A _____

STAY REQUESTED UNDER CCP § 2029.650(B)
Discovery order compelling identification of anonymous speaker

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ____

YELP INC.,
Petitioner,

v.

The Superior Court of the State of California for the County of San Francisco,
Respondent.

THOMAS P. KELLY III,
Real Party in Interest.

Superior Court of California, County of San Francisco, No. CGC-19-573821
Honorable Ethan P. Schulman, Dept. 302, (415) 551-3723

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF AND MEMORANDUM OF POINTS AND AUTHORITIES [SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER]

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Court of Appeal
State of California
First Appellate District, Division __

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Case Name: YELP, INC., v. SUPERIOR COURT OF SAN FRANCISCO COUNTY

Please check the applicable box:

[ ] There are no interested entries or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity of Person	Nature of Interest
Yelp, Inc.	Non-party Petitioner
Thomas P. Kelly, Jr.	Plaintiff/Real Party in Interest
John Doe a/k/a Michael L.	Defendant/Real Party in Interest

Dated: July 29, 2019

/s/ William J. Frimel
William J. Frimel

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Introduction

This Petition for Writ of Mandate arises out of an Order of the San Francisco County Superior Court ("Respondent Court") compelling Non-Party Petitioner, Yelp Inc. ("Yelp"), to produce identifying information concerning one of its users, in violation of her constitutional right to speak using a pseudonym.[1] The Petition seeks an order reversing Respondent Court's Order, which granted plaintiff's motion to compel and erroneously held that plaintiff had established a prima facie case of defamation sufficient to overcome the user's First Amendment right to speak anonymously.

This case presents an issue of urgent importance because it involves the abridgement of fundamental constitutional rights in an emerging area of law that could have far-reaching consequences for consumers and consumer review web sites such as Yelp. Both Yelp and consumers at large will suffer irreparable harm if the Respondent Court's Order is allowed to stand and Yelp is forced to disclose Doe's personally identifying information based on plaintiff's conclusory assertion that Doe must not be one of his former clients. No professional wants to think that former clients were dissatisfied; indeed, no business wants to believe that it has not met its customers' expectations. But the mere fact that somebody posts a brief comment expressing such dissatisfaction, and saying that the reviewer therefore took her business elsewhere, is not a sufficient basis for asserting that the reviewer must not

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[1] The Petition uses female gender pronouns to refer to the Doe generically, without intending any assertion about Doe's actual gender.

have been a customer, and hence the review must be false. Yet, at bottom, those are the only "facts" that plaintiff put forward as a basis for stripping Doe of her First Amendment right to speak anonymously.

The consequence of the decision below, if upheld by this Court, is that online forums would have no ability to protect their users' personal information—which the users have entrusted to them and which the companies, and the users themselves, are entitled to protect under established First Amendment principles. Based upon state law and the First Amendment, as well as the evidence submitted to Respondent Court, the motion to compel should have been denied.

Moreover, if Yelp is required to comply with the Respondent Court's order, Doe will become a named defendant in plaintiff's defamation action, resulting in irreparable harm due to the public disclosure of Doe's identity, the need for Doe to spend significant time and money defending plaintiff's lawsuit, and/or adverse employment consequences for Doe. Thus, review by writ is appropriate, and Yelp also asks the Court to issue a writ of supersedeas staying, pending appeal, the order of disclosure.

Such relief is warranted under *H.B. Fuller Co. v. Doe* (Ct. App. 6th Dist. 2007), 151 Cal. App. 4th 879. In *H.B. Fuller*, the trial court denied a motion to quash a "subpoena . . . directing Yahoo to produce . . . information identifying" an anonymous defendant. *Id.* at 884. The Court of Appeal "issued a temporary stay

followed by a writ of supersedeas staying enforcement of the subpoena pending the outcome of" the appeal. *Id.* at 885. The Court further noted that, "[i]f the present order were not appealable, it would be reviewable by extraordinary writ since enforcement of the subpoena would plainly deprive defendant of an important interest — his First Amendment right to speak anonymously—without an effective appellate remedy." *Id.* at 886.

Kelly has moved to compel immediate compliance with the disclosure order, seeking sanctions, even though Yelp had informed Kelly that it would be filing this writ petition. Kelly apparently hopes to moot the appeal by obtaining the identifying information before Yelp's appeal can be heard. Avoidance of mootness is a well-supported basis for a stay pending appeal. Moreover, disclosure of Doe's identity would work a permanent loss of her right to speak anonymously. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns* (1976) 427 U.S. 347, 373.

Granting the stay will not cause any irreparable injury to Kelly because Doe removed the review in question months ago, in response to intimidation by Kelly, and the only relief sought in the court below is an award of damages against Doe. A delay in the award of damages can be compensated by pre-judgment interest.

A. Nature of the Case

This case arises out of a consumer review posted on Yelp's website by Yelp

user John Doe, using the username "Michael L.," regarding plaintiff Thomas P. Kelly III, a lawyer based in Santa Rosa, California. Yelp operates a popular website, Yelp.com, and related mobile applications (collectively, the "Site"), that allow members of the public—free of charge—to read and write reviews of local businesses, government agencies, and other local establishments.

Plaintiff filed a defamation claim against Doe and subpoenaed Yelp to produce Doe's name, address and contact information. Yelp responded to plaintiff's subpoena with written objections, including an objection that plaintiffs had not satisfied the legal standard that the First Amendment and California Constitution require: establishment of a prima facie case of defamation as articulated in *Krinsky v. Doe 6* (Cal. App. 6th Dist. 2008) 159 Cal. App.4th 1154, prior to using a court's subpoena power to identify an anonymous speaker. Plaintiffs moved the Respondent Court to compel Yelp to produce Doe's personally identifying information. In opposition, Yelp argued that plaintiffs failed to meet their burden to establish a prima facie case of defamation as *Krinsky* requires. A Judge Pro Tem on the Respondent Court recommended that the motion to compel be granted; that proposed ruling was confirmed by a tentative order issued on May 29, 2019, the day before oral argument by counsel for the parties, and entered as the order of the Court on May 30, 2019. The order required Yelp to produce Doe's personally identifying information, reasoning that Kelly had identified specific facts set forth

in the review that could be proved true or false, and that Kelly's declaration had set forth a prima facie basis for deeming such facts false.

B. Issue Presented

Whether Respondent Court erred in granting plaintiff's motion on the ground that plaintiff established a prima facie case of defamation, supportable under constitutional standards, that was sufficient to overcome Doe's rights under the First Amendment and the California Constitution to speak anonymously.

C. Why Extraordinary Relief Is Justified

As discussed below, extraordinary relief is both necessary and justified in this case because it raises significant and novel constitutional issues in an emerging area of law that would have a widespread impact on consumers and consumer review sites. Additionally, Yelp lacks an adequate means, such as a direct appeal, by which to obtain relief. In addition, because Kelly has, despite having been informed that this writ would be sought, moved in the trial court to compel compliance with the May 30 order and sought sanctions for Yelp's refusal to comply until this writ is decided, Yelp also seeks a stay pending appeal.

In this verified Petition for Writ of Mandate, Petitioner, Yelp, respectfully alleges and submits the following:

1. All exhibits accompanying this Petition, except for the Declaration of Ian MacBean, are true copies of original documents on file with Respondent Court. The

exhibits are incorporated herein by reference as though fully set forth in this Petition. The exhibits are paginated consecutively from page 1 through page 175, and page references in this Petition are to the consecutive pagination. The MacBean Declaration, Exhibit O, P00146 to P00175, is supplied to place in evidentiary form facts about Yelp's operations that were contained in the record but not under oath.

D. Timeliness of Petition

2. The Respondent Court issued its order requiring the disclosure of Doe's identity on May 30, 2019. Because Yelp's writ petition is nonstatutory, Yelp has sixty days from the date of the Respondent Court's order to seek writ relief. *See Cal West Nurseries v. Superior Court* (Cal App. 4th Dist. 2005) 129 Cal. App. 4th 1170, 1173-74 ("As a general rule, a writ petition should be filed within the 60-day period that applies to appeals.") (*citing Popelka, Allard, McCowan & Jones v. Superior Court* (Ct. App. 1st Dist. 1980) 107 Cal. App. 3d 496, 499).

E. Absence of Other Remedies

3. "Generally, discovery orders are not appealable." *City of Woodlake v. Tulare County Grand Jury* (Cal. App. 5th Dist. 2011) 197 Cal. App. 4th 1293 (quoting *H.B. Fuller Co.*). As explained in *H.B. Fuller Co.*, the proper procedure for seeking review of a discovery order that is not "ancillary to litigation in another jurisdiction," and does not "operate[] as the last word by a California trial court on

the matters at issue," but that would, like the one entered by the trial court, "deprive defendant of an important interest—his First Amendment right to speak anonymously— without an effective appellate remedy," is to seek an "extraordinary writ." 151 Cal. App. 4th at 885-86; see also *O'Grady v. Superior Court* (Cal. App. 6th Dist. 2006) 139 Cal. App. 4th 1423, 1439 ("[e]xtraordinary review will be granted . . . when a discovery ruling plainly threatens immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy," hence court granted review of order compelling response to subpoena seeking "documents identifying any . . . persons" who supplied information to journalists); *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 848 (granting "extraordinary writ to restrain the trial court from requiring" disclosure of "private associational information" protected by the First Amendment); *People ex rel. Lockyer v. Superior Court* (Cal. App. 4th Dist. 2004) 122 Cal. App. 4th 1060, 1071; *Karen P. v. Superior Court* (Cal. App. 2d Dist. 2011) 200 Cal. App. 4th 908, 912. Accordingly, Yelp respectfully submits this Petition.

F. Factual Background

4. The Yelp Site allows consumers to read and write reviews about local businesses. Exhibit O, P00148 ¶ 3; *see also Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1126 (9th Cir. 2014) ("Today, individuals can share their opinions with the entire world courtesy of a few taps on the keyboard. [Yelp] provides an online forum on which

its users express opinions as to services ranging from dog walkers to taco trucks."); *Edwards v. District of Columbia*, 755 F.3d 996, 1006-07 (D.C. Cir. 2014) ("Further incentivizing a quality consumer experience are the numerous consumer review web sites, like Yelp . . . which provide consumers a forum to rate the quality of their experiences . . . That the coal of self-interest often yields a gem-like consumer experience should come as no surprise."). To write reviews on the Yelp Site, a user must register for a free Yelp account. Exhibit O, P00149 ¶ 4. During the registration process, users must provide a first and last name, email address, and zip code. *Id.* ¶ 5. The first name and the first letter of the last name provided by a user comprise the user's screen name, which is publicly visible on Yelp's Site. *Id.* ¶ 5. Users may submit any name they like, and may also designate any zip code as their "location." *Id.* Although Yelp encourages users to provide real names, it does not require users to identify their actual name or place of residence. *Id.* Yelp does not ask users to provide a physical address to register a Yelp account; it does not have such an address for Doe.

5. Yelp requires its users to agree to Yelp's Terms of Service. *Id.* ¶ 4. Those Terms, which incorporate Yelp's Content Guidelines, require users to base their reviews on personal consumer experiences that they have had with the reviewed business. *Id.* P00169. Reviews that Yelp deems in violation of these requirements are subject to removal. *Id.*, P00154 ¶ 21; Exhibit I, P00094. Yelp allows any

registered user, including any users managing a claimed business page on Yelp, to flag reviews and other third-party content for violations of Yelp's Terms of Service and Content Guidelines. Exhibit O, P00154, ¶ 21. Members of Yelp's User Operations team manually evaluate such flagged content, compare the content to Yelp's Terms of Service and Content Guidelines, and in their discretion may remove content if they determine the content violates Yelp's Terms of Service and Content Guidelines. *Id.*

6. Plaintiff is a lawyer with an office in Santa Rosa, California. Exhibit E, P00024. On January 7, 2019, a Yelp user with the screen name "Michael L." posted a one-star review on plaintiff's Yelp business listing, which stated, in its entirety:

> Do not do it. He completely bungled my case. Had no idea what he's doing. eventually, I had to find another attorney and pay double. Stay away!
>
> Exhibit A, P00005-P0006.

On January 19, plaintiff Kelly sent a message to Doe using Yelp's direct messaging system, telling her:

> You are not a client of mine. I have zero cases in san francisco. Yelp has provided your information to me. I will be in touch through counsel.
>
> Exhibit I, P00099.

On February 28, 2019, Doe responded through the same messaging system, telling Kelly, "it [the message] has been deleted." *Id.*

7. The third sentence of Kelly's message, although sent by an officer of the court, in an obvious attempt to intimidate a non-lawyer, was a bald-faced lie: Yelp had **not** provided any identifying information to Kelly. Exhibit I, P00085, ¶ 7. In fact, on February 14, Kelly sent a letter to Yelp demanding that it identify Doe so that he could sue her for defamation. Exhibit E, P00034. And, in his first declaration filed below, Kelly swore that he had no way of identifying Doe, or serving process on Doe, without getting a subpoena enforced. *Id.,* P00026 ¶ 7. But the prevarication was effective: Doe herself removed the review, and confirmed her removal by a message to Yelp dated February 24. 2019. Exhibit I, P00085 ¶ 9.

8. Kelly's misstatements of fact were not confined to direct messages between him and Doe. In a reply declaration dated May 4, 2019, sworn on personal knowledge, Kelly swore the following: "The review of Defendant 'Michael L.' was not removed by Defendant, but was in fact removed by Yelp at least a month after the present case was commenced." Exhibit K, P00107, ¶ 4. Considering that the complaint was filed on February 15, 2019, it is apparent that Kelly's averment about the date of removal of the review by "Defendant Michael L.," and about who removed that review, was also false.[2]

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[2] The claimed basis for the averment that "the review of Defendant 'Michael L.' was removed by Yelp," *id.* ¶ 4, that the removal "was for 'Violation of the Terms of Service,'" *id.* ¶ 5, and that an entry to this effect appears on the Yelp page for his office, as shown by Exhibit A to his declaration. *Id.* ¶ 6. However, Exhibit A shows that Yelp removed a review dated November 4, 2015, for violation of its terms of service. Plaintiff is not suing over the November 2015 review; he is

9. Meanwhile, Kelly had contacted Yelp to inform it of his position that the review was false and should be removed. Exhibit E, P00025, ¶¶ 7-11. His contention was that Doe was never one of his clients, based on the following reasoning: that he had never had a client named "Michael L."; that he does not "handle any cases in San Francisco"; and that he had never been involved in any matter that fit these facts: that a former client had hired another lawyer after hiring him and paid a fee for that other lawyer, in effect "paying double."

10. Yelp responded to Kelly's private communications by telling him, twice, that it had examined the review and was neither willing to remove the review, nor to provide Doe's identifying information. Yelp told Kelly that it was satisfied, based on its investigation, that the review "reflect[s] the personal experience and opinions of the reviewer." *Id.*, P00032, P00040. Yelp specifically responded to Kelly's point that he had never handled cases "in" San Francisco, noting that the geolocation information associated with the user was simply "regional," and that in any event Yelp users based in one place often do business in other places. *Id.* P00040.

11. On February 15, 2019, Kelly filed this action in the Superior Court for San Francisco County, alleging that Doe's review contained false factual statements in that, according to Kelly, there never was a case, and in that he does

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suing over a review dated January 17, 2019, posted by someone using the same username. If his suit were over a 2015 review, his libel action filed in February 2019 would be untimely by more than three years, and the subpoena would have to have been denied enforcement for that reason alone.

not litigate cases in San Francisco. Exhibit A, P00005.

12. On February 20, 2019, Kelly served a subpoena on Yelp seeking to identify Doe. Exhibit B, P00010-00011. Yelp served written objections to the subpoena dated March 8, 2019, stating, among other things, that enforcement of the subpoena would violate the constitutional rights of its user to speak anonymously. Exhibit E, P00044-P00046.

13. On April 2, 2019, Kelly moved to compel responses to the subpoena. Exhibit C, P00012-P00013. Attempting to meet the well-established test for enforcement of process overriding the right to speak anonymously, *Krinsky v. Doe 6* (2008) 159 Cal. App.4th 1154, 1173, Kelly submitted a declaration that purported to establish a prima facie case that Doe's review contained factually false statements that could support a claim for defamation consistent with the First Amendment. Exhibit E, P00023-P00025. Kelly had admitted in his correspondence, *id.* P00034, that Yelp allows its users to provide pseudonyms for their account names, and, therefore, that the mere fact that he does not recall ever having represented someone named "Michael L." did not help him show that Doe had lied about being a former client. However, without taking account of the fact that Yelp allows pseudonymous identification of its users' zip codes as well as their names, Kelly's complaint rested heavily on the allegation that he did not handle "cases in San Francisco." Exhibit A00005. Notably, however, he did not argue this

point in his motion to compel, and the declarations submitted in support of his motion to compel did not repeat the claim that he had never handled a case in San Francisco. Nor did he argue, or aver, he had never represented someone from San Francisco in a case handled elsewhere.

14. Instead, Kelly's declarations hewed to the peculiar wording that he "cannot find any case, client or legal matter that I have ever handled that meets the specific facts set forth in the comments made by Defendant on Yelp's site." Exhibit E, P00025 ¶ 16. However, Kelly never specifically claimed to have personal knowledge about whether any of his former clients had ever retained a different lawyer after using Kelly's services, or whether any former client had **paid** another lawyer after using Kelly's services (that is, in effect, paying double). Nor did his declarations ever show how he could have had personal knowledge about what his clients had done after dispensing with his services.

15. Yelp argued that, to some extent, Doe's review stated opinions rather than fact. For example, Yelp contended that the word "bungled" was simply a hyperbolic way of expressing dissatisfaction with a professional's services, and that the dissatisfaction was a matter of opinion. Exhibit G, P00077. It argued that the context of the review—placement on a consumer review site—tended to suggest that any strong words were a matter of opinion rather than fact. *Id.* P00078. Moreover, Yelp questioned whether Kelly's declaration properly reflected personal

knowledge about whether Doe had gone to another lawyer after feeling dissatisfied with Kelly, and about whether using that other lawyer had forced Doe to "pay double." *Id.* P00073.

16. The parties initially appeared before a Judge Pro Tem, who indicated that the case was a close one, but that he recommended that the motion to compel be granted. The Judge Pro Tem indicated that his recommendation was made despite the "unbecoming" and "untoward" actions of lying to Doe in a message and submitting an "obviously inaccurate" reply declaration. Exhibit L, P00121. The Superior Court judge granted the motion to compel following oral argument on May 30, 2019, Exhibit N, P00142-P00145, saying however that "this is a very marginal case and is just barely over the line of the applicable standard." Exhibit M, P00137.

17. The court below decided that the review contained provably false statements of fact in that

> statements that Plaintiff "bungled" his legal case and "has no idea what he is doing" are provable factual assertions that Plaintiff engaged in professional misconduct in handling his case, misconduct that was so serious that the reviewer was forced to find other counsel to represent him and to pay "double." Plaintiff's assertion that there was no case in which he represented anyone that fit any of the facts stated in the review [citation omitted], while very general, is sufficient to support the inference that the assertions in the review that Plaintiff so badly "bungled" a client's case that the client was forced to find other counsel to represent him and to pay "double" are false.
>
> Exhibit N, P00143-P00144.

The Court held that the facts in this case were "closely comparable" to the facts held

sufficient to warrant enforcement of the subpoena in *Yelp Inc. v. Superior Court (Montagna)* [Cal. App. 4th Dist. 2017] 17 Cal. App. 5th 1, where the Fourth District panel was willing to excuse gaps in plaintiffs' evidence of falsity on the ground that it is unfair to require plaintiffs to provide evidence of falsity that is necessarily unavailable when the plaintiffs have not yet identified the anonymous defendant. *Id.* at 19.

18. Both Yelp and Doe will suffer immediate and irreparable harm if writ relief does not issue from this Court, in that Yelp will be forced to produce the personally identifying information of Doe in violation of her constitutional right to remain unknown. Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation. Here, Respondent Court's actions will chill usage of Yelp in the future by consumers that wish to write anonymously about their experiences with local businesses, to the disservice of consumers who want to

express their honest views, of consumers who want to know what other consumers have to say, and of Yelp itself as the platform on which such views would otherwise be expressed.

19. Moreover, the decision below, if upheld by this Court, will provide a road map for other businesses to overcome their critics' First Amendment and California Constitutional right to speak anonymously by simply swearing, in general terms, that the statements in a review "do not fit the facts" of any business or professional transaction "that I can find." Although false critical reviews, especially when offered by competitors, are a scourge that Yelp has dedicated significant resources to combat, in well-publicized ways, more specificity should be demanded when plaintiffs allege that a particular review is an example of such abuses, lest the constitutional right to speak anonymously be entirely eviscerated.

WHEREFORE, Petitioner respectfully prays as follows:

1. That the order of disclosure be stayed pending resolution of this writ proceeding.

2. That a Writ of Mandate or other appropriate writ issue in the first instance, directing Respondent Court to vacate its order granting Plaintiff's Motion to Compel Compliance, or alternatively, to show cause before this Court at the time and place then or thereafter specified by order of this Court, why it has not entered said different order and why a peremptory writ should not issue;

3. That upon the return of the alternative writ and the hearing on the order to

show cause, a Peremptory Writ of Mandate or other appropriate writ issue under seal of this Court compelling Respondent Court to vacate its erroneous order and to enter an order as prayed by Yelp and as directed by this Court;

4. That this Court award Yelp the costs of this proceeding; and

5. That this Court award Yelp such other and further relief as it deems proper.

VERIFICATION

I, WILLIAM J. FRIMEL, declare as follows:

I am counsel for Petitioner Yelp, Inc. in this matter. I have read the foregoing Petition for Writ of Mandate and Request for Stay, and know its contents. The facts alleged in this Petition are within my own knowledge, and I know such facts to be true.

I declare under penalty of perjury that the foregoing is true and correct, and that this verification was executed on July 29, 2019, at Menlo Park, California.

_____

WILLIAM J. FRIMEL

ARGUMENT

I. The Constitutional Right to Speak Anonymously Requires Plaintiffs to Make a Legal and Evidentiary Showing of Valid Claims Before They May Enforce Subpoenas to Identify Anonymous Critics Whom They Are Suing for Tortious Speech.

It is settled law that the First Amendment protects the right to speak anonymously, requiring a compelling interest to overcome that right, *McIntyre v. Ohio Elections Com'n* (1995) 514 U.S. 334, 342 (an "author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment"), and that court orders and judgments are a form of state action regulated by the First Amendment. *Organization for a Better Austin v. Keefe* (1971) 415 U.S. 1; *New York Times v. Sullivan* (1964) 376 U.S. 254, *NAACP v. Alabama* (1959) 357 U.S. 449.

Moreover, within this appellate district, as well as in state appellate and federal courts across the country, it is also settled law that, in light of the First Amendment right to speak anonymously (and parallel rights under Article 1, Sections 1 and 2 of the California Constitution), *ZL Technologies v. Does 1-7* (Cal. App. 1st Dist. 2017) 220 Cal. Rptr. 3d 569, 596), a plaintiff who seeks to use judicial process to identify anonymous critics for the purpose of serving process on them to pursue claims that the speech was tortious must present to the Court both legal argument establishing that the plaintiff has legally tenable claims, and evidence sufficient to establish a prima facie case on the elements of those claims that are

legally tenable. Because the leading California case establishing these requirements is *Krinsky v. Doe 6* (Cal. App. 6th Dist. 2008) 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231, this brief refers to the requirements as "the *Krinsky* standard."

This appellate district embraced the *Krinsky* standard in *ZL Technologies Inc. v. Does 1-7* (Cal. App. 1st Dist. 2017) 220 Cal. Rptr. 3d 569. Decisions from other California appellate districts following the rule include *John Doe 2 v. Superior Court* (Cal. App. 2d Dist. 2016), 206 Cal. Rptr. 3d 60, and *Yelp Inc. v. Superior Court* (Cal. App. 4th Dist. 2017) 224 Cal. Rptr. 3d 887, 897. The leading cases nationally are *Dendrite v. Doe* (N.J. App. 2001) 342 N.J. Super. 134, 775 A.2d 756 and *Doe v. Cahill* (Del. 2005) 884 A.2d 451; state and federal courts following the approach include *Highfields Capital Mgmt. v. Doe* (N.D. Cal. 2005) 385 F.Supp.2d 969; *Sarkar v. Doe* (Mich. App. 2016) 897 N.W.2d 207; *Doe v. Coleman* (Ky. 2016), 497 S.W.3d 740, 743; *Thomson v. Doe* (Wash. App. Div. 1 2015) 356 P.3d 727; *In re Indiana Newspapers* (Ind. App. 2012) 963 N.E.2d 534; and *Mobilisa v. Doe* (Ariz. App. Div. 1 2007) 170 P.3d 712.

Although the *Krinsky* standard was crafted in a case in which an anonymous speaker defended her own constitutional right to remain anonymous, in *ZL Technologies,* this Court allowed a web platform to assert the free speech rights of its users; other California appellate districts have expressly recognized such standing. *Glassdoor, Inc. v. Superior Court* (Cal. App. 6th Dist. 2017) 9 Cal.

App.5th 623, 634, 215 Cal. Rptr. 3d 395, 405; *Yelp Inc. v. Superior Court* (Cal. App. 4th Dist. 2017), 17 Cal. App. 5th 1, 224 Cal. Rptr. 3d at 892-893.

In a defamation action, the plaintiff has to show that he is suing over factual statements rather than opinions, which are not actionable as defamation. *John Doe 2 v. Superior Court*, *supra*, 206 Cal. Rptr. 3d at 69 (Cal. App. 2d Dist. 2016). "Thus, to be actionable, an allegedly defamatory statement must make an assertion of fact that is provably false. 'The question is whether the statement is provably false in a court of law.'" *Id.*, citing *Weller v. American Broadcasting Companies* (Cal. App. 1 Dist. 1991) 232 Cal. App. 3d 991, 1006, 283 Cal. Rptr. 644. And the determination of whether the statement is one of fact and not opinion is made by the court as a matter of law. *John Doe 2*, 206 Cal. Rptr. 3d at 68-69. Hence, the Respondent Court's rulings on this issue are subject to de novo review.[3] Additionally, because the issue in this case is whether plaintiff overcame Doe's First Amendment right to speak anonymously, the Court must make an independent examination of the record as a whole to ensure that the proper balancing of free speech rights is achieved. *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485; *In*

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[3] *See Glassdoor, Inc. v. Superior Court* (Cal. App. 6th Dist. 2017) 9 Cal. App. 5th 623, 634 ("[D]isputes of this kind are governed by a tripartite standard of review. We review the trial court's order independently insofar as it rests on undisputed facts. We also determine independently the scope of First Amendment protection to be accorded to the speech upon which the plaintiff's claim is predicated. We defer to the trial court's findings of fact on nonconstitutional questions so long as they are supported by substantial evidence.")

re George T. (Cal. 2004) 33 Cal.4th 620, 632, 93 P.3d 1007, 1014.

To the extent that statements are found to be provably false, and hence actionable as a matter of law, the plaintiff must also make an evidentiary showing that he has a prima facie basis for claiming falsity. *ZL Technologies*, 220 Cal. Rptr. 3d at 596-598. When, as in this case, the statement is about a matter of public concern, the First Amendment requires plaintiff to bear the burden of showing falsity. *Philadelphia Newspapers v. Hepps* (1986) 475 U.S. 767; *Nizam-Aldine v. City of Oakland* (Cal. App. 1st Dist. 1996) 54 Cal. Rptr. 2d 781, 787.

II. Plaintiff Did Not Show, About Any Statement in Doe's Review, Both That the Statement Was an Actionable Accusation of Provable Fact and That Plaintiff Had Prima Facie Proof of Falsity.

The Respondent Court erred in its application of the *Krinsky* standard because it failed to analyze each of the statements in Doe's review separately to ensure that plaintiff was relying on criticisms that were **both** legally actionable and false. As we show here, Doe's review contained both potentially actionable facts and non-actionable opinions, but there was no probative evidence that any of the **potentially** actionable facts was false. Consequently, the motion to compel should have been denied.

A. Plaintiff Failed to Produce Prima Facie Evidence of Falsity About Those Statements Properly Treated as Statements of Provable Fact.

In the court below, Kelly identified the following as the "facts" in Doe's review

that were actionably false:

> First, that there was a "case." Second, Plaintiff represented Defendant in that case. Third, that Plaintiff "had to find another attorney." Fourth, that the reason Defendant had to see alternative counsel was that Plaintiff "completely bungled" the case. Fifth, that Defendant had to pay alternative counsel "double."
>
> Exhibit D, P00019.

Each of these excerpts contains an assertion of fact, except that the fourth excerpt contains a factual assertion of what the reason for changing lawyers was; that is to say, that Doe's opinion about the quality of Kelly's legal services animated her decision to switch lawyers.

However, instead of squarely meeting these facts and providing evidence sufficient to mount a prima facie case of falsity, Kelly's moving papers ducked them. He provided no evidence that there was never a "case" or that Kelly did not represent Doe in that case. Nor was there any evidence that Doe did not find another lawyer after using Kelly's services, or that Doe never paid such other lawyer. And there was no evidence about what opinions about Kelly might have animated Doe's election to make a change of counsel.

For example, Yelp agrees that whether Doe moved on to another lawyer after starting with Kelly, and whether Doe paid that other lawyer, are matters of fact; if false, perhaps they could provide some basis for Kelly's defamation claim. But that means only that they are "provably false"; at the same time, they are also

"provably true." The reason why, to the extent Kelly's motion to compel rested on these aspects of the review, his motion should have been denied under the legal standards of *Krinsky* and *ZL Technologies,* is that Kelly neither adduced evidence that these factual assertions were false, nor presented **any** admissible evidence supporting a claim of falsity.

His declaration contained only the vague formulation that he had not "found" any cases fitting the facts stated in Doe's review. But what facts? Kelly did not aver that none of his clients had ever hired a second lawyer after parting ways with Kelly, and he did not aver that none of his clients had ever paid money to a second lawyer after hiring Kelly.

Kelly's declaration contained this averment:

> I cannot find any case, client, or legal matter that I ever handled that meets the specific facts set forth in the comments made by Defendant on Yelp's site.

Unlike the assertions contained in Kelly's pre-litigaton correspondence with Yelp, and unlike the characterizations of Kelly's averments as set forth in his briefs, this statement is not a positive averment that Kelly never represented anyone in the circumstances set forth in the review; Kelly's averment is only that he "cannot find" such a case. But find where? The averment says nothing about where Kelly looked. Perhaps it is implicit that Kelly was making a claim about not finding such a case in his records, but the declaration contains no facts about the quality of his record-

keeping such that not "finding" such a case in his records would have probative value about whether such a case had ever existed.

Moreover, the statement does not specify what parts of the Doe review Kelly was treating as "facts" – did he mean to include the "completely bungled" and "had no idea what he is doing" as part of the totality of facts that did not exist, even though, as argued below, these represent non-actionable opinion?

There are indications in the record that the "facts" to whose falsity Kelly was attesting were the assertions in the Doe review that Doe had moved on to a second lawyer after first hiring Kelly, and that Doe had then paid that second lawyer. After all, when Kelly wrote a letter to Yelp on February 14, he said that the review contained "clear, provable statements of fact"; recited the entire text of Doe's review; and then stated

> These are explicit factual claims that the reviewer "had to find another attorney" and had to 'pay double." There are no cases I have ever handled where facts like this occurred.

However, Kelly's vague averment that none of his cases fitted Doe's review precisely should not be taken as implying any averment about what Doe might or might not have done after parting ways with Kelly. Indeed, there is nothing in Kelly's declaration that shows that he was competent to testify about such facts. Kelly never said, under oath or otherwise, that he has some way of tracking what lawyers his former clients hire, and, if there other such lawyers, what the financial

arrangements are. It is black letter law in California that an affidavit or declaration "must be made on personal knowledge and must show affirmatively that the affiant or declarant is competent to testify to the matters stated. . . . The text of the affidavit or declaration itself must demonstrate the requisite personal knowledge and competency." 6 WITKIN, CALIFORNIA PROCEDURE (5th ed. 2008) *Proceedings Without Trial*, § 225, p. 666; *see also Roy Brothers Drilling Co. v. Jones*, 176 Cal. Rptr. 449, 452–53 (Cal. App. 2d Dist. 1981); *Snider v. Snider*, 19 Cal. Rptr. 709, 717 (Cal. App. 1st Dist. 1962). Nothing in Kelly's declaration shows that he has any competence to testify about whether any of his clients have hired a different lawyer after first hiring him.

Indeed, Kelly's reply brief below clearly demonstrates that Kelly has **no** evidence that Doe was never one of his clients, and no evidence that Doe never hired a different lawyer, but only that he hopes to use discovery after identifying Doe to determine whether Doe was or was not ever one of his clients. Part B of the reply brief, which argued that Kelly had presented a prima facie case, did not contend that the language in the review referring to Kelly's having "bungled" Doe's case was false, but only that these words "ha[d] a very clear tendency to injure" Kelly. Exhibit J, P00102.

The reply brief then turned to actual **facts** in the review on which Kelly argued he was basing his defamation claim, but at that point his brief turned

hypothetical: he did not cite his declaration as showing a prima facie case of falsity, but only said that he could proceed with a defamation claim "if" he could prove falsity: "if" Yelp's records showed Doe's real name did not match any of his clients, "if" he took Doe's deposition and discovered whether he was ever in a case, "if" he took Doe's deposition and found out whether or not Doe had ever hired a second lawyer, and "if" Doe had to pay that second lawyer. Exhibit J, P00102-P00103.

Indeed, the one fact that plaintiff had originally set forth in the complaint as providing a basis for inferring that Doe was never one of his clients—the allegation that Kelly does not litigate cases in San Francisco—did not make any appearance in his opening brief, in his reply brief, or in his declarations. And wisely so, because that factual averment was irrelevant. Doe's review never stated that his case was handled in San Francisco, and, even assuming that the locational statement on Doe's profile is an accurate statement of Doe's place of residence or employment during the relevant time period, Kelly never claimed that he had checked his records to determine whether he had ever had a client who **lived** or **worked** in San Francisco. Hence, in this case there is no probative evidence in the record calling into question the veracity of any factual assertion in Doe's review.[4]

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[4] Indeed, Kelly's declaration says that he "regularly" handles federal litigation in California, Exhibit E, P00025 ¶ 5**,** and a search in the federal online docket system, PACER, reveals that plaintiff Kelly has handled a number of cases in the Northern District of California in which the presiding judges, including District Judge Seeborg, District Judge Alsup, and District Judge Chhabria, sat in the Northern District's San Francisco Courthouse. *E.g, Stewart v. Bank of*

But the First Amendment right to speak anonymously, as construed by binding precedent in this district, does not allow a plaintiff to compel the identification of an online critic in the hope that discovery will allow the plaintiff to show falsity. The plaintiff needs to present a prima facie case of falsity, and because Kelly did not present such a prima facie case below, the order enforcing the subpoena should be reversed.

B. Doe's Opinion that Kelly "Completely Bungled" Her Case, Like Her View That Kelly "Had No Idea What He's Doing," Is Not Actionable; Even Were They Actionable, There Is No Evidence That These Statements Were False.

Plainly, Doe was not satisfied with Kelly's legal services. A client is not required to be satisfied with a lawyer's services, and defamation law does not and should not bar a client from saying publicly that she was dissatisfied, even from saying in strong terms that she was dissatisfied. In this case, Doe did not recite any specific facts about what Kelly allegedly did wrong in the course of a case; false statements of fact about what Kelly did could certainly lead to a defamation claim. For example, had Doe said of Kelly that "he missed filing deadlines"; that "his briefs were bounced because they were always ten pages longer than allowed"; that "he showed up at hearings inebriated"; that "he called the judge names and insulted the

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America, No. 3:16-cv-05322 (JST); *Portillo v. Beyer Finan. Corp.*, 3:15-cv-04493 (RS); *Inigues v. Vantium Capital*, No. 3:13-cv-00037 (WHA). The Court can take judicial notice of these filings, which contradict the allegation in the complaint that Kelly has never handled cases in San Francisco, and hence further undermines Kelly's basis for alleging that Doe was never one of his clients.

jury publicly"; that "he filed a negligence case when my only claim was for breach of contract"; or that "he billed me $5000 for what turned out to have been only an hour's work"—these would all be deemed factual statements which, if false, could form the basis for a defamation claim.

But here the expression of dissatisfaction was entirely in vague, lay terms that simply reflect disgust: Doe's review said only that Kelly "completely botched" Doe's case and added, "Had no idea what he is doing." The fact that she expressed her opinions in strong terms does not transform her opinions into statements of fact. To the contrary, the strong language that she used represents rhetorical hyberbole, and a wealth of cases hold that expressions of dissatisfaction and criticism couched in strong language of epithets or rhetorical hyberbole cannot be made the subject of a defamation action. *Good Govt. Group of Seal Beach v. Superior Court* (Cal. 1978) 586 P.2d 572, 576; *Seelig v. Infinity Broad. Corp.* (Cal. App. 1st Dist. 2002) 119 Cal. Rptr. 2d 108, 116; *Ferlauto v. Hamsher* (Cal. App. 2d Dist. 1999) 88 Cal. Rptr. 2d 843, 850; *Morningstar, Inc. v. Superior Court* (Cal. App. 2d Dist. 1994) 29 Cal. Rptr. 2d 547, 553.

The court below decided that "completely bungled" and "had no idea what he's doing" were provable factual assertions that could form a basis for a libel claim because they implied professional misconduct on Kelly's part. P00143-P00144. But plaintiff Kelly did not argue below that these were factual assertions, and he

presented no evidence that these assertions were factually false. For this reason alone, granting the motion to compel on these grounds was error.

For example, language such as "bungled" has been treated as expressing hyperbole and opinion, not matters of fact that are provably false. For example, *Kirsch v. Jones*, 219 Ga. App. 50, 464 S.E.2d 4 (1995), held that a newspaper's characterization of a lawyer as having "bungled" was a mere expression of opinion and hyperbole that was not actionable; that holding was cited with approval by a Georgia federal district court in *Monge v. Madison County Record*, 802 F.Supp.2d 1327, 1335 (N.D. Ga. 2002), in the course of ruling that a newspaper report saying that a lawyer had "torpedoed" his client's case was similarly not actionable. Similar rulings denying plaintiffs the ability to sue over comparable language include *Magnusson v. New York Times Co.* (Okla. 2004) 98 P.3d 1070, 1076 (surgeon could not sue over statement that he "botched" operations); *Washington v. Smith* (D.D.C. 1995), 893 F. Supp. 60, 64, *aff'd* (D.C. Cir. 1996) 80 F.3d 555, 557 (coach could not sue sports columnist for citing the coach's supposed penchant to "screw things up"); *Corporate Training Unlimited v. National Broadcasting Co.* (E.D.N.Y.1994) 868 F.Supp. 501, 511 (statement that plaintiffs "screwed up my husband's life, screwed up my life, screwed up . . . the whole family's life" was not "statement of verifiable fact"); *Sandler v. Marconi Circuit Tech. Corp.* (E.D.N.Y.1993) 814 F.Supp. 263, 268 (saying plaintiff "screwed up" was just an expression of opinion, not defamation).

Similarly, in the court below, neither plaintiff's motion to compel nor his reply brief made any reference to Doe's statement "Has no idea what he's doing"; apart from the blocked quotation of the review, that language was not discussed at all in plaintiff's moving papers, or his reply papers. Nor, for that matter, did plaintiff furnish to the Superior Court any evidence that this statement was false – no evidence that he **did** have some idea what he was doing in representing Doe. For that reason alone, even if this language could properly be deemed a statement of fact rather that a hyberbolic opinion, it was error to compel identification of Doe on that ground.

Moreover, Kelly's decision not to argue below about the "has no idea" language was sound, in that a number of courts have refused to allow defamation claims to proceed against defendants for saying that a plaintiff "had no idea what he [was] doing." *See Clorite v. Somerset Access Television* (D. Mass. Sept. 20, 2016) 2016 WL 5334521, *6-7 (defendant's statement that "that person over there behind the one camera [(plaintiff)] doesn't know what he is doing" was "a[n] expression[] of opinion and . . . thus not actionable"); *Bethea v. Merchants Commercial Bank* (D.V.I. Sept. 8, 2014) 2014 WL 4413045, *19 (in saying "[y]ou don't know what you are doing on this loan," defendant was "clearly expressing his personal opinion"); *Lathrop v. Juneau & Assocs.*, 2005 WL 3797706, *9 (S.D. Ill. Apr. 25, 2005) ("[T]he statements that Plaintiff is 'not a very good builder' and 'does not know what he is

doing' are so vague that their truthfulness cannot be proven" and therefore are opinion).[5]

In addition, the context of Doe's statement militates in favor of a holding that these two characterizations are non-actionable opinion rather than provable or disprovable statements of fact—and context is consistently held to be a major factor in distinguishing between fact and opinion in evaluating allegedly defamatory meaning. Just as inclusion in the op-ed section of a newspaper signals to readers that they are more likely to be reading opinions than facts, *Brian v. Richardson* (N.Y. 1995) 87 N.Y.2d 46, 53, 660 N.E.2d 1126, this Court in *Summit Bank v. Rogers* (2012) 206 Cal. App.4th 669, 696–701, 142 Cal.Rptr.3d 40, as in other California cases, *e.g.*, *Krinsky*, 159 Cal. App.4th at 1162, 72 Cal. Rptr.3d at 1174-1175, as well as courts in other jurisdictions, *Ghanam v. Does* (Mich. App. 2014) 845 N.W.2d 128, 144; *Obsidian Fin. Group v. Cox* (D. Or. 2011) 812 F. Supp.2d 1220, 1223–1224, *aff'd* (9th Cir. 2014) 740 F.3d 1284; *Doe v. Cahill* (Del. 2005) 884 A.2d 451, 465, have recognized that Internet discussion forums lend themselves to hyperbole and exaggeration, hence affecting the way in which online readers perceive statements as more likely reflecting personal opinion than objective fact. *Sandals Resorts Int'l v. Google*, *Inc.* (N.Y. App. Div. 1st Dept. 2011) 925 N.Y.S.2d

[5] In *ZL Technologies*, one review included the assertion, "The CEO doesn't know what he is doing." *ZL Techs.*, 220 Cal. Rptr. 3d at 587. This Court did not identify that part of the review as stating actionable matters of fact on which plaintiff was entitled to present evidence of falsity on remand. *Id.* at 589.

407 ("readers give less credence to allegedly defamatory remarks published on the Internet"). Moreover, the brevity of the review, sandwiched between the opening "Do not do it" and the closing "Stay away!", and the absence of the subject in the sentence "Had no idea . . .," all mark these two criticisms as reflecting a hyperbolic expression of dissatisfaction with Kelly's services that cannot be the basis for a defamation case.

To be sure, Yelp reviews are not inherently expressions only of opinion; indeed, Yelp encourages its users to relate their experiences in factual terms reflecting personal experiences, and not to exaggerate; and it uses recommendation software and other programs to encourage the posting of high quality content and to steer readers away from content that may have lower value, Exhibit O, P00152-P00154, ¶¶ 18-21. But Doe's review, considering its language and its Internet context, should properly have been treated as expressing opinion rather than fact.

Indeed, at oral argument, the judge below suggested that he understood the phrase "completely bungled" as reflecting opinion, but that he was impelled in the direction of finding a provably false statement of fact by Doe's having gone on to say that his unhappiness with Kelly's representation was so strong that she felt she had to find another lawyer and pay that lawyer for what she had already paid Kelly to do. These additional statements are matters of fact, the judge reasoned, that are provably false.

But this represents a key error in the reasoning of the judge below, and a key basis for reversal, for two reasons.

First, if a libel defendant asserts opinions but also makes factual accusations, he can be sued over the factual accusations assuming that they are false; but he cannot be sued over the parts of his statement that are matters of opinion. Whether or not it is true that Doe hired a second lawyer and paid that lawyer, Doe cannot be found liable for defamation for expressing adverse opinions about Kelly. The judge was wrong, therefore, to conclude that coupling facts with the hyperbolic opinions made the opinions proper grist for defamation litigation.

Second, although, as noted above, whether Doe moved on to another lawyer after starting with Kelly, and whether Doe paid that other lawyer, are certainly matters of fact, and although, if false, perhaps they could provide some basis for Kelly's defamation claim, as argued above, Kelly neither **proved** that these factual assertions were false, nor presented any admissible evidence supporting a claim of falsity. Consequently. Kelly's motion to compel should have been denied under the legal standards of *Krinsky* and *ZL Technologies*.

III. The Court Should Not Follow Dictum from the Fourth District Case of *Yelp, Inc. v. Superior Court (Montagna)* to Hold That a Plaintiff Claiming Falsity Based Solely on the Contention That an Anonymous Reviewer Was Never a Customer Is Excused from Presenting Any Probative Evidence of Falsity.

The trial court's decision to compel identification of Doe rested heavily on

dictum from the Fourth Appellate District's decision in *Yelp, Inc. v. Superior Court (Montagna)* [Cal. App. 4th Dist. 2017] 17 Cal. App.5th 1, which enforced a subpoena to identify an anonymous reviewer who posted negative review about an accountant named Gregory Montagna. The *Montagna* decision is discussed at length on each of the three pages of the trial court's ruling, culminating in this language from the decision:

> Yelp cannot be allowed to defend against his discovery request by asserting he should not be entitled to information about the identity of its anonymous reviewer unless he can first demonstrate, with specificity, that the review does not accurately portray his actions in connection **with that particular client**—something he cannot do without first identifying the reviewer. Indeed, the assertion amounts to bootstrapping.
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> 17 Cal. App.5th at 19 (emphasis in original).

However, as explained below, the trial court failed to recognize the significant differences between the prima facie case mounted in *Montagna*, both with respect to the quantum of evidence or falsity and the nature of the falsity claim in that case, which was very different from the claim advanced by plaintiff Kelly in this case. Moreover, the language quoted above was only dictum, in that plaintiff Montagna presented specific evidence of falsity regarding other parts of the review in that case, and the Fourth District panel relied on that specific evidence in affirming the enforcement of that subpoena. Finally, although the Superior Court likely considered itself bound by the appellate ruling in *Montagna*, *Auto Equity Sales v. Superior Court* (Cal. 1962) 57 Cal.2d 450, 369 P.2d 937, 940 (Cal.

1962), this Court is not bound by decisions of a coordinate appellate district, and the Court should not follow *Montagna*'s dictum.

In *Montagna*, the Court was considering whether to enforce a subpoena to identify the author of the following review, who had used the pseudonym "Alex M.":

> Too bad there is no zero star option! I made the mistake of using them and had an absolute nightmare. Bill was way more than their quote; return was so sloppy I had another firm redo it and my return more than doubled. If you dare to complain get ready to be screamed at, verbally harassed and threatened with legal action. I chalked it up as a very expensive lesson, hope this spares someone else the same.
>
> 17 Cal. App.5th at 5.

Montagna filed suit against the author of this review, but he did not contend, as Kelly has alleged in this action, that the review was not written by a former client; rather, his contention was that the review had been written by a specific former client, Sandra Jo Nunis, who had refused to pay his bill and against whom he had had to file a collection action. He averred that the review was factually false in several significant respects –

(1) that Nunis had been quoted a price of $200 based on her representation that her income was exclusively W-2 wages, but that because her income was more complicated, she was charged $400; hence the clear implication that the upcharge was unfair was factually false;

(2) that the return prepared for Nunis was entirely clean and accurate; and

(3) that nobody in his office had screamed at, harassed or threatened her.

Id. at 17-18.

Yelp argued that certain other statements in the review had not been shown to be false, and the appellate panel responded that the assertion "fails for several reasons." *Id.* at 19, These included that Yelp's argument "focuses on only one aspect of Alex M.'s statement," *id.*; that Montagna had presented evidence tending to suggest both that the review was by Nunis, and that Nunis had made false statements about his work on her tax return, *id.*; and that Montagna had committed that, if the subpoenaed data revealed that the author was not Nunis and not her sock puppet, he would promptly dismiss the lawsuit. *Id.* at 20. The court concluded, "It is difficult to imagine what more Montagna could have reasonably done to justify the unveiling of his accuser." *Id.*

The facts of this case are very different. Kelly does not claim that he is seeking to identify a specific former customer; he insists that no customer would say this about him, and he is trying to find out **whether** the reviewer is some unnamed non-customer. Yet, as argued above, he has presented no probative evidence to support his wishful assumption that it was a non-customer who made such unflattering statements about him.

Moreover, extending the *Montagna* precedent to allow enforcement of subpoenas based on the theory that a critical reviewer might not have been an actual customer, and that, therefore, any criticism is necessarily false because those

things did not happen to the particular reviewer, would pose a serious threat to the ability of consumers to protect their constitutional right to speak anonymously. Many professionals and business owners are reluctant to believe that any of their real customers would criticize their products or their services, and many would like to protect their reputations by ensuring that no criticisms of them can be found online. The law should not make it too easy to identify anonymous critics by simply averring, in general terms, that the facts stated in the review do not "fit" any of the plaintiff's actual customers. At that level of generality, a court cannot make an independent assessment of whether there is, or is not, a prima facie case of falsity. And, if consumers know that their identities can be obtained too easily, the threat of disclosure will have a serious chilling effect on consumer speech.

IV. Kelly's Dishonest Actions in This Litigation Provide an Additional Reason to Deny Enforcement of His Subpoena.

In the court below, the Judge Pro Tem expressed his disapproval of the dishonest manner in which plaintiff Kelly had sought to suppress criticism by defendant Doe, first by lying to Doe about whether Kelly had obtained identifying information from Yelp, and then by attempting to rebut Yelp's criticism of his having bullied Doe into removing the January 2017 review by submitting a false declaration swearing that it was Yelp that removed the review for violating the Yelp Terms of Service, not Doe who removed the review after Kelly lied about

having obtained Doe's real name.[6] The Respondent Court said at the hearing that he shared the Judge Pro Tem's concerns; yet both judges were willing to enforce the subpoena. That conclusion was wrong for two reasons in addition to the arguments above.

First, in adopting the standard requiring plaintiffs to make both a legal and an evidentiary showing that they have valid claims on which there is a realistic chance of succeeding before they can compel the identification of an anonymous Internet speaker, even the earliest courts indicated that they were proceeding based on an assumption that the plaintiff had acted in good faith. *E.g.*, *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 767 (N.J. Super. App. Div. 2001); *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 579 (N.D. Cal. 1999). California cases such as *Krinsky* have held that a plaintiff's good faith is not enough, that more than good faith is required; but that should not mean that subpoenas should be enforced for plaintiffs who have been proceeding without good faith. A plaintiff who uses dishonest tactics to suppress reviews, as Kelly has done here, is not acting in good faith and ought to be denied access to the equitable remedy of discovery.

Second, Kelly's evident willingness to make false statements to achieve his goals, even in a sworn declaration, should undercut judicial willingness to accept his declarations as making true statements. Certainly, when the plaintiff's

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[6] In addition, it appears that his complaint falsely alleged that he has never handled cases "in" San Francisco. *See* page 26 n.4, *supra*.

declaration is phrased as generally as Kelly's declaration here, not directly explaining what facts in Doe's review were false, but simply contending, without any stated basis for personal knowledge, that the facts in the review do not match any real interactions with former clients, and where, as here, it appears that at least some of the allegations on which the claim of falsity was originally based are false, courts should not be quick to indulge any assumptions about whether plaintiff has made out the requisite prima facie case of falsity.

CONCLUSION

The Petition for a Writ of Mandamus, and the request for a stay pending appeal, should be granted.

July 29, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that this Petition contains 9,896 words, including footnotes and excluding tables, certificates and attachments, as counted by the word-processing program used to prepare this Petition.

Dated: July 29, 2019

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