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January 11, 2018

By TrueFiling & Federal Express

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: *Yelp, Inc. v. The Superior Court of Orange County (Montagna)*
Fourth Appellate District, Division 3, Case No. G054358
consolidated w/Case No.: G054422, 17 Cal.App.5th 1
Request for Partial Depublication (Cal. Rules of Court, rule
8.1125(a))

To the Chief Justice and the Associate Justices of the California Supreme Court:

Yelp Inc. requests¹ depublication of Part II of the Court of Appeal's decision in *Yelp, Inc. v. Superior Court* (4th Dist. 2017) 17 Cal.App.5th 1, published on November 13, 2017 ("*Montagna*"). That section of *Montagna* should be depublished for two reasons. First, it erroneously relies on this Court's decision in *Williams v. Superior Court* (2017) 3 Cal.5th 531, which dealt with unrelated concerns, to justify its conclusions concerning important constitutional rights in the evolving area of anonymous speech rights. Though not presented with the issue, the Court of Appeal held that courts need not apply a separate balancing test to order the unmasking of an anonymous speaker, and predicted that the California Supreme Court would agree should it decide the issue in the future. In doing so, the Court of Appeal violated the principles of constitutional avoidance and judicial restraint. Second, Part II of *Montagna* should be depublished because

¹ This request is timely. Under CRC 8.1125(a)(4), any request for depublication must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal. The decision becomes final 30 days after it is rendered under CRC 8.490(b)(2). It was rendered on November 13, 2017. Therefore, it became final on December 13, 2017, making the request for decertification due January 12, 2018.

its overall impact severely weakens free speech rights in California, based on its flawed analysis of a unique factual scenario where the business owner claimed to already know the identity of the anonymous speaker. As a result, virtually anyone who dares to express critical comments about experiences with businesses, politicians, or other vital topics will be adversely impacted if Part II of the *Montagna* decision remains published.

I. Yelp’s Interest in Depublication

Yelp Inc. owns and operates Yelp.com, a social networking and search website that (along with related mobile applications) provides a forum for members of the public to read and write reviews about local businesses, government services, and other entities. Yelp’s goal is to help the public make more informed choices about local businesses and services, and to help individuals more fully participate in their local community. Yelp is made available to the public at no charge and without any registration requirement. Those who choose to register by creating an account can write reviews and have access to a broader range of features on Yelp, such as message boards, event postings, and communication tools. Among other things, Yelp allows registered users to write detailed reviews about local businesses and service providers, including public and nonprofit organizations. Such reviews are read by tens of millions of other users when making a wide range of consumer and other decisions.

Yelp has a strong interest in maintaining the integrity of the information on its website and advocating on behalf of consumer speech related issues. Here, the Court of Appeal’s decision will chill usage of Yelp in the future by consumers that wish to describe their experiences with local businesses.

II. Background

This case arises out of a consumer review posted on Yelp’s website by Yelp user Alex M. regarding plaintiffs Montagna & Associates, Inc., an accounting firm, and its president, Gregory Montagna (“Plaintiffs”). The full review stated:

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

Plaintiffs filed a defamation claim against Sandra Jo Nunis, a former client whom they believed to be Alex M., and unidentified John Doe users of Yelp. Plaintiffs then subpoenaed Yelp for Alex M.'s identifying information (including the user's full name, email address, IP address, mailing address, and birth date) in an effort to confirm Alex M. was Nunis. Yelp's response included an objection that Plaintiffs had not satisfied the legal standard that the First Amendment and California Constitution require—establishment of a prima facie case of defamation as articulated in *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, prior to using a court's subpoena power to identify an anonymous speaker. Plaintiffs moved the trial court to compel Yelp to produce Alex M.'s personally identifying information. Plaintiffs asserted that Yelp lacked standing to assert Alex M.'s constitutional rights. Plaintiffs also sought monetary and contempt sanctions. In opposition, Yelp argued that it had standing to oppose a subpoena by asserting its users' constitutional rights, and that Plaintiffs failed to meet their burden to establish a prima facie case of defamation as *Krinsky* requires. The trial court's tentative ruling was to grant Plaintiffs' motion on the bases that Yelp lacked standing and that Plaintiffs had met the *Krinsky* standard (the court declined to identify how, specifically, Plaintiffs had satisfied the *Krinsky* test), require Yelp to produce Alex M.'s personally identifying information by December 9, 2016, and deny both parties' requests for monetary sanctions because "both parties had substantial justification for their positions in this evolving area of law." At the hearing on the motion, the court ordered Yelp to produce Alex M.'s identifying information, and took the issue of sanctions under submission. The court subsequently awarded monetary sanctions in the amount of \$4,962.59 against Yelp for opposing the subpoena.

Yelp filed a Writ of Mandate, arguing that it would suffer immediate and irreparable harm if writ relief did not issue from the Court of Appeal and a temporary stay was not immediately placed on the Order compelling production, since Yelp would be forced to produce the personally identifying of the reviewer, Alex M. Yelp argued that the trial court erred by concluding that it lacked standing to assert the First Amendment rights of its user, and by deciding that Plaintiffs had made a prima facie showing the statements were actionable defamation.

The Court of Appeal granted review and then issued a published decision on November 13, 2017. The Court of Appeal agreed with Yelp that the trial court erred in concluding that it did not have standing, but disagreed with Yelp's assertion that it was wrong to conclude that Plaintiffs had met their prima facie burden. As a result, the Court of Appeal denied the petition for writ of mandate and reversed the order imposing sanctions against Yelp.

III. Reasons Part II of *Montagna* Should Be Depublished

A. By Erroneously Relying on *Williams* for its Conclusions, the Court of Appeal Violated the Principles of Constitutional Avoidance and Judicial Self-Restraint

The principle of judicial restraint requires courts to avoid reaching constitutional questions in advance of the necessity of deciding them. *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230. “In an emerging area of the law, [courts] do well to tread carefully and exercise judicial restraint, deciding novel issues *only when the circumstances require.*” *Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 20, fn. 6 (emphasis added). Part II of the *Montagna* opinion violates this principle because it unnecessarily creates a new constitutional test out of whole cloth.

Specifically, the Court of Appeal relied on selected portions of the *Williams* case to support its holding that a “separate compulsory ‘balancing test’ need not be applied in a case where the plaintiff has already demonstrated a prima facie case of defamation,” and predicted that the California “Supreme Court would agree” should it decide this question in the future. *Montagna*, 17 Cal.App.5th at 14-15. Yet no party ever asserted that such a test should be applied in this case, or advocated for any new test at all.² To the contrary, both parties agreed that *Krinsky* set forth the proper standard. In a highly analogous case, the Sixth District recognized it would be “inappropriate” to “consider what standard to employ in evaluating the merits” because it was unnecessary to decide such constitutional rights. *Matrixx Initiatives, Inc. v. Doe* (2006) 138 Cal.App.4th 872. That same reasoning applies here. Additionally, *Montagna* repeatedly describes the issues in this case as “complex,” “dynamic,” “evolving,” “unsettled ‘area of law,’” and yet, it needlessly prognosticated about important constitutional rights in a developing area of law. This was judicial adventurism—a clear violation of the

² At oral argument, in a response to a justice’s question, Yelp’s counsel mentioned that courts in other jurisdictions have adopted a further balancing test. However, Yelp never urged the Court of Appeal to adopt such a test. To the contrary, Yelp repeatedly and consistently argued in its papers and at oral argument that *Krinsky* set forth the proper standard, as interpreted by *ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603. Stated another way, Yelp argued that Plaintiffs were required to produce evidence to support each of the elements of their claims, including that the statements were both falsifiable and false.

principles of constitutional avoidance and judicial self-restraint. *Montagna* should be depublished for this reason alone.

In any event, the Court of Appeal’s analysis is flawed, inapplicable, and would sow rampant confusion among the trial courts about how it should be applied. In contrast to this case, *Williams* was about discovering putative class members in a PAGA action who were likely aggrieved due to alleged systematic labor code violations,³ and did not implicate the discovery targets’ rights to free speech guaranteed by the U.S. and California constitutions, including the freedom to speak under a pseudonym. In deciding *Williams*, this Court made it abundantly clear that it was limiting its decision to the appropriate scope of discovery in PAGA suits. *Williams*, 3 Cal.5th at 540 (“we granted review to resolve issues of first impression concerning the appropriate scope of discovery in a PAGA action”; and “[n]othing in the characteristics of a PAGA suit, essentially a qui tam action filed on behalf of the state to assist it with labor law enforcement, affords a basis for restricting discovery more narrowly.”). *Id.* at 537. *Williams* did not implicate anyone’s free speech rights and did not reference or implicate *Krinsky*, which sets out the applicable test that must be met prior to unmasking anonymous online speakers.⁴ *Montagna*, in stark contrast to *Williams*, is a case where the Plaintiffs sought to identify an individual defendant on the basis of defendant’s published criticisms of Plaintiffs’ publicly promoted commercial services, and production of that information necessarily compromised that individual’s constitutional rights to speak anonymously (as well as risks extrajudicial retaliation against that individual for his or her exercise of those rights). These distinctions—which the Court of Appeal ignored—are significant because *Williams* addresses extremely different factual scenarios, rights, and public policy objectives. In short, *Williams* is nothing like *Montagna* and should not have been relied upon, much less been a basis for the Court of Appeal’s conclusions.

³ *Williams* specifically relied on cases involving class actions and unrelated Labor Code sections for its holding that “the contact information of those a plaintiff purports to represent is routinely discoverable” without any requirement that the plaintiff show good cause, whereas *Krinsky* dealt with balancing an anonymous internet speaker’s First Amendment rights with a libel plaintiff’s right to prosecute his or her case. It is puzzling that the Court of Appeal would cite to *Williams*, let alone rely on it for one of its central conclusions in a case involving important, fundamental speech rights.

⁴ *Krinsky* makes plain that its test aims specifically to protect important state and federal constitutional protections for freedom of speech.

B. Part II of *Montagna* Should also be Depublished Because it Will Have Negative Consequences for Anonymous Speech Rights in California

The Fourth District’s holding will have at least two negative consequences for anonymous speakers’ rights. The first is that any plaintiff can now claim ignorance of supposed undisclosed necessary facts in order to sidestep his or her burden under *Krinsky* to provide sufficient factual evidence to support a prima facie cause of action, prior to obtaining the personally identifying information of an anonymous speaker. This effectively nullifies Californians’ rights, under the California Constitution and the First Amendment to the U.S. Constitution, to speak out anonymously. This is because the Court held that Alex M.’s identifying information should be ordered disclosed based on the circular argument that Plaintiffs could not satisfy their prima facie burden to demonstrate falsity “without first identifying the reviewer.” *Montagna*, 17 Cal.App.5th at 19. In support of this conclusion, the Court relied on *Williams*—which as discussed above is inapplicable in this context, and unhelpful—and *Krinsky*, which stated that plaintiff “need produce evidence of only those material facts that are accessible to her.” *Krinsky*, 159 Cal.App.4th at 1172.

But the Court of Appeal misunderstood and misapplied *Krinsky*.⁵ In discussing facts that might not be “accessible,” *Krinsky* specifically referenced the defamation element of *actual malice*, which is almost always challenging for plaintiffs to prove since defendants seldom say outright they are posting something maliciously. This was also made clearer in *John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1311:

Balancing the long-standing First Amendment right to publish anonymously with a libel plaintiff’s right to prosecute her case, the *Krinsky* court determined that a libel plaintiff seeking to compel disclosure of an anonymous speaker’s identity must (1) give notice to the anonymous speaker and (2) “make a prima facie showing of the elements of libel,” limited to “only those material facts that are

⁵ Although there are no established criteria for depublication, it primarily occurs when the opinion is wrong on a significant point, “such that it would mislead the bench and bar if it remained as citable precedent.” See Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 515.

accessible to [the plaintiff].” (*Krinsky*, supra, 159 Cal.App.4th at pp. 1171–1172.)

Recognizing that **certain elements of a libel claim, such as actual malice, may be difficult to establish without knowing the defendant’s identity**, the court limited the requisite prima facie showing to evidence accessible to a libel plaintiff. (*Id.* at pp. 1171–1172 & fn. 12.) With this accommodation, *Krinsky* concluded the burden “should not be insurmountable [where] plaintiff knows the statement that was made **and [can] produc[e] evidence of its falsity** and the effect it had on her.” (*Id.* at p. 1172.) (Emphasis added).

Unlike actual malice, which as a mental state is notoriously difficult to prove, a plaintiff must have some evidence of a statement’s falsity in order to bring a claim. In fact, it is an element that “plaintiff should be able to establish without discovery.” *Garment Workers Center v. Superior Court* (2004) 117 Cal.App.4th 1156, 1162; *see also Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 16 (“the legislative intent [behind the anti-SLAPP statute] is best served by an interpretation which should require a plaintiff to marshal facts sufficient to show the viability of the action *before* filing a SLAPP suit.”) (emphasis in original). Decisions interpreting the anti-SLAPP statute, like *Garment Workers* and *Ludwig*, are highly analogous to the situation in *Montagna*, and persuasive—much more so than *Williams*—since the “. . . statute provides similar protections in lawsuits arising out of a defendant’s exercise of the right to speak or petition.” *ZL*, 13 Cal.App.5th at 634; *Doe 2*, 1 Cal.App.5th at 1311 (observing that the “prima facie showing required under *Krinsky* is consistent with the prima facie showing required of a libel plaintiff seeking special discovery under section 425.16, subdivision (g) . . .”). Consequently, “the same prophylactic conditions are an appropriate and measured counterbalance to a defendant speaker’s constitutional rights to privacy and anonymous speech.” *Id.*

Based on the above, a plaintiff business owner facing criticism that includes a statement that the consumer found better service elsewhere (whether, as here, better tax advice—or a tastier pizza, a more empathetic veterinarian, or a less expensive lawyer) should *not* be able to obtain the critic’s personally identifiable information based solely on *speculation* that no one could have provided better services to that consumer. Without any showing that such evidence is truly “inaccessible” or that reasonable efforts were made to obtain the alleged necessary information through other means, it is far too easy for plaintiffs and their lawyers

to abuse the subpoena power delegated to them by the courts. *See* Eisenberg, CAL. PRAC. GUIDE APP. & WRITS, ¶ 11:180.2 (explaining that depublication may occur when “the supreme court believes the opinion’s analysis was too broad and could lead to unanticipated misuse as precedent.”)

Moreover, Yelp’s interpretation of the law is consistent with anti-SLAPP decisions that have rejected discovery requests where a plaintiff failed to show any effort to investigate the matter or obtain the requested information from other sources. *See Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342, 1351, fn. 4 (plaintiff’s failure to document attempts to contact witnesses or otherwise conduct any investigation required denial of motion for discovery). Indeed, as courts have repeatedly affirmed in the anti-SLAPP context, “trial judges should refrain from ordering ‘unnecessary, expensive and burdensome’ discovery proceedings ‘if it appears from the SLAPP motion there are significant issues as to *falsity* or publication . . .’” *Paterno*, 163 Cal.App.4th at 1349, citing *Garment Workers*, 117 Cal.App.4th at 1162 (emphasis added).

These principles are especially pertinent in this case. Plaintiffs here not only claimed to know who published the alleged defamatory statements, but they named that person in their lawsuit. And yet, there was no evidence that Plaintiffs did *anything* to obtain the factual information that was supposedly unavailable (i.e., whether the customer truly received better service from another tax preparer) directly from that named defendant. Ignoring this crucial fact, the Court of Appeal opined: “it is difficult to imagine what more [plaintiffs] could have reasonably done to justify the unveiling of his accuser.” *Montagna*, 17 Cal.App.5th at 20. However, it was not inconceivable, much less unreasonable under the circumstances of this case to expect Plaintiffs to take the named defendant’s deposition, propound written discovery, or at least seek documents from defendant to obtain the supposedly necessary information. Here, Plaintiffs did nothing and relied solely on speculation that no customer of theirs could ever have received better service elsewhere. The Court of Appeal expects too little of plaintiffs. A modicum of investigative due diligence should be required before stripping targeted speakers of their Constitutional free speech rights.

This Court should not permit *Montagna*’s interpretation of *Krinsky* to stand. That any plaintiff can claim ignorance of supposed undisclosed facts based on the speculative hope they will obtain the necessary information to support their claims

is a serious and pervasive problem.⁶ Depublication of Part II of *Montagna* is the proper remedy to undo the mischief caused by this loophole.

A related problem with Part II of *Montagna* is that the Court of Appeal adopted Plaintiffs' argument that the alleged defamatory statements at issue were actionable because the anonymous speaker omits facts Plaintiffs believe were necessary to accurately describe their version of events.

In our view, a trier of fact could reasonably include Alex M.'s "prediction" of what future clients might expect is also an implied representation as to the manner in which Montagna (and perhaps his staff) actually treated Alex M. The implication is that Montagna and his staff screamed at, harassed, and threatened Alex M. when he or she dared to complain, and moreover that they did so without justification. Indeed, the implied assertion Montagna and his staff will abuse clients *without justification* is at the heart of Alex M.'s suggestion that *any* future client should prepare to receive similar treatment. Montagna alleges in his complaint those implied assertions of fact are false: "Plaintiffs did not scream, harass, or threaten Defendant." He repeats that assertion in his declaration.

Montagna, 17 Cal.App.5th at 18-19.

There are no facts supporting these implications (indeed, it is difficult to imagine that any consumer believes that screaming, harassment, or threats from a business are justified) or legal authorities supporting this novel theory of "defamation by omission." *Paterno*, 163 Cal.App.4th at 1352-1353 (media defendant's alleged failure to tell plaintiff's "side of the story" was rejected as "novel theory" in defamation case). No legal authority requires a reviewer to explain the business's position for them.⁷ This novel theory is an unprecedented expansion of California

⁶ Plaintiffs are already using *Montagna* in this way. For example, just last month, a litigant filed a motion to compel against Yelp seeking the disclosure of a reviewer's identifying information. *Matevosian v. KAAS Law, et al.*, LA.S.C. Case No. BC657112. Relying on *Montagna*, and without *any* evidence to support his claim (indeed he does not even claim the statements are false), the litigant argues that he needs to know the identity of the reviewer to establish a prima facie case of libel. This is exactly the kind of abuse *Montagna* allows and encourages.

⁷ The Court of Appeal's decision here is again colored by Plaintiffs' statements that it did not act in this way toward Defendant Nunis, an atypical situation that should not be extended to every case involving anonymous speech. Further, Plaintiffs in this case

defamation law, and will lead to confusion in the lower courts, as courts will be forced to speculate about unintended implied meanings well beyond the text of alleged defamatory statements. This is especially likely to occur because the Court’s reasoning is exceedingly difficult to parse. It suggests the implied assertion of abuse of Montagna’s clients “without justification” is conclusive here, as opposed to the express assertion of abuse. But the Court of Appeal then inexplicably relies on Montagna’s rejection of the express assertion (at least as to the identifiable defendant Nunis) as evidence that the implied assertion is false. The Court of Appeals had no reason to mention the supposed implied assertion if the plaintiffs’ refutation of the express assertion was allegedly sufficient, and it makes no sense to allow plaintiffs’ refutation of facts relevant to Nunis—a specific, already-identified individual—to be used as a basis for identifying a different, unknown speaker.

IV. Conclusion

This case presents an issue of statewide importance because it involves the abridgement of fundamental constitutional rights in an emerging area of law that could have far-reaching consequences for virtually anyone who publishes information through the internet: Whether they are a consumer, hobbyist, political dissident, newspaper, or website that relies on third-party speech, many will suffer irreparable harm if Part II of the *Montagna* decision is allowed to stand. The Court of Appeal’s conclusions in Part II concerning important constitutional rights in an evolving area of law violated the principles of constitutional avoidance and judicial restraint and should be depublished. Additionally, the consequences of the Fourth District’s decision are deeply worrying. Any plaintiff can now force the disclosure of an anonymous speaker’s identifying information based on speculation that facts may exist to support his or her claim. The bench and the bar will struggle to apply the Court’s opinion.

Based on the foregoing, and pursuant to California Rules of Court, rule 8.1125(a), Yelp respectfully requests that the Supreme Court depublish Part II of the Court of Appeal’s Opinion in *Yelp, Inc. v. Superior Court* (2017) 17 Cal.App.5th 1.

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could have responded to the review at issue and explained their side of the story with the free tools already available to them through Yelp’s platform.

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
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Very truly yours,

A handwritten signature in cursive script that reads "Adrian Facchetti". The signature is written in black ink and is positioned above a horizontal line.

Adrianos Facchetti, SBN 243213
Attorney for Yelp Inc.

Please see attached Proof of Service

SERVICE LIST

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ATTACHMENT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YELP INC.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

GREGORY M. MONTAGNA et al.,

Real Parties in Interest.

GREGORY M. MONTAGNA et al.,

Plaintiffs and Respondents,

v.

YELP INC.,

Objector and Appellant.

G054358 consol. w/G054422

(Super. Ct. No. 30-2016-00848551)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Andrew P. Banks, Judge. Consolidated with an

appeal from an order of the Superior Court of Orange County, Andrew P. Banks, Judge. Petition denied. Order reversed.

Law Offices of Adrianos Facchetti and Adrianos Facchetti; Aaron Schur and Connie Sardo for Petitioner, Objector, and Appellant.

Krongold Law and Steven L. Krongold for Real Parties in Interest, Plaintiffs and Respondents.

Aaron Mackey and Andrew Crocker for Electronic Frontier Foundation as Amicus Curiae on behalf of Petitioner, Objector, and Appellant.

Catherine R. Gellis for Floor64 as Amicus Curiae on behalf of Petitioner, Objector, and Appellant.

Perkins Coie, James G. Snell, Christian Lee, and Hayley L. Berlin for Automattic Inc., Dropbox, Inc., Facebook, Inc., Google Inc., Pinterest, Inc., Reddit, Inc., Snap, Inc., and Twitter, Inc., as Amici Curiae on behalf of Petitioner, Objector, and Appellant.

* * *

Yelp Inc., which operates a website for consumer reviews, has petitioned for a writ of mandate to overturn an order compelling its production of documents that may reveal the identity of an anonymous reviewer on its site. Yelp also appeals from a separate order imposing \$4,962.59 in monetary sanctions against it for failing to comply with the subpoena requiring production of the documents. Pursuant to the parties' stipulation, we have consolidated the writ proceeding with the appeal.

Yelp argues the orders must be reversed because: (1) the trial court erroneously concluded Yelp lacked standing to assert the First Amendment rights of its anonymous reviewer as grounds for resisting the subpoena; and (2) the court further erred by concluding plaintiff Gregory M. Montagna, Sr.,¹ made a prima facie showing the

¹ The plaintiffs in the lawsuit are Montagna and his corporation, Montagna & Associates, Inc. We refer to them collectively as "Montagna."

content of the review posted on Yelp’s site by “Alex M.,” the anonymous reviewer, was defamatory.

We agree the trial court erred in ruling Yelp lacked standing to assert the First Amendment rights of its anonymous reviewer, Alex M., but find no error in its determination Montagna made a prima facie showing the challenged review was defamatory. Consistent with the recent opinion *ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603 (*ZL Technologies*), we conclude the latter finding was sufficient to support the trial court’s order compelling Yelp to produce the subpoenaed documents in the circumstances of this case. We consequently deny the petition for writ of mandate.

However, given the dynamic nature of this area of law—the primary cases we rely upon were decided *after* the trial court issued its ruling—we also conclude Yelp’s opposition to Montagna’s motion to compel was substantially justified. We thus reverse the order imposing sanctions against Yelp.

FACTS

Montagna filed a lawsuit against Sandra Jo Nunis and several Doe defendants alleging a single cause of action for trade libel. According to the first amended complaint, Montagna, an accountant, prepared a tax return for Nunis in 2015. Montagna initially quoted Nunis a “minimum” fee of \$200 for the preparation of her return, based on her representation that her income was comprised exclusively of wages reported on a W-2 form, and she would require only a simple return. However, both Nunis’ income and the resulting tax return were allegedly more complicated than she had represented. As a consequence, Montagna charged Nunis \$400 for preparation of the return, rather than the \$200 fee he initially quoted.

Nunis allegedly paid Montagna only \$200, and refused to pay him more even after receiving “a collection letter” for the balance. And in November 2015, Nunis allegedly went online to the Yelp website and posted the following review of Montagna,

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

Montagna alleged the following statements made by Nunis in the review were provably false: (1) the return he had prepared for her was accurate and complete; (2) he had not caused her to hire another firm to redo his work; (3) he was not negligent in preparing her return, such that her refund more than doubled; and (4) no one in his office screamed at, harassed, or threatened her.

Montagna allegedly sent a demand to Nunis, asking she retract the Yelp review, or correct the false and libelous statements, and warned her that if she failed to do so, legal action might be taken against her. Nunis, however, allegedly failed and refused to either delete or correct her review and Montagna thereafter filed the lawsuit.

In June 2016, Montagna served Yelp with a deposition subpoena seeking business records. Specifically, Montagna asked for copies of any and all documents that would identify the Yelp user Alex M., to either confirm Montagna’s belief that the name was an alias used by Nunis, or discover the true identity of the anonymous reviewer. Yelp objected to the subpoena, arguing it violated the free speech rights of the anonymous Alex M., and it later refused to produce the documents.

After Montagna and Yelp engaged in an unsuccessful effort to resolve the discovery dispute, Montagna filed a motion for an order holding Yelp in contempt of court and compelling its compliance with the deposition subpoena. In October 2016, Yelp filed opposition to Montagna’s motion. Both parties sought an award of monetary sanctions against the other.

The trial court treated Montagna's motion as simply a motion to compel compliance with his discovery request. The court granted the motion, finding (1) Yelp lacked standing to enforce the anonymous reviewer's First Amendment rights because it had failed to establish the second and third elements of the test set forth in *Matrixx Initiatives, Inc. v. Doe* (2006) 138 Cal.App.4th 872 (*Matrixx*), and (2) even if Yelp had standing to assert the reviewer's first amendment rights, Montagna had alleged facts sufficient to demonstrate a defamatory statement by the anonymous reviewer, Alex M., and was thus entitled to discovery regarding that reviewer's identity. Consequently, the court ordered Yelp to comply with the subpoena by December 9.

Although the trial court's tentative ruling was to deny Montagna's request for monetary sanctions against Yelp, it was persuaded at the hearing to take that issue under submission. And on December 2, the court issued a second order, imposing \$4,962.59 in sanctions against Yelp.

On December 7, two days before the trial court's deadline for compliance with its discovery order, Yelp filed a petition for a writ of mandate in this court, seeking an immediate stay of that order. On December 8, we issued the requested stay and invited Montagna to file an informal response to the petition.

Yelp also filed a separate appeal from the sanction order, and the parties stipulated to consolidate the writ proceeding with that appeal. We subsequently accepted amicus briefs in support of Yelp's position on the standing issue, from (1) Electronic Frontier Foundation, (2) Automatic, Inc., Dropbox, Inc., Facebook, Inc., Google, Inc., Pinterest, Inc., Reddit, Inc., Snap Inc., and Twitter, Inc., and (3) Floor64, Inc., d/b/a The Copia Institute.

DISCUSSION

I. Standing

Yelp first contends the trial court erred in concluding it lacked standing to challenge Montagna's subpoena based on the First Amendment rights of its anonymous

reviewer, Alex M. We agree. In reaching its conclusion, the trial court relied on *Matrixx*, a case involving anonymous postings to an online message board. However, as pointed out in the recent case of *Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623 (*Glassdoor*), *Matrixx* is distinguishable.

In *Matrixx*, a pharmaceutical company filed a lawsuit claiming that several anonymous posts to the online message board had defamed it. (*Matrixx, supra*, 138 Cal.App.4th at p. 875.) The company was able to trace the posts to the offices of a San Francisco hedge fund, and it took the deposition of that fund’s manager to identify the anonymous poster. (*Id.* at p. 876.) The manager, however, refused to answer questions, citing the posters’ “First Amendment right to speak anonymously.” (*Ibid.*) On appeal, the court held the manager lacked standing to assert the constitutional rights of those third party posters. (*Id.* at pp. 877-881.)

The *Matrixx* court relied on *Powers v. Ohio* (1991) 499 U.S. 400 (*Powers*), for the proposition three criteria must be satisfied to establish an exception to the general rule “that . . . litigants must assert their own legal rights rather than rely on the rights or interests of third parties.” (*Matrixx, supra*, 138 Cal.App.4th at p. 877.) The three criteria are: “(1) the litigant suffers a distinct and palpable injury in fact, thus giving him or her a concrete interest in the outcome of the dispute; (2) the litigant has a close relationship to the third party such that the two share a common interest; and (3) there is some hindrance to the third party’s ability to protect his or her own interests. [Citations.]” (*Id.* at p. 877.) The court noted the first consideration—the “distinct and palpable injury” criterion—was not at issue in the case. (*Id.* at p. 877.) The same is true here, as Montagna obviously does not assert there is no viable ““case or controversy”” pending before the court. (*Ibid.*)

In its analysis, however, the *Matrixx* court noted it was presented with an unusual procedural posture for analyzing third party standing because “the litigants who are challenging discovery are not parties in the underlying action for which the discovery is sought, but instead are *themselves* the third parties in a lawsuit that may have nothing

to do with them.” (*Matrixx, supra*, 138 Cal.App.4th at p. 879.) The cases it found most closely analogous were *In re Subpoena Duces Tecum to America Online, Inc.* (Jan. 31, 2000, No. 40570) 52 Va. Cir. 26, 32 (revd. on other grounds *America Online, Inc. v. Anonymous Publicly Traded Co.* (2001) 261 Va. 350) (*AOL*), and *In re Verizon Internet Services, Inc.* (D.D.C. 2003) 257 F.Supp.2d 244, 258 (revd. on other grounds *Recording Industry Ass’n. of America, Inc. v. Verizon Internet Services, Inc.* (D.C. Cir. 2003) 351 F.3d 1229, 1239) (*Verizon*). (*Matrixx, supra*, 138 Cal.App.4th at p. 880.)

In both *AOL* and *Verizon*, the courts found the interests of internet service providers (ISPs) to be sufficiently intertwined with those of their subscribers that it was proper to accord the ISPs standing to assert their subscribers’ First Amendment rights in the action. As explained in *AOL*, “If AOL did not uphold the confidentiality of its subscribers, as it has contracted to do, absent extraordinary circumstances . . . one could reasonably predict that AOL subscribers would look to AOL’s competitors for anonymity. As such, the subpoena duces tecum at issue potentially could have an oppressive effect on AOL.” (*AOL, supra*, 52 Va. Cir. at p. 32; see *Verizon, supra*, 257 F.Supp.2d at p. 258 [noting Verizon itself had “a vested interest in vigorously protecting its subscribers’ First Amendment rights, because a failure to do so could affect Verizon’s ability to maintain and broaden its client base”].)

The *Matrixx* court expressly noted that in both *AOL* and *Verizon*, “the challenge to the subpoena was made *by an entity with a sufficiently close relationship to the anonymous user that judicial consideration was warranted*” (*Matrixx, supra*, 138 Cal.App.4th at p. 880, italics added), but then distinguished the situation before it from those cases. As the court explained, by contrast to the ISPs in *AOL* and *Verizon*, which could “easily satisf[y]” the “‘close relationship’ criterion of prudential standing” (*Matrixx, supra*, 138 Cal.App.4th at p. 881), the hedge fund manager before it claimed *no relationship* with the anonymous poster whose identities were being sought by the

pharmaceutical company. Given that circumstance, the hedge fund manager “offer[ed] no facts compelling a finding of standing” (*Ibid.*)

Significantly, this case is distinguishable from *Matrixx* on the exact same basis that *Matrixx* distinguished the *AOL* and *Verizon* cases. Here, Yelp is the host of the website where the anonymous Alex M. posted the review of Montagna’s professional services, and it has a substantial interest in protecting the right of its users to maintain their anonymity when posting reviews.

In its terms of service, Yelp specifically acknowledges its users may “use a pseudonym” when posting reviews, and cautions them to “take care to note that others may still be able to identify you if, for example, you include identifying information in your reviews.” And although Yelp also informs its users “that we may disclose information about you to third parties” in certain circumstances,² the clear implication is that it will not do so willingly, without a compelling reason. Thus, Yelp occupies a similar position to the ISPs in *AOL* and *Verizon*, both of which the *Matrixx* court concluded could “easily satisf[y]” the close relationship requirement for establishing third party standing. (*Matrixx, supra*, 138 Cal.App.4th at p. 881.)

Other courts, both before and after *Matrixx*, have also concluded a content provider had standing to assert the First Amendment and privacy interests of a third party who contributed content anonymously. In *Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538, 1541, this court allowed a nonparty newspaper “to assert the constitutionally protected rights of an author to remain unknown.” And in *Digital Music*

² The circumstances described are “if we have a good faith belief that such a disclosure is reasonably necessary to (i) take action regarding suspected illegal activities; (ii) enforce or apply our Terms and Privacy Policy; (iii) comply with legal process or other government inquiry, such as a search warrant, subpoena, statute, judicial proceeding, or other legal process served on us; or (iv) protect our rights, reputation, and property, or that of our users, affiliates, or the public.”

News LLC v. Superior Court (2014) 226 Cal.App.4th 216, 230, footnote 12 (disapproved on other grounds in *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557, fn. 8 (Williams)), the court concluded the operator of a digital music site had standing to assert the constitutional privacy right of an anonymous commenter on the site.

Moreover, in March 2017, the Sixth District Court of Appeal—the same court which issued the *Matrixx* opinion—issued its opinion in *Glassdoor*, holding that a website host had standing to assert the First Amendment rights of a third party who posted an allegedly defamatory review on its site. (*Glassdoor, supra*, 9 Cal.App.5th at p. 634.) And *Glassdoor* distinguished the court’s earlier *Matrixx* opinion on the same ground we do here, explaining: “Glassdoor is not an avowed stranger to the speaker, as was the objector in *Matrixx*. It is the acknowledged *publisher* of the speech at issue. Such a publisher has a strong interest in protecting the right of its users to speak anonymously.” (*Id.* at p. 630.)

Rather, *Glassdoor* explained the situation before it “is the same as in the cases distinguished by *Matrixx*. As Glassdoor’s corporate counsel declared, its business model ‘relies on maintaining its users’ anonymity. The reliability of the information on glassdoor.com would likely decrease if litigants could readily obtain users’ identities, because users would fear retaliatory litigation based on the information they posted.’ This would naturally tend to harm Glassdoor’s interests, because its usefulness to potential readers depends on the degree to which posters feel able to frankly recount their employment experiences without fear of adverse consequences. . . . [¶] Anonymous publication thus furnishes not only the medium through which persons like Doe exercise their First Amendment rights, but is also a significant asset in Glassdoor’s business—an asset in which Glassdoor possesses a direct pecuniary interest squarely aligned with the interest of each anonymous content provider. This symbiosis constitutes a ‘sufficiently close relationship . . . that judicial consideration [i]s warranted.’ (*Matrixx, supra*, 138 Cal.App.4th at p. 880.)” (*Glassdoor, supra*, 9 Cal.App.5th at pp. 630-631.)

Additionally, *Glassdoor* concluded the website host need not affirmatively establish there is a ““hindrance to the third party’s ability to protect his or her own interests”” to justify standing: “The quoted requirement is one of the limitations on standing adopted by federal courts. [Citation.] It is not, however, among the *jurisdictional* constraints arising from the constitutional requirement of a ‘case[]’ or ‘controvers[y].’ [Citations.] It is instead one of the *prudential* considerations intended to protect the integrity of the judicial process. As such, it is to be flexibly applied in a manner befitting its purposes, and ‘should not be applied where its underlying justifications are absent.’ [Citation.]” (*Glassdoor, supra*, 9 Cal.App.5th at p. 631.)

The court explained the justifications for applying a hindrance requirement were “the undesirability of triggering an unnecessary adjudication where the holder of the rights at issue ‘do[es] not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not,’ and the desirability of ensuring that the third party’s interests are not represented by an inadequate advocate. [Citation.]” (*Glassdoor, supra*, 9 Cal.App.5th at p. 631.) And the court reasoned that neither justification was implicated in the case where a website host was seeking to assert the First Amendment rights of an anonymous reviewer: “Here the first objective does not appear to be at issue since [the reviewer] has already asserted his right to speak anonymously and Glassdoor’s disclosure of his identity would effectively destroy that right. Nor do we see any reason to suppose that [the reviewer] would be a better advocate than Glassdoor. Indeed, it appears that in settings like this one, the opposite will typically be true. Several cases in similar contexts have disposed of the ‘hindrance’ issue on the rationale that anonymous speakers cannot represent their own interests without sacrificing the very anonymity they seek to protect.” (*Glassdoor, supra*, 9 Cal.App.5th at pp. 631-632.)

Although Montagna argues *Glassdoor* is wrongly decided for several reasons, we find none of them persuasive. Montagna first claims that *Glassdoor* errs by

according the host of an online review site the same third-party standing that would traditionally be given to a newspaper. As he explains: “[the website host] is not a newspaper publisher protecting the anonymity of its source. The pseudonymous author is not an aggrieved citizen speaking out on political, religious, or social issues at the core of First Amendment protection. [Instead, t]he gravamen of the lawsuit involves commercial speech on a private matter: grievances about the quality of service from a local business.” And as Montagna points out, commercial speech is entitled to less protection under the First Amendment than other kinds of speech.

But as Yelp points out, the argument mischaracterizes “commercial speech.” Speech is not denominated “commercial” based on whether the *topic* it addresses involves commerce. Rather, as our Supreme Court explained in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, speech is typically found to be “commercial” when *the speaker* is engaged in commerce, the intended audience is actual or potential buyers or customers *of the speaker’s goods or services*, and the factual content is commercial in character. (*Id.* at p. 960.) In short, the type of “commercial speech” that is accorded less First Amendment protection is comprised largely of statements made *by* those engaged in commerce relating to their business—not statements made *about* them by consumers. That does not describe the speech at issue in this case.

Montagna also argues *Glassdoor* inaccurately claims “that a ‘substantial preponderance of national authority favors the rule that publishers, *including Web site operators*, are entitled to assert the First Amendment interests of their anonymous contributors in maintaining anonymity.” (*Glassdoor, supra*, 9 Cal.App.5th at p. 629.) However, Montagna’s quibble with this claim is partly based on its contention website hosts that publish anonymous content must be distinguished from newspapers that publish anonymous content—a contention he fails to support with any persuasive distinction.

Other than his inaccurate contention that reviews posted on sites such as Yelp are mere “commercial speech,” Montagna argues only that newspapers are different than websites like Yelp because they “create or edit” content, and thus can be held directly liable for defamation on the same basis as their anonymous authors. By contrast, he claims “publishers and distributors of online content,” are statutorily immune to such liability. (Citing 47 U.S.C. § 230, subd. (c)(1).) But if the content publisher’s ability to assert third-party standing were limited to situations where the publisher could be held directly liable for the content at issue, it would serve little purpose. And Montagna cites no cases supporting such a rule.

Montagna asserts the statute that shields Internet providers like Yelp from direct liability for the content posted by third parties on their sites distinguishes them from traditional newspapers because it creates a perverse incentive for the providers to “encourage users to register and post comments regardless of whether the comments are true or not. In fact, the more controversial and offensive the comments, the more interest is generated, which, of course, leads to more web traffic and advertising revenue.” But even if that were true, Montagna fails to explain how that distinction would affect the providers’ *standing* to assert the First Amendment interests of their users. And we cannot see how it would.

Montagna also claims *Glassdoor* erroneously relies on *AOL* and *Verizon* as a basis for finding third-party standing, noting those cases “did not involve a libel plaintiff seeking to uncover the identity of a potential defendant.” Instead, the ISPs in *AOL* and *Verizon* were asserting the rights of their subscribers to challenge an overbroad statute that had a potentially chilling effect on the subscribers’ free speech. But again, Montagna fails to explain how that distinction would materially affect the courts’ conclusions regarding the standing of the ISP. In both *AOL* and *Verizon*, the courts focused on the fact the ISP would likely *lose subscribers* if it did not act to protect their First Amendment rights. The same is true here. If Yelp reviewers believed it would

reveal their identities to any plaintiff who demanded it do so as part of discovery in a lawsuit, we have no doubt it would lose a segment of those reviewers. Consequently, we conclude that like the ISPs in *AOL* and *Verizon*, Yelp also has a significant stake in “vigorously protecting its [reviewers’] First Amendment rights, because a failure to do so could affect [its] ability to maintain and broaden its client base.” (*Verizon, supra*, 257 F.Supp.2d at p. 258.)

Moreover, we reject Montagna’s suggestion Yelp cannot claim to be aligned with Alex M.’s privacy interests in this case, when it seeks to separate itself from the interests of its users in other contexts. As Montagna laments, “Yelp and other websites pick and choose when they are aligned with their users.” But of course, Yelp is free to argue its interests align with its users, or do not, in whatever *different* contexts it chooses. Yelp is not claiming *to be* its users. What Yelp cannot persuasively do is argue its interests are both aligned, and divergent, from those of its users in the *same* context. And it has not.

Finally, Montagna contends *Glassdoor* has erroneously dispensed with the hindrance requirement of third party standing. We disagree. What *Glassdoor* did was emphasize a point also acknowledged in *Matrixx*, which is that hindrance—i.e., a demonstration that the party whose First Amendment rights are being asserted is somehow hindered from asserting them directly—is not a *requirement*, but merely a “prudential consideration[] intended to protect the integrity of the judicial process.” (*Glassdoor, supra*, 9 Cal.5th at p. 631.) The justifications for including it are to ensure the third party is not attempting to enforce the rights of a person who does not want to assert them, and that the third party can adequately advocate for the interests of the person whose rights are being asserted. (*Ibid.*) And the *Glassdoor* court reasoned those concerns were satisfied in the case where the person whose rights were at issue had already demonstrated a desire to remain anonymous, and the third party who was

asserting that right is the website host that benefitted from their ability to do so. (*Id.* at p. 632.) We agree.

Further, while it is true, as the *Glassdoor* court acknowledges, that California allows a party to appear and “defend the right to anonymity under a fictitious name,” it also notes that party might also be effectively hindered in offering evidence to support that defense, or by the inability to appear in person. (*Glassdoor, supra*, 9 Cal.5th at p. 632.) At a minimum, the anonymous party would have to hire counsel to represent it in defending his or her anonymity. Given that practical consideration, both the anonymous party’s and the court’s interests might be better served by allowing the website host to assert the party’s right to remain anonymous.

Based on all of the foregoing, we concur with *Glassdoor* in holding that a website host such as Yelp has standing to assert the First Amendment rights of persons who post reviews anonymously on its site, as against an effort to compel Yelp to identify those persons.

II. Propriety of Compelling Yelp’s Production of Documents

Having determined Yelp has standing to assert Alex M.’s First Amendment rights in opposing production of documents that might reveal his or her identity, we turn to the issue of whether the trial court’s order compelling the production was correct on the merits. We conclude it was.

In *ZL Technologies*, the First District Court of Appeal recently analyzed the showing a plaintiff must make to justify an order compelling a website host to produce identifying information about a person who allegedly defamed the plaintiff in comments posted anonymously on the site. (*ZL Technologies, supra*, 13 Cal.App.5th at p. 610.) As the court explained, such cases require the courts to resolve “‘a conflict between a plaintiff’s right to employ the judicial process to discover the identity of an allegedly libelous speaker and the speaker’s First Amendment right to remain anonymous.’ [Citation.]” (*Ibid.*)

The *ZL Technologies* court noted, “the constitutional right to publish anonymously’ has long been recognized as “an aspect of the freedom of speech protected by the First Amendment.” [Citations.]’ [Citation.]” (*ZL Technologies, supra*, 13 Cal.App.5th at p. 611.) However, “[w]hen vigorous criticism descends into defamation,’ . . . ‘constitutional protection is no longer available.’ [Citations.]” (*Ibid.*) Thus, a plaintiff seeking discovery of the anonymous person’s identity must first make a prima facie showing the comment at issue is defamatory. (*Id.* at p. 613.) Adopting the test in *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1172, footnote 14 (*Krinsky*), the court stated that an appropriate showing requires “evidence “that . . . will support a ruling in favor of [the plaintiff] if no controverting evidence is presented. [Citations.] It may be slight evidence which creates a reasonable inference of [the] fact sought to be established but need not eliminate all contrary inferences. [Citation.]” [Citations.]’ [Citation.]” (*ZL Technologies, supra*, 13 Cal.App.5th at p. 612.)

Further, the *ZL Technologies* court stated that before the trial court orders the production of information identifying the anonymous commenter, it “must ensure reasonable efforts are made to notify the [commenter], permitting them an opportunity to respond, before disclosure of their identities may be compelled.” (*ZL Technologies, supra*, 13 Cal.App.5th at p. 615.) In doing so, however, the court rejected the suggestion that it should be the burden of the plaintiff seeking discovery to make those efforts. The court acknowledged that often the plaintiff’s only means of contacting the anonymous commenter would be to post a notice on the same website where the original comment had been posted, and requiring the plaintiff to do that would effectively be compelling it to “exacerbate its own injury” by republishing the alleged defamation. (*Ibid.*) Instead, “the trial court should direct the subpoenaed party to provide [the notice].” (*Ibid.*)

We agree with that analysis. As between the plaintiff seeking to discover the identity of the anonymous commenter, and the website host that presumptively knows the identity or has access to information that may reveal it, it makes little sense to place

the burden of notification on the former. And placing the burden on the website host seems especially appropriate in circumstances such as these, where the host *is depending on the rights of the anonymous commenter* as the basis for defending the discovery request.

In this case, Yelp does not challenge the sufficiency of notice to Alex M. as a basis for challenging the order compelling its production of documents, and thus we need not reach the issue. However, we note that not only did Montagna affirmatively assert he contacted Nunis, the former client he believes is Alex M. (or at a minimum, has some relationship with Alex M.), but Yelp informs us it also reached out via e-mail to Alex M., using the e-mail address provided in connection with the account.

Finally, *ZL Technologies* rejected the assertion that even after the plaintiff has made a prima facie showing of defamation, the court should be required to apply a final “balancing test, weighing ‘the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.’” (*ZL Technologies, supra*, 13 Cal.App.5th at p. 616, quoting *Dendrite Internat. v. Doe No. 3* (App. Div. 2001) 342 N.J.Super. 134, [775 A.2d 756].) As the court instead concluded, “a further balancing should not be required ‘[w]here it is clear to the court that discovery of the defendant’s identity is necessary to pursue the plaintiff’s claim,’ and the plaintiff makes a prima facie showing that a libelous statement has been made.” (*ZL Technologies, supra*, 13 Cal.App.5th at p. 617, fn. omitted.) Again, we agree.

Indeed, as our Supreme Court reaffirmed only recently in *Williams, supra*, 3 Cal.5th at page 541 (*Williams*), “a civil litigant’s right to discovery is broad. ‘[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.’ [Citations.] *This right includes an entitlement to learn ‘the identity and*

location of persons having knowledge of any discoverable matter.’ [Citation.] Section 2017.010 and other statutes governing discovery ‘must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-established causes for denial.’ [Citation.] This means that ‘*disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it.*’ [Citation.]” (Italics added, fn. omitted.)

In *Williams*, the Supreme Court upheld an order requiring an employer to disclose the identities and contact information of employees, as part of discovery in a lawsuit alleging violations of employee rights under the Labor Code. (*Williams, supra*, 3 Cal.5th at p. 554.) In doing so, the Court emphasized the importance of a plaintiff’s right to take discovery as a means of obtaining the information necessary to prove its case, and disapproved earlier cases suggesting that “a party seeking discovery of private information [must] always establish a compelling interest or compelling need” before courts will compel the production of the information. (*Id.* at p. 557.)

Although *Williams* is not directly on point, it strongly suggests our Supreme Court would agree with *ZL Technologies*’ conclusion that a separate compulsory “balancing test” need not be applied in a case where the plaintiff has already demonstrated a prima facie case of defamation. Consequently, we turn to the issue of whether the trial court correctly determined Montagna did that in this case.

A. Defamatory Content of Alex M.’s Review

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

Yelp contends the content of the review does not support a prima facie claim for defamation, largely because it purportedly states only opinions. As Yelp

correctly points out, to support a defamation claim, the alleged statement must be one that is reasonably interpreted as stating *actual facts* that are *provably false*. “The dispositive question . . . is whether a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion.” (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809 (*Seelig*).

We are unpersuaded by Yelp’s contention because we cannot agree with its characterization of the review. While it is true that pure expressions of opinion are not actionable, “[t]hat does not mean that statements of opinion enjoy blanket protection. [Citation.] To the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. [Citation.]” (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 156 (*GetFugu*).

The issue of whether challenged statements convey the requisite factual imputation is a question of law for the court. (*Seelig, supra*, 97 Cal.App.4th at p. 810.) And when ascertaining whether the statements in question are provably false factual assertions, courts consider the ““totality of the circumstances.”” (*Id.* at p. 809.) “The critical question is not whether a statement is fact or opinion, but ““whether a *reasonable fact finder could conclude* the published statement declares or implies a provably false assertion of fact.” [Citation.]” (*GetFugu, supra*, 220 Cal.App.4th at p. 156, italics added.)

In this case, Alex M. began her review of Montagna’s professional services by stating “Too bad there is no zero star option! I made the mistake of using them and had an absolute nightmare.” While we would agree this opening salvo states a pure opinion, it also provides crucial context that can be considered in evaluating the comments that follow. (See *Wong v. Jing* (2010) 189 Cal.App.4th 1354 (*Wong*)). And what these opening comments reflect is that Alex M. is feeling *very aggrieved* by his/her experience with Montagna, having rated it as low as possible and referring to it as a “nightmare.”

In *Wong*, a case with strikingly similar facts, a Yelp reviewer began a review of a dentist by stating “Let me first say I wish there is [*sic*] ‘0’ star in Yelp rating. Avoid her like a disease!” (*Wong, supra*, 189 Cal.App.4th at p. 1361.) The appellate court expressly relied upon those introductory statements as part of the circumstances that would support a fact finder’s determination the review had falsely *implied* the plaintiff engaged in specific acts of professional wrongdoing—even though the review *did not explicitly state* she had done those things: “Given (1) Jing’s introductory remarks that Wong deserves a zero rating and should be avoided ‘like a disease’ and that he regretted ever bringing his son to see her, (2) his rage at Wong’s use of amalgam because it contains mercury, and (3) Wong’s evidence that Jing was advised and consented to the use of amalgam, a jury reasonably could find that the review falsely implied Wong had failed to warn and advise about silver amalgam and arguably better alternatives to its use.” (*Id.* at pp. 1371-1372.)

Here, the rage expressed by Alex M. about Montagna is similarly palpable, and her stated regret at the lack of a zero star option is identical. She then follows her “nightmare” characterization of her dealings with Montagna by first stating “[the bill] was way more than their quote.” Yelp argues this statement is factually true, based on Montagna’s allegation he had billed his client Nunis (whom he suspects to be Alex M.) \$400 for preparing her tax returns, after quoting her a price of only \$200. But we conclude a reasonable fact finder could find that Alex M. is implying Montagna had *no justification* for his price hike—hence the rage. “A statement can . . . be libelous per se if it contains a charge by implication from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter. [Citation.]” (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 112.) Alex M.’s statement meets that test.

Montagna specifically alleges facts demonstrating his price hike vis-à-vis Nunis was justified. He states his original quote to Nunis was based on her specific

representations as to the scope of work that would be necessary to prepare her tax return. And when those representations proved incorrect, Montagna allegedly had to do significantly more work than anticipated to prepare the returns, and was thus justified in charging her a higher fee. Hence, Montagna adequately alleges Alex M.'s implied assertion he hiked her fee without justification was a provably false assertion of fact. He then supported those allegations in the declaration he submitted in support of his motion to compel.

Alex M.'s review continued with the assertion “[the] return was so sloppy I had another firm redo it and my return more than doubled.” Yelp contends the assertion Montagna’s work was “sloppy” is merely an opinion. We agree—the word “sloppy” is inherently vague, and in this context might refer to a wide variety of issues, including the possibility the returns were entirely accurate, but plagued with typos. However, Alex M. did not confine her comment to that abstract claim of sloppiness.

Instead, Alex M. stated the return was “so sloppy *I had another firm redo it and my return [sic: refund] more than doubled.*” (Italics added.) That implies the return was not merely messy, but was prepared *improperly and inaccurately*—i.e. that Montagna’s work did not comply with the standards of his profession—flaws so significant they necessitated the return being redone by someone else. Moreover, the statement includes an explicit factual claim that when the return was redone, the amount of Alex M.’s refund “doubled.” That is a clear, provable statement of fact, which if false, could support a claim of defamation. (*Wong, supra*, 189 Cal.App.4th at p. 1372 [false statement is defamatory if “it could subject Wong to contempt and cause her to be avoided and thereby injure her professional career”].)

Again, Montagna specifically alleged Alex M.’s statement was false, stating, “Plaintiffs prepared accurate, clean returns in full compliance with applicable laws and regulations; Plaintiffs did not cause Defendant to hire another firm to redo his

work; Plaintiffs were not negligent in any manner such that Defendant's tax refund more than doubled." And he restated those facts in his declaration.

Finally, Alex M. concluded her review of Montagna by stating "[i]f you dare to complain get ready to be screamed at, verbally harassed and threatened with legal action. I chalked it up as a very expensive lesson, hope this spares someone else the same." Yelp contends the assertion that Montagna's future clients should expect to be screamed at, harassed, and threatened cannot support a defamation claim because it constitutes only a "prediction as to the occurrence of a future event," and such predictions cannot be proven true or false. Once again, we disagree with Yelp's characterization of the statement.

In our view, a trier of fact could reasonably include Alex M.'s "prediction" of what future clients might expect is also an implied representation as to the manner in which Montagna (and perhaps his staff) actually treated Alex M. The implication is that Montagna and his staff screamed at, harassed, and threatened Alex M. when he or she dared to complain, and moreover that they did so without justification. Indeed, the implied assertion Montagna and his staff will abuse clients *without justification* is at the heart of Alex M.'s suggestion that *any* future client should prepare to receive similar treatment. Montagna alleges in his complaint those implied assertions of fact are false: "Plaintiffs did not scream, harass, or threaten Defendant." He repeats that assertion in his declaration.

Yelp also contends that some of the statements in Alex M.'s review cannot actually be proved false because we do not yet know who Alex M. is. For example, Yelp points out, "Plaintiffs have not alleged—let alone provided prima facie evidence demonstrating—that *none of their clients* have ever hired another firm to redo a return that Plaintiffs had done. In fact, it is unlikely that Plaintiffs would have knowledge of such a situation, as it would necessarily have occurred after Plaintiffs provided services to such a client."

But the assertion fails for several reasons. First, it focuses on only one aspect of Alex M.'s statement, stripping it of its defamatory context. The claim was not merely the relatively anodyne assertion Alex M.'s tax return was redone by another tax preparer; instead, it was that the return had to be redone *because Montagna's work was negligent*, and the second tax preparer had so improved on it *that the size of Alex M.'s refund doubled*. Montagna denied that more specific contention, not only in his complaint, but in his declaration: "I prepared accurate, clean returns in full compliance with applicable laws and regulations; I did not cause Defendant to hire another firm to redo his work; I was not negligent in any manner such that Defendant's tax refund more than doubled."

Additionally, as Montagna points out, Yelp cannot be allowed to defend against his discovery request by asserting he should not be entitled to information about the identity of its anonymous reviewer unless he can first demonstrate, with specificity, that the review does not accurately portray his actions in connection *with that particular client*—something he cannot do without first identifying the reviewer. Indeed, the assertion amounts to bootstrapping. As *Williams* makes clear, the purpose of discovery in a civil case is to assist parties in seeking the information they need to establish their case or defense, not to reward those who can demonstrate they have already done so. In the *Krinsky* case, the court recognized this, making clear that a plaintiff seeking to unmask an anonymous Internet commenter cannot be faulted for the inability to provide evidence of facts that can only be known after the anonymous commenter has been identified. (*Krinsky, supra*, 159 Cal.App.4th at p. 1172 [plaintiff "need produce evidence of only those material facts that are accessible to her"].)

In this case, Montagna has been forthright in acknowledging he believes his former client Nunis is Alex M., and in alleging facts demonstrating that while there are some parallels between his experience with Nunis and the factual claims made by Alex M., those factual claims are false. Montagna has also made clear that if discovery reveals

his reviewer is not Nunis (or someone connected to her), he intends to dismiss her as a defendant in the lawsuit, and to substitute the real Alex M. in her place. It is difficult to imagine what more Montagna could have reasonably done to justify the unveiling of his accuser. We certainly do not adopt Yelp's implication that in the absence of knowing Alex M.'s identity, Montagna should be required to both allege, and declare under penalty of perjury, that "none of [his] clients" has ever experienced any of the things Alex M. alleges occurred to him or her. Montagna's ability to pursue a claim against Alex M. should not depend on his ability to swear he is professionally unassailable *by anyone* on each and every point the anonymous Alex M. complains about.

In the circumstances of this case, we conclude Montagna has demonstrated a sufficient prima facie case of defamation to justify an order compelling Yelp to produce information regarding the identity of Alex M. We consequently deny Yelp's petition for a writ of mandate overturning the trial court's order compelling it to comply with Montagna's deposition subpoena.

III. Sanctions

In its consolidated appeal, Yelp also challenges the trial court's order imposing monetary sanctions against it for failing to voluntarily comply with Montagna's deposition subpoena. The trial court is required to award monetary sanctions against any party "who unsuccessfully makes or opposes a motion to compel an answer or production, *unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.*" (Code Civ. Proc., § 2025.480, subd. (j), italics added.)

The trial court's tentative decision was to deny Montagna's request for sanctions against Yelp, but it was persuaded at oral argument to take the issue under submission even as it confirmed its tentative decision to grant Montagna's motion to compel. Two weeks later, the court issued its sanction order, imposing \$4,962.59 in sanctions against Yelp.

Yelp contends the court abused its discretion by failing to find Yelp acted with substantial justification in opposing the motion to compel production. As it notes, “Courts have held that substantial justification exists to oppose a motion to compel where ‘novel questions’ are presented in a case or where there is ‘conflicting legal authority on an unsettled issue.’” (Quoting *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 Cal.App.3d 1, 15.) Indeed, in *Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 749, the appellate court reversed a discovery sanction order, finding that while the court may have properly ruled against appellants on the substance of the discovery dispute, the sanction award was improper because the existence of “conflicting legal authority on an unsettled issue provided substantial justification for appellants’ position, negating the basis for the sanction order.”

Here, as Yelp points out, even the trial court expressly acknowledged—both in its tentative and at the hearing—that the law governing Montagna’s motion to compel was an “evolving” and “unsettled” area of law. We certainly agree with that observation. In fact, the case law we have relied upon most heavily in this opinion, including *Glassdoor*, *ZL Technologies*, and *Williams*, was decided after the trial court issued its ruling. The evolution continues.

Moreover, the trial court characterized the question of whether sanctions were appropriate as “a close one,” even as it also concluded Yelp lacked standing to even assert the First Amendment and privacy rights of its anonymous reviewer, Alex M. Had the trial court understood, as we conclude here, that Yelp did have standing, we doubt the trial court would have imposed the sanctions against it.

In light of the complex issues presented in this case, the evolving state of the applicable law, and the fact the trial court erred in concluding Yelp lacked standing to make the arguments it did, we conclude the trial court erred by imposing monetary sanctions against it. Hence, we reverse that order.

DISPOSITION

The petition for writ of mandate is denied. The order imposing monetary sanctions against Yelp is reversed. The parties are to bear their own costs in this consolidated proceeding.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.