

CAUSE NO. 219-04483-2014

PLAINTIFF: § **IN THE DISTRICT COURT**
JEREMY WAGES and
THE RHODES TEAM

VS. § **219th JUDICIAL DISTRICT**

DEFENDANT:
LIN L § **COLLIN COUNTY, TEXAS**

PLAINTIFF'S MOTION TO COMPEL & FOR SANCTIONS AGAINST
NONPARTY YELP, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs JEREMY WAGES and THE RHODES TEAM who files this Motion to Compel & for Sanctions and would respectfully show the Court as follows:

I.

1. On 11/06/2014, Plaintiffs filed this lawsuit against Defendant.
2. On 11/07/2014, Plaintiffs sent a Subpoena Duces Tecum to nonparty YELP, Inc. who has possession of certain relevant documents that relate to the merits of this lawsuit.

Exhibit A

3. On 11/10/2014, YELP, Inc. was properly served with the Subpoena Duces Tecum and ordered to produce documents and respond to written questions by 12/04/2014.
4. As of the date of filing this Motion to Compel & For Sanctions, YELP, Inc. has refused to provide the documents, failed to timely & properly file any objections with this Court, failed to timely & properly file a Protective Order although they are not entitled and are therefore in default.

5. YELP, Inc. corporate counsel in California attempted to cite California law in a letter to Plaintiff's counsel which is inapplicable to our case at issue nor is it proper form under the Texas Rules of Civil Procedure.**Exhibit B**

6. Plaintiff's counsel advised YELP, Inc. corporate counsel Plaintiffs would file a Motion to Compel (the discovery documents in YELP, Inc.'s possession) AND seek reimbursement for Plaintiffs attorney' fees and court costs unnecessarily incurred herein.**Exhibit C**

II.

As clearly stated in TRCP 192.3, "*parties may obtain discovery of ANY matter which is relevant to the subject matter of the pending action whether it relates to the claim or the defense of the party seeking discovery or the claim or defense of any other party.*

Clearly, Plaintiffs are entitled to have their Subpoena Duces Tecum & Written Questions complied with as it DIRECTLY pertains to the claims of this defamation lawsuit.

III.

The trial court can impose sanctions against a party for refusing to comply with proper discovery requests, regardless of whether the party has disobeyed an order compelling discovery. TRCP 215(1)(2).

The purpose of discovery sanctions (1) secure compliance of discovery rules (2) deter other litigants for violating the discovery rules (3) punish parties that violate the discovery rules. Chrysler Corp. v. Blackmon, 841 S.W.2d 844,849(Tex. 1992).

PRAYER

WHEREFORE. PREMISES CONSIDERED, Plaintiffs Jeremy Wages and The Rhodes Team requests that Plaintiffs' Motion to Compel and for Sanctions be granted as follows:

1. Witness YELP, Inc. comply with the Subpoena Duces Tecum and Written Questions within a reasonable time period;
2. Plaintiffs recover reasonable attorney's fees and costs incurred herein in the amount of \$2,500 dollars by having to bring this Motion to Compel and for Sanctions and attending said hearing and that all things be charged against YELP, Inc.

Respectfully submitted,

/s/ Robert D. Wilson

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CERTIFICATE OF CONFERENCE

I, Robert D. Wilson, attorney for Plaintiffs, pursuant to Texas Rules of Civil Procedure state that efforts to resolve the discovery dispute referred to in this Motion without the necessity of Court intervention have been attempted and failed.

/s/ Robert D. Wilson

Robert D. Wilson

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on all parties of record in accordance with the Texas Rules of Civil Procedure on this 10th day of December, 2014.

/s/ Robert D. Wilson

Robert D. Wilson
Attorney for Plaintiffs

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PLAINTIFF: § IN THE DISTRICT COURT
JEREMY WAGES and
THE RHODESTEAM

VS. § 219th JUDICIAL DISTRICT

DEFENDANT: § COLLIN COUNTY, TEXAS
LIN L

**PLAINTIFF'S RESPONSE TO NONPARTY YELP, INC.'s OPPOSITION
TO PLAINTIFF'S MOTION TO COMPEL (DOCUMENTS)**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs JEREMY WAGES and THE RHODES TEAM who files this *response* to NONPARTY YELP, INC.'s OPPOSITION to Plaintiff's Motion to Compel(Documents) & for Sanctions and would respectfully show the Court as follows:

I.

Summary of NONPARTY YELP, INC.'s OPPOSITION

1. Plaintiff's Subpoena Duces Tecum (for production of documents) from NONPARTY YELP, INC. is "improper and/or this Court has no jurisdiction over YELP, INC.
2. YELP, INC. is not required to file an "objection"(Motion to Quash or Motion for Protective Order) directly with this Court.
3. YELP, INC. is NOT bound by the Subpoena to produce Documents because Plaintiff's case is outside the (1) year Statute of Limitations for Defamation cases.
4. YELP, INC. is protected under the First Amendment.
5. Plaintiff's counsel did NOT confer with YELP, INC. prior to filing its Motion to Compel.

II.

1. **Plaintiff's Subpoena Duces Tecum (for production of documents) from NONPARTY YELP, INC. is "improper and/or this Court has no jurisdiction over YELP, INC.**

YELP's Opposition brief point above is clearly misguided and misquotes the law. This Court DOES have jurisdiction on the underlying lawsuit because of CPRC § 15.002(a)(1). Further, as a result of jurisdiction over the subject matter lawsuit, a NONPARTY in possession of information and documents related to the lawsuit is also subject to the Courts' power.

Further, NONPARTY YELP ADMITS they have "given notice" and contacted Defendant "Lin L" (see Opposition Brief page 17, paragraph C) and therefore HAVE information & knowledge concerning information relevant to this lawsuit, the whereabouts of LIN L and are subject to the standard discovery processes under the Texas Rules of Civil Procedure afforded litigants in developing their respective cases.

TRCP 205.1(d) controls the "production of documents" sought by Plaintiff against NONPARTY YELP, INC. Under TRCP 205.2, Plaintiff served NONPARTY YELP, INC. through their registered agent of service "10 days before the subpoena compelling production was due" (Plaintiff served NONPARTY YELP, INC. MORE THAN (25) DAYS)(see also YELP brief, page 51, prgh 4, Connie Sardo affidavit). Further, Plaintiff complied with TRCP 205.3 with the "contents" of the production notice. NONPARTY YELP, INC. argument fails because NOWHERE in the rule does it forbid "out-of state" production of documents from a NONPARTY. Therefore, as a matter of law, YELP, INC.'s argument fails.

- 2. YELP, INC. is not required to file an “objection”(Motion to Quash or Motion for Protective Order) directly with this Court.**

Again, YELP’s Opposition brief point above is clearly misguided and misquotes the law relating to production of documents from a NONPARTY in a lawsuit. TRCP 205(d) refers “NONPARTY YELP, INC. MUST RESPOND per TRCP 176.6(e) or move for a Protective Order under TRCP 192.6(b). **YELP, INC. failed to timely file a Motion for Protective Order before 12/04/2014 the compliance date for the production of documents.** Even if the Court is to look past NONPARTY YELP, INC.’s failure to timely file a Motion for Protective Order with the Court and considers the letter of YELP, INC.’s California counsel Cardo Sardo(Exhibit H, NONPARTY YELP’s Opposition Brief, pg. 69-71) dated 11/20/2014 as “notice” to Plaintiff, Plaintiff is STILL required under TRCP 176.6(d) *as the requesting party* to move for an order(to the Court to produce the documents) after an objection is made. Therefore, at worst YELP has waived their objections by failing to comply with the rule; at best, YELP has still not shown grounds that Plaintiff’s Motion to Compel is frivolous or sanctionable conduct when attempting to comply with the rule for production of the discoverable documents in YELP’s possession related to this lawsuit.

- 3. YELP, INC. is NOT bound by the Subpoena to produce Documents because Plaintiff’s case is outside the (1) year Statute of Limitations for Defamation cases.**

Again, YELP's Opposition brief point above is clearly misguided and misquotes the law. **First, a "statute of limitations" affirmative defense can only be raised by the defendant.** TRCP 94, *see also Quantum Chem. Corp. v. Toennies*, 47 S.W. 3d 473, 481(Tex. 2001). Secondly, Plaintiff's pleadings clearly relate to damages to Plaintiff's "real estate business" and defendant's false statements were concerning same. The "correct" statute of limitations for business disparagement is two years. CPRC § 16.003(a), *see also Newsom v. Brod*, 89 S.W. 3d 732,734(Tex.App. – Houston(1st Dist.) 2002, no pet.) YELP has acknowledged in their Opposition Brief this is a "business account" matter.(see pg. 32,prgh 9, Ian MacBean affidavit). Therefore, as a matter of law, YELP, INC.'s argument fails.

4. YELP, INC. is protected under the First Amendment from identifying "anonymous Internet speakers.

YELP's opposition point is clearly a misstatement of the law. For YELP to construe or attempt to persuade this Court that the 1st Amendment of the US Constitution condones defamatory statement protections, is insane. "Defamation can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment. The bottom line is that spreading false information in and of itself carries no First Amendment credentials." *see Herbert v. Lando*, 441 U.S. 153, 171(1979); also cited in *Yelp v. Hadeed Carpet Cleaning, Inc.*, Record No. 0116-13-4; Court of Appeals of Virginia(2014), published opinion.

Furthermore, courts have long recognized a distinction in the level of protection the First Amendment accords to literary, religious or political speech as compared to that

accorded to commercial speech. cited in *Yelp v. Hadeed Carpet Cleaning, Inc.*, Record No. 0116-13-4; Court of Appeals of Virginia(2014), published opinion.

Thus, the John Does' First Amendment right to anonymity is subject to a substantial government interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary. *Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 477(1989), citing *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566(1980). Texas even holds a "later publisher" of a disparaging statement can be a named defendant as found in *Jacobs v. McIlvain*, 759 S.W.2d 467,469(Tex.App. – Houston(14th Dist) 1988)(defamation case) *rev'* Therefore, as a matter of law, YELP, INC.'s argument fails.

5. Plaintiff's counsel did NOT confer with YELP, INC. prior to filing its Motion to Compel.

YELP's opposition point is clearly a misstatement of the facts between Plaintiff's counsel and YELP's corporate counsel and a shameful statement to the Court. YELP's attached **Exhibits I, J and K(emphasis added)** clearly demonstrate that Plaintiff's counsel "conferred" in **WRITING CONCERNING THE MOTION BECAUSE YELP DOES NOT LIST THEIR PHONE NUMBERS FOR PERSONAL CONTACT** on any of their documentation in this matter. As stated in TRCP 192.3, "*parties may obtain discovery of ANY matter which is relevant to the subject matter of the pending action whether it relates to the claim or the defense of the party seeking discovery or the claim or defense of any other party.* Clearly, Plaintiffs are entitled to have their Subpoena Duces Tecum & Written Questions complied with as it DIRECTLY pertains to

the claims of this defamation lawsuit. Therefore, at worst YELP has LIED to this Court; at best, YELP is unfamiliar with the basics of Texas law and procedure under TRCP 1 and the Texas Lawyers Creed.

PRAYER

YELP, along with this very same lawyer, Mr. Paul A. Levy, has made ALL these same arguments *and lost* in the Virginia Court system as outlined in the attached Exhibit A published opinion *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.* case and appears to be “forum shopping” for a different result in Texas.

WHEREFORE. PREMISES CONSIDERED, Plaintiffs Jeremy Wages and The Rhodes Team requests that Plaintiffs’ Motion to Compel and for Sanctions be GRANTED as follows:

1. Nonparty Witness YELP, Inc. comply with the Subpoena Duces Tecum and Written Questions within a reasonable time period;
2. Plaintiffs recover reasonable attorney’s fees and costs incurred herein in the amount of \$2,500 dollars by having to bring this Motion to Compel and for Sanctions and attending said hearing and that all things be charged against YELP, Inc.

Respectfully submitted,

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