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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

v.

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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS THIRD AMENDED CLASS ACTION COMPLAINT AND TO DISMISS OR STRIKE CLASS ACTION ALLEGATIONS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: October 14, 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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REGULATIONS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' opposition confirms that their Third Amended Complaint ("TAC") – which is virtually identical to the Second Amended Complaint ("SAC") previously dismissed by this Court – should be dismissed with prejudice.

Plaintiffs argue that this Court's March 22, 2011 Order dismissing the SAC somehow does not control, even though it addressed identical allegations and claims to those renewed by Plaintiffs in their most recent pleading. That is not the law. Plaintiffs do not satisfy any exception to the law of the case doctrine that would allow them to reargue the sufficiency of their deficient allegations of "extortion" again here. Instead, they rely on a few, general allegations having nothing to do with the named Plaintiffs (much less, any "extortion"), and a handful of allegations by newly-added Plaintiff Wheel Techniques that rest on the same deficient theories previously rejected by the Court.

In addition, Plaintiffs have failed to come forward with a single piece of *evidence* that they were injured due to any misconduct by Yelp, as they must to demonstrate Article III standing in response to Yelp's factual challenge under Rule 12(b)(1). More troubling, Plaintiffs *do not refute* that they created several fake 5-star reviews about their businesses that were appropriately filtered from Yelp's site, confirming that any purported injuries result from their own deceptive conduct – and not any "manipulation" by Yelp. Plaintiffs' speculation and baseless evidentiary objections fall well short of their obligation to "furnish affidavits or other evidence necessary to satisfy their burden of establishing subject-matter jurisdiction," which also requires dismissal of their claims. *In re Facebook Privacy Litig.*, No. C 10-02389 JW, 2011 WL 2039995, at *2 (N.D. Cal. 2011).

Plaintiffs have had six opportunities to plead a legally sufficient cause of action – and more than 18 months to develop evidence to demonstrate their standing or support their claims – but have been unable to do so. The Court should dismiss their Third Amended Complaint with prejudice.

II. ARGUMENT

A. This Court's Prior Order Is Law of the Case

As detailed in Yelp's moving papers, this Court previously held that Plaintiffs' allegations – in a nearly-identical complaint – that Yelp "actively manipulates user reviews to force businesses into purchasing advertising" failed to state a "plausible claim for relief." *See* Order Granting Mot.

Dismiss, March 22, 2011, Dkt. No. 70 ("Order"), at 2:26-27; 20:17; Yelp's Mot. Dismiss TAC ("MTD"), 5-7. Plaintiffs now argue that this Order somehow does not apply, even though it addressed allegations and claims identical to those contained in Plaintiffs' latest pleading. Pl.'s Opp'n. Br. ("Opp."), at 12-13. Plaintiffs are wrong. "Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Friends of the Earth, Inc. v. Mosbacher*, No. C 02-04106 JSW, 2007 WL 962949, at *1 (N.D. Cal. Mar. 30, 2007).

Contrary to Plaintiffs' assertions, the Court "explicitly" decided that the SAC failed "to plausibly allege that any of Yelp's conduct amounted to an implied extortionate threat," a necessary element of any claim based upon a theory of extortion. Order at 17:6-7; *Liberty Mutual Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982) (law of the case doctrine applies where issue "decided explicitly or by necessary implication"). Because Plaintiffs' latest complaint again relies entirely on claims of extortion – based on allegations that are largely word-for-word identical to its SAC – the law of the case doctrine prevents Plaintiffs from relitigating the sufficiency of these allegations again here.[1] *See, e.g.*, *In re Calpine Corp. ERISA Litig.*, No. C 03-1685 SBA, 2005 WL 3288469, at *10 (N.D. Cal. Dec. 5, 2005) (dismissing with prejudice amended complaint, stating "Plaintiff may not reassert a theory that has already been considered and soundly rejected as insufficient by this Court").

Moreover, Plaintiffs are incorrect that this Court may apply the Order in its "discretion." Opp. at 12. It is well settled that the Order is the controlling law of the case unless "there has been an intervening change of controlling authority, new evidence has surfaced or the previous disposition was clearly erroneous and would work a manifest injustice." *Allmerica Fin. Life Ins. & Annuity Co. v. Dalessio*, No. C-96-0385 VRW, 2006 WL 408538, at *3 (N.D. Cal. Feb. 20, 2006). Where, like here, none of these factors are present, there is no discretion to reexamine issues addressed in a prior

[1] Plaintiffs' suggestion that the law of the case doctrine does not apply because "Plaintiffs' TAC superseded the SAC" is baseless. Opp. at 13. Plaintiffs cite a sole case from the Southern District for this claim, which is unhelpful to them. *In re Sony Grand Wega KDF-E A10/A20 Series Rear Protection HDTV Television Litig.*, 758 F. Supp.2d 1077, 1098 (S.D. Cal. 2010). There, the court dismissed an amended complaint, with prejudice, including a claim that previously had survived under the court's earlier order, finding dismissal appropriate given that plaintiffs had opted to re-plead the entire complaint – including the previously dismissed claims – rather than proceed on the sole surviving claim. This case only confirms, then, that this Court should apply its prior order to dismiss Plaintiffs' near-identical complaint, with prejudice.

order. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (abuse of discretion not to abide by previous ruling where no exceptions to law of the case doctrine exist). Plaintiffs' opposition fails to establish any of these limited exceptions to the law of the case doctrine.

Although Plaintiffs argue (without support) that the TAC presents "additional authorities to support their UCL claims," to depart from this Court's prior ruling Plaintiffs must point to "an intervening change in controlling" authority. Opp. at 12; *see Allmerica*, 2006 WL 408538, at *3. Plaintiffs do not identify any intervening legal decision that compels a different outcome here.

Nor do Plaintiffs point to any new evidence of an "implied threat" of harm. Opp. at 12. Although Plaintiffs point to a "new" general allegation that Yelp hires community managers (like many other internet companies) who are "encouraged" to post reviews, they make no attempt to tie these allegations to the named Plaintiffs or to any "extortion". *See* Opp. at 15; TAC ¶ 38. Plaintiffs do not dispute that for Plaintiffs Levitt, Cats & Dogs ("C&D"), and Chan, the TAC adds no new allegations at all. MTD at 7-8; *see* Decl. of S. Ashlie Beringer, Exhibit 6, Dkt. No. 79-6. *See also Baymiller v. Guarantee Mut. Life Co.*, 2000 WL 33774562 *2 (C.D.Cal.2000) (dismissing claims "alleged in both the first and second complaint" where plaintiff used "the same facts" to support those claims.). And because the allegations for new Plaintiff Wheel Techniques rely on the same, deficient theory of extortion alleged by the other Plaintiffs (MTD at 8-10, 11-14), the Court's analysis applies by "necessary implication" to these allegations, too. *Liberty Mutual Ins. Co.*, 691 F.2d at 441.

The circumstances in *Baymiller* are particularly on point. 2000 WL 33774562, at *2. There, the court dismissed with prejudice four claims that it previously had dismissed from plaintiff's earlier pleading, rejecting the plaintiff's arguments that the amended pleading contained allegations and "issues . . . wholly different from the claims in the FAC":

> The [same] claims . . . are alleged in both the first and second complaint, with the same facts supporting each claim. *Because Plaintiffs have failed to truly amend their complaint as to these causes of action, the SAC is hereby dismissed with prejudice for the same reasons as the FAC. Plaintiffs do not allege that the Court's May 3, 2000 order on these issues is clearly erroneous, that the law has changed, this is not on remand, and no other circumstances have been changed.*

Id. (emphasis added). "No litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable

result the second time." *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir. 1997). Plaintiffs furnish no basis for revisiting this Court's detailed Order dismissing the virtually identical SAC.

B. Plaintiffs Fail to State a Claim Under the Unfair Competition Law ("UCL")

The reason Plaintiffs seek to avoid this Court's Order is clear: Plaintiffs' opposition confirms that they have failed to add a single plausible or legally sufficient allegation to their TAC that supports their untenable "extortion" claims. MTD at 10-15; *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007). In fact, Plaintiffs now *concede that they have no evidence* to support their contention that Yelp engaged in a policy of "manipulation" (Opp. at 7), despite representing otherwise to this Court. Order at 20:17-19.

1. Plaintiffs Have Not Alleged Unlawful Conduct

This Court's prior decision that Plaintiffs' had alleged no "unlawful" conduct under the UCL was not based on a "lack of allegations," as Plaintiffs suggest. Opp. at 15. Rather, the Court found that the SAC "fail[ed] to plausibly allege that any of Yelp's conduct amounted to an implied extortionate threat." Order at 17:6-7. Specifically, after engaging in a detailed analysis of Plaintiffs' allegations, the Court found Plaintiffs' claims that Yelp manufactured or deliberately manipulated their reviews to be "entirely speculative." Order at 17:7-9. The Court also found that the SAC lacked "*factual* allegations from which any distinct communication of a threat might be inferred." Order at 17:11-12 (emphasis added). Plaintiffs' scant new allegations in no way change this.

Indeed, Plaintiffs rely on two "new" general allegations alleging that unidentified "employees" wrote "reviews" and that Yelp employs community managers who are "encouraged to write reviews." Opp. at 15; TAC ¶¶37-38. But these allegations do not involve extortion or supply any basis for a reasonable inference that Yelp made an implied threat. Opp. at 15. Plaintiffs do not allege that any community managers – whose Yelp profiles contain clearly identifying badges – created any reviews (negative or positive) about their businesses, much less false reviews timed to sales pitches. These "new" allegations furnish no more basis for Plaintiffs' "extortion" claims than Plaintiffs' claims in the SAC that "false negative reviews are sometimes generated by Yelp personnel" (SAC ¶34), which this Court previously found to be entirely deficient. Order at 17:7-10.

Likewise, Wheel Techniques' vague claim that it heard a rumor that Yelp sales employees

were terminated for "scamming" related to advertising does not support a reasonable inference that Yelp engaged in extortion, or that it made a threat to Wheel Techniques or anyone else. TAC ¶ 82. Plaintiffs do not explain what this supposed "scamming" consisted of, nor even allege that it involved reviews – and the TAC does not in any way connect this "scamming" to any of the named Plaintiffs.

Because they cannot cite any *new* allegations that support their extortion claims, Plaintiffs recycle the same theories that this Court previously found to be deficient. Opp. at 16. Once again, Plaintiffs argue that the posting of negative reviews and removal of positive reviews (supposedly, in proximity to conversations with Yelp's employees) should be construed as an extortionist threat. But the Court squarely rejected each of these theories – including identical allegations made by Plaintiffs Chan, Levitt, and C&D. *See* Order at 17:16-18:10.

For the same reasons, the allegations of newly-added plaintiff Wheel Techniques fail to plead extortion. *See* MTD at 10-14. Plaintiffs argue that a threat of harm to Wheel Techniques should be inferred from its allegation that a negative review was moved to the top of its review page "within minutes" of speaking to Yelp about advertising, and because other negative reviews supposedly "beg[a]n to be listed first, around that time." Opp. at 16. But, like the other named Plaintiffs, Wheel Techniques provides "no basis from which to infer that Yelp authored or manipulated *the content* of the[se] negative reviews" (Order at 17:9-10) – and, thus, cannot overcome this Court's ruling that claims premised on Yelp's posting of and "failure to remove negative reviews … is clearly immunized by [section 230 of the Communications Decency Act ("CDA 230")]." *Id.* at 14:25-26.

Nor does Wheel Techniques' allegation that a single, 5-star review was "replaced" following a sales call demonstrate the existence of a "threat". Opp. at 16. As this Court held, the removal of positive reviews "is entirely consistent with Yelp's policy . . . that Yelp automatically filters potentially fake positive and negative reviews." Order at 17:18-20. Plaintiffs supply no facts to suggest that the removal of a single review was due to anything other than Yelp's automated filter (which would, for example, remove any fake positive reviews posted by Wheel Techniques itself). Instead, the purported fluctuation of a few reviews on Wheel Techniques' review page is precisely the type of "select snapshots of plaintiffs' overall star ratings" that this Court has held does not establish "an implied threat of harm from Yelp." Order at 17:20-23; 17:27-18:1.

The criminal cases cited by Plaintiffs only highlight the deficiencies of their claims, as they involve blatant and detailed threats of harm that are not remotely presented here. Opp. at 17-18 (citing *United States v. Lisinski*, 728 F.2d 887 (7th Cir. 1984) (government employee demanded money to prevent threatened loss of victim's liquor license); *United States v. Rivera Rangel*, 396 F.3d 476 (1st Cir. 2005) (government employee repeatedly demanded money in exchange for approval of necessary permits); *People v. Oppenheimer*, 209 Cal. App. 2d 413, 418 (1962) (menacing letters stating "[i]t will cost you more not to pay" and "[a]re all windows insured?" constituted a threat).

Because Plaintiffs have failed to add any allegations creating a plausible inference that Yelp engaged in any threat of harm, their claim under the "unlawful" prong must be dismissed.[2]

2. Plaintiffs Have Not Alleged "Unfair" Conduct

Yelp's moving papers – and the Order – established that Plaintiffs also failed to allege any plausible facts demonstrating that Yelp engaged in any "unfair" conduct under the UCL. MTD at 14-15; Order at 19:19-20:14. As Plaintiffs concede, their TAC relies on the same speculative allegations and theories to support their "unfairness" claim that this Court previously dismissed. Opp. at 18; MTD at 14-15; Order at 20:7-9. Plaintiffs once again argue that Yelp engaged in "unfair" conduct by supposedly "manipulating" reviews (Opp. at 18-19), but they fail to provide any additional factual support for this theory, which this Court already rejected. Order at 14:25-26; 20:7-9.

Plaintiffs concede that they have added no new allegations whatsoever for Plaintiffs Chan, Levitt, or C&D, and thus their "unfairness" claims for these Plaintiffs must be dismissed under this Court's prior Order. *Supra* at 2-5. Indeed, the only new allegation Plaintiffs cite in support of their "unfairness" claim is a single alleged conversation in which Yelp supposedly informed Wheel Techniques that an unidentified competitor advertised with Yelp and that Yelp "work[s] with your

[2] Acknowledging that their case lacks sufficient factual basis – and despite this Court's recent order denying discovery – Plaintiffs again suggest that they should be able to subject Yelp to discovery in the event this Court dismisses their TAC. Plaintiffs have alleged no basis whatsoever to pursue discovery at this late stage. *See, e.g., Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (denial of discovery proper where district court found alleged facts deficient as a matter of law); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (denial of discovery proper where plaintiffs could not point to any specific information obtainable through discovery that would have enabled appellants to state a cause of action). Nor do Plaintiffs identify any discovery that could possibly lead to support for their extortion claim, particularly since the existence of a threat of harm – the core element of extortion – necessarily is within Plaintiffs' knowledge.

reviews if you advertise with us." Opp. at 19; TAC ¶ 78. This sole, alleged conversation plainly does not demonstrate an "incipient violation of an antitrust law," nor does it suggest that Yelp has "materially tilted the economic playing field in favor of plaintiffs' competitors" or "threatened competition" within the meaning of the test articulated in *Cel-Tech* or otherwise. Order at 19:25-20:4 (citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999)). As noted in *Cel-Tech*, "injury to a competitor is not equivalent to injury to competition," and only conduct that "significantly threatens competition" in the market overall satisfies this test. 20 Cal. 4th at 186-187. Plaintiffs do not come close to alleging facts that satisfy this standard.

Finally, Plaintiffs' suggestion that the "unfairness" prong requires courts to engage in a "factual inquiry" that "cannot be made on the pleadings" (Opp. at 19-20) is refuted by numerous decisions dismissing "unfairness" claims where, as here, they rest on purely speculative allegations that fail to allege a plausible basis for balancing the harms to plaintiffs against the benefits to defendant. *See* Order at 20:4-9; *see also, e.g., Mangindin v. Wash. Mut. Bank*, 637 F. Supp. 2d 700, 709-10 (N.D. Cal. 2009) (dismissing unfairness claim under the balancing test).

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

As set forth in Yelp's moving brief, in the rare circumstances where courts have addressed claims labeled as "extortion" in a civil context, the claim has been considered a claim for duress or involved explicit threats of harm which are not present here. MTD at 15-17 (citing cases). Plaintiffs' opposition does not – and cannot – cite to any cases upholding a claim for "civil extortion" based on vague allegations of "implied" threats of harm like those asserted here. *See* Opp. at 20.[3] Even if California courts recognized claims for civil extortion, however, Plaintiffs' claims for extortion and attempted extortion fail because they do not point to a single, plausible allegation demonstrating that Yelp threatened to harm Plaintiffs unless they advertised, the essential element of any claim for extortion. *See* MTD at 11-14; *supra* at 5-8.

D. Yelp is Immune from Plaintiffs' Claims under CDA Sections 230(c)(1) & (c)(2)

[3] The cases cited by Plaintiffs are inapposite and involve explicit threats of harm. *See Padgett v. City of Monte Sereno*, No. C 04-03946 JW, 2007 WL 878575 at *1 (N.D. Cal. Mar. 20, 2007)("civil extortion" claim based upon anonymous threatening letter); *Hisamatsu v. Niroula*, No. C-07-04371-JSW (EDL), 2009 WL 4456392 at *5 (N.D. Cal. Oct. 22, 2009) (civil extortion claim based upon explicit threats of bodily harm).

Plaintiffs distort CDA 230 and this Court's prior Order in a continued attempt to pursue claims for which Yelp is squarely immune under CDA 230(c)(1) and (c)(2). *See* MTD at 17-19. Although this Court correctly observed that non-speculative claims 1) based on Yelp's own content such as "Yelp's own alleged postings," or 2) unrelated to Yelp's actions as an online publisher (such as "purported threats") are "potentially actionable," the Court did not conclude that Plaintiffs' allegations were in fact actionable or that Yelp has "no immunity," as Plaintiffs erroneously suggest. Order at 15:25-27; 16:2-3. Instead, the Court found that Plaintiffs failed to allege a single, plausible instance of Yelp creating any review about a Plaintiff (much less a false, negative review), or engaging in any threat against Plaintiffs that would put Yelp outside the well-established safe harbors of CDA 230(c)(1). Order at 17:6-10. Like its predecessors, Plaintiffs' TAC fails to provide allegations sufficient to pierce Yelp's immunity under CDA 230(c)(1). *See* MTD at 17-19.

Attempting to sidestep Yelp's immunity, Plaintiffs cite several inapplicable cases, each of which involved specific factual allegations that the defendant created the content giving rise to the plaintiffs' claims – facts that are not plausibly asserted here. *See Hy Cite Corp v. Badbusinessbureau.com LLC*, 418 F. Supp. 2d 1142 (D. Ariz. 2005) (defendant drafted editorial comments and titles about plaintiff); *Kruska v. Perverted Justice Foundation Incorporated.org*, No. CV-08-00054-PHX-SMM, 2010 WL 4791666 (D. Ariz. Nov. 18, 2010) (defendant helped create and post content about plaintiff); *Anthony v. Yahoo! Inc.*, 421 F. Supp.2d 1257 (N.D. Cal. 2006) (defendant created false dating profiles provided to plaintiff).

Nor can Plaintiffs overcome Yelp's CDA 230(c)(1) immunity by relying on deficient allegations that Yelp "manipulated" third-party reviews. This Court has already held that allegations of "manipulation" predicated on Yelp's publishing functions (as opposed to claims that it manufactured content) do not give rise to liability. Order at 14:25-15:18;16:17-18 ("Section 230(c)(1) immunity protects service providers from lawsuit for 'its exercise of a publisher's traditional editorial functions.'").

Plaintiffs also fail to distinguish a recent case with almost identical allegations that the defendant had "manipulated" consumer reports. *See Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822 (C.D. Cal. May 4, 2011). As the court in *Asia*

Economic found, allegations that a defendant "increase[d] the prominence" of negative content (like a one-star review) in internet search results unless a business paid money to the defendant are "insufficient to remove Defendants from the ambit of the CDA." *Id.* Likewise, Plaintiffs' speculative allegations that Yelp "manipulated" the order of their reviews in response to their advertising decisions – even if they were plausible – do not constitute a "chang[e] . . . [in] the substantive content" of any review, and thus cannot give rise to liability. *Id.*; TAC ¶ 80.

Plaintiffs' efforts to limit the recent decision in *A-1 Technology* to claims involving defamation are similarly baseless. Opp. at 22, discussing *A-1 Technology, Inc. v. Magedson*, No. 150033/10, slip op. at 3 (N.Y. Sup. Ct. June 22, 2011). In a case involving strikingly similar allegations to those asserted here, the court in *A-1 Technology* found that CDA 230(c)(1) immunized the defendant from claims alleging it "request[s] money from companies in exchange for removing or reducing the visibility of allegedly defamatory content." *A-1 Technology*, No. 150033/10, slip op. at 3. This case was not decided on the basis of a "defamation bar" in the state of New York, as Plaintiffs' suggest. Opp. at 22. Rather, the court reiterated that CDA 230 affords immunity to interactive computer services from claims that they deliberately manipulated online complaints, where – as here – the content is created by a third party. *Id.* at 9-10.[4]

Finally, Plaintiffs' contention that CDA 230(c)(2) does not apply to claims that Yelp removed or filtered positive reviews is incorrect. Opp. at 6; 21. As this Court correctly held, Section 230(c)(2), separately from CDA 230(c)(1), immunizes Yelp for claims arising from its filtering or removing potentially objectionable content – such as spam reviews written by business owners – so long as Yelp undertakes these activities in good faith. Order at 16:22-24; *see, e.g., Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003) (CDA(c)(2) provides immunity from "claims premised on the taking down of a customer's posting" including "unfair business practices" claims).[5] As recently confirmed in *Holomaxx Tech. v. Microsoft Corp.*, No. CV-10-4924-JF, 2011 WL 865278 (N.D. Cal.

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[4] Although Plaintiffs seek to distinguish these cases by claiming that Yelp "drafted the content of reviews," Plaintiffs do not – and cannot – point to a single allegation in the TAC that supports this claim. Opp. at 22.

[5] Spam online reviews (a practice called "astroturfing"), like spam emails, are such an obstacle to internet commerce that the Federal Trade Commission has adopted rules to stem them. *See* 16 C.F.R. §§ 255, et seq. ("Guides Concerning the Use of Endorsements and Testimonials in Advertising").

Mar. 11, 2011), Plaintiffs bear the burden of alleging plausible, non-speculative facts sufficient to allege that Yelp's filtering and removal of potentially unreliable reviews is done "in an absence of good faith." MTD at 18-19. Tellingly, Plaintiffs' opposition fails to cite any allegations that Yelp's removal of their reviews lacked a legitimate purpose or was due to anything other than the operation of its automated review filter, which filters potentially unreliable content from Yelp. *See* Order at 17:18-20; TAC ¶ 6. While the Court noted that a non-speculative "theory of extortion" based upon the deliberate removal of positive reviews might indicate an absence of good faith, it unequivocally held that Plaintiffs had failed to provide any plausible, factual support for this theory.[6] Order at 16:22-27; 17:7-9. As such, Plaintiffs' TAC fails to allege a basis for overcoming the safe harbor for online publishers' filtering activities in Section 230(c)(2) and should be dismissed.

E. Plaintiffs Lack Article III Standing

Plaintiffs' opposition does not offer a shred of evidence that Plaintiffs were injured due to any misconduct by Yelp – and implicitly conceded that the named Plaintiffs themselves are responsible for creating the very fake positive reviews about their businesses that they now complain Yelp filtered and removed. Because Plaintiffs have failed to come forward with any *evidence* (as opposed to speculation and baseless evidentiary objections) that Yelp created false negative reviews about the named Plaintiffs or unlawfully manipulated their reviews, they cannot satisfy their burden of establishing standing in response to Yelp's Rule 12(b)(1) factual challenge. *See* MTD at 19-20.

1. Plaintiffs Failed to Meet Their Burden of Demonstrating Article III Standing

Although this Court previously found Plaintiffs' allegations of injury to be *facially* sufficient to allege standing (Order at 10:13-14), it did not address the factual challenge to standing presented on this motion. As detailed in Yelp's moving papers, when considering a factual challenge to standing under Rule 12(b)(1), the Court "is permitted to look beyond the complaint to extrinsic evidence," including specifically affidavits like Ian MacBean's Declaration furnished by Yelp in support of its motion. MTD at 20 (citing *In re Facebook Privacy Litig.*, No. C 10-02389 JW, 2011

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[6] The Court did not address whether Plaintiffs had met their burden of pleading the "absence of good faith" in its March 22, 2011 Order, which was issued just days after (and based upon briefs and arguments made weeks before) the decision in *Holomaxx Tech*. 2011 WL 865278.

WL 2039995, at *2 (N.D. Cal. 2011)). In response, Plaintiffs cannot rest on their allegations and are required to come forward with actual evidence that they suffered an injury in fact due to Yelp's misconduct. *Id.* (quoting *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)).

Rather than set forth *evidence* – as they must – that Plaintiffs' purported injuries are traceable to user reviews that Yelp created or deliberately manipulated, Plaintiffs argue that Yelp's evidence does not "exclude the possibility" that unspecified Yelp employees "may" have created false names, used false email addresses, or gone to extreme technical measures (such as using "anonymizer" or proxy sites designed to replace the user's IP address) to hide their identities from Yelp in order to write false reviews about Plaintiffs. Opp. at 9-10. But such conjecture is not *evidence* and cannot rebut Yelp's affidavit – detailing its in-depth analysis of each review posted about each of the named Plaintiffs – demonstrating that there is no evidence that these reviews were created by any Yelp employee.[7] MTD at 22-23; *In re Facebook*, 2011 WL 2039995, at *2.

Yelp is not obligated to come forward with evidence that would "exclude [every] possibility" that an employee concealed his or her identity and IP address from Yelp, no matter how far-fetched or absurd. To the contrary, once Yelp furnished evidence that its employees did not author the reviews in question or manipulate Plaintiffs' reviews, the burden shifted to *Plaintiffs* to come forward with credible evidence that this was not so. *Id.* Yet, Plaintiffs have failed to provide any evidence indicating that their businesses were harmed because Yelp created specific reviews at issue or engaged in unlawful "manipulative" conduct, as they must to demonstrate Article III standing. As such, Plaintiffs' claims must be dismissed for lack of standing. *See, e.g.*, *Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024 JSW, 2010 WL 2528844, at *3-*4, *6 (N.D. Cal. June 18, 2010) (dismissing complaint based on factual challenge under Rule 12(b)(1) because unrebutted declarations demonstrated that plaintiffs had not sustained injury in fact).

Because they cannot meet their evidentiary burden, Plaintiffs hide behind a series of baseless "evidentiary objections" to the sworn declarations and exhibits submitted by Yelp. Opp. at 8-11.

[7] Contrary to Plaintiffs' claims, Mr. MacBean did not rely "only on information provided to Yelp by its users." Opp. at 9. He also reviewed the IP addresses associated with each review – unique technical identifying information associated with the computer used to create and post the review. MacBean Decl., ¶ 5.

Unsurprisingly, Plaintiffs do not cite a single case in support of their alleged "objections," nor can they. Yelp's motion is supported by detailed declarations and exhibits – precisely the type of evidence contemplated for a factual challenge under 12(b)(1). *See, e.g.*, *Safe Air For Everyone v. Meyer*, 373 F.3d at 1039 (factual challenge may be asserted "by presenting affidavits or other evidence properly brought before the court"). Likewise, Plaintiffs' attack on the form of Yelp's evidence is plainly improper at this stage. *See, e.g., Fraser v. Goodale*, 342 F.3d 1032, 1038 (9th Cir. 2003) (even at summary judgment stage courts "do not focus on the admissibility of the evidence's form."); *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) (holding that "[w]hile the facts underlying the affidavit must be of a type that would be admissible as evidence . . . the affidavit itself does not have to be in a form that would be admissible at trial."). And, as set forth in Yelp's specific Responses to Plaintiffs' Evidentiary Objections to the MacBean Declaration, Plaintiffs' remaining evidentiary objections are similarly baseless and apparently intended to distract the Court from their utter failure to rebut Yelp's factual showing. *See* Yelp's Resp. Pls.' Evidentiary Objections.

Critically, Plaintiffs also *do not deny* that Plaintiffs Levitt and Wheel Techniques created several of the fake 5-star reviews that give rise to their claims that Yelp "manipulated" reviews. MTD at 22-23; Opp. at 11. Plaintiffs' silence on this point is damning and their feeble attempts to discredit Yelp's evidence demonstrating Plaintiffs' own misconduct (and defeating Plaintiffs' claims that the removal of these fake reviews was improper) go nowhere. Yelp did not rely on "external websites" or "third party information" to demonstrate that these Plaintiffs created fake reviews, as Plaintiffs suggest, but furnished specific admissions authored by Plaintiffs and maintained in Yelp's business records. For example, Yelp furnished the following email authored by Plaintiff Wheel Techniques, transmitted through Yelp's messaging system, as evidence that this user account (which posted several 5-star reviews about Wheel Techniques) was used by it:

> Dear Vincent, We here at Wheel Tech really feel put down by your recent review and want to let you know that legally you cannot put such input out on the net. If you read your invoice we can legally sue you for any positive OR negative reviews . . . Please remove your negative comments or we have no choice to seek legal actions against you . . . Hope to hear from you soon. John Mercurio owner.

MacBean Decl., ¶ 16 and Ex. 4; *see also* MacBean Decl., ¶¶ 22-23 and Exs. 7 and 8 (attaching information supplied by Plaintiff Levitt on his "Boris L." Yelp profile). Yelp's evidence, together

with Plaintiffs' own silence, demonstrate that any alleged "manipulation" of reviews was due not to Yelp, but to Plaintiffs' own misconduct in creating false positive reviews and threatening third-party users who posted negative reviews, in clear violation of Yelp's Terms of Service.

2. Discovery Is Unnecessary and Inappropriate

Contrary to Plaintiffs' mischaracterization of the relevant case law, discovery on jurisdictional issues is permitted "*only* if such discovery is necessary *and* if it is possible that the plaintiff [could] demonstrate the requisite jurisdictional facts if afforded that opportunity." *GreenPeace, Inc. v. State of FranceI*, 946 F. Supp. 773, 789 (C.D. Cal. 1996) (quoting *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.), *cert. denied*, 493 U.S. 993, 110 S. Ct. 541, 107 L.Ed.2d 539 (1989)) (emphasis added). "In addition, *discovery is permitted only* 'where the facts are peculiarly within the knowledge of the opposing party.'" *Id.* (emphasis added). None of these circumstances are present here.

Most fundamentally, Plaintiffs have not identified any source of discovery that would establish the jurisdictional facts necessary to demonstrate their standing. Opp. at 11-12. Although Plaintiffs' opposition speculates that Yelp employees could have created fictitious accounts and provided false information about their identities to create reviews (Opp. at 9-11), they provide nothing to suggest that this actually occurred, much less explain how discovery from Yelp could possibly elucidate this point. Yelp already conducted an exhaustive review of the information and data in its possession (including computer IP addresses) concerning the source of the contested reviews. Any additional information concerning the identity of those who created these users' accounts is in the hands of the users themselves, and not available through discovery of Yelp.

Likewise, Plaintiffs fail to identify any facts "peculiarly within [Yelp's] knowledge" that would provide jurisdictional support. Indeed, Plaintiffs are in the best position to know whether they created the fake positive reviews that form the basis of their claims – and their failure to deny these facts leaves no doubt as to what occurred. Information about Yelp's former sales employees – who never had any contact with the named Plaintiffs – cannot possibly shed light on these issues.

F. Plaintiffs Cannot Plead Legally Sufficient Class Allegations

Finally, Yelp demonstrated that Plaintiffs' proposed class allegations cannot survive the pleading stage under Federal Rule of Civil Procedure 12(b)(6), 12(f), or 23 because it is readily

apparent from the face of their pleading that the proposed class is not ascertainable or maintainable given the fact-intensive claims here, and because Plaintiffs' own allegations are inconsistent with any uniform company "policy" of "manipulation" capable of class-wide adjudication. MTD at 23-25.

Plaintiffs' opposition brushes aside allegations describing the absence of any company policy, which are inconsistent with the commonality requirement for class certification. MTD at 24. Instead, Plaintiffs speculate that "if" Yelp terminated employees for "scamming" due to "this lawsuit," Plaintiffs somehow could certify a class. Opp. at 24. Such conjecture cannot overcome Plaintiffs' own allegations that Yelp took steps to punish and prevent employees from "scamming relating to advertising" (defeating their claim that Yelp had a uniform "policy" of manipulation) and merely confirms that Plaintiffs' claims are based wholly on unfounded speculation. MTD at 24.

Moreover, Plaintiffs' suggestion that it would be possible to "simply" determine "which reviews Yelp manipulated in a manner that did not comply with the Review Terms" from unspecified "electronic data" defies credulity. Plaintiffs do not explain what "electronic data" could possibly establish whether particular reviews (or Yelp's screening or publication of specific reviews) complied with Yelp's Review Terms. Opp. at 23-24. Making this determination would require ascertaining for ***each of tens of millions of individual reviews***: 1) who wrote the review, 2) the motives for writing the review, 3) whether or not the reviewer was improperly affiliated with or received incentives from the business owner, 4) whether or not the reviewer had patronized the business, 5) whether or not the review contained threats, harassment, lewdness, hate speech, or other displays of bigotry; 6) whether or not the review reflected the reviewer's personal experience; or any one of the many other criteria in Yelp's Review Terms. *See* Beringer Decl., Exs. 4 and 5; Beringer Supp. Decl., Dkt. No. 64, Exs. 1 and 2. This inquiry alone would require years of litigation and underscores the reasons Plaintiffs' class allegations should be dismissed now. *See* MTD at 23-25.[8] Likewise, Plaintiffs have identified no "electronic records" that would reveal whether Yelp threatened unlawful injury to specific class

[8] Plaintiffs' suggestion that such an inquiry would be "simple" is particularly disingenuous in view of their copious efforts to litigate the particular circumstances leading to the removal of each of the 204 reviews Yelp filtered or removed concerning the named Plaintiffs, in connection with Yelp's Rule 12(b)(1) motion. Plaintiffs' evidentiary objections alone are more than 29 pages long, forecasting the impossible task the Court would face were it to face a similar inquiry into millions of reviews for hundreds of thousands of businesses that are addressed by Plaintiffs' claims. *See* Pls.' Evidentiary Objections, Dkt. 85-2.

members – as required to identify members of the proposed classes here.

Plaintiffs also fail to make any credible showing that the individual Plaintiffs' claims satisfy the typicality requirement. *See* MTD at 24-25. Plaintiffs instead point to a handful of superficial "facts" they assert are "common" to all class members (such as the fact that Yelp "was in contact with Plaintiffs for advertising") (Opp. at 24-25) but these generic similarities do not overcome the material inconsistencies and variations that pervade Plaintiffs' claims – and which would pervade the claims of hundreds of thousands of individual businesses which received different individualized communications and received distinct and different reviews by millions of reviewers – including on matters that bear directly on liability and the proposed class definition. *See* MTD at 24-25.

The cases cited by Plaintiffs only confirm the deficiency of their class allegations. In *Westways World Travel, Inc. v. AMR Corp.*, 2005 WL 6523266 (C.D. Cal. Feb. 24, 2005), the court *decertified* a class asserting extortion-based claims, due to individual fact issues that pervade Plaintiffs' claims here. Affirming that class certification in an extortion case is "*only* viable if it is susceptible to class-wide proof," the court rejected the plaintiffs' proposed class-wide extortion claims, finding that proof of "the subjective and objective fear" of individual class members could "vary significantly among the class" and would require a "fact-intensive inquiry" that would likely predominate over common issues. *Id*. at *8 (emphasis added). Precisely the same is true here.[9]

III. CONCLUSION

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

DATED: September 30, 2011

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Ashlie Beringer
Ashlie Beringer

[9] Likewise, Plaintiffs cite to inapt cases finding class certification appropriate where – unlike here – claims hinged on uniform contracts or representations made to the proposed class. *See* Opp. at 24-25 (citing *Schlagal v. Learning Tree, Int'l*, No. 98-6384, 1999 WL 672306 (C.D. Cal. Feb. 23, 1999) (class members relied on written misrepresentations); *Ewert v. eBay, Inc*., Nos. C-07-02198 RMW C-07-04487 RMW, 2010 WL 4269259 (N.D. Cal. Oct. 25, 2010) (claims based upon form contracts with eBay). In stark contrast, the extortion allegations here hinge on specific conversations, review histories, and mental states unique for each of hundreds of thousands of proposed class members—and that do not overlap even among the named Plaintiffs. And, as detailed in Yelp's moving brief, Plaintiffs' "new" allegations are inconsistent with any suggestion of a uniform company policy of "manipulation". MTD at 24.