

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

HADEED CARPET CLEANING,)
 INC.)
)
 Plaintiff,)
)
 v.)
)
 JOHN DOE #1, et al..)
)
 Defendants.)

Case No. CL12003401

FILED
 CLERK OF COURTS
 CITY OF ALEXANDRIA
 2012 OCT 31 P 12:39
 EDWARD SEMONIAN, CLERK
 BY DEPUTY CLERK

**HADEED'S RESPONSE TO YELP'S
 MEMORANDUM IN SUPPORT OF ITS OBJECTIONS TO SUBPOENA AND IN
 OPPOSITION TO HADEED'S MOTION TO COMPEL DISCOVERY**

Plaintiff Hadeed Carpet Cleaning, Inc. ("Hadeed") requests an order that overrules non-party Yelp, Inc.'s ("Yelp"), objections to identifying John Doe #1, John Doe #2 and John Doe Corporation (collectively, "Defendants"), and requires Yelp to produce the requested materials within one business day. In reply to Yelp's brief, Hadeed states as follows:

I. SUMMARY

The Court's decision on this motion will effectively decide this case because, other than through Yelp, Hadeed has no other means of identifying the anonymous communicators. The Court should overrule Yelp's objections and order it to immediately produce the requested information.

II. THE FACTS

In section 2 of its motion, Hadeed set forth a number of material facts. Yelp did not dispute the authenticity of these facts and they are therefore conceded. In summary, certain anonymous communicators, who claimed to be Hadeed customers, posted reviews on Yelp's

website, about improper and in some cases fraudulent services that they received from Hadeed. Hadeed has no record of these persons being customers. Their specific statements were attached to the motion. Yelp knows the identity of these anonymous communicators, but refuses to disclose that information. Hadeed filed suit for defamation against the anonymous communicators in this Court, and served a subpoena on Yelp's registered agent in Virginia.

III. ANALYSIS

Each of Yelp's objections is discussed below:

A. **Hadeed Can Subpoena Yelp's Records by Serving a Subpoena on Yelp's Registered Agent in Virginia.**

Hadeed argued that it was entitled to serve a subpoena on the registered agent of an out of state party. *See Orange County v. Morgan*, 28 Va. Cir. 189 (Va. Cir. Ct. 1992) (subpoena validly served on registered agent of a trust). In response Yelp argues that other states do not allow service of this type and that Virginia's apparent use of this type of service is unconstitutional.

First, the purpose of Virginia Code § 8.01-407.1(4), (5) is to permit objectors to file a "detailed" objection so that the Court can quickly and cleanly rule on the objection. Here, Yelp filed a bare bones objection and now, in an attempt to supplement it, has filed a 20 page brief, an affidavit and detailed exhibits. Yelp has waived its right to file such a detailed response and the Court should not even consider Yelp's response on the merits.

Substantively, Yelp argues that other states do not allow service of a *subpoena duces tecum* on a registered agent. This is hardly surprising because many of those states' statutes appear to differ materially from Virginia's statutes. *Compare, Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So. 2d 121, 127 (Miss. 2005) (under the Mississippi statute a subpoena was not "process" because their statute allowed mailing process while subpoenas must be served in person), *with Bellis v. Commonwealth*, 241 Va. 257 (1991) (*subpoena duces tecum* is "process")

under Va. Code § 18.2-456). As argued previously, Virginia's statutory framework is different such that the Boyd Graves Conference acknowledged that the service of a *subpoena duces tecum* was a common practice in Virginia, and that the practice was supportable based on the wording of Virginia's statutes.

Faced with the Boyd Graves memorandum, Yelp argues that Virginia's practice of serving *subpoena duces tecums* on registered agents is unconstitutional. As a threshold matter, Yelp is doing business in Virginia. While it argues that it merely "enables its users to make statements accessible in Virginia through the internet," Yelp Memorandum at 5, Yelp's contention misstates both the facts and the law. Yelp does not merely enable its users to make the statements that others may access; it contracts directly with Virginia residents and businesses, like Hadeed, on a regular basis to get them to advertise on Yelp. Furthermore, Yelp tries to support its argument by citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), but in that case the Fourth Circuit adopted the reasoning of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)., which held that jurisdiction is proper over an internet actor when they are doing business in the forum state. Later Fourth Circuit opinions have further extended jurisdiction over out-of-state parties if their "Internet activity is expressly targeted at or directed to the forum state." *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). Not only is Yelp doing business with Virginia residents, but Yelp's activity in providing advertising for, and hosting reviews of Hadeed's carpet cleaning business in Virginia is only targeted at Hadeed's current and potential clients, who live in Virginia. Surely Yelp is not posting reviews so that people in Hawaii might consider using Hadeed's carpet cleaning services.

Despite these flaws with its case, Yelp asserts that the jurisdictional hurdle for subpoenas

is still governed by *Pennoyer v. Neff*, 95 U.S. 714 (U.S. 1878), which limits jurisdiction to persons physically within the state. However, Yelp's registered agent is physically located in Virginia and, more recently than 1878, courts have enforced subpoenas against nonparties located outside of the jurisdiction. *E.g.*, *In re Ragland*, 343 A.2d 558 (D.C. 1975) (enforcing a subpoena issued in D.C. against a witness residing in Philadelphia); *Helge v. Druke*, 136 Ariz. 434, 437 (Ariz. Ct. App. 1983) (the court allowed a foreign nonparty to be served with a subpoena while passing through the state and compelled to produce documents located outside the state).

Of the 12 cases cited by Yelp in support of Yelp's theory that subpoena jurisdiction is still governed by *Pennoyer v. Neff*, Yelp Memorandum at 6, n.2, only one of them actually references *Pennoyer*: *John Deere Co. v. Cone*, 239 S.C. 597 (1962). The others never reach the relevant constitutional questions but instead, are not relevant, or base their decisions on their particular state's interpretation of its own long-arm statute or of their own version of the Uniform Interstate Depositions and Discovery Act, which may differ materially from the Virginia Act. *E.g.*, *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So. 2d 1186 (La. Apr. 11, 1994) (Louisiana court concluded that a nonparty could not be served with a subpoena to *appear* and produce documents because it was not authorized by the Louisiana civil code); *CMI, Inc. v. Alejandro Ulloa*, 73 So. 3d 787, 791 (Fla. Dist. Ct. App. 5th Dist. 2011) (Florida court quashed a subpoena because plaintiffs failed to comply with Florida's Uniform Law to Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings, which Florida has read to preclude such subpoenas); *Laverty v. CSX Transp., Inc.*, 404 Ill. App. 3d 534, 539 (Ill. App. Ct. 5th Dist. 2010) (decided on grounds of *forum non conveniens* without addressing the nature of subpoena power whatsoever). In fact, one case Yelp cites actually notes

that, under its state's statutes, a nonparty may be served to appear in court via *subpoena* in criminal matters. *Armstrong v. Hooker*, 135 Ariz. 358, 359 (Ariz. Ct. App. 1982).

As such, Yelp's citation to authorities outside Virginia has no bearing on this issue, which is determined by an interpretation of Virginia statutes. Other jurisdictions have concluded that they may enforce subpoenas on nonparties and Virginia is not required by the Constitution to do otherwise. *E.g., In re Ragland*, 343 A.2d 558 (D.C. 1975); *Helge v. Druke*, 136 Ariz. 434, 437 (Ariz. Ct. App. 1983).

Furthermore, even if the Court's jurisdiction to serve and enforce subpoenas was limited to parties physically present in Virginia, the presence of Yelp's registered agent is sufficient for it to receive process because that is the whole purpose of having a registered agent in a state, so that a corporation may receive process. Yelp has cited no Virginia authority concluding that the registered agent is not sufficient, by itself, to establish jurisdiction. Even if it were not, Yelp has other significant contacts with Virginia, in terms of its contracting with Virginia businesses and residents and the fact that its website is directed at advertising and/or reviewing Virginia businesses.

Finally, Yelp misconstrues Hadeed's jurisdictional argument to imply that anyone communicating on the Internet is subject to subpoena anywhere in the world. This analogy fails because Yelp maintains a registered agent in Virginia, contracts with Virginia businesses and residents, and advertises to Virginia businesses and residents. A Virginia Circuit Court can enforce a subpoena on Yelp.

B. Hadeed Did Not Agree to Litigate a Discovery Dispute in California

Without the citation of any authority, Yelp baldly asserts that this discovery dispute must be litigated in a California courtroom. Yelp's Terms of Service do not prevent this Court from

maintaining control over the discovery in this case. Compelling Yelp to comply with a valid subpoena is not a “dispute” under the Terms of Service. The Terms of Service state:

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.

MacBean Affidavit, Exhibit C. Yelp contends that this non-party discovery request is a “dispute” and that “if ‘disputes’ were limited to causes of action, then the word ‘dispute’ would be surplusage.” Yelp Memorandum at 10. This is mere sophistry. While it is true that a general rule of contract interpretation is that language should be construed such “that no provision is merely a superfluity,” this is not the case where the language “is plainly merely a repetition.” *Ames v. American Nat'l Bank*, 163 Va. 1, 39 (1934). Here the contract uses the phrase “claim, cause of action, or dispute.” This is clearly a repetition. Black’s Law Dictionary explicitly notes that “claim” is a synonym for “cause of action,” and vice versa. BLACK’S LAW DICTIONARY, (9th ed. 2009). Furthermore, it defines a “cause of action” as “1. A group of operative facts giving rise to one or more bases for suing,” and “dispute” is defined as a “1. A conflict or controversy, especially one that has given rise to a particular law suit.”¹ *Id.*

There is no meaningful difference between the “conflict or controversy” giving rise to a law suit and the “operative facts” that constitute the conflict or controversy giving rise to a law suit. The Terms of Service state that Hadeed must use California courts for any “claim brought by either party:” the only “claim” that can be “brought” is a legal claim, and that language should

¹ “Words used by the parties are to be given their usual, ordinary and popular meaning, unless it can be clearly shown in some legitimate way that they were used in some other sense, and the burden of showing this is always upon the party alleging it.” *Ames v. American Nat'l Bank*, 163 Va. at 39.

not be construed to mean otherwise. And, as stated in both Yelp's objection and in Hadeed's motion, Hadeed has no possible basis for bringing a law suit against Yelp. Hadeed is merely seeking information about John Does for use in the law suit that Hadeed has against those John Does.

Additionally, the fact that Yelp may be held in contempt for failing to respond to a valid subpoena does not transform this discovery into a "dispute" between Yelp and Hadeed. Contempt is about Yelp's respect for this Court's orders. If Yelp were to walk into a court room and cause disruption it could be held in contempt, but that does not mean that Yelp is involved in a dispute with the parties present in court at the time.

Finally, even if Yelp's resistance to Hadeed's non-party subpoena constitutes a "dispute" under the Terms of Service, Hadeed did not agree to submit to a California court claims or disputes that were independent of the contractual relationship between Yelp and Hadeed. The Terms of Service define "you" as "you, *as a user of the Site.*" (emphasis added). The Terms of Service were intended to require Hadeed to use California courts if it had a dispute with Yelp regarding Hadeed's use of the web site. Here, Hadeed's *use* of the Yelp site is not implicated. It is the use of Yelp's website by third parties that is the problem.

C. Hadeed Has Met the Legal Requirements for Obtaining Information about Yelp's Anonymous Internet Users.

The legal requirements for obtaining information about Yelp's anonymous internet users are set forth in Virginia Code § 8.01-407.1. Hadeed's motion explained these requirements and why they were met.

Yelp asserts that, in addition to the Virginia requirements, Hadeed must also jump a constitutional hurdle. However, the First Amendment does not protect the anonymity of

individuals whose speech is defamatory. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (“defamatory reports of facts [are] matters deserving no First Amendment protection); *see also Chaves v. Johnson*, 230 Va. 112, 121-122 (1985).

Although the Virginia Supreme Court has not addressed the issue of anonymous defamation directly, at least one Virginia Circuit Court has held that the anonymity of anonymous speakers is not protected by the First Amendment where their speech tortuously defames a company. *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 35-36 (Va. Cir. Ct. 2000) *rev'd on other grounds Am. Online v. Anonymous Publicly Traded Co.*, 261 Va. 350, 364-365 (2001). Oddly, Yelp cites *In re Subpoena Duces Tecum to America Online, Inc.* in its support, yet that circuit court *denied* the motion to quash based on receiving a copy of the allegedly defamatory statements, just as this Court has received from Hadeed.

The anonymous communicators who are commenting on Hadeed’s fraudulent activities, were not anonymously distributing political pamphlets like the defendants in *McIntyre v. Ohio Elections Committee*, 514 U.S. 334 (1995), Yelp Memorandum at 12, instead they appear to be deliberately lying about Hadeed’s business in order to damage it. Yelp is really taking the untenable position that the speakers have a constitutional right to maintain their anonymity and destroy Hadeed’s business with false allegations.

Yelp cites to *United States v. Alvarez* for the proposition that a defamatory statement is only not protected by the First Amendment if the plaintiff makes a “showing of liability.” Yelp Memorandum at 17. What *Alvarez* actually says is that in “instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.” *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012). In this case, the speakers have claimed to

be personal witnesses to events that did not occur. It is therefore impossible that they were not knowingly or recklessly false in their statements, and as a matter of law, their statements and their identities do not receive First Amendment protection.

Yelp ultimately seeks to sway the Court with a parade of horrors sure to arise if Yelp is compelled to respond to this subpoena, but by now, Yelp's argument is more than strained. Allowing Hadeed to obtain the identities of the individuals who made defamatory statements about its business does not somehow engender the "Big Brother consequences" of which Yelp warns. Yelp Memorandum at 14. As the Court can see from Exhibit A, there are very real defamatory statements being made to damage Hadeed's business, and Hadeed is helpless to seek recourse without the identities of the persons making those statements. This is precisely why such statements and the identities of their speakers do not receive First Amendment protection. Moreover, Virginia Code § 8.01-407.1 empowers this Court to act as a gatekeeper and deny subpoenas that do not meet the requisite standards.

Finally, Yelp contends that this Court should just disregard Virginia law and adopt the standard set forth in *New Jersey by Dendrite Int'l, Inc. v. John Doe No. 3*, 342 N.J. Super. 134, 775 A.2d 756 (2001), to evaluate whether Hadeed has sufficiently proven his case. Yelp Memorandum at 16. However, in the one case where the *Dendrite* reasoning was suggested to a court in the Fourth Circuit, that court declined to adopt it. *Elektra Entm't Group, Inc. v. Doe*, 2008 U.S. Dist. LEXIS 100564 (E.D.N.C. Sept. 26, 2008). Furthermore, even if the Court adopted *Dendrite*, it would still need to overrule Yelp's objections because Hadeed has satisfied the *Dendrite* standards.


V. CONCLUSION

This Court should simply overrule Yelp's objections, and enter an Order requiring Yelp to provide the information requested within one business day.

WHEREFORE, HADEED CARPET CLEANING, INC., by counsel, respectfully requests the Court to enter an order compelling Yelp to comply with the subpoena.

Respectfully Submitted,

HADEED CARPET CLEANING, INC.
By Counsel




Raighne C. Delaney, VSB No. 38787 *w/ the*
Bean, Kinney & Korman, P.C. *correct*
2300 Wilson Blvd.
Seventh Floor
Arlington, VA 22201
(703) 525-4000
(703) 525-2207 [fax]
rdelaney@beankinney.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, a true and accurate copy of this pleading was
emailed and mailed, first class mail, postage prepaid to:

Paul Alan Levy
Public Citizen Litigation Group
1600 20th St., NW
Washington, D.C. 20009
plevy@citizen.org

Raymond D. Battocchi, Esq.
Raymond D. Battocchi, P.C.
35047 Snickersville Turnpike
Round Hill, Virginia 20141
battocchi@aol.com


Raigne C. Delaney

with authority