

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

United States of America, *et al.*,

Plaintiffs,

v.

Google LLC,

Defendant.

Case No. 1:20-cv-03010-APM

HON. AMIT P. MEHTA

State of Colorado, *et al.*,

Plaintiffs,

v.

Google LLC,

Defendant.

Case No. 1:20-cv-03715-APM

HON. AMIT P. MEHTA

**DEFENDANT’S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS OF YELP, INC. CUSTODIAN LUTHER LOWE**

Google moves to compel the production of documents from a proposed custodian in response to Google’s April 13, 2021 subpoena to Yelp, Inc. (“Yelp”). Despite weeks of negotiation, Yelp refuses to produce custodial documents from Luther Lowe, Yelp’s Senior Vice President, Public Policy, who during Plaintiffs’ investigation and for years prior to that, led Yelp’s global outreach regarding its antitrust claims about Google. On Yelp’s behalf, Mr. Lowe has been pushing for a case against Google for many years, and has knowledge of the evolution of, and sources for, Yelp’s factual allegations. There is no comparable individual among Yelp’s proposed custodians. Google asks the Court to compel Yelp to produce responsive documents

for Mr. Lowe by October 29, 2021, and to produce a privilege log for documents withheld from production. Yelp lacks any basis to oppose these requests. Yelp's allegations against Google, conceived and advanced by Mr. Lowe, are a central part of the Government's case. Now that the very governmental action Yelp advocated for in its communications is underway, Yelp cannot deny Google the documents it needs to defend itself.

BACKGROUND

Yelp is an online platform that allows consumers to search for and connect with local businesses. On April 13, 2021, Google issued a Rule 45 subpoena to Yelp. During Plaintiffs' investigations, Yelp presented its allegations about Google, which were ultimately pleaded in the Complaints.¹ Yelp nonetheless asserted broad objections to the subpoena.

In August 2021, Google moved for the Court's assistance due to Yelp's lack of response to its subpoena [Dkt. Nos. 190, 195], and this Court ordered updates on Yelp's progress. After this prodding, Google and Yelp reached an agreement on search terms for five custodians, and are in the process of reaching agreement on similar terms for an additional five custodians.

Despite its agreement as to other custodians, Yelp refuses to run the same search terms for Luther Lowe, who has led Yelp's competition claims and has knowledge of any alleged harm caused by Google. After initially agreeing to include Mr. Lowe as a custodian, Yelp advised in late August that it had changed its position. Yelp thereafter rejected Google's offer to negotiate limitations to reduce burden (*e.g.*, filtering out attorney names). To assist Yelp in identifying targeted, responsive information, Google next provided samples from Plaintiffs' productions, including Yelp presentations to Plaintiffs and Mr. Lowe's congressional testimony [*see* Joint

¹ Indeed, as Google explained in its August 27, 2021 briefing [Dkt. Nos. 190, 195], Yelp's response to Google's subpoena contrasts starkly with the cooperation and responsiveness it has offered to DOJ and the Colorado Plaintiffs. *See* Appendices A, B.

Status Reports, Dkt. Nos. 210, 215, 222]. Yelp was unmoved, citing the burden of reviewing material and asserting that Mr. Lowe had no personal knowledge of the information in his statements. And despite its purported burden, Yelp offered other custodians. None of these points resonate: Mr. Lowe's documents are indisputably relevant and should be produced.

ARGUMENT

I. Mr. Lowe's Relevant, Non-Privileged Documents Should be Produced

Mr. Lowe is a non-lawyer who has testified before the U.S. Senate and Ohio Senate, has made numerous appearances on television and podcasts, and has given other commentary seeking antitrust enforcement against Google on the very allegations ultimately brought by the Plaintiffs.² [REDACTED]

[REDACTED]

[REDACTED].³

The specific Subpoena requests to which Yelp objects are plainly relevant to this case, including Requests 12 and 13 (emphasis added below).⁴

- Request 12: All communications with, and documents or data provided to, third parties (including, but not limited to, government entities, market participants, trade associations, consultants, researchers, academia, and interest groups) *related to Google's search results, including any antitrust, competition, or consumer protection investigation or litigation involving Google.*
- Request 13: All documents related to actual, potential, or contemplated participation in industry organizations or coalitions *related to search or search advertisements.*

For several reasons, Yelp's strategy of offering other custodians⁵ in lieu of Mr. Lowe is

² See Appendices A, B.

³ See Appendix B.

⁴ Yelp has agreed to search terms and data productions that relate to a focused set of subpoena requests proposed by Google. See Appendix C.

⁵ [REDACTED]

not acceptable, as it will deprive Google of the information needed to effectively depose or cross-examine Yelp witnesses in this matter. **First**, the majority of public and other statements regarding Yelp’s allegations about Google as they relate to this case are from Mr. Lowe. Yelp’s substitute custodians do not sufficiently address such statements, including Mr. Lowe’s March 2020 testimony to the Senate Judiciary Committee that closely aligns with the Colorado Plaintiffs’ Complaint, at ¶¶ 183-89:

*When Google sees a user’s query has local intent, Google’s local search service is placed higher on the page, and in a more attractive format, than any organic links to other local search verticals that might appear. The effect is to steer a massive amount of traffic away from local search providers, starving them of the user interaction they require to keep their content fresh and relevant.*⁶

Documents that Yelp already produced in this case reveal that none of the alternative proposed custodians focuses on competition issues, as Mr. Lowe does. For example, [REDACTED] is a data scientist, whose role appears to be largely technical, based on documents produced to date.⁷ [REDACTED] is [REDACTED], whose documents produced thus far focus on details of advertising campaigns and budgets, and internal metrics.⁸ The remaining five individuals are similarly not substitutes for Mr. Lowe.⁹ **Second**, none of the substitute individuals are [REDACTED] [REDACTED]. See Appendix B (examples of [REDACTED]). Indeed, two are

⁶ Testimony of Luther Lowe before the U.S. Senate Committee on the Judiciary (March 10, 2020), at 5, <https://www.judiciary.senate.gov/imo/media/doc/Lowe%20Testimony.pdf>.

⁷ [REDACTED]
[REDACTED]
[REDACTED]

⁸ [REDACTED]
[REDACTED]
[REDACTED]

⁹ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

business school professors, who are not even current employees of Yelp. Yelp has not provided any search hit count reports that demonstrate the documents Yelp intends to produce from other custodians will contain Mr. Lowe's records.¹⁰ *Third*, it is simply not accurate if Yelp asserts that Mr. Lowe lacks sufficient knowledge for his documents to be relevant. His public and other commentary about antitrust cases, including about this litigation, reflect specific and historical knowledge of Yelp's allegations as they relate to Google.¹¹

II. Yelp Has Declined Reasonable Proposals by Google to Reduce Burden

Yelp has refused to engage Google's repeated efforts to resolve any legitimate burden objection. Google submits that the following process will enable Yelp to produce documents with minimal burden:

- Yelp should run the agreed-upon search terms over Mr. Lowe's documents with appropriate revisions to capture documents responsive to Requests 12 and 13, and Google is willing to revise search terms based on hit reports that show categories likely to contain significant privileged material.
- Likewise, for the remaining requests at issue,¹² Google and Yelp can negotiate and agree upon document categories likely to be privileged (*e.g.*, communications with attorneys in the "To" and "From" fields absent other non-attorney recipients), subject to Yelp's production of a privilege log with entries describing withheld documents.
- Google will mark documents with third party names presumptively Highly Confidential, subject to de-designation under the Protective Order as appropriate.

Yelp's burden argument is without merit; it can designate filters, such as attorney and/or firm names (*e.g.*, @kanterlawgroup.com or @hueston.com) to avoid producing privileged material, as is typical in any e-discovery process. Nor has Yelp provided search hit counts that demonstrate

¹⁰ Google notes that Yelp's counsel has also advised it will oppose any deposition or other testimony of Mr. Lowe, an objection which Google believes also lacks any basis.

¹¹ See Alex Kantrowitz, *Yelp's Luther Lowe on the 'Seismic' Antitrust Case Against Google*, MEDIUM, Oct. 20, 2020, <https://onezero.medium.com/yelps-luther-lowe-on-the-seismic-antitrust-case-against-google-d835a3578c99> (commenting on this litigation, including historical observations about Google, Yelp, and his own views on competition law and policy); see also Appendix B at [REDACTED]

¹² See Appendix C.

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