George Mason American Inn Of Court

Wednesday, November 20, 2013

AGENDA

TOPIC: Social Media Claims: The Internet Review Industry, How Yelp Works, How Businesses (And Lawyers) Can Fight Negative Reviews, And The Virginia Unmasking Statute.

1. Opening Remarks and Introduction of Panel (Nina J. Ginsberg) (3 minutes)

2. A Presentation on Anonymous Internet Posters and Virginia Law – (Raighne C. Delaney) (40 minutes)

3. Discussion of Stored Communications Act and the Issuance of Subpoenas After the Virginia Supreme Court's Decision in *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.* (Thomas F. Urban) (10 minutes)

4. Post-Presentation Questions and Comments (7 minutes)

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Flagg v. City of Detroit (E.D.Mich. 200) (holding that party having control over text messages preserved by third party service provider cold consent to disclosure of those communications)

Internet Law and Practice Note on First Amendment Issues on the Internet – The Right to Speak Anonymously

Anonymous Internet Posters & Virginia Law

Raighne Delaney

Bean, Kinney & Korman, P.C.

Clash of Rights

Right to Speak Anonymously

v.

Right to Personal Security (uninterrupted enjoyment of one's personal reputation)

Internet Review Industry

- Purpose of Reviews – Help Consumers
- Crowdsourcing theory: millions can't be wrong
  - 80% of Customers Trust the Reviews (1)
  - 25% Believe posts are unfair (2)
  - Most read less than 7 reviews before deciding (3)
  - Most Trusted Sites: TripAdvisor, Zagat, OpenTable, Edmunds.com and Yelp (CNBC) (4)
- 14% of all internet reviews are fake (NY Atty Gen)
- Cannot sue the website for posting

Problems with Internet Reviews

- Cheap Talk
- Fake Reviews
  - 2004 Amazon Canada Website (5)
    - Glitch revealed identities: writers reviewing on books
  - TR made $28,000 per month writing fake reviews (6)
  - 2015 Amazon lawsuit against 1,000 fake reviewers
- Requested Reviews Get Rejected
- Disgruntled Ex-Employees or Ex-lovers
- Competitors
  - Chain Hotel Near Independent v. Isolated Chain Hotel Reviews (7)
- Reviewers are Ignorant
  - Chefs discuss Yelp reviews on Youtube

Advertisement

- "I need someone who is a YELP expert to post positive reviews for a spa that will not be filtered using existing yelp accounts. Must have at least 10 friends on Yelp. Please be a yelp expert!! I will pay $10 per-review after 3 days they must meet the criteria above." (8)

Solutions to Problems

- Computers Might Detect Fake Reviews
  - Chicago Hotel Test, 400 fake positive, 400 possible real (9)
    - Humans could not detect fakes
    - Computers were 90% accurate
- Verified Consumers
  - Expedia, to review, must book through Expedia
  - Tripadvisor, to review, just provide phony log in
    - Small hotels reportedly 10% more likely to receive 5 star reviews on tripadvisor
  - Amazon, "Verified Customer"

UK Investigation

- TripAdvisor changes its slogan from:

"Reviews you can trust."

"Reviews from our community"

- Thompson, "*Trust, Travel and Trip Advisor*," Forbes, July 24, 2012.
  - (UK watchdog couldn't tell which reviews were real and which were simply made up).

Takeaway

- "The big takeaway is that the system is being manipulated with fake positive and fake negative reviews-and that's all negative for consumers who are using them to try and make smart choices."

- Tuttle, "Why you shouldn't trust positive online reviews-or negative ones, for that matter," TIME, August 28, 2012.

Advice to Business Owners

- Do a better job with customers!
- Contact review site and complain
- Join the Conversation, with poster and others
- Emphasize positive (hidden positives)
- Encourage reviews?
- Sue to take down the post
- Sue for damages
- Do a better job with customers!

Yelp's Business Model

- Driven by free labor force
    - Yelp Elite Reviewers
- Yelp may not know reviewer's ID
    - "Real Reviews By Real People"
- Advertising Revenue from businesses
- If you don't advertise . . .
- Each extra Yelp star is a 5 to 9% bump in revenue (10)
- Yelp defends model under Communications Decency Act and Right to Free Speech

How Yelp Polices Its Site

- Relies on Reviewers to only post actual experiences, not verified customers
- Relies on computer to screen out fake reviews
- Unreliable reviews are "filtered," meaning not shown directly nor are they removed entirely.
- Allows businesses to interact with reviewers, publicly or privately.

Hadeed Carpet's Situation

- 7 Reviewers did not appear to be customers
  - 4 were first time posters, with no friends
  - 1 was from out of state, where there was no business
  - 1 had the same post under two different names
  - 1 had zero friends and a few other posts
  - All had the "double charge" theme
- None could be identified with database search
- All 7 reviews deemed unreliable by Yelp

Va. Code 8.01-407.1

- 30 days before return, file subpoena and "supporting material"
- Posts "are or may be tortious", or "legitimate good faith basis" to believe a victim of actionable conduct
- Other reasonable efforts fruitless
- Identity centrally needed
- No motion to dismiss pending
- Responsive ISP likely to have information
- ISP required to serve poster, with forms provided by plaintiff

Possible Responses to Subpoena

- Any interested person may file objection
- If any objection filed, subpoena stayed till Court rules
- Any interested person may notice the objection for hearing

Enforcement of Subpoena

- Subpoena Sought Names and/or IP addresses
- Yelp's Objection noticed for hearing on papers
  - *Can't Serve Registered Agent*
  - *Dendrite* Test Applies (evidence required)
  - Have Not Met *Dendrite*
    - Have not proved they were not customers
    - Have not proved you've never defrauded anyone
- Yelp in contempt, fine?, appeal to Court of Appeals
- Court of Appeals
  - "are or may be tortious," "legitimate good faith basis"
  - Registered agent gets "process", subpoena is process *Bellis*

The Arguments

- What is the Right Test?
  - Yelp: *Dendrite*, First Amendment protects, apply Dendrite as a floor, Not Met
  - Hadeed: *Gertz,* states regulate libel, no const. floor, 8.01-407.1 standard is floor, met
- Court: "Supporting Material" language
  - Is the Test Met?
  - Can you subpoena the registered agent?
  - Violation of Due Process?

Procedural Points & Recommendations

- Suing John Doe v. Y.B.
- Affidavits v. representations
- Setting the stage/Understanding the industry and the target
- Representing Anonymous Poster

Virginia Supreme Court's Decision

- Cannot serve subpoena on registered agent of foreign corporation because the General Assembly never authorized it.

- Use the Uniform Interstate Deposition and Discovery Act (UIDDA) to subpoena Yelp in California.

General Assembly

- Two members of General Assembly (one D, one R) considering expressly authorizing service of civil subpoenas on registered agents of foreign corporations.

- Designating registered agent would be consent to civil subpoena service, an express waiver of constitutional rights.

UIDDA:
Va. Code sec. 8.01-412.8, et seq.

- Provides simple procedures for courts in one state to issue subpoenas for out of state document requests and depositions.
- Only applies if both states have adopted the Act.
  - Both VA and CA have.
- Essentially, the party can deliver a foreign subpoena to the superior court where discovery is sought, and the clerk in that state then issues a subpoena in accordance to the rules of the state in which the discovery is being sought.

California Code of Civil Procedure, sec. 2029.100 et seq.

- California:
  - Foreign subpoena submitted to the superior court where discovery is sought.
  - Requestor must also submit an application (found online) requesting the superior court to issue a subpoena with the same terms as the foreign subpoena, and pay a $20 fee.

South Park Clip

https://www.youtube.com/watch?v=CsXZ5htogKg

End Notes

1) https://www.brightlocal.com/2013/06/25/local-consumer-review-survey-2013/

2) http://maritzresearch.com/reviewstudy2013.

3) http://searchengineland.com/2013-study-79-of-consumers-trust-online-reviews-as-much-as-personal-recommendations-164565

4) http://www.cnbc.com/2014/06/20/is-that-online-review-site-telling-you-the-truth.html

Endnotes

5) http://www.nytimes.com/2004/02/14/us/amazon-glitch-unmasks-war-of-reviewers.html

6) http://www.businessinsider.com/this-guy-made-28000-a-month-writing-fake-book-reviews-online-2012-8

7) Mayzlin, et al, Promotional Reviews: An Empirical Investigation of Online Review Manipulation, The American Economic Review, September 2013.

8) Press Release, NY Attorney General, September 23, 2013, "AG Schneiderman announces agreement with 19 companies to stop writing fake online reviews and pay more than $350,000 in fines."

Endnotes

9) http//www.nytimes.com/2011/08/20/technology/finding-fake-reviews-online.html

10) http://www.huffingtonpost.com/2011/10/03/yelp-review-revenue_n_992096.html

11) http://www.huffingtonpost.com/entry/amazon-sues-1000-people-over-fake-reviews_56251dc7e4b08589ef483531

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 14. Evidence (Refs & Annos)
Article 5. Compelling Attendance of Witnesses, Etc.

VA Code Ann. § 8.01-407.1

§ 8.01-407.1. Identity of persons communicating anonymously over the Internet

Currentness

A. In civil proceedings where it is alleged that an anonymous individual has engaged in Internet communications that are tortious, any subpoena seeking information held by a nongovernmental person or entity that would identify the tortfeasor shall be governed by the following procedure unless more expedited scheduling directions have been ordered by the court upon consideration of the interests of each person affected thereby:

1. At least thirty days prior to the date on which disclosure is sought, a party seeking information identifying an anonymous communicator shall file with the appropriate circuit court a complete copy of the subpoena and all items annexed or incorporated therein, along with supporting material showing:

a. That one or more communications that are or may be tortious or illegal have been made by the anonymous communicator, or that the party requesting the subpoena has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit was filed. A copy of the communications that are the subject of the action or subpoena shall be submitted.

b. That other reasonable efforts to identify the anonymous communicator have proven fruitless.

c. That the identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense.

d. That no 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 of the underlying plaintiff is pending. The pendency of such a motion may be considered by the court in determining whether to enforce, suspend or strike the proposed disclosure obligation under the subpoena.

e. That the individuals or entities to whom the subpoena is addressed are likely to have responsive information.

f. If the subpoena sought relates to an action pending in another jurisdiction, the application shall contain a copy of the pleadings in such action, along with the mandate, writ or commission of the court where the action is pending that authorizes the discovery of the information sought in the Commonwealth.

2. Two copies of the subpoena and supporting materials set forth in subdivision A. 1. a. through f. shall be served upon the person to whom it is addressed along with payment sufficient to cover postage for mailing one copy of the application within the United States by registered mail, return receipt requested.

3. Except where the anonymous communicator has consented to disclosure in advance, within five business days after receipt of a subpoena and supporting materials calling for disclosure of identifying information concerning an anonymous communicator, the individual or entity to whom the subpoena is addressed shall (i) send an electronic mail notification to the anonymous communicator reporting that the subpoena has been received if an e-mail address is available and (ii) dispatch one copy thereof, by registered mail or commercial delivery service, return receipt requested, to the anonymous communicator at his last known address, if any is on file with the person to whom the subpoena is addressed.

4. At least seven business days prior to the date on which disclosure is sought under the subpoena, any interested person may file a detailed written objection, motion to quash, or motion for protective order. Any such papers filed by the anonymous communicator shall be served on or before the date of filing upon the party seeking the subpoena and the party to whom the subpoena is addressed. Any such papers filed by the party to whom the subpoena is addressed shall be served on or before the date of filing upon the party seeking the subpoena and the anonymous communicator whose identifying information is sought. Service is effective when it has been mailed, dispatched by commercial delivery service, transmitted by facsimile, or delivered to counsel of record and to parties having no counsel.

5. Any written objection, motion to quash, or motion for protective order shall set forth all grounds relied upon for denying the disclosure sought in the subpoena and shall also address to the extent feasible (i) whether the identity of the anonymous communicator has been disclosed in any way beyond its recordation in the account records of the party to whom the subpoena is addressed, (ii) whether the subpoena fails to allow a reasonable time for compliance, (iii) whether it requires disclosure of privileged or other protected matter and no exception or waiver applies, or (iv) whether it subjects a person to undue burden.

6. The party to whom the subpoena is addressed shall not comply with the subpoena earlier than three business days before the date on which disclosure is due, to allow the anonymous communicator the opportunity to object. If any person files a written objection, motion to quash, or motion for protective order, compliance with the subpoena shall be deferred until the appropriate court rules on the obligation to comply. If an objection or motion is made, the party serving the subpoena shall not be entitled to inspect or copy the materials except pursuant to an order of the court on behalf of which the subpoena was issued. If an objection or motion has been filed, any interested person may notice the matter for a hearing. Two copies of any such notice shall be served upon the subpoenaed party, who shall mail one copy thereof, by registered mail or commercial delivery service, return receipt requested, to the anonymous communicator whose identifying information is the subject of the subpoena at that person's last known address.

B. The party requesting or issuing a subpoena for information identifying an anonymous Internet communicator shall serve along with each copy of such subpoena notices in boldface capital letters in substantially this form:

NOTICE TO INTERNET SERVICE PROVIDER

WITHIN FIVE BUSINESS DAYS AFTER RECEIPT OF THIS SUBPOENA CALLING FOR IDENTIFYING INFORMATION CONCERNING YOUR CLIENT, SUBSCRIBER OR CUSTOMER, EXCEPT WHERE CONSENT TO DISCLOSURE HAS BEEN GIVEN IN ADVANCE, YOU ARE REQUIRED BY § 8.01-407.1 OF THE CODE OF VIRGINIA TO MAIL ONE COPY THEREOF, BY REGISTERED MAIL OR COMMERCIAL DELIVERY SERVICE, RETURN RECEIPT REQUESTED, TO THE CLIENT, SUBSCRIBER OR CUSTOMER WHOSE

IDENTIFYING INFORMATION IS THE SUBJECT OF THE SUBPOENA. AT LEAST SEVEN BUSINESS DAYS PRIOR TO THE DATE ON WHICH DISCLOSURE IS SOUGHT YOU MAY, BUT ARE NOT REQUIRED TO, FILE A DETAILED WRITTEN OBJECTION, MOTION TO QUASH OR MOTION FOR PROTECTIVE ORDER. ANY SUCH OBJECTION OR MOTION SHALL BE SERVED UPON THE PARTY INITIATING THE SUBPOENA AND UPON THE CLIENT, SUBSCRIBER OR CUSTOMER WHOSE IDENTIFYING INFORMATION IS SOUGHT.

IF YOU CHOOSE NOT TO OBJECT TO THE SUBPOENA, YOU MUST ALLOW TIME FOR YOUR CLIENT, SUBSCRIBER OR CUSTOMER TO FILE HIS OWN OBJECTION, THEREFORE YOU MUST NOT RESPOND TO THE SUBPOENA ANY EARLIER THAN THREE BUSINESS DAYS BEFORE THE DISCLOSURE IS DUE.

IF YOU RECEIVE NOTICE THAT YOUR CLIENT, SUBSCRIBER OR CUSTOMER HAS FILED A WRITTEN OBJECTION, MOTION TO QUASH OR MOTION FOR PROTECTIVE ORDER REGARDING THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, NO DISCLOSURE PURSUANT TO THE SUBPOENA SHALL BE MADE EXCEPT PURSUANT TO AN ORDER OF THE COURT ON BEHALF OF WHICH THE SUBPOENA WAS ISSUED.

NOTICE TO INTERNET USER

THE ATTACHED PAPERS MEAN THAT _ _ (INSERT NAME OF PARTY REQUESTING OR CAUSING ISSUANCE OF THE SUBPOENA) HAS EITHER ASKED THE COURT TO ISSUE A SUBPOENA, OR A SUBPOENA HAS BEEN ISSUED, TO YOUR INTERNET SERVICE PROVIDER _ _ (INSERT NAME OF INTERNET SERVICE PROVIDER) REQUIRING PRODUCTION OF INFORMATION REGARDING YOUR IDENTITY. UNLESS A DETAILED WRITTEN OBJECTION IS FILED WITH THE COURT, THE SERVICE PROVIDER WILL BE REQUIRED BY LAW TO RESPOND BY PROVIDING THE REQUIRED INFORMATION. IF YOU BELIEVE YOUR IDENTIFYING INFORMATION SHOULD NOT BE DISCLOSED AND OBJECT TO SUCH DISCLOSURE, YOU HAVE THE RIGHT TO FILE WITH THE CLERK OF COURT A DETAILED WRITTEN OBJECTION, MOTION TO QUASH THE SUBPOENA OR MOTION TO OBTAIN A PROTECTIVE ORDER. YOU MAY ELECT TO CONTACT AN ATTORNEY TO REPRESENT YOUR INTERESTS. IF YOU ELECT TO FILE A WRITTEN OBJECTION, MOTION TO QUASH, OR MOTION FOR PROTECTIVE ORDER, IT SHOULD BE FILED AS SOON AS POSSIBLE, AND MUST IN ALL INSTANCES BE FILED NO LESS THAN SEVEN BUSINESS DAYS BEFORE THE DATE ON WHICH DISCLOSURE IS DUE (LISTED IN THE SUBPOENA). IF YOU ELECT TO FILE A WRITTEN OBJECTION OR MOTION AGAINST THIS SUBPOENA, YOU MUST AT THE SAME TIME SEND A COPY OF THAT OBJECTION OR MOTION TO BOTH YOUR INTERNET SERVICE PROVIDER AND THE PARTY WHO REQUESTED THE SUBPOENA. IF YOU WISH TO OPPOSE THE ATTACHED SUBPOENA, IN WHOLE OR IN PART, YOU OR YOUR ATTORNEY MAY FILE A WRITTEN OBJECTION, A MOTION TO QUASH THE SUBPOENA, OR A MOTION FOR A PROTECTIVE ORDER OR YOU MAY USE THE FORM BELOW, WHICH MUST BE FILED WITH THE COURT AND SERVED UPON THE PARTY REQUESTING THE SUBPOENA AND THE INTERNET SERVICE PROVIDER BY MAILING AT LEAST SEVEN BUSINESS DAYS PRIOR TO THE DATE SET IN THE SUBPOENA FOR DISCLOSURE:

.....

Name of Court Listed on Subpoena

.....

Name of Party Seeking Information

Case No. _____

OBJECTION TO SUBPOENA DUCES TECUM

I object to the Subpoena Duces Tecum addressed to .....

for the following reasons:

[Name of Internet Service Provider to Whom the Subpoena is Addressed]

(Please PRINT. Set forth, in detail, all reasons why the subpoena should not be complied with, and in addition, state (i) whether the identity of the anonymous communicator has been disclosed in any fashion, (ii) whether the subpoena fails to allow a reasonable time for compliance, (iii) whether it requires disclosure of privileged or other protected matter and no exception or waiver applies, or (iv) whether it subjects a person to undue burden.)

(attach additional sheets if needed)

.....

Respectfully Submitted,

.....

John Doe .....

.....

Enter e-mail nickname or other .....

alias used in communicating via .....

the Internet service provider to .....

whom the subpoena is addressed. .....

CERTIFICATE

I hereby certify that a true copy of the above Objection to Subpoena Duces Tecum was mailed this _____ day of _____, (month, year), to

.....

(Name and address of party seeking information) and

.....

(Name and address of Internet Service Provider)

John Doe .....

Enter e-mail nickname or other .....

alias used in communicating via .....

the Internet service provider to .....

whom the subpoena is addressed. .....

Credits

Added by Acts 2002, c. 875.

Notes of Decisions (5)

VA Code Ann. § 8.01-407.1, VA ST § 8.01-407.1
Current through End of the 2015 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 14. Evidence (Refs & Annos)
Article 6.2. Uniform Interstate Depositions and Discovery Act (Refs & Annos)

VA Code Ann. § 8.01-412.10

§ 8.01-412.10. Issuance of subpoena

Effective: July 1, 2009
Currentness

A. To request the issuance of a subpoena under this article, a party shall submit to the clerk of court in the circuit in which discovery is sought to be conducted in the Commonwealth (i) a foreign subpoena and (ii) a written statement that the law of the foreign jurisdiction grants reciprocal privileges to citizens of the Commonwealth for taking discovery in the jurisdiction that issued the foreign subpoena.

B. When a party submits a foreign subpoena to a clerk of court in the Commonwealth, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

C. A subpoena under subsection B shall:

1. Incorporate the terms used in the foreign subpoena; and

2. Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

D. A request for the issuance of a subpoena under this article does not constitute an appearance in the courts of the Commonwealth, and no civil action need be filed in the circuit court of the Commonwealth.

E. The provisions of this article shall be in addition to other procedures authorized in the Code of Virginia and the rules of court for obtaining discovery.

Credits
Added by Acts 2009, c. 701.

Notes of Decisions (1)

VA Code Ann. § 8.01-412.10, VA ST § 8.01-412.10
Current through End of the 2015 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 14. Evidence (Refs & Annos)
Article 6.2. Uniform Interstate Depositions and Discovery Act (Refs & Annos)

VA Code Ann. § 8.01-412.11

§ 8.01-412.11. Service of subpoena

Effective: July 1, 2009
Currentness

A subpoena issued by a clerk of court under this article shall be served in compliance with the applicable statutes of the Commonwealth for service of a subpoena.

Credits
Added by Acts 2009, c. 701.

VA Code Ann. § 8.01-412.11, VA ST § 8.01-412.11
Current through End of the 2015 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 14. Evidence (Refs & Annos)
Article 6.2. Uniform Interstate Depositions and Discovery Act (Refs & Annos)

VA Code Ann. § 8.01-412.12

§ 8.01-412.12. Deposition, production, and inspection

Effective: July 1, 2009
Currentness

Statutes and rules applicable in actions pending in the circuit courts of the Commonwealth with respect to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises, shall apply to subpoenas issued under § 8.01-412.10.

Credits
Added by Acts 2009, c. 701.

VA Code Ann. § 8.01-412.12, VA ST § 8.01-412.12
Current through End of the 2015 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 14. Evidence (Refs & Annos)
Article 6.2. Uniform Interstate Depositions and Discovery Act (Refs & Annos)

VA Code Ann. § 8.01-412.13

§ 8.01-412.13. Application to court

Effective: July 1, 2009
Currentness

An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under § 8.01-412.10 shall comply with the statutes and rules of court of the Commonwealth and be submitted to the court in the circuit in which discovery is to be conducted. A separate civil action need not be filed.

Credits
Added by Acts 2009, c. 701.

Notes of Decisions (1)

VA Code Ann. § 8.01-412.13, VA ST § 8.01-412.13
Current through End of the 2015 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 14. Evidence (Refs & Annos)
Article 6.2. Uniform Interstate Depositions and Discovery Act (Refs & Annos)

VA Code Ann. § 8.01-412.14

§ 8.01-412.14. Uniformity of application and construction; reciprocal privileges

Effective: July 1, 2009
Currentness

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. The privilege extended to persons in other states for discovery under this article shall only apply if the jurisdiction where the action is pending has extended a similar privilege to persons in the Commonwealth, by that jurisdiction's enactment of the Uniform Interstate Depositions and Discovery Act, a predecessor uniform act, or another comparable law or rule of court providing substantially similar mechanisms for use by out-of-state parties.

Credits
Added by Acts 2009, c. 701.

Notes of Decisions (2)

VA Code Ann. § 8.01-412.14, VA ST § 8.01-412.14
Current through End of the 2015 Reg. Sess.

End of Document

770 S.E.2d 440
Supreme Court of Virginia.

YELP, INC.
v.
HADEED CARPET CLEANING, INC.

Record No. 140242. | April 16, 2015.

Synopsis

Background: After business filed defamation action against individuals who posted anonymous reviews of business's carpet cleaning services to social networking website, corporation issued subpoena duces tecum to nonresident operator of website, seeking documents revealing identity and other information about individuals who posted reviews. Website operator filed written objections to subpoena duces tecum. The Circuit Court, City of Alexandria, Lisa B. Kemler, J., 2013 WL 7085181, issued order enforcing subpoena duces tecum and held website operator in contempt when it refused to comply. Website operator appealed. The Court of Appeals, Petty, J., 62 Va.App. 678, 752 S.E.2d 554, affirmed. Website operator appealed.

[Holding:] The Supreme Court, Elizabeth A. McClanahan, J., held that trial court lacked authority to enforce subpoena duces tecum against website operator.

Reversed and remanded.

Mims, J., filed separate opinion concurring in part and dissenting in part in which Millette, J., joined.

West Headnotes (7)

[1] **Pretrial Procedure**
Inconvenience or other detriment
Pretrial Procedure
Subpoena duces tecum; production of documents or tangible things
Pretrial Procedure
Business and financial records and reports

Trial court lacked authority to enforce subpoena duces tecum directing non-party, nonresident operator of social networking website to produce documents located in California in connection with business's underlying defamation suit against individuals who posted anonymous reviews of business to website; information sought by business was beyond reach of trial court, and the determination that the trial court lacked authority to enforce the subpoena was supported by traditional limits on subpoena power and public policy established through enactment of Uniform Interstate Depositions and Discovery Act (UIDDA), under which the place where discovery was sought to be conducted determined which trial court issued and enforced a subpoena. West's V.C.A. §§ 8.01–328.1, 8.01–329(A), 8.01–412.10, 8.01–412.13; Sup.Ct.Rules, Rule 4:9A.

Cases that cite this headnote

[2] **Courts**
Jurisdiction of the Person in General

Personal jurisdiction is based on conduct that subjects nonresident to the power of state courts to adjudicate its rights and obligations in a legal dispute.

Cases that cite this headnote

[3] **Pretrial Procedure**
Persons Who May Be Examined
Pretrial Procedure
Subpoena duces tecum; production of documents or tangible things
Pretrial Procedure
Persons subject

Subpoena power of state court over an individual or a corporation that is not a party to a lawsuit is based on power and authority of court to compel attendance of a person at a deposition, or production of documents by a person or entity.

Cases that cite this headnote

[4] **Pretrial Procedure**

Subpoena duces tecum; production of documents or tangible things

Enforcement of a subpoena seeking out-of-state discovery is generally governed by the courts and the law of the state in which witness resides or where documents are located.

1 Cases that cite this headnote

[5] **States**

Relations Among States Under Constitution of United States

"Comity" is a matter of favor or courtesy, based on justice and good will; it is permitted from mutual interest and convenience, from a sense of inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return.

Cases that cite this headnote

[6] **Courts**

Corporations and business organizations

General personal jurisdiction over a foreign corporation exists only if it is at home in the forum state.

Cases that cite this headnote

[7] **Courts**

Corporations and business organizations

Foreign corporation is not at home, for purposes of exercising general personal jurisdiction over corporation, in every state in which it engages in a substantial, continuous, and systematic course of business.

Cases that cite this headnote

Attorneys and Law Firms

*441 Paul Alan Levy (Scott Michelman; Raymond D. Battocchi; Public Citizen Litigation Group, on briefs), for appellant.

Raighne C. Delaney (James Bruce Davis; Rachelle E. Hill; Zachary G. Williams; Bean, Kinney & Korman, Arlington, on briefs), for appellee.

Automattic, Inc., Facebook, Inc., Google Inc., Medium, Pinterest, TripAdvisor LLC, and Twitter, Inc. (Eric D. Miller; John K. Roche, Perkins Coie, on briefs), Electronic Frontier Foundation (Matthew J. Erausquin; Andrew Crocker; Consumer Litigation Associates, on brief), Reporters Committee for Freedom of the Press and 16 Others (Bruce D. Brown; Kevin M. Goldberg; Fletcher, Heald & Hildreth, on brief), Three Yelp Reviewers Whose Identities Appellee Seeks to Obtain (Jay Ward Brown; Shaina Jones Ward; Matthew E. Kelley; Levine Sullivan Koch & Schulz, on brief), in support of amici curiae appellant.

Present: LEMONS, C.J., GOODWYN, MILLETTE, MIMS, McCLANAHAN, and POWELL, JJ., and KOONTZ, S.J.

Opinion

Opinion by Justice ELIZABETH A. McCLANAHAN.

Yelp, Inc. ("Yelp"), appeals from the judgment of the Court of Appeals affirming the order of the Circuit Court of the City of Alexandria holding Yelp in civil contempt for failing to comply with a non-party subpoena duces tecum served upon it by Hadeed Carpet Cleaning, Inc. ("Hadeed"). The subpoena duces tecum directed Yelp, a Delaware corporation with its principal place of business in California, to produce documents located in California in connection with a defamation action filed by Hadeed against John Doe defendants. Because we conclude the circuit court was not empowered to enforce the subpoena duces tecum against Yelp, we will vacate the judgment of the Court of Appeals and the contempt order of the circuit court.

I. BACKGROUND

Yelp operates a social networking website that allows registered users to rate and describe their experiences with local businesses. Since Yelp does not require users to provide their actual names, users may post reviews under pseudonyms. Hadeed, a Virginia corporation doing business in Virginia, filed a defamation action in the circuit court against three John Doe defendants alleging they falsely represented themselves as Hadeed customers and posted negative reviews regarding Hadeed's carpet cleaning services on Yelp.

Hadeed issued a subpoena duces tecum to Yelp, seeking documents revealing the identity and other information about the authors of the reviews. The information provided by users of Yelp upon their registration and the Internet Protocol addresses used by registered users who post reviews are stored by Yelp on administrative databases accessible only by specified Yelp employees located in San Francisco. [1] Yelp has no offices in Virginia.

Although Yelp's headquarters are located in California, Yelp is registered to do business in Virginia and has designated a registered agent for service of process in Virginia. Hadeed served the subpoena duces tecum on Yelp's registered agent in Virginia. Yelp objected to an initial subpoena duces tecum for, among other reasons, Hadeed's failure to comply with the requirements of Code § 8.01–407.1. Hadeed then issued a second subpoena duces tecum that complied with the procedural requirements of Code § 8.01–407.1. That section sets forth the procedure that must be followed for any subpoena seeking information identifying a tortfeasor "[i]n civil proceedings where it is alleged that an anonymous individual has engaged in Internet communications that are tortious." Code § 8.01–407.1(A). [2]

***442** After Yelp filed written objections to the subpoena duces tecum, Hadeed moved to overrule the objections and enforce the subpoena duces tecum. The circuit court issued an order enforcing the subpoena duces tecum and subsequently holding Yelp in civil contempt when it refused to comply. [3] The Court of Appeals affirmed the circuit court's decision. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 62 Va.App. 678, 752 S.E.2d 554 (2014).

With specific regard to the exercise of subpoena power over Yelp, the circuit court and Court of Appeals ruled that service of the subpoena on Yelp's registered agent in Virginia provided the circuit court with jurisdiction to enforce the subpoena duces tecum. [4] *Id.* at 709–10, 752 S.E.2d at 569.

II. ANALYSIS

Yelp contends that the Court of Appeals erred in holding that "a Virginia trial court may assert subpoena jurisdiction over a non-party California company, to produce documents located in California, just because the company has a registered agent in Virginia." [5]

[1] In determining whether the circuit court was empowered to enforce the subpoena duces tecum against Yelp, we first observe that while the General Assembly has expressly provided for the exercise of *personal jurisdiction* over nonresident *defendants* under certain circumstances, it has not expressly provided for the exercise of *subpoena power* over *nonresident non-parties*. In particular, the General Assembly has provided for the exercise of personal jurisdiction over nonresident defendants, including foreign corporations, through enactment of the long-arm statute, Code § 8.01–328.1, and has provided a range of options for the manner in which nonresident defendants may be served when "exercise of personal jurisdiction is authorized by this chapter." Code § 8.01–329(A). [6] When personal jurisdiction is based upon the long-arm statute, "only a cause of action arising from acts enumerated in this section may be asserted against [the defendant]." Code § 8.01–328.1(C). [7] In contrast ***443** to the express provisions authorizing the exercise of personal jurisdiction over nonresident defendants and the manner of service of process on such nonresident defendants, the General Assembly has not expressly authorized the exercise of subpoena power over non-parties who do not reside in Virginia. [8]

Similarly, our Rules do not recognize the existence of subpoena power over nonresident non-parties. Rule 4:9A sets forth the procedure for issuing a subpoena duces tecum to a non-party. The subpoena duces tecum may be issued by the clerk pursuant to Rule 4:9A(a)(1) or by an attorney pursuant to Rule 4:9A(a)(2). Rule 4:9A does not address the issuance of a subpoena duces tecum to persons who reside or have a principal place of business outside of Virginia. Likewise, Rule 4:9A does not address the issuance of a subpoena duces tecum for documents located outside of Virginia. Rule 4:9A also does not address service on the non-party of the subpoena duces tecum or service upon a nonresident or foreign corporation. [9]

[2] **[3]** The General Assembly's authorization of the exercise of personal jurisdiction over nonresident defendants does not confer upon Virginia courts subpoena power over nonresident non-parties. It is axiomatic that "[t]he underlying concepts of personal jurisdiction and subpoena power are entirely different." *In re National Contract Poultry Growers' Ass'n*, 771 So.2d 466, 469 (Ala.2000). "Personal jurisdiction is based on conduct that subjects the nonresident to the power of the [state] courts to adjudicate its rights and obligations in

a legal dispute." *Id.* "By contrast, the subpoena power of [a state] court over an individual or a corporation that is not a party to a lawsuit is based on the power and authority of the court to compel the attendance of a person at a deposition, or the production of documents by a person or entity." *Id.; Phillips Petroleum Co. v. OKC Ltd. Partnership,* 634 So.2d 1186, 1187 (La.1994) ("The concepts, and/or underlying purposes, of personal jurisdiction and subpoena power are simply different.").

Therefore, the power to compel a nonresident non-party to produce documents in Virginia or appear and give testimony in Virginia is not based on consideration of whether the nonresident non-party would be subject to the personal jurisdiction of a Virginia court if named as a defendant in a hypothetical lawsuit.[10] *See, e.g., In re National Contract Poultry Growers' Ass'n,* 771 So.2d at 469 ("The fact that NCPGA may have sufficient ***444** contacts with the State of Alabama to subject it to the jurisdiction of the Alabama courts under the Alabama long-arm personal-jurisdiction provisions is irrelevant to the question [of whether it is required to respond to a subpoena in a lawsuit in which it is not a party]."); *Colorado Mills, LLC v. SunOpta Grains & Foods Inc.,* 269 P.3d 731, 734 (Colo.2012) (There is no "authority applying our long-arm statute, or the long-arm statute of any other state for that matter, to enforce a civil subpoena against an out-of-state nonparty."); *Ulloa v. CMI, Inc.,* 133 So.3d 914, 920 (Fla.2013) ("The long-arm statute does not extend the subpoena power of a Florida court to command the in-state attendance of a nonresident, non-party person or entity, or compel that person or entity to produce documents."); *Phillips Petroleum Co.,* 634 So.2d at 1188 ("Whereas the long-arm statute extends Louisiana's personal jurisdiction over persons or legal entities beyond Louisiana's borders, there is no similar authority for extending the subpoena power of a Louisiana court beyond state lines to command in-state attendance of nonresident nonparty witnesses."); *Syngenta Crop Prot., Inc. v. Monsanto Co.,* 908 So.2d 121 (Miss.2005) ("[A] Mississippi court cannot subpoena a nonresident nonparty to appear and/or produce in Mississippi documents which are located outside the State of Mississippi, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court."); *Craft v. Chopra,* 907 P.2d 1109, 1111 (Okla.Ct.App.1995) *(rejecting* the assertion that "discovery of documents from non-resident non-parties by subpoena issued in the State of Oklahoma" is permitted "so long as the non-resident has sufficient due process 'minimum contacts' with the State of Oklahoma").[11]

[4] Thus, enforcement of a subpoena seeking out-of-state discovery is generally governed by the courts and the law of the state in which the witness resides or where the documents are located. *See, e.g., In re National Contract Poultry Growers' Ass'n,* 771 So.2d at 469 (where documents located in foreign jurisdiction are sought from non-party foreign corporation, subpoena must issue from foreign jurisdiction and be served in accordance with law of foreign jurisdiction); *Colorado Mills, LLC,* 269 P.3d at 734 ("enforcing civil subpoenas against out-of-state nonparties is left to the state in which the discovery is sought"). In recognition of the territorial limits of subpoena power, most states have adopted some form of the Uniform Interstate Depositions and Discovery Act ("UIDDA"), which sets forth procedures for litigants to pursue out-of-state discovery.[12]

The Virginia General Assembly enacted the UIDDA, Code §§ 8.01–412.8 et seq., in 2009. The Act provides reciprocal mechanisms by which discovery of persons and documents in Virginia may be obtained in connection with actions pending in a foreign jurisdiction through presentment of a subpoena issued by the foreign jurisdiction.[13] "In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." Code § 8.01–412.14. Thus,

> ***445** [t]he privilege extended to persons in other states for discovery under this article shall only apply if the jurisdiction where the action is pending has extended a similar privilege to persons in the Commonwealth, by that jurisdiction's enactment of the Uniform Interstate Depositions and Discovery Act, a predecessor uniform act, or another comparable law or rule of court providing substantially similar mechanisms for use by out-of-state parties.
>
> *Id.*

[5] The UIDDA, as enacted in Virginia, is the successor to the Uniform Foreign Depositions Act ("UFDA"), "rooted in principles of comity and provides a mechanism for discovery of evidence in aid of actions pending in foreign jurisdictions." *America Online, Inc. v. Anonymous Pub. Traded Co.,* 261 Va. 350, 360, 542 S.E.2d 377, 382 (2001) (applying UFDA). Comity "is a matter of favor or courtesy, based on justice and good will. It is permitted from mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in

order that justice may be done in return." *Id.* at 361, 542 S.E.2d at 383; *see also America Online, Inc. v. Nam Tai Elec., Inc.*, 264 Va. 583, 591, 571 S.E.2d 128, 132 (2002) (applying UFDA).

In determining the scope of subpoena power over nonresident non-parties, it is important to consider the policy underlying the General Assembly's enactment of the UIDDA. The UIDDA provides a reciprocal and fair process that assists out-of-state litigants seeking discovery from non-parties and seeks to "promote uniformity of the law with respect to its subject matter among the states that enact it." Code § 8.01–412.14. The UIDDA affords protection to Virginia citizens subject to a subpoena from another state by providing for enforcement of the subpoena in Virginia. In turn, the UIDDA contemplates that Virginia courts will respect the territorial limitations of their own subpoena power. Such respect furthers the preservation of comity and uniformity among the states, which ultimately benefits Virginia citizens. [14]

The language of the statute also manifests the intent of the General Assembly to respect the territorial limitations of out-of-state discovery. Under the UIDDA, the place where "discovery is sought to be conducted" determines which circuit court issues and enforces a subpoena. *See* Code §§ 8.01–412.10 and –412.13. The location of discovery also determines which jurisdiction's law governs a non-party's discovery obligations. *See* § 8.01–412.12. This language indicates the General Assembly has not created two mechanisms for obtaining discovery from a non-party residing outside of Virginia. [15]

[6] **[7]** In sum, we conclude that the circuit court was not empowered to enforce the non-party subpoena duces tecum directing Yelp to produce documents located in California in connection with Hadeed's underlying defamation action against the John Doe defendants in the Virginia circuit court. The information sought by Hadeed is stored by Yelp in the usual course of its business on administrative databases within the custody or control of only specified Yelp employees located in San Francisco, and thus, beyond the reach of the circuit court. [16] Our holding is consistent ***446** with the traditional limits on subpoena power of state courts and the public policy established by the General Assembly through enactment of the UIDDA. [17] Although the General Assembly has expressly authorized Virginia courts to exercise personal jurisdiction over nonresident parties, it has not expressly authorized Virginia courts to compel nonresident non-parties to produce documents located outside of Virginia. Because the underlying concepts of personal jurisdiction and subpoena power are not the same, the question of whether Yelp would be subject to personal jurisdiction by Virginia courts as a party defendant is irrelevant. [18] Therefore, subpoena power was not conferred upon the circuit court by Yelp's act in registering to conduct business in Virginia or designating a registered agent for service of process in the Commonwealth.

III. CONCLUSION

For the foregoing reasons, we will vacate the judgment of the Court of Appeals, vacate the contempt order of the circuit court, and remand for further proceedings consistent with this opinion. [19]

Reversed and remanded.

Justice MIMS, with whom Justice MILLETTE joins, concurring in part and dissenting in part.

The majority opinion holds that the General Assembly has not provided for the exercise of "subpoena power" over non-resident non-parties. Because the relevant statutory text is clear, I disagree.

The General Assembly has said that a subpoena duces tecum is "process." Code § 1–237 (defining "process" to include a subpoena); Code § 8.01–2(8) (defining "subpoena" to include a subpoena duces tecum for the purposes of Title 8.01). It has said that "[u]pon commencement of an action, process shall be served in the manner set forth in" Chapter 8 of Title 8.01. Code § 8.01–287. Chapter 8 of Title 8.01 includes Code § 8.01–301. In Code § 8.01–301(1), the General Assembly provides that a foreign corporation may be served with process through its Virginia registered agent. Nothing in the Code restricts service of process if the foreign corporation is a non-party or redefines process to exclude subpoenas or subpoenas duces tecum if the foreign corporation is a non-party. Finally, the General Assembly has said that Virginia courts may use their ***447** contempt power to punish any person who disobeys lawful process. Code § 18.2–456(5).

Thus, the General Assembly *has* provided for the exercise of subpoena power over a non-resident non-party, where that non-resident non-party is a foreign corporation with a

Virginia resident agent (as Yelp is in this case). The majority opinion overlooks the clear statutory language.[1] As far as the General Assembly is concerned, if a foreign corporation can be lawfully served with process in Virginia, Virginia courts can compel it to respond to discovery here. However, for reasons I discuss below, state statutes are not the last word on this subject. Rather, the Due Process Clause of the Fourteenth Amendment narrows the broad authority the General Assembly has given Virginia courts.

But before undertaking the constitutional analysis, some important observations are in order. First, in its statement of facts, the majority opinion says that Yelp stores IP addresses in administrative databases accessible only by specified Yelp employees located in San Francisco. No evidence supports this statement. Rather, through an affidavit by its Associate Director of User Operations, Yelp says only that the user operations team has access to the database, and the user operations team is in San Francisco. This does not establish that user operations team members are the *only* Yelp employees with access to the database, or that all other employees with access, if any, are *only* in San Francisco.[2]

This misstatement of the evidence is compounded by footnote 17, in which the majority opinion states that the Court's holding does not mean that Virginia courts cannot compel production in Virginia by a non-party foreign corporation that (unlike Yelp) has an office in Virginia. The implication of this footnote is that if the record at issue is located in Virginia, Virginia courts can compel the non-party foreign corporation to produce it here. Yet the majority opinion's conclusion makes that impossible. If the General Assembly has not provided for the exercise of subpoena power over a non-resident non-party (as the majority opinion says), how can Virginia courts acquire this authority based solely on the location of the record being sought? The majority opinion, which is based solely upon an interpretation of what the General Assembly has authorized, cites no statute for this proposition.

Further, to base the courts' power to compel production on the geographic location of a record is simply incompatible with the digital era. The majority opinion appears to presume that records are still printed on paper as documents and stored in filing cabinets in a file room, where they can be seen and touched. This practice is waning in modern interstate commerce and soon only nostalgic vestiges will remain, the lingering artifacts of an earlier age. Now, records are more commonly intangible and incorporeal, stored electronically in binary form. Where are such records located? Only on the device where the information is created? On any device where a copy can be found? On any device that can access it remotely? Under the majority opinion, the answers to these ***448** questions will determine whether the General Assembly has authorized Virginia courts to exercise subpoena power. And the questions cannot be answered in the abstract. Circuit courts throughout the Commonwealth will be forced to grapple with them often.

To illustrate the practical difficulty the majority opinion needlessly creates, one can consider a hypothetical case where an employer sues a former employee to recover funds he embezzled by falsely endorsing a customer's check and depositing it in his personal account. The check is both drawn on and deposited into accounts at a national bank incorporated in Delaware with its principal place of business in North Carolina. The bank has a registered agent, hundreds of branches, and thousands of employees in Virginia. The employer serves a subpoena duces tecum on the bank's Virginia registered agent, seeking production of the check. The bank routinely scans all paid and deposited checks, stores the images electronically on a server located at its principal office in North Carolina, and destroys the physical check.

According to the majority opinion, whether the General Assembly has authorized Virginia courts to compel this out-of-state bank, a non-party foreign corporation but with pervasive presence in and contacts with Virginia, to produce its electronic record depends on where the record is located. That cannot be the case, but it is the effect of the majority opinion's analysis.[3] , [4]

Second, the majority opinion states that the General Assembly has not authorized courts to exercise subpoena power over a non-resident non-party in the long-arm statute, Code § 8.01–328.1. However, the long-arm statute is irrelevant. It neither confers nor constrains the power at issue here. As noted above, the authority is provided by Code §§ 1–237, 8.01–2(8), 8.01–287, 8.01–301, and 18.2–456(5).

To the contrary, the long-arm statute expressly provides that "nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this Commonwealth over foreign corporations which are subject to service of process pursuant to the provisions of any other statute." Code § 8.01–328.1(C). Foreign corporations with Virginia registered agents are subject to service of process under Code § 8.01–301(1). The long-arm statute therefore

does not deny Virginia courts jurisdiction over them, whether they are parties or not. This is consistent with our previous holdings that by enacting the long-arm statute, the General Assembly intended to confer as much jurisdiction upon Virginia courts as constitutional due process allows. *E.g., Peninsula Cruise, Inc. v. New River Yacht Sales, Inc.*, 257 Va. 315, 319, 512 S.E.2d 560, 562 (1999); *John G. Kolbe, Inc. v. Chromodern Chair Co.*, 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971).

Third, the majority opinion refers to the legislature's enactment of the Uniform Interstate Depositions and Discovery Act, Code §§ 8.01–412.8 to –412.15, as further support for its conclusion that the General Assembly has not authorized Virginia courts to exercise subpoena power over non-resident non-parties. However, that Act only provides Virginia courts with *additional* authority.[5] Nothing in it subtracts from the statutory authority the General Assembly has already provided Virginia courts in Code §§ 1–237, 8.01–2(8), 8.01–287, 8.01–301, and 18.2–456(5). Consequently, Virginia courts had authority to compel production by a non-party foreign corporation prior to the Act's enactment, and that authority remains.

***449** Fourth, the majority opinion cites several decisions by appellate courts in other states finding that trial courts in those states could not enforce a subpoena against a non-resident non-party. However, those decisions are not relevant in this case because they are interpretations holding that the applicable state law did not provide those states' courts with the broad authority the General Assembly has provided Virginia courts in Code §§ 1–237, 8.01–2(8), 8.01–287, 8.01–301, and 18.2–456(5).

The majority opinion relies principally on *In re National Contract Poultry Growers' Ass'n*, 771 So.2d 466 (Ala.2000). That Alabama case involved a non-party corporation incorporated in Arkansas. Its principal place of business was in Louisiana and it did not have an Alabama registered agent. A party obtained a subpoena against the corporation and served it by certified mail at its Louisiana office. The corporation did not respond to the subpoena and the trial court thereafter found it in contempt. *Id.* at 466–67. On appeal, the Supreme Court of Alabama reversed. *Id.* at 470. It determined that an Alabama statute and the Alabama Rules of Civil Procedure permitted a subpoena to be "served at any place within the state." 771 So.2d at 468–69 (quoting Ala. R. Civ. P. 45(b)(2)). Because the subpoena was served by certified mail in Louisiana, the subpoena was not served on the corporation within the state as Alabama law required. *Id.* at 469–70.

Similarly, *Craft v. Chopra*, 907 P.2d 1109 (Okla.Civ.App.Div.1995), involved a plaintiff suing a doctor in Oklahoma, alleging that he sexually abused her while she was under anesthesia. She obtained a subpoena against a Texas hospital for letters of recommendation pertaining to the doctor's privileges there. There is no indication of whether the hospital had a registered agent in Oklahoma. Rather, the subpoena was served on it by certified mail in Texas. When the hospital resisted the subpoena, the trial court refused to enforce it and awarded the hospital damages. *Id.* at 1110–11. On appeal, the Oklahoma Court of Civil Appeals affirmed. It determined that under the Oklahoma statute, subpoenas could be served only within the state. *Id.* (construing former Okla. Stat. tit. 12, § 2004.1(A)(1)(c)).

These cases are irrelevant here because Yelp was served in Virginia according to Virginia law. Code § 8.01–301(1).

Another case cited in the majority opinion, *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So.2d 121 (Miss.2005), involved three non-party corporations. All three were incorporated in Delaware. One had its principal place of business in North Carolina, another in Minnesota, and the last in Indiana. All had Mississippi registered agents. *Id.* at 124. The Supreme Court of Mississippi ruled that a state statute permitted service of process on foreign corporations by registered or certified mail but that a rule of court required subpoenas to be served personally. *Id.* at 127–28 (construing Miss.Code Ann. § 79–4–15.10 and Miss. R. Civ. P. 45(c)(1)). Reconciling these conflicting provisions of Mississippi law, the court determined that subpoenas were not process and therefore could not be served on a foreign corporation through its registered agent. *Id.*

This case is not relevant here because a subpoena is process under Virginia law and can be served on a foreign corporation through its Virginia registered agent. Code §§ 1–237 and 8.01–301(1).

Other cases cited in the majority opinion are also irrelevant. *Ulloa v. CMI, Inc.*, 133 So.3d 914 (Fla.2013) involved criminal defendants charged with driving under the influence who sought technical data from the corporation that manufactured breathalyzer equipment. The corporation was incorporated in Kentucky. There is no indication of where it had its principal place of business, but it had a Florida

registered agent. *Id.* at 915. The Supreme Court of Florida determined that the applicable Florida statute provided that subpoenas in criminal cases ran only within the state. *Id.* at 920–21 (construing Fla. Stat. § 914.001(1)).

Similarly, *Phillips Petroleum Co. v. OKC Ltd. P'ship,* 634 So.2d 1186 (La.1994), involved a non-party corporation incorporated in Texas. Its principal place of business was in Texas, but it had a Louisiana registered agent. *Id.* at 1187. The Supreme Court of Louisiana determined that the applicable Louisiana statute simply did not "provide for ***450** the subpoena of a nonresident witness." *Id.* at 1188 n. 3 (construing La.Code Civ. Proc. Ann. art. 1352).

These cases are not relevant here because Virginia law does provide for the subpoena of a non-resident non-party, if that non-party is a foreign corporation with a Virginia registered agent that can be served with process.

Each of these opinions also includes language (recited in the majority opinion in this case) rejecting the claims made by the parties seeking discovery that the subpoenas should be enforced because the courts could exercise personal jurisdiction over the foreign corporations. I agree with the majority opinion and these out-of-state cases that having personal jurisdiction over a non-resident non-party is not enough to allow a court to enforce a subpoena; there must also be statutory authority enabling a court to *exercise* that jurisdiction by enforcing a subpoena. Where I part with the majority opinion is its conclusion that the General Assembly has not provided that authority here, under Virginia law.

These flaws in the majority opinion are significant and problematic. Nevertheless, it reaches the correct conclusion that the circuit court cannot enforce Hadeed's subpoena duces tecum in this case. However, the reasons are constitutional rather than statutory. Specifically, a state court's coercive judicial power is limited by the Due Process Clause of the Fourteenth Amendment. *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. ——, ——, 131 S.Ct. 2780, 2786–87, 180 L.Ed.2d 765 (2011). This extends to enforcement of subpoenas and subpoenas duces tecum. *Eli Lilly & Co. v. Gottstein,* 617 F.3d 186, 192 & n. 4 (2d Cir.2010) (collecting cases); *see also United States Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988) ("[T]he subpoena power of a court cannot be more extensive than its jurisdiction.").

Hadeed argues that Virginia courts may constitutionally exercise personal jurisdiction over Yelp because it has a Virginia registered agent and therefore has consented to being subject to jurisdiction here. There is historical authority supporting the proposition that a foreign corporation consents to be sued in a state when it appoints an agent for the receipt of process there. *E.g., Railroad Co. v. Harris,* 79 U.S. 65, 81, 12 Wall. 65, 20 L.Ed. 354 (1871); *Pennoyer v. Neff,* 95 U.S. 714, 735, 24 L.Ed. 565 (1878); *Ex parte Schollenberger,* 96 U.S. 369, 24 L.Ed. 853 (1878); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.,* 243 U.S. 93, 95–96, 37 S.Ct. 344, 61 L.Ed. 610 (1917).

However, to the extent that these cases are applicable to a non-party foreign corporation at all, I believe they have been supplanted by the contacts-based theory of personal jurisdiction articulated in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *Shaffer v. Heitner,* 433 U.S. 186, 212, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). Contacts-based jurisdiction comes in two forms, general and specific. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 n. 15, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The party claiming that a court may exercise jurisdiction bears the burden of showing a prima facie case for that claim. *ESAB Group, Inc. v. Zurich Ins. PLC,* 685 F.3d 376, 391 (4th Cir.2012).

To be subject to general jurisdiction, a foreign corporation must have " 'continuous corporate operations within a state ... so substantial and of such a nature as to justify suit on causes of action arising from dealings entirely distinct from' " the activities it purposefully directs there. *Daimler AG v. Bauman,* 571 U.S. ——, ——, 134 S.Ct. 746, 761, 187 L.Ed.2d 624 (2014) (quoting *International Shoe,* 326 U.S. at 318, 66 S.Ct. 154) (alteration and emphasis omitted). A corporation has such operations in the states where it is incorporated and where it has its principal place of business. *Id.* at 760. A corporation may also be subject to general jurisdiction in other states, provided that the corporation's operations there are " 'so continuous and systematic as to render [it] essentially at home' " there. *Id.* at 761 & n. 19 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, ——, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011) (internal quotation marks omitted)).

Yelp is incorporated in Delaware. Its principal place of business is in California. Hadeed has neither alleged nor

shown that ***451** Yelp has any corporate operations within the Commonwealth, much less operations that are sufficiently "continuous and systematic," for the purposes of the *Goodyear Dunlop* test. Accordingly, I cannot conclude on this record that Virginia courts may exercise general jurisdiction over Yelp.

Specific jurisdiction assesses whether a foreign corporation has sufficient contacts with a state for its courts to constitutionally exercise jurisdiction over the corporation based on its activity there. *Burger King,* 471 U.S. at 472, 105 S.Ct. 2174. Further, the foreign corporation's activities must be "purposefully directed" at that state. *Id.* Activity is purposefully directed at a state if it is "such that [the corporation] should reasonably anticipate being haled into court there." *Id.* at 474, 105 S.Ct. 2174. "[R]andom, fortuitous, or attenuated" activity or "the unilateral activity of another party or a third person" is insufficient. *Id.* at 475, 105 S.Ct. 2174 (internal quotation marks and citations omitted).

The limited record in this case does not establish that Yelp has sufficient contacts with the Commonwealth or that it has purposefully directed activities here such that Virginia courts may exercise specific jurisdiction over it. Neither the complaint nor the materials Hadeed submitted in support of the subpoena duces tecum alleges any such contacts or purposeful direction; rather, each merely states that Yelp operates a website with approximately 54 million unique visitors per year.

Hadeed has not shown whether Yelp has paid subscribers or how many of them reside in Virginia. It has not shown how many Virginians view or contribute to Yelp's website, or that merely viewing or contributing to the website would amount to more than "the unilateral activity of ... a third person," which is insufficient to confer specific jurisdiction. *Burger King,* 471 U.S. at 475, 105 S.Ct. 2174. It has not shown whether Yelp solicits advertising from Virginia businesses or that it has any contracts with Virginia residents. Accordingly, the record does not include evidence from which I can conclude that Yelp has sufficient contacts with or has purposefully directed activity into Virginia so that courts here may constitutionally exercise specific jurisdiction over it. [6]

For these reasons, I must respectfully dissent from the majority opinion's determination that the circuit court lacked statutory authority to enforce the subpoena duces tecum against Yelp. However, I conclude that the evidence was insufficient to establish that the court could exercise personal jurisdiction over Yelp within the limits of Fourteenth Amendment due process. I therefore concur in the judgment vacating both the judgment of the Court of Appeals and the contempt order of the circuit court.

All Citations

770 S.E.2d 440, 43 Media L. Rep. 1580

Footnotes

1 Specifically, Yelp's "user operations team" is tasked with the duty of compiling the data that comprises information that would identify its users. These employees, and "[n]o other employees" use "specialized access to this data" to compile information that would identify Yelp users in response to subpoenas for such identifying data.

2 Code § 8.01–407.1 was enacted following a study and report on the discovery of electronic data pursuant to a Joint Resolution of the General Assembly. The Resolution recognized that "Virginia is the center of the Internet, with numerous multi-state and multi-national Internet businesses located in the Commonwealth" and that motions regarding the discovery of electronic data "arise out of cases pending in other states but are being heard in the Commonwealth solely because the Internet service providers ..., which may be the custodians of such electronic data, are located in the Commonwealth." S.J. Res. 334, Va. Gen. Assem. (Reg.Sess.2001). In response to the directions embodied in the Resolution, the Office of the Executive Secretary of the Supreme Court of Virginia issued a report on the disclosure of electronic information "maintained by electronic communications service providers in Virginia, particularly the legal procedure for [the] subpoena of such information and the application of that procedure in cases where litigation pending outside the Commonwealth of Virginia results in an application to the Virginia courts for orders compelling disclosure of information." Executive Secretary of the Supreme Court of Virginia, *Report to the Governor and General Assembly of Virginia: Discovery of Electronic Data,* Senate Doc. No. 9, at 1 (2002), *available at* http://leg2.state.va.us/dls/h & sdocs.nsf/By+Year/SD92002/$file/SD9_2002.pdf (last visited April 10, 2015).

3 Following the circuit court's order enforcing the subpoena duces tecum, Yelp informed Hadeed that in order to appeal the order and protect its users' rights, it would not comply with the Order. Hadeed then moved to have Yelp held in contempt. 62 Va.App. at 687–88, 752 S.E.2d at 558.

4 Both the circuit court and Court of Appeals relied upon Code § 13.1–766(A), which states that "[t]he registered agent of a foreign corporation authorized to transact business in this Commonwealth shall be 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," and Code § 8.01–301(1), which provides for service of process "on the registered agent of a foreign corporation which is authorized to do business in the Commonwealth."

5 Yelp asserts additional assignments of error in connection with its contention that enforcement of the subpoena was inconsistent with the First Amendment to the Constitution. In light of our holding that the circuit court lacked the authority to enforce the subpoena duces tecum, we need not reach these assignments of error.

6 The General Assembly has also recognized that "[a] court of this State may exercise jurisdiction on any other basis authorized by law." Code § 8.01–330.

7 The long-arm statute further provides that "nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this Commonwealth over foreign corporations which are subject to service of process pursuant to the provisions of any other statute." Code § 8.01–328.1(C). In this regard, Code § 8.01–301 sets forth the most common modes of service upon a foreign corporation depending on whether the foreign corporation is authorized to transact business in Virginia and the basis for exercising jurisdiction over such corporation.

8 The dissent contends that Code § 8.01–301 confers upon the circuit courts a general subpoena power extending beyond Virginia because the statute lists how process may be served on a foreign corporation. However, there is a fundamental difference between the issuance of an enforceable subpoena and the manner by which a subpoena may be served. *See Bellis v. Commonwealth*, 241 Va. 257, 261–62, 402 S.E.2d 211, 214 (1991). Service by one of the modes prescribed by law does not make the subpoena served enforceable. Service of process "cannot cure defects in the 'process' itself." *Lifestar Response of Md., Inc. v. Vegosen*, 267 Va. 720, 725, 594 S.E.2d 589, 591 (2004). Thus, the General Assembly's authorization of a method of service does not make all process served by such a method lawful.

9 The Rule does provide that *copies* of the subpoena duces tecum must be served pursuant to Rule 1:12 upon *counsel of record and parties having no counsel.* Rule 4:9A(a)(1) and (2). In addition, Rule 4:1(f) provides, in pertinent part, "that any notice or document required or permitted to be served under this Part Four shall be served as provided in Rule 1:12." Rule 1:12 governs service of process after the initial process of "[a]ll pleadings, motions and other papers not required to be served otherwise and requests for subpoenas duces tecum" and provides for service "by delivering, dispatching by commercial delivery service, transmitting by facsimile, delivering by electronic mail when Rule 1:17 so provides or when consented to in writing signed by the person to be served, or by mailing, a *copy to each counsel of record on or before the day of filing.*" (Emphasis added.)

10 While the exercise of subpoena power over nonresident non-parties may certainly raise Due Process considerations, the issue before us on appeal is whether the circuit court had authority to exercise subpoena power in the first instance.

11 This principle holds true even in states where the designation by a foreign corporation of a registered agent for service of process is deemed to confer personal jurisdiction upon the state court. *See, e.g., Ulloa v. CMI, Inc.*, 133 So.3d at 920 ("[d]esignating an agent for service of process subjects a foreign corporation to the jurisdiction of the Florida court to adjudicate its rights and obligations in a legal dispute," but it does not confer subpoena power beyond state lines); *Phillips Petroleum Co.*, 634 So.2d at 1188 (although "[a] principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court," it does not subject the corporation to the subpoena power of the court).

12 See Uniform Law Commission, Uniform Interstate Depositions and Discovery Act, Legislative Enactment Map, http://www.uniformlaws.org/Act. aspx?title=Interstate Depositions and Discovery Act (last visited March 9, 2015).

13 Pursuant to Code § 8.01–412.10, a party seeking to conduct discovery in Virginia in aid of a lawsuit pending in another jurisdiction "shall submit to the clerk of court in the circuit in which discovery is sought to be conducted in the Commonwealth (i) a foreign subpoena and (ii) a written statement that the law of the foreign jurisdiction grants reciprocal privileges to citizens of the Commonwealth for taking discovery in the jurisdiction that issued the foreign subpoena."

14 Consistent with this policy, Rule 4:5(a1)(iii), which governs depositions taken in another state, requires enforcement matters to be pursued "by process issued and served in accordance with the law of the jurisdiction where the deposition is taken."

15 If the UIDDA provided additional authority for Virginia courts to exercise subpoena power over nonresidents, this could subject non-parties to greater discovery than litigants. A Virginia subpoena that was quashed or limited could be "re-litigated" under another jurisdiction's law by resorting to the UIDDA. *See, e.g.* Cal. Civ. Pro.Code 2029.600(a).

16 The dissent argues that Yelp has not proved that user operations team members are the *only* Yelp employees with access to the database, or that all other employees with access, if any, are *only* in San Francisco. This argument misses the point. Regardless of the number of employees who have access to the data comprising information that would identify Yelp users, such data is maintained in the regular course of Yelp's business by employees in California. For this reason, we cannot accept the dissent's position that the concept of out-of-state discovery is outdated in this "digital era" in which data is more easily accessed and disseminated in electronic form. Even data that is maintained in a tangible form can be, and has long been, subject to reproduction and dissemination. Yet, corporate data, in any form, is necessarily created and maintained in the regular course of a corporation's business by designated corporate employees who are located at a place that is either within Virginia or out-of-state.

17 Thus, our holding does not mean that a Virginia court could not compel in-state discovery from a non-party foreign corporation that maintains an office in Virginia. This case presents the issue of a Virginia court's power to compel *out-of-state discovery* from a non-party foreign corporation.

18 The dissent proposes to subject nonresidents to the jurisdiction of Virginia courts even though they have not been sued in our courts by extending subpoena power to the limits of personal jurisdiction using the minimum contacts analysis. However, the minimum contacts analysis is *premised* upon the existence of actual litigation against a *nonresident defendant*. "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and *the litigation results from alleged injuries that arise out of or relate to those activities.*" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)(emphasis added) (internal quotation marks and citations omitted).

The dissent also assumes an "out-of-state bank" with a "pervasive presence" in Virginia would be subject to general personal jurisdiction in our courts. However, general personal jurisdiction over a foreign corporation exists only if it is at "home" in the forum state. *Daimler AG v. Bauman,* —— U.S. ——, 134 S.Ct. 746, 760–62, 187 L.Ed.2d 624 (2014). A corporation is not "at home" in "every state in which [it] 'engages in a substantial, continuous, and systematic course of business.' " *Id.* at 760–61. It would be an "exceptional case" that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business [are] so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n. 19.

19 We will not quash the subpoena duces tecum since Hadeed may choose to seek enforcement of the subpoena duces tecum through the versions of the UIDDA enacted in California, Cal.Civ.Proc.Code §§ 2029.100 et seq. See also, Delaware, Del.Code Ann. Tit. 10, § 4311.

1 In footnote 8, the majority opinion correctly observes that valid service cannot make unlawful process lawful. However, the majority opinion does not explain why the process at issue in this case is unlawful. *Cf. Lifestar Response of Md., Inc. v. Vegosen,* 267 Va. 720, 724, 594 S.E.2d 589, 591 (2004) (holding that the amended motion for judgment validly served on the defendant was not lawful process because it did not include the notice required by Rule 3:3(c)).

Hadeed's subpoena duces tecum is authorized by Code § 8.01–407.1. Nothing in that statute, or any other, says that it does not apply to non-resident non-parties. Accordingly, it appears that under the majority opinion, the "lawfulness" of process appears to turn not on whether its form and substance is authorized by law but on the status of the entity upon whom it is served.

2 In footnote 1, the majority opinion correctly notes that, according to the affidavit, user operations team members have specialized access to the database and only they respond to subpoenas seeking that information. However, this statement does not support the majority opinion's extrapolation that only those employees have access to the database.

Despite the majority opinion's characterization in footnote 16, the issue is not whether Yelp proved that only employees in California have access to the database. Rather, the issue is that the majority opinion states as a fact that only employees in California do, when that proposition is not supported by the record.

3 Incidentally, if an attorney wants to issue a subpoena to such a foreign corporation, how can he or she do so without first knowing where the record is located? Issuing such a subpoena without sufficient knowledge that it is located in Virginia would be sanctionable under Code § 8.01–271.1.

4 Contrary to the majority opinion's assertion in footnote 18, this dissent does not assume that Virginia would have personal jurisdiction over the hypothetical bank. Rather, whether a Virginia court can compel the bank to produce the record depends on whether the bank has constitutionally sufficient contacts with Virginia, not whether the record is located here.

5 Specifically, the Act supplies Virginia courts the statutory authority to compel a Virginia resident to produce information relevant to litigation pending in another state's courts. The Act has no effect on Virginia courts' authority over non-residents.

6 Hadeed also argues that under Code § 8.01–277.1, Yelp waived any objection to jurisdiction because it failed to make a special appearance. Hadeed contends that Yelp's written objections to the subpoena duces tecum are not a motion to quash, so they did not preserve a jurisdictional argument under Code § 8.01–277(A). I disagree.

Yelp has done none of the things listed as examples of "conduct related to adjudicating the merits of the case" in Code § 8.01–277.1(A). The merits of this case involve whether the defendants defamed Hadeed and conspired against it in violation of Code § 18.2–500, as alleged in the complaint. Yelp's participation in the proceedings is not related to the adjudication of those claims. All Yelp has done is resist the enforcement of Hadeed's subpoena duces tecum in the manner expressly provided by Code § 8.01–407.1(A)(4), which includes the filing of written objections. Unlike *conducting* discovery, *resisting* discovery is not one of the means by which jurisdictional objections may be waived under Code § 8.01–277.1.

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356 P.3d 727
Court of Appeals of Washington,
Division 1.

Deborah THOMSON, an individual, Appellant,
v.
Jane DOE, Respondent.

No. 72321–9–I. | July 6, 2015.

Synopsis

Background: Attorney, appearing pro se, brought a defamation suit against an anonymous poster, who wrote a negative review of attorney on online lawyer review website. Attorney filed motion to compel website to comply with attorney's subpoena seeking poster's identity. The Superior Court, King County Mariane C. Spearman, denied attorney's motion, and attorney appealed.

Holdings: The Court of Appeals, Appelwick, J., held that:

[1] when addressing a defamation plaintiff's motion to unmask an anonymous defendant, the court must consider the nature of the speech at issue when determining the evidentiary standard to apply, and

[2] as matter of first impression, prima facie standard was appropriate, and because attorney failed to make a prima facie showing of defamation, website would not be compelled to comply with attorney's subpoena seeking identify of anonymous poster.

Affirmed.

West Headnotes (15)

[1] **Constitutional Law**
Anonymous speech
Constitutional Law
Internet

First Amendment protects the right to speak anonymously, and this right applies equally to online speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**
Defamation

Defamatory speech does not enjoy the protections of the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] **Constitutional Law**
Defamation

When faced with a defamation claim, courts aim to strike a balance between the right to protect one's reputation and the constitutional right to free speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Libel and Slander**
Criticism and comment on public matters and publication of news

When a defamed plaintiff is a public figure, the standard of fault is more stringent, and such a claim requires a showing of actual malice.

Cases that cite this headnote

[5] **Constitutional Law**
Matters of private concern

When the challenged speech involves a purely private concern, there is no threat to the free and robust debate of public issues, and thus, the First Amendment provides less stringent protection. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Appeal and Error**
Depositions, affidavits, or discovery

If the correct legal standard was applied, appellate courts generally review a trial court's denial of a motion to compel compliance with subpoena for an abuse of discretion.

Cases that cite this headnote

[7] **Appeal and Error**
Cases Triable in Appellate Court
Constitutional Law
Anonymous speech

Motion to reveal a speaker's identity has First Amendment consequences, and accordingly, de novo review is the proper standard of review when considering the trial court's decision on a motion to reveal an anonymous speaker's identity in context of defamation action. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Reputation; defamation
Pretrial Procedure
Identity and location of witnesses and others

In the interest of due process—or, at the very least, in the interests of fairness and judicial economy—a defamation plaintiff should attempt to notify anonymous speaker that his identity might be unmasked. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**
Defamation
Pretrial Procedure
Identity and location of witnesses and others

When addressing a defamation plaintiff's motion to unmask an anonymous defendant, the court must consider the nature of the speech at issue when determining the evidentiary standard to apply; the evidentiary standard should match the First Amendment interest at play. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
What is "commercial speech"

For First Amendment purposes, commercial speech is expression related solely to the economic interests of the speaker and its audience or speech proposing a commercial transaction. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Particular Issues and Applications

Anonymous poster's speech on online lawyer review website, posting negative review of attorney, was not commercial speech, warranting the lowest protection, and it was also not political speech, warranting the highest protection, and instead, poster's speech was entitled to an intermediate level of protection in context of attorney's defamation action. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Pretrial Procedure**
Identity and location of witnesses and others

Neither good faith showing, whereby defamation plaintiff seeking an anonymous speaker's identity must establish good faith basis to contend that speaker committed defamation, nor motion to dismiss standard, whereby defamation plaintiff must support claim with facts sufficient to defeat motion to dismiss before obtaining identity of an anonymous speaker through the discovery process, was appropriate standard when determining if online lawyer review website should be compelled in defamation action to comply with attorney's subpoena seeking identify of anonymous poster, who posted negative review of attorney on website; under the motion to dismiss standard, a defamation plaintiff would need only to allege the elements of the claim, without supporting evidence, and this was insufficient to protect the speaker's First Amendment right to anonymous speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Pleading**
Statement of cause of action in general

Washington is a notice pleading state, requiring only a simple concise statement of the claim and relief sought. CR 8(a).

Cases that cite this headnote

[14] **Pretrial Procedure**
Identity and location of witnesses and others

Prima facie standard, whereby defamation plaintiff must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question, was appropriate standard, and because attorney failed to make a prima facie showing of defamation, online lawyer review website would not be compelled in defamation action to comply with attorney's subpoena seeking identify of anonymous poster, who posted negative review of attorney on website; considering the speech at issue, supporting evidence was required before poster was unmasked.

Cases that cite this headnote

[15] **Pretrial Procedure**
Identity and location of witnesses and others

Where defamation plaintiff subpoenas a third party without the defendant's involvement, the summary judgment standard, whereby defamation plaintiff must support claim with facts sufficient to defeat a summary judgment motion before obtaining the identity of an anonymous speaker through the discovery process, is too severe and a prima facie standard should be applied, whereby defamation plaintiff must submit sufficient evidence to establish a prima facie case for each essential element of the claim in question.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

APPELWICK, J.

¶ 1 What showing must be made by a defamation plaintiff seeking disclosure of an anonymous speaker's identity? This is an open question in Washington. Thomson brought a defamation suit against Doe, an anonymous poster who wrote a negative review of Thomson on Avvo.com. Thomson then subpoenaed Avvo seeking Doe's identity. When Avvo refused to provide the information, Thomson moved to compel Avvo's compliance with the subpoena. The trial court denied Thomson's motion, finding that Thomson had not made a prima facie claim of defamation. We affirm.

***729 FACTS**

¶ 2 Deborah Thomson is a Florida attorney. Avvo Inc. operates an online lawyer review and rating system. On May 21, 2014, Thomson filed a pro se lawsuit in Florida against Jane Doe, an anonymous individual who posted a review on Thomson's Avvo profile. The review, posted by "Divorce client," stated:

> I am still in court five years after Ms. Thomson represented me during my divorce proceedings. Her lack *of* basic business skills and detachment from her fiduciary responsibilities has cost me everything. She failed to show up for a nine hour mediation because she had vacation days. She failed to subpoena documents that are critical to the division of assets in any divorce proceeding. In fact, she did not subpoena any documents at all. My interests were simply not protected in any meaningful way.

¶ 3 Thomson's complaint alleged that Doe was not a client and that the post was designed to impugn Thomson's personal and professional reputation. Thomson alleged four causes

of action: defamation, defamation per se, defamation by implication, and intentional infliction of emotional distress (IIED).[1]

¶ 4 On June 25, 2014, Thomson filed a subpoena in King County Superior Court requesting from Avvo the anonymous poster's identification.[2] On July 3, Thomson received an e-mail from Joshua King, Avvo's vice president of business development and general counsel. King told Thomson,

> I've received your subpoena seeking records on an anonymous review. Our policy on handling such subpoenas is to let the reviewer know, so that they can move to quash if they want. They may also provide me with more information about the representation, in which case we may ask you to withdraw the subpoena.
>
> Thomson replied, "Thank you for letting me know.... I am pretty certain I am aware who wrote it, so I am eager to obtain the records."

¶ 5 On July 8, King e-mailed Thomson,

> I have received a response. While I can't give you the specifics, it included information sufficient for me to believe the reviewer was a client of yours.
>
> Given this information, I ask that you withdraw the subpoena.

Thomson responded, "Please be advised that I will not be withdrawing my subpoena. Please provide the documents requested therein."

¶ 6 On July 16, Thomson moved to compel Avvo to comply with the subpoena. She asserted that Doe's speech was libel and defamation. Specifically, she alleged that each of the sentences in the Doe post was either a false statement of fact or a combination of fact and opinion that was provably false. She did not submit a declaration, affidavit, or any other evidence in support of her motion.

¶ 7 Avvo opposed the motion, arguing that Thomson failed to show that the post was defamatory and failed to provide evidence of damages.

¶ 8 On July 28, the trial court denied Thomson's motion to compel. It stated that Thomson "failed to make a prima facie showing re[garding her] defamation claim."

Thomson appeals.[3] Avvo and Doe each filed a response.

DISCUSSION

[1] **[2]** **[3]** ¶ 9 The First Amendment protects the right to speak anonymously. *McIntyre* ***730** *v. Ohio Elections Comm'n,* 514 U.S. 334, 342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). This right applies equally to online speech. *In re Anonymous Online Speakers,* 661 F.3d 1168, 1173 (9th Cir.2011). However, defamatory speech does not enjoy the protections of the First Amendment. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Accordingly, when faced with a defamation claim, courts aim to strike a balance between the right to protect one's reputation and the constitutional right to free speech. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 759–60, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 346–48, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

[4] **[5]** ¶ 10 To that end, the United States Supreme Court has considered the type of speech at issue when determining the appropriate standards to apply in defamation cases. For example, when a defamed plaintiff is a public figure, the standard of fault is more stringent; such a claim requires a showing of actual malice. *See New York Times,* 376 U.S at 279–80, 84 S.Ct. 710; *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 155, 162–63, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). This heightened standard reflects the constitutionally protected " 'interchange of ideas for the bringing about of political and social changes desired by the people.' " *New York Times,* 376 U.S. at 269, 84 S.Ct. 710 (quoting *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)). By contrast, when the challenged speech involves a purely private concern, " '[t]here is no threat to the free and robust debate of public issues' " and thus the First Amendment provides less stringent protection. *Dun & Bradstreet,* 472 U.S. at 759–60, 105 S.Ct. 2939 (alteration in original) (quoting *Harley–Davidson Motorsports, Inc. v. Markley,* 279 Or. 361, 366, 568 P.2d 1359 (1977)).

¶ 11 Here, we are asked to determine whether the trial court struck the proper balance in reviewing Thomson's motion to disclose Doe's identity. To answer this question, we must address two issues: first, whether the trial court applied the correct standard in reviewing a motion to reveal an

anonymous speaker's identity, and second, whether Thomson met that standard.

[6] ¶ 12 Whether the trial court applied the correct legal standard is a question of law that we review de novo. *Hundtofte v. Encarnación,* 181 Wash.2d 1, 13, 330 P.3d 168 (2014) (Madsen, J. concurring). If the correct legal standard was applied, we generally review a trial court's denial of a motion to compel for an abuse of discretion. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.,* 176 Wash.App. 168, 183, 313 P.3d 408 (2013). This is because the trial court is " 'better positioned than another' " to decide discovery issues. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wash.2d 299, 339, 858 P.2d 1054 (1993) (quoting *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 403, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)); *see also Amy v. Kmart of Wash., LLC,* 153 Wash.App. 846, 855–56, 223 P.3d 1247 (2009).

¶ 13 However, when the trial court's ruling involves libelous speech, the United States Supreme Court has indicated that independent appellate review is proper. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). This is because the constitutional values at issue warrant review by judges—including appellate judges—rather than the trier of fact:

> In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions ***731** by triers of fact may inhibit the expression of protected ideas.

Id. at 502, 504–05, 104 S.Ct. 1949.

[7] ¶ 14 *Bose* thus suggests that when a discovery motion —typically a matter of discretion—implicates the First Amendment, the trial court is no longer better positioned to decide the issue in question. *See Fisons,* 122 Wash.2d at 339, 858 P.2d 1054. We acknowledge a distinction between *Bose* and the present case. There, the Court reviewed the finding of actual malice, one of the elements of the plaintiff's defamation claim. *Bose,* 466 U.S. at 489–90, 104 S.Ct. 1949. Here, we review the denial of the plaintiff's motion to unmask the defendant, a threshold question. Thus, unlike in *Bose,* the decision before us does not involve the ultimate determination of whether the speech was libelous and therefore unprotected. Nonetheless, a motion to reveal a speaker's identity has First Amendment consequences. *See McIntyre,* 514 U.S. at 342, 115 S.Ct. 1511 (acknowledging the constitutional right to anonymous speech). Accordingly, we hold that de novo review is the proper standard of review when considering the trial court's decision on a motion to reveal an anonymous speaker's identity.

¶ 15 We now turn to the requisite showing a defamation plaintiff must make on a motion to unmask an anonymous defendant. This is an open question in Washington. However, many other courts, both federal and state, have considered this issue. *See* discussion *infra.* The two leading cases are *Dendrite Int'l, Inc. v. Doe No. 3,* 342 N.J.Super. 134, 140, 775 A.2d 756 (2001) and *Doe No. 1 v. Cahill,* 884 A.2d 451, 456 (Del.2005).

¶ 16 In *Dendrite,* an anonymous speaker posted messages on an online bulletin board criticizing Dendrite's stock performance. 342 N.J.Super. at 145, 775 A.2d 756. Dendrite sued the anonymous speaker and sought disclosure of the speaker's identity. *Id.* at 146, 775 A.2d 756. The New Jersey intermediate appellate court set out a four-step process for determining whether to compel disclosure of the speaker's identity:

> [T]he trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board.
>
> The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech.

> The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted ..., the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.
>
> Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

Id. at 141–42, 775 A.2d 756. The *Dendrite* court stated that the test "must be undertaken and analyzed on a case-by-case basis. The guiding principle is a result based on a meaningful analysis and a proper balancing of the equities and rights at issue." *Id.* at 142, 775 A.2d 756.

¶ 17 In *Cahill,* the Delaware Supreme Court considered the proper standard to apply when faced with a public figure plaintiff's request to unmask an anonymous defendant. 884 A.2d at 457. The *Cahill* court adopted a "modified *Dendrite* standard consisting only of *Dendrite* requirements one and three: the ***732** plaintiff must make reasonable efforts to notify the defendant and must satisfy the summary judgment standard."[4] *Id.* at 461. In concluding that summary judgment was the appropriate evidentiary standard, the *Cahill* court expressed concern "that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously." *Id.* at 457. The court recognized that there was an "entire spectrum" of evidentiary standards that could be applied, with varying levels of severity.[5] *Id.* It rejected the least stringent standard, the good faith test:

> Plaintiffs can often initially plead sufficient facts to meet the good faith test applied by the Superior Court, even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision. After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

Id. It also rejected the next level of evidentiary showing, the motion to dismiss standard:

> [E]ven silly or trivial libel claims can easily survive a motion to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be. Clearly then, if the stricter motion to dismiss standard is incapable of screening silly or trivial defamation suits, then the even less stringent good faith standard is less capable of doing so.

Id. at 459. By contrast, the court noted, the summary judgment standard would "more appropriately protect against the chilling effect on anonymous First Amendment internet speech that can arise when plaintiffs bring trivial defamation lawsuits primarily to harass or to unmask their critics."[6] *Id.*

[8] ¶ 18 As a threshold matter, we agree with *Dendrite* and *Cahill* that notice is a crucial element of the standard. *See* 342 N.J.Super. at 141, 775 A.2d 756, 884 A.2d at 460–61. In the interest of due process—or, at the very least, in the interests of fairness and judicial economy—a plaintiff should attempt to notify a Doe defendant that his or her identity might be unmasked. Here, although Thomson did not attempt to provide notice to Doe, Doe acknowledges that Avvo cured this problem by notifying her.

¶ 19 The choice of whether to apply the standard of either *Dendrite* or *Cahill* is less clear. Most federal and state courts to consider this question have adopted some form of the *Dendrite* and *Cahill* tests.[7] In addition, ***733** two state courts have determined that adopting *Dendrite* or *Cahill* would be unnecessary, because their state procedural rules provided equivalent protection.[8] Only one court has significantly strayed from *Dendrite* and *Cahill.* The Virginia Court of Appeals declined to adopt either test, instead applying a state statute that required a lower standard of proof. *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.,* 62 Va.App. 678, 695–97, 752 S.E.2d 554, 562 (2014), *rev'd on other grounds,* — Va. ——, 770 S.E.2d 440 (2015). Under the Virginia statute, a defamation plaintiff seeking an anonymous

speaker's identity must establish a good faith basis to contend that the speaker committed defamation. *Id.* at 699, 752 S.E.2d 554. In rejecting *Dendrite* and *Cahill,* the *Hadeed* court stated that the legislature had "considered persuasive authority from other states and made the policy decision to include or exclude factors that other states use in their unmasking standards." *Id.* at 703, 752 S.E.2d 554.

¶ 20 Thomson argues that we should follow Virginia's lead and apply the good faith test, while Doe and Avvo advocate the heightened standard under *Dendrite* and *Cahill.* In this way, the parties frame the issue before us as an either/or decision. But, in doing so, the parties bypass an important threshold question: what is the nature of the speech at issue?

¶ 21 The Ninth Circuit has suggested that this question is crucial when reviewing a motion to disclose an anonymous speaker's identity. *See Anonymous,* 661 F.3d at 1177. In *Anonymous,* the plaintiff sought to unmask anonymous online posters who disparaged the plaintiff and its business practices. *Id.* at 1171. Applying *Cahill,* the district court granted the plaintiffs motion. *Id.* at 1172, 1176. The posters filed a writ of mandamus challenging the decision. *Id.* at 1172. The Ninth Circuit denied the writ, finding that the posters had not demonstrated a need for the extraordinary remedy of mandamus. *Id.* at 1177–78. In doing so, the *Anonymous* court also discussed the link between the type of speech at issue and the appropriate evidentiary standard:

> Because *Cahill* involved political speech, that court's imposition of a heightened standard is understandable. In the context of the speech at issue here balanced against a discretionary discovery order under [Federal Rule of Civil Procedure] 26, however, *Cahill* 's bar extends too far.... *[We] suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.* For example, in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle. The specific circumstances surrounding the speech serve to give context to the balancing exercise.

***734** *Id.* at 1176–77 (emphasis added) (citations omitted).

[9] ¶ 22 We agree with *Anonymous:* the evidentiary standard should match the First Amendment interest at play. This aligns with the United States Supreme Court's treatment of the standard of fault in defamation cases. *See, e.g., New York Times,* 376 U.S at 279–80, 84 S.Ct. 710 (requiring plaintiffs to meet a higher bar in cases of protected speech); *Dun & Bradstreet,* 472 U.S. at 758–60, 105 S.Ct. 2939 (recognizing that commercial speech warrants lesser protection). We therefore hold that, when addressing a defamation plaintiff's motion to unmask an anonymous defendant, the court must consider the nature of the speech at issue when determining the evidentiary standard to apply.

[10] **[11]** ¶ 23 Here, the parties treat the type of speech as a peripheral question, only cursorily disputing whether Doe's statements constituted commercial speech. If Doe's speech was commercial, it would warrant a lower evidentiary bar. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557, 562–63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) ("The Constitution therefore accords lesser protection to commercial speech than other constitutionally guaranteed expression."). Commercial speech is "expression related solely to the economic interests of the speaker and its audience" or "speech proposing a commercial transaction." *Id.* at 561–62, 100 S.Ct. 2343. Doe's speech does not meet this standard: although her economic interests might have been affected by the behavior her review describes, her act of speech impacts more than her economic interests. While Doe's speech is not commercial, warranting the lowest protection, it is also not political, warranting the highest. Thus, Doe's speech is entitled to an intermediate level of protection.

[12] **[13]** ¶ 24 As such, we reject Thomson's assertion that a good faith showing—the least stringent standard—would be appropriate here. We likewise reject the next level of evidentiary showing, the motion to dismiss standard. As *Dendrite* and *Cahill* persuasively argue, this standard would be inadequate to protect this level of speech. *See* 342 N.J.Super. at 156, 775 A.2d 756, 884 A.2d at 458–60. Specifically, *Cahill* points out that in a notice pleading state like Delaware, a complaint "need only give 'general notice of the claim asserted.' " 884 A.2d at 458 (quoting *Ramunno v. Cawley,* 705 A.2d 1029, 1034 (Del.Sup.Ct.1998)). Therefore, "even silly or trivial libel claims can easily survive a motion

to dismiss where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be." *Cahill,* 884 A.2d at 459. Washington is also a notice pleading state, requiring only a simple concise statement of the claim and relief sought. CR 8(a); *Pac. Nw. Shooting Park Ass'n v. City of Sequim,* 158 Wash.2d 342, 352, 144 P.3d 276 (2006). Thus, under the motion to dismiss standard, a defamation plaintiff would need only to allege the elements of the claim, without supporting evidence. This is insufficient to protect the speaker's First Amendment right to anonymous speech. As Doe points out, disclosing a speaker's identity is a harm that cannot be reversed. Imposing a higher standard ensures that a speaker's identity is not disclosed in a "silly or trivial" case. *Cahill,* 884 A.2d at 459. And, it preserves judicial resources by ensuring that a newly unmasked defendant could not immediately have the case dismissed.

[14] ¶ 25 This leaves the two remaining standards considered by other courts: prima facie and summary judgment. The *Cahill* court's treatment of its summary judgment standard as equivalent to *Dendrite* 's prima facie standard has caused some confusion in subsequent cases in other jurisdictions. *See* 884 A.2d at 460; *see also Solers, Inc. v. Doe,* 977 A.2d 941, 954 (D.C.2009) ("Procedural labels such as *prima facie* or 'summary judgment' may prove misleading, but the test we now adopt closely resembles the 'summary judgment' standard articulated in *Cahill.*"); *Pilchesky v. Gatelli,* 2011 P.A. Super 3, 12 A.3d 430, 444 (2011) ("[l]n Pennsylvania, the prima facie test and the summary judgment test are identical."); *Indep. Newspapers, Inc. v. Brodie,* 407 Md. 415, 455–56, 966 A.2d 432 (2009) (rejecting the summary judgment standard as too stringent, instead adopting ***735** the prima facie standard). Despite this confusion, the "important feature of *Dendrite* and *Cahill* is to emphasize that the plaintiff must do more than simply plead his case." *Solers,* 977 A.2d at 954. Considering the speech at issue here, we agree that supporting evidence should be required before the speaker is unmasked. [9]

[15] ¶ 26 An additional factor that informs this question is the point in time in the litigation at which the question arises. Here, Doe had not appeared, answered Thomson's complaint, or defended against the subpoena. In fact, Doe did not have notice of the lawsuit until Avvo notified her. In our judgment, under these circumstances—where a plaintiff subpoenas a third party without the defendant's involvement —the summary judgment standard is too severe and a prima facie standard should be applied. [10]

¶ 27 Doe also urges this court to adopt the balancing prong of the *Dendrite* test, arguing that it allows courts to weigh equitable considerations posed by individual cases. The inclusion of a balancing test has thus far been a matter of debate nationally. [11] *Cahill* and its progeny have rejected the balancing test as unnecessary. *See Cahill.* 884 A.2d at 461: *Krinsky v. Doe 6,* 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231, 245–46 (2008); *Solers,* 977 A.2d at 956. As the *Krinsky* court reasoned, "When there is a factual and legal basis for believing libel may have occurred, the writer's message will not be protected by the First Amendment. Accordingly, a further balancing of interests should not be necessary to overcome the defendant's constitutional right to speak anonymously." 72 Cal.Rptr.3d at 245–46 (citations omitted). In support of the balancing test, the *Pilchesky* court reasoned that defamation law "nurture[s] the proper balance between an individual's right to speak freely and an injured plaintiff's right to redress.... By imposing upon the trial court the task of balancing these interests, First Amendment considerations are brought into proper focus." 12 A.3d at 445–46. Likewise, in *Mobilisa, Inc. v. Doe,* 217 Ariz. 103, 111, 170 P.3d 712 (2007), the court asserted that the test is "necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech." The *Mobilisa* court continued that

> surviving a summary judgment on elements not dependent on the anonymous party's identity does not necessarily account for factors weighing against disclosure. For example, the anonymous speaker may be a non-party witness along with a number of known witnesses with the same information. The requesting party's ability to survive summary judgment would not account for the fact that in such a case it may have only a slight need for the anonymous party's identity. Additionally, without a balancing step, the superior court would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to ***736** advance the requesting party's position, and the availability of alternative discovery methods. Requiring the court to consider and weigh these factors, and a myriad of other potential factors, would provide the court with the flexibility needed to ensure a proper balance is reached between the parties' competing interests on a case-by-case basis.

Id. at 720–21 (citation omitted).

¶ 28 As *Mobilisa* recognizes, certain cases present facts that could necessitate application of the balancing prong. Here, neither party asserts—nor do we perceive—any such facts. This is a straightforward libel claim against a speaker brought by the subject of the speech. Thus, while *Dendrite* balancing might be appropriate in some cases, it is not justified on the record before us.

¶ 29 The final issue we address is Avvo's attempt to serve as the arbiter of Doe's identifying information. Obtaining information from the anonymous poster allowed Avvo to make an informed response to Thomson. Once in that position, Avvo should have afforded the trial court the opportunity for in camera review, so that it too could ground its decision in fact rather than speculation.

¶ 30 The trial court applied the proper standard in reviewing Thomson's motion. Under that standard, Thomson's motion must fail. As Thomson freely admits, she presented no evidence to support her motion. [12] Therefore, the trial court properly denied Thomson's motion for failure to make a prima facie showing of defamation. [13]

¶ 31 We affirm.

WE CONCUR:

All Citations

356 P.3d 727, 43 Media L. Rep. 1997

Footnotes

1 Thomson's MED claim cannot survive if her defamation claim is not constitutionally sufficient. *See Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Therefore, we address only Thomson's defamation claims.

2 Avvo's principal place of business is in Washington.

3 This case was filed as a direct appeal. Because the denial of Thomson's motion was not a final order, we believe it is more appropriately a matter for discretionary review. *See* RAP 2.2(a). However, neither responding party challenged the order's appealability, and the parties agree that this case poses an issue involving a significant public interest. We will therefore address the issue.

4 In rejecting the other two requirements, the *Cahill* court noted that the second step—requiring the plaintiff to set forth the exact defamatory statements—was subsumed in the summary judgment inquiry. 884 A.2d at 461. It further reasoned that the fourth step—the balancing prong—was unnecessary, because the "summary judgment test is itself the balance." *Id.* The *Cahill* court evidently considered its summary judgment standard as equivalent to *Dendrite* 's required prima facie showing. We discuss this further below.

5 Although the lines between standards are sometimes blurred, cases and commentators generally discuss four levels of evidentiary showings, listed here from least to most stringent: (1) requiring a good faith basis that the plaintiff was the victim of actionable conduct, (2) requiring a party to show that its claim can survive a motion to dismiss, (3) requiring a prima facie showing that actionable conduct occurred, and (4) requiring a plaintiff to survive a hypothetical motion for summary judgment. *See, e.g., Cahill,* 884 A.2d at 457 (grouping together prima facie and summary judgment standards); Mallory Allen, *Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar For Disclosure of Online Speakers,* 7 WASH. J. L. TECH. & ARTS 75, 82–85 (2011) (grouping together motion to dismiss and prima facie standards).

6 It is worth noting that, under the *Cahill* standard, the plaintiff is required to introduce only such evidence that is within his or her control. 884 A.2d at 463.

7 *See SaleHoo Grp., Ltd. v. ABC Co.,* 722 F.Supp.2d 1210, 1215 (W.D.Wash.2010) (adopting a *Dendrite*-style test); *Doe I v. Individuals,* 561 F.Supp.2d 249, 255–56 (D.Conn.2008) (adopting the *Dendrite* prima facie showing, because *Cahill's* test is "potentially confusing and also difficult for a plaintiff to satisfy"); *Highfields Capital Mgmt., LP v. Doe,* 385 F.Supp.2d 969, 974 n. 6, 975 (N.D.Cal.2005) (relying on *Dendrite* and *Cahill* in holding that it "is not enough for a plaintiff simply to plead and pray"); *Mobilisa, Inc. v. Doe,* 217 Ariz. 103, 111, 170 P.3d 712 (2007) (adopting *Cahill's* summary judgment standard and *Dendrite's* balancing test); *Krinsky v. Doe 6,* 159 Cal.App.4th 1154, 1172, 72 Cal.Rptr.3d 231 (2008) ("agree[ing] with those courts that have compelled the plaintiff to make a prima facie showing of the elements of libel"); *Solers, Inc. v. Doe,* 977 A.2d 941, 954 (D.C.2009) (adopting a test that "closely resembles the 'summary judgment' standard articulated in *Cahill* "); *In re Indiana Newspapers,* 963 N.E.2d 534, 552 (Ind.Ct.App.2012) (finding that "the test that draws the most appropriate balance between protecting anonymous speech and preventing defamatory speech is the *Dendrite* test"); *Doe No. 1 v. Coleman,* 436 S.W.3d 207, 211 (Ky.Ct.App.2014) (adopting the *Dendrite* test "as modified by" *Cahill*); *Indep.*

Newspapers, Inc. v. Brodie, 407 Md. 415, 454–55, 966 A.2d 432 (2009) (adopting the *Dendrite* test); *Mortg. Specialists, Inc. v. Implode–Explode Heavy Indus., Inc.,* 160 N.H. 227, 239, 999 A.2d 184 (2010) ("join[ing] those courts which endorse the *Dendrite* test"); *Pilchesky v. Gatelli,* 2011 Pa. Super 3, 12 A.3d 430, 442–46 (2011) (adopting a "modified version of the *Dendrite/Cahill* test"); *In re Does 1–10,* 242 S.W.3d 805, 821 (Tex.Ct.App.2007) (finding itself "in alignment with the formulations set out in *Cahill* ").

8 *See Maxon v. Ottawa Publ'g Co.,* 402 Ill.App.3d 704, 711, 341 Ill.Dec. 12, 929 N.E.2d 666 (2010) (Illinois Supreme Court Rule 224 requires notice, specification of defamatory statements, determination that valid claim was stated, and verified complaint); *Thomas M. Cooley Law Sch. v. John Doe 1,* 300 Mich.App. 245, 266, 833 N.W.2d 331 (2013) (court rules require plaintiff to survive motion for summary disposition and allow Doe to obtain protective order); *see also Ghanam v. Does,* 303 Mich.App. 522, 539–40, 845 N.W.2d 128 (2014) (endorsing *Dendrite/Cahill* as a preferable standard, but following *Cooley* as precedent).

9 In Washington, the two standards are not identical. A prima facie showing means " 'evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved.' " *State v. Baxter,* 134 Wash.App. 587, 596, 141 P.3d 92 (2006) (internal quotation marks omitted) (quoting *State v. Aten,* 130 Wash.2d 640, 656, 927 P.2d 210 (1996)). Summary judgment is more stringent, requiring the moving party to show that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. CR 56(c); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.,* 134 Wash.2d 692, 698, 952 P.2d 590 (1998).

10 By contrast, if an unmasked defendant could immediately prevail on summary judgment, disclosing his or her identity would have no legal purpose. Where a defendant has appeared and answered, he or she is in a position to file a summary judgment motion. To avoid unnecessary disclosure, the trial court could defer the discovery motion pending the summary judgment or apply the higher summary judgment standard to the discovery motion in lieu of the prima facie standard.

11 *Compare Cahill,* 884 A.2d at 461 (rejecting *Dendrite* balancing test); *Krinsky,* 72 Cal.Rptr.3d at 245–46 (same); *Solers,* 977 A.2d at 956 (same); *Coleman,* 436 S.W.3d at 211 (same); *Does 1–10,* 242 S.W.3d at 821–22 (same) *with Mobilisa,* 170 P.3d at 720–21 (adopting *Dendrite* balancing test); *Indiana Newspapers,* 963 N.E.2d at 552 (same); *Brodie,* 966 A.2d at 456 (same); *Mortgage Specialists,* 999 A.2d at 193 (same); *Pilchesky,* 12 A.3d at 445–46 (same).

12 In fairness to Thomson, when she filed her motion, the requisite showing was unclear. And, Avvo brought no motion challenging the adequacy of Thomson's pleadings. But, because Thomson did not produce any supporting evidence, her claim fails whether we review it as a direct appeal or discretionary review, de novo or for abuse of discretion.

13 Thomson brought a Florida claim against Doe. Therefore, Florida law would provide the required elements of defamation unless it is established that another jurisdiction's law is applicable.

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661 F.3d 1168
United States Court of Appeals,
Ninth Circuit.

In re ANONYMOUS ONLINE SPEAKERS,
Anonymous Online Speakers, Petitioner,
v.
United States District Court for the District of Nevada, Reno, Respondent,
Quixtar, Inc.; Signature Management TEAM, LLC; Apollo Works Holdings, Inc.; Green Gemini Enterprises, Inc.; North Star Solutions, Inc.; Northern Lights Services, Inc.; Sunset Resources, Inc.; Sky Scope Team, Inc., Real Parties in Interest.

No. 09–71265. | Argued and Submitted March 2, 2010. | Filed Jan. 7, 2011.

Synopsis
Background: Multilevel marketing corporation sued provider of business training materials for allegedly tortiously interfering with existing contracts and with advantageous business relations by purportedly orchestrating Internet smear campaign via anonymous postings and videos disparaging corporation and its business practices of distributing consumer products through independent business owners (IBOs) to which provider sold its products. The United States District Court for the District of Nevada, Edward C. Reed, Senior District Judge, ordered disclosure of identity of three of five non-party anonymous speakers as part of discovery process. Under All Writs Act, speakers sought writ of mandamus directing vacatur of disclosure order, and corporation cross-petitioned for mandamus relief directing provider's employee to testify regarding identity of other two speakers.

Holdings: The Court of Appeals, McKeown, Circuit Judge, held that:

[1] in matter of first impression, discovery of identity of non-party online anonymous speakers did not offend First Amendment, and

[2] no exceptional cause warranted mandamus relief compelling employee's testimony.

Petitions denied.

West Headnotes (20)

[1] **Constitutional Law**
Anonymous speech

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. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[2] **Constitutional Law**
Internet

Although the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech in that there is no basis for qualifying the level of First Amendment scrutiny that should be applied to online speech. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[3] **Constitutional Law**
Internet

As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely, under the First Amendment, without fear of economic or official retaliation or concern about social ostracism. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[4] **Constitutional Law**
Absolute nature of right
Constitutional Law
Anonymous speech

The right to speak, whether anonymously or otherwise, is not unlimited, under the First Amendment, and the degree of scrutiny varies depending on the circumstances and the type of speech at issue. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[5] **Constitutional Law**
Political speech, beliefs, or activity in general

Given the importance of political speech in the history of the United States, federal courts afford political speech the highest level of protection. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[6] **Constitutional Law**
Commercial Speech in General

Commercial speech enjoys a limited measure of protection, under the First Amendment, commensurate with its subordinate position in the scale of First Amendment values, as long as the communication is neither misleading nor related to unlawful activity. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[7] **Constitutional Law**
Freedom of Speech, Expression, and Press
Constitutional Law
"Fighting words"
Constitutional Law
Lack of constitutional protection

Some speech, such as fighting words and obscenity, is not protected by the First Amendment at all. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[8] **Mandamus**
Nature and scope of remedy in general

The writ of mandamus is an extraordinary remedy limited to extraordinary causes.

Cases that cite this headnote

[9] **Mandamus**
Proceedings in civil actions in general

The limit on mandamus power to only provide a remedy for an extraordinary cause is particularly salient in the discovery context because courts of appeals cannot afford to become involved with the daily details of discovery, although mandamus jurisdiction may be exercised to review discovery orders raising particularly important questions of first impression, especially when defining the scope of an important privilege.

2 Cases that cite this headnote

[10] **Mandamus**
Nature and scope of remedy in general
Mandamus
Proceedings in civil actions in general

Not only is the mandamus standard difficult to meet as a practical matter, only in the rare case will interlocutory review of discovery disputes be considered under the collateral order doctrine.

1 Cases that cite this headnote

[11] **Mandamus**
Nature and scope of remedy in general

In evaluating mandamus petitions, Court of Appeals is guided by the following factors: (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief, (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal, (3) whether district court's order is clearly erroneous as a matter of law, (4) whether district court's order is an oft repeated error or manifests a persistent disregard of the federal rules, and (5) whether district court's order raises new and important problems or issues of first impression.

1 Cases that cite this headnote

[12] **Mandamus**

Courts and judicial officers subject to mandamus

Every factor for consideration of mandamus relief need not be satisfied, and the absence of the factor, inquiring whether district court's order is clearly erroneous as a matter of law, is dispositive.

Cases that cite this headnote

[13] **Mandamus**

Discretion as to grant of writ

Mandamus is discretionary and even where the guiding factors are satisfied, Court of Appeals may deny the petition.

Cases that cite this headnote

[14] **Federal Civil Procedure**

Discretion of Court

District court has wide latitude in controlling discovery, and decisions governing discovery are highly fact-intensive. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

4 Cases that cite this headnote

[15] **Constitutional Law**

Discovery and subpoenas

The nature of the speech should be a driving force in choosing a standard by which to balance the First Amendment rights of anonymous speakers in discovery disputes. U.S.C.A. Const.Amend. 1.

12 Cases that cite this headnote

[16] **Constitutional Law**

Difference in protection given to other speech

Commercial speech is afforded less First Amendment protection than political, religious, or literary speech. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[17] **Federal Courts**

Definite and firm conviction of mistake

The clear error standard is highly deferential and is only met when the reviewing court is left with a definite and firm conviction that a mistake has been committed.

3 Cases that cite this headnote

[18] **Constitutional Law**

Internet

Mandamus

Proceedings in civil actions in general

Any error in district court's order requiring disclosure of identities of non-party anonymous online speakers, in context of discovery for tortious interference with existing contracts and with advantageous business relations claim against alleged employer of speakers, was not clear, as would warrant mandamus relief preventing disclosure under First Amendment, even if speech was commercial, since court appropriately weighed important value of anonymous speech against need for discovery, and determined that disclosure was warranted even under strictest test applicable to political speech. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[19] **Federal Civil Procedure**

Protective orders

A protective order is just one of the tools available to the district court to oversee discovery of sensitive matters that implicate First Amendment rights. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[20] **Mandamus**

Proceedings in civil actions in general

Mandamus

Form, requisites, and sufficiency in general

Business training provider's petition for writ of mandamus directing reversal of district court's order denying provider's motion to compel testimony regarding identity of non-party anonymous online authors of two blogs

that allegedly disparaged multilevel marketing corporation and its business practices was garden variety discovery dispute, lacking exceptional cause for mandamus relief, since petition was devoid of any foundation for request for mandamus relief, and even failed to cite to case law establishing factors for consideration in evaluating petition for mandamus.

Cases that cite this headnote

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Appeal from the United States District Court for the District of Nevada, Edward C. Reed, Senior District Judge, Presiding. D.C. No. 3:07–cv–00505–ECR–RAM.

Before: SIDNEY R. THOMAS, M. MARGARET McKEOWN, and JAY S. BYBEE, Circuit Judges.

ORDER

The opinion filed July 12, 2010 and appearing at 611 F.3d 653, is withdrawn and replaced with the accompanying opinion.

OPINION

McKEOWN, Circuit Judge:

The proceeding before us is but a short chapter in an acrimonious and long-running business dispute between Quixtar, Inc. ("Quixtar"), successor to the well-known Amway Corporation, and Signature Management TEAM, LLC ("TEAM"). Quixtar sued TEAM, claiming that TEAM orchestrated an Internet smear campaign via anonymous postings and videos disparaging Quixtar and its business practices. As part of the discovery process, Quixtar sought testimony from Benjamin Dickie, a TEAM employee, regarding the identity of five anonymous online speakers who allegedly made defamatory comments about Quixtar. Dickie refused to identify the anonymous speakers on First Amendment grounds. The district court ordered Dickie to disclose the identity of three of the five speakers.

The Anonymous Online Speakers seek a writ of mandamus directing the district court to vacate its order regarding the identity of the three speakers. Quixtar cross-petitions for a writ of mandamus directing the district court to order Dickie to testify regarding the identity of the anonymous speakers from the remaining two sources. Because neither party has established that it is entitled to the extraordinary remedy of mandamus, we deny both petitions.

BACKGROUND

Quixtar is a multilevel marketing business that distributes consumer products such as cosmetics and nutritional supplements through Independent Business ***1172** Owners ("IBOs"). TEAM provides business training and support materials and has sold its products, including motivational literature and educational seminars, to Quixtar IBOs. TEAM was founded by two Quixtar IBOs, Orrin Woodward and Chris Brady. As IBOs, their contracts with Quixtar included post-termination non-competition and non-solicitation provisions. Disagreement regarding contract compliance and enforceability came to an impasse in August 2007, when both Woodward and Brady were terminated as IBOs, and they joined a class action against Quixtar.

TEAM and Quixtar became embroiled in several lawsuits across the country. In this suit, Quixtar asserts claims against TEAM for tortious interference with existing contracts and with advantageous business relations, among other claims. The tortious interference claims are premised on Quixtar's contention that TEAM used the Internet to carry out a "smear campaign" with the objective and effect of inducing Quixtar IBOs to terminate their contracts at Quixtar and join

a competing multilevel marketing company affiliated with TEAM.

During discovery in this suit, Quixtar took the deposition of Dickie, TEAM's Online Content Manager. Dickie refused to answer questions regarding the identity of certain anonymous online speakers. In response, Quixtar brought a motion to compel Dickie to testify regarding his knowledge of the authors of statements from five different online sources: the "Save Us Dick DeVos" blog, the "Hooded Angry Man" video, the "Q'Reilly" blog, the "Integrity is TEAM" blog, and the "IBO Rebellion" blog. According to Quixtar, statements contained in these five fora support its claims of tortious interference, including comments such as: "Quixtar has regularly, but secretly, acknowledged that its products are overpriced and not sellable"; "Quixtar refused to pay bonuses to IBOs in good standing"; Quixtar "terminated IBOs without due process"; "Quixtar currently suffers from systemic dishonesty"; and "Quixtar is aware of, approves, promotes, and facilitates the systematic noncompliance with the FTC's Amway rules." Quixtar believes that the anonymous speakers of these statements are actually TEAM officers, employees, or agents.

After reviewing the specific statements from each source, the district court ordered Dickie to testify regarding his knowledge of the identity of the anonymous online speakers from three of the sources: "Save Us Dick DeVos," the "Hooded Angry Man" video, and the "Q'Reilly" blog. The Anonymous Online Speakers from those sources filed this petition for a writ of mandamus in an effort to block Dickie's testimony. Quixtar opposes the petition and cross-petitions for a writ of mandamus directing the district court to order Dickie to reveal the speakers from the remaining two sources —the "Integrity is TEAM" blog and the "IBO Rebellion" blog.

ANALYSIS

I. ANONYMOUS SPEECH AND THE FIRST AMENDMENT

[1] First Amendment protection for anonymous speech was first articulated a half-century ago in the context of political speech, *Talley v. California,* 362 U.S. 60, 64–65, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), but as the Supreme Court later observed, the *Talley* decision harkened back to "a respected tradition of anonymity in the advocacy of political causes." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 343, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Undoubtedly the most famous pieces of anonymous American political advocacy are *The Federalist Papers,* penned by ***1173** James Madison, Alexander Hamilton, and John Jay, but published under the pseudonym "Publius." *Id.* at 344 n. 6, 115 S.Ct. 1511. Their opponents, the Anti–Federalists, also published anonymously, cloaking their real identities with pseudonyms such as "Brutus," "Centinel," and "The Federal Farmer." *Id.* It is now settled that "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." *Id.* at 342, 115 S.Ct. 1511.

[2] **[3]** Although the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech—there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech. *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). As with other forms of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without "fear of economic or official retaliation ... [or] concern about social ostracism." *McIntyre,* 514 U.S. at 341–42, 115 S.Ct. 1511.

[4] **[5]** **[6]** **[7]** The right to speak, whether anonymously or otherwise, is not unlimited, however, and the degree of scrutiny varies depending on the circumstances and the type of speech at issue. Given the importance of political speech in the history of this country, it is not surprising that courts afford political speech the highest level of protection. *Meyer v. Grant,* 486 U.S. 414, 422, 425, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (describing the First Amendment protection of "core political speech" to be "at its zenith"). Commercial speech, on the other hand, enjoys "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," *Bd. of Trustees of SUNY v. Fox,* 492 U.S. 469, 477, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), as long as "the communication is neither misleading nor related to unlawful activity." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). And some speech, such as fighting words and obscenity, is not protected by the First Amendment at all. *See, e.g., Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

II. PETITION BY ANONYMOUS ONLINE SPEAKERS

[8] **[9]** **[10]** In this case, our decision is guided by the interplay of these bedrock First Amendment principles with the standards governing our review of petitions for writs of mandamus. We have repeatedly emphasized that "[t]he writ of mandamus is an 'extraordinary' remedy limited to 'extraordinary' causes." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court,* 408 F.3d 1142, 1146 (9th Cir.2005) (quoting *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004)). This limit on our mandamus power is particularly salient in the discovery context because "the courts of appeals cannot afford to become involved with the daily details of discovery," although "we have exercised mandamus jurisdiction to review discovery orders raising particularly important questions of first impression, especially when called upon to define the scope of an important privilege." *Perry v. Schwarzenegger,* 591 F.3d 1147, 1157 (9th Cir.2010) (internal quotation marks and citation omitted). [1]

***1174** **[11]** **[12]** **[13]** In evaluating mandamus petitions, we are guided by the practically enshrined *Bauman* factors:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.

Id. at 1156 (citing *Bauman v. U.S. Dist. Court,* 557 F.2d 650, 654–55 (9th Cir.1977)). We do not require every factor to be satisfied, and "the absence of the third factor, clear error, is dispositive." *Burlington,* 408 F.3d at 1146. Ultimately, mandamus is discretionary and "even where the *Bauman* factors are satisfied, the court may deny the petition." *San Jose Mercury News, Inc. v. U.S. Dist. Court,* 187 F.3d 1096, 1099 (9th Cir.1999).

A. Standards Guiding Courts in Balancing Discovery and the Right to Anonymous Speech

This case is not the first time we have considered the relationship between the First Amendment and compelled discovery in the context of a petition for mandamus. *See, e.g., Perry,* 591 F.3d at 1165 (granting a petition for mandamus regarding a discovery order compelling disclosure of political campaign information). *Perry* involved the efforts of a party in the same-sex marriage suit in California to obtain internal campaign communications relating to the campaign strategy and advertising of the proponents of a ballot proposition. Focusing on First Amendment associational rights, we held that the district court erred in determining that "the First Amendment privilege, as a categorical matter, does not apply to the disclosure of internal campaign communications." *Id.* at 1161. We concluded that permitting discovery "would likely have a chilling effect on political association," and that plaintiffs had "not shown a sufficient need for the information." *Id.* at 1165.

Although we emphasized that our holding was "limited to *private internal* campaign communications concerning the *formulation of campaign strategies and messages,*" *id.* at 1165 n. 12, the structure of the analysis is instructive. We first considered whether the proponents—the opponents of disclosure—made a prima facie case of arguable First Amendment infringement and then shifted the burden to plaintiffs to "demonstrate a sufficient need for the discovery to counterbalance that infringement." *Id.* at 1164.

The *Perry* decision rested on the importance of political association and political expression, and it did not involve anonymous speakers. Indeed, we have not previously considered the First Amendment claims of an anonymous, non-party speaker on the Internet in the context of commercial contractual relationships like those at issue here. Nor have we considered such a challenge in the discovery context.

Two circuit courts have, however, addressed analogous situations in published opinions. The issue has also been raised ***1175** in a number of state and federal trial courts, and more cases are percolating through the system. In 1998, the Sixth Circuit considered a government agency's motion to compel a newspaper to answer a subpoena identifying an anonymous advertiser. *NLRB v. Midland Daily News,* 151 F.3d 472 (6th Cir.1998). Just last year, the Fourth Circuit considered whether to uphold an order allowing a deposition of an anonymous speaker in a securities fraud class action. *Lefkoe v. Jos. A. Bank Clothiers, Inc.,* 577 F.3d 240 (4th Cir.2009).

In both of these cases, the courts held that the anonymous speech at issue was commercial speech, but declined to establish or follow any particular standard, other than the general and long-standing precepts governing commercial speech. The Sixth Circuit, in *Midland Daily News,* noted that as long as commercial speech is about lawful activity and is not misleading, it is protected. 151 F.3d at 475 (citing *Central Hudson Gas & Elec. Corp.,* 447 U.S. at 566, 100 S.Ct. 2343). The court affirmed the district court's denial of the National Labor Relations Board's ("NLRB") motion to compel the identification of the anonymous advertiser, because it was not the "least extensive means" the NLRB could use. *Id.* In *Lefkoe,* the Fourth Circuit reiterated that commercial speech enjoys only limited First Amendment protection and held that "the Doe Client's claimed First Amendment right to anonymity [wa]s subject to a substantial governmental interest in disclosure so long as disclosure advance [d] that interest and [went] no further than reasonably necessary." *Id.* at 248–49. The court highlighted the balance between discovery under Federal Rule of Civil Procedure Rule 26 and protection of anonymous speech: "the substantial governmental interest in providing Jos. A. Bank a fair opportunity to defend itself in court is served by requiring the Doe Client to reveal its identity and provide the relevant information. Rule 26 explicitly expresses this interest." *Id.*

This issue has arisen not infrequently in trial courts; the paucity of appellate precedent is not surprising because discovery disputes are not generally appealable on an interlocutory basis and mandamus review is very limited. The many federal district and state courts that have dealt with this issue have employed a variety of standards to benchmark whether an anonymous speaker's identity should be revealed.

To begin, a few courts have declined to adopt a new or different standard to accommodate anonymous speech. *See, e.g., Klehr Harrison Harvey Branzburg & Ellers v. JPA Dev.,* No. 0425, 2006 WL 37020, at *8 (C.P.Phila.Jan. 4, 2006) (noting that "the grafting of new tests onto existing rules threatens to compromise the values protected by other constitutional provisions, including due process, equal protection, and the right to a trial by jury").

A number of courts have required plaintiffs to make at least a prima facie showing of the claim for which the plaintiff seeks the disclosure of the anonymous speaker's identity. *See, e.g., Doe I v. Individuals,* 561 F.Supp.2d 249 (D.Conn.2008); *Highfields Capital Mgmt., LP v. Doe,* 385 F.Supp.2d 969 (N.D.Cal.2005); *Sony Music Entm't, Inc. v. Does 1–40,* 326 F.Supp.2d 556 (S.D.N.Y.2004). The lowest bar that courts have used is the motion to dismiss or good faith standard. *See, e.g., Columbia Ins. Co. v. seescandy.com,* 185 F.R.D. 573 (N.D.Cal.1999); *In re Subpoena Duces Tecum to America Online, Inc.,* No. 40570, 2000 WL 1210372 (Va.Cir.Ct. Jan. 31, 2000) (reversed on other grounds, *America Online, Inc. v. Anonymous Publicly* ***1176** *Traded Co.,* 261 Va. 350, 542 S.E.2d 377 (2001)).

Other courts have relied on a standard that falls somewhere between the motion to dismiss and the prima facie standards. In *Doe v. 2TheMart.com,* 140 F.Supp.2d 1088 (W.D.Wash.2001), the court drew from *seescandy.com* and *America Online,* but recognized that a higher standard should apply when a subpoena seeks the identity of an anonymous Internet user who is not a party to the underlying litigation. *See id.* at 1095 (noting that identification is only appropriate where the compelling need for discovery outweighs the First Amendment right of the speakers because litigation may continue without disclosure of the speakers' identities); *accord Sedersten v. Taylor,* No. 09–3031–CV–S–GAF, 2009 WL 4802567 (W.D.Mo. Dec. 9, 2009); *Enterline v. Pocono Med. Ctr.,* 3:08–CV–1934, 2008 WL 5192386 (M.D.Pa. Dec. 11, 2008).

The district court in this case applied the most exacting standard, established by the Delaware Supreme Court in *Doe v. Cahill,* 884 A.2d 451 (Del.2005). The *Cahill* standard requires plaintiffs to be able to survive a hypothetical motion for summary judgment and give, or attempt to give, notice to the speaker before discovering the anonymous speaker's identity. *Id.* at 461. The court in *Cahill* therefore required that the city councilman plaintiff " 'submit sufficient evidence to establish a *prima facie* case for each essential element' " of his defamation claim. *Id.* at 463 (quoting *Colgain v. Oy Partek Ab (In re Asbestos Litig.),* 799 A.2d 1151, 1152 (Del.2002)). The court pointed to its "concern[ ] that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously," *id.* at 457, and reasoned that "the summary judgment standard more appropriately balances a defamation plaintiff's right to protect his reputation and a defendant's right to speak anonymously." *Id.* at 462.

Interestingly, in each of these cases, the initial burden rests on the party seeking discovery and requires varying degrees of proof of the underlying claim. In *Perry,* however, we evaluated the First Amendment political associational rights separately from the underlying claims and adopted

a "heightened relevance standard" requiring plaintiffs to " 'demonstrate[ ] an interest in obtaining the disclosures ... which is sufficient to justify the deterrent effect ... on the free exercise ... of [the] constitutionally protected right of association.' " 591 F.3d at 1164 (quoting *NAACP v. Alabama,* 357 U.S. 449, 463, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (omissions and alterations in *Perry*)).

With this broad array of standards in mind, we consider the Anonymous Online Speakers' petition for mandamus.

B. No Clear Error

[14] We begin with the premise that a district court "has wide latitude in controlling discovery" and that decisions governing discovery are highly fact-intensive. *White v. City of San Diego,* 605 F.2d 455, 461 (9th Cir.1979).

The district court here appropriately considered the important value of anonymous speech balanced against a party's need for relevant discovery in a civil action. It also recognized the "great potential for irresponsible, malicious, and harmful communication" and that particularly in the age of the Internet, the "speed and power of internet technology makes it difficult for the truth to 'catch up' to the lie."

[15] **[16]** Against this backdrop, the district court applied *Cahill,* which elevates the bar to disclosure to the highest level. Because *Cahill* involved political speech, ***1177** that court's imposition of a heightened standard is understandable. In the context of the speech at issue here balanced against a discretionary discovery order under Rule 26, however, *Cahill* 's bar extends too far. As in *Perry* and as recently illustrated by the Supreme Court in *Doe v. Reed,* we suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes. *See Perry,* 591 F.3d at 1160–61; *Doe v. Reed,* 561 U.S. 186, 130 S.Ct. 2811, 2817–18, 177 L.Ed.2d 493 (2010). For example, in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle. *See Lefkoe,* 577 F.3d at 248 (inasmuch as the speech in question is of a commercial nature it "enjoys less First Amendment protection"). The specific circumstances surrounding the speech serve to give context to the balancing exercise.

By contrast with *Cahill,* this case does not involve expressly political speech but rather speech related to the non-competition and non-solicitation provisions of Quixtar's commercial contracts with its IBOs. We need not, however, decide if the speech at issue here constitutes commercial speech under the Supreme Court's definition in *Central Hudson. See* 447 U.S. at 561–62, 100 S.Ct. 2343. Even if the speech was commercial, the district court's choice of the *Cahill* test did not constitute clear error.

[17] **[18]** The clear error standard is highly deferential and is only met when "the reviewing court is left with a 'definite and firm conviction that a mistake has been committed.' " *Cohen v. U.S. Dist. Court,* 586 F.3d 703, 708 (9th Cir.2009) (citations omitted). The district court weighed appropriate considerations and, given the decision to disclose the speakers' identities even under the strictest test outlines in *Cahill,* there was no clear error. If there was error at all, it was an error with no consequence. *Cf. Sinclair v. TubeSockTedD,* 596 F.Supp.2d 128 (D.D.C.2009) (declining to adopt a standard because plaintiff's claim would fail under either the *Cahill* or *Dendrite* standard).

[19] We decline to consider the other four *Bauman* factors, because we conclude that the third factor, whether the district court's order was clearly erroneous, is dispositive. *Burlington,* 408 F.3d at 1146. We deny the anonymous speakers' petition for writ of mandamus. We leave to the district court the details of fashioning the appropriate scope and procedures for disclosure of the identity of the anonymous speakers. On this point, we note that the parties have a protective order in place that provides different levels of disclosure for different categories of documents to various recipients, such as disclosure for "Attorneys' Eyes Only."[2] Second Amended Protective Order at 3, *Quixtar v. Signature* ***1178** *Management Team,* 566 F.Supp.2d 1205 (D.Nev.2008) (No. 437). A protective order is just one of the tools available to the district court to oversee discovery of sensitive matters that implicate First Amendment rights. *See Perry,* 591 F.3d at 1164 (noting that a protective order can ameliorate the harms of disclosure).

III. CROSS–PETITION BY QUIXTAR

[20] In its cross-petition, Quixtar seeks reversal of the district court's order denying the motion to compel testimony from Dickie regarding the identity of the anonymous authors of the "Integrity is TEAM" and the "IBO Rebellion" blogs. The cross-petition suffers from a fundamental error—Quixtar fails to present any foundation for its request for mandamus relief. Quixtar's cross-petition lacks even a citation to our

opinion in *Bauman,* which established the factors we consider to evaluate a writ of mandamus. Quixtar's cross-petition falls into the category of a garden variety discovery dispute: it offers no extraordinary circumstance that merits exercising our mandamus power.

CONCLUSION

Neither party has shown that it is entitled to relief. We deny both the Anonymous Online Speakers' petition and Quixtar's cross-petition for writ of mandamus.

PETITION AND CROSS–PETITION DENIED.

All Citations

661 F.3d 1168, 39 Media L. Rep. 2735, 11 Cal. Daily Op. Serv. 342, 2011 Daily Journal D.A.R. 397

Footnotes

1 Not only is the mandamus standard difficult to meet as a practical matter, only in the rare case will we consider interlocutory review of discovery disputes under the collateral order doctrine. *See Mohawk Industries, Inc. v. Carpenter,* 558 U.S. 100, 130 S.Ct. 599, 606, 175 L.Ed.2d 458 (2009) (noting that courts have generally denied pre-trial review of discovery disputes). In *Perry,* we reserved as a close question "whether *Mohawk* should be extended to the First Amendment privilege." 591 F.3d at 1156. As in *Perry,* we need not decide that question here because in both petitions, the parties rely on mandamus jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

2 A similar issue arose in a related case pending in the Circuit Court for the County of Kent in Michigan. On May 11, 2010, that court issued an opinion denying the Anonymous Online Speakers' motion to quash Dickie's deposition, during which he would presumably reveal the names of the persons who made anonymous Internet postings about Quixtar. In allowing the deposition to proceed, the court directed that only counsel may be present at the deposition, and the deposition transcript will be "for attorney eyes only." If either party believes the presence of a non-attorney is necessary, the court noted that it would entertain such a motion. The court also noted that in the absence of a decision from this court, it would consider a motion by either party to strike portions of the transcript and/or remove the "for attorney eyes only" condition. *Indep. Bus. Owners Ass'n Int'l v. Woodward,* No. 07–08513–CZ (Kent County Cir. Ct. (Mich.) May 11, 2010).

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November 10, 2014

VIA FEDERAL EXPRESS

Office of the Clerk, Civil Division
Superior Court of California, County of Santa Clara
191 N. First St.
San Jose, CA 95113

RE: Application for Discovery Subpoena in Action Pending Outside California
David Smith, et al. v. Ronglan Shang – CL 2014-05862
Circuit Court for Fairfax County, Virginia

Dear Clerk:

The undersigned represents the Defendant in the above-referenced out-of-state proceedings. Pursuant to California Code of Civil Procedure Section 2029.300, enclosed please find the following documents in support of Defendant's Application for a Discovery Subpoena in an Action Pending Outside of California:

- Money Order in the amount of $30 for the applicable filing fee;
- Form SUBP-030, Application for Discovery Subpoena in Action Pending Out of State;
- Virginia Subpoena Duces Tecum to Google, Inc. (true and correct copy);
- Form SUBP-035, Subpoena for Production of Business Records; and
- Copies of each of the above to be filed stamped and returned.

Additionally, I have enclosed a prepaid envelope in which the approved application and stamped copies of the aforementioned documents which I request be returned to me.

Thank you for your assistance in this matter. If you have any questions or require additional information, please contact me.

Sincerely,

Thomas F. Urban II

Thomas F. Urban II
Counsel for Defendant Ronglan Shang

SUBP-030

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Thomas F. Urban II, Esq. (Virginia Bar #40540) Law Firm of Urban & Falk, PLLC 6066 Leesburg Pike, Suite 400, Falls Church, VA 22041 TELEPHONE NO.: 703-861-5235 FAX NO. (Optional): 703-340-1450 E-MAIL ADDRESS (Optional): urban law@yahoo.com ATTORNEY FOR (Name): Ronglan Shang	
Court for county in which discovery is to be conducted: **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** Santa Clara STREET ADDRESS: 191 N. First St. MAILING ADDRESS: 191 N. First St. CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME: Civil	
Court in which action is pending: **Name of Court:** Fairfax County Circuit Court STREET ADDRESS: 4110 Chain Bridge Road, Fairfax, VA 22030 MAILING ADDRESS: 4110 Chain Bridge Road CITY, STATE, AND ZIP CODE: Fairfax, VA 22030 COUNTRY: USA	
PLAINTIFF/PETITIONER: Shaoming Cheng and David Smith DEFENDANT/RESPONDENT: Ronglan Shang	CALIFORNIA CASE NUMBER (if any assigned by court)
APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (of action pending outside California): CL 2014-05862

1. Applicant *(name)*: is *(check one)*:
   ☐ Plaintiff ☐ Petitioner ☑ Defendant ☐ Respondent ☐ Other *(specify)*:
   in the above action.
2. Applicant requests that this court issue a subpoena for discovery under Code of Civil Procedure sections 2029.100 – 2029.900 to *(name and address of deponent or person in control of property)*:

3. Attached is *(check one)*: ☐ the original ☑ a true and correct copy of the document from the court in which the action is pending that requires the person in 2 to *(check all that apply)*:
   a. ☐ attend and give testimony at a deposition;
   b. ☑ produce and permit inspection and copying of designated materials, information, or tangible things in the possession, custody, or control of the deponent;
   c. ☐ permit the inspection of premises under the control of the deponent.
4. Applicant submits with this application a proposed subpoena that includes terms identical to those in the document from the out-of-state court. (Code of Civil Procedure section 2029.300(d).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: November 10, 2014

Thomas F. Urban II (Licensed in Virginia)
(TYPE OR PRINT NAME)

Thomas F. Urban II
(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)

Note: This application must be accompanied by the fee specified in Government Code section 70626. A discovery subpoena must be personally served on the deponent in compliance with California law, including Code of Civil Procedure section 1985.

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-030 [New January 1, 2010]

APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA

Code of Civil Procedure §§ 2029.100–900
www.courtinfo.ca.gov

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265; Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: CL 2014-05862

N/A
HEARING DATE AND TIME

Fairfax County Circuit Court

4110 Chain Bridge Road, Fairfax, Virginia 22030
COURT ADDRESS

David Smith, et al., v. *In re:* Ronglan Shang

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Google, Inc. Custodian of Records
NAME

1600 Amphitheater Parkway
STREET ADDRESS

Mountain View (CITY) California (STATE) 94043 (ZIP)

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

All electronic mail messages between [redacted] and [redacted] from 1/1/2011 to the present.

at 6066 Leesburg Pike, Suite 400, Falls Church, VA 22041 (LOCATION) at December 8, 2014 (DATE AND TIME)

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of

Ronglan Shang
PARTY NAME

Thomas F. Urban II
NAME OF ATTORNEY

40540
VIRGINIA STATE BAR NUMBER

Law Firm of Urban & Falk, PLLC
OFFICE ADDRESS

(703) 861-5235
TELEPHONE NUMBER OF ATTORNEY

6066 Leesburg Pike, Suite 400, Falls Church, VA 22041
OFFICE ADDRESS

(703) 340-1450
FACSIMILE NUMBER OF ATTORNEY

November 10, 2014
DATE ISSUED

Thomas F. Urban II
SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

☒ **This SUBPOENA DUCES TECUM is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325.**

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME: Google, Inc. Custodian of Records

ADDRESS: 1600 Amphitheater Parkway, Mountain View, CA 94043

☐ PERSONAL SERVICE Tel. No. N/A

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:

☐ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ NOT FOUND _____, Sheriff

_____ by _____, Deputy Sheriff
DATE

CERTIFICATE OF COUNSEL

I, Thomas F. Urban II, counsel for Defendant Ronglan Shang, hereby certify that a copy of the foregoing subpoena duces tecum was e-mailed and mailed
DELIVERY METHOD
to Heidi Meinzer, Esq., counsel of record for David Smith and Shaoming Cheng, on the 10th day of November, 2014.

Thomas F. Urban II
SIGNATURE OF ATTORNEY

NOTICE: Upon receipt of the subpoenaed documents, the requesting party must, if requested, provide true and full copies of those documents to any other party or to the attorney for any other party, provided the other party or attorney for the other party pays the reasonable cost of copying or reproducing those documents. This does not apply when the subpoenaed documents are returnable to and maintained by the clerk of the court in which the action is pending. Va. Code § 8.01-417

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:
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E-MAIL ADDRESS: urban_law@yahoo.com
ATTORNEY FOR *(Name)*: Ronglan Shang (Defendant)

FOR COURT USE ONLY

Court for county in which discovery is to be conducted:
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara
STREET ADDRESS: 191 N. First St.
MAILING ADDRESS: 191 N. First St.
CITY, STATE, AND ZIP CODE: San Jose, CA 95113
BRANCH NAME: Civil

Court in which action is pending:
Name of Court: Farifax County Circuit Court
STREET ADDRESS: 4110 Chain Bridge Road, Fairfax, VA 22030
MAILING ADDRESS: 4110 Chain Bridge Road
CITY, STATE, AND ZIP CODE: Fairfax, VA 22030
COUNTRY: USA

PLAINTIFF/PETITIONER: Shaoming Cheng and David Smith
DEFENDANT/RESPONDENT: Ronglan Shang

CALIFORNIA CASE NUMBER (if any assigned by court):

SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS IN ACTION PENDING OUTSIDE CALIFORNIA

CASE NUMBER (of action pending outside California): CL 2014-05862

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known)*:
Google, Inc., Custodian of Records, 1600 Amphitheatre Parkway, Mountain View, CA 94043

1. **YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:**

To *(name of deposition officer)*: Thomas F. Urban II, Esq.
On *(date)*: December 8, 2014 At *(time)*: 10:00 a.m
Location *(address)*: 6066 Leesburg Pike, #400, Falls Church, VA 2

Do not release the requested records to the deposition officer prior to the date and time stated above.

a. ☑ by delivering a true, legible, and durable **copy** of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.

b. ☐ by delivering a true, legible, and durable **copy** of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).

c. ☐ by making the **original** business records described in item 3 available for inspection at your business address by the attorney's representative and permitting **copying** at your business address under reasonable conditions during normal business hours.

2. *The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records must be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.*

3. The records to be produced are described as follows *(if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified)*:
All e-mail messages between lawyercheng18@gmail.com and sdsd1505@163.com since 1/1/11

☐ Continued on Attachment 3 *(use form MC-025)*.

4. Attorneys of record in this action or parties without attorneys are *(name, address, telephone number, and name of party represented)*: Heidi Meinzer, Esq., 114 North Alfred St., Alexandria, VA 22314 (703) 548-1915
Thomas F. Urban II, P.O. Box 321043, Alexandria, VA 22320 (703) 861-5235

☐ Continued on Attachment 4 *(use form MC-025)*.

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-035 [Rev. January 1, 2012]

Code of Civil Procedure, §§ 2029.100–2029.900, 2020.410–2020.440; Government Code, § 68097.1
www.courts.ca.gov

PLAINTIFF/PETITIONER: Shaoming Cheng and David Smith DEFENDANT/RESPONDENT: Ronglan Shang	CASE NUMBER (of action pending outside California):

5. **If you have been served with this subpoena as a custodian of consumer or employee records under Code of Civil Procedure section 1985.6 *and* a motion to quash or an objection has been served on you, a court order or agreement of the parties, witnesses, and consumer or employee affected must be obtained before you are required to produce consumer or employee records.**
6. ☐ Other terms or provisions from out-of-state subpoena, if any *(specify)*:

☐ Continued on Attachment 6 *(use form MC-025)*.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

(TITLE)

PROOF OF SERVICE OF SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Subpoena for Production of Business Records In Action Pending Outside California* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*: Google, Inc. Custodian of Records
   b. Address where served: 1600 Amphitheatre Parkway, Mountain View, CA 94043
   c. Date of delivery: d. Time of delivery:
   e. Witness fees and mileage both ways *(check one)*:
      (1) ☐ were paid. Amount: ..... $ _____
      (2) ☐ were not paid.
      (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*: $ _____
   f. Fee for service: ..... $ _____
2. I received this subpoena for service on *(date)*:
3. ☐ I also served a completed *Proof of Service of Notice to Consumer or Employee and Objection* (form SUBP-025) by personally delivering a copy to the person served as described in 1 above.
4. Person serving:
   a. ☐ Not a registered California process server
   b. ☐ California sheriff or marshal
   c. ☐ Registered California process server
   d. ☐ Employee or independent contractor of a registered California process server
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b)
   f. ☐ Registered professional photocopier
   g. ☐ Exempt from registration under Business and Professions Code section 22451
   h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.
Date:

(SIGNATURE)