
IN THE
Court of Appeals of Virginia

RECORD NO. 0116-13-4

YELP, INC.,

Appellant,

v.

HADEED CARPET CLEANING, INC.,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

One or more persons, acting anonymously, published defamatory statements that injured Hadeed Carpet Cleaning, Inc. (“Hadeed Carpet”). The statements were published on an internet website maintained by Yelp, Inc. (“Yelp”). Hadeed Carpet sought compensation for the injury by filing an action against those persons, identifying them as John Does because Hadeed Carpet did not know their names. To obtain the defendants’ identities, Hadeed Carpet issued a document subpoena to Yelp. The subpoena complied with Va. Code § 8.01-407.1, which establishes procedures by which a litigant may obtain the names of persons communicating over the internet.

When Yelp refused to comply with the subpoena, the trial court held Yelp in contempt and assessed a fine. Yelp now appeals the contempt citation on two assignments of error: (1) the trial court violated the United States Constitution by “stripping the Doe defendants of their First Amendment right to speak anonymously;” and (2) the trial court had no subpoena jurisdiction over Yelp, a non-party corporation. This Court has jurisdiction over this appeal pursuant to Va. Code § 19.2-318.

STATEMENT OF THE FACTS

A. Procedure Under Va. Code § 8.01-407.1.

This code provision modifies Rule 4:9A(g) of the Supreme Court of Virginia when a litigant seeks the identity of persons communicating over the internet. In such cases, section 8.01-407.1 requires the following procedure:

1. At least thirty days before the disclosure is sought, the party seeking the information must make a filing that: 1) attaches a copy of the subpoena, 2) provides supporting material showing that tortious communications were made, 3) the legitimate good faith basis for contending that the party is a victim, 4) a copy of the communications, 5) that other reasonable efforts to identify the anonymous communicator have proven fruitless, 6) the identity of the anonymous communicator is centrally needed to advance the claim, or is directly relevant to a claim or defense, 7) that no dispositive motion is pending, 8) that the entity subpoenaed is likely to have responsive information. See Va. Code § 8.01-407.1(A)(1).
2. Two copies of the subpoena are served on the subpoenaed entity, along with required notices. The subpoenaed entity will then send one

copy to the anonymous communicator. See Va. Code § 8.01-407.1(2), (3).¹

3. Seven days prior to the return of the subpoena, either the anonymous communicator, or the subpoenaed entity may file with the court, a detailed 1) objection, 2) motion to quash, or 3) motion for protective order. See Va. Code § 8.01-407.1(4), (5).

4. The filed objection or motion shall state “all grounds” relied upon for denying the disclosure and shall also address i) whether the identity of the anonymous communicator has been disclosed in any way beyond its recordation in the account records, ii) whether the subpoena fails to allow a reasonable time for compliance, iii) whether the subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies, or whether (iv) it submits the subpoenaed party to an undue party. See Va. Code § 8.01-407.1(5).

5. If an objection or motion is filed, then compliance with the subpoena is deferred until the appropriate court issues an order ruling on the objection, motion to quash or motion for protective order. See Va. Code § 8.01-407.1(6).

¹ To comply with this provision, Yelp was required to identify the anonymous communicators using its own resources. Yelp has not raised any inability to communicate with the anonymous communicators as an issue, thus, the Court may presume that Yelp knows their identity.

6. If an objection, motion to quash or motion for protective order is filed, then “any interested person” may “notice” the matter for a hearing. See Va. Code § 8.01-407.1(6).

B. Uncontested Facts

Facts # 1 through #23 below were set forth in Hadeed Carpet’s *“Request for the Court to Overrule Yelp’s Objections to the Subpoena, in Support of the Hearing Pursuant to § 8.01-407.1 of the Virginia Code, Alternatively, Motion to Compel Discovery,”* and were not disputed by Yelp at the trial court level.

1. Yelp is a Delaware corporation with its principal place of business in California. Yelp operates www.yelp.com, a social networking site that allows users to review businesses all over the country and search for such reviews. www.yelp.com has approximately 54 million unique visitors.
2. As of June 29, 2012, Yelp maintains two files that relate to Hadeed on www.yelp.com: Hadeed Rug Cleaning and Hadeed Oriental Rug Cleaning. A true and accurate copy of the search for Hadeed is set forth in the Appendix at pages 28 - 30. True and accurate copies of screenshots of the files that relate to Hadeed Rug Cleaning and Hadeed Oriental Rug Cleaning are set forth in the Appendix at pages, 31 – 34, and pages 35 - 37 respectively.

3. Although Yelp invites users to post their real names and other identifying information in creating an account on www.yelp.com, Yelp states in its privacy policy that it does not require users to provide anything other than a valid email address during registration. Upon information and belief, most of Yelp's users write reviews under pseudonyms or "screen names," in effect rendering their posts anonymous. Yelp's Privacy Policy is set forth in the Appendix at pages 38 - 39.

4. Upon information and belief, between December 2011 and April 2012, John Doe #1, John Doe #2 and John Doe Company, representing themselves as customers of Hadeed, anonymously wrote a series of negative reviews of Hadeed on www.yelp.com. A copy of Defendants' reviews and user profiles, as of, July 27, 2012, is set forth in the Appendix at pages 40 – 42.

5. The reviews at Appendix 40 – 42 can be accessed and viewed by anyone with an Internet connection, even those who are not registered users of www.yelp.com. In fact, Yelp states in its privacy policy that reviews on its site are intended to be public. As of July 27, 2012, these reviews were under the "Hadeed Rug Cleaning" listing at www.yelp.com.

6. After conducting an independent investigation in an attempt to match the negative reviews contained in Appendix pages 40 – 42, with customers

on the Hadeed Carpet customer database, Hadeed Carpet determined that it simply had no record that the negative reviewers were ever actually Hadeed Carpet customers. Consequently, Hadeed Carpet believes that the aforementioned are not the opinions of its customers, but were made by Defendants falsely representing themselves as customers of Hadeed Carpet.

7. The negative reviews are false and defamatory. For example, user “Bob G.” from Oakton allegedly relates how he was in a desperate need of emergency carpet cleaning and was ripped off. User “Chris H.” from Washington, reported that his precious rugs were shrunk. User “JS.” from Falls Church, reports that he was charged for work never performed. User “YB” from Fairfax, reports that unauthorized work was performed and his rug was stained. One user, “Aris P.” from Haddonfield, N.J., reports that the price was double the quote and that Hadeed was once bankrupt. Many of the negative reviews report that the price was double what was charged. After combing its customer records, Hadeed Carpet was at a loss to find records of these allegations. Regarding Aris P., in particular, Hadeed conducts no business in New Jersey.

Not only was Hadeed Carpet unable to find any evidence that the negative reviewers were ever Hadeed Carpet customers, but many of the

negative reviewers use the same theme. For example, negative reviewers Bob G., YB, and Aris P. use the theme that Hadeed doubled the price. Negative reviewers Bob G., Chris H., MP., Mike M., and Aris P. criticize Hadeed's advertising.

8. The negative reviews allege or imply that Hadeed Carpet is dishonest, unprofessional, and/or takes advantage of its customers, which would tend to prejudice Hadeed Carpet in its profession or trade of cleaning rugs. Good customer service, honesty and fair dealing are crucial to Hadeed Carpet's business. Such statements are therefore "defamatory per se" under Virginia law, and are presumed to cause damage to Hadeed Carpet's business and reputation.

9. Consequently, Defendants are liable to Hadeed Carpet for defamation under Virginia law if they were not in fact customers of Hadeed Carpet, and determining whether or not Defendants were customers of Hadeed Carpet is centrally necessary for Hadeed Carpet to advance any defamation claim.

10. On June 5, 2012, Hadeed Carpet, by counsel, emailed to Yelp a list of alleged customers who had submitted negative reviews that Yelp had published, and requested the identity of these alleged customers. A copy of the email is set forth in the Appendix at page 43.

11. On June 6, 2012, Yelp responded and refused to disclose the identities of the alleged customers, citing its privacy policy. Yelp's privacy policy is set forth in the Appendix at page 38.

12. Yelp's privacy policy states that it retains certain information it may collect for a period of five years. This information includes, but is not limited to, a user's full name, gender, birth date, email address and location. Further, Yelp states that it is entitled to collect certain kinds of information about its users, including their IP addresses, and requires a valid e-mail address from those who register on its website.

13. Since Yelp stores the information stated above, and given the dates on which the reviews were posted, there is a strong and reasonable likelihood that Yelp has such information regarding Defendants.

14. Even if Yelp does not have the actual names of the anonymous communicators, Yelp's records, could be used to identify Defendants. Defendants' IP addresses in particular would allow Hadeed Carpet to identify one or more of the Defendants' internet service providers, such as Comcast or Verizon ("ISPs"). An IP address is a unique number code typically owned and assigned to customers by an ISP. If Hadeed Carpet acquires Defendants' IP addresses, it would be able to issue subpoenas on Defendants' ISPs, who would most likely be able to identify Defendants.

Absent an IP address, Hadeed Carpet lacks knowledge of Defendants' ISPs and therefore has no basis for issuing a subpoena on them.

15. On July 2, 2012, Hadeed Carpet filed suit against the anonymous communicators, and immediately issued its first subpoena to Yelp.

16. In a letter dated July 19, 2012, Yelp objected to the subpoena, noting in part that Hadeed Carpet had failed to comply with Va. Code § 8.01-407.1. A true and accurate copy of Yelp's objections, which were not filed with the court, is attached in the Appendix at page 44.

17. In response, Hadeed Carpet's counsel exchanged e-mails with Aaron Schur, counsel for Yelp, as well as Paul Alan Levy, who at the time represented himself as counsel for at least one of the Defendants. A true and accurate copy of these e-mails is attached to the Appendix, at pages 56 – 59.

18. In response to Yelp's objection as to service on its registered agent, Hadeed sent Yelp a report from the Boyd-Graves Conference, a Supreme Court of Virginia committee, that concluded that service of a subpoena duces tecum on a foreign non-party's Virginia Registered Agent was proper and in accordance with Virginia law. A true and accurate copy of this report is attached to the Appendix at pages 60 – 71.

19. Counsel for one of the defendants, Paul Levy, asserted that “what information [Yelp] [has]” about each of its users can be seen on their user profiles, notwithstanding that Yelp’s privacy policy states the only account information publicly available on www.yelp.com is a user’s first name and last initial. See Appendix, p. 56. As a result of that representation, Hadeed Carpet, through counsel, logged onto Defendants’ profiles in an attempt to collect identifying information. However, Hadeed Carpet was unable to view any information beyond each Defendant’s location.

20. Thereafter, on July 30, 2012, Hadeed Carpet’s counsel issued a new subpoena, in compliance with Va. Code § 8.01-407.1, by first filing the required disclosure with this Court on the same day, Court’s docket # 11, and confirmed service on Yelp’s registered agent by filing an affidavit of service on August 6, 2012. Court’s Docket #12. The subpoena set a return date of September 13, 2012 at 9:00 am.

21. As shown on docket #11, the subpoena makes two requests for each of the following seven anonymous communicators, Bob G., JS, Chris H., YB, Mike M., Aris P., MP, :

- Yelp’s document(s) that contains the full name, gender, birth date, IP address or email address of [each anonymous communicator].
- [The anonymous communicator’s postings] that relate, in any way, to Hadeed Carpet Cleaning, Inc.

22. On September 5, 2012, Yelp timely filed an objection to the subpoena. The objection is set forth in the Appendix at pages 7 – 9. No anonymous communicator has filed any objection.

C. Facts Presented by Yelp's Affidavits and Exhibits

1. Yelp's content guidelines require reviewers to actually have been customers of the business in question, and to base their posts on personal experiences. Yelp's Brief in Opposition, p. 4.
2. When Yelp deems a post in violation of these rules or believes that a post is "less reliable," Yelp filters these reviews by removing them or showing them as filtered. Yelp's Brief in Opposition, p. 4.
3. Yelp's version of all of the reviews is set forth at the Appendix, pages, 82 – 118.
4. As of the unknown date on which Yelp printed its list of reviews for Hadeed Rug Cleaning, Yelp had approved only four (4) reviews, Appendix, pages 82 – 85. In addition, Yelp had "filtered" 71 reviews, Appendix, pages 87 – 111, and removed five (5) reviews. Appendix, pages 111 – 112.
5. As of the unknown date on which Yelp printed its lists of reviews for Hadeed Oriental Rug Cleaning, Yelp had approved only three (3) reviews. Appendix, page 113- 114. In addition, Yelp had "filtered" five (5) reviews, Appendix, pages 116 -118, and removed one review. Appendix, page 118.

6. In summary, by the unknown date that Yelp printed its list of reviews, Yelp had determined that only eight of the 89 reviews were reliable enough to post, and had either removed or “filtered” the remaining reviews. Six of the reviews that were eventually approved were positive.

7. Yelp also does not reveal any information about the reviewers whose names Hadeed Carpet has subpoenaed, except that it sent notifications to them that Hadeed Carpet sought their information, it checked their IP addresses, and they are all different, and that Yelp has received communications from one or more reviewers who indicate that they wish to remain anonymous. Appendix, p. 185.

8. In addition to hosting a web site upon which purported customers can post comments about Hadeed Carpet, and other businesses, Yelp solicits these businesses to advertise on Yelp’s website. A copy of Hadeed Carpet’s advertising agreement with Yelp is set forth in the Appendix, pages 72 – 77.

9. According to the advertising agreement, Yelp has an “advertising program” for business. In exchange for \$475 per month, Hadeed Carpet receives an “Enhanced Profile” which even allows Hadeed Carpet to remove competing ads, gets 1500 ads per month, and has an optional feature of video hosting. Appendix, p. 73.

10. The point of Yelp's service is to act on a local level by "provid[ing] an internet platform that connects people with local businesses, enabling consumers to rate and describe their experiences with local businesses."

Appendix, p. 78, par. 2.

11. However, posters only need to supply an email address. They do not even need to supply Yelp with their actual name or place of residence.

Appendix, p. 78, par. 3.

12. In addition, to interacting with Virginia residents who are alleged consumers, and contracting with Virginia businesses, like Hadeed Carpet for the advertising program, Yelp maintains a registered agent in Virginia.

Appendix, p. 79a.

STANDARD OF REVIEW

Both parties agree that the circuit court is to act as a gatekeeper in determining whether Hadeed Carpet is entitled to the requested discovery. In such case, this Court would normally review the circuit court's decision under an abuse of discretion standard. *E.g., Landrum v. Chippenham & Johnston-Willis Hosps, Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011).

However, in cases raising First Amendment issues, an appellate court has the obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508-511 (1984).

SUMMARY OF ARGUMENT

- I. This Court should affirm the Circuit Court because Hadeed Carpet provided sufficient evidence of a *prima facie* case against the defendants, under both Va. Code § 8.01-407.1 and the so-called *Dendrite* test.
- II. This Court has jurisdiction to enforce a subpoena duces tecum on the registered agent of an out of state company that transacts business in Virginia.

ARGUMENT

I. The Trial Court Properly Applied the Standard in Va. Code § 8.01-407.1

Freedom of expression is a foundation of American democracy, but the freedom is not unlimited. Libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). Therefore, the States are free to provide legal remedies for private citizens injured by defamatory speech, so long as state law does not impose strict liability for false statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). While false speech is not entitled to the same level of protection as truthful or political speech, *United States v. Alvarez*, 132 S.Ct. 2537, 2544 (2012); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Chavez v. Johnson*, 230 Va. 112, 122 (1985), the Virginia Supreme Court has cited “defamation speech” as an example of constitutionally “unprotected speech.” *Jaynes v. Commonwealth*, 276 Va. 443, 464 (Va. 2008).

The First Amendment, to be sure, does confer a qualified privilege to speak regarding public figures. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). False and defamatory statements regarding public figures are privileged from libel actions unless made with “malice,” which means knowledge of falsity or reckless disregard for the truth. *Id.* However,

Hadeed Carpet is a corporation, not a public figure. Therefore, the defendants had no constitutional privilege to defame Hadeed Carpet.

Notwithstanding the foregoing, Yelp argues that the defendants are entitled to a greater measure of constitutional protection than a typical defendant who has defamed a non-public figure. The two differences that purportedly distinguish this case from a garden variety defamation case are: (1) the defendants spoke anonymously; and (2) the defendants published their statements on the internet. Neither of these facts has legal significance.

Anonymous speech receives constitutional protection not because of its anonymity, but because of its content. Constitutionally protected speech does not lose protection simply because the speaker chooses to remain anonymous. For this reason, the United States Supreme Court and the Virginia Supreme Court have struck down, as overly broad, governmental regulations that restrict the anonymous publication of protected speech.

Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (U.S.) (village ordinance would have prevented anonymous distribution of religious tracts as well as commercial literature); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (Ohio statute prohibited the distribution of campaign literature that did not contain the name and

address of the person or campaign official issuing the literature); *Talley v. California*, 362 U.S. 60 (1960) (California ordinance barred distribution of all handbills unless the author and publisher disclosed their identities); *Jaynes*, 276 Va. 443 (Virginia statute prohibiting emails from a disguised internet address was overly broad because the statute applied to protected speech as well as unprotected speech).

A speaker's choice to remain anonymous does not convert constitutionally unprotected speech into constitutionally protected speech. The publisher of a defamatory statement gains no privilege publishing anonymously. For example, a publisher of child pornography obtains no privilege by concealing his identity and a person inciting violence and the forcible overthrow of the government cannot escape prosecution by omitting his name from a manifesto expressing his views.

The internet is a powerful medium of communication. Like any powerful medium, the internet can be used for good or for ill. A person seeking to promote a political or religious point of view may gain more adherents by publishing a blog than by speaking on a street corner. A person desiring to injure another's reputation may do greater damage by publishing on Yelp than by complaining to his neighbors. However, the great reach of the internet affords no basis for distinguishing internet

speech from other speech for constitutional purposes. The Supreme Court has ruled there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno v. ACLU*, 521 U.S. 844, 870 (1977). Hence, constitutionally protected speech published on the internet remains constitutionally protected. However, constitutionally unprotected speech published on the internet does not become protected by the mere fact of its publication on the internet.

A person who publishes constitutionally protected anonymous speech on the internet does have a legitimate concern for preserving his anonymity. A government official or private party might invoke a court’s subpoena power to require an internet service provider to disclose the author’s identity. If courts issued such subpoenas as a matter of course, anonymous protected speech on the internet would be suppressed. However, the Virginia’s General Assembly has addressed this concern by adopting Va. Code § 8.01-407.1. This statute provides, among other things, that the court may not subpoena an internet service provider to provide the name of an anonymous internet communicator unless the communicator is given an opportunity to object and unless the court makes a preliminary determination that a communication at issue is or may be tortious. As will be shown, Va. Code § 8.01-407.1 provides all the

protection the Constitution requires. However, the Court need not reach the question of whether Va. Code § 8.01-407.1 satisfies Constitutional requirements in every case; the Court needs only decide that the defamatory statements at issue here enjoy no constitutional protection. The statements here would not have been constitutionally protected if the authors had disclosed their names; therefore, the authors' desire for anonymity does not convert the statements into constitutionally protected expressions.

A. The Virginia Test

In 2002, after a series of cases involving attempts to discover by subpoena the identify of persons using America Online, e.g., *America Online, Inc. v. Nai Tam Electronics, Inc.*, 264 Va. 583, 571 S.E.2d 128 (2002), the Virginia General Assembly crafted a procedure and standard, found in Va. Code § 8.01-407.1 which applies to anyone seeking to reveal the identity of persons communicating anonymously over the internet. This statute affords an anonymous communicator a level of protection against the disclosure of his or her identity by allowing the Circuit Court judges to act as gatekeepers in deciding whether any particular applicant is entitled to the identity of the anonymous communicator. This is the Virginia Test.

Under the Virginia test, the party seeking the identity of the anonymous communicator must 1) provide notice of the subpoena to the anonymous communicator via the internet service provider and afford him or her an opportunity to object, and 2) satisfy a circuit court judge acting as a gatekeeper that a) one or more communications was made that are or “may be” tortious, b) that the seeker has a legitimate good faith basis for making the request, c) that other reasonable efforts to identify the anonymous communicator have proven fruitless, d) the identity of the anonymous communicator is centrally needed to advance the claim or defense, e) that no dispositive motion is pending to dismiss the claim, and f) that the entity to whom the subpoena is addressed likely has responsive information. See generally Va. Code § 8.01-407.1.

Here, Hadeed Carpet has sued the anonymous communicators on a defamation theory. Under Virginia law, a plaintiff claiming defamation must prove by a preponderance of the evidence that the defendant (1) published (2) an actionable statement with (3) the requisite intent. See *Gazette, Inc. v. Harris*, 229 Va. 1, 15, 325 S.E.2d 713, 724-25 (1985). Words that are actionable as defamation per se include words which prejudice a person in his business, profession or trade. *Tronfeld v. Nationwide Mut. Ins. Co.*, 272 Va. 709, 713, 636 S.E.2d 447, 449-50 (2006). And, there is a legitimate

state interest in compensating individuals for the harm inflicted upon them by defamatory falsehood. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

In their postings, attached to the Complaint, the anonymous communicators in question have all asserted that they were customers of Hadeed Carpet and with some specificity, they describe how Hadeed Carpet has provided poor service, or even fraud. If these anonymous communicators are not Hadeed Carpet customers, then their statements constitute defamation per se. Hadeed Carpet represented to the Court that it had done everything it could do to discover the identities of the anonymous communicators, to no avail. Without the identity of the anonymous communicators, Hadeed Carpet cannot further pursue its claims. There is nothing vague or conclusory about Hadeed Carpet's allegations. No dispositive motion is pending. And, Yelp clearly has responsive information to the subpoena. Under these circumstances, Hadeed Carpet has met the Virginia test.

B. The Dendrite Test

In response, Yelp's main argument is essentially that Virginia test for determining when to release the identities of anonymous communicators does not satisfy a minimum constitutional standard.

Yelp concedes that the anonymous communicators were given notice and that none of them have filed an objection in this case. Opening Brief, p. 26. Thus, if the anonymous communicators are entitled to some minimal level of constitutional protections, such as notice of the matter before the Circuit Court and an opportunity to be heard, by objecting, e.g. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), Va. Code § 8.01-407.1 provides the required minimal protection.

Next, whether anonymous speech of a defamatory nature directed against commercial entities is entitled to any protection under the First Amendment remains to be seen. The cases identified by Yelp's Opening Brief demonstrate that courts around the country have wrestled with the concept that there should some showing of merit to the case before a subpoena is enforced. The Virginia General Assembly decided to address this area of concern by requiring a Circuit Court judge to find, among other things, that one or more communications was made that are or "may be" tortious, that the seeker has a legitimate good faith basis for making the request, that other reasonable efforts to identify the anonymous communicator have proven fruitless, that the identity of the anonymous communicator is centrally needed to advance the claim or defense, and that no dispositive motion is pending to dismiss the claim. Thus, in addition

to affording an anonymous communicator with notice and an opportunity to be heard, the Virginia statute requires an applicant to jump additional hurdles to satisfy a judge that there is a good reason to enforce a particular subpoena.

The Virginia statute seems well reasoned. It offers protection to anonymous communicators on multiple levels, such as by offering them the opportunity to file an anonymous objection, and whether or not an anonymous communicator appears, an applicant must still convince a circuit judge that all of the statute's elements are met. Thus, Hadeed Carpet submits that, while other states and courts may be free to impose whatever standards they might like to impose, the Virginia Test clearly meets the minimal constitutional protections required under the First Amendment.

Yelp urges this Court to disregard the Virginia Test and adopt the so-called *Dendrite* test, devised in 2001 by a New Jersey state intermediate appellate court, which was not used by the Virginia General Assembly in 2002. The Virginia test and *Dendrite* test are not the only two tests.²

² In comparison to *Dendrite*, there is another test known as the *Sony Music* Test, which has been applied to the anonymous sharing of music over the internet. *Sony BMG Music Entm't v. Doe*, 2008 U.S. Dist. Lexis 106088 (E.D.N.C. 2008) *citing to Sony Music Ent v Does 1 – 40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004).

In any event, according to *Dendrite*, before allowing the identification of anonymous communicators, the trial court shall require the applicant to, 1) notify the anonymous posters that they are the subject of a subpoena, 2) set forth the exact statements that constitute actionable speech, 3) have the Court determine whether the Complaint states a *prima facie* case sufficient to withstand a motion to dismiss, 4) set forth “sufficient evidence” supporting each element of the cause of action, on a *prima facie* basis, and 5) have the Court balance the defendant’s First Amendment rights of anonymous free speech against the strength of the *prima facie* case.

Dendrite International, Inc. v. John Doe, 342 N.J. Super. 134 (N.J. Super. 2001). While Yelp fails to support its belief that Dendrite Test contains the minimum constitutional standard or that the Virginia Test fails to meet constitutional muster, in any case, Hadeed Carpet has satisfied the *Dendrite* Test. Each of the *Dendrite* elements are discussed below:

1. Hadeed Carpet Notified the Anonymous Communicators

Before the Circuit Court, Yelp did not dispute that Hadeed Carpet had met the first *Dendrite* requirement of notifying the anonymous communicators. Yelp concedes that the Virginia procedure probably satisfies the notice requirement, in this instance, but might not in other cases. Opening Brief, p. 24. However, Yelp has conceded that the

anonymous communicators have notice of this matter. *Id.* Hadeed Carpet has satisfied the notice requirement in this case.

2. Hadeed Carpet Set Forth the Exact Statements
That Constitute Actionable Speech.

Before the Circuit Court, Yelp did not dispute that Hadeed Carpet had met this *Dendrite* requirement in stating the exact statements that constitute actionable speech. Yelp concedes that attaching the exact statements to the Complaint, “could be sufficient to meet the second” element. Opening Brief, p. 25. Hadeed Carpet has met this element by attaching the exact statements to the Complaint.

3. The Complaint States a Prima Facie Case of
Defamation.

Before the Circuit Court, Yelp did not dispute that Hadeed Carpet had met this *Dendrite* requirement. Now, Yelp quibbles that, while perhaps the Complaint states a prima facie case of defamation, Yelp believes the defamation claim is “seriously flawed.” Opening Brief, p. 26. However, none of Yelp’s arguments have anything to do with whether the Complaint states a prima facie claim of defamation. As the Circuit Court noted, “the statements are tortious if not made by customers of Hadeed Carpet Cleaning.” Appendix, p. 182.

First, Yelp notes that “falsely stating oneself to be a former customer of Hadeed does not defame Hadeed.” Opening Brief, p. 26. Yelp sidesteps the issue. Nobody is being sued for simply falsely claiming to be a customer. The defendants are being sued for 1) falsely claiming to be a former Hadeed Carpet customer and 2) at the same time falsely describing a negative or fraudulent experience, as a Hadeed Carpet customer, which constitutes defamation per se.

In response, Yelp argues that Hadeed Carpet’s owner, Joe Hadeed, responded to many, if not all of the posts. This quasi argument was not raised before the Circuit Court, but it does show that Hadeed Carpet made every effort to engage with the poster(s), in the ways that were available.

Yelp then raises another makeshift argument, namely that because Hadeed Carpet did not sue or subpoena all of the negative posters, the other anonymous posts must be substantially true. Opening Brief, p. 27. Yelp tries to make as much of this as possible, noting that,

the very fact that so many other reviews on Yelp, whose veracity Hadeed does not contest . . . shows that even if the anonymous reviewers did not have the negative experiences they describe, it would be implausible for Hadeed to allege that the presence of a few more reviews saying the same thing as dozens of actual customers had already said would cause Hadeed any incremental harm.

Opening Brief, p. 27 – 28.

This argument actually demonstrates Yelp's intellectual dishonesty.

Yelp itself determined that nearly all of the posts about Hadeed Carpet were either completely unreliable, and removed them, or deemed them less reliable and eventually "filtered" them. In fact, the seven anonymous communicators at issue here were: 1) Bob G. from Oakton, 2) Chris H from DC, 3) J.S. from Falls Church, 4) Y.B. from Fairfax, 5) MP from Leesburg, 6) Mike M from Occoquan, and 7) Aris P from Haddonfield, NJ. A simple comparison of Appendix pages 40 – 42, with Yelp's production, at Appendix, pages 82 -118 shows that Yelp ultimately "filtered" ALL seven anonymous communicators at issue in this case.

Whether there is one person making 89 posts, or 89 people making one post each, nobody really knows. Whether any of the 89 posts represent the beliefs of actual customers, nobody knows. Perhaps Yelp is doing a public service in this case by alerting the public to a problem at Hadeed Carpet. Or, perhaps Yelp is simply the greatest device ever created for one person to slander another. Either way, the record indicates that Hadeed Carpet has done everything it can to identify these posters, which is to search its own records and attempt to engage with the posters. It sued a handful of John Does as a sample, not as an admission that the remaining posts, filtered or removed, were accurate.

4. Hadeed Carpet Set Forth “Sufficient Evidence” of a “Prima Facie” Case

Before the Circuit Court, Yelp focuses its argument on the fourth *Dendrite* requirement, arguing, in one sentence, “Yelp does not know whether Hadeed will be able to establish an adequate evidentiary basis . . . but on the current record it has not done so.” Yelp’s Memorandum in Opposition, p. 18 – 19.

At oral argument, Yelp made outlandish statements in an effort to bolster that one sentence. First, Yelp noted that Hadeed Carpet “has offered no evidence that anything false has been said about him.” Appendix, p. 156, line 20. This assertion ignores the fact that if the negative reviewers are not customers, then everything they have written about Hadeed Carpet is false.

Next, Yelp noted that, “There’s no averment that staff would go to homes and never charge more than the advertised prices.” Appendix, p. 156, line 21. This is absurd on two levels. First, what matters is whether a specific person experienced the false advertising of which they complained. Second, Hadeed Carpet probably serves 35,000 customers per year and its staff encounters all variety of circumstances. For example, one advertised price may relate to a machine made product. If a customer calls and represents they have a machine made product, they may get quoted

the advertised price. When the staff examines the carpet, it may be a hand-made carpet, in which case the advertisement would not be applicable. This demand for information is merely an attempt by Yelp to make Hadeed Carpet work harder.

Finally, Yelp demanded that Hadeed Carpet compare its invoices with its advertised prices to make sure they are the same. Appendix, p. 157, line 2. In other words, Yelp demands that Hadeed Carpet look at all the invoices for a year, perhaps 35,000, and to see if any customer was ever charged more than the advertised price. It is not clear how information regarding 35,000 other customers would be relevant to the issue of whether one specific person was defrauded through a bait and switch.

Before this Court, Yelp does not really add much to its argument that the fourth *Dendrite* element was not met. But, if *Dendrite* applies, Hadeed Carpet is only required to present “sufficient evidence” of a “prima facie” case, not all evidence necessary to survive a tough cross examination, summary judgment,³ or even obtain a jury verdict. Hadeed has met the

³ The amicus argue that Hadeed Carpet must have sufficient evidence to survive summary judgment standard citing *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005). However, summary judgment in Virginia is disfavored, the parties are not allowed to use affidavits or deposition testimony in seeking summary judgment, and when a complaint’s allegations are simply denied by a defendant, summary judgment is inappropriate. E.g., Rule 3:20 of the Rules of the Virginia Supreme Court; *O’Brien v. Snow*, 215 Va. 403, 210

Dendrite standard because it has provided the actual statements, and if the posters are not customers, their statements are defamatory per se. This information was sufficient in *Fodor v. Doe*, 2011 U.S. Dist. Lexis 49672 (D. Nev. 2011).⁴

Neither Yelp nor the amicus offer any concrete suggestions as to what other evidence Hadeed Carpet might present, but at least Yelp does not make the same strange arguments that it made before the Circuit Court. Instead, Yelp just generally demands more evidence from Hadeed Carpet, castigates the information in the record, or describes it as “unsworn.”

For example, take “Aris P.” from Haddonfield, N.J., who reported that the price was double the quote. Hadeed Carpet has never done business

S.E.2d 165 (1974). Based on the record to date, Hadeed Carpet should easily survive summary judgment in the Virginia state courts.

⁴ Moreover, at the trial court, Yelp cited *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000) for the conclusion that there must be a “good evidentiary reason to believe that Hadeed’s defamation claim can be successful,” (Objection to Subpoena) while the actual language of that case states that Hadeed needs only “a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed.” Furthermore, the court denied the motion to quash when the plaintiff only provided allegations that “the John Does published in Internet chat rooms certain defamatory material, misrepresentations, and confidential material,” far less than provided here.

in New Jersey, so Yelp explains that the problem with Hadeed Carpet’s search for the anonymous communicators is that the anonymous communicators may simply be hiding their locations, in addition to hiding their names. Opening Brief, p. 30.

As for the facts being unsworn, Yelp did not demand sworn affidavits in its objection, Appendix p. 7 – 9, in its brief in opposition to Hadeed Carpet’s request to overrule the subpoena, or ever explain how it was prejudiced by the lack of an affidavit. Nobody is prejudiced by the lack of a sworn affidavit in this case because there is no additional information that would be included in a sworn affidavit contain other than the facts presented in Hadeed Carpet’s statement of facts, which Yelp did not even bother to contest. While a sworn affidavit might be of higher dignity than the signature of the undersigned counsel representing his good faith belief in the accuracy of the pleadings, the *Dendrite* test only requires “sufficient” evidence of a “prima facie” case, not scientific proof. And, just like in *Fodor*, the actual posts themselves are the sufficient evidence. There is no dispute that the posts in question were posted on Yelp and that the posts contain serious derogatory information about Hadeed Carpet.

Ultimately, Yelp and the amicus simply want to make it impossible to request the identity of anonymous communicators. According to them, an

applicant must first spend a lot of time and effort proving every wild fact or rebutting any assertion that might arise on cross-examination before learning the identity of the poster. In other words, they demand that an applicant must demonstrate that both the chicken and egg came first.

5. Hadeed Carpet Passes the Balancing Test

Finally, Yelp contends that *Dendrite* requires a balancing test and that the Circuit Court failed to make such a balancing test. Hadeed Carpet disagrees. Before the Circuit Court, Yelp raised no factors that might weigh in the anonymous communicator's favor, other than the mere fact that they may want some anonymity. Implicit in the Circuit Court's ruling is the determination that this case is serious. Again, *Fodor* provides a good example. After concluding that the posts were potentially defamatory, the *Fodor* court concluded that the posts were not clearly sardonic opinion, and were meant to be taken seriously. Just like in *Fodor*, the anonymous communicators in this case obviously intend for their posts to be taken seriously, to come to the attention of consumers, and for potential consumers to take their statements into account, when they consider whether to use Hadeed Carpet.

Yelp's brief actually bolsters this point. Yelp forgets that it itself removed or "filtered" many of the posts due to reliability questions, but then

takes the position that there is a serious problem at Hadeed Carpet due to so many anonymous posts containing negative reviews. Yelp's attempts to belittle Hadeed Carpet actually strengthen the argument by Hadeed Carpet that this is a serious problem, that people are not joking around about Hadeed Carpet, and this should weigh in Hadeed Carpet's favor.

The amicus brief raises a number of issues that are not present in this case, but when considered, also weigh in Hadeed Carpet's favor, if they are considered as part of some balancing test. This dispute is not about political speech. This is not a whistleblower type case in which a whistleblower fears retaliation from a governmental authority because he or she has spoken out against corruption. None of the posters claim to be past or present employees of Hadeed Carpet; they all claim to be past or present customers. Hadeed Carpet has practically no ability to retaliate against anonymous communicators, unless they are making defamatory statements about Hadeed Carpet's business, in which case Hadeed Carpet's only avenue of redress is in the courts. It is hard to see how Hadeed Carpet might socially ostracize the anonymous communicators, given the sheer land area and population of the area in which Hadeed Carpet operates. Other than facing a lawsuit, for making false statements, an anonymous communicator who presents negative information about

Hadeed Carpet faces hardly any negative consequences whatsoever, other than the disclosure of their name. While disclosure of a name is a harm of sorts, Hadeed Carpet agrees with *Fodor* that “there is no compelling public interest in protecting anonymous speech of this character.” *Fodor v. Doe*, 2011 U.S. Dist. Lexis 49672, * 13 (D. Nev. 2011).

Ultimately, the Virginia Test, devised in 2002, by the General Assembly, meets the minimal constitutional standard for the disclosure of the identities of anonymous communicators, if any. But, if this Court believes the General Assembly erred in some way, Hadeed Carpet meets the standards that Yelp argues this Court should adopt.

II. **Service on Yelp’s Registered Agent Was Good Service.**

Hadeed served its subpoena on Yelp’s registered agent in Virginia. Virginia Code § 8.01-301 states that if a foreign corporation is authorized to transact business in the Commonwealth then it may be served through its registered agent. A registered agent is defined under Virginia Code § 13.1-766 as “an agent of such corporation upon whom any process, notice, order or demand required or permitted by law to be served upon the corporation may be served.” The provisions of the code explicitly allow for service on a registered agent of the corporation in a state.

In *Bellis v. Commonwealth*, 241 Va. 257 (1991), the Virginia Supreme Court found service on a third party sufficient by way of subpoena duces tecum. Thereafter, in 2005, the Boyd-Graves Conference looked into whether a possible rule or statutory change regarding this issue was warranted. Appendix, p. 60. The conference concluded that “the function of a corporation’s Virginia registered agent is to be that corporation’s agent for service of process, notice, order or demand required by law to be served on the corporation.” App. 66. The conference noted that *Bellis v. Commonwealth* clearly showed that a subpoena duces tecum constitutes process and notice. In the end, the conference concluded that “valid service of a properly issued subpoena duces tecum can be made on a foreign corporation by service on its registered agent.” *Id.*

In response, Appellant argues that jurisdiction to enforce subpoenas directed on non-parties remains limited to individuals and companies subject to state sovereign power under *Pennoyer v. Neff*, 95 U.S. 714 (1878); Opening Brief, p. 34. As a threshold matter, this view is “anachronistic and detrimental to the quality of justice administered by state courts.” Rhonda Wasserman, *The Subpoena Power: Pennoyer’s Last Vestige.*, 74 Minn. L. Rev. 37 (1989).

In any case, *Pennoyer* has long been eroded by the contacts and fairness analysis in *International Shoe v. Washington*, 326 U.S. 310 (1945). The due process clause of the fourteenth amendment allows states to assert subpoena power when the assertion comports with traditional notions of fair play and substantial justice. *Id.* A subpoena burdens an out of state nonparty less than a defendant, and the amount of contacts required to assert subpoena power would certainly be less than required for personal jurisdiction over a non-resident. *Id.* Traditional notions of fair play and substantial justice would not be violated by service upon a registered agent in the state.

Finally, Yelp is subject to Virginia's sovereign power. In addition to being served in Virginia, Yelp has Virginia contacts. Yelp's contacts with Virginia are not limited to website access from Virginia computers. As shown from its own affidavits, Yelp intends to affect the local economy, has business relationships with Virginia companies in the form of its advertising program, and relationships with Virginia residents, upon whom Yelp relies to critique Virginia's businesses. See *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 209 F.3d 707, 713-14 (4th Cir. Md. 2002).

CONCLUSION AND REQUEST FOR RELIEF

The Court should affirm the Circuit Court, dismiss the appeal and remand the case to the Circuit Court so that the Circuit Court can monitor Yelp's compliance with the subpoena and take additional enforcement action against Yelp, if needed, and grant Hadeed Carpet its costs of the appeal.

/s/

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I hereby certify that on May 30th, 2013, a true and accurate copy of this pleading was emailed and mailed, first class mail, postage prepaid to:

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that this Reply Brief, excluding the cover page, table of contents, table of authorities and certificates contains 7,659 words according to the word count feature of Microsoft Word 2010.

/s/

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