VIRGINIA:

CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

HADEED CARPET CLEANING, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CL12003401
	)	
JOHN DOE #1, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF YELP IN SUPPORT OF ITS OBJECTIONS TO SUBPOENA FROM HADEED CARPET CLEANING, INC. AND IN OPPOSITION TO HADEED'S MOTION TO COMPEL DISCOVERY

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MISCELLANEOUS

The popular website www.yelp.com is maintained by Yelp Inc. ("Yelp"), and allows members of the public both to read and to write reviews about their experiences with local businesses. This is a defamation case in which plaintiff Hadeed Carpet Cleaning, Inc. ("Hadeed") alleges that seven of eighty-three reviews posted on Yelp about Hadeed and its sister business, Hadeed Oriental Rug Cleaning, are false and defamatory. Hadeed seeks to identify the authors of those seven comments so that it can serve process on them and proceed with its litigation, if, in Hadeed's judgment, the litigation seems to be worth pursuing after it knows the names of the posters. To that end, Hadeed served a subpoena on the Virginia registered agent for Yelp, a non-party headquartered in San Francisco, California. But Virginia lacks jurisdiction to enforce subpoenas to non-party foreign corporations for records maintained outside the State of Virginia. Moreover, Hadeed has repeatedly agreed to Yelp's Terms of Service, which require Hadeed to resolve all disputes between the two parties in federal or state courts located in the County of San Francisco. Nor has Hadeed met the constitutional requirements for stripping the anonymous speakers of the First Amendment right to speak anonymously, by producing admissible evidence that the statements are false or, indeed, that they have caused Hadeed any injury. Consequently, the subpoena should not be enforced.

FACTS AND PROCEEDINGS TO DATE

Hadeed is a Virginia company that takes consumers' carpets to its premises for cleaning. As of October 19, 2012, Yelp's public web site displyed seventy-five reviews about Hadeed and eight more reviews about a related company, Hadeed Oriental Rug Cleaning, that had been posted by various users on the Internet platform that Yelp provides to enable consumers to describe their experiences with local businesses. Yelp rigorously applies its Terms of Service and Content Guidelines, which require reviewers to have actually been customers of the business in question, and

to base their posts on their own personal experiences. Affidavit of Ian MacBean, ¶ 9 and Exhibit A. Posts that Yelp deems in violation of these requirements are subject to removal. In addition, Yelp uses a proprietary algorithm to "filter" potentially less reliable reviews; such reviews are moved to a separate page, which a visitor to Yelp's site can view by clicking on a link at the bottom of a business listing with "filtered" reviews; ratings associated with those reviews are not factored into the business's overall rating on Yelp. *Id.* ¶ 12. Taking the filtered and unfiltered reviews together, forty-eight reviews gave Hadeed the lowest possible rating, one star, but twenty-eight others gave it the highest possible rating of five stars. Two, three and two posters gave ratings of two, three and four stars, respectively. Exhibit A. Evidently, the reviewers have a range of feelings about Hadeed.[1]

Yelp users must register to be able to post reviews; in the registration process, users must provide a valid email address. *Id.* ¶ 3 . However, users are free to choose a screen name of their own choosing, and may also designate a particular zip code of their choosing as their "location." There is no requirement that the user's actual name or actual place of residence be identified (although Yelp encourages users to provide real names, and requires real name for members of its Elite user program). *Id.* Moreover, users who change locations are not required to change their location description when they move. *Id.* Yelp also typically records the Internet Protocol "("IP") address from which each posting is made. *Id.* ¶ 4. This information is typically stored in Yelp's administrative database, and is accessible to Yelp's custodian of records, located in San Francisco,

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[1]This data is based on the reviews shown on the web site as of October 19, 2012, and posted between May 2008 and September 2012. The numbers do not include six separate reviews, each giving Hadeed the lowest rating, that were removed entirely for violating Yelp's Content Guidelines or Terms of Service.

California. *Id.*

Yelp has no offices or real property in Virginia. *Id.* ¶ 7. Yelp has registered to do business in Virginia, and has designated an agent for the service of Virginia process. *Id.* ¶ 8. However, the agent has no information about the identity of Yelp users or, indeed, access to such information. *Id.*

From September 2011 to at least September 2012, Hadeed contracted with Yelp to show advertising on Yelp's web site. *Id.* ¶ 14; Motion to Compel Discovery Exhibit 10. In July 2009 and March 2012, Hadeed established business owner accounts with Yelp. MacBean Affidavit ¶ 13 and Exhibit D. Article V of the Hadeed's advertising contract requires it to comply with Yelp's terms of service, Motion to Compel, Exhibit 10; similarly, in the process of signing up for its business owner account, Hadeed agreed to the Terms of Service. MacBean Affidavit ¶ 13 and Exhibit D. Hadeed reiterated its agreement to the Terms of Service each time it logged into either of its business owner accounts, as recently as within the past three weeks. *Id.* ¶ 14 and Exhibit E. The Terms of Service, in turn, include the following (capitalization in original):

> **13. CHOICE OF LAW AND VENUE**
>
> California law will govern these Terms, as well as any claim, cause of action or dispute that might arise between you and Yelp (a "Claim"), without regard to conflict of law provisions. FOR ANY CLAIM BROUGHT BY EITHER PARTY, YOU AGREE TO SUBMIT AND CONSENT TO THE PERSONAL AND EXCLUSIVE JURISDICTION IN, AND THE EXCLUSIVE VENUE OF, THE STATE AND FEDERAL COURTS LOCATED WITHIN SAN FRANCISCO COUNTY, CALIFORNIA.

Id. ¶ 12 and Exhibit C.

The state and federal courts in San Francisco follow the consensus rule whereby a party seeking to identify anonymous Internet speakers whom it charges with tortious speech must provide notice of the subpoena to the anonymous speakers, identify the specific statements claimed to be

actionable, plead a viable legal claim against each anonymous speaker, and present sufficient evidence to show a prima facie case that it has a realistic chance of succeeding on the merits. *E.g.*, *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005); *Art of Living Foundation v. Does 1-10*, 2011 U.S. Dist. LEXIS 88793 (N.D. Cal. Nov. 9, 2011). Even if the party serving the subpoena is from a different state, and in support of litigation filed elsewhere, California law allows a lawyer to issue a California subpoena without pursuing pro hac vice admission, by specifying that seeking issuance of such a subpoena does not constitute entry of an appearance in the state court. California Code of Civil Procedure section 2029.300(a).

ARGUMENT

I. THE COURT LACKS JURISDICTION TO SUBPOENA DOCUMENTS FROM YELP.

A. The Law Denies Virginia Courts Jurisdiction to Subpoena Out-of-State NonParties.

When jurisdiction is challenged, the plaintiff bears the burden of establishing an evidentiary basis for the jurisdiction. *Nathan v. Takeda Pharmaceuticals America*, 83 Va. Cir. 216, 2011 Va. Cir. LEXIS 99 (Va. Cir. Fairfax Aug. 2, 2011); *iDefense, Inc. v. Dick Tracy Group*, 58 Va. Cir. 138, 2002 Va. Cir. LEXIS 36 (Va. Cir. Fairfax Jan. 9, 2002). This burden cannot be met by conclusory pleading. *Eastern Direct Mktg. v. The Coolidge Co.*, 26 Va. Cir. 282, 1992 Va. Cir. LEXIS 568 (Va. Cir. Arlington Feb. 4, 1992). Hadeed offers three conclusory bases for its contention that it is entitled to compel Yelp to respond to a Virginia subpoena. The first two are that Yelp "conducts business over the Internet in Virginia, and that Yelp is present through its registered agent. It was served in Virginia [through service on its registered agent]." Request to Overrule Yelp's Objections,

at 9. In a related argument, Hadeed also relies on the reasoning of the Boyd Graves Conference, contending that because a subpoena is "process," and because process may be served on a registered agent, this Court has personal jurisdiction to command a foreign corporation to produce documents kept out of state through the delivery of process to the registered agent. *Id.* at 8. None of these arguments can succeed.

As the United States Court of Appeals for the Fourth Circuit said in *ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 712-713 (4th Cir. 2002), predicating personal jurisdiction on the mere fact that Yelp enables its users to make statements accessible in Virginia through the Internet offends traditional principles of state sovereignty:

> [T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.
> * * *
> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet.

Moreover, unlike personal jurisdiction to impose liability on a party under state long-arm statutes, which is now regulated by the "minimum contacts" analysis of the Fourteenth Amendment's Due Process Clause, jurisdiction to enforce subpoenas directed to non-parties remains limited to individuals and company's subject to the state's sovereign power under *Pennoyer v. Neff*, 95 U.S. 714 (1877). Under that power, subpoenas can only be served on persons who are present in the jurisdiction, for documents that are located in the jurisdiction. So far as counsel have been able to

discover, every state that has addressed the question has limited its subpoena jurisdiction in that manner.[2] That is why every state has adopted some version of the Uniform Interstate Depositions and Discovery Act. In Virginia, the relevant statute is sections 8.01-412.8 *et seq.* of the Virginia Code; in California the provisions are contained in sections 2029.100 *et seq.* of the California Code of Civil Procedure. California has made it particularly easy for out-of-state parties to obtain California process in aid of civil suits in their own jurisdictions by providing that a request for an issuance of a subpoena in aid of out-of-state proceedings "does not constitute making an appearance in the courts of this state," 2029.300(a), and hence may be effected by the party's out-of-state attorney. These provisions would rarely be needed if Hadeed's expansive notions of subpoena jurisdiction were sound, expanding Virginia's power to subpoena anybody who communicates through Internet web pages accessible in Virginia and to any company that is engaged in interstate commerce including Virginia. It was pursuant to such provisions for discovery in support of pending proceedings in other states that the plaintiffs in *AOL v. Nam Tai Electronics*, 264 Va. 583, 571 S.E.2d 128 (Va. 2002), and *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001), came to Virginia to obtain Virginia process to obtain information from America Online

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[2] *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 733-734 (Colo. 2012); *CMI, Inc. v. Alejandro Ulloa*, 73 So. 3d 787 (Fla. 2011); *Laverty v. CSX Transp.*, 404 Ill. App. 3d 534, 538, 956 N.E.2d 1 (2010); *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121 (Miss. 2005); *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okl. App. 1995); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186, 1187-1188 (La. 1994); *Armstrong v. Hooker*, 135 Ariz. 358, 359, 661 P.2d 208, 209 (Ariz. App. 1982); *John Deere Co. v. Cone*, 239 S.C. 597, 603, 124 S.E.2d 50, 53 (S.C. 1962). *See also Cates v. LTV Aerospace Corp.*; 480 F.2d 620, 623-624(5th Cir. 1973) (subpoena cannot command production of documents in federal district court different from the one in which the documents are maintained); *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956), *rev'd on other grounds*, 354 U.S. 156 (1957) (same); *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 479 N.Y.S.2d 528 (N.Y. A.D. 1984) (trial court subpoena to non-party witness could not be enforced; proper procedure is to secure commission to seek discovery under authority of court in witness's own state).

("AOL"), a Virginia company, instead of trying to compel AOL to produced identifying information through process from the California and Indiana courts, respectively.

The fact that Yelp complies with Virginia law by registering an agent for service of process scarcely subjects Yelp to subpoena jurisdiction in Virginia. Several courts have expressly rejected the proposition that having a registered agent for service of process subjects the corporation to subpoena jurisdiction that would not otherwise exist. *CMI, Inc. v. Alejandro Ulloa*, 73 So. 3d 787 (Fla. 2011); *Ariel v. Jones*, 693 F.2d 1058, 1060-1061 (11th Cir. 1982) For example, in *Syngenta Crop Prot. v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005), reviewing a statute virtually identical to Virginia Code section § 13.1-766, the Court said "[t]there is no doubt that the statutory language stating that a foreign corporation's registered agent is that corporation's agent 'for service of process, notice or demand required or permitted by law to be served on the foreign corporation,' does not authorize a party's service of a subpoena duces tecum upon nonresident nonparties." Similarly, in *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186, 1187-1188 (La. 1994), the court said, "A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. Finding CKB subject to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this Texas corporation is bound to respond to a subpoena, duly received, by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party."

The very case that Hadeed cites in support of jurisdiction, *Moore v. Lindsay*, 1989 U.S. Dist. Lexis 18042 (W.D. Va. 1989), shows the mischief of Hadeed's theory that having a registered agent for the service of process renders a company "present" in the state and hence subject to jurisdiction for all purposes, including being subpoenaed. In that case, the court held that an Oregon woman

could be sued by a Virginia resident who slipped and fell while visiting in the defendant's Oregon home, simply because the Oregonian had been served with a summons while she was visiting relatives in Virginia. If the same theory applied to corporations based on their having an agent for service of process, Yelp would be subject to general jurisdiction and could be sued for a slip-and-fall at its San Francisco office in Virginia or, indeed, in any state in which it is engaged in interstate commerce. This rule would obliterate the key due process distinction between general and specific jurisdiction, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415 (1984), in that any company would become subject to general jurisdiction simply by registering an agent so that it could be more easily served in a case where it is subject to specific jurisdiction.

The same flaw infects the reasoning of the memorandum from a committee of lawyers to the Boyd Graves Conference, which acknowledges the absence of any clear authority supporting power to subpoena documents from non-party foreign corporations. Hadeed Motion Exhibit 9. In constructing an argument that Virginia subpoenas can compel such production, the committee relies on the argument that a subpoena is a form of process, and that Virginia law authorizes service of process on foreign corporations through their registered agents. In drawing the conclusion that such subpoena service can be **effective** in compelling all out-of-state corporations to produce documents that they keep at their offices elsewhere, the memorandum simply assumes away the issue of jurisdiction. Moreover, given that fact that a summons is process, then by the same reasoning service of a summons on the registered agent of a foreign corporation could subject that corporation to personal jurisdiction even if the cause of action did not arise from the corporation's minimum contacts with Virginia, and even if the foreign corporation's activities in Virginia were not so continuous and systematic that the corporation is subject to general jurisdiction in Virginia.

The memorandum on which Hadeed relies is unpersuasive in yet another respect—the introductory section makes clear that, except for one lawyer who was surveyed, the issue of obtaining documents from out-of-state non-parties by serving subpoenas on their registered agents is one that simply has not been arising in Virginia. The clear implication of the survey results is that Virginia lawyers have not been invoking the supposed power to use Virginia subpoenas to obtain documents from out-of-state nonparty corporations.

Hadeed argues that if Yelp does not want to be subject to subpoena jurisdiction in Virginia it need only stop doing business in Virginia and cancel its registered agent. This cavalier attitude toward interference with the business activities of out-of-state companies ignores Virginia's obligations under the Commerce Clause: applying the registered agent requirement in such a way that a company that complies with the rule thereby forfeits its due process right not to challenge jurisdiction (whether as a party or a nonparty) in the state would impose an undue burden on interstate commerce and hence run afoul of the Dormant Commerce Clause. *See Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921, 926-927 (1983).

B. Hadeed Agreed to Pursue Any Disputes with Yelp in California.

Hadeed cannot insist that Yelp litigate these issues in Virginia for another reason: It agreed that California law will govern any disputes that it has with Yelp and that the federal or state courts located in San Francisco, California, would be the exclusive jurisdiction and venue for such disputes. Although Hadeed focuses on the arbitration clause to which it agreed in its advertising contract with Yelp, both the advertising agreement between Yelp and Hadeed Carpet Cleaning that is attached to Hadeed's motion and the business owner account that both Hadeed businesses established with Yelp in July 2009 and March 2012, include Hadeed's agreement to Yelp's Terms of Service. MacBean

Affidavit ¶¶ 13-15 and Exhibits C, D, E. Those Terms provide that any claim or dispute made by Hadeed against Yelp will be governed by California law, and that the federal or state courts will have exclusive jurisdiction to decide such matters:[3]

> California law will govern . . . any claim, cause of action or dispute that might arise between you and Yelp (a "Claim"), without regard to conflict of law provisions. FOR ANY CLAIM BROUGHT BY EITHER PARTY, YOU AGREE TO SUBMIT AND CONSENT TO THE PERSONAL AND EXCLUSIVE JURISDICTION IN, AND THE EXCLUSIVE VENUE OF, THE STATE AND FEDERAL COURTS LOCATED WITHIN SAN FRANCISCO COUNTY, CALIFORNIA.
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> MacBean Affidavit, Exhibit C (capitalization in original).

In arguing against the application of the arbitration clause in the Advertising Contract, Hadeed acknowledges that federal law immunizes Yelp from being sued by Hadeed based on the content that Yelp's other users place on its web site. Therefore, Hadeed contends, it has no cause of action against Yelp, and the arbitration clause only applies to claims that seek to impose substantive liability. But that argument cannot apply to the forum selection clause in Yelp's Terms of Service, whose terms define a "claim" as including any "claim, cause of action or dispute." If "disputes" were limited to causes of action, then the word "dispute" would be surplusage. It is apparent that there is a "dispute" between Yelp and Hadeed over whether Yelp is required to provide access to its otherwise confidential files about some of Yelp's other customers, and whether the First Amendment precludes enforcement of Hadeed's subpoena.

Moreover, Hadeed has made clear that, if the Court overrules Yelp's objections and orders Yelp to comply with the subpoena, Yelp will be unable to appeal that decision unless it is first held

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[3]Contrary to Hadeed's motion, at 9-12, Yelp's objection did not argue that this subpoena dispute must be arbitrated.

in contempt, and Hadeed's eventual contention that the Court should impose coercive sanctions and award compensatory relief pursuant to a civil contempt finding would certainly constitute a "claim" and a "dispute." These controversies are plainly within the coverage of the forum selection clause to which Hadeed agreed as a condition of obtaining the special posting privileges that are accorded without charge to business owners under the provisions of Yelp's business owner's account program. As part of the consideration for these services, Hadeed agreed to litigate any disputes with Yelp before federal or state judges in a location convenient to Yelp, using the law and procedures of Yelp's home state.

The forum selection and choice of law provisions should be enforced. The Virginia Supreme Court has expressly upheld both contractual choice of law provisions and contractual forum selection clauses, *Settlement Funding v. Neumann-Lillie*, 274 Va. 76, 645 S.E.2d 436 (Va. 2007); *Paul Bus. Sys. v. Canon U.S.A.*, 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990), and the lower courts routinely enforce forum selection clauses as well. *Prater v. Dent Wizard Int'l Corp.*, 2005 WL 2898731 (Va. Cir. Alexandria May 12, 2005); *Ash-Will Farms v. Leachman Cattle Co.*, 61 Va. Cir. 165, 2003 Va. Cir. LEXIS 155 (Va. Cir. Winchester Feb. 13, 2003); *Sawyer v. Peoples Network*, 60 Va. Cir. 15, 2002 Va. Cir. LEXIS 260 (Va. Cir. Chesterfield Mar. 6, 2002); *Bowen v. Norwegian Cruise Line*, 52 Va. Cir. 314, 2000 Va. Cir. LEXIS 280 (Va. Cir. Chesterfield Jun. 13, 2000). Moreover, there is a reasonable relationship between the subject of the current dispute—whether Yelp should have to produce certain documents—and the forum, which is where the documents are located. Moreover, Yelp has an understandable interest in being able to assure all of its members that subpoenas seeking to identify them will be litigated under the long-established principles in the courts in San Francisco, where many other companies that host user-generated anonymous comments are located. Hadeed

vaguely argued that the selection of arbitration as a forum would be against public policy, Br. at 11, but because Yelp argues only for the right to have subpoenas issued out of local courts, no such public policy objections apply here.

Either because of the contractual forum selection clause, or because of the lack of subpoena jurisdiction, Yelp's objections should be upheld, and the motion to compel should be denied without prejudice to the pursuit of discovery from the California courts.

II. HADEED HAS NOT MET THE CONSTITUTIONAL REQUIREMENTS FOR USING STATE POWER TO IDENTIFY ITS ANONYMOUS CRITICS.

Even if this dispute is properly resolved in Virginia, Yelp's constitutional objections should be upheld because the First Amendment limits the compelled identification of anonymous Internet speakers. The First Amendment protects the right to speak anonymously. *E.g., Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995):

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.**
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356 (emphasis added).

A court order, even when issued at the behest of a private party, is state action and hence subject to constitutional limits. That is why, for example, an action for damages, even when brought

by an individual, must satisfy First Amendment scrutiny, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

The right to speak anonymously is fully applicable online. The Internet is a public forum of preeminent importance that enables any individual to reach the public hundreds or even thousands of miles away at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously over the Internet. *In re Does 1-10*, 242 SW.3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007).

Internet speakers may choose to speak anonymously for many reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's

technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, Cal. Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers who are highly respected in their own legal communities have admitted that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, Nov. 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427 &BRD =1769&PAG=461&dept_id=4969&rfi=8. A federal appeals court recently sanctioned a lawyer who used subpoenas to identify anonymous defendants, not with any intention of litigating against them but in the hope of extorting quick settlements through the threat of public shaming. *Mick Haig Productions v. Does 1-670*, 687 F.3d 649, 652 (5th Cir. 2012). The Court noted that other courts had encountered similar misuse of subpoenas by other lawyers. *Id.* n.2.

Lawyers who represent plaintiffs in these cases have also urged clients to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business

Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* In *Swiger v. Allegheny Energy*, 2006 U.S. Dist. Lexis 32059 (E.D. Pa. May 19, 2006), a company filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and dismissed the suit without obtaining any judicial remedy other than removal of anonymity. Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

As one court said in denying identification of anonymous Internet speakers, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). *See also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal 1999):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

The fact that a plaintiff has filed suit does not create a compelling government interest in taking away a defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

Courts have drawn on the media's privilege against revealing sources in civil cases, *Miller*

v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980), to form a similar rule protecting identity of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), established a five-part standard that became a model followed or adapted throughout the country:

> 1. **Give Notice**: Courts require the plaintiff, and sometimes the Internet Service Provider ("ISP"), to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
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> 2. **Require Specificity**: Courts require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights.
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> 3. **Ensure Facial Validity**: Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.
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> 4. **Require An Evidentiary Showing**: Courts require the plaintiff to produce evidence supporting each element of its claims.
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> 5. **Balance the Equities**: Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.
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> *Id.* at 760-61.

Appellate courts in five states have endorsed *Dendrite*'s final balancing stage: *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011); *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012). Four state appellate courts have followed a summary judgment or prima facie evidence standard, but without express balancing, led by the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005): *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008); *In re Does 1-10*, 242 S.W.3d 805

(Tex. App. 2007); *Solers v. Doe*, 977 A.2d 941 (D.C. 2009).[4] The federal and state courts for San Francisco, California, apply either the *Dendrite* balancing test, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005); *Art of Living Foundation v. Does 1-10*, 2011 U.S. Dist. LEXIS 88793 (N.D. Cal. Nov. 9, 2011), or its *Cahill* variant without express balancing. *E.g.*, *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008).

Hadeed cites *AOL v. Nam Tai Electronics*, 264 Va. 583, 571 S.E.2d 128 (Va. 2002), for the proposition that in Virginia, a subpoena to identify anonymous defamers does not even implicate the First Amendment because the First Amendment does not preclude liability for defamation. Br. 9 n.2. *Nam Tai* says no such thing, and directly contrary is the decision in *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 2000 Va. Cir. LEXIS 220 (Va. Cir. Ct. Fairfax Jan. 31, 2000), *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). Indeed, just this past Term the Supreme Court of the United States held that even false speech can be protected by the First Amendment unless the plaintiff shows that the statements an overcome the various hurdles imposed by the First Amendment for defamation liability. *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012). Here, there has been no showing of liability for defamation; Hadeed has done no more than file a complaint alleging defamation, and it has failed to produce any evidence that any of the statements made about it are false, or that they have caused the slightest damage to its business reputation. Moreover, in *Nam Tai*, the Court was considering AOL's objections to the enforcement of a subpoena issued at the behest of a California trial court, to identify anonymous defendants who had been sued in that court, and the Court had to consider its

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[4] *See also Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011) (Illinois rules require verified complaint, specification of defamatory words, determination that valid claim was stated, and notice to Doe).

obligations under principles of comity, because the California court had already determined that discovery was appropriate and had issued a commission to pursue discovery in Virginia.

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to secure enforcement of a subpoena to identify Doe defendants is too onerous a burden because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Fodor v. Doe*, 2011 U.S. Dist. LEXIS 49672 (D. Nev Apr. 27, 2011); *Does v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *Alvis Coatings v. Does*, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. Dec. 2, 2004); *see also In re Baxter*, 2001 U.S. Dist. LEXIS 26001 (W.D. La. Dec. 20, 2001) (following "reasonable possibility or reasonable probability of success" standard derived from *Dendrite*). Indeed, in *Immunomedics v Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery.[5]

Yelp does not know whether Hadeed will be able to establish an adequate evidentiary basis

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[5] *Dendrite* also includes an express balancing stage. The balancing stage is comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities. After all, an order of disclosure is an injunction, and not even a preliminary one at that. A refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once a speaker's name is published to the world, she loses her anonymity and can never get it back. Any violation of an individual speaker's First Amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976). But in some cases, identification of the Does may expose them to significant danger of extra-judicial retaliation. If there is evidence suggesting the possibility of retaliation, the *Dendrite* balancing approach allows the Court to weigh that evidence in the Doe's favor in deciding whether to quash a subpoena. On the current record, there is no basis for applying the balancing stage one way of the other.

overriding the anonymous speakers' First Amendment right to speak anonymously, but on the current record, it has not done so. For that reason, as well as because Hadeed had not obtained subpoenas from a court with subpoena jurisdiction over Yelp, Yelp's objections should be upheld, and the motion to compel compliance with the subpoena denied.

CONCLUSION

The motion to compel compliance with Hadeed's subpoena should be denied, and Yelp's objections should be upheld.[6]

Respectfully submitted,

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[6]Yelp objected to the subpoena in part because its broad language, anything "related to Hadeed," could have required Yelp to provide the contents of private messages about Hadeed exchanged between its users; such discovery could contravene the federal Stored Communications Act. 18 U.S.C. §§ 2701, *et seq.* Because Hadeed's motion to compel limits the scope of its subpoena to statements that are "posted publicly on the internet for all to see," Br. 14, this objection is moot, and is not pursued in this brief.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2012, I caused a copy of the foregoing opposition and accompanying affidavit and exhibits to be served by first-class mail, postage prepaid, on counsel for plaintiff as follows:

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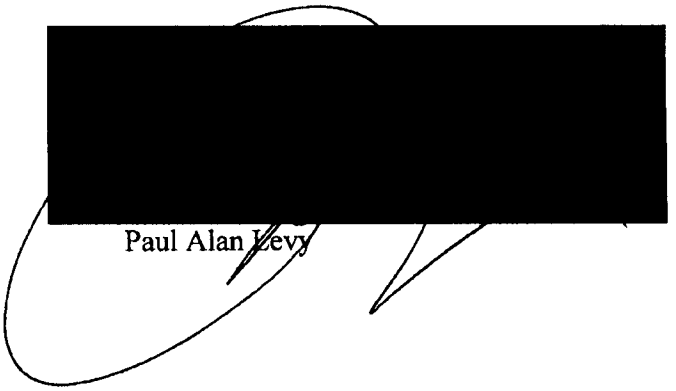

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