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BY EMAIL (rdelaney@beankinney.com) AND FAX (703-525-2207)

September 4, 2012

Raighne C. Delaney, Esquire
Bean, Kinney & Korman PC
2300 Wilson Blvd., 7th Floor
Arlington, VA 22201

Re: *Hadeed Carpet Cleaning, Inc. v. John Doe I, et al.*
No. CL12003401 (Circuit Court, City of Alexandria)
Detailed Objections to Subpoena

Dear Mr. Delaney:

I write on behalf of Yelp Inc., to respond to the subpoena duces tecum dated July 27, 2012, which was served on third-party Yelp Inc.'s agent for service of process in the above-entitled matter. The subpoena demands production in Virginia of various electronic business records located at Yelp's offices in San Francisco, California. Yelp objects to the subpoena on three principal grounds.

First, the subpoena seeks documents and information located in California through a Virginia subpoena—none of the documents sought can be found in Virginia, and all are located at Yelp's California offices. This poses statutory, constitutional and contractual barriers to enforcement. Virginia's subpoena power does not extend to records located in California. *See, e.g.*, Legal Ethics Opinion 1495, <http://www.vacle.org/opinions/1495.htm> (“[I]t would be improper and violative of DR 1-102(A)(4) for a Virginia attorney to request a Virginia court to issue a subpoena duces tecum to obtain documents from an out-of-state individual, knowing that such subpoena is not enforceable.”) The report of the Boyd Graves Conference, which you furnished during our earlier discussions about the issue, confirms that there is no clear authority in Virginia for compelling an out-of-state third party to provide documents located out of state in response to a Virginia subpoena. Given the serious constitutional due process objections to enforcement of the subpoena against a California company, Virginia law should not be construed to require production of the records.

Indeed, there is no specific jurisdiction over Yelp in this case—Yelp is immune from any liability for allegedly tortious comments, even comments about Virginia companies, that is posted on its web site by its users, 47 U.S.C. § 230, *Zeran v AOL*, 129 F.3d 327 (4th Cir. 1997). Indeed, to the extent that Hadeed advertises on Yelp, and seeks to exert specific jurisdiction, it agreed to Yelp's terms of service which, among other things, include Hadeed's consent to “exclusive” personal jurisdiction and “exclusive” venue, thus committing Hadeed to resolve all disputes between the parties in the state or federal courts in the County of San Francisco, California. Yelp is not subject

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to general jurisdiction in Virginia, having no offices or any other real property in Virginia. Certainly, it would be unfair to hold that, simply because Yelp has an agent for service of process in Virginia, so that it can, in appropriate circumstances, be served with process conveniently when it is named as a party in a lawsuit, the very act of making that agent for the convenience of Virginia litigants subjects Yelp to general jurisdiction in Virginia. Consequently, it would be a violation of constitutional due process for Yelp to be held responsible for producing in Virginia documents located only in Yelp's office in California, when principles of federalism and state sovereignty call for Virginia to respect California's authority over its own citizens by following the accepted procedures of the Uniform Act.

I note that it is not difficult for you to domesticate your Virginia subpoena in California – you need not even find a member of the California Bar to get the subpoena issued.

Second, you have not met the legal requirements for obtaining identifying information about Yelp's anonymous Internet users. Because the First Amendment protects the right to speak anonymously, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), appellate courts through the United States have agreed that, when a party seeks to invoke court process to identify anonymous speakers so that they can be sued, the party must first plead proper claims and produce evidence sufficient to make out a prima facie case of the claims on which the lawsuit is based. *E.g.*, *In re Indiana Newspapers*, 963 NE2d 534 (Ind. App. 2012); *Pilchesky v. Gatelli*, 12 A.3d 430 (2011); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (DC 2009); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

This test is similar to the requirements of *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000), *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), and Section 8.01-407.1 of the Virginia Code, which specifically provide for the consideration of evidence as well as pleadings, and require a showing that the identities of anonymous defendants are "centrally needed to advance the claim." Unless there is a good evidentiary reason to believe that Hadeed's defamation claim can be successful, there is no basis for depriving Yelp's users of their anonymity. Moreover, although the *America Online* is often cited as setting forth a more permissive standard than cases such as *Dendrite* and its progeny, the case was decided before *Dendrite* developed the test requiring proof of falsity and the other key elements of the plaintiff's claim. If presented with the issue, we believe that the Virginia courts would join the national consensus standard on this issue.

Finally, several of the objections that Yelp raised to your original subpoena are still of concern. Because the subpoena seeks all documents for the users that "relate in any way" to Hadeed, rather than merely documents sufficient to identify the individuals responsible for specifically identified reviews, this aspect of the subpoena is overbroad. For example, it could include private

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messages exchanged between Yelp users about Hadeed that would be subject to the protections of the Stored Communications Act (18 U.S.C. §§ 2701, et seq.). These overbroad requests also could encompass other non-review content on Yelp that are not reasonably accessible to Yelp, such as revised or edited reviews or Yelp "Talk" postings. Hence including them within the scope of Yelp's document search obligation renders the subpoena impermissibly overbroad and burdensome.

Consequently, Yelp will not be producing documents in response to your subpoena in its current form. If you file a motion to compel production, we will oppose that motion.

Sincerely yours,


Paul Alan Levy

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Attorneys for Yelp, Inc.

September 4, 2012

cc: Hon. Edward Semonian Jr.
Clerk of Court, Alexandria Circuit Court