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 7 YELP! INC.

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

17 Defendants.

No. CV 10-01321 MHP

**DEFENDANT YELP! INC.'S OPPOSITION TO
 PLAINTIFFS' CROSS-MOTION FOR:**

**(A1) DESIGNATION OF *CATS AND DOGS* AS LEAD
 ACTION AND STAY OF LEVITT ACTION**

---OR, IN THE ALTERNATIVE---

**(A2) CONSOLIDATION OF ACTIONS, DEEMING
CATS AND DOGS' FIRST AMENDED COMPLAINT
 AS THE OPERATIVE PLEADING**

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

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

Date: Monday, July 19, 2010

Time: 2:00 p.m. _

Judge: Hon. Marilyn Hall Patel

22 CATS AND DOGS ANIMAL
 23 HOSPITAL, INC., et al., on behalf of
 itself and all others similarly situated,

24 Plaintiffs,

25 v.

26 YELP! INC.,

27 Defendant.

No. CV 10-02351 MHP

1 **I. INTRODUCTION**

2 Defendant Yelp! Inc. (“Yelp”) has sought, for months now, to simplify the procedural
3 setting of this case and to have it (and the related litigations against *Yelp*) conducted in an orderly
4 fashion. In contrast, Plaintiffs in *Cats and Dogs Animal Hospital, Inc. v. Yelp! Inc.*, No. CV 10-
5 02351 MHP (“*Cats and Dogs*”) have repeatedly taken positions that would increase the
6 complexity of the cases and increase the burden on the Court and the parties. Plaintiffs’ cross-
7 motion here is no exception.

8 This case was originally filed in the Central District, as was another putative class action
9 arising from the same facts, which Yelp attempted—without cooperation from Plaintiffs’
10 counsel—to consolidate with this action.¹ The case was ordered transferred to this district (over
11 Plaintiffs’ objection), which the Central District found to be more convenient for the parties and
12 witnesses, in part, because of the potential for consolidation with the related putative class action
13 already pending here, *Boris Y. Levitt v. Yelp! Inc.*, Case No. CV 10-01321 MHP (“*Levitt*”).

14 Yelp has now moved to consolidate this action with *Levitt*, seeking to streamline the
15 proceedings and avoid litigating related lawsuits separately. Again, Plaintiffs take an
16 obstructionist position. They now argue that, rather than consolidating these related cases, the
17 Court should instead stay the *Levitt* action, despite Plaintiffs’ belief that *Levitt* has an alleged
18 factual scenario that is “identical” to seven (of the ten) *Cats and Dogs* named Plaintiffs. (Cross-
19 Motion at 4:15–16.) In essence, Plaintiffs ask the Court to ignore the *Levitt* action while this case
20 proceeds. This approach would subvert a fundamental basis for the transfer of this action to this
21 Court—the efficient resolution of all class actions against Yelp. Also, this would mean that after
22 the conclusion of this action, Yelp would still be forced to defend the *Levitt* action, involving
23 burdensome (and potentially duplicative) motion practice, at a minimum, and potentially even
24 more substantially burdensome litigation through trial. Such a result is neither efficient nor
25 orderly. In any event, Plaintiffs’ motion to stay the *Levitt* action should be denied because they
26 lack standing to bring it, and fail to provide any substantive basis for such a motion.

27 ¹ Ultimately, that related case, *LaPausky v. Yelp! Inc.*, was taken over by Plaintiffs’ counsel here,
28 and then dismissed in an apparent effort to stymie Yelp’s motions to consolidate and transfer.

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

2 Yelp incorporates by reference Section II, Relevant Facts and Procedural History, from its
3 Motion to Consolidate Related Cases for All Purposes. (See Docket No. 64 at 3:15–6:20.)

4 **III. ARGUMENT**

5 **A. Plaintiffs’ Cross-Motion to Stay *Levitt* Should Be Denied.**

6 **1. Plaintiffs Lack Standing to Move to Stay the *Levitt* Action.**

7 Plaintiffs in *Cats and Dogs* ask this Court to stay *Levitt*—a case to which they are not a
8 party. This is procedurally improper, since Plaintiffs in *Cats and Dogs* have no standing to make
9 such a motion.² If Plaintiffs in *Cats and Dogs* wish to make procedural motions in the *Levitt*
10 action, the correct course would be for Plaintiffs to first move to intervene in *Levitt* under Federal
11 Rule of Civil Procedure 24(a) or 24(b) and then, if the Court were to grant Plaintiffs’ status as
12 intervenors, move to stay the *Levitt* action. See, e.g., *Widjaja v. Yum! Brands, Inc.*, No. CV-F-09-
13 1074 OWW/DLB, 2009 WL 3462040, at *7-10 (E.D. Cal. Oct. 22, 2009) (granting motion
14 brought by plaintiffs of first-filed action to intervene in later-filed, related action, but then
15 denying their motion to stay later-filed action and finding consolidation to be “the most efficient
16 and fair way to protect the interests of all parties”).

17 **2. Plaintiffs Have Pointed to No Authority Supporting a Stay of *Levitt*.**

18 In addition to the procedural impropriety of asking the Court to stay a case to which they
19 are not a party, Plaintiffs cite no authority whatsoever to support a stay of *Levitt* and merely argue
20 that consolidation with *Levitt* would result in delay. Plaintiffs may argue that their motion to stay
21 is based on the first-to-file rule, but that rule does not apply to the present circumstances. The
22 first-to-file rule “is a generally recognized doctrine of federal *comity* which permits a district
23 court to decline jurisdiction over an action when a complaint involving the same parties and
24 issues has already been filed in *another jurisdiction*.” *Pacesetter Sys. Inc. v. Medtronic, Inc.*, 678
25 F.2d 93, 94-95 (9th Cir. 1982) (emphasis added). *Cats and Dogs* and *Levitt* are no longer in

26 ² Nor does Plaintiffs’ potential status as putative class members in *Levitt* make them “parties” to
27 that action. *Saleh v. Titan Corp.*, 353 F. Supp. 2d 1087, 1091 (S.D. Cal. 2004) (“[T]he Ninth
28 Circuit . . . [has] concluded that putative class members are not parties to an action prior to class
certification.”).

1 separate jurisdictions—these related actions are both in the Northern District, before the *same*
2 *judge*—because the Central District granted Yelp’s motion, under 28 U.S.C. § 1404(a), to transfer
3 *Cats and Dogs* to the Northern District. (Docket No. 56 at 7 (“[T]he Court finds that Defendant
4 has clearly established that for the convenience of the parties and witnesses, and in the interests of
5 justice, this action should be transferred to the Northern District of California.”).) Thus, the first-
6 to-file doctrine has no application here, and Plaintiffs have not pointed to any authority
7 supporting an argument that the Court should stay *Levitt* on the basis of the first-to-file rule.

8 Furthermore, the Central District already decided the first-to-file issue. In its decision to
9 transfer the *Cats and Dogs* case to the Northern District, the Central District declined to apply the
10 first-to-file rule based on the “balance of convenience exception”:

11 Plaintiffs argue that the first-to-file rule weighs against transfer . . . However
12 . . . a court may relax the first-to-file rule ‘if the balance of convenience weighs in
13 favor of the later-filed action.’ The Court finds that the balance of convenience
weighs in favor of transfer, and thus the first-to-file rule does not prevent transfer.

14 (*See id.* at 6 (citing *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994).) Importantly,
15 “[t]he balance of convenience exception to the first-to-file rule includes consideration of the same
16 convenience factors considered under a 28 U.S.C. § 1404(a) transfer of venue motion.”³ *Sony*
17 *Computer Ent’t Am. Inc. v. Am. Med. Response, Inc.*, No. C06-06603 CW, 2007 WL 781969, at
18 *4 (N.D. Cal. Mar. 13, 2007).⁴ Plaintiffs have already lost this argument, and this Court should
19 reject any attempt to raise it again.

20 3. Staying *Levitt* Would Be Neither Efficient Nor Fair.

21 Plaintiffs’ main objection to consolidation appears to be a purported delay of the
22 proceedings. (Cross-Motion at 3:20–4:13.) But the real delay (and substantial additional burden)

23 _____
24 ³ The fact that the first-to-file exception includes an analysis of the relative convenience of the
25 courts under the § 1404(a) factors further demonstrates that the doctrine is inapplicable to a
situation where the actions are pending in the same district.

26 ⁴ A determination of convenience is typically addressed *by the court in the first-filed action.*
27 *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991) (“As for the respective
28 convenience of the two courts, normally this argument should be addressed to the court in the
first-filed action. Apprehension that the first court would fail to appropriately consider the
convenience . . . should not be a matter for [the second court’s] consideration.”).

1 would result from the stay that Plaintiffs are requesting in their cross-motion. Once this case was
2 over, Yelp and the plaintiff in *Levitt* would be forced to restart that case and engage in complex
3 briefing regarding the preclusive effect of the judgment in *Cats and Dogs*,⁵ and potentially even
4 more burdensome litigation thereafter, including a new round of motions to dismiss, duplicative
5 discovery, new expert reports, new summary judgment motions, and a new trial—all on claims
6 that arise from nearly the same alleged facts as the claims in the *Cats and Dogs* litigation. This
7 result would be wholly inefficient and inequitable, defeat a key purpose of Yelp’s successful
8 motion to transfer *Cats and Dogs* to this Court, and undermine the principles supporting the
9 Court’s procedures for consolidation—namely, the efficient, orderly litigation of related actions.

10 Consolidation would not result in delay.⁶ Instead, consolidation would make this
11 litigation more efficient by streamlining the discovery process and halving the required motions.
12 *See Siegall v. Tibco Software, Inc.*, No. C 05-2146 SBA, 2006 WL 1050173, at *2 (N.D. Cal.
13 Feb. 24, 2006) (“The purpose of consolidation is to avoid unnecessary costs or delays that would
14 ensue from proceeding separately with claims or issues sharing common aspects of law or fact.”).
15 The Central District correctly reasoned that the potential consolidation of *Cats and Dogs* with
16 *Levitt* supported transfer (*see* Docket No. 56 at 6), and, as Plaintiffs’ admit, “the Court in its
17 discretion could consolidate the *Cats and Dogs* and *Levitt* actions under Rule 42(a) because they
18 involve common questions of law and fact.” (Cross-Motion at 3:22–25.) Yelp requests that to
19 promote an efficient and orderly resolution of all actions, this Court exercise its discretion to
20 consolidate these cases rather than invite unneeded delay, burden, and uncertainty by staying the
21 *Levitt* action.

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24 ⁵ While a judgment in *Cats and Dogs* may have some preclusive effect in *Levitt*, not all of the
25 claims in *Levitt* have been asserted in *Cats and Dogs*. Thus, at a minimum, Yelp and the *Levitt*
26 plaintiff would have to submit briefing on the extent of any preclusive effect prior to proceeding
27 with litigation of the *Levitt* plaintiff’s claims—all this even though all of the claims stem from
28 what Plaintiffs describe as an alleged “scenario” that is “identical to seven [of ten] of the Cats and
Dogs Plaintiffs.” (*See* Cross-Motion at 4:15-16.)

⁶ Yelp will be filing a separate reply in support of its Motion to Consolidate.

1 **B. If Consolidation Is Granted, Plaintiffs’ Cross-Motion to Deem Their First**
2 **Amended Complaint as the Operative Pleading Should Be Denied.**

3 Plaintiffs make an odd request that if the Court grants consolidation, the Court should also
4 deem their First Amended Complaint the “operative” pleading. This makes no sense. The
5 consolidated and superseding complaint should include all eleven named plaintiffs in both the
6 *Cats and Dogs* and *Levitt* cases, and should also include plaintiff-specific allegations for each
7 named plaintiff. Proceeding with the current *Cats and Dogs* complaint—without modification—
8 would not incorporate all named plaintiffs, or their claims and allegations, into the litigation. It
9 would also muddy which claims and allegations are presently asserted against Yelp. (*See also*
10 Yelp’s Motion to Consolidate, Docket No. 64 at 10:5–19 (citing authorities discussing advantages
11 of consolidated complaint).) Plaintiffs have not explained how the remaining claims by *Levitt*
12 would be resolved if the *Cats and Dogs* complaint becomes the “operative” complaint. Yelp
13 likely would be forced to litigate these remaining claims after the conclusion of the litigation over
14 the *Cats and Dogs* complaint, as discussed above. Thus, Plaintiffs’ proposal would only further
15 complicate and confuse these proceedings.

16 **C. Yelp Defers to the Court as to Appointment of Interim Class Counsel.**

17 Yelp takes no formal position on whether moving counsel should be appointed to act as
18 interim class counsel for the putative class. Yelp does note that moving counsel has consistently
19 thwarted reasonable efforts to effect a procedurally streamlined process (*e.g.*, resisting attempts to
20 consolidate all related class actions, supported by a superseding complaint to avoid the risk of
21 duplication and claim splitting). Moving counsel’s attitude toward other plaintiffs’ counsel in the
22 related cases has also been less than exemplary. For example, in a Central District court filing,
23 moving counsel accused counsel for LaPausky of “collusion” with Yelp simply for stipulating to
24 consolidation and to an extension of time to respond to the complaint. (Docket No. 16:20-24.)
25 Moving counsel has also criticized counsel for Levitt for stipulating to an extension of time to
26 respond to the complaint (Cross-Motion at 5:12-17), and refused to include Levitt’s counsel in a
27 meet-and-confer process regarding discovery (Docket No. 66-2, ¶ 3).

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1 Despite these actions, Yelp defers to the Court’s judgment on this issue, and reserves its
2 right to make any arguments in connection with later motions concerning class counsel, should
3 they arise.

4 **D. Plaintiffs’ Cross-Motion for Yelp to Re-submit Its Previously Filed Motion to**
5 **Dismiss Should Be Denied.**

6 Yelp’s motion to dismiss was pending before the Central District when Judge Fairbank
7 ordered *Cats and Dogs* transferred to the Northern District. Judge Fairbank did not rule on this
8 motion, holding, in light of her decision to transfer, that “the separate Motion to Dismiss filed by
9 [Yelp] is moot and taken off calendar.” (Docket No. 56 at 1.) As an initial matter, there is no
10 authority, and Plaintiffs cite none, that permits Plaintiffs to dictate that Yelp re-file a motion that
11 has been declared moot. Further, if the Court grants Yelp’s motion for consolidation and orders
12 the filing of a superseding, consolidated complaint (which it should), any new motion to dismiss
13 should address the content of the latest pleading, and not solely the claims of the *Cats and Dogs*
14 complaint. If the Court does not grant consolidation, Yelp respectfully requests that the Court
15 allow it to file a new motion to dismiss relying on case law from the Northern District of
16 California rather than the Central District of California. Either way, Plaintiffs’ Cross-Motion
17 should be denied.

18 Regardless, Yelp seeks clarification from the Court as to its deadline for filing a motion to
19 dismiss, based on this Court’s standing order that provides that motions to dismiss shall not be
20 filed before the Initial Case Management Conference, except by leave of Court. To date, no
21 CMC has been held by either court.

22 **IV. CONCLUSION**

23 For the foregoing reasons, Yelp respectfully requests that Plaintiffs’ cross-motion be
24 denied in its entirety.

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Dated: June 28, 2010

COOLEY LLP

/s/ Matthew D. Brown
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