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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LENORE ALBERT, Plaintiff and Appellant, v. YELP, INC., Defendant and Respondent.	G051607 (Super. Ct. No. 30-2014-00738725) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge. Affirmed.

Lenore L. Albert, in pro. per., for Plaintiff and Appellant.

Law Offices of Adrianos Facchetti and Adrianos Facchetti; Aaron Schur for Defendant and Respondent.

I. INTRODUCTION

As this court recently pointed out, when a complaint is attacked by an anti-SLAPP motion, it cannot be amended so as to add or omit facts that would take the claim out of the protection of the anti-SLAPP statute. (See *Mobile Medical Services, etc. v. Rajaram* (2015) 241 Cal.App.4th 164, 170 (*Mobile Medical*).) In the instant case, the plaintiff sued the ubiquitous business review internet service Yelp, alleging three causes of action which are unmeritorious. On appeal she posits she might be able to amend to allege other causes of action, at least two of which, unfair competition and false advertising, might arguably have merit given the Second District's recent decision in *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294 (*Demetriades*) [suit based on Yelp's statements about itself].) But whether they have merit cannot be reached in this case. Given the rule against amendments to add or omit facts in anti-SLAPP cases, we must affirm the judgment based on the three causes of action actually alleged.

II. BACKGROUND

Lenore Albert operates a small law office in Huntington Beach. A temporary employee of hers, George Olivo, became upset because he believed Albert had missed a deadline concerning a case involving a friend of his. Thereafter, according to Albert, Olivo enlisted a group of his friends (and possibly others) in a campaign of defamation against Albert on social media, including Yelp. The campaign allegedly included having nonclients pose as clients to write derogatory reviews about Albert's services.

Yelp provides an internet rating system about most businesses, particularly small ones like restaurants and auto repair shops. Businesses are automatically listed on Yelp, so Albert has no choice as whether to appear on a Yelp review page. And anyone can post a review of a business on Yelp free of charge. Besides offering opportunities for third parties to review businesses, Yelp also sells "advertising packages" (the phrase is from a Yelp vice-president) to businesses. Given this dual role of bulletin board provider

and seller of advertising, the Federal Trade Commission has received a considerable number of complaints that Yelp essentially extorts the purchase of advertising by the manipulation of reviews. (See *Curry v. Yelp Inc.* (N.D. Cal., Apr. 21, 2015, 14-CV-03547-JST) (*Curry*) [2015 U.S. Dist. LEXIS 53020] at p. 2.)[1] On occasion these complaints have generated litigation. (E.g., *Levitt v. Yelp! Inc.* (9th Cir. 2014) 765 F.3d 1123 (*Levitt*) [claims by plaintiffs that their refusal to buy advertising from Yelp resulted in bad reviews].)

Yelp counters that the software generating its star-review rankings operates independently of whether the affected business purchases advertising. Or, as one of its vice-presidents declared under oath, "the software does not favor advertisers or punish non-advertisers." In line with its claim that its software is independent of whether a business advertises, Yelp also asserts that it employs a filter to try to weed out reviews from interested parties, whether false positive reviews from employees, or false negative reviews from competitors.

We note, in this regard, that reviews which are weeded out on Yelp are still accessible (generally at the end of a Yelp review page, if one looks for them) – they simply do not count in the aggregate one-to-five star rating system. According to Albert, her decision not to advertise on Yelp resulted in the removal of at least one positive, five-star review from the counted reviews, and the display of multiple negative reviews.

In the late summer of 2014, based on the bad reviews allegedly generated by Olivo and company (reviews which, says Albert, were counted in calculating her low

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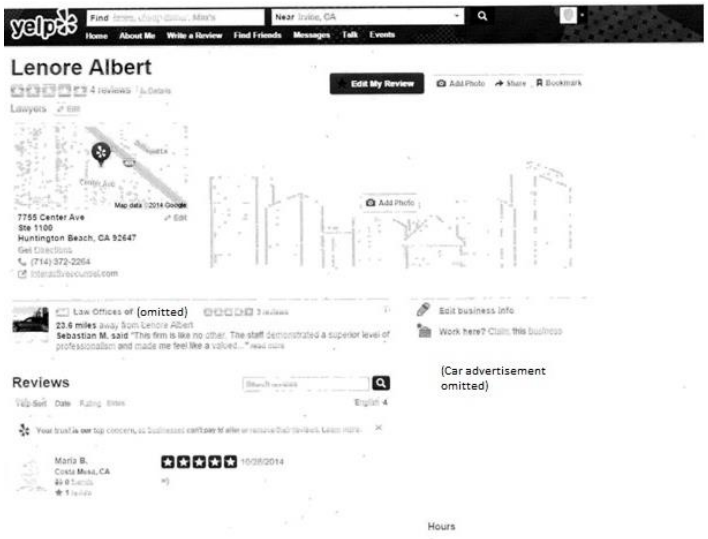
[1] Ironically, the *Curry* case was the engine of investors who were disappointed that the value of their stock went down when the alleged manipulation was exposed: "Plaintiffs state that the truth about Yelp's manipulation of reviews in favor of advertisers and against non-advertisers was revealed by an April 2, 2014 Wall Street Journal article that detailed the results of a FOIA request served on the FTC regarding customer complaints about Yelp. . . . In response to the Wall Street Journal's inquiry, the FTC released 2,046 consumer complaints filed with the FTC between 2008 and March 4, 2014. [Citation.] As a result of the Wall Street Journal article, Plaintiffs allege that the market became aware of 'new facts concerning the volume and the apparent corroborative nature of business owner complaints of Yelp's extortion-like tactics and thus Yelp's operations and financial condition.' . . . Plaintiffs claim that the article's publication caused a decline in Yelp's stock, which, after closing at $80.18 on April 1, 2014, fell to $75.63 by the close of April 2, 2014." (*Curry, supra*, at pp. 6-7.)

rating), and the resulting one-star rating accorded Albert's law practice, Albert brought this action against Olivo, a number of people alleged to be "cohorts" of Olivo, and Yelp itself. In general, the derogatory third-party reviews, as set out in the complaint, accuse Albert of being a poor lawyer who loses her clients' cases because she doesn't file papers timely.[2]

As Yelp typically formats its review pages, a business will typically appear in the general area of the upper left hand corner of the review page, which will be under a running banner for Yelp itself. The page shows a map with the business's location, and its address and phone number. The space to the immediate right is a space for photos. If no photos are posted by either the business itself or reviewers, there is merely a rectangular box with a faint outline of city buildings suggesting a sort of skyline. Competitors' advertisements may appear under the box with their aggregate rating and sample reviews. According to Albert's evidence in the anti-SLAPP motion, this is what her review page would look like without any posted photos:



[2] Because we conclude that Yelp is immune under federal law for the third-party defamatory posts to Yelp's review page of Albert, we need not discuss Yelp's argument that these posts were mere opinion, or delve too deeply into the nature of the reviews.

If photos are posted, those photos generally look as if they were posted by the business itself for promotional purposes. For example, a typical Yelp review of a restaurant may have pictures to the immediate right showing appetizing food served by the restaurant. A review page of an auto repair shop might have pictures of employees proudly standing in front of service bays. And, when lawyers appear on Yelp, the pictures may show the lawyers and their office staff looking fierce in front of their offices or law books. However, as Albert alleges in her complaint, when Olivo began his campaign of vilification, a picture was appended to the immediate right of her Yelp information so that someone checking out Albert's Yelp review would find the figure below. As reproduced from our record, there is no indication to a website visitor that the "Gone Crazy Be Back Soon" post-it like photo shown below was the product of a third party, as distinct from Albert herself.[3]

[3] It must be remembered we are limited to hard copy representations of Albert's evidence in opposition to Yelp's anti-SLAPP motion, and in considering an anti-SLAPP motion, the court must "accept as true the evidence favorable to the plaintiff." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) It might be, for example, that on a typical Yelp review page of a picture posted by a third party to the immediate right of the box identifying the business is clearly marked as from a third party. For our purposes here, however, we assume that the "Gone Crazy" picture was *not* clearly identified as from a third party.

Albert alleges she was unable to delete the post-it note picture. She sued. Albert's complaint against Yelp alleged only three causes of action: (1) defamation; (2) intentional interference with economic advantage and (3) intentional infliction of emotional distress. Yelp quickly brought an anti-SLAPP motion and that motion was granted.

III. DISCUSSION

A. *Yelp's Anti-SLAPP Motion*

Because anti-SLAPP motions have become so common, we need not belabor the basic SLAPP framework, except to say there is now a well-established two-prong approach used by the courts. First, we ask the question: Is the defendant being sued for activity "protected" by the statute, either exercise of free speech or right to petition under the California or federal constitutions? (Code Civ. Proc., § 425.16, subds. (b)(1),(e)[4]; see *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2016) 245 Cal.App.4th 19, ___ [defining first prong of anti-SLAPP analysis as whether defendant is

[4] All further statutory references are to the Code of Civil Procedure except references to section 230, which is to title 47 of the United States Code.

sued for conduct covered by subdivision (e) of section 425.16].) Then we ask: Accepting plaintiff's evidence as true, is there a possibility the plaintiff may prevail on the merits? (See *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 347-348).[5]

As to the first question, there can be no doubt Yelp has been sued for its exercise of free speech rights. Subdivision (e) of section 425.16 defines such exercise to include "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) Here, comment on issues of public interest are integral to Albert's claims. According to Albert's own complaint, she practices as a crusader for small homeowners fighting foreclosures by large financial institutions. She calls herself a "consumer advocate" who is working "for the People." Yelp's evidence on the anti-SLAPP motion is even stronger in that regard, showing that Albert has been the object of (mostly favorable) publicity in the press[6] in regard to her efforts to stop allegedly wrongful foreclosures. And her own website is replete with the theme of her being a champion of the little guy against big banks, including a bundle of political cartoons, quotes from civil rights advocates, and political exhortations. The tenor of many of the third-party posts giving her bad reviews was that she was not living up to her image as such a champion. So we must determine whether such speech addresses an issue of public interest.

The problem of distinguishing purely private speech from comment on issues of public interest has been well explored in *Wong v. Jing* (2010) 189 Cal.App.4th 1354 (*Wong*). The *Wong* decision catalogs the cases discussing whether comments on private businesses (often small businesses like Albert's) involve issues of

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5 Section 425.16, subdivision (b)(3) actually uses the word "probability" instead of possibility. But California courts long ago recognized, given the right to jury trial, that there could be no *weighing* of the evidence to assess a true *probability*. (E.g., *HMS Capital, Inc. v. Lawyers Title Co., supra,* 118 Cal.App.4th at p. 212 [courts do not weigh the evidence on an anti-SLAPP motion].)

6 Including articles mentioning her in USA Today, American Banker, the East Bay Express and the OC Weekly. The evidence also included a full page picture in the San Francisco Daily Journal.

public interest so as to be within the protection of the anti-SLAPP statute. (*Id.* at pp. 1366-1367.) The rule distilled from *Wong* is that the dividing line is between comment that merely concerns "a particular interaction between the parties" and comment which touches on "matters of public concern that can affect many people." (*Id.* at p. 1366.)

We conclude the posts regarding Albert implicate broader matters than just whether she missed a deadline in one case. If articles about doctors and insurance brokers are within the purview of the anti-SLAPP statute (see *ibid.*), so too are comments about a lawyer heavily involved in the foreclosure fallout from the Great Recession? (Cf. *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 923 ["The collapse in 2008 of the housing bubble and its accompanying system of home loan securitization led, among other consequences, to a great national wave of loan defaults and foreclosures."].)

However, there is a statutory exemption from section 425.16's anti-SLAPP protection even for free speech, if that speech is commercial speech within the meaning of section 425.17. We reproduce the operative text of section 425.17 in the margin.[7] But, as the italicized words show, the exemption applies to a defendant's statements trying to sell its own products or services, not a third party's comments about some other person's products or services.

Here, Albert's *complaint* does not allege any causes of action arising out of Yelp's own efforts to sell its advertising services. Rather, the complaint's causes of

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[7] The statute provides:

"(c) Section 425.16 does not apply to any cause of action brought against a person *primarily engaged in the business of selling or leasing goods or services*, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person *if both* of the following conditions exist:

"(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made *for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services*, or the statement or conduct was made in the course of delivering the person's goods or services.

"(2) The intended audience is *an actual or potential buyer or customer*, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue." (Italics added.)

action all center on the third party statements from Albert's online tormentors. Since Albert's complaint seeks to hold Yelp liable for that, protected (non-commercial) speech, it is clear the first anti-SLAPP prong is present. We now address the three causes of action proffered in that complaint in regard to the second prong.

B. *Defamation*

Since Yelp is an internet service provider, it is immunized, under section 230 of the Telecommunications Act of 1996, for defamation contained in any *third party* reviews on a Yelp page pertaining to a given business.[8] The case law on this point is conclusive. (See *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327 [no liability on part of internet provider for delay in removing defamatory messages by unidentified third party]; *Batzel, supra,* 333 F.3d 1018 [section 230 immunized moderator of website for third party post accusing woman of possession of art stolen by Nazis]; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* (4th Cir. 2009) 591 F.3d 250 [website that posted complaints about automobiles sold or serviced by particular dealer protected by section 230]; *Hupp v. Freedom Communications, Inc.* (2013) 221 Cal.App.4th 398 [newspaper website not responsible for five postings by author of article on the website]; *Jones v. Dirty World Entertainment Recordings LLC* (6th Cir. 2014) 755 F.3d 398 (*Dirty World*) [website not responsible for third party posts concerning high school teacher]; see generally *Almeida v. Amazon.com, Inc.* (11th Cir. 2006) 456 F.3d 1316, 1321, quoting *Zeran v. America Online, Inc., supra,* 129 F.3d at p. 330 ["The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'"].)

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[8] The Telecommunications Act of 1996 is often called the Communications Decency Act of 1996 or "CDA." The core of the immunization provisions of the statute can be found at 47 U.S.C. section 230, subdivision (c)(1). We follow *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1027, in referring to the legislation as the "Telecommunications Act of 1996," because much the "decency" part of the legislation was held unconstitutional in *Reno v. ACLU* (1997) 521 U.S. 844 and *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, and the part that usually generates litigation is the internet service provider immunization provided for in section 230.

All doubt is removed when we examine two of the most extreme cases illustrating the immunizing effect of section 230, *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096 (*Barnes*) and *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119. These cases involved more than simple defamatory third party comments. Rather, in both cases third parties were able to use a website to cast the plaintiff in a decidedly negative false light. In *Barnes*, the ex-boyfriend of the plaintiff posted revenge porn on the website. The court held the website itself was still immune under section 230. (*Barnes, supra,* 570 F.3d at p. 1103 [to hold the website responsible would be to treat it like a publisher in contravention of section 230].) And in *Carafano*, the court held a dating website could not be held responsible for a third party's virtual impersonation of an actress on the site. Of course, section 230 certainly does not immunize third parties who actually write defamatory posts to a website. (E.g., *Bentley Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418 [former tenant could be liable for postings on Yelp about landlord])[9], but the website itself is unreachable.

Fair Housing Council v. Roommates.com LLC (9th Cir. 2008) 521 F.3d 1157 (*Roommates*) and *Anthony v. Yahoo! Inc.* (N.D. Cal. 2006) 421 F.Supp.2d 1257 (*Anthony*), both relied on by Albert, are inapposite here. *Roommates* involved a website specifically designed to elicit illegal housing preferences. (See *Roommates, supra*, 521 F.3d at p. 1170; see also *Phan v. Pham* (2010) 182 Cal.App.4th 323, 327 [distinguishing *Roommates* based on design of site and affirmative solicitation of illegal preferences].) In the present case, by contrast, there is no evidence that Yelp *solicits* defamatory or misleading reviews. In fact, all evidence is that it tries to keep such reviews off its site,

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[9] However, one commentator has noted that Yelp discourages legal action against third party reviewers. "Yelp explicitly discourages businesses from taking legal action against posters, warning that 'defamation suits are notoriously expensive and difficult to win,' lawsuits can draw 'attention to posts that would otherwise have been ignored by most rational consumers,' and the law is well settled that it will not help to bring Yelp into the dispute." (Alexander G. Tuneski, *Hey, That's My Name! Trademark Usage on the Internet* (2012) 31 Franchise L.J. 203, 205.)

even if (as the present case illustrates) it is not always successful in its quest[10].

Anthony likewise does not advance Albert's case. It was based on the allegation that a dating site had itself *created* false profiles to give lonely-heart subscribers false hope and thus renew their subscriptions. (*Anthony, supra*, 421 F.Supp.2d at p. 1262.) The general rule which *Anthony* illustrates is that websites are not immunized from allegations they "created tortious content." (*Id.* at p. 1263.) Here, though, Albert has not adduced any evidence Yelp *created* any of the posts which appeared on Albert's Yelp review page. The closest she comes involves the "Gone Crazy" posting we have reproduced above, but Albert does not provide any evidence Yelp itself actually created the post.

A more sophisticated variation of Albert's defamation argument is that Yelp's proprietary filter software unfairly and inaccurately downgrades businesses like hers who do not buy advertising from Yelp. We note that there is an ad for another lawyer on both Yelp's review pages reproduced right above Albert's inauspicious one-star rating. But even this variation of the argument was considered and found wanting in *Gentry v. eBay, Inc*. (2002) 99 Cal.App.4th 816 (*Gentry*). There, too, a litigant claimed a rating algorithm on a website had been gamed in the form of "compilations" based on false representations of conspirators. (*Id*. at p. 831.) The purpose of those representations was to inveigle innocent buyers on eBay to purchase fake sports memorabilia, such as phony autographed baseballs. (*Id*. at p. 821.) Our colleagues in Division One of this district said that to hold the site liable would be inconsistent with

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[10] And in fact *Roommates* affirmatively thwarts Albert's claims in the context of Yelp-style third party reviews. It is easy to overlook that the *Roommates* court, while saying the website could be liable for its own eliciting of illegal preferences, also said that a free-form "Additional Comments" section of the website *was* protected under section 230. (*Roommates, supra*, 521 F.3d at p. 1173.)

section 230. (*Id*. at p. 831 [liability would be equivalent to treating website as "original communicator" contrary to Congress' intent].)[11]

Even more dispositive on the "gamed filter" argument is *Levitt, supra*, 765 F.3d 1123. *Levitt* confronted Albert's precise argument about Yelp's filtering system. The case recounts several small businesses who, upon declining the opportunity to pay for one of Yelp's advertising packages, allegedly had their good reviews magically disappear and bad reviews correspondingly materialize from thin air.[12] (*Id*. at pp. 1127-1129.) To be sure, the plaintiffs in the *Levitt* case didn't allege the clever sort of defamation *qua* defamation Albert alleges here. Rather, the plaintiffs' basic claim in *Levitt* was more direct, i.e., Yelp was running a de facto extortion racket which would, at the very least, give rise to a cause of action for unfair competition. (See *id*. at p. 1130.)

The Ninth Circuit rejected the extortion theory on the merits. (See *Levitt, supra*, 765 F.3d at pp. 1130-1134.) The court, as is the pattern in section 230 litigation, found dispositive the absence of evidence that Yelp *itself* had authored any bad reviews. (*Id*. at pp. 1134-1136.) In the present case, as against Yelp's anti-SLAPP motion, Albert likewise presents no evidence that Yelp itself (that is, someone working for or at the behest of the company) created, developed or manufactured any of the bad reviews left on Yelp's page on Albert.

Another variation on holding website providers liable for defamation from third parties is the encouragement theory. The idea is that if the provider has made it too easy for vindictive third parties to sully the reputations of their targets, it can be held liable. That theory has likewise fared poorly; the courts have uniformly rejected website liability based on the idea that a website psychologically encourages defamatory reviews.

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11 Albert makes no attempt to distinguish *Gentry* on its facts. Rather, she merely quotes a passage in it to the effect that a web service provider can also be a content provider. That thought, however, does not advance her argument; the key is whether compiled content is protected by section 230, and *Gentry* held it was.

12 To be precise, the good reviews were not deleted but appeared at the end of the business's profile buried in a not recommended graveyard. (See *Levitt, supra*, 765 F.3d at p. 1126.)

(See *Dirty World*, *supra*, 755 F.3d at p. 414.) In that regard, *Dirty World* drew this useful distinction between the usual website case involving a third party posting and the software employed in *Roommates*: It is one thing to create a bulletin-board-style website that allows third parties to post defamatory content; it is quite another to go out and affirmatively ask third parties to post defamatory content. (See *id*. at pp. 1169-1174.) There is no evidence in the case before us that Yelp has done any such asking.

We must therefore conclude that there is no possibility Albert's defamation claim could survive the traditional second prong of an anti-SLAPP motion, which is the possibility of prevailing on the merits. (E.g., *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 211 [noting plaintiff's burden on second prong is to show both legal sufficiency and a """sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."""].)

C. *Intentional Infliction of Emotional Distress*

The tort of intentional infliction of emotional distress requires extreme and outrageous conduct with the intention of causing emotional distress, which actually causes another to suffer severe or extreme emotional distress. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) For the conduct to be considered outrageous, it must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Ibid*.) Since Albert provided no evidence that Yelp itself authored any of the defamatory postings or that Yelp intentionally hid positive reviews, nothing it did would approach extreme conduct.

D. *Intentional Interference With Economic Relations*

Interference with prospective economic advantage requires, among other things, a separate wrongful act by the defendant designed to disrupt an economic relationship. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) Given that Yelp is immune for the third party postings under section 230 and that

Albert proffered no evidence that Yelp authored or encouraged any of those postings, there was no chance of Albert prevailing on this cause of action either.

E. *Other Possible Causes of Action*

On appeal, Albert argues that a host of other possible causes of action might be viable if she had the chance to amend her complaint. Her opening and reply briefs mention fraud, negligent misrepresentation, unfair competition and false advertising – and for good measure we might also add false light.

But anti-SLAPP motions are not like demurrers, where leave to amend can be granted as late as on appeal. (E.g., *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) Rather, the law is now settled that plaintiffs cannot amend their complaints in the face of anti-SLAPP motions so as to add or omit facts once the court has determined correctly that the first prong of the anti-SLAPP statute has been met. (*Mobile Medical, supra,* 241 Cal.App.4th 164, 170; *M.F. Farming Co. v. Couch Distributing Co., Inc.* (2012) 207 Cal.App.4th 180, 186, fn. 2; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1052, 1054-1056; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772; *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074 (*Simmons*).) And whatever possibility of amendment the law might allow does not exist here. This is most certainly not a case, like *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, where the trial court *allowed* an amendment after an anti-SLAPP motion had been filed. Here, as Albert conceded at oral argument before this court, she proffered no specifics to the trial court when the possibility of an amendment came up. We certainly cannot fault the trial court for not letting Albert amend her complaint when she did not tell the court how she would amend it.[13] (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he

[13] Because such an amendment at this late date is precluded, we also deny Albert's request to take judicial notice and motion to augment the record of various Yelp postings which postdate the complaint.

can amend his complaint and how that amendment will change the legal effect of his pleading."].)

It might be true, in a vacuum, that what Yelp says *about itself*, and specifically its review filter, could constitute commercial speech and thus be exempt from the anti-SLAPP statute. (See *Demetriades, supra*, 228 Cal.App.4th at p. 310.[14]) But the basic dynamics that prevent the easy circumvention of the anti-SLAPP statute via belated amendments to the complaint would still apply. An anti-SLAPP motion is tested against the existing complaint, not a theoretically better version proffered after the court has granted an anti-SLAPP motion. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 462-463.) Since Albert failed to include allegations in the complaint that were based on Yelp's own statements, we have no basis on which to reverse to allow her to pursue a *Demetriades* action.

F. *Indispensible Party*

Albert's final argument is that, even if Yelp is protected by the anti-SLAPP statute in conjunction with section 230, the court should nevertheless have kept Yelp in the case as a defendant to insure that there was jurisdiction to require it to take down the third party posts. In this opinion we need not, and do not, decide whether an internet service provider may be made a defendant in a lawsuit solely to establish jurisdiction to make a third party take down a post. The issue has been waived. The theory is not to be found in Albert's points and authorities in opposition to Yelp's anti-SLAPP motion. In fact, the idea that Yelp should be in the case merely to assure third parties take down their posts runs counter to the whole tenor of her opposition to Yelp's motion. That opposition was predicated precisely on the theory that Yelp was, in her words, "neither [a] passive pass-through of information provided by others nor merely facilitator of expression by

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14 And, likewise, Yelp's statements about itself do not receive protection under section 230. (*Demetriades, supra*, 228 Cal.App.4th at p. 313.)

individuals" but was itself a content originator. Given that approach, it is not surprising we cannot find in her complaint a theory of innocent third party jurisdiction.

IV. DISPOSTION

The judgment is affirmed. Yelp to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.