COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	BOSTON MUNICIPAL COURT CENTRAL DIVISION
PAM LERNER JEWELRY, INC., dba PAGEO, and GEORGE PELZ, Plaintiffs, v. LINDA G. DOE, Defendant.	CIVIL ACTION NO. 07-2075-H

NON-PARTY YELP INC.'S OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

Yelp Inc. ("Yelp") maintains the popular website www.yelp.com ("Yelp site") where members of the public may, free of charge, both write reviews about their experiences with local businesses, and read what other members of the public have posted. On February 28, 2015, a Yelp user using the screen name "Linda G." posted a review on the Yelp business listing for plaintiff Pageo, a jewelry store, in which she described her experience as a Pageo customer and with plaintiff George Pelz, Pageo's owner. Plaintiff Pelz publicly responded to Linda G.'s review on March 7, 2015, and Linda G. responded to plaintiff Pelz's comment on March 15, 2015. Both plaintiff Pelz's comment and Linda G.'s response are available on the Yelp Site.

On July 27, 2015, plaintiffs brought suit against defendant Linda G., alleging that her review of plaintiffs is false and defamatory. This proceeding arises out of a Massachusetts subpoena that plaintiffs served on Yelp's registered agent in Boston, Massachusetts, seeking identifying information regarding Linda G. But plaintiffs have not met the constitutional requirements for stripping an anonymous speaker of the First Amendment right to speak anonymously, such as making an evidentiary showing that the statements about plaintiffs are false. Moreover, Massachusetts lacks jurisdiction to enforce subpoenas to non-party foreign corporations for records maintained outside the Commonwealth of Massachusetts. Consequently, the subpoena should not be enforced.

FACTS AND PROCEEDINGS TO DATE

Yelp is a corporation organized under the laws of Delaware, with its headquarters in San Francisco, California. Yelp has no offices or real property in Massachusetts. MacBean Affidavit ¶¶ 6, 8. To write reviews on Yelp, a user must register for a free Yelp account. *Id.* ¶ 13. In the registration process, users must provide a first name, last name, valid email address and zip code. *Id.* The first name and the first letter of the last name that is provided by a user are publicly available

on the Yelp Site. *Id.* This is true of the Yelp user at issue here—i.e., the first name ("Linda") and first letter of the last name ("G.") provided by the user are publicly available on the Yelp Site. *Id.* Yelp does not ask users to provide a physical address in order to register a Yelp account, and indeed, Yelp does not have any such information for Yelp user Linda G. *Id.* Users may choose any screen name they like, and may also designate any zip code as their "location." There is no requirement that the user's actual name or actual place of residence be identified (although Yelp encourages users to provide real names, and requires real names for membership in its Elite user program). *Id.* ¶ 4.

Information that Yelp receives from its users is stored in Yelp's administrative database, which is accessible to Yelp's user operations team located in San Francisco, California. *Id.* ¶ 5. The Yelp servers that store this information—including the information plaintiffs seek regarding Linda G.—are not located in Massachusetts. Yelp's Terms of Service and Content Guidelines require reviewers to have actually had a consumer experience with the business reviewed, and to base their posts on personal experiences. *Id.* ¶ 9 and Exhibit B. Posts that Yelp deems in violation of these requirements are subject to removal. *Id.*

Plaintiff Pageo runs jewelry stores located in Newton Center, Nantucket, and Boston, Massachusetts. Plaintiff Pelz owns Pageo. Plaintiffs registered for a free Yelp Business Account for Pageo on April 11, 2014. MacBean Affidavit ¶ 10. A Yelp Business Account allows the account holder to, among other features, communicate publicly or privately with consumers on Yelp's web site, post information about its business (including photos), and track visits to its business's Yelp page. *Id.* Plaintiffs have taken advantage of these features, for example by posting a lengthy description of their business, and by responding to some reviews that Yelp users have posted, including the response to Linda G.'s review that is quoted below. *Id.* The entire set of

reviews, including material posted by plaintiffs, is attached to the MacBean affidavit as Exhibit F.

On February 28, 2015, Yelp user Linda G. posted the following review on the Yelp business listing for plaintiff Pageo:

> Run! Way overpriced, but worse than that is the ethics or LACK THEREOF!!
> My husband, myself and some friends of ours were loyal customers of Pageo Newton, Nantucket and Boston. Together we spent 100s of thousands of dollars on some gorgeous but definitely way overpriced jewelry. It would be cheaper to fly to Italy, get a villa and buy it yourself!
> The reason why am writing today is that at one point I was in a very desperate situation and I sold my diamond ring to George my wedding ring/engagement ring. I was in abusive relationship and was very very desperate. I thought I could trust him since I had given him so much business , but basically gave me not even near one 10th of what it was worth, but I was so desperate I took it so I could find a place to live and get away from my abusive husband who controlled all of our assets... George took all the jewelry that I had ever bought there and gave me peanuts for it!! I had asked him if he could hold onto it and I would give him a good interest if he would just let me borrow to get out of my situation but he was unwilling to do so .. I know he's not a bank, but considering our relationship and if anyone knew the true value of my jewelry it would be him!! He had no heart no soul.... Disgusting to take advantage of a woman like that!! The least he could have done was send me somewhere else, somewhere where I could have received at least half of what it was worth!
> Incredibly at a later point I went to a fundraiser where they were raising money for abused women and different artists were donating their paintings and guess who sat at the same table? yes that's right the man who basically ripped me off when I was so down and out I could not believe he was at a fundraiser for abused women and sitting right next to me , I think he was with his sister , sister in law? If that's not a hypocrite I don't know what it is I say stay away-for many many reasons thank you!!
> One word to end GROSS!!!

On March 7, 2015, plaintiff Pelz publicly responded to Linda G.'s review by posting the following:

> You are a Yelp Terrorist. How do you respond to a complete fabrication? There is not a single word of truth in the Linda G. post. This "story" is complete fiction.
> The Boston Globe today had an article about situations like this and they said:
>
> "The Yelp! terrorists are far fewer in number than the average users, who post simply to be helpful or funny. So let's not let them win."
>
> I was advised by yelp to not publicly respond to this post and to "Flag" it. They

> would deal with it within 5 business days. They have not.
> I hope Yelp does the right thing and remove this libel from their site.

On March 15, 2015, Yelp user Linda G. responded to plaintiff Pelz's comment, by posting the following:

> I am so not surprised By your comment George!
> I have written 6 reviews in my life time which anyone smart enough can see that to be true.
> Very interesting how your first message was that you would like to know my last name and try to make it right. What happened to that response? Hmmm
> The fact that you wanted to know my last name show either you have scammed and ripped off many other vulnerable and desperate women who had to sell their jewelry in order to escape from controlling and abusive men or just a ploy as your second comment displays.
> A yelp terrorist!! One word ,LAUGHABLE!
> I have gone on with my life and want nothing in return I just thought possibly I could help even if just one other woman from being scammed by YOU!
> What comes around goes around.
> Good luck to YOU!

Plaintiff Pelz contacted Yelp's Support Center on March 2, 2015 and March 9, 2015, requesting that Linda G.'s review be removed from the Yelp Site. *Id.* ¶ 15 and Exhibit E. Yelp examined the review, determined that it appeared to reflect the user's personal experience and opinions, consistent with Yelp's Terms of Service and Content Guidelines, and responded to plaintiff's inquiries on March 6, 2015 and March 12, 2015, respectively, stating that it had evaluated the review and opted to leave it on the Yelp Site. *Id.*

On July 27, 2015, plaintiffs filed a complaint against Linda G. Doe, alleging claims for libel and intentional infliction of emotional distress. Yelp was not named as a party. On August 6, 2015, plaintiffs issued a Massachusetts subpoena to Yelp seeking the deposition of the "Keeper of Records," as well as the production of documents, regarding the "name and address" of defendant Linda G. Doe. Motion to Compel, Exhibit 2. Plaintiffs delivered the subpoena to Yelp's registered

agent for service of process, National Registered Agents, Inc. ("NRAI"), in Boston, Massachusetts on August 12, 2015. Sardo Affidavit ¶ 4. NRAI does not have (or have access to) any of the information that plaintiffs seek regarding Yelp user Linda G. MacBean Affidavit ¶ 5.

Pursuant to Massachusetts Rule of Civil Procedure 45(d)(1),Yelp promptly served written objections on August 13, 2015, asserting (among other things) that this Court lacked subpoena jurisdiction, and accordingly that the subpoena should be domesticated in California, and arguing further that enforcement of the subpoena would violate the First Amendment right of Doe to speak anonymously absent the proper legal showing by the plaintiffs. Sardo Affidavit ¶ 5 and Exhibit H Motion to Compel Exhibit 1. In its objections, Yelp offered to speak with plaintiffs' counsel about the subpoena, if counsel so chose.

But plaintiffs ignored Yelp's offer to meet and confer about the subpoena, and instead filed this motion to compel on August 18, 2015, noticed for hearing on September 1, 2015 (one day **before** the compliance dates set forth in the subpoena), in violation of Boston Municipal Court Joint Standing Order 1-04: Civil Case Management.[1] Plaintiffs sent a copy of their motion to Yelp's California counsel by first-class mail, which Yelp received the evening of August 25, 2015, two days before a brief in response was due to be filed with the Court. Sardo Affidavit ¶ 6. The motion did not contain any certificate of counsel stating that counsel had met and conferred with Yelp's counsel

[1] "Before filing any discovery motion, including any motion for sanctions or for a protective order, counsel for each of the parties shall confer in good faith to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of counsel for the moving party to arrange for the conference. Any motion to compel discovery shall include a certificate of counsel filed by the moving party certifying that he has conferred with opposing counsel as required by this section."

before filing the motion, as required by Section III.D.4 of the Standing Order cited above.

Yelp promptly emailed plaintiffs' counsel, Timothy Lynch, on August 28, 2015, pointing out that his motion was premature, offering again to meet and confer. Sardo Aff. ¶ 7 and Exhibit I. Mr. Lynch again ignored Yelp's offer to meet and confer and its request that he withdraw the improperly filed motion. Yelp accordingly retained undersigned counsel, Mr. Levy, who contacted Mr. Lynch to discuss the subpoena and seek an extension of time to respond. Mr. Levy provided Mr. Lynch with links to the forms that he could complete to domesticate his subpoena in California, and explained that Mr.Lynch need not obtain letters rogatory or local counsel in California to domesticate the subpoena. Levy Aff. ¶ 3 and Exh. A. Mr. Lynch agreed to postpone the hearing on the motion to compel. Counsel also discussed the subpoena and Yelp's objections. Mr. Lynch agreed to discuss with his clients the possibility of providing Yelp with an affidavit in support of their claims against Linda G. Doe, in an effort to comply with the First Amendment test applied by many state and courts; Mr.Lynch also agreed to discuss the possibility of domesticating the subpoena in California. *Id.*

However, plaintiffs' counsel has not provided any such affidavits and has taken no steps to domesticate the subpoena. Hence, Yelp now files this brief in opposition to the motion to compel.

ARGUMENT

I. PLAINTIFFS HAVE NOT MET THE CONSTITUTIONAL REQUIREMENTS FOR USING STATE POWER TO IDENTIFY THEIR ANONYMOUS CRITICS.

A. The First Amendment and Massachusetts Constitution Protect the Right to Speak Anonymously.

Even if this dispute is properly resolved in Massachusetts, Yelp's constitutional objections should be upheld because the First Amendment limits the compelled identification of anonymous

Internet speakers. The First Amendment protects the right to speak anonymously. *E.g., Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995):

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, **an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment**.
>
> * * *
>
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
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> *McIntyre*, 514 U.S. at 341-342, 356 (emphasis added).

The Supreme Judicial Court endorsed the constitutional right to speak anonymously in *Commonwealth v. Dennis*, 368 Mass. 92, 96-97, 329 N.E.2d 706, 708-09 (1975).

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

514 U.S. at 347.

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

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

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship,*

Audiences and Anonymous Speech, 82 Notre Dame L. Rev. 1537 (2007).

Indeed, in a number of cases, plaintiffs have succeeded in identifying their critics and then sought no further relief from the court. Thompson, *On the Net, in the Dark*, Cal. Law Week, Volume 1, No. 9, at 16, 18 (1999). A federal appeals court recently sanctioned a lawyer who used subpoenas to identify anonymous defendants, not with any intention of litigating against them but in the hope of extorting quick settlements through the threat of public shaming. *Mick Haig Productions v. Does 1-670*, 687 F.3d 649, 652 (5th Cir. 2012). The Court noted that other courts had encountered similar misuse of subpoenas by other lawyers. *Id.* n.2. *See also A.F. Holdings v. Does 1-1058*, 752 F.3d 990 (D.C. Cir. 2014).

Lawyers who represent plaintiffs in cases against anonymous detractors have also urged clients to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* In *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), *aff'd*, 540 F.3d 179 (3rd Cir. 2008), a company filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and dismissed the suit without obtaining any judicial remedy other than removal of anonymity. Even the pendency of a subpoena may have the effect of deterring other members of the public from discussing the plaintiff.

As one court said in denying identification of anonymous Internet speakers, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic

First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). *See also Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal 1999):

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

Moreover, because the Supreme Judicial Court has held that the Massachusetts constitution should be interpreted at least as broadly as the cognate provisions of the United States Constitution, *Hosford v. School Comm. of Sandwich*, 421 Mass. 708, 712 n.5 (1996); *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 268-69 (1993); *Colo v. Treasurer and Receiver Gen.*, 378 Mass. 550, 558 (1979); *Commonwealth v. Sees*, 374 Mass. 532, 536-37 (1978), the Massachusetts Constitution also requires strict scrutiny of any claim of state power to compel identification of an anonymous speaker.

"In order to justify a restraint on protected expression, such as compulsory disclosure of the source of a political leaflet, the State must demonstrate that there is a compelling State interest in such a restraint." *Commonwealth v. Dennis*, *supra*, 368 Mass. at 99, 329 N.E.2d at 710.[2] The mere fact that a plaintiff has filed suit does not create a compelling government interest in taking away a defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005).

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[2]Although the *Dennis* case involved a political leaflet, commentary about businesses and their products also receives full protection under the First Amendment. *See generally Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984).

B. The First Amendment and Massachusetts Constitution Require Plaintiffs to Meet Procedural and Substantive Standards Before Using State Power to Compel Identification of Their Critics.

Courts have drawn on the media's privilege against revealing sources in civil cases, *Wojcik v. Boston Herald*, 60 Mass. App. Ct. 510, 517, 803 N.E.2d 1261, 1267 (2004), *citing Bruno & Stillman v. Globe Newspaper Co.*, 633 F.2d 583, 598-599 (1st Cir. 1980)*; Ayash v. Dana-Farber Cancer Inst.*, 46 Mass. App. Ct. 384, 390, 706 N.E.2d 316, 320 (1999); *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), to form a similar rule protecting identity of anonymous Internet speakers. The leading decision, *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), established a five-part standard that became a model followed or adapted throughout the country:

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

This "*Dendrite*" test, or variations on the test, have found broad acceptance in state appellate courts across the country—evidence of wrongdoing rather than mere allegations, is required in every one of the dozen states, in addition to the District of Columbia, that has decided the question. The

main difference among these courts is whether to adopt *Dendrite*'s final balancing stage.

The following state appellate courts have endorsed the entire *Dendrite* test including the final balancing stage:

> *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007): A private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following *Dendrite*, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.
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> *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009): The court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing of] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.
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> *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010): A mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the *Dendrite* test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.
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> *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011): The court required a city council chair to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.
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> *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012): The Court reversed on order allowing the recently retired head of a local charity to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account, because he had provided no evidence that the accusation was false.

Several other state appellate courts have followed a summary judgment or prima facie

evidence standard without express balancing:

> *Doe No. 1 v. Cahill*, 884 A.2d 451, 456 (Del. 2005): The Delaware Supreme Court reversed a trial court decision ordering a local newspaper chain to identify a user who had posted comments in a community forum claiming that a member of the city counsel was mentally unbalanced and, purportedly, implying describing his sexual orientation by misspelling his name "Gahill."
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> *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. App. 2008): The Sixth Appellate District reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as "a management consisting of boobs, losers and crooks."
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> *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007): The court granted mandamus reversing a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.
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> *Solers v. Doe*, 977 A.2d 941 (D.C. 2009): The court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.
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> *Doe v. Coleman*, 436 S.W.3d 207, 211 (Ky. Ct. App. 2014): The Kentucky Court of Appeals granted a writ or prohibition, overturning a trial court order that refused to quash a subpoena seeking to identify anonymous speakers who had criticized the chairman of the local airports board, because the trial court had not required the plaintiff to set forth a prima facie case for defamation under the summary judgment standard.

Most recently, the Washington Court of Appeals endorsed the evidence requirement, while putting off for another day the question whether to have a balancing stage, noting that the record before the court contained no information to which the balancing stage could be applied. *Thomson v. Doe*, — P.3d —, 2015 WL 4086923, at *8 (Wash. Ct. App. July 6, 2015).[3]

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[3] Intermediate appellate courts in two other states have refused to create special procedures pursuant to the First Amendment because they concluded that existing state procedural rules provided equivalent protections, giving Doe defendants the opportunity to avoid being identified pursuant to subpoena if the plaintiff cannot establish a prima facie case. In Illinois, two appellate panels relied on Illinois court rules that already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Maxon v.*

The state and federal courts in northern California, where Yelp has its office and where it maintains the documents whose production is sought and where, as argued below, the subpoena should properly be served, apply either the *Dendrite* balancing test, *Highfields Capital Mgmt. v. Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005); *Art of Living Foundation v. Does 1-10*, 2011 U.S. Dist. LEXIS 88793 (N.D. Cal. Nov. 9, 2011), or its *Cahill* variant without balancing. *E.g.*, *Krinsky v. Doe 6*, 72 Cal. Rptr.3d 231 (Cal. App. 2008). Many other federal courts have done so as well.[4]

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to secure enforcement of a subpoena to identify Doe defendants is too onerous a burden because plaintiffs who can likely succeed on the merits of their claims will be unable to present such proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in

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Ottawa Pub. Co., 929 N.E.2d 666 (Ill. App. 2010); *Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011). In Michigan, a panel of the Court of Appeals said that an anonymous defendant could obtain a protective order against discovery, deferring enforcement of an identifying subpoena while he pursued a motion for summary disposition either on the face of the complaint or for failure to produce sufficient evidence of defamation. *Thomas M. Cooley Law School v. John Doe 1*, 833 N.W.2d 331 (Mich. App. 2013). Because the court deemed these state-law procedures adequate to meet First Amendment standards, and accordingly reversed the trial court's order enforcing the plaintiff's subpoena, it declined to decide whether special First Amendment procedures might be needed in some cases. The court recognized that a later case might impel it to adopt the *Dendrite* approach, or that rulemaking by the state supreme court might provide a good basis for the adoption of that standard. A second appellate panel expressly endorsed *Dendrite* but declined to impose it directly because of the prior panel holding. *Ghanam v. Does,* 845 N.W.2d 128 (Mich. App. 2014).

[4] Additional cases showing that the *Dendrite* standard is one that allows plaintiffs with meritorious cases to succeed, are *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*," quoting *SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int'l v Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); and *Sinclair v. TubeSockTedD*, 596 F. Supp.2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard).

identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011); *Does v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004); *see also In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (following "reasonable possibility or reasonable probability of success" standard derived from *Dendrite*). Indeed, in *Immunomedics v. Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery.[5]

Parties seeking to identify their online critics also argue that subpoenas to identify alleged anonymous defamers do not even implicate the First Amendment because false speech is unprotected. But that argument fails, not least because the Supreme Court of the United States has held that even false speech can be protected by the First Amendment unless the plaintiff shows that the statements can overcome the various hurdles imposed by the First Amendment for defamation liability. *United States v. Alvarez*, 567 U.S. —, 132 S. Ct. 2537, 2545 (2012). The filing of a complaint is not tantamount to a showing of liability for defamation; plaintiffs have done no more than file a complaint alleging that false negative statements have been made about them and have caused injury.

C. Plaintiffs Have Not Made the Requisite Showing.

[5] Yelp supports the adoption of *Dendrite*'s express balancing stage, comparable to the test for grant or denial of a preliminary injunction, considering the likelihood of success and balancing the equities. However, on the current record, there is no basis for applying the balancing stage one way or the other, and in any event plaintiffs have failed to satisfy the fourth step of the test by making an evidentiary showing in support of their claims against Linda G.

Plaintiffs have not met the *Dendrite / Cahill* test. In particular, despite Yelp's repeated requests, plaintiffs have produced no evidence that any of the statements made about them by Linda G. are defamatory, or that they have caused damage to plaintiffs' business reputation. Plaintiffs were given every opportunity to submit such evidence, in that the constitutional requirement was noted both in Yelp's written objections and in its counsel's efforts to meet and confer. For that reason (as well as the jurisdictional reason argued below) the motion to compel discovery regarding the identity of Linda G. Doe should be denied, without prejudice to being renewed with proper evidence and in a court of proper jurisdiction.

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

When jurisdiction is challenged, the plaintiff bears the burden of establishing an evidentiary basis for the jurisdiction. *Miller v. Miller*, 448 Mass. 320, 325, 861 N.E.2d 393, 398 (2007); *Droukas v. Divers Training Acad., Inc.*, 375 Mass. 149, 151, 376 N.E.2d 548, 549 (1978). Pageo offers three conclusory bases for its contention that it is entitled to compel Yelp to respond to a Massachusetts subpoena—that Yelp carries postings about Massachusetts businesses, that it has sought employees in Boston, and that the conduct alleged against defendant Linda G. Doe caused tortious injury in Boston. Motion to Compel, ¶¶ 7-12. None of these arguments can succeed.

These facts might have some bearing if plaintiff sought to exercise personal jurisdiction to sue Yelp for allowing Linda G. Doe to post her allegedly defamatory reviews. But plaintiffs have not sued Yelp, which is, in fact, immune under federal law from being sued for defamation over materials that its users have posted. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007). Plaintiffs ask the Court to exercise subpoena jurisdiction over a non-party who

cannot lawfully be sued in Massachusetts for the wrong alleged in the complaint.

"It is axiomatic that "[t]he underlying concepts of personal jurisdiction and subpoena power are entirely different." *Yelp, Inc. v. Hadeed Carpet Cleaning,* 770 S.E.2d 440, 443 (Va. 2015). Unlike personal jurisdiction to impose liability on a party under state long-arm statutes, which is now regulated by the "minimum contacts" analysis of the Fourteenth Amendment's Due Process Clause, the traditional view taken by states across the country is jurisdiction to enforce subpoenas directed to non-parties remains limited to individuals and companies subject to the state's sovereign power under *Pennoyer v. Neff,* 95 U.S. 714 (1877). Under that power, subpoenas can only be served on persons who are present in the jurisdiction, for documents that are located in the jurisdiction. So far as counsel have been able to discover, every state that has addressed the question has limited its subpoena jurisdiction in that manner.[6]

That is why every state has adopted some version of the Uniform Interstate Depositions and Discovery Act or its predecessor, the Uniform Interstate and International Procedure Act. In Massachusetts, the relevant statute is Mass. Gen. Laws Ann. ch. 223A, § 10; in California the

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[6] *Yelp, Inc. v. Hadeed Carpet Cleaning,* 770 S.E.2d 440, 443 (Va. 2015); *CMI, Inc. v. Alejandro Ulloa*, 133 So.3d 914 (Fla. 2013); *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 733-734 (Colo. 2012); *Laverty v. CSX Transp.*, 404 Ill. App. 3d 534, 538, 956 N.E.2d 1 (2010); *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121 (Miss. 2005); *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okl. App. 1995); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186, 1187-1188 (La. 1994); *Armstrong v. Hooker*, 135 Ariz. 358, 359, 661 P.2d 208, 209 (Ariz. App. 1982); *John Deere Co. v. Cone*, 239 S.C. 597, 603, 124 S.E.2d 50, 53 (S.C. 1962). *See also Cates v. LTV Aerospace Corp.*; 480 F.2d 620, 623-624 (5th Cir. 1973) (subpoena cannot command production of documents in federal district court different from the one in which the documents are maintained); *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956), *rev'd on other grounds,* 354 U.S. 156 (1957) (same); *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 479 N.Y.S.2d 528 (N.Y. A.D. 1984) (trial court subpoena to non-party witness could not be enforced; proper procedure is to secure commission to seek discovery under authority of court in witness's own state).

provisions are contained in sections 2029.100 *et seq.* of the California Code of Civil Procedure. California has made it particularly easy for out-of-state parties to obtain California process in aid of civil suits in their own jurisdictions by providing that a request for an issuance of a subpoena in aid of out-of-state proceedings "does not constitute making an appearance in the courts of this state," section 2029.300(a), and hence may be effected by the party's out-of-state attorney. These provisions would rarely be needed if Pageo's expansive notions of subpoena jurisdiction were sound, expanding Massachusetts' power to subpoena anybody who communicates through Internet web pages accessible in Massachusetts and to any company that is engaged in interstate commerce including Massachusetts.

The fact that Yelp complies with Massachusetts law by registering an agent for service of process does not subject Yelp to subpoena jurisdiction in Massachusetts. Several courts have expressly rejected the proposition that having a registered agent for service of process subjects the corporation to subpoena jurisdiction that would not otherwise exist. *Yelp, Inc. v. Hadeed Carpet Cleaning,* 770 S.E.2d 440, 443 (Va. 2015); *CMI, Inc. v. Alejandro Ulloa*, 133 So.3d 914 (Fla. 2013); *Ariel v. Jones*, 693 F.2d 1058, 1060-1061 (11th Cir. 1982). For example, in *Syngenta Crop Prot. v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005), the Court said "[t]here is no doubt that the statutory language stating that a foreign corporation's registered agent is that corporation's agent 'for service of process, notice or demand required or permitted by law to be served on the foreign corporation,' does not authorize a party's service of a subpoena duces tecum upon nonresident nonparties." Similarly, in *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186, 1187-1188 (La. 1994), the court said, "A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. Finding CKB subject

to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this Texas corporation is bound to respond to a subpoena, duly received, by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party."

The only case that Pageo invoked is *Netezza Corp. v. Intelligent Integration Sys.*, 27 Mass. L. Rptr. 551, 2010 WL 5490131 (Sussex Cy. Super Ct. Oct. 26, 2010), but Judge Hinkle's opinion expressly declined to address the question, litigated in other states, whether any corporation could be subjected to subpoena jurisdiction in Massachusetts just because it had a registered agent in Massachusetts, because in *Netezza*, the company had several plants in Massachusetts:

> IBM has substantial presence in the Commonwealth: the largest IBM software development lab in North America—which houses 3,400 of IBM's leading experts—is located in Littleton, and IBM operates additional facilities in Cambridge, Waltham and Westford.
>
> *Id.* at *4 (Mass. Super.)

Here, it is undisputed both that Yelp has no facilities and no physical presence in Massachusetts, and that all of the information that plaintiffs seek is located in California. Consequently, *Netezza* affords no support for Pageo's assertion of subpoena jurisdiction here.

Pageo also relies in large part on the language of Rule 45(d)(2), and the fact that the subpoena purports to schedule the deposition and production of records at plaintiffs' counsel's office in Boston, Massachusetts, which is near the location of the service, although nearly 3,100 miles from Yelp's headquarters in San Francisco, California, where the records and custodian of records are located. But although Rule 45(d)(2) may permit service of a subpoena on a nonresident non-party in limited circumstances, service and jurisdiction are entirely different concepts. The Rule does not purport to address the issue of subpoena jurisdiction over a non-party such as Yelp that has no physical presence in the Commonwealth and where the records and custodian of records are located

thousands of miles away. To interpret Rule 45(d)(2) otherwise would lead to the illogical result that a resident of Massachusetts may be subpoenaed only within 50 miles of his residence, place of employment, or place of business, but that a nonresident that is located anywhere in the world is subject to Massachusetts' subpoena power simply because it has a registered agent within the state.

CONCLUSION

The motion to compel compliance with Pageo's subpoena should be denied, and Yelp's objections should be upheld.

Respectfully submitted,

Paul Alan Levy (pro hac vice sought)
plevy@citizen.org

Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202) 588-1000

T. Christopher Donnelly, BBO #129930
tcd@dcglaw.com
Kelly A Hoffman, BBO # 673409
kah@dcglaw.com
Donnelly, Conroy & Gelhaar, LLP
One Beacon Street, 33rd Floor
Boston, Massachusetts 02108
(617) 720-2880

Counsel for Yelp Inc.

September 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2015, I caused a copy of the foregoing opposition and accompanying affidavit and exhibits to be served hand on counsel for plaintiff as follows:

Timothy G. Lynch, Esquire
Swartz & Lynch, LLP
45 School Street
Boston Massachusetts 02108

T. Christopher Donnelly