In the
Virginia Court of Appeals

Record No. 0116-13-4

HADEED CARPET CLEANING, INC.,

Plaintiff-Appellee,

v.

JOHN DOE # 1, *et al.*,

Defendants.

YELP, INC.,

Non-party respondent-Appellant.

REPLY BRIEF OF APPELLANT YELP, INC.

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Yelp's opening brief and Hadeed's response make clear that this appeal presents a clear issue of First Amendment law—whether a plaintiff that seeks to divest Internet speakers of their First Amendment right to speak using pseudonyms must make an evidentiary showing of potential merit before obtaining a court order that requires a third-party like Yelp to provide identifying information. Hadeed gives no reasons of policy why this Court should not agree with the appellate courts of ten other states that have construed the First Amendment as requiring such a showing before the right to speak anonymously or pseudonymously may be abridged; instead, it mistakenly contends that Virginia's legislature has rejected the *Dendrite* line of cases, that speech becomes unprotected under the First Amendment once a plaintiff alleges that it has been defamed, and that Yelp failed to preserve for appeal its contention that a plaintiff must produce evidence of defamation. As this reply brief shows, none of those arguments is sound. We also show the flaws in Hadeed's argument that the Virginia courts have subpoena jurisdiction over Yelp.

I. Enforcement of the Subpoena Violated the First Amendment Rights of Yelp's Anonymous Users.

As Yelp's opening brief showed, appellate courts in ten states have held that, when a plaintiff seeks to identify an anonymous speaker whom the plaintiff seeks to sue on the ground that the speech is allegedly wrongful, the plaintiff must both give notice and make a legal and factual showing of merit that ensures that only plaintiffs with potentially meritorious claims are able to surmount the First Amendment right to speak anonymously. These states do not require the plaintiff to show any certainty that it can prevail; they require only that the court take an early look at the merits to determine whether there is a realistic possibility that the speech **may** be wrongful. *See generally* Levy, *Developments in Dendrite*, 14 Fla. Coastal L. Rev. 1 (2012).

Hadeed argues that this national consensus approach to the problem of reconciling the First

Amendment right to speak anonymously with the right to use the courts to obtain redress of grievances is at odds with what it calls the "Virginia test," referring to Va. Code § 8.01-407.1. However, even apart from the fact that a state statute cannot overrule the requirements of the First Amendment, there is no inconsistency between section 8.01-407.1 and the *Dendrite-Cahill* line of cases. First of all, section 8.01-407.1 does not refer to the First Amendment, and does not set forth any substantive standard for determining whether a given lawsuit has a sufficient chance of succeeding that a compelling government interest supports court-ordered identification of the otherwise anonymous defendant. Rather, section 8.01-407.1 defines itself as a procedural provision—section 8.01-407.1(A) provides that subpoenas "shall be governed by the following procedure," and the statute then proceeds with a detailed protocol for notifying the court, the ISP, and the anonymous defendant(s) of the claimed basis for the litigation. Unlike the trial court decision in *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 37 (Cir. Ct. Fairfax Cy. Jan. 31, 2000), *reversed on other grds. sub nom. America Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), which held that the needed showing can be made by "pleadings or evidence" (and which was addressed in our opening brief at page 22), the statute is silent on what materials can or should be considered in deciding whether the showing is sufficient.

Instead, section A(1)(a) says only that the party seeking discovery must show that it "has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction . . .." It is not enough for the plaintiff to show good faith; it must show a "legitimate" basis for claiming that the speech was tortious. That requirement is entirely consistent with the rule in other states that a plaintiff seeking relief must show an evidentiary basis for its claim. Similarly, under subsection (b), the plaintiff must show that identifying information is "centrally needed to

advance the claim," or relates to a "core claim or defense," or is "directly and materially related to that claim." If the plaintiff bringing a defamation claim does not even have evidence that a statement about the plaintiff is false, or that the statement has caused damage to its business reputation, then the identifying information is not "needed" – the claim could still not succeed even if the identifying information were obtained. Subsection (d) further indicates that either legal or evidentiary challenges to the sufficiency of the lawsuit for which identification is sought can be enough to bar enforcement of the subpoena, in that pendency of a "motion to dismiss, motion for judgment on the pleadings, or judgment as a matter of law, demurrer or summary judgment-type motion challenging the viability of the lawsuit" is a proper basis for the trial court to deny enforcement of the subpoena. Thus, the Virginia legislature did not forbid trial courts to follow the consensus approach to this First Amendment issue that has developed in other jurisdictions over the ten years since the statute was adopted; indeed, the statute may be said to have anticipated those precedents, by requiring the presentation of materials from which a trial court can determine the likelihood of the speech really being tortious, and not just allegedly tortious.

The assumption that the Does' speech is unprotected in pervasive in Hadeed's brief. *E.g.*, 17, 18, 19, 20. For example, Hadeed argues that the ruling below can be affirmed on the ground that "the defamatory statements at issue here enjoy no constitutional protection," Br. 20, and asserts that "constitutionally unprotected speech published on the internet does not become protected by the mere fact of its publication on the internet." *Id.* 19. But Hadeed never explains how the Court can avoid applying First Amendment protections on this theory, because constitutionally protected speech does not become unprotected just because a company sues over it. At this point, Hadeed has only filed a complaint alleging, in vague terms, that because seven Doe defendants were not

Hadeed's customers, the statements they made about how Hadeed treated **them** must be false. But Hadeed must first establish the falsity and injurious character of the statements, not to speak of meeting the relevant standard of care requirements, before Hadeed be in a position to argue that the speech is constitutionally unprotected. Until then, Hadeed is in the same position as the plaintiff companies in *Dendrite*, *Mobilisa*, and *Mortgage Specialist*, and the same position as the individuals in *Cahill, Krinsky, Gatelli,* and the other plaintiffs in the many appellate cases cited in our opening brief — plaintiffs who have alleged defamation but have as yet proved nothing, certainly not proved enough to justify disregarding the First Amendment rights of the Doe defendants on the theory that their speech is constitutionally unprotected.[1]

Moreover, and perhaps most important, Hadeed never explains why a plaintiff with a valid defamation claim should not be put to the test of providing at least some evidentiary support for its claim that false statements have been made about it, or that the statements about it have caused cognizable injury. Like any other defamation plaintiff, Hadeed knows what it has done and what it has not done, and should be able to provide an affidavit from a knowledgeable corporate

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[1] For the first time on appeal, Hadeed argues (Br. 16-17) that it is not a public figure and that the First Amendment affords no protection to speech about it. This argument errs in two ways. First, the First Amendment regulates defamation claims about non-public figures. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974); *WJLA-TV v. Levin*, 264 Va. 140, 155, 564 S.E.2d 383 (Va. 2002). Second, the pervasiveness of Hadeed's advertising of its carpet cleaning services – on Yelp as well as in the traditional mass media — makes it a public figure for the purpose of Yelp users' comments about its services. *See Steaks Unlimited v. Deaner*, 623 F.2d 264, 273-274 (3d Cir. 1980), *cited with approval*, *National Foundation for Cancer Research v. Council of Better Business Bureaus*, 705 F.2d 98, 101-102 (4th Cir.1983). Indeed, Hadeed has contracted with Yelp to be able to use the pages about Hadeed to place its own advertising; the Yelp users who have commented positively or negatively about Hadeed are simply responding in a forum whose basic content (the description of the company) is subject to Hadeed's control. Hadeed has ample access to communicate its own message in this forum, making it especially appropriate to treat Hadeed as a public figure in the Yelp community.

representative establishing that, contrary to the assertions of the Does in this case, its staff never charge more than the advertised price, never provide the various forms of poor service alleged, and the like, and what steps its managers employ to ensure that field staff do not act in this way.

To be sure, Hadeed has complicated its task by alleging, not that it never overcharges customers, but only that seven specific Yelp users are not its customers, and by arguing that it necessarily follows that Hadeed did not perpetrate overcharges or poor service on these particular individuals. But Hadeed never provides the slightest evidence to support the allegation that the seven Yelp users are not its customers. It simply represents—through its counsel—that a review of unspecified aspects of its customer database, using criteria that it does not deign to share with the Court, suggests to Hadeed that the individual users were not, in fact, customers. Of course, neither unsworn allegations in a complaint, nor unsworn arguments in a legal brief, constitute evidence that could override the Doe speakers' First Amendment rights. But even if these assertions were sworn, their conclusory nature would make them insufficient to permit the Court to conclude that the claim here is "legitimate," not to speak of sufficiently likely to succeed to warrant overcoming the Does' First Amendment right to speak anonymously.

Indeed, the extravagance of Hadeed's arguments even calls its good faith into question. For example, on the Yelp service, although Hadeed has responded to some posts by saying that it believes that the posts come from a competitor, in response to several other posts Hadeed has responded in terms that suggest that Hadeed recognizes that these are individual customers and expressed gratitude that they called problems to Hadeed's attention. App. 84, 85, 101. In the court below, Hadeed claimed that it was pursuing these defamation claims because it suspected that an unidentified competitor was deliberately seeding Yelp's site with negative reviews, App. 162-163,

but the evidence rebuts that suspicion. Thus, although at one point in its brief Hadeed states, "Whether there is one person making 89 posts, or 89 people making one post each, nobody really knows," Hadeed Br. 28, the evidence strongly suggests that one person did not make all the posts. First, Yelp reviewed its internal records to determine that each of the seven posts over which Hadeed has sued came from a different Internet Protocol address (if each came from the same person, one would expect overlap of IP addresses). App. 185. Moreover, many of the posts **praise** Hadeed, although many others are negative, and several are mixed. App. 79-80. In the circumstances, the suggestion that one person could possibly have written each of these reviews is simply incredible.

Hadeed also argues that Yelp waived its claim that Hadeed is obligated to produce **evidence** of falsity and not simply unsworn allegation on the theory that Yelp did not submit sufficiently specific objections, or did not use the specific word "affidavits" in its brief below in opposition to the request to overrule the objections. Hadeed Br. 32. However, the written objections faulted Hadeed for not meeting "the legal requirements [that] the party must first plead proper claims and produce evidence sufficient to make out a prima facie case of the claims on which the lawsuit is based," App. 8, and for failing to supply "good evidentiary reason to believe that Hadeed's defamation claim can be successful." *Id.* The objections also invoked "the test requiring proof of falsity and the other key elements of the plaintiff's claim." Moreover, Hadeed's brief ridicules Yelp for having argued below that Hadeed "has offered no evidence that anything false has been said," *id.* 29, and for arguing that "[t]here's no averment" on a particular issue. *Id.* Thus, in its own brief, Hadeed admits that, in the court below, Yelp had argued that Hadeed needed sworn affidavits (or other admissible evidence) to meet the applicable legal standard.

Finally, the odd way in which Hadeed has chosen to couch its claims of falsity undercuts the

force of its libel claims. Hadeed does not deny that it sometimes overcharges customers or provides poor service of the sort alleged by the seven Doe defendants. It only argues that it did not overcharge any of **these seven** individuals, or provide poor service to any of **these seven**. But if there is a general problem of overcharging to others of Hadeed's 35,000 customers — and nothing in Hadeed's papers below or in this Court alleges otherwise—then Hadeed cannot sue them because, regardless of what happened to the seven, the gist of the Does' statements is true. Under the authority cited in Yelp's opening brief, at 26-27, never rebutted by Hadeed's brief, the doctrine of substantial truth would bar Hadeed's defamation claim.

Finally, Hadeed argues that, assuming that the Court agrees with Yelp's argument that the Court should adopt the final, "balancing" stage of the analysis in such cases as *Mobilisa v. Doe,* 170 P.3d 712 (Ariz. App. Div. 1 2007), and *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001), the Court should rule that the balancing analysis favors Hadeed here because the posters represent themselves as customers, not as employees against whom Hadeed could easily retaliate, and because Hadeed is not a big enough player in the Washington, DC, market to be able to retaliate against customers. However, once a user is identified with a pseudonym, then anybody else whom the user has criticized will also be able to identify her. The possibility of community ostracism or pressure is an important reason why many people want to preserve their anonymity when they speak online. Moreover, the peculiar nature of Hadeed's libel claim— which does not assert that claims that its field staff refuse to honor advertised prices are necessarily false, but only that because Hadeed assumes, for unclear reasons, that the posters were not its customers, the bait and switch could not have been played on these particular posters—makes the interest in pursuing such libel claims particularly weak. In any event, assuming that Hadeed chooses to make an evidentiary showing of falsity on remand from this

Court, the trial court can best sort out any arguments about how the balancing part of the *Dendrite* analysis should be applied here.[2]

II. The Court Below Lacked Subpoena Jurisdiction Over Hadeed.

Hadeed argues that, contrary to the holding of **every** other state and federal court that has addressed this issue, in Virginia service on an out-of-state entity that is not party to the litigation but that has a registered agent in the state is sufficient to subject that entity, and all of its documents no matter where located, to plenary jurisdiction in the state. For this argument, Hadeed relies on *Bellis v. Commonwealth*, 241 Va. 257 (1991), but that case presented no issue of jurisdiction—Bellis was a Virginia doctor who had received a subpoena to testify in a Virginia criminal proceeding. If the mere ability to serve a subpoena on a corporation pursuant to the registered agent statute is a sufficient basis for jurisdiction, without relying on any other statutory basis for jurisdiction, then every out-of-state corporation that has a registered agent in Virginia will become subject to general jurisdiction, regardless of whether the company's contacts with Virginia are related to the cause of action - that is, personal jurisdiction also could be based on the registered agent statute rather than on the long-arm statute.

Hadeed also argues by analogy to the Virginia long-arm statute, but that statute cannot be a basis for jurisdiction here—it allows jurisdiction over causes of action against out-of-state companies

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[2] Hadeed also points to the fact that Yelp's algorithm has "filtered" the Does' comments as supporting its position on the balancing prong, on the theory that it represents Yelp's determination that these comments might be less reliable. Hadeed Br. 33-34. However, the algorithm does not make any individualized determination that can affect the strength of each Doe's First Amendment right to make that comment, and if anything, the filtering process would seem to hurt Hadeed on the balancing analysis. Filtering limits the audience for such comments, because only users who complete a special "CAPCHA" process are able to see those comments, and Yelp thus disallows indexing of filtered reviews by search engines such as Google. Thus, the filtering process limits the extent to which the reviews could affect Hadeed's reputation.

causing in-state tortious injury, but only if those contacts with Virginia are related to the cause of action. Va. Code § 8.01-328.1(A)(4). Here, however, Yelp is statutorily immune from being sued over the content that its users have chosen to place on its web site. 47 U.S.C. § 230; *Zeran v AOL*, 129 F.3d 327 (4th Cir. 1997).[3]

Consequently, the long-arm statute cannot support subpoena jurisdiction. If Virginia chooses to defy the long-standing mutual recognition among states that out-of-state corporations that are not party to lawsuits are entitled to defend their private documents in the courts of their home states, it is the legislature, not this Court, that should make that determination.

CONCLUSION

The judgment of contempt and the order compelling Yelp to comply with the subpoena to identify Yelp's users should be vacated, and the case remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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[3] In that regard, Hadeed's argument (Br. 28) about whether Yelp might be "doing a public service . . . by alerting the public to a problem at Hadeed Carpet" ignores the fact that Yelp is a platform on which its users, including Hadeed itself, express their own views. Yelp has no views about the quality of Hadeed's services or about whether it lives up to its advertised prices.

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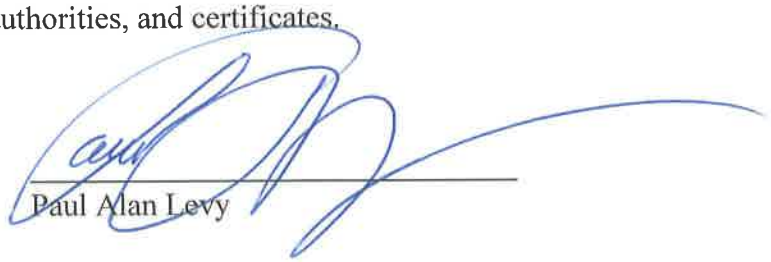

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2013, I caused a copy of the brief to be served by first-class mail, postage prepaid, on counsel for plaintiff as follows:

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