CIRCUIT COURT OF HENRICO COUNTY, VIRGINIA

USHA RAJAGOPAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CL 10-3014
	)	
JOHN DOES,	)	
	)	
Defendants.	)	

DEFENDANT JOHN DOE'S (CANNOLI38'S) MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA AND FOR SANCTIONS

INTRODUCTION

Seeking to avoid an anti-SLAPP statute in her home state of California, Dr. Usha Rajagopal has filed a lawsuit in this Court for the apparent purpose of intimidating five individuals into removing their online comments critical of her San Francisco plastic surgery practice.[1] In furtherance of her lawsuit, Dr. Rajagopal has subpoenaed from Google the identities of the five speakers. Dr. Rajagopal's efforts are troubling in light of the comments she has targeted: those referencing a *San Francisco Weekly* article reporting that she hired a consultant who manipulated her Google page rank and manufactured positive online reviews. All the while Dr. Rajagopal has been on probation after stipulating that the Medical Board of California could "establish a factual basis" for charges that a patient of hers went into a vegetative state due to her "gross negligence."

STATEMENT OF THE ISSUES

1. Before authorizing subpoenas that would strip individuals of their right to speak anonymously, courts require plaintiffs to make a preliminary showing on the merits of their case. Dr. Rajagopal's subpoena included nothing about the merits of her case, and her complaint is meritless. Should the subpoena be quashed?

2. Under section 8.01-271.1 of the Virginia Code, sanctions are appropriate against a party or the party's attorney where claims in legal papers are not well grounded in fact or warranted by existing law, and where claims are made for any improper purpose. Dr.

[1] John Doe cannoli38 appears before this Court for the limited purpose of opposing the subpoena. Cannoli38 does not waive a personal jurisdiction defense. *See Loyet v. Thompson*, 1999 WL 262438, at *1 (Va. Cir. Ct. Mar. 15, 1999) ("[A] motion to quash may preserve the special appearance asserted."). Although counsel represents only defendant cannoli38, most of the arguments in this motion apply equally to all five defendants.

Rajagopal's claims are plainly groundless, because the speech of which she complains is based on an article and California Medical Board decision, and she apparently filed suit in Virginia to avoid California law and intimidate the defendants into voluntarily removing their online comments. Should Dr. Rajagopal and her attorney be sanctioned?

STATEMENT OF THE CASE

1. "If you type the terms 'San Francisco' and 'plastic surgery' into the Google search engine," begins Ashley Harrell's September 15, 2010 article in the San Francisco Weekly, "the first business that comes up is the San Francisco Plastic Surgery & Laser Center," owned by Dr. Usha Rajagopal. Exh. 1 at 1. Dr. Rajagopal's online reviews are stellar. She nearly uniformly receives five stars and is described as "an excellent plastic surgeon" and someone "you'd wish . . . was your mother." *Id.* What the reviews do not mention, and what the article reports, is that Dr. Rajagopal hired a consultant who boosted her Google ranking and apparently—in what is known as "astroturfing"—manufactured positive online reviews. *Id.* The article describes, for example, a glowing online review from a woman who had recently undergone breast augmentation surgery. It then describes another online review from a man who had recently had his "man boobs" surgically removed. The author of both posts was "trosecra," and the consultant Dr. Rajagopal hired to boost her business's page rank was named Tracy Rosecrans. *Id.* at 3.

One patient, however, was never able to comment on her experience with Dr. Rajagopal. In October 2007, a 35-year-old, referred to in the article simply as Aminy, sought treatment from Dr. Rajagopal to correct creasing in her forehead resulting from a 2003 eyebrow lift performed by Dr. Rajagopal. After Dr. Rajagopal administered various

anesthetics, but before she began the operation, Aminy became nauseous. By the time the paramedics arrived, Aminy was in ventricular fibrillation. She arrived at the hospital in a comatose state, in which she remained until her death, over two years later. *Id.* at 2, 6.

According to an official complaint by the Executive Director of the Medical Board of California, Dr. Rajagopal is "guilty of unprofessional conduct through gross negligence with regard to her treatment of" Aminy:

- "[Dr. Rajagopal] advised the patient to eat on the morning of surgery, complicating her risks of nausea/vomiting, potential aspiration of gastric contents, and respiratory arrest. The standard practice is for a patient to be 'NPO' ('nil per os,' nothing by mouth) for at least 6 hours prior to a surgical intervention when narcotics are to be administered."

- "[Dr. Rajagopal] failed to provide intra-operative monitoring of the patient's blood pressure, heart rate, cardiac rhythm, and/or oxygen saturation during the administering of the tumescent solution of lidocaine and epinephrine, both of which are independently known to be potentially cardio-toxic. This failure to properly monitor the patient and thereby be able to earlier detect an adverse effect of the narcotics and/or local anesthetics, by itself, constitutes an extreme departure from the standard of care."

- "[Dr. Rajagopal] failed to have qualified nursing personnel, such as a Registered Nurse or a Certified Scrub technician, present during the surgery. This failure, by itself, constitutes an extreme departure from the standard of care."

- "[Dr. Rajagopal] mixed her tumescent solution in a basin rather than according to the standard practice of using a closed system of a 1 liter IV bag of Ringer's Lactate."

- "[Dr. Rajagopal's] tumescent solution contained approximately four times the usual amount of Lidocaine used for this type of procedure in one-third the volume, making the solution much more concentrated, which increased the cardio-toxic risks."

Exh. 2 ¶ 28.

Dr. Rajagopal never contested these allegations. Rather, as the Decision of the Medical Board of California states, under the section labeled "CULPABILITY":

> For the purpose of resolving the Accusation without the expense and uncertainty of further proceedings, [Dr. Rajagopal] agrees that, at a hearing, [the Executive Director of the Medical Board of California] could establish a factual basis for the charges in the Accusation, and that [Dr. Rajagopal] hereby gives up her right to contest those charges.

Exh. 3 ¶ 10. The Medical Board revoked Dr. Rajagopal's medical license but then stayed the revocation, placing her on probation for three years. *Id* at 4.

The *San Francisco Weekly* article also mentions other less-than-satisfied customers of Dr. Rajagopal. At that time the article was written, three civil lawsuits had been filed against Dr. Rajagopal in the San Francisco Superior Court. Exh. 1 at 7.

2. Several people noticed the contrast between Dr. Rajagopal's five-star reviews and their own experiences or the experiences described in the *San Francisco Weekly* article. Two former patients submitted the following comments on maps.google.com:

> ***October 20, 2009***
> ***By Erika***
> ***Titled "Just saw her on TV"***
> I had a procedure about 5 years ago. I was still young then, and just wanted to get the procedure done. Her service was the cheapest compared to other surgeons so I went for it. Dr Raj just saw me once, didn't even tell me how it was gonna look, and just cut me. Now the result is uneven, and I continue to have problems with the outcome. I even had a hematoma after the surgery and the whole experience was just awful. She may be good for some skin rej. type of things but I would never trust her to use a knife ever again.

> ***June 10, 2009***
> ***By Samantha***
> ***Titled "Experience – No Genuine Patient Care . . ."***
> Unethical business. Lack of patient care. Disgrace to the medical health profession. Similar to a fast food joint. Surprised that they have not been shut down. The only thing nice about this place is the time they spent to make the office look nice. If only they cared about their patien[ts] just as much as they do about their interior design. Patien[ts] = $$ to them, nothing more! Be careful!!!!!

Exh. 5 at 2-3. Three people submitted the following comments on maps.google.com after reading the article:

> ***September 17, 2010***
> ***Titled "Beware!"***
> After reading the article in *San Francisco Weekly* re: Dr. Rajagopal, have to wonder about all of the glowing five star reviews. According to the article, this Dr. is on probation for failure to use proper medical procedures, and has also caused the death of a patient due to her complete mishandling of the case. Read on: http://sfweekly.com/2010-09-15/news/doctoring-the-web.
>
> ***September 19, 2010***
> ***By jeff***
> ***Titled "warning about this MD & these postings"***
> See the Sept 15-21 *San Francisco Weekly* for a story about how this doctor hired a consultant to create lots of fake reviews. The article also discloses that the medical board put this physician on probation for making mistakes that put one of her patients in a vegetative comatose state, and the patient later died.
>
> ***October 10, 2010***
> ***By cannoli38***
> ***Titled "Her License Should be Revoked"***
> Just as Jeff said, read the SF Chronicle's article on this doctor. She is responsible for putting a woman into a vegetative state who later died. Rajagopal is a danger who shouldn't be allowed to have a medical license.

Id.

Dr. Rajagopal responded by suing the five people who posted the above comments.[2] Her complaint alleges that they have "conspired together" to "engage[] in a malicious campaign of unlawfully defaming and spreading lies about Dr. Rajagopal." Exh. 4 ¶¶ 5, 8. It alleges defamation, tortious interference with her contracts with existing patients, tortious interference with her potential contracts with future patients, and

[2] Based on a conversation with the *San Francisco Weekly* article's author, counsel for cannoli38 understands that Dr. Rajagopal has not filed suit against the *San Francisco Weekly* or the author of the article.

conspiracy to willfully and maliciously injure her in violation of section 18.2-499 of the Virginia Code. *Id.* ¶¶ 12-28.

In conjunction with her complaint, Dr. Rajagopal subpoenaed Google, demanding the IP address associated with each of the defendants' comments. Under section 8.01-407.1 of the Virginia Code, a subpoena seeking the identities of people communicating anonymously over the Internet must meet several requirements. Because Google is required by statute to provide a copy of all the materials accompanying the subpoena to the anonymous speaker, Va. Code § 8.01-407.1(2), and cannoli38 did not receive these materials, it appears that Dr. Rajagopal did not fully comply with the statute.

ARGUMENT

I. Because the defendants have a First Amendment right to speak anonymously, this Court should require a preliminary showing on the merits before compelling Google to identify the defendants.

A. The First Amendment protects the right to speak anonymously. *Jaynes v. Com.*, 276 Va. 443, 461 (2008); *see Watchtower Bible and Tract Soc'y. of N.Y. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999). From the literary efforts of Mark Twain to the authors of the Federalist Papers, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). As the Supreme Court wrote in *McIntyre v. Ohio Elections Commission*:

> [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.

514 U.S. 334, 341-42 (1995). "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 356.

"[T]he right to communicate anonymously on the Internet falls within the scope of the First Amendment's protections." *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372, at *6 (Va. Cir. Ct. 2000), *rev'd on other grounds*, *Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001). The Supreme Court has treated the Internet as a forum of preeminent importance because it provides any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997). "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas," and therefore "the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded." *McMann v. Doe*, 460 F. Supp. 2d 259, 266 n.35 (D. Mass. 2006) (internal quotation omitted).

B. A court order, even if granted for a private party, is a form of state action and is thus subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). An order to compel production of a person's identity in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see Bates v.*

City of Little Rock, 361 U.S. 516, 524 (1960). Abridgement of the right to speech, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-63; *Bates*, 361 U.S. at 524.

Based on these principles, a growing consensus of courts has recognized that civil subpoenas seeking information regarding anonymous speakers raise First Amendment concerns. *See SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214-15 (W.D. Wash. 2010) (listing cases). These courts recognize that "[i]f Internet users could be stripped of [their] 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).

One of the first decisions to address the standard a court should apply to subpoenas that seek to unmask Internet speakers is the unpublished Virginia Circuit Court decision in *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (2000). Noting that "[t]here appear to be no published opinions addressing this issue either in the Commonwealth of Virginia or any of its sister states," *id.* at *5, the court struck a balance between the First Amendment rights of speakers and the victims of tortious online communications. It concluded that "before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable that court to determine that a true, rather than perceived, cause of

action may exist, must be made." *Id.* at *7. Toward this end, it established the following standard:

> [A] court should only order a non-party, Internet service provider to provide information concerning the identity of a subscriber (1) when the court is satisfied by the pleadings or evidence supplied to that court (2) that the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed and (3) the subpoenaed identity information is centrally needed to advance that claim.

Id. at *8.[3] Codifying a version of this standard, the Virginia Code currently requires a plaintiff like Dr. Rajagopal to provide "supporting material showing . . . [t]hat 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 [tortious conduct]." Va. Code § 8.01-407.1(1).

In the eleven years since *America Online*, numerous courts have addressed what showing a plaintiff must make to discover the identities of anonymous Internet speakers. Reading *American Online* narrowly, these courts have widely rejected its approach.[4] The

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[3] *America Online* declined to adopt an even more rigorous standard out of an interstate comity concern that is not present in this case. *Id.* at *7. ("This Court is unwilling to establish any precedent that would support an argument that judges of one state could be required to determine the sufficiency of pleadings from another state when ruling on matters such as the instant motion.").

[4] *See, e.g.*, *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) ("In our view, [*America Online*'s] 'good faith' standard is too easily satisfied to protect sufficiently a defendant's right to speak anonymously."); *Doe I v. Individuals*, 561 F. Supp. 2d 249, 255 (D. Conn. 2008) (declining to adopt *America Online*'s approach because it "set[s] the threshold for disclosure too low to adequately protect the First Amendment rights of anonymous defendants"); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1167 (Cal. Ct. App. 2008) (refusing to adopt *America Online*'s standard because it "offers no practical, reliable way to determine the plaintiff's good faith and leaves the speaker with little protection"); *Solers,*

case law has instead "begun to coalesce around the basic framework of the test articulated in *Dendrite*." *SaleHoo*, 722 F. Supp. 2d at 1214 (citing *Dendrite Int'l, Inc. v. Doe No. 3,* 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001)). In *Dendrite*, a company sued four anonymous defendants who had criticized it on a Yahoo! bulletin board. 775 A.2d at 759-60. The court set out a five-part standard for evaluating subpoenas that seek to identify anonymous Internet speakers, under which the court should:

> **1. Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
>
> **2. Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
>
> **3. Ensure Facial Validity:** 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;
>
> **4. Require An Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims; and
>
> **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.

Id. at 760-61.

Other courts have adopted slight variations on *Dendrite*. In *Doe v. Cahill*, for example, the Delaware Supreme Court ruled that an elected official who sued over statements attacking his fitness to hold office could identify the anonymous online speakers only if he could put forward sufficient evidence to establish a prima facie case on all elements of a defamation claim within his control, including evidence that the

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Inc. v. Doe, 977 A.2d 941, 952 (D.C. 2009) ("In our view, [*America Online*'s] 'good faith test' insufficiently protects a defendant's anonymity.").

statements were false. 884 A.2d 451, 460, 461 (Del. 2005). Under the *Cahill* standard, plaintiffs should only obtain the requested discovery if they can put forth at least enough evidence to survive a motion for summary judgment. *Id.* at 457. The District of Arizona applied *Cahill's* summary-judgment test in refusing to enforce a subpoena to identify the authors of postings criticizing the Best Western motel chain where the plaintiff did not present any evidence that the Doe defendants had written anything false. *Best Western Int'l, Inc. v. Doe,* 2006 WL 2091695 (D. Ariz. July 25, 2006). And in *McMann v. Doe*, the District of Massachusetts relied on *Cahill* and *Best Western* in rejecting a lawsuit by a homebuilder against the anonymous operator of another critical website. 460 F. Supp. 2d 259. The court denied a motion for leave to subpoena the website's host, holding that the plaintiff had failed to state a claim for any cause of action that justified violating the defendant's First Amendment right to speak anonymously. *Id.* at 268.

Despite minor variations in the tests, each of the cases, including *America Online*, seeks to ensure that First Amendment rights are not trammeled unnecessarily by "consider[ing] the important value of anonymous speech balanced against a party's need for relevant discovery in a civil action." *In re Anonymous Online Speakers*, 2011 WL 61635, at *6 (9th Cir. Jan. 7, 2011). Thus, courts must, at a minimum, review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a sufficient basis for piercing a speaker's anonymity.[5]

[5] *See also, e.g.*, *Pilchesky v. Gatelli*, --- A.3d ----, 2011 WL 17520 (Pa. Super. Ct. Jan. 5, 2011); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Solers*, 977 A.2d 941; *Indep. Newspapers v. Brodie*, 966 407 Md. 415 (2009); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008); *London-Sire*

II. Because Dr. Rajagopal has not made, and cannot make, a preliminary showing on the merits, the subpoena must be quashed.

A. Cannoli38 was not notified of the basis for the subpoena.

Before requiring the disclosure of an anonymous Internet speaker's identity, this Court should require that the speaker be notified and provided a basis for the requested information. Under the Virginia Code, a party seeking information about an anonymous Internet speaker must submit to the subpoenaed party—here, the Internet service provider—two copies of the required supporting materials. Va. Code § 8.01-407.1(2). Among the numerous required materials are those showing "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." *Id.* § 8.01-407.1(1)(a). The subpoenaed party must send those materials by registered mail or commercial delivery service to the anonymous speaker. *Id.* § 8.01-407.1(3).

Dr. Rajagopal has apparently not satisfied the notice requirements of the Virginia Code or the First Amendment. Cannoli38 received an email from Google with one attachment, a subpoena signed by Dr. Rajagopal's counsel, which itself provides nothing more than a copy of five comments submitted on maps.google.com and a demand for

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Records v. Doe 1, 542 F. Supp. 2d 153 (D. Mass. 2008); *Krinsky*, 159 Cal. App. 4th 1154 (Cal. App. 2008); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Highfields Capital Mgmt. v. Doe*, 385 F.Supp.2d 969 (N.D. Cal. 2005); *Sony Music Entm't v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

information about the people who made the comments. Exh. 5. This information was insufficient to satisfy the statute or put the defendants on notice of the claims against them.

B. Dr. Rajagopal's complaint is meritless, and she has provided no evidence supporting its claims.

Under the *Dendrite* standard, a request for the identities of anonymous speakers must contain a prima facie cause of action and evidence supporting each element of the cause of action. *Dendrite*, 775 A.2d at 761. Because Dr. Rajagopal asserted *no* claims in support of her subpoena, let alone evidence supporting each element of those claims, she cannot meet this, or any other, standard. Moreover, based on her complaint, the inadequacy of the claims is clear.

1. Dr. Rajagopal's first claim is for defamation. In a defamation case, the plaintiff bears the burden to show that the defendant published false information that she either knew to be false or of which she negligently failed to ascertain the truth. *Gazette, Inc. v. Harris*, 229 Va. 1, 15 (1985). Statements of opinion are not actionable because they cannot be false. *Fuste v. Riverside Healthcare Ass'n, Inc.,* 265 Va. 127, 132 (2003).

The complaint alleges only that "[d]efendants knew that [their statements] were false or acted negligently in failing to determine the facts on which the statements were based." Complaint ¶ 14. These conclusory pleadings are insufficient under *Dendrite*. They are also wrong. Cannoli38's comment has two components; one is fact, the other is opinion. The opinion component is that "Dr. Rajagopal is a danger who shouldn't be allowed to have a medical license." Because statements of opinion are not actionable, Dr. Rajagopal's allegation cannot be based on this part of cannoli38's comment.

The factual component of cannoli38's comment is an accurate characterization of the *San Francisco Weekly* article. It reads: "Just as Jeff said, read the SF Chronicle's article on this doctor. She is responsible for putting a woman into a vegetative state who later died."[6] The *San Francisco Weekly* article states:

> In one stance, a 35-year-old woman who was undergoing a fairly routine plastic surgery didn't get the chance to tell anyone about the quality of the doctor's care. Due to what the medical board has called Dr. Rajagopal's "gross negligence," the woman sustained a serious brain injury. She slipped into a coma, and never woke up.

Exh. 1 at 2. By reference to medical board documents, the article also reports in significant detail that Dr. Rajagopal made numerous mistakes in her treatment of the deceased patient. For example, it states:

> According to medical board documents, the first mistake Dr. Rajagopal made was to "advise the patient to eat on the morning of surgery, complicating her risks of nausea/vomiting, and respiratory arrest."
>
> No nurse or anesthesiologist was present, and nobody was monitoring Aminy's vital signs. "This failure prevented early detection of an adverse effect of the narcotics," the medical board documents reported.

Id. at 6. And the article states that according to Aminy's attorney, the procedure "was done in a doctor's office, totally unequipped to handle an emergency. . . . There was no anesthesiologist, no resuscitative equipment in her office. [Dr. Rajagopal] had to call 911. It was a mess all the way around." *Id.* (alteration in original).

[6] Cannoli38 clearly meant the "SF Weekly's article," not the "SF Chronicle's article." This error is unlikely to have caused any genuine confusion, however, because cannoli38 refers to "Jeff's" posting, which correctly refers to the *San Francisco Weekly* article. Moreover, another post on maps.google.com submitted by a defendant in this action included a link to the *San Francisco Weekly* article.

Because cannoli38's comment accurately characterizes the *San Francisco Weekly* article, even if the article is inaccurate, cannoli38's comment is not actionable. *See* 47 U.S.C. § 230 (stating that no "provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 62-63 (2006) (holding that section 230 provides immunity to defendants who posted online comments critical of a doctor and recirculated an email accusing the doctor of stalking women).

Moreover, Dr. Rajagopal's admissions before the California Medical Board limit her ability to assert that the allegations in the article are false. The article accurately characterizes the allegations brought against Dr. Rajagopal by the Executive Director of the California Medical Board. And Dr. Rajagopal stipulated that "[f]or the purpose of resolving the Accusation without the expense and uncertainty of further proceedings, [she] agrees that, at a hearing, [the Executive Director of the California Medical Board] could establish a factual basis for the charges in the Accusation, and that [she] hereby gives up her right to contest those charges." Exh. 3 at 3.

Most to the point, because cannoli38's comment is of paramount public concern, it deserves the highest rung of First Amendment protection. *See Snyder v. Phelps*, Slip Op. No. 09-751, at *5-6 (U.S. S. Ct., Mar. 2, 2011). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community." *Id.* at *6 (quoting *Connick v. Meyers*, 461 U.S. 138, 146 (1983)). The public has an interest in knowing whether a doctor has a track record of gross negligence and unprofessional conduct. The public has an even stronger interest in that

information when the available information on a doctor is misleadingly—if not fraudulently—one-sided.

2. The remaining claims too must fail because they essentially recharacterize the defamation as other torts, but a plaintiff cannot circumvent the constitutional limitations on state-law defamation by repackaging her cause of action. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (holding that the plaintiff could not bring a claim of intentional infliction of emotional distress without meeting the "actual malice" standard the First Amendment requires of defamation claims). Were it otherwise, plaintiffs would be able to plead around the United States Supreme Court's "considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.*

These other claims are also meritless on their own terms. Claims two and three allege that defendants tortiously interfered with Dr. Rajagopal's contracts with current patients and her future business expectancies. Complaint ¶¶ 16-23. A prima facie case for both torts requires a showing that the defendant induced or caused a breach of the contract or expectancy. *Chaves v. Johnson*, 230 Va. 112, 120 (1985). Privileged conduct, however, is not actionable. *Id.* at 121. One such privilege is for truthful information. Restatement (Second) of Torts § 772 (1979); *see also Chaves*, 230 Va. at 121 (citing Restatement (Second) of Torts § 772 as a source of privileges). Because, as discussed above, cannoli38's comment is truthful and protected by the First Amendment, it is privileged and not actionable.

The final claim is that defendants conspired to injure Dr. Rajagopal's trade, business, and reputation in violation of section 18.2-499 of the Virginia Code. Complaint ¶¶ 24-28. To recover under this provision, a plaintiff must show, at the very least, a conspiracy between two or more people for the purpose of willfully and maliciously injuring another in his reputation, trade, business, or profession. *See CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 28 (1993). Dr. Rajagopal's claim requires finding a conspiracy between two people simply because they posted reviews on the same Google website. To state the argument is to refute it.

C. The balance of the equities favors quashing the subpoena.

The final step of the *Dendrite* standard involves a balancing of the defendants' First Amendment right to speak anonymously against the strength of the plaintiff's prima facie case and the plaintiff's need for the defendants' identities. *Dendrite*, 775 A.2d at 760-61. In light of the weakness of Dr. Rajagopal's claims and great public interest in encouraging comments such as defendants', this balance strongly favors the defendants. Accordingly, the subpoena should be quashed.

III. Dr. Rajagopal and her attorney should be sanctioned.

Under Virginia law, every paper of a party represented by an attorney shall be signed by the attorney. Va. Code § 8.01-271.1. The attorney's signature represents that

> (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id. If a court finds that an attorney violated this rule it "shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee." *Id.*

Both Dr. Rajagopal and her attorney should be sanctioned. As explained in the preceding section, the claims in the complaint are not well grounded in fact or warranted by existing law. Even more worthy of sanction, however, is the apparent improper purpose motivating this lawsuit. As explained below, Dr. Rajagopal and her attorney seemingly filed this suit in Virginia to intimidate the defendants into voluntarily removing their offending online comments while avoiding California's anti-SLAPP statute.

A. Dr. Rajagopal and her attorney have abused the Virginia judicial system by bringing a meritless suit with absolutely no ties to the forum state. To the extent this case should have been brought anywhere, it should have been brought in California. Dr. Rajagopal and her business are in California. And because the *San Francisco Weekly*'s readership and Dr. Rajagopal's clients are very likely overwhelmingly Californians, the five defendants are most likely Californians. Finally, those searching for reviews of San Francisco plastic surgeons are also likely to be Californians.

By all appearances, Dr. Rajagopal and her attorney brought this case in Virginia to avoid California's anti-SLAPP statute. Because of the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech," the California Legislature created a special motion to strike available to those

sued for speaking in connection with a public issue. Cal. Civ. Proc. Code § 425.16(a), (b)(1). Under the statute, unless a plaintiff can show a probability of success on the merits, in light of the pleadings and supporting and opposing affidavits, the complaint should be struck. *Id.* § 425.16(b)(1), (b)(2). A prevailing defendant is entitled to attorneys' fees and costs. *Id.* §§ 425.16(c)(2), 1987.2. Had this case been filed in California, it almost certainly would have been met by a successful special motion to strike under the anti-SLAPP statute.[7]

B. In many cases, the practical effect of lawsuits like this one is that defendants will remove their online comments. Independent from the merits of the claims, Dr. Rajagopal and her attorney have imposed on all who wish to review her negatively the costs and headache of defending a lawsuit in a foreign jurisdiction.[8] Cannoli38, for example, promptly deleted the offending post upon learning of the lawsuit. That this practical effect was Dr. Rajagopal's *reason* for filing this suit finds support in the California Medical Board decision. Dr. Rajagopal admitted that one could establish a factual basis for the Medical Board's allegations, and she made this admission to resolve the accusation "without the expense and uncertainty of further proceedings." Exh. 3 at 3. Why then would she want to litigate those very issues before a jury?

The most significant harm resulting from lawsuits like this one is suffered by the public. The marketplace of ideas relies on the free flow of information. Imposing costs on

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[7] Because all relevant conduct occurred in California, under Virginia choice of law rules, California law would govern the question of substantive liability in this case. *See Buchanan v. Doe*, 246 Va. 67, 70 (1993). Should this case proceed, cannoli38 will file a special motion to strike the complaint under California's anti-SLAPP statute.

[8] Even with pro bono counsel, cannoli38 still bears the costs of counsel's *pro hac vice* application and travel expenses.

one viewpoint but not another creates a distorted marketplace and a misinformed public. The *San Francisco Weekly* article illustrates this point. After reading several rave reviews of Dr. Rajagopal, one online commenter wrote: "Thanks to the website and the support of this community, I finally decided to [have my procedure]. . . . I had my pre-op with Dr. Rajagopal yesterday and have a scheduled date of June 24th for the surgery . . . WISH ME LUCK!!!" Exh. 1 at 9.

CONCLUSION

The Court should quash the subpoena and impose sanctions on Dr. Rajagopal and her attorney.

Respectfully submitted,

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EXHIBITS