FILED
TARRANT COUNTY
8/27/2020 4:49 PM
THOMAS A. WILDER
DISTRICT CLERK

NO. 67-270669-14

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

RAUHAUSER'S RESPONSE TO PLAINTIFFS' MOTION TO QUASH DEPOSITION OF JAMES MCGIBNEY

The Court should deny plaintiffs' motion to quash the oral deposition of James McGibney.

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."[1]

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

[1] ***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 McGibney, plaintiffs hobgoblinize *Retzlaff*, describing him (without evidence) as Rauhauser's "cohort" and "longterm strawman."[2] Mot. ¶¶ 6-7.

6. In what is now a pitched battle to thwart Rauhauser's discovery, plaintiffs have filed (so far) three motions to quash:

(i) June 24, 2020 (with 62 pages of exhibits),

(ii) June 25, 2020 (with 62 pages of exhibits); and

(iii) August 3, 2020 (with 79 pages of exhibits).

Plaintiffs' 203 pages of exhibits consist chiefly of filings by *Retzlaff* in other matters—in *none* of which either McGibney or Rauhauser is a party. "Methinks the lady doth protest too much."[3]

7. Plaintiffs argue that discovery *Retzlaff* sought in *unrelated* cases in *other* courts is relevant to Rauhauser's right to depose McGibney in the case at bar. It is not. At issue in the case at bar is Rauhauser's second amended notice of the oral deposition of James McGibney served on August 25, 2020. The deposition is to be taken on **September 3, 2020**. **Exhibit 1**. Rauhauser's deposition notice does not require McGibney to produce any documents. *Id*.

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[2] The evidence appended to Rauhauser's TCPA motion was that Rauhauser and Retzlaff had never met or spoken. In over six years, this evidence has never been controverted.

III. ARGUMENT & AUTHORITIES

8. "In our judicial system, 'the public has a right to every man's evidence.'" ***Trump v. Vance***, 591 U.S. ___, ___, 2020 WL 3848062, at * 4 (July 9, 2020).

> **In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to cross-examine adverse witnesses.**

Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

> **Where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy, [the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination].**

Brock v. Roadway Exp., Inc., 481 U.S. 252, 276 (1987) (Stevens, dissenting in part), quoting ***Greene v. McElroy***, 360 U.S. 474, 496-97 (1959); *see also* ***Goldberg***, 397 U.S. at 269 (right of confrontation of witnesses is not limited to criminal cases). Rauhauser has a right to McGibney's deposition testimony.

A. The Date and Time of McGibney's Deposition are Reasonable

10. Plaintiffs claim the time of the deposition is "entirely unreasonable." Mot. ¶ 7. But after plaintiffs filed their motion, Rauhauser changed the date and time of the deposition for McGibney's convenience. Plaintiff have never challenged the new date and time or given an alternate date or time with which they would comply..

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[3] Shakespeare, William, *Hamlet*, Act III, Scene 2, spoken by Queen Gertrude to

B. McGibney is Not "Covered by a Protective Order" Preventing This Court From Allowing His Deposition

10. Plaintiffs claim "McGibney is covered by a protective order issued by the 431st District Court" that would prevent this Court from permitting Rauhauser to depose McGibney in the case at bar. Mot. ¶ 8. A protective order was issued by the 431st District Court ordering plaintiff *Retzlaff* in ***Retzlaff v. Van Dyke*** to desist from further attempts to depose McGibney in the 431st District Court. Whatever else this may be, it is a far cry from *McGibney's* being "covered" by a protective order that limits the exercise of *this* Court's discretion to control discovery in its own case.

11. Neither McGibney nor Rauhauser was a party in ***Retzlaff v. Van Dyke***—a suit that has now been dismissed with prejudice. Rauhauser's attorney did not represent any party in that suit. Rauhauser's attorney did not propound any discovery in that suit. The order of the 431st District Court that pro se plaintiff *Retzlaff* not request deposition subpoenas for McGibney outside the discovery period in that case is not an impediment to this Court's allowing Rauhauser to depose the plaintiff who sued him in the case at bar: James McGibney.

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suggest that the queen in Hamlet's play-within-a-play lacks credibility.

C. McGibney's Argument to Quash McGibney's Deposition Because "McGibney Has Nothing Relevant to Say" is Not a Proper Basis to Quash a Deposition

12. Citing ***In re Univar USA, Inc.***, 311 S.W.3d 186 (Tex. App.—Beaumont 2010, orig. proceeding), plaintiffs claim that Rauhauser's deposition "is extremely unlikely to produce any relevant information." Mot. ¶ 9. ***Univar*** involved an organizational deposition with the matters listed on which examination was requested as required by TEX. R. CIV. P. 199.2(b)(1). It also involved a subpoena duces tecum the ***Univar*** court found overbroad:

> **[T]he categories identified in the notice of deposition and the subpoena duces tecum are not limited to the products Texas Solvents sold to Texas U.S. Chemical during Thompson's employment.**

Id., at 189. By contrast, Rauhauser's notice of McGibney's deposition, **Exhibit 1**, is not an organizational notice under TEX. R. CIV. P. 199.2(b)(1). No matters are listed that the Court could be find "irrelevant." No documents are requested in a subpoena that the Court could find to be overbroad. ***Univar*** is inapposite.

13. Because a deponent is not required to have personal knowledge of relevant facts, a claimed lack of personal knowledge is insufficient to prevent a deposition. TEX. R. CIV. P. 192.3(c); *see* ***In re Jinsun, LLC***, 2015 WL 5092176 at *4 (Tex. App.—Houston [14th 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 [14th Dist. 1999, no pet.).

14. Courts in other jurisdictions also recognize that a witness's claimed lack of knowledge is an insufficient for a protective order because "the other side is allowed to test this claim by deposing the witness." *See, e.g*., ***Libertarian Party of Ohio v. Husted***, 302 F.R.D. 472, 479 (S.D. Ohio 2014) "([I]n ordinary circumstances, [it] does [not] matter that the proposed witness … professes lack of knowledge of the matters at issue, as the party seeking the discovery has the right to test the asserted lack of knowledge.")

D. Rauhauser Has a Good Faith Basis to Depose McGibney

15. McGibney declares it should be "clear" that the chimerical creature he refers to as "Retzlaff/Rauhauser" is merely trying to "gain insight into McGibney's cooperation with the FBI in the FBI's ongoing investigation of Retzlaff." Mot. ¶ 10. McGibney does not explain how he claims to know this.

16. McGibney forgets that his *credibility* is also relevant. Rauhauser has the right to depose McGibney even if only to impeach his credibility. A witness may be cross-examined on any issue that is probative of his credibility. *See, e.g.,* ***Torres v. Danny's Serv. Co***., 266 S.W.3d 485, 487 (Tex. App.—Eastland 2008, pet. denied). Rauhauser is not required to describe his anticipated impeachment questions or evidence in order to justify deposing McGibney.

IV. CONCLUSION

17. Both constitutional Due Process and the Texas rules of civil procedure afford Rauhauser the opportunity to confront and cross-examine McGibney, or to impeach his credibility. Rauhauser's rights will be harmed if he is not allowed to depose McGibney. McGibney's apparently paralyzing fear of being deposed is irrelevant to Rauhauser's rights, as is McGibney's emotional vilification of Retzlaff.

V. PRAYER

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 8-27, 2020, a true and correct copy of the foregoing was sent by:

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

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

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ORDER DENYING MOTION TO QUASH DEPOSITION OF JAMES MCGIBNEY

After considering plaintiffs' motion to quash Rauhauser's deposition of James McGibney, the response, and other evidence on file, the Court **DENIES** the motion in ail things.

SIGNED the ___ day of _____, of 2020.

_____

PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:

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