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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12
 13 SAN FRANCISCO DIVISION

14 BORIS Y. LEVITT, on behalf of himself and all
 15 others similarly situated,
 16 Plaintiffs,
 17 v.
 18 YELP! INC.; and DOES 1 through 100, inclusive,
 19 Defendants.

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

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

Date: October 14, 2011
 Time: 1:30 p.m.
 Place: Courtroom 15
 Judge: Hon. Edward M. Chen

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1 **I. INTRODUCTION**

2 Plaintiffs Boris Y. Levitt, d/b/a Renaissance Restoration, a/k/a Renaissance Furniture
3 Restoration (“Levitt”), Cats and Dogs Animal Hospital, Inc. (“Cats and Dogs”), Tracy Chan, d/b/a
4 Marina Dental Care, a/k/a Marina Dental Care (“Chan”) and John Mercurio d/b/a Wheel
5 Techniques (“Wheel Techniques”) on behalf of themselves and all others similarly situated, filed
6 a class action Third Amended and Consolidated Complaint (“TAC”) against Defendant Yelp! Inc.
7 (“Yelp” or “Defendant”) for a violation of Business and Professions Code section 17200, civil
8 extortion and attempted civil extortion. Defendant now moves to dismiss this case and to strike or
9 dismiss the class allegations.

10 Plaintiffs were previously found to have standing and have adequately alleged and
11 submitted facts sufficient to support Article III standing. Plaintiffs have stated claims under
12 California’s Unfair Competition Law and for civil and attempted civil extortion. They bring their
13 claims on behalf of an ascertainable class and satisfy Rule 23.

14 Defendant’s motion should be denied in its entirety.

15 **II. STATEMENT OF FACTS**

16 **A. Yelp Background**

17 Yelp is a review website, which allows users to post reviews and rate businesses. TAC ¶2.
18 Users post reviews and assign a star rating with one star being the lowest and five stars being the
19 highest rating. *Id.* Yelp then assigns the business an overall star rating based on *some* of the user
20 reviews. *Id.* Yelp draws over 25 million people each month, who can search the public ratings of
21 businesses and/or post their own reviews. *Id.* Yelp claims that its website is “Real People. Real
22 Reviews” and that Yelp will only remove user reviews under certain circumstances, including 1)
23 when Yelp’s automated filter suppresses the review; 2) when the review violates the Yelp Terms
24 of Service or Content Guidelines; or 3) when the user removes the review (“Review Terms”).¹
25 TAC ¶¶3, 6.

26 _____
27 ¹ “Review Terms” is defined in paragraph 6 of the TAC exactly as it is defined above.
28 Plaintiffs’ use of the phrase “Review Terms” refers only to the defining language set forth in
paragraph 6. It is not an incorporation or an incorporation by reference of any exhibits or

1 Despite these representations, Yelp does not comply with its own Review Terms. TAC ¶7.
2 Instead, Yelp actively manipulates the reviews of users to coerce businesses to purchase
3 advertising. *Id.* Yelp uses several approaches to effectuate its extortionist conduct and obtain its
4 desired advertising revenues. Each approach is firmly rooted in Yelp’s understanding that a
5 business’s reputation and revenues are often tied to rating-based websites like Yelp. TAC ¶¶8, 24.

6 To instill fear in a business and coerce it to pay for advertising, Yelp controls a business’s
7 overall star rating primarily by manipulating the reviews contrary to Yelp’s own policies and
8 representations. TAC ¶¶34-35, 37, 38, 40. This can occur several ways. Yelp may manipulate
9 which user reviews are filtered (essentially suppressed from general public view and not
10 considered as part of the star rating), which affects and controls the business’s overall star rating.
11 *Id.* at ¶40. Yelp may refuse to remove reviews that violate its own Review Terms, which affects
12 and controls the business’s overall star rating. *Id.* Yelp may represent to a business that it has the
13 ability to remove reviews, which would affect and control the business’s overall star rating.

14 Finally, Yelp may generate and post false negative reviews for the business which directly
15 affects and controls the business’s overall star rating. *Id.* The owner of plaintiff Wheel
16 Techniques was told that a former Yelp employee stated that Yelp terminated a group of sales
17 employees around the time that this and similar lawsuits were filed as a result of scamming related
18 to advertising. TAC ¶82. Plaintiff also was told that Yelp froze the computers of sales employees
19 to prevent those employees from being able to change reviews. *Id.* Yelp also generated content
20 through agents. Yelp’s CEO, Jeremy Stoppelman, admitted that Yelp did generate reviews and
21 that it paid users to generate and post those reviews. TAC ¶38. Not only did Yelp pay users to
22 create content, but in 16 cities, Yelp also maintains community managers who are “encouraged to
23 review.” *Id.*

24 Each of Yelp’s approaches revolves around unfair rating changes, which businesses fear
25 because of the corresponding loss of customers and revenue. TAC ¶¶8, 10. Yelp capitalizes on
26 this fear by both implicit and explicit threats that if the business does not pay for advertising, its
27 portions of Yelp’s website, as suggested by Yelp’s treatment in its motion and the exhibits
28 submitted by its declarants.

1 overall star rating and reviews will decline. *Id.*

2 **B. Class Allegations**

3 Plaintiffs seek to represent the following subclasses of Non Sponsors (those whose reviews
4 Yelp manipulated, but who did not purchase advertising) and Sponsors (those whose reviews Yelp
5 manipulated and who thereafter purchased advertising). *See* TAC ¶ 109(a)-(b).

6 Non Sponsors are defined as:

7 [a]ll similarly situated businesses and persons nationwide who were in contact
8 with Yelp regarding the option to advertise on Yelp, declined to purchase
9 advertising, and as a result of not purchasing advertising, were subject to the
10 manipulation of the reviews of their businesses by Yelp – in a manner that did not
11 comply with Yelp’s representations regarding its Review Terms² – during the
12 four years prior to the commencement of this lawsuit, through the final resolution
13 of this lawsuit.

14 *Id.*

15 Sponsors are defined as:

16 All similarly situated businesses and persons nationwide who were in contact with
17 Yelp regarding the option to advertise on Yelp, whose reviews were manipulated
18 by Yelp in a manner that did not comply with Yelp’s representations regarding its
19 Review Terms and who thereafter purchased advertising during the four years
20 prior to the commencement of this lawsuit, through the final resolution of this
21 lawsuit.

22 *Id.*

23 **C. Plaintiffs’ Experiences with Yelp**

24 Non Sponsor Plaintiff Levitt³ was contacted by a Yelp sales representative in July 2009
25 asking Levitt to purchase advertising. TAC ¶¶46-47. Subsequently, Levitt declined the offer.
26

27 ² For purposes of both subclass definitions, Review Terms means, as set forth in the
28 complaint, Yelp’s public representation that reviews may only be removed from Yelp if: 1) A
user removes the review; 2) Yelp removes the review for violating the Terms of Service or
Content Guidelines; or 3) “The review may have been suppressed by Yelp’s automated software
system. This system decides how established a particular reviewer is and whether a review will
be shown based on the reviewer’s involvement on Yelp. While this may seem unfair to you, this
system is designed to protect both consumers and businesses alike from fake reviews (i.e., a
malicious review from a competitor or a planted review from an employee). The process is
entirely automated to avoid human bias, and it affects both positive and negative reviews. It’s
important to note that these reviews are not deleted (they are always shown on the reviewer’s
public profile) and may reappear on your business page in the future.” *See id.*

³/ For purposes of this motion only, Plaintiffs’ experiences with Yelp are only addressed
summarily, due to page constraints.

1 TAC ¶47. *Just two days* after Levitt declined Yelp’s advertising solicitation, all but one of his top-
2 rated 5 star reviews was removed from his public Yelp review page. TAC ¶49. Yelp’s action
3 caused Levitt’s overall star rating to plummet to 3.5 stars. TAC ¶¶ 47-49. Yelp’s manipulation
4 caused Levitt to have significantly reduced customer interest in his business (his Yelp page was
5 reviewed only 158 times as opposed to 261 times the previous month). TAC ¶ 49. And Levitt’s
6 monthly business income declined accordingly. TAC ¶49. Yelp continued its unfair conduct by
7 restricting Levitt’s searchable business category designations from multiple categories to just one
8 category. TAC ¶53.

9 In September 2009, a Yelp sales representative began calling Non Sponsor Plaintiff Cats
10 and Dogs and promised to manipulate its reviews if Cats and Dogs purchased advertising. TAC ¶¶
11 58-61. *Not even one week* after Cats and Dogs declined to purchase advertising, Yelp posted
12 multiple negative reviews. TAC ¶¶66-68. One of these negative reviews had been removed
13 before because it violated Yelp’s Review Terms. TAC ¶¶60-61, 66. Plaintiff alleges that the other
14 new negative reviews were manufactured by Yelp or its agents. TAC ¶69. Yelp’s conduct caused
15 Cats and Dogs reputational harm, a loss in customers, page views, sales, business revenues and
16 assets. TAC ¶71.

17 In May or June of 2008, Sponsor Plaintiff Chan was contacted by a Yelp sales
18 representative and offered the opportunity to advertise. TAC ¶87. Yelp told Chan that Yelp
19 employees had the ability to remove reviews from a business’s review page. TAC ¶¶88, 91. In
20 August 2008, Chan declined to purchase advertising from the sales representative. TAC ¶89-90.
21 *Within just two to three days* after Chan declined to purchase advertising, Yelp removed nine top-
22 rating 5-star reviews from Chan’s Yelp review page. TAC ¶90. Yelp caused Chan’s overall star
23 rating to plunge from the highest 5 star rating to 3 stars. *Id.* Because Chan feared that Yelp would
24 continue to manipulate her public reviews (which Yelp admitted they could and would do), she
25 felt compelled to purchase advertising. TAC ¶¶92-93. Just days after Chan purchased advertising,
26 the 5 star reviews Yelp had removed were suddenly reinstated and Chan’s overall star rating rose
27 again. TAC ¶93. In October 2008, Yelp asked Chan to increase her advertising payments to
28

1 \$500.00 per month. TAC ¶¶94. Instead, Chan cancelled her advertising contract, and Yelp then
2 removed positive reviews from her review page and replaced them with negative reviews. TAC
3 ¶¶95. Yelp's conduct caused a decline in her overall star rating, the number of Chan's new patients
4 declined as well as her revenues and business assets, and her reputation was harmed. TAC ¶¶101-
5 02.

6 In or around late 2008 and early 2009, Wheel Techniques began receiving calls from Yelp
7 representatives requesting that Wheel Techniques purchase advertising. TAC ¶¶74-76. Around
8 the same time period as it began receiving advertising calls, Wheel Techniques also began
9 receiving negative reviews on Yelp. TAC ¶¶74, 76. The negative reviews did not appear to be
10 written by actual customers of Wheel Techniques because Wheel Techniques had no records of
11 performing the reviewed work or the names of the reviewers who claimed they had visited the
12 shop. TAC ¶¶74-76. On March 8, 2010, Wheel Techniques was again contacted by Yelp for
13 advertising, which it declined, and *within minutes* a one-star review was moved to the top of
14 Wheel Technique's Yelp review page replacing a five-star review that had previously been listed
15 at the top of the review page. TAC ¶¶79-80. Wheel Techniques alleges that Yelp employees or
16 individuals acting on behalf of Yelp manufactured the negative reviews that began appearing
17 when it declined to purchase advertising, and moved the one-star review to the top of its review
18 page after it declined to purchase advertising. TAC ¶¶77, 81.

19 Yelp's conduct caused each of the named Plaintiffs' overall Yelp star ratings to decline and
20 that resulted in a decrease in Plaintiffs' customers, a loss of sales, revenues and assets, and
21 reputational injuries. TAC ¶¶55, 71, 83, 102. Sponsor Plaintiffs seek injunctive and restitution
22 relief for payments they made to Yelp due to its unlawful extortion and unfair conduct. TAC
23 ¶¶124-25. Non Sponsor Plaintiffs seek injunctive relief ordering Yelp to cease its UCL violations.
24 TAC ¶¶126-27. Sponsors and Non Sponsors seek damages and punitive damages for attempted
25 civil extortion and civil extortion. TAC ¶¶138-39, 145-46.

26 **D. The Court's Order on Yelp's Prior Motion to Dismiss**

27 On March 22, 2011, the Court issued an order on Yelp's Motion to Dismiss the Second
28

1 Amended Class Action Complaint (“SAC”) and to Dismiss or Strike Class Allegations. *See* Dkt.
2 70 (“Order”). The Court found that Plaintiffs had alleged facts sufficient to establish Article III
3 standing and overruled Yelp’s standing and jurisdictional challenges. Order, 9:15-16. The Court
4 further found that Communications Decency Act (“CDA”) did “not provide Yelp blanket
5 ‘immunity’ from suit or in any way limit this court’s jurisdiction over Plaintiff’s claims.” Order,
6 11:6-7. In addition, the Court found that Plaintiffs had also alleged facts sufficient to satisfy the
7 UCL standing requirements. Order, 12:18-20.

8 With regard to Plaintiff’s UCL claim pleaded under the unlawful prong, the Court found
9 that under the CDA, the following alleged actions by Yelp were actionable: Yelp removed positive
10 reviews, thereby changing the overall star rating, immediately after plaintiffs declined to purchase
11 advertising or terminated their advertising contracts”; 2) “Yelp manufactured its own negative
12 reviews of plaintiffs’ businesses”; and 3) “Yelp stated that paying for advertising would help
13 Plaintiff’s overall star rating because Yelp ‘tweaks’ the ratings, ‘manually adds and removes
14 reviews in its own discretion’ and its employees have the ability to remove reviews.” Order,
15 14:14-22, 15:25-27; 16:2-4; 16:20-27.

16 Although Plaintiffs’ allegations were actionable under the CDA, the Court found that the
17 SAC didn’t allege sufficient facts to demonstrate that Yelp’s conduct amounted to an implied
18 extortionate threat because 1) it was speculative that Yelp manufactures its own reviews or
19 manipulates reviews of businesses who purchase advertising; 2) no distinct communication of a
20 threat could be inferred; and 3) the apparent correlations between Plaintiffs’ overall star ratings
21 and their advertising decisions only provided select snapshots of Plaintiffs’ overall star ratings.
22 Order, 17:6-10; 17:11-12; 17:20-23.

23 For Plaintiffs’ unfair prong UCL claim, the Court found that Plaintiffs didn’t allege facts
24 sufficient to show that they had 1) met the *Cel Tech* or *South Bay* tests; and 2) that the theory of
25 extortion as a theory of unfairness failed for the same reasons that the unlawful prong had not been
26 met. Order, 19:22-25; 19:25-27. Finally, the Court found it unnecessary to address the class
27 action allegations. Order, 20:22-23.

1 **E. Plaintiffs’ Attempts to Commence Discovery**

2 After receiving the Order, Plaintiffs sought discovery of the names, addresses, and contact
3 information of Yelp’s former sales employees so that they could discover, among other issues,
4 whether Yelp had a widespread policy of manipulating overall star ratings, drafting negative
5 reviews to extort advertising money out of businesses and their owners, and develop issues
6 relating to Yelp’s conduct. Plaintiffs believed this discovery would be crucial towards
7 establishing their allegations and prosecuting their complaint. Because Plaintiffs are not former
8 Yelp employees and could not possibly have first-hand knowledge of inside information, the
9 requested discovery is the only means to obtain such information. Plaintiffs moved to compel this
10 information, but the discovery request was denied on August 1, 2011. *See* Dkt. No. 82.

11 **III. ARGUMENT**

12 **A. Legal Standards**

13 Article III standing is challenged by a motion to dismiss under Rule 12(b)(1). *Chandler*
14 *v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir.2010). On a Rule 12(b)(6)
15 motion, the court must accept the factual allegations of the complaint as true and must draw all
16 reasonable inferences in favor of the plaintiff. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.
17 1998). A plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”
18 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007).

19 A Rule 12(f) motion “is not the proper vehicle for dismissing portions of a complaint
20 when the 12(f) challenge is really an attempt to have portions of the complaint dismissed; such a
21 challenge is better suited for a 12(b)(6) motion to dismiss” *Swift v. Zynga Game Network*,
22 No. C 09-05443 SBA, 2010 WL 4569889 at *10 (N.D. Cal. Nov. 3, 2010) (denying motion to
23 strike Rule 23 class allegations). Class action allegations are not the type of “redundant,
24 immaterial, impertinent, or scandalous matters” that Rule 12(f) is designed to address. Fed. R.
25 Civ. P. 12(f).

26 Defendant’s motions should be denied because 1) Plaintiffs have standing; 2) Plaintiffs
27 have sufficiently pled UCL and civil extortion and attempted civil extortion claims; and 3)

1 Plaintiffs' class allegations satisfy Rule 23.

2 **B. Plaintiffs Have Article III Standing**

3 Article III of the Constitution confers standing on a party if the party can demonstrate: “(1)
4 it has suffered ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not
5 conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the
6 defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed
7 by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-81
8 (2000). Under Rule 12(b)(1), “the defendant may either challenge jurisdiction on the face of the
9 complaint or provide extrinsic evidence demonstrating lack of jurisdiction on the facts of the
10 case.” *Rachford v. Air Line Pilots Assoc.*, No. C 03-3618PJH, 2006 WL 1699578 at *3 (N.D. Cal.
11 June 16, 2006). If a defendant makes a factual challenge, “[i]t then becomes necessary for the
12 party opposing the motion to present affidavits or other evidence necessary to satisfy its burden of
13 establishing that the court, in fact, possesses subject matter jurisdiction.” *St. Clair v. City of*
14 *Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

15 The Court held in its March 22, 2011 Order that Plaintiffs had alleged facts sufficient to
16 confer Article III standing. Order, 9:15-16. Despite the previous order and in conjunction with
17 Yelp’s refusal to permit Plaintiff to conduct even limited discovery, Yelp again contests Plaintiffs’
18 standing by raising a 12(b)(1) factual challenge. In light of these facts, Plaintiffs should be
19 entitled to conduct limited discovery. As discussed below, Yelp’s evidence is not conclusive and
20 does not defeat Plaintiffs’ standing.

21 **1. Plaintiffs’ Standing Is Not Affected By Yelp’s Evidence**

22 Yelp fails to prove that Plaintiffs’ injuries are not connected to Yelp’s wrongful conduct in
23 generating or modifying the content of reviews and manipulating reviews. Yelp’s reliance on the
24 Ian MacBean Declaration is misplaced because there is no factual basis underlying the majority of
25 its assertions (e.g., it fails to provide the most basic information about declarant such as how long
26 he has worked at Yelp) and instead consists largely of hearsay and speculation.⁴

27 ⁴ The bulk of the MacBean declaration and exhibits is inadmissible as set forth more fully
28 in Plaintiffs’ concurrently filed Evidentiary Objections.

1 Yelp’s contention that it has “confirmed that none of the consumers who created and
2 posted [the reviews about Plaintiffs] are current or former employees or agents of Yelp” (Yelp
3 MTD, 21:10-13) relies upon cursory, non-exclusive searches that are based only on information
4 provided to Yelp by its users. Specifically, Yelp’s purported “confirmation,” relied on searches 1)
5 to determine whether each reviewer’s Yelp user profile was “flagged in Yelp’s database” as being
6 associated with a current or former employee; 2) running a search of the first and last names that
7 reviewers provided to Yelp in a database of current and former Yelp employees; 3) checking the
8 email addresses provided by the reviewers to Yelp to see if any had an @yelp.com email address;
9 and 4) reviewing the IP address provided by each reviewer in connection with each of the
10 Plaintiffs’ reviews to see if they were associated with any Yelp IP address. *See* Declaration of Ian
11 MacBean (Dkt. No. 80), ¶¶ 2-5. This does not verify that Yelp employees did not post reviews or
12 alter reviews on Plaintiffs’ business pages and that Yelp’s conduct did not cause Plaintiffs’ harm.
13 *See Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993) (“although [certificates] were proper
14 evidence, they were not necessarily conclusive evidence”).

15 A closer look at these searches demonstrates that they are not conclusive or exclusive.
16 Yelp necessarily has to rely on the information provided by its users – such as first and last name.
17 Nowhere in the MacBean declaration does Yelp set forth any verification requirements for a user’s
18 first and last name, such as requiring a user to provide a government-issued identification
19 document or to require an in-person verification of the information. Common sense mandates that
20 if a user does not provide their true first and last name, then Yelp’s comparison of user names with
21 its list of current and former employees is meaningless. A Yelp employee could have registered as
22 a user under a different first or last name or both. If Yelp uses first and last name information to
23 “flag” user accounts associated with current or former Yelp employees, then that search is also
24 inconclusive. No information, however, is provided about how Yelp would know whether a user
25 account should be flagged, particularly given its representation that a group of “certain [Yelp]
26 employees” are “prohibited” from providing written content to the website. MacBean Decl., ¶2.

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1 Notably, this statement in the MacBean declaration necessarily implies and concedes that some
2 Yelp employees *can* generate content by posting reviews – the very fact that Yelp seeks to deny.

3 Similarly, Yelp’s reliance on email addresses provided by its users will fail. “The fact that
4 none of the Yelp posters used a Yelp email address in their contact information does not mean that
5 the poster was not a Yelp employee.” Declaration of Richard Gralnik, ¶10. Hundreds of free
6 services on the internet allow persons – including any Yelp employee – to “create one or more
7 entirely anonymous, completely unverified and perfectly valid email accounts.” *Id.*

8 Finally, Yelp’s search of “IP addresses” again fails because it relies upon information
9 provided by the user to Yelp. “The fact that the posted reviews about the named Plaintiffs did not
10 originate from the IP address of a computer or device at Yelp does not mean that the posts could
11 not have come from a Yelp computer or device.” Gralnik Decl., ¶12. Just as with email services,
12 there are “numerous ‘anonymizer’ sites on the Internet designed to hide a user’s actual IP address
13 from other users such as Yelp.” *Id.* at ¶13.

14 The MacBean declaration fails to exclude the possibility that – as Plaintiffs alleged – one
15 or more Yelp employees generated negative reviews, modified the content of reviews or otherwise
16 manipulated reviews to the detriment of Plaintiffs. Therefore, since Plaintiffs’ injuries are linked
17 to Yelp’s improper conduct, Plaintiffs have again demonstrated they have standing.

18 Likewise, Yelp’s attempts to prove that reviews removed or filtered from Plaintiffs’ pages:
19 1) were the result of asserted (but unproven and undocumented) violations of the Terms of Service
20 or violations of Content Guidelines (allegedly in force during an unspecified time frame); 2) were
21 removed by the reviewers; or 3) were allegedly generated by Plaintiffs also fail. Yelp MTD, 21-
22 22. The MacBean declaration is almost completely devoid of any facts which would provide a
23 basis and foundation for his statements about reviews being filtered, removed or in violation of
24 various Terms of Service or Content Guidelines. *See generally* Plaintiffs’ Evidentiary Objections.
25 Yelp submitted *no written evidence* from its administrative records (referenced throughout the
26 MacBean declaration) that stated the reviews were filtered or removed for alleged violations of the
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1 Terms of Service or Content Guidelines. Declarant’s say-so is not admissible evidence, and
2 Yelp’s unsupported assertions cannot be considered.

3 Similarly flawed is Yelp’s contention that certain reviews for Wheel Techniques and
4 Renaissance Restoration were created by Plaintiffs themselves. Yelp MTD, 21-22. Yelp’s only
5 basis for this is its unsupported assertion that selected information provided by third parties on
6 Facebook and external websites is true and verified. *See* MacBean Decl., ¶¶14-22. Statements by
7 third parties asserted for their truth is the very definition of hearsay, and that precludes Yelp from
8 relying on that inadmissible information. Yelp may not rely on inadmissible hearsay statements to
9 conclude that a particular Facebook page or external website is in fact associated with and
10 maintained by the owner of a Plaintiff business. Fed. R. Evid. 801, 802. And Yelp has no factual
11 basis or personal knowledge to support any such speculation. Accordingly, Yelp has not
12 demonstrated how or why or for what reason reviews of Plaintiffs’ businesses were removed or
13 filtered on Yelp’s website.

14 **2. Plaintiffs Should be Permitted to Conduct Limited Discovery**

15 When a factual challenge is made to a complaint’s jurisdictional allegations, “discovery is
16 necessary . . . if it is possible that the plaintiff can demonstrate the requisite jurisdictional facts if
17 afforded that opportunity.” *St. Clair*, 880 F.2d at 201. Further, discovery should be permitted
18 “where the facts are peculiarly within the knowledge of the opposition party.” *GreenPeace, Inc. v.*
19 *State of France*, 946 F. Supp. 773, 789 (C.D. Cal. 1996); *see also Farr*, 990 F.2d at 454 (would
20 have been fair to allow party to obtain some discovery when faced with a 12(b)(1) motion). “It is
21 an abuse of discretion to dismiss for lack of subject matter jurisdiction without giving plaintiff
22 reasonable opportunity, if requested, to conduct discovery for this purpose.” *GreenPeace, Inc.*,
23 946 F. Supp. at 789.

24 Here, Plaintiffs have not had the opportunity to conduct jurisdictional discovery on
25 disputed, controlling issues of fact – whether Yelp’s conduct in manipulating and contributing to
26 Plaintiff’s reviews caused them harm – that are in dispute. Plaintiffs’ previous attempt to obtain
27 discovery of former Yelp sales employees’ contact information – which was denied – would have
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1 likely assisted them to obtain and submit evidence necessary to oppose Yelp’s standing challenge.
2 This discovery would have likely allowed Plaintiffs to understand exactly how Yelp’s behind-the-
3 scenes conduct impacted reviews of Plaintiffs’ businesses and why their reviews (and thousands of
4 others) would suddenly change after they declined to purchase advertising. Accordingly, in the
5 event the Court is inclined to consider Yelp’s extrinsic evidence, Plaintiffs respectfully renew their
6 request to conduct limited discovery related to the issues raised by the standing challenge and to
7 submit evidence obtained from that discovery before the Court rules on this motion.

8 **C. Plaintiffs Have Properly Stated a Claim for Unfair Competition**

9 **1. The Law of the Case Doctrine**

10 As a preliminary matter, the law of the case doctrine does not and should not be applied
11 to Plaintiffs’ UCL claims. “For the law of the case doctrine to apply, the issue in question must
12 have been decided explicitly or by necessary implication in [the] previous disposition.” *U.S. v.*
13 *Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). More importantly, application of the
14 law of the case doctrine is in the court’s discretion. *Taylor v. Clark*, No. 1:07-cv-00032-SW1-
15 SMS PC, 2011 WL 917382 at *21 (C.D. Cal. Feb. 16, 2011) (“application of the law of the case
16 doctrine is discretionary.”) citing *United States v. Mills*, 810 F.2d 909 (9th Cir. 1987).

17 Yelp asks this Court to apply the law of the case doctrine to preclude the UCL claims of
18 class representatives Levitt, Chan and Cats & Dogs based on Yelp’s contention that Plaintiffs did
19 not add allegations to the TAC in the sections on those class representatives. *See* MTD, 11:25-
20 12:4. . Yelp ignores the fact that the TAC added new factual allegations that are applicable to all
21 plaintiffs [*see infra* Section II.A], and has added an additional class representative who has new
22 factual allegations as to Plaintiffs’ UCL claims. *See* TAC ¶¶ 37, 38, 72-83. The TAC, therefore,
23 presents different issues. Because Plaintiffs have presented a new basis and additional authorities
24 to support their UCL claims, the law of the case doctrine is inapplicable to Plaintiffs’ claims and
25 the TAC and all claims therein should be evaluated on the merits. *See Moreno v. The Geo Group,*
26 *Inc.*, 1:07-CV-01630, 2009 WL 841139 at *2 (E.D. Cal. March 26, 2009) (declining to apply law
27 of the case on motion to dismiss when new basis and additional authorities on claim were
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1 presented).

2 Further, applying the law of the case doctrine to Plaintiffs UCL claims (or any portion
3 thereof) is inappropriate because Plaintiffs' TAC superseded the SAC. *See In re Sony Grand*
4 *Wega KDF-E A10/A20 Series Rear Protection HDTV Television Litigation*, 758 F.Supp.2d 1077,
5 1098 (S.D. Cal. 2010) (declining to apply law of case doctrine on motion to dismiss to claim that
6 "remain[ed] substantively unchanged" because previous complaint was superseded and law of
7 case doctrine is discretionary) citing *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
8 1542, 1546 (9th Cir. 1989) ("[A]n amended pleading supersedes the original").

9 Even if the issues presented by the SAC and the TAC were the same (they are not) the
10 application of the law of the case doctrine is within the Court's discretion. *See id.* at 1098 ("[t]he
11 law of the case doctrine is discretionary and 'is in no way a limit on a court's power to revisit,
12 revise, or rescind an interlocutory order prior to entry of final judgment in the case.'").
13 Accordingly, Plaintiffs' claims should be evaluated on their merits.

14 **2. Plaintiffs Adequately Alleged Unfair Competition Claims**

15 The UCL prohibits conduct that is "any unlawful, unfair or fraudulent business act or
16 practice" Cal. Bus. & Prof. Code § 17200. "The purpose of the UCL is to protect both
17 consumers and competitors by promoting fair competition in commercial markets for goods and
18 services." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1359 (2010) (internal citations
19 omitted). Under the UCL, "a business practice need only meet one of the three criteria to be
20 considered unfair competition." *Id.* (citing *McKell v. Washington Mutual, Inc.*, 142 Cal. App.
21 4th 1457, 1471 (2006)). "Therefore, an act or practice is 'unfair competition' under the UCL if it
22 is forbidden by law or, even if not specifically prohibited by law, is deemed an unfair act or
23 practice." *Id.* (citing *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1335 (2009)).

24 **a. Unlawful Conduct**

25 As predicates for the "unlawful" prong of the UCL, Plaintiffs allege that Defendants
26 "unlawfully attempted to and/or did in fact commit extortion as set forth in California Penal
27 Code sections 518, 519, 523, 524, the Hobbs Act, civil extortion and attempted civil extortion."
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1 See TAC ¶ 118. Pursuant to California Penal Code section 518, extortion is defined as
2 “obtaining of property from another, with his consent . . . induced by a wrongful use of . . . fear .
3 . . .” “Fear, such as will constitute extortion, may be induced by a threat . . . to do an unlawful
4 injury to the . . . property of the individual threatened or of a third person . . .” Cal. Penal Code
5 § 519. Attempted extortion is actionable under California law.⁵ Both the Hobbs Act definition
6 of extortion and claims for civil extortion and attempted civil extortion are substantially similar
7 to the California Penal Code. See, e.g., 18 U.S.C. § 1951(b)(2); *Hisamatsu v. Niroula*, No. C-07-
8 04371-JSW (EDL), 2009 WL 4456392 at *5 (N.D. Cal. Oct. 22, 2009).

9 As this Court articulated, in a case cited by Defendant, with regard to pleading “[u]nder the
10 UCL unlawful prong, it is not necessary that plaintiffs allege violation of the predicate laws with
11 particularity; they must at a minimum, however, identify the statutory or regulatory provisions that
12 defendants allegedly violated.” See *In re Actimmune Mktg. Litigation*, No. C 08-02376 MHP,
13 2009 WL 3740648 at *15 (N.D. Cal. Nov. 6, 2009). As set forth below, Plaintiffs have not only
14 identified the statutory provisions that Yelp allegedly violated (which, per *Actimmune* should
15 satisfy the minimum pleading requirement), they also pleaded adequate facts giving rise to the
16 violation.

17 **b. Yelp’s Conduct Constitutes an Implied Extortionate Threat**

18 It is well-settled that threats – sufficient to constitute extortion or attempted extortion –
19 may be implied. See, e.g., Cal. Penal Code § 523 (threats may be implied); see also *United States*
20 *v. Lisinski*, 728 F.2d 887, 891 (1984) (“The implied threat will usually be that, unless the victim
21 cooperates with the extortionist, economic loss will result”); *United States v. Rivera Rangel*, 396
22 F.3d 476, 484 (1st Cir. 2005) (In context of extortion through fear of economic loss, “we note that
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25 ⁵ See Cal. Penal Code § 523 (“Every person who, with intent to extort any money or other
26 property from another, sends or delivers to any person any letter or other writing, whether
27 subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in
28 Section 519, is punishable in the same manner as if such money or property were actually
obtained by means of such threat”); Cal. Penal Code § 524 (“Every person who attempts, by
means of any threat, such as is specified in Section 519 of this code, to extort money or other
property from another is punishable by imprisonment . . .”).

1 it is immaterial that Rivera never explicitly threatened Ventura”). In fact, as described by one
2 court, vague and implied threats are not only actionable, but sometimes more effective. Indeed,
3 [a]n experienced extortionist does not find it necessary to designate specifically
4 what he intends to do as a means of terrifying his prey . . . the more vague and
5 general the terms of the accusation, the better it would serve the purpose of the
6 accuser in magnifying the fears of his victim, and the better also it would serve to
7 protect him in the event of the failure to accomplish his extortion, and of a
8 prosecution for his attempted crime . . . [n]o precise words are necessary to
9 convey a threat. Conduct takes its legal color and quality more or less from the
10 circumstances surrounding it.

11 *People v. Oppenheimer*, 209 Cal.App.2d 413, 422 (1963) (internal citations and quotations
12 omitted).

13 In its March 22, 2011 Order, the Court found that due to the lack of allegations in the SAC,
14 Plaintiffs had not alleged that Yelp had engaged in an implied extortionate threat. Specifically, the
15 Court found that it was speculative that Yelp manufactures its own negative reviews or
16 manipulates reviews to the detriment of businesses who refuse to purchase advertising because the
17 SAC provided no basis from which to infer that Yelp authored or manipulated the content of the
18 negative reviews complained of by Plaintiffs. *See* Order 17:6-10. The TAC, however, adds new
19 allegations which demonstrate that Yelp does create content on its own site. Specifically, in the
20 TAC Plaintiffs allege: 1) that approximately 200 Yelp employees or individuals acting on behalf
21 of Yelp have written reviews of businesses on Yelp (TAC ¶ 37); 2) that Yelp’s CEO admitted that
22 Yelp has paid users to write reviews and maintains community managers who are encouraged to
23 review in 16 cities (TAC ¶ 38); and 3) that a class representative was told that a group of sales
24 employees at Yelp were terminated for scamming related to advertising around the time that this
25 lawsuit started (TAC ¶ 82). These additions – which provide factual support that Yelp writes its
26 own reviews and that sales employees engaged in scamming related to advertising – certainly
27 make it plausible and provides a basis for the allegations that Yelp representatives not only wrote
28 and manipulated reviews on Plaintiffs’ review pages, but that they did so shortly after Plaintiffs
declined to purchase advertising as part of a policy of extortionate “scamming.”

These allegations are consistent with and buttressed by Plaintiffs’ own experiences relating

1 to advertising with Yelp. Although Plaintiffs simply do not have access to the detailed
2 information that Yelp must maintain as to what happened to each review of Plaintiffs' businesses
3 each time Plaintiffs were contacted for advertising, the accounts of their experiences demonstrate
4 how Yelp made its implied extortionate threats.

5 For example, Plaintiff Chan alleges that *just days* after she was contacted by Yelp for
6 advertising and declined to purchase it, Yelp removed nine of her top-rated 5 star reviews from her
7 Yelp review page. TAC ¶¶ 89-90. Chan further alleges that Yelp subsequently told Chan that it
8 tweaks the ratings every so often, and that it could help her if she paid for advertising. TAC ¶ 91,
9 99. Similar to Chan, *just two days* after Boris Levitt was contacted by Yelp for advertising and
10 declined Yelp's advertising solicitation, all but one of his top-rated 5 star reviews was removed
11 from his public Yelp review page. TAC ¶49.

12 With Wheel Techniques, a different tact was taken. Wheel Techniques alleges that it was
13 contacted by Yelp for advertising, and *within minutes* after Wheel Techniques declined the offer,
14 a five-star review which had previously been listed at the top of the review page was replaced by a
15 one-star review. TAC ¶¶ 79-80. Not only did negative reviews begin to be listed first, around that
16 same time, Wheel Techniques also alleges that negative reviews appeared on its Yelp review page
17 from reviewers who did not appear to be actual customers. TAC ¶¶ 74-76. Similarly, Cats and
18 Dogs alleges that a Yelp sales representative began calling Non Sponsor Plaintiff Cats and Dogs
19 and promised to manipulate its reviews if Cats and Dogs purchased advertising. TAC ¶¶ 64. *Not*
20 *even one week* after Cats and Dogs declined to purchase advertising, Yelp posted multiple
21 negative reviews. TAC ¶¶ 66-68. One of these negative reviews had been removed before
22 because it violated Yelp's Review Terms. TAC ¶ 61.

23 Taken together, these allegations – along with the additional information Plaintiffs have
24 alleged relating to Yelp's authoring of reviews and advertising scamming – are sufficient to allege
25 that Plaintiffs' received implied extortionate threats from Yelp when they declined to purchase
26 advertising.⁶

27 ⁶ In the event the Court finds that Plaintiffs' added allegations are not sufficient to state a
28 cause of action, Plaintiffs respectfully renew their request to conduct limited discovery. *See*

1 *General Motors Acceptance Corp.*, 72 Cal.App.4th 861, 886 (1999), which weighs the unfair
2 practice’s ‘impact on its alleged victim . . . against the reasons, justifications and motives of the
3 wrongdoer,’ and others apply different tests or have blended the two approaches. Order, 19:9-15.

4 Plaintiffs plead unfair competition by alleging facts showing that Yelp tries to force small
5 businesses to pay for advertising because if they do not, the business’s overall star rating, which is
6 created by Yelp, will decline. TAC ¶¶8-9, 36, 54, 69, 81, 92. This, in turn, impacts a business’s
7 reputation and profits and devastates small businesses. TAC ¶¶10, 123, 55, 71, 83, 102. Plaintiffs
8 further allege that when they complained about Yelp’s conduct, Yelp retaliated against them by
9 removing positive reviews or re-publishing negative reviews to their Yelp review pages. *See*,
10 *e.g.*, TAC ¶¶ 53, 97. Yelp’s conduct favors businesses who purchase advertising to the detriment
11 of businesses that do not purchase advertising. TAC ¶78.

12 These facts demonstrate 1) Yelp’s conduct “harms competition by favoring businesses that
13 submit to Yelp’s manipulative conduct and purchase advertising to the detriment of competing
14 businesses that decline to purchase advertising and have their reviews negatively manipulated by
15 Yelp” [TAC ¶119]; 2) that the harm caused to class members due to Yelp’s conduct, including
16 damage caused to their sales, revenues, assets, and business reputations, greatly outweighs any
17 benefit to Yelp in advertising sales [TAC ¶120]; and 3) that the harm caused to class members,
18 including threats, retaliation, extortion, and attempted extortion is substantially injurious to
19 consumers and is immoral and unethical [TAC ¶¶121]. Accordingly, Plaintiffs’ allegations are
20 sufficient to meet several of the “unfair” competition tests.

21 In its Order, the Court found that Plaintiffs had not pleaded facts demonstrating unfair
22 competition under the “unfair prong” because Plaintiffs relied upon the unlawful prong
23 allegations. Order, 19:22-25. Plaintiffs respectfully submit that even if the Court does not find
24 that they alleged facts sufficient to demonstrate that Yelp committed extortion or attempted
25 extortion under the UCL’s “unlawful prong,” (*i.e.*, the threat element) it does not necessarily
26 mean that Plaintiffs have not alleged sufficient facts to give rise to a claim under the “unfair”
27 prong of the UCL. *See, e.g., Colonial Am. Casualty and Surety Co. v. Bay Commercial*

1 *Construction Co.*, No. C 04-1714 PJH, 2004 WL 2434955 (N.D. Cal. Oct. 29, 2004) (finding that
2 although motion to dismiss as to breach of contract claim was granted, that “[g]iven the flexible
3 nature of the definition of ‘unfair’ under § 17200, BCC had alleged sufficient facts in its breach
4 of contract claim for there to be a possibility that it could prove that counter-defendants acted
5 unfairly].”)

6 Should the Court find that Yelp’s alleged conduct does not qualify as extortion, Yelp’s
7 manipulative and retaliatory conduct is precisely the type of activity the “unfair” prong of the
8 UCL was intended to encompass. *See, e.g., Cel-Tech*, 20 Cal. 4th at 181 (“When a scheme is
9 evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of
10 equity is not impotent to frustrate its consummation because the scheme is an original one”)
11 (internal quotations omitted).

12 Although the Court’s Order found that the SAC’s allegations did not “allege beyond a
13 speculative level that Yelp’s actions threaten competition and there are no allegations from
14 which the Court could reasonably infer that Yelp is materially tilting the economic playing field
15 in favor of plaintiffs’ competitors,” (Order, 20:1-4), the TAC contains new facts adequate to
16 show a threat to competition. *See* TAC ¶78 (when Wheel Techniques asked why a competitor,
17 known for performing “shotty work” had five stars, Yelp told him that it was because his
18 competitor advertised and that “we work with your reviews if you advertise with us.”)

19 The remaining issue in the Order was the Court found that it was impossible to “balance
20 the harms to plaintiffs against the benefits to Yelp” because the Court was not able to attribute
21 the appearance and disappearance of reviews to Yelp’s conduct and plaintiffs weren’t able to
22 quantify the extent to which they were harmed. Order, 20:4-9. Plaintiffs respectfully submit that
23 the balancing inquiry required to determine whether a business practice is unfair is generally a
24 factual inquiry and cannot be made on the pleadings. As a court in this district explained,
25 “California courts, have noted that the determination of whether a business practice is unfair is
26 one of fact which requires a review of the evidence from both parties and often cannot be made
27 solely on the pleadings.” *Ferrington v. McAfee, Inc.*, 2010 WL 3910169 at * 13 (N.D. Cal. Oct.
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1 5, 2010). Accordingly, the fact that Plaintiffs do not quantify the precise extent of their harm in
2 the pleadings does not mean they will not be able to calculate their harm and prove a claim for
3 unfair competition. *See id.* (denying defendant’s motion to dismiss plaintiff’s claim under unfair
4 prong of UCL because plaintiffs may be able to show that “deception was unscrupulous and
5 causes injury to consumers which outweighs its benefits”).

6 **D. Plaintiffs Adequately Alleged Claims for Attempted Civil and Civil Extortion**

7 Over recent years, several federal courts have ruled that a claim for civil extortion and
8 attempted civil extortion exists in California. *See Monex v. Deposit Co. v. Gilliam*, 680 F. Supp.
9 2d 1148, 1155-56 (C.D. Cal. 2010) (“The Court has previously held in this case that a claim for
10 attempted extortion is implied from California Penal Code sections 523 and 519” and explaining
11 elements that must be shown for a civil tort action); *Padgett v. City of Monte Sereno*, No. C 04-
12 03946 JW, 2007 WL 878575 at *1 (N.D. Cal. March 20, 2007) (plaintiff alleged claim for civil
13 extortion); *Hisamatsu v. Niroula*, No. C-07-04371-JSW (EDL), 2009 WL 4456392 at *5 (N.D.
14 Cal. Oct. 22, 2009) (construing claim in second amended complaint as civil extortion and stating
15 that it was adequately alleged). In so doing, “[c]ourts have relied on the definition and elements of
16 the criminal code to analyze civil extortion claims.” *See Hisamatsu*, 2009 WL 4456392 at *5. As
17 noted by a court in this district, “California has long recognized a claim of ‘civil extortion.’” *Id.*

18 As explained above, Plaintiffs have adequately alleged the required elements for extortion
19 under the California Penal Code, including that there was an implied threat by Yelp. *See infra*
20 Section III.C.2.a. Accordingly, they have adequately alleged claims for civil extortion and
21 attempted civil extortion. *See Hisamatsu*, 2009 WL 4456392 at *5.

22 **E. Yelp is Not Immune From Plaintiffs’ Claims under the CDA**

23 The Court previously ruled that Yelp is *not* immunized under the CDA as to Plaintiffs’
24 allegations that relate to “Yelp’s own alleged postings, from statements made by its ad
25 salespersons, or from Yelp’s deliberate manipulation of customer reviews.” Order, 15:19-21. The
26 Court also found that Plaintiffs’ allegations that Yelp manufactured negative reviews is
27 “potentially actionable, because Yelp, and not some third-party, is the alleged provider of such
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1 content.” Order, 15:25-27. And likewise, the Court found that “plaintiffs’ fourth theory of
2 purported threats – its representations that it could manipulate reviews in favor of advertisers – are
3 also actionable.” Order, 16:2-3. Finally, the Court found that “[u]nder the theory of extortion
4 proffered by plaintiffs, Yelp’s removal of positive user reviews certainly was not in good faith and
5 other courts have denied motions to dismiss on the basis of CDA immunity in these
6 circumstances.” Order, 16:24-27. Crucially, the *only* category of Plaintiffs’ allegations that the
7 Court found to be immunized under the CDA was “to the extent the extortion claim [was]
8 premised on Yelp’s failure to remove negative reviews.” Order, 14:25-27. Plaintiffs revised the
9 TAC accordingly and do not allege that that Yelp’s wrongdoing stemmed from its failure to
10 remove negative third-party reviews.

11 Despite the Court’s clear ruling that there is no immunity, Yelp tries to *again* assert it is
12 immune from liability for any alleged extortionate actions because of the CDA. The relevant
13 allegations in the TAC are that 1) Yelp removed positive reviews thereby changing the overall
14 star rating, immediately after plaintiffs declined to purchase advertising or terminated their
15 advertising contracts [TAC ¶¶49, 66, 90]; 2) Yelp manufactured its own negative reviews of
16 Plaintiffs’ businesses [TAC ¶¶ 67, 69, 74-77, 82]; 3) Yelp told Plaintiffs that paying for
17 advertising would impact Plaintiffs’ overall star ratings and represented that its employees have
18 the ability to remove reviews [TAC ¶78, 91, 99]; and 4) Yelp manipulates reviews, including the
19 order of reviews, depending on whether a business advertises [*see, e.g.*, TAC ¶¶80-81].

20 As the Court found before, those allegations do not immunize Yelp under the CDA. *See,*
21 *e.g., Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F.Supp.2d 1142, 1149 (D. Ariz. 2005)
22 (CDA immunization argument “ignores Plaintiff’s allegations that wrongful content appears on
23 the Rip-off Report website in editorial comments created by Defendants and titles to Rip-off
24 Reports” and allegation that defendants “produce original content contained in the Rip-off
25 Reports.”); *Kruska v. Perverted Justice Foundation Incorporated.Org*, No. CV-08-00054-PHX-
26 SMM, 2010 WL 4791666 at *5 (D. Ariz. Nov. 18, 2010) (allegations that defendant contributed
27 content to website and that defendant worked in collusion to post and repost materials about
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1 plaintiff sufficient to avoid CDA immunity); *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257, 1263
2 (N.D. Cal. 2006) (allegations that Yahoo created false online dating profiles and sent profiles of
3 former subscribers to current members not protected under CDA).

4 To support its second attempt to avoid liability, Yelp reiterates its prior arguments and
5 relies upon two additional cases, *Asia Economic Institute v. Xcentric Ventures, LLC*, No. CV 10-
6 01360 SVW (PJWx) 2011 WL 2469822 (C.D. Cal. May 4, 2011) and *A-1 Technology, Inc. v.*
7 *Madegson*, No. 150033/2010 at * 9 (N.Y. Sup. Ct. June 22, 2011). Neither of these cases is
8 directly on point and the Court’s prior ruling should stand.

9 Unlike this case, the *Asia Economic Institute* plaintiffs *did not* contend that defendants
10 created or altered the content of the reports. Rather, the claim was that defendants created various
11 HTML coding which plaintiffs alleged had the effect of making the reports more visible in Google
12 search results and was tantamount to altering the content.⁷ *Asia Econ. Inst.*, 2011 WL 2469822 at
13 *6. The *Asia Economic* Court disagreed. *Id.* The *A-1 Technology, Inc.* decision dealt with
14 defamation claims. In that case, a New York state *trial court* – relying on recent New York State
15 Court of Appeals authority that the CDA bars actions for defamation when the website provider
16 exercises traditional editorial control – held that the fact that Xcentric took compensation in
17 exchange for removing postings did not constitute an exception to the defamation bar under the
18 CDA. *See id.* at *10. *A-1 Technology* is inapposite to the instant case because there are no
19 defamation claims and the allegations aren’t that there was an arms-length buy-sell transaction, but
20 rather that Yelp engaged in extortion. Nor does the *A-1 Technology* case have any bearing on
21 Plaintiffs’ allegations here that Yelp drafted the content of reviews.

22 Yelp again seeks protection under the editorial function exception to the CDA under
23 Section 230(c)(2) when it argues that Plaintiffs’ “fail to plead that Yelp’s removal of reviews was
24 made in an ‘absence of good faith.’” Yelp’s MTD, 18:24-25. Section 230(c)(2) provides that an
25 interactive service provider will not be held liable for good faith actions which “restrict access to

26
27 ⁷ Plaintiffs also contended that defendants modified the reports’ titles, however, the Court
28 found that because of the information provided on the site, “users thus know precisely how the
titles of their submissions will appear before posting.” *Id.* at *7.

1 or availability of materiality that the provider or user considers to be obscene, lewd, lascivious,
2 filthy, excessively violent, harassing, or otherwise objectionable” But here, Plaintiffs are not
3 challenging Yelp’s restriction of access to information and any purported pleading requirements
4 under Section 230(c)(2) are inapplicable. *See, e.g., Holomaxx Technologies v. Microsoft Corp.*,
5 No. CV-10-4924 JF, 2011 WL 865278 (N.D. Cal. March 11, 2011) (challenging whether email
6 spam filtering was done in good faith and protected under CDA); *Holomaxx Technologies v.*
7 *Yahoo! Inc.*, No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. March 11, 2011) (same).

8 Regardless, the fact that Plaintiffs have alleged that Yelp intentionally manipulated and
9 developed its own content to attempt to *extort* money from Plaintiffs is plainly sufficient to
10 demonstrate an absence of good faith. In fact, the Court’s Order reached this conclusion as well
11 when it stated “[u]nder the theory of extortion offered by plaintiffs, Yelp’s removal of positive
12 user reviews certainly was not in good faith” Order, 16:24-26 (emphasis added). There can
13 be no question that Plaintiffs have met the pleading standard to demonstrate that Yelp may be held
14 liable under the CDA.

15 **F. Plaintiffs’ Claims Should Not be Dismissed or Stricken**

16 **1. It is Improper to Dismiss Plaintiffs’ Claims**

17 There is no basis for dismissing or striking Plaintiffs’ claims because, as set forth above,
18 the named Plaintiffs have standing under Article III and thus their class claims should survive.
19 Moreover, because Plaintiffs have adequately pleaded claims under the UCL and for civil
20 extortion and attempted civil extortion, the TAC should not be dismissed.

21 **2. Plaintiffs Have Alleged Sufficient Subclasses**

22 Defendant’s request that the Class allegations be dismissed and/or stricken is premature
23 and without merit. Plaintiff’s subclass definitions are sufficient because the subclass members
24 will be readily identifiable from Defendant’s electronic records. To identify the members of each
25 subclass, one would simply need to determine which class members Yelp communicated with
26 regarding advertising (likely traceable through Yelp), which reviews Yelp manipulated in a
27 manner that did not comply with the Review Terms (traceable through electronic data), and which
28

1 Sponsor class members paid Yelp for advertising thereafter (also tracked through Yelp records).
2 Accordingly, Defendant’s contention that Plaintiffs failed to allege an ascertainable class because
3 individual issues predominate lacks merit.

4 Defendant’s argument that the TAC’s allegation that a group of Yelp sales employees were
5 terminated – after this lawsuit was filed – because of scamming related to advertising in no way
6 defeats Plaintiffs’ class allegations. In fact, if there was a policy of “scamming” amongst Yelp
7 employees, as alleged by Plaintiffs, and because of this lawsuit Yelp suddenly attempted to
8 eliminate those employees and end that conduct, Plaintiffs would certainly still be able to certify a
9 class (even if limited in time) once discovery took place.⁸

10 Defendant argues that the class allegations are deficient because the class involves
11 businesses and persons who were in contact with Yelp regarding the option to advertise regardless
12 of whether Yelp made an unlawful threat or the class members felt fear or purchased advertising
13 because of Yelp’s threat. *See* MTD, 25. Defendant’s assessment, however, fails because the
14 subclasses are defined to include class members that were subject to Yelp’s manipulations, which,
15 are sufficient to constitute at a minimum *attempted* extortion, regardless of whether the class
16 member felt any fear or felt compelled to purchase advertising. Moreover, if Plaintiffs were to
17 define their class by a class member’s feeling of fear (which is unnecessary), it would necessitate
18 the types of individual inquiries that defeat class certification (i.e., each class member would need
19 to be asked if they experienced fear).

20 Finally, Defendant argues that Plaintiffs cannot satisfy the typicality requirement because
21 their claims are factually inconsistent. It is well-settled that class certification may be proper
22 “even though varying fact patterns support the claims or defense of individual class members or
23 there is a disparity in damages by the representative parties and other members of the class.”

24
25 ⁸ *See, e.g., Westways World Travel, Inc. v. AMR Corp.*, No. EDCV 99-386, 2005 WL
26 6523266 at *8 (C.D. Cal. Feb. 24, 2005) (stating that class certification claim on extortion is
27 “viable if it is susceptible to class-wide proof”) (citing *George Lussier Enters., Inc. v. Subaru of*
28 *New England, Inc.*, 2001 WL 920060 at *17 (D.N.H. Aug. 3, 2001) (offering internal documents
showing plan to extort dealers and testimony of former employees regarding plan susceptible to
class certification)).

