

NO. 67-270669-14

<b>JAMES MCGIBNEY and</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>VIAVIEW, INC.,</b>	§	
<i>Plaintiffs,</i>	§	
v.	§	
	§	
<b>THOMAS RETZLAFF, LORA</b>	§	<b>TARRANT COUNTY, TEXAS</b>
<b>LUSHER, JENNIFER</b>	§	
<b>D'ALLESANDRO, NEAL</b>	§	
<b>RAUHAUSER, MISSANNONEWS,</b>	§	
<b>and JANE DOES 1-5,</b>	§	
<i>Defendants</i>	§	<b>67<sup>th</sup> JUDICIAL DISTRICT</b>

**RAUHAUSER'S RESPONSE TO PLAINTIFFS' MOTION TO QUASH DEPOSITION  
OF GODADDY.COM, LLC**

The Court should deny plaintiffs' motion to quash the deposition on written questions of nonparty GoDaddy.com, LLC.

1. Plaintiffs are James McGibney and ViaView, Inc.; defendants are Thomas Retzlaff, Lora Lusher, Jennifer D'Allesandro, Neal Rauhauser, Missanonnews, and Jane Does 1-5.

2. Only defendant Rauhauser remains before the Court.

3. This case returns to the Court after a *second* remand from the court of appeals for award of Rauhauser's attorney's fees and mandatory sanctions "sufficient to deter the filing of similar actions."<sup>1</sup>

4. This case is set for a final hearing on TCPA attorney's fees and sanctions on September 17, 2020.

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<sup>1</sup> *McGibney v. Rauhauser (Rauhauser II)*, 549 S.W.3d 816 (Tex. App.—Fort Worth 2018, pet. denied); *Rauhauser v. McGibney (Rauhauser I)*, 508 S.W.3d 377 (Tex. App.—Fort Worth 2014, no pet.).

## II. FACTS PERTINENT TO THIS MOTION

5. In 2014, plaintiffs sued Thomas Retzlaff as one of ten defendants. Retzlaff was never served, never answered, and never appeared. Retzlaff has never been a party herein. Yet, to argue that the Court should prevent Rauhauser's deposition of GoDaddy.com, LLC, plaintiffs hobgoblinize *Retzlaff*.

6. Plaintiffs argue that discovery *Retzlaff* sought in *unrelated* cases in *other* courts is relevant to Rauhauser's right to depose GoDaddy.com, LLC, in the case at bar. It is not.

## III. ARGUMENT & AUTHORITIES

### A. Rauhauser Did Not Violate TEX. R. CIV. P. 191.4(b)(1)

7. Plaintiffs argue the Court should quash Rauhauser's deposition on written questions of GoDaddy.com, LLC, because it was served on GoDaddy "prior to being filed with the clerk of this Court." Mot. ¶ 6. This is true but immaterial. Rule 191.4(b)(1) does not require that a deposition notice be filed *prior to* being served on the witness. The rule requires only that the notice be filed. Rauhauser's notice of the deposition on written questions of GoDaddy.com, LLC, was filed as the rules require. No rule has been violated.

## **B. The Information Rauhauser Seeks From GoDaddy.com, LLC, is Relevant**

8. Plaintiffs return to their now-threadbare trope (repeated several times in the instant motion alone) that the only issue remaining for the Court to determine is the amount of attorney's fees. Mot. ¶ 7. Plaintiffs are incorrect. The Court must also determine the amount of *mandatory* TCPA sanctions to award to Rauhauser in accordance with TEX. CIV. PRAC. & REM. CODE § 27.009.

9. Plaintiffs appear to base their highly attenuated argument on the fact that the court of appeals' opinion in the second appeal includes this statement:

**We sustain the motion of Appellants' second issue with regard to the amount of the attorney's fees awarded by the trial court and remand this portion of the case to the trial court once again to conduct a hearing on attorney's fees consistent with this opinion.**

*McGibney v. Rauhauser*, 549 S.W.3d 816, 839 (Tex. App.—Fort Worth 2018, pet. denied). The *McGibney* court also “sustain[ed] ... Appellants' third issue with respect to the \$150,000 sanctions award,” which was McGibney's challenge to the *amount* of TCPA sanctions this Court awarded, not to the propriety of awarding sanctions at all. Yet, plaintiffs argue this means the court of appeals ordered this Court not to award any amount of TCPA sanctions.

10. Plaintiffs' strained interpretation of the court of appeals' second opinion asks this Court to ignore the court of appeals' first opinion. The 2014 opinion closed with this:

**We remand this case to the trial court to enter an order of dismissal in accordance with this opinion and for further proceedings relating to Rauhauser’s court costs, attorney’s fees, expenses, and sanctions under section 27.009(a)(1) and (2) of the TCPA.**

*Rauhauser v. McGibney*, 508 S.W.3d 377, 390 (Tex. App.—Fort Worth 2014, no pet.). McGibney forgets (or hopes to lead the Court into error with respect to) the “law of the case” doctrine.

**[I]n a subsequent appeal, instructions given to the trial court in the former appeal will be adhered to and enforced.**

*Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Johnson-Todd v. Morgan*, 2018 WL 6684562, at \*2 (Tex. App.—Beaumont 2018, pet. denied); *see also Dernick Resources Inc. v. Wilstein*, 471 S.W.3d 468, (Tex. App.—Houston [1<sup>st</sup> Dist.] 2015, no pet.) (“[T]he law of the case doctrine ordinarily binds the court of appeals to its initial decision if there is a subsequent appeal in the same case.”)

11. As Rauhauser has briefed before, in awarding mandatory TCPA sanctions against McGibney, this Court can consider “other aggravating misconduct.” Such conduct could include the fact that McGibney registered numerous Internet domains in the names of Rauhauser and his attorney. The GoDaddy.com discovery is designed to reveal this. The discovery is relevant.

**C. Rauhauser’s Subpoena to GoDaddy.com Was Not Served to “Increase Attorney’s Fees”**

12. Plaintiffs claim that the only purpose for Rauhauser to send a deposition on written questions to nonparty GoDaddy.com to obtain documents is to “increase attorney’s fees.” Mot. p. 1. As they have done before, plaintiffs even personally attack Rauhauser’s counsel:

**This subpoena is yet another example of Attorney Jeffrey Dorrell attempting to ... benefit himself.**

Mot., p. 3 [emphasis in original]. But it was not necessary for plaintiffs to spend even **one dollar** for attorney’s fees as a result of Rauhauser’s subpoena to GoDaddy.com. No response to the subpoena was required from plaintiffs. The only attorney’s fees plaintiffs incurred were to hysterically denounce Rauhauser and his counsel for seeking the discovery and ask the Court to prevent it.

13. Plaintiffs misrepresent to the Court that, “[Rauhauser] has already tried, unsuccessfully, to subpoena GoDaddy.com through **three other courts.**” Mot. p. 1 [emphasis in original]. This is false. Rauhauser has *never* served a subpoena to GoDaddy.com “through” any other court. Rauhauser has propounded *only one* subpoena to for GoDaddy.com records—the one that plaintiffs now seek to quash.

**D. McGibney’s Argument to Quash the GoDaddy.com Deposition Because McGibney Has No “Independent Knowledge” is Not a Proper Basis to Quash the Deposition**

14. Rauhauser’s GoDaddy.com subpoena does not inquire about *McGibney’s* knowledge. Yet, McGibney strangely lists a litany of domain names he purchased in the names of Rauhauser and his attorney six years ago and represents to the Court that McGibney has “no independent knowledge” of who *presently* owns each. This is irrelevant. *McGibney’s* “independent knowledge” is not the subject of Rauhauser’s discovery to GoDaddy.com. Rauhauser seeks to discover who *originally* registered these domains in 2014. *See* Plaintiffs’ Exhibit A. Apparently, McGibney very much does *not* want Rauhauser to discover this.

15. Because a deponent is not required to have “independent knowledge” of relevant facts, a claimed lack of personal knowledge is insufficient to prevent a deposition in any event. TEX. R. CIV. P. 192.3(c); *see In re Jinsun, LLC*, 2015 WL 5092176 at \*4 (Tex. App.—Houston [14<sup>th</sup> Dist. 2015, orig. proceeding) (“Jinsun was not required to show that Dolcefino had ‘personal knowledge of any facts relevant to the disputed issues in this case.’ The trial court abused its discretion by quashing Dolcefino’s deposition on the ground of lack of personal knowledge.”); *In re Team Transp., Inc.*, 996 S.W.2d 256, 259 (Tex. App.—Houston [14<sup>th</sup> Dist. 1999, no pet.). This is even more true when the party denying “independent knowledge” and seeking to thwart discovery is *not even the deponent*.

#### IV. CONCLUSION

16. The Texas rules of civil procedure afford Rauhauser the opportunity to learn—and to be able to prove—whether McGibney was the harasser who registered multiple Internet domains in the names of Rauhauser and his attorney. Rauhauser’s case will be harmed if he is not allowed to obtain the GoDaddy.com records. McGibney’s apparently paralyzing fear of the truth coming to light is irrelevant to Rauhauser’s rights, as is McGibney’s emotional vilification of Retzlaff.

#### V. PRAYER

17. For these reasons, defendant Neal Rauhauser prays the Court to deny McGibney’s ill-grounded motion to quash his deposition in all things. Rauhauser prays for such other and further relief, at law or in equity, as to which Rauhauser shall show himself justly entitled.

Respectfully submitted,

**HANSZEN  LAPORTE**

By: \_\_\_\_\_ /s/ Jeffrey L. Dorrell

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**ATTORNEYS FOR DEFENDANT THOMAS RETZLAFF**

## CERTIFICATE OF SERVICE

I hereby certify that on 8-28, 2020, a true and correct copy of the foregoing was sent by:

- Hand delivery
- Certified mail
- Telephonic document transfer
- E-service

in accordance with TEX. R. CIV. P. 21a to the following counsel of record:

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