9 addressed in detail above, the claims asserted on behalf of the proposed classes must also be
10 dismissed. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-24 (9th Cir. 2003).¹²

11 **VII. The Third Amended Complaint Should Be Dismissed with Prejudice**

12 The TAC is the *sixth* pleading Plaintiffs have filed in this case, and it is the third amended
13 complaint filed since the cases were consolidated and lead counsel was appointed over one year ago.
14 *See supra* pp. 5-8. Likewise, this is the *fourth motion* Yelp has filed to address the deficiencies of
15 Plaintiffs’ fruitlessly changing pleadings. *See* Dkt. Nos. 51, 59 and Case No. 10-02351, Dkt. No. 22.
16 Plaintiffs have had *more than one year* to develop a legally sufficient pleading but have failed to do
17 so. Yelp should not be put to the continued expense of defending a case founded solely upon
18 speculation where no plausible cause of action exists. The TAC should be dismissed with prejudice.
19 *Baymiller*, 2000 WL 33774562, at *2 (“[A]s this is Plaintiff’s third submitted Complaint, no injustice
20 is committed by dismissing the claims. The Court finds that providing Plaintiffs with three
21 opportunities to state a claim is more than ample.”).

22 **VIII. Plaintiffs’ Class Allegations Are Deficient**

23 Finally, this Court also should dismiss and/or strike Plaintiffs’ purported class action
24 allegations under Rules 12(b)(6), 12(f) and/or 23. When – as here – it is apparent from the face of the
25 pleading that individual issues predominate or that the alleged class is not ascertainable, this Court

26 ¹² Although the TAC should be dismissed in its entirety, at a minimum, all claims asserted on behalf
27 of the Sponsor Plaintiffs must be dismissed because the Court previously held Plaintiff Chan’s
28 allegations insufficient to state any claim predicated on alleged “extortion,” and Plaintiff Chan (the
sole named Plaintiff purporting to represent the Sponsor subclass) has alleged no new allegations in
the TAC. Order at 17-18. *See* Ex. 6 to Beringer Decl.

1 repeatedly has dismissed class allegations at the pleading stage. *See, e.g., Stearns v. Select Comfort*
2 *Retail Corp.*, No. 08-2746, 2009 WL 4723366, at *15-16 (N.D. Cal. Dec. 4, 2009) (dismissing class
3 allegations that involved elements “individual to each purported class member, such as . . . notice . . .
4 and reliance”); *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1166-67 (N.D. Cal. 2008)(striking class
5 allegations because “proposed class cannot, as alleged, be presently ascertained”).

6 During the hearing on Yelp’s motion to dismiss the Second Amended Complaint, Judge Patel
7 expressed considerable doubt that a class could ever be certified in this case given the predominance
8 of highly-individualized factual inquiries:

9 How would you certify a class in this case? Because it seems to me that as you get
10 over some of these problems still each case is so distinguishable what happened in that
11 particular case different from what happened from some other business that may have
12 a complaint, and so forth?

13 Tr. of Proceedings, Dkt. No. 69, at 28:23-29:4. In response, Plaintiffs asserted that they believed they
14 could demonstrate a pattern or policy of manipulation of reviews by Yelp. *Id.* at 29:5-8.

15 The TAC, however, alleges precisely the *opposite* of a policy of manipulation, and instead
16 asserts (based on triple hearsay) that a Plaintiff heard rumors that Yelp “terminated a group of sales
17 employees” due to alleged “scamming relating to advertising,” and froze sales employees’ computers
18 to “prohibit employees from being able to change reviews.” TAC ¶ 82. Far from alleging a pattern
19 or policy of manipulation, Plaintiffs now assert that Yelp had a policy of *prohibiting* its employees
20 from manipulating reviews and took steps to punish employees who supposedly violated this policy.
21 *Id.* As the United States Supreme Court recently held, Plaintiffs’ inability to “provide . . . convincing
22 proof of a companywide . . . policy” precludes “the existence of any common question.” *Wal-Mart*
23 *Stores, Inc. v. Dukes*, 564 U.S. ___, No. 10-277, slip op. at 19 (June 20, 2011). Plaintiffs’ own
24 allegations defeat any claim that Yelp had a policy or practice of extortion, and their class allegations
25 should be dismissed because they cannot satisfy, on their face, the commonality requirement for class
26 certification. *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 641-42 (S.D. Cal. 2007)
(dismissing class allegations because plaintiffs failed to “allege [a] common scheme or policy that
27 would diminish the need for individual inquiry”).

28 In addition, Plaintiffs’ class allegations are deficient because Plaintiffs purport to represent a
class that would include every business and person “who [was] in contact with Yelp regarding the

1 option to advertise,” irrespective of whether Yelp made any unlawful threat of injury to such class
2 members, or whether the class members reasonably felt fear or were compelled to purchase
3 advertising as a result of any such threat. TAC ¶ 105(a)-(b). *See Hovsepian v. Apple, Inc.*, No. 08-
4 5788, 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17, 2009) (striking class action allegations where
5 proposed class included individuals with no claims against defendants).

6 Moreover, the named Plaintiffs do not – and cannot – satisfy the typicality requirement under
7 Rule 23. Given the enormous variation among Plaintiffs’ allegations, they cannot possibly establish
8 that their claims are typical of any that could be asserted by hundreds of thousands of individual
9 businesses, each of which made independent decisions to advertise on Yelp (or not) for their own
10 reasons, received different individualized communications from different salespeople, and received
11 distinct reviews and ratings from hundreds of thousands of reviewers (whose reviews are impacted
12 differently by Yelp’s automated review filter) before and after their decisions to purchase advertising
13 on Yelp (or not). *Dodd-Owens v. Kyphon, Inc.*, No. C06-3988, 2008 WL 410241, at *1 (N.D. Cal.
14 Feb. 12, 2008) (“[T]o proceed with their class action Plaintiffs [at] the very least must allege some
15 specific commonality and typicality among the members.”).

16 Finally, it is apparent at the pleading stage that the proposed class is not administratively
17 feasible and would require a highly individualized inquiry into the separate statements (if any) made
18 to each class member, the state of mind of each member, and whether tens of millions of third-party
19 reviews were removed or reinstated in a manner consistent with “Yelp’s representations regarding its
20 review terms” (TAC ¶ 105(a)) – an inquiry that would overwhelm the resources of the parties and
21 this Court. Parsing the confusing and varied allegations even of the named Plaintiffs is challenging.
22 *See* Mot. Dismiss SAC, pp. 4-8, 24; *supra* pp. 6-10. Attempting to replicate this effort for hundreds
23 of thousands of individual businesses with equally individual circumstances would be impossible.

24 IX. CONCLUSION

25 For each of these reasons, the Third Amended Complaint should be dismissed in its entirety
26 with prejudice, and the class allegations should be stricken.

27 DATED: July 22, 2011

GIBSON, DUNN & CRUTCHER LLP

28 By: /s/ Ashlie Beringer
Ashlie Beringer