No. S235968

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

DAWN L. HASSELL and THE HASSELL LAW GROUP, P.C.,
Plaintiffs and Respondents

v.

YELP, INC.
Appellant.

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

Appeal from the Superior Court of the State of California,
County of San Francisco, Case No. CGC-13-53025,
The Honorable Donald J. Sullivan and the Honorable Ernest H. Goldsmith,
presiding

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

The growth of the internet since enactment of the Communications Decency Act (CDA) has indeed been impressive. But that growth has also come with a price, as the internet offers an unprecedented opportunity and forum for those wishing to inflict harm on others. Defamatory comments – especially those that go "viral" – have the capacity to destroy the entire reputation of a business or person. As noted by Dean Erwin Chermerinsky in his *amicus* brief supporting Hassell, the internet has also become home to various forms of stalking, bullying, harassment, and even threats of physical violence. The harm these online torts inflict on victims can be far more powerful than any response or counter speech could remedy alone. It simply cannot be the case, as Yelp's Silicon Valley friends argue, that internet companies themselves should be the ultimate arbiters of these wrongs.

The effect of the rules advocated by Yelp and its *amici* is that victims of online torts cannot receive any true remedy for their online harms. Collectively, they argue that Yelp must be named as a defendant for injunctive relief purposes, but that Section 230 bars it from being named as a defendant. To further deprive victims of any remedy, *amici* also insist that internet companies like Yelp even have the right to prevent users from editing or removing tortious content on their own. In short, the only party who can help prevent further ongoing harm to victims such as Hassell is Yelp.

Although Yelp's *amici* all adopt this aim, they approach it in various ways. Some *amici* attempt to mischaracterize this case as concerning a default judgment that was strategically designed to prevent all parties, even Defendant Bird, from notice. That depiction is controverted by the record, and by the simple fact that Defendant Bird has herself entered this case

before this Court to brief the issues. Other *amici* unpersuasively point to *suspected* fraudulent litigation activity in other states as grounds for this Court to prevent *actual* tort victims from becoming whole. Of course, this purported fraud is a red herring because, to the extent this conduct is a concern, there are better mechanisms for responding to it.

Against this backdrop, many *amici* argue that the below proceedings infringed on Yelp's First Amendment and due process rights. These arguments presume, falsely, that the underlying defamation here was protected by the First Amendment in the first place. The arguments also fail to fully address the ability of a California court to enter orders against nonparties to effectuate judgments against party defendants.

The arguments raised by Yelp's *amici* arguments concerning the CDA fare no better. These arguments attempt to draw from the already generous immunity Congress has provided to internet companies, and apply it in a way that is supported neither by the text nor intent of the CDA. The Court of Appeal properly rejected all of the various forms of these arguments.

II. DEFENDANT BIRD WAS PROPERLY SERVED, HAD NOTICE OF THE LAWSUIT, AND HAS MADE A GENERAL APPEARANCE IN THIS CASE.

As a threshold matter, many of the *amici curiae* briefs attack – directly, or by implication – the method of service on Defendant Bird. Not only is the propriety of service on Defendant Bird not an issue in this appeal, but it is altogether a moot point because the record clearly shows she had notice of the lawsuit by publicly acknowledging it before her answer was due; she then initiated mediation of the lawsuit with the Bar Association; and she has also now appeared before this Court as *amicus curiae*.

Given the extent of *amici*'s arguments, it is important to note that service was not only properly effected against Bird, but it provided actual and timely notice of the lawsuit. The record is clear that Defendant Bird could not be physically located after multiple attempts, and that the address of service was her legal mailing address. (AA.V1.T3.00024-27.) Substitute service to that address, which has never been challenged by evidence or testimony, was therefore proper. (See C.C.P. § 415.200(b).) Further, this method of service did give Bird notice of the lawsuit as roughly one week later, Defendant Bird updated her Yelp review to announce that "Dawn Hassell has filed a lawsuit against me..." (AA.V1.T6.00057, 102-105.) Defendant Bird then initiated mediation of the lawsuit in June 2013 with the Bar Association of San Francisco, before eventually backing out. (AA.V1.T5.00031-32.) Defendant Bird's current protest, that she "never had an opportunity to defend herself," (Bird, 4,) is thus entirely false. Clearly, this unchallenged service on Defendant Bird put her on notice of the pendency of this action, and gave her the opportunity to respond.

Further illustrating Defendant Bird's knowledge of the lawsuit is her bizarre entry into the case before this Court as *amicus curiae*. A party's appearance is considered to be either "general" or "special." (See *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 8011-801.) There is a clear delineation between the two types of appearances. A "special" appearance is made for the sole purpose of challenging personal jurisdiction. (*Id.*) But if a litigant "seeks relief on any basis other than lack of personal jurisdiction, he or she makes a general appearance." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal. 4th 1028, 1037.) Appellees can find no prior instances where a defendant has defaulted at the trial court level, but then entered the case on appeal as *amicus curiae*. But, here, it is clear that

Defendant Bird has made a general appearance because her briefing does not seek relief on grounds of personal jurisdiction, but instead attacks the scope of the injunction entered by the trial court. (See e.g., Br. of Ava Bird ("Bird"), 12-13 [formally requesting this Court to "reverse the orders of the trial and appellate courts, and direct those courts to enter an order granting Yelp's Motion to Vacate"].)

To the extent other *amici* try to derive importance from the service of process below, as many do, (see e.g., Br. of ACLU of Northern California et al. ("ACLU"), 16 ["In view of this questionable service, it is particularly inappropriate to rely on the default judgment…"]; IA/CTA, 28 ["a default judgment cannot have preclusive effect unless the defendant 'has been personally served with summons or has actual knowledge of the existence of the litigation.'"],) the record below, coupled with Defendant Bird's current briefing, shows that those points should be disregarded. Defendant Bird's briefing makes clear that she is aware of this litigation – and she always has been – and that she has intentionally disobeyed a court order and continues to refuse to comply with the injunction.

III. *AMICI'S* SUGGESTION THAT THE COURT OF APPEAL'S DECISION ENCOURAGES FRAUD IS MISGUIDED.

Perhaps the most frequent argument appearing in the Silicon Valley *amicus* briefs is a "red herring" suggestion that the Court of Appeal's decision encourages fraud. Supporting this line of reasoning, *amici* cite several cases nationwide where it appears that litigants may have filed outright fraudulent lawsuits in order to obtain injunctions. (See generally, Rev. Br. of Eugene Volokh ("Volokh"); see also Br. of Public Citizen, Inc. et al. ("Public Citizen"), 39-43; Br. of Airbnb, Inc. et al. ("Airbnb"), 34-37 [citing arguments by Volokh and Public Citizen]; Br. of Google Inc.

("Google"), 13 [citing arguments by Volokh and Public Citizen].) As at least one *amicus* has conceded, some of this discussion is entirely "speculative." (Volokh, 35.) This Court should not rule based on such "speculative" theories about entirely different cases in entirely different states. Further, it is "the general rule that issues not raised by the appealing parties but advanced for the first time by *amici* curiae are not considered." (*Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 446 n.10.)

First and foremost, the connection between such concerns and this case are, quite frankly, overblown. As conceded by one *amicus*, "[n]one of the fraudulently obtained orders... was entered by a California Court." (Public Citizen, 42; see also Br. of Glassdoor, Inc. et al. ("Glassdoor"), 24.) The majority of the purported fraud raised by *amici* also predates the Court of Appeal's decision. To the extent that *amici* all suggest the Court of Appeal's decision is somehow a catalyst for this fraud, they are clearly mistaken.[1]

Second, to the extent there is even a problem to be addressed, *amici* have chosen the wrong vehicle to do so. Unlike many of the fraudulent cases they cite, this case is against a named individual and not a Doe defendant. (Public Citizen, 31-39; Volokh, 45-47.) Although, as discussed *supra* at 8-10, *amici* repeatedly suggest that service was improper, Defendant Bird has made an appearance in this case without formally challenging service. (Cf. Volokh, 39-43.) As also illustrated by Defendant Bird's appearance, it cannot be said that this case involves a fake defendant. (Cf. Volokh, 16-27.) She has herself acknowledged writing

[1] The one instance provided by *amici* where a litigant cited the Court of Appeal's decision to support some form of injunction was a case in Canada. (See Google, 15.)

the defamatory reviews, and acknowledged the lawsuit. The injunction in this case does not cover government documents among a laundry list of websites. (Cf. Volokh, 30-35.) The injunction does not target the entire web page in which the defamatory comments appear. (Cf. Volokh, 43-50.) This is not a case of a buried URL amongst a longer list of websites affected by the injunction. (Cf. Volokh, 51-53.) This case does not involve a seedy "reputation management company." (Cf. Volokh, 35-38; Public Citizen, 29-39.) Nor does this case involve forged signatures from a notary, judge, (cf. Volokh, 27-29; 53-57,) or adverse party, (cf. Public Citizen, 39-43 [describing forged consent orders].) Because the facts of this case are so distinguishable from all of these scenarios proposed by *amici*, it simply cannot be said that the Court of Appeal's decision in this case does or will encourage the proliferation of tactics that are not even at issue here. The proposed connection is even more attenuated considering that these cases are mostly occurring before the decision below and outside of California.

This Court should not allow these *possibly* fraudulent cases to deprive *actual* victims of court remedies. "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine." (*Hoover v. Ronwin* (1984) 466 U.S. 558, 601 [Stevens, J., dissenting].) The applicable legal doctrine here allows victims of defamation to be made whole through injunctive relief. (See *Balboa Island Vill. Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1148.) That injunctive relief would be meaningless indeed if a speaker's adjudicated defamation could live on through third parties like Yelp. California law therefore rightly allows injunctions to be enforced through such intermediaries. (ABM., 26-31.) This Court should not seek to change this legal doctrine based on the bogeyman cited by *amici*.

Indeed, shifting legal doctrine based on these fears would undoubtedly harm the victims of online torts. These victims include small businesses such as Hassell, to whom reputation is priceless. But, as Dean Chermerinsky points out, these victims also include many other groups of individuals, who find themselves targeted by "revenge porn," "doxing," violent threats, and online sexual harassment. (Br. of Erwin Chermerinsky et al. ("Chermerinsky"), 6.) This is no small group. A new Pew survey has found that "[a]round four-in-ten Americans (41%) have been personally subjected to at least one type of online harassment." (Maeve Duggan, *Online Harassment 2017* (July 11, 2017), http://www.pewinternet.org/2017/07/11/online-harassment-2017/.)[2] To many who find themselves included in this latter group of victims, the ability to protect oneself from illegal speech online can be not just about reputation but about personal safety, perhaps even life or death. (*Id.*) To allow the fraud suggested by *amici* to deprive these real victims of any viable remedy to their harassment is a solution that would be unjust in addition to being legally unsound. The actual victims of these online harms may not have as loud of a voice as the stalwarts for the Silicon Valley cause, but they are every bit as worthy of protection.

Last but not least, there are much better mechanisms to address the fraud raised by *amici*. For example, as Defendant Bird recognizes, a fraudulent plaintiff may be subject to substantial attorneys' fees penalties under California's powerful anti-SLAPP law. (See C.C.P. § 425.16; Bird, 8-9 [citing anti-SLAPP awards ranging from $27,000 to $130,506.71].)

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[2] Dean Chermerinsky also cites a Pew study, but it appears that the study has been updated since the filing of his amicus brief. (See Chermerinsky, 6.) The 2017 study indicates that the problem has only gotten worse since the 2014 study.

Yelp is aware of these anti-SLAPP remedies, and is in fact particularly aggressive about pursuing them. (See Order Granting In Part and Denying In Part Defendant's Motion For Attorney's Fees Costs and Ruling on Related Requests, *Rahbar v. Yelp* (San Francisco Superior Court Feb. 5, 2016) No. CGC 10-499227 [awarding Yelp costs and fees of $80,865.20 in anti-SLAPP motion against defamation plaintiff].) Court sanctions can also be issued in an amount "sufficient to deter repetition of [the] conduct or comparable conduct," and these sanctions can also include non-monetary components. (C.C.P. § 128.7(c)-(d).) But these civil penalties pale in comparison to the harsh criminal penalties that fraudsters face. The filing of false or forged instruments with a court is a felony, (Penal Code § 115,) as is the alteration or forging of court records, (Penal Code § 470(c).) Conviction of these crimes can carry penalties of $10,000 and three-years imprisonment per offense. (Penal Code §§ 18, 672.) These are not penalties to be taken lightly. If these penalties are somehow insufficient, then *amici* are welcome to petition the legislature to increase the penalties or even change the standard of proof for default judgments involving injunctions.

In the end, it is not clear that the speculative concerns raised by *amici* are actually a problem in California. To the extent they are, there are better ways of addressing this fraud than depriving innocent tort victims of valid court remedies.

IV. THERE ARE LIMITS ON FIRST AMENDMENT PROTECTIONS WHERE, AS HERE, THE SPEECH AT ISSUE HAS BEEN ADJUDICATED AS DEFAMATORY.

Like Yelp's First Amendment arguments, many similar arguments raised by *amici* arise from the false presumption that the speech at issue is constitutionally protected.

However, it has long been established that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation..." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246; see also ABM, 14, [cases cited].) Such utterances serve "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Balboa Island*, 40 Cal.4th at 1149 [quoting *Bose Corp. v. Consumer Union of U.S., Inc.* (1984) 466 U.S. 485, 503-504].)

Of course, Defendant Bird herself generally speaking has freedom of speech rights under the First Amendment. Assuming that Yelp has a First Amendment right to administer the forum in which Defendant Bird speaks, (see e.g., Br. of the Reporters Committee for Freedom of the Press et al., 11-12,) ***such rights are necessarily derivative to the underlying legality of Defendant Bird's speech***. In other words, if Defendant Bird's speech is found unlawful (because, for example, it is defamatory, discloses confidential information, or incites violence), she is thus not protected by the First Amendment, and then it necessarily follows that Yelp cannot assert First Amendment protections for displaying her very same words. Otherwise, the absurd result would be that those who disseminate other people's unlawful speech would receive greater First Amendment protections than the original speaker.

Some *amici* overlook this derivative nature of Yelp's rights. For instance, Airbnb remarkably insists that Yelp "is the party best-positioned" to defend these claims, and has "an even stronger incentive to defend speech than the original speaker." (Airbnb, 25.) But Airbnb fails to explain why Yelp has such a strong incentive to defend one of millions of comments on its website made by someone else, compared to the significant money judgment that the original speaker herself faces. Airbnb also fails to explain how exactly such a defense would look, considering that websites are so far removed from the facts of the underlying defamation, and considering Airbnb's simultaneous insistence that CDA prevents the website from mounting such a defense anyway.[3] Other *amici* that seem satisfied with the website coming to the speaker's defense also fail to provide such explanations. (See Bird, 7; Glassdoor, 11.)

Notably, no *amicus* argues that Yelp would have a continued, independent First Amendment right to host the defamatory words after a contested trial between speaker and victim. Instead, *amici* recognize that internet companies are bound by third-party injunctions in these circumstances. (See e.g., Public Citizen, 22-23 [the organization only recognizes injunctions entered after contested trials].)

This concession shows that the true concern raised by *amici* is not that Yelp has rights beyond Defendant Bird's. Instead, the thrust of *amici*'s argument is that it is the nature of Defendant Bird's default that raises constitutional concern. But, as described *infra* at 18-21, no *amicus*

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[3] In this argument, Airbnb also raises a meritless assertion that "[i]f the defendant is not the speaker, the defendant will have no reason to defend the speech." (Airbnb, 25.) Clearly, an improperly named defendant in a defamation suit has plenty of reason to defend a lawsuit and avoid entry of a large money judgment for someone else's conduct.

cites any authority for the proposition that default judgments are entitled to less deference than other forms of judgments. The distinction Yelp and its *amici* thus attempt to draw between a jury's determination and a default judgment after an evidentiary prove up is a false construct. Both render a valid, legal adjudication.

By way of example, in the ACLU's view, "such an injunction entered after a default judgment is unconstitutional." (ACLU, 21.) But the ACLU cites no authority for this statement. Instead, the ACLU arrives at this conclusion through a series of attenuated steps, beginning with its mischaracterization of the entire injunction as a prior restraint. (ACLU, 8-21.)[4] "The term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" (*Alexander v. United States*, (1993) 509 U.S. 544, 550 [emphasis added].) The prohibition on prior restraints in American constitutional law originated as a reaction to an English licensing system that meant "no publication was allowed without a government granted license." (*Balboa Island*, 40 Cal.4th at 1149, quoting Chemerinsky, Constitutional Law: Principles and Policies (2d ed. 2002) § 11.1.1, p. 892.)

But, as here, an injunction issued *after* "a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression." (*Balboa Island*, 40 Cal.4th at 1156.) *Balboa Island* never held that such a determination must be made by a jury, just as

[4] The Court of Appeal stripped the injunction of its prohibition on future speech, which was the one feature of the injunction that was arguably a prior restraint. (*Hassell v. Bird*, 247 Cal.App.4th 1336, 1360-61.) Although that part of the injunction is not on appeal, the ACLU seems to go further, and argues that the entire injunction is a prior restraint.

long as a "defendant would [not] be deprived of the right to a jury trial concerning the truth of his or her allegedly defamatory publication." (*Id.* at 1155, quoting *Sid Dillon Chevrolet v. Sullivan* (1997) 251 Neb. 722, 746.) Here, Defendant Bird was not deprived of the right to jury trial,[5] and the court made a "determination" that the remarks were defamatory based upon a review of the robust evidentiary record. No further process is due.

V. THE PROCEDURE BELOW SATISFIED DUE PROCESS.

As with Yelp's arguments, *amici*'s due process arguments ring hollow. California law clearly allows for injunctions to be enforced against third parties without running afoul of due process. Moreover, not only do *amici* fail to describe what alternative process is actually due, they affirmatively insist that Yelp cannot play a role in that process because the CDA prohibits litigants from involving them.

A. Defendant Bird's Default Does Not Raise Due Process Concerns.

Defendant Bird, who has not and will not remove the defamatory material, but has entered the case as *amicus curiae*, defaulted below. At no point has she tried to set aside the default. *Amici* improperly suggest that the default nature of the judgment below infects its validity. Not so.

First, the effect of a default is clear: a party, "by permitting [its] default to be entered, confessed the truth of all the material allegations in the complaint." (*O'Brien v. Appling*, (1955) 133 Cal.App.2d 40, 42.) The resulting "judgment by default is just as conclusive upon the issues tendered by the complaint as if rendered after answer filed and trial on

[5] She waived that right by failing to appear. (See C.C.P. § 631(f)(1).)

allegations denied by the answer." (*Id.*; see also *In re Circosta* (1963) 219 Cal.App.2d 777, 785-86 [applying that rule to injunctive relief].) This well-established rule makes practical sense because a plaintiff can never force a defendant to appear at a trial and defend the allegations.

But it does not follow that a plaintiff is automatically entitled to a default judgment just because a defaulting defendant has admitted the allegations as true. An action such as this one "requires that any [default] judgment be entered by the court [only] after what is commonly called a prove-up of the allegations of the complaint." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 533-34, citing C.C.P. § 585(b).) These prove-up hearings exist to help bring to light frivolous claims that should not be reduced to judgment. (See *id.* [noting in that case that, if there had been a prove-up hearing, it "would have brought down the procedural stack of cards" on which the plaintiff's claim was based.].) Despite the criticism that these hearings "lack[] key protections provided by a full trial on the merits," (see ACLU, 15; see also Br. of First Amendment and Internet Law Scholars ("FAILS"), 7,) *amici* provide no law supporting the same and no guidance as to what other options remain when a defendant chooses not to challenge a plaintiff's allegations. And because there was such a prove-up hearing in this case below, *amici*'s characterization of the default judgment as a mere rubber stamp is not persuasive. Admissible evidence was presented to the trial court, who accepted it, conducted a hearing, heard testimony, and made a ruling based upon all of it.

Importantly, despite the focus of several *amici* on the default nature of the judgment, not a single one has cited authority for the notion that default judgments can simply be ignored as invalid. In the view of some *amici*, the default judgment here is worthless because there was no "*adversary* proceeding," apparently because the adversary did not appear.

(See Airbnb, 22-23, quoting *Freedman v. Maryland* (1965) 380 U.S. 51, 58 [emphasis added]; Br. of Internet Assoc. and Consumer Technology Assoc. ("IA/CTA"), 20.) But due process in an adversary proceeding only requires notice and an *opportunity* to defend; it does not require that the adversary *actually* opt in to the action and choose to defend. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314.) In fact, as the *Mullane* Court explained, the defendant "can choose for himself whether to appear or default, acquiesce or contest." (*Id.*; see also *Richards v. Jefferson Cty.* (1996) 517 U.S. 793, 799.)

The fact that Defendant Bird had the opportunity to appear and contest the allegations here also undermines the Internet Association's general depiction of default judgments as "the very opposite of 'judicial determinations' in 'adversarial proceedings.'" (See IA/CTA, 28, citing *In re Silva* (B.A.P. 9th Cir. 1995) 190 B.R. 889, 893.)[6] This depiction also pulls the quote from *Silva* out of context. The *Silva* case involved questions of collateral estoppel under federal law. Unlike the federal collateral estoppel doctrine, however, "[i]n California, it is well settled that a default judgment" supports collateral estoppel. (*In re Younie* (B.A.P. 9th Cir. 1997) 211 B.R. 367, 375; see also *Four Star Elec., Inc. v. F& H Constr.* (1992) 7 Cal.App.4th 1375, 1380.) California law therefore fully recognizes the validity of default judgments, and if the judgment was properly obtained – by giving notice and opportunity to the adversary – there is no good reason to afford such judgments lesser treatment.

These arguments advanced by *amici* also present a problematic view

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[6] The IA/CTA brief extrapolates this same line of reasoning to consent decrees. (See IA/CTA, 28.) But, again, *amicus* provides no authority for the radical position that consent decrees lack the full force of a court order after a fully contested hearing.

of the justice system. As much as *amici* try to mischaracterize the Court of Appeal's decision as creating a "roadmap" for sinister behavior, they ignore the roadmap they create to place defendants outside the reach of the courts. In *amici*'s view, a defendant must simply default, and the resulting judgment would lack any value. For example, *amicus* Public Citizen explains how it refuses to follow court orders that arise out of default judgments, and it only recognizes court orders that follow contested hearings. (Public Citizen, 22-23.) If this Court were to adopt this distorted view of judgments – that the public can ignore a court order if it is perceived as not contested hotly enough – then it would render courts effectively powerless to effectuate orders against defendants unless the defendant affirmatively opted to step foot in the courtroom.

B. Due Process Does Not Prevent The Enforcement Of An Injunction Through A Non-Party.

As discussed in the parties' briefing, it is already a deeply rooted legal principle that injunctions may be enforced against third parties without running afoul of due process. (ABM, 22, citing *Ross v. Superior Court of Sacramento County* (1977) 19 Cal.3d 899, 905; *In re Lennon* (1897) 166 U.S. 548.)

Most of *amici*'s arguments against this rule are based on cases that have been discussed in the parties' briefing, or by the Court of Appeal in the decision below. For example, one *amicus* cites the *Richards* case. (FAILS, 7, citing *Richards,* 517 U.S. at 798.) Appellees have already distinguished *Richards* on grounds that it involved pecuniary interests. (See ABM, 25.) The Court of Appeal similarly distinguished some of Yelp's cases on the same basis. (See *Hassell v. Bird*, 247 Cal.App.4th 1336, 1356, citing *Fazzi v. Peters* (1968) 68 Cal.2d 590; *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th

110, 120-121.) But it is noteworthy that even cases involving money judgments can be enforced through third parties, such as by levying bank accounts, (see C.C.P. § 700.140,) or by garnishing wages through an employer, (C.C.P. § 706.010 *et seq.*) Banks and employers are required to comply with the terms of these writs by handing over property of the named defendants in much the same way that Yelp was ordered to respond with regards to the defendant's speech.

The ACLU cites new cases on this point, but greatly exaggerates their holdings. For example, the ACLU insists that "[t]he United States Supreme Court has held that due process prohibits a court from issuing an injunction against a nonparty." (ACLU, 22, citing *Zenith Radio Corp v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 109-112, and *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co.*, Ltd. (1987) 484 U.S. 97, 104.) This argument greatly misstates those cases. Not only is a discussion of due process wholly absent in *Zenith*, but that court recognized that there were indeed occasions when the Federal Rules of Civil Procedure allow injunctions to run against nonparties. (*Zenith*, 395 U.S. at 112, citing Fed.R.Civ.P. 65(d).) Further illustrating the ACLU's overreach is that *Omni* never even mentioned injunctions. (See *Omni*, 484 U.S. at 104.) These cases simply provide no guidance to the issues involved in this appeal.

Google, for its part, attempts to narrow the availability of such injunctions to only those nonparties who meet certain strict criteria proposed by Google. (Google, 17-35.) As the Court of Appeal below described, California law already provides that a nonparty can be ordered to "effectuate [a] judgment" against a defendant on the sole basis that the enjoined defendant is acting "with or through" the nonparty. (*Hassell*, 247 Cal.App.4th at 1355-57.) Clearly, that standard is met here because

Defendant Bird's defamatory words were posted through Yelp's platform. And, because Yelp can legally prevent Defendant Bird from removing this content, only Yelp has the power to stop Defendant Bird's illegal activity. In every sense of the words, Bird is acting "with and through" Yelp to violate the injunction.

The practice of enforcing injunctions through nonparties is also not nearly as "limited" as Google argues. As even Google's own authority recognizes, this Court has recognized this enforcement mechanism as early as 1917. (See Google, 18-19, citing *Berger v. Superior Court* (1917) 175 Cal. 719, 720-21.) Although Google recognizes *Berger* as stating the correct rule for California, Google inexplicitly disregards that rule in favor of the narrower formulation expressed in Fed.R.Civ.P. 65(d)(2), which facially only applies to those in "in active concern or participation" with a defendant or other agent. (See Google, 22-25 [outlining federal cases], 26-28 [urging adoption of "in concert" standards from Fed. R. Civ. P. 65(d)(2)].) Aside from walking through some federal cases,[7] Google provides no compelling reason for this Court to abandon over a century of its own jurisprudence, which recognizes the enforceability of injunctions against those "with or through" whom a defendant acts. There are, however, compelling reasons not to abandon this approach in favor of the language adopted by the Advisory Committee on Rules of Civil Procedure because, as explained throughout this brief, such approach would leave courts powerless to effect some of their judgments, and would leave victims of online torts without any meaningful remedy.

The Court of Appeal properly allowed the enforcement of the Bird

[7] The state law cases cited by Google, which were also initially cited by Yelp, are all inapposite to this issue. (See ABM, 28-29.)

injunction against a nonparty. *Amici*'s attempt to strangle the enforcement of such injunctions is unavailing.

C. Yelp's Interest In Defendant Bird's Speech Is Derivative To Her Own Interest In Such Utterances.

A due process review of the case also necessarily requires scrutinizing the property interest at stake for websites such as Yelp. (See ABM, 23, citing *O'Bannon v. Town Court Nursing Ctr.* (1980) 447 U.S. 773, 788.) But here, the greatest interest that Yelp can assert necessarily entails the underlying integrity of Defendant Bird's comments. *Amici* acknowledge this interest, but remarkably argue that they should have "discretion" to determine which court judgments to follow in furtherance of that interest.

As framed by *amici*, websites have an interest in providing third-party content that is *truthful*. (See Glassdoor, 3; [recognizing that it is the "truthful and frank [] reviews" that are helpful]; Airbnb, 25 [citing "Yelp's interest in maintaining the overall integrity of its platform"].) And of course, "[t]he social utility of *candid* user reviews cannot be denied." (Glassdoor, 4 [emphasis added].) Of course, the converse of that statement is also true: the worthlessness of defamatory user reviews cannot be denied. Consistent with *amici*'s arguments, even Yelp's own terms and conditions show that it is not (at least not purportedly) interested in disseminating false and defamatory content. (AA.V3.T27.00748; see also AA.V3.T27.00757.)

It is axiomatic that these interests are soundly defeated by a website's display of adjudicated defamatory content. Interestingly, many *amici* seem content to follow court orders that are issued after a contested hearing. (See e.g., Public Citizen, 22-23.) *Amici* therefore recognize that adjudicated defamation does nothing to serve these interests in website integrity. But as described above, the enforceability of a judgment does

not hinge on the intensity of the defense erected in the case, and default judgments are thus every bit as valid as any other court judgment.

What *amici* expressly desire is the unprecedented right to decide which court judgments they want to obey, and which court judgments they can deem invalid and ignore. Some *amici* expressly state this intention outright. (See e.g., Public Citizen, 22 [the organization routinely ignores certain judgments, but will obey others that it deems valid].) As Volokh argues, "[i]nternet company discretion is the best (albeit imperfect) way of dealing with the epidemic of questionable court orders." (Volokh, 57; see also Google, 16 [Google has "a set of internal policies whereby it may remove material that a court has determined to be unlawful," but Google is not "required" to comply with court orders].)[8]

If this Court were to approve of the practice suggested by *amici*, it would naturally upset the rule of law, and greatly diminish the constitutional authority of the court system to enforce its orders. In *amici*'s view, some companies are so far above the law that they are entitled to enjoy "discretion" over which court orders are worthy of obedience. The danger behind this stance is obvious, and it should be rejected outright.

D. No Alternative Process Is Proposed By *Amici*, And In Fact, They Insist That Yelp Cannot Be Included In Any Other Process.

Amici's due process arguments leave unanswered a fundamental question: what expanded process do they contend is actually due to Yelp here? (See ACLU, 19-21.) On the one hand, they argue that some more

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[8] Of course, as described in Point III above, *amici* have not shown any "epidemic of questionable court orders" infecting the California judicial system.

process is due, but on the other hand, they insist that the CDA prevents any further process. They apparently hope this quagmire goes unnoticed, so that websites like Yelp can operate entirely outside the reach of the courts.

This question is important, especially in light of the record here, which shows Yelp receiving both notice and an opportunity to be heard. (See *Mullane*, 339 U.S. at 314.) Yelp received notice of the litigation less than a month after the case was filed. (AA.V3.T21.00601-601, 00617-634). Yelp received notice on two separate occasions of the injunction after its entry. (AA.V3.T27.00704-718, .00720-730; AA.V3.T28.00798-799.) Further, Yelp had the opportunity to challenge the enforcement of the Bird injunction by filing a motion to vacate, (*Hassell*, 247 Cal.App.4th at 1353; see also Chermerinsky, 13,) and Yelp indeed pursued that avenue for relief. *Amici* seem to assume – wrongly – that, simply because Yelp was not named as a defendant, it was deprived of any opportunity to know about, or become involved in, this litigation.

Even assuming *arguendo* that some additional form of process were due, it is not clear how websites such as Yelp could or would challenge the underlying merits of someone else's defamation. As candidly described by one *amicus* in another context, "[t]he relationship between a mass platform and any one of its users – who may number in the millions or even billions – is tenuous." (IA/CTA, 26.) If websites truly wanted to engage in some kind of process to litigate the merits of its user' conduct, then it is natural to ask how such litigation would look. For example, how could Yelp present evidence that Defendant Bird was speaking the truth, when Defendant Bird is just one of the millions or billions of users that visit its website?

Remarkably, some *amici* try to litigate the merits of Defendant Bird's defamatory words before this Court, even though the underlying merits of the defamation are not at issue. For example, Glassdoor

challenges the scope of the injunction, insisting that it removes some part of the comments that were only opinion. (See Glassdoor, 7, 13-15.) But this determination cannot be made simply by reading the defamatory statements, and is instead a factual inquiry. (See *Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 426-27 ["Not all statements that appear to be opinions, however, are immunized" from tort liability].) Those factual merits are not before the Court.[9]

Pulling Yelp into the merits of these cases – such as by naming it as a defendant – would also inherently undermine its CDA immunity. But, of course, Yelp and its *amici* do not mention this natural effect of their due process arguments, preferring to obfuscate the otherwise clear fact that they seek to be placed entirely outside the reach of the courts.

VI. *AMICI* IMPROPERLY PUSH TO WIDEN THE SCOPE OF IMMUNITY UNDER THE CDA.

Yelp's *amici* attempt to use the CDA to go so far as to argue that internet companies are entirely outside the reach of courts. Although the CDA provides immunity from direct suit, such immunity does not mean that internet companies can opt out of valid court orders.

Hassell are aware that "[t]he normal way these disputes play out is between [the private] persons." (IA/CTA, 14; see also Public Citizen, 21 ["pursue the speaker, not the host"].) That is exactly how this dispute played out. Defendant Bird posted defamatory comments on Yelp's website. Hassell sued Bird, and obtained monetary and injunctive relief

[9] One *amicus* raises the question of how effective such an injunction can be. (See Change.org, 26, 28.) This argument similarly does not go to the constitutional questions at issue in this case, and instead would be an argument for the trial court to consider when evaluating whether injunctive relief would be appropriate given the facts of a particular case.

against her. But anticipating that she would have difficulties enforcing the judgment against the recalcitrant Bird, Hassell also sought to have the injunction enforced through non-party Yelp if necessary. At no point did she attempt to impose liability on Yelp, or even rope Yelp into expensive litigation on the merits of the defamation claim against one of its users. She simply sought to enforce a valid court judgment.

Some *amici* criticize this injunction as circumventing the CDA, as if Hassell's pursuit of Defendant Bird and desire to have an enforceable injunction were part of some disreputable loophole within the CDA. (See e.g., FAILS, 9; Airbnb, 21 [referring to this process as "gamesmanship"].) To be clear, this injunction is hardly a loophole. As laid out throughout Appellees' briefing, the immunity sought by Yelp's *amici* is not contained within the CDA because Congress never intended the CDA to cover this set of circumstances. Reading this kind of immunity into the CDA would unjustly deprive online tort victims of important, and meaningful, remedies.

A. The Enforcement Of The Bird Injunction Treats Yelp As Neither A Speaker Nor Publisher, As Contemplated By The CDA.

Amici's first misguided effort to obtain broader protections under the CDA than Congress ever contemplated is to cite its prohibition against treating internet service providers (ISPs) "as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1); see e.g., ACLU, 24-25; Airbnb, 9-10; IA/CTA, 32-33.)

The Court of Appeal's decision treats Yelp neither as a "speaker" nor as a "publisher" for purposes of the CDA. First, as described in Appellees' briefing, a website is not considered to be treated as a "speaker" or "publisher" simply because it is ordered to do something related to third-party content. (See ABM, 35-36, citing *Barnes v. Yahoo!, Inc.* (9th Cir.

2009) 570 F.3d 1096, 1107.) Instead, Section 230(c)(1) only applies "when the duty the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker." (*Id.*) This analysis necessarily requires evaluating the plaintiff's cause of action, and against whom that cause of action is asserted. (*Id.*) The defamation cause of action here was asserted against Defendant Bird.

As the Court of Appeal found, no liability has been imposed on Yelp here. (*Hassell*, 247 Cal.App.4th at 1365.) As the court described, "[i]f an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp. Violating the injunction or the removal order associated with it could potentially trigger a different type of liability that implicates the contempt power of the court." (*Id.*) *Amici* similarly err by trying to frame "liability" in a way that is not contemplated by the CDA. (See Airbnb, 13, citing Black's Law Dictionary 1053 (10th ed. 2014); see also Br. of Change.org et al. ("Change.org"), 31, 34.) This approach conflates an ISP's obligation to comply with the removal order with "liability" for the tort of defamation. But, as described above, *amici* collectively acknowledge that such take-down orders are valid in some circumstances (e.g., after a jury trial).

Furthermore, because the CDA was intended to protect internet companies from tort claims such as defamation, it is not surprising that the terms "speaker" and "publisher" "are drawn from the law of defamation," where they signify various forms of financial liability. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 49.) Under defamation law, a "speaker" faces tort liability for "a false and unprivileged publication, which has a tendency to injure a party in its occupation." (*Bently*, 218 Cal.App.4th at 426.)

A "publisher" is liable for defamation either on the same basis as the

original speaker, or upon knowledge of the defamatory content, depending on whether it is a primary or secondary publisher. (See *Barrett*, 40 Cal.4th at 44-45 [describing common law liability standards].) The distinction between various forms of publisher liability "is a practical one. Publishers are ordinarily aware of the content of their copy. It is not reasonable, however, to expect distributors to be familiar with the particulars of every publication they offer for sale." (*Id.* at 45 n. 8.) The distinction also highlights the primary intent behind the CDA. Congress was expressly concerned about cases such as *Stratton-Oakmont*, where an internet company's censoring of obscene materials from its users, was sufficient to make it a "publisher" under the common law for all of its content, thus imposing on it massive defamation liability for uncensored statements appearing on its platform. (ABM, 44-45.)

In stark contrast to the words carefully chosen by Congress, Hassell did not seek to impose liability under defamation law against Yelp. Hassell have not pursued Yelp as an original "speaker"; that financial liability was imposed upon Defendant Bird. Unlike *Stratton-Oakmont*, Hassell have not pursued financial liability against Yelp as a primary publisher under the theory that Yelp censors and edits its third-party content. Further, despite some *amici*'s characterization of this case as imposing notice-based liability on Yelp, (see e.g., ACLU, 26-34,) Hassell have not sought to impose such liability on Yelp as a secondary publisher. Hassell have simply sought to enforce the injunction properly entered against Defendant Bird via the removal order issued by the court.

The enforcement of this injunction does not put Yelp in the same position of the original speaker. (See ACLU, 24-25.) Most notably, the judgment below imposed a money judgment on the original speaker in the amount of $557,918.85. (AA.V1.T9.00212-216.) Defendant Bird's

financial liability is in no way shared with Yelp. Clearly, Yelp is not placed in the same position as the original speaker simply because enforcement of the injunction is sought through Yelp.

In the end, Hassell did not seek to hold Yelp accountable either as a "speaker" or "publisher" as contemplated by the CDA. Hassell did not allege that Yelp violated any duty as such. Hassell do not seek to impose financial liability on Yelp based on its status as a "speaker" or "publisher," as those terms are defined in defamation law. This all stands in contrast to Defendant Bird, against whom such accountability has been sought.

B. The Speculative Cost To Comply With Court Orders Is Not Compelling Enough To Read A Broadened Immunity Shield Into The CDA.

In their push to expand the CDA well beyond its original intent, Yelp's *amici* also raise concerns about the costs and burdens of the Court of Appeal's decision. (Change.org, 17-18; Airbnb, 37; Public Citizen, 19.) Without much in the way of specifics, the argument that it would be "burdensome" for such companies to comply with court orders is not persuasive. Indeed, it seems to invite a certain lawlessness applicable only to internet companies, which is not the aim of the CDA. (See *Fair Hous. Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1164 [the CDA was "not meant to create a lawless no-man's-land on the Internet."].)

On the contrary, removing a specific comment from a website should be a simple task involving nothing more than a few key strokes. Already, website content is regularly edited and updated on a regular basis. (See e.g., Change.org, 16 [*amicus curiae* Wikimedia Foundation, Inc., received 13.5 million proposed edits to its websites in August 2016 alone].) Even Yelp regularly reviews and blocks third-party content that it believes violates its terms of services – including content that Yelp itself has deemed

defamatory. (AA.V3.T27.00748; see also AA.V3.T27.00757.) Adding compliance with a few court orders[10] to this operation hardly seems like "death by ten thousand duck-bites," (Airbnb, 18,) but much more like a drop in the bucket.

To the extent that compliance costs do begin to pose the kind of burden that these *amici* suggest, which is far from clear, there are again better solutions to this hypothetical problem. The law is replete with examples where a third party's compliance with a court order is compensated, including *inter alia* witness fees, (Gov. Code § 68093,) fees for employers processing child support garnishments, (Fam. Code § 5235,) or fees charged by banks to respond to levies, (C.C.P. § 700.140(d) [contemplating such fees].)

One *amicus* incorrectly argues that the burden imposed by the Court of Appeal's decision is that it has a chilling effect on speech. (See Glassdoor, 21, citing *Barrett*, 40 Cal.4th 33, 56.) The decision has no such effect. The chilling effect in *Barrett* was based on the fact that the plaintiff sought monetary damages against the ISP. As Congress described while enacting the CDA, this chilling effect would arise from websites removing third-party content out of concern for endless liability. (See ABM, 44.) Barrett was thus the quintessential case that Congress sought to bar with the CDA. Glassdoor does not describe how free speech could be chilled, or even remotely burdened, by simply requiring a website to remove content that has already been adjudicated between the victim and the speaker as defamatory.

If compliance with third-party court orders presents a true burden on

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[10] It does not appear that many victims attempt to overcome all the hurdles necessary to obtain injunctive relief.

internet companies, they can thus take their case to the legislature, and ensure that burden is offset by some kind of transaction fee. The solution is not to exempt such companies from the reach of the court. This easily mitigated burden is also a small harm when compared to the reputational and other harm that can continue to be inflicted on online tort victims.

C. Congress Did Not Consider Reputation Management Companies When It Enacted The CDA.

Several *amici* also raise the specter of disreputable reputation management companies to justify broadening the already powerful CDA. (See Public Citizen, 30-35, 39-42; Airbnb, 35-36; Volokh, 17-18.) To the extent this industry's operations have become problematic, then *amici* should turn to the legislature for a solution.

According to these *amici*, such reputation management companies often engage in practices ranging from illegitimate to outright fraudulent. (See e.g., Volokh, 17 [describing the filing of "a libel lawsuit in the plaintiff's name against a *fake* defendant"].) Volokh, for example, speculates that reputation management companies are behind a possible scheme using fraudulent notaries, and proposes that the CDA be interpreted in a way that reigns in this business practice. (Volokh, 35.)

The problem with this line of argument, aside from its speculative nature, is how far afield this business practice is from the tort liability Congress sought to eliminate when it enacted the CDA. In fact, Congress could not have been concerned about the conduct of these reputation management companies when it enacted the CDA's protections because this industry apparently did not exist at the time.[11] When recently faced with a question of statutory interpretation, a unanimous Supreme Court

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[11] *Amici* all characterize this industry as a new one.

refused to interpret the text of the 1977 Fair Debt Collection Practices Act in a way that would have covered the new debt-buying industry within its scope. (*Henson v. Santander Consumer USA Inc.* (2017) – U.S. –, 198 L.Ed.2d 177, 184-185.) In the view of the *Henson* Court:

> while it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced.

(*Id.* at 184.) Similarly, here, Congress has not entertained the effect of the "reputation management" industry on the internet, and has not made any judgment calls as to whether or how this industry should be regulated. "[T]he evolution of the [reputation management] business might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past." (*Id.* at 185.) But that question involves inherently legislative fixes. (*Id.*)

D. The CDA Was Not Intended to Deprive Victims of Defamation of a Remedy to Remove Proven False Statements.

There is no indication that, through the CDA, Congress sought to prevent the type of injunction that is at issue in this case. There is also no reason to read such intent into the CDA, when doing so would deprive victims of online harms of any meaningful remedy.

The importance of a viable remedy for victims such as Hassell cannot be overstated. California law is to be interpreted in a way ensuring that "[f]or every wrong there is a remedy." (Civ. Code § 3523; see also *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 531.) This ancient canon of interpretation can be seen

even in the earliest jurisprudence of the U.S. Supreme Court, where it was recognized that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." (*Marbury v. Madison*, (1803) 5 U.S. (1 Cranch) 137, 163; see also *Tex. & P. Ry. Co. v. Rigsby* (1916) 241 U.S. 33, 39-40 ["This is but an application of the maxim, *Ubi jus ibi remedium*."].)

As Dean Chermerinsky's brief thoughtfully explains, if this Court were to adopt *amici*'s position, then the victims of online abuse would be deprived of any meaningful remedy. (Chermerinsky, 8-10.) This is not hyperbole: in addition to the difficulties involved in compelling defendants such as Bird into complying with court orders, many *amici* expressly point out that internet companies have the power to prevent her compliance by restricting a user's ability to remove content. (Public Citizen, 21; FAILS, 8.) Thus, in this case, Yelp could for example, suspend or terminate Defendant Bird's account. Yelp could have a policy that, once comments are posted online, they cannot be modified by the user. In any of these circumstances, Yelp would render Defendant Bird completely powerless to comply with the injunction even if she desired to do so.

In short, because of the extensive control ISP's have over their forums, the only effective remedy for victims such as Hassell is a removal order. Victims should not be deprived of that remedy unless Congress stated an unequivocal desire to accomplish that result, which it has not done.

VII. CONCLUSION

For the reasons set forth in this brief and Respondents' prior briefing, Respondents respectfully request that this Court affirm the opinion of the Court of Appeal in its entirety.

Dated: July 20, 2017[12]

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[12] Originally submitted July 19, 2017 via Truefiling, but rejected and resubmitted on July 20, 2017 per instructions from the clerk's office.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, Plaintiffs and Respondents hereby certify that the typeface in the attached brief is proportionally spaced, the type style is roman, the type size is 13 points or more and the word count for the portions subject to the restrictions of Rule 8.204(c)(3) is 8,230.

Dated: July 20, 2017

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PROOF OF SERVICE

Case No. S235968

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of San Francisco, California, and not a party to the within action. My business address is 100 Bush Street, Suite 1800, San Francisco, CA 94104. On July 20, 2017, I served the following document(s):

RESPONDENTS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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[√] **ELECTRONIC SERVICE (E-MAIL):** Based on the California rules, I transmitted by e-mail the document(s) listed above from this e-mail address, erik@dplolaw.com, to:

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[√] **U.S. Mail:** I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties below by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at San Francisco, California addressed as set forth below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 20, 2017, at San Francisco, California.

J. Erik Heath