VIA ELECTRONIC AND U.S. MAIL
Honorable Edward M. Chen
United States District Court
Northern District of California
450 Golden Gate Avenue, 17th Floor
San Francisco, CA 94102

Re: *Levitt et al. v. Yelp! Inc.*, Case No. C 10-1321 EMC, Letter Brief Regarding Plaintiffs' Discovery Demand

Honorable Judge Chen:

Plaintiffs request the Court's intervention regarding their request to open discovery to obtain information pertaining to Defendant Yelp! Inc.'s former sales employees.

Plaintiff's Position

On May 4, 2011, following the Court's March 22, 2011 ruling on Defendant's Motion to Dismiss, Plaintiff served one interrogatory, requesting the names of and contact information for Defendant's former employees. Rather than providing this information, Defendant served objections and a statement that it would provide a response only "at such time, as any, as it is required to do so under the terms of the Court's August 24, 2010 Order." Plaintiffs assert that – both under the terms of the Court's previous discovery orders (including the August 24, 2010 Order) and under the Federal Rules – it is appropriate and necessary for Defendant to provide a substantive response to the interrogatory Plaintiff has propounded. Defendant asserts that discovery should not be permitted to go forward until such time as it has filed an Answer in this case. By this letter brief, the plaintiffs respectfully request that the Court issue a ruling as to the status of discovery in this case, and in particular as to Defendant's obligation, if any, to provide a substantive response to Plaintiffs' Interrogatory No. 1.

Compelling Defendant to respond to the *one* interrogatory Plaintiffs served is consistent with prior court rulings. On August 24, 2010, then-presiding Judge Patel issued an order appointing Ongaro Burtt LLP as lead plaintiffs' counsel in this consolidated action, and ordering Plaintiffs to file a consolidated amended complaint. In this order, Judge Patel specifically stated that "Class-related discovery may commence *subsequent to the Court's order adjudicating the motion to dismiss if one is filed,* ***or*** *subsequent to the filing of an answer.*" (emphasis added). Again, during the March 7, 2011 hearing on Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint, Judge Patel affirmed that Plaintiffs could commence discovery once the Court ruled on Defendant's motion to dismiss. *See* Transcript of Proceedings, Docket No. 69.[1]

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[1] / At the hearing on Defendant's Motion to dismiss, the following exchange occurred:

"MR. ONGARO: I think the only thing in the prior order, Your Honor, was after the Court's ruling on this, then discovery could take place.
THE COURT: Yes. Yes.
MR. ONGARO: And so we will adhere to that.
THE COURT: For which you're very anxious to get started.
MR. ONGARO: I am chomping at the bit." Dkt. No. 69 at 31:9-24.

Thus, the Court in this case has twice ruled that discovery could commence once a ruling on Defendant's Motion to Dismiss was issued. And such a ruling was, in fact, issued on March 22, 2011, following which Plaintiffs served their first (and only) interrogatory. Defendant's refusal to provide a substantive response is entirely inconsistent with the Court's orders regarding discovery. Defendant takes the position that it need not respond to discovery until after such time as Defendants file an answer in this case.[2] Simply put, this is not what the Court ordered. The Court specifically stated that discovery could commence following either Defendant's filing of an answer ***or*** the court adjudicating Defendant's motion to dismiss. One of these conditions precedent has come to pass; therefore discovery is appropriate at this time. Defendant's stance is inconsistent with the Court's previous rulings and should be rejected.

Commencement of discovery at this point is also consistent with Federal Rules and law. Under the Federal Rules, broad discovery is permitted, included through interrogatories such as that propounded by Plaintiffs. *See* FRCP Rule 26(a)(1),(2). Plaintiffs are entitled to propound interrogatories at any point after the parties meet and confer at the onset of the case to discuss the nature of the case and a discovery plan, and to arrange initial disclosures. *See* FRCP 26(d)(1), (f)(1). Here, the parties exchanged initial disclosures quite some time ago. Accordingly, nothing under the Federal Rules bars Plaintiffs from commencing discovery at this point. Moreover, discovery in Federal Courts is liberally permitted, and a party seeking to withhold discovery "carries a heavy burden of making a 'strong showing' why discovery should be denied." Skellerup Industries, Ltd. v. City of Los Angeles, 163 F.R.D. 598 (C.D. Cal., 1995) (quoting Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975). Here, Defendant cannot meet this burden. Defendant's motion to dismiss was sustained on the grounds of the sufficiency of the facts in the pleadings. This is exactly the circumstances when discovery *should* be permitted, even during the pendency of a motion to dismiss. *See* Skellerup, 163 F.R.D. at 601 (the type of motion – whether it is a challenge as a 'matter of law' or on the 'sufficiency' of the pleadings – is relevant to whether discovery should go forward pending a motion to dismiss). Plaintiffs' continued investigation has produced additional facts to bolster their allegations. *See* Dkt. No. 90 at 20. However, clearly there is an informational disparity in this case – the bulk of the information regarding this dispute is in Defendant's possession. If (as Defendant contends) Plaintiffs have insufficient basis for their claims, discovery should be consistent with that position. If this is not the case, however, discovery will assist Plaintiffs in sufficiently alleging their claims such that this case can go forward on its merits. *See* Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986) (public policy favors disposition of cases on their merits). Thus, even if the commencement of discovery was not explicitly authorized by previous Court rulings (which it is), it would nonetheless be appropriate under the circumstances, and given that only one interrogatory was served, it is in no way overly burdensome.

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[2] / In its March 22, 2011 ruling, the Court sustained Defendant's motion to dismiss without prejudice. This constitutes an "order adjudicating the motion to dismiss if one is filed" such that Plaintiff is entitled to commence discovery. That the motion was sustained is immaterial – had Judge Patel wanted to predicate discovery on a motion to dismiss being denied and Defendant being required to file an Answer in this case, she would have used the conjunctive "and" rather than "or" in her August 24, 2010 order, and she would not have affirmed Plaintiff's right to commence discovery at the March 7, 2011 hearing.

Defendant's Position

Plaintiffs seek to open discovery to obtain the contact information for all of Yelp's former sales employees, in violation of the Court's August 24, 2010 Order staying all discovery until such time (if any) as the pleadings in this case are closed, and despite the Court's recent Order dismissing the Second Amended Complaint on grounds that apply equally to Plaintiffs' most recent pleading. It is telling that Plaintiffs chose not to pursue this position with the Court during the 14-month period that this case was pending before the Honorable Marilyn Patel.

On March 22, 2011, the Court dismissed Plaintiffs' Second Amended Complaint ("SAC") – their *fifth* pleading – finding that Plaintiffs' allegations that Yelp "actively manipulates user reviews to force businesses into purchasing advertising" were insufficient to support a cause of action for "extortion" under California's Unfair Competition Law. *See* Dkt. No. 70 ("Order"). Specifically, the Court held that Plaintiffs' claims were barred by Section 230(c)(1) of the Communications Decency Act, and that they also failed to plausibly allege that Yelp engaged in "manipulation," since it was not possible to "reasonably attribute the appearance and disappearance of various user reviews to Yelp's wrongdoing as opposed to its efforts to filter out unreliable reviews." *Id.* at 16:24-27; 17:7-10; 20:7-9.

Based on representations by Plaintiffs' counsel "at the motion hearing that *continued investigation has produced additional facts* that would bolster plaintiffs' allegations" (*Id.* at 20:17-19) (emphasis added), the Court gave Plaintiffs one more chance to plead a viable claim. Notably, not once during that hearing did Plaintiffs' counsel request – nor did the Court suggest – that Plaintiffs would be permitted to engage in discovery to "bolster" their claims or before the Court assessed the sufficiency of any amended pleading. Likewise, the Court's Order granting Plaintiffs leave to amend in no way suggested that discovery would be permitted, and instead, referred to Plaintiffs' assurances that they *already* had developed "additional facts" through their ongoing investigation of potential plaintiffs. Order at 20:17-19.

Nonetheless, following this Court's Order dismissing Plaintiffs' SAC, and without any complaint on file, Plaintiffs served discovery on May 4, 2011, seeking the names, addresses, and telephone numbers of *all former sales employees* who worked for Yelp (there are hundreds), regardless of whether these employees interacted with any of the named Plaintiffs. Not only is this information overbroad and wholly irrelevant to Plaintiffs' claims of "extortion" but Plaintiffs' attempt to open discovery is in plain violation of the Court's August 24, 2010 Order, which expressly stayed all discovery in this case until after "the court's order adjudicating the motion to dismiss if one is filed, or subsequent to the filing of an answer." *See* Order Re: Appointment of Lead Counsel, Dkt. No. 96, at 4 ("August 24 Order"). Plaintiffs now argue that the Court somehow intended to allow Plaintiffs to take discovery after ruling on Yelp's motion, *even if it granted the motion and dismissed the Complaint*. There is no support for this reading in the

Court's Orders, the hearing transcript, or otherwise. Indeed, the Court's intent to stay discovery until after *all* motions to dismiss had been adjudicated and, if applicable, the pleadings had closed is confirmed in the parties' July 12, 2010 Joint Case Management Statement, in which the parties agreed that "discovery should be deferred until the pleadings have closed (*i.e. until after any motions to dismiss are decided* and, if necessary, Yelp has filed an Answer in this action)." *See* Dkt. No. 27, at 8 (emphasis added). This is further confirmed by the Court's statement at the July 19, 2010 Case Management Conference that "discovery is not appropriate when you're looking at a motion to dismiss." Tr. of Proceedings, Dkt. No. 32, 21:3-4.[3]

Contrary to Plaintiffs' suggestion, the "bulk of the information" relevant to Plaintiffs' claims is not in Yelp's possession, and is uniquely known to Plaintiffs. Indeed, Plaintiffs' extortion claims require Plaintiffs to show that they received a "threat" of unlawful injury that was the "controlling cause" of their decision to forfeit something of value – facts that focus on *Plaintiffs and their state of mind. See* Order 14:4-14; *Chan v. Lund*, 188 Cal. App. 4th 1159, 1171 (2010). The reason Plaintiffs have been unable to uncover evidence of such threats in over one year of "investigation" is clear: no such evidence exists. Having failed repeatedly in their efforts to state a claim, they should not now be permitted to flout this Court's Orders and engage in a wasteful fishing expedition of *hundreds* of former Yelp employees in the vain hope that something might turn up to support their claims.

Conclusion

By submission of this letter, the undersigned parties attest that, per section 4 of the Court's Standing Order on Discovery, counsel with full and complete authority on discovery matters met and conferred in person, and that lead trial counsel have concluded that no agreement can be reached.

David R. Ongaro
Counsel for Plaintiffs
/s/ *David R. Ongaro*

S. Ashlie Beringer
Counsel for Defendants
/s/ S. *Ashlie Beringer*

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[3] Nor does the Court's use of the disjunctive in the August 24, 2010 Order support Plaintiffs' position; instead, this plainly refers to the possibility that Yelp would file an answer in response to Plaintiffs' Amended Complaint, rather than challenge the pleading through a motion. Plaintiffs attempt to invoke the Federal Rules to trump the terms of the Court's August 24 Order is likewise misplaced. It is well-settled that "district judges have broad discretion to manage discovery and to control the course of litigation" through the use of Case Management Orders and other procedures, pursuant to Federal Rule of Civil Procedure 16. *Avila v. Willits Env'tl Remediation Trust*, 633 F.3d 828, 833-34 (9th Cir. 2011); see also Local Rule for the Northern District of California 16-10.

ATTESTATION PURSUANT TO GENERAL ORDER 45

I, David R. Ongaro, attest that concurrence in the filing of this Joint Letter Brief Regarding Plaintiffs' Discovery Demand has been obtained from each of the other signatories.

DATED: July 26, 2011

By: *\/s\/ David R. Ongaro*
David R. Ongaro