

**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 REPLY IN SUPPORT OF MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS OF YELP, INC. CUSTODIAN LUTHER LOWE**

Yelp has failed to demonstrate any e-discovery burden or purported First Amendment concerns that outweigh the relevance of Luther Lowe’s documents to this case. To date Yelp has produced a mere 10,000 documents in response to Plaintiffs’ and Google’s subpoenas, of which only 2,400 are in response to Google’s search terms – a production volume mismatched to Yelp’s contribution to Plaintiffs’ allegations.<sup>1</sup> Yelp should be compelled to use the very same search terms it has agreed to for other custodians to identify responsive, non-privileged documents from Mr. Lowe’s records.

<sup>1</sup> [REDACTED]

## I. Luther Lowe’s Documents Are Relevant to this Litigation

In the years leading up to the filing of these cases, Mr. Lowe testified and made frequent public appearances on Yelp’s behalf about the allegations in this case.<sup>2</sup> He has held himself out as a leading source about antitrust enforcement and alleged harm to Yelp caused by Google.<sup>3</sup> His statements plainly influenced the drafting of the Complaints.<sup>4</sup> Google seeks discovery regarding the basis for these statements. Contrary to Yelp’s brief, the extent of Mr. Lowe’s personal knowledge is itself a discoverable fact that Google is entitled to test based on his documents.

Moreover, Mr. Lowe’s declaration that the presentations that *he made to the government* were “primarily drafted by Yelp’s outside counsel and/or consultants acting at counsel’s direction”<sup>5</sup> confirms that the most readily available, non-privileged information is his related internal or external correspondence. Even if other custodians collectively have some of this knowledge – which Yelp has failed to substantiate with any overlap analysis – Google would still be entitled to discovery from Mr. Lowe’s documents, as those custodians were not the employees whose statements parallel the Complaints.

## II. Yelp Refused to Negotiate a Reasonable Scope and has Failed to Demonstrate Undue Burden

Yelp’s lengthy declarations about its burden and Google’s purported unreasonableness

<sup>2</sup> See, e.g., Luther Lowe U.S. Senate Testimony, <https://www.judiciary.senate.gov/imo/media/doc/Lowe%20Testimony.pdf>; Luther Lowe Ohio Senate Testimony, [https://search-prod.lis.state.oh.us/cm\\_pub\\_api/api/unwrap/chamber/133rd\\_ga/ready\\_for\\_publication/committee\\_docs/cmte\\_s\\_judiciary\\_1/submissions/cmte\\_s\\_judiciary\\_1\\_2019-10-17-0230\\_917/10.17.19lowetestimony2.pdf](https://search-prod.lis.state.oh.us/cm_pub_api/api/unwrap/chamber/133rd_ga/ready_for_publication/committee_docs/cmte_s_judiciary_1/submissions/cmte_s_judiciary_1_2019-10-17-0230_917/10.17.19lowetestimony2.pdf).

<sup>3</sup> Indeed, Mr. Lowe coordinates a newsletter about antitrust and Google (“This Week in Google Antitrust” (TWIGA)). See, e.g., <https://twitter.com/lutherlowe/status/1096245290531729409?lang=en> (linking to subscription page for “This Week in Google Antitrust” and noting that “TWIGA is free”); Interview of Lowe on C-SPAN (Mar. 17, 2020), <https://www.c-span.org/video/?470421-1/communicators-luther-lowe>; Angelica Stabile, *Yelp executive accuses Google of doing ‘a lot to harm consumers and small businesses’*, Fox News, Sept. 10, 2020, <https://www.foxbusiness.com/technology/yelp-executive-google-harms-consumers-small-business>.

<sup>4</sup> See Google Mot. at 4. Compare Luther Lowe U.S. Senate Testimony (see n.2) at 4-6, with States’ Complaint ¶¶ 168, 175-76, 183 (including preceding section heading IV.C.2), and 187 (allegations about Google’s entry into “verticals,” OneBox, and purported harm to specialized vertical search providers).

<sup>5</sup> Declaration of Luther Lowe, dated Oct. 8, 2021, at ¶ 5.

neglect to mention that (1) it initially agreed to produce Mr. Lowe's documents subject to negotiations on scope; (2) Google repeatedly sought to negotiate search terms or limitations to reduce burden and explained its reasons for seeking the documents (*see* Appendix E at 1-2, Appendix F); and (3) fail to provide any hit counts about custodian overlaps in support of its claim of burden.

Yelp's prior productions or proposed substitute custodians are not sufficient in the absence of Mr. Lowe's documents. In the absence of hit reports, a search by Google's counsel in the email metadata of Yelp's already-produced documents yields 74 hits in 10,000 documents for the names "Luther Lowe" or "Luther," or Lowe's email address "[REDACTED]." Google also received Yelp's September 21, 2021 letter (Yelp. Opp. Ex. E), and then reviewed the documents Yelp has produced in response to Plaintiffs' subpoenas for information about Yelp's substitute custodians. These exercises only confirmed the need for this Motion because the documents reflect little overlap (74 hits thus far) between these custodians and Mr. Lowe (Google Mot. at 4). Documentary discovery is necessary for Google to understand the basis of claims in the Complaints, *e.g.*, States' Complaint, ¶¶ 37-39, 51-55, 59-89, 96-102, 168-211, and to determine if it will seek Mr. Lowe's testimony in the case (the Plaintiffs are differently situated, having met with Mr. Lowe and having unfettered access). Certainly, Yelp nowhere identifies a basis for withholding his documents in toto. Yelp's alternative proposal would also force Google to evaluate and/or seek testimony of up to seven other people. This is inefficient and impractical.

Moreover, Yelp's suggestion that Google's requests should be "directed to Plaintiffs, not third party Yelp," *see* Yelp. Opp. at 4 n.2, should be rejected because Google's requests seek Yelp documents, both internal and external communications about the claims in this case, that would not be captured by [REDACTED]. (Google Mot., Appendix C

(summary of subpoena requests)).

Finally, Yelp's complaints about the cost of producing Mr. Lowe's documents (\$55,000) must be viewed through the lens of its status as an important third party in this case. As of the filing of Yelp's brief, it had produced 10,000 documents total in this litigation, with only 74 hits in email metadata fields for Mr. Lowe's first name, full name, or email address. [REDACTED]

[REDACTED], and now productions during the litigation, Yelp cannot hide behind expense to prevent Google from testing its complaints. Yelp's arguments also ring hollow as it has refused steps that would reduce its burden. Yelp would not negotiate scope or limitations with Google or provide hit counts for Mr. Lowe, and instead proposed to produce documents from multiple other individuals. Yelp caused itself more burden.

### **III. Presumptive Designation of Documents as “Highly Confidential” Resolves Any Concerns Yelp Has Regarding Third-Party Names**

Yelp's claimed concern about the disclosure of other third parties is resolved by Google's willingness to presumptively designate documents that identify such parties as “Highly Confidential,” subject to appropriate de-designation by agreement with Yelp or via a ruling from this Court. Yelp erroneously claims in its brief that (1) Google has cited “no authority” in support of this point, and (2) that the Protective Order would allow documents with third-party names to “be disclosed to both Google's outside and in-house counsel.” (Yelp. Opp. at 6). Both points are plainly wrong. First, Yelp fails to respond, much less distinguish, *Klayman v. Judicial Watch* and *Filanowski v. Wal-Mart Stores, Inc.* (Google Mot. at 6 n.13),<sup>6</sup> in which courts noted that the presence of a protective order minimizes any potential chilling effect of production on third parties.

<sup>6</sup> See *Klayman v. Judicial Watch, Inc.*, 2008 U.S. Dist. LEXIS 142879, at \*11-12 (D.D.C. Jan. 8, 2008) (declining to quash subpoena to third party and noting that the potential chilling effect of production was minimized by presence of protective order), *aff'd*, 2008 U.S. Dist. LEXIS 142884 (Apr. 2, 2008); *Filanowski v. Wal-Mart Stores, Inc.*, 1999 U.S. Dist. LEXIS 24150, at \*5-6 (D. Me. Oct. 29, 1999) (“Having failed to make some showing *how* Defendant's possession of the list impairs . . . associational activities, especially in light of the recently issued confidentiality order, the Court is satisfied that the privilege does not apply in this case.”).

Second, Yelp misreads the Protective Order, which expressly provides that the designated Google in-house counsel may not review Highly Confidential documents unless the producing party consents and/or this Court has ruled upon a motion to de-designate after notice. (Dkt. No. 98, at ¶¶ 1(e), 12(d), 17)). Nor does Yelp have any basis whatsoever to question outside counsel's compliance with the Protective Order.

Finally, none of Yelp's cited cases supports the conclusion that the relevance of Luther Lowe's documents is outweighed by a risk of chilling third parties. Yelp exaggerates the breadth and understates the relevance of Google's requests when making comparisons to *Apple v. Match* and *Wyoming v. U.S. Dep't of Agric.*<sup>7</sup> Both cases involved broad requests about the associational activities of the third parties and the formation of their advocacy groups, none of which are present here. Yelp is conflating discovery about Yelp's own allegations with discovery about the identities or activities of third parties. Google's requests are focused on Yelp and its factual bases for claims about Google, and its search terms – to which Yelp has agreed for all other custodians – are tailored to these issues. There is no basis for Yelp to oppose using the search terms with Mr. Lowe's documents, as none focus on the inner workings of associations or advocacy groups.

### CONCLUSION

For these reasons, Google respectfully requests that the Court grant Google's motion.

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<sup>7</sup> Compare requests in *Apple Inc. v. Match Grp. Inc.*, No. 4:21-mc-80184-YGR, Dkt. 36 at 4 (N.D. Cal. Aug. 19, 2021) (Google Mot., Appendix D, at 4) (seeking all documents about “formation, documents of incorporation, bylaws, purpose, objectives, activities, sponsorship, founders, meeting minutes, membership, and fees”) and *Wyoming v. U.S. Dep't of Agric.*, 208 F.R.D. 449, 452 (D.D.C. 2002) (seeking documents about specific advocacy groups including “meetings or conversations,” “notes, memoranda, or letters that relate in any way to any of these groups,” and “‘daytimers,’ calendars, and/or diaries”) with Google Mot., Appendix C (selected requests from Google's subpoena to Yelp, for which Yelp has agreed to run search terms).

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