

1 Munger, Tolles & Olson LLP  
 MALCOLM A. HEINICKE (SBN 194174)  
 2 Malcolm.Heinicke@mto.com  
 560 Mission Street  
 3 Twenty-Seventh Floor  
 San Francisco, CA 94105-2907  
 4 Telephone: (415) 512-4000  
 Facsimile: (415) 512-4077

5 Attorneys for Defendant  
 6 YELP! INC.

7  
 8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

11  
 12 JUSTIN LARKIN, ANTHONY  
 TIJERINO, and AHMAD DEANES, on  
 13 behalf of themselves and all others  
 similarly situated,

14 Plaintiffs,

15 v.

16 YELP! INC.,

17 Defendant.  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

CASE NO. CV 11-1503 EMC

**DEFENDANT'S NOTICE OF NON-  
 OPPOSITION TO MOTION FOR  
 PRELIMINARY APPROVAL OF CLASS  
 AND COLLECTIVE ACTION  
 SETTLEMENT**

Date: June 4, 2012  
 Time: 1:30  
 Courtroom: 5, 17th Floor  
 Judge: Honorable Edward M. Chen

1 Pursuant to Civil L.R. 7-3(b), Defendant Yelp! Inc. hereby states that it does not  
2 oppose, and instead respectfully requests that the Court grant, Plaintiffs' Motion for Preliminary  
3 Approval of Class and Collective Action Settlement. See Docket Entry No. 32.

4 As stated in the motion, Defendant does not admit and instead denies any  
5 wrongdoing or liability. Furthermore, and most pertinent to this Court's review of the pending  
6 settlement, Defendant contends that if this matter were litigated further, Plaintiffs would face  
7 significant obstacles to obtaining class or collective action certification and establishing liability.

8 **First**, as Defendant demonstrated to Plaintiffs in the discussions that led up to the  
9 settlement, a large number of the former employees in the proposed California class (including  
10 the two named California plaintiffs themselves) executed severance agreements with general  
11 releases, which covered the state law claims at issue here. Courts throughout California have  
12 consistently held that a general release signed by an employee in a severance agreement bars that  
13 employee from later seeking overtime or other wage claims under California law -- in other  
14 words, courts consistently uphold the exact sort of release at issue here. See, e.g. *Jimenez v. JP*  
15 *Morgan Chase & Co.*, 2008 WL 2036896, \*3 (S.D. Cal. 2008); *Renov v. ADP Claims Services*  
16 *Group, Inc.*, 2007 WL 5307977, \*3 (N.D. Cal. 2007). In so holding, these courts have rejected  
17 any argument that California Labor Code section 206.5 voids the general release for the simple  
18 reason that section 206.5 applies only when the employer retains wages that the employer  
19 concedes are due the employee. *Id.* As Judge Wilken explained in *Renov*, section 205.6 was  
20 enacted to prevent an employer from withholding wages concededly due to force an employee to  
21 release a claim to the full amount of compensation owed; if the employer contests that the wages  
22 are due or additional compensation is paid for the release, then section 206.5 simply does not  
23 apply and the release is valid. *Renov*, 2007 WL 5307977 at \*3.

24 In addition, and also in exchange for monetary consideration, a majority of the  
25 current employees within the proposed class voluntarily executed release agreements, which  
26 expressly and specifically released the claims subsequently filed in this lawsuit. Just as California  
27 courts have made clear that separation releases are valid, they have also held that pre-certification  
28 releases like those signed by Account Executives here are valid. See, e.g. *Chindarah v. Pick Up*

1 *Stix, Inc.*, 171 Cal. App. 4th 796, 803 (2009). *Chindarah* squarely held that an employer may  
2 obtain a general release from current employees in exchange for monetary payment even if a class  
3 action lawsuit for unpaid overtime is imminent or has been filed, and such releases bar putative  
4 class members from recovering damages as part of the eventual lawsuit.

5 Finally, many of the employees not subject to releases executed arbitration  
6 agreements that contain class and collective action waivers. Defendant submits that there can be  
7 little doubt that these arbitration provisions are enforceable in the context of standard wage and  
8 hour claims. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Valle v.*  
9 *Lowe's HIW, Inc.*, No. 11-1489 SC, 2011 WL 3667441 (N.D.Cal. Aug. 22, 2011) (upholding the  
10 validity of a class action waiver in the context of a wage and hour action and citing cases for the  
11 proposition that “in light of *Concepcion*, *Gentry* is no longer good law”). Indeed, even if *Gentry*  
12 somehow remained good law, the class/collective action waiver provision would still be  
13 enforceable because employees were given the option to opt out of the arbitration program. *See*  
14 *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1362165 (N.D. Cal. 2011)  
15 (holding that a class waiver was not unconscionable under former California law because the  
16 individuals in question had an opportunity to opt out of the arbitration program) (citing *Circuit*  
17 *City Stores, Inc., v. Ahmed*, 283 F.3d 1198, 1199-200 (9th Cir. 2002) and *Circuit City Stores,*  
18 *Inc., v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002)).

19 **Second**, Defendant contends that even if those individuals not subject to the  
20 release agreements could somehow proceed in court, they would still be unable to obtain class or  
21 collective action certification. This is because Plaintiffs are essentially alleging that they worked  
22 off-the-clock during the pertinent period and that Defendant knew that they were doing so, but  
23 did not make additional payments.

24 Although Plaintiffs do not and cannot allege that Defendant required the pertinent  
25 employees to work overtime without extra compensation, Plaintiffs argued that Defendant knew  
26 or should have known about such overtime work because, they contend, (a) Yelp encourages  
27 overtime work by offering incentive compensation; and (b) any overtime work would occur in the  
28 office.

1           The mere fact that an employer offers incentive compensation does not establish  
2 that employees choose to work unrecorded overtime and that the company has actual or  
3 constructive knowledge of such practices. Companies frequently offer incentive compensation to  
4 encourage efficient and high quality work, and doing so is not a *per se* violation of either  
5 California or federal overtime law. *See Koike v. Starbucks Corp.*, 2008 WL 7796650 (N.D. Cal.  
6 2008) (“it does not follow that simply because [the employees] had an incentive to work off the  
7 clock that they actually did so and that [the employer] knew of such off-the-clock work”).  
8 Similarly, though it is true that any overtime would occur in the office, this alone does not  
9 establish that employees actually worked overtime or that Defendant’s management knew or  
10 should have known of such work. Indeed, Account Executives are not required to arrive and  
11 leave at a specific hour, but instead have the flexibility to arrive in a general time frame, i.e., one  
12 Account Executive could arrive at 7 a.m. and leave at 3:30 p.m (which occurs, for example, when  
13 a west coast based Account Executive has a territory on the east coast), while another Account  
14 Executive could arrive at 9 a.m. and leave at 5:30 p.m. In addition, Account Executives are given  
15 the freedom to stop work to perform personal errands during the day, so that an Account  
16 Executive could come in at 8 a.m., take an hour for lunch, run an errand at 2:30 p.m. for an hour,  
17 and then leave at 6 p.m. The resulting fluctuations in work hours means that there is no reason  
18 management could or should know about isolated instances of work over eight hours per day or  
19 forty hours per week by individual Account Executives.

20           Similarly, Plaintiffs have not alleged that they ever told management that they  
21 worked more than eight hours a day or forty hours per week, that they ever discussed working  
22 unpaid overtime with management, or that Yelp ever received a meaningful number of  
23 complaints about unpaid overtime. As such, Defendant takes the position if litigation were to  
24 proceed, primary contested factual issues would include (a) whether each Account Executive  
25 worked overtime; (b) whether Yelp knew or should have known that the Account Executive  
26 worked overtime; (c) if so, whether such time was *de minimis*; and (d) if any wages are owed for  
27 uncompensated time, whether such wages are subject to an offset for payments for time that was  
28 not actually worked. Those factual issues would require individual analysis.

1                    *Third*, Defendant vigorously disputes the notion that any of the Account  
2 Executives in question worked significant amounts of overtime without additional compensation.  
3 Because the key component of an Account Executive’s job is communicating with local  
4 businesses, an Account Executive’s hours necessarily mimic the hours that local businesses are  
5 open. In addition, one reason why Yelp is so popular with its employees is that its culture  
6 encourages Account Executives to work less than eight hours a day and to frequently take breaks  
7 for lunch, personal errands, and in-office socializing.

8                    Perhaps more importantly, Defendant analyzed objective data from the company’s  
9 data systems, and these data confirmed that during the pertinent periods, Account Executives  
10 generally did not work more than eight hours a day or forty hours per week. Defendant also  
11 obtained statements from pertinent employees confirming that they did not work uncompensated  
12 overtime. And, Defendant is not aware of any objective data sample to the contrary.

13                    \* \* \* \* \*

14                    Despite these strong defenses to the instant claims, Defendant chose to work with  
15 Plaintiffs and their counsel to resolve this matter. Nevertheless, Defendant respectfully submits  
16 that the presence of these significant defenses underscores the risks face by the Plaintiffs and the  
17 absent class members of proceeding with litigation and thus confirms the fairness of this  
18 settlement to the putative class. Defendant therefore respectfully joins Plaintiffs in requesting  
19 that the Court grant preliminary approval for the class and collective action settlement.

20  
21 DATED: May 21, 2012

Munger, Tolles & Olson LLP

22  
23 By: /s/ Malcolm A. Heinicke

Malcolm A. Heinicke  
Attorneys for Defendant  
YELP! INC.