Case No. S235968
In the Supreme Court of the State of California

DAWN HASSELL, et al.
Plaintiffs

v.

AVA BIRD
Defendant

and

YELP INC.
Non-Party Appellant

On Appeal of a Decision by the Court of Appeal
First Appellate District, Division Four, Case No. A143233

After a Decision by the Superior Court of the County of San Francisco
The Honorable Ernest H. Goldsmith, Case No. CGC-13-530525

AMICUS CURIAE BRIEF OF GOOGLE INC. IN SUPPORT OF YELP INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

MISCELLANEOUS

APPLICATION TO FILE BRIEF OF AMICUS CURIAE GOOGLE INC. IN SUPPORT OF YELP, INC.

Pursuant to Rule 8.520(f) of the California Rules of Court, Google Inc. applies for leave to file the accompanying amicus curiae brief in support of petitioner Yelp, Inc.

Google is an online service provider that operates one of the world's most popular search engines, along with other widely used online services (including YouTube and Blogger) that help users express themselves and gain access to information. Google hosts user-submitted content of all kinds, and its search engine publishes links to hundreds of billions of webpages that allow its users find what they are looking for across the Internet's vast expanse.

Given how it operates, Google has a substantial interest in the issues raised by this case. Every year, Google receives thousands of demands to remove allegedly defamatory (or other allegedly illegal) third-party material from its services. These demands frequently take the form of court orders like the one issued here—orders that purport to impose obligations directly on Google even though Google was not a party to the underlying case. Google relies on core principles of due process, the longstanding rules governing the scope of nonparty injunctions, and the immunity provided in Section 230 of the Communications Decency Act ("Section 230") to protect itself from such orders.

The rulings in this case fundamentally threaten those protections. In approving the injunction against Yelp, the courts below departed from established law and endorsed a clear end run around Section 230 that imposes greater obligations on online intermediaries as nonparties than they could face as named parties to a lawsuit. As a result, Google now faces the prospect of orders to remove content from its services

without any advance notice or opportunity to be heard, with the threat of contempt looming if it does not comply. The Court of Appeal's ruling already has been cited by litigants seeking to defend a sweeping blocking order, which purports to require Google to censor search results around the world and remove links to websites that have been deemed unlawful only in a single country. *See* Respondents' Factum ¶ 77, *Google Inc. v. Equustek Sols. Inc.*, File No. 36602 (S.C.R. Aug. 8, 2016) (Can.).

Google is familiar with the contents of the parties' briefs and believes its perspective will assist the Court in understanding why the injunction against Yelp in this case cannot stand. Google's brief focuses on the bedrock rules of due process and equity, which for decades have protected nonparties from overbroad court orders. Google submits this brief to explain the continuing importance of these principles for online intermediaries in cases involving information accessible through their services.

Dated: April 14, 2017

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
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BRIEF OF AMICUS CURIAE GOOGLE INC. IN SUPPORT OF YELP, INC.

Introduction & Summary of Argument

This case presents an exceptionally important issue for Google and many other online service providers whose platforms help hundreds of millions of people communicate on the Internet. By binding Yelp, a nonparty to the underlying action, to an injunction requiring it to remove user-created content from its service, the courts below created a dangerous precedent eroding established protections for online intermediaries.

Much of the discussion in other briefs in this case addresses Section 230, which provides broad immunity for service providers who publish or facilitate access to online content. Those protections are vital in ensuring that the Internet continues to be a medium for robust and open speech. Google agrees that Section 230 protects Yelp against the removal order and any finding of contempt liability.

But there is another, even more fundamental problem with the injunction at issue. Compelling Yelp to remove content from its service disregards longstanding rules of equity and due process that limit the circumstances in which court orders can bind nonparties. For over a century, it has been the law in this State that injunctions can apply *only* to the actual parties to a case and their close associates. To be properly bound by an injunction, a third-party must be legally identified with the party (an agent, employee, or servant) or must act "in concert" with the party as an "aider and abettor" of the party's violation of the order.

For good reason, these limitations are stringent. Injunctions are not vehicles for forcing nonparties to take affirmative action when they have only a loose or arm's-length relationship with an alleged

wrongdoer. Instead, only a nonparty that deliberately works "with or for" a party to subvert the injunction can be so bound. *People v. Conrad*, 55 Cal. App. 4th 896, 903 (1997). California's rules mirror those that exist nationwide, are expressly codified in the Federal Rules of Civil Procedure, and have repeatedly been endorsed, including to shield online service providers identically situated to Yelp. *See Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010).

Applying these protections is especially important here. Because of the sheer amount of information that they make accessible, online intermediaries such as Yelp and Google routinely find themselves facing demands to remove third-party material accessible through their services. Preserving the Internet's role as a vital medium for expression requires a careful balancing of the rights of speakers, users, service providers, and those who might be harmed by unlawful material. Congress structured that balance when enacting Section 230, affording broad protection to online service providers from claims arising from what their users post. Longstanding rules of equity and due process that limit injunctions to parties and their close affiliates are equally important to that balance. These principles ensure that *nonparty* intermediaries are not transformed into deputies, required under pain of contempt to censor material created by others.

The ruling below departed from these principles in two ways. First, it was improper to have named Yelp in the injunction in the first place. Before being included in the order, Yelp did not receive notice of the relevant proceedings. Nor were Yelp's interests effectively represented by any of the parties to the underlying litigation. Yelp is not an agent of its users; it is a distinct entity with its own identity and

concerns. Its only relationship to the defendant was as an online host of the defendant's content, the same role Yelp plays for millions of other users. For the court to have enjoined Yelp by name without an opportunity to be heard violates due process.

Second, there was no substantive basis for requiring Yelp to remove user-created material from its service. Because it was not a party to the underlying case or legally identified with one, Yelp could properly have been bound to an order only if, after the injunction issued, it acted "in concert" with the defendant to circumvent the court's order. Yelp did no such thing.

The decision to bind Yelp by the courts below disregarded established law limiting the scope of injunctions, including the Seventh Circuit's decision in *Blockowicz*, which is directly on point. The rulings also create significant operational concerns for online intermediaries, setting the stage for a new wave of nonparty injunctions against Google and other online services in California. This Court should reverse. It should make clear that online intermediaries cannot be enjoined as nonparties merely for hosting, publishing, or linking to third-party content and, similarly, that they do not act "in concert" with their users simply by declining to remove material that a court has found to be defamatory or otherwise unlawful. These holdings will keep California law consistent with its historical foundations, national practice, and constitutional mandates. They will also protect online service providers from being unjustifiably conscripted into censoring the Internet.

Google's Interest In This Case

On a regular basis, Google is presented with injunctions and other court orders like the one issued against Yelp here. Those orders, which

come from state and federal courts around the country, as well as from foreign jurisdictions, typically demand that certain user-generated material hosted on Google's services or accessible through its search engine should be removed.[1] In many cases, these orders identify Google by name or purport to bind it directly, even though Google is not a party in the underlying case and never received prior notice of the proceedings or an opportunity to be heard before the injunction issued. When that happens, Google typically has no insight into the underlying dispute or the means by which the order was procured, though it is not uncommon for Google to receive orders that seem aimed at quashing public commentary or debate.

In some instances, the orders that Google has received have turned out to be fake or fraudulent—while the orders appear real, they have not actually been issued by a court. In other cases, orders have been obtained against fictitious defendants who then quickly "agree" to a removal injunction being issued against them. These orders appear to be a tool to secure the removal of material without ever actually serving or notifying the actual creator of the content. An example of such an order (which was issued and later withdrawn by a federal district court) is attached as Exhibit 1.[2]

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[1] Google publishes information about the court orders and other legal demands it receives in a Transparency Report, accessible here: https://www.google.com/transparencyreport/removals/government/?hl=en.

[2] This scenario has been extensively reported in popular legal blogs. *See, e.g.*, Eugene Volokh & Paul Alan Levy, *Dozens of suspicious court cases, with missing defendants, aim at getting web pages taken down or deindexed*, The Washington Post, Oct. 10, 2016, https://www.washingtonpost.com/

(continued...)

With only narrow exceptions, Section 230 of the CDA immunizes Google from suits for claims involving third-party content that are brought directly against it. Indeed, courts have repeatedly rejected efforts to name Google as a party and seek relief directly against it for third-party material that is linked to from its search results or appears on its content-hosting platforms.[3] In an effort to evade this robust immunity, plaintiffs often resort to tactics like the one used here against Yelp. They seek an injunction—sometimes a preliminary injunction, other times a permanent injunction, sometimes following a default judgment—that purports to compel nonparties, like Yelp or Google, to remove third-party content from their services, even though they could not obtain such relief directly against such providers.

(...continued from previous page)
news/volokh-conspiracy/wp/2016/10/10/dozens-of-suspicious-court-cases-with-missing-defendants-aim-at-getting-web-pages-taken-down-or-deindexed/?utm_term=.3521d2a362ed (discussing a pattern of cases where permanent injunctions to remove content were obtained using apparently fictitious defendants); Tim Cushing, *The Latest In Reputation Management: Bogus Defamation Suits From Bogus Companies Against Bogus Defendants*, Techdirt.com (Mar. 31, 2016, 8:31 AM), https://www.techdirt.com/articles/20160322/10260033981/latest-%20reputation-management-bogus-defamation-suits-bogus-companies-against-bogus-defendants.shtml (discussing multiple cases filed in Contra Costa County Superior Court in which apparently fictitious defendants purportedly "admitted" defamation and agreed to a permanent injunction).

[3] *See, e.g.*, *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (applying CDA to defamation claims arising from Google search results); *Obado v. Magedson*, 612 F. App'x 90 (3d Cir. 2015) (same); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (dismissing claims based on content of Google's "Sponsored Link" advertisements); *Kabbaj v. Google Inc.*, No. 13-1522-RGA, 2014 U.S. Dist. LEXIS 47425, at *12 (D. Del. Apr. 7, 2014) (dismissing claims premised on Google hosting third-party information), *aff'd*, 592 F. App'x 74 (3d Cir. 2015).

Because Google is seldom given a chance to object to these orders before they issue, courts may not be appraised of the legal limitations on enjoining nonparties, and they will sometimes endorse the plaintiff's *ex parte* demand to include Google and other nonparty intermediaries within the scope of an injunction. Once that happens, the order is then sent to Google as a *fait accompli*, with a threat of contempt if it fails to remove the content at issue.

Such orders come from foreign courts as well. In some instances, the orders are remarkably broad. Foreign courts have, for example, tried to order Google to remove information from its search results on a global basis, so that the ruling of a single court in one nation can operate to censor what people all over the world can see or find. *See, e.g.*, *Equustek Sols. Inc. v. Google Inc.*, 2015 BCCA 265, ¶ 107 (Ct. of App. British Columbia 2015) (Can.) (granting injunction with "worldwide effect"). In defending a worldwide blocking order in the Supreme Court of Canada, the plaintiff is expressly relying on the Court of Appeal's ruling in this case as demonstrating the propriety of Canadian courts extraterritorially enjoining Google (as a nonparty) from making search results available even to users in the United States. Respondents' Factum ¶ 77, *Google Inc. v. Equustek Sols.*, File No. 36602 (S.C.R. Aug. 8, 2016) (Can.).

Google regularly challenges orders that seek to enjoin it even though it is not a party to the underlying suit by invoking principles of equity and due process, as well as its immunity under Section 230. These rules have long made clear that nonparty injunctions purporting to compel Google to remove content posted by its users or accessible through its search engine are improper. By appealing to these principles,

Google has generally been able to effectively defeat efforts to compel the removal of third-party content through overbroad court orders.

Google does, however, have a set of internal policies whereby it may remove material that a court has determined to be unlawful if the order does not purport to bind Google directly. These policies provide a robust mechanism for people harmed by material that may appear on or through Google's services. But U.S. law has always protected Google from being *required* to comply with orders in cases where it is not a party and is not taking active steps to aid and abet an actual party's violation of the injunction. This limitation on the scope of nonparty court orders allows Google to exercise discretion in deciding whether to remove speech from its services, just as Congress intended in Section 230.

The ruling below threatens these protections, with significant consequences for online speech. Allowing injunctions to issue directly against nonparty service providers, and threatening them with contempt for failing to remove content, would make it perilous for intermediaries to resist even the most questionable court orders. Service providers might end up removing postings that were never actually found to be unlawful or where even the creator of the content was never properly notified of the action. Preventing such results is one of the reasons Congress enacted Section 230: "Without § 230, persons who perceive themselves as the objects of unwelcome speech on the Internet could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). And it is also what the equitable and due process

limits on enjoining nonparties have longed worked to prevent.

As we now explain, the proper application of those rules protects Yelp, Google, and other online service providers from injunctions like the one issued here.

Argument

I. Equity and Due Process Prohibit Injunctions From Binding Nonparties Not Closely or Actively Affiliated With A Party

A. Historical Rulings Limit The Application of Injunctions To Nonparties

Basic principles of due process limit the power of courts to bind nonparties, those who are, effectively, "strangers to the litigation" (*Philip Morris USA, Inc. v. Williams*, 549 U.S. 346, 353 (2007)). *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917) ("The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice." (internal citations omitted)).

As this Court has explained: "It is the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding, and any judgment which does so is void to that extent." *In re Wren*, 48 Cal. 2d 159, 163 (1957); *see also Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 180 (1973) ("'There will be no adjudication of liability against a [non-party] without affording [it] a full opportunity at a hearing, after adequate notice, to present evidence . . . .'" (alteration in

original) (citation omitted)); *Envtl. Coal. of Orange Cty., Inc. v. Local Agency Formation Comm'n*, 110 Cal. App. 3d 164 (1980) ("A judgment cannot be rendered against one who is not a party to an action.").

These principles apply to injunctions. "It is well established that injunctions are not effective against the world at large." *People ex rel. Gwinn v. Kothari*, 83 Cal. App. 4th 759, 765 (2000). In 1897, for example, the U.S. Supreme Court invalidated an injunction "because it enjoins persons not parties to the suit," "we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction." *Scott v. Donald*, 165 U.S. 107, 117 (1897). In Learned Hand's words:

> [N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930); *accord Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945) ("The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.").

Equity allows only a very limited exception to this rule. In narrow circumstances, an injunction can run or be enforced against a nonparty. A century ago, this Court described this exception:

> Ordinarily only the parties to an action and their successors are bound by a judgment given in an action *inter partes*. In matters of injunction, however, it has been a common practice to make the injunction run also to classes of

> persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abetters, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment.

Berger v. Superior Court, 175 Cal. 719, 720-21 (1917) (overturning contempt finding against individual who was not affiliated with the defendants and was "not acting in concert with any of them").

Berger approvingly cited the New York Court of Appeal's decision in *Rigas v. Livingston*, 178 N.Y. 20 (1904), which offered a more precise account of when an injunction can extend to nonparties: "persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in collusion or combination with them." *Id.* at 24. In other words, "to make a person not a party to the action liable for disobeying an injunction the person should bear such a relation to the defendant *as enables the latter to control his action.*" *Id.* at 25 (emphasis added). In the absence of such collusion or control, a nonparty "is not guilty of of a breach of injunction by exercising a right which belonged to him before the suit." *Id.* (quoting 2 High on Injunctions 1112, § 1435 (3d ed.).

Leading federal authorities from this period echo these same limitations. In *Chase National Bank v. City of Norwalk*, the Supreme Court explained that "persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act *if their relation is that of associate or confederate.*" 291 U.S. 431, 436-37 (1934) (emphasis added). Learned Hand put the point in similar terms:

> [T]he only occasion when a person not a party may be

> punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. *This means that the respondent must either abet the defendant, or must be legally identified with him.*

Alemite, 42 F.2d at 832-33 (emphasis added).

These cases are clear: only nonparties who are either legally identified with a named party (an agent, employee, or servant) or who work in "active concert" with the enjoined party to assist in a violation of a court order may be properly bound by an injunction, or held in contempt for violating it. From being historical accidents, these rules ensure that injunctions remain properly confined by the rules of equity and the overarching mandates of due process. *See id.* at 833. They are why courts consistently reject contempt citations against nonparties who had not actively confederated with the defendant. *See, e.g.*, *Berger*, 175 Cal. at 720 (overturning contempt finding against one who "was an absolute stranger to the proceedings, having no connection, direct or indirect, with any of the parties, and not acting in concert with any of them"); *Scott*, 165 U.S. at 117 ("This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties.").

B. Modern Cases Carry Forward Traditional Limitations On The Scope Of Injunctions Against Nonparties

Courts in this State and around the country have consistently applied these principles in more recent cases, further fleshing out the circumstances under which a nonparty can be deemed to be acting "in concert" with a party such that it can be enjoined or held in contempt. The rules developed in these cases are strict. They make clear that Yelp, and similarly situated online service providers, do not aid and abet

violations of an injunction simply by virtue of providing the platforms for user speech or making third-party content available via the Internet. Such intermediaries cannot properly be bound by nonparty injunctions.

California Cases. Two leading Court of Appeal cases confirm that neither a common purpose nor a routine contractual relationship is enough to bind a nonparty to an injunction.

People v. Conrad involved an injunction that prohibited certain individuals and organizations from picketing in front of an abortion clinic. The injunction also applied to "their agents, representatives, employees and members, and each of them, and each and every person acting at the direction of or in combination or in concert with defendants." *Conrad*, 55 Cal. App. 4th at 899 (citation omitted). Various individuals not expressly named in the injunction, and who were not members of the enjoined organization, were held in contempt after protesting. The Court of Appeal threw out these convictions. It held that "[m]ere 'mutuality of purpose'" between a party and a nonparty "is not enough" to bring the nonparty within the injunction's scope. *Id.* at 903. Instead, the enjoined party must "be demonstrably implicated in the nonparty's activity." *Id.* That means that the nonparty is subject to contempt only "when, with knowledge of the injunction, the nonparty violates its terms *with or for* those who are restrained." *Id.* Under this standard, even though the nonparty protesters knew of the injunction and came to the clinic "specifically to do what the enjoined parties could not," it was improper to hold them in contempt. *Id.* at 903-04; *see also Planned Parenthood Golden Gate v. Garibaldi*, 107 Cal. App. 4th 345, 355 (2003) (affirming the "with or for" standard and invalidating injunction insofar as it applied to anyone with "actual notice").

Similarly, in *People ex rel. Gwinn v. Kothari*, the Court of Appeal held that a public nuisance injunction barring the owners of a motel from allowing certain activities on the premises could not be applied to bind future owners of the property. The court explained that "an injunction is binding only on the parties to an action or those acting in concert with them, and an arm's-length bona fide purchaser is not in this group." 83 Cal. App. 4th at 766-67, 769. In other words, a nonparty who merely engaged in a transaction with a party regarding the property in question is not properly subject to an injunction under established rules of equity and due process. "'The courts . . . may not grant an . . . injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.'" *Id.* at 769 (alterations in original) (quoting *Regal Knitwear*, 324 U.S. at 13).

Federal Cases. California law limiting the scope of injunctions against nonparties is entirely consistent with federal law. The Federal Rules of Civil Procedures restrict injunctions to the parties, their officers, agents, servants, employees, and attorneys, and "other persons who are in active concert or participation." Fed. R. Civ. P. 65(d)(2); *accord Conrad*, 55 Cal. App. 4th at 903 (relying on Rule 65 in describing permissible scope of an injunction); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1124 (1997) (same). Under that standard, a nonparty must have a "close alliance with the enjoined defendant" before it can be bound. *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000).

"The courts have interpreted the language in question . . . as requiring that a person either be 'legally identified with' a party in the case or 'aid and abet' the party to violate a decree." *NBA Props., Inc. v.*

Gold, 895 F.2d 30, 32-33 (1st Cir. 1990) (Breyer, J.) (citation omitted); *accord Herrlein v. Kanakis*, 526 F.2d 252, 254 (7th Cir. 1975) ("The cases interpreting the rule have held nonparties other than officers, agents, servants, employees, and attorneys of parties liable under injunctions when the nonparty has aided or abetted a party in the violation of the injunction."). If the nonparty is not "legally identified" with the party, it can be bound only where it "participated in the contumacious act of a party." *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 35 (1st Cir. 1980).[4]

Federal courts regularly invalidate injunctions where these requirements are not met. For example:

- *Doctor's Assocs. v. Reinert & Duree, P.C.*, 191 F.3d 297 (2d Cir. 1999). The Second Circuit invalidated an injunction that "bars the nonparty appellants from prosecuting lawsuits that do not aid or abet the federal defendants in violating the injunctions entered against them." *Id.* at 303. The fact that the nonparties and the parties "shared the same interests and attorneys" was not enough to bind the nonparties to the injunction. *Id.* at 304-05.

- *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 25 F. Supp. 2d 372 (S.D.N.Y. 1998). The court held that an injunction prohibiting a publisher from selling or distributing an infringing book could not be

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[4] The "legally identified" prong applies only where the technical nonparty is a legal alter ego of the party, such that an order binding the party operates as a matter of law to bind the nonparty. The classic example would be where the nonparty is an agent, employee, or legal representative of the enjoined party. *See generally Nat'l Spiritual Assembly of the Baha'is of the U.S. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Baha'is of the U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010).

applied to nonparty retailers and distributors who purchased the book from the publisher before the injunction issued. Those nonparties' actions were independent of the publisher and thus were not in "in active concert." *Id.* at 374-75.

- *ONE11 Imps. Inc. v. NuOp LLC*, No. 16-CV-7197 (JPO), 2016 U.S. Dist. LEXIS 175160 (S.D.N.Y. Dec. 19, 2016). The court similarly refused to extend an injunction barring a party from selling or distributing infringing products to nonparty retailers: "Without evidence that the relationship between NuOp and the nonparty retailers is 'anything but an arm's length transaction involving totally distinct entities,' the Court's preliminary injunction Order does not purport to bind and is not binding on nonparty retailers and/or distributors." *Id.* at *5 (citation omitted).

Like the California decisions discussed above, these cases make clear that nonparties who act independently of the named defendant are not aiders and abettors and cannot be bound by an injunction.

Blockowicz. The case most directly on point is the Seventh Circuit's ruling in *Blockowicz v. Williams*, which involved a defamation claim against someone who posted a review on an online service. The court entered a default judgment and an injunction ordering the review removed. The defendant (the party that allegedly created the review as issue) did not respond, so the plaintiffs served the injunction on various online intermediaries, including Ripoff Report, the website hosting the material. After Ripoff Report declined to comply with the removal order, Plaintiffs asked the court to hold the website and its manager in contempt. The district court held that it lacked the authority to extend the injunction to Ripoff Report, and the Seventh Circuit agreed.

The court first explained that establishing "active concert" requires the plaintiff to prove that the nonparty is aiding or abetting the defendant in violating the injunction. *Blockowicz*, 630 F.3d at 567. And that requires looking at the non-party's *post-injunction* conduct. "A non-party who engages in conduct before an injunction is imposed cannot have 'actual notice' of the injunction at the time of their relevant conduct." *Id.* at 568. Any other result "would be inconsistent with the purpose of Rule 65(d)(2)(C), which is to prevent defendants from rendering injunctions void by carrying out prohibited acts through third parties who were not parties to the original proceeding." *Id.* For that reason, the mere fact that the Ripoff Report had entered into a terms of service agreement with the defendant before the defamatory review was posted could not, as a matter of law, be a basis for applying the injunction to Ripoff Report.

Focusing on the period *after* the injunction was issued, the Seventh Circuit explained that Ripoff Report had done nothing other than continuing to host the defamatory material, and that was not enough. Ripoff Report had no contact with the defendants and did not work in concert with them to help them evade the injunction. The court made clear that "the fact that [Ripoff Report] is technologically capable of removing the postings does not render its failure to do so aiding and abetting." *Id.* Equally unavailing was that Ripoff Report had declined to enforce its terms of service (which prohibit defamation) against the defendant, because "mere inactivity" in the face of a court order is "simply inadequate to render" nonparties as "aiders and abettors in violating the injunction." *Id.* at 568. *Accord Beutler v. Doe (In re)*, No. CL-2015-13256, 2016 Va. Cir. LEXIS 137, at *20 (Va. Cir. Ct. Aug. 16,

2016) (citing *Blockowicz* in observing that "mere inactivity on the part of a non-party registry or web hosting service does not constitute aiding and abetting the violation of an injunction").

C. The "In Concert" Standard Is Strictly Limited To Nonparties Who Intentionally Aid and Abet A Party In Evading A Court Order

These authorities firmly establish that unless a nonparty is "legally identified" with a party, the only possible basis for enjoining it would be if it acted "in concert" with the defendant, that is an aider and abettor of the defendant's violation of the injunction. Because it is a departure from the basic rule that nonparties cannot be bound by a judgment, this "in concert" requirement is necessarily stringent. The case law discussed above reveals several core principles limiting when a nonparty can be enjoined under this standard:

- ***The nonparty's actions must have allowed the actual party to circumvent the injunction***. Courts cannot bind nonparties for their own sake: the purpose of the "in concert" rule is merely to prevent a defendant from playing "jurisdictional shell games" by working together with closely affiliated nonparties to evade an injunction. *Kothari*, 83 Cal. App. 4th at 765; *see also Regal Knitwear*, 324 U.S. at 14 (nonparty must be subject to the control of the defendant in order to be bound by an injunction); *Alemite*, 42 F.2d at 833 ("it is not the act described which the decree may forbid, but only that act when the defendant does it").

- ***A very tight relationship is required between the nonparty and the party.*** The standard requires a "close alliance" (*Microsystems Software*, 226 F.3d at 43), such that the nonparty is actually acting "with or for" the party (*Conrad*, 55 Cal. App. 4th at 903). Mere "mutuality of purpose is not enough" (*id.*), nor is the fact that party and

the nonparty are affiliated in some general sense (*Doctor's Assocs.*, 191 F.3d at 304-05), or have an arms'-length agreement (*Kothari*, 83 Cal. App. 4th at 766-67). Instead, contempt can be imposed against the nonparty only where it actually "participated in the contumacious act of a party." *Merriam*, 639 F.2d at 35; *accord Microsystems Software*, 226 F.3d at 43 ("[a] nonparty who has acted independently of the enjoined defendant will not be bound by the injunction").

- ***The nonparty must act with intent to help the party violate the injunction.*** The standard for aiding and abetting requires the actor "to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." *Howard v. Superior Court*, 2 Cal. App. 4th 745, 749 (2d Dist. 1992); *see also Gerard v. Ross*, 204 Cal. App. 3d 968, 983 (2d Dist. 1988) ("A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort."); *Resolution Trust Corp. v. Rowe*, No. C 90-20114 BAC, 1993 U.S. Dist. LEXIS 1497, at *13 (N.D. Cal. Feb. 8, 1993) ("Under California law, actual knowledge and intent are required to impose aiding and abetting liability."). It is not enough that the nonparty knew about the injunction and the defendant's violation of it. *Accord Blockowicz*, 630 F.3d at 568.

- ***The nonparty can only be held in contempt for concerted action taken <u>after</u> the injunction was entered.*** The "in concert" requirement includes "knowledge of the injunction" (*Conrad*, 55 Cal. 4th at 903), so the analysis necessarily focuses on the relationship between the party and the nonparty *after* the injunction issues. "Actions that aid and abet in violating the injunction must occur after the

injunction is imposed for the purposes of Rule 65(d)(2)(C), and certainly after the wrongdoing that led to the injunction occurred." *Blockowicz*, 630 F.3d at 568; *see also Merriam*, 639 F.2d at 35 (a nonparty "can be found to be in contempt only if in active concert or participation with a party in *postinjunction activity*" (emphasis added)).

- ***The "in concert" standard requires affirmative action by the nonparty, particularly in the context of online service providers.*** Finally, inaction or a refusal to act is not enough. *Blockowicz*, 630 F.3d at 568-69 (nonparties' "mere inactivity is simply inadequate to render them aiders and abettors in violating the injunction"). *Blockowicz* stands for the proposition that where an online service provider simply declines to take action called for by the court order—such as leaving content up, not removing information from its search results, or otherwise continuing to provide a general service to a party—that is not the kind of close concerted action required to subject it to contempt.

II. Binding Nonparty Service Providers To Injunctions Requiring Them to Remove Third-Party Content Violates Established Rules of Equity and Due Process

The lower court rulings in this case departed from these principles. In binding Yelp by name to the injunction, even though it was not a party to the case, and requiring it on pain of contempt to remove third-party content on its service, the courts below exceeded what equity and due process allow. Reaching this dangerous result involved two fundamental errors that this Court should correct.

A. Naming Yelp In The Injunction Without Prior Notice Violated Due Process

First, Yelp never should have been named in the injunction. Even though Yelp was not a party to the case, the injunction specifically

commanded it to act: "Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names 'Birdzeye B.' and 'J.D.' attached hereto as Exhibit A and any subsequent comments of these reviewers within 7 business days of the date of the court's order."[5] At the time this command issued, however, Yelp had not been given notice of the proposed injunction or an opportunity to be heard. Binding a nonparty to an injunction under those circumstances violated due process.

"The central reason that one who is not a party to the action in which the injunction was issued cannot be bound by it is that he has not had his day in court with respect to the validity of the injunction." *Merriam*, 639 F.2d at 37. This "day in court" requirement is a fundamental aspect of due process. *See Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996) (observing that binding nonparties runs against the "deep-rooted historic tradition that everyone should have his own day in court" (citation omitted)). This is why courts have always insisted on careful limits on who can be named in an injunction. As explained above, the only nonparties that can be bound by an injunction are those legally identified with the defendant or those acting "in concert" with it.

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[5] The Court of Appeal suggested that the removal order was somehow not an "injunction against Yelp" and that it did not "impose any independent restraint on Yelp's autonomy." *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1354 (2016). That cannot be squared with the plain language of the injunction, which expressly requires Yelp to remove content from its service. That directly restrains Yelp's autonomy by compelling to take action that it otherwise would not. In any event, these semantics are irrelevant. No matter how the order is styled ("injunction" or "removal order"), due process requires notice and an opportunity to be heard before Yelp can be bound, and any court order forcing Yelp to take down third-party content exceeds what equity allows.

And while an injunction may generally apply to those categories of entities, to expressly name a *particular* nonparty in the text the injunction is a very different matter. Before that step is taken by any court exercising its equitable powers, due process requires advance notice to the nonparty: "whether a particular person or firm is among the 'parties' officers, agents, servants, employees, and attorneys; [or] other persons in active concert or participation with' them is a decision that *may be made only after the person in question is given notice and an opportunity to be heard*." *Lake Shore Asset Mgmt. v. C.F.T.C.*, 511 F.3d 762, 767 (7th Cir. 2007) (internal citation omitted) (emphasis added).[6]

That did not happen here. Before it included Yelp in the injunction, the Superior Court made no finding that Yelp was acting "in concert" with Bird or that they had any sort of legal affiliation. And the Court certainly did not give Yelp any notice that it might be named or any chance to be heard on the issue prior to the entry of the injunction. Binding Yelp by name in the removal order therefore was improper. *See*

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[6] The only circumstance where due process permits a nonparty to be bound without prior notice is where that nonparty has such a close legal relationship with an actual party that the party effectively represented the interests of the nonparty in the proceeding (a concept often referred to as "privity"). *See Regal Knitware*, 324 U.S. at 14. "When privity is invoked as a basis for binding a nonparty to an injunction, it is 'restricted to persons so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding.'" *Nat'l Spiritual Assembly*, 628 F.3d at 849 (citation omitted); *accord Microsystems Software*, 226 F.3d at 43. That was not the case here. Yelp was not an agent, servant, employee, or other legal alter ego of the defendant. Someone who uses an online service to post content does not thereby establish a representational relationship with the service provider or gain the ability to bind the provider in legal proceedings.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112 (1969) ("It was error to enter the injunction against Hazeltine, without having made this determination [of concert or participation] in a proceeding to which Hazeltine was a party.").

Courts in similar cases—including cases involving Google—have vacated orders issued in violation of this core due process principle. In *Google Inc. v. Expunction Order*, 441 S.W.3d 644 (Tex. Ct. App. 2014), for example, the Texas Court of Appeals held than an ex parte order requiring Google to expunge certain disciplinary records violated Google's due process rights: "Google was never named as a party to the suit, was never served with process, never waived or accepted process, and never made an appearance in the suit before the expunction order was entered. Nothing in the record establishes that Google stands in privity to the [actual parties]. Accordingly, we hold that Google was not a party to the suit and that the trial court lacked jurisdiction to enter orders against Google." *Id.* at 647. The injunction issued here is void for the same reason.

The violation of Yelp's due process rights is particularly egregious because the plaintiff could not have obtained injunctive relief directly against Yelp if it had actually been named as a party and afforded corresponding procedural protections. Section 230 bars claims against interactive computer service providers like Yelp and Google based on information originating with their users, including claims for injunctive relief. *See Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 780-81 (1st Dist. 2001); *accord Kabbaj*, 2014 U.S. Dist. LEXIS 47425, at *13; *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 U.S. Dist. LEXIS 145380, at *21 (C.D. Cal. May 4, 2011). Congress thus

made a policy decision to categorically protect Yelp and other service providers from claims such as these. Yelp was a stranger to this litigation not by happenstance, but because Plaintiff apparently made a strategic choice to try to evade that immunity, recognizing that it never could have obtained an injunction against Yelp if had been a party. It cannot be that Yelp can be bound by an injunction as a nonparty—and required to do exactly what Section 230 is intended to prevent (*Zeran*, 129 F.3d at 331-34)—without any prior notice. Due process does not allow this endrun around federal immunity.

B. Yelp Cannot Be Bound By The Injunction Because It Did Not Act "In Concert" With The Defendant To Violate It

There is another fundamental problem with the order: Yelp is not among the category of nonparties that can properly be bound to the injunction or faced with contempt for violating it. Following the lead of the Seventh Circuit in *Blockowicz*, this Court should reject the ruling below and confirm that online intermediaries do not act "in concert" with their users simply by not taking any action to remove or disable third-party content posted on their online platforms.

1. Online Service Providers Like Yelp and Google Do Not Act "In Concert" With Users By Failing to Remove Content

The relationship between Yelp and its users, as is typical for online hosting platforms, is an arms-length one based on a standardized terms of service agreement. But the mere existence of a contractual relationship does not render a service provider a legal alter ego of its users (*accord NBA Props.*, 895 F.2d at 33 (franchisee not legally identified with franchisor)), nor establish that the two entities act "in concert."

What is more, any agreement here was entered into *before* the injunction issued (indeed, before the case was even filed) so there is no basis for concluding that Yelp contracted with Bird in order to help her violate that order. *See Blockowicz*, 630 F.3d at 569 (explaining that Ripoff Report's "only act, entering into a contract with the defendants, occurred long before the injunction was issued").

Focusing on the period following the injunction, it is clear that Yelp did not act with the purpose of helping Bird evade the injunction. There is no evidence that Yelp "had any contact with the defendant[] after the injunction was issued" (*id.* at 568) or engaged in any concerted action with Bird. Yelp did nothing to prevent Bird from taking the defamatory postings down herself or that helped her evade personal obligations under injunction. And mere inactivity in the face of an injunction is not enough. As *Blockowicz* makes clear, a service provider's "failure to take down the statements does not indicate that [it has] taken any action since the injunction was issued." *Id.* at 569; *see also NBA Props.*, 895 F.2d at 33 ("positive action" required for aiding and abetting). Simply put, there was no basis for finding that Yelp, with knowledge of the injunction, violated its terms "with or for" the defendant. *Conrad*, 55 Cal. App. 4th at 903.

This rule applies with special force in cases precisely like this. That is because, as discussed, federal law already codifies the nature of the relationship between online intermediaries, on the one hand, and the third-parties responsible for creating defamatory content on the platforms operated by online intermediaries, on the other:

> Section 230 marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others. "Absent §

> 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement." Congress, however, decided to treat the Internet differently.

Jones, 755 F.3d at 407 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003)). By enacting Section 230, Congress thus affirmatively decided that online intermediaries do *not* act "in concert" with their users in any legally relevant sense by continuing to publish or distribute their content, even after being told that it is defamatory. *Zeran*, 129 F.3d at 330-34 (AOL immune even though it "unreasonably delayed in removing defamatory messages"); *Jones*, 755 F.3d at 416 ("decision not to remove the posts" fully protected under Section 230). Because of Section 230, service providers cannot be deemed aiders and abettors of their users' conduct when they engage in the "traditional editorial functions" that the statute protects—including declining to remove user-created material. *Zeran*, 129 F.3d at 330.

To hold otherwise would bring about the very result that Section 230 seeks to prevent: where service providers,"[f]aced with potential liability for each message republished by their services," are forced to take down content or face legal consequences. *Zeran*, 129 F.3d at 330-31. It would be an absurd result for a nonparty to be bound by an injunction (and subject to possible contempt) based on conduct for which Congress immunized it from being sued as a party. And established principles of equity and due process foreclose that result here.

C. The Courts Below Fundamentally Misapplied Established Principles Limiting The Scope of Nonparty Injunctions

In applying the injunction to Yelp, the Court of Appeal disregarded established authority limiting the scope of nonparty injunctions. As an initial matter, the court ignored the due process violation that occurred when Yelp was named in the injunction without notice. That alone is reversible error—it was improper to include Yelp by name in the court order without affording it any prior chance to be heard on that issue.

Beyond that, the only justification the court gave for allowing Yelp to be bound was that "our Supreme Court has explicitly confirmed that injunctions can be applied to nonparties in appropriate circumstances." *Hassell*, 247 Cal. App. 4th at 1355 (citing *Ross v. Superior Court*, 19 Cal. 3d 899, 906 (1977)). But the question here is whether this case involves one of the narrow set of "appropriate circumstances" in which it is permissible to apply an injunction to a nonparty. The court did not engage in that analysis. It did not discuss whether Yelp was actually among the "classes of persons through whom the enjoined party may act." *Ross*, 19 Cal. 3d at 906. Without that, there was no basis for including Yelp within the terms of the injunction.

The Court of Appeal then compounded these mistakes by concluding that because Yelp had been specifically named in the injunction, there was no need to address whether it had actually aided and abetted Bird's violation of the order. According to the court, the aiding and abetting issue "has no bearing on the question whether the trial court was without power to issue the removal order in the first instance." *Hassell*, 247 Cal. App. 4th at 1357. But that is not the law. As

discussed above, there are only two possible grounds for binding a nonparty to an injunction. The first—where the nonparty is "legally identified" with the party—plainly does not exist here. The second is the issue that the Court of Appeal sidestepped: where the nonparty is an aider and abettor of the party's violation. Far from having "no bearing" on whether Yelp could be bound by the injunction, this is the essential question that must be addressed in making that determination. The court's failure to do so requires reversal.

That is especially so given the looming threat of contempt. While the Court of Appeal purported to avoid addressing that issue (*id.* at 1354), its determination that Yelp was properly named in the injunction exposes the company, and similarly situated online intermediaries, to contempt based simply on a decision not to remove content as directed by the injunction, and irrespective of Section 230 (*id.* at 1365). That is impermissible. "In order to hold a nonparty in contempt, a court first must determine that she was in active concert or participation with the party specifically enjoined (typically, the named defendant)." *Microsystems Software*, 226 F.3d at 43; *see also Zenith Radio*, 395 U.S. at 112 ("a nonparty with notice cannot be held in contempt until shown to be in concert or participation"). There is nothing like that here. As shown above, a nonparty online intermediary's inaction in the face of an order to remove third-party content is not enough to hold it in contempt. *Blockowicz*, 630 F.3d at 568.

Conclusion

Established principles of equity and due process—reinforced by the overarching mandate of Section 230—impose strict limits on nonparty injunctions purporting to require online service providers to

censor their platforms by removing or rendering inaccessible user content. Under those principles, Yelp should never have been bound by the injunction in this case. Instead, this Court should make clear: (1) that due process forbids nonparties from being named in injunctions without prior notice and opportunity to be heard; (2) that acting "in concert" requires more than the ordinary relationship of online intermediaries and their users; and (3) that online service providers do not aid and abet their users' violations by declining to remove their content in response to an injunction. Confirming these principles will keep California law consistent with its historical foundations, established authority from this State and around the country, and the requirements of federal law.

Dated: April 14, 2017

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: *s/ David H. Kramer*

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, the undersigned counsel for Google Inc. certifies that this brief contains 8,222 words, excluding portions of the brief exempted by Rule 8.520(c)(3).

Dated: April 14, 2017 By: *s/ David H. Kramer*
David H. Kramer

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRADLEY SMITH, an indivudal Plaintiff Pro Se, vs. DEBORAH GARCIA, Defendants.	C.A. NO.

ORDER GRANTING CONSENT MOTION
FOR INJUNCTION AND FINAL JUDGMENT

The parties having filed a Consent Motion for Injunction and Final Judgment, and therefore, good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

The Court finds that Defendant Deborah Garcia ("Defendant") posted false and defamatory statements about Plaintiff Brad Smith ("Plaintiff") on the following webpage(s): https://getoutofdebt.org/86646/reader-raises-concerns-about-financial-rescue-llc-and-success-linkprocessing-llc-by-consumer https://getoutofdebt.org/46403/my-parents-were-contacted-by-debt-relief-centers-of-america-sharron (the "Defamation").

1. The Defamation is not otherwise protected by the First Amendment.

2. Defendant shall remove the Defamation.

3. If the Defendant cannot remove the Defamation from the Internet, the Plaintiff shall submit this Order to Google, Yahoo, Bing, or any other Internet search engine so that the link can be removed from their search results pursuant to their existing policies concerning de-indexing of defamatory material.

4. Upon entry of this Order, this matter shall be closed.

DATED this 22nd day of April, 2016

W Smith

APPROVED AS TO
FORM AND CONTENT

Deborah Garcia
1588 Main Street
Warwick, RI 02893
Pro Per Defendant

Brad Smith
2101 Business Center Drive
Irvine, CA 92612
Pro Per Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRADLEY SMITH,	)	
Plaintiff,	)	
v.	)	C.A. No. 16-144 S
DEBORAH GARCIA,	)	
Defendant,	)	
and	)	
MYVESTA FOUNDATION,	)	
Defendant-Intervenor.	)	

MEMORANDUM AND ORDER

WILLIAM E. SMITH, Chief Judge.

Before the Court is Defendant-Intervenor Myvesta Foundation's ("Myvesta") Motion to Vacate (ECF No. 10), Motion for Disclosure (ECF No. 11), and Motion to Dismiss (ECF No. 13). For the reasons set forth below, Myvesta's motions are GRANTED.

I. Background

This case started with a defamation lawsuit based on comments contained in two blog posts. (See Complaint, ECF No. 1.) The lawsuit was purportedly brought by "Bradley Smith" ("Plaintiff") against "Deborah Garcia" ("Defendant"). Shortly after that lawsuit was filed, the Court was presented with a Consent Motion for Injunction and Final Judgment (ECF No. 2),

which the Court adopted and entered (ECF No. 3). The Consent Judgment included an admission by Defendant that the comments at issue constituted defamation and provided an Order that could be submitted to various internet search engines so that the defamatory statements would be removed. (Id.)

Several months later, Myvesta submitted a Motion for Leave to Intervene. (ECF No. 4.) Myvesta operates the website on which the allegedly defamatory comments had been posted. According to Myvesta, the Consent Judgment was obtained through fraud on the Court. Myvesta's attorney attempted to contact Defendant by mail at the address listed on the Consent Judgment submitted by the parties, but the letter was returned as undeliverable. (Aff. ¶ 2, ECF No. 9; Ex. 2, ECF No. 9.) Myvesta's attorney also contacted the attorney for the named Plaintiff in this case. Plaintiff's attorney "confirmed . . . both that [Plaintiff] had not signed the papers submitted in this case and in his name and that [Plaintiff] had not authorized the filing of this action in his name." (Aff. ¶ 3, ECF No. 9; Ex. 3, ECF No. 9.)

When these matters were brought to the Court's attention, the Court scheduled a hearing for November 16, 2016. (Notice of Hearing dated 11/01/2016.) Both Plaintiff and Defendant were absent from that hearing. Plaintiff's attorney explained that Plaintiff would not be attending because "it is not his case" and because he "can't spend the money and time to fly across the country on a case he did not file." (Ex. 3, ECF No. 9.)

Defendant provided no explanation for her absence. After hearing the motion, the Court directed the file be sent to the United States Attorney for investigation.

II. Motion to Vacate

Myvesta has submitted a Motion to Vacate the Consent Judgment. (ECF No. 10.) Relief from a final judgment is appropriate where the order at issue was procured through fraud or misrepresentation. Fed. R. Civ. P. 60(b)(3). In light of the evidence that the Consent Judgment was procured through fraud on the Court, including the misrepresentation that the named Plaintiff instigated the action, Myvesta's Motion to Vacate is GRANTED.

III. Motion for Disclosure

Myvesta requests that the Clerk of Court provide a copy of the check submitted as payment for the filing fee in this case in order to assist Myvesta in determining what person or persons should be held responsible for this fraud on the Court. (ECF No. 11.) Myvesta's Motion for Disclosure is GRANTED. The Clerk of Court is hereby directed to provide a copy of the check submitted as payment for the filing fee in this case.

IV. Motion to Dismiss

Myvesta has submitted a Motion to Dismiss, claiming the Court lacks subject matter jurisdiction and that Plaintiff failed to state a claim on which relief may be granted. (ECF No. 13.) "If the court determines at any time that it lacks subject-

matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). Having reviewed the Complaint and the evidence submitted, the Court agrees with Myvesta that there is no subject matter jurisdiction and dismissal is therefore appropriate.

On the face of the Complaint, the only possible basis for subject matter jurisdiction is diversity jurisdiction. (See Complaint ¶¶ 1-7, ECF No. 1.) To establish diversity jurisdiction, "there must be complete diversity among the parties . . . ." Am. Fiber & Finishing, Inc. v. Tyco Healthcare Grp., LP, 362 F.3d 136, 139 (1st Cir. 2004). "Generally, once challenged, the party invoking subject matter jurisdiction . . . has the burden of proving by a preponderance of the evidence the facts supporting" diversity among the parties. Bank One, Texas, N.A. v. Montle, 964 F.2d 48, 50 (1st Cir. 1992) (internal quotation omitted). In this case, the named Plaintiff has failed to provide any evidence supporting a finding of diversity jurisdiction and has refused to even appear before the Court. Moreover, according to the affidavit presented by Myvesta, the named Plaintiff is claiming to have never filed this action in the first place. Under these circumstances, and without any evidence to establish diversity jurisdiction, dismissal for lack of subject matter jurisdiction is appropriate. Myvesta's Motion to Dismiss is GRANTED.

V. Motion for Award of Attorney's Fees

In conjunction with Myvesta's Motion to Dismiss, Myvesta has requested that the Court establish a briefing schedule on the issue of attorney's fees and sanctions. (See Motion to Dismiss 16-18, ECF No. 13-1.) The Court agrees that attorney's fees may be appropriate in this case. Additionally, the Court has inherent authority to "award sanctions upon finding that a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." F.A.C., Inc. v. Cooperativa De Seguros De Vida De Puerto Rico, 563 F.3d 1, 6 (1st Cir. 2009) (internal quotation omitted). The Court directs the parties to submit argument on what, if any, attorney's fees and sanctions are appropriate in this case in accordance with Rule 54 of the Federal Rules of Civil Procedure. Additionally, given the apparent confusion regarding the identity of the person who filed both the Complaint and the Consent Judgment, the parties are further directed to submit argument on who should be responsible for paying those attorney's fees.

VI. Conclusion

For the foregoing reasons, Defendant-Intervenor's Motion to Vacate (ECF No. 10), Motion for Disclosure (ECF No. 11), and Motion to Dismiss (ECF No. 13) are GRANTED. The Clerk of Court will provide a copy of the check submitted as payment for the filing fee in this case to Defendant-Intervenor. Lastly, the

parties are hereby ORDERED to submit initial filings on the issue of attorney's fees and sanctions within thirty (30) days. No final judgment shall enter until all matters are disposed of.

IT IS SO ORDERED.

William E. Smith
Chief Judge
Date: January 31, 2017

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN FRANCISCO)

I am employed in the County of San Francisco, State of California. I am over the age of 18 and am not a party to this action. My business address is Wilson Sonsini Goodrich & Rosati, P.C. ("WSGR"), One Market Plaza, Spear Tower, Suite 3300, San Francisco, California 94105-1126.

On April 14, 2017, I served the foregoing **Amicus Curiae Brief of Google Inc. in Support of Yelp Inc.** in *Hassell v. Bird*, Case No. S235968 before the Supreme Court of California, on each person in the enclosed Service List.

I served the foregoing document by U.S. Mail, as follows: I placed true copies of the document in a sealed envelope addressed to each interested party in the Service List. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at WSGR's offices in San Francisco, California. I am readily familiar with WSGR's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 14, 2017 in San Francisco, California.

Regina C. Glynn

SERVICE LIST

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Case No. A143233

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Case No. CGC-13-530525