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13 Attorneys for Representative Plaintiffs
 and the Plaintiff Class

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17 JUSTIN LARKIN, ANTHONY TIJERINO, and
 AHMAD DEANES, on behalf of themselves and
 18 all others similarly situated,

19 Plaintiffs,

20 v.

21 YELP! INC.,

22 Defendant.

Case No. 3:11-cv-01503-EMC

FIRST AMENDED COMPLAINT FOR DAMAGES

FLSA COLLECTIVE ACTION
RULE 23 CLASS ACTION

- (1) FLSA OVERTIME (29 U.S.C. §§ 207; 216(b), 255(a));
 - (2) CALIFORNIA OVERTIME (Cal. Lab. Code §§ 510, 1194; IWC Wage Order No. 4, § 3);
 - (3) WAITING TIME PENALTIES (Cal. Lab. Code §§ 201, 202, 203);
 - (4) UCL RESTITUTION (CA Bus. & Prof. Code §§ 17200 *et seq.*)
 - (5) ITEMIZED WAGE STATEMENT DAMAGES (Cal. Lab. Code § 226(a), 226(e))
- DEMAND FOR JURY TRIAL**

1 behalf of similarly situated individuals who have worked as Account Executives for Defendant
2 (“FLSA Collective Action Members”). These claims are brought on behalf of Plaintiffs and all
3 FLSA Collective Action Members during the period commencing three years prior to the filing of
4 their respective consents to be included in this collective action (the “Collective Action Period”).

5 7. Plaintiffs Larkin and Tijerino also bring claims under California law for overtime
6 compensation, other damages, restitution, statutory penalties, interest, and attorneys’ fees and
7 costs. These California claims are brought pursuant to Federal Rule of Civil Procedure 23 on
8 behalf of all persons who worked as Account Executives in California (“California Class
9 Members”) at any time during the period commencing four years prior to the filing of this action
10 (the “Class Period”).

11 8. The California Class Members and FLSA Collective Action Members shall
12 hereinafter be collectively referred to as “Class and Collective Action Members.”

13 **IV. PARTIES**

14 **A. Plaintiffs**

15 9. Plaintiff Justin Larkin is a citizen of California residing in the city and county of
16 San Francisco. Mr. Larkin was employed by and worked for Defendant in its San Francisco offices
17 as an Account Executive from approximately September 2008 until March 2009.

18 10. Plaintiff Anthony Tijerino is a citizen of California residing in the city and county of
19 San Francisco. Mr. Tijerino was employed by and worked for Defendant in its San Francisco
20 offices as an Account Executive from approximately February 2010 through November, 2010.

21 11. Plaintiff Ahmad Deanes is a citizen of Arizona. Mr. Deanes worked for Defendant
22 in its Scottsdale, Arizona office as an Account Executive from approximately October, 2010 until
23 January, 2011.

24 **B. Defendant**

25 12. Defendant Yelp! Inc. is a corporation with its principal place of business in San
26 Francisco, California. At all times relevant to this action, Defendant has been an employer covered
27 by the FLSA, the California Labor Code, and the California Industrial Welfare Commission Wage
28

1 Order (“IWC Wage Order”) applicable to Defendant’s industry or its Account Executives’
2 occupation, which is presumed to be IWC Wage Order No. 4.

3 **V. STATEMENT OF FACTS**

4 13. Defendant owns and operates a website(s) whose purpose is to help people find
5 local businesses to patronize. Defendant is not engaged in retail sales. Rather, Yelp makes money
6 by selling online advertising products to businesses. Regardless of their specific job title –
7 Account Executive Trainee, Junior Account Executive, Account Executive, or Senior Sales
8 Account Executives – all Class and Collective Action Members have had the same core job duty
9 of, and have spent the vast majority of their work time, trying to sell Yelp’s advertising products.
10 More specifically, Class and Collective Action Members are primarily engaged in making calls to
11 potential sales leads from Yelp’s offices to pitch Yelp’s advertising products and try to produce
12 individual sales of those products.

13 14. Yelp has paid all Class and Collective Action Members under a common
14 compensation plan and policy. At all times during the period covered by this action, all Class and
15 Collective Action Members have been paid a base salary. During the relevant time period herein,
16 Class and Collective Action Members have also had the ability to earn additional compensation or
17 move to a higher level of compensation based on their performance. Regardless of the specific
18 compensation plan that has been in effect at any given time, during all time periods relevant to this
19 action, the majority of all Class and Collective Action Members compensation has been comprised
20 of base salary.

21 15. During the time period covered by this action, all Class and Collective Action
22 Members have worked more than forty (40) hours in a workweek and/or more than eight (8) hours
23 in a workday (“overtime”). Plaintiffs worked overtime, observed other Class and Collective
24 Action Members work overtime, and also learned of other Class and Collective Action Members
25 working overtime through their conversations with other Class and Collective Action Members.
26 Throughout the time period covered by this action, Defendant has had actual or constructive
27 knowledge that Class and Collective Action Members have been working overtime. For example,
28

1 Class and Collective Action Members have regularly been present in Defendant's offices working
2 overtime. Further, Defendant has induced Class and Collective Action Members to work overtime
3 by establishing compensation plans under which Class and Collective Action Members were
4 promised additional compensation above what would otherwise be their base salary if they met or
5 exceeded certain sales quotas that Defendant set.

6 16. Defendant has classified all Class and Collective Action Members as being exempt
7 from federal and California laws requiring the payment of overtime wages for overtime on a
8 categorical, class wide basis. On the basis of this common, class wide exempt classification,
9 Defendant has maintained and applied a single common policy, plan, and practice of not paying
10 any Class and Collective Action Members the overtime wages required under the FLSA or
11 California law for overtime work by non-exempt employees – i.e., at least one and one half times
12 the employee's regular rate for all overtime work. The legality of this common policy, plan and
13 practice is at issue in this lawsuit. In fact, Class and Collective Action Members have not been
14 exempt from overtime under either federal or California law at any time during the Class Period or
15 Collective Action Period during which they have been employed as Account Executives.

16 17. Defendant has not kept records of Class and Collective Action Members' work
17 hours. The itemized statements that Defendant has furnished to Class and Collective Action
18 Members at the time they are paid their wages do not show their total hours worked or their
19 overtime hours.

20 18. Defendant has induced and misled Class and Collective Action Members to believe
21 they are exempt from overtime by communicating to them as a matter of purported fact that they
22 are exempt from overtime.

23 VI. COLLECTIVE ACTION ALLEGATIONS

24 19. Plaintiffs brings the First Claim For Relief for violations of the FLSA as a collective
25 action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b) on behalf of the FLSA Collective
26 Action Members, who include all persons who have worked for Defendant in California, New
27 York, Arizona, and other states as Account Executives (including Account Executive Trainees,
28

1 Junior Account Executives, Account Executives, and Senior Account Executives) at any time
2 within the applicable statutory time period.

3 20. Plaintiffs and the FLSA Collective Action Members performed the same or
4 substantially similar duties for Defendant, were subject to Defendant's common policy and practice
5 of not paying at least one and one-half times the employee's regular rate for overtime, have
6 otherwise been subject to common compensation plans, policies and practices, and are otherwise
7 "similarly situated" employees within the meaning of the FLSA.

8 21. The First Claim For Relief for violations of the FLSA may be brought and
9 maintained as an "opt-in" action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b),
10 because Plaintiffs' claims and all FLSA Collective Action Members are similarly situated.

11 22. The names and addresses of the FLSA Collective Action Members are available
12 from Defendant. Accordingly, Plaintiffs pray herein for an order requiring Defendant to provide
13 the names and all available contact information for all FLSA Collective Action Members, so notice
14 can be provided to them of the pendency of this action, and their right to opt-in to this action.
15 Plaintiffs further pray that the applicable statute of limitations be tolled based on, among other
16 reasons, Defendant's conduct in misrepresenting the facts to Collective Action Members with
17 regard to their eligibility for overtime pay.

18 **VII. RULE 23 CLASS ACTION ALLEGATIONS**

19 23. Plaintiffs Larkin and Tijerino bring all claims alleged herein under California law as
20 class action claims on behalf of, and seeks to have certified pursuant to Rule 23 of the Federal
21 Rules of Civil Procedure, the class comprised of:

22 All persons who have been employed by Yelp! Inc. as Account Executives
23 (including but not limited to Account Executive Trainees, Junior Account
24 Executives, Account Executives, and Senior Account Executives) in the state of
25 California during any portion of the period commencing four years from the filing
26 of this action through the entry of final judgment in this action.

1 24. The class claims herein have been brought and may properly be maintained as a
2 class action under Rule 23 of the Federal Rules of Civil Procedure because (1) the class is so
3 numerous that joinder of all class members is impracticable; (2) there are questions of law and or
4 fact common to the class; (3) the claims of the proposed class representatives are typical of the
5 claims of the class; and (4) the proposed class representatives and their counsel will fairly and
6 adequately protect the interests of the class. In addition, the questions of law or fact that are
7 common to the class predominate over any questions affecting only individual class members and a
8 class action is superior to other available means for fairly and efficiently adjudicating the
9 controversy.

10 a. Ascertainability and Numerosity: The potential California Class Members as
11 defined herein are so numerous that joinder would be impracticable. Defendant has employed
12 more than 200 Account Executives during the Class Period, and it can further be presumed that
13 California Class Members' residences are dispersed throughout California, and that some
14 California Class Members no longer reside in the state. The names and addresses of the California
15 Class Members are available to the Defendant. Notice can be provided to the California Class
16 Members via first class mail using techniques and a form of notice similar to those customarily
17 used in class action lawsuits of this nature.

18 b. Commonality and Predominance of Common Questions: There are questions
19 of law and fact common to Plaintiffs and the California Class Members that predominate over any
20 questions affecting only individual members of the Class. These common questions of law and
21 fact include, but are not limited to:

22 i. Whether Defendant has failed to pay California Class Members
23 overtime wages for time worked in excess of forty (40) hours per week and/or eight (8) hours per
24 day:

25 ii. Whether Defendant has violated sections 510 of the California Labor
26 Code and IWC Wage Order No. 4, § 3, by its failure to pay California Class Members overtime
27 compensation;

1 iii. Whether Defendant’s failure to pay overtime compensation to
2 California Class Members constitutes an unlawful, unfair, and/or fraudulent business practice
3 under California Business & Professions Code §§ 17200 *et seq.*;

4 iv. Whether Defendant has violated California Labor Code §§ 201 and
5 202 by failing, upon termination, to timely pay California Class Members wages that were due for
6 overtime wages, and whether such failure was willful;

7 v. Whether Defendant’s failure to pay all compensation owed to
8 California Class Members at time of termination of employment constituted an unlawful, unfair,
9 and/or fraudulent business practice under California Business & Professions Code § 17200 *et seq.*;

10 vi. Whether Defendant has knowingly and intentionally violated
11 California Labor Code § 226(a) by failing to furnish California Class Members with accurate
12 written itemized statements at the time of the payment of their wages showing their total hours
13 worked; and,

14 vii. The proper measure of damages, restitution, interest, and penalties
15 owed to Plaintiffs and the California Class Members.

16 c. Typicality: Plaintiffs’ claims are typical of the claims of the other California
17 Class Members. Defendant’s common course of unlawful conduct has caused Plaintiffs and
18 California Class Members to sustain the same or similar injuries and damages caused by the same
19 common policies, practices, and decisions of Defendant. Plaintiffs’ claims are thereby
20 representative of and co-extensive with the claims of the other California Class Members.

21 d. Adequacy of Representation: Plaintiffs are members of the Rule 23 Class
22 defined herein, do not have any conflicts of interest with other California Class Members, and will
23 prosecute the case vigorously on behalf of the class. Plaintiffs will fairly and adequately represent
24 and protect the interests of the California Class Members. Plaintiffs have retained attorneys who
25 are competent and experienced in litigating large employment class actions, including large wage
26 and hour class actions.

1 **VIII. DAMAGES**

2 25. As a direct, foreseeable, and proximate result of Defendant’s conduct, Plaintiffs and
3 similarly situated Class and Collective Action Members are owed overtime compensation, interest,
4 liquidated damages, restitution, and available statutory penalties, the precise amounts of which will
5 be proven at trial.

6 **IX. CLAIMS FOR RELIEF**

7 **FIRST CLAIM FOR RELIEF**
8 **FLSA CLAIMS, 29 U.S.C. § 201, *ET SEQ.***
9 **(ON BEHALF OF ALL PLAINTIFFS AND**
10 **FLSA COLLECTIVE ACTION MEMBERS)**

11 26. The allegations of each of the preceding paragraphs are re-alleged and incorporated
12 herein by reference, and Plaintiffs allege as follows a claim of relief on behalf of themselves and all
13 FLSA Collective Action Members.

14 27. At all relevant times, Defendant has been, and continues to be, an “employer”
15 engaged in interstate “commerce” and/or in the production of “goods” for “commerce,” within the
16 meaning of the FLSA, 29 U.S.C. § 203. At all relevant times, Defendant has employed, and
17 continues to employ, as “employee[s],” Plaintiffs and each of the FLSA Collective Action
18 Members. At all relevant times, Defendant has had gross operating revenues in excess of
19 \$500,000.

20 28. Plaintiffs’ consent to sue in this action pursuant to Section 16(b) of the FLSA, 29
21 U.S.C. § 216(b). Copies of Plaintiff Tijerino and Deanes’ consents to sue are attached hereto as
22 Exhibit A. A copy of Plaintiff Larkin’s consent to sue has already been filed in this action.

23 29. The FLSA requires each covered employer, such as Defendant, to compensate all
24 non-exempt employees at the rate of not less than one and one-half times the regular rate of pay for
25 work performed in excess of forty (40) hours in a workweek.

26 30. The FLSA Collective Action Members are entitled to overtime compensation for all
27 overtime hours worked.
28

1 31. At all relevant times, Defendant had a policy and practice of not paying FLSA
2 Collective Action Members at the rate of not less than one and one-half times the regular rate of
3 pay for work performed in excess of forty (40) hours in a workweek.

4 32. By failing to compensate Plaintiffs and the FLSA Collective Action Members at a
5 rate of not less than one and one-half times the regular rate of pay for work performed in excess of
6 forty (40) hours in a workweek, Defendant violated, and continues to violate, the FLSA, 29 U.S.C.
7 §§ 201, *et seq.*, including 29 U.S.C. §§ 207(a)(1).

8 33. Defendant's violations have at all relevant times been willful because, among other
9 reasons, Defendant has known of or shown reckless disregard for the status of Plaintiffs and FLSA
10 Collective Action Members as nonexempt employees, and Defendant has had actual and/or
11 constructive knowledge of Plaintiffs and FLSA Collective Action Members working overtime
12 hours for which they have not been compensated at the rate of no less than one and one-half times
13 their regular rate of pay.

14 34. As a direct and proximate result of Defendant's unlawful acts, Plaintiffs and FLSA
15 Collective Action Members have been deprived of overtime compensation in an amount to be
16 determined at trial, and are entitled to recover damages in the amount of unpaid overtime
17 compensation, interest, liquidated damages, and attorneys' fees and costs, as provided by the
18 FLSA, 29 U.S.C. §§ 216(b) and 255, and such other legal and equitable relief as the Court deems
19 just and proper.

20
21 **SECOND CLAIM FOR RELIEF**
22 **FAILURE TO PAY CALIFORNIA OVERTIME COMPENSATION**
23 **(CAL. LABOR CODE §§ 510, 1194; IWC WAGE ORDER NO. 4.)**
24 **(ON BEHALF OF PLAINTIFFS LARKIN AND TIJERINO AND ALL CALIFORNIA**
25 **CLASS MEMBERS)**

26 35. The allegations of each of the preceding paragraphs are re-alleged and incorporated
27 herein by reference, and Plaintiffs allege as follows a claim of relief on behalf of themselves and
28 the above-described Rule 23 Class of similarly situated California Class Members.

1 through either involuntary termination or resignation. Defendant, however, as described above,
2 willfully failed and refused to pay these persons all accrued overtime wages owed immediately
3 upon termination or resignation, or within 72 hours of their resignation, as required under
4 California Labor Code §§ 201 and 202, respectively.

5 41. As a result of its willful failure to timely pay all overtime wages owed at the time of
6 termination, or, as applicable, within 72 hours of resignation, Defendant is liable to Plaintiffs and
7 all other California Class Members who are former employees waiting time penalties under
8 California Labor Code § 203.

9
10 **FOURTH CLAIM FOR RELIEF**
11 **VIOLATIONS OF THE UNFAIR COMPETITION LAW (UCL)**
12 **(CAL. BUSINESS & PROFESSIONS CODE §§ 17200 ET SEQ.)**
13 **(ON BEHALF OF PLAINTIFFS LARKIN AND TIJERINO AND ALL CALIFORNIA**
14 **CLASS MEMBERS)**

15 42. The allegations of each of the preceding paragraphs are re-alleged and incorporated
16 herein by reference, and Plaintiffs allege as follows a claim of relief on behalf of themselves and
17 the above-described Rule 23 Class of similarly situated California Class Members.

18 43. California Business & Professions Code § 17200, *et seq.* (“UCL”) prohibits “unfair
19 competition” in the form of any unlawful, unfair, or fraudulent business act or practice.

20 44. Beginning at an exact date unknown to Plaintiffs, but at least four years prior to the
21 filing of this action, Defendant has engaged in unfair competition as defined by the UCL by, and as
22 further described above: (1) failing to pay overtime compensation to Plaintiffs and similarly
23 situated California Class Members in violation of California Labor Code § 510 and IWC Wage
24 Order No. 4, § 3; (2) failing to pay Plaintiffs and similarly situated California Class Members all
25 due and unpaid overtime wages upon termination in violation of California Labor Code §§ 201 and
26 202; and (3) failing to pay overtime compensation to Plaintiffs and similarly-situated California
27 Class Members in violation of the FLSA, 29 U.S.C. § 207(a)(1).

28 45. Plaintiffs and similarly-situated California Class Members have suffered injury in
fact and have lost money as a direct and proximate result of Defendant’s unfair competition,

1 including, but not limited to, money due to them as overtime compensation, which money has been
2 acquired by Defendant by means of its unfair competition within the meaning of the UCL.

3 46. Pursuant to the UCL, Cal. Bus. & Prof. Code §§ 17203, 17204, and 17208,
4 Plaintiffs are entitled to maintain an action on behalf of themselves and on behalf of similarly
5 situated California Class Members for restitution for all unpaid overtime wages since four years
6 prior to the filing of this action, including interest, and such other relief as the Court deems just and
7 proper.

8 **FIFTH CLAIM FOR RELIEF**
9 **CALIFORNIA WAGE STATEMENT VIOLATIONS**
10 **(CAL. LAB. CODE § 226)**
11 **(ON BEHALF OF PLAINTIFFS LARKIN AND TIJERINO AND ALL CALIFORNIA**
12 **CLASS MEMBERS)**

13 47. The allegations of each of the preceding paragraphs are re-alleged and incorporated
14 herein by reference, and Plaintiffs allege as follows a claim of relief on behalf of themselves and
15 the above-described Rule 23 Class of similarly situated California Class Members.

16 48. Pursuant to California Labor Code § 226(a), Defendant has at all relevant times
17 been required, semimonthly or at the time of each payment of wages, to furnish employees such as
18 Plaintiffs and California Class Members accurate itemized written statements containing all the
19 information described in that statute, including, but not limited to, the total hours worked by the
20 employee.

21 49. Defendant has knowingly and intentionally failed to comply with California Labor
22 Code § 226(a) by, among other things, knowingly and intentionally failing to furnish Plaintiffs and
23 California Class Members with accurate itemized written statements showing their total hours
24 worked.

25 50. Under Labor Code § 226(e), an employee suffering injury as a result of a knowing
26 and intentional failure by an employer to comply with § 226(a) is entitled to recover the greater of
27 all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and
28 one hundred dollars (\$100) for each violation in a subsequent pay period, up to a maximum amount
of \$4,000.

1 by Defendant;

- 2 E. Costs of action incurred herein, including expert fees;
- 3 F. Attorneys' fees, including fees pursuant to 29 U.S.C. § 216;
- 4 G. Pre-judgment and post-judgment interest, as provided by law; and
- 5 H. Such other relief as this Court deems necessary, just, and proper.

6 54. WHEREFORE, Plaintiffs Larkin and Tijerino, on behalf of themselves and the
7 above-described Rule 23 Class of similarly situated California Class Members, requests relief as
8 follows:

9 A. Certification of the above-described Rule 23 Class as a class action, pursuant to
10 Rule 23 of the Federal Rules of Civil Procedure;

11 B. Provision of class notice to all California Class Members;

12 C. A declaratory judgment that Defendant has knowingly and intentionally violated the
13 following provisions of law:

14 1. Cal. Labor Code §§ 510, 1194 *et seq.* and IWC wage order No. 4, by failure
15 to pay overtime compensation to California Class Members;

16 2. Cal. Labor Code §§ 201 and 202, by willful failure to pay overtime
17 compensation at the time of termination of employment;

18 3. Cal. Business and Professions Code §§ 17200 *et seq.*, by failure to pay
19 overtime compensation due to California Class Members under California law and the FLSA and
20 by willfully failing to pay all compensation owed to California Class Members upon termination of
21 employment; and,

22 4. Cal. Labor Code § 226(a), by failure to provide itemized written statements
23 semimonthly or at the time of payment of wages showing all the information required by California
24 law, including but not limited to total hours worked;

25 D. A declaratory judgment that Defendant's violations as described above were willful
26 and/or knowing and intentional;

27 E. An equitable accounting to identify, locate, and restore to all current and former
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